FREE COLLECTIVE BARGAINING

SUPPORT COLUMN OR CRUMBLING PILLAR OF THE SOCIAL MARKET ECONOMY

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1. ABSTRACT

In the last sixty years free collective bargaining has turned into a support column for the Social Market Economy. The process of free collective bargaining grants employees and employers the right to negotiate salaries and working conditions, without any state influence through coalition organizations. The system has been fragile for two decades. Businesses are less inclined to apply collective agreements and employees are less likely to be organized in trade unions. This reduces the range of collective provisions, whereas so-called outside competition is growing and increasingly placing collective bargaining standards under pressure. The bargaining partners have responded by introducing opening clauses into collective bargaining. These made collective agreements more flexible. Wage pressure has nevertheless continued, as has the erosion of collective bargaining coverage. Moreover, in recent years, competition has been generated between different trade unions. While undercutting adds to wage pressure, overbidding shakes up wage demands. If these new developments are intensified, the collective bargaining system will become fragmented. The question arises of whether the bargaining partners are able

to prevent this, and to what extent outside competition and trade union competition conform with the system of collective bargaining. The bargaining partners are calling for legislation. The trade unions want statutory minimum wages and employers want to preserve the principle of "one company, one trade union" (tariff uniformity). Such state interventions in free collective bargaining are discouraged, for the time being at least. Experiences with opening up collective agreements to business operational deviations have revealed that the bargaining partners are definitely capable of responding to changed general economic conditions. The state is only called upon if the trade unions and federations of employers are unable to ensure reasonable application for their collective agreements in the long term. To the extent that the state slips into the role of a replacement bargaining partner, free collective bargaining is placed in a crisis of legitimacy.

2. FREE COLLECTIVE BARGAINING: ESSENCE AND HISTORICAL ROOTS

With the exception of the *Die Linke* (i.e. The Left), all political parties represented in the *Bundestag* (i.e. Federal Parliament, the lower house of the German Parliament) are explicitly committed to free collective bargaining, which has turned into a support column for Germany's Social Market Economy. Free collective bargaining is derived from the freedom of association, as laid down in Article 9 section 3 of the Basic Law of the Federal Republic of Germany (for: *Grundgesetz der Bundesrepublik Deutschland, GG*). This ensures that all individuals and professions have the right to establish coalitions in order to preserve and promote economic and employment conditions. This provision encompasses positive and negative freedom of association. Positive freedom of association creates the opportunity for employees and employers to join forces in coalition organizations, such as trade unions or federations of employers, which are able to conclude collective agreements without any state influence. As a result of this assurance, free collective bargaining is guaranteed for coalition organizations.[1] Negative freedom of association includes the right not to act within such consortia and to regulate working conditions on an individual basis. However, it does not go so far as to allow for general withdrawal from collective agreements.[2] The universal coverage of collective agreements – laid down in the *Collective Agreements Act* (for: *Tarifvertragsgesetz*, *TVG*) –, the *Act on Posting Employees Abroad* (for: *Arbeitnehmer-Entsendegesetz*, *AEntG*) and the *Minimum*

Working Conditions Act (for: *Mindestarbeitsbedingungsgesetz*, *MiArbG*) provide for the opportunity, under certain conditions, to force “outsiders”, who are not covered by the collective agreement, to comply with collective bargaining standards.

The idea of free collective bargaining was laid down in the Collective Agreements Decree of 1918. This first placed the system of collective agreements in Germany on a legal basis. A few years later however, the state granted wide-ranging powers, with the option of compulsory arbitration. This situation changed after the Second World War. Freedom of association was granted specific protection under basic constitutional law and the state restrained itself in its interventions into free collective bargaining. Where state interventions occurred, they were limited to declaring collective agreements universally binding (at the request of the bargaining partners). Overall, however, the instrument of universal coverage was used sparingly.[3] Even during the heyday of universal coverage, i.e. in the 1980s and 1990s, just slightly over one per cent of all collective agreements were declared universally binding. Federations of employers tried to keep their distance from this instrument in the 1990s.[4] The practice was completely different at the time of the Weimar Republic. By the end of 1928, 1,829 collective agreements were universally binding, out of a total of 8,925. This share is equivalent to more than 20 per cent. Overall, just over half of all employees covered by collective agreements came under the scope of universally binding collective agreements. Against this background, it is not surprising that prior to the enactment of the TVG, consideration was given to declaring collective agreements universally binding, even against the will of the bargaining partners.[5] This idea was not included in *TVG* at that time, but later experienced a renaissance in the framework of *AEntG*. Because this Act (since its amendment in 1999) has allowed for the declaration of universal coverage for a minimum wage collective agreement – via a statutory instrument executed by the Minister of Employment – even when there is no majority for such a measure on the Collective Bargaining Committee, which has equal representation of trade unions and employers.

