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Research Report

Reducing precarious work in Europe through social dialogue: The case of Germany

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03

**Karen Jaehrling, Ines Wagner
and Claudia Weinkopf**

with the support of

Thorsten Kalina and Gerhard Bosch

Reducing precarious work in Europe through social dialogue

The case of Germany

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1 Introduction

Unlike in other countries the ‚Great Recession‘ has not intensified the growth in atypical employment in Germany (Figure 1). Income inequality has not increased either, at least not over the short term (until 2012) (Grabka 2015). The recent slow-down in the increase of atypical work has nevertheless hardly diminished but rather ‘frozen’ the income inequality and labour market segmentation which has evolved over many years leading up to the crisis. The previous degradation of employment conditions has not only affected those in atypical employment but also part of those in standard employment. This is true both in subjective terms – as indicated for instance by an increase in ‚precautionary savings‘ (Carlin et al. 2015: 77), or lower staff turnover due to fewer employees giving notice (Knuth 2014) – and in objective terms, as indicated by the increase in low wage work among standard employees as well as decreasing pension levels.

Figure 1 Working population (aged 15-64) by employment form*, in Mio

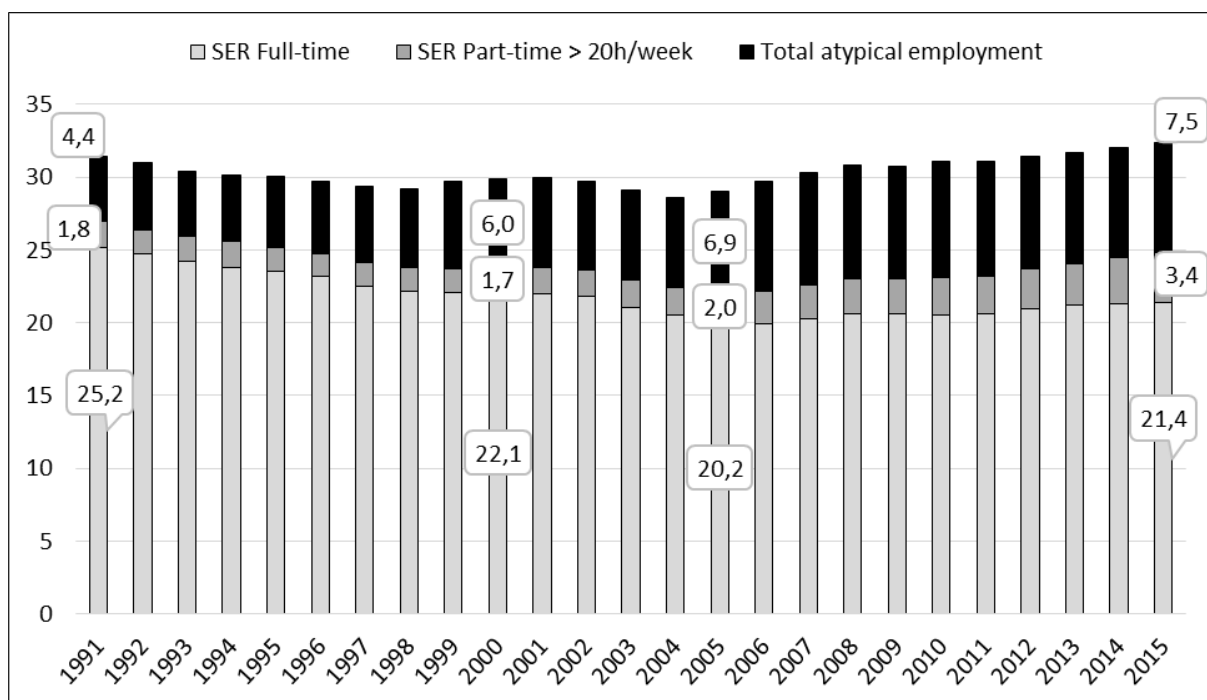
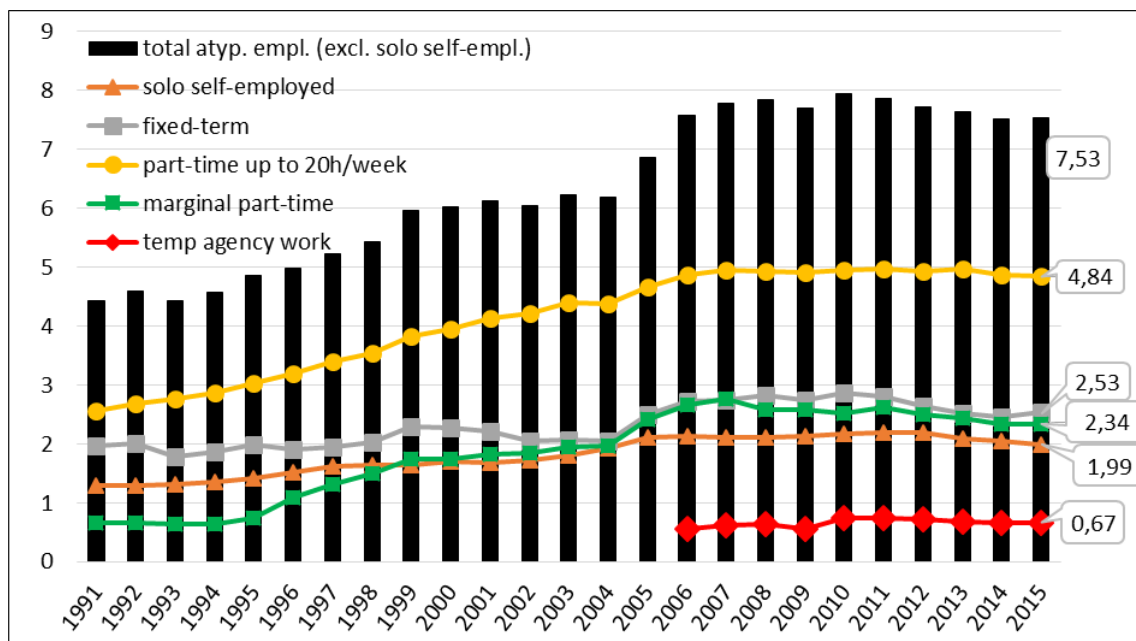


Figure 1 (continued) Working population (aged 15-64) by employment form*, in Mio

*excluding pupils, students, apprentices, armed forces, civilian service

Note: The different categories of atypical employment forms are partly overlapping and therefore cannot be added up to. The total number of atypical employees does not double count them. It doesn't include solo self-employed.

Source: Federal Statistical Office Website (www.destatis.de) (based on Mikrozensus)

A new German Social Model?

According to the view shared by most observers, Germany is thereby a long way from a more inclusive employment model that up until the 1990s used to be a defining feature for large parts of the national economy (Bosch et al. 2010). A large strand of literature discusses the current transformation of the German Social and Employment Model (see e.g. contributions in Unger 2015; Dustmann et al. 2014; Carlin et al. 2015; Eichhorst 2014; Lehndorff 2015), with differing emphases placed on the variety of causes and mechanisms that have brought about the transformation – such as the effects of unification; a tight monetary policy and fiscal austerity; the liberalization of product markets, the vertical disintegration of firms through outsourcing, the shrinking public sector, or the Hartz-Reforms. Diverging views also exist with regard to the role of social dialogue and in particular of the trade unions in this transformation process:

- Part of the literature has pointed out that trade unions and works councils partly sided with employers and tolerated or even actively supported the introduction of exclusive regulations shifting labour market risks one-sidedly on non-core workers. They thereby geared the traditional institutions and procedures of collective bargaining towards 'competitive corporatism' (Deppe 2013) and participated in cross-class coalitions that ultimately institutionalized a 'dualization' of the labour market (e.g. Palier/Thelen 2010). During the recent economic crisis this exclusionary tendency manifested itself in a new type of

‘crisis corporatism’ (Urban 2010) primarily protecting core-workers against unemployment at the expense of e.g. temporary agency workers.

- Other studies have highlighted how the proliferation of atypical employment produced negative feedback effects on trade unions’ overall bargaining power and exercised a ‘disciplining effect’ (Brinkmann/ Nachtwey 2013) which wore on unions’ ability to effectively defend the interest of both core and non-core workers. In this account, the consent of unions to participate in exclusionary ,cross-class coalitions‘ is rather understood as a result of ,shotgun weddings‘. Unlike in the case of successful neo-corporatist arrangements of the past, these are not ,shotgun weddings in the shadow of hierarchy‘ (Thelen 2012: 13) – i.e. where the State, in a manner of speaking, puts a gun to the heads of both employers and employees in order to force them to agree on a compromise – but rather what we propose to term ,shotgun weddings in the shadow of the market‘, where employers’ ability to unilaterally withdraw from agreements and circumvent existing regulations force the trade unions to give in.
- Several studies emphasized that the rise in atypical employment is also a result of changing employers’ strategies making more systematically use of existing exit options (Jaehrling/Méhaut 2013; Eichhorst 2014). This matches with studies arguing that it is employers’ strategies and interests that to an important extent explain employment stability among core-workers (Crouch 2015). Hence the dualized nature of the labour market is largely a result of unilateral decisions and strategies of single employers, who meet little resistance from their workforce.
- At the same time, a number of studies have focused on a partly successful modernization of unions’ strategies aimed at reaching out for non-core workers through e.g. organizing campaigns (e.g. Pulignano et al. 2015; Bispinck/Schulten 2011; Dribbusch/Birke 2014; Rehder 2014; Haipeter/Lehndorff 2014; Bernaciak et al. 2014).

To sum up, the current situation is characterized by novel labour market structures where an all-time high for the level of employment co-exists with a stable and high level of atypical employment and precariousness. It is a contested issue among social partners, political actors and academic observers if and to what extent the latter is a necessary precondition of the first. However, recent trends both at the legislative level and in collective bargaining indicate that the novel structure is by no means a new equilibrium which would qualify for the term ‘New German Social model’. Instead, recent years have witnessed several reforms aimed at re-regulating the labour market, due not least to massive pressures from the trade unions, most importantly the introduction of the national minimum wage in 2015. The following report will take stock of the different gaps in employment protection that have evolved both for core and non-core workers and will discuss the strategies of social partners and the government in addressing these gaps.

Methodology and structure of the report

The study consists of two parts. The first part of the report analyses the current challenges facing social partners, by adopting the concept of ‘protective gaps’ in employment rights, representation, enforcement and social protection. According to the basic understanding adopted here, ‘precariousness’ is not limited to non-standard forms of employment such as mini-jobs, temporary agency work or fixed-term employment. Instead, our study distinguishes between the said four different types of ‘protective gaps’ and investigates the extent to which these gaps affect both employees in a standard employment relationship (chapter 2) and in three different types of non-standard or ‘atypical’ employment: Less-than guaranteed full-time work (chapter 3), Fixed-term work and temporary agency work (chapter 4) and cost-driven subcontract work, including posted work and self-employment (chapter 5). The second focus of our study was on social dialogue approaches which seek to reduce these gaps; these will be presented in the second part of the report (see chapter 6 for an overview). Because collective bargaining or co-determination is often insufficient to provide effective protection, particular attention was paid to approaches that make use of and at the same time extend the classical instruments of social dialogue in Germany. A core aim of these approaches is, for example, the effective enforcement of legal minimum standards, where state actors play an important role too are may even be predominant (as in case 2). We selected four case studies with a focus on different sectors:

- 1) Social dialogue initiatives in the German Meat Processing Industry with a focus on posted work (chapter 7)
- 2) Public procurement practices in the federal state of Bremen aimed at raising pay levels and enforcing minimum standards for employees working under public contracts (chapter 8)
- 3) Sector and company level agreements in the steel industry geared towards socially sustainable use of subcontracts (chapter 9)
- 4) And finally the case of mini-jobs, which is less an example for attempts to close protective gaps but rather an analysis of why this has failed so far (chapter 10).

The report is based on a review of the academic literature, available documents and statistics, a few additional own descriptive statistics based on the German Socio-Economic Panel (SOEP) and expert interviews. 6 interviews with representatives from employers’ associations and trade unions were carried out in 2015, as part of the field work for the first part of the report, including interviews with

- 2 representatives from the umbrella organisation of the employers’ associations (BDA)
- 2 representatives from the umbrella organisation of the trade unions (DGB)
- 2 trade unionists responsible for the retail industry (Ver.di North-Rhine Westfalia)

- 1 representative from employers association for the retail industry in North-Rhine Westfalia (HD NRW)
- 1 representative from employer association of the temp work agencies (iGZ)
- 1 representative from the food, beverages and catering trade union (NGG)

Additionally, 14 interviews were carried out, most of them in the first half of 2016, with 20 experts representing the organisations involved in the social dialogue initiatives presented in the second part of the report. These interviews are listed in the introductory paragraph of the respective case study chapter.

We would like to express our thanks to all those who were interviewed as part of this research. We are also grateful to the European Commission for financing our research.

PART I

IDENTIFYING PROTECTIVE GAPS IN STANDARD AND ATYPICAL EMPLOYMENT

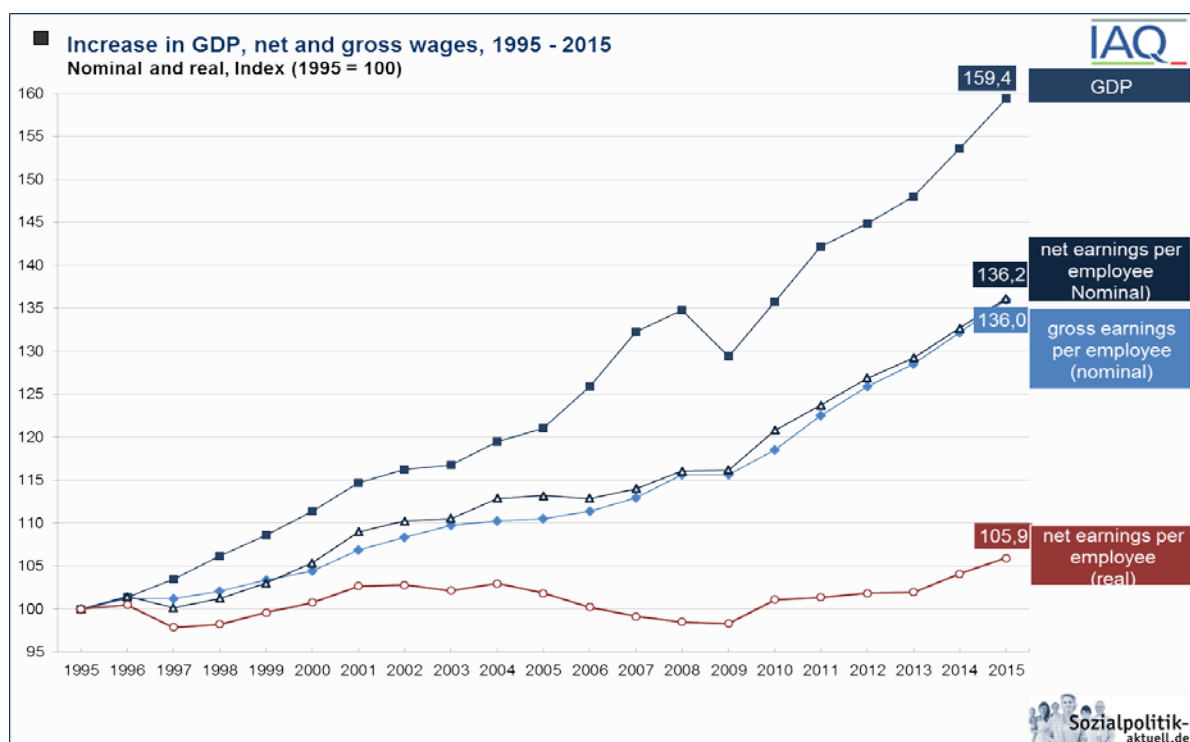
2 Standard employment relationship

Gaps in social protection for both standard and precarious forms of work arise in particular from a) a lack of statutory standards, in particular until the introduction of the national minimum wage (see 2.1); b) the fact they are often not covered by collectively agreed rights securing higher standards (see 2.2) and c) from a lack of enforcement, due to diminishing presence of works councils and other means of collective interest representation (see 2.3). Moreover, the short duration of unemployment benefits and the reduction in pension levels potentially affect a broad share of the working population including those in standard employment (see 2.4).

In-work regulatory gaps

Since the mid-1990s and in particular during the 2000s, wages have increased much slower than the GDP and from 2002 onwards real wages even fell up until the crisis (Figure 2); in particular for the lowest quintile, but also for the median earner (Felbermayr et al. 2014: 11). Although the rise in low wage employment is concentrated on employees in atypical employment, it has also spread among those in standard employment (Table 1).

Figure 2 Increase in GDP, nominal and real wages 1995-2016



Source: Sozialpolitik Aktuell ; URL: http://www.sozialpolitik-aktuell.de/tl_files/sozialpolitik-aktuell/_Politikfelder/Einkommen-Armut/Datensammlung/PDF-Dateien/abbIII1.pdf, based on data from the systems of national accounts, provided by the Federal Statistical Office)

Table 1 Low pay-incidence and Ø hourly pay, 2010

	Low pay-incidence	Ø hourly pay
Mini-jobs (only as a main job; employees not in education or apprenticeship)	84.3%	€ 8.19
Temp agency workers	67.7%	€ 8.91
Fixed-term contracts	33.5%	€ 12.06
Part-time ≤ 20 hours per week	20.9%	€ 14.45
All atypical employees	49.8%	€ 10.36
SER (permanent full-time or part-time jobs > 20 hours/week, no temp agency employment)	10.8%	€ 17.09

Source: Statistisches Bundesamt 2012

Moreover, the declining prevalence of pattern agreements, the decentralization of collective bargaining, concession bargaining at company level and the rising share of companies not covered by collective agreements contributed to very moderate pay increases also for the middle income segment: In industry and construction for instance median hourly earnings nominally grew by 21% between 2002 and 2014, compared to merely 4% in the services of the business economy; and in education, health, arts and entertainment wages increased by 4% between 2006 and 2014. In all these sectors, hourly wage increases were much below the average in other countries of the Euro group; and in some occupations, nominal wages even declined (Table 2).

Table 2 Median hourly earnings (in €) and share of low wage earners, in selected sectors and occupations, 2002–2014

	2002	2006	2014	2002/2006* 2014
Industry and construction				
Euro area	11.20	11.93	15.01	+34%
Germany (total economy)	14.79	15.68	17.84	+21%
skilled manual occupations	14.22	14.94	16.32	+15%
<i>(share of low wage earners)</i>	<i>(8.02)</i>	<i>(11.17)</i>	<i>(9.28)</i>	<i>(+16%)</i>
service and sales occupations	8.84	8.95	10	+13%
<i>(share of low wage earners)</i>	<i>(54.21)</i>	<i>(60.48)</i>	<i>(54.05)</i>	<i>(-0.3%)</i>
Services of the business economy				
Euro area	10.30	11.00	12.69	+23%
Germany (total economy)	12.60	12.46	13.08	+4%
skilled manual occupations	12.02	11.63	12.14	+1%
<i>(share of low wage earners)</i>	<i>(22.2)</i>	<i>(30.04)</i>	<i>(32.14)</i>	<i>(+45%)</i>
service and sales occupations	10.93	10.10	10.88	-0.46%
<i>(share of low wage earners)</i>	<i>(32.49)</i>	<i>(44.55)</i>	<i>(43.9)</i>	<i>(+35%)</i>
Education; human health and social work activities; arts, entertainment and recreation; other service activities				
Euro area	12.05	13.53	15.19	+26%
Germany (total economy)	n.a.	15.51	16.13	+4%
service and sales occupations	n.a.	11.28	11.45	+2%
<i>(share of low wage earners)</i>	<i>n.a.</i>	<i>(34.74)</i>	<i>(37.37)</i>	<i>(+8%)</i>

* In the case of the education, human health and other service activities, the changes refer to the period between 2006 and 2014, as no 2002 data are available.

Source: Structure of earnings survey, data provided by Eurostat Website, authors' compilation

Apart from stagnating or even decreasing hourly wages, fewer employees currently receive bonus payments, such as holiday pay, Christmas bonus or bonuses from profit participating schemes, as our own calculations show (Table 3): The decrease in the share of employees receiving any bonus payment was stronger among those on atypical contracts (who were already benefitting less) but was also considerable among standard employees. Finally, working time flexibility has become a frequent job requirement that is often not remunerated or compensated in other ways: As Table 4 below shows, the share of employees receiving no compensation for overtime hours even affects employees on standard contracts more strongly than those on atypical jobs, which is closely related to the different educational profiles in these two groups: Employees with a vocational or a university degree are more likely to neither have their overtime hours paid, nor receive time off for them.

Table 3 Share of employees receiving bonus payments (holiday, christmas / annual bonus; profit participation schemes)

	1999–2002	2011–2013
Total	63	52
Standard contracts (full-time, open-ended contracts)	69	60
Atypical contracts, total (excl. TAW)	50	38
Fixed-term	52	35
Part-time (covered by social sec.)	60	50
Mini-job	16	7

Source: Own calculations (IAQ/Thorsten Kalina) based on SOEP 2013

Table 4 Compensation of overtime hours, by type of employment contract and by education; in % of employees, 2013

	Total	By employment contract		By education		
		Standard	Atypical	No vocational degree	Apprenticeship; vocational degree	University degree
Time off	51	51	51	43	54	47
Paid	11	9	14	24	12	5
Partly time off, partly paid	22	22	12	24	24	15
No compensation	16	18	13	9	11	33

Source: Own calculations (IAQ/Thorsten Kalina) based on SOEP 2013

These developments ultimately contributed to a shift in the wage setting system from self-regulation under the principle of ‘autonomy of collective bargaining’ (*Tarifautonomie*) enshrined in the German basic constitutional law towards a stronger role of hierarchical regulation by the state, resulting in a ‘hybrid’ or ‘mixed’ system of wage setting (Bosch 2015). This change did not only start with the introduction of the national minimum in 2015 (although this was a decisive step), but occurred through a succession of incremental reform steps, reflecting not least the strong opposition by employers’ associations, but also within the trade union camp, against a more prominent role of the state in wage setting.

The decision to introduce the statutory minimum wage was preceded by a long campaign of the DGB unions initiated by two large unions operating in the service sector – Ver.di (broad range of service industries) and the NGG (Food, Beverages and Catering Industry Trade Union), the latter one having demanded a national minimum wage as early as 1999. Since 2006 the

campaign was officially supported by the trade union umbrella organization (DGB), thereby putting to a rest a controversial debate within the trade union camp. The two large and influential unions in the manufacturing sector, IG Metall and IG BCE (mining, chemical and energy industry) had been highly skeptical about the effects of a minimum wage and considered this to be a threat to the principle of 'Tarifautonomie'. In more tangible terms, one major concern of the manufacturing sector unions was the possible wage depressing effect, with the minimum wage acting as a new wage norm for the lower pay grades in future collective bargaining rounds.

At the political level, the social democrats (SPD) officially supported the claim for a national minimum wage since the beginning of the union campaign. This was partly motivated by the wish to compensate for the 'Hartz' reforms (2002-2004) which had introduced cuts in unemployment benefits and helped to deregulate the labour market (temp work, mini-jobs etc.), thereby alienating the DGB unions from the SPD. During parliamentary term 2005-2009 a national minimum wage was rejected by the conservatives (CDU/CSU), the coalition partner of the SPD in the government led by Chancellor Angelika Merkel. Nevertheless, legally defined wage floors increasingly won the approval among both coalition partners as well as the electorate. As a result, an increasing number of legally binding industry minimum wages were introduced, based on the Law on Posted Workers, which originally was restricted to the construction sector. A new paragraph had been introduced in this law by the red-green coalition in 1998, as a response to the blockade strategy adopted by the umbrella organization of the employers' associations (BDA) towards extending collective agreements. This had resulted in a strong decrease in generally binding collective agreements during the 1990s (Kirsch/Bispinck 2002). The new paragraph allowed the government to declare the lowest pay grade in a collective agreement generally binding without the consent of the BDA and even if the employer association of the respective industry wouldn't represent 50% of the industries' workforce. Starting with the industrial cleaning sector in 2007, a succession of legislative reforms included additional industries in the Law on Posted Workers, and several unions and employers' associations in these industries made use of the option to have their lowest pay grades transformed into an industry-wide minimum wage, covering all companies both from within the country and from abroad (see Table 5). In the case of the care sector, the government also made use of its newly established right to set generally binding minimum rates even without the consent of the employer organisation if this is considered appropriate by a specially appointed commissio. Hence, the Law on Posted Workers which had originally been introduced as a means to cope with the EU's eastward enlargement and the risk of dumping wages from companies *abroad* has thereby undergone a functional shift and been transformed into a means to reduce wage competition between companies *within* Germany. However, the progress was slower and more 'uncertain' than expected (Bosch/Weinkopf 2011) because

employer organisations in large industries like e.g. retail or hospitality refused to use the regulation, whereas others threatened to withdraw from the agreement if trade unions wouldn't make concessions in other respects.

Table 5 Industry minimum wages introduced after 2006 based on Law on Posted Workers, November 2016

Industry	Year of introduction	Current level (hourly wage in €)
Business Cleaning	7/2007	8.70 East / 9.80 West (indoor) 11.10 East / 12.98 West (outdoor)
Industrial laundries	10/2009	8.75
Mining specialists	10/2009	Expired 2015
Waste	1/2010	9.10
Elderly care	8/2010	9.00 East / 9.75 West
Private security services	6/2011	Expired 12/2013
Temporary agency work*	1/2012	8.50 East / 9.00 West
Further educational and vocational training	8/2012	13.50 East / 14.00 West
Staging	8/2013	10.70
Stonemasonry	10/2013	11.00 East / 11.35 West
Hairdressers	11/2013	Expired 2015
Meat processing	8/2014	8.60
Textile/Clothing	1/2015	8.75 East / 8.50 West
Agriculture and Forestry	1/2015	7.90 East/ 8.00 West

* based on Law on Temp Agency Work

Source: Own compilation based on BMAS 2016

Another predecessor of a national minimum wage were pay clauses in the public procurement laws (at the level of the federal states) obliging contracting firms to pay their employees a minimum wage corresponding more or less to the lowest pay grade in the public sector collective agreement. These pay clauses had been introduced in the years following the *Rüffert* ruling of the European Court of Justice in 2008. The ruling judged that public procurement laws obliging public contractors to comply with collective agreements which had not been declared generally binding before were incompatible with EU primary law (Schulten 2014; Sack 2013; Jaehrling 2015).

Despite this succession of state interventions in the field of wage setting, the national minimum wage still came as a surprise to many observers, given the strong opposition by both employers' associations and the majority of economists dominating the public discourse and important

expert advisory bodies, such as the German Council of Economic Experts (*Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung*). Even after the introduction, the minimum wage remains a contested issue. While the BDA continues to voice its fundamental opposition against the minimum wage¹, the claims of individual employers' associations have focused on questions related to the design (such as: more exceptions e.g. for interns²; clarifications which bonuses and wage supplements can be taken into account when calculating the minimum wage etc.) and the implementation of the minimum wage (see also below: enforcement gaps).

Concerning the effects of the minimum wage, the fear of severe job losses has not come true in the first months after the introduction. Rather to the contrary, overall employment has further increased, and this despite the fact that the number of marginal part-time jobs has declined against the tide (by 168,000 jobs in the first quarter of the year, see Bundesagentur für Arbeit 2015a), most probably as a result of the minimum wage (see also below, section 3). Regarding wages, a recent simulation study shows that the minimum wage will contribute to reduce the gender pay gap by 2.5 percentage points (Boll et al. 2015). According to first figures from the Federal Statistical Office, in the first quarter of 2015 hourly wages increased disproportionately stronger among mini-jobbers (+4.9% compared to same quarter in previous year); low skilled employees (+4%), employees in East-Germany (+3.6%) and among women (+2.8%) – compared to 2.5% on average (BMAS 2015). Hence, as intended by the law, first empirical results confirm that the minimum wage contributes to reduce wage inequalities and benefits in particular employees in female dominated low pay occupations.

However, even full-time work at the minimum wage level (€ 1,090 net for single household; € 1,300 for single parent with 1 child, including child benefit) is barely sufficient to raise household income above the at-risk-of-poverty threshold (60% of median income) for multiperson households. Therefore, the level of precariousness (in terms of earned income) continues to hinge on the effectiveness of the collective bargaining system to raise wage levels well above the statutory minimum wage. The legislation introducing the minimum wage – titled 'Act on the strengthening of free collective bargaining' (Tarifautonomiestärkungsgesetz) – also is intended to back-up the self-regulative capacities of social partners by making it easier for

¹ Excerpt from BDA website: "A statutory minimum wage encroaches on autonomous collective bargaining. BDA works against state intervention in the autonomy of social partners, in particular in the form of minimum wages decreed by statute. Determination of minimum working conditions must continue to be left in first instance to the social partners in the framework of autonomous social dialogue as protected by the constitution." (see http://www.arbeitgeber.de/www/arbeitgeber.nsf/id/EN_Collective_bargaining, 23.6.2015)

² Current exceptions from statutory MW apply to: Under 18 years, apprentices, interns (if internship is obligatory for education or if internship doesn't exceed 3 months), long-term unemployed in the first six months of employment, voluntary work, family workers.

them to define higher industry minimum wages (through an extension of the provisions in the Law on posted workers to all industries).

Representation gaps

A slight majority of employees remains covered by collective agreements, however this varies largely between East and West Germany and also by sector. Shares are below 50% in two low-wage industries (hospitality and retail), but also in the IT industry (see Table 7 below). Roughly half of those not covered by a collective agreement however work in companies who state that they model their pay on a collective agreement (Ellguth/Kohaut 2013: 282). The strong erosion of collective bargaining (from 85% at the beginning of the 1990s) revealed the weaknesses of the German system of industrial relations, where unlike in the Scandinavian countries the high coverage of collective agreements was traditionally predominantly based on a high level of collective organisation on the employer side and less on powerful trade unions with high trade union density (European Commission 2009: 45-49). Accordingly, under increasing competitive pressures employers increasingly made use of their capability to unilaterally withdraw from collective agreements by exiting employers' associations, or by changing into a so called 'OT memberships' ('Ohne Tarifbindung' = without collective agreement) deliberating them of the obligation to comply with collective agreements, or else by not joining an employers' association at all. Wage inequality however has also increased *between* industries, and among firms covered by collective agreements (Antonczyk et al. 2010). This was helped by the decentralization of collective bargaining and by the outsourcing of ancillary services from the public sector and manufacturing firms to industries with much lower collectively agreed wages (if any). The decentralization was partly a result of political pressures (or a shotgun wedding in the shadow of the state), as in the case of the 'Pforzheimer Abkommen' where IG Metall accepted the introduction of opening clauses in their collective agreements, allowing firms e.g. to cut annual bonuses. Their consent was 'stimulated' by the threat, voiced by the then chancellor Gerhard Schröder (SPD), to relax the statutory primacy of collective agreements over company agreements ('Günstigkeitsprinzip') if the social partners wouldn't agree on facilitating company pacts (Bispinck 2003).

The share of employees working in companies with a works council is even lower (41% in 2015), again particularly in the hospitality (12%) and retail (26%) sector, but also in the construction sector (16%) (Table 7). The share of employees neither covered by a collective agreement nor represented by a works council increased during the 2000s (from 26% in 2003 to 36% in 2015 in West-Germany, from 42% to 49% in East-Germany) (Table 6).

Table 6 Employees covered by collective agreements and works councils, 2003/2015 (in %)

	Collective agreement (CA)		Works Council (WC) (only private sector)		Both CA and WC (only private sector)		Neither CA nor WC (only private sector)	
	West	East	West	East	West	East	West	East
2003	70	54	48	40	42	31	26	42
2015	59	49	42	33	34	25	36	49

Source: Ellguth/Kohaut 2016 and 2004; authors' compilation

Table 7 Share of employees covered by collective agreement + representation at workplace level by sector, 2015, in %

Sector	collective agreement (at sectoral or company level)		Works council
	West	East	
total	59	49	41
agriculture	50	21	
Utilities, waste, mining	92	78	86
Production	65	37	65
construction	69	61	16
wholesale	43	35	26
Retail	42	30	
Transport + logistics	56	29	44
IT	19	28	37
Finance + insurance	80	63	66
hospitality	42	26	12
Health + education	60	55	47
Economic, scientific + professional services	50	51	28
Non-profit	61	57	n.a.
Public sector + social insurances	98	98	n.a.

Source: Ellguth/Kohaut 2016 and 2004; authors' compilation

Despite longstanding legal rights the establishment of works councils has often met with resistance by employers in the private service sector, as well as in small and medium sized companies in the manufacturing sector (Kotthoff/Reindl 1990). The absence of a works council entails the risk of a number of protective gaps: Apart from watching over the compliance with

legal and collectively agreed employees' rights they are also crucial for putting into effect collective labour law. Collective labour law includes information, consultation and co-determination rights for works councils which are aimed to enforce and supplement individual employee rights; e.g. works councils can require a firm to conclude a 'social plan' (Sozialplan) in case of dismissals for economic reasons.³ Moreover, although works councils are legally independent from unions, they remain the most important communication channel between unions and employees in practice, by facilitating the recruitment of union members, disseminating information on collective bargaining and organizing union members' participation in collective bargaining rounds including organizing strikes. Changes in the works council act in 2001 have tried to address the representation gap in small and medium sized companies, e.g. by speeding up the procedures for setting up a works council in companies with 5-50 employees. However, in 2015, only 9% of small firms (5-50 employees) in the private sector had a works council (Ellguth/Kohaut 2016) and another 12% (West) or 7% (East) had 'other forms of collective interest representation' in 2012 (Ellguth/Kohaut 2013).

Other forms of informal collective interest representation have partly emerged in the absence of works councils, but with much weaker bargaining position and rights; hence "co-determination in the precarious service sector also means precarious co-determination arrangements" (Artus 2013: 420). As Artus argues based on case studies carried out in the retail and hospitality sector, the relationship between union representatives and worker activists among precarious employees is sometimes difficult, partly due to different sociodemographic profiles of the two groups (gender, migration, age). But part of the difficulties seem also to be anchored in conflicting strategies or routines of collective action, where unions tend to stick to their co-management attitudes and their "bureaucratic patterns of union organizing", whereas activists adopt more conflictual attitudes and strategies. "Union policies thus oscillate systematically between individualised support for the workers affected and the political wisdom of not fundamentally risking their corporatist arrangements with these large companies." (Artus 2013: 421; see also Dörre 2011 in a similar vein).

Over the last two decades unions have however come to adapt their approach to the changing environment and have diversified their strategies. Within the core manufacturing industries, the IG Metall for instance launched a campaign titled 'better instead of cheaper' (Besser statt Billiger) aimed at changing the outcome of local concession bargaining by enabling works councils to develop alternatives to wage cutting and unpaid working time prolongation (Haipeter et al. 2011). Moreover, several unions have launched campaigns modelled after (or

³ Since 2004, the law on dismissal protection exempts small firms with less than 10 employees (previously 5) from dismissal protection.

at least inspired by) the ‘organizing’-approach in anglo-saxon countries. These campaigns were partly quite successful, in terms of newly recruited union members and collectively agreed wage rises, even in low-wage industries such as retail, private security, industrial cleaning or temporary agency work (see e.g. Brinkmann et al. 2008; Brinkmann/Nachtwey 2013; Dribbusch 2010; Dribbusch/Birke 2014). The shift towards union revitalization strategies “comes as a partial strategic change, because the organizing-approach re-emphasizes the organizational power as a precondition of institutional power” (Brinkmann/Nachtwey 2013).

Institutional power, on the other hand, has seen a revival during the economic crisis, too, when both traditional (short-time working) and more recent (e.g. working-time accounts) provisions for working time flexibility which require the consent of employee representatives were used expansively and thereby helped to cope with the negative demand shock by means of internal rather than external flexibility. It thereby contributed to rehabilitate the ‘social partnership’ model, which until then had come to be considered as obsolete, growth-retarding and rigid in the eyes of many employers and politicians (Helfen 2013). Unions and employers associations were also consulted for the design of investment programs for the hardly hit export-oriented industries. However, as observers note, ‘crisis corporatism’ is different from the neocorporatist negotiations of the past, in that it is much more selective and punctual (Haipeter 2012) and in that it doesn’t call into question the segmentations of the labour market which have developed over the past 20 years (Dörre 2011). The mass dismissal of temporary agency workers for instance leads Dribbusch/Birke (2014: 18) to conclude that “safeguarding core workforces at the expense of employees with more precarious terms of employment was a key instrument in stemming the crisis”. On the other hand, it should be noted that unions continued to support the integration of young people into the labour market throughout the crisis, e.g. by negotiating minimum annual quota for new apprenticeships in the chemical industry, or by guaranteeing all young journeymen to be employed for at least one year after apprenticeship in the metal industry (Bosch 2011). The social partners thereby helped to prevent a massive increase in unemployment among young people.

