

# Social Partnership: Basic Aspects of Labour Relations in Germany

Horst Küsters



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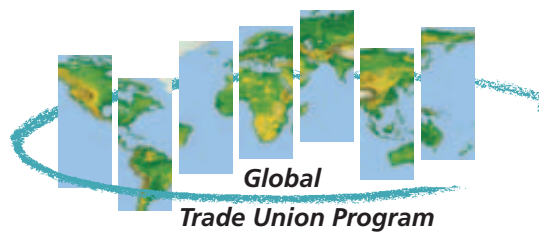
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# **Social Partnership: Basic Aspects of Labour Relations in Germany**

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## Inhalt

Foreword .....	6
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### Chapter 1

#### General Conditions for Trade Union Activities in Germany

Historical retrospective .....	8
The Federal Republic of Germany .....	9
1. The social security system.....	14
2. The system of self-governance .....	18
3. Problems related to social security systems .....	20
4. Unemployment insurance .....	27
5. Statutory health insurance .....	39
6. Long-term care insurance.....	49
7. German pension insurance.....	54
8. Statutory accident insurance .....	64
9. The pillars of old-age provisions .....	69

### Chapter 2

#### Development and Structure of the German Trade Unions

1. A brief historical overview .....	75
2. The organisational structures of individual trade unions, the example of the Industrial Union of Metal Workers (IG Metall).....	92
3. The United Service Union (ver.di) .....	97

## Chapter 3

### Labour Law

1. The structure of labour law .....	102
2. The Health and Safety Regulations .....	104
3. The Collective Bargaining System .....	121
4. The Future of the Centralised Collective Agreement .....	137

## Chapter 4

### The Works Constitution

1. The Works Constitution Act .....	145
2. Works Councils .....	149
3. The reform of the Works Constitution Act (2001) .....	159
4. European Works Councils (EWCs) .....	162

## Chapter 5

### Co-determination

1. Board Level Co-determination .....	164
2. Co-determination in the Coal and Steel Industry .....	165
3. The Co-determination Act of 1976 .....	166

List of References .....	169
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## Foreword

Globalisation is in a crisis. Political and economic forces, who played the liberalisation/privatisation/deregulation card in the last few decades and boosted transnational investments, undermined existing national systems of social security and industrial relations by so doing, while no attempt was made to build up mechanisms that compensated for declining national social security systems at either the transnational or global levels. A rapidly growing number of individuals, who previously enjoyed social security within the framework of traditional industrial relations, is now thrown into precarious life situations without reaping the benefits of economic growth from which others further up the social ladder are profiting.

The need to find a response to poverty, increasing disparities and unequal opportunities to participate takes on growing urgency; yet there is also renewed pressure to move industrial relations and social policy to the top of a national development-policy agenda.

The Friedrich-Ebert-Stiftung (FES) is actively involved in both fields. In our efforts to find an adequate response to social and labour-related problems in the national and international environment, we are seeking to cooperate with trade unions from all regions across the world.

As an offspring of the German labour movement in historical terms, our foundation has been playing a role within the framework of German Social-Democracy since its inception in 1925. In this context, mention needs to be made of the fact that we exercise a mandate of the German Confederation of Trade Unions (DGB) by acting on its behalf in international trade union co-operation.

This publication is intended for both national and international readers who seek to obtain an insight into the system of industrial relations in Germany. It is a completely revised version of the first publication of 2002, and also takes account of the many changes implemented in the context of the reform agenda 2010. At the same time, this new edition gives a much more detailed account of the functioning of the German system of social security.

The concept of social partnership in the Federal Republic of Germany is described in its various facets and placed in a historical, social, legal and economic context. Trade unionists and other interested readers are given a brief overview of industrial relations. The individual chapters are structured as compact modules which may be read separately. Additional graphs and charts may be used as visual teaching material as well.

For easier use, a CD comes with this publication including graphs and charts as pdf-files.

The German model of industrial relations is not unique; many models are used in Europe which function in a similar manner, while others are designed differently. In the course of more than half a century, however, the freedom and independence of the two social partners (trade unions and employers' associations) and the existence of a comprehensive network of conflict-resolution mechanisms have been important factors that ensured social stability.

This model is the result of interaction between political democracy, the economy, participation rights and the freedom to represent social interests. If this publication offers encouragement to support democracy by means of social justice, it has served its purpose.

In Germany, like in other parts of the world, industrial relations are under great pressure to change. This is the more true as this country has no compact Industrial Relations Code, but a sort of patchwork of regulations which are supplemented by court rulings in a continuous process. Some information in this book, such as the figures related to contributions of blue and white-collar workers to the social insurance, may eventually

become outdated. Yet this will not affect the substance of this publication in any way as long as the structural character of the system will not change.

Horst Küsters, the author of this book, is an experienced German trade unionist who worked for many years for the Public Service, Transport and Haulage Workers' Union (ÖTV), which later became one of the co-founders of the trade union ver.di. He is currently working as an international consultant for trade unions and organisations in development cooperation.

On behalf of the Friedrich-Ebert-Stiftung, I should like to thank Horst Küsters for his work.

Bonn, December 2007

*Rudolf Traub-Merz*  
Coordinator  
International Trade Union Cooperation  
International Development Cooperation  
Division  
Friedrich Ebert Stiftung

## Chapter 1

# General Conditions for Trade Union Activities in Germany<sup>1</sup>

### Historical retrospective

German trade unions represent the social, economic and cultural interests of all workers in the Federal Republic of Germany. A brief review of the history of the Federal Republic of Germany offers a better insight into the general conditions of constitutional, social, and collective bargaining laws under which trade unions in Germany carry out their task of representing comprehensively the interests of workers dependently employed.

### Liberation from Nazi dictatorship

The unconditional surrender of the German forces on 8/9 May 1945 and the defeat of the Nazi dictatorship brought the Second World War to a close in Europe. Europe, and Germany

in particular, were in ruins; the territory of the former German Reich was initially partitioned into three, and after France was admitted into the Allied Control Council, into four occupational zones, and the same happened to the country's capital. State power rested with the Joint Control Council of the Allied Commanders-in-Chief.

### The partition of Germany

Shortly after the end of the war, relations between the Western allies and the Soviet Union started to cool down and soon the "Cold War" set in. In consequence, the three western zones were united into one economic administrative entity and later established as a uniform political and economic entity – the Federal Republic of Germany. Its constitution was called the Basic Law and came into force on 23 May 1949. Bonn was chosen to be the provisional capital. In eastern Germany, the German Democratic Republic was founded on 7 October 1949 with the Soviet sector of Berlin as its capital.

In the process, Germany was divided into two different political entities: in the West (in what later became the Federal Republic of Germany), the model of a social market economy was increasingly being implemented after the reform of the currency, while in the East (later to become the German Democratic Republic, GDR), a centralised planned economic system was created by nationalising industry, commerce and agriculture in line with the principles of "real socialism".



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<sup>1</sup> The term "workers" or "employees" is used in a gender-neutral manner in what follows.





## The Federal Republic of Germany

### The Basic Law

When the constitution, the Basic Law came into force (a term designed at the time to indicate the provisional nature of this constitution of which a final version was planned to be formulated once Germany had been reunited), the Federal Republic of Germany was founded on 23 May 1949 and in October that same year the GDR was proclaimed a people's republic based on the Soviet model.

At the centre of the Basic Law are human and civil rights and also the principle of the rule of law with the separation of power as a major element. It is intended to constrain State power by checks and balances on the part of the independent bodies of the legislature, executive and jurisdiction.

The principle of the "Social State" – or welfare state – constitutes another core element; it entails an obligation of the State to protect socially disadvantaged individuals and to make constant efforts to bring about social justice. The social market economy is a product of the

"Social State" principle as it is supposed to prevent unbridled capitalism on the one hand and planned economic centralism as an obstacle to individual initiative and creativity on the other.

"All State power emanates from the people" – this fundamental democratic principle is enshrined in the Basic Law. Therefore a free, secret and independent ballot determines all levels of political life and the legislature: at the community and district level, the level of federal states or Länder and the national level, and ultimately the level of the European Union.

### Reunification

When relations between the USSR and the USA became more relaxed in the course of a general détente and the East German government collapsed, the GDR acceded to the Federal Republic of Germany on 3 October 1990, following negotiations between the governments of the GDR and the Federal Republic. In consequence, the Basic Law came into effect on the territory of the former GDR as well. Berlin is now the capital and seat of government.



corrective function with regard to social policy and is expected to ensure a balanced social system, albeit on the basis of capitalist competition. The social market economy calls for building a „Social State“ because unbridled capitalism contributed a great deal to the political upheavals and the two world wars in the first half of the 20<sup>th</sup> century.<sup>2</sup>

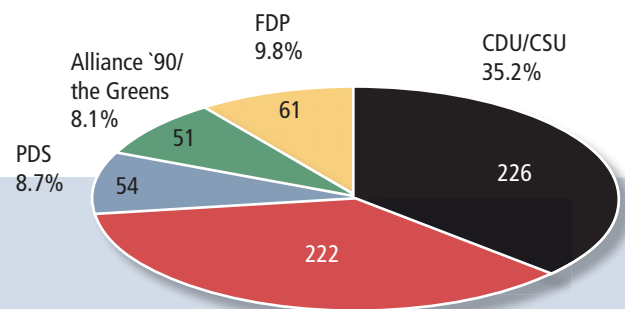
### The democratic rule of law and the „Social State“

A well-functioning social market economy presupposes both a democratic rule of law, which guarantees fundamental rights and personal and economic liberties and in which the actions of State organs are regulated by constitutional provisions, and a „Social State“ which takes legislative, financial and material measures in order to ameliorate to some extent social differences and tensions.

### The „Social State“

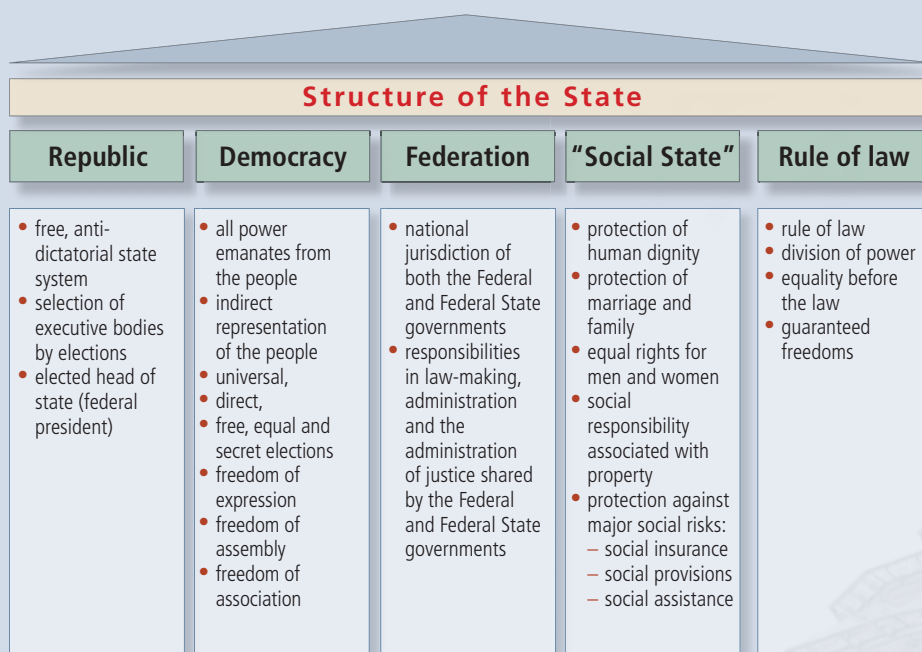
Individual and collective freedom of association is an important feature of the Social State as practised in the Federal Republic of Germany. Freedom of association means the right of every individual to associate him/herself with others in order to protect or promote working conditions, and the protection of both the status and activities of such associations under the constitution. The associations of the employees – the trade unions – and of the employers – employers’ associations – enjoy such protection; as parties to collective agreements they are empowered to regulate working conditions through collective agreements in their area of responsibility and to do so independently without interference by third parties. Parties to such agreements are obliged to abide by the conditions negotiated. If, for example, an employer does not comply with the provisions of

2 Das Politiklexikon. Schubert/Klein. Bonn, Publisher J.H.W. Dietz Nachf., 1997, p. 263



**Distribution of seats in the German Bundestag 2005**

### Basic principles of the Constitution



the collective agreement, legal proceedings may be instituted against him in the labour courts.

### The rule of law

Under the rule of law, institutions of the State are subordinated to the law enshrined in the constitution. The Basic Law guarantees specific unalienable fundamental rights to each individual and gives precedence to the body of law and legal provisions in the conduct of the State.

The democratic rule of law is characterised by the fact that the constitution and the separation of powers take precedence. The separation of powers is intended to prevent a concentration and misuse of political power. We distinguish between legislative power, executive power and judicial power. The Basic Law assigns these powers to independent institutions of the State: legislative power is vested in the parliaments, executive power in governments and judicial power in the courts of law.

The court system in Germany consists of five branches of law: “ordinary” courts are responsible for criminal and civil cases and the “non-

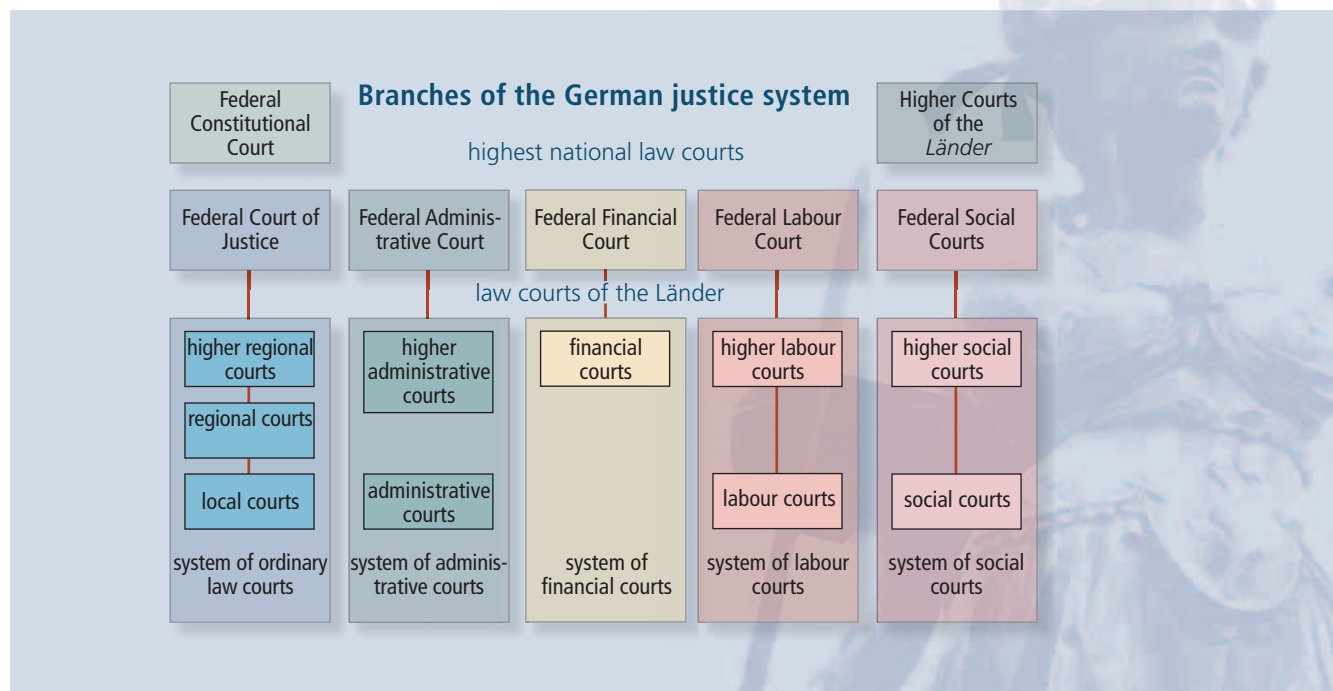
mandatory” cases regarding the land title register, decedents’ estates and guardianship.

Courts with ordinary jurisdiction administer the law at four instances: magistrates’ courts, district courts (Landesgericht), higher district courts (Oberlandesgericht) and the Federal Court of Justice (Bundesgerichtshof). Administrative courts function at four levels as well and are responsible for litigation concerning administrative law, i.e. reviewing the conduct of public bodies in the State administration. The fiscal courts (two instances) handle disputes over taxes and levies.

The courts most relevant to our subject are the labour courts and the social courts which will be described in detail in the following section.

### Labour courts

Labour jurisdiction consists of three instances (labour court, higher labour court and Federal Labour Court) and handles disputes arising out of employment contracts, the works constitution based on the Works Constitution Act and matters of disagreement between parties to collective agreements<sup>3</sup>.



3 These terms will be explained in chapter 4 and 5.



A labour court of first instance is composed of a professional judge and two lay judges from the side of the employees and the employers, respectively; the latter are appointed by either trade unions or employers' associations. Workers may be represented in court by their trade union representative, employers by a representative of their employers' association. Representation by legal counsel is not mandatory in the labour courts, i.e. litigants may plead their own case. There are labour courts in almost every major city, 147 in total including chambers in session outside court buildings.

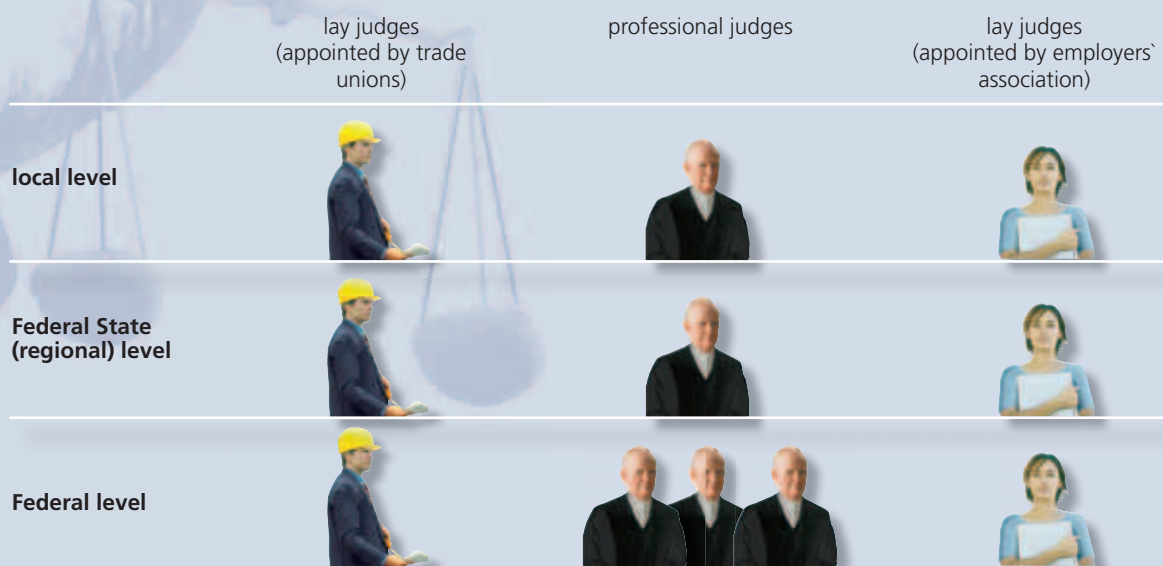
The courts of second instance are the higher labour courts with chambers again composed of one professional judge and two lay judges from the trade unions and employers, respectively. Litigant parties need to be represented by legal counsel (either a representative of the trade unions or employers' association or a lawyer) in cases requiring a defended judgment. In a case where no judgment but a decision is required, litigants may plead their own case. There are 21 higher labour courts in total, including chambers in session outside court buildings.

The Federal Labour Court based in Erfurt acts as the third instance. There are currently nine panels of judges (Senate) consisting of three professional judges and two lay judges from the trade unions and employers. In a case requiring defended judgment, litigants must be represented by a lawyer; in all other cases the petition paper or argument in support of a complaint must be signed by a lawyer, while the litigant may present his/her case in court.

Labour courts and higher labour courts are independent courts of law and fall under the remit of the labour ministries of the Länder (or the ministries of justice in some Länder), while the National Ministry of Labour and Social Affairs is responsible for the National Labour Court.

The costs of labour court proceedings are equivalent to those of other branches of law, but the party winning in the first instance is not entitled to a refund of its costs for legal representation. This procedure is intended to prevent workers from having to bear the substantial legal costs of the opposite party if they lose a case. Labour courts offer the opportunity to receive legal aid by the State, as do all other branches of law.

### The system of labour and social courts



## Social courts

Social courts are a branch of the administrative courts which emanates from the principle of the Social State and its underlying philosophy. Social courts are responsible for disputes related to statutory social entitlements such as pensions from the statutory pension insurance or the accident insurance, unemployment benefits, and payments by the statutory health insurances or long-term nursing insurance.<sup>4</sup>

Social courts act as a three-tier structure. In the first instance, social courts rule on all disputes regarding social insurance law. Each social court consists of a minimum of four chambers responsible for the different social insurance areas. Each chamber of a social court sits with one professional judge and two lay judges, acting as associate judges. In analogy to the labour courts, lay judges enjoy the same rights and obligations as professional judges, i.e. they have the same voting right. Lay judges are nominated by the trade unions or other associations from a socio-political or occupational background and the employers' associations from health insurances etc.

Each Land has a higher social court as the second and final instance for legal disputes concerning social law. The panels of judges are composed in the same manner as the chambers of first instance and each panel sits with one chairperson, two professional and two lay judges.

The National Social Court hears appeals (on a point of law) against rulings of the higher social courts or complaints about the non-admission of an appeal in the higher social courts. The panel of judges is composed in the same manner as that of the second-instance courts.

Proceedings in the social courts are free of charge as a matter of principle so that litigant

citizens must not bear any court fees. Only public authorities and public-law institutions, such as insurers or public support institutions (Versorgungsamt), must pay a fee for each case in which they are involved. Representation by legal counsel is usually required because of the complicated issues at stake. Trade unions, for example, provide such support for their members. In addition, legal aid is available in the social courts as well. There are 69 social courts in total in Germany, plus the higher social courts in each Land.

The statutes of the trade unions affiliated to the DGB provide for free legal advice and representation in labour and social courts by the trade union concerned; the latter may delegate such function to the legal protection agency of the DGB, a limited company.<sup>5</sup>

## 1. Social Security Systems

### A brief historical retrospective<sup>6</sup>

In the second half of the 19<sup>th</sup> century, Germany's industrialisation was pushed ahead at a rapid pace. The faces of the towns and landscapes in the industrial regions of Saxony and Prussia changed within a few years. After the setbacks inflicted on organised labour by the reactionary policies of the German states in the aftermath of the 'lost revolution' of 1848, trade unions formed in many trades and industrial occupations in the '60s and '70s. In the trades, unions emerged which followed the traditions of the workers' organisations and journeymen's unions of the era before 1848.

In the centres of the heavy industry, some attempts were made in the 1860s to organise not only tradesmen but also women and unskilled workers. Workers' movements could take two different forms, which existed side by side: There were temporary strike coalitions

<sup>4</sup> see Chapter 2

<sup>5</sup> The legal protection agency, the former legal protection department of the DGB, was set up as a separate entity on 1-4-1998. See Chapter 3 on this.

<sup>6</sup> The term "workers" is used in a gender-neutral manner, including both male and female workers, in the entire chapter 2.



that were set up to deal with specific conflict situations, and there were permanent trade associations that were founded on the principle of representative democracy. As the latter were able to advance the workers' interests even after a labour dispute, and as they formed reserves for the next industrial action that was sure to follow, the concept of central associations took root relatively quickly.

Founded in 1865, the first of these central associations, the National Union of Cigar Workers, was ideologically close to the General Association of German Workers (ADAV) which Ferdinand Lassalle had established in Leipzig in 1863 as a workers' movement to support social democracy in party politics. Next to the ADAV, the Hirsch-Dunker trade associations and the Christian trade unions emerged, the former associated with the liberal Progress Party, the latter with the catholic Centre Party.

The then chancellor of the German Reich, Otto von Bismarck, widened the scope of social policy so as to drive a wedge between the workers and Social Democracy. On the one hand, Bismarck's state bared its teeth, marginalising and oppressing the social-democratic workers and depriving them of their rights; on the other, this reactionary State introduced a national social policy that had no equal in Europe at the time. Thus, laws were passed which introduced health insurance in 1883, accident insurance in 1884, and disability and old-age insurance in 1889.

The principles regulating these social security systems, to which statutory unemployment insurance was added in 1927, survived the Empire, the Weimar Republic, and even the dictatorship of the Nazis. The following principles still apply today:



### The basic principles of the social security systems

- The principle of insurance, which postulates that the insured acquire a claim to benefits by paying contributions. Pension and unemployment insurance benefits are governed by the principle of commensurability, meaning that the amounts paid in pension insurance and the duration of payments in unemployment insurance depend on the total amount and duration of contribution payments. Health insurance benefits as well as those paid under the nursing insurance scheme introduced in 1994 are based on the principle of solidarity and aim to ensure the provision of essentials.
- The principle of combining governmental framework legislation and social self-government, under which the State sets a legal framework within which social insurance is managed by governing and controlling bodies elected by the insured and the employers.
- The principle of diversity which, ignoring the concept of a standard insurance, supports a wide variety of coexisting and mutually complementary insurance types and providers.

Besides, everyone has a legal claim to social benefits of whatever kind which is actionable in any court having jurisdiction.

In his policy statement of October 1969, the first Social-Democratic chancellor of the Federal Republic, Willy Brandt, announced his government's intention of creating a Social Code incorporating all social laws. The purpose of this compilation was to simplify social legislation and increase its transparency. To simplify matters, only those parts of the Social Code that are of the greatest importance to our subject will be discussed in the following.

Next to the rule of law, the model of social market economy postulates the principle of social security. In Germany, social security is created by efficient social-security systems. These systems were built up over many decades by trade unions, employer organisations, and politicians from all parties. From the trade unions' point of view, social security should be guided by the interests of the workers and their families as well as by the needs of the socially-disadvantaged segments of the population.



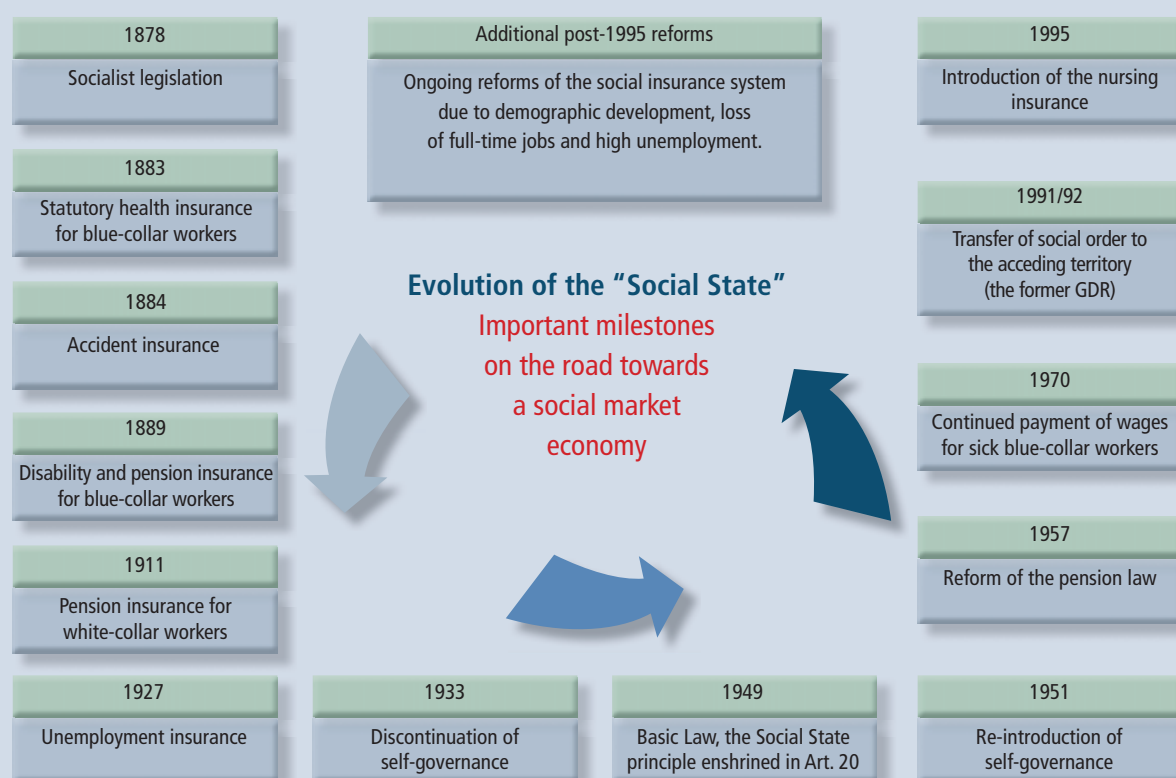
In the opinion of the trade unions, this includes

- self-fulfilment, self-determination, and participation in societal policy-making and decisions,
- health promotion and preservation,
- safe and humane workplaces,
- occupational skills and corresponding employment,
- adequate and secure incomes, and
- a supply of social and health-related goods and services that meets the demand.