Even in the case of industrial disputes, the state has failed to intervene on a regular basis in the past 60 years. This was largely against the background of the negative experiences of compulsory state arbitration at the time of the Weimar Republic. Given that the bargaining partners, at the time of transition to democracy after the First World War, were

incapable of reaching arbitration agreements on their own, or no settlement could be made through the bargaining partner's untried arbitration procedures, the government decided to introduce compulsory state arbitration. The *Arbitration Decree* – enacted in 1923 - granted labor market players the right to make settlements without any influence from the state. In cases of disputes with macroeconomic significance however, the state reserved the right to intervene and to issue binding arbitration verdicts, even against the will of the contracting parties. This provision was intended to stabilize the system of collective agreements, but at the same time the state also ensured that it had a massive impact on wage negotiations.[6]

Strike mediators initially acted as helpers in times of need, in order to arbitrate in disputes between employees and employers, but the influence of the state grew increasingly stronger after 1924, until eventually, after the outbreak of the world economic crisis of 1929/30 and in conjunction with emergency state decrees (wage stops), this resulted in de-facto suspension of free collective bargaining. It was essentially due to this development that both bargaining parties advocated non-State freely negotiated collective agreements.[7] Since then the state has quite consciously kept out of disputes.

3. INSTITUTIONAL FRAMEWORK FOR FREE COLLECTIVE BARGAINING

3.1 The Players: Trade Unions and Federations of Employers

The founding congress of the *DGB* – The Confederation of German Trade Unions (*Deutscher Gewerkschaftsbund, DGB*) was held in October 1949. The new umbrella organization first represented trade unions in the three western zones. The Soviet occupied zone had the Free German Trade Union Federation, which had already been founded three years earlier, and was disbanded in 1990 shortly before German reunification, with its individual trade unions joining their West German counterparts in the *DGB* by 1991. The *DGB* was originally made up of 16 individual trade unions and now has eight members, following various mergers.[8] The *DGB* is seen as a uniform trade union and therefore represents all denominational, political and ideological trends. However, this concept was breached by the reestablishment of Germany's Christian Trade Union Federation (for: *Christlicher Gewerkschaftsbund, CGB*) in 1955 (initially

as Germany's Christian Trade Union Movement, but renamed in 1959). Moreover, in 1949, the German Civil Servants Association was reestablished, which primarily constituted an organization for officials in the civil service.

Trade unions coordinate the interests of employees and thereby minimize the structurally inherent inferiority of employees to employers. The quote about the trade unions having contributed to turning the "Laboring Poor" at the beginning of industrialization into today's responsible and respected workers, holding equal rights, has been attributed to Götz Briefs. Employee organizations helped to accord the status of an individual to the working man. However, Briefs stresses that trade unions were formed as "foreign bodies within laissez-faire capitalism".[9] Today, however, they represent an essential player in free collective bargaining, and – from the perspective of employers federations – have turned into "a support pillar of the Social Market Economy".[10] Nevertheless, trade unions are far from being uncontroversial today. In a representative survey conducted by *Infratest dimap* and published in *ARD Deutschland Trend* in May 2008, 55 per cent of respondents agreed with the statement "Trade unions in Germany do good work overall" but still 41 per cent did not agree.[11]

Federations of employers were historically formed as a response to the organization of employees into trade unions.[12] Though this was initially a matter of building a self-contained defensive front against the trade unions, work related to collective bargaining and political lobbying soon moved into the foreground. The traditional role was for trade unions to make demands and the federations of employers to react.[13] This role continued even after the Second World War. Under conditions of export-led growth, the federations of employers were able to develop into "dynamic wage policy players".[14] With globalization – which began in the eighties – the general economic conditions changed. Competition became sharper and many businesses criticized the industry-wide collective agreement and the collective bargaining policy of their federations. It became even more difficult for federations to maintain the loyalty of their members with the help of industry-wide collective agreements, because they have been affected by globalization in different ways. Export-oriented companies, which are fully exposed to the pressure of international competition, are faced with companies, which are relatively protected on local sales markets. Suppliers of stable niche products are

producing next to ailing mass producers and large companies, which set up international production sites, are faced with small businesses which (have to) remain in Germany. With the increasing heterogeneity of interests, the inter-company room for maneuver of employer federations is reduced, so they are forced to increasingly assume a role in collective bargaining policy.