Meanwhile, industrial disputes have gained importance in the service sector. Although the overall number of industrial disputes remains low in comparison with other countries, there has been a shift from the manufacturing sector: In 2014, nine out of ten labour conflicts occurred in the service sector (Dribbusch 2014). A number of large industry wide strikes attracted public attention over the last few years, such as the strike in the retail sector in 2009 and 2013, in the airport security industry in 2013, or in public child care and social work in 2015. However, in line with the decentralisation of collective bargaining, there is a trend towards strikes limited to the local level and/or in single companies, such as the ongoing strike at Amazon. These strikes have partly been quite successful, not only in terms of wage increases (e.g. an increase by up to 26% within one single year in the airport security industry) but

also in terms of newly recruited members. Industrial disputes are therefore “increasingly being perceived by trade unions as ‘opportunities’ for organisation. This applies in particular to ‘untypical’ industrial disputes in little organised and highly precarious domains” (Dribbusch/Birke 2014: 25). This is probably also a reason why the law on tariff unity (Tarifeinheitgesetz) that was passed in May 2015 also met with resistance from part of the unions (Verdi, NGG). The law restricts the right to conclude collective agreements to the union with the highest share of members within a given company. While supporters of the law claim that this is an important means to restore social peace (employers’ associations) and/or to counteract a fragmentation of collective bargaining to the benefit of occupational groups with greater structural and organisational power, such as pilots, train drivers or physicians (unions), critics consider this as a severe encroachment on the right to strike. Even law experts have diverging interpretations of the law and of the effects it will have on collective bargaining.

Enforcement gaps

Compliance with minimum labour standards hinges essentially on the ability of employees and employee representative to ‘mobilise’ the law in cases of non-compliance or conflicting interpretations of legal norms (McCann 1994; Albistone 2005; Kocher 2009). This in turn depends on their awareness of norms and on the available resources and costs as well as the potential benefits and risks associated with giving ‘voice’ to complaints. Employees in atypical employment forms might therefore be more likely to shy away from ‘voice’ as they usually bear a higher risk of losing their job (because it is fixed term or because they are not covered by employment protection, like posted workers). However, employees on permanent jobs arguably have similar concerns, and studies in law sociology have often emphasized that employees in general seldom complain during ongoing contractual relationships for fear of retaliation (dismissal, unfair treatment in promotion and other work related decisions at the employer’s discretion) (Kocher 2012: 67). National laws and law enforcement systems provide a range of instruments and mechanisms which try to address this fundamental asymmetry, most importantly state inspections and participatory rights for collective actors which can enhance the organisational capacity of social partners for self-regulation and ‘self-enforcement’ – such as the right for unions to file a collective claim.

In Germany, unions don’t have a right to file collective claims. They nevertheless play a very important role in rule enforcement: Firstly, by offering free legal advice and assistance to their members, including a legal expenses insurance, and secondly, by offering a large variety of training courses for unionised works council members in order to support them to effectively enforce rights at company level. One of the core tasks of works councils according to the law consists of watching over the proper implementation of all types of regulations that are „to the benefit of employees“, i.e. labour law and by-law, decrees on health and safety, collective

agreements, company agreements (§ 80 (1) BetrVG). In the case of non-compliance with minimum labour standards, however, works councils can only enter into consultations and negotiations with the management and thereby exert pressure on management to comply with the rules, but they lack rights to effectively enforce individuals' entitlements (Kocher 2012: 67). More importantly, as noted above, nearly 60% of employees nowadays work in companies without a works council. Hence the majority of employees is left without access to a collective body supporting the enforcement of their rights. Union members can access legal advice offered to them by their unions – but the large majority of employees abstains from joining a union.

Another possible legal mechanism which can enhance 'self-enforcement' is a general contractor liability enforcing employers to watch over their sub-contractors' compliance with labour laws. A general contractor liability applies to the main construction sector since 2002, and to all industry-wide minimum wages as well as to the national minimum wage. There is little empirical evidence to what extent this effectively forces employers to carefully select their subcontractors and possibly even to implement own control mechanisms, apart from obliging their subcontractors to state in written that they observe the minimum standards. As workers in subcontracted firms often belong to vulnerable groups of employees, as in the case of posted workers, the probability is quite low that cases will be taken to court, even more so as unions cannot file collective claims. In a few cases unions have however been successful at using the general contractor liability for scandalizing non-compliance in subcontracting firms (see section on posted workers). Moreover, a few large companies with a strong union foothold have begun to establish control mechanisms that seek to effectively safeguard employees' rights in subcontracting firms and are not necessarily restricted to minimum wages only. One example is Thyssen company which has introduced a system of checks and balances in order to reduce the number of work related accidents in subcontracting firms.

With regard to state enforcement, a special department of customs service with ca. 6,300 employees is responsible for controlling minimum wages, including industry wide minimum wages, and illicit work. The number of staff will be increased by 1,600 employees following the implementation of the national minimum wages, but due to skill shortages this will take until 2019 or even longer. Further control institutions partly exist at the regional level, for instance in order to watch over the proper implementation of pay clauses in public procurement laws. There are also some voluntary institutions set up by social partners: In the federal state of Hamburg, for example, there is an independent control and advice agency for commercial cleaning (Prüf- und Beratungsstelle für das Gebäudereiniger-Handwerk e.V., <http://www.pbst.de/>) which gives advice to their member companies on relevant labour standards, conducts spot check on firms among its member companies and issues yearly certificates documenting, among others, that the firm complies with relevant legal and collectively agreed rules. Finally, the pension insurance agency (Deutsche

Rentenversicherung) carries out company audits in every firm every four years in order to control for the correct payment of social security contributions.

Evidence from state inspections with regard to the industry wide minimum wages suggest that non-compliance with minimum wages often occurs in the form of an incorrect calculation of hours worked, or incorrect calculation of wage elements taken into account (e.g. including bonuses, costs for travel and lodging etc.), or a resort to bogus self-employment, bogus internships or bogus voluntary work (e.g. Cremers 2013). A proper documentation of working time (among others) is therefore considered as indispensable for the effective enforcement (albeit that this documentation can be manipulated as well). When the national minimum wage was introduced, much criticism was levelled against perceivedly ‘excessive’ bureaucratic requirements imposed on companies, such as the obligation to document working hours of employees on a daily basis. In line with the unions the government however has refused to make substantial concessions on this point.⁴ Unlike in other countries, such as the UK, the obligation to document working hours anyway only applies to part of the workforce: to mini-jobbers (across all industries) and to employees with a monthly wage of up to € 2,950 in those industries that are included in the ‘law on combating illicit work’ (Schwarzarbeitsbekämpfungsgesetz), such as industrial cleaning, meat industry, construction – but not, for instance, retail, elderly care, postal service or private households.

If employees report cases of non-compliance aimed at initiating controls by the customs service, they do not benefit from this immediately: If underpayment of wages is detected, the employees don’t receive support (e.g. in the form of a ‘notice of underpayment’ issued by the control institution HMRC in the UK). Instead, the control institutions only request the firm to pay outstanding social security contributions and fines to the public administration. Employees concerned have to file a suit themselves in order to receive their outstanding wages.

Apart from a credible threat by hard law and state inspections, ‘soft law’ like public guidelines and media campaigns informing employees and employers about their rights and duties, are considered as an essential tool to enhance self-enforcement. The Federal Ministry of Labour has set up a minimum wage hotline. The DGB has set up a hotline for the first 12 months as well, also providing advice and information. For more detailed individual advice, callers are however referred to the counselling services offered by local offices of the unions – which are only accessible to union members.

⁴ Very recently, the government has lowered the maximum threshold for jobs covered by the obligation to document working time € 2000 /month, i.e. jobs with higher wages are excluded from the obligation, provided that employees have effectively received wages exceeding € 2000 over the previous 12-month period; thereby excluding e.g. seasonal workers in the agricultural sector from this exemption.

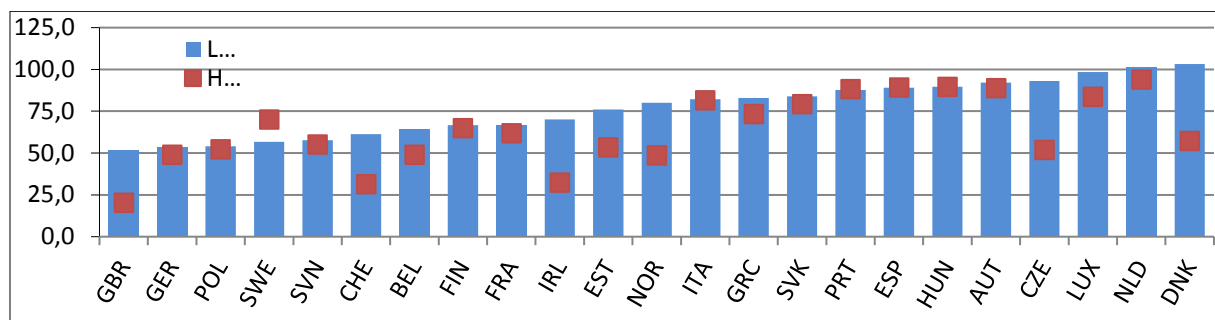
In sum, the public or collective support for individual employees affected by a violation of their rights is somewhat patchy, at least for non-union members. This is one more reasons why it seems safe to assume that employees in atypical employment are more exposed to violations of minimum labour standards: not only because they risk more (losing their job and maybe even their residence permit) but also because they lack access to institutions and organizations who either prevent non-compliance through their sheer existence (works councils) or who support them to enforce their rights. The scarce empirical evidence indeed reveals that a considerable share of posted workers or mini-jobbers do in effect experience a violation of their rights (see sections below). However, it should be noted that non-compliance is also an issue among core-workers, possibly as a feedback effect, since non-compliance has become so common among non-core workers. For instance, a survey among more than 1,000 union members in the construction industry in 2009 revealed, among others, that more than 40 per cent of them had experienced non-compliance with collectively agreed annual bonuses; and 28 per cent even reported that employers paid below the collectively agreed hourly wage (Bosch et al. 2011).

Social protection and integration gaps

Two social protection gaps in particular affect a large part of the workforce, including part of employees in standard employment: firstly and most importantly the relatively low pension entitlements for low to medium wage earners, and secondly the short duration of wage related unemployment benefits.

To begin with old-age benefits, entitlements from the statutory pension insurance are closely related to the earnings during the working life. Due to a rather strict ‘principle of equivalence’ (‘Äquivalenzprinzip’) between wages and pensions, net replacement rates for low wage earners are not higher than for average or high wage earners, unlike in many other countries – which is all the more severe as the replacement rates are quite low by international comparison (Figure 3).

Figure 3 Net pension replacement rates from mandatory (public and private) pension schemes: low and high earner (50% vs. 150% of average wage) after full career (as % of individual net pre-retirement earnings), single person, 2015



Source: Data provided by OECD 2015: 147

Notes: The results of the OECD pension models calculations presented here include all mandatory pension schemes for private-sector workers, regardless of whether the schemes are public or private. 'Quasi-Mandatory' schemes with near-universal coverage are also included, provided that they cover at least 85% of employees. For each country, the main national scheme for private-sector employees is modelled. A full career is defined here as entering the labour market at age 20 and working until the standard pension-eligibility age, which varies between countries. Hence the length of career varies with the statutory retirement age: 40 years for retirement at 60, 45 with retirement age at 65 etc.

For further information on the methodology and assumptions used in the OECD pension models see OECD 2011: 116

This is to an important extent due to the pension reforms since 2001 which, among others, introduced a so-called 'sustainability' or 'demographic factor' preventing pensions to increase at the same rate as wages. It thereby contributed to lower replacement rates from 52.6% in 2000 to currently 47.1% of the previous wage.⁵ The replacement rates will decrease further in the future, at the lowest down to 43%, which is the legally defined minimum target from 2030 onwards.⁶

Accordingly, low earnings and periods without employment entail a particular high risk for income poverty in old age in Germany. Even 45 years of full-time employment on the level of the current minimum wage of € 8.50 are not sufficient to build up pension entitlements at the level of the means-tested 'basic allowance for old-aged and disabled' (Grundsicherung im Alter und bei Erwerbsminderung) for a single person, corresponding currently to roughly € 700 net/month (2015). Exemplary calculations show that in order to reach this minimum level, an employee retiring in the year 2028 after 45 years of full-time employment (37.7 hours/week),

⁵ Pension levels had already been reduced several times previous to 2001; in 1985 the replacement rate for the 'standard pensioner' was above 57%.

⁶ Note: The replacement rates are calculated based on wages and pensions *before* taxes (but after deduction of social security contributions). The replacement rate based on net wages and pensions *after* taxes will be higher, since taxes on wages are higher due to the progressive nature of the tax system.

would currently need to earn an hourly wage of € 10.98, provided that the replacement rate would stay at the current level. However, since the replacement rate is bound to decrease even further, the current minimum wage would even have to be € 11.94 (and would have to increase steadily up to a level of € 17.84 in 2028) (Steffen 2015, based on current projections on wages and pension replacement rates by the pension insurance agency). Hence, the share of those who have to rely on the non-contributory means-tested minimum income benefit (currently: 3% among those aged 65+) are likely to grow strongly, unless either strong wage rises or supplementary pension schemes will compensate for the increasing ‘pension gap’.⁷

The expansion of supplementary pension schemes has indeed been the political priority measure to address the pension gap since the beginning of the 2000s. Occupational or company pensions as well as personal pension schemes have been important second and third tiers of the pension system for long, but the pension reforms have assigned them a more important role. Along with the cuts in replacement levels the government introduced subsidies for voluntary personal pension schemes (‘Riester’ and ‘Rürup’ pension) as well as for occupational and company pensions (through tax + social security exemptions for employees’ contributions). Hence the reforms have also contributed to a functional shift: Whereas previously the second and third pillar were a *supplement* to the statutory pension, they now are meant to *substitute* for the decreasing levels in the statutory pension insurance (Schmähl 2012).⁸

Empirical evidence on the share of employees opting in these supplementary schemes however show that employees in low-wage jobs and industries are much less likely to accumulate supplementary pension entitlements that can effectively substitute for the cuts in the statutory pension levels. With regard to *personal* pension schemes (‘Riester’ in particular), this is despite the fact that the public subsidies are disproportionately high for low incomes; and that indeed low-wage earners (including female part-timers) have above average participation rates (TNS Infratest 2012: 35). Hence these subsidized personal pension schemes do contribute to close the gender and skill gap in terms of *access* to additional pension schemes. However, the *level* of private pension entitlements among low wage earners is relatively low (TNS Infratest 2012: 86). Moreover, many of the women with low individual wages who opt in the Riester scheme live in households with additional earners and therefore do not necessarily belong to the group of households at risk of poverty or precariousness. When looking at the household level the picture

⁷ ‘Rentenlücke’ is the term officially used in Germany to designate the difference between the income levels before and after retirement.

⁸ In a similar vein, the abolition of publicly financed early retirement options have passed the responsibility to negotiate and finance early retirement schemes on the social partners alone. While previously collective agreements tended to top up the public subsidies, collective or company agreements now substitute for these, but for obvious reasons do not fully compensate the public cuts and hence often secure less generous levels of wage replacement than before, if they continue to exist at all (Fehmel 2013).

is therefore different: In the two lowest quintiles the take up rate is under 25% (Geyer 2011: 19). So, even though there is a relatively strong redistributive element in the architecture of the state subsidies, it is obviously not sufficient to incentivize low income households to build savings high enough to make up for the pension gap. Instead, the Riester scheme de facto mainly subsidizes high-income households: A recent study finds that about 38% of the aggregate state subsidies go to the top quintile of the income distribution, and only about 7% to the bottom quintile (Corneo et al. 2015).

Similarly, with regard to occupational or company pension schemes, these are much more prevalent in large firms and in the manufacturing industries as well as in the credit and insurance industry. By contrast, they are much less common in service industries with lower profit margins and a high share of small firms. Occupational pension schemes in the private sector covered less than 40% of employees in 2011 (TNS Infratest 2012: 80), ranging between 84% in the credit and insurance industry and 26% in the hospitality industry (BMAS 2012: 138). Coverage rates strongly increase with wages, ranging from less than 15% among employees with monthly wages below € 1,000 to around 75% among those with wages above € 5,500 (ibid: 161). Hence unlike in the case of the Riester scheme, inequality between low and high earners already translates into differential *access* to occupational and company pensions. Moreover, more than 25% of employees covered by an occupational or company pension did not receive any subsidy from their employer but paid the whole contribution on their own (ibid: 140). This type of occupational pension (with no or low contributions by employers) has gained in importance and is particularly wide spread in small companies.⁹ As a consequence, here again the *level* of pension entitlements is quite low for a relevant share of those covered by a company pension (ibid.).

Overall, an important share of employees are either not covered by additional pensions at all – 29% had neither an occupational nor a personal pension scheme in 2011; and even more than 40% among those with earnings below € 1,500 (BMAS 2012: 161) – or have entitlements that will probably be too low to transform their statutory pension into a ‘living pension’.

In sum, the reduction in the statutory pension levels and the shift towards the second and third pillar of the pension system therefore tends, on the one hand, to increase the social protection gap between the well-off and the less well-off. At the same time, it has also increased risks and insecurity with regard to retirement income among average and even above average earners in

⁹ An example: In the hotel and restaurant industry, the pension reform in 2001 spurred the conclusion of a collective agreement in 2002 introducing a national occupational pension scheme for the HORECA industry. But employers contribution is only € 150 / year for each full-time employee, and employees can convert up to 4% of their yearly wage into tax-free employee contributions.

continuous employment. The current structural low interest rates further contribute to diminish entitlements from the capital-market based supplementary pension schemes. Some pension experts conclude that for a broad majority of employees the second and third pillar will not be sufficient to compensate for the cuts in the statutory pension insurance (e.g. Schmähl 2012: 311). These effects might partly be offset, at the aggregate level, by increasing female participation rates, longer working lives and a general shift to higher skilled jobs. For those with precarious career paths however, the available evidence suggests that poverty risks will increase strongly over the next decades, unless comprehensive reform steps will be taken. Currently, the at-risk-of-poverty rate among people aged 65+ (14.9% in 2013) is already higher than EU average (13.8%), and it is particularly high among foreign nationals (above 40% in 2011, see Seils 2013).

The DGB unions' primary political objectives over the last 10 to 15 years has been to secure a decent pension level for the majority, rather than to strengthen the redistributive character of the pension system to the benefit of the (increasing) minority with very low pension entitlements. Unions at first even rejected a reform proposal by the then conservative Labour Minister, Ursula von der Leyen, on a 'lifelong achievement pension' (Lebensleistungsrente), arguing that the proposal would distract attention from the low and falling general replacement rates (DGB 2012). The proposal was about introducing pension top ups for those with a contribution history of at least 35 years. Instead, core union claims were to maintain the previous levels of the pension replacement rate and to preserve options for early retirement for certain groups. Both claims also motivated the DGB's strong opposition towards the gradual increase of the statutory retirement age to 67, because this implies pension reductions for those retiring at an earlier age (63 at the earliest), following unemployment or poor health conditions¹⁰. The increase in workloads documented by many studies in both high and low skilled occupations is indeed likely to increase the number of health-related early exits of the labour market (see e.g. Jaehrling/Lehndorff 2012). Given that public schemes subsidising early retirement schemes were abolished as well (see Footnote 8), trade unions assumed that an important share of those entering retirement will be affected by reduced pension levels.

¹⁰ Retirement age increases from 65 to 67 between 2012 and 2029, hence the standard retirement age of 67 applies to the birth cohorts from 1964 onwards. Insured persons can claim an unreduced pension at the age of 65 already if they are entitled to the 'exceptionally long service pension' after 45 years of compulsory contributions (including certain periods of childrearing and of unemployment benefit, but not of unemployment assistance or means-tested basic allowance for jobseekers ('Hartz IV')). Those who have a minimum contributory record of 35 years can claim pension at a reduced rate at the age of 63 at the earliest. The reduction amounts to 0.3% of the pension for each month the pension is claimed until the statutory retirement age, i.e. up to 14.4% ($48 \times 0.3\%$). For those who qualify for the 'old-age pension for people with severe disabilities' the minimum retirement age for an unreduced pension will gradually increase to 65 by 2029 (from 63), the minimum age for a reduced pension will increase from 60 to 62.

Accordingly, the unions made a partial reversal of this reform their priority, and during the coalition negotiations between Christian Democrats (CDU) and Social Democrats (SPD) in 2013 successfully lobbied for a temporary extension of the early retirement option at the age of 63 for those with 45 contribution years. This reform was passed in 2014. By contrast, so far no legislative initiatives have been taken to implement the ‘solidary lifelong achievement pension’ on which SPD and CDU have agreed in their coalition agreement as well. Hence the very recent pension reforms have done little to prevent poverty in old age to increase among employees with precarious working lives. Rather to the contrary: since additional expenses for the reform measures are financed out of contributions (not taxes) this will contribute to decrease pension levels, due to the adjustment mechanism in the pension system (Bäcker 2014).

With regard to social benefits in the case of unemployment, the earnings-related benefits have lost in importance following the ‘Hartz IV’ reforms, which abolished unemployment assistance, reduced the maximum duration of unemployment benefit, and tightened eligibility criteria by reducing the qualifying period from three to two years (within which applicants have to have worked for a minimum of 12 months). Only a minority of the unemployed (27% in 2014) is nowadays entitled to unemployment benefit, whereas the majority (65%) receives the newly introduced, means-tested ‘basic allowance for job seekers’ (often referred to as ALG II = unemployment benefit II).¹¹ In conjunction with the increasing share of low wage work – leading to very low wage replacement even for part of those entitled to unemployment benefits¹² – the reforms have thereby contributed to raise the at-risk-of-poverty rate among the unemployed to the highest level in the EU: According to calculations from Eurostat based on EU-SILC, the at-risk-of-poverty rate among unemployed (aged between 18 and 64) was at 86% in Germany, compared to 67% in the EU 28, in 2013. Hence, the imminent risk of falling into poverty is certainly higher for those in atypical employment, but given the figures the risk is perceived as real among standard employees as well.

¹¹ This is partly also to do with the re-classification of part of social assistance recipients into the group of unemployed, thereby statistically increasing the number of those who are unemployed and not entitled to unemployment benefit.

¹² More than 50% among male unemployment benefit recipients received a monthly benefit of less than € 900 in 2014; among female benefit recipients the share was 75% (source: Sozialpolitik aktuell).

3 Less than guaranteed full-time hours

Part-time work has increased strongly since the beginning of the 1990s, both in absolute and relative terms. More than half of female employees worked part-time in 2014 (57%), whereas this was only true for one men in five (Wanger 2015). Despite recent increases in weekly working hours, a ‘half-day’ job is still the norm among mothers: In 2011, women with children (up to 16 years) were working 22.7 h/week on average, an increase by 1.3 hours since 2006 (Kümmerling et al. 2015). This increase is mostly consistent with employees preferences: Only a minority among both male (27%) and female (14.7%) part-time workers states that they couldn’t find a full-time job. However, preferences for extending working hours are widespread, particularly among mini-jobbers. Nearly two thirds (64%) of female mini-jobbers would like to increase their working hours (to 20.8 hours/week on average, an increase by 9 hours compared to their current contracted hours); and 45% of women with a regular part-time contract would like to increase working hours (by 4 hours on average) (Wanger 2011). This indicates that the traditional institutions shaping womens’ working time preferences – in particular joint taxation and the special status of mini-jobs – have lost some of their vigour, since part-time work has become an important element in employer’s strategies to cut costs via imposing involuntarily short part-time jobs. So far, both legal regulations and collectively agreed rights have predominantly focused on reducing maximum and regular weekly working hours in full-time employment, facilitating access to (temporary) part-time employment and securing equal rights for part-time jobs. Securing minimum working hours and rights to increase working hours, by contrast, is only an emergent issue for working time regulation. The following paragraphs will therefore focus on this emergent issue in particular.

In-work regulatory gaps

Employees’ rights to *reduce* working hours have been strongly expanded since the 1990s. Since 1992 already parents are entitled to take parental leave for up to three years (for their children aged 0-8). Until 2001 they were however only allowed to work up to 19 hours/week during the leave, and this required the consent of the company. Since 2001 the Law on part-time and fixed-term work (TzBfG) secures a right to reduce working hours and work up to 30hours/week during parental leave – unless the employer brings forward adverse urgent operational reasons and only in companies with at least 15 employees. With the same restrictions (15 employees, adverse operational reasons), the law also entitles all employees to reduce their working hours, provided they have worked for their employer for at least 6 month. Previous to 2001, similar regulations were partly fixed in collective agreements and company agreements (Büntgen 2013: 15), and company agreements in particular continue to re-emphasize and specify this right (e.g.

which circumstances qualify for ‘adverse urgent operational reasons’), determine the application procedures and partly go beyond e.g. by securing works councils information and consultation rights.

Rights to return to full-time jobs or increase working hours

By contrast, a right to *return* to their previously contracted hours is restricted to parents, according to the law on parental leave. Other part-time employees who wish to increase their working hours shall be given preference over other applicants with equal merits for appointment, if a position with higher working hours becomes available within a company (§ 9 TzBfG). Collective and company agreements partly contain regulations on recruitment procedures which codify and specify this priority for part-time workers (Bispinck 2014: 15; Büntgen 2013: 49ff), but partly also go beyond, e.g. by securing rights to return to full-time work within certain time limits (Büntgen 2013: 57ff). According to the coalition agreement the current government intends to improve part-time workers’ rights to increase their working hours by establishing a right to limit the duration of a working time reduction in advance, which then would entitle employees to return to their previous hours after their contracted period for working time reduction ends. This would however not benefit employees who have entered their job on a part-time contract, hence the regulation wouldn’t improve the situation for large part of the workforce in many service industries, where part-time job offers are rather the norm.

Minimum working hours

As indicated by the strong growth in marginal part-time employment over the 1990s and the first half of the 2000s (Figure 1), contracts with very low working hours have increased substantially. Employers generally have important incentives to make use of part-time work as a means to cut cost. On the one hand, it allows them to closely match paid working hours with variable work loads. No legal regulations define minimum working hours or rule out split shifts. Moreover, the working volume of part-time jobs can be adapted more flexibly and at lower costs for employers, compared to full-time work. This is because existing regulations compensating employees for their willingness to work overtime and protecting them from excessive overtime demands are mostly ineffective in the case of part-time employees. The law on working time only defines maximum daily and weekly working hours, hence for someone with a part-time contract the gap between contracted (minimum) hours and legally permissible maximum hours can be much higher than for a full-time worker. The same is true for compensation of overtime work: In most collective agreements, bonuses for overtime (if any) are usually made mandatory for hours exceeding the regular hours of a full-time employee. Additional hours of part-time

workers will therefore mostly not qualify for overtime bonuses.¹³ Furthermore, overtime hours usually don't have to be factored into the statutory sickness and holiday pay, hence if part-time employees constantly work longer hours, their compensation for absent times will only be calculated based on their lower contracted hours.

Employers have exploited this regulatory gap to an important extent, and in some instances excessively so, as a case in the airport security industry illustrates: Employees used to be given a contract over 80 hours but worked 120 hours on average instead. This malpractice has eventually been addressed by a collective agreement stipulating that employees are entitled to an increase of their contracted working hours up to the number of hours actually worked on average in the previous year. In a similar vein, the regional collective agreement for the retail industry in North Rhine Westphalia (NRW) stipulates that employees are entitled to an increase of their contracted working hours if their actual working hours continuously exceed their contracted hours by more than 20% over a period of 17 weeks (Bispinck 2014). Very few collective agreements so far prescribe an *absolute* minimum of weekly or daily working hours (see Bispinck 2014); a notable exception being the already mentioned collective agreement for the NRW retail industry, which makes a minimum of 4 hours per day or 20 hours per week mandatory, unless the employee prefers fewer working hours.¹⁴ According to a trade unionist however, the persistently high share of marginal part-time employment in the regional retail industry indicates that the regulation of the collective agreement is often neglected and lower working hours are imposed on employees nevertheless (Interview with Ver.di NRW, June 2015).

Work on demand and zero-hours contracts

The law on part-time work (TzBfG) stipulates that employers and employees can agree by contract on 'work on demand' (§ 12 TzBfG). The law also defines minimum requirements: The contract has to fix the duration of the daily and weekly working hours; if this is not fixed in the contract, a minimum of three hours per day and 10 hours per week is deemed as agreed. If employees have effectively continuously worked more than 10 hours per week in the past, the higher number of working hours is deemed to be agreed, according to several rulings by the

¹³ The regulatory gap has to some extent diminished following the general flexibilization of working time, because this contributed to a general decrease of paid overtime over the last decades (Weber et al. 2014). Instead 'transitory' overtime has increased, where working hours in excess of normal daily and weekly working hours are compensated by time-off at a later point in time. In this case, full-time workers don't have a particular advantage over part-time workers (or disadvantage, from the employers' point of view), at least with regard to the compensation of overtime.

¹⁴ Similar concessionary rules exist in company agreements stipulating that the company shall abstain from offering minijobs (Büntgen 2013).

Labour Court (Absenger et al. 2014: 38). Moreover, the law stipulates that the employer has to notify the employee at least four days in advance, otherwise the employee is not obliged to work.

The legal regulation on work on demand also allows for collective agreements deviating from the minimum standards (3 hours/day, 10 hours/week, 4 days advance notice) even to the disadvantage of employees (§ 12 (3) TzBfG). This illustrates a general trait of the German laws on working time: many standards are non-mandatory or concessionary law ('tarifdispositives Recht') i.e. they can be curtailed and adjusted to the needs of certain occupations or industries by collective agreements – similar to the law on equal pay for temp agency workers (see next section). This has considerably facilitated the flexibilization of working time, to the extent that already by the year 2000 the then president of the BDA, Dieter Hundt, was quoted saying that anyone calling collective agreements an obstacle to flexible working time schedules was "either malicious or unaware of collective agreements" (quoted after Absenger et al. 2014: 21). During the recent economic crisis the plethora of collectively agreed flexible working time schedules is recognized as having contributed to the relatively small fall in employment (Herzog-Stein/Seifert 2010). Moreover, this kind of concessionary law can partly be considered as an organizational support for both employers' associations and trade unions, since it gives employers an incentive to join an employer association and subscribe to a collective agreement which allows for a more flexible implementation of the law.¹⁵ On the other hand, it also bears the risk of making fundamental employees' rights a disposable object in collective negotiations that are embedded in increasingly asymmetrical power relations. Against this background, a study issued by the trade union associated research institute WSI, recommends to trade unions *not* to make use of the legislative opening clause to the disadvantage of employees (Absenger et al. 2014).

Hence, the legislation is unambiguous in that zero-hours contracts are not legal. But it contains opening clauses, and in many respects fails to define clear limits. It has thereby given rise to many legal disputes and a large variety of interpretations to the disadvantage of employees (Absenger et al. 2014: 38f.) Most importantly, it is discussed controversially if the law requires that the contractually fixed number of weekly working hours can refer to an *average* over several weeks or months or to every single week. Moreover, it was a contested issue if the obligation to define working hours included the possibility to only define a lower limit of working hours, or a range of working hours, instead of a fix number that the employer would invariably have to demand, thereby restricting flexibility to the *timing* of working hours. The Federal Constitutional Court ruled in 2006 that contracts can indeed fix minimum working hours, but

¹⁵ Albeit that, both in the case of 'work on demand' and 'equal pay for temp agency workers', the incentive is respective legislation allows employers not covered by a collective agreement to make use of these collectively agreed deviations as well.

that the number of hours worked on top of this minimum number shall not exceed 25% (1 BvR 1909/06) – a ruling that reconfirmed previous rulings by the Labour court, but was commented critically by observers for legalizing so called ‘Bandbreiten-Verträge’ (hours-range-contracts) entitling employers to unilaterally vary the volume of working hours (e.g. Schlichting 2007). At the same time, the ruling has also set limits to these ‘Bandbreiten-Verträge’, which according to a trade unionist from the retail industry could be much larger in practice (Interview with Ver.di NRW, June 2015).

As Absenger et al. (2014: 36) note, it is questionable to what extent employees – and employers, for that matter – are aware of the complex jurisdiction. Indeed, deviating interpretations nevertheless seem to persist in practice: In 2012 a retail chain produced negative headlines because the majority of its sales assistants were employed on ‘work on demand’ contracts with a contracted range between 2 and 40 weekly working hours, hence they were only guaranteed 2 hours per week but had to be available for another 38 hours (Absenger et al. 2014: 37).

According to the only available quantitative survey dating from 2010, work on demand is more prevalent among part-time workers than among full-time workers, particularly among mini-jobbers, 13% of which stated that they had a work-on-demand contract (compared to 7.5% for regular part-time workers and 3.7% for full-time workers) (Schult/Tobsch 2012). It is assumed however that informal types of work-on-demand are more widespread. This assumption is supported by our own calculations based on a general household survey (SOEP) that includes a question on the number of contracted weekly working hours. In 2013, around 9% of dependent employees declared that they had no fixed number of working hours. At almost a third (32.6%) this share was much higher among mini-jobbers (see Table 8 below). This could be regarded as an indicator that some mini-jobs are used by firms as a functional equivalent of temp agency work.

Table 8 Employees without fixed number of weekly working hours

Employment form	Share of employees without fixed number of weekly working hours (in %)
Full-time	6.5
Part-time (social insurance)	8.7
Mini-job	32.6
Temp agency work	11.8
Total economy	9.4

Source: Own calculations (IAQ/Thorsten Kalina) based on SOEP 2013

Similar results are reported in an IAB study on atypical employment, based on a survey among companies (and their employees) with more than 10 employees: According to this survey, 17%

of all employees and more than 37% of those on a mini-job stated that they were working 'on demand' (Fischer et al. 2015: 218).

Further calculations indicate in which industries work on demand is most frequently used and where it is increasingly used: As table 9 below shows, the largest group of employees without a contractually fixed number of weekly working hours can be found in wholesale and retail, in accommodations and food service activities, and in the education industry; and the increase both in absolute and relative terms was also strongest in service sector industries, like **accommodation, real estate activities, health and social care, education and transport**. **Overall**, the share of employees without fixed number of weekly working hours as increased by 7,6% between the period 1997–2000 and 2010–2013.

Table 9 Employees without fixed number of weekly working hours by industry, 1997–2000 and 2010–2013

	1997-2000	2010-2013	Change 1997–2000 to 2010–13 (in %)
Agriculture	180.713	205.140	13,5
Metal, Electro, Car manufacturing	1.073.947	799.976	-25,5
Mining, Energie, Chemical industry	403.354	277.907	-31,1
Other manufacturing industries	901.430	806.754	-10,5
Construction	720.064	463.666	-35,6
Wholesale + Retail	1.981.609	1.702.930	-14,1
Accommodation and food service activities	580.560	1.138.555	+ 96,1
Transport	852.494	967.505	+ 13,5
Financial and insurance activities	382.991	389.468	+ 1,7
Real estate activities	652.587	1.138.351	+ 74,4
Public administration	354.401	415.999	+ 17,4
Education	918.501	1.169.815	+ 27,4
Health an social care	729.675	929.001	+ 27,3
Other services	1.017.087	908.091	-10,7
Missing	699.382	1.008.487	+44,2
Total	11.448.793	12.321.647	7,6

Source: Own calculations (IAQ/Thorsten Kalina) based on SOEP 2013

Representation gaps

Part-time workers, including mini-jobbers, formally enjoy the same rights with regard to interest representation as full-time workers. A reform of the works council constitution act in 2001 also clarified that part-time worker are to be counted pro rata when calculating the number of obligatory works councils mandates. In practice, participation of part-time workers, and in particular of mini-jobbers, can be hampered by the fact that their working hours are often outside the core working hours of regular employees, because they are often used to cover

unsocial hours, e.g. in the late afternoon and evening or on Saturdays and Sundays. As a trade unionist from Ver.di explained in an interview, employees meetings are usually scheduled during regular working hours, in order to enable participation to as many employees as possible.

A number of collective agreements and company agreements are aimed at restricting the use of mini-jobs, by either securing participatory rights to works councils in recruitment procedures or by committing employers to abstain from offering mini-jobs at all, with the usual exceptions (Büntgen 2013: 37f) (Zimmer 2012: 50f), in particular if it's on request of the employee, i.e. voluntary. It seems remarkable that most examples quoted in Büntgen's analysis of collective agreements stem from the IG Metall's organisational area (metal, software development, machinery tools, car manufacturing), hence in industries with a rather low share of mini-jobs. This points at the limited scope of these collective agreements but at the same time suggests that the IG Metall also targets mini-jobs in companies that are within its reach. For a more detailed analysis of public policies and social partners' strategies regarding mini-jobs see the **Case study on mini-jobs** in the second part of the report.

Enforcement gaps

Enforcement gaps are particularly important with regard to mini-jobbers. They are since long entitled to equal pay and equal treatment by the law, but surveys repeatedly documented widespread deviations in practice concerning fundamental statutory employees' rights like sick pay and paid holidays (RWI 2012; Fischer et al. 2015, see also Case study on mini-jobs in 2nd part of the report). Evidence from qualitative studies also confirm the practice of paying mini-jobbers only for the hours they actually work (Benkhoff/Hermet 2008; Voss-Dahm 2009; Voss/Weinkopf 2012). Moreover, if almost 85% of them earn low hourly wages (see Table 1 above), this is partly due to non-compliance with equal pay: In the past, some collective agreements even included separate low-wage groups for marginal part-time workers, and it is not clear to what extent this kind of wage groups nowadays persist in practice. As qualitative studies revealed, this practice is to some extent deemed legitimate by employees and employee representatives and partly even by the mini-jobbers themselves, because the lower gross wage doesn't necessarily translate into lower net wages, due to the exemptions from taxes and social security contributions (Voss-Dahm 2009).

Generally, collective agreements can be an important tool to facilitate compliance with laws. As seen above, oftentimes collective agreements or company agreements contain regulations which do not *add* protective standards, by e.g. restricting the use of atypical forms of employment like mini-jobs or work on demand, but by reconfirming and specifying the legal

requirements, such as in the case of the rights of employees to reduce their working hours or to be treated preferentially when a full-time position becomes available.