According to their statutes, the trade unions support enhancing the social constitutional state and encourage the spread of democracy in the economy and the administration. Representing the economic, social, cultural, and pro-

fessional interests of their members, they actively participate in the design of social security through, among other things, the social security systems.

Today, the principle of the Social State is enshrined in the Basic Law, Germany's constitution which in this particular respect cannot be changed even by the two-thirds majority in parliament which otherwise suffices for the purpose.<sup>7</sup> This, in fact, constitutes a permanent obligation on the Social State to secure for its citizens the conditions that are indispensable for their subsistence. At the same time, every citizen is called upon to assume responsibility for their social security. The Social State is based on the principle of performance and counter-performance.



<sup>7</sup> Article 79 regulates amendments to the Basic Law. Article 79 Paragraph 3 prohibits amendments affecting the principles laid down in Articles 1 and 20 as well as the division of the Federation into Länder.

Social policy must see to it that the cost of the social-insurance and public-welfare benefits extended by the Social State, which is borne by the community of the insured and the tax-paying public, respectively, does not transgress certain reasonable limits and remains affordable in consequence. As both demographic developments and societal changes affect the financing of the social security systems, social policy must necessarily keep scrutinising ways and means of preserving our social security systems for future generations.

Most social legislation is now incorporated in the twelve volumes of the Social Code (SGB), while those laws that have not yet been codified will be regarded as constituent elements of the SGB pending their integration. This has made the social law of the Federal Republic of Germany much more manageable than it used to be.

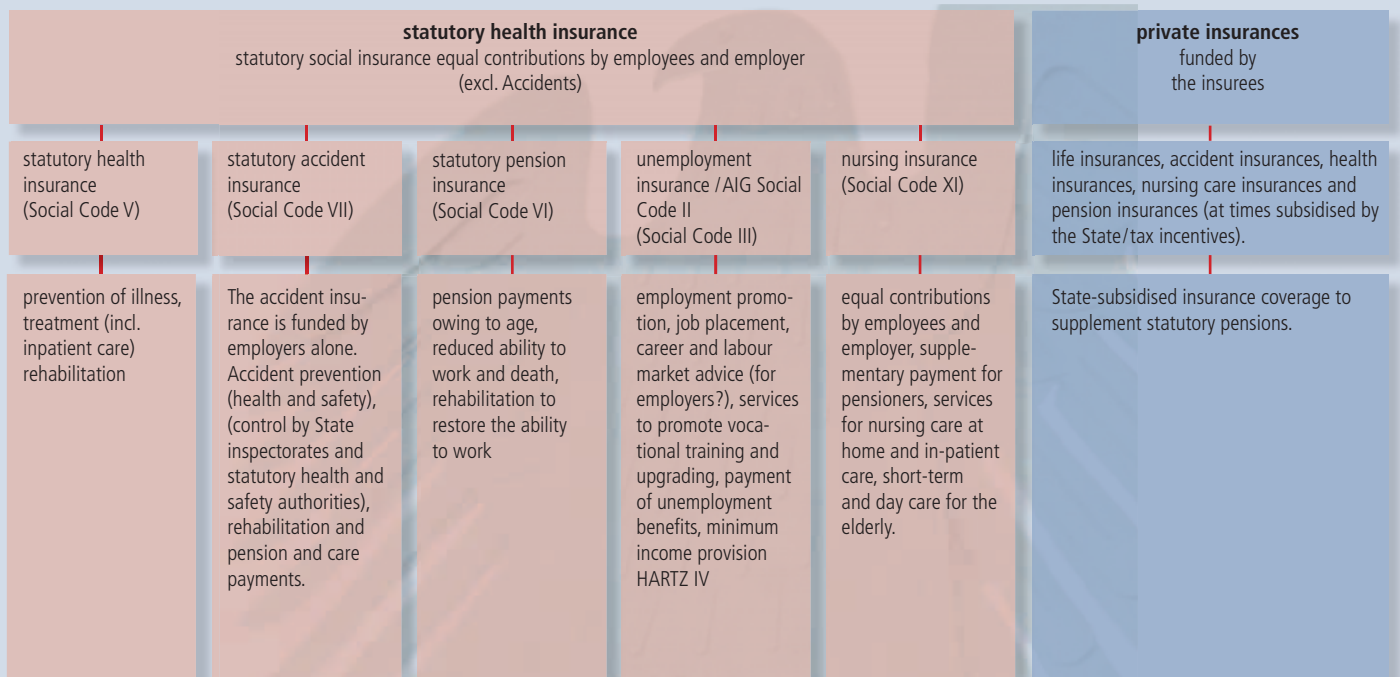
## 2. The system of self-government

The term “self-government” depicts the transfer of administrative functions to legally independent organisations controlled and governed by their stakeholders. While all self-governing institutions are supervised by the State in terms of compliance with the law and are bound by framework legislation, they are not supervised in terms of technical implementation, i.e. there is clearly-defined scope for independent action.

We distinguish between four categories

- **local self-government** of municipalities and counties which, although part of the executive, have specific self-managed functions which they carry out subject to municipal regulations,

### The social security systems in Germany



- **self-government of professional groups**, or chambers, which represent the interests of their members (bar association, medical association etc.) in addition to statutory functions transferred to them as public-law associations,
- **self-government of cultural institutions** (universities, public broadcasting),
- **self-government of social institutions** related to the social insurance system (health insurances, nursing insurances, the German pension insurance scheme and accident insurance agencies).

**Insurance against unemployment** is the responsibility of the Federal Employment Agency (Bundesagentur für Arbeit) which, although a public-law institution, is not defined as a social insurance agency since members of its governing boards are not elected.

It may be appropriate at this point to describe in brief the system of self-government practised by social insurance agencies and the Federal Employment Agency:

Social insurance agencies are defined as corporations governed by public law; their functions are spelled out in the provisions of the Social Code (Sozialgesetzbuch) and the State supervises them (on points of law) through the national or regional insurance offices.

Social insurance agencies are responsible for and fulfil public functions transferred to them by legislation. The system of self-government enables the stakeholders, i.e. insured workers and their employers, to carry out the functions, set out in the relevant sections of the Social Code, through their elected representatives.

Social insurance agencies usually have three governing bodies: the assembly of representatives elected by the members, the managing board consisting of several managers who formally represent the social insurance concerned, and the full-time managing director heading the administration.

The assembly of representatives is the most important body of the social insurance agency and has mainly legislative functions. The number of representatives is laid down in its statute, but must not exceed 60 members. Representatives elect from their midst a chairperson and a deputy; the two must represent different groups (group of insured persons or employers). The statutes of most insurers provide for the chair to change by alternation at regular intervals.

The managing board is elected by the assembly of representatives; it is responsible for the administration of the social insurance agency, must carry out the decisions taken by the assembly of representatives and is accountable for its work. The pension and accident insurance agencies have full-time managers who are part of the managing board in an advisory function.

The board of governors, who serve as honorary members, is the supreme self-governing body in the statutory health insurance. It elects and controls the full-time management which acts in its own responsibility and is accountable to the board of governors.

Members of self-governing bodies are elected every six years in a secret ballot. Trade unions or other workers' associations and the employers' associations elect their representatives separately. If the number of candidates does not exceed the number of seats, formal election procedures may be considered unnecessary for cost reasons; such elections are called "unchallenged elections". If elections take place, they will be carried out by postal vote. Only a few social insurance agencies, usually the largest and most important ones, proceed in this manner.

The **National Employment Agency** is not considered a social insurance agency since its supreme governing bodies – the boards of governors at national and local levels – are not elected by the insured, but appointed by the

Federal Ministry of Labour and Social Affairs or the ministries of the Länder, respectively. Boards of governors are composed of representatives of public authorities, employers and trade unions by one third each. Again, the full-time management, or the managing director at the local level respectively, is controlled by the board of governors.

Union and employer representatives serving in an honorary function on self-governing bodies are actively involved in solving emerging problems. Given their practical experience, the social insurance agency is thus in a much better position than State bureaucrats to respond to the needs of the insured, and it may use this information for the purpose of taking action itself or lobbying the legislature. Major self-governing functions are similar for all types of social insurance agencies: they adopt the budget, take note of the annual accounts, approve the annual report and elect and control the management. Members who act on self-governing bodies in an honorary function also work on various subject-specific committees, including the counter-claims committees. The latter examine cases in which the insured have appealed against demands for payment by social insurance agencies, and take the necessary decisions.

Insurance advisers working on an honorary basis are available in both the pension insurance and the health insurances; insured workers may consult them on controversial matters arising from the insurance relationship without extra costs. This procedure guarantees that helpful advice is available locally on all matters relevant to the insured. All members of a self-governing body are entitled to intensive training and further training for which they must be released from work by their employer. They do not receive a salary, but usually a lump sum payment in return for their work. Lost income, if any, will be refunded.

German trade unions attach great importance to procedures of self-government in the social insurance systems: given the regular exchange of views between members of self-governing bodies and the trade unions who have nominated them, trade unions are able to respond to the practical implications of legislation and bring them up in the political debate. In addition, self-governing bodies exert a great deal of policy-making influence on social insurance agencies since they are involved in decisions on personnel, statutory and budgetary matters.

### 3. The problems of the social security systems

#### The structures of Germany's social security systems

Before we turn to the problems that influence our social security systems, an explanation of their structures appears indicated. Virtually all these systems are based on the pay-as-you-go or **current-disbursement principle**, meaning that those in gainful employment pay a certain percentage of their monthly gross income into the four statutory social-insurance funds now existing (pension, health, nursing, unemployment) by which they are insured under applicable legal regulations. Their employers, in turn, pay the same amount. Wage-earners whose income exceeds a certain limit, called a contribution assessment ceiling, are free to take out private insurances.

One exception is that of the statutory accident insurance in so-called **Berufsgenossenschaften** (occupational health and safety insurance) which receive contributions from employers only. Social-insurance contributions differ in amount from one insurance system to another; this will be discussed at a later point.

Under the pay-as-you-go approach, contributions are not saved up for each individual contributor but pooled by the insurance institutions and used each month to defray the cost of the benefits which legal regulations compel them to pay to the insured.

The best example by which to explain the **pay-as-you-go process** is that of the statutory pension insurance:

Paid half and half by the insured and their employers, incoming contributions are used almost exclusively to finance monthly pension payments to the current beneficiaries. These people, in turn, acquired claims called pension entitlements at the time when they were gainfully employed by virtue of the contributions paid by them and on their behalf, which were then used to finance the generation of pen-

sioners existing at the time. Part of the contribution funds is used for other benefits such as rehabilitation measures at health resorts to recover the capacity to work, etc. All this means that pension benefits ultimately depend on

- how many wage earners pay into the pension funds, and for how long,
- the amounts actually paid in contributions, and
- the entitlements acquired by the current generation of pensioners by virtue of their contribution payments during their working lives.

This principle is also called the **inter-generational contract**.<sup>8</sup> Because this contract exists, all social security systems are affected by the factors outlined below.<sup>9</sup>

### The inter-generational contract: pension insurance

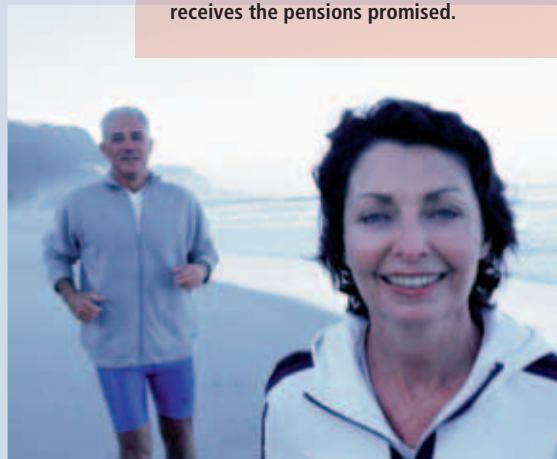
#### The inter-generational contract: pension insurance

##### pays contributions

(amounts are so calculated as to ensure payment of pensions at any given time.



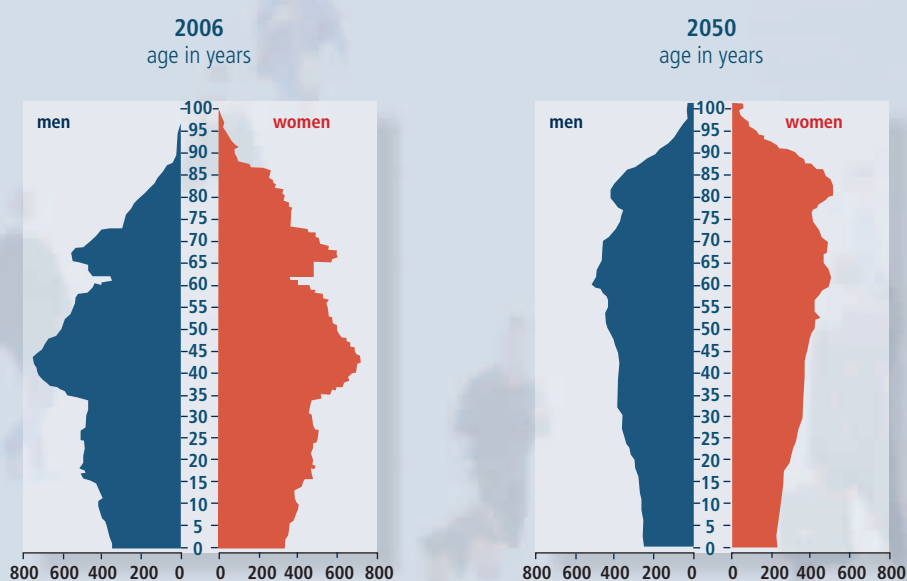
#### the current generation of pensioners receives the pensions promised.



<sup>8</sup> The term has more than one meaning: as a rule, it is used to designate a contract between the wage-earning generation which finances the social security systems through its contributions and the generation of pensioners which, having financed the preceding pensioner generation with its own contributions, now relies itself on being financed by those who are currently in gainful employment. Consequently, we are looking at a contract between two generations. But each wage-earning generation also finances children and adolescents, a fact that is inadequately appreciated in the government's policies for families, children, and adolescents and is left completely out of consideration in this context. Recognising that this contract extends to three generations would mean spending much more of the taxpayers' money on relieving the wage-earning generation that is bringing up children.

<sup>9</sup> Their impact on the statutory accident insurance is limited; see Section 8.

## Demographic development: age structure of the population in Germany



extrapolation based on the following assumptions: constant birth rate; life expectancy of newborn boys 83.5 years, girls 86.0 years; annual immigration of 100,000.  
Source: Federal Statistical Office

In all states, societies are influenced by **demographic developments, globalisation, and industrial and economic restructuring**. The impact of these factors on Germany's social security systems will be briefly described below.

### Demographic developments

The basic element of the social structure is the population. Its size is influenced by three factors, namely births, deaths, and migrations.

Although the **birthrate** has been declining for decades in Germany, there has been no severe decline in the population because life expectancy of the people living in Germany kept increasing, and the immigration inflow exceeded the emigration drain. However, the population is expected to decline markedly in the future because more people die than are born

each year. Not even immigration can compensate these losses. The new Länder are hit particularly hard because birthrates there are lower than elsewhere, the number of immigrants from abroad is as small as it could be, and many migrate from East to West, especially young people of employable age.<sup>10</sup>

At the same time, a significant shift is going on in the age structure of Germany as a whole, meaning that the proportion of old people is growing continuously, while fewer and fewer young people move up. Every year since 1973, for instance, there have been more deaths than births in Germany

### Changes in the demographic structure

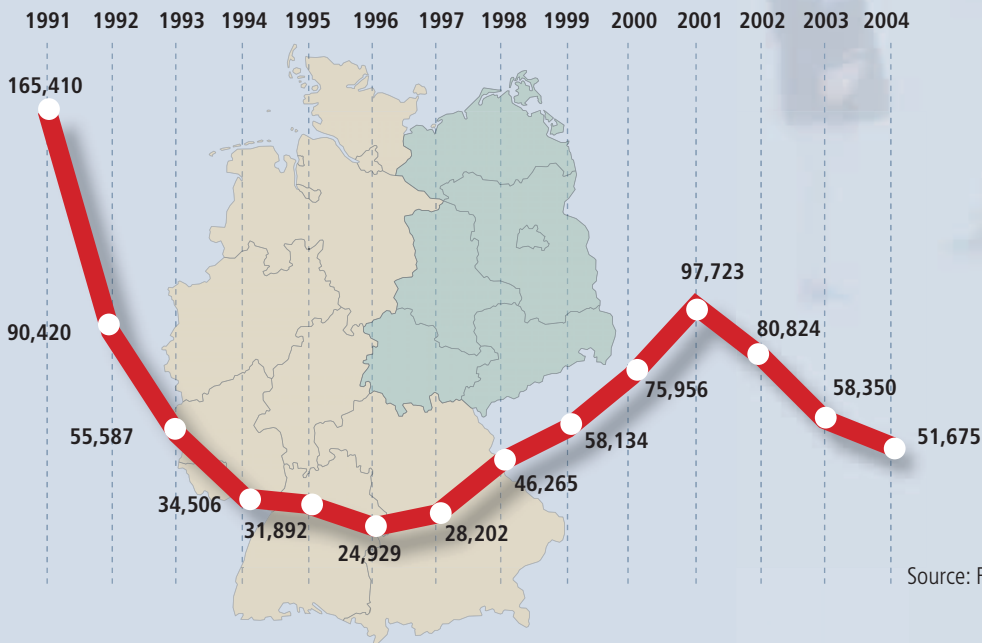
Changes in the relationship between the age structure of the population and the number of births and deaths affect the proportional rela-

<sup>10</sup> Taking migrants and immigrants into consideration, the new Länder and East Berlin lost around one million people in 2004. Source: Datenreport 2006, Federal Statistical Office 2006.



## People are leaving eastern Germany

If you deduct those who moved to the East from those who left, the following number of individuals turned their back on the East since reunification



tion between the age groups, i.e. children and adolescents, potential wage-earners, and pensioners. Consequently, the ratio between the part of the population that is in gainful employment and the part that must be supported by the wage-earners is changing as well.

In addition, the life expectancy of the population is steadily increasing and affects the length of time for which pensions are drawn. In the old Länder, it amounted to

- **9.9 years** overall in **1960** (9.6 years for men and 10.6 years for women).
- After reunification, it was **15.8 years** overall in **1995** (13.6 years for men and 18.2 years for women), and
- **17.2 years** overall in **2005** (14.7 years for men and 19.8 years for women).

This means that the average age of wage-earners keeps going up while their share in the total population keeps going down; as the number

of young people who enter the economically active phase of their life is declining, the number of premium-payers is bound to decline as well, while the proportion of those who live on their transfer benefits is increasing.

### Horror scenarios are out of place here, but...

using demographic developments to stir up a fear-ridden debate makes neither political nor economic sense. While it is true that the number of pensioners will increase in Germany until 2030, it is equally true that the number of children and adolescents will decline at the same time. Now, as the wage-earners for whom social-insurance contributions are mandatory must pay for the support not only of pensioners but of those who are not yet in gainful employment, the relationship between the active and inactive members of the population will change little compared to the present situation, for even today, each non-working person (pensioner, child or adolescent) is supported by 1.5 wage earners.<sup>11</sup>

11 Source: Federal Statistical Office.

The situation will become problematic only in the event of a marked change in the relationship between contributors and beneficiaries, i.e. when fewer and fewer premium-payers have to support more and more beneficiaries. The conclusion is that rather than paint horror scenarios, we should begin tackling the problem of how to remodel the funding of our social security systems in a way that makes sense.

So far, a number of steps to modify the existing systems have been taken since the mid-80s. However, these steps did not meet with the approval of everyone concerned or involved as they merely led to – albeit substantially enormous – cutbacks in the benefits paid by all social systems. Although they did result in some minor structural improvements, all these attempts essentially failed because there was no fundamental change in the funding regime of the social security systems. At the end of the day, the insured pay steadily increasing contributions and receive steadily decreasing benefits.

It is imperative to take timely and comprehensive steps to address demographic developments as well as globalisation and its immediate consequence, the restructuring of industry and the economy. However, the reform efforts undertaken by the current grand coalition so far appear not to follow any discernible course, all the more so as there is as yet no sign of any fundamental reconstruction of the social security systems which, as before, are being amended only to the detriment of the insured. Chances are that a fundamental reform will be tackled only after a clear political majority has been established.

### Industrial and economic restructuring

The growing economic interdependence of the nation states caused by the traffic in goods and services and the migration of capital, tech-

nologies, and labour induced the industrialised nations to restructure their industry and their economy. From the 1970s, national markets that were sealed off before began to open up and invite international competition. This is illustrated very well by those corporations which, formally protected by the State, used to hold monopolies in the telecommunication, transport, and energy sectors. Caught up in the same development, banks, insurances, and private and public service providers will have to confront international competitors more than before in the future.

### The elimination of full-time jobs

The consequences of this restructuring process for the workers in the countries concerned are severe: As the global division of labour expands, the demand for low-skilled industrial workers declines steadily. At the same time, new jobs are being created in other segments of the labour market which, however, require greater qualifications as a general rule. Moreover, many full-time jobs are being replaced by part-time or low-paid jobs to save expenses and public charges. In Germany, these problems were aggravated by labour-market policies. Thus, for instance, the decision to remit the income tax on **midi-jobs**<sup>12</sup> with a monthly pay of between 401 and 800 Euros induced many employers to split up what used to be full-time jobs into several mini-jobs because the tax burden on a full-time job makes it around 54% more expensive than three mini-jobs doing the same work.<sup>13</sup>

In consequence, the number of full-time jobs on which social-insurance contributions are due is declining continuously: since the mid-90s, Germany's enterprises have shed around 2.2 million full-time jobs, so that ever since that time, around 1,000 wage earners, for whom social insurance used to be mandatory, have been moving every working day from the asset

<sup>12</sup> See also Chapter 2, Section 4.gen

<sup>13</sup> Peter Bofinger. *Wir sind besser als wir glauben*. p. 89. Rowohlt Verlag, 2005.



to the liability side of the macro-economic ledger. What is more, whole enterprises keep moving to eastern Europe and Asia, causing considerable losses of full-time jobs to the tune of several hundred a day.

The political side originally expected that a large proportion of these jobs would be replaced by new ones created in the **service sector**. This may reasonably be doubted, for even there, big German enterprises have already begun re-locating jobs to eastern Europe and Asia. Because of the deregulation of the European service market and the enlargement of the EU, suppliers were able to move their production facilities to the east of Europe, followed by entire manufacturing lines and factories. Later on, even production-related services like development, design, and marketing were shifted to these countries by German enterprises.

Because of the economic boom of 2006 and 2007, growth rates are increasing and unemployment figures are slowly declining. Yet the grand coalition has so far been somewhat hesitant in tackling its project of reforming the Social State comprehensively. Instead of fundamentally reforming the labour market, the health system, the statutory pension insurance, and the taxation system, only patchwork repairs were done in a few sectors such as labour-market policy. Next to the economic boom, these measures may well have contributed towards reducing the unemployment rate by almost 1.5%. Even taken together, however, they cannot secure the funding of our social security systems in the longer term because no changes were made to the financing system itself.

## The financing of the social security systems

The social systems are financed by the workforce: under the current system, the cost of the social security systems is paid almost exclusively by employees subject to compulsory insurance. In 1970, 22 million wage earners<sup>14</sup> paid around 11.4 billion Euros for around 8 million pensioners, while today, the 26.5 million wage earners who are subject to compulsory insurance must find some 140 billion Euros to support about 20 million pensioners.

In addition, the wage-earning population confronts some 4 million unemployed and 2 million people who draw income support or class-two unemployment benefit<sup>15</sup>, all living exclusively on the money generated by those who are currently in gainful employment (the 50% contributed by the employers actually constitute withheld pay and are thus paid by the employees<sup>16</sup>).

This means that the **employees' incomes** are bearing a disproportionately high and continuously growing part of the cost of the social security systems while the burden on corporate and capital income is declining, although its share in the gross national product is going up. Thus, the burden on profit and capital income came down from some 34% in 1977 to around 17% in 2003, while the dependent labour force furnishes around 90% of the cost of the social systems through their social insurance contributions, their wage tax, and their value-added and eco-tax payments.

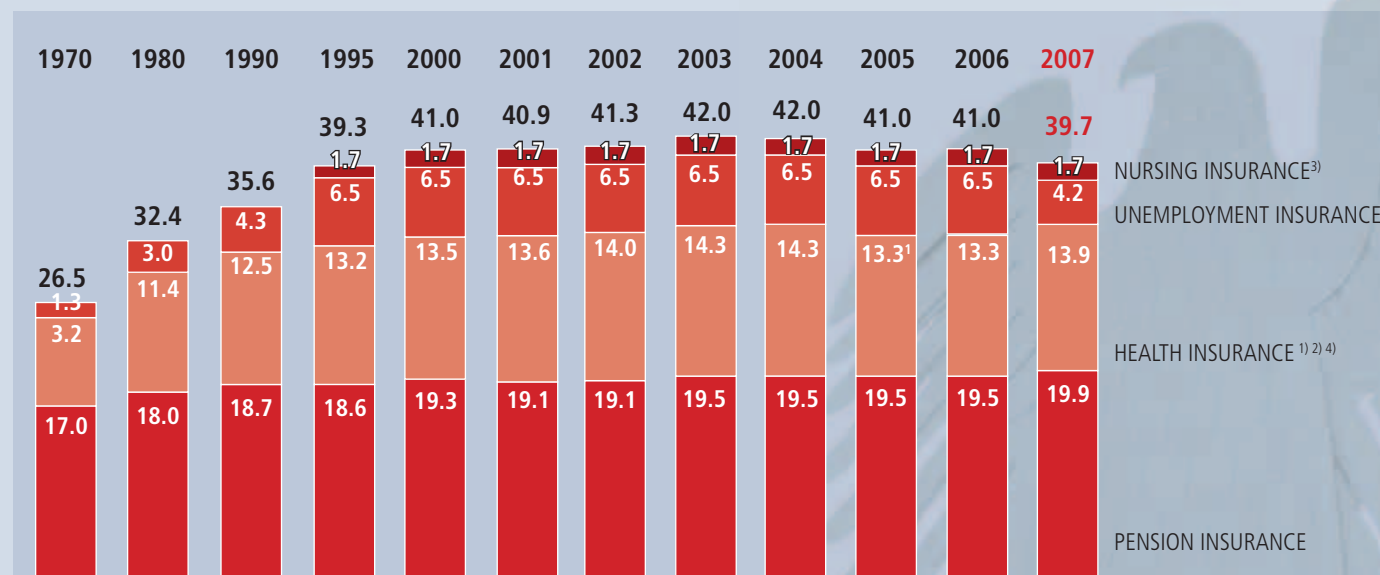
It is evident even today that in the medium term, our social systems will no longer be able to meet on their own account the claims acquired by their members through the payment of contributions because the number of premium-payers keeps declining and, as described earlier, the social systems are financed

14 Meaning holders of jobs that are subject to compulsory insurance.

15 The term will be explained in greater detail in Section 2.4.

16 In the year of its introduction, this was a genuine contribution which diminished the employer's profits. In the years that followed, however, nominal-pay increases that would have been due because of productivity improvements were either omitted or delayed until the employers' advance contribution to social insurance was neutralised.

## Development of contributions to the statutory social insurance (in % of gross pay)



- 1) as of July 2005 plus 0.9% special contribution by employees  
 2) until 30-6-2005 14.2%  
 3) as of January 2005 plus 0.25% for childless employees  
 4) as of 30-9-2006

Source: BMAS, IW

by wage earners with full-time jobs. Persons with high incomes contribute, through the tax they pay, only towards financing the general duties of the State but not towards funding the social security systems, as social insurance contributions are mandatory only for those with incomes below the contribution assessment ceiling. Mutatis mutandis, this also applies to civil servants<sup>17</sup> who have to pay taxes but not social insurance contributions.

What is more, members of the dependent workforce whose incomes range markedly below the ceiling pay much more in social insurance contributions than top earners. Thus, for instance, those who earn one million Euros per year do pay taxes at the peak rate of 42% but no more than around 2.4% in social insurance contributions. Conversely, low-income earners pay hardly any taxes, but almost 40% of their income goes for social insurance contributions.

In the last 20 years, moreover, there has been no timely and comprehensive response in politics and society to the changes that were becoming apparent, probably because everybody was hoping that future booms would facilitate stabilising the labour market and the social security systems, as they had done in the past.

These problems as well as the expenses caused by the **reunification of Germany**, which still constitute a heavy burden on the budgets of the social security systems, have been criminally underrated. The **transfers from west to east** amount to around 4% of the gross national product of west Germany to this day. What is more, most of these transfers are financed not by taxes but by the budgets of the social security systems. Extraneous benefits such as the inclusion of time spent bringing up children in the pension insurance and the so-called risk structure equalisation in health insurance con-

<sup>17</sup> By contrast, wage and salary earners in the public service, by far the largest proportion of those employed by public authorities, must pay not only taxes but also social insurance contributions like everyone else in dependent employment.

stitute considerable burdens because great sums are paid by the insured towards these expenditures, although these are really responsibilities of the State that should be financed by all taxpayers, including civil servants and the self-employed.