3.2 Collective Agreements

Collective agreements may be concluded centrally, based on sectors, or on the business plant level. In the event of central negotiations, the bargaining partners negotiate nationwide, cross-sector agreements. In the case of sector negotiations, sector-wide agreements are concluded. Decentralized negotiations at the business plant level are essentially excluded in Germany by the Works Council Constitution Act (for: *Betriebsverfassungsgesetz, BetrVG*) and *TVG*. Article 77 (3) of *BetrVG* contains a provision stipulating that wages and other conditions of employment, which have been or are usually governed by the collective agreement, may form the subject of a works agreement, unless the collective agreement expressly allows for such a provision. The so-called favorability principle (for: *Günstigkeitsprinzip*) is laid down in Article 4 (3) of *TVG*. Pursuant thereto, deviations from the industry-wide collective agreement are only permitted if they contain a change in favor of the employee, or are allowed for by the collective agreement. Business operational provisions, which “undercut” the collective agreement, are thereby excluded, unless the bargaining parties explicitly consent thereto. Company-based negotiations are not legally excluded. Individual enterprises may conclude company wage agreements.

By means of free collective bargaining – as laid down under basic constitutional law – and the prohibition on business plant-based negotiations, a specific structure has been developed for working relationships in Germany, under which trade unions and federations of employers primarily conclude sector-based collective agreements, which are sometimes concluded across regions, and sometimes slightly differentiated by regions. These are designated industry-wide collective agreements. Although at present only around one in five employees are organized in trade unions, working conditions are negotiated collectively for almost two thirds of all employees. The remaining one third negotiate with the employer individually, but frequently with reference to existing wage

agreements. Under the collective provisions, industry-wide collective agreements are predominant, by contrast with company wage agreements: In the western part of Germany 90 per cent of employees covered by collective agreements are paid based on industry-wide collective agreements and the figure for Eastern Germany is 77 per cent.

The dominance of the industry-wide collective agreement is also linked to the interests of bargaining partners in sector-wide collective agreements. Employers save on transaction costs because they do not have to negotiate a series of individual contracts of employment. They also benefit from the administrative function: Longer-term collective agreements in particular create planning reliability, and a uniform non-strike obligation within the sector – beyond the term of an industry-wide collective agreement – stabilizes the general conditions for an interlinked economy. Given that wage disputes are distributed across industries and are thereby largely kept out of business plants, a settlement function is also devolved to the industry-wide collective agreement. The fact that companies which are not bound by collective agreements may gain competitive advantages through wage undercutting has a detrimental impact. Trade unions have an interest in the industry-wide collective agreement because it checks the structural power of the employer and assures the involvement of employees in economic progress.[15] Furthermore, it is important for sector-based trade unions to pursue the goal of “equal wage for equal work”. This is essentially facilitated by a cross-industry wage policy. The same applies to the objective of a solidarity-based wage policy, which does not only target wage equalization between various professional groups and their qualifications, but also aspires to achieve harmonization between sectors. This makes it clear that wage increases are directed at sectors with high productivity gains, and therefore primarily at capital-intensive export branches, as well as at macroeconomic productivity growth, as in the case of wage increases at work-intensive branches with low productivity gains, which might include the civil service or commerce.

4. STRUCTURAL CHANGES

4.1 Trade Unions and Federations of Employers

The organizational base of German trade unions remained amazingly stable overall until shortly after reunification. In 1950 the degree of organization among employees (net degree of organization) was 34 per cent. Until 1993 the net degree of organization fluctuated in a range between 32 and 36 per cent. It then fell into constant decline. Eventually, in 2007, it was just 18 per cent, and had therefore almost halved. A more in-depth analysis reveals that stable trade union domains only exist in large business plants with 4,000 or more employees.[16] In particular in the service sector, the diminishing organizational base results in a declining capacity for implementation and arrangement.

In addition there are structural changes to the “market for trade unions”. The *DGB* trade unions have faced increasing competition from Christian trade unions and divisional trade unions, which represent specific professional groups, such as the Cockpit Association (pilots), the Marburg Federation (doctors) or the locomotive drivers trade union GDL (transport staff). While competition from Christian trade unions forces the DGB trade unions to offer employers larger wage concessions, the divisional trade unions are forcing the large trade unions to conduct more aggressive wage negotiations and to question their traditional solidarity-based wage policy, in case of which the singled-out professional groups go without wage increases, to the benefit of weaker groups.[17]

Similar trends may be observed on the employer side. In parallel to the foundation of *DGB*, a consortium of employers had already been formed in the western zone in 1947, from which the Confederation of German Employer Organisations (*Bundesvereinigung der Deutschen Arbeitgeberverbände, BDA*) emerged in 1950, as an umbrella organization for various multidisciplinary national and regional federations, alongside a whole series of specialist national federations. By comparison with trade unions, the membership trend at most employer federations is less transparent. The largest German federation of employers, the metalwork employers federation, registered a decline in West Germany between 1970 and 2008, from 9,594 to 3,803 businesses. The absolute decline began back in the 1980s, but accelerated in the 1990s. A large indicator for the inclination of businesses to get organized into employer federa-