Social protection and integration gaps

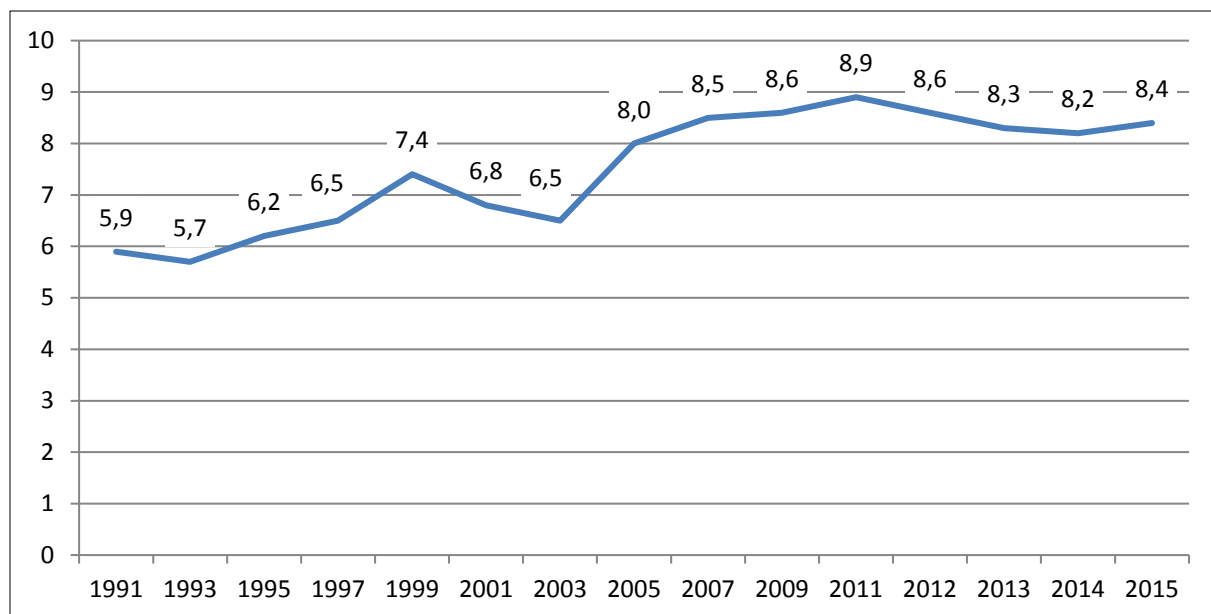
Employees in mini-jobs are not covered by the general obligation to pay social insurance contributions and they are exempt from paying income tax on their earnings. This form of state subsidy for low earnings is granted completely regardless of other earnings, assets or the household income of the employees. From the employers' perspective, the attractiveness of mini-jobs is less obvious than it may seem at first glance. They have to pay a flat-rate contribution of 31% (13% for health insurance, 15% for old-age pensions, a 2% flat-rate income tax and 0,99% for diverse levies) on top of the monthly wages for mini-jobs, which is around 50% higher compared to other forms of insured employment (for which contributions average around 21%). This flat-rate employers' contribution does not give marginal part-time employees any entitlement to social insurance benefits, except very low pension allowances. Since 1999 mini-jobbers can opt-in to pay contributions for the statutory pension. Those who do opt-in are also entitled to state subsidies for additional personal pension schemes (Riester). Even if they opt-in, however, this would not allow them to build up substantial pension entitlements if they stay in this job for several years. As a survey shows however, the stepping stone effect is very limited, hence a large share of female mini-jobbers either stay in the job for very long time or change back to inactivity or unemployment after some time (Wippermann 2012).

4 Fixed-term work and temporary agency work in Germany

In-work regulatory gaps

Within Germany we can distinguish between fixed-term contracts and temporary agency work. The regulatory framework for fixed-term contracts was relaxed in the 1980s and 1990s. As a result, there was a considerable increase in the volume of fixed-term work from 5.9% in 1991 up to 8.9% of all employees in 2011 with a slight reduction in recent years.

Figure 4 Proportion of fixed-term contracts in Germany, 1991–2015, in % of employees over 25¹⁶



Source: Federal Statistical Office¹⁷ (based on Mikrozensus)

In comparison to other European countries, Germany ranked somewhere in the middle with regard to fixed-term work. However, the rates of fixed-term contracts were especially high in Germany with regard to certain groups such as unskilled workers, people working in academic professions or in the service sector (ibid.). Moreover, fixed-term contracts increased especially among newly employed (Rhein/Stüber 2014). In that sense fixed-term contracts contribute to

¹⁶ The purpose of this threshold is to exclude apprentices in vocational training courses who typically have a fixed-term contract which should not be assumed to be “precarious”.

¹⁷

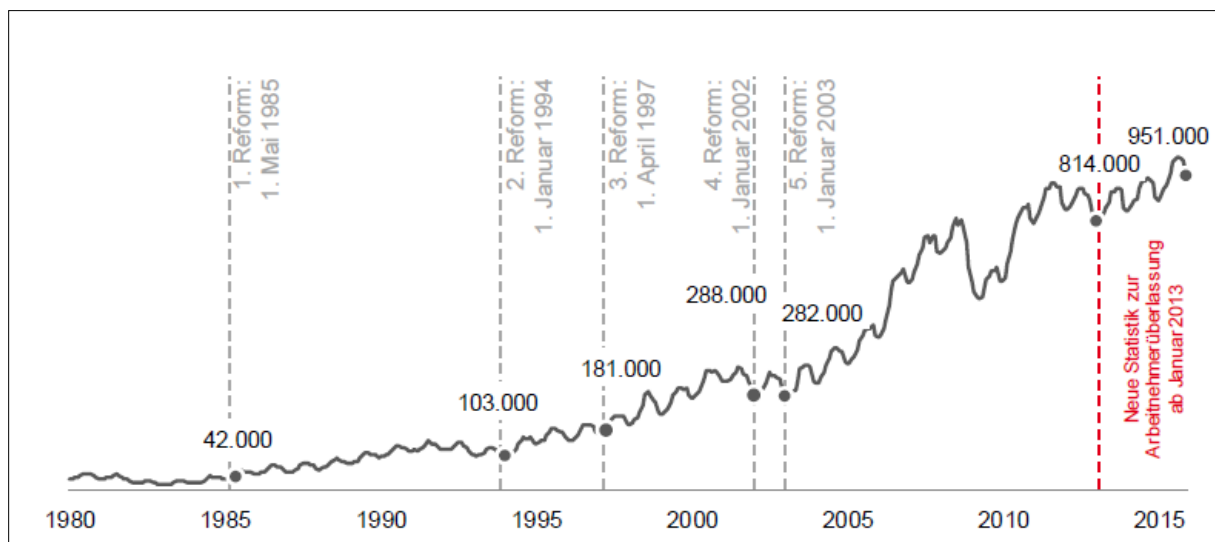
https://www.destatis.de/DE/ZahlenFakten/Indikatoren/QualitaetArbeit/Dimension4/4_2_BefristetBeschaeftigte.html

employment instability for certain groups of workers but as such does not play as big a role as temporary agency work which will be discussed in the remainder of this section.

In Germany, temporary agency work is defined as a form of employment where workers are employed by agencies (temporary work agencies) which in turn hire them out to a third party (the client company) where they work temporarily under the client company's direction and supervision. The temporary worker is considered an employee of the temporary work agency, not of the hiring company. During the employment relationship the temporary worker can be hired out to several client companies.

Since the mid-2000s there has been a significant rise in temporary agency work in Germany. From mid-2000 to 2015 the number of TAWs has more than doubled. Within this time period the number of temporary agency workers shortly decreased in the crisis years after 2009, but the number rose again soon afterwards and peaked in 2015 with 951,000 employees (Bundesagentur für Arbeit 2016c) (+8% compared to 2014).¹⁸ TAW is particularly prevalent in the metalworking industry where 28% of all agency workers are placed and in the area of logistics, security and cleaning (Bundesagentur für Arbeit 2016c: 10). According to several studies, temp agency work is increasingly used as a labour cost saving measure instead of a short term instrument to adjust seasonal fluctuations (Holst et al. 2009; Holst 2014; IG Metall 2012).

Figure 5 Development of TAW, 1980–2015



Source: Bundesagentur für Arbeit 2016c: 7

¹⁸ The discrepancy between these figures and the data provided by the Federal Statistical Office (see Figure 1 in Chapter 2) – ca. 950.000 as compared to 670.000 employees in TAW in 2015 – can at least partly be explained by different sources (Mikrozensus/Labour Force Survey versus administrative data).

The increase in TAW in Germany is related to the de-regulatory dynamics of the legal framework for TAW. Temporary agency work in Germany is regulated by the Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz, AÜG*). The act passed in 1972 but has since its adoption been substantially revised. The initial act limited the employment of the same agency worker to a maximum period of three months. It also banned temporary work agencies from ‘synchronising’ the period of the employment contract with the leasing period with the user-company; a regulatory measure that is being called the ‘synchronisation ban’ (*Synchronisationsverbot*). Moreover, it prohibited the temporary work agency to re-employ a worker after 3 months after which the worker has been let go (*Wiedereinstellungsverbot*). However, since the 1980s these regulatory measures were gradually relaxed. On the one hand the maximum assignment period was step by step extended and in 2003 even completely abolished. On the other hand, the so-called synchronization ban and the ban to re-employ agency workers after a 3-month period were removed in its entirety from the regulatory framework in 2003. These amendments were part of a broader package of labour market deregulation known as the Hartz reforms. It was now much more attractive for both temporary work agencies as well as user companies to take on agency workers. This is despite the fact that the same law introduced the equal pay principle for TAW; this rule however remained largely ineffective, due to an opening clause for collective agreements (see separate paragraph below).

Since 2012, a series of re-regulatory changes has imposed some restrictions on employers’ ability to use temp agency work as a cheaper alternative to direct employment contracts. First, a generally binding minimum wage for temporary agency work was implemented in 2012, after several years of controversial debates. Second, the introduction of a clause (a so-called ‘revolving-door-clause’) which forbids the re-hiring of former regular staff on poorer terms as agency workers if less than a period of six months passed after the termination of their previous regular employment (however, vocational training does not count) was decided as a regulatory measure. Thirdly, it was made obligatory for user companies to inform agency workers about any vacant posts in order to increase their chances of obtaining a regular job (but no mandatory transition). The most recent legal reform that will enter in force in January 2017 aims to clarify the meaning of ‘temporary’ in relation to the maximum hiring period and re-introduces a maximum period of hiring TAW of 18 months. This can be either extended or reduced by collective agreements making use of an opening clause in the law. Moreover, the law entitles temp agency workers to equal pay and treatment with regular employees at the same user company from the ninth month of their assignment. Again, this can be extended to 15 months by collective agreement, provided that this CA makes wage supplements from the 6th week of employment obligatory, leading to a gradual rapprochement to equal pay. The effect this law will have on pay levels among temp agency workers, and the question whether trade unions

should making use of the derogative options offered by the law, is a subject of controversial discussions also within the trade unions camp (see separate paragraph below).

As such TAW work contracts share many similarities with the standards employment relationship: TAW are included in statutory social insurance, holiday entitlements and receive continued pay in case of sickness and are covered by statutory protection against unfair dismissals. However, TAW face a number of risks: they often work in difficult work situations, receive disproportionately low wages, face a reduced employment security, have substandard access to further training, and a lower job satisfaction (Artus 2014; Vogel 2004; Brehmer/Seifert 2007). Therefore, these equal rights have to be reevaluated in the light that they are very short term. As legal dismissal protection requires a minimum employment of duration of 6 months, a large proportion of temps are excluded. Even though in theory it is possible to employ temp workers more permanently, in practice this is mostly not the case. In 2015, more than half of the employment relationships (54%) ended after a period of fewer than 3 months, and 31% even ended in less than one month (Bundesagentur für Arbeit 2016c). Less than one fifth (18%) of temporary agency workers were employed longer than one year in the same temp work agency. Only a small minority of these short-term TAW jobs ends because the TAW is offered a permanent job at the user-company. This indicates that one of the main intentions of the deregulation of TAW – to make TAW a stepping stone into permanent employment – has largely failed. Therefore, the risk of temporary agency workers to lose their job is more than five times higher than for regular employees (Bundesagentur für Arbeit 2016c: 15).

Equal pay for equal work?

Even though the Temporary Employment Act since 2003 establishes the right to equal pay and equal treatment for TAW from the first day of an assignment at a user-company, the law still allows for deviations from this principle provided this is stipulated in a collective agreement. At the time of its implementation, trade unions accepted this concessionary law (equal pay law with opening clause for collectively agreed wages), as they estimated that this would help them to organize the temp agency sector. On the employers' side, there was at first the concern that the trade unions would refuse to enter into collective wage agreements in order to push through equal pay which was expected to increase market prices to an extent of around 20% (Weinkopf 2006). However, the first collective wage agreement was quickly concluded between a small employers' association and a small Christian trade union providing for very low remuneration with a gross hourly wage of only €5.20 for low-skill occupations. Hence, the initial trade unions' judgement on the potentially beneficial role of the concessionary law had underestimated the role of yellow unions and their willingness to agree on collective agreements with the lowest possible wages. As a result, there was no longer any possibility of enforcing the equal pay principle by refusing collective pay negotiations. The bargaining power of the DGB-unions was

lowered substantially and employers refused a negotiation of wages close to equal pay. In hindsight, the equal pay reform with the possibility to derogate from the equal pay principle through collective agreements created a loophole to circumvent this principle. Instead DGB unions concluded collective agreements with much lower wages than they had hoped for, in order to restrict the spread of ‘yellow’ collective agreements. In May 2003, the member unions of the DGB jointly concluded collective agreements with the largest TAW employer association BAP (Bundesarbeitgeberverband der Personaldienstleister) and iGZ (Interessenverband Deutscher Zeitarbeitsunternehmen) which at least provided for slightly improved conditions for temps (Weinkopf 2006). The lowest pay level in these two basic CLAS was declared generally binding in 2012 and constitutes the sector wide universally binding minimum wage. In June 2016, this minimum wage stands at € 9 per hour in West Germany and € 8.50 per hour in East Germany. Additionally, the trade unions successfully campaigned for industry specific wage supplements for temp agency workers that helped to reduce the pay gap at least in some industries (see section ‘representation gaps’ below).

Overall, the way the ‘equal pay principle’ has been implemented in Germany has so far not prevented that substantial pay gaps between TAW and core workers continue to exist. In 2012, two thirds of the temporary agency workers (67.7%) earned hourly wages below the low-pay threshold (€ 9.13) (Kalina/Weinkopf 2014). According to the German Federal Employment Agency there is a large pay gap between agency and regular workers. At the end of 2015 an agency worker received on average 58.1% of the remuneration of a regular employee (Bundesagentur für Arbeit 2016c). Pay differences in the manufacturing industry were more than 40%. In the service sector a 30% pay gap has been identified. While many agency workers are on average either less qualified or do less qualified jobs, studies that have taken into account structural differences between agency and regular workers still identified a remaining pay gap between 15 and 25% (Jahn/Pozzoli 2013). It is questionable to what extent this will change with the new law, which from 2017 onwards entitles temp agency workers to equal pay latest after 9 or 15 months (if this is laid down in a collective agreement, otherwise from 1st day of assignment). Figures provided by the German government in fact show that between 2000 and 2012 only 25% of all employment contracts of temp agency workers was 9 month or longer (Bundesregierung 2016). Since this is the *employment contract* with the agency, not the *assignment period* (which is the relevant criterion for the entitlement to equal pay), the share of those who would have actually benefitted from the recently introduced entitlement to equal pay after 9 month is even lower.

Representation gaps

In Germany agency workers are entitled to vote in the company-level elections of employee representatives in the user firm after having worked there for at least three months. However,

as stated above, more than half (54%) of the employment relationships end in fewer than 3 months (Bundesagentur für Arbeit 2016c:14). Consequently, many TAWs are not entitled to vote in the user firms' social elections. Moreover, after 3 months the TAW has an active voting right to vote in the works council elections but does not have the passive voting right to stand and be elected into the works council. Despite these efforts to involve TAW into collective channels of representation, recent studies argue that in firms in which TAW is prevalent the general works council representation density is disproportionately low (Artus 2014). Even if a works council exists it is questionable if it feels responsible for TAW because they are formally not part of the workforce it has a mandate to represent (Artus 2014). Nevertheless, since 2013 the number of temp agency workers within a firm must be taken into account when calculating the number of works council members employees are entitled to. Moreover, works councils at the hiring firm are at least partly responsible for TAW; namely, the co-determination rights of works councils also include TAW.

Collective agreements on temporary work – enforcing or undermining equal pay?

Trade unions have been seeking to regulate TAW in the aforementioned collective agreements. Some unions such as the IG Metall and the service sector union Verdi have tried to build structures to organize agency workers. Finally, campaigns have become an instrument for mobilization in favor of agency workers' rights. In 2008, the IG Metall launched a broad campaign for equal pay and equal treatment of agency workers in the metal industry (Initiative Leiharbeit fair gestalten: Gleiche Arbeit – Gleiches Geld)¹⁹ (cf. Benassi/Dorigatti 2015). Subsequently, other unions, such as the services union, ver.di²⁰, and the chemical and energy workers' union²¹ (IG Bergbau, Chemie, Energie, IG BCE) have developed similar initiatives. With these campaigns the trade unions aimed to 1) highlight the abuse of TAW and put pressure on the government to amend the Temporary Employment Act to make it into a more stringent equal treatment regulation; 2) provide practical support for agency workers and to organise them into unions; and 3), approach the user companies, where trade unions were often in a much stronger position.

One major result of these efforts is the 2010 conclusion of a collective agreement in the steel industry for North-Rhine Westphalia, Lower Saxony and Bremen which for the first time stated that TAW have to receive the same pay as the core workers.²² Another result of the IG Metall campaign was that the trade union was able to conclude more than 1,200 workplace agreements on TAW over a period of four years (Meyer 2013: 294). These workplace agreements, or so-

¹⁹ <http://www.gleicharbeit-gleichesgeld.de>

²⁰ <http://www.hundertprozentich.de/>

²¹ <https://www.igbce.de/themen/leiharbeit-werkvertraege/>

²² <http://www.igmetall.de/stahltarifrunde-2010-dritte-verhandlung-fuer-nordwestdeutschland-5555.htm>

called ‘better-agreements’ (Besser-Vereinbarungen) have stipulated certain supplements that user companies must pay in addition to the minimum rates in the TAW collective agreement for agency workers and even introduce an obligation for equal pay after a certain period of time. Between November 2012 and July 2013 new collective agreements on TAW were concluded in eleven sectors in branches such as metalworking and the chemical industry. The main issue in these agreements is determining the sector-specific supplements for agency workers which user companies have to pay (Spermann 2013). These are calculated on the basis of the collective agreements with the temporary agencies and usually increase in line with the length of time that agency workers have been working on an assignment at a user company. In the metalworking industry, for example, an agency worker in a lower pay grade will receive a supplement of 15% in addition to the rate in the agency collective agreement from the 7th week of employment, 20 % from the 4th month, 30 % from the 6th month, 45 % from the 8th month and 50 % from the 10th month. After ten months the agency worker will reach a pay level which comes close to that paid for a regular worker (cf. Schwitzer/Schumann 2013).

These agreements at company and sectoral level exist in sectors where trade unions are traditionally strongly represented. They certainly close a regulatory gap, but only in these sectors. Moreover, a few changes in the general and industry specific legal framework have put the question on the agenda, whether the trade unions should continue to negotiate collective agreements that are leveraging out the individual temp agency workers’ entitlement to equal pay. Firstly, In 2010 the federal court of labour judged several collective agreements that were concluded with the ‘yellow’ unions as unlawful. Theoretically, this judgement restored the option for the DGB trade unions to refuse concluding collective agreements which suspend the equal pay principle, hence to renounce on using the opening clause and thereby establish equal pay from the first day of an assignment. In practice, however, this judgement resulted in a strategic dilemma for trade unions: whether they should now advocate to fully implement the equal pay principle or else continue to negotiate collective agreements, with the aim of trading equal pay against improvements in other areas, and also in order to further increase their membership rates among TAW. Those in favour of such collective agreements have argued that they can help to raise TAW wages in low paying occupations and industries where ‘equal pay’ effectively means an entitlement to very low pay (Matecki 2013).

This however was before the introduction of the national minimum wage in 2015, which at € 8.50/hour is only slightly below the lowest pay grade in the TAW collective agreement (€ 9 West; € 8.50 East Germany).²³ The question whether a collective agreement should be concluded or

²³ Given that low-skilled occupations make up for a large share of temp agency jobs, this lowest pay grade is frequently used. Although no exact data are available on how many TAW are classed into this pay group, the high share of low-wage workers among TAW (2/3 in 2012, see above) allows to conclude that it is not a small minority.

not is therefore currently discussed controversially again within the trade union camp, as it was in previous years (see also Schulten/Schulze-Buschhoff 2015; Helfen 2015). The current debate occurs in the context of the recent TAW reform which, as explained above, retains an opening clause that allows to conclude collective agreements undercutting equal pay, but on condition that equal pay is introduced after 9 month of an assignment with the same employer; this can be extended until the 15th month, provided that the collective agreements makes wage supplements from the 6th week of employment obligatory, leading to a gradual rapprochement to equal pay. Despite fierce criticism from within the trade union camp²⁴ the member unions of the DGB jointly decided to take up negotiations with the two employers associations (iGZ and BZA) in October 2016, claiming for a 6% pay increase and a full alignment of wages in East and West Germany. The core arguments in favour of a collective agreement advanced by the trade union departments responsible for the wage policy (see DGB Bundesvorstand 2016) is that this allows to extend collectively agreed wages on the periods between assignments; that the collectively agreed wages (when declared generally binding) also apply to cross-border temp agency work (who would otherwise only be entitled to the national minimum wage); that it is difficult for individual employees to enforce equal pay on their own, and that this is facilitated by the 'better agreements' – which by defining the pay supplements sort of determine what constitutes 'equal pay' in a given industry. The core arguments advanced by their critics is that few temp agency workers actually benefit from the pay supplements, given that a lot of industries are not covered by them and that a large portion of TAW assignments are only of very short duration. Moreover, they contend the importance of the rules relating to pay between assignments, pointing to the widespread practice that TAW are either dismissed after the end of an assignment or that employers make use of employees working time accounts (by deducting the hours not worked in between assignments).²⁵

Enforcement gaps

The demarcation between temporary agency work and a subcontract exists in a grey zone. Oftentimes, so-called bogus subcontracts are actual temporary work agency arrangements. For the enforcement institutions but also for the individual workers it is often difficult to determine under which conditions the work is carried out. Indications for an employment relationship are the integration of the employee in the work process as well as the hierarchical supervisory

²⁴ See the dossier under <http://www.labournet.de/?p=100686>

²⁵ It is a legally contested issue whether the practice of using working time accounts of employees to cover for payment between assignment (the latter is legal obligation) is compliant with the law. A recent ruling has judged this practice as unlawful (LAG Berlin-Brandenburg, Urteil vom 17.12.2014, Az. 15 Sa 982/14), but there have been different judgments in the past, hence this issues is currently awaiting a ruling by the highest court. In any way, the fact that there have been several judgements on this issue, can be interpreted as an indicator that this practice is not uncommon.

structure. The personal dependence on content, execution, time, place and other modalities determines which contractual form is applied (Bonin/Zierahn 2013: 4). In order to counter such practices the Employer association of the temporary agency firms established an independent arbitration board (*'Kontakt- und Schlichtungsstelle'*). It is independent from the employers association and offers a free hotline to employees. In case malpractices are detected – such as the use of bogus subcontracting by a temp work agency – the firm can be excluded from a membership of the employers association (Interview with employer association, 2015). Moreover, the new law proposal that is scheduled to enter in force in 2017, abolishes the option that in cases that have been identified as bogus subcontract and de facto TAW, the respective company can simply circumvent any legal consequences by ex-post transforming the subcontract into a leasing/TAW contract with the main contractor, provided that it is licenced as a temp work agency.

Social protection and Integration gaps

The low stability of employment (often alternating with periods of unemployment) (cf. Crimman et al. 2009; Haller/Jahn 2014) leads, in reality, to lower levels of social protection for the majority of temporary agency workers, which is exacerbated by the frequently low rates of pay. For example, in 2013 325.000 people started to work in the TAW sector after being unemployed. Of those 325.000, 61% (200.000) were employed after 6 and twelve months. By contrast, 39% of them were again unemployed after 6 or twelve months of employment (Bundesagentur für Arbeit 2015).

As noted in section 2.4, two forms of benefits exist for the unemployed in Germany: the contribution based unemployment benefit and the means-tested 'basic allowance for job seekers' (often referred to as '*ALG II*' = unemployment benefit II). Whether temporary agency workers are entitled to the former or the latter depends on the previous income and the duration of the previous employment. They are entitled to the full unemployment benefit if they were employed for at least 12 months (this does not have to be consecutive months) during the last 2 years. However, as described above, many temporary agency workers are employed fewer than 10 or even 3 months. If they fail to accumulate 12 months, they are only entitled to the means-tested ALG II. Claimants must attend training courses, and be ready to step into any job offered them by the *Arbeitsagentur* or *Job Center*, even a very low paid one.

TAW also affects health and safety at work substantially. TAW have to adapt to new work requirements constantly. The tasks and responsibilities may change with each assignment but also their position. In that sense, TAW are limited in acquiring similar training and experience than their permanent employed colleagues. While the latter is able to acquire tricks and skills in order to ease the workflow and to work safely, there is only limited possibility for TAW to

do the same. The dilemma here is that TAW need a good introduction into the workflow in order to avoid health and safety issues, but the necessary time is often limited for this workforce (Szczeny et al. 2008). If they are not introduced to the health and safety regulations properly in the company they also do not know whom to contact if they have questions with regards to these rules. The main reasons for the heightened accident risks for TAW are: insufficient integration of TAWs in the workplace, heightened accident risk of newcomers, insufficient adjustment to the new job, high pressure to get a permanent contract, insufficient communication between the user and the sending company (Szczeny et al. 2008).

The short employment duration and the rapid change of the workplace also affect the psychological condition of TAW as well as their social life. TAW have to adapt to new circumstances quickly and are most of the time a minority in the company. Therefore, they feel less integrated into the firm and are subject to various discriminatory practices (i.e. pay and training) violating their sense of fairness. Moreover, TAW are sometimes forced to accept jobs away from their families causing an additional burden to coordinate work and private life (Bornewasser 2010).

5 Cost-driven subcontracted work

This section deals with a broad variety of different forms of subcontracted work. According to the definition adopted for the purpose of this study, the term '*subcontracted employees*' refers to "jobs that are managed as part of an outsourcing contract between two organisations, a client and a supplier, and the supplier is the direct employer of the subcontracted employee" (see Grimshaw et al. 2016, Box 13.1). The client can be either a public body or a private company. **Posted Workers** can be seen as a specific form of subcontracted employees: they are also dependent employees, but they work for a supplier in a chain of cross-border subcontracting: they are migrant workers who are employed by a company that is registered in the migrants' home country and are sent to the host country in order to perform work at the client company. A **solo self-employed** can also fulfill a service as a subcontractor (i.e. have an outsourcing contract), but does not have own employees.

In-work regulatory gaps

Posted workers

Working conditions of posted workers are regulated via the EU Posting of Workers Directive which has been implemented in Germany via the German Posting Act (Arbeitnehmer-Entsendegesetz) in 1996. The particularity of the German posting law is that it does not cover the whole economy (like the Danish posting law for example) but only certain sectors. The law initially included the construction industry, but has been amended several times in order to include additional industries, among which the care sector, security services and meat processing (see also section 2). Posted workers in those sectors are covered by these minimum conditions:

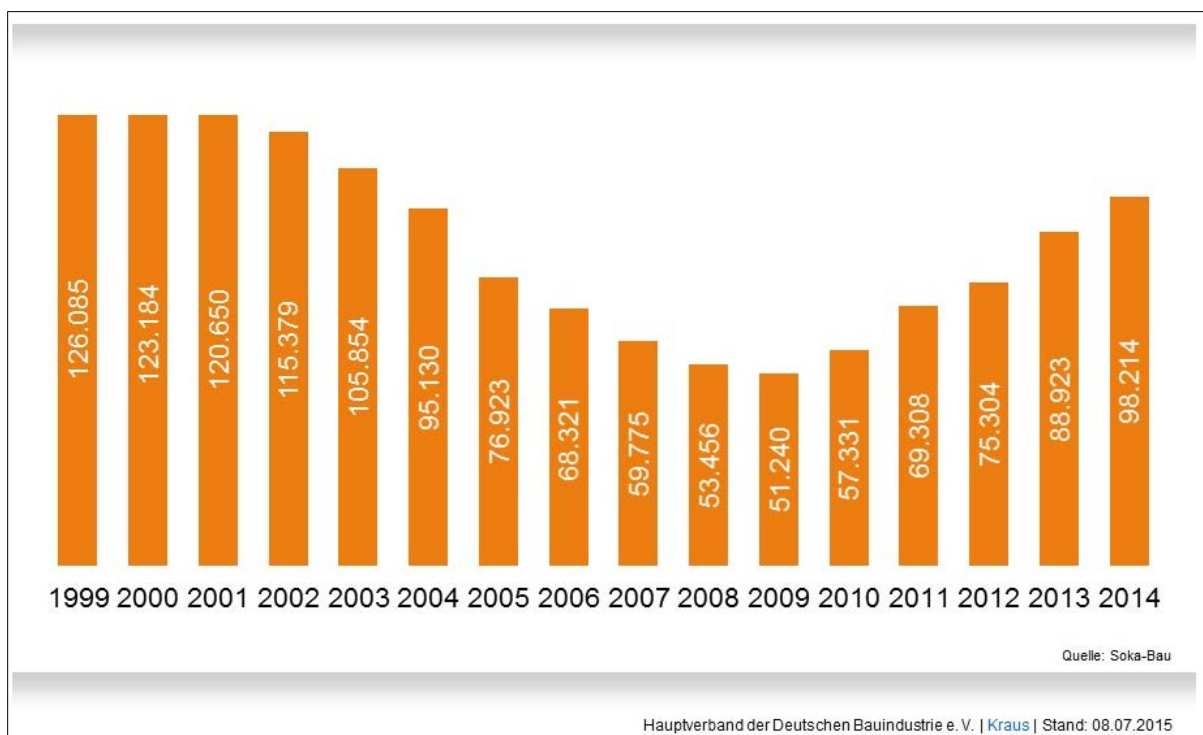
- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay, including overtime rates;
- conditions of hiring out workers, in particular the supply of workers by temporary work agencies
- health, safety and hygiene at work;
- protective measures in the terms and conditions of employment of pregnant women or those who have recently given birth, of children and of young people;
- equal treatment between men and women and other provisions on non-discrimination.

However, social security contributions (i.e. sick and pension pay) are paid in the country.

In sectors which are not listed in the German Posting Act the sending country conditions apply to posted workers. This has been the case in the German meat industry until mid-2014 leading to a situation where workers earned € 3-5 per hour with no right for paid holidays according to German law (Wagner 2015b; Blasius 2013; Grossarth 2013). This changed with the introduction of the universally binding sectoral minimum wage regulation which applies to all workers on German territory and the adoption of the meat industry into the list of sectors covered by the German Posting Act.

Especially the German construction industry has become a main destination country for posted workers, mainly from Eastern European countries, with a peak of 188,000 registered postings in 1996. In 2014, 98.214 postings were registered (see Figure 6). The drop in postings can partly be explained by the increase of solo-self-employed workers, also originating from Eastern Europe (see below).

Figure 6 Numbers of Posted Workers send to the German construction industry



Source: Hauptverband der Deutschen Bauindustrie 2015²⁶

The portable documents A1 are currently the only register of information on posting data (Wagner / Hassel 2015). Employers posting workers to an EU member state are required to apply to the relevant national authorities for an A1 document. The document exempts workers from paying social security contributions in the country where they are temporarily working

²⁶ <http://www.bauindustrie.de/zahlen-fakten/statistik/arbeitsmarkt/entsandte/>

and proves they do so in their country of residence (Council Regulations 1408/71 and 574/72). In 2014 the 3 main sending countries of posted workers were Poland (266,745 PDs A1 issued), Germany (232,776 PDs A1 issued) and France (119,727 PDs A1 issued). The three main receiving Member States were Germany (414,220 PDs A1 received), France (190,848 PDs A1 received) and Belgium (159,753 PDs A1 received). Moreover, the majority of posted workers to Germany was sent from Eastern European countries while the postings to France and Belgium were more balanced with regards to the EU 28 member states (Pacolec/De Wispelaere 2015: 14).

Subcontracted employees

In general subcontract workers have no right to equal pay. According to reports by trade unions and surveys of works councillors (e.g. Siebenhüter 2013; IG Metall 2015a), firms are making increasing use of subcontracts instead of temporary agency work, which has been more strongly regulated since 2010 (see chapter 4 above). A recent study (Hertwig et al. 2015) supports the assumption that it is not an exception that subcontracted employees who work ‘on-site’, i.e. on the premises of the contracting company, de facto work under the instructions of staff from the contracting company and hence must be regarded rather as temp agency workers. As explained above (chapter 4), the new law proposal that is scheduled to enter in force in 2017, abolishes the option that in such cases of bogus subcontracts the respective company can simply circumvent any legal consequences by ex-post transforming the subcontract into a leasing/TAW contract with the main contractor, provided that it is licenced as a temp work agency. The reform also strengthens works councillors information rights with regard to the extent of subcontracting and the precise terms and conditions of the subcontract. Still, in this latter respect the reform has been criticized by the trade unions as providing too little support for their goal to stop the abuse and the abundant use of subcontracts.

Nevertheless, a number of laws and collective agreements have established certain minimum wages and other rights applying specifically to the situation of subcontracted employees. These will be discussed in more detail in two case study reports in the second part of this report (see chapters 8 and 9).

Solo self-employed

The number of solo-self employed has increased much more than the number of employees over the last years. For example, the number of dependent employees has increased by 5% between 2000 and 2012, while the number of solo-self employed has increased by 40% in the same time period (Brenke 2013; see also Figure 1 in section 1). Unlike in the beginning of the 2000’s solo-self employed now constitute the majority among self-employed (with or without

employees), which overall account for 11.7% of the workforce – still a relatively low share compared to most other European countries.

The most significant increase of solo self-employed was registered in the construction sector. The proliferation of self-employment in construction is related to the changes in the German Trade and Crafts Code (Handwerksordnung). Before 2004 establishing a business was only possible if the owner held a qualification as a ‘Master Craftsman’ (Meister) in their trade. The relaxation of this obligation allowed certain professions to set up a self-employed business as a registered handicraft entity either without such a diploma entirely or with a ‘qualification period’ of 6 years. Of the previously 80 listed professions, 40 professions are not anymore obliged to hold a ‘Master Craftsman’ diploma when offering services. This is the case for the profession of tiler, leading to a situation that many workers in other professions register themselves as tilers. Between 2004 and 2012 the number of registered handicraft tiling companies in Germany increased from about 12,000 to 68,000 of which 18,500 had a registered owner from Eastern Europe (IG BAU / ZDB 2013).

Many among those solo self-employed in construction stem from Eastern Europe. During the transition period for the freedom of movement post Eastern European accession this was the only channel they could enter the labour market. Since solo self-employed are not employees, they are not subject to the minimum conditions set by the German Posted Workers Law. Therefore, the creation of a single person company has emerged as a legally permissible method of avoiding the sectoral minimum wages. As a result, one can observe a functional shift from using solo self-employment as a means to enter the German labour market to a means of actually avoiding the minimum wage standards in the German labour market. For construction companies, it is often rather attractive to hire individuals with self-employed status as they do not have to pay either the minimum wage or social security contributions (Haubner 2014).

Hybrid category: economically dependent workers

Some labour laws include provisions for a hybrid category called ‘*arbeitnehmerähnliche Person*’ (~ ‘person similar to a dependent employee’). This group is defined as persons being ‘economically dependent’ and therefore ‘in need of protection’. ‘Economically dependent’ is different from ‘personally dependent’: it means that the person is in fact autonomous in terms of his/her working time, is not integrated in the organisation of the ‘employer’ etc. (both factors are regarded as indicators for bogus self-employment), but is dependent on the *income* from a contract with a company, because this is more or less the only client he/she is working for. The most important benefit tied to the status of ‘*arbeitnehmerähnliche Person*’ is the entitlement to a statutory 4 weeks of paid holiday. In most other aspects they are treated as self-employed, i.e. are not entitled to sick pay or social security contributions by the employer. Unlike other solo self-employed, they are however compulsorily insured in the statutory pension

insurance, but have to pay the full contributory rate (ca. 20% of their income) on their own, hence the ‘employer’ does not supplement this either.

No statistics are available on the number of persons working in this hybrid status; but it’s known to be a relatively widespread phenomenon in the media industry (‘freelance’ journalists).

Representation gaps

Works councils from the contracting firm have almost no rights to represent and workers are constrained from interacting with the works council directly (Däubler 2011: 6). The works council has only a right to information concerning the conclusion of a contract. Moreover, German co-determination act doesn’t apply to subcontracting firms that are based in countries outside Germany.

Collective redress is not part of the legal system for unions in Germany. Unions do need the workers’ support to initiate court proceedings. However, structural conditions and the fear to loose employment hinders the union to get the necessary workers’ consent for a court proceeding. This complicates enforcement claims and the reimbursement of wage arrears for workers. However, trade unions developed strategies to include posted workers and subcontract workers.