Financed by the taxpayer, provisions for civil servants constitute a drain without end. Civil servants enjoy health care provisions that are financed by taxes and old-age provisions for which they do not have to pay out of their own pocket.<sup>18</sup> At the federal, land, and community level, expenditures on social provisions are expected to rise from 25.6 billion Euros in 2004 to 36.3 billion Euros in 2030, any future increases in civil-servant salaries not included.<sup>19</sup> In the last few years, the subsidies paid by the Federal Government towards these benefits consistently ranged 18 to 20 billion Euros below the actual total, the obvious conclusion being that the civil servants' pensions are financed from the taxes paid by the working population at large, whose old-age provisions are greatly inferior.

### The reform of the social security systems

All political parties that currently make up the government are agreed that the social security systems will have to be reformed comprehensively and profoundly if they are to fulfil their duties in the next twenty years, although most of the stabilisation measures that were and still are undertaken consist of benefit retrenchments.

So far, not a single political force has been able to show an overall concept of regulatory policy under which a consistent reform programme could be implemented to modernise the social security systems as well as the tax policy. All

reforms implemented so far, sweeping though they may have been in the field of unemployment insurance, are nothing but patches applied to individual branches of the social security system, but there is no evidence of any master plan for a comprehensive redesign that meets the requirements of a changing industrialised society.

Even the **health reform** of 2007, which came into force on April 1 and will be discussed later, revealed itself as the lowest common denominator between the **Bürgerversicherung** (citizens' health insurance)<sup>20</sup> favoured by the SPD and the **Deutscher Gewerkschaftsbund** (the German Confederation of Trade Unions, DGB) and the **Gesundheitsprämie** (flat-rate health premium) adopted by the **CDU** at its last convention. Even now, it is fairly clear that the reform will not reach its target of sustainably solving the financing problems of the health-care system. Although some repairs have been done on **taxation policy** whose modernisation should form part of the master concept to stabilise the social security systems, their effect will be absorbed by the 3 percent increase in value-added tax on January 1, 2007.

We may expect intense debates to take place in society and politics before the social security and taxation systems can be re-structured to the extent necessary.

## 4. Unemployment insurance

Within the framework of social, economic, and fiscal policy, it is one of the core duties of the State to use its labour market policy to ensure the highest possible level of employment, promote the integration of those seeking work, and thus to keep the negative consequences of

18 Around 4.1 million civil servants, pensioners and dependents receive reimbursements called allowances that cover 50 to 80 percent of their health care costs, the remainder being covered by private insurances. A civil servant's pension may amount to as much as 75 percent of his last pay, financed entirely by the State. Kinder und Jugendliche finanziert, was nur unzureichend durch die staatliche Familien-, Kinder- und Jugendpolitik honoriert wird. Die Anerkennung eines Drei-Generationen-Vertrags würde bedeuten, dass weitaus mehr Steuermittel aufgewendet werden müssten, um die erwerbstätige Generation, die Kinder erzieht, zu entlasten.

19 Third pension report of the Federal Government 2005, pp. 64 ff.

20 The Bürgerversicherung and Gesundheitsprämie models will be briefly introduced in Section 2.5.

unemployment within the narrowest possible bounds in the interest of both the national economy and the individual.

The scandal that was aroused when it was revealed that the Federal Labour Office, as it was then called, had forged its placement statistics triggered a fundamental revision of the employment promotion system as well as immediate action in some fields. These measures ranged from qualification upgrades to the subsidisation of non-wage labour costs. Under the Act, young persons, older employees, and job seekers with low qualifications received particular support because of the unusual difficulties in finding employment for them. In addition, special qualification measures were provided for women to improve their ability to reconcile their family and working lives.

Apart from these temporary measures, the red-green coalition that formed the government at the time established the 'Commission for Modern Labour Market Services' in August 2002 with the remit of restructuring completely the unemployment insurance system. Chaired by Peter Hartz, a member of the board of the Volkswagen company, the body was given the name **Hartz Commission**. Coming from all walks of life in business and society, its 15 members included two trade union representatives from the IG Metall and from Ver.di.<sup>21</sup>

### The 'Hartz Acts'

The Commission's mandate was to develop new strategies for employment and placement or, in other words, concepts to reduce unemployment, and to submit suggestions regarding the reorganisation of the Federal Labour Office. Some of the suggestions made in the Commission's report were translated in the following years into laws regulating modern labour market services, the so-called Hartz I, II, III, and IV Acts now embodied in volume II and III of

the Social Code (SGB). Since then, the reconfiguration of the former Federal Labour Office has been refined and changed in a number of ways, while regulations that proved to be ineffective have been modified.

Under the Hartz III Act of January 1, 2004, the Federal Labour Office was reconfigured comprehensively. Within two years, it was converted from a federal authority into a modern service provider, the Federal Employment Agency – a rather brief space of time, given the scope of the task and the size of the organisation involved. As the Agency's business report for 2005 shows, the first steps towards a capable, competent, and customer-oriented service enterprise have been taken with some success.

### The Federal Employment Agency

The three most important duties of the Federal Employment Agency are

- to promote employment,
- to provide support for the unemployed, and – in its capacity as the federal family fund,
- to pay child allowance,
- further duties include conducting labour-market and occupational research and monitoring the labour market.

The Federal Employment Agency comprises

- its headquarters,
- ten regional directorates,
- 178 employment agencies, and
- around 660 field offices at the local level.

### Labour promotion

Labour promotion constitutes the most important aspect of the mission of the Federal Employment Agency. The Third Volume of the Social Code (SGB III) specifies the elements of labour promotion, including

<sup>21</sup> See trade unions in the Confederation of German Trade Unions (DGB).

- career guidance,
- placement in trainee and qualified jobs,
- employer counselling,
- promoting vocational training,
- promoting in-service training (upgrading),
- promoting the occupational integration of handicapped persons,
- providing benefits to create and maintain jobs, and
- providing compensation in case of unemployment or insolvency.

The Federal Agency regards promoting **equal opportunities** for women and men – as embedded in the law – as one of the guidelines of its business policy. Equal opportunity officers have been installed at each employment agency as well as at the Land and federal levels ever since 1998. They inform and advise the agency's own experts and executives as well as institutions and authorities within their jurisdiction about matters related to equal opportunities, the reconcilability of women's working and family lives, and women empowerment.

The reorganisation of employment agencies as **customer centres** relieves the executive departments of the employment agencies, enabling them to concentrate their time and their capacities on their main function, which is to look after the working population. Customers seeking employment are given appointments to talk about placement and the benefits provided by the employment agency (unemployment benefit, further training, retraining, etc.). This permits both parties, the consultants of the employment agencies as well as the unemployed, to prepare themselves thoroughly for these talks. To ensure efficient counselling, customer centres endeavour to bring the ratio between advisers or case managers and employment seekers up to between 1 : 75 and 1 : 150, depending on the occupation in question. So far, the ratio used to vary between 1 : 350 and 1 : 800.

The **consultation services** offered by customer centres cover career guidance, job orientation, and labour market counselling. Addressing young people and adults who look for a job, career guidance precedes (or accompanies) the process of placement, providing information about occupations and their requirements, vocational training options, and developments in the world of work.

Labour market counselling is intended to support employers by providing information about the design of workplaces, the current state and development of the labour market, etc. For this purpose, customer centres have their own special contacts who are supposed to maintain an ongoing exchange with employers to bring them together with those seeking work.

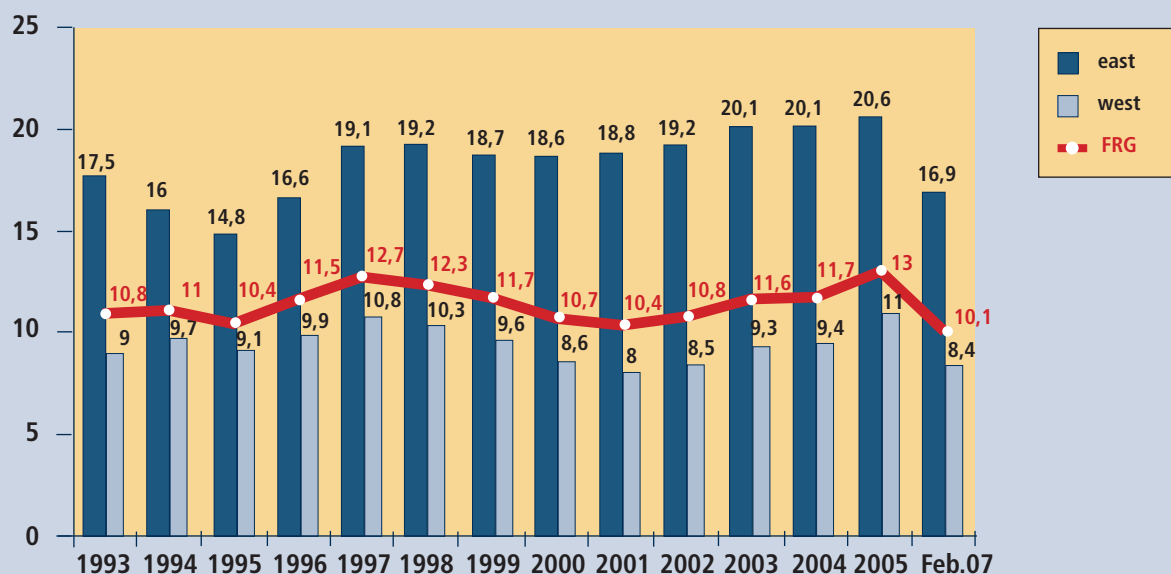
Taking stock of the skills and employment options of a job seeker normally comes first in the placement process. Next, an integration agreement is concluded which specifies both the measures necessary for occupational integration and the steps the customer will have to undertake. The placement process itself may be handled either by the employment agency or a private job agent commissioned by it.

In practice, **employment promotion** aims either to prevent unemployment altogether or to end it as quickly as possible. In addition to the guidance services described above, the same purpose is served by training programmes, occupational promotion, employer support (wage subsidies, recruitment assistance), and a wide variety of other measures designed to assist integration in the labour market.

### The benefits of unemployment insurance

The benefits of unemployment insurance, these services are called active benefits which take priority over passive benefits.

## Unemployment figures



Source: Federal Employment Agency

**Unemployment benefit I<sup>22</sup>** is a passive unemployment insurance benefit which may be claimed by persons who are unemployed or attending in-service training if they

- have registered as unemployed with their employment agency,
- have paid insurance contribution for no less than 12 months during a two-year period, and
- are not more than 65 years of age.<sup>23</sup>

The **time** span for which unemployment benefit I may be claimed depends on the age of the insured and the time for which contributions were paid during the last two years before unemployment. From February 1, 2006, the maximum term will be six months when contributions have been paid for one year, and 12 months for any longer period. Unemployed persons aged 55 and over who have been paying

contributions for 30 or 36 years are entitled to unemployment benefit for 15 and 18 months, respectively. To cushion part of the income loss which occurs at the time of transition from unemployment benefit I to unemployment benefit II, an allowance is paid for a period of two years after the expiry of unemployment benefit I, which is reduced by half after the end of the first year. The maximum allowance for singles is 160 Euros, couples receive 320 Euros, and each child living in the family receives a maximum of 60 Euros per month.

Unemployment **benefit I** is a risk insurance benefit, which is why its amount is governed not by the duration or sum total of contribution payments but by the nature of the risk insured, i.e. loss of pay occasioned by unemployment. This being so, unemployment benefit constitutes a flat-rate compensation for the employment income that has been lost.

<sup>22</sup> The unemployment benefit that is paid directly after the beginning of unemployment is called unemployment benefit I to distinguish it from the basic security benefit that was formally called unemployment assistance and is called unemployment benefit II today.

<sup>23</sup> This group of employees falls within the jurisdiction of the statutory pension insurance, receiving pensions instead of unemployment benefit.



## Entitlements to Unemployment Benefits I



\*duration of employment covered by social insurance in months

Source: Federal Employment Agency

This being so, the amount paid in unemployment benefit I to unemployed persons with one or more children corresponds to **67 percent** of their gross pay, minus any amounts that are usually withheld. All other employees receive **60 percent**.

Unemployment insurance contributions are paid half and half by those employees for whom insurance is compulsory and their employers. The maximum income for which contributions are due is 5,250 Euros in the old and 4,550 Euros in the new Länder. In 2007, the total rate was 4.2 percent.

### Welfare for the unemployed (unemployment benefit II)

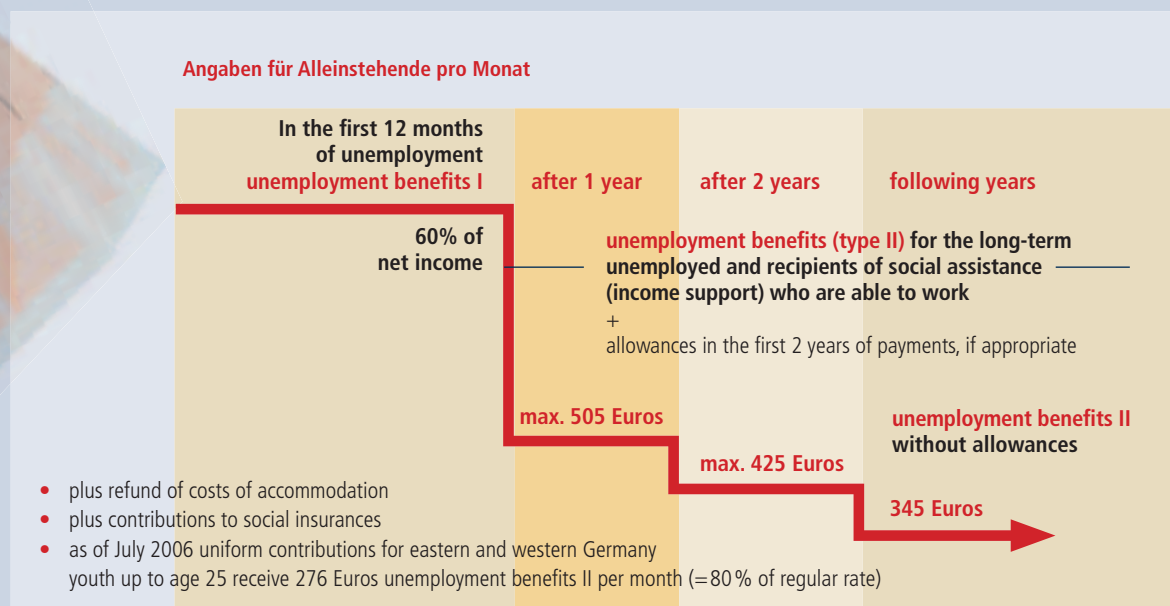
According to Volume II of the Social Code (SGB II), it is the duty of the statutory unemployment insurance to provide unemployment benefit II<sup>24</sup> as a welfare measure. Early in 2005, the

fourth of the acts on modern labour market services, the so-called Hartz IV Act, came into force, codified in Volume II of the Social Code. Hartz IV merges the former income support for employable persons with unemployment assistance. The latter was destined for unemployed persons who could not claim unemployment benefit because of the duration of their unemployment or other reasons. This group of persons now receives a basic security benefit for employment seekers called unemployment benefit II, a labour market policy system financed entirely by tax money that demands from its beneficiaries a show of initiative and is designed to promote the integration into the labour market of all employable persons needing help by offering tailor-made solutions.

It is the objective of this “**basic security benefit**” to strengthen the personal responsibility of employable persons requiring assistance and of persons (spouses) living in the same household.

24 The 11 volumes of the Social Code (SGB) contain most social security acts. Those which have not yet been codified are treated as appendices to the Social Code for the time being. Basic security provisions for employment seekers and labour promotion are regulated in SGB II and SGB III, respectively.

## Unemployment benefits (type I)



Furthermore, it contributes towards assisting these persons in securing their livelihood through their own resources, independently of these basic security provisions” (quoted from the Act). To this end, those concerned must actively participate in all measures designed to integrate them in the labour market or, should this prove impossible, take up any reasonable job offer. The motto under which the Government describes all this is **‘Fördern und Fordern’** (carrot and stick)<sup>25</sup>. Job seekers have to conclude an integration agreement which specifies the promotion measures to be undertaken and the requirements they have to fulfil. In the event of beneficiaries failing to comply with these agreed requirements, the provider of the basic security benefit may take recourse to sanctions (see **violation of duties** below).

Eligibility extends to all persons who are

- aged between 15 and 65,
- employable,

- available to the labour market for no less than 3 hours a day,
- in need of assistance, and
- resident in the Federal Republic of Germany.

Employed persons with a very low income and persons whose unemployment benefit I is very low are similarly assumed to be in need of assistance.

### The institutions that provide the SGB II benefits

Originally, all basic security benefits were to come from a single source. This target was not reached. Municipalities remain in charge of some subsistence benefits, housing and heating benefits, and social-integration services like psychosocial care, child care, and debtor guidance.

So as not to miss the target entirely, consortiums were established. Within the space of six

<sup>25</sup> While this idea is completely appropriate in principle, the problem lies in the fact that many segments of the labour market have few or no jobs to offer.



months, 354 consortiums were founded by 178 employment agencies together with 439 municipal institutions; 19 municipal institutions and agencies were created to perform the functions specified in SGB II permanently, and 69 counties and county boroughs (so-called option municipalities) were given the option of assuming responsibility for the care of the long-term unemployed for the duration of an experimental period of six years. This option was used to the full. The purpose of the experiment is to compare the success of the integration efforts undertaken by consortiums and option municipalities.

### SGB II benefits

Once unemployment benefit I has expired (see above), unemployment **benefit II** steps in. For two years after that, an individualised allowance is paid to cushion the loss suffered especially by former recipients of relatively high incomes because of the much lower amounts paid in unemployment benefit II. The actual amount is fixed in consideration of the applicant's assets and other revenues as well as those of certain of his family members.<sup>26</sup>

The **regular basic security** benefit for singles is 345 Euros per month; in addition, housing and heating costs will be reimbursed to a reasonable extent.<sup>27</sup> While allowances are normally paid for partners and children, the assets and incomes of partners living in the same household with a beneficiary will be reviewed for possible deduction from the standard benefit.

While unemployment benefit II is higher in nominal terms than the former social assistance, the latter was augmented by various non-recurring social benefits so that at the end of the day, the amount paid in unemployment benefit II is actually less than what used to be paid in income support. This hits all those particularly hard who, as former recipients of a high gross income, were entitled to a relatively high unemployment assistance because it used to be income-dependent.

Any violation of the duties laid down in the integration agreement entails sanctions. Missing an interview with the consortium or an enterprise that advertised a job may constitute such a violation.

From January 2007, there will be three levels of sanctions:

- After the first violation, benefits will be cut by 30 percent for three months,
- The second violation entails a 60 percent reduction, and
- All benefits will be cancelled entirely after the third violation in a single year, including reimbursements for housing and heating expenses.
- The housing expenses of adolescents are similarly threatened by sanctions.

Next to financial benefits, the SGB II provides for comprehensive guidance and consultation, especially through case management.<sup>28</sup> Furthermore, the 40 or so integration benefits specified in SGB III are available besides those laid down in SGB II (e.g. initial financial support and social employment opportunities).

26 As this term includes not only families but also partners living together in hetero- or homosexual relationships, lawmakers use the term „Bedarfsgemeinschaft“ (need-based community).

27 The reasonableness of rental charges is judged by the prices normally paid in the downmarket range at the beneficiary's home town; for singles, a flat of 400 to 500 square feet is regarded as appropriate.

28 According to the SGB II, people with considerable placement deficits should be extensively promoted and, if necessary, challenged. Case managers working at the consortiums are required to provide highly individualised guidance and advice, while at the same time controlling and monitoring the sometimes complex benefit system. This task calls for a great deal of social, psychological, and economic competence.

## Employment opportunities

These are publicly-financed forms of temporary employment designed to guide employable persons who are in need of assistance back to the labour market. There are two variants of these employment opportunities, one a compensation of expenses, the other generating earnings.

In the **compensation** variant, the income is not a regular hourly pay but a compensation for expenses paid **over and above** unemployment benefit II to the amount of 1 to 2 Euros per hour. This is why the public usually calls these employment opportunities **one-Euro jobs**. This variant is intended for persons who have been unemployed for a very long time and have little chance of obtaining another employment. The intention is to familiarise these persons again with keeping to a regular daily schedule and meeting the requirements of employment. At the same time, job opportunities may also serve to maintain employability or keep it from degrading in those cases where skills acquired previously are no longer put to use or have become outdated after a long period of unemployment. Specific target groups include those aged under 25 and over 50 as well as migrants and women.<sup>29</sup>

In the **income variant**, unemployed persons receive the wages that are commonly paid for their respective employment in lieu of unemployment benefit II; for these jobs, social insurance is compulsory.

The law requires that jobs offered in either of the two variants be **“additional”**, **“in the public interest”**, and **“non-competitive”** with other employers. This is done to keep regular employment relationships, on which social insurance contributions are paid, from being ousted by these extra jobs. For this reason, most

of these jobs are offered in the social or cultural field, in nursing and child care, in environmental protection, landscape care, and administration. While one-Euro jobs are not limited to the public service or non-profit institutions, so that they can be offered by private employers as well, options are severely restricted by legal requirements, namely that such jobs should be **“additional”** and **“in the public interest”**. The Federal Agency recommends limiting the working week to 30 hours so that enough time is left for looking after a regular job.

So-called **marginal jobs** offer another opportunity to supplement a person's income. In this case, a distinction is made between low-paid and temporary employment. While all marginal employment relationships are subject to social insurance contributions, these are raised in the form of flat rates that depend on the job involved.

The term **low-paid employment** describes jobs that are paid at no more than 400 Euros per month, such as **mini-jobs**, for instance. On these jobs, a flat rate of 30 percent is paid for insurance and taxes by the **employer alone**, with 15% going for the statutory pension insurance, 13% for the statutory health insurance, and 2% for taxes and the solidarity surcharge. In addition, employers may have to pay another 0.1% under the Continuation of Wage Payments Act or the Maternity Protection Act, as applicable.<sup>30</sup> Lower flat rates are paid on jobs in private households.

Recipients of unemployment benefit II will continue to draw their **regular benefit** although their employment income will be subtracted from their benefit, leaving only 100 Euros per month untouched. One advantage of this employment option is that it offers people an opportunity to earn at least part of their living themselves.

<sup>29</sup> IAB research report: Soziale Arbeitsgelegenheiten, February 2007, pp. 7ff.

<sup>30</sup> See Chapter 4, Labour Legislation.

Beyond the limit mentioned above, a transition zone that includes earnings between 400.01 and 800 Euros (so-called **midi-jobs**) has been created so that workers can gradually move from total exemption to full payment of social insurance contributions. An employee's social insurance contributions will increase slowly until they equate the amount paid by the employer per month at an income level of 800 Euros.

Besides, persons may hold jobs of this kind as a side-line next to a main job for which social insurance is compulsory. In these cases, the secondary income is not added to the primary income, so that it does not become subject to social insurance as well. These regulations are intended to make the low-pay sector more attractive. However, two or more mini-jobs held side by side will be added up to form an employment relationship that is fully subject to social insurance.

Limited-term jobs that extend over no more than two months or 50 working days within a calendar year are described as **short-term employment**. In this employment category, earnings are not subject to social charges but to taxation. Taxes may be paid either by the employer in a lump sum or by the employee in a personalised amount.

### The 50plus initiative

When the Federal Government raised the retirement age (see Chapter 2, Pension Reform 2007), the initiative thus launched aimed to create conditions which ensure that older workers aged 50 and above are indeed able to work later in life. The intention is to increase the employment rate among elderly workers, which is low in Germany compared to our

European neighbours, from 45 to 50 percent by 2010. The package includes the following:

#### Secure earnings scheme for older workers (combined wage)<sup>31</sup>

When older workers accept a job in which they are noticeably less well paid than before, the difference in net pay will be made up by the State for the duration of two years at a rate of 50 percent in the first year and 30 percent in the second. Pension insurance contributions will be augmented to a level corresponding to 90 percent of the former gross wage.

#### Integration allowance

Employers may receive an allowance for employing, for a period of no less than one year, older workers aged 50 and over who were unemployed for at least six months. Amounting to between 20 and 50 percent of the wage cost, the allowance may be paid for up to three years.

#### In-service training

Regulations used to specify that only enterprises with a workforce of no more than 100 could be subsidised for upgrading the qualification of workers aged 50 and over. This rule will be extended to cover workers aged 45 and over and enterprises with a workforce of no more than 250.

#### Fixed-term employment

From January 1, 2006, older workers may be temporarily employed for up to four years in conformance with applicable EU standards.

#### Increasing employment figures

Even in 2006, the number of older workers employed in jobs with compulsory social insurance increased from 2.77 million to 3.11 million. The Federal Government is hoping

31 Only one variant of the combined-wage scheme will be discussed here, although there is quite a number of ways in which transfer benefits and employment incomes can be combined (employer allowances for hiring long-term unemployed, allowances for employees under the above-mentioned secure earnings scheme, initial financial support under SGB II, mini- and midi-jobs, etc.). For detailed information about combined wages, refer to "Kombilöhne in Deutschland – neue Wege, alte Pfade, Irrweg?" by Karen Jaehrling and Claudia Weinkopf. Published by: Friedrich-Ebert-Stiftung, Economic and Social Policy Department, 2006.

that its 50plus initiative will help to increase the employment rate further, so that it reaches 50 percent by 2010 as outlined in the Lisbon Targets.<sup>32</sup>

### Child allowance

Acting on behalf of the Federal Government, the Federal Employment Agency handles the payment of child benefits. As a social security benefit, child allowances are paid for children who are less than 25 years old, provided they live in the household of their parent or parents, are unmarried, and are undergoing training. Trainee incomes and other revenues may not exceed 7,680 Euros per year. Child allowance is paid monthly in the following amounts:

- for each of the first three children 154 Euros and
- for each additional child 179 Euros.

Paid irrespective of parental income, child benefit is a minimum allowance for child care, education, and training.

### Critical opinions on the legislation for modern services ('Hartz Acts')

Attacks – especially on the Hartz IV Act – come from many angles.

Trade unions and social organisations criticise that

- benefits have been cut severely,
- unemployment benefit is now paid for a shorter period, which is particularly hard on workers who have been paying unemployment insurance contributions for a long time,

- any assets in need-based communities may be offset against payments, and
- the rules on reasonableness have been tightened.

Another deficit is that jobs are simply lacking not only for persons with low qualifications, and that the unemployed suffer from resultant placement problems.

In the view of the DGB, material security for the unemployed is completely inadequate, so that poverty, especially in old age, appears inevitable as the pension entitlements acquired through basic security benefits are at the very bottom of the scale.

According to a study commissioned by the Hans Böckler Foundation,<sup>33</sup> the regular benefit of 345 Euros per month is barely sufficient to “survive at the lowest possible level”.<sup>34</sup>

If we apply the international definition of poverty, a person living in Germany is considered poor if his or her monthly income, modified in consideration of personal needs, amounts to less than 60 percent of the median income of 1,564 Euros. Accordingly, the recipients (singles without children) of unemployment benefit must be included in this category, for they receive on average some 317 Euros for housing and heating in addition to the regular benefit of 345 Euros. Including social insurance and any limited-term allowances they may receive, their monthly income reaches around 835 Euros. This covers no more than the so-called minimum socio-cultural subsistence which secures participation in social life only on a very modest scale.

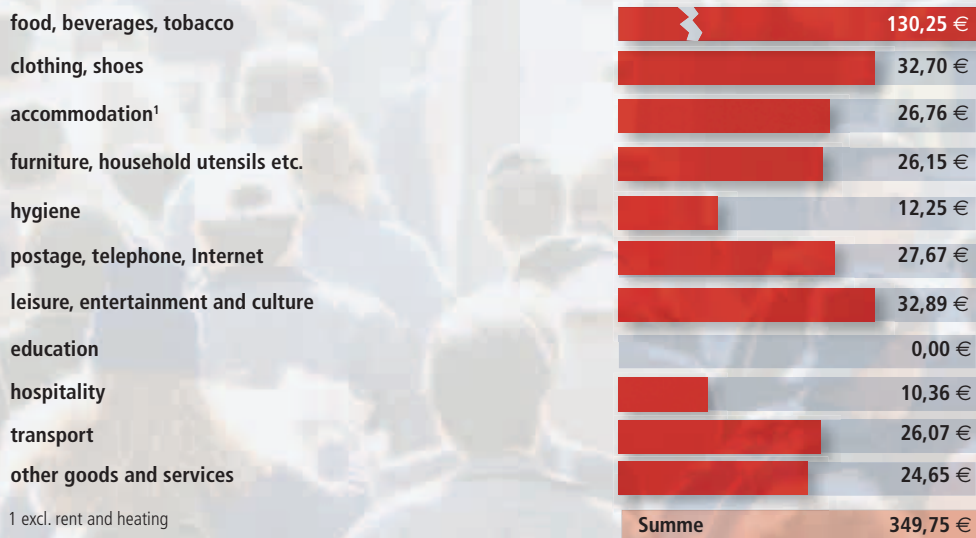
32 At the spring summit held by the European Heads of State and Government in Lisbon in March 2000, a long-term strategy was adopted which aims to „...turn Europe into the most competitive and dynamic ... economic area in the world...“. Part of this strategy is a reform of the labour market policies of the EU member states which includes promoting the growth of employment and improving the employment situation of elderly workers.