tions is the collective bargaining coverage of businesses. This has been in decline since the mid-1990s (see Chapter 3.2). In structural terms, a lot of employer federations have reacted to the fall in members by forming so-called "*OT*" (*ohne Tarifbindung*) federations (federations not covered by collective bargaining). In the metal and electrical industry alone, almost 2,500 businesses were organized in *OT* federations in 2008. All services are provided in these federations (legal advice, political lobbying or professional expertise), but none of the collective agreements negotiated by the employer federation must be applied. This ensures the federations of employers have a certain financial stability, but does not counter the decline in collective bargaining coverage. Where there is no willingness to employ collective agreements at enterprises and a lack of assertive trade unions, ultimately no more collective agreements will be concluded. Where free collective bargaining no longer works, the clamor for state interventions grows louder. The discussion on the minimum wage, which has been held for several years, is one example of this.

Another structural change is noticeable in employer federations: In recent years collective bargaining associations, which have existed for decades, have been dismissed or completely disbanded. An example of the full disbanding of collective bargaining federations is the vehicle trade, where federal state guilds began to disband as employer federations in 2007. The steel and metall workers union *IG Metall*, which is responsible for this sector, thereby faced the problem of no longer having any collective bargaining partners. Examples of the termination of collective bargaining associations can be found in public service, where the federal states have negotiated collective agreements independently of the Federal Government and the municipalities since 2005, the banking industry, where the federation of employers of German *Volksbank* and *Raiffeisen Bank* branches terminated the collective bargaining association with public and private banks in 2006, or the East German Construction Industry, where a new employer umbrella organization (Association of East German Building Federations) was founded in 2002.

4.2 Collective Bargaining Coverage

The structural changes in respect of the players involved in wage bargaining policy are also reflected in the development of collective bargaining coverage. Even if almost two thirds of employees are still covered by collective agreements, the fact that only a minority of establishments

are still covered by collective agreements cannot be overlooked. According to the *IAB* establishment panel (*IAB Betriebspanel*), 63 per cent of all establishments in the western zone and 75 per cent in the eastern zone were not bound by a collective agreement. Though a share of around 40 per cent of these businesses not covered by collective agreements are voluntarily guided by collective agreements. However, a look at the longer-term development of collective bargaining coverage reveals that it is in decline. While the share of establishments with company wage agreements largely remained stable at a low level, the share of establishments with an industry-wide collective agreement has fallen since the mid-1990s, from 53 to 35 per cent in the western zone, and from 28 to 21 per cent in the East. In parallel, the share of employees with industry-wide collective bargaining coverage fell from 72 to 55 per cent in the western zone and from 56 to 40 per cent in the East. Collective bargaining coverage depends on the size of the business, the sector and the region. Smaller business plants are less frequently bound by collective agreements than larger ones; in industry, banks or public service, collective bargaining coverage is higher than for company or personal-related services; in Eastern Germany, collective bargaining coverage is generally lower than in the western zone.

However, in addition to this “external erosion” of collective bargaining coverage, there is also an “internal erosion”.[18] This is shown by the fact that businesses are authorized to escape from collective bargaining standards using opening clauses (for: *Öffnungsklauseln*) on collective bargaining. Opening clauses on collective bargaining are instruments, which allow business partners, in certain cases – mostly to ensure employment –, to make time-related deviations from the collective agreement in respect of working hours or fees. This may be transacted between the works council and management, via business agreements, or between the works council, trade union and management, by means of supplementary collective agreements. Of businesses which are aware that the opening clauses may be applicable, one in two made use of this instrument in 2005.[19] In addition however, there is also illegal undercutting of collective bargaining standards, which comes about without the consent of the bargaining partners. Based on the estimates of works councils, this has occurred in around 15 per cent of all establishments in recent years.[20]

4.3 Trade Union Competition and Tariff Uniformity

In recent time several individual trade unions have appeared in Germany's Christian Trade Union Federation, which have concluded independent collective agreements.[21] The DGB trade unions criticize the fact that the *CGB* trade unions are competing by means of undercutting and are therefore only selected as negotiating partners by employers because they make larger concessions than *DGB* trade unions.[22] Employers view this development as completely positive because the *CGB* trade unions are supplanting DGB trade unions in poorly organized sectors, such as small trade, and do not thereby endanger tariff uniformity (essentially only one collective agreement may be employed at one business plant).

However, there is also a race to the top in progress. Since 2001, several professional associations in the transport and health sectors have cancelled the collective bargaining agreements which existed between them and the sectors' trade unions, following which they have forced through their own collective agreements.[23] Through the autonomous effect of collective bargaining policy, better wages and working conditions should be negotiated for the represented professional group(s) than was the case within the framework of the inter-profession collective bargaining policy of sector-based trade unions. For the affected enterprises, this means that decades of tariff uniformity have been replaced by plurality in collective bargaining, in respect of which there are various overlapping collective agreements within the scope of application. At Lufthansa in Germany, two trade unions are competing for cabin crew, and they negotiate independent collective agreements. The situation is similar at *Deutsche Bahn* (i.e. German Railways) and in hospitals.