IG BAU has responded to increasing numbers of posted workers by attempting to organize and represent them. One well-known aspect of this effort was the establishment of the European Migrant Workers Union (EMWU), which attempted to create a transnational structure, from which workers could also receive representation in their sending countries. The EMWU did not establish the independent role it initially envisioned due to insufficient union support from unions in other European countries but also within Germany, as well as organizational flaws in EMWU itself, and was eventually reintegrated into the IG BAU (Greer et al. 2013). Although the idea of an independent transnational migrant workers union has been abandoned, the IG BAU strategy of representing migrants remains the same: represent the rights of posted workers at the political level and provide information to workers on construction sites or at housing sites and help with legal services in certain dire cases.

Moreover, in recent years The Confederation of German Trade Unions (Deutscher Gewerkschaftsbund – DGB) has responded to increasing numbers of posted workers by establishing 7 “fair mobility” service centres in large cities across Germany, co-financed by the German Government. Similar service centers have been established by several federal states and local authorities. In these service centres project workers with relevant language skills inform posted workers and migrant workers more generally about labour law and social legislations in their native languages and across sectors to preserve the created norms within the German labour market. Despite these efforts to empower foreign subcontract workers, organizing them

in order to effectively enforce their rights remains a difficult task for the trade unions and the campaign has had limited success so far, e.g. in terms of membership recruitment among foreign contract workers (Pries / Shinozaki 2015; Interview with NGG 2015).

At the workplace level, an unfortunate event led to an in-house collective agreement for posted workers at the Meyer Werft. Due to a fire accident at a posted workers' housing site two posted workers died in the fire who were employed at a subcontractor at the Meyer Werft. The fire was a result of the precarious housing situation. As a consequence IG Metall Küste and the Meyer Werft negotiated a collective agreement (valid until March 2017) which covers the employment conditions of employees working at subcontracting firms. Moreover, it contains information, control, and participation rights for the works council in the outsourcing process. The collective agreement obliges subcontracting firms to adhere to social standards (working times, health and safety, and adequate housing) as well as a minimum wage of € 8.50. A permanent working group consisting of works council and management controls the implementation. This working group also consults about the cancellation of a contractual relation and in the case of a disagreement about the scope of the subcontracts, the in-firm arbitration committee can be consulted. Moreover, the company committed itself to inform the works council in detail about the subcontracting relations and to consult the production and personnel development in relation to subcontracting with the works council. The works council has the right to look into the contracts and nature and scope of service work of the subcontractors. This collective agreement has by now been extended to Neptun and Rostock.

There are and have been efforts in trying to organize solo self-employed workers in Germany. For example, 'mediafon' is a service provided by the services union for solo self-employed for almost all professions and sectors. It offers practical and individual help for solo self-employed²⁷. Another example is the IG BAU's policy on solo self-employment: It calls for improvements in the social security regime for self-employed workers since most do not have access to the public social security system and have to conclude their own private insurance and carry the full cost. The unions have advocated a fundamental reform, in which contracting firms would take on a share of the social security contributions of their self-employed workers. Moreover, IG BAU, together with the Central Association of German Building Trades (ZDB), has called for the reintroduction of the obligation to hold a 'Master Craftsman' certificate when setting up a business in a construction-related trade (IG BAU / ZDB 2013). Both parties see this as a crucial step in stopping the further spread of bogus self-employment in construction. The union has also called for an obligatory control of single person companies in construction by the public authorities (IG BAU 2013a). In addition, it wants a better legal definition of bogus

²⁷ <http://www.mediafon.net>

self-employment and higher fines for companies that make use of it. Finally, works councils in the construction companies should be granted a right of co-determination over the use of subcontractors (IG BAU 2013b).

Enforcement gaps

The Germany construction sector institutionalized a system of main contractor liability as a response strategy to regulate transnational subcontracting chains. The main contractor liability system constitutes the accountability of the main contractor regardless of which subcontractor down the chain disregarded the payment of the minimum wages or payment into the holiday fund institution SOKA-BAU. A posted worker can institute proceedings against each parent company in the chain to reclaim the payment of the respective minimum wage as set out in the collective labour agreement.

In response to this regulation large German construction companies (which do not engage in construction work anymore but mainly manage large sites) established a system of checks and balances that encompasses getting signed statements from all the employees from all subcontractors on the site saying that they received the respective minimum wages and holiday fund payment.

Court proceedings to reclaim wages through the main contractor liability are relatively infrequent. Legal costs are a strain on union budgets and unions cannot initiate class actions in Germany. However, it is a very useful instrument for trade unions to use media pressure to get the main contractor to pay back wage arrears. Moreover, fines are often not high enough and companies may even calculate the fines into the cost frame when hiring subcontractors.

Moreover, even though a comparatively tight regulatory framework exists there is widespread non-compliance of the posting framework. One of the many cost-saving strategies of service providers is the deliberate manipulation of hours. Posted workers may work 200-240 hours a month while the employer accounts for only 160 hours in the payslips and thereby reduces the actual hourly wage (union representative, interview 2012). To put it differently, workers work a 60 hour week while the payroll lists a 40 hour week. This practice disregards the adherence to the maximum work period and at the same time undermines the hourly minimum wage. Even though workers earn an hourly wage on their pay slips, they do not receive overtime, night-time or weekend bonuses on top of their wage. However, working 100 hours overtime, without extra payment, reduces the hourly minimum wage to € 5 or 6. These practices are very difficult to detect because the payslips and accounting books list the legally allowed maximum amount of hours worked. Even when enforcement agencies, such as a labour inspectorate, in addition check the bank accounts to see whether the sum on the payslips is actually transferred to the

bank account of the worker, there are other practices via which firms may reduce the actual pay received (Cremers 2013; Wagner 2015a).

Moreover, in industries such as construction, where different wage brackets apply to different skill categories, employers often mislabel highly qualified workers as ‘unskilled’, and place them in the lowest pay category, while still appearing to comply with the collective agreements. Even if workers receive the respective minimum wage excessive deductions of costs for tools, working clothes, travel arrangements or accommodation reduces the paid amount.

In addition, managers may require workers to attest in writing that they receive the minimum wage payment. The contracts and the statements workers have to sign are sometimes written in the language of the host country, and therefore workers are unable to read what they are signing. Posted workers often have two contracts, one from the firm that sends them, and one contract specifying the work and employment conditions in the host country. This specification is often only provided to them in the language of the host country. Controls do take place by the FKS. However, official controls are not able to detect malpractices because the paperwork of foreign firms is in accordance with the rule system (Wagner 2015a).

In this respect, two distinct gaps exist in relation to EU labour mobility. The first is a cooperation gap on an international or transnational level between enforcement actors. The cooperation gap and ensuing problems arise due to the underdeveloped cooperation between enforcement actors across EU member states. For example, host country enforcement institutions cannot enforce fines across borders and depend on sufficient collaboration with the respective labour enforcement agency in the home base of the subcontracting company. While such cooperation does exist between, for example, Germany and the Netherlands, they are not as well developed with the Eastern European neighbours. The same is true for letterbox companies. In order to find out whether a company is an actual company or a letterbox company the host country institution has to rely on the effective cooperation with the respective institution where the company is registered. However, the administrative process is very long and complicated and takes too much time in order to be effective (that is: while the administrative institutions find out whether a company is a letterbox company, that company has plenty of time to de-register from the respective commercial register and reregister in another commercial register) (McGauran 2016; Wagner 2015c).

On a national level trade unions demand that the number of inspections on construction sites be significantly increased, and national inspection services be strengthened considerably (in terms of logistics, staff and powers). There is also a lack of cooperation and insufficient exchange of information within the national states between the actors and institutions involved in the enforcement of rights. Moreover, a big problem is the way in which enforcement of the local rules is hindered by the complicated mix of sending and host country legal

standards, by the ability of transnational subcontractors to shift between jurisdictions to avoid compliance, and by the unwillingness of most posted workers to confront their employers about their legal rights (Wagner 2015c; Berntsen/Lillie 2015; Cremers 2013; Wagner/Lillie 2014).

Another enforcement gap is the difficulty to determine whether a worker is a bogus 'self-employed'. There is some evidence that regular employees have been replaced by bogus self-employed workers in the construction sector in order to circumvent the higher labour costs required under collective agreements (Gross 2009; Koch et al. 2011). The distinction between (real) self-employed and bogus self-employed is a frequent issue of juridical disputes, conflicts between employee representative and employers and public debates. The social security law has over the last decades specified the definition of dependent employees to make sure that the obligation to pay contributions to the social insurances is not avoided by "bogus self employment". The criteria for dependent employment are: Integration into the organisation of a company (for example receiving orders), no own employees, working only for one company, no own entrepreneurial initiatives (for example looking for other orders), the job is similar to a former job in the company. The social insurances have the right to check the contracts to determine the status of the worker. However, only some insurances like the occupational and health insurances in the construction industry are actively using their rights. Enforcement is mainly driven by individual lawsuits which are often supported by the unions. The unions have an own remedy with some hundred lawyers. If someone has been identified as a bogus self-employed according to certain criteria, he/she will be re-classified as a dependent employee, with all related rights (employment protection, sickness pay, holiday pay etc.). Moreover, the employer is obliged to pay outstanding social security contributions, including the employee's contributions.

As part of the current reform on subcontracting and temp agency work there are also attempts to combat bogus self-employment. The reform proposal, which is scheduled to enter into force in 2017, also includes the introduction of a new paragraph in the civil code (§ 611a Bürgerliches Gesetzbuch) that codifies previous case law and contains a legal definition of dependent employment as opposed to self-employment. According to this definition, someone is a dependent employee if he/she receives orders relating to content, time, procedure, duration, and location of the work they are requested to perform. This has to be established based on how the work is performed in practice, not on the contracted status.

Social protection and integration gaps

In general, there are substantial risks involved in solo self-employment, especially with regards to old age and sickness insurance: the respective income has to cover the running living costs as well as provide financial stability for the pension. Moreover, these costs have to cover sick leave and holiday pay. Some professions are obliged to join a pension scheme, but have to cover

all costs of their own, with few exceptions (see below, also Eichhorst et al. 2013: 113f). Opt-in options do exist in social security but ask relatively high fees for low earners. As a result, more than 50% of solo self-employed do not pay into any pension scheme or life insurance, according to a recent survey (Brenke/Benzowka 2016).

One important component of providing social security for a particular group of solo self-employed, namely self-employed in the creative industry, is the Artists' Social Welfare Fund (*Künstlersozialkasse*). The Artists' Social Welfare Fund covers up until half of the contributions to sickness-, care and pension insurance for self-employed in the creative industry whilst the federal government supplements the rest through federal subsidies (20%) and social payments by the companies (30%). This system can only properly function if the companies pay their contributions into the fund, which was only controlled randomly in the past years.

With regards to posted workers, the employers of posted workers pay the social security contributions (i.e. sick and pension pay) in the sending country and not in the country where the work is performed. The sending country's social security contributions are usually much lower than the ones of the country where the work is performed, leading to an overall reduction in labour costs (Fellini et al. 2007). This can lead to a situation in which a firm establishes a letterbox company as a way to lower the amount of tax and social contributions it has to pay.

PART II

CASE STUDIES ON SOCIAL DIALOGUE INITIATIVES TARGETING PRECARIOUS WORK

6 Case studies of initiatives based on social dialogue – an overview

The question of how far and in what way the gaps in protection described above might be reduced has been on the agenda in various arenas for some time. At the European level, the principle of equal treatment for atypical work and the prevention of exploitative employment forms has been enshrined in various directives (1997: part-time work; 1999: fixed-term work; 2008: temporary agency work). However, the directives merely stipulate minimum substantive and procedural requirements, leaving considerable room for manoeuvre at national level. Furthermore, the equal treatment principle in essence simply sets forth an entitlement to *relative* equality rather than to any specific substantive rights (such as a specific level of wages), which depend on the work and employment conditions pertaining in each individual country.

Consequently, national legislatures and the social partners find themselves having to shoulder a dual task. It falls to them, firstly, to establish general standards that determine working conditions, including among workers in standard employment relationships, and which, at the same time, serve as benchmarks for equal treatment. Secondly, they are required to establish specific rights in order to guarantee equal treatment for atypical employees. However, falling membership of both unions and employers' associations and the decline in coverage by collective agreement in Germany means that the definition of general standards through collective bargaining has diminished in importance. As far as wage setting is concerned, statutory norms have partially filled the ever widening gaps. As is clear from the first part of the report, it has also in recent years proved possible to establish collectively agreed standards in many sectors for the first time and thereby to reduce the holes in the collective agreement landscape, as in the security industry, for instance, or among specific groups of workers, particularly temporary workers.

In what follows, four further initiatives and bargaining processes that aim to raise minimum standards in precarious forms of work will be analysed. All four cases deal with industry-wide forms of social dialogue, but ones that are in part supplemented and fine-tuned by firm-level negotiations. In some cases, besides the social partners as narrowly defined (representatives of employees and employers), state actors also play significant roles. This reflects the basic tendency towards the hybridisation of industrial relations in Germany that has already been addressed in the first part of the report (even though the involvement of state actors in the negotiation and agreement of employment conditions is hardly a novelty).

After a brief outline of the four case studies, the following sections examine some of the common features of and differences between the various initiatives and analyse the reasons why they came about, the objectives being pursued and the factors that might contribute to their success (or lack of it) in reducing the gaps in employment protection.

Brief outline of the four case studies

The four case studies cover a range of industries, forms of precarious work and gaps in protection (see Table 10).

Table 10 Summary of scope and content of social dialogue initiatives

Case study	Industry	Type of precarious work	Gaps in protection	Social dialogue
1. Posted work	meat processing	posted workers	minimum rights; enforcement	Collective agreement on minimum wage + voluntary commitments to improve working and housing conditions of migrant workers
2. Public procurement	construction, catering, cleaning	sub-contracted work; posted workers	enforcement; minimum rights	Public procurement practices aimed at enforcement of both statutory rights and collectively agreed standards
3. Socially sustainable sourcing	metal industry	sub-contracted work	enforcement; minimum rights; representation	Collective and company agreement on health + safety issues + 'fair work' standards in sub-contracting companies
4. Mini-jobs	service sector	less than full-time hours (short part-time work)	minimum rights; enforcement; social protection	Few legislative attempts to restrict use; some efforts to combat non-compliance with minimum rights + support transitions into regular jobs

- 1) The first case study focuses on a number of measures undertaken by the social partners with the aim of improving the working and living conditions particularly (but not exclusively) of **posted workers** in the meat processing industry. They include the introduction of an industry minimum wage in 2014 and two voluntary commitments made by the employers in 2014 and 2015. The first, a voluntary code of conduct, pledges companies to take steps to implement and monitor minimum working conditions and to provide suitable accommodation for posted workers. The second voluntary commitment stipulates,

furthermore, that the employers will stop using posted workers by July 2016 at the latest and from then on will conclude subcontracts with German firms or German subsidiaries of foreign companies only. Employing migrant workers at subcontractors with the home base in Germany, instead of abroad, implies that these workers are employed according to German social insurance law, which is usually higher and more easily accessible than the equivalent in a lower wage sending country. Companies have also committed themselves to increase the proportion of core workers. This second voluntary commitment came about on the initiative of the Ministry of Labour but was signed by only the six largest companies.

- 2) The second case study deals with regulations and practices in **public procurement** in the federal state of Bremen that were introduced after the 2008 Rüffert judgement in order to lay down certain minimum standards for working and employment conditions in contracted companies – within the restrictive framework of the ECJ ruling – and to monitor compliance. The drafting of the local regulations is closely entwined with the increase in the number of collective agreements declared generally binding and the introduction of the national minimum wage, i.e. with the general trend towards a hybrid wage-setting system. Before the national minimum wage was introduced in 2015, the Bremen state government had in 2012 introduced a state-wide minimum wage that applied to all contracted firms. A very recent reform, introduced in 2016, aims, among other things, to support the social partners at local level in their collective bargaining. In the construction and transport sectors, the (not generally binding) collective agreements now determine pay levels at contracted firms, albeit restricted to certain value thresholds, and only as an option, not as a mandatory rule. If the basis for awarding public contracts is merely compliance with the minimum wage regulations, it is argued, it is more difficult for companies bound by collective agreements to engage in the tendering process and in the medium term removes any incentive for them to conclude collective agreements at all.
- 3) The third case study (**socially sustainable sourcing**) focuses on a special ‘collective agreement on the use of contracts for services’ concluded in 2014 in the steel industry in North Rhine-Westphalia. Among other things, it stipulates that, before awarding contracts for services, firms should investigate whether the activity in question could not be carried out by its own employees. Whenever possible, employers should enter into contracts for services only with firms bound by collective agreements. At the very least, however, subcontractors should agree in writing to comply with statutory norms such as the national minimum wage and working time regulations. Finally, companies in the steel industry are obliged to put in place appropriate measures for monitoring contracted firms’ compliance with these obligations, in which works councils also have to play a part. The case study examines the negotiation and implementation of this collective agreement and also considers some supplementary company agreements and trade union strategies in a selected steel company.

- 4) The fourth and final case study investigates the long-running dispute over **mini-jobs**, which since the end of the 1990s have been the object of some very controversial estimates of the extent of the individual precarity, economic utility and social consequences associated with them. Social partners have taken occasional measures to improve the quality of work, albeit with only limited effect; on the political level, attempts at reform have been at a standstill for more than 10 years, despite repeated demands from trade unions, women's rights groups and charities for the abolition of this atypical employment form. The case study analyses the backgrounds of this polarised constellation of interests, recent reform proposals and the strategies adopted by policymakers and the social partners with the aim of ensuring equal treatment/equal pay and supporting transitions into standard employment. Equally as important as such targeted strategies are the direct and indirect effects of the national minimum wage, the introduction of which has led to larger than average pay increases for mini-jobbers and, in an unusually large number of cases, the conversion of mini-jobs into standard jobs liable for social insurance contributions.

Extended forms of social dialogue: negotiations on behalf of third parties

One characteristic shared by all four case studies is that they all concern constellations of interests in which, for various reasons, at least one of the two parties principally affected – employees and employers of the companies whose working and employment conditions are the object of the negotiations – do not themselves have a seat at the negotiating table. In consequence, only limited use can be made of the standard instruments of collective self-regulation, namely bilateral collective agreements setting out the mutual obligations agreed by the two parties. A more important role is played instead by external obligations, although these are not necessary of a legal nature. Thus the case studies focus on various aspects (interests, actors involved, regulatory character) of extended forms of social dialogue that have, not coincidentally, emerged where standard forms of social dialogue have hitherto not had any effect in Germany.

Actors, motives, interests

There are several reasons why one or both parties do not sit at the negotiating table. In the case of mini-jobbers and posted workers, this is due in the first instance to their low levels of union membership and the considerable difficulties employee representatives face in trying to inform them of their rights, let alone mobilise them. These difficulties are further compounded by the spatial and temporal fragmentation of these employees' jobs and/or the organisational separation from core employees' jobs. In the case of mini-jobs, the short working times and to some extent their scheduling at off-peak times are obstacles to participation in the normal workplace information, opinion-forming and codetermination processes – insofar as these exist at all in the small service-sector companies in which mini-jobbers tend to be concentrated.

Nevertheless, efforts to involve these workers can be successful if targeted strategies are deployed, as the example of the commercial cleaning sector shows. However, such strategies take up considerable time and effort and are difficult to sustain over the long term. The situation among posted workers is even more difficult, since there are language barriers to be overcome and in some cases also fear of reprisals from their employers. Furthermore, German legislation on the representation of employee interests does not apply in their case, since their employer has its registered office abroad. This also restricts the opportunities for German trade unions and works councils to approach these workers. Union information, advice and support measures specifically targeted at them also require considerable expenditure of time and effort and to date have had only limited effect (cf. also Wagner 2015b and section 5.2 in 1st part of national report).

To some extent, however, these difficulties must also be attributed to ambivalent attitudes among the workers concerned and real or perceived divergences from the positions of German trade union representatives. It is true that atypical workers would benefit unreservedly from stronger enforcement of basic employee rights (sick pay, paid holidays etc.), which is an important objective in all our cases. Disproportionately large numbers of them have also benefited from the introduction of minimum wages because of their low starting wages. However, a considerable share of mini-jobbers have no interest at all in compulsory inclusion in the social insurance system, and even less so in becoming liable for income tax, which is an element of the trade union plan. And for posted workers also, inclusion in the German social insurance system, which is a goal in the meat processing industry, will inevitably lead to higher deductions from wages, albeit in return for better protection, particularly in the event of illness or accident²⁸. Ultimately, the lower wages and non-wage costs of migrant workers are also the basis for the sending firms' competitive advantage and thereby also give the migrant workers access to the German labour market. The migrant workers' tacit acquiescence in their employers' undercutting strategy (cf. also Bernaciak 2014: 25) leads to at least a potential conflict of interests with employee representatives in the host country. These in turn act not only in a spirit of solidarity but also with a view to protecting their own members against 'social dumping' and to some extent this pursuit of their own interests weakens their solidaristic commitment towards peripheral workers. As the **posted work** and **sustainable sourcing** case studies make clear, however, it is absolutely possible to push such divergences into the background and develop trade union positions and strategies that take into consideration the interests of both sides.

²⁸ In contrast to mini-jobbers, who already have health insurance via their spouses or from some other source.

In the case of public and private procurement (case studies 1, 2 and 3), the employers in the firms subject to the regulations do not sit directly at the table either when the conditions that are to be applied to their employees are being negotiated. The background here is not (simply) their inadequate *capacity* for self-regulation at firm or industry level but rather – from the awarding authority's or the commissioning firm's point of view – the inadequacy of their *actual efforts* in that regard. There are in turn various reasons why the commissioning organisations regard these efforts as inadequate and set higher standards: a run of accidents (**sustainable sourcing** case study), increased media reporting on the misuse of atypical work (**sustainable sourcing, public procurement**), blatant infringements of basic rights and of the humane treatment of workers (**posted work, public procurement**) and, finally, external impulses in the form of legal regulations and debates on reform (see next section). In addition, the solid entrenchment of social dialogue in the commissioning firms is, on the one hand, a structural cause of the high pay gap (because they prevent wages from dropping to the lower levels of their suppliers) and, on the other, the driving force behind the efforts to prevent subcontractors having sole responsibility for determining their working and employment conditions (**sustainable sourcing** case study). Overall, the case studies confirm the findings of earlier studies (Wright/Brown 2013; Walters/James 2011) that, for all the economic utility that social sustainable sourcing strategies can have even for the firms themselves, external pressure is required to initiate such strategies.

As is the case on the employees' side, the interests of the commissioning organisations and the contracted companies on the management side coincide only partially and there are ambivalent positions on both sides. On the one hand, the lower standards in the contracted companies are one very important reason why contracts are awarded to external providers; even the commissioning organisations themselves have only limited interest in completing closing the pay/protection gap. And for the firms subject to external obligations, the requirements are associated for them with higher wage costs; at the same time, taking greater account of working and employment conditions in selecting the firms to be awarded contracts may mean that the price competition between contracted firms is mitigated to some extent and that there is consequently less pressure to reduce costs at the expense of working and employment conditions.

Thus in this type of negotiations on behalf of or about third parties, the basic challenge for collective interest representation bodies on both the employees' and employers' sides, that of unifying internally divergent interests, is posed in a particularly acute form and beyond organisational boundaries. Furthermore, there is a tendency for cross-camp coalitions to form, and in particular between employers' and employees' representatives in commissioning companies (particularly in the **sustainable sourcing** case study, to a lesser extent in the **posted work** study). Unlike the 'cross-class' coalitions discussed in the literature (Palier/Thelen 2010),

however, the purpose of the coalitions described here is intended to counter labour market segmentation or at least to reduce its negative effects on the working and employment conditions of non-standard workers.

Externally imposed vs. mutually agreed obligations: on the regulatory character of the new instruments

Besides the standard instrument of binding mutually agreed obligations (enshrined in collective and/or company agreements), externally imposed obligations play a larger than usual role in the cases investigated. This is inherent in the principle of ‘negotiations concerning third parties’, on whom obligations are to be imposed, but also arises out of the substance of the obligations. These obligations are, for the most part, requirements that are already enshrined in law: national or industry minimum wages, health and safety regulations, right to paid holidays, compliance with maximum working times and breaks, no abuse of atypical employment forms etc. Thus the agreements do not create any new rights but rather reinforce and in some cases duplicate them by incorporating them into *private* contracts between commissioning organisations and contractors (i.e. between principal and agent). Besides their function as calls to action, these agreements create new monitoring and sanctioning mechanisms governed by private law - such as the right to unannounced site inspections, the obligation on firms to provide information and allow access to company documents and contractual penalties in the event of a lack of cooperation or confirmed infringements (see section 4 ‘enforcement gaps’). In the **public procurement** case study, however, the introduction of the state-wide minimum wage created a new legal standard that serves as a reference point for contracts with contracted companies. In addition, with the most recent re-introduction of genuine regulations on compliance with collective agreements in the construction sector, collective agreements, i.e. mutually agreed obligations that are mandatory for some companies, are being elevated to a standard binding on all contracted companies, a process comparable to that whereby collective agreements are declared generally binding, although one that applies only to contracted companies.

In the **posted work** case study, the obligations go beyond legal minimum standards. However, these more onerous obligations are less binding, since they are either formulated as targets (increase in the share of core employees) or do not incur sanctions in the event of non-compliance (switch to contracting with German firms only). This kind of *non-binding obligation* is an instrument frequently used in other contexts as well, such as corporate social responsibility policies, for example. One question that keeps surfacing in the debate on such policies is how far they are actually intended to effect real changes in behaviour or whether their real purpose is to send a message to the outside world. In the case of the meat processing industry, one of the employers’ motives in signing up to the voluntary agreement was to send a signal from the industry to policy makers to the effect that collective self-regulation is

working and that no further state interventions are required. Nevertheless, the possibility that symbolic objectives may play a part or even predominate does not exclude the possibility that the voluntary agreement is having a real effect, both internally and externally, i.e. among firms that have not yet signed up to this voluntary agreement. For as one of our interviewees conjectured, outside actors, in this case the major retailers, are likely to work only with meat suppliers which have signed up to the agreement. The internal effects, i.e. real changes in behaviour among the signatory firms, remain to a large extent dependent on the extent to which actual organisational processes are put in place to implement the agreement and how far the social partners at firm/establishment level are able to monitor implementation (see also the paragraph below on ‘enforcement gaps’). One year after signing the voluntary self-commitment, the firms report that all workers previously employed as posted workers are now employed at subcontract firms with the home base in Germany, but at subcontractors nonetheless, as the trade union criticizes. The core workforce increased only minimally from 44,8% to 46% (SPA 2016). Moreover, unlawful practices are continuously reported by the employee representatives such as unlawful wage deductions for knives and clothing.

The intertwining of legal and collective regulations

In all four case studies, state actors and legal regulations play an important role, albeit to varying degrees. This is particularly obvious in the **public procurement** case study, where the social partners are not formally included in either conception or implementation. Nevertheless, there are many points of contact, even here. Firstly, as already noted, the collective agreements (particularly in the construction, transport and commercial cleaning sectors) constitute the core of the legal regulations. Without the social partners’ prior assent to such agreements, state support for their implementation would be meaningless. Secondly, some of the unions are involved informally in implementation (by providing the administrative actors with information and assessments). Thirdly and finally, the social partners play a part in the decision-making process by engaging in discussions with policy-makers and administrators. Thus even the recent decision in favour of genuine compliance with collective agreements in the construction and transport sectors has the support of both the employers’ associations and employee representative bodies and would presumably not have been taken against their wishes.

The intertwining is less obvious but nevertheless important in the **posted workers** und **sustainable sourcing** case studies. Firstly, as already noted, the obligations are based largely on existing legal obligations. Moreover, it was legal re-regulation (among other things) that forced firms into action. This applies especially to the general contractors’ liability in respect of the minimum wages (both industry and national), which in both cases increased firms’ willingness not to treat working and employment conditions in subcontracting companies as a ‘black box’

but rather to take preventive measures to limit their own liability risks. And as already noted, the announcement of a legal reform that would prevent abuses of contracts for services and temporary agency work was the context out of which the voluntary agreement in the meat processing industry arose; and it also backed up existing initiatives in the steel industry. In both cases, therefore, legal regulations or even just discussions of reform at the political level impelled firms to take action ‘in the shadows of hierarchy’ (Scharpf 1991). Conversely, of course, demands made by the social partners and their subsequent campaigning can also provide the impetus for legal reforms. Thus both the national minimum wage and the reform of the legal regulations governing contracts for service and temporary agency work are responses to demands that the unions and certain elements on the employers’ camp have been making for years.

Finally, new legal regulations can also alter the basis for firms’ calculations and thereby impel them to seek out alternative employment models. In the **posted work** and **mini-jobs** case studies, the national minimum wage and the marginally higher industry minimum wage in the meat processing sector made the widespread practice of paying workers significantly less than 8.50 or 8.60 euros respectively completely²⁹ illegal. If wages are raised to the legally stipulated level, the cost advantage over standard workers is reduced or, in the case of mini-jobs, reversed, since higher social insurance contributions have to be paid for this atypical employment form. In the run-up to the introduction of the minimum wage, critics anticipated that, because of the narrowing of the legal pay gap, one of its effects would be that firms would lapse into the use of informal labour and other illegal practices in order to maintain the cost advantage. The same criticism is made of the re-regulation of contracts for services and temporary agency work. These fears may be partly justified; similar attempts at circumvention (e.g. the conversion of agency work into contract work or self-employment) have also been reported and criticised by the trade unions in the past. However, the two case studies show that there are also contrary trends: companies adapt their employment strategies and convert non-standard employment into standard employment because, from the cost point of view, there is no longer any reason not to and it may even have cost advantages.

To what extent do these strategies reduce protective gaps?

It can be seen from the summary presented in Table 10 that the elimination of ‘enforcement gaps’ is an important objective in all case studies. Over and above that objective, however, the

²⁹ Even prior to this, this practice sometimes came up against the law (equal pay legislation in the case of mini-jobbers, wages contrary to honest practices in the case of posted workers in the meat processing industry).

enforcement of minimum rights and the closure of gaps in social protection are also important goals, whereas dealing with gaps in representation appears to be of lesser importance.

Rights and gaps in social protection: equal rights = minimum rights?

The rights that are to be safeguarded by the various initiatives are predominantly minimum entitlements, enshrined in law, that apply to all employees. They are particularly relevant for the employee categories under investigation here. The introduction of the national minimum wage (and the marginally higher industry minimum wage in the meat processing sector) has already led to significant increases in hourly pay rates for mini-jobbers and posted workers as well as for those employees in the public procurement case study in receipt of the state-wide minimum wage. For workers in the meat processing industry and for marginal part-time workers ('mini-jobbers'), there is also the question of their enrolment in the social insurance system (according to German law). Provided that these and other general statutory minimum entitlements are successfully implemented (see below), this represents a substantial improvement in their work and life situations. Nevertheless the mini-jobs example shows that *universal* minimum rights are not always sufficient to eliminate the *specific* risks of precarity associated with atypical employment. The small number of hours worked per week means that even enrolment in the social insurance system is not sufficient to provide mini-jobbers with an independent income that will meet their basic needs when they are not in gainful employment (because they are unemployed, retired etc.). One example of rights or measures tailored to the specific risks of atypical employment is the (non-binding) voluntary agreement in the meat processing industry that commits signatory companies to comply with certain minimum standards in providing accommodation for migrant workers. Another example of a similar right tailored to the specific situation of atypical workers is the wage supplements paid to temporary employees in France.

Thus equal rights policies remain incomplete so long as they do not take account of the unequal risks inherent in atypical employment and make no provision for specific measures. In the case of mini-jobs, the solution is by no means obvious, since it is virtually impossible to achieve a social consensus on treating short part-time workers and full-timers equally with regard to pensions, for example, as the debates on a minimum pension have repeatedly shown. There may be constellations therefore where the only way of eliminating specific risks would be to abolish atypical employment forms altogether, or at least to confine them to social groups for whom they do not constitute a risk (e.g. students or pensioners with mini-jobs). And in fact this is the direction that the current (albeit very cautious) deliberations on reform within the employers' associations' umbrella organisation are heading.

Besides the question of whether 'equal rights' can be recast as '*universal* rights', there is also the question of whether they can be equated with '*minimum* rights'. Although 'equal' implies

relative equivalence with prevailing standards and not with a set of minimum rights acting as an absolute lower limit, a narrower interpretation of this kind tends to inform the EU directives mentioned at the beginning and is even more evident in the relevant case law of the Court of Justice of the European Union (CJEU); it is also reflected to some extent in the case studies presented here. In the **public procurement** study, the CJEU's Rüffert judgement led to a thoroughgoing revision of the principles underlying the award of public contracts, such that contracted companies have to comply only with the lowest wage scales rather than with entire wage grids. Only after several years of legally controversial debates and a few more recent CJEU judgements has the payment of wages significantly higher than a minimum level once again been made a requirement following the very recent return to strict compliance with collective agreements in the construction sector (if only under certain conditions). At the same time, and paradoxically, the more demanding interpretation of equal pay has been rejected in other sectors. Thus a further increase in the state-wide minimum wage³⁰ to the level of the lowest pay grade in the state's public services has been rejected by the state government, which argued that this "*would go beyond securing livelihood and is therefore out of the question*". Why the lowest pay grade in the public services is out of the question for social services or catering for public organisations, to which this state-wide minimum wage has hitherto applied, remains unexplained. To some extent at least, and somewhat inconsistently, the narrower interpretation of 'equal' or 'fair' pay would seem to remain in force.

It is noteworthy that in the **sustainable sourcing** case study in the steel industry, where the restrictions of the European directives and the case law on public procurement do not apply, only the national minimum wage is obligatory, but not any higher, collectively agreed rate of pay. Our interviewees in company management justified this by declaring that such ambitious objectives were shelved in the initial phase. However, legal hurdles and/or prevailing interpretations of the law also seem to play a role in some cases. Thus according to our trade union interviewee with responsibilities in this area, the established legal interpretation is that the imposition on subcontractors of obligations that go beyond the statutory requirements constitutes an unwarranted infringement of contracted firms' autonomy (contract to the detriment of a third party).³¹ At the same time, he suggested that it was possible, nevertheless, to make firms' compliance with collective agreements *de facto* a criterion for selection in the contract award procedure. The commissioning firms' own interest in low priced offers of their subcontractors would however make them abstain from such practices.

³⁰ The state-wide minimum wage applies everywhere there are no higher generally binding collective agreements.

³¹ This argument was advanced earlier by the employers' side when a collective agreement on equal pay for temporary agency workers was agreed in the steel industry in 2010; however, this view has not become established in law.

Enforcement gaps

As mentioned above, in three of the four case studies (**sustainable sourcing**, **public procurement**, **posted work**) new monitoring and sanction mechanisms are being developed in order to ensure contracted firms comply with fundamental rights. The monitoring measures include unannounced site inspections, either spot checks or triggered by concrete suspicions; right of access to company documents (pay and working time documentation) and additional obligations on contracted companies to provide information about themselves and their own subcontractors. The sanctions and/or problem-solving strategies are graduated and range from clarificatory discussions and warnings to financial penalties in the event of a lack of cooperation or confirmed infringements and the termination of contractual relations or even exclusion from future calls for tender in both private and public-sector procurement. As is evident from the two case studies on public and private-sector procurement, such monitoring mechanisms take time to become effective – staff need to be trained, the monitoring mechanisms have to be adapted to the practical challenges (see **public procurement** case study) and internal procedures have to be established, such as the coordination with purchasing departments and companies' own health and safety departments (**sustainable sourcing** case study).

Comparison of the case studies reveals a number of points that facilitate monitoring and sanctions in private-sector procurement (**sustainable sourcing**). Unlike procurement in the public sector, the new procedures can be linked into existing corporate structures and processes, in particular the institutionalised monitoring of health and safety. Synergy effects can be produced here by exchanges of information and experiences. It is true that, in public procurement too, the authorities work with other supervisory bodies (customs, for instance). However, there have hitherto been obstacles to closer exchanges (related to data protection regulations, among other things). An even greater advantage, secondly, is the fact that the steel company is able to call on its own employees as a resource in addition to the personnel with full-time responsibility for monitoring and supervision. To that end, the company is putting on a broad range of training courses with the aim of raising awareness of possible infringements of the law by contracted companies. In some cases, staff work in close physical proximity to workers from the contracted companies. In this way, the company is putting in place a sort of all-encompassing 'social control' system for subcontractors operating within its purview. Thirdly and finally, the formally organised employee representatives are more closely involved. Thus union representatives generally have rights of access to the contracted companies, which they have been actively using for some years. In addition, the collective agreement on subcontracts provides for a right of complaint for contract workers towards the commissioning company's managers or works council; this is however so far hardly used by them. Still, in several contracted companies, there have been successful attempts to put in place employee representative bodies and to persuade employers to conclude collective agreements, i.e. to

establish the core elements of a standard self-regulation system. In such cases, in the aftermath of or in conjunction with efforts to close the minimum rights gaps, the representation gap can also be reduced.