33 Associated with the trade unions, this foundation was named after the first chairman of the DGB, Hans Böckler. Its mission is to promote industrial democracy as well as research into economic and socio-economic matters, and to provide scholarships to support undergraduate and postgraduate students.

34 Quoted from „Verteilungseffekte der Hartz-Reform“, Irene Becker, HBS 2006.

## How to survive at the very bottom

regular payments to ensure a minimum income level consists of monthly contributions for



calculation Irene Becker; the most plausible variant based on the amounts included in data bank EVS 2003 (currently still valid) with the most up-to-date figures; Source: Becker 2006, © Hans Böckler Stiftung

Another point of criticism is the fact that unemployment benefit II is offset against any assets the recipient may own. Only 200 Euros for each year of a person's life are exempt from this, the maximum total being 13,000 Euros. This reduces to absurdity any efforts a worker may have undertaken to secure his or her old age by saving up during his working life. On the other hand, the law expressly exempts any assets subsidised by the state as old-age provisions (the so-called 'Riester pension').<sup>35</sup>

In the opinion of the trade unions, the **principle of equivalent consideration** is infringed when persons who become unemployed after many years of paying insurance contributions are treated exactly like a person who has paid unemployment insurance contributions for no more than one year, there being a marked difference between performance and counter-performance in this case.

In addition, the trade unions find fault with the fact that the Act failed to reach its goal, which was to reduce unemployment sustainably. In their view, it is mostly due to the booming economy that the proportion of unemployed in the employable population went down by around 2.2 percent nationwide and by 2.8 percent in the east of Germany (March 2007: 9.8%; 8.1% in the west and 16.5% in the east of Germany).

Not only precarious employment (loan employment, limited-term employment relationships, and marginal part-time jobs which account for around 40 percent of all jobs at the moment) but also marginal employment (mini-jobs) is on the increase. In 2005, for example, 6.6 million people held mini-jobs. In the retail and catering trade as well as in the nursing sector, thousands of insured (regular) jobs were scrapped and marginal employment rela-

<sup>35</sup> The colloquial name of a privately-financed pension that is supported by the State by subsidies and special tax deductions, introduced as part of the pension reform of 2000/2001 by Walter Riester, then Minister of Labour and former deputy chairman of the IG Metall. The same applies to the so-called 'Rürup pension' which was introduced in 2005 by B. Rürup, an economist who developed this private but governmentally subsidised capital-formation scheme as a provision against old age.

tionships created instead. In other words: enterprises in these industries either cut up regular jobs into mini-jobs or organise their work from the beginning so that it can be done by a number of persons working short hours.<sup>6</sup> Consequently, a large segment of the German working population no longer enjoys many social and workers' rights, such as protection against unfair dismissal, social insurance protection, maternity protection, and some co-determination rights. As incomes are frequently low, even temporary unemployment may lead to poverty, while the elderly are threatened by it because of the low pensions they receive. In addition, the growing number of precarious employment relationships depresses the value of pensions, as these are based on the average income of the insured population, which is assessed at 29,488 Euros per year in 2007.

This being so, the Confederation of German Trade Unions (DGB) demands the introduction of a statutory **minimum wage** in the low-pay sector which, representing a major element in a comprehensive strategy to alleviate poverty, may contribute towards preventing starvation wages and a decline in the average wage level at the expense of governmental transfer benefits. In view of the declining reach of collective agreements<sup>37</sup> and the spread of wage dumping, the DGB believes it is an absolute must for Germany to join the number of those EU countries where minimum wages are laid down in law.<sup>38</sup>

More and more workers, although gainfully employed, can only secure an adequate livelihood by drawing unemployment benefit II. In no more than 22 months after ‚Hartz IV‘ came

into force, their number rose to 1.1 million, of which around 400,000 work in full-time and 160,000 in part-time jobs.

On the one hand, the government's pension policy is stepping up the pressure on female and male workers to go on working until the age of 65 and 67, respectively. On the other, the government is doing little to increase employment among the elderly. For according to the opinion of the DGB, even the **50plus initiative**<sup>39</sup> contains nothing that is truly new but merely continues along the former line of providing financial incentives and promotion instruments for enterprises.

At the moment, the Federal Ministry of Labour is considering a law prohibiting extremely low wages of two to three Euros per hour (**'unethical wages'**)<sup>40</sup> which, ranging below the subsistence level, are nevertheless paid in certain full-time jobs. Beyond that, it is intended to establish a ‚third-tier labour market‘ where around 100,000 long-term unemployed with unusual placement deficits will be paid a kind of combined wage to reintroduce them to a regular work schedule. Another intention is to pay payroll-cost subsidies (combined wage) to enterprises that employ adolescents aged 25 and under who are difficult to place, provided their qualification is upgraded at the same time.

While these repairs are certainly necessary in unemployment insurance, there is no sign of a unified solution that combines minimum and combined wages, options of generating extra income, and mini-jobs in a package that makes sense, for there is no agreement on that among the coalition partners. In principle, the SPD

36 Study by Tatjana Fuchs: „Arbeit & Prekariat. Ausmaß und Problemlagen atypischer Beschäftigungsverhältnisse“, Hans-Böckler-Stiftung 2006, pp. 19ff.

37 See Chapter 4 Section 2.

38 Thus, for example, statutory minimum wages apply in nine of the 15 old EU countries, ranging from 437 Euros in Portugal to 1,503 Euros in Luxembourg. The same holds true for nine of the ten new members, where they range from 82 Euros in Bulgaria to 580 Euros in Malta. Introducing the minimum wage of 7.50 Euros per hour demanded by the DGB would put Germany in the first group, with a pay range from 7.36 (Great Britain) to 8.44 (France) Euros per hour. Needless to say, it would be important for the introduction of minimum wages to be supported by other governmental measures, such as improvements in child care, a reform of the housing allowance, etc.

39 See above.

40 In jurisprudence, wages that range 20 to 30 percent below those commonly paid in any given industry are considered unethical.



advocates merging combined and minimum wages in order to guarantee that workers in full-time employment are paid enough to meet their minimum subsistence requirements.

In case the coalition should be unable to adopt the combined/minimum wage model described above because of resistance offered by the CDU, an alternative being considered is to extend the minimum wage postulated in the law on the posting of workers to include not only the building and cleaning sectors but also the hairdressing, retail, hotel, and restaurant trades, temporary employment agencies, security and postal services, utilities, and meat-packing, agricultural, and forestry operations.

In the *Land* of North Rhine-Westphalia, which is governed by a CDU-FDP coalition, the Minister for Social Affairs extended the minimum-wage rule that applied in the security sector to cover the hotel and restaurant trade. Following a request by the food and restaurant workers' union and the employers' association, the three lowest pay grades were declared binding. This means that all full-time workers employed in the lowest pay grade of this industry (jobs without qualification requirements) are entitled to a monthly income of 900 Euros, the minimum wages applying in the two other grades being 1,220 and 1,284 Euros.

## 5. The statutory health insurance

Introduced as early as 1884, the statutory health insurance forms the oldest branch of the German social insurance system. Its **fundamental principle** is to achieve solidarity in the sharing of burdens among the insured, among the healthy and the sick, among those with higher and lower incomes, among the young and the old, and among singles and families. Any individual falling sick is entitled to whatever material and immaterial benefits may be indicated according to the state of the art.

In 2005, around 239.4 billion Euros or 10.7 percent of the gross domestic product were spent in Germany on health care.<sup>41</sup> Compared to the preceding reporting period, this marks an increase of 2.4 percent. Consequently, per-capita expenditure on health care amounted to 2,900 Euros in 2005. More than half (57 percent) of the total cost was borne by the statutory health insurance, an amount of 135.9 million Euros that was 3.3 percent higher than in the year before. The share of the private health insurance funds was 22 billion Euros or around 9 percent, 4.2 percent more than in the preceding year.

Medical services, medication, spectacles and other prosthetic aids, bandaging, and other expendables accounted for more than half of the total expenditure. The cost of medical services and medication was up by 0.5 and 10 percent, respectively.

### Benefits

The range of benefits covered by the statutory health insurance includes

- the prevention of diseases and their deterioration, contraception, sterilisations, abortions, preventive treatment, medical prophylaxis, conservative dental treatment, etc.;
- the early diagnosis of diseases through screenings of adults and children, etc.;
- the treatment of diseases by physicians, dentists, and psychotherapists, treatment in hospitals, nursing at home, ergonomic tests and therapies, the provision of medicines, remedies, and adjuvants, etc.;
- medical rehabilitation, such as inpatient and outpatient rehabilitation courses and follow-up treatments, etc.;
- the payment of sickness benefits to cover illnesses of the insured persons as well as the supervision, care, and nursing of sick children, etc.; and

<sup>41</sup> Source: Federal Statistical Office. Its reports are normally published one year after the end of the reporting period.

- in pregnancy and maternity, the cost of medical care, the assistance of a midwife, hospital and domestic births, the provision of medicines, bandages, remedies, and adjuvants, any domestic help required, etc. In addition, maternity benefit is paid within the period protected under the Maternity Protection Act.

The full scope of these benefits, which is very large compared to many other states, is specified in detail in Volume V of the Social Code (SGB).

### The health insurance funds

The **Health Care Structure Reform Act of 1996** abolished the distinction between so-called primary funds, meaning health insurance funds in which membership was compulsory when the health insurances were founded, and alternative funds, meaning institutions for which people could opt in lieu of the statutory insurances. To some extent, this distinction was related to that between wage and salary earners among the employees. Today, everyone is **free to choose** among the statutory health insurances, meaning that everyone who belongs to the income class for which insurance is compulsory<sup>42</sup> may opt for any of the statutory health insurance funds that serves his or her region. The term Ersatzkasse (alternative fund) continues to be used for reasons of tradition. The benefits prescribed in law apply to all statutory health insurance funds, although the additional benefits they offer are left to their discretion to some extent, to be used in their competition for members.

The former primary funds, such as the general local health insurance funds (AOK), the company health insurance funds (BKK), and

the guild health insurance funds (IKK)<sup>43</sup> used to maintain independent operations in many communities, forming an umbrella organisation at the federal level. Conversely, the trend towards concentration set in fairly early among the alternative funds. The biggest alternative funds are the *Deutsche Angestelltenkasse* (DAK) and the *Barmer Ersatzkasse* (BEK). Meanwhile, regional and supra-regional mergers have narrowed the number of statutory health insurance funds down to 241, including funds that specialise in certain professions, such as sailors, miners, and agricultural workers.

As both the morbidity and the average income of the members fluctuate widely from one insurance fund to the next, the **risk adjustment scheme** was introduced in 1994, followed by a similar adjustment scheme for **financial strength** in 2000 which equalises 92 percent of these differences by redistributing them. The purpose of the risk adjustment scheme is to keep insurance funds from selecting the risks they want to cover, induce them to improve their quality and profitability, and enhance the equitability of contributions. Most experts judge that the risk adjustment scheme has stood the test of time, although it is not perfect.

### The insured

As in the other branches of the social insurance system, the group of the insured is defined in applicable laws. Those insured by the statutory health insurance system include

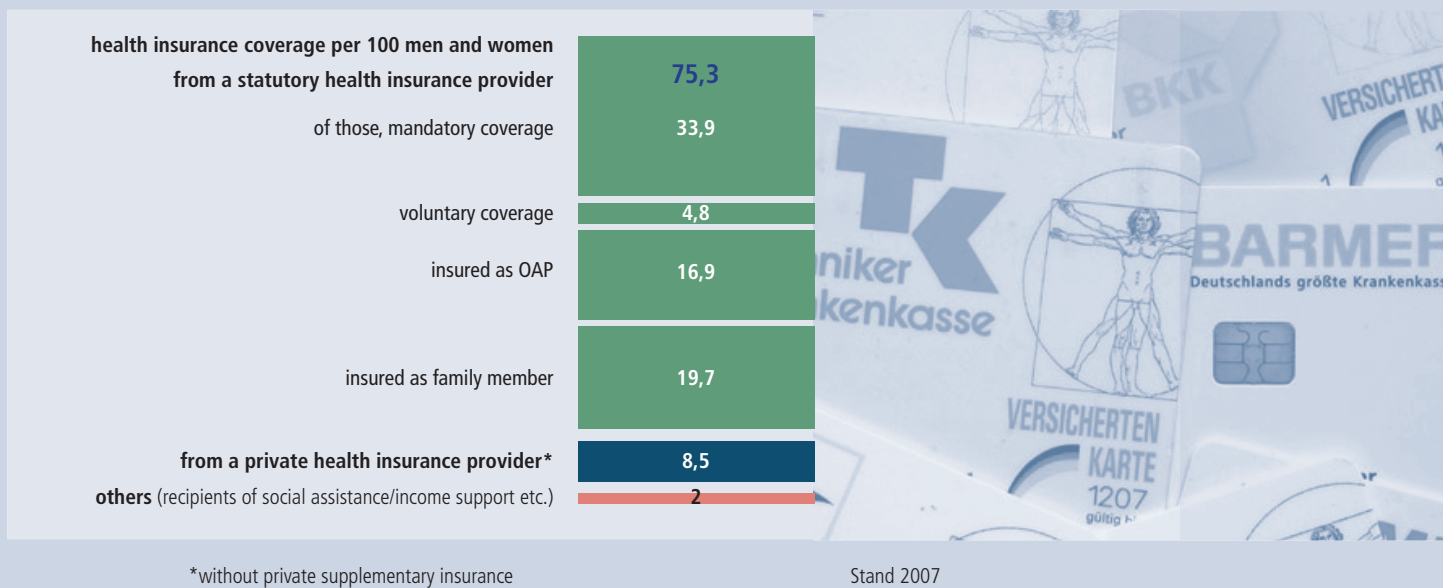
- workers whose regular income remains below the annual ceiling,
- unemployed persons entitled to class I and II unemployment benefit,
- trainees,

<sup>42</sup> In 2007, statutory health insurance was compulsory for all those with incomes not exceeding 47,700 Euros per year and/or 3,975 Euros per month. Apart from a few exceptions, this income threshold does not apply to self-employed persons, freelancers, and civil servants. However, members of that group may opt to join a statutory health insurance fund voluntarily.

<sup>43</sup> Guilds are craft-related trade organisations at the local or regional level in which membership is voluntary. They monitor and regulate training under the dual system and hold journeymen's examinations. As public-law bodies, they are supervised by the trade chambers. Similarly organised as public-law bodies, the trade chambers are organs of self-government in which membership is mandatory for all members of a trade within a town or a region.



## Health insurance coverage amongst Germans



- pensioners who were insured in a statutory health insurance fund for at least nine tenths of the second half of their working lives or were co-insured as family members at one time,
- handicapped persons,
- recipients of income support who were registered with a statutory health insurance fund by their social services department,
- farmers,
- sailors,
- artists and publicists, and
- students who have not completed their 14<sup>th</sup> semester and/or have not reached the age of 30.

Being **exempt**, civil servants, soldiers, judges, and wage or salary earners whose regular annual income exceeds a certain threshold are free to take out insurance either with a statutory health insurance or a private insurance fund. This limit is equal to 75 percent of the **annual-income threshold for compulsory insurance** in the pension insurance system which is re-

defined every year by the Federal Ministry for Labour and Social Affairs; in 2007, it amounted to 47,250 Euros or 3,975 Euros per month.

At the moment, the German statutory health insurance system covers around 75.3 million people, of whom 33.9 million are compulsory members, 4.8 million are voluntary members, 19.7 million are co-insured dependants<sup>44</sup>, and 16.9 million are pensioners. Total membership amounts to around 90 percent of the population.

### Financing

Health insurance funds are financed almost exclusively by the **contributions** of their members. Set independently of the insurance risk involved (see above: **principle of solidarity**), contributions represent a percentage of the relevant revenue of the insured, which is normally their **total gross income**. Insured persons whose membership in a statutory health insurance fund is not compulsory but voluntary

<sup>44</sup> Paying no contribution, family members without incomes of their own are covered by the statutory health insurance of other family members holding a job for which social insurance is compulsory. Family members include married spouses, registered spouse equivalents, and minors.

also have to pay dues on other revenues, such as income from rentals.

However, contributions are raised only on revenues up to the so-called **contribution assessment ceiling**, which is adjusted every year. In 2007, the ceiling for the statutory health insurance amounted to 42,750 Euros per year or 3,562.50 Euros per month. All contributions are financed on a parity basis, meaning that employees and employers each pay half into the statutory health insurance fund. Contribution percentages vary from fund to fund; at the moment, they range between 12.9 and 15 percent of the gross pay, the average being around 14 percent.

### Self-government

Like the other branches of the social security system, the statutory health insurance is founded on the principle of **self-government**. The medical profession participates in the self-government of the statutory health insurance through its associations of panel doctors; together, the insurance funds and the medical associations have been empowered by the State to organise medical care in Germany under its supervision. Since the health reform of January 1, 2004, the **Joint Federal Committee** has been the most important organ of self-government. Composed of three nonpartisan members and representatives of the statutory health insurance funds, the panel doctors, the panel dentists, and the hospitals, it defines the content of medical care.

### Problems of the public-health system

Because of the demographic developments described above, and because of its dependence on gainfully employed premium-payers, the health insurance system runs the risk of losing revenues as unemployment increases. At the same time, the ongoing advance of medical

progress continuously boosts the cost of public health.

The **health reform** of 2004 was an attempt to remedy defects in the German public-health system. Although it is the third most expensive system in the world – only the USA and Switzerland invest more money in their public-health systems – its quality defects are considerable.

It is indeed amazing that despite the extraordinarily high cost of public health in Germany, the **quality of care** for patients is no more than middling on a European scale. In Germany, more people die of cardiac infarction, apoplexy, cancer, and diabetes than in most other central European states. Moreover, around 17,000 people are killed each year in Germany by avoidable mistakes in hospital treatment.<sup>45</sup> This means that one in thousand hospital patients dies because of malpractice. Most deaths are due to infections and medication side-effects.

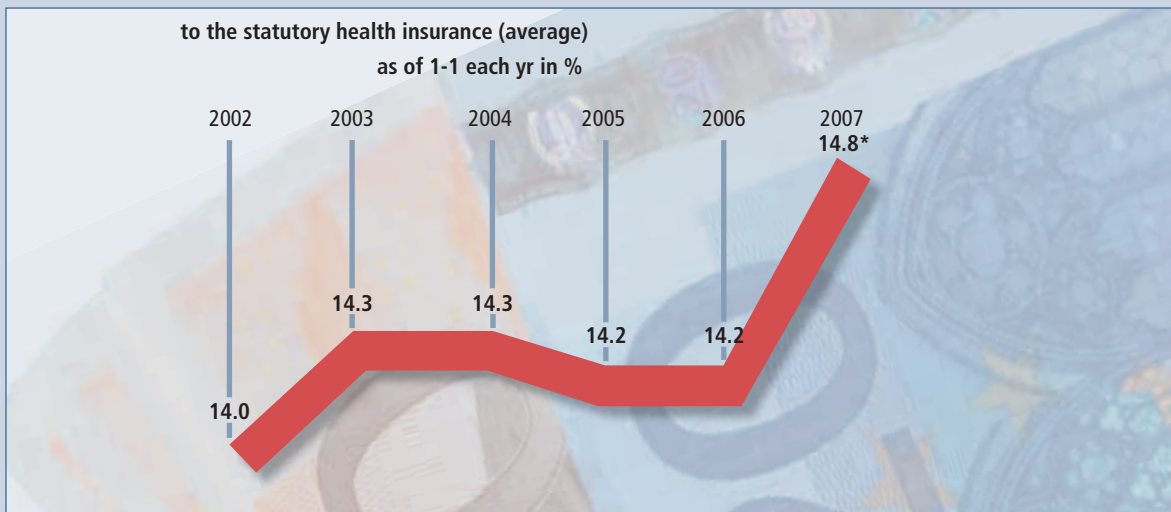
Moreover, the present lack of coordination among doctors, hospitals, and health insurance funds causes a muddle of excessive, defective, and misdirected care which, besides being detrimental to the health of the people concerned, is the source of unnecessary expenditure.

During the debate in the run-up to the above-mentioned health reform of 2004, the **trade unions** advocated a reform which

- guarantees care for all in conformance with the demand,
- interfaces prevention, inpatient and outpatient treatment, and rehabilitation,
- improves the quality of medical care, and
- makes for a health-care system of quality and economic efficiency.

45 Study by the Aktionsbündnis Patientensicherheit Agenda 2007.

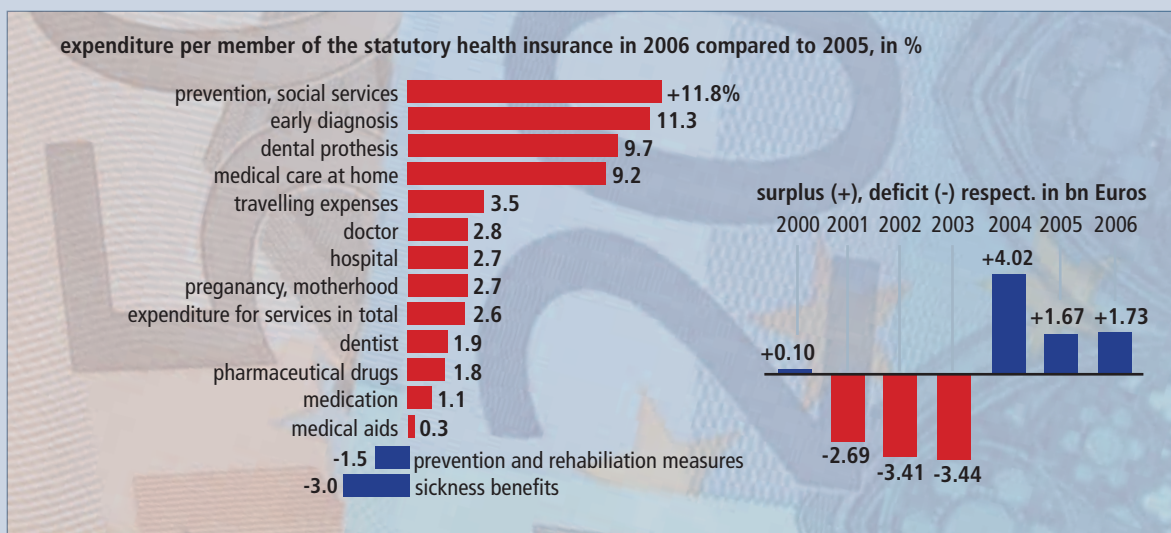
## Contributions



\*including 0.9% supplementary contributions

Source: BMG/GKV

## The spending structure of health insurances



Source: BMG

While the **health reform of 2004** did initiate some steps in that direction, its most important objective, which was to implement a comprehensive structural change of the public-health system, fell victim to the process of political compromise between the then government and the opposition. Next to some positive innovations, including

- the introduction of the family-doctor model,
- greater patient involvement,
- the establishment of health centres, and
- a wider scope for outpatient treatment in hospitals,

the **health reform of 2004** mainly served to dip even deeper into the purses of the patients and the insured, while doctors, pharmacists, and other service providers, including especially the pharmaceutical industry, were involved only a little or not at all in bearing the brunt of the savings. Of the 10 billion Euros or so that were to be saved in the first year of the reform, the insured and the patients bore around 8 billion. This was (and still is) effected by increasing the patients' contributions towards nearly all benefits, including

- visits to doctors and dentists,
- the purchase of medicines, remedies, and adjuvants,
- hospital care, preventive and rehabilitation measures,
- domestic care and domestic help, and
- travel expenses.

Today, a patient's contribution towards the cost of medicine is 10 percent, with a minimum of 5 and a maximum of 10 Euros. The contribution towards remedies and domestic care is 10 percent of the cost plus 10 percent per prescription. With the exception of travel expenses, children aged up to 18 pay no contribution. In addition, workers have been charged **0.45 contribution points** in their statutory health insurance since July 1, 2005. As agreed between the government and the opposition, this was done to relieve the employers who from that time onwards did not have to contribute any longer towards the cost of dentures and – to a large extent – sickness

benefits. In point of fact, this marked the abandonment of the principle of **parity financing**.

### The health reform of 2007

Predictably, even these reform measures were not enough to stabilise the statutory health insurance system sustainably. For this reason, the two parties that form the grand coalition, the CDU and the SPD, agreed in 2005 to make a fresh start towards restructuring the public-health system. Their objectives were

- to improve the quality of medical care,
- enhance the economic efficiency of the health system by increasing its transparency,
- promote competition among the health insurance funds,
- eliminate red tape, and
- expand the range of choices and options open to the insured.

As the most important objective was to stabilise the growing cost of Germany's public-health system for some time to come, calling the project a **health-system financing reform** would meet the case better.

"The health reform of 2007 paves the way for a new health insurance ... (thus) ... putting our health system on track for the future ..." (Quoted from the website of the Federal Health Ministry entitled "The new health insurance").

**The cornerstones of the reform** are these:

#### Statutory health insurance

- From April 1, 2007, health insurance funds are allowed to offer different tariffs among which people can choose. Thus, insured persons may opt to undertake to visit their family doctor first in case of sickness, in return for which they are remitted the so-called practice fee in the amount of 10 Euros per quarter (the so-called **family-physician tariff**).
- As an alternative, the insured may opt to pay a higher proportion of the cost of each treatment from their own pocket (**retention tariff**).

- Or else they may opt to pay their doctors' bills themselves and submit them to the health insurance funds later, as they would if they were privately insured. They will then be reimbursed the sum minus their retention (**reimbursement tariff**).
- From April 1, 2007, economically efficient insurance funds are allowed to refund contributions. Conversely, health insurance funds are also allowed to raise **contribution surcharges** (from January 1, 2009), if they are strapped for funds in spite of all flat-rate and co-payments. Surcharges may not exceed 1 percent of the relevant income, and incomes will not be reviewed at all if the monthly contribution does not exceed 8 Euros. The insured are allowed to change their health insurance fund whenever a surcharge is announced.
- From April 1, 2007, uninsured persons must become members of a statutory health insurance fund if they have been compulsorily insured at some time in the past or have never been members of a health insurance fund. For those who were formerly privately insured, compulsory membership begins on January 1, 2009.
- Persons who do not regularly attend preventive medical examinations and fall severely ill later pay up to two percent of their income in contributions from April 1, 2007. Until then, persons with chronic diseases had to pay no more than one percent of their income in contribution.
- On April 1, 2007, the **range of benefits** offered in statutory health insurance was enlarged to include, for instance, a claim to rehabilitation and prophylactic immunisation. Parent-child treatment is paid for, and hospitals may give outpatient treatment to patients that depend on highly specialised therapies.
- Patients who suffer complications after cosmetic surgery, tattoos, etc. performed without medical indication will have to bear the cost of treatment from April 1, 2007 onwards.

### Private health insurance

- From January 1, 2009 onwards, persons who change to another private insurance fund will be able to take the **old-age provisions** with them that form part of their contribution. Amounting to around 3.5 percent of the contribution total, these provisions were formerly retained by the insurance fund. This makes it easier to change.
- From January 1, 2009, only those insured persons will be able to change to a private health insurance fund whose annual revenues have exceeded the **annual-income threshold** (currently 47,250 Euros per year, s.a.) that applies in the statutory insurance system for three consecutive years.
- From July 1, 2007, private health insurance funds must offer a **standard tariff** for **uninsured** formerly self-employed persons or freelancers who are classified as belonging to private health insurance. While providing the same range of benefits as the statutory health insurance, these tariffs may not exceed the maximum contribution paid in the statutory system.
- From January 1, 2009, private health insurance funds will have to replace their standard tariffs by a **baseline tariff** which must be open – without any need to undergo a medical checkup – to all those who are voluntarily insured in the statutory system, provided they comply with the conditions for changing to the private system that have been outlined above. However, premiums may be graded by age and sex. In the period from January 1 to June 30, 2009, privately insured persons will be similarly entitled to change to this baseline tariff.

Legislators hope that the tools described above will force the health insurance funds to compete in terms of service quality and economic efficiency, a hope that is expressed in the official designation of the relevant law (Act for the Promotion of Competition in Statutory Health Insurance).



Criticism levelled at the health reform of 2007. There has rarely been a reform within the social security system which, even in the run-up to the political consultations within the government coalition, was rejected as unambiguously as this one by experts and coalition-party politicians alike. The massed ranks of its opponents included 'left-wing' SPD MPs, established health experts, SPD trade unionists, and moderate SME representatives as well as conservative CDU/CSU politicians.<sup>46</sup> In the view of the trade unions, this reform should have boosted the strengths and repaired the deficits of the German health system. In the opinion of the DGB, it failed to do so because it hardly changed anything in the structure of the health care system, improving neither its quality nor its financing. Although a number of its cornerstones do make sense according to the DGB, the reform did not contain an all-inclusive concept for the future. Other critics, including Prof. Karl Lauterbach, the health expert of the SPD parliamentary party, admit that the coalition's project is "a total failure".<sup>47</sup> Even today it is clear that the cost of medication, for instance, did not go down as planned but went up by around 6 percent instead, mainly because of factors other than the increase in value-added tax. This is because a regulation that was originally intended to force doctors to exercise financial caution has a number of loopholes which, promptly identified, permitted expenditure to increase. Independent experts like the so-called five wise men<sup>48</sup> have already denounced the financial reform of the health insurance system as a total loss, stating that competition is distorted by the creation of the health fund in its current form, and appealing to the political sphere to make some incisive changes before the fund comes into being.<sup>49</sup>

Although there are certain passages that make sense, the reform is basically a relatively unconvincing compromise between two widely different models for redesigning the German public-health system.