The consequences of overbidding are not only felt by employee organizations in the form of member migrations and the growing pressure to realign the strategy for collective bargaining policy. Employers are also affected. On the one hand, they have to negotiate more frequently, while on the other hand they are confronted with building up wage demands of rival trade unions. Both result in confrontational collective bargaining negotiations. At the former public transport enterprises, industrial disputes have occurred at Lufthansa and German Railways, as well as in the hospitals. The risk of build-up in the wage demands should definitely be taken seriously. Because if assertive professional groups, which are capable of mobilizing, are able to achieve better working conditions than

branch trade unions in their own organizations, there is a threat of additional divisional trade unions being formed and the collective bargaining system becoming frayed. To prevent this, the branch trade unions have to react. On the one hand, they may attempt to make a maximum number of improvements in collective bargaining negotiations for all professional groups. This would signify a general drift away from the course of wage restraints, which has been noticeable since the mid-1990s. On the other hand, they would have to sacrifice their solidarity-based wage policy, in respect of which the singled-out professional groups do not exploit their potential room for maneuver in terms of wage policy, to the benefit of other professional groups. The United Service Union has already tried out such a strategy. In summer 2009 it implemented its own, improved schedule of salaries in the education system for employees in pre-schools and childcare facilities and therefore represented, in a completely targeted way, the interests of well-organized (and thereby likely to form spin-offs) professional groups.

The *BDA* (2008) regards the core of free collective bargaining as damaged if – despite an existing collective agreement at a business plant – there is a threat of collective bargaining disputes and the obligation to avoid industrial action therefore being devalued. In case of competing trade unions, a company can no longer rely on not being exposed to industrial action during the term of a concluded collective agreement. In order to prevent an employer having to negotiate with different trade unions at various times, where necessary the legislator should ensure that tariff uniformity is retained as a central element of collective bargaining law. The intention is to prevent a cluster of strikes due to the new “rules of the game”. The agreement of collective bargaining associations, obligatory arbitration procedures or cooling-down phases are recommended after the breakdown of collective bargaining negotiations.[24]

4.4 Industry-Wide Collective Agreement

The short review makes it clear the German system of collective bargaining is in an upheaval phase. The industry-wide collective agreement is thereby under pressure from two sides. On the one hand, the collective bargaining system is being destabilized by falling collective bargaining coverage, and on the other hand by growing trade union competition and the resultant fragmentation of the collective bargaining system. Both

developments result in a call for legislation. Whereas trade unions demand statutory minimum wage limits, employers are requesting a clear commitment from the legislator to tariff uniformity. As a negative factor, both bargaining partners thereby acknowledge that they can no longer complete free collective bargaining without the assistance of the legislator. As a positive factor, the social partners are making demands for the legislator to adjust the regulatory framework to the changed general conditions in such a way that free collective bargaining is not jeopardized. Whether viewed negatively or positively: The call for legislator has a long history.

Until the 1960s, free collective bargaining was implemented in Germany on the basis of strong economic growth. Increasing prosperity allowed the trade unions not only to regularly achieve wage increases, but also the five-day week with full wage adjustment or continued payment of salaries in the event of illness.[25] Despite the two oil price shocks of 1973/74 and 1979/80, the Bonn Republic returned to reasonable economic growth. However, the bargaining partners were then negotiating against the background of a drastic increase in unemployment. In order to improve redistribution of existing work, the trade unions rely on reducing working hours. The metalworkers and printworkers trade unions went on strike in 1984 for the introduction of a 35-hour week, with full wage adjustment. Following reunification, the general economic conditions then deteriorated in a sustained manner. With the 1992/93 recession, there was a crisis of transformation in the eastern zone of the Republic, while the consequences of globalization became increasingly noticeable in the western zone and the industry-wide collective agreement, which is distinctive of the German system of collective bargaining, underwent a crisis.