A comprehensive and integrative approach of the kind found in the sustainable sourcing case study cannot be taken for granted in private sector procurement, and in the **Posted Work** study, for example, is nowhere to be found. Thus in the meat processing company we investigated, the monitoring of compliance with minimum conditions is not carried out by the company's own staff and according to its own procedures but is outsourced to external inspection agencies. To some extent, the preconditions here are also less favourable: the unions and works council have fewer personnel at their disposal, industrial relations in the meat processing industry are generally less cooperative and contractual relations are less transparent as a result of the use of posted workers and long subcontractor chains. In such an environment, independent external agencies with substantial legal expertise (legal practices, accountants, auditors) may indeed have certain advantages. Even in the **sustainable sourcing** case study, the union representative in charge regards purely internal monitoring and supervisory procedures as inadequate; noting the ambivalence of the company's interests (see above), he argues in favour of a combination of internal and external monitoring, since the latter have a stronger deterrent effect and thus would have spill-over effects above and beyond the actual monitoring procedures. Legal hurdles were also advanced by our interviewees in the posted work study in justification of the use of external agencies. According to the prevailing legal opinion, and in contrast to public commissioning bodies, the commissioning firms themselves (and hence their works councils as well) are not allowed access to subcontractors' pay and working time documents, whereas external agencies are of course permitted to inspect such documents. These legal reasons were judged by our interviewees in several case studies to be a significant obstacle to the effective monitoring of minimum rights, although the justifications for this and the restrictions inferred from it differed in each case. This suggests a need for some legal clarification. In any event, one actual consequence in both cases (**posted work** and **sustainable sourcing**) is that the electronic system that is available for recording contract workers' attendance times is not used to monitor compliance with working time and minimum wage legislation (in conjunction with pay records), whether on a regular or random basis. Nevertheless, private commissioning organisations may take counter-measures and impose sanctions if, on the basis of the information available to them from their internal monitoring procedures described above, they merely have reasonable suspicion of infringements. Unlike public-sector commissioning bodies, private commissioning organisations may, on the basis of such suspicions, exclude firms from the tendering process without providing any further evidence.

Even when contracted companies are obliged to make their records available for inspection (to public supervisory bodies or external agents in the case of private-sector procurement), these

are still self-disclosed documents, which can be manipulated. In our interviewees' experience, this does indeed happen and can be difficult to prove. Questioning employees themselves is only of limited use in uncovering infringements because of the tacit consensus mentioned above and the fear of reprisals (cf. public procurement case study). Nevertheless, the monitoring procedures and associated sanctions are regarded by those involved as basically sensible and (with some exceptions) as effective. The main criticism voiced by employee representatives is that too little monitoring is done and that, overall, too few resources are devoted to it.

Conclusion: equal rights, unequal risks – challenges for social dialogue

For the social partners and state actors in Germany, improving atypical employees' working and employment conditions poses the challenge of developing new processes and structures in order to establish basic standards in areas where the standard instruments of regulation based exclusively on collective bargaining have failed in the past. Furthermore, merely putting in place legal standards has in practice frequently proved insufficient if there are too many incentives and opportunities to circumvent them, as is patently the case in Germany. Thus it is no coincidence that, in the case studies presented here, the social partners and state actors interact in various ways. These interactions manifest themselves less in the form of tripartite negotiations, in which the three parties reach agreement on common objectives and measures, than in measures that supplement or support each other or are mutually dependent on each other. This kind of coordination is not always as planned and systematic as in the case of public procurement, where collective agreements serve as reference points, or, conversely, in private-sector procurement, where legal standards are incorporated into agreements with contracted companies. However, even the less systematic coordination is not coincidental but can be seen as a logical sequence of steps, as in the case of general contractor liability, which increases the incentives for firms to establish their own processes with the aim of preventing infringements of minimum rights.

The forms of social dialogue described are also novel in that they involve 'negotiations on behalf or about third parties' (and/or in fact fourth parties), i.e. firms and employees that do not themselves sit at the negotiating table, or do so only occasionally. This extension of the sphere of influence brings with it opportunities to regain the discretionary power that has to a large extent been lost as a result of the vertical disintegration of firms and the outsourcing of public services. At the same time, this extension also brings with it specific difficulties, not only for the interest representation bodies on both sides but also for the subsequent implementation of the regulations. Whether these initiatives remain an intermediate step that will in the medium term (re-)establish the social partners' powers of self-regulation in the firms and sectors concerned or whether they will develop into permanent forms of social dialogue remains to be seen. In at least one of the case studies (sustainable sourcing), new interest representation bodies have

already been successfully established in the ‘third parties’. However, it is scarcely a coincidence that this has occurred in the steel industry, where employees and employers are relatively well organised and industrial relations still largely adhere to the ‘German model’ of earlier decades. While subcontractors operating in the steel industry constitute, like temporary employment agencies, a gap in the well organised core of the German model, where strong social partners are also in a position to act (if not altogether altruistically) as advocates for the rights of atypical employees, both mini-jobs in the service sector and employment in contracted companies in the meat processing industry together represent a gap on the periphery of the labour market, where the basic structures of industrial relations have long been weaker.

Substantively, the primary objective of the various measures described here has hitherto been to lay down and, even more importantly, to implement minimum working and employment conditions. There are various reasons for this. Firstly, there is the fact that in broad swathes of the German economy even these minimum conditions could not and still cannot be taken for granted and it has taken considerable efforts to establish them. Restrictions set by European case law have also played a part, as has a narrow interpretation of ‘equal rights’ as ‘minimum rights’. At the same time, the case studies illustrate the shortcomings of such a narrow interpretation of equal rights, since it is still a long way from relative equality with standard employees and, moreover, does not address the specific risks of atypical employment.

7 Posted Work: Social dialogue initiatives in the German Meat Processing Industry

Introduction

Working conditions and wages in the German meat processing industry have been attracting criticism for years. In particular, the conditions for employees of Eastern European companies posted to Germany have been decried in numerous media reports. The main areas of concern have been excessively long working times, extremely low hourly pay rates and the poor quality of much of the accommodation made available by the meat processing companies. These conditions have been deplored as the ‘criminal practices of modern slavery’ (Doelfs 2012). Belgium, France and Austria have accused Germany of unfair competitive practices because posted workers have been employed on dumping wages (EFFAT 2013). And French workers took to the streets to protest against social dumping practices in the German meat industry because they put French jobs in jeopardy (Blume 2013). The meat processing industry has also come under increasingly strong pressure domestically in recent years.

This case study focuses on the initiatives the social partners in the industry and politicians have put in place since 2013 in order to improve the industry’s image and employees’ working conditions and wages. Three important measures are investigated:

- the introduction of an industry minimum wage,
- the voluntary code of conduct for the meat industry, and
- the meat industry’s voluntary agreement to improve working conditions.

Before describing these initiatives in more detail, we start with a brief description of the meat processing industry.

Methodology

The case study is based on analyses of documents, press reports, statistics and the academic literature, as well as interviews with

- 2 works councillors in large meat processing companies (Interviews WC1 and WC2)
- 1 manager of a large meat processing company (Interview M1)
- 4 union representatives (Interviews U1, U2, U3 and U4)

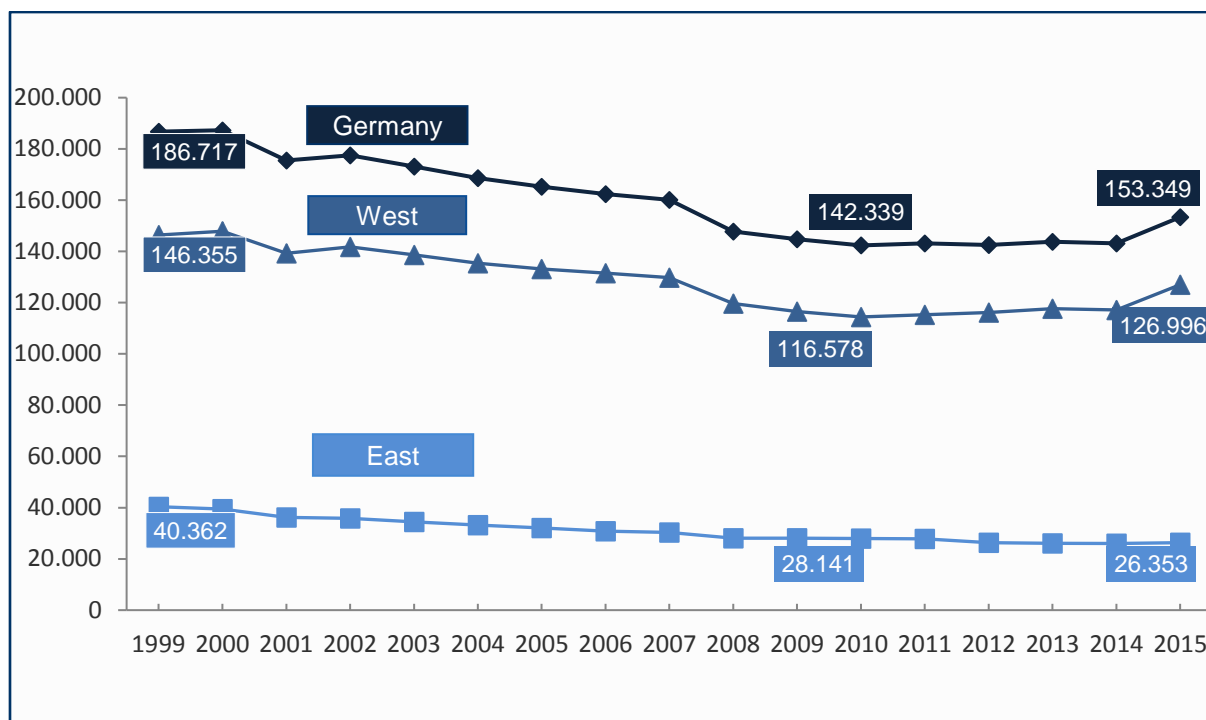
The meat processing industry

The German meat processing industry comprises slaughter houses and meat processing companies. The large majority of the workforce (almost 83% of the 190,000 workers in June 2015) are employed in meat processing. The sector has undergone a process of increasing concentration over recent decades. The number of companies decreased by more than 44% between 1999 and 2014 (with particular pronounced reductions in East Germany). In 2014, the four largest meat companies (Tönnies, Vion, Westfleisch, Danish Crown) revealed almost 60% of the industry's total revenue.

Between 1999 and 2010 more than 44,000 workers in the German meat industry who were subject to social security contributions lost their jobs.³² In the same time period, the number of posted workers from Eastern Europe increased to more than 25,000 (estimation by Brümmer 2014: 148). Since then, however, the decline of the number of insurable jobs had come to an end. In 2015, the total number of employees who were subject to social security contributions went up by more than 10,000 (+7.1%). This is related to recent initiatives such as the introduction of a minimum wage for meat processing and further initiatives (see below).

³² Several sources mention that excessive usage of posted workers started in 2004. However, according to data provided by Bundesagentur für Arbeit (2016), the most advanced annual decreases of employees in meat processing took place in 2001 (-11,837 jobs) and 2008 (-12,339 jobs) whereas in 2004, the number of employees declined by "only" 4,402.

Figure 7 Number of employees (subject to social security contributions) in the German meat processing industry, 1999–2015



Source: *Beschäftigtenstatistik*, Federal Employment Agency (special statistical evaluation by order of IAQ)

The slaughter and meat processing companies have adopted strategies to reduce wage costs, which have led to deteriorating wages and working conditions in countries such as Germany and the UK (Grunert et al. 2010; Wagner 2015b; Wagner/Hassel 2016). German companies have mainly resorted to external flexibilisation by using subcontractors with posted workers from Eastern Europe. Cost advantages mainly resulted from very low hourly pay and the fact that the posted workers are subject to social security contributions in the sending countries. Registration requirements do not exist for posted workers. It is therefore difficult to calculate the exact numbers of posted workers. A works council survey conducted by the trade union NGG in 2012 indicated that in the large meat processing companies posted workers accounted for up to 90% of the workforce (NGG 2012).

Industrial relations and social dialogue

The NGG union (Nahrung-Genuss-Gaststätten – Food, Beverages and Catering Union) covers the whole hospitality, food and beverages sector with approximately 1.3 million employees (only insurable jobs). The number of union members is 204,348 (Güster 2015), which corresponds to a union density of roughly 15%. The employers' side is much more fragmented by sub-sector. The employers' association in the hospitality sector is DEHOGA and in catering the *Bundesverband der Systemgastronomie* (BDS). In meat processing, by contrast, there is no single employer association at the federal level, but four different associations:

- *Arbeitgebervereinigung Nahrung und Genuss e.V./Food and Beverage Employers' Association (ANG),*
- *Verband der Fleischwirtschaft e.V./Meat Industry Association,*
- *Bundesvereinigung der Deutschen Ernährungsindustrie e.V./Federal Association of the German Food Industry (BVE),*
- *Bund für Lebensmittelrecht und Lebensmittelkunde e.V./German Federation for Food Law and Food Science (BLL).*

The ANG mainly represents the socio-political interests of the employers in the whole food processing sector. However, the ANG has no entitlement to negotiate collective agreements with the NGG union at federal level because that entitlement for meat processing rests with nine different employer associations at the regional level. Collective agreements in meat processing are typically negotiated – if at all – at regional or (predominantly) at company level. While the regional level is the most important level for collective agreements in most German industries, the main difference with other sectors in the German economy is that in the meat sector (but also the food processing sector more broadly) every year hundreds of collective agreements are concluded and re-negotiated at the firm and regional level leading to a very differentiated collective bargaining landscape. According to the NGG union, in the industries they represent there are currently 4,000 collective agreements, of which 2,800 are company or in-house agreements (70%) (Güster 2015). The ANG estimates the number of collective agreements in food processing at around 2,000 and coverage by collective agreements at 62% (52% sectoral and 10% firm-level agreements) (ANG 2016).

The 2014 industry minimum wage agreement

The NGG union had been the first German Trade Union Confederation (DGB) affiliate to call, as early as 1999, for the introduction of a statutory minimum wage in Germany (from 2010 onwards the demand was for a minimum wage of € 8.50 per hour) (see section 2.1 in the 1st part of the national report). However, the German federal government favoured industry-specific minimum wages and opened the Law on Posted workers in 2007 for applications from all industries. But only a couple of industries applied for extensions of collectively agreed minimum rates. The main reason was that in several industries, there were no nation-wide collective agreements which could be extended or employer associations were not willing to negotiate sectoral minimum rates (Bosch et al. 2011: 148ff). In May 2007, the SPD and the Federal Minister for Labour and Social Affairs tried to push the meat processing industry to negotiate a sectoral minimum wage but without success (Sirlehtov 2007).

In the following years, the bad working conditions and very low wages particularly for posted workers in meat processing were frequently criticized in the media. On 26 June 2012, talks were held between Franz-Josef Möllenberg (the then general secretary of the NGG union), Ole

Wehlast (general secretary of the Danish food workers' union NNF), Harald Wiedenhofer (general secretary of EFFAT, the European Federation of Food, Agriculture and Tourism Trade Unions) and the former German labour minister Ursula von der Leyen on the situation in the German animal slaughter industry. The minister proposed that a round table should be set up to clarify the problems (EFFAT 2012). In May 2013, on the recommendation of the NGG, a meeting was held with representatives of the four largest companies Tönnies, VION, Westfleisch and Danish Crown, the social partners in the industry (ANG and NGG) and the Federal Minister for Labour and Social Affairs.

One result of this initiative was that on 16 July 2013 the NGG union wrote to more than 100 companies in the meat processing industry and called on them to conclude a minimum wage agreement for the industry. This call was supported by the four large meat processing companies, which declared themselves in favour of a minimum wage. The ANG employers' association also stated that it would welcome the negotiation of a minimum wage agreement in the meat processing industry. This increase in support for a minimum wage was taking place against the background of the likely introduction, following the 2013 general election, of a statutory minimum wage in January 2015. In order to ease its introduction in low-wage sectors, particularly in East Germany, the federal government had offered all affected sectors the possibility of agreeing, for a transitional period of up to the end of 2017 at the latest, minimum hourly rates below the probable statutory minimum wage of € 8.50. However, the precondition for such collectively agreed variances was that the minimum rates thus agreed would have to be declared generally binding. To that end, the meat processing industry was included in the Posted Workers Act (*Arbeitnehmer-Entsendegesetz*) (Doelfs 2014).

However, the conditions for the agreement of such an industry minimum wage in the meat processing industry were extremely unfavourable, because there was no negotiating partner on the employers' side for collective bargaining at national level. As already noted, the employer's associations in the industry are organised on a regional basis. Consequently it had first to be agreed internally that one of the regional associations, in this case the Lower Saxony employers' association VdEW (*Verband der Ernährungswirtschaft* – Food Industry Association), would be granted authorisation to represent the other eight regional associations in the national negotiations on an industry minimum wage with the NGG trade union. As part of this process, the large abattoir operators became members of the regional associations. Thus a new national employers' association was not set up for the negotiations; rather, the VdEW acted on behalf of the other regional associations when the negotiations got under way in October 2013. However, on 17 December 2013, the VdEW broke off the negotiations abruptly without naming a date for resumption. According to the NGG's deputy secretary general, Claus-Harald Güster, the employers were refusing to accept the trade union demand that the industry minimum wage

should quickly be brought close to € 8.50 and, furthermore, were insisting on setting different minimum wages for East and West Germany (NGG 2013a).

After the negotiations were broken off, even employers' representatives outside the meat processing industry started to give vent to their increasing frustration and to put pressure on VdEW to reach an agreement with NGG in order to rescue the industry from its run of negative headlines. According to a report in the *Frankfurter Allgemeine Zeitung* (FAZ), the president of the Confederation of German Employers' Associations, Ingo Kramer, intervened and arranged for the ANG, one of the employers' associations in the industry functioning at national level that had more experience in collective bargaining, to take over the negotiations on the employers' side (Creutzburg 2014; Doelfs 2014).

The minimum wage agreement for the meat processing industry was eventually concluded on 13 January 2014. In contrast to those in many other industries, this collective agreement is concerned solely with the level of the minimum wage. It was agreed that the collectively agreed minimum wage of € 7.75 per hour was to be introduced on 1 July 2014. Because of delays in the process of declaring the agreement generally binding, the collective bargaining committee did not give its agreement until 24 June 2014, so that the minimum wage did not actually come into force until a month later, on 1 August 2014 (NGG 2014a; ANG 2014).

As Table 11 shows, the collective agreement provided for the minimum wage to be raised in three stages – from 1 December 2014, 1 October 2015 and 1 December 2016. Initially, therefore, the minimum wage in the meat processing industry was to be significantly lower than the planned statutory minimum wage of € 8.50 per hour. As early as October 2015, however, it was to be slightly higher, at € 8.60 per hour, while a further increase to € 8.75 was scheduled for December 2016.³³ For the NGG union, a key concern in the minimum wage negotiations was not to allow different minimum wage rates in East and West Germany (NGG 2014a). The chief NGG negotiator, Claus-Harald Güster, said of the collective agreement: 'This is the beginning of the end for wage dumping in the German meat processing industry.' (NGG 2014b). The trade union hoped 'that we can now start out on the road to an industry-wide collective agreement in the meat processing industry, which to date has been largely devoid of collective agreements' (Doelfs 2014).

³³ In 2017, the industry minimum wage will be slightly below the national minimum wage (€ 8.75 compared to € 8.84 following the recent decision of the government to increase the national minimum wage in January 2017. Due to transitional provisions applying in the first years after the introduction of the national minimum wage, this lower industry specific minimum wage will determine pay level in the meat industry until the end of 2017.

Table 11 Minimum wage in the meat processing industry

Valid from ... to	Gross hourly pay
1 July 2014 to 30 November 2014	€ 7.75
1 December 2014 to 30 September 2015	€ 8.00
1 October 2015 to 30 November 2016	€ 8.60
1 December 2016 to 31 December 2017	€ 8.75

Source: Own compilation

The collective agreement will remain in force until the end of 2017 and includes a declaration of commitment to further negotiations on a new minimum wage from July 2017. The NGG union is supporting the implementation of the minimum wage agreement by making information available to employees in a number of languages, organising seminars for voluntary and full-time employee representatives on the application and implementation of the collective agreement and appointing a project secretary for a fixed period who is to support the implementation of the minimum wage and act as contact person and/or organiser for contract worker and employees from Central and Eastern Europe.

According to recent data from the German Statistical Office, the introduction of an industry minimum wage has had a significant impact on pay levels in the meat processing industry. The average hourly pay of full-time employees in the German meat processing industry rose within one year (September 2015 compared to September 2014) by 5.3% (compared to only 2.4% for all sectors). Differentiated by East and West Germany, the increase in average hourly pay in meat processing in East Germany was a remarkable 11.6% (West Germany: +3.8%). The general pay increases were much smaller (2.0% in West and 4.6% in East Germany – cf. Statistisches Bundesamt 2016).

Contrary to all the prophecies of doom, the minimum wage in the meat processing industry has clearly not led to any loss of jobs. On the contrary. According to data from the Federal Statistical Office, the number of employees liable to pay social insurance contributions in the meat processing industry across the country had risen by 5% by the 3rd quarter of 2015 compared with the same period in the previous year. The increase in West Germany was actually 6.0%, while East Germany saw only a slight increase of 0.7%. By way of comparison, the average increase in employment in all sectors in the same period was 2.2% (2.3% in West Germany and 0.7% in the East).

The voluntary code of conduct in the German meat processing industry

In July 2014, in the course of the preparations of the introduction of the sectoral minimum wage for the meat processing industry, the four large companies adopted a voluntary code of conduct, the main thrust of which was that the German companies in the meat processing industry would

take on joint responsibility for the working conditions of their subcontractors' employees. In the preamble to the code of conduct which was also supported by the Federal Ministry for Labour and Social Affairs, it is stated that: 'By signing and verifiably implementing this declaration, the employers' associations and companies are putting on record their fundamental concern with maintaining appropriate social standards for their own employees and also for the (foreign) employees of their labour supply partners working in the meat processing industry.' This applies to compliance with the legislation in force, International Labour Organisation (ILO) conventions, the UN Declaration of Human Rights, UN conventions on the rights of children and the abolition of any form of discrimination against women and the OECD guidelines for multinational companies, regardless of which country these companies are based in.

In §1 the companies operating in the meat processing industry undertake to

- press for workers to be provided with suitable accommodation at their labour supply partners;
- request their current and future labour supply partners to commit themselves in writing to comply with this declaration;
- to take part in the dialogue with local and regional authorities and other public and social institutions.

Other provisions concern the joint responsibility of the commissioning companies in the meat processing industry for ensuring that subcontractors comply with minimum social standards, e.g. paying workers' travel costs from their home country to Germany, charging posted workers reasonable fares for travel from their accommodation to their place of work and providing them with the necessary tools and equipment.

The code of conduct also sets out the German companies' rights and responsibilities with regard to monitoring contracted companies' compliance with minimum standards and with their obligation to allow inspections. Companies in the meat processing industry are entitled to have their labour supply partners inspected by an independent auditing company in order to verify that they are fulfilling their obligation to pay the minimum wage.

As of October 2015, 66 companies working with subcontractors and operating a total of 143 production plants had signed the code (Verband der Fleischwirtschaft 2015).

The voluntary agreement to improve working conditions

Even after the introduction of the sectoral minimum wage and the code of conduct in summer 2014, the working conditions in meat processing were still frequently subject for critical assessments and media reports. In March/April 2015, Sigmar Gabriel, Federal Minister for

Economic Affairs and Energy, visited a number of abattoirs in Germany and discussed contract work with the management at each site. He challenged the companies to take action against existing shortcomings and to improve working conditions.

The large companies were concerned to put in place transparent structures so that internal controls could be simplified. Furthermore, they also hoped that their voluntary agreement to improve working conditions would send a clear political signal, to the effect that the industry's economic actors were in a position to improve the bad working conditions themselves, without state intervention. The initiative was coordinated by the ANG, the Food and Beverage Employers' Association, whose chair emphasised in the press that the initiative was a 'top-level issue' and that it was implemented in a just a few weeks (Holsboer 2015).

On 21 September 2015, agreement was reached in the Federal Ministry for Economic Affairs and Energy on a "Standortoffensive" of the German meat processing industry and a voluntary commitment by German companies to make working conditions more attractive (Bundesministerium für Wirtschaft und Energie 2015). Alongside minister Sigmar Gabriel (SPD), the six largest German meat producers in Germany (Danish Crown Fleisch GmbH, Heidemark Geflügel Spezialitäten, Lohmann & Co. AG / PHW-Gruppe, Tönnies Holding GmbH & Co. KG, Vion GmbH and Westfleisch SCE with limited liability) and the NGG union undertook to launch this initiative.

The large meat producers committed themselves to:

- improving working and living conditions for employees in the meat processing industry;
- providing training places and putting in place the appropriate promotional and recruitment measures to ensure they are filled;
- adapting their organisational structures by July 2016 in such a way that all workers deployed in their plants will be in a regular employment relationship, registered in Germany and liable for social insurance contributions. This amounts to abandoning the use of posted workers whose social insurance contributions and entitlements are determined by the usually considerably lower standards prevailing in their home countries;
- increasing and further developing the share of their core workforce.

However, dispensing with posted workers does not mean that the companies are dispensing with the use of generally significantly lower paid workers from the East European EU member states. Rather, such workers now have to be employed directly in German companies (or branches of foreign companies in Germany) in accordance with German (social insurance) law. Thus the meat processing companies are not committing themselves to abandoning the use of contract workers altogether, but just ceasing to enter into subcontracts with foreign sending companies. Nevertheless, in undertaking to increase the share of the core workforce, the

companies are committing themselves to reducing the share of contract workers. However, no targets for this have been fixed, nor are there any sanctions that can be imposed if companies do not keep this promise.

It was agreed that implementation of these measures is to be evaluated on a regular basis. In order to put this agreement into practice, annual reports are to be produced and submitted to the Federal Ministry of Economic Affairs and Energy and the Federal Ministry of Labour and Social Affairs.

In the estimation of our interviewees from the NGG union, the introduction of the minimum wage contributed to this initiative, not least because general contractor liability for companies in the meat processing industry was also linked to it.

‘There’s direct liability on the part of general contractors and my theory would be that they said that it’s easier to monitor companies that are registered in Germany.’ (Interview WC1, 2015).

The NGG union described the voluntary agreement as a step ‘in the right direction’ (NGG 2015a). In its estimation, the greatest benefit of contract workers being employed by German limited liability companies rather than the sending companies was that they would be better protected against risk such as illness and workplace accidents. At the same time however, the NGG pointed to the limited binding power of the companies’ voluntary agreement: *‘Of course we welcome any measure that helps to improve the working and living conditions of workers in the German meat processing industry. However, in the light of our many years of experience in this industry, we have serious doubts as to whether a voluntary agreement will really be effective.’ (NGG 2015b)*

The works councillors we interviewed in two large meat processing companies (WC1 und WC2) shared this sceptical appraisal and pointed to the considerable difficulties and gaps in the legislation that made it difficult to monitor minimum wages in external service providers. They were also critical of the fact that the agreement applies only to the large companies which, they said, had already implemented the agreed standards to a large extent, and in particular the employment of contract workers by German firms. However, in their view, there was a greater need to take action against the other companies to which the voluntary agreement does not apply.

On the employers’ side, the ANG’s chief executive emphasised: ‘This voluntary agreement is an important contribution to the social integration of these workers and their integration into the German labour market. At the same time, the changeover to exclusively German employment relationships liable for social insurance contributions makes the situation of employees in the German meat processing industry more transparent. I expect that the entire meat processing

industry will stick to this voluntary agreement.’ (ANG 2015). In the estimation of one of our interviewees, a manager in a large company, pressure from the retail trade will also help to make processors stick to the agreement:

‘The big four have signed and the bottom line is this: if the Aldis and Lidl of this world read about it, they’ll say: If you want to continue to supply us, then sign up, otherwise you’ll be demoted to a category B supplier. That’ll quickly have major repercussions, so companies will sign up.’ (Interview M1, 2015)

A representative of the union NGG provided a completely different assessment:

‘If Aldi would really put pressure on Tönnies and refer to the danger of a very bad image, it might happen that he agrees to negotiate. But they don’t do that, because the meat packages do not provide any information that it comes from Tönnies. The client has no chance to identify what he or she is buying.’ (Interview U4, 2016)

In the view of the works councillors we interviewed in two large companies (WC1 and WC2), a high signature rate to the self agreement is also an important precondition for implementation of the commitment to increase the share of core workers. While the changeover to German subcontractors is almost complete in these two firms, the share of contract workers even in the large companies is 50% or higher, since the pay gap between them and the core workers paid the collectively agreed rate remains wide. In the works councillors’ opinion, a lack of real commitment to the voluntary agreement, i.e. the absence of binding quotas for core workers and of sanctions, and the failure of smaller companies to sign up to the agreement are acting as a damper on the large companies’ willingness to increase the share of core workers single-handedly because they expect such a move to bring with it appreciable competitive disadvantages:

‘It says in the voluntary agreement that the share of core workers is to be increased. That can only be done by getting rid of subcontracts and employing the workers directly (...). Or we turn it into temporary agency work. That’s not great either, but it’s the softer version, because we have some grip on it, some influence. (...). We’ve advised management that the free movement of labour means we could also employ these workers directly, but they don’t want to go down that route. If there’s no industry-wide solution, nothing will change. If one company goes it alone, then it will suffer a direct competitive disadvantage. True, such a move might be publicly applauded and get the company invited on to talk shows, but its economic situation will deteriorate.’ (Interview WC1, 2015).

In the works councillors’ view, therefore, there is still a need for an industry-wide binding legal solution that restricts the use of contract workers. This is similar to the view of the NGG union: *‘The voluntary agreement for the German meat processing industry must not become a fig leaf. The NGG wants to see statutory regulation in order to prevent the misuse of subcontracts and*

calls on the federal government to implement in full the legislation against the misuse of subcontracts announced in the coalition agreement.’ (NGG 2015a)

One year after signing the voluntary self-commitment the signatory firms published a progress report on 28 September 2016. As a matter of fact, the 18 companies with 88 firms which have signed the agreement in the meantime reported that all workers previously employed as posted workers are now employed at subcontract firms with a home base in Germany.³⁴ Accordingly, they are now subject to the German social security system and the German labour law applies. The report also mentions that this has not been appreciated by all workers because the deductions are now higher than before.³⁵

It is important to emphasize that in many cases (according to assessments by the union NGG and representatives of the initiative “Fair mobility”), the staff of the subcontractors typically remained almost the same as before:

“They only added a German Managing Director to the former managing staff from Eastern Europe.”

The second goal of the joint agreement – an increase of the number and share of workers directly employed by the meat processing companies themselves – has not been attained. Table 12 illustrates that the composition of the total workforce remained largely unchanged between 2014 and 2015.

³⁴ According to the report the companies which signed the agreement have market shares of around 65% as regards the slaughtering of pigs while their shares in the areas of cattle (45%) and poultry (35%) are much lower (SPA 2016).

³⁵ The report mentioned that there had been conflicts in several companies. Some of the employees did not agree to the contractual changes because the net monthly payments were lower than before. Particularly skilled workers moved to other subcontractors where they could keep their status as posted workers with lower deductions from their monthly earnings.

Table 12 **Structure of employees at the 18 companies that have signed the agreement, 2014 und 2015**

	2014	2015	Change of number	Change in %
Core employees	14,287	14,814	+527	+3,7
Employees at subcontractors	15,054	14,871	-183	-1,2
Temp agency workers	2,581	2,512	-69	-2,7
Total number of employees	31,922	32,197	+275	+0,9

Source: Own presentation after SPA 2016

The core workforce of the meat processing companies increased only very slightly by 527 employees (+3.7%) respectively from 44,8% to 46% of the total workforce while the share of employees of the subcontractors was reduced by only one percentage point (from 47.2% to 46.2%).

In the press release launched by the Federal Ministry for Economics and Energy, it was stated: “The achieved result is an important interim step but we will keep on talking with the companies in order to intensify the efforts to increase the proportion of the core workforce.” (Bundesministerium für Wirtschaft und Energie 2016)

The union NGG emphasized that the employees of the subcontractors remain to be exploited in precarious employment and co-determination is circumvented (Krogmann 2016a). The vice-president of the union, Claus-Harald Güster, requested the companies to increase the share of core employees und to conclude collective agreements. He emphasized: “Only collective agreements provide reliable standards and are binding, self commitments are not.” (Krogmann 2016b).

Conclusions

The German meat processing industry was long regarded as a prototype low-wage industry in the manufacturing sector (‘wild west conditions in food processing’ – cf. Czommer 2008). Because of the absence of industry-wide (minimum) wage standards and the increasing use of subcontractors, particularly from Eastern Europe, the industry became the exemplar for wage dumping strategies. This damaged the industry’s reputation.

In recent years, there has been strong political pressure to improve working conditions and eliminate wage dumping, both within Germany and from several neighbouring countries that have complained to the European Commission about conditions in the German meat processing industry. However, conditions in the industry were scarcely propitious, because the structure of representation on the employers’ side is fragmented and the level of coverage by collective agreement is low (company agreements predominate).

Since 2014, the strong public pressure has helped to push the social partners and politicians into putting in place initiatives intended to improve the industry's image as well as pay and working conditions. The most important change is the agreement to introduce an industry-wide minimum wage, which came into force in August 2014. It also applies explicitly to employees from Eastern European companies who are working in Germany. Following the introduction of the minimum wage, the average hourly wages of workers in the meat processing industry have risen by more than the average increase across the economy as a whole.

However, the code of conduct and, particularly, the voluntary agreement to improve working conditions have to date been taken up only by the large companies in the industry, although it has to be said that they do account for relatively high shares of employment and turnover. By now, however, the positive impact of these voluntary agreements on working conditions seems to be rather limited. There are still considerable gaps in both representation (weak organisation on both the employers' and employees' sides, small number of collective agreements and only a few works councils) and enforcement in the industry. Effective controls and sanctions for non-compliance with the minimum wage as well as proper recording of actual working times would be first but very important steps in order to improve working conditions. More sustainable efforts would also require more restrictions against the extensive usage of subcontracting and consumers' acceptance to pay higher prices for meat.

8 Public Procurement in Bremen: Hybrid wage-setting systems – what role for state and social partners?

Introduction

From the 1990s onwards, several federal states (*Länder*) in Germany introduced prevailing wage laws (*Tariftreuegesetze*) in order to combat wage dumping, particularly in the construction sector where the largest share of public expenditures is allocated. The laws obliged companies with a public contract to pay their employees according to the ‘relevant’ collective agreements. The European Court of Justice’s *Rüffert* judgement in 2008 led to the abolition of prevailing wage laws in Germany. However, several *Länder* revised their procurement laws with a view to limiting wage competition among public contractors nevertheless, most importantly through the introduction of state level minimum wages, ranging between € 8.50 and € 9.18 per hour (March 2015). Moreover, in the years following *Rüffert*, trade unions and employers’ organizations in several industries jointly requested the Federal Ministry of Labour to declare the lowest pay grade in their collective agreement generally binding for the whole industry. These ‘industry specific minimum wages’ (*Branchenmindestlöhne*) subsequently became reference points for the new procurement laws at *Länder* level, thereby giving the commissioning authorities an additional lever to control and enforce these minimum wages. In the case of Bremen³⁶, this was further supported by the establishment by the city state of its own labour inspection procedures.

Both models – ‘pre-Rüffert’ and ‘post-Rüffert’ – can be characterized as ‘hybrid’ wage-setting systems in which, besides the social partners, the state assumes an important role. There are, however, some differences between the two models. Broadly speaking, the *Rüffert* ruling marks a shift in state interventions towards establishing and enforcing minimum wages for a broader set of industries – as opposed to securing higher standards defined by collective agreements for a more limited number of industries.

The current situation can be characterized as a period of realignment for the ‘hybrid’ wage-setting model in public procurement, not least following the introduction of the national minimum wage in 2015. The national minimum wage has involved the centralization and harmonization of the various state interventions in wage setting: a uniform minimum wage (of currently € 8.50) is now negotiated and decided at the federal level and additional resources for enforcement of this minimum wage have been allocated to a federal authority (a specialized task

³⁶ Bremen is both a federal state and a city; it is one of three *Länder* (with Hamburg and Berlin) whose territory is more or less restricted to a city. The territory of Bremen includes the neighboring city of Bremerhaven.

force within Customs). This raises the question of whether the national minimum wage renders pay clauses at *Länder* level redundant, and this question has in fact been put on the political agenda in several *Länder*, including Bremen. Whereas at first sight these debates might seem to center on the division of responsibilities between different legislative levels (national/regional), the following analysis reveals that another underlying and more general question concerns the role the State is to play in the future wage setting system and whether and how the public sector (including public contracts) should assume a lead role in terms of wages and working conditions.

The case study aims:

- to investigate to what extent the post-Rüffert regulations in Bremen have effectively helped to reduce low pay and non-compliance with labour law and to identify what have been the most important challenges in implementing and enforcing these policies;
- to describe current reform proposals and discuss how they will affect the hybrid wage setting model.

Methodology

The case study is based on analyses of documents, press reports, and the academic literature, as well as interviews with

- 1 representative of SOKOM (Interview A1)
- 1 representative of the public inspection agency GND (Interview A2)
- 1 member of parliament from Social Democratic Party (Interview P1)
- 1 member of parliament + 1 party secretary from left wing opposition party 'Die Linke' (Interview P2)
- 2 representatives of chamber of commerce (Interview E1 and E2)
- 1 representative from trade union IG BAU (Interview U1)
- 2 representatives from trade union NGG (Interview U2)

The post-Rüffert pay clauses in Bremen – objectives and regulations

In 2009, Bremen became the first federal state in Germany to introduce a minimum wage for public procurement following the ECJ's *Rüffert* ruling; all but a few of the *Länder* followed suit. These regional precursors of the national minimum wage contributed – in conjunction with other measures, in particular the industry specific minimum wages based on the Posted Workers Act – to a shift towards a hybrid wage setting system in Germany, well before the final introduction of the national minimum wage in 2015.