### Two classes of medical care?

For many years, moreover, medical associations, health insurance funds, political parties, trade unions, and social organisations have been issuing warnings galore against the emergence of two classes of medical care in Germany.<sup>50</sup> Medical progress is advancing rapidly – but at a price. In recent years, growing costs induced the statutory health insurance funds to cross off quite a number of benefits that were not indispensably necessary. This holds true for the reimbursement of medical advice and other services as well as for medicines, remedies, and adjuvants which the statutory insurance funds, unlike the private insurers, no longer refund because they are not considered indispensable any longer. All this, as well as the preferred treatment enjoyed by private patients in medical practices and hospitals, is due to the fact that private insurers pay doctors and hospitals several times the rate paid by the statutory health insurances because their clientele normally consists of well-paid white-collar workers, civil servants, freelancers, and politicians, whereas the statutory insurances are legally obliged to insure people with low incomes as well.

In the election campaign of 2005, the parties that later on formed the coalition government (CDU/CSU and SPD) presented different concepts for reforming the health care system to counteract these developments. While the

46 When the vote was taken in parliament on February 2, 2007, 23 members of the CDU/CSU party group and 20 members of the SPD party group voted against the Act. The opposition was unanimous in its Noes.

47 *Der Spiegel* No. 28/2006, p. 24. See also No. 5/2007, p. 66, where the situation of the insured is addressed.

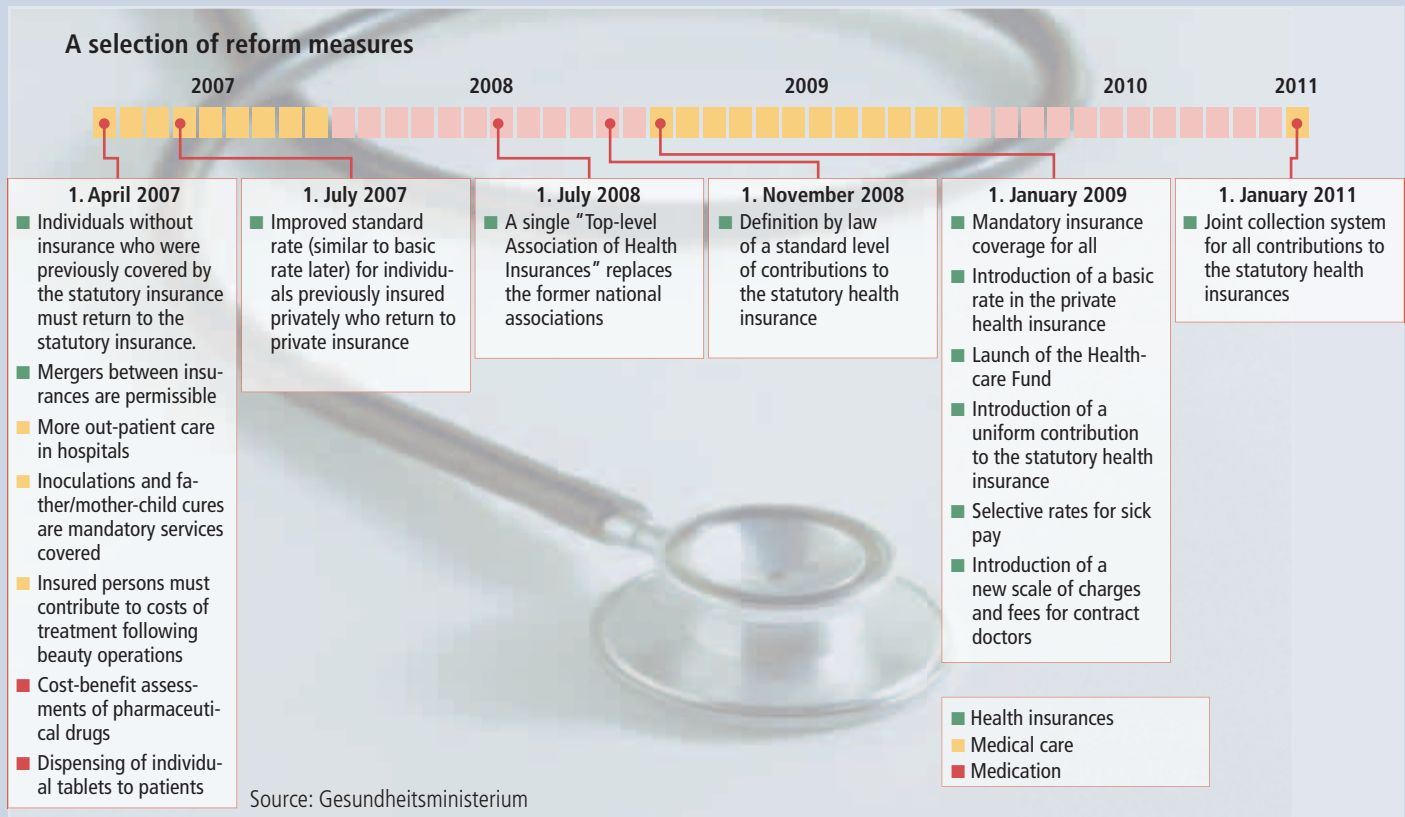
48 Popular designation for the scientists who belong to the council of economic experts established to assess macroeconomic developments. Established by law in 1963, the council of experts periodically assesses macroeconomic developments and informs the political and public sphere accordingly. It consists of a chairman and four members: Prof. Dr. B. Rürup (chair), Prof. Dr. P. Bofinger, Prof. Dr. W. Franz, Prof. Dr. B. Weder di Mauro, and Prof. Dr. W. Wiegart.

49 See the annual report by the council of economic experts 2006/07, November 8, 2006, Chapter 1, Section II (patchwork without a concept), pp. 9ff.

50 See Lauterbach, Karl: *Der Zweiklassenstaat*, Rowohlt, Berlin, June 2007.



## Health reform: step by step



CDU/CSU proposed a 'health premium', the SPD favoured a 'solidarity-based citizens' insurance'. Before the coalition agreement could be signed on November 11, 2005, a compromise on reforming the health care system had to be found which would address the rising cost of health care without being too far removed from the different models favoured by the coalition partners, for in Germany, the motto 'after the election is before the election' forms part of political day-to-day life. This undertaking was not necessarily<sup>51</sup> as complex as squaring a circle, as many people are wont to say, although the two models fundamentally differ in their approach. To improve the readers' understanding of the health-policy discussion in Germany, I

am going to describe the two models briefly in the following.

### The solidarity-based health premium

The model presented by the CDU/CSU for reforming the health system changed its name several times ('per-capita charge', 'health premium') until the above designation was agreed upon. It aims to ensure a permanent foundation for the financing of the health insurance system and to reduce non-wage labour costs by disassociating health insurance costs from payroll costs. The basic idea of the model is to convert the present pay-as-you-go system into a capital-covered premium model.

<sup>51</sup> There are considerations (e.g. Wolfram F. Richter: "Gesundheitsprämie oder Bürgerversicherung? Ein Kompromissvorschlag" in Wirtschaftsdienst 11/2005) of various blends of the two models which, however, I am not going to discuss because it would be beyond the scope of this overview. – HK

The model comprises two components:

- First, all persons insured with the statutory health insurance will pay a ‘personal health premium’ that is not related to their income. Present calculations indicate that this premium will amount to around 109 Euros per month. While the practice of co-insuring non-active married spouses without charge will be abandoned, minors will be insured without contribution as before.
- Second, the model envisages an employer premium in the amount of 60 Euros. The present employers’ share will be fixed at 6.5 percent of the income that is subject to contributions and paid into a special fund (health fund) which, in turn, will pay the employers’ contribution (see above) into the health insurance fund. At the moment, employers’ contributions account for some 65 billion Euros each year. In addition, the special fund will receive the health insurance contributions of the social insurance agencies.

The maximum charge to be borne by the insured will be 7 percent of their income, which will apparently include revenues from part-time jobs, interest, and rentals. Persons who are unable to raise their personal health premium will receive a social subsidy, i.e. their premiums will be paid with tax money. Those in a weak social position will be relieved via the income tax. Estimates range between 27 and 14 billion Euros per year, depending on the model variant.

The CDU/CSU emphasises that with the introduction of the health premium, health insurance costs and non-wage labour costs will no longer be directly related. According to the original plan, the insured were to receive the employers’ health insurance contributions. In the current model, this idea was dispensed with and replaced by that of freezing the employers’ contributions. The model last discussed within

the CSU envisaged a health premium that would range between 30 and 260 Euros, depending on the personal income of the insured; however, this failed to gain acceptance within the CDU. All model variants are predicated on a revision of the tax law, for it will depend on the taxation model whether the insured will have to pay more or less.

### The solidarity-based citizens’ insurance

The SPD has agreed on the following cornerstones for a citizens’ insurance: all citizens are to be covered by the citizens’ insurance, and the contribution assessment ceiling will be abandoned. All health insurance funds, statutory as well as private, are to offer policies under the same competitive conditions. Citizens’ insurance tariffs are to be included in the risk adjustment scheme. As before, health insurance funds will be financed by income-related contributions. For those in dependent employment, contributions will be paid on a parity basis by the employees and their employers, as before.

In the future, health benefits will be financed under a twin-pillar system. Within the first pillar, a certain percentage of wages and salaries will be used to finance the health insurance as before.<sup>52</sup> In addition, a second pillar will be introduced to include other revenues, such as those from part-time jobs, rentals, capital interest, etc. As a flat-rate tax on capital income, the revenues generated by this pillar will be earmarked for the citizens’ insurance. Tax exemptions will ensure that savings and old-age provisions will remain free from additional burdens. Capital revenues will not be subject to an income threshold so that health insurance contributions based on employment income can be lowered immediately. All extraneous health insurance benefits will be financed by tax money.

52 By widening the range of insured persons and incomes, contribution rates could be lowered to 15 percent by 2030 and even further if certain structural measures were implemented. Quoted from ‘Die Bürgerversicherung’, p. 13, by Prof. Dr. Dr. Karl Lauterbach, SPD MP, formerly of Cologne University.

## 6. The nursing insurance

As the youngest branch of the social insurance system, the nursing insurance did not come into force until January 1, 1995. Conversely, the statutory health, accident, and pension insurances were introduced in 1883, 1884, and 1889, followed by unemployment insurance in 1927.

Although the fact that people may need nursing and suffer from prolonged illnesses or physical handicaps has been known from time immemorial, it was only identified as a social problem in politics when the life expectancy of large parts of the population increased and family structures began to change, especially in the post-war years.

Until the nursing insurance was introduced, the consequences and costs of nursing had to be borne by the patients and their families. Social assistance stepped in only when the financial resources of those in need and their next of kin were overstrained. Even people who had led a full working life and had paid taxes and social insurance contributions for 45 years found that, when they needed stationary care, not only their own pensions (save for some pocket money) but also the incomes of their children were partly sequestered to pay for the steadily increasing cost of nursing. Thus, pensions could no longer provide security, and pensioners were put on the same footing as those who had never paid any contributions into the social security system.

### Statutory insurance

Against this background, all political parties were agreed that a social nursing insurance financed on the pay-as-you-go model would have to be created. Consequently, the nursing insurance covers almost the entire population on the principle that 'nursing insurance follows health insurance'. Both the contribution assessment ceiling and the insurable wage limit are the same as those of the statutory health

insurance. This being so, statutory and private nursing insurance exist side by side as independent elements of statutory nursing insurance.

### The organisation of the nursing insurance

The statutory nursing insurance forms part of the health insurance system. Statutory nursing insurance funds do not have an administration of their own. They are managed by a health insurance fund which they reimburse for administration expenses. Private funds are obliged in law to handle the private nursing insurance process. Interfering with the right of private funds to specify their own range of benefits, the law postulates that these must be the same as those offered by the statutory nursing funds.

### The financing of the nursing insurance

**Statutory nursing insurance:** Funds are raised in a pay-as-you-go process through contributions paid half and half by the insured and their employers. The contribution rate is 1.7 percent, with employees and employers paying 0.85 percent each. When the nursing insurance was introduced, one of the country's national holidays was eliminated to relieve the burden on the employers. The one exception to this rule is the Free State of Saxony, where employees and employers pay a share of 1.35 and 0.35 percent, respectively. In return for this, the public holiday was retained. The employees' share is withheld from their pay and paid into the respective health insurance fund by their employers.

Pensioners have been paying the full contribution since April 1, 2004. Until then, pensioners and pension insurance institutions each bore half of the contribution. Following a ruling by the Federal Constitutional Court which obliged the legislature to allow for the upbringing of children, all childless persons aged 23 and over (but not including those born before 1940) have been paying a surcharge of 0.25 percent since January 1, 2005.

## Private nursing insurance

Private nursing insurance is handled by private insurance funds<sup>53</sup>, the benefits being similar to those offered by the statutory nursing insurance. The law stipulates that maximum contributions may not exceed those paid into the statutory health insurance funds. The amount to be paid in premiums essentially depends on the age of entry, and while non-active married spouses are not included in the insurance, the contribution they pay is only half the regular amount. Children aged 18 and under are co-insured with their parents. Children who are of age and undergoing training are co-insured under the same conditions as those applying in the statutory nursing insurance system. In addition, private funds are not allowed to exclude or surcharge certain risks, as they are allowed to do in their private health insurance contracts. Among other things, they are legally obliged to enter into contracts, accept persons that are already in need of care, refrain from grading their premiums by the sex and health of the insured, etc.

## The benefits of the nursing insurance

All benefits are governed by the principle that

- prevention and rehabilitation take precedence over nursing, and
- outpatient care takes precedence over inpatient care.

Basically, benefits are not intended to cover all burdens but only to cushion them. Around 25 percent of the cost<sup>54</sup> may well have to be borne by the persons who are in need of care, their nearest relatives, or social assistance. However, the nursing insurance did materially reduce the number of people who depend on social assistance.

Next to the benefits that relate to **domestic** and **inpatient nursing**, the insurance provides **in-kind and cash benefits** as well as other benefits that are paid either to those needing care or to those who look after them.

**Domestic-care** benefits are graded by care levels, which range from I to III. In-kind as well as cash benefits may be claimed in this context.

**In-kind benefits** include the care services provided by a nursing institution. The nursing insurance will bear the cost of care up to a certain limit at each care level. In levels I, II, and III, which include persons needing substantial, extensive, and comprehensive care, respectively, benefits amount to 384 Euros, 921 Euros, and 1,432 Euros per month. In exceptional cases, level-III payments may go as high as 1,918 Euros per month.

In the place of in-kind benefits, persons needing care may receive **cash benefits** which are similarly staggered (205, 410, and 665 Euros).

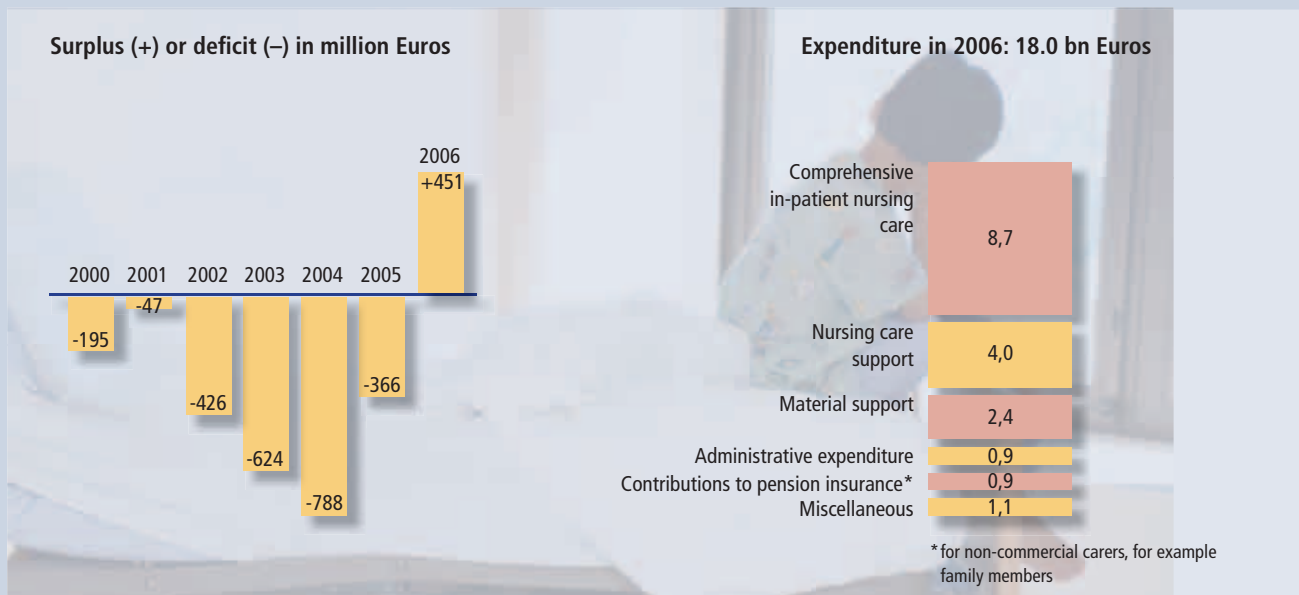
Another alternative is to combine in-kind and cash benefits, with the nursing insurance fund assuming the cost of the requisite care equipment (hospital bed, lifting gear, etc.) and subsidising any reconstruction which may be needed in the home to adapt it to the requirements of care. In addition, free training courses are offered for nursing staff and family members. Furthermore, the nursing insurance fund will pay pension insurance contributions for those persons who give up their employment or work shorter hours to look after somebody who needs care. Such people are also protected by the statutory accident insurance.

For **partial inpatient care**, i.e. for persons who are intermittently looked after in a nursing institution, the nursing insurance will assume

53 In Germany, around 8 million people are insured with a private health insurance fund.

54 This is because care levels and contribution rates have remained unchanged since 1995, so that nursing insurance benefits had to be reduced because of inflation and the growing demand for nursing services.

## The funding of the nursing insurance



Source: BMG

the cost of nursing, social care, and medical treatment up to the amounts specified for in-kind benefits in outpatient care.

For **inpatient care**, the nursing insurance will pay flat rates in the amounts of 1,023, 1,279, and 1,432 Euros per month; in cases of hardship, the amount may rise to 1,688 Euros per month.

### Some critical points about the nursing insurance scheme

It is gratifying that the possibility of needing care has finally come to be recognised as one of the common contingencies after protracted discussions and political disputes. However, the problem lies in the fact that benefits are related not to the actual amount of care needed but to care levels, and that the term 'care' is interpreted too narrowly. Nor are the benefits adapted to rising service costs. In other words: the benefits paid for nursing are the same today as they were in 1995. This puts people who care for the needy under pressure to hurry up their services, which ultimately affects quality. It is estimated that at the time of writing, nursing insurance

benefits have lost 30 percent of their value because of the effects of inflation and the rising demand for care, the balance being covered by the insured, their next of kin, or social assistance.

In those cases – and their number is growing – in which in-kind benefits have been exhausted and there is need for further care, those concerned will have to bear an increasing part of the cost which, if their resources are not up to this, will have to be borne by governmental social assistance ('help for care'). What is more, the time needed for nursing is determined mainly on the basis of physical complaints, with budgets being drawn up that specify the time required for each ministration to the minute but allow no time at all for human contact. In other words: time budgets make no allowance for social support in cases of senile dementia, mental crisis, or isolation.

On the contrary, the incentives offered under today's system lead in the wrong direction: as inpatient care is much more expensive, budgets de-emphasise domestic care although it is therapeutically much more valuable in terms of



the emotional and social situation of the patients. For inpatient care institutions, on the other hand, success in rehabilitation is financially counter-productive as the care level of rehabilitated patients will be downgraded, the result being that the institution makes a loss because it receives lower payments.

Therefore, it is imperative to extend nursing insurance benefits to include senile dementia, mental crisis, isolation and other complaints of a similar nature. This would call for a contribution increase which, however, could be substantiated by reasons other than the one already mentioned, for the gap between revenues and expenditures is growing from year to year. Experts expect all reserves to be consumed by 2009. In this context, the Confederation of German Trade Unions (DGB) believes that it is necessary to abandon the distinction between the statutory and the private nursing insurance system and to create a joint nursing insurance fund which receives contributions from employees, civil servants, and self-employed alike, so that the burden of financing the nursing insurance is distributed more equitably. In addition, the DGB believes that work and care should be made more reconcilable for next of kin who look after a sick member of their family.

The Act to Reform the Sustainable Development of the Nursing Insurance System of June 19, 2007, represents the grand coalition's response to the urgent problems of the nursing insurance. As ever, it is a minimum reform at the level of the lowest common denominator that could be found among the coalition parties CDU/CSU and SPD. What is more, even the vice-chairman of the CDU parliamentary party thinks that it will do no more than solve the current problems for the time being which, however, will be back on the agenda by 2009 at the latest.

Next to increasing payments for domestic and inpatient care, the coalition agreed on the following innovations in statutory nursing insurance.

On July 1, 2008, the contribution rate will increase from 1.7 to 1.95 percent of the compulsorily insured income, with employees and employers bearing 0.975 percentage points each. The surcharge paid by childless persons, which currently amounts to 0.25 percentage points, will go up from 1.1 to 1.35 percent. It is thought that this rate increase will guarantee the financing of the nursing insurance until 2014. From 2015 onwards, rates will be stepped up at three-year intervals as needed. By way of compensation, the unemployment insurance contribution will go down from 4.2 to 3.9 percent on January 1, 2008.

The sum paid by the nursing insurance funds for the care of dementia patients will go up from 460 to 2,400 Euros per year. Further improvements relate to rehabilitation, reporting on the quality of nursing homes, the creation of local nursing centres, temporary releases from work for nursing purposes, and guarantees for a return to the job.

As the steps taken will merely serve to alleviate the problems of the statutory nursing insurance to a certain extent, the major political parties have developed the following concepts in preparation for the election campaigns of 2008 (Land parliamentary elections in Lower Saxony, Hessen, and Bavaria) and 2009 (federal elections):

### The concept of the CDU/CSU

The party disputes neither the extension of nursing benefits nor the need for higher contributions. In the latter context, however, the CDU/CSU is thinking of re-introducing its old 'per-capita rate' concept. The party considers prescribing a monthly surcharge to be paid by the insured, which will amount to six Euros in the first year of the reform and serve to build up a 'demography reserve'. This surcharge will be increased by one Euro per month in each subsequent year. Once again, only the insured will be called upon to pay that surcharge. Whether or not the savings thus accumulated



## Payments under the nursing insurance until 2012

	home care by family members (nursing care support)	domiciliary care by care providers (material support)	residential care (in homes)
<b>care category 1</b>			
until now	205,– Euro	384,– Euro	1023,– Euro
2008	215,– Euro	420,– Euro	1023,– Euro
2010	225,– Euro	450,– Euro	1023,– Euro
2012	235,– Euro	450,– Euro	1023,– Euro
<b>care category 2</b>			
until now	410,– Euro	921,– Euro	1279,– Euro
2008	420,– Euro	980,– Euro	1279,– Euro
2010	430,– Euro	1040,– Euro	1279,– Euro
2012	440,– Euro	1100,– Euro	1279,– Euro
<b>care category 3</b>			
until now	665,– Euro	1432,– Euro	1432,– Euro
2008	675,– Euro	1470,– Euro	1470,– Euro
2010	685,– Euro	1510,– Euro	1510,– Euro
2012	700,– Euro	1550,– Euro	1550,– Euro
<b>care category 4</b>			
until now	–	1918,– Euro	1688,– Euro
2008	–	1918,– Euro	1755,– Euro
2010	–	1918,– Euro	1825,– Euro
2012	–	1918,– Euro	1918,– Euro

will be adequate is open to question.<sup>55</sup> Lastly, the benefits paid for domestic care will be brought up level with those paid for inpatient care.

### The concept of the SPD

The party intends to raise the contribution rate to about two percent, to be paid half and half by the insured and their employers. Furthermore, privately-insured persons are to pay as much for their nursing insurance as those in statutory insurance, who currently pay about twice the amount. In addition, the SPD advocates subsidising the nursing insurance with tax money.

Lastly, the SPD wants more transparency with regard to the quality of nursing homes, for at present, neither the inmates nor their next of kin have access to the results of the reviews conducted by the medical services of the insurance funds, a fact that is scandalous from

the point of view of mature patients. Greater transparency would serve to enhance competition among nursing homes.

The per-capita rate suggested by the CDU runs counter to the basic position of the SPD with regard to the financing of the social security systems. In its opinion, nursing insurance should take the form of a citizen's insurance which includes high-income earners and heirs as well as capital and interest revenues to cushion the expenditure boom that is expected in the next few years.

### Conclusion

It is certain even now that the resultant dispute about basic approaches as well as the quality of the compromise that will be ultimately found will resemble those of the health reform of 2007.

<sup>55</sup> Assuming an interest rate of three percent, no more than around 5,000 Euros could be saved in a period of twenty years, an amount that would be gone after a few months in a nursing home.

## 7. The statutory pension insurance

### The institutions of the statutory pension insurance

Reorganised on January 1, 2005, the statutory pension insurance system includes the general and the miners' pension insurance.<sup>56</sup> The former Federal Insurance Institute for Salaried Employees and the Association of German Pension Insurance Institutions have been merged into the new Federal Pension Insurance Institute. Their former Land insurance institutes now operate as regional insurance institutions. This marks the abolition of separate insurance institutions for blue- and white-collar workers, a step that was long overdue because the same legal regulations have been applying to both for decades, and the separation itself was outdated. Formerly separate, the mining, rail, and marine insurance institutions were merged into a federal institute that covers all three industries. Now as before, pension insurance institutes are public-law institutions with their own organs of self-government on which the employers and the insured are equally represented. Delegates to these bodies of self-government are elected at six-year intervals in a free and secret ballot.

### Compulsory versus voluntary insurance

The pension insurance covers all employees as well as self-employed persons, pupils, and housewives. Membership is compulsory for all employees and trainees in paid employment. For some self-employed persons such as independent master craftsmen, membership is compulsory as well; other self-employed persons may join the insurance on a voluntary basis.

### The duties of the statutory pension insurance

It is the prime function of the statutory pension insurance to provide medical, employment-promotion, and other rehabilitation benefits. All rehabilitation measures aim at restoring the employability of the insured and/or prevent its deterioration. These benefits take precedence over pension benefits, which are granted as soon as applicable conditions are met.

Judged by its financial volume, the statutory pension insurance is the largest among the social security systems of the Federal Republic of Germany. Providing around 32 percent of all direct social benefits,<sup>57</sup> its total expenditures of some 240 billion Euros account for almost 10 percent of Germany's gross national product.

### The financing of the statutory pension insurance<sup>58</sup>

Financing is based on the **contributions** of the insured and their employers, with each paying half of the current contribution rate into the pension insurance. Redefined by the legislature on an annual basis, this contribution rate applies to all incomes below the contribution assessment ceiling, meaning the limit below which incomes are subject to compulsory pension-insurance contributions. The contribution assessment ceiling is high enough to include well-paid white- and blue-collar workers. In 2007, it is 5,250 and 4,400 Euros per month in the old and new *Länder*, respectively, with employees and employers paying a rate of 9.75 percent each. As any income beyond that limit is not subject to compulsory insurance, it will not be taken into consideration when pension benefits are computed. The contribution rate is calculated to ensure that all ongoing

<sup>56</sup> The miners' social insurance mainly serves blue- and white-collar workers employed in mining and related enterprises. The overall contribution rate is higher than in the general pension insurance, the added cost being borne by the employers. Moreover, the miners' pension insurance offers early-retirement and other additional pension benefits. The reason for this lies in the peculiarities of mining work. The new Federal Insurance Institution for Miners, Railwaymen, and Seamen retains the special features of the former mining insurance.

<sup>57</sup> Social-security spending accounts for some 57 percent of public-budget expenditures.

<sup>58</sup> Data source: Rentenversicherung in Zahlen, Deutsche Rentenversicherung Bund 2007.

benefits can be paid from contributions and federal subsidies, and a sustainability reserve<sup>59</sup> equivalent to 20 percent of a monthly expenditure total can be maintained.

The second financing pillar is a **federal subsidy** paid from a budget earmarked for those governmental functions that are performed by the pension insurance. These include payments for public burdens resulting from war, contribution-free periods, upgrades of former GDR pensions, pensions for displaced persons, etc. The amount of this subsidy is redefined every year.

In 2005, total spending on pension insurance amounted to around 240 billion Euros, of which some 73 percent were borne by the insured, while the remaining 27 percent came from the federal subsidy.