Already in the eighties free collective bargaining was heavily criticized and even called into question by *Kronberger Kreis* (1986) and later also the *Deregulation Commission* (1991) and the *Monopolies Commission* (1994). The federal government acknowledged free collective bargaining in its comments on the main report of the *Monopolies Commission* and expressed the view that the two sides should resolve their problems themselves.[26] The two bargaining sides in fact responded to the crisis in 1994 with the so-called job security collective agreement. This allowed opportunities in some industries for temporary reduction of working hours without (full) compensatory wage increases, if the companies

undertook in return to refrain from layoffs for operational reasons. After the end of the recession, however, it was soon apparent that the pressures of globalization made necessary further flexibility in and differentiation of the collective agreements. Initially the majority of unions were trying to prevent opt-outs wherever possible. An exception was the Mining, Energy and Chemicals Union (for: *IG Bergbau/Energie/Chemie*), whose collective bargaining sectors had adopted different kinds of opening clauses for working-hours and salaries already in the "nineties".[27] With the "opening" of the collective wage agreement, employment should be secured (Business Alliances for Work). Although other industries followed suit, overall development was slow. In the economic policy debate, further elements of flexibility were called for.[28] This culminated finally in the threat of the then-Chancellor Gerhard Schröder, who in his famous "Agenda 2010" speech threatened the collective bargaining parties with legal opening clauses.[29]

In essence, this debate was about a reform of the *favorability principle* laid down in the TVG (see Section 3.2). Since the TVG did not explain further what is meant under the regulation to be in favor of the worker, adjudication developed the so-called *Sachgruppenvergleich* (i.e. *classification comparison*).[30] Accordingly, only rules that stand in a material connection to each other can be compared. As a result, Business Alliances for Work were unable to withstand the consequences of a "favorability" challenge. For in such an alliance, employer and employee exchange wage concessions for expanded protection against redundancy; therefore, regulatory matters, although indeed economical, are in a narrow sense not legally related to each other.[31] The discussion of a legal clarification of the favorability principle resulted in various legislative initiatives from the *FDP* (Free Democratic Party) and the *CDU/CSU* (Christian Democratic Union/Christian Social Union), which however did not win majority backing in the German Bundestag. The *FDP* initiative was designed to include job security in favorability comparison and then to support the favorability of a barter (wage cut against greater protection against redundancies) if at least three quarters of the employees agreed with a barter deviating from the collective agreement.[32] The bill of the *CDU/CSU* parliamentary group also envisaged a consideration of the employment prospects in the favorability comparison. Here, too, the assessment of what is "favorable" should be aligned with the degree of acceptance by the workforce. A barter is considered favorable if two thirds agree with it. A deviation from the collective agreement, however,

should not extend past the term of the collective agreement that it departs from. [33]

From an economic perspective these draft laws should essentially be welcomed.[34] However, the subject has lost some degree of relevance in recent years. Following the threat from the German Chancellor to introduce opening clauses by law, the bargaining parties have shifted their positions. In the largest German sector, the metal and electrical industry, the *Pforzheimer Agreement* was concluded in 2004, which does not only restrict deviations from the industry-wide collective agreement to crisis situations, but also allows for prevention. In the meantime, in almost all larger sectors, there have been opening clauses related to working hours or fees. The statutory requirement for action has therefore become less urgent from the perspective of employer federations. The *CDU/CSU* has also taken the subject off its agenda, and only the *FDP* still included the proposal in its last election manifesto.

4.5 Statutory Minimum Wages

Another subject has moved to the center of the discusion on collective bargaining law. The erosion of the industry-wide collective agreement, in addition to the increasing share of low-income earners, led to trade unions demanding statutory minimum wages for several years. If the individual trade unions within the *DGB* were initially at odds on this issue, the *DGB* managed to steer its member federations to a common course at its 18th ordinary Federal Congress in May 2006. In concrete terms, the *DGB* Congress calls upon the legislator to introduce a law on the minimum wage, at a rate of 7.50 Euros an hour. This was selected as an introductory rate, so that full-time employees can achieve a living-wage market income through their work. Regardless of this aspect, the trade unions actively pushed for an expansion of *AEntG*, in order to allow for the extension of collective bargaining minimum wages to businesses not bound by collective agreements. The *AEntG* was introduced for the building industry in 1996, in order to protect the German building industry from wage dumping by foreign construction firms. Back in 1997, sector-specific minimum wages were introduced in the main construction trades and declared universally binding. They were followed by several sectors of ancillary construction trades. As the Schroeder Government was considering extending the Act to all sectors in 2005, but had not yet taken a decision, the number of economic branches was expanded on

several occasions by the Grand Coalition. In addition to the construction industry, the scope of application presently includes building cleaning, mailing services, security services, specialist mining works, laundry services, waste management, education and training services, and the care sector. Due to this expansion, the state may extend sector-specific minimum wages to up to four million employees.

Inclusion in *AEntG* assumes that at least 50 per cent of employees in this sector are bound by collective agreements. In order to allow lower wage limits to be stipulated in sectors with lower collective bargaining coverage, the *MiArbG*, enacted in 1952 but never used, was amended. This Act now provides for a steering committee, which is intended to establish whether social distortions exist in a branch of the economy and whether minimum wages should be stipulated, amended or annulled. If the steering committee discovers distortions, the Federal Ministry for Employment and Social Affairs sets up expert committees, which work out minimum wages for the affected branches, which can then achieve legal force via a statutory instrument.