After the *Rüffert* ruling, the procurement law in Bremen was revised and amended in several steps:

- In 2009, a revised procurement law (*Tarifreue- und Vergabegesetz*) was passed, which stipulates that public contracts have to contain clauses obliging contractors to comply with, *firstly*, in the case of the public transport sector, the full collective agreement for this sector; *secondly*, the industry-specific minimum wages that have been declared generally binding, based on the Posted Workers Act; and *thirdly*, a minimum wage for public procurement in all other industries of € 7.50/hour (later increased to € 8.50 and currently at € 8.80).³⁷
- Contracted companies are also responsible for ensuring that their sub-contractors comply with these minimum rights, and they are required to notify the contracting authority in advance about the use of sub-contracting. In addition to the pay clauses, the law also refers to the ILO core conventions and gives commissioning authorities the right to take into consideration additional criteria in order to foster certain social goals, environmental protection or innovation.
- The scope of this minimum wage for public procurement was further extended in 2012, when the Bremen government passed a ‘federal state minimum wage act’ (*Landesmindestlohngesetz*). This act, which also set up a tripartite commission charged with updating the public procurement minimum wage every two years, now also covers service providers that receive public money through grants (*Zuwendungen*). Grants are a frequently used transaction mode in the area of social services, education, sports and cultural activities. Moreover, although the law does not mandate this, the administration also requires companies with concession contracts³⁸ (e.g. in school catering) to pay the minimum wage.³⁹
- The procurement law obliges commissioning authorities (e.g. a public hospital) to monitor compliance with these minimum rights and to sanction non-compliance, whereas under the previous procurement law, monitoring was optional not mandatory. The sanctions, by contrast, have not been increased; non-compliance can be fined at a rate of between 1% and 10% of the contract value. Moreover, commissioning authorities have the right to

³⁷ Unlike in other amended procurement acts in German federal states, this minimum wage for public procurement applies only to tenders *below* the threshold values above which European procurement directives apply (currently € 5.225 Mio for construction contracts and € 209,000 for supply and service contracts). At the time of its introduction in 2009, the Bremen government followed advice from legal experts that this was a solution compatible with EU Law (Rüffert), as the interviewed expert from SOKOM explains (Interview A1). In practice, however, this limitation is hardly relevant, since there are almost no tenders above the threshold value in industries that don’t have a higher industry specific minimum wage. These industry specific minimum wages also apply above the threshold values.

³⁸ Unlike a public contract, a concession involves the awarding of rights, not of monetary remuneration – e.g. the right to build a certain infrastructure or to provide certain services of public interest and to raise fees for this from the users.

³⁹ According to information from the state government of Bremen, 108 out of 148 schools offered their pupils a school lunch in 2014; in 47 schools this was offered by a private (for profit or non-profit) provider (Bremische Bürgerschaft, Drucksache 18/493 S).

- immediately terminate the contract and the company can be excluded from future public tenders for a period of up to 2 years. For the latter purpose, a register has been established.
- Finally, in order to support the commissioning authorities, an organizational unit called the ‘special commission for the minimum wage’ (*Sonderkommission Mindestlohn – SOKOM*) was set up. Its tasks are to select companies for inspection and, in the case of non-compliance, to recommend a sanction, based on the inspection results. The inspection is carried out either by staff of the commissioning authority itself, or – in the majority of cases – it is delegated to external agencies, e.g. a law firm.

Thus the pre-Rüffert prevailing wage laws were more ambitious in terms of the *level* of wages, in that the extension was not restricted to the lowest pay grade but made the full collectively agreed employment conditions obligatory. The post-Rüffert procurement laws, on the other hand, are more ambitious in terms of both the *scope* of legal wage norms (in that they cover public contracts in *all* industries, not only construction and public transport) and, to some extent at least, the *enforcement* of these rules. With regard to the industry specific minimum wages, the amended procurement act in Bremen contributes to the *enforcement* of existing legislation by adding new mechanisms for monitoring and sanctioning non-compliance (within the scope of public procurement), whereas in the case of industries without a generally binding collective agreement, the law directly establishes a regional minimum wage specific to public procurement.

The amended procurement act of 2009 aimed to preserve as much as possible from the previous prevailing wage act. The introduction of the regional minimum wage in 2012 followed a somewhat different rationale. It did not simply extend the existing regulations to every industry within public reach. Rather, it was partly and even predominantly motivated by the strategic objective of stimulating debate at the national level and supporting the introduction of a national minimum wage, as the then chair of the governing Social Democratic Party (SPD) explained:

"We decided to do that in order to set down markers, in order to say – before any other state did so, before the national government did so: it's possible. There are realms where the State can say, I insist on a minimum wage, end of story". It was somewhat contentious, whether we could actually do it. So we decided to set down this milestone, and thereby also send a signal to the minimum wage debate at the national level." (SPD member of state parliament, Interview P1; authors' translation)

Thus, in that sense, the regional minimum wage in Bremen can be considered as a predominantly ‘political project’, as Kathmann and Dingeldey (2015) argue; and as their analysis shows, this was also the case in several other federal states, which in the years after 2011 followed suit and introduced their own minimum wages for public procurement. This

particular piece of legislation was meant to shape the overall ‘hybrid’ wage setting system in Germany rather than simply being a core element of the local procurement system. Still, there are differing views as to what difference the state minimum wage (*Landesmindestlohn*) has made in the past, and consequently what role it should play in the future, as we will see below.

Implementation, monitoring and sanctions

The legislation and the administrative directive specifying its implementation (Bremer Senat 2012) contain provisions applying to both the tendering process itself and the monitoring procedures. With regard to the tendering process, apart from including the written statement about the pay clauses in the public contract, the commissioning authorities are obliged to consult the register (listing companies who are excluded from public tenders) before issuing the contract. In order to exclude inappropriately low bids, they have to do substantive tests on bids 20% lower than the contract value as calculated by the administration or more than 10% lower than the second-lowest bid. In that case, the bidding company has to disclose its own calculation to the commissioning authority if it wishes to avoid exclusion from the tender procedure.

With regard to monitoring, SOKOM's work and the inspection procedures are regulated by law. SOKOM is an organizational unit within the department of economic affairs in Bremen. Currently three employees are assigned to the unit (but not exclusively so). Their task is, among other things, to select the companies for inspection. As the interviewee from the SOKOM explained, selection is based not on formal criteria but on risk, i.e. an experience-based assessment of the probability of non-compliance. Non-compliance is more frequent in some trades (e.g. dry construction) than in others. Another indicator might be if a firm from a distant area wins a tender with a relatively low contract value; in such a case, it is not unlikely that the firm will keep part of the money and subcontract the work to a cheaper firm because the long journey makes the job unprofitable.

Initially, most inspections were carried out by staff from the commissioning authorities. Now, however, the large majority of inspections are outsourced to an external agency. As the directive on the implementation of monitoring procedures notes (Bremer Senat 2012), an external agency is preferable in particular in cases where a conflict of interest might arise for the commissioning authority – e.g. between enforcing sanctions for non-compliance, on the one hand, and being responsible for the timely delivery of purchased works and services, on the other. Around half of these external inspections are carried out by a public service company that provides cleaning, security and transport services for the public hospitals. In this company, just one person – a facility manager – is officially assigned to this task, but only with very limited time budget. For the inspections, she is accompanied by other employees of the company, in accordance with the ‘dual inspection’ principle.

The inspections take the form of unannounced on-the-spot checks by at least two inspection agents. Employees encountered on site are asked their name, function and hourly wage and management is requested to present employment contracts, wage and working time records, as well as further documents if necessary – e.g. trade registrations for self-employed workers. If these documents are not available on site, the inspection agents will immediately visit the branch office or else summon the company's management to send the documents available without delay. If the inspectors' preliminary report based on these documents and oral statements raises initial suspicion, the commissioning authorities, in cooperation with the inspection agency, conduct further inquiries and inform SOKOM of the results. SOKOM also supports the contracting authorities in this process (information retrieval, legal advice). SOKOM ultimately recommends whether and how the company should be sanctioned; however, the actual decision on any sanction is made by the commissioning authority itself. SOKOM also cooperates with the local branch of Customs, firstly by notifying them of inspections and secondly informing them of any evidence of illegal activity that may also be prosecuted by Customs (non-compliance with industry minimum wages, informal work, bogus self-employment).

SOKOM publishes biennial reports on its monitoring activities. According to the latest available report, covering the period 3/2013 - 2/2015 (Bremer Senat 2015a), the commissioning authorities notified SOKOM of 4324 public contracts; 116 inspections were carried out and sanctions imposed in 19 cases. The reasons for the sanctions were non-payment of the construction minimum wage, bogus self-employment and a failure to notify the authorities about sub-contractors in advance. In most cases, the penalty was less than € 10,000, but in one case, where 12 workers were not paid the minimum wage, it amounted to € 465,000. Moreover, in most cases, the companies were excluded from public tenders for a period of between 6 and 15 months; in three cases, the contract was terminated. The sanctions do not include a request to companies to pay outstanding wages. As the SOKOM interviewee explained, there is no legal basis for the commissioning authorities to do that. However, it can happen that companies that have been temporarily excluded from public tenders voluntarily provide the commissioning authority with evidence of the payment of arrears in order to restore their reputation. There is no 'naming and shaming' of companies. This was on the political agenda once, as the SOKOM interviewee recalled, but it was decided not to proceed for reasons of data protection.

Effects and effectiveness of monitoring – industries with industry specific minimum wages (construction, contract cleaning)

Construction and contract cleaning are the largest industries within the realm of public procurement that have industry specific minimum wages above the national minimum wage (€ 8.50) and also above the Bremen minimum wage for public procurement (€ 8.80).

The construction sector is the main target of the inspections; around three quarters of the inspections and all sanctions concerned construction works. The other inspections were conducted in maintenance and repair work, contract cleaning, security services, laundry services and maintenance of the public green space. The SOKOM interviewee explained that the reason for the focus on construction is that this is where the majority of public contracts are allocated, and also where the majority of the most severe violations of minimum rights occur (Interview A1). This is mainly because companies can draw on migrant workers from other regions within Germany (East Germany) and from Eastern European countries who work on the construction sites on a temporary basis and have much lower wage expectations. In the other industries, such as contract cleaning work, the work is constant and therefore predominantly done by local employees. Inspections in contract cleaning have so far produced virtually no evidence of non-compliance. The origin of construction workers, the temporary nature of construction work sites and the frequent use of subcontracting chains also makes for a lack of transparency and renders monitoring difficult.

The interviewee from the trade union IG BAU, representing both construction and contract cleaning, largely confirmed this assessment. He added that, in general, cleaning companies comply with the industry specific minimum wage (of currently € 9.80 in West Germany), although there might be some minor issues with unpaid overtime hours. Moreover, he estimated that the low level of non-compliance is due not only to monitoring by SOKOM and Customs but also to the successful organizing campaigns and industrial action initiated by IG BAU all over Germany in recent years. This points to the potential of self-enforcement (as opposed to enforcement through external agencies such as SOKOM), whereby it is the employees or employee representatives, and partly also employers' associations, that prevent non-compliance by mobilizing members to demand certain minimum rights and raising awareness of their rights among members. Hence, contrary to the usual picture, it is the female-dominated industry of industrial cleaning that seems in a better position to guarantee compliance, at least with regard to the hourly minimum wage, than the male-dominated construction industry.⁴⁰ This is not least because of the different social origin of the employees, which makes cleaners more accessible to trade unions' organizing strategies than migrant/posted workers in subcontracting chains. In fact, there have been attempts by German trade unions to organize migrant workers in the past, albeit with limited success (Lillie/Wagner 2015). In the case of Bremen, the IG BAU representative confirmed this general picture (interview U1). It is the exception rather than the rule that employees affected by underpayment contact the trade union. As the trade unionist explained, that might occur if they have not

⁴⁰ It needs to be emphasized, nevertheless, that employment conditions in contract cleaning remain very precarious, due to the usually very low number of working hours offered to employees – a problem that so far has not been addressed by procurement law.

received *any* wage for a period of several months and can no longer afford to pay their bills. Even then it is only rarely that migrant workers seek help, which according to the trade unionists is due in part to implicit or explicit threats by the middlemen.

The social partners not only help to *prevent* non-compliance through self-enforcement, they are also part of the external, 'ex-post' enforcement procedures, in two distinct ways. Firstly, although trade unions do not have formal rights and responsibilities in the enforcement process, they can be asked by the administration in some cases to cross-check the inspection results, in order, for example, to ascertain whether certain tasks presumably performed by unskilled workers (and accordingly paid the lower minimum wage for unskilled workers) should not in fact require skilled workers.⁴¹ In that case the trade union will check collective agreements (pay scale classifications) and administrative regulations and give feedback to SOKOM, which will use it to inform its final recommendation (interview A1, interview U1). Secondly, in cases where the trade unions receives information, one way or the other, that wages have not been paid, they sometimes directly approach the general contractor because in such a case the general contractor liability applies. The trade union prompts the general contractor to pay the outstanding wages, and according to the IG BAU representative, companies tend to comply with this request in order to avoid litigation (interview U1). This kind of informal communication and pressure from the trade union is an additional enforcement tool that does not show up in any statistics on cases handled in the labour courts or sanctioned by SOKOM or Customs.

According our SOKOM interviewee, inspections have become more detailed and rigorous than they were originally (interview A1). This is a result of learning processes on the part of SOKOM and the inspection agencies, which quickly realised that the written documents provided by the companies may have little do to with reality, as is the case, for example, with a trade registration for a (bogus) self-employed worker. SOKOM also benefits from advice given by SOKA BAU (a body that administers special social security benefits for the construction industry). Over time, according to our interviewee, SOKOM has developed better information retrieval procedures. Improved knowledge of where to look and what questions to ask and a more targeted selection of companies for inspection also explains, according to the SOKOM expert, why the 'hit rate' has increased, i.e. why the number of sanctions has increased over the years although the number of inspections has remained relatively constant or even slightly decreased.

Difficulties in assessing whether written documents correspond to reality are still part of the challenges faced by inspection agents, as our interviewee from the public inspection agency

⁴¹ In the construction industry there are two minimum wages declared generally binding based on the Posted Workers Act: one for unskilled work, one for skilled work (currently € 11.25 / 14.45 per hour).

(GND) explains (interview A2). According to her, it is very hard to prove non-compliance if both employer and employee present a congruent view that appears to be confirmed by the employment contract and wage and working time records, i.e. if there is a tacit consensus between both parties to cover up non-compliance. A typical example would be an employee on a construction site who supposedly holds a ‘mini-job’ but in reality works full-time.⁴² The inspector described a recent case in which she had seen the worker every day with her own eyes, because the construction site happened to be located at her own workplace:

“And he was really on-site every day, and he tells me that he’s working on a 450 euro basis. In such a case I take a look at the working time documentation, of course; I request that [from the management]. But you can say what you like on paper, I can write down a lot. But in the end I would have to provide evidence that he hasn’t only worked on a 450 euro basis. But that he’s working full-time.” Interviewer: And that can’t be proved? “No, because then I would have to go to the construction site every day and say: OK, Mr. XYZ, you’re here again, but the number of hours for a 450 euro job has already been exceeded”. (Interviewee from public inspection agency GND; Interview A2, authors’ translation).

Asked for possible measures to facilitate monitoring and enhance effectiveness, the inspection agent suggested companies should be given less time when required to produce wage and working time records – not a few days or even a full week, but rather a 24-hour deadline, since otherwise it is too easy to fake the records.

In the view of the IG BAU representative, the most important lever for improving the effectiveness of the monitoring regime would simply be more inspections; an inspection rate of less than 5% is much too low, in his view. Moreover, inspections should preferably be done by construction engineers, following an approach practiced in Hamburg until a few years ago, because engineers have the necessary expertise, e.g. to judge whether the work is being performed by skilled or unskilled employees.

With regard to sanctions, the IG BAU representative estimates that the bite of the sanctions is far from effective – firstly, because even the maximum of a 10% fine is not high enough and, secondly, because a violation of minimum wage rules is treated as an administrative rather than criminal offence.

“You know, if you calculate: you have a wage share of 50% and the contract is worth € 1 Mio, so the labour factor is worth € 500,000. Now you contract this out to a sub-sub-sub-sub contractor, and they do the work for € 200,000 instead of € 500,000. In that

⁴² Mini-jobs and regular part-time work in the construction industry have indeed increased in several German regions, as statistics show, and experts are fairly unanimously agreed that this is usually an indicator of informal work.

case you easily budget for a € 100,000 fine, that's no problem at all. So the 10% fine fixed in law, that's nothing." (trade union representative (IG BAU), Interview U1, authors' translation)

Still, overall the IG BAU representative estimates that the monitoring regime has improved:

"The temporary exclusion from public tenders is a sharp sword. It's a good thing that minimum wages are monitored; this wasn't the rule before. Customs did that, true, but they had much fewer staff at the time. So the procurement law has indeed had a certain effect." (trade union representative, (IG BAU), Interview U1, authors' translation)

On the employers' side, the president of the Chamber of Crafts, himself owner of a medium-sized construction company, also expressed his doubts about the effectiveness of the monitoring. The public inspection agencies – both from SOKOM and from Customs – would usually target only the most accessible firms, not the ones guilty of the most severe forms of non-compliance. This was due to a sheer lack of not only resources but also the necessary inspection rights. Instead of these ex-post, 'downstream' measures, preventive measures would, in his view, be much more effective:

"The most sensible method would be to start right at the beginning, when the commissioning authority predefines certain conditions. To give an example: at the moment, firms in the main construction trades are allowed to pass on 100% of the construction work to subcontractors. In Hamburg, there was a rule, at some point in time, that required firms to carry out at least 50% of the construction work themselves. But this rule failed in legal terms, as did the requirement to pay collectively agreed wages." (president of Chamber of Crafts, Interview E1, authors' translation).

Effects and effectiveness of controls – industries without higher industry specific minimum wages (catering, social services)

A range of industries have collectively agreed wages that have not been declared generally binding and are below the minimum wage for public procurement, or have a low coverage rate. This is the case, for example, in contract catering, security services, social services, gardening and landscaping. In all these industries, companies with public contracts or grants, as well as some of those with concession contracts, are currently obliged to pay their employees a wage of at least € 8.80/hour. According to the SPD member of the federal state parliament from the SPD we interviewed, the Bremen minimum wage law currently benefits around 1700 employees who

would otherwise earn less.⁴³ He added that, at the time of its introduction, “*we were quite aware that we would reach only a limited number of employees with this new law*”. (SPD Member of Parliament, Interview P1).

Companies and non-profit organisations receiving grants can be inspected by the SOKOM as well; whereas this is not the case for companies with concession contracts. According to the SPD Member of Parliament, there was a time, two years ago, when the inspections were intensified for organisations receiving grants because it turned out they often ignored the minimum wage. However, he was confident that this was no longer the case. He attributed this to the inspections and to increased pay expectations and market wages:

Realistically or objectively, it has be said that developments in the labour market and the evolution of wages and salaries have now overtaken the € 8.50. There are certainly a number of areas, for instance in some unskilled building jobs, where you might get people who can be fobbed off with € 8.50. But my impression is that this is on the decline.(...) The labour market in Bremen simply doesn't have that many people who would be willing to work for less than the lowest level of unemployment benefit (Hartz 4). The Bremen minimum wage is Hartz 4.⁴⁴ (SPD Member of Parliament, Interview P1; authors' translation)

In his view, the limited scope and effect of the minimum wage for public procurement, together with the increase in market wages, justify the recent (February 2016) decision by the SPD/Green-led government to freeze the regional minimum wage and instead wait until the national minimum wage has caught up. The regional minimum wage was an important political measure, rather than a major factor in improving precarious work, as the SPD representative argued:

"(...) so it was an important regulatory measure, and an important signal, but it wasn't a lever for combatting poverty in Bremen. It can't be, because the number of those affected by it is much too low." (SPD Member of Parliament, Interview P1, authors' translation).

The decision to freeze the minimum wage has been criticized by the left-wing opposition (*Die Linke*), who argue that Bremen is thereby abandoning an important measure for counteracting the spread of precarious jobs in Bremen (Interview P2). The interviewed members of *Die Linke*

⁴³ It is not clear, though, if these figures include catering concessions, or other concessions as well, where the procurement law and the minimum wage law doesn't apply directly.

⁴⁴ A full-time minimum wage (at € 8.50) equates to a monthly net income of about € 1090. The means-tested flat rate benefit 'Hartz IV' is currently € 399 or a single person, plus housing costs of up to € 377 (in Bremen).

came to a different conclusion with regard to the effectiveness of the minimum wage for public procurement. In their view, statistics provided by the government at the request of *Die Linke* confirm the effectiveness of the regional minimum wage as they show that there have been relatively strong wage increases for employees at the lower end of the wage scale since 2012.⁴⁵

“The minimum wage doesn’t combat poverty, we have to look at it realistically. That’s not what it does. It’s just been one element, so to speak, in a whole hodge-podge of measures targeting precarious work, temporary jobs, mini-jobs (...) But then to say: we have introduced an instrument relatively successfully, we also have a monitoring commission, we’ve had an effect – that cannot be denied – and now we are leaving all this behind, as if we had X other instruments that target this problem.... in that context, it’s an absolutely invidious step that’s being taken.” (Die Linke Member of Parliament, Interview P2; authors’ translation)

The representatives of *Die Linke* suspect that one reason for freezing the federal minimum wage is not simply that the government in Bremen deems it to be redundant after the introduction of the national minimum wage, but rather that it does not want to interfere in debates at the national level, with the national minimum wage commission having to present its recommendation for the future level of the minimum wage at the end of June 2016. It must be noted, though, that the commission has relatively little room for manoeuvre, as only in exceptional circumstances are they allowed to deviate from the rule, enshrined in the legislation, that increases in the minimum wage should mirror the increase in collectively agreed wages over the previous period. As a result of this first adjustment round, the national minimum wage will increase to € 8.84 from 2017 onwards. This also means that the minimum wage in Bremen, which was frozen at € 8.80, will no longer constitute the wage floor for public contracts from 2017 onwards.

Apart from the direct, instrumental effect on wages, and the political effect as a signal spurring the introduction of – and now the increase in – a national minimum wage, yet another effect is mentioned by the trade union NGG, which represents the catering industry, amongst others. The trade unions’ umbrella organization DGB in Bremen has issued a statement against the decision to freeze the minimum wage (DGB Bremen-Elbe-Weser 2016), which is entirely

⁴⁵ The Senate’s response to the information request (Bremer Senat 2015b) provides statistics that show an unusually high increase of 9.4% for unskilled workers in 2013 in Bremen. This is much higher than the wage increases in 2012 and 2014 (0.1 and 1.5%) for the same group, and considerably higher than for skilled workers in the same year (+2.7%). It should be stressed, however, that the minimum wage for public procurement was already in place in 2010 and only extended to a limited number of additional workers in 2012. Moreover, other measures might have contributed to a sharp increase in wages among unskilled workers, including the introduction of a minimum wage for temp agency workers in 2012 and for staging, stonemasonry and hairdressing in 2013.

supported by the NGG representatives we interviewed, even though they would have preferred a more outspoken protest (Interview U2). Although the NGG representatives confirm that the minimum wage has had few direct effects on employees in the HORECA industry, they point to its symbolic value as a signal to employers and employees that the public sector at least does not engage in wage dumping; that the low-wage sector is not supported or tolerated by politicians any longer; and that the public sector is ready to take on a lead role in determining wages and working conditions.

“The problem is – and this is where such things as the state minimum wage are trying to interfere – that in catering and in other growing segments of the service industry, there is ever more outsourcing, and then it gets tough. Every two or three years the contract will be put out to tender and then they will try to push, push, push prices downwards. And when the public sector is joining in this game – this is politically not acceptable. Because I can’t be against wage dumping at the political level, and then when it comes to my behaviour as an employer just do the same.” (NGG representative, Interview TU2, authors’ translation)

As the NGG representatives explained, there is a strong need for further improvements in wages and working conditions in school catering and other public authority catering. Union density is very low; the NGG has very few members working in school canteens or in catering for cultural and sport events hosted by public bodies. The local branch of the employers’ organization DEHOGA confirmed that they do not have any member companies offering services for school canteens. Whereas canteens in large industrial plants in Bremen are often operated by one of the big contract caterers (Eurest, Aramark, Sodexo), who have concluded firm-level collective agreements with the NGG, the market-segment of catering for public clients is dominated by small, local, partly also non-profit firms without any collective agreement. The few NGG members in school canteens often report high fluctuation due to high workloads and unpaid overtime hours, according to the NGG representatives.

Recent realignment and future prospects: regional minimum wage, revival of prevailing wage laws, sectoral minimum wages?

The decision to freeze the regional minimum wage (but not abandon it⁴⁶) was passed in February 2016. At the same time, the Bremen state parliament passed two other pieces of legislation initiated by the two parties of the governing coalition, the SPD and Bündnis 90/Die

⁴⁶ Whereas the Liberals (FDP) in Bremen have proposed abolishing the regional minimum wage act, the SPD-led government decided merely to freeze the minimum wage and thereby have the option to revitalize it, as our SPD interviewee explained, “because you never know how things will develop at national level”.

Grünen. One of these acts increases the threshold values below which public authorities are allowed to award contracts directly and to use restricted tenders instead of competitive tenders (for construction work: from € 10,000 to 50,000 for direct awards and from € 50,000 to 500,000 for restrictive tender; for supply and service contracts the values have increased to € 40,000 / 100,000). The second obliges public authorities to request companies to comply with ‘relevant’ collective agreements in the case of restrictive tenders or directly awarded contract (Bremer Senat 2016).

These changes represent a return to the pre-Rüffert system, albeit only within the limits of the lower threshold values and for restrictive tenders or direct awards. Moreover, in the first draft proposal the prevailing wage regulation, which had hitherto (that is, between 2000 and 2016) applied only to public transport, was to be extended to *all* industries; in the final draft, however, it applies only to construction. This might be a concession in the face of doubts expressed by the SOKOM interviewee (Interview A1) about the administrative burden generated by such a comprehensive approach, particularly when it comes to gathering, selecting and operationalising the collectively agreed norms to be monitored in each industry. In any case, the act is particularly relevant to the construction sector, where collectively agreed wages are well above the level of the national and regional minimum wage, and also well above the industry specific minimum wage for the construction industry. This is the main justification given by the SPD Member of Parliament we interviewed. According to him, the employers’ representatives in construction have often complained that the absence of more ambitious social goals in the procurement legislation also undermines social dialogue:

“Time and time again, they’ve given us an ear-bashing – quite rightly – about the fact that it wouldn’t make sense for them to conclude collective agreements with the trade unions for their industry. Because all that’s checked in public tenders is whether bidders are paying the minimum wage (...). That was a sound suggestion in our view. We have now proposed this [new legislation] actually in order to reinforce the regional collective agreements. So now, no one can say any longer: I offer heating and sanitary services, so for instance maintenance or installation of a heating system, and I base my calculations on an hourly wage of € 8.80, and the commissioning authority will let it pass because it’s the lowest price. Instead they have to say: I calculate a wage based on the collective agreement that has been negotiated between IG Metall and the heating and sanitary trade association here in Bremen.” (SPD Member of Parliament, Interview P1, authors’ translation)

This view is supported by the president of the Chamber of Crafts:

“No, the minimum wage as such doesn’t ensure that we get a decent level [in public contracts]. (...) This is only the case with the prevailing wage norm. The problem is simply: Why should I, being a company carrying out public contracts, stick to collective

agreements, if it's only the minimum wage I have to apply?!" (President of chamber of crafts, Interview E1, authors' translation)

The left wing opposition party, *Die Linke*, also welcome this initiative. They would still prefer to maintain the regional minimum wage and to develop it into a mechanism securing higher wages in the (extended) public sector, thereby restoring the public sector's lead role in securing decent working conditions. In their information request to the government about the 'role of the federal state minimum wage', they therefore suggest using the minimum wage as a tool to raise wage levels in public procurement to the lowest pay grade in the public sector. In its response, the government explicitly expressed a different view on the role of legal minimum wages:

"The Senate believes that maintaining the federal state minimum wage alongside the national minimum wage is not constructive. A legal wage floor serves to prevent a downward wage spiral (...) In particular, tying the federal state minimum wage to the lowest pay grade in the public sector would go beyond securing livelihood and is therefore out of the question." (Bremer Senat 2015b; authors' translation).

Thus these are two opposing views on the question of whether or not a legal wage floor can go "beyond securing livelihood"; they also differ on the question of whether or not the lowest pay grade in the public sector is located beyond subsistence level.⁴⁷

The NGG representatives, who would also have preferred the federal state to maintain its more proactive role in setting minimum wages, are now planning to make use of a new option introduced with the national minimum wage, namely the possibility to have collective agreements declared generally binding without meeting the 50% threshold that was required previously (i.e. the members of the relevant employers' organization had to employ at least 50% of the employees concerned). According to the NGG representative, the local branch of the employers' organization DEHOGA is indeed willing to jointly submit an application for extension of the CA. It was actually willing to do so previously but found it difficult to prove it could cross the 50% threshold. If they succeed in having the collective agreement declared generally binding, not only will the new rate replace the minimum wage for public procurement but it will also go well beyond it, since it will not be restricted to the realm of public procurement.

⁴⁷ The hourly wage in the lowest pay grade in the public sector collective agreement for Bremen currently corresponds to € 9.90, excluding annual bonuses.

Conclusion

Both models – ‘pre-Rüffert’ and ‘post-Rüffert’ – can be characterized as ‘hybrid’ wage-setting systems in which, alongside the social partners, the state assumes an important role. However, there are some differences between the two models. The first concerns the stage or *function in the wage setting process* that is targeted by state interventions. In the pre-Rüffert model, wage levels were determined solely by the social partners, but the state extended the *scope* of their bilateral collective agreement. In the second, post-Rüffert model, the state is additionally involved in determining the (lowest) wage level (by means of the state level minimum wages⁴⁸) and plays a more important role in *monitoring* and *enforcement*. The second difference relates to the *goals* of state intervention in wage setting. The pre-Rüffert prevailing wage laws were more ambitious in terms of wage levels, in that the extension was not restricted to the lowest pay grade but made the full collectively agreed working conditions obligatory. The post-Rüffert procurement laws, on the other hand, were more ambitious in terms of both the *scope* of legal wage norms, in that they covered public contracts in all industries, not only construction and public transport, and, to some extent at least, the *enforcement* of these rules. Thus after the Rüffert ruling and partly as a consequence of it, there has been a shift in state interventions towards establishing and enforcing minimum wages for a broader set of industries, as opposed to securing higher standards defined by collective agreements in a limited number of industries.

The very recent realignment following the introduction of the national minimum wage contains elements of both models: it preserves the additional measures adopted to control and enforce legal minimum wages (both national and industry specific) and it reinstates pre-Rüffert prevailing wage laws for the construction sector and construction-related trades that ensure higher collectively agreed wage levels in these industries, albeit restricted to certain value thresholds, and only as an option, not as a mandatory rule. Against the background of this decision to move beyond minimum wages for construction, it seems somewhat inconsistent that, by (de facto) abolishing the regional minimum wage, the federal government of Bremen refuses to adopt a more ambitious lead role also for wages in low-paying service industries that are not covered by collective agreements, and that it explicitly rejects the idea of ‘equal pay’ (even with the lowest pay grade in the public sector) for these industries. For employees in these service industries, it seems that the national minimum wage will for a long time be the going rate – not only in the private sector but also in public procurement.

⁴⁸ Which in some *Länder* are however fixed based on previous consultations with the social partners in ‘minimum wage commissions’, see Schulten/WSI for an overview:

http://www.boeckler.de/pdf/wsi_ta_tariftreue_uebersicht_stand_2015_03.pdf

9 Socially Sustainable Sourcing in the Steel Industry

Introduction

The steel industry in Germany currently (2015) comprises some 180 plants and employs around 98,000 people⁴⁹; Germany is by far the largest steel producer in Europe (cf. European Commission 2016a). The largest steel producers in Germany include Thyssen Krupp Steel Europe (TKSE), Arcelor Mittal, Salzgitter, Saarstahl and Dillinger. Despite its relatively small size, the industry is regarded as a very important part of the German manufacturing sector's value added chain by virtue of its interconnections with other manufacturing industries. Whereas the number of plants and employees has remained relatively stable in recent years, turnover has dropped sharply (from 49.7 billion euros in 2011 to 37.8 billion euros in 2015). This reflects the weakening of demand in the wake of the euro crisis, increasing global overcapacity and fierce international competition, which has intensified considerably in recent years, particularly as a result of Chinese imports. In Germany as in other countries, this gave rise in the first half of 2016 to protests from both employers and employees calling for measures to protect their industry from subsidised steel imports, demands that were echoed at European level (cf. European Commission 2016a and 2016b).

These difficult economic conditions constitute the background to another development dynamic that is the main focus of this study, namely the industry's use of subcontracts. As in other sectors, the use of such contracts has over the past five years or so become an increasingly contentious issue (cf. Manske/Scheffelman 2015). The present study highlights a number of measures in which the intensity of use of subcontracts and working and employment conditions in contracted companies have been the object of negotiations:

1. trade union strategies for increasing coverage by collective agreements and plant-level codetermination in contracted companies;
2. the 'Collective Agreement on Subcontracts' that was concluded between IG Metall in North Rhine-Westphalia and the steel industry employer's association, together with a number of supplementary company-level measures illustrated by taking the example of one company in the steel industry;
3. supplementary company-level measures intended to promote the socially responsible management of subcontracts, which are illustrated by taking the example of one company

⁴⁹ <http://www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=171736.html>

in the steel industry. The analysis is anonymised; the company is referred to hereinafter as 'Steel'.

Methodology

The case study draws on an analysis of available documents, press reports and interviews with

- 1 representative of the IG Metall trade union (Interview G1)
- 3 representatives of the company's HR department (Group Interview M1), whose supplementary measures will be examined in greater depth.

In addition, a workshop on subcontracts was organised as part of the project; the participants included an employee representative from Steel, who reported on his experiences with the implementation of the collective agreement.

Subcontracts in the steel industry: industrial relations eroded and fragmented

The characteristics of industrial relations in the metal and engineering industry as a whole apply even more strongly to the steel industry. These include continuing high membership rates for interest representation bodies on both the employers' and employees' sides, highly centralised collective bargaining procedures and a high level of coverage by collective agreement. However, none of this can any longer be taken for granted if the companies that conclude subcontracts with the steel producers are included, even those contracts that are fulfilled on the steel producers' premises. These 'on-site' contracts have existed for a long time following the outsourcing of services such as catering and machinery cleaning. In a more recent development, activities that are part of firms' core business are increasingly being outsourced as well (cf. Hertwig et al. 2015). Over the last 10-15 years, this has led to considerable growth in the so-called 'industrial services' and 'contract logistics' segments. According to reports by trade unions and surveys of works councillors (e.g. Siebenhüter 2013; IG Metall 2015a), firms are also making increasing use of subcontracts instead of temporary agency work, which has been more strongly regulated since 2010. Further evidence of this shift away from agency work is to be found in the legal opinions offered by lawyers close to the employers that refer to the advantages of 'free industrial services' versus 'regulated agency work' (cf. the contributions in Rieble et al. 2012). Firms in this industrial services/contract logistics segment are often involved in a very wide range of activities, extending from servicing and maintenance via production logistics to parts of the manufacturing process itself. They do not generally adopt the client company's collective agreement but rather (if at all) another collective agreement stipulating significantly lower rates of pay, thereby taking advantage of the overlaps with the organisational areas of trade unions affiliated to the German Federation of Trade Unions.

These overlaps arise because in Germany there have traditionally been no craft unions but industry trade unions, concluding industry-level collective agreement that covers many different activities. Conversely, various industry-level agreements may apply to the same activity (e.g. packing and warehousing), depending on the industry to which the company in question assigns itself (through its membership of an employers' association). In this way, outsourcing to companies that do not belong to the steel producing industry furthers the fragmentation of industrial relations, since it creates a situation in which different trade unions negotiate separate collective agreements for different trades working on the same company premises. Thus besides IG Metall, the unions IG BAU (for cleaning and construction workers), NGG (canteen workers) and, above all, Ver.di (for logistics workers) are also active in steel industry companies. In January 2016, however, IG Metall and Ver.di agreed to cooperate more closely in order to clarify which of them has collective bargaining competence for contract logistics companies within IG Metall's sphere of influence.⁵⁰

However, this dual competence problem has a less serious effect on employment conditions in contracted companies than the fact that many of them are neither bound by collective agreements nor have any codetermination bodies at establishment level; in general, the working and employment conditions they offer are significantly inferior to the established standards in the metalworking and electrical engineering industry. According to reports by trade union representatives and works councillors, some of these employment conditions actually infringe certain statutory minimum standards, particularly those on health and safety and working time (cf. IG Metall 2014a).

Socially responsible management of subcontracts 'from the bottom up': trade union strategies for increasing coverage by collective agreement and codetermination in contracted companies

Trade union strategies for dealing with subcontracts in the steel industry initially developed in an uncoordinated way. In the more recent past, however, they have been the focus of an official IG Metall campaign (cf. <http://www.fokus-werkvertraege.de>), which mainly involves providing legal information and guidance, models of 'best practices' and additional advice and support services for employees and employee representatives at establishment level (cf. IG Metall 2014b; 2015b). Thus the trade union strategies are directed less at the industry than at the establishment level, where employees and works councils in both the commissioning and

⁵⁰ According to this agreement, IG Metall has competence if a contract logistics company carries on its activities on the premises of a company within IG Metall's sphere of influence, if more than 75% of its activities are performed for an end user within IG Metall's sphere of influence or if manufacturing activities (production, assembly) account for more than 50% of the company's total activities (cf. <https://www.igmetall.de/kontraktlogistik-18244.htm>).

subcontracting companies are supported in their efforts to put in place in the contracted companies the standard apparatus for reconciling conflicting interests (elected works councils, collective agreements) and prevent infringements of legal standards. Early examples of such initiatives in the steel industry have been documented as early as the 1990s (cf. IG Metall 2014a). Another important objective of the campaign, as it was of the earlier initiatives, is to have greater restrictions placed on the use of subcontracts, and particularly to prevent misuse of them as a means of circumventing the more highly regulated temp agency work.