### The benefits of the statutory pension insurance

The benefits of the statutory pension insurance are not confined to pensions alone (old-age and partial-disability pensions, pensions for widows, widowers, and orphans, and subsidies for health-insurance contributions). They also include prevention and rehabilitation benefits relating to medical care and employment promotion (curative treatment in specialised institutions, training for work in a new occupation for people who were incapacitated for their former job by ill-health, etc.). Rehabilitation benefits take precedence over pension benefits, for medical and employment support makes more sense than the payment of pensions, both to the individual and the national economy.

In addition, the insurance pays old-age as well as survivors' pensions (widowers, widows, orphans, half-orphans). Regular pensions are paid from the age of 65. From January 1, 2009 onwards, severely handicapped persons for example may receive a pension not earlier than

the age of 63. For a transitional period, people who have reached the age of 60 will be able to claim a pension before reaching the statutory age of 65 (63 for severely handicapped persons). However, pensions will normally be reduced in such cases by as much as 18 percent. These transitional regulations will be abolished step by step between January 1, 2006 and 2009.

The benefits of the statutory pension insurance also include grants towards the pensioners' contributions to the statutory health insurance which amount to half the total contribution. On the other hand, pensioners must pay the full added charge for dental prostheses (0.9 percent) which, however, has only half the original effect because the pensioners' health insurance contributions were reduced at the same time.

### Pension types

#### Regular old-age pensions

Only the insured individuals themselves are entitled to this type of pension, provided they have reached a certain age, normally 65, and passed a qualifying period of five years. As part of the pension reform of 2007, the Federal Parliament decided to increase the statutory age for entitlement to an old-age pension to 67. In the period from 2012 to 2029, the statutory retirement age will be increased gradually from 65 to 67. From 2012 onwards, the retirement age will be increased in one-month increments, beginning with all persons born in 1947. From 2024 onwards, the increment will be extended to two months, so that all persons born in 1964 and later fall under the statutory retirement age of 67. However, those who can demonstrate that they have paid contributions for 45 years or more will be able to draw old-age pension from the age of 65, as before. Those whose compulsory insurance period is less than 45 years will have their pensions reduced by 0.3

<sup>59</sup> To defray current expenses and to compensate fluctuations in revenues and expenditures, pension insurance institutes must have funds available at short notice. In addition, reserves must be maintained in case these funds are inadequate to compensate such fluctuations. Together, these funds form a sustainability reserve which today must be equivalent to 20 percent of a monthly expenditure total.

percent for each month, and 3.6 percent for each year, that is lacking. This is particularly important for those who have been insured for 35 years and more who, although their statutory age for retiring on a full pension is gradually raised from 65 to 67 years, may draw a pension at 63 if they agree to a 14.4 percent reduction. To keep good faith, it was decided that persons born in 1958 or earlier who concluded flexible-retirement agreements before January 1, 2007 will fall under the old legal regulation, meaning that their statutory retirement age will be 65 years as before.

### **Partial disability pensions**

Again, only the insured themselves can claim this pension. Insured persons who are partially disabled after 35 years (40 years from 2024 onwards) of compulsory insurance may draw a pension at the age of 63, as before. All others who draw a pension because of some partial disability will have their pensions reduced by 14.4 percent (0.3 percent per month) from 2012 onwards. In the future, therefore, the time window for retirement will range from age 63 to age 67; today, it is open between the age of 63 and 65. This form of pension, too, carries a qualifying period of five years. Insured persons with a partial disability receive a pension if they have passed the qualifying period and paid contributions into the statutory insurance for no less than three years, provided they are able to work for between three and six hours per day. This serves to compensate any loss of pay occasioned by part-time employment entered into for medical reasons. For severely handicapped persons, the statutory age for retirement on a full pension will be increased gradually from 63 to 65 years from 2012 onwards.

### **Survivors' pensions**

Persons entitled to claim this pension include the widows, widowers, orphans, and former spouses of the deceased if the insured has passed the qualifying period of five years or has drawn a pension before.

### **Pension amounts**

The actual amount of a pension depends on the number of earning points acquired during the insurance period. Earning points are acquired during the period in which contributions are paid, their number depending on the amount of the contributions and their duration.

### **Earning points**

One earning point (EP) corresponds to the average income<sup>60</sup> of all employees in any given year. Employees who generate exactly the above-mentioned average income in a given year receive one earning point. If this goes on for 40 years, for instance, they will have 40 earning points. Employees with higher or lower incomes will be credited with the ratio between their income and the average income of the workforce. This ratio is calculated by dividing an individual's insured annual earnings by the average income of the insured population in any given year.

The result is the number of personal earning points. As personal incomes at the beginning of paid employment tend to be lower than later on, only a very few workers receive one earning point per year in that period. Conversely, if their income should rise above the average at some later time, they will receive more than one earning point. All earning points thus acquired will be added up on retirement.

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<sup>60</sup> The average income is determined every year by the Federal Statistical Office.

**Example**

42 years of statutory pension-insurance contributions, during which the income earned amounted to half the average for 10 years: **10 x 0.5 EPs.**

20 years with an income corresponding to the average: **20 x 1.0 EPs.**

12 years with an income 20 percent above the average: **12 x 1.2 EPs.**

The resultant total is: **39.4 EPs.**

**The current pension value**

The current pension value is a gross value in Euros which corresponds to the contributions due on an average income in a calendar year. This value follows the development of average wages and salaries in a given year.

**The pension formula**

Different multiplication factors called pension-type factors are applied to each of the pension types described below. The earning-point total is multiplied by the factor defined for the pension type in question to produce personal earning points. These personal earning points reflect the working life of an insured person as they allow for periods during which contributions were paid and not paid as well as for substitute qualifying periods, etc. The pension that is due to a person is determined by multiplying this earning-point total with the current pension value, i.e. the amount of the monthly old-age pension<sup>61</sup> generated by the average annual contribution of all employees.

**Example**

Employees in the old Länder<sup>62</sup>  
42 years of pension insurance contributions, personal earning points: **35.00 EP**

Current pension value: **26.13 Euros**

Old-age pension at 65 (pension type factor 1.0)

Monthly pension:  
35 x 26.13 Euros = **914.55 Euros**

**Therefore, the pension formula runs as follows:**

**Personal earning points x pension type factor x current pension value = monthly pension**

Times spent in unemployment, in raising children, in marginal employment, in the national service, or in marginal employment with lump-sum pension insurance contributions are considered separately in determining the number of personal earning points.

Broken down by gender and region of origin, the amounts actually paid in old-age pensions in 2007 were as follows:

**Old Länder**

Men	Women
820 Euros	369 Euros

**New Länder**

Men	Women
906 Euros	661 Euros

<sup>61</sup> The old-age pension carries a so-called pension-type factor (multiplication factor) of 1.0. For partial disability pensions, the factor is 0.5, so that partial disability pensions are determined by multiplying the current pension value by 0.5.

<sup>62</sup> If we were looking at employees from the new *Länder*, contribution periods would normally be longer because the former GDR would not officially admit to the existence of unemployment, so that persons retiring at 65 would normally have paid contributions for more than 45 years.

## The standard pension

The standard pensions commonly quoted in the pension insurance system are purely mathematical values which tell us nothing about the amounts actually paid. On the contrary, they actually gloss over the facts. Standard pensions are the amounts which pensioners would theoretically receive if their income had been equal to the workforce average for a period of 45 years. Today, that average amounts to 29,488 Euros per year. In the old and the new Länder, the resultant theoretical amount is 1,176 and 1,036 Euros per month, respectively, the latter being due to the lower contribution assessment ceiling in the new Länder.

## Pension taxation

The tax treatment of pensions was rearranged on January 1, 2005. Until then, only the interest and yield generated in the period after retirement was subject to taxation. For persons who retired at 65, that proportion amounted to 27 percent of the annual pension. When the Federal Constitutional Court handed down a ruling on the equal treatment of statutory and civil servants' pensions, the law had to be changed. Since 2005, pensions are taxed according to the so-called EET principle (exempt-exempt-taxed), meaning that tax relief is granted on pension insurance contributions and the resulting pensions are taxed. During a transitional period, taxation rates will increase gradually until they reach 100 percent in 2040.<sup>63</sup>

## The pensioners' contributions to the health and nursing insurance

Pensioners pay half the regular health insurance contribution from their monthly pension at a

rate set by their insurance fund. Persons voluntarily insured in the statutory health insurance have been paying contributions at the full rate since April 1, 2004.

## Pension deductions

The pension types described above may, under certain circumstances, be drawn prematurely, i.e. before the statutory age. As a rule (the exceptions have been described above), pensions will be subject to deductions in these cases amounting to 0.3 percent per month or 3.6 percent per year. The intention is to abolish the early-retirement options introduced in 1972 in the long run.

## Pension adjustments

The pensions paid by the statutory pension insurance are dynamic, meaning that they are adjusted on July 1 of each year to match any changes in the income of the insured population. This involves re-calculating pensions on the basis of a new current pension value. Until pension levels in the old and new Länder have equalised, pensions will be adjusted at different rates.

The actual amount by which pensions are adjusted depends on wage developments in the preceding calendar year, including any changes in the pension-insurance contribution rate. Until 2009, moreover, old-age provisions will be factored in at an increasing rate to ensure that the expenditures of the working population on the 'Riester pension' are taken into consideration, which effectively lowers pension adjustments. In 2010, yet another mathematical factor will be introduced to ensure that the pension level is reduced from 69.5 to 67 percent.

63 The Court ordered the legislature to issue new regulations ensuring that civil servants' pensions, which have always been taxed, are treated on an equal footing with statutory-insurance pensions no later than January 1, 2005. In the period from 2005 to 2024, contributions paid during the active phase of a person's life that used to be taxed are gradually made exempt, starting with a share of 60 percent which increases by two-percent increments every year. Also from 2005 onwards, pensions are gradually made subject to taxation, two percent being added each year until 2020 and one percent from then on, so that pensions will be fully subject to taxation by 2040.



## The sustainability factor

On January 1, 2005, a so-called sustainability factor was introduced as part of the consolidation attempts described above. Figured into the annual pension adjustment, this factor reflects developments in the relationship between pensioners and contributors (pensioner quotient) and, consequently, demographic developments (declining birthrates, increasing life expectancy) as well as changes in the employment structure. If, for instance, the number of contributors should decline as the number of jobs subject to compulsory social insurance shrinks, pension adjustments will be reduced. Conversely, if the number of contributors should increase as the economy booms, pension adjustments will benefit, provided the quotient is not changed by an increase in the number of pensioners. The sustainability factor is not figured in whenever its application would lead to pension cuts. As this would have been the case in 2005 and 2006, pensions were not upgraded in those two years. In the long run, the inclusion of the sustainability factor will cause pension levels to decline.

## The sustainability reserve

Legal regulations compel pension insurance institutions to retain a sustainability reserve (or fluctuation reserve, as it was called until the end of 2003) to compensate any deficits and revenue fluctuations, the purpose being to avoid sudden contribution increases. As contribution revenues declined, especially from the mid-nineties onwards, these reserves were tapped more and more often to keep insurance contributions stable. Until 2002, the reserve had to correspond to no less than one monthly expenditure total<sup>64</sup> of the pension insurance (some 15 billion Euros at the time). In 2003, it was reduced to 0.8 times the amount spent monthly, and early in 2007, it was equivalent to 0.2 monthly expenditures. This reserve

meltdown threatens the insurance's ability to compensate revenue fluctuations. All experts are agreed that this fluctuation reserve, having been gradually lowered from three monthly expenditures to its present level, is very far from being adequate. Late in 2004, for example, the Federal Insurance Institute for Salaried Employees (BfA) encountered a liquidity gap which it was only able to fill by selling property worth 2.1 billion Euros.

## Basic social security

Persons aged 65 and over as well as persons aged 18 and over who are fully disabled for medical reasons are entitled to basic social security. Like income support, benefits depend on a means test in which existing assets as well as other revenues are taken into account. Benefit amounts correspond to those granted by social assistance as help towards securing a living. Further benefits include reimbursements for the cost of housing and heating as well as any other benefits that may be required. Basic social security is financed by tax money, not by pension insurance contributions. Its management lies in the hands of counties and county boroughs.

Basic social security was introduced in 2003 because many elderly people with a low pension refrained from applying for social assistance because they felt ashamed, or because they feared that their children might be held responsible. Pension insurance funds are now required to point out to those who apply for a pension that the institution of basic social security exists, and that no recourse will be taken for their maintenance against children with an annual income of less than 100,000 Euros.

Discussing the peculiarities of the statutory pension insurance system in greater detail would go beyond the scope of this survey.

<sup>64</sup> In the seventies, the average fluctuation reserve amounted to six monthly expenditures, declining in the eighties and nineties to 1.7 and 1.5 expenditure totals, respectively.

However, we might throw some light on the background of the present discussion about the future configuration of the German pension system if we take a look back into history.

### Historical overview

The origins of Germany's social-security system reach back to the imperial era. The adoption of the 'Act Establishing an Old-age and Disability Insurance System' by the parliament of the German Empire at the time when Otto von Bismarck was chancellor laid the foundations for Bismarck's social legislation (May 24, 1889). As part of this legislation, a pension insurance system was introduced on January 1, 1891.

### The original pension concept

Bismarck's pension concept was based on two pillars, the principle of social equalisation and the principle of insurance. Social equalisation was achieved by tax-funded subsidies that were paid by the community of taxpayers. As workers' incomes were low, they generally paid no taxes, so that equalisation was financed by the prosperous. Contributions were withheld from the workers' weekly wages. The system was financed by a combination of the capital-coverage and the pay-as-you-go approach, and contribution revenues were used to pay current expenses. However, the focus of the insurance was on disability, not on old age, for there was hardly any member of the working population who reached the statutory retirement age, which was 70 until 1916. This is why the system

was alternatively called an old-age disability pension. A major reform came in 1911, when a survivors' pension was introduced and salaried employees were included in the pension insurance system.

### The inter-generational contract

The fundamental principles of the pension system described above remained intact until dynamic pensions were introduced in 1957. For the first time, the pension reform of 1957 introduced the idea that pensions should serve to substitute pay and safeguard the standard of living, marking the transition to a pay-as-you-go system<sup>65</sup> under which pensions were dynamically linked to gross-wage developments. In that context, the concept of an inter-generational contract was introduced, based on the idea that the contributions paid by each economically active generation should be used to finance the social security of the inactive generation.

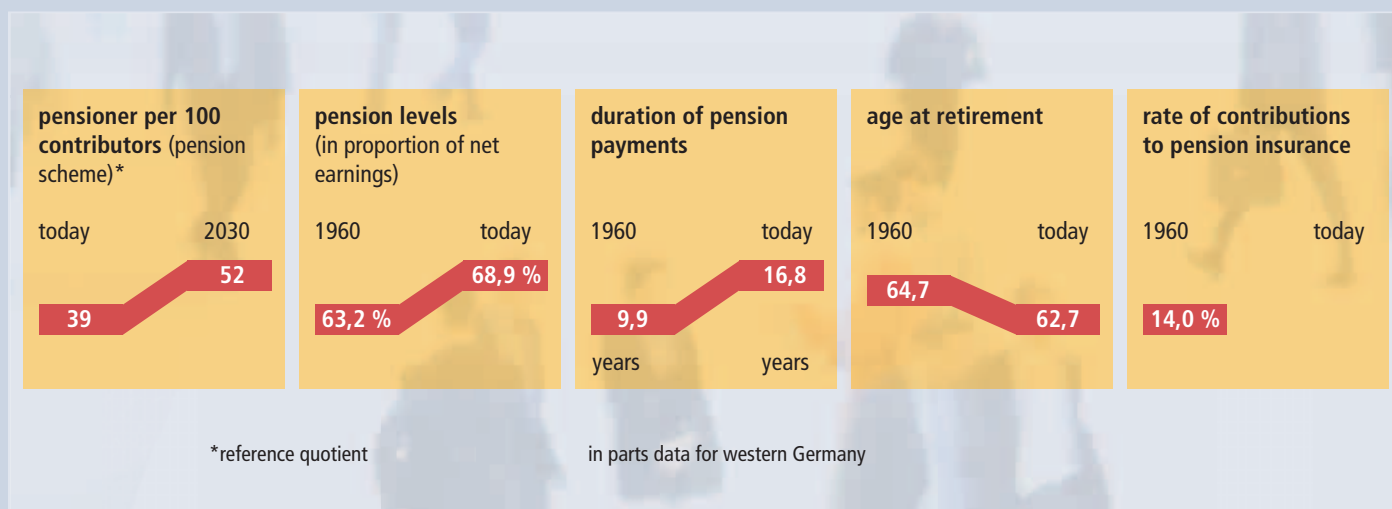
To be sure, the fathers<sup>66</sup> of the pension reform of 1957 were thinking of a contract between three generations,<sup>67</sup> children, the working population, and the elderly, which the Adenauer Government that was in power at the time reduced for purely populist reasons to a contract between two generations, namely the active and the old population. The consequence was that declining birth rates and their sequel, declining employment figures, could cause the pay total to go down, which was bound to lead to pension cuts sooner or later.

65 Contributions received are used immediately to pay for the benefits provided by the solidarity-based community instead of being saved up for each contributor individually. In return, premium-payers are entitled to benefits in case of need.

66 First among these is Wilfried Schreiber, a mathematician who developed the inter-generational contract system in the early '50s based on the theories of Gerhard Mackenroth and Ferdinand Oeter and with the support of Oskar Nell-Breuning (mathematicians, economists, and social scientists).

67 Under the three-generation contract, the costs occasioned by bringing up children were supposed to be financed by tax money. According to Schreiber's original concept, moreover, the entire economically active population was supposed to pay into the system, including freelancers and the self-employed (lawyers, doctors, pharmacists, etc.). Accordingly, the economically most powerful segment of the working population would have been included in the system to strengthen it with their relatively high contributions. What is more, Schreiber intended the system to pay not a full-scale but only a basic pension, to be supplemented by a private pension covered by savings. As we all know, this as well as the three-generation contract fell by the wayside.

## Problems related to the pension insurance



Source: VDR

Immediately after its introduction, the new pension formula of 1957 boosted pension levels to around 60%<sup>68</sup> of the average pay level. Only a little later, it was increased to 70% of the income received by employees of comparable status. At the time, the DGB called for a pension level of 90% as a substitute wage “after a full working life in which insurance has been paid for 45 years” but failed to gain acceptance. Lastly, a flexible retirement option was introduced in 1972 under which pensions could be claimed at the age of 60, 63, or 65 years, depending on certain conditions.

### Transfer of the system to the new Länder

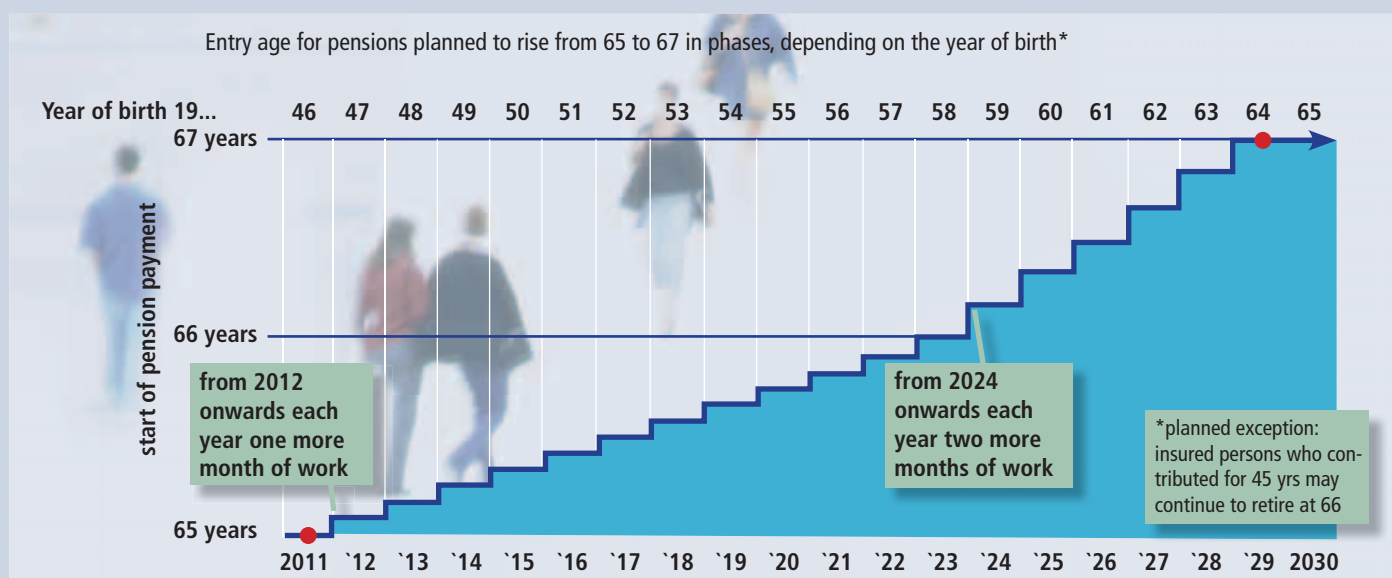
When the west German social insurance systems were transferred to the new Länder (the former GDR) as part of the reunification of October 1990, a lasting burden was imposed on

all social-security systems. In the pension sector, the impact of the transfers from the old Länder proved particularly grave as the insurance periods acquired in the former GDR were transferred intact into the statutory pension insurance system. This is why pensioners in the new Länder are better off than those in the old Länder (even if we take company-pension<sup>69</sup> benefits into account), for the working lives of those in the west, unlike those of their colleagues in the new Länder, were interrupted by unemployment, child-rearing, and other periods without insurance. This is the reason why men and, more importantly, women in the old Länder were insured for so much shorter periods. No such interruptions occurred in the GDR, for its command economy subsidised full employment until it went bankrupt and provided generous child-care options for women, most of whom were economically

<sup>68</sup> In 1956, for example, the pension paid by the insurance systems for blue- and white-collar workers corresponded to no more than some 28 and 22% of the average wage received by premium-payers of comparable status.

<sup>69</sup> There was no system of company pensions in the GDR.

## On the road towards a "pension at 67"



active. Accordingly, the pensions received by women in the new Länder are higher by 18% on average than those of women in the old Länder.

### Future developments

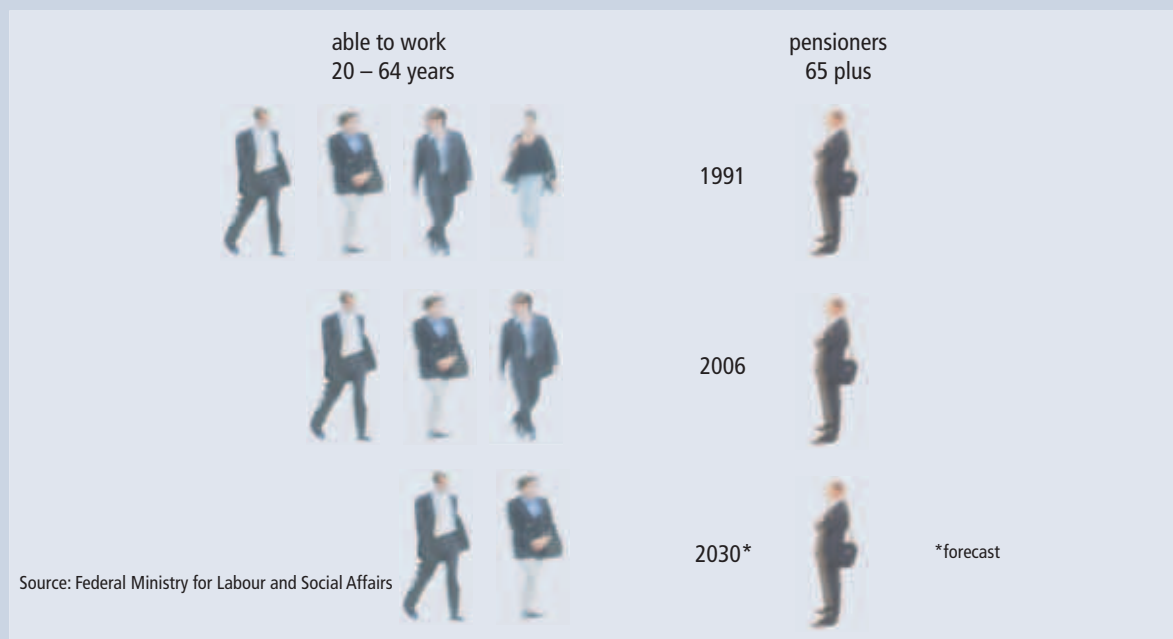
Being as dependent on the factor of labour as virtually all social-security systems in Germany, the inter-generational contract will work only as long as a balance can be maintained between revenues (from insurance contributions) and expenditures (on current benefits). The Federal Republic of Germany resembles other industrialised nations in Europe in that life expectancy keeps increasing while the birth rate keeps declining, the consequence being that there will be fewer and fewer contributors and more and more beneficiaries in the long term. Thus, for example, the period for which the average person draws a pension has almost doubled since 1957. This demographic development was addressed in several reform measures which, however, did not prove effective enough

to secure either the pension insurance or any of the other social-security systems.

Next to demographic developments, the early retirement option of which a great many people took advantage in the mid-90s (encouraged by employers as well as by federal, Land, and municipal institutions) did much to put the statutory pension insurance into the precarious position it is in now by advancing the time at which revenues end and benefits begin. An added factor is the growing number of marginal jobs on which, naturally enough, only low contributions are paid.

The reforms implemented so far imposed severe cutbacks on the generation that is now supporting the pension system through its contributions. The original objective was to secure for the future a pension level of 67% (instead of the former 70%). While a difference of 3% may appear marginal, we should not forget that the aforementioned pension level may only be reached by persons who have paid

## Ratio: persons able to work/pensioner



insurance contributions for some 45 years, a target that was missed by the large majority of the insured in the old Länder and is unlikely to be reached by more than a small minority of the employed in united Germany.

### The present situation

In a variety of pension reforms, benefits were slashed in an attempt to compensate the marked change in the relationship between contributors and pensioners occasioned by demographic developments and the steady decline in the number of premium-payers. Related measures include raising the statutory retirement age and introducing deductions on pensions claimed before that age is reached.

Following the same path in its pension reform of 2007, the present government decided to raise the statutory retirement age to 67 in the period from 2012 to 2029. The first group to be involved will be those born after 1947. Implementation will be in one-month increments

from 2012 and in two-month increments from 2024, so that all those born from 1964 onwards will fall under the statutory retirement age of 67. Further details about the reform have been given above.

### Points of criticism about the reform policy

The trade unions envisage ensuring the sustainability of the social security systems by enlarging the group of the insured and including incomes not related to dependent employment. This would imply transforming the insurance system from its present state, in which only persons in dependent employment are insured whose monthly income remains below a defined limit, into an insurance in which membership is compulsory for the entire economically active population, including the self-employed, political mandate holders, and civil servants. The plan is intended as an alternative to further benefit cuts and risk privatisations. For legal as well as practical reasons, several steps will be needed to achieve this.

In a first step, the contribution assessment ceiling<sup>69</sup> might be abolished gradually. However, the entitlements accruing from relatively high contributions are to be limited in a return to the aforementioned principle of 'social equalisation', for the limitation of benefits represents a solidarity-based contribution to the community of the insured which counterbalances the lower contributions paid by low-income earners. According to the concept of the trade unions, any permanent occupation yielding more than a trifling income is to come under the protection of the social security system.

In addition, contributions to the statutory pension insurance are to be made compulsory for all capital, rental, and other taxable incomes. However, to protect low and mid-range incomes of this kind, tax exemption limits are to be introduced. For the same reason, incomes of the kind described above are to be included in compulsory insurance only after the contribution assessment ceiling has been either abolished or raised considerably. Otherwise, compulsory insurance would affect only that group of persons that is even now supporting the social security system through its contributions.

The DGB rejects the increase in the retirement age introduced under the pension reform of 2007 because it believes it cannot be defended either on labour-market or on social-policy grounds. Even if the economic boom persists, unemployment will recede only slowly. For this reason, a higher statutory retirement age not only increases the burden on the elderly but also impairs the chances of younger workers on the labour market by obstructing their access to it. The DGB similarly rejects the sustainability factor (see above) because it leads to a decline in the pension level. Lastly, it feels that the insurance financing system has not been strengthened in line with the demands made above.

Once again, it is the insured and the pensioners who have to bear the burden of a higher retirement age and a lower pension level, while no effort is made to put the finances of the statutory pension insurance on a secure footing by extending its coverage to the entire economically active population.

The lawmakers are therefore called upon to make up for their former political failings by sustainably reforming the old-age pension system. Thus, no satisfactory solutions have been found so far for the flexibilisation of employment biographies, which has been spreading steadily over the last few years. Alternating periods of unemployment, part-time work, very low income, and self-employed activity cause inadequate incomes in old age. In the opinion of the trade unions, the basic security required in this respect is inadequate.

## 8. The statutory accident insurance

The statutory accident insurance forms part of the social security system. Its origins go back to the year 1884; today, it is defined in Volume VII of the Social Code.<sup>70</sup>

### The duties of the statutory accident insurance

All enterprises must be covered by the statutory accident insurance.

The mission of the statutory accident insurance includes

- preventing accidents at work and occupational diseases,
- precluding work-related health hazards,
- ensuring effective first aid,

and, for persons affected by accidents or occupational diseases,

<sup>69</sup> In the pension insurance system, insurance is not compulsory for marginal incomes below € 400 per month and for incomes above the contribution assessment ceiling, which in April 2005 was € 5,200 per month in the old and € 4,400 per month in the new Länder.