The Grand Coalition was unable to reach agreement on the introduction of a general statutory minimum wage. With the changeover to a Christian Democrat-Liberal coalition, expectations in this area are even lower because the *FDP* rejected any form of statutory minimum wages in its election manifesto. In the next legislative period there is no expectation that the state, beyond the current level, will slip into the role of bargaining partners and enforce collective agreements wherever employers and trade unions are no longer willing or able to do so. The same applies to extensions of the *AEntG* and *MiArbG*.

5. THE FUTURE OF FREE COLLECTIVE BARGAINING

In the last fifteen years three “break points” have been identifiable in the support column of free collective bargaining: If reform of the favorability principle and therefore the securing of jobs were in the foreground within the context of business alliances, the issue currently at stake is primarily to combat low wages through minimum wages and the assurance of tariff uniformity through organizing trade union competition. An example of the favorability principle reveals the following: The credible threat of state influence resulted in particular in trade unions shifting their position, and collective agreements have since become flexible to

such an extent that there is presently no statutory requirement to act on the employer side. Free collective bargaining has therefore removed one breaking point.

The issue of tariff uniformity could be clarified in a similar way. Only the threat of the legislator to force competing trade unions to form collective bargaining associations, to be included in wage negotiations with agreed salary demands, may produce a behavioral change. It is already noticeable that the sector trade unions (in their own interests) are trying out new collective bargaining policy strategies, in order to prevent spin-offs from divisional trade unions. One feasible strategy would be to agree separate schedules of salaries for certain professional groups, and to make stronger differentiations in wage increases. To the extent that the stabilization of sector trade unions succeeds, (under otherwise equal conditions) the by now historic collective bargaining structures and hence tariff uniformity will be retained. Before the legislator makes regular interventions into trade union competition, the players should first be granted the opportunity to try out their own solutions. The legislator is only called upon if further professional groups with the capacity to strike combine their interests in divisional trade unions, and the system of collective bargaining has thereby become fragmented.

Before mandatory minimum wages are introduced, it is also worth considering whether stimulus mechanisms exist which could compel the unions and management to implement wage rates without legislative intervention. It is theoretically possible to introduce mandatory memberships, such as those which exist for employers in Austria, and which existed for employees in Anglo-Saxon countries up until the end of the 80s (closed shop). Mandatory memberships strengthen the coalitions, but violate the so-called freedom of association. According to German law, they would represent a stronger intervention in wage autonomy than legally mandated minimum wages. There are “other” possibilities; wage-related differentiation clauses – which provide for the regulation of bonuses for trade union members – could be legalised, in order to create a selective incentive to join a trade union.

The German Federal Labor Court (for: *Bundesarbeitsgericht*) declared differentiation clauses as permissible in principle in a 2009 judgement, thus setting aside its existing objections.[35] However, the differentiation clauses should not have any impact on the powers of an employer –

based on individual rights – to provide an appropriate bonus to employees not organized in trade unions. A “simple differentiation clause”, which takes this factor into consideration, may be compatible, according to the Federal Labor Court, with negative freedom of association because it does not place any undue pressure to join a trade union on those who do not belong to any such organization. Even if the question of the size of the bonus that may be omitted in the individual case remains open, the trade unions have a new instrument available for membership campaigns. Employee organizations then have the medium-term option of expanding the organizational base in such a way that once again they will become more assertive in non-collective bargaining zones.

Without any changes to behavior at employers, the bargaining partners will however not be able to comply with their regulatory duties. Federations of employers secure their financial base by forming so-called *OT* federations, but do not counter creeping wage erosion. In order to strengthen collective bargaining coverage, the collective bargaining federations had to court *OT* members in a targeted way. Even newly founded enterprises must be courted in a targeted way, since they are less frequently bound by collective agreements. At enterprises where the level of organization in trade unions is low, this might prove less successful because there would be no cause to fear the possibility of trade unions, where necessary, achieving collective bargaining coverage through an industrial dispute. This shows that the inclination to revoke collective bargaining coverage is favored by weak trade unions. However, with regard to all considerations, it should not be forgotten that negative freedom of association also forms part of free collective bargaining. Ultimately each employer is free not to join any organization. It is precisely this “outside competition” that contributes to the discipline of the bargaining partners.[36] Since it gives both employers and employees the opportunity to defend themselves against a collective agreement practice that is against their interests.