This strengthening of IG Metall's efforts to deal with the issue of subcontracts has been driven not only by the increased use of such contracts (see above) but also, in the estimation of our IG Metall interviewee, by heightened awareness among works councils and in the union itself. After their campaign on temporary agency work, their attention turned to other, hitherto little-noticed employment relationships:

'IG Metall has ascertained that our organisational power in the large steel plants is declining because we are in fact absolutely unable any longer to maintain contact with various colleagues. (...) And let's say we've been a bit slow to react, we have to admit it. We've been going along with all these outsourcing processes and, quite honestly, we were happy if we were able to protect the core workforce (...) Of course works councillors reminded us about it, they said, 'now we have regulated agency work and despite that we have people running around who we have absolutely nothing to do with. We don't know who's who', because it's all happening through the subcontracts that are almost completely outside the control of the codetermination institutions. And that's why IG Metall also launched a campaign here.' (IG Metall union secretary, Interview U1; authors' translation)

The campaign was also launched with the aim of protecting the interests of the core workforce, as another IG Metall representative explained:

'We're not doing it just for fun. The main thing, as always, is to look after the people there. The second, very significant reason is that in the long term our collective agreements will be at risk if there are too many subcontracts. (...) If I permanently shift jobs from the core workforce to service providers who pay significantly lower rates, there's a risk that our standard employment relationship will be undermined.' (Dieter Lieske, IG Metall Duisburg-Dinslaken, quoted in IG Metall 2014a: 31), authors' translation).

This process of reconsideration on the part of the formally organised employee representatives initially required them to acquire some basic legal knowledge and to make greater use of the existing rights. This represented a significant obstacle at the outset:

‘A lot of works councillors said they could see no legal means of tackling subcontractors and had no responsibility for their employees. The Works Constitution Act in fact offers a lot of opportunities to do something in that area. (...). The existing legal principles and options are now being used much more systematically’ (Dieter Lieske, IG Metall Duisburg-Dinslaken, quoted in IG Metall 2014a: 31; authors’ translation).

In fact, works councils’ legally codified rights are much weaker when it comes to subcontracts than they are in the case of temporary agency work. Whereas the works council must explicitly agree to the use of temporary agency workers, they have no such right in the case of subcontracts. First and foremost, they have the right to be informed and may submit alternative plans for the use of outside companies to their company management. In addition, they may lodge an objection when outsourcing leads to the dismissal of the company’s own employees; nevertheless, their legal options for effectively preventing outsourcing are limited. However, as the studies by Siebenhüter (2013) and Hertwig et al. (2015, 2016) show, works councils do develop more or less proactive strategies for dealing with this legal framework. Accordingly, experienced works councils are able on occasions, through tie-in deals and countertrades with management, to exert influence where they have no legal rights of codetermination.

Even IG Metall itself did not make greater use of its rights to approach contract workers until the campaign was already under way. It also began to deploy more personnel, and in one district (Duisburg) a union secretary was even appointed for this purpose. His task is to seek out employees of subcontractors, to inform them of their rights and to mobilise them for works council elections and collective negotiations (cf. IG Metall 2014a: 30).

Overall, the cases documented in the IG Metall pamphlet (ibid) show that the trade union representatives and works councils in the commissioning firms are dependent on close cooperation with each other and with the employees of the contracted companies in order to uncover grievances, to confront management with them, to mobilise employees and so on. On numerous occasions in the past, they had managed in this way to organise works council elections, conclude collective agreements, agree regulations on holidays and working time, uncover bogus subcontracts and convert the contract jobs into temporary agency jobs in the steel company. In the steel firms’ multiply segmented internal labour markets, this last achievement is, according to IG Metall, ‘the first step towards the core workforce’ (IG Metall 2014b). Our contact at IG Metall also spoke of a case in which the conversion from contract to temporary agency work led to a pay increase of several hundred euros for the workers concerned. The collective agreements negotiated in the contracted companies are for the most part company agreements. According to our IG Metall interviewee, they are some 15-20% below the level of the steel industry agreement, and some are even lower. For the employees in question, however, these agreements still provide significant pay increases compared with their

previous situation without any collective agreements at all. Thus although the wage gaps and other gaps in protection between the core workforce and contract workers are far from completely closed even when agreements are successfully negotiated, they are considerably narrowed.

However, our contact at IG Metall also pointed to the limitations of the trade union mobilisation strategies and the fundamental dilemma underlying them. On the one hand, the short-lived nature of the contractual relationships between the commissioning firms and the subcontractors, which often last just a matter of months or even less, makes it difficult to conclude collective agreements and establish permanent interest representation institutions. On the other hand, even success gives rise to a further problem. When the contractual relationships are longer, it may indeed be possible in some cases to push through improved working and employment conditions in the contracted companies. However, this in turn leads to a rise in their prices. If management is then unwilling to accept these higher prices, the companies risk losing contracts – and the trade union finds itself back at square one.

‘The only thing I can do then is to wipe the slate clean and start from scratch again to try to organise these companies in order to ensure that I improve employees’ situations at least for the brief period the contract is in force (...). It’s the task of Sisyphus.’ (IG Metall union secretary, Interview U1, authors’ translation)

Thus the success of ‘bottom-up’ strategies for the socially responsible management of subcontracts is dependent to a certain extent on there being corresponding ‘top-down’ strategies, i.e. ones that take due account of social criteria when awarding contracts to firms.

A further dilemma emerges, even in cases when a contract is not awarded to the firm submitting the lowest tender. This is illustrated by a current example described by the trade union representative. A contracted company that has been operating for decades on the premises of a large steel company and in which works council elections and collective agreements have been successfully established in recent years has recently lost the contract because of the resultant price increases – not to a cheaper external competitor but to a subsidiary of the steel company, which is also within IG Metall’s sphere of influence. Because of the generally difficult economic situation in the steel industry, this subsidiary has surplus employees; the new contract enables it to continue to employ these workers. The union representative we interviewed views this outcome with a certain degree of ambivalence, since jobs have been secured and outsourced activities brought back into the company. This effect is also welcomed in the already quoted IG Metall pamphlet, where it is stated: *‘When greater job security and fair pay is expected of outside companies, they raise their prices. That makes the jobs of the core workforce a little bit safer, since outsourcing becomes less attractive.’* (IG Metall 2014a: 12). However, this example makes it clear that longstanding employees of the contracted companies can also lose their jobs as a result; this

needs to be taken into consideration when efforts are being made to dismantle the practice of outsourcing, which has been going on for decades, in favour of more socially acceptable arrangements.

Collective agreement on subcontracts in the steel industry

The strategies examined up to this point have been dependent largely on mobilisation of power resources on the employees' side; in that respect, they can be described as 'bottom-up' strategies for the socially sustainable management of subcontracts. The focus of this section, in contrast, is on initiatives in which management has played an active role and basically take as their starting point the commissioning firms' buying power. Socially sustainable sourcing strategies of this kind had their origins in international value-added chains, in which groups operating on a global basis oblige their suppliers from other countries to comply with certain social and environmental standards. However, they are now also being deployed here and there in national value-added chains (cf. among others Wright/Brown 2013; Deakin/Koukiadaki 2009), including in the German steel industry.

The 2014 collective agreement on the use of subcontracts applies to the steel industry in North Rhine-Westphalia, Lower Saxony and Bremen; a second, similarly named agreement has been concluded for the Saarland. The collective agreement stipulates, among other things, that before awarding subcontracts companies must ascertain whether the activity in question could be carried out by its own employees. Whenever possible, employers should enter into such contracts only with firms bound by collective agreements⁵¹. At the very least, however, contracted companies should agree in writing to comply with statutory norms such as the national minimum wage and working time regulations. Finally, companies in the steel industry are obliged to put in place appropriate measures for monitoring contracted firms' compliance with these obligations, in which works councils also have to play a part. Furthermore, employees of contracted companies must also be able to lodge a complaint with the commissioning firm or its works council in the event of non-compliance with the standards.

Thus the collective agreement departs from standard collective agreements in several regards. Instead of binding mutual obligations agreed by the contracting parties, it basically contains obligations imposed from the outside, i.e. on third parties (the contracted companies) that have not signed the collective agreement. Furthermore, these externally imposed obligations are mainly legal standards, such as compliance with the working time and health and safety legislation in force. When they go beyond the legal minimum standards, they are

⁵¹ In the similarly named agreement covering the Saarland, on the other hand, compliance with collectively agreed standards is compulsory, cf. <https://www.igmetall.de/tarifergebnis-in-der-saarlaendischen-stahlindustrie-14306.htm>

formulated as less binding targets, such as those concerning coverage by collective agreement in the contracted companies. Thus the collective agreement does not create any new substantive standards but aims primarily to ensure that legal standards are properly enforced. To this end, the parties to the agreement are required to develop their own procedural regulations and measures for monitoring and sanctioning infringements (such as arrangements for employees of the contracted companies to lodge complaints).

As far as our IG Metall contact is concerned, the collective agreement is welcomed as an achievement that could not have been carried off as easily in other parts of the union's sphere of influence. According to him, IG Metall quite deliberately targeted the steel industry first, as it had done earlier in the agency work campaign, because of its strength in the steel industry. However, he is critical of the fact that many of the regulations are neither strongly binding nor very detailed. In his view, this shows

'that they're really not genuine collectively agreed standards but that there's a big amount of leeway and at the end of the day whether or not there are good company agreements depends on the strength of the works council.' (IG Metall union secretary, Interview U1, authors' translation)

In his work as a trade union official, the collective agreement is 'part of a plan for approaching people' that helps him in his activities in contracted companies:

'With this collective agreement, and as the person responsible for it, I can go up to people and say, "We've got a collective agreement for you here, even though you're not a member of IG Metall at all"'. (IG Metall union secretary, Interview U1, authors' translation)

One important element here, in his view, is the employees' right to lodge a complaint, even though the works councils lack resources in this area. The collective agreement and the company-level measures based on it have also made it easier for him to persuade the management of subcontractors that it may be to their advantage to agree to the election of works councils and the negotiation of collective agreements, because in that way they can meet the requirements stipulated by the commissioning firms and inject greater transparency into their dealings with them:

'Yes, so now when they say, 'we have a works council, we have a collective agreement, (...) we're fulfilling the requirements you've laid down. And you can also approach the works councillors here and check all this', that's simply the transparency which, for the contracted companies, adds a new dimension to their relationship with their clients.' (IG Metall union secretary, Interview U1, authors' translation)

Company strategies for the socially responsible management of subcontracts

Our contacts in the HR department at *Steel*, whose actual implementation practices are the focus of this section, also regard the collective agreement more as a confirmation of previously adopted strategies than as giving fresh impetus to the campaign for the socially responsible management of subcontracts. In fact, the collective agreement partly codifies what has long been established practice at *Steel* and in other companies in the steel industry. In the present case, this includes in particular company regulations that fully specify and implement the works council's statutory rights to be informed and consulted about the use of subcontracts. According to our IG Metall contact, in some firms in the steel industry there are even company agreements that 'establish what is virtually codetermination on economic and commercial matters', i.e. that grant works councils wide-ranging opportunities to voice their opinion on whether subcontracts should be awarded at all. Such an agreement has also been concluded in a subsidiary of *Steel*. And at *Steel* itself, there has long also been a code of conduct that obliges contracted companies to comply with legislation on health and safety and codetermination.

Over the past few years, the issue of the socially responsible management of subcontracts has gained additional momentum in the steel company. Under the guidance of the HR department, structures are being put in place that are intended to improve the implementation and monitoring of health and safety and 'fair work' regulations in contracted companies. They include:

- Regular **surveys of workplace accidents** and implementation of effective preventive measures. In recent years, these measures have led to a considerable reduction in the number of accidents in contracted companies (from around 25% at the beginning to now less than 10%).
- A revised and extended **code of behaviour** for contracted companies, which also contains measures for monitoring and sanctioning infringements. It is an integral part of any contract and, in particular, contains detailed regulations on health and safety, obligations on disclosure (of accidents, for example), the commissioning company's monitoring rights and the obligation to comply with statutory and (if applicable in the partner company) collectively agreed norms. Infringements of statutory or collectively agreed norms or of other provisions contained in the code of behaviour are regarded as breaches of contract. Such breaches of contract may give rise merely to reprimands or to claims for damages and exclusion from future calls for tender, whereas infringements of health and safety regulations may incur an additional fine of up to 1,000 euros per infringement and, in serious cases, possible termination of the contract.
- A **contact point** with its own dedicated staff that is to put in place internal procedures to facilitate both the prevention and disclosure of breaches of the law and the effective

monitoring and implementation of regulations laid down in the code of conduct. This is in accordance with a decision of the supervisory board which backs up the activities of this contact point and strengthens their internal bargaining power (in particular vis-à-vis the purchasing department).

The focus in what follows is on the company's own contact point, which was set up in 2014 in the HR department as a pilot project, initially for a period of three years. According to the interviewees with responsibility for the project (interview M1), the main factors driving it were, on the one hand, a strong commitment on the part of the current HR director, who has placed greater emphasis than his predecessors on health and safety and employment and working conditions more generally in subcontracts. Not the least of the reasons for this is a peculiarity of the German right to codetermination in the coal and steel industry. In the large companies that are co-managed on the basis of the coal and steel industry model ('*Montanmitbestimmung*'), the 'Human Resources Director' ('*Arbeitsdirektor*') a position frequently held concurrently by the head of the HR department, is elected on the suggestion of the employee representatives on the supervisory board. In the present case, the Human Resources Director had previously worked for many years as a works councillor. His engagement for more socially sustainable sourcing strategies was triggered in particular by internal statistics revealing a disproportionate high rate of workplace accidents at the labour supply companies. The focus of the companies' activities at the beginning was therefore on occupational health and safety measures, which according to regular surveys have contributed to reduce the accident rate considerably. A second favourable factor was that, in the course of the regular meetings with the works council on the topic of subcontracts, the further development of the measures already put in place was also discussed. Finally, and most decisively, developments in the legal sphere, in particular the re-regulation of temporary agency work, the public debate and case law on bogus subcontracts and the introduction of the minimum wage legislation, including general contractors' liability, encouraged the realisation that infringements of the law by labour supply companies also harbour considerable economic risks for commissioning firms. Accordingly, five risk areas have been identified to be investigated as a matter of priority: bogus subcontracts/illegal hiring out of workers; bogus self-employment; illegal employment of foreign workers; moonlighting/ clandestine work and the minimum wage legislation/general contractors' liability. These five risk areas fall within the spheres of responsibility of the four employees assigned to the project, while health and safety issues are dealt with separately in a dedicated department that is significantly better staffed (not least because it is dealing with health and safety of *all* employees at *Steel*).

Work on the project can be divided into three main strands: 1) monitoring and sanctions 2) training 3) prevention.

- (1) **Monitoring and sanctions:** Leads given by employees are used to pursue possible infringements. Information on the contact point is given out in the course of training events (see below) and on posters. In this way, employees of labour supply companies are to be enabled to avail themselves of the right of complaint enshrined in the collective agreement. To date, however, only employees of *Steel* but not of the labour supply companies themselves have approached the contact point with evidence of possible infringements. Staff at the contact point then conduct site inspections and interviews at the labour supply company, with the assistance of the purchasing department and if necessary the health and safety or legal department, in order to ascertain whether infringements have actually occurred, what measures should be taken to stop them and, if appropriate, what sanctions should be imposed. The decision on sanctions is then in the hands of the relevant purchasing department; the appraisals made by the pilot project are only recommendations. According to our interviewees on the pilot project (interview M1), in the first 1½ years of the project's life there was no case in which a contract was terminated early because of infringements in the five risk areas listed above. Rather, the main purpose of the interviews is to ascertain the actual circumstances of the case and to clarify the contractual rules and requirements. As one of our interviewees emphasised, this often has a signalling effect for companies, since it makes them realise that their compliance with labour law is being monitored. The presentation of the project at the annual 'partner company day', to which all labour supply companies are invited, was intended to achieve the same objective.
- (2) Another important element of the project is the **training courses** for managerial staff and employees that aim to raise their awareness of the five risk areas by explaining, for example, that labour supply company employees should not be given any instructions because this crosses the boundary between subcontracts and temporary agency work and may mean that the subcontract has to be categorised as a bogus contract. This makes it clear that the main thrust of the project is not simply to improve the working and employment conditions of labour supply company workers but also to ensure that flexibilisation instruments such as subcontracts are drafted and implemented in accordance with the law. Employees at all levels of the hierarchy take part in these training events; with approximately 2 events per week (each lasting 3 hours), each for 20-30 participants, several hundred employees have already been trained. For the project workers themselves, the training events are also occasions on which they may receive important information and in some cases concrete evidence. Furthermore, according to one of our interviewees, they also serve as a forum for employees from all levels of the hierarchy and areas of responsibility to swap notes with and learn from each other – e.g. employees from the purchasing department who draft the contracts and employees from the 'shop floor' whose task it is to put the contracts into practice on behalf of the company.

- (3) Finally, the project offers the relevant purchasing departments **support in selecting labour supply companies** for the purpose of preventing infringements of norms and ‘unfair’ work. There have already been cases in which purchasing departments have asked the contact point to check up on individual companies that have submitted a bid in response to a call for tenders. In such cases, the contact point gets in touch with the firm in question and tries to obtain further information and, where appropriate, documentation that might offer clues to their reliability. In doing so, it is reliant on self-disclosure; on this basis, it assesses whether there are still doubts about the company’s reliability or whether the initial concerns are unfounded. Project workers’ involvement in purchasing processes is currently confined to contracts with *new* partner companies. Even here, it is by no means routine. This is due, firstly, to the meagre personnel resources; the question of how many employees are eventually to be assigned to such work will only be decided in the course of the project. Furthermore, at the time of the interview, an internal purchasing guideline developed by project staff had been submitted for approval; this new guideline will make it a routine part of the purchasing process for new partner firms to be evaluated from a labour law perspective prior to the award of any contract.

One common characteristic of all three sets of measures is their emphasis on dialogue and education, the aim being to heighten awareness and change behaviour – both in the contracted companies and among their own colleagues and purchasing department. Severe sanctions and prescriptive instructions play a less important role. However, it takes time to bring about a ‘culture change’ of this kind, as our interviewees repeatedly emphasised. Consequently, it is not intended that the project will end after 3 years; rather it will be decided at the end of the 3-year trial period where and how it is to be permanently embedded in the company’s organisational structures.

The fact that the project is only in its initial phase was put forward by our interviewees on the pilot project as the reason why the company’s code of conduct stipulates that only the national minimum wage, rather than a higher, collectively agreed rate, is binding. However, other reasons put forward by the interviewees suggest that this is not currently a top priority. Hence, it is primarily up to the purchasing department to decide whether or not the declared ambition of contracting only with companies covered by collective agreements whenever possible will be realised. In the view of our IG Metall contact, who is also familiar with developments at *Steel*, the purchasing department’s commitment to coverage by collective agreement is by no means universally high. The reasons he gave for this were, firstly, that it is in the company’s own interest to receive low bids and, secondly, that the collective agreement landscape is now so fragmented that extensive knowledge on the part of the purchasing department is required. Consequently, there is a strong incentive for the purchasing department to adopt the statutory minimum wage as its only point of reference:

'Who in the purchasing department actually knows what the collective agreements stipulate and what the rates of pay are? We would have to have the agreements with NGG, EVG, IG Metall, IG BAU and Ver.di in front of us in order to be able to assess in any way at all whether what is being paid is more or less compliant with the collective agreements. And now that the minimum wage sets the legal wage floor, so to speak, we only need to ask 'Are they paying 8.50 euros or not?'. This is very convenient for purchasing managers.' (IG Metall union secretary, Interview G1, authors' translation)

In so far as any attention at all is paid to compliance with collective agreements, efforts are often confined to checking directly contracted firms only while their sub-contractors are ignored. Another of the project's weak points, in his eyes, is that all the monitoring is carried out internally by the company's own employees. He sees conflicts of interest at work here, in both the works council and management, that occasionally stand in the way of more thorough monitoring and more severe sanctions. When infringements are identified, he argues, management is faced with the problem that severe sanctions may significantly disrupt the company's normal operations. And as for works councillors, the risks for core employees may reduce their interest in uncovering bogus subcontracts:

'So when it actually comes out that we're talking about bogus subcontracts or illegal agency work, that may mean under certain circumstances that works councillors are arranging for outside personnel to suddenly appear on Steel's payroll. In view of Steel's current economic situation, I believe that's a conflict of interest that isn't so easy for works councillors to resolve.' (IG Metall union secretary, Interview U1, authors' translation)

Because of these ambivalent interests, the IG Metall representative also regards purely internal monitoring processes as inadequate and advocates a combination of internal and external monitoring, since the latter have a stronger deterrent effect and thus would have spill-over effects above and beyond the actual monitoring procedures.

'You see if someone from outside ensures that a company like that actually disappears, that has a quite different effect, because it's also communicated quite differently than if someone inside the company tries to find a way of solving the problem while keeping a lid on it as far as possible.' (IG Metall union secretary, Interview U1, authors' translation)

As a model, he points to the example of a meat processing company where monitoring is carried out annually by an external agency, and to an initiative launched by Steel's Human Resources Director, who in one suspicious case actively involved the German Customs (which is responsible, among other things, for monitoring compliance with the minimum wage legislation) and initiated a large-scale monitoring exercise on the company's premises. For the IG Metall representative, however, the biggest obstacle to effective monitoring lies in the sheer

volume of subcontracts at *Steel*, where several thousand labour supply companies operate over the course of a year, accounting for up to 20% of all workers on the site. The resultant complexity poses almost insuperable challenges for the pilot project and the works council; the works council member also reported on this at the workshop held at the IAQ in December 2015. In the IG Metall representative's opinion, this requires at the very least reforms to the codetermination law in order to put the various parties in the workplace in a position to reinvigorate even more strongly the instruments for the socially responsible management of subcontracts. In particular, the right of complaint enshrined in the collective agreement requires the works council as well to allocate sufficient personnel to it. The current legislative reforms, however, have failed to include a regulation that contract workers should be included under certain conditions when staffing levels for the works council committee are calculated, as agency workers already are.

Conclusion

Following the partial re-regulation of temporary agency work by means of statutory and collectively agreed norms, the focus of the social debate and the disputes between the social partners switched to another instrument of flexibilisation, namely subcontracts. The approaches to the re-regulation of agency work can be seen not only as precursors but also as a *cause* of the debate on subcontracts, because they changed the social partners' interests, albeit in diametrically opposed directions. For the trade unions and works councils, whose main concern with regard to subcontracts had hitherto been to prevent or, at least, restrict outsourcing, they contributed to a heightened awareness of peripheral workers' employment conditions. For the employers, on the other hand, the re-regulation of temporary agency work increased interest in the use of less highly regulated flexibilisation instruments such as subcontracts. In the steel companies, however, there are, as the present case study illustrates, overlaps between the interests of management, on the one hand, and the trade unions and works councils, on the other, such that the strategies adopted by both sides are pulling in the same direction to some extent. Management's interest in ensuring that subcontracts comply with the law does not, it is true, completely coincide with the trade unions' and works councils' interest in reducing the use of this flexibilisation instrument. However, the two sides share the goal of establishing 'fair' working and employment conditions in the contracted companies, although the two sides differ in their views of what exactly constitutes 'fair' work and where the priorities should be set. This is particularly evident in their differing positions on the question of coverage by collective agreement in the contracted companies. Ultimately, however, both the 'top-down' and 'bottom-up' approaches to the socially responsible management of subcontracts help significantly to narrow the pay and protection gaps between the core workforce and contract workers.

However, the persistent divergences of interests mean that the overlaps and strategies tending in the same direction cannot be taken for granted. In the case of the steel industry, one favourable factor is the fact that the position of 'Human Resources Director' (*Arbeitsdirektor*), which exists because of the industry's particular co-determination regulations, constitutes a firmly established intermediate institution within company management structures; depending of course on the office holder's personal commitment, this may be a channel through which a balance can be sought between the company's economic objectives and employees' concerns and interests. Above and beyond that, the following observation by Wright/Brown (2013: 24) also applies to the development of strategies for socially sustainable sourcing: "Although these strategies may deliver business benefits, lead firms will generally not adopt them unless pressured or persuaded by third parties." In the present case, the comparatively strong trade unions and works councils in the steel industry are just such a (semi-) external force capable of driving the development of strategies for the socially responsible management of subcontracts from the top down and the bottom up, even though it was only after a series of rethinking and learning processes that they began to make increasing use of the legal possibilities and power resources at their disposal. Finally, the legal reforms and debates about reform have been an important driving force, as we have seen.

This last observation underlines the close intertwining of legal, collective and company-level approaches to regulation that are, overall, characteristic of the dynamics described here. This also applies to the new set of regulatory instruments themselves. For the most part, the collective agreement lays down substantive standards that are already incorporated into legislation, while the company agreements that implement the collective agreements are also based primarily on statutory norms. Consequently, they do not create any new rights but rather reinforce and in some cases duplicate them by incorporating them into *private* contracts between commissioning organisations and contractors (i.e. between principal and agent). Besides their function as calls to action, these agreements create new monitoring and sanctioning mechanisms governed by private law - such as the right to unannounced site inspections, the obligation on firms to provide information and allow access to company documents and contractual penalties in the event of a lack of cooperation or confirmed violations.

The effectiveness of monitoring procedures and sanctions depends of course on the resources devoted to them and the mode of implementation (internal vs. external), although both internal and external monitoring procedures have their specific advantages and disadvantages. Spot checks carried out by outside bodies possibly have a greater deterrent effect. On the other hand, in the *Steel* case study at least, internal monitoring procedures have the advantage of enabling a comprehensive system of continuous 'social monitoring' of contracted companies to be built up through the provision of extensive training courses for company employees. Such a system also offers more leeway for showing forbearance in the event of violations in the interest of

keeping operations going. Aside from this, however, once outsourcing has reached a certain level and contractual relationships in subcontracting chains have attained a certain degree of complexity, there do seem to be justified doubts as to whether all approaches to the regulation and monitoring of working and employment conditions in contracted companies will come up against certain limits, regardless of how they are organised and implemented. Thus from the point of view of ensuring 'fair' employment conditions in such companies, strategies that aim to reduce the excessive use of subcontracts seem to make sense. However, as is shown by the example of the contracted company that did not have its contract renewed after operating on the commissioning company's premises for decades, care must be taken not to create new dislocations when efforts are being to reduce outsourcing, a practice that has been going on for decades.

10 Mini-jobs: A hands off approach

Introduction

Mini-jobs constitute a specific form of short part-time work in Germany, one that is particularly widespread. Employees in mini-jobs are not covered by the general obligation to pay social insurance contributions and they do not have to pay any income tax on their earnings either. The number of mini-jobs has increased substantially over the last decade, reaching almost 7.4 million in June 2015 (Bundesagentur für Arbeit 2016a). Around two thirds of the employees hold the mini-jobs as their only job, whereas one third of the mini-jobs are second jobs, held alongside a main job.

At the same time, mini-jobs are one of the most hotly contested employment forms in Germany. Whereas they are criticised by the trade unions and also by an increasing number of employers' associations and labour market experts as a form of precarious work and an impediment to women seeking to participate in the labour market on more equal terms, they remain popular with many employers and employees. They offer employees an opportunity to earn up to 450 euros per month without deductions for taxes and social insurance contributions, while employers value them as a particularly flexible and cheap employment form.

The present case study presents empirical findings on the extent to which this employment form can be characterised as precarious and analyses the reforms and proposals for reform made in the recent past as well as the strategies adopted by the social partners for dealing with mini-jobs.

Methodology

The case study draws mostly on an analysis of available documents, press reports, academic literature, statistics, own supplementary quantitative analyses, and additionally on interviews carried out during the 1st stage of the research project with

- 2 representatives from umbrella organisation of employers' associations (BDA) (Interview E1)
- 2 representatives from umbrella organisation of trade unions (DGB) (Interview U1)
- 2 trade unionists responsible for retail industry (Ver.di North-Rhine Westfalia) (Interview U2)
- 1 representative from employers association for retail industry in North-Rhine Westfalia (HD NRW) (Interview E2).

Stop-go: the regulation of marginal part-time employment since the mid-1990

Exemptions from taxes and social security contributions for “marginal employment” were introduced as early as the late 1950s in order to encourage housewives to take up at least a small part-time job, and to solve the problem of labour shortages in several industries. Compared to the average amount of total deductions for other employees, which is currently about 21% of gross pay in Germany, mini-jobbers’ exemption from tax and social insurance contributions is a considerable subsidy for low paid jobs, and it is granted completely regardless of employees’ other earnings, assets or household income. Although the situation in the labour market has changed over the last decades, the institution of marginal employment and its exclusion from the social insurance system has not disappeared and the regulations applying to it have not been substantially modified, despite several reforms and reform attempts.

The most far reaching attempt so far to stop the expansion of mini-jobs was a reform in 1999 by the then new SPD-Green coalition. The declared objective of the reform was significantly to restrict the number of marginal part-time employment relationships by lowering the earnings ceiling for mini-jobs from 620 to just 300 DM (Bundesministerium für Arbeit und Sozialordnung 1998). However, this objective was abandoned in the legislative process and the ceiling was eventually set at 630 DM per month. Marginal part-time employment was now to be restricted in the medium term by abolishing the annual uprating of the earnings ceiling. The other objectives of this reform were to improve employees’ social protection and to strengthen the financial basis of the social insurance schemes by introducing flat-rate social insurance contributions for employers, set initially at 22% (or 10% for private households). Employers previously had had to deduct a flat-rate income tax of 20%, although they could pass this on to their employees (cf. Rose 2003: 113). The new flat-rate employers’ contribution did not, however, give marginal part-time employees any entitlement to social insurance benefits (except very low pension entitlements). It was intended primarily to ensure that companies did not favour mini-jobbers because of their lower non-wage labour costs. At the same time, however, mini-jobbers were given the possibility of topping up the employer’s contribution by making their own contributions up to the standard level (at the time 18.7% of total pay). However, even if they took advantage of this ‘opt-in’ offer, the resulting pension entitlements would remain meagre because of their low monthly income.⁵² The 1999 reform also abolished the exemption from income tax and social insurance contributions for those whose mini-job was a second job. Despite fierce criticism and vigorous lobbying by various industries (notably

⁵² According to a 2012 survey of mini-jobbers, only 7% were taking advantage of this arrangement (RWI 2012).

newspaper publishers, agriculture and the hotel and restaurant industry, cf. Rose 2003), the reform came into force in March 1999 (Deutscher Bundestag 2003).

The more recent reform of 2003 constituted a complete policy U-turn. Efforts to contain the spread of marginal part-time employment were no longer on the political agenda. Rather, the so-called ‘mini-jobs’ were now seen as a means of making the labour market more flexible and creating incentives to take up employment in the lower income brackets (Deutscher Bundestag 2003). Against this background, several changes were agreed with a view to expanding marginal part-time employment. The earnings ceiling was raised from € 325 to 400, the working time ceiling of 15 hours per week was simply abolished and the obligation on those whose mini-jobs were second jobs to pay income tax and social insurance contributions, which had only been introduced in 1999, was scrapped. Furthermore, a so-called ‘transition zone’ for incomes between 400.01 and 800 euros was introduced, in which employees’ social insurance contributions rise in stages from 4% to the standard 21% rate (‘midijobs’). The earnings ceiling was raised to € 450 per month in 2013 and the transition zone now ends at € 850.

A further change after 2003 affected employers’ social insurance contributions, which were raised in 2006 to around 31%. This took them to a level about 50% higher than the contributions for regular employees (currently about 21%). However, employers seem in the past to have compensated for the higher contributions burden by adopting a number of circumvention strategies (see next section). For employees, there was another change to the pension arrangements in 2013, albeit a largely symbolic one. They can still exempt themselves from the compulsory insurance but have to actively apply to do so (i.e. opt out); otherwise, they automatically pay the top-up contributions.

All things considered, therefore, the reforms of the last two decades, by introducing (in some cases voluntary) social insurance contributions, have brought mini-jobs into line to some extent with regular employment forms. However, in contrast to what was planned at the beginning of this period, no further restrictions have been introduced. On the contrary: the raising of the upper limit on weekly working times and the two increases in the earnings ceiling have actually extended the sphere of application.

A strong increase, mainly driven by second jobs

While the 2003 reform was swiftly followed by a sharp increase in ‘pure’ mini-jobs as a sole job (from 4.4 to 5 million in 2004), the further growth of this employment form since then has been driven primarily by the increase in second jobs, which rose from 930,000 in 2003 to almost 2.5 million in 2015. This seems partly to reflect the overall growth in part-time employment which forces employees, in particular women, to top up their earnings with a second job (Schmidt/Voss 2014). This supposition is supported by the finding that ‘top-up’ mini-jobbers

are most likely to have their main jobs in one of three sectors, namely education, health and social care or public administration (cf. Schmidt/Voss 2014). Part-time working has increased sharply in these three sectors since the 1990s and pay levels there are in the low to intermediate bracket, making it difficult to earn a living wage. Overall, the results of this study point to a gendered profile of second jobs. Women with a second job earn much lower hourly wages and lower monthly wages in their main job than their male counterparts (ibid. 41; see also Rudolph 2011 for similar results). While two thirds of women with a second job are in the two lower quintiles of the earnings distribution with their main job, more than half of the male employees are in the upper two quintiles. Unlike overtime worked in the same job, mini-jobs as a second job are exempt from social security contributions paid by employees, which makes them financially attractive even to middle and high earners.

Women account for the large majority of mini-jobbers. Almost two thirds (61.1%) of all mini-jobbers are female (62.9% among those solely working in a mini-job and 56.1% of those holding a mini-job as a second job – June 2015). Male mini-jobbers are typically in the younger or older age groups, whereas most women working in mini-jobs are middle-aged (often with children). Further groups working in mini-jobs are high-school and university students as well as early retirees and pensioners (> 65 years), who obtain their social protection in other ways. Finally, around 10% of mini-jobbers have their earnings topped up by the means-tested unemployment assistance (“Hartz IV”). The largest group of mini-jobbers works in the retail sector (ca. 900,000 in June 2015), followed by the hospitality industry (776,000) and services to building and landscaping activities (575,000).

There is considerable debate as to whether the increase in mini-jobs constitutes a positive employment effect or, on the other hand, reflects the substitution of standard employment relationships. The overall evidence is mixed. But in certain industries and several companies, insurable jobs have indeed been replaced by mini-jobs (Bäcker 2007; Hohendanner/Stegmaier 2012).

Precariousness of mini-jobs: facts and perceptions

Judging by the material security offered by mini-jobs, this employment form can clearly be classified as precarious work. This is related to several issues: the low level of (hourly and monthly) earnings, the exclusion from the social security system and the widespread discrimination in terms of paid holidays, sick pay and other employment rights (see below). Moreover, mini-jobbers are also more likely to be working on demand. In a survey on work-on-demand carried out in 2010, 13% of mini-jobbers stated that they had a work-on-demand contract (compared to 7.5% for regular part-time workers and 3.7% for full-time workers) (Schult/Tobsch 2012). It is assumed, however, that informal types of work-on-demand are more

widespread, and this is also supported by other results who find that more than a third of mini-jobbers is working 'on-demand' (see chapter 3).

Nevertheless, mini-jobs are still quite popular among certain groups of employees. The first reason for this popularity relates to the fact that earnings are paid without any deductions – at least at first glance. Many mini-jobbers obviously do not realize that this is frequently an illusion, given the fact that many employers discriminate against them by paying lower wages or by not providing other legal entitlements (see next paragraph). The second and more complex explanation is closely related to the tax and social insurance arrangements that underpin the old-fashioned German arrangements which still support the single (male) breadwinner model: i.e., the system of joint taxation and the derived entitlement to social protection for economically inactive spouses. Working as a mini-jobber does not reduce the tax splitting advantage and mini-jobbers remain covered by their partners' health insurance at no extra cost. Accordingly, the marginal deduction rates for an increase in working time and earnings above the mini-job threshold are extremely high. Depending on the family's marginal tax rate, they can easily be in excess of 100% and thus can act as a very effective brake on any increase in the female labour supply.

The strong rise in the numbers of mini-jobs in recent years cannot, however, be explained solely by the preferences of certain groups of employees. Employers' strategies to increase the use of cheap and flexible mini-jobbers must also be taken into account, especially in the service sector. This might be surprising at first sight, given that, as explained above, the attractiveness of mini-jobs is less obvious from an employer's perspective as they have to pay a flat-rate contribution of around 31%, which is considerably higher than for regular jobs covered by social security. This is intended primarily to ensure that companies do not favour mini-jobbers because of their lower non-wage labour costs. In practice, however, it is quite evident that employers are frequently successful in reducing labour costs substantially, not least by non-compliance with equal pay and basic employee rights. Although mini-jobbers, like all other German employees, are legally entitled to holiday and sick pay and other employment rights, in many cases they are paid only for the hours they work and hourly wages are frequently very low. In 2013, around two thirds of all mini-jobbers earned less than € 8.50 per hour, and almost one quarter earned even less than € 5. Previous evidence of widespread discrimination against mini-jobbers is provided mainly by qualitative studies (Benkhoff/Hermet 2008; Voss-Dahm 2009; Voss/Weinkopf 2012). It has been confirmed recently by the results of several survey studies (RWI 2012; Wippermann 2012; Fischer et al. 2015).