<sup>70</sup> All data have been extracted from the 2007 database of the National Association of Industrial Accident Insurance Institutes.



- restoring the health and physical powers of the insured, and
- recompensing the insured or their surviving dependents through monetary or pension benefits.

### The institutions of the statutory accident insurance

On July 1, 2007, an apex organisation uniting all *Berufsgenossenschaften* (occupational health and safety associations) and public-service accident insurances was formed: The German Statutory Accident Insurance, which insures more than 70 million people against accidents at and on the way to work, accidents at school, and occupational diseases.

At the moment, there are twenty-five industrial and nine agricultural industrial *Berufsgenossenschaften* that are active in three major areas, namely

- the industrial,
- the agricultural, and
- the public-service sector.

While the industrial associations are structured by industries or branches, the agricultural and metal-working *Berufsgenossenschaften* also have a regional structure. In the public service, there are separate accident insurance institutes which, mostly attached to Land or local governments, fulfil the duties of a *Berufsgenossenschaft*. These insurance institutes also cover persons with an honorary office in sports clubs, fire brigades, etc. as well as children, pupils, and students. For the last-named category, contributions are paid by the local, Land, and federal governments.

In the future, the number of these institutes will be reduced by mergers. A reform of the statutory accident insurance is pending which will affect not only the number of *Berufsgenossenschaften* but also the legal regulation of benefits.

### The financing of the statutory accident insurance

Unlike other social insurance institutes, *Berufsgenossenschaften* are funded by contributions that are paid by entrepreneurs only. In return, the insurance relieves enterprises of their liability for industrial accidents and occupational diseases; any insured persons affected will claim benefits directly from their *Berufsgenossenschaft*.

Contributions depend on two factors:

- The first is the average risk of an accident happening in the industry concerned. To this end, the *Berufsgenossenschaften* set up their own risk tariffs in which they assign a specific hazard class to each branch of a trade. These tariffs reflect the insurance risk that exists in a given trade which, for example, is higher in the building trade than in administrative occupations.
- The second factor on which contributions depend is the wage bill, i.e. the total amount paid in wages by an enterprise. Industries with lower wage bills pay lower contributions, while those with higher wage bills pay higher contributions. In addition, health and safety associations may add surcharges to or grant rebates on contributions depending on the number of claims in which, however, claims resulting from travel accidents are not included. This is supposed to provide an incentive to improve on-the-job safety.
- On average, the contribution rate amounts to some 1.3% of the gross wage.

### Self-government

*Berufsgenossenschaften* are constituted as self-governing public-law institutions. Their organs, i.e. the assemblies of representatives and the boards, are composed of equal numbers of honorary trade union and employer represen-

tatives who are elected at six-year intervals in what is called social-insurance elections. These self-government bodies control the activities of the *Berufsgenossenschaften* and ensure that their work reflects the practical requirements of their industry.

### The benefits of the statutory accident insurance

#### Accident prevention

At the national level, **workplace health and safety** in Germany is organised by

- the supervision and consultation services of the statutory accident insurance institutes (called *Berufsgenossenschaften*) and
- the Land agencies that are responsible for health and safety at the workplace, i.e. normally the factory inspectorates.<sup>71</sup> In some states, factory inspectorates are called labour inspection agencies.

The mission of these two supervisory services is to visit factories within their jurisdiction, check them for compliance with industrial-safety laws and regulations, and see to it that any defects uncovered are set right. Both cooperate closely on accident prevention and exchange notes.

Besides monitoring accident prevention measures in the factories, facilities, and administrations within their jurisdiction, *Berufsgenossenschaften* advise employers as well as employees. They also cooperate with health insurance funds on the prevention of work-related health hazards. Their specialists are authorised to order companies to eliminate hazards and to impose penalties whenever accident prevention regula-

tions are infringed either with intent or through negligence; the fines imposed in such cases may be as high as 10,000 Euros.

Around 1 million industrial accidents<sup>72</sup> were reported in 2006, 5.2 percent more than in the year before. Of these, 1,084 accidents were fatal, and 23,513 victims were granted an accident allowance. The number of industrial accidents declined considerably since 1996; in 2005, it was lower by 2.2 percent than in the year before, the sharpest decline being noted in the number of fatal industrial accidents (-8.7%) and newly-granted accident allowances (-4%). Broken down by industry, the biggest declines were posted by the mining (-10.7%), metalworking (-7.4%), and precision/electrical engineering sectors (-6.7%). While the number of travel accidents has been stagnating, the incidence of suspected occupational diseases has been going down as well.

Most of the cost of occupational health and safety is borne by the enterprises, either directly through internal measures or indirectly through contributions to the statutory social insurance funds. In total, the statutory accident insurance funds spend around 13 billion Euros annually, of which some 900 million go for prevention measures. The lion's share, around half, is spent on the payment of pensions for recent and past occupational accidents and diseases.

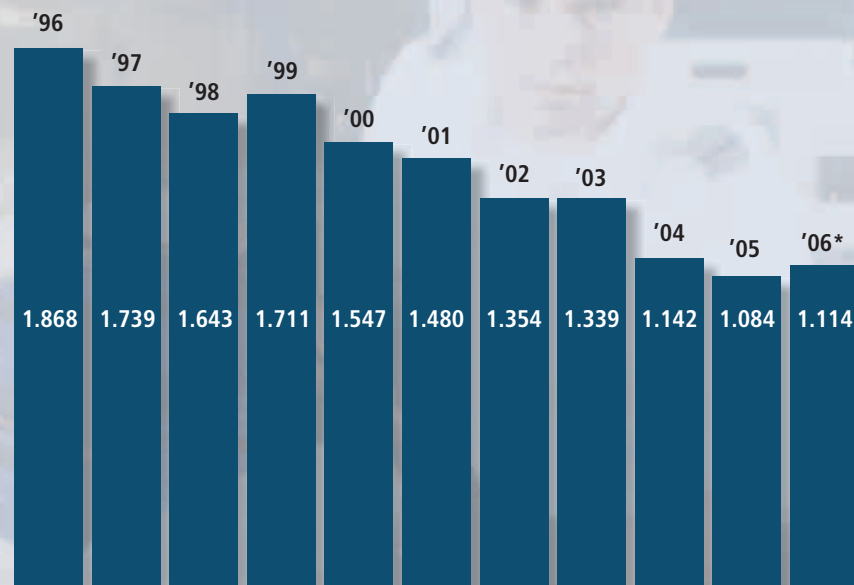
The industrial accident insurances claim that the ongoing decline in the incidence of occupational accidents and diseases is due to their preventive activities. This decline has had a positive effect on current disbursements, too, for the contribution total shrank by 164.5 million Euros to about 8.7 billion Euros.

71 In former times, factory inspectorates were exclusively concerned with workplace health and safety. Most Länder have meanwhile entrusted them with additional tasks in environmental and technical-consumer protection. In the field of industrial safety, they monitor compliance with governmental health and safety regulations, issuing warnings and imposing fines as required. In particularly severe cases, they may even report the offence to the police. A total of 147 factory inspectorates conduct around 465,000 inspections in some 200,000 factories each year.

72 Provisional statistic published by the national association of industrial *Berufsgenossenschaften* in March 2007. The figure includes both on-the-job and travel accidents. Travel accidents are those accidents that occur while travelling directly to and from the place of work and are covered by the statutory accident insurance. The national association covers around 43 million persons employed in three million factories.

## Workplace hazards

Fatal accidents at work and on the way to and from work (in the jurisdiction of the Berufsgenossenschaften)



Source: HVBG

\*provisional

A working draft recently presented for reforming the statutory accident insurance provides for benefit cuts, so that – if it is adopted without amendment by the federal and Land governments – it once again aims to relieve the cost burden on enterprises at the expense of the insured.

### Internal measures to ensure occupational health and safety

Like the external regime, corporate health and safety at work is a two-track system. Again, the Berufsgenossenschaften and the governmental factory inspectorates pursue identical objectives in health and safety protection. Next to the accident prevention rules of the *Berufsgenossenschaften*, around 40 laws and a multitude of administrative and technical regulations define a minimum standard with which enterprises have to comply to protect their employees in production and administration.

The key role in this context is played by the Occupational Safety Act of 1973, which requires enterprises to employ doctors to provide medical care for their employees as well as industrial-safety specialists to monitor the safety of production lines, machines, and equipment in technical terms.

The duties of company doctors as well as technical-safety specialists cover a wide field. They include ensuring that

- workplaces, facilities, machines, and equipment conform to the most recent technical safety requirements,
- employees observe the rules of accident prevention and industrial safety in all their actions, and
- occupational safety and accident prevention laws and regulations are implemented within enterprises to protect the employees.

In addition, they advise managements on all issues relating to health protection and workplace safety, including work humanisation. Required to cooperate, the two groups coordinate their activities in corporate committees on occupational safety and health on which works councils are represented. All factories employing more than twenty persons are required to establish such a committee.

### **Industrial-medicine care**

Industrial-medicine care is handled by

- factory medical officers,
- factory paramedics, and
- first-aid providers.

Numbers depend both on the size of the workforce and the hazard class of the company concerned. Depending on these two factors, the employment of factory medical officers is regulated by different care models. As a general rule, only large factories employ full-time medical officers. Factory doctors are not bound by their employers' instructions. Most of these physicians are in private practice and do their duties as factory doctors as a side-line, although they have to demonstrate training in industrial medicine. The time for which they have to be available at the factory depends on the size of the workforce, the health risk to which employees are exposed, and the frequency of accidents. The length of time which factory medical officers have to devote to the employees is regulated by the Berufsgenossenschaften in conformance with the peculiarities of the industry concerned.

Alternatively, factory medical care may be entrusted to external service providers. Thus, the Berufsgenossenschaften have their own nationwide industrial-medicine services. Similar services are provided by private companies and institutes as well as by the TÜV.

The employment of paramedics also depends on the size of an enterprise and the potential hazards to the workforce. All factory paramedics must be adequately trained. As regards the employment of first-aid personnel, regulations say that factories employing from two to twenty persons must have one first-aid provider. First-aid personnel must be trained and relieved of their duties for training purposes while continuing to receive their wages.

### **Occupational safety and health specialists**

Any enterprise with a workforce of more than twenty must employ an occupational safety and health specialist. The actual number depends on the size of the enterprise. The duties of these specialists include advising the management on measures relating to industrial safety and health, accident prevention, and the humanisation of work. According to the Occupational Safety Act, such specialists must be appointed by the employer. They may be either persons employed in the factory or service providers commissioned for the purpose. Occupational safety and health specialists are not bound by their employers' instructions. As a rule, they have some technical grounding as engineers, technicians, or master craftsmen, complemented by occupational safety and health courses organised either by the government or a Berufsgenossenschaft. Works councils must be involved in any decision about whether specialists are to be employed by the company itself or recruited from among outside institutions or service providers.

### **Further benefits of the statutory accident insurance**

Victims of an occupational accident or disease may claim a variety of accident-insurance benefits, including

- curative treatment,
- rehabilitation,
- care, and
- cash benefits.

### Curative treatment

Immediately after an industrial accident has occurred or an occupational disease has been diagnosed, the *Berufsgenossenschaft* in charge must do anything that is medically indicated to restore or at least improve the health of the victims, prevent any deterioration in their condition, and alleviate the consequences of the incident. This includes financing comprehensive medical care by physicians and hospitals as well as domestic nursing and medical rehabilitation. In addition, the *Berufsgenossenschaften* operate hospitals for the medical treatment of accident-related disabilities, many of which specialise in intensive care or in accident and plastic surgery.

### Vocational and social rehabilitation

Medical rehabilitation is complemented by vocational and social rehabilitation. Its prime objective is to reintegrate injured persons as sustainably as possible into their working lives by providing consultation, training, and mobility aids. In addition, the *Berufsgenossenschaften* pay the cost of finding a job, work-ability testing, retraining, further education, and even school education. Moreover, the *Berufsgenossenschaften* are obliged to provide assistance in coping with the requirements of daily life and participating in the life of the community. This may include finding or converting a residence suitable for the requirements of a handicapped person as well as facilitating the participation of injured persons in cultural or societal life by, for instance, providing transport to and from cultural or athletic events.

### Nursing

Victims of an occupational accident or disease who are in need of care may claim related benefits from their *Berufsgenossenschaft*. Depending on the extent of the need, cash benefits may be paid, nurses provided, or stationary nursing in an institution paid for.

### Cash benefits

Injured persons who are unable to work during curative treatment will receive an industrial-injury allowance which is higher than sick pay because it is intended to replace the employment income (see the chapter on statutory health insurance).

### Pensions

One of the most important benefits is the pension that is paid whenever the earning capacity of insured accident or disease victims is reduced by 20 or more percent for more than 26 weeks after the incident. As such pensions are intended in part to compensate pain, any employment income received in parallel will not be offset against them. In certain cases, a lump-sum compensation may be paid in lieu of a pension, depending on the degree to which earning capacity is reduced. The pensions of the statutory accident insurance are also paid to survivors (widows, widowers, orphans). Lastly, survivors will receive a grant to help with the funeral cost after the death of an insured person.

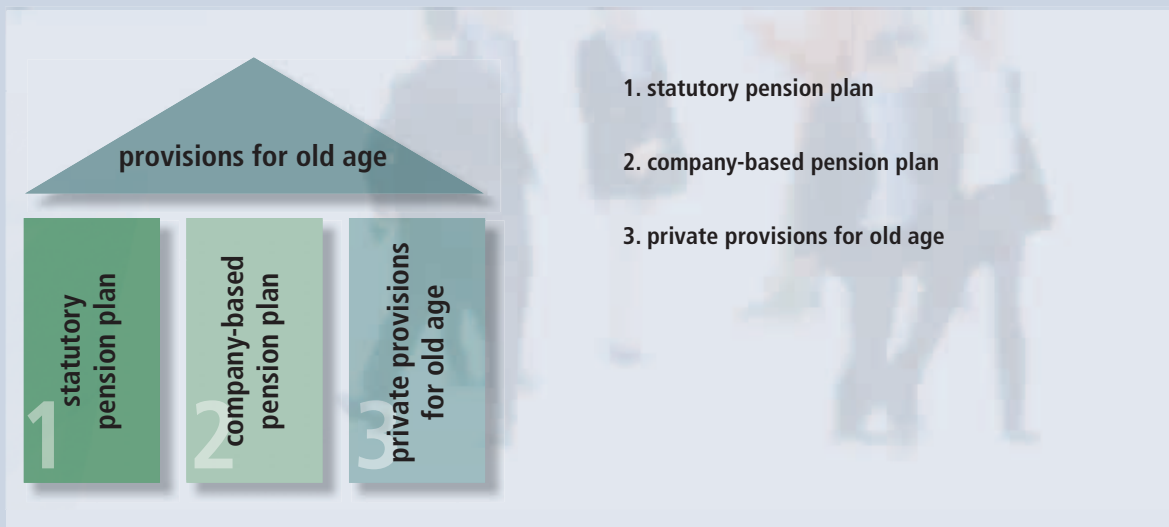
## 9. The pillars of old-age security

### The first pillar:

#### The statutory pension insurance

Forming the first pillar of old-age security, compulsory membership in the statutory pension insurance covers the largest group of economically active persons in our society, including all blue and white-collar workers in dependent employment as well as certain self-employed groups. Next to the statutory pension insurance, there are three more public-law systems which form part of the first pillar of old-age security because they are prescribed in law as obligatory for certain groups of persons. These are:

### The current pension is composed of three major elements:



- the pension system for civil servants,
- old-age provisions for farmers, and
- professional pension systems (for lawyers, doctors, pharmacists, etc.).

#### The pension system for civil servants

In Germany, members of the civil service are employed in a special public-law relationship, a status that is defined in both constitutional and ordinary law. Unlike ordinary public-service employees, whose relationship with their employer is governed by private law, there is a special bond of loyalty between civil servants and their employers, which is why it is their duty to execute without bias certain governmental functions that relate to the security of the State or the public. Civil servants may be employed by federal, Land, county, and local governments. In return for this special bond of loyalty, the authorities are obliged to devote special care to civil servants, guaranteeing a salary that is conformable with their status, support in case of sickness, and an adequate pension after retirement. The rights and ob-

ligations of civil servants and the authorities that employ them are regulated in law.

The fact that civil servants do not pay contributions towards their old-age pension is one of the consequences of this legally-regulated lifelong alimentation. The details are laid down in the Civil Pensions Act. The retirement age is normally the same as in the statutory pension insurance. Pension amounts depend on seniority, the maximum, which is reached after 40 years of service, amounting to 75 percent of the last gross salary. As pensions are subject to income tax, the net normally amounts to around 80 percent of the last salary received.

#### Old-age security for farmers

The old-age security system for farmers does not belong to the statutory pension insurance but forms an independent branch of the social-insurance system. Old-age security for farmers is managed by agricultural pension funds attached to the agricultural *Berufsgenossenschaften* (occupational health and safety associations).



The benefits provided by these funds resemble those of the statutory pension insurance, although the actual amounts paid are lower as they are merely intended to provide a supplementary income to self-employed farmers and their families. To compensate, contributions are smaller as well. Farmers whose annual income does not reach a certain limit receive a governmental allowance towards their insurance contributions. Disbursing around 2.3 billion Euros, the Federal Government accounts for some 80 percent of the pensions paid by the agricultural pension funds.

### Professional pension funds

These special systems serve self-employed doctors, dentists, pharmacists, notaries, lawyers, tax consultants, etc. Attached to one of the professional associations or operating as public-law institutions for specific professions, they oversee the compulsory insurance of their members besides handling other duties relating to their professional group. Based on related Land laws, these insurance systems govern and finance themselves. Because of the widely differing composition of their memberships, their benefits and contributions cannot be easily compared. Contributions are invested in reserve funds, so that members basically save up for their own pension.

### The second pillar: Company pension plans

Company pension plans constitute the second pillar of old-age security. They represent a voluntary payment on the part of the employers which cannot be revoked once it has been granted. This means that employees retain their claim even if they leave the company before reaching retirement age. Normally, company

pensions are either agreed with the works council or specified in a collective agreement.

The basic regulations that govern company pension plans are laid down in the Company Pensions Act of 1972. Thus, for instance, collective-agreement provisions relating to company pensions must specify that

- claims will survive if beneficiaries leave the company before reaching retirement age,
- pensions will be adapted to the business situation of the enterprise,
- claims will remain secure in cases of insolvency,<sup>73</sup> and
- a lump sum may be paid in compensation to employees leaving the company.

Company pensions may be provided through

- direct insurance,
- company pension commitments
- support and pension funds, or
- pension schemes.

The term *direct insurance* refers to life insurances taken out by employers for the benefit of employee groups or individuals. A direct insurance provides not a pension but a one-off payment of the entire sum saved that will normally be tax-free, provided the insurance had a life of no less than 12 years.

*Pension commitments* are the commonest form of company old-age security. For the worker, they establish a direct claim on the company itself, which can be redeemed not only by the payment of a pension but also through capital benefits.

<sup>73</sup> In cases of insolvency, pensions will be funded by the Pension Protection Scheme established by the employers' associations together with the Association of Life-insurance Companies. The scheme is financed by enterprises that have opted for their own old-age security system. It is supervised by the federal supervisory authority for the insurance industry.

*Support funds* are legally independent pension institutions that are financed by contributions from their member companies and their own capital income. However, employees may claim benefits not from their fund but from their employer. A pension protection scheme ensures the survival of claims and the maintenance of pensions.

**Pension funds** assume liability for benefits financed by employers and possibly by employees. They are not obliged to form reserves or to protect themselves against insolvency. Ultimately, they represent independent life-insurance companies under the supervision of the Federal Supervisory Authority for the Insurance Industry.

**Pension schemes** were introduced as an alternative in company old-age security in the pension reform of 2002. Resembling a pension fund in this respect, a pension scheme is an independent benefit provider that is financed by employers' contributions or withheld pay. Pension schemes provide old-age pensions and may provide benefits for invalids and survivors, depending on the policy.

Since 2002, employees have been entitled to demand that amounts equivalent to up to 4 percent of the contribution assessment limit in the statutory pension-insurance system (in 2007: 5,250 and 4,400 Euros in the old and the new Länder, respectively) be diverted to a superannuation scheme. However, higher amounts may be agreed. Only employees who are members of a statutory pension insurance are legally entitled to this. The advantage to employees lies in the fact that they enjoy tax breaks and cuts in social-insurance contributions while they are saving up, and that their pensions will be considerably higher because interest is guaranteed on the capital. The manner of handling this rededication of income is settled in negotiations between employers and employees.

In 2002, for example, the metalworkers' IG Metall created a pension system for the metal industry together with the employers' association which offers employees the option of supplementing their income in old age by diverting part of their pay without paying taxes or social-insurance dues on their contributions.

On reaching the age of retirement, company employees will begin receiving benefits from the pension plan either in the form of monthly supplementary pensions or in the form of a lump sum representing the capital saved plus interest. Alternatively, these two modalities may be blended in various degrees. The amounts actually paid depend on what has been agreed. In some industries, collective agreements regulating company pension plans have been concluded. While these vary greatly in detail, the overall advantage for employees is considerable as pension plans regulated in collective agreements are normally more cost-efficient and profitable than case-by-case solutions. In the opinion of the trade unions, covering company pension plans in collective agreements is very important because these normally include additional benefits financed by the employers.

Company pension plans for the public service These additional provisions for pensioners and survivors are based on collective agreements concluded between the public-service employers, i.e. the federal, Land, and local governments, and Ver.di., the trade union for the sector. Membership in this insurance is compulsory for the approximately 4 million blue and white-collar workers and trainees employed in the public service who, unlike the civil servants mentioned above, are employed under private law and covered by the statutory pension insurance. Benefits are paid after a claim under the statutory pension insurance has been established. Company pensions, to

which a point model is applied, complement statutory pensions.

Financing is handled by two separate settlement systems, one for the west (the old *Länder*) and one for the east (the new *Länder*).

In the old *Länder*, the system is financed by contributions paid by the employers and the employees, with the employers' share amounting to 6.45 percent of the consolidated gross pay and the employees' share to 1.41 percent. In addition, employers pay tax-free rehabilitation contributions amounting to 2 percent of the pay on average.

The new *Länder* have been gradually moving from the pay-as-you-go approach to a fully-funded system ever since 2004. As financial potentials were low immediately after the reunification of Germany, and as this state of affairs has not improved materially since then, contributions will go on being levied at a rate of 1 percent, paid by the employers alone. Another contribution, again in the amount of 1 percent, is paid jointly by employers and employees. The latter contribution will be gradually raised to 4 percent, to be shared equally by both partners.

Unlike the two million or so civil servants, the four million blue and white-collar workers and trainees employed in the public service finance their supplementary old-age provisions by paying contributions into the social security system.

### The third pillar: Private provisions

This third pillar of old-age security incorporates a multitude of private provisions, including all forms of private capital formation. These, in turn, include investments in real estate, shares,

long-term savings agreements and, most importantly, private life or pension insurances. All these alternatives, however, may only be designated as old-age provisions if it is assured that benefits are paid until the death of the beneficiary, independently of the length of time involved. In this context, it must be remembered that only those with an adequate income may make their own provisions, and that those whose employment income was below the average during their working lives will not only receive lower pensions but would not normally be able to make any – or only very limited – private provisions for their old age. It was only the above-mentioned option of income diversion that enabled a larger segment of the population to provide for their old age by saving up capital.

### Government-supported old-age provisions (Riester pension/Rürup pension)<sup>74</sup>

Next to the tax-relief options mentioned above, there are two forms of government-supported old-age provision.

#### The Riester pension

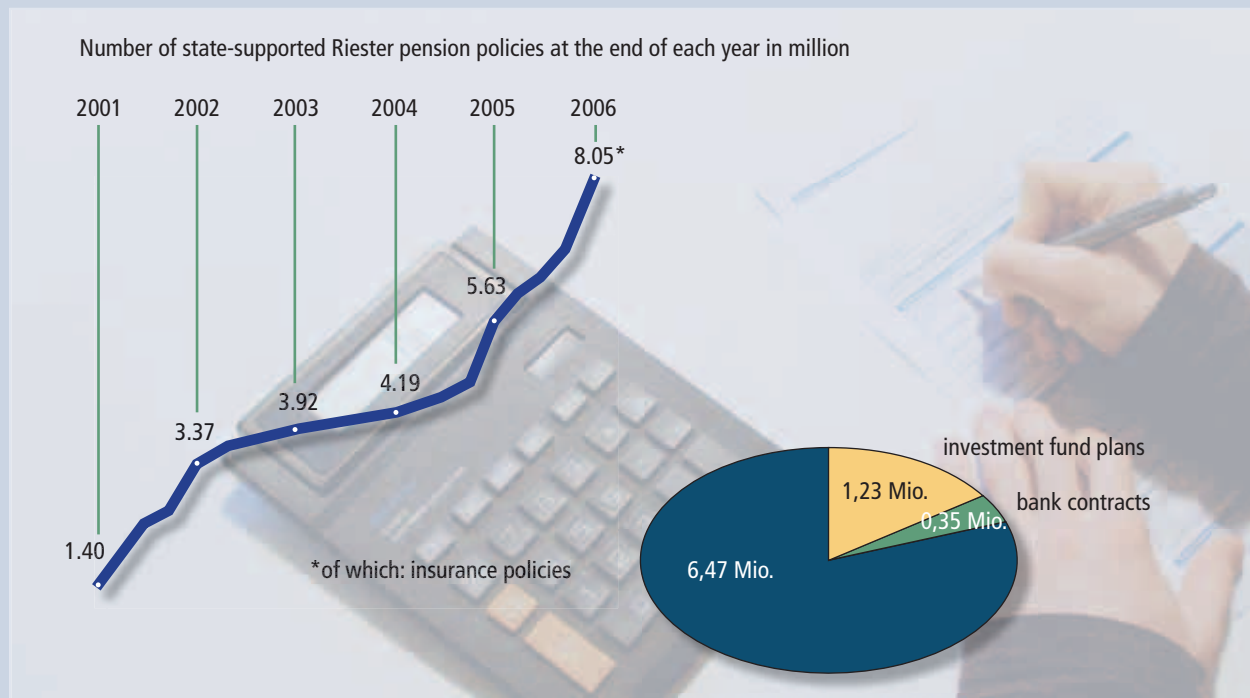
Introduced in 2002, this form of supplementary old-age provision is supported with tax funds in the form of allowances and tax breaks. Support is generally limited to those who are compulsorily insured with the statutory pension insurance. Governmental support was granted because the net basic pension received by these persons<sup>75</sup> is due to be lowered from 70 to 67 percent in the near future.

The Riester pension system is very tightly regulated. Under certain conditions, its perquisites may be extended to company old-age provisions, i.e. pension schemes, direct insurances, and pension funds.

<sup>74</sup> Named after Walter Riester, at one time federal minister of labour and deputy chairman of the IG Metall, and Prof B. Rürup, chairman of the council of experts on macroeconomic developments.

<sup>75</sup> Standard pension after 45 years of contribution payments. See Chapter 2.5, statutory pension insurance.

## Riester pension plans are very popular



Quelle: BMAS

Governmental support makes the system interesting for many employees; around 4 million have availed themselves of it up to now. A government bonus of up to 1,575 Euros per year has been paid tax-free since 2006, and the amount is scheduled to increase to a maximum of 2,100 Euros per year in 2008.

### The Rürup pension

Based on pension insurance contracts, this system is also subsidised by the State. Its benefits approximately correspond to those of the statutory pension insurance, although it is fully funded and not financed by levies. It targets self-employed persons with a relatively high tax burden as well as highly-paid employees who cannot take advantage of a Riester pension or a company pension plan.

### Real estate, savings

Another form of private old-age provision that is subsidised by the government is acquiring property for residential purposes and/or saving up capital (savings supplements, life insurances, etc.). Unfortunately, many employees today are in no position to add to their wealth in this way.

As the benefits of the statutory pension insurance go on declining, company and private old-age provisions will certainly acquire considerable importance in the future.

## Chapter 2

# Development and Structure of the German Trade Unions



### 1. A brief historical overview

The social confrontation between Capital and Labour became more intense in the wake of industrialisation, which began to take shape in the German states in the 19<sup>th</sup> century. The workers were left more or less unprotected against exploitation by their “factory owner”. While some protective legislation was put in place in Prussia in 1839 to limit the employment of children and adolescents, workers who formed an association were sentenced to a term in prison. In the course of the revolution of 1848 – a revolution of the bourgeois middle classes in the pursuit of goals such as national unity, parliamentary democracy and universal suffrage for all citizens, which ultimately failed due to the absence of an organised mass labour movement – the printers and cigar workers succeeded to set up the first labour organisations. The first formally established organisations were mainly founded by craftsmen able to link

up with traditions dating back to pre-industrial journeymen’s associations. It was a long and tedious learning process before it dawned on the workers, the majority of whom had moved from rural areas to the east of the river Elbe (West and East Pomerania), the Hunsrück, Swabian Alp and Lower Bavaria into the fast developing centres of the Ruhr Area, Upper Silesia and Saxony, that their interests would be best served by organisations of their own.

In view of the advance of industrial capitalism and ensuing exploitation of workers, which manifested itself in disastrous living conditions (low wages, bad housing conditions, malnutrition, frequent unemployment), social-democratic ideas were becoming increasingly more popular in the labour organisations. In the year 1863, Ferdinand Lassalle founded the General German Workers’ Association (German abbrev. ADAV) as a party-political organisation of Social Democracy. In parallel, other trade



union or party organisations were established, for example the liberal (Hirsch-Dunker) unions close to the liberal Progress Party, and also the Christian trade unions from a socially-oriented Catholic background of the Rhineland which was aligned to the Centre Party. The latter had a strong presence in the Rhineland and Westphalia, in particular.

Two major currents prevailed amongst social democrats, representing diverging views about the role of trade unions: Lassalle and his successors perceived Social Democracy first and foremost as a party-political workers' organisation, whilst the "Eisenach Group" around August Bebel and Wilhelm Liebknecht viewed it as a combination of democratically-structured trade associations through which the working class would have to fight for its emancipation, as Karl Marx put it in his inaugural address to the International Labour Organisation, which was founded in Geneva in 1864. Trade unions of different orientations were established accordingly: workers' associations close to the ADAV and trade unions oriented towards the Social Democratic Workers' Party (SDAP) under the leadership of August Bebel and Wilhelm Liebknecht.

Once the two social-democratic groups had been united to form a Socialist Workers' Party (SAP), the amalgamation conference in Gotha in 1875 was immediately followed up by a trade union conference aimed at an amalgamation of social-democratic trade unions. In line with the demand of the amalgamation conference, the union meeting re-affirmed the principle that workers should join the Socialist Workers' Party, but "keep politics out of the labour organisations".

Restrictions imposed on the union-based and political workers' movement in the wake of the foundation of the German Empire in 1871

became even more severe during the economic downturn in 1873, and reached a peak in 1878 when "Socialist Legislation" was passed forcing social democrats underground. It prohibited workers' joining trade unions. The fierce industrial actions which followed could not be suppressed even with the deployment of police and military forces and strengthened the social democrats and their trade unions, who were still operating underground, to such an extent that the Socialist Act had to be repealed in 1890; owing to the prevailing social and political problems, trade unions were able to establish themselves as a mass movement with a formal organisational structure.

Strike actions in 1889/1890 were marked by painful union defeats during a great number of industrial disputes, yet at the same time made workers more aware of the need to defend their rights by means of comprehensive, supra-regional and, if possible, countrywide acts of solidarity which required an amalgamation of trade unions. These views prevailed only in the social-democratic, i.e. the so-called free trade unions, which therefore united in 1890 to form a common top-level organisation<sup>76</sup>, the General Commission of the Trade Unions chaired by Carl Legien, whilst the Hirsch-Dunker and Christian trade unions did not affiliate for policy reasons. The General Commission had a mandate to protect the rights of association and to organise recruitment campaigns in areas where no trade union existed. Moreover, it was mandated to fund defensive actions, draw up an organisational plan for the trade unions and organise the congresses of the top-level association. The "job description" clearly indicated that the General Commission was not designed to lead the free trade unions, but merely to tackle tasks of a kind that the individual occupational associations were unable or unwilling to take on themselves.<sup>77</sup> At the first congress of the top-level association held

<sup>76</sup> Foundation of the General Commission of the Trade Unions on 16/17 November 1890 in Berlin.

<sup>77</sup> More on this: *Kleine Geschichte der Gewerkschaften*, Michael Schneider, Bonn, Publisher J.H.W. Dietz Nachf., 1989.





in Halberstadt in March 1892, it was decided after heated and controversial discussions to establish central associations. The resolution stated that „centralisation as the basis of union organisation is the best instrument to enable ... allied trades and occupations to support each other financially in the event of strikes and lock-outs ... and ... to establish a common body“. At the same time, the resolution recommends that all “trades” which had thus far been organised locally or united under the roof of a union stewards’ body join one of the existing central bodies or to establish such organisations, if required<sup>78</sup>.

The years that followed saw a considerable expansion of union-based support schemes. Almost all trade unions introduced strike funds, sickness funds, funds in support of reprimanded workers and for the distribution of death benefits; in 1894, the first local labour secretariats were set up providing free advice and legal representation in matters pertaining to social insurance and labour laws to all workers, including non-members. Incidentally, Friedrich Ebert, who later became the first democratic President of Germany and after

whom the Friedrich-Ebert-Stiftung is named, was originally a labour secretary.

In other words, the internal union confrontation between supporters of a strong central organisation and those who continued to prefer local forms of organisation was decided in favour of the “centralists” by a narrow margin. The “localists”, however, who “rejected the model of the parliamentary democracy and favoured direct action, i.e. the syndicalist idea of unity brought about locally by economic and political struggle...”<sup>79</sup>, continued to be of some importance into the first decade of the 20<sup>th</sup> century. As a result, it still took a long time until the centralised form of organisation, opted for in Halberstadt, finally prevailed - not least because the Party Congress of the Social-Democratic Party of Germany ruled in 1908 that SPD membership was incompatible with membership in the “Free Association of German Trade Unions” founded by the localists.

In view of growing membership figures and social successes attained by the trade unions in subsequent years, the relationship between the Social-Democratic Party and the Free Trade

<sup>78</sup> Resolution of the Congress of Trade Unions in Halberstadt in March 1892 regarding the question of organisation.

<sup>79</sup> Kleine Geschichte der Gewerkschaften, Michael Schneider, Publisher J.H.W. Dietz Nachf., 1989, Bonn, p. 78.

Unions close to them gradually changed. While the trade unions concentrated on bargaining activities, social support in situations of strike and crises and cooperation in drafting legislative bills on social and economic policies, the SPD as a workers' party dealt with all policy areas in the parliamentary arena, from foreign policy to the issue of the class struggle.

Before the outbreak of World War I, the trade unions had some successes in bargaining policy and industrial action, but failed in matters such as regulating statutory working time, introducing a public unemployment insurance and job placement scheme. Moreover, neither the SPD nor the trade unions succeeded to abolish the Prussian three-class voting system in favour of universal suffrage.

When the imminent danger of war could no longer be ignored in the summer of 1914, it became clear that neither the Free Trade Unions nor the SPD would organise massive strikes to prevent it. While the parliament, the Reichstag, had nothing to do with the declaration of war, since that was the sole responsibility of the Kaiser and his advisers, it had to approve the war expenditure and loans needed to lead the country into war. Members of parliament from the SPD finally gave their consent to the war loans after passionate debates, and even a minority with dissenting views towed the party line and voted in favour of them. Amongst them was Karl Liebknecht, who later co-founded the Spartakus Group and the USPD, which eventually turned into the Communist Party of Germany (KPD). One day before the decision was taken by the Social Democrats, the Free Trade Unions had indicated that they would be prepared to refrain from any wage disputes while the war was on (the so-called truce decision). The decision was made public officially on 17 August 1914. The two organisations had taken great pains to arrive at such a decision and saw their support not only as a patriotic act but an advance concession that would eventually pay in terms of a more democratic shaping of social affairs in the Reich. This expectation is

clearly expressed in the response of the Social-Democratic parliamentary group to the Imperial Government's demand for approval of the war loans. "...The Social Democrats opposed this fatal development forcefully to the end and did all they could even during the final hours to maintain the peace by demonstrating vigorously, notably in consultation with our French brothers. Yet all their efforts have been in vain. Now we are confronted with the unchangeable fact of war. We are threatened with the horrors of enemy invasion... For our people and its future in freedom a great deal, if not everything is at stake in the event of a victory of Russian despotism which is steeped in the blood of the very best of its own people... . To defend our own country, our own culture is in agreement with the Socialist International, but not a war of conquest."

During the war, the government made some concessions with regard to cooperation between trade unions and employers in the form of joint committees in specific arms-producing industries; these committees had a mandate to resolve disputes between employers and trade unions that could not be settled at company level. Furthermore, the Auxiliary Service Act of 2 December 1916, which had been considerably improved by additions suggested by the Free Trade Unions, provided for the establishment of committees composed of blue and white-collar workers as well as parity-based conciliation committees in companies relevant to the war. In addition, trade unionists were appointed to all arbitration and mediation panels, thus adding considerably to union influence on these panels and enabling them to get a foot in the door of large companies hitherto closed to them. Despite such improvements in the representation of union interests we should bear in mind that the Auxiliary Service Act was primarily meant to function as a shield protecting war production against labour unrests.

In all the conflicts that broke out within the Social-Democratic Party in the years of the German Empire both during and after World

War I, which were fought out between the various wings of the party and eventually split the party into Social Democrats and Communists, the trade unions always joined the parliamentary majority group of the Social Democrats. Despite inevitable infighting, the Free Trade Unions never split up themselves.

Wartime deprivation and misery clearly radicalised the workers politically, as demonstrated by the subsequent split into SPD and USDP, and resulted in a growing protest movement that was not led by the trade unions. This protest movement included major parts of the army and navy. When on 29/30 October 1918 the sailors of the German High Seas Fleet refused to go into battle against the British fleet since they saw no point in it and it would have meant certain death for all of them, the arrest of several hundreds of mutinous sailors triggered a revolution which spread to all major cities in no time and brought down the Empire.

When the war and the revolution had ended and the Republic had been founded, the fundamental structures of a new state and social order were put in place with the support of the trade unions, and the General German Trade Union Confederation (ADGB) was founded as the umbrella organisation of the Free Trade Unions; it officially announced its party-political neutrality at the founding congress in Nurnberg in 1919 and clearly stated that its activities would not be restricted to the representation of occupational interests of its members, but that it would actively fight for the victory of socialism.

In the early years of the Weimar Republic, which were marked by attempted coups from the right-wing, a stagnating economy and galloping inflation, the trade unions found themselves on the defensive: although they attempted to protect the living and working conditions of their members through many strike actions, they had a hard time defending the achievements made during the time of the revolution and the foundation of the Republic,

notably the freedom of association, the Works Council Act and the eight-hour work day. When inflation was at its peak in 1923, the eight-hour work day was undercut by a new working time regulation against fierce resistance from the Free Trade Unions. The State became involved in the shaping of industrial relations through compulsory State arbitration in industrial disputes, which had been introduced in 1923, thus limiting the freedom of association.

When the economic situation in Germany began to improve visibly from 1924 onwards, this helped to stabilise the political situation as well. Under the bourgeois governments which came into office, the trade unions were able to contribute successfully to changes in social policy. Mention needs to be made first of all of more extensive social security coverage and the introduction of statutory unemployment insurance and job placement, to which the trade unions made a decisive contribution.

Yet after a few years of relative political and economic stability, the trade unions were again confronted with a serious crisis caused by the political radicalisation in Germany in the wake of the world economic slump in 1929, which eventually resulted in their dissolution by the Hitler regime. Although during the revolution and the years of the Weimar Republic the Free Trade Unions had – due to its basic programme oriented towards a socialist society – successfully prevented the organisation from splitting into social-democratic and communist trade unions, it became clear in the following years that they would not be able to stop the emerging Nazi Movement and a dictatorship of the National-Socialists under Hitler, not least because of the existence of various political wings within the trade unions.

The Great Depression of the 1930s left its mark on all sectors of the economy; when the unemployment figure had gone up to 4.4 million by the end of 1930, the SPD-led government found itself in dire straits. The State could not hand over sufficient funds to the statutory insurance

institution that would have enabled the latter to pay benefits to millions of unemployed workers. The SPD and the trade unions called for increased contributions, but their demand was rejected by the employers and the parties on the right. This brought about the fall of the government, followed by a number of rapidly changing presidential governments which came to office without the consent of parliament with only the President's support under emergency rule based on paragraph 48 of the constitution. The autonomy of bargaining parties was suspended and wages were determined by the government. Not only did the ADGB attempt to fend off a curtailment of workers' rights, but it submitted plans on how to deal with the consequences of the crisis as well; these plans, however, were rejected by the employers, or the government of the day, respectively. The Republic was increasingly being torn between the extreme political forces of the left and the right, large parts of industry supported Hitler's Nazi party, which had started its triumphant progress in the elections of 1930. On 30 January 1933, Adolf Hitler was appointed Chancellor of the Reich, and on 23 March the Reichstag passed the "Enabling Act" against the votes of the SPD – the Communist Party KPD had already been banned on 7 March and their parliamentary members arrested; this Act granted dictatorial rights to Hitler and enabled him to set up the "Fuehrer State" in the following years which he had planned to establish after all democratic rights had been abolished.

In the belief that the trade union organisations would be allowed to continue functioning under a Chancellor Hitler, as late as April 1933 the ADGB attempted to ensure their survival by proclaiming its willingness to adapt to the new rulers, dissociating itself from the SPD and merging with the other unions of the Hirsch-Dunker type and the Christian unions in order to continue activities as a depoliticised united trade union. This attempt was doomed to failure, and did fail as early as 2 May 1933: the Hitler regime ordered SA and SS troops to occupy the buildings of the ADGB and its

affiliates, many officials were murdered, others arrested and tortured and some were able to flee into exile.

### A new beginning after 1945

During the time of exile, in the resistance and the concentration camps of the "Third Reich", the idea of founding new, ideologically neutral and non-partisan trade unions gradually took shape with the aim of preventing a split of the labour movement similar to that before 1933. After their liberation from the Nazi dictatorship, the survivors began to realise these ideas of building up united trade unions among the ruins of a country divided into occupational zones.

Social Democrats, Christians and Communists together tried hard to protect the unity of the labour movement against party influence. Their attitude towards political parties was defined accordingly: "The relationship of trade unions to individual parties is determined by the parties themselves and by their attitude towards the trade unions" (VII Interzonal Conference in Dresden in 1948).

As early as 1946, the Free German Trade Union Confederation (FDGB) was founded in the Soviet occupational zone, while in the zones occupied by the Western Allies, who were in disagreement about fundamental features of union work, a joint trade union council of the Western zones was only established in early 1948. The trade unions from all zones of occupation met several times to ensure cohesion amongst the organisations and clarify matters of principle. The onset of the Cold War and the partition of Germany into two separate states (1949) put an end to cooperation between the two trade union confederations. The FDGB was increasingly being influenced by the Socialist United Party (SED) of East Germany (DDR) – a fact which made cooperation with the West German trade unions more difficult; the latter had united in 1949 to form the German Trade Union Confederation (DGB) under Hans





Besetzung des Berliner Gewerkschaftshauses am 2. Mai 1933 von SA und SS. Die Gewerkschaften wurden aufgelöst.

Böckler as their first President. At the founding congress, the DGB mapped out its agenda for the future economic and social order of the Federal Republic of Germany. The corresponding economic principles were spelled out in their demand for

- “an economic policy which ensures full employment of all those willing to work with due regard to their dignity and freedom,
- co-determination for all organised workers in all matters pertaining to personal, economic and social questions and in managing and shaping the economy,
- the transfer of key industries into public ownership (mining, iron and steel, large chemical enterprises, energy sector, transport infrastructure and credit institutions),
- social justice by granting all working individuals an adequate share of the overall revenues of the state and ensuring adequate livelihoods for those unable to work for reasons of age, disablement or sickness“.

Furthermore, they note that “such a process of decision-making on economic policy calls for

centralised planning of the entire economy in order to prevent individual self-interest from triumphing over overall economic considerations”.<sup>80</sup>

With this agenda, the DGB as well as the SPD and some parts of the CDU (Ahlen Programme of 1947) moved towards an anti-capitalist course. Their economic concept was not aimed at a comprehensively planned economy in which all means of production were in the hands of the State. Instead, economic planning, public ownership, co-determination and social justice were intended to create the foundations for a democratic order in the economy, in which key industries remained under the control of the democratic State in order to prevent capitalists and right-wing extremists from becoming “bedfellows” again – a fact which had brought about the downfall of the Weimar Republic.

Plans to nationalise the economy, which had emerged in the first years after the war, had already been given up by the Western Allies prior to the foundation of the Federal Republic;

<sup>80</sup> Principles of Economic Policy of the German Trade Union Confederation of October 1949, Founding Congress.

they were content with breaking up the large corporations. With the onset of the Cold War and the reform of the currency, which did not touch the economic assets of entrepreneurs, the power situation in the Federal Republic changed in both the economy and society. The majority situation in Germany did no longer leave any scope for the realisation of the Munich economic-policy programme since large parts of the population became convinced that a fast and safe reconstruction of the devastated country would best be achieved by a restoration of the old economic order. After the CDU had supplemented its Ahlen Programme in 1949 by the “Düsseldorf policy guidelines”, in which Ludwig Ehrhardt developed the concept of the “social market economy”, the DGB successfully upheld the idea of a united trade union organisation in the face of entrenched controversial positions about fundamental societal and economic policies in the Federal Republic of Germany in society and political parties; yet it failed to implement its economic-policy principles of 1949 since the general political and societal conditions had changed by then.

From 1950 onwards, the DGB stepped up efforts to enshrine in law at least the principle of co-determination by submitting a draft bill. This law was intended to ensure not only equal co-determination of workers in personnel, social and economic matters, but union involvement at the shopfloor and in the form of external (boardroom) co-determination. Despite nationwide campaigns and demonstrations of organised labour, the Works Constitution Act passed in 1952 failed to meet union demands by a wide margin in respect of co-determination. Under this Act, trade unions were practically excluded from the shopfloor since they were not mentioned as bodies relevant under the works constitution. In order to be represented organisationally inside the enterprises, the majority of trade unions responded to the 1952 Works Constitution Act by establishing a system of shopfloor union representatives or shop stewards. In addition, they succeeded to establish a parity-based system of co-determination

in the coal and steel industries for the government had obviously been greatly impressed by the results of the original ballot organised in the steel and mining industries, the two industries vital for the reconstruction of the country (willingness to strike 96% and 92%, respectively).

Their defeat in connection with the 1952 Works Constitution Act caused the trade unions to actively support the SPD camp during the general election campaign of 1953 and to call upon their members to give the CDU/CSU their just deserts for their conduct in the co-determination issue. This campaign failed dismally: in the general elections of September 1953, the conservative CDU/CSU Government received more than 45% of the votes, and the trade unions had to bury all hopes of being able to realise their co-determination concepts with SPD support.

The DGB support during the 1953 election campaign for a government other than the conservative one caused considerable tensions inside the trade unions because union officers and members from the Christian wing of the trade unions regarded the DGB election appeal as “a breach of the principle of non-partisanship” amongst united trade unions. In order to prevent this from happening again, the spokesmen of the Christian workers demanded more seats on the national executive committee of the DGB and those of its individual affiliates, and their respective substructures. In addition, they called for a revision of the Munich Basic Programme and recognition of union members from the CDU/CSU social committees and Catholic and Protestant workers’ associations as a separate group under DGB statutes. As these changes were not planned to be voted on at the union congresses, which would usually be responsible for such decisions, but decided by the executive committees for fear of failing to obtain the required majority, several Christian-Social union officers left the DGB trade unions and founded the Christian Trade Union Movement (CGD) in 1955, which changed its name



to the Christian Trade Union Federation (CGB) in 1959. Nevertheless, a major part of union officers and members of the social committees kept their membership in the DGB affiliates so that the CGB has not played an important role in the history of German trade unions.

The fact that the DGB had shifted emphasis towards bargaining and social policy was clearly reflected in the action programme adopted in 1955, which in its major demands called for tangibly improved working and living conditions for those in dependent employment as fast as possible:

- introduction of the five-day week with an eight-hour workday
- equal pay for men and women
- continued payment of wages in the case of sickness, including for blue-collar workers
- provisions for regulating protection against dismissals and social protection in the event of retirement, disability, accident, sickness and unemployment
- parity-based co-determination in economic matters of stock companies and qualified co-determination in other types of companies and public administrations
- improved health and safety provisions
- adequate training facilities for young workers, both male and female.

The unions succeeded in implementing this action programme during the next ten years with the exception of parity-based co-determination. Moreover, the DGB continued to express its views publicly about general political issues, for example the introduction of mandatory military service or the proposal to equip the armed forces with carrier systems for nuclear missiles. Especially the campaign against nuclear arms resulted in large-scale union demonstrations and rallies.

Another conflict was caused by the conservative government's attempts to introduce emergency legislation in 1958 which, similar to provisions in the Weimar Constitution, restricted specific basic rights and granted comprehensive powers to the government in the event of an emergency. A prolonged conflict with the SPD ensued who was open to cooperation with the government on this issue. This fuelled heated internal discussions, in particular within the IG Metall under its President Otto Brenner, up to a point where strike action was envisaged in the event that these laws would be adopted. By the way, as late as May 1968 the Grand Coalition was finally able to adopt the legislation, after the DGB had successfully insisted on some major changes of the initial draft.



Streik Kassel  
1958

Urabstimmung  
IG Metall 1958

While the political and social situation in the Federal Republic was gradually changing, prolonged and controversial discussions took place in parallel within the DGB as to whether the existing economic order, although far from being in line with the 1949 principles of economic policy, should be accepted. This was a matter of reorientation by repudiating class struggle and moving in the direction of social partnership. After heated debates within the trade unions, a new Basic Programme was adopted in 1963 which largely recognised the existing economic and societal order and supported the social market economy on a capitalist basis. Apart from the repudiation of the class struggle, the Basic Programme accepted the complete integration of the Federal Republic into the West.

In so doing, the trade unions followed the example of the SPD who had already adopted its Godesberg Programme in 1959. In their Düsseldorf Basic Programme the trade unions once again reiterated their independence vis-à-vis governments, political parties, churches and the corporate world and tolerance in ideological, religious and political matters.

On the one hand, the early turbulent years of the Federal Republic saw the trade unions affiliated to the German Trade Union Confederation (DGB) actively involved in politics by taking part, for example, in the preparatory phases of legislation, yet on the other at a critical distance to the political parties in order to be able to develop their own concepts of co-determination and equality between male and female workers in the Federal Republic. Milestones on this road include the struggle and commitment in support of co-determination laws and social legislation in the 1960s and 70s, the fierce confrontations over emergency legislation in the 1960s and the struggle for a reduction of working time for the purpose of fighting mass unemployment in the 1980s and 90s.

Given growing unemployment, the controversies over reduced working time became more intense. While initially the trade unions regarded the issue of reduced working time as a contribution to the humanisation of the world of work, the fierce industrial disputes in the years 1978, 1981, 1984 and 1986 were dominated by the argument that the 35-hour workweek could safeguard existing jobs and prevent mass unemployment. Lock-outs imposed by the employers during these industrial disputes aggravated the situation because the burden of strike action came to be increasingly incalculable for the trade unions.

Despite massive opposition by the employers and extensive lock-outs, the trade unions, spearheaded by IG Metall, made considerable headway in their wage policy and a reduction of weekly working time since they did not shy away from taking strike actions at a time of economic crisis with simultaneous mass unemployment in order to realise their demand for reduced working time at full pay. Although they did not attain their declared goal of lowering mass unemployment – this being a task for society as a whole which cannot be resolved by means of bargaining policy alone – and the government failed to take the necessary labour-market measures, they still made an important contribution to job security by gradually introducing a workweek of 35 hours.

### The unification of the two German states

When in 1989 the population of the GDR forced the SED regime to its knees by persistent protest actions and demonstrations, and the wall dividing Germany had come down, the SED and its allied organisations were disbanded. The Free German Trade Union Federation (FDGB), which, as a mass organisation, had been mandated to educate and instruct the working people at their place of work about the goals of the party, was equally dissolved. The majority of its members joined the DGB

affiliates in the course of unification. The DGB and its individual member unions invested a considerable amount of personnel and material at a time when the last GDR government was still in office; by expanding their organisational network after the two German states had been united on 3 October 1990 they created a platform which enabled the many hundreds of thousands of trade unionists in the new Länder to fully represent their interests. Almost overnight, DGB affiliates had obtained some two to three million new members. This state of affairs did not last for long, though; the majority of former people's owned companies (VEBs) and large agricultural production cooperatives (LPVGs) were either dissolved or privatised and in the process union membership declined continuously until it reached the current levels.

### New questions, new problems, new forms of organisation?

After their renewed foundation after World War II, the German trade unions have been going through a number of phases in their political agenda: demands for a structural change of the capitalist order of the economy were their primary focus up to the end of the 1950s, the second phase up to the mid-1970s was more strongly marked by the demand for pragmatic changes to the existing conditions, while from the mid-1980s onwards union policy has primarily been oriented towards a more extensive and different form of participation and greater job security through reduced working time without loss of pay.

Currently, the trade unions are going through a phase marked by drastically declining membership of all DGB affiliates. Although trade unions in Germany are still strong organisations despite the drastic loss of members, their position in society is in jeopardy unless they succeed to retain their members and recruit new ones; adapt their organisational structures, methods of work and attribution of functions

to the new problems, expectations of the members and dwindling financial resources.

Their survival depends on their ability to learn and adapt to the changes in general conditions ("Only those who change remain loyal to themselves"). Moreover, they need to improve their capacity to provide qualified services to the members and give them the feeling that, as members, they do not only support a political and social force with their contributions, but obtain highly qualified services in areas such as bargaining and shopfloor policy, legal protection, advanced training etc. which are important to them.

### The structures of the German Trade Union Confederation (DGB)

The DGB is an association comprising eight individual trade unions which have come together voluntarily to form a confederation; they have come to the realisation that a joint umbrella organisation is better able to deal with the policy areas described above than an individual trade union on its own. The DGB and its affiliates are organisationally separate entities: the DGB has no authority to issue instructions to one of its affiliates nor is there a hierarchical relationship between them. Indeed, the trade unions have full autonomy of how they shape and implement their functions mandated under the statutes both in respect of the conclusion of collective agreements and decisions in favour of industrial action. The DGB is not a party to collective agreements unless it has been commissioned to negotiate by one or more trade unions.

Trade unions which organise workers on the territory of the Federal Republic of Germany may affiliate to the DGB provided they recognise the DGB statutes and no other DGB affiliate organises the same groups of workers.

Trade unions affiliated to the DGB have some 6.5 million members. They pay a contribution of usually 12% of their dues to the top-level Confederation enabling it to deliver services. 5% of this some goes to the DGB legal protection agency, a limited company (see below). Mention needs to be made of the fact that all financial resources of the DGB affiliates come exclusively from membership dues and that they are not allowed to accept funds from third parties. They are independent of governments, public administrations, enterprises, religious denominations and political parties and define themselves as unitary trade unions. The same applies to the Confederation by implication.

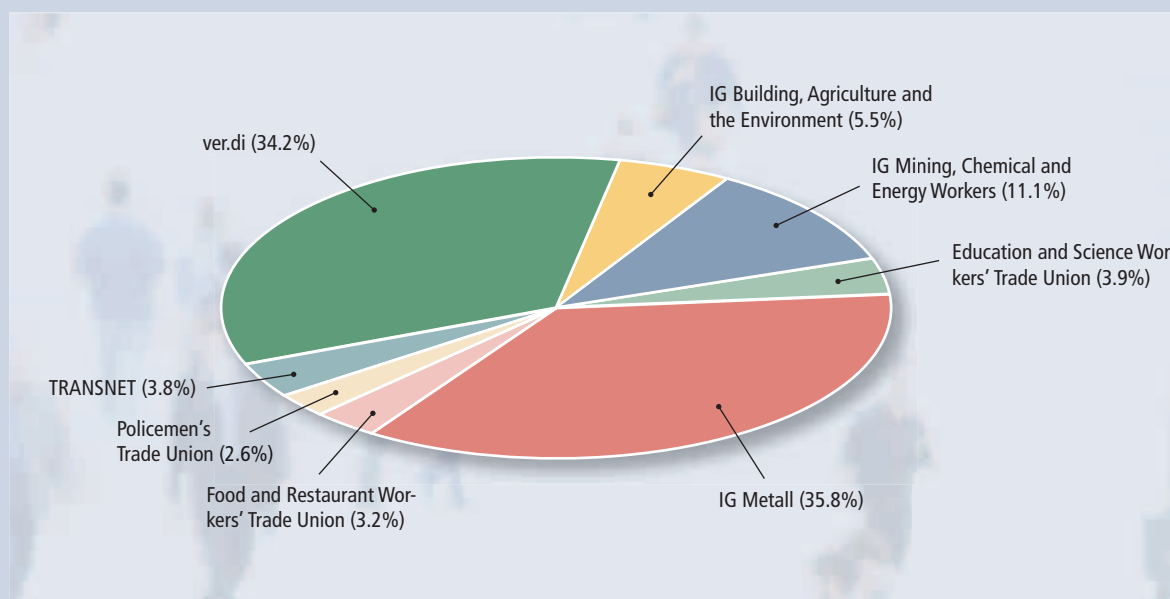
The German Trade Union Confederation is democratically structured, as are the affiliates. In consequence, internal decision-making is a bottom-up process, i.e. starting at the shopfloor, to the local organisations and finally to the national level. The most important DGB bodies are:

- **The Federal Congress.** It is the supreme decision-making body of the Confederation and convenes every four years. Delegates to the congress are elected by the member trade unions: their numbers are determined by the Federal Committee in proportion to the number of members of the affiliate concerned. At present, there are 400 delegates to the congress. The main tasks of the Federal Congress include the determination of trade union policy (e.g. adoption of the basic programme), discussion and