Yet the question arises of how far “outside competition” from businesses that are not bound by collective agreements can go. To what extent should the bargaining parties pull back and the provision on working conditions be surrendered to the individual contractual level? Free collective bargaining is indeed a freedom right and not a freedom obligation.[37] However, an excessive renunciation of the use of this freedom right by the collective agreement parties may result in the state being called upon

– on account of the relevant protection and regulatory duties under basic constitutional law – to create appropriate minimum working conditions. [38]

With the extension of *AEntG*, the state regularly intervenes in the organization of working conditions, at the request of the collective bargaining partners. Unlike in the case of a universal statutory minimum wage, the state does not set wages. Such a situation would arise if minimum collective bargaining wages were extended, via a statutory instrument, to all employees working in the relevant sector. Nevertheless free collective bargaining is in a deep crisis. Because, on the one hand, the state must ensure that collective agreements are provided with a reasonsable scope of application. And where there are no collective agreements, the amended version of *MiArbG* allows the state to stipulate minimum wages. There has been no such state assistance in the past six decades of the Social Market Economy. The possibility still arises of both social partners reviving themselves and once again being able to improve and collectively govern their freedom right and working conditions. If they fail to take this opportunity, the state will assume the role of a replacement collective bargaining partner. Or it will allow for a split in the system of collective bargaining system, into collective bargaining-regulated and individually-regulated zones, while allowing for a further increase in "outside competition". In the medium term, both routes lead collective bargaining into a deep legitimacy crisis and will shake up an important pillar of the Social Market Economy.

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1| Löwisch (1996), p. 816.
2| Cf. Lesch (2006).
3| Lesch (2003), pp. 5 et seq.; Bispinck et al. (2003), pp. 134 et seq.)
4| Bispinck/Schäfer (2005), p. 29.
5| Lesch (2003), p. 6.

6| *Bähr (1989), pp. 21 et. seq., Huck (1993), p. 127.*
7| *Zachert (2009), p. 179.*
8| *Keller (2001), p. 93.*
9| *Briefs (1965), p. 549.*
10| *Cf. Bundesvereinigung Deutscher Arbeitgeberverbände (2010).*
11| *http://www.infratest-dimap.de/umfragen-analysen/bundesweit/ard-deutschlandtrend/2008/mai/*
12| *Schroeder/Silvia (2003), p. 256.*
13| *Schroeder (1996), p. 601.*
14| *Schroeder/Silvia (2003), p. 253.*
15| *Traxler (1997), p.102.*
16| *Cf. Biebeler/Lesch (2007)*
17| *Cf. Lesch (2008), Schroeder/Graefe (2008).*
18| *Bahnmüller (2002), Streeck/Rehder (2005).*
19| *Cf. Kohaut/Schnabel (2007).*
20| *Bispinck/Schulten (2003), Massa-Wirth (2007), pp. 99 et seq.*
21| *Bispinck/Dribbusch (2008), p. 157.*
22| *Ibid., p. 160, Schroeder (2008), p. 3.*
23| *Cf. Bispinck/Dribbusch /2008), Lesch (2008). The pilots association Cockpit started this process in 2001. They were followed by other professional groups, such as doctors, air traffic controllers, cabin crew or locomotive drivers. Locomotive drivers were already represented in their own trade union, which, however, formed a collective bargaining association along with other railway trade unions. The other professional groups achieved trade union status for their organizations and ended collective bargaining policy cooperation with the United Services Union (for: "Vereinte Diensteistungsgewerkschaft ver.di").*
24| *Cf. Bundesvereinigung deutscher Arbeitgeberverbände (2008).*
25| *For details see Bispinck (2009).*
26| *See Bundestag paper 13/1594 of June 1,1995.*
27| *Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung (1998), pp. 125 et seq.*
28| *E.g. Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung (1995), pp. 226 et seq., idem (1998), pp. 123 et seq., Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft und Arbeit (2004)*
29| *The government statement, verbatim: "Suitable provisions shall create an appropriately flexible framework within collective agreements. This constitutes a challenge and a responsibility for bargaining partners. Article 9 of the Basic Constitutional Law grants constitutional status to collective bargaining. But this not only constitutes a right, but also an obligation […]. I would therefore expect the bargaining partners, under the existing situation, - but to a much greater extent -, to agree on business alliances, as is already the case in many branches. If this does not happen, the legislator must act." See Federal Government bulletin no. 21-1 of March 14, 2003.*
30| *Cf. Bundesarbeitsgericht (2000).*
31| *Lesch (2006), pp. 31 et seq.*
32| *See "Entwurf eines Gesetzes zur Sicherung betrieblicher Bündnisse für Arbeit", Bundestags-Drucksache 14/6548 of 4 July 2001.*
33| *See "Entwurf eines Gesetzes zur Modernisierung des Arbeitsrechts", Bundestags-Drucksache 15/1182 of June 18, 2003.*
34| *Lesch (2006), pp. 32 et seq.*
35| *See press release no. 27/09 on the judgment of the 4th Senate of March 18, 2009 on the legitimacy of "simple differentiation provisions".*
36| *Cf. Lesch (2003).*
37| *Rieble (2004), pp. 423 et seq.*
38| *Ibid., p. 426.*