In the RWI study, surveys were carried out among both mini-jobbers and companies. The results clearly indicate massive violations of statutory rights (see Table 13). For instance, according to the survey of mini-jobbers, paid holidays are not provided to 41.5% of the

employees (and another 26.1% answered that they did not know if such holidays were possible or did not answer this question). The results of the RWI's company survey are similar, although one might have expected that companies would not admit non-compliance with fundamental worker entitlements (see Table 10).⁵³

Table 13 Survey Results on Fundamental Worker Entitlements in Mini-Jobs

Responses by	paid holidays		sick pay		pay for public holidays	
	Not possible	No answer	Not possible	No answer	Not possible	No answer
Employees	41.5%	26.1%	38.7%	34.6%	43.3%	36.3%
Companies	31.2%	11.1%	25.6%	10.7%	40.3%	13.3%

Source: Author's calculations based on RWI 2012: 47

Similar findings were produced by a second survey conducted in 2013/14, in which 1,100 companies (with 10 or more employees) and 7,500 employees were asked, among other things, whether and how frequently statutory entitlements were granted (Fischer et al. 2015; Stegmaier et al. 2015). The investigation shows that workers are both less well informed about and less likely to claim their basic rights the lower their weekly working times are, and that this is particularly true of mini-jobbers. Thus around 30% of the mini-jobbers surveyed were of the opinion that they had no legal entitlement to either paid holidays or sick pay (Fischer et al. 2015: 75). The share who do not receive these entitlements is even greater, with only around 50% of the mini-jobbers surveyed enjoying paid holidays or sick pay (ibid. 100; 112). Among full-time and part-time employees in insurable jobs, the figures for paid holidays were 97% and for sick pay more than 95%.

According to the results of the company survey, 14% of companies assume that mini-jobbers are not entitled to sick pay (no entitlement to paid holidays: 18%) (ibid: 92). When asked about the actual provision of these benefits, only 76% of the companies replied that they gave their mini-jobbers paid holidays and sick pay (Fischer et al. 2015: 116 und 147). Table 14 shows that the main reasons the companies gave for refusing mini-jobbers sick pay were that they worked too few hours and that their jobs were largely temporary; the supposed lack of legal entitlement was mentioned by only 41.3%. This discrepancy can be interpreted as an indication that some employers knowingly deny their mini-jobbers their statutory minimum rights, obviously on the

⁵³ The divergence between the responses of employees in mini-jobs and companies might be partly due to the fact that the average size of the companies participating in the company survey was much larger than the companies in which the mini-jobbers responding to the survey were employed.

assumption that they have legitimate, i.e. widely accepted grounds for doing so (temporary nature of jobs).

Table 14 Reasons why mini-jobbers do not receive sick pay, descriptive results (company survey 2013/14)

Reasons why mini-jobbers do not receive sick pay	Share of 'Applies' in % (95%-CI)
Company cannot afford it financially	17.2 (9.5-29.1)
Marginal part-timers are only employed temporarily in the company	73.7 (60.5-83.7)
Marginal part-timers are employed in the company for less than 4 weeks	16.8 (9.0-29.3)
They work only a small number of hours per week	76.3 (63.3-85.7)
Marginal part-timers basically do not have any entitlement to sick pay	41.3 (28.9-55.0)
Other reason	11.0 (5.8-19.8)

Note: projected figures, CI = confidence interval

Source: Fischer et al. 2015: 152

Stepping stone or trap?

In the debate on whether mini-jobs should be regarded as precarious employment relationships, another factor that should be taken into consideration is how long workers remain confined to mini-jobs only and to what extent they act as stepping stones into regular employment. The evidence on this is highly variable and to some extent contradictory. For example, with regard to the question of whether mini-jobbers are actually interested in working longer hours and hence in their jobs serving as stepping stones, a 2009 survey (SOEP) showed that almost two thirds (64%) of the female mini-jobbers surveyed wanted to work more hours (Wanger 2011). Our own supplementary analyses based on SOEP 2013 show that this continues to be the case. Around 54% of all workers whose only job is a mini-job would like to increase their working hours.⁵⁴ And according to another survey, there is certainly a willingness on the part of employers to convert mini-jobs into regular part-time or full-time positions. Approximately

⁵⁴ This contrasts with the results of another survey, according to which only about a quarter of mini-jobbers would like to increase their hours and only 16% would like to take up a regular full-time or part-time positions within the next year (RWI 2012: 55f). In this survey, however, 'top-up' mini-jobbers, high-school and university students and pensioners, all of whom would have much less interest in increasing their hours, accounted for almost 50% of the sample.

61% of the firms surveyed stated that such a conversion was possible in principle and about 39% had actually effected such conversions in the previous 12 months (RWI 2012: 91ff).

However, these findings are not consistent with the available data on mini-jobbers' actual career trajectories. According to the official statistics, each month since 2012 about 55,000 mini-jobbers with no other employment have taken up insurable employment, while a further 40-45,000 have gone into insurable employment with a second job (cf. vom Berge et al. 2016: data tool). Relative to the average total stock of around 5 million mini-jobbers with no other employment, this equates over a year to slightly less than a quarter of all mini-jobbers. On the other hand, a majority of mini-jobbers remain in mini-jobs or move back into unemployment or inactivity. Moreover, it remains unclear how long these jobs last, i.e. what share are seasonal jobs, for example. The study by Wippermann (2012) also makes it clear that mini-jobs by no means constitute a short period in (women's) employment histories, as is often assumed. Persons employed as mini-jobbers on average remained in such jobs for 79 months. For married women and for women with a family member requiring care at home, tenure in mini-jobs was even longer, at 85 and 99 months respectively. Mini-jobs obviously do not act as a "stepping stone" either. Among women who had held a mini-job in the past, only 14% were in full-time work, and 26% in an insured part-time job. More than 50% of these former mini-jobbers had completely left the labour market in the meantime.

Wippermann (2012: 16f) concludes that mini-jobs act "very quickly as effective glue" and adds: "the pure mini-job is an effective (albeit unintended) measure for creating lifelong economic powerlessness and dependency among women." According to this study, women obviously do not take sufficient account of the impact of the tax and social security regulations that favour their second-earner status when taking up a mini-job. From their subjective perspective, the decision in favour of the mini-job is regarded as an individual choice, which is motivated mainly by their intention to match the working time volume and flexibility needs to their current life circumstances. Mini-jobbers' career trajectories certainly cannot be explained solely by their (adaptive) preferences. Thus a study by Brülle (2013) shows that, even after controlling for working-time preferences and further socio-demographic factors, mini-jobbers move considerably less frequently into standard employment relationships. A recent study by Lietzmann et al. (2016) focuses on the group of unemployed *childless singles* taking up a mini-job and finds that for those who are unemployed for at least five months, the probability of being employed in a regular job increases by between 10 and 20 percentage points, compared to their unemployed peers. This can be read as a confirmation for the assumption that 'a mini-job is better than no job' for part of the unemployed. But it can't be read as a confirmation that the proliferation of mini-jobs *improves* the labour market prospects of unemployed, since it doesn't control for the counterfactual case that mini-jobs would be abolished. In other words, this slightly improved employment prospects for unemployed taking up a mini-job merely

indicates that mini-jobs are yet another ‘back door’ into the labour market that unemployed are forced to take if they wish to improve their individual situation. It is still possible that if this ‘back door’ was to be closed, firms would not simply refuse to recruit among unemployed but use other ‘signals’ or a simple probation period to fill their vacancies.

Mini-jobbers’ subjective perceptions are relevant in a second, political regard: women formerly employed in a mini-job are much more critical of the mini-job regulations than those currently in a mini-job. While only 24% of the latter group sees a need for substantial changes in mini-job regulations, among the former mini-jobbers this proportion is much higher, at 63% (Wippermann 2012). This indicates that changes in mini-job regulation would be supported by the majority of older women who have had experience of mini-jobs in the past, but only by a minority of the current female mini-jobbers. This can be regarded as a crucial barrier to reform.

Current policies and stakeholder strategies with regard to mini-jobs

All in all, the forces driving the increase in mini-jobs are diverse, comprising a mixture of employees’ interests, changes in regulation since 2003 and employers’ strategies to increase flexibility and to reduce labour costs. Given the trade-off between short-term (individual/company) benefits and long-term (both individual and societal) costs, opinions on the overall advantages and disadvantages of the special treatment granted to mini-jobs are largely divided. Some people emphasize their contribution to greater flexibility within the German labour market and their high popularity among employers and certain groups of employees. Moreover, it is frequently even questioned whether mini-jobs are precarious at all, because many of the employees are second earners. From a gender perspective, however, there can be little doubt that, in conjunction with other features of the tax and benefit system (joint taxation, derived benefit entitlements for married women), the mini-job regulations create strong incentives for married women in particular to enter into and remain in fragmented employment relationships with very low earnings.

Against this background, women groups within the DGB trade unions, along with other women’s rights organisations (e.g. Deutscher Frauenrat 2010), have for a long time demanded the abolition of this atypical employment form. The demand was officially taken up by the DGB trade unions in 2012. In previous years, some of the unions had tacitly welcomed the retention of this type of atypical employment, according to Palier/Thelen (2010), who attribute this to the prevalence of the male breadwinner/female second-earner model among union members in the male-dominated manufacturing unions. Our interviewees at the DGB agreed that this might partly explain why manufacturing unions are less engaged in lobbying for the abolition of mini-jobs. Yet they stress that the basis for this reluctance is dwindling, because the male breadwinner model is no longer the model of choice for younger workers (Interview U1). Another reason might be the financial incentives for male union members taking up mini-jobs as a second job

(see above). In 2012, the DGB trade unions nevertheless agreed on a reform proposal aimed at removing the incentives for short part-time work and to fully include all part-time workers in the social security system (DGB 2012). They suggested that exemptions from income tax for mini-jobs should be abolished and that employees' and employers' social insurance contributions should be levied at the full rate of around 42% from the first euro earned but that they should initially be distributed unevenly between employees and employers and then gradually aligned until they converge at a monthly income level of 800 euros. For employees, this would entail a gradual increase in their contributions (from 0% to 21%), whereas employers' contributions would gradually decrease (from 42% to 21%). At the same time, the DGB also decided to plan a broad media campaign in order to solicit support for their reform proposal. This campaign was, however, postponed and is now to be launched in the run-up to the next parliamentary election in 2017, in order to influence the next coalition agreement, according to our interviewees from the DGB.

Unlike in the case of temporary agency workers (see section 4 in the first part of the report), there is little evidence of particular trade union strategies aimed at *organizing* mini-jobbers – with the notable exception of the contract cleaning industry. Here, mini-jobbers constitute the majority of blue-collar workers in many firms. Repeated industrial action, most notably a strike in 2009, not only finally led to higher wage rates but also helped to mobilize cleaners in mini-jobs, although this did not lead to any lasting increase in union density. Still, at 20%, mini-jobbers make up a considerable share of trade union members in the cleaning industry and are thus a “significant political factor” in the trade union, according to a representative of IG BAU (Riedel 2012). In other industries, in contrast, mini-jobbers are less of a powerful support for unions, and vice versa. In the case of the retail sector, a trade unionist explained that it would make little sense to target organizing campaigns at mini-jobbers because it would have little effect to call a strike at a certain company with the mini-jobbers only (Interview U2). This illustrates the general trend noted in the first part of the report (see section 2.2), namely that industrial action in the service industries is often focused on single companies instead of the whole industry. For this kind of strike, organizing campaigns usually try to mobilize the whole workforce of a particular company or establishment, without distinguishing according to the type of contract, because it requires the unified effort of all employees to give weight to their claims. Thus, part of the explanation for the limited campaigning efforts targeting mini-jobbers seems to be that they represent an – albeit large – minority in most service sector industries and that the representation gaps in these industries are so great even among ‘core workers’ that trade unions’ primary concern is firstly to establish the basic structures for interest representation, such as collective agreements and works councils. Put differently, unlike in the case of temporary agency work, mini-jobs are not a ‘hole’ in the well-organised core (i.e. manufacturing industries), where strong unions and works councils are able to fight for the rights of atypical

employees, but a ‘hole in the margins’ of the labour market, where these basic structures of representation do not exist.

Although the DGB trade unions, as well as several independent experts, have repeatedly demanded the abolition of mini-jobs over the last decade, politicians have remained very reluctant in this respect, not least for fear of voter retaliation in future elections. The current coalition agreement between the SPD and CDU, concluded in 2013, merely states that mini-jobbers should be better informed of their rights and that the government intends to facilitate the process of moving from marginal part-time employment into regular insurable employment. To that end, a number of projects supported by the Federal Employment Agency have been going on at local level for some years, the aim being to support benefit claimants in their efforts to convert their mini-jobs into insurable employment. Some of the projects have been very successful, although only a small proportion of mini-jobbers (about 10%) have been involved. The employers’ associations continue to oppose the abolition of mini-jobs on the grounds that mini-jobs are ‘an indispensable flexibility instrument’ (BDA 2016, also Interview E1) and are required in order to meet the need for flexible part-time labour (HDE 2015). However, the HDE (the employers’ association in the retail sector, where the largest group of mini-jobbers is employed), along with other employers’ associations, has been prompted by the increasing volume of reports and findings on the failure to give mini-jobbers sick pay or paid holidays to launch a campaign to inform its member companies of mini-jobbers’ rights (Interview E2).

Thus the reforms that *directly* address the regulation of mini-jobs are currently at a standstill. However, the introduction of the national minimum wage in 2015 has *indirectly* had considerable effects on marginal part-time employment. One of the things that have been affected, hardly surprisingly, is pay. In the wake of the minimum wage, mini-jobbers’ hourly pay has risen considerably faster than that of workers in insurable jobs (5% higher than in previous year in each of the first and second quarters of 2015, compared with 2.5 and 3.2% respectively for all employees) (cf. Amlinger et al. 2016: 10). Secondly, the minimum wage has led to an unusually sharp decline in the number of mini-jobbers with no other employment. On the introduction of the minimum wage in January 2015, the seasonally adjusted number of workers with a mini-job only fell by about 94,000. At the same time, insurable employment rose and the number of moves from mini-jobs into jobs liable for social insurance contributions virtually doubled (cf. vom Berge et al. 2016). The decline in the number of mini-jobs and the simultaneous rise in insurable employment can be observed particularly in low-wage sectors, such as the hospitality and private security industries (ibid: 28ff; see also Amlinger et al. 2016: 15).

Various reasons have been put forward to explain this decrease in mini-jobs, notably the conversion of mini-jobs into regular part-time jobs at the same employer as a result of the hourly wage increases, which raised mini-jobbers' monthly earnings above the maximum threshold (currently 450 euros). In the view of our interviewees from the retail employers' association, these conversions also reflect the employers' preferences, because the higher wages meant that mini-jobbers were unable to work sufficient hours and hence became inflexible (Interview E2). Another explanation might be that employers' abilities to pay mini-jobbers *lower* wages than to their regular employees was now restricted due to the national minimum wage, and that as a consequence the use of mini-jobs was no longer financially attractive to firms, not least because of the higher employers' contributions to social security. And finally, another mechanism could be that mini-jobs were destroyed as a result of the sharp wage increases. This latter reason seems to be of lesser importance. Initial analysis shows that around half of the additional transitions from a mini-job (to other jobs, unemployment or inactivity) spurred by the introduction of the minimum wages were transitions into jobs covered by social protection, while transitions into unemployment were of little relevance (cf. vom Berge et al. 2016).

It remains to be seen whether the decline in mini-jobs in the wake of the minimum wage will continue. However, the data available to date (up to August 2015, see vom Berge et al. 2016: data tool) suggest that this was a one-off effect. Reforms of the institutions that indirectly support mini-jobs, and particularly the income splitting tax regime for married couples, would presumably have a greater effect. Furthermore, there is less resistance from the employers' camp to abolition of the income splitting tax regime. Since 2013, the Confederation of German Employers' Associations (BDA) has been calling for the abolition of the financial incentives in tax and social insurance law that stand in the way of an expansion of the female labour supply (BDA 2013). The representatives of the BDA whom we interviewed (Interview E1) explained that their organisation did not support the complete abolition of mini-jobs but had a preference for indirect measures that would be likely to increase women's interest in working longer hours. Moreover, DGB trade unions have spoken on various occasions in favour of a switch from joint to separate taxation. However, whether this is politically feasible is more than questionable. At the last general election, the SPD and Greens put forward reform proposals that amounted to a restriction of the income splitting advantage. Their poor performance in the elections were attributed in part to these possible tax increases for a segment of the electorate.

Conclusion

Since the 1990s, mini-jobs have developed into an important element of companies' employment strategies in many low-wage industries. Employer's interest in short part-time jobs, which they can use to deal with variable workloads and extended operating hours,

coincides in part with the preferences of students, pensioners and female second-earners who are not dependent on their own earned income in order to meet all their basic needs, at least not in the short term, because they are insured elsewhere, through their parents or spouses, or are in receipt of social benefits. In the medium and long term, however, mini-jobs harbour a number of risks to the material security of women in the core phase of their working lives and are also a factor in cementing the traditional gender division of labour. The fact that more than half of mini-jobbers would like to work more hours is an indication that many of them are now working against their wishes in such jobs for want of any alternatives. Besides the short hours, the low hourly rates of pay and the widespread practice of only paying employees for the actual hours worked (no paid holidays, public holidays or sick pay), which is against the law, all contribute to the precariousness of mini-jobs.

However, concern with the interests of the electorate (which have to be assumed – there are no survey data on this) and the hostile attitude of the employers' associations must largely explain why there have been no serious political initiatives since the 1998/99 reform to restrict marginal part-time employment, despite repeated demands from trade unions, women's associations and charities. Instead, policy makers and the labour administration have concentrated their efforts on supporting transitions into insurable employment and informing mini-jobbers of their rights, in some cases supported by information campaigns directed by employers' associations and trade unions. As trade union experiences show, however, it is extremely difficult to mobilise mini-jobbers to defend their rights and demand appropriate remuneration.

Thus while the systematic restriction or even the abolition of mini-jobs has not featured on the political agenda for a long time, changes in the general regulatory environment can help to improve mini-jobbers' employment conditions and reduce the number of mini-jobs, as the introduction of the minimum wage has demonstrated. Even more far-reaching effects would presumably be achieved by reforms of the institutional framework that has played a major part in the spread of mini-jobs, namely the income splitting tax arrangements for married couples and the derived entitlements to social insurance for spouses. Unlike the complete abolition of mini-jobs, this would merely change the financial incentive structure for the (predominantly) female second earners, and not those for other groups like students and pensioners. The positions of the social partners on this point have recently converged, since for some years now the employers' associations have been critical of the disincentives that militate against substantial levels of labour market participation among women. However, attempts to reform the tax arrangements for married couples have failed on several occasions in the past, so that it is difficult to assess whether this consensus between the social partners will have sufficient traction to bring about such a reform.

11 Summary and conclusions

Changes in the German political and industrial relations landscape have a twofold impact on the existing regulatory gaps and the ways as to how these gaps can be closed via social dialogue: First, German industrial relations have hybridized because the autonomy of collective bargaining was supplemented by state interventions setting minimum wage standards. This development points to general re-regulatory efforts within the German labour market in order to counteract the expansion of the precarious work and low-wage work sector. Second, the German labour market is currently characterized by a co-existence of both high and increasing levels of employment and a large low-wage/precarious work sector. Therefore, even in light of certain re-regulatory efforts the regulatory burden of the past decades of de-regulation, and the representation gap in terms of i.e. declining works council coverage are still omnipresent. Moreover, dominant employers strategies are still geared towards wage competition based on both an intense use of atypical employment and a broad range of cost cutting strategies for those in standard employment, e.g. by outsourcing production or exiting collective bargaining. The social partners in Germany are thus confronted with novel developments in both the German industrial relations system and the labour market.

Protective gaps in dualized labour market

The dualized nature of the labour market is a result of a broad range of factors, including institutional reforms in the first half of the 2000s, but also more longstanding structural trends, as indicated by the longstanding trend of wage moderation, and the strong increase in low-wage work and mini-jobs since the mid-1990s (cf. Bosch/Weinkopf 2008; Dustmann et al. 2009; Dietz et al. 2013; Jaehrling 2017). Overall, the evidence presented above is broadly consistent with other studies that have highlighted how a decline in collective bargaining, decreases in union density and cuts in unemployment benefits have tended to reinforce the asymmetrical relaxation of employment protection legislation and to channel risks to the periphery of the labour market, either intendedly or unintendedly (Palier/Thelen 2010; Eichhorst/Marx 2012; Hassel 2014). However, our findings also show that the asymmetrical distribution of risks doesn't mean that employees on standard contracts have been spared; on the contrary, they have become increasingly exposed to a number of protective gaps, too, which in turn also limits their resources and organisational power to improve working conditions for non-core workers.

With regard to **employment rights gaps**, wage inequality received a strong boost over the 2000s, with a drop in real wages that was particularly strong at the lower end of the wage distribution, but also lead to decreases at the median wage level. The introduction of the national minimum wage in 2015 put an end to extreme forms of low pay and is an important

first step towards reducing the pay gap between regular and atypical employees. However, it is still a far cry to 'equal pay' e.g. for temp agency workers who despite the European Directive on TAW usually receive much lower wages than their colleagues in the hiring firm, due to opening clauses of the respective law. The same is true for employees in subcontracting firms and posted workers. The main rationale behind using posted work and subcontracting is frequently to circumvent the higher wage levels in firms covered by collective agreements.

Apart from low hourly wages, the spread of low and variable number of working hours adds to low and insecure earnings. So far, both legal regulations and collectively agreed rights have predominantly focused on reducing maximum weekly working hours and facilitating access to part-time employment. Securing minimum working hours, by contrast, is only an emergent issue. Zero-hours contracts (widespread in the UK) are not legal, but the law on 'work on demand' in many respects fails to define clear limits. No legal regulations define minimum working hours or rule out split shifts. Many employers have benefitted from these and other regulatory gaps and made part-time work a dominant strategy to cut costs.

One of the most important and currently much discussed **gaps in social protection** is the relatively low level of pension entitlements even for medium wage earners. Unlike in many other countries, the net replacement rate for low wage earners is not higher than for average or high wage earners – which is all the more severe as the replacement rates are quite low by international comparison. Accordingly, low earnings and periods without employment entail a particular high risk for income poverty in old age in Germany. Furthermore, the at-risk-of-poverty rate among unemployed is the highest in Europe, as a result of both the spread of low wages (and accordingly low benefit entitlements) and the shortened duration of wage related unemployment benefits since the Hartz reforms. Finally, access to affordable health insurance is problematic in particular for solo self-employed, as the minimum contributions are set relatively high, even for those with low earnings – and low earnings are widespread among solo self-employed.

A strong decline in collective bargaining has led to a situation where only a minority of employees in the private sector remain covered by both a collective agreement and a works council (34% in West and 25% in East), whereas those who are represented by neither of the two traditional pillars of the industrial relations system in Germany have strongly increased (see table 2). The **representation gap** is particularly large in small companies and in the service sector, where the overwhelming majority of employees work in companies without works councils who are maybe the most important pillar in securing compliance with labour law. Temp agency workers and mini-jobbers formally enjoy more or less the same participatory rights, but short contract durations, fragmentation of working time and working places as well as organizational boundaries inhibits the effective use of these rights.

Enforcement gaps are particularly important with regard to posted workers and mini-jobbers. In the case of posted workers rule circumvention is widespread by miscalculating working hours and wages or mis-categorising workers into lower pay scales. In the case of mini-jobs, surveys have repeatedly documented widespread non-compliance concerning fundamental statutory employees' rights like sick pay and paid holidays. Hence, contrary to expectations the proliferation of atypical employment has not substituted for non-compliance (because employers have more means to cut costs legally), but rather contributed to facilitate it, since it has moved many jobs out of unions' reach. The issue of enforcement has gained in importance with the introduction of industry specific minimum wages and the national minimum wage, since it is now a large fraction of companies that can be targeted by state inspections. Moreover, a chain liability law enforces employers to watch over their sub-contractors' compliance with labour laws, thereby (potentially) enhancing 'self-enforcement'. Considerable resources are deployed for the state inspections; and additionally, an important fraction of trade unions' resources goes into counselling services for individual employees affected by a violation of their rights. Public and collective support for non-union members remains more patchy. However, since 2011 the German peak union organization (DGB) has established counselling services for migrant workers in several cities, co-financed by the government and European Social fund.

Trade union strategies: Revitalization, dualisation or 'shot-gun weddings'?

The literature on the changing German employment relations identifies several strategies trade unions employ to position themselves within this changing context (i.e. dualization strategies, organizing efforts, see introduction to this report). Our analysis suggests that trade union strategies, within the context of the various existing employment groups and sector characteristics, cannot be easily grouped within one strategy. The results rather resonate with several streams of the literature.

For example, there has been a trend toward what can be called union revitalization strategies in various shapes and sizes. This is for instance true for the IG Metall which not only launched the 'better instead of cheaper' campaign but also negotiated a novel in-firm collective bargaining agreement for posted workers. Such organizing approaches re-emphasize organizational power as a precondition of institutional power (Brinkmann/Nachtwey 2013). The resulting strength in institutional power is visible in the 2012 reform package of temporary agency work. A number of court rulings of the German Federal Labour Court also strengthened the rights of works councilors to represent TAW which again strengthened the institutional power of worker representative bodies in relation to TAW. Moreover, industrial disputes have increased in the service sector. Strikes, mainly at the local level, have been successful in terms of wage increases and in terms of membership recruitment. These examples show a higher willingness of unions to use their power to strike and organize certain segments in the workforce in order to further strengthen their organizational and eventually their institutional power.

Other findings rather seem to support the dualization thesis, at least to a certain extent. The protection of the core workforce at the expense of TAW for instance was a key instrument during the crisis, and was not strongly disputed by the trade unions. The unions' strategies with regard to pension policies have also not made the dramatically low pension entitlements of low wage earners (the majority of which is female) their primary concern, but rather focused on maintaining the pension levels of the (predominantly male) median earner. The latest pension reform in 2014, which strongly bears the signature of the manufacturing unions, is a case in point here, since it secures early retirement options for a small fraction of core workers, while it doesn't improve the situation of low wage workers. A top priority in current reform proposals of both trade unions and the government is to stabilize the replacement rate for all, whereas plans to introduce a minimum pension have been abandoned. However, it would be misleading to simply classify the overall trade union goal to secure the status quo of pension levels as a policy exclusively benefitting core-workers. The decrease of pension levels arguably affects all employees and is of particular relevance for those who de facto don't have access to supplementary pension schemes in order to close their increasing 'pension gap'.

The case of temporary agency work is a similar case in point for what seems to be supporting the dualization thesis at first glance might not capture the full story at second glance. The German law implemented the equal pay principle for temporary agency workers as prescribed by the EU regulation, but left an important backdoor by allowing social partners to agree on lower wages. This backdoor (concessionary law) was originally introduced with the consent of the trade unions, which at the time estimated that this would help them to organize the temp agency sector, probably bearing in mind other examples where concessionary law had indeed backed up unions' institutional power by giving them a means to trade concessions in one area against improvements in others. In the case of temp agency work however this proved to be a fatal misjudgement, since it underestimated the potential role of 'yellow unions' who stood by immediately and were willing to agree on collective agreements with the lowest possible wages. DGB Unions therefore were more or less forced to conclude collective agreements with much lower wages than they had hoped for, in order to restrict the spread of 'yellow' collective agreements. Hence, what might look like an example illustrating the 'cross-class-coalition' thesis in fact has developed into a case in point for what we propose to term 'shotgun wedding in the shadow of the market'. Unions and employee representatives have nevertheless learned to use the opening clause to reduce the pay gap between TAW and the core workforce through collective and company agreements, and also to use these agreements as a means to organize temporary agency workers and strengthen the unions' membership basis. A new strategic dilemma for the trade unions has resulted from a court decision in 2010 judging several 'yellow' collective agreements as unlawful, and the introduction of the national minimum wage in 2015 that is close to the lowest pay grade in the TAW collective agreement. Both elements severely

limit the ability of employers and ‘yellow’ trade unions to agree on very low wages. This therefore led to controversial discussions within the trade union camp whether they should continue to conclude collective agreements that trade the full implementation of equal pay against improvements in other fields (e.g. pay between assignments) and the possibility to further strengthen their own organisational power.

Finally, another example of a ‘shotgun wedding in the shadow of the market’ is the trade unions’ strategy to re-insource workers that have been outsourced via subcontracts. For example, in the retail industry, the union Ver.di in the *Länder* North Rhine Westphalia and Baden Württemberg negotiated a collective agreement for stocking goods in the retail sector (*Warenverräumung im Einzelhandel*) which introduced lower pay grades in the collective agreements in order to give employers an incentive to re-insource outsourced retail store stocking jobs. However, even after these measures have been implemented Ver.di noticed no massive return to in-sourcing by employers. Hence, it seems that the re-regulation by itself is not sufficient to alter the contractual arrangements, possibly because the use of subcontracts has already been institutionalized.

Overall, our findings show that trade unions struggle to cope with the new situation of hybrid industrial relations and a high employment / large low-wage-work sector in Germany. They illustrate the existence of a tense relationship between trying to protect the interests of core workers while equally trying to organize non-core workers and improve their working conditions. In the past, this tense relationship has also manifested itself in conflicting strategies within the trade union camp. This is precisely because most unions meanwhile have come to adopt strategies aimed at including the non-core workers, whereas in the beginning the predominant approach was to simply try to restrict the use of all sorts of atypical employment (see also Keune 2015).

Our case studies on social dialogue initiatives shed some more light on the difficulties and challenges but also the successes of attempts to bridge the protective gaps that have evolved over a long time in Germany, and to counteract the dualized labour market structures.

Social dialogue across organizational boundaries

The outsourcing of public services and companies’ use of subcontracting, solo self-employment and temp agency work often does not only entail higher risks of precariousness among the affected workforce, but also moves them out of the organizational boundaries of the hiring company, thereby also moving them out of the reach of established forms of interest representation and collective bargaining. Three of our cases document novel forms of social dialogue that can be seen as attempts to make up for this fragmentation, by stretching across organizational boundaries and setting up ‘negotiations on behalf or about third parties’, where

the firms and employees primarily affected do not themselves sit at the negotiating table. The legal extension of collectively agreed wages is one well-known example as they also apply to all firms regardless of whether they are members of employers' associations. A similar example is the collective agreement in the steel industry (case study on socially sustainable sourcing) or the self-commitment in the meat industry (case study on posted work), which targets subcontracting companies that were not involved in the negotiations.

This extension of the sphere of influence brings with it opportunities to regain the discretionary power that has been lost due to the expansion of the 'second-tier' workforce – but also specific difficulties, in particular for the proper implementation of the regulations. As the norms are externally imposed obligations (instead of mutually agreed), they require monitoring and sanctioning mechanisms in order to become effective. This in turn requires to deploy substantial resources, and although the interviewed trade unions' representatives in all three cases acknowledge improvements, they point at the need to considerably increase the bite of the sanctions as well as the frequency and depth of inspections. Practical problems and legal restrictions relating to data protection and trade secrets inhibit the retrieval of information on working conditions in monitored companies. Moreover, in the case of the steel industry, the biggest obstacle to effective monitoring according to the trade union representative is the sheer volume of subcontracts at the steel company. This suggests that the proper enforcement of equal rights requires limits to the use of atypical work; hence securing equal rights for atypical workers is not an *alternative* to restricting the use of atypical work, but should be seen as a complement.

Overall, the examples of extended forms of social dialogue across organizational boundaries have been partly successful in improving job quality for the 'second-tier' workforce. Yet it is scarcely a coincidence that these attempts seem to be more effective in the steel industry (case study on socially sustainable sourcing), where employees and employers are relatively well organized and industrial relations still largely adhere to the 'German model' of earlier decades. While subcontractors operating in the steel industry constitute a gap in the well-organized core of the German model, where strong social partners are also in a position to act (if not altogether altruistically) as advocates for the rights of atypical employees, posted workers in contracted companies in the meat processing industry together represent a gap on the periphery of the labour market, where the basic structures of industrial relations have long been weaker.

Intertwining of collective bargaining and state regulation

In all four case studies, state actors and legal regulations play an important role, and there are various ways in which they interact with the traditional pillars of social dialogue in Germany.

- Firstly, new legal regulations can alter the basis for firms' calculations. In the case of posted work in the meat industry and mini-jobs in the service sector, the statutory minimum wages

considerably reduced the cost-advantage of using these forms of non-standard work. Although it was anticipated that firms would lapse into the use of informal labour and other illegal practices in order to maintain the cost advantage, the case studies document that companies can also adapt their employment strategies and convert non-standard employment into standard employment.

- Secondly, new legal regulations and even discussions on reforms can cast a ‘shadow of hierarchy’ that forces firms into action. This applies especially to the general contractors’ liability in respect of the minimum wages which increased firms’ willingness not to treat working and employment conditions in subcontracting companies as a ‘black box’ but rather to take preventive measures to limit their own liability risks, as in the posted work and socially sustainable sourcing case studies.
- Thirdly, the case studies document examples of a combinatory regulation that is based on both legal and collective agreed norms. For instance, collectively agreed industry specific minimum wages are the norms controlled by the public authorities in the public procurement case. And conversely, the collective agreement in the steel duplicates existing statutory rights, with a view to improving enforcement and making it a concern to the social partners at company level.
- Finally, a close cooperation between state inspections and social partners is usually needed for the effective enforcement of statutory rights, e.g. through trade unions’ support for posted workers in claiming their rights.

Equal rights = universal minimum rights?

Substantively, the primary objective of the various measures described in the case studies has been to lay down and, even more importantly, to implement universal minimum working and employment conditions. This illustrates the fact that in broad swathes of the German economy even these minimum conditions cannot be taken for granted and it takes considerable efforts to establish them. At the same time, the mini-jobs example shows that *universal* minimum rights are not always sufficient to eliminate the *specific* risks of precariousness associated with atypical employment. The small number of hours worked per week means that even enrolment in the pension system is not sufficient to provide mini-jobbers with an independent income that will meet their basic needs when they are not in gainful employment (but unemployed, retired etc.). By contrast, one example of rights or measures tailored to the specific risks of atypical employment is the (albeit non-binding) voluntary agreement in the meat processing industry that commits signatory companies to comply with minimum standards in providing accommodation for posted workers. Thus equal rights policies remain incomplete so long as they do not take account of the unequal risks inherent in atypical employment.

Moreover, there is also the question of whether ‘equal rights’ can be equated with ‘*minimum rights*’. Although ‘equal’ implies relative equivalence with prevailing standards and not with a set of minimum rights acting as an absolute lower limit, a narrower interpretation of this kind is evident in the relevant case law of the Court of Justice of the European Union (CJEU) and is also reflected to some extent in the case studies presented here. In the public procurement study, the CJEU’s *Rüffert* judgement led to a thoroughgoing revision of the principles underlying the award of public contracts, such that contracted companies since have to comply only with the lowest wage scales rather than with entire wage grids. Only after several years of legally controversial debates and a few more recent CJEU judgements has the payment of collectively agreed wages significantly higher than a minimum level once again been made a requirement in the construction sector, albeit with some restrictions. At the same time, a further increase in the procurement-specific minimum wage (that covers other industries) to the level of the lowest pay grade in the state’s public services has been rejected by the state government, illustrating that the narrower interpretation of ‘equal’ or ‘fair’ pay would seem to remain in force. It is also noteworthy that in the sustainable sourcing case study in the steel industry, where the restrictions of the European directives do not apply, only the national minimum wage is obligatory for subcontracted companies. This seems to be partly due to legal hurdles and/or prevailing interpretations of the law, as according to our interviewees the established legal interpretation is that the imposition on subcontractors of obligations that go beyond the statutory requirements constitutes an unwarranted infringement of contracted firms’ autonomy.

Overall, attempts to establish ‘equal pay’ even in its narrow meaning should be seen an important first step, but is not sufficient as it is still a long way from equality with standard employees and does not address the specific risks of atypical employment.

So what recommendations?

Our research findings support a call for all stakeholders a) to collaborate in order to effectively enforce universal minimum rights b) to design and implement measures that address the specific risks of atypical employment forms and c) to aim for fair working conditions in a more ambitious sense than merely securing minimum rights. Our high-priority recommendations addressing all four protective gaps are as follows:

- **Introduce rights to minimum working hours and to increase working hours** (*in particular for those on short part-time jobs*)
- **Design levies and funds aimed at compensating for specific risks encountered by atypical employees** (*e.g. securing access to further training despite short contract durations; or supplements on company taxes for the use of fixed-term jobs, following the French example*)

- **Relax a too strict application of ‘equivalence principle’ and top up the pension levels for low wage earners** (*following the example of many other European countries*)
- **Facilitate access to health insurance and pension provision for solo self-employed** (*e.g. by lowering minimum contributions for the health insurance*)
- **Support social partners in their attempts to have collectively agreed wages extended by the law** (*by making more use of the respective legal options*)
- **Implement measures aimed at reducing the excessive use of atypical forms of employment** (*e.g. by strengthening works councils rights regarding the use of subcontracts, mini-jobs and temp agency work*).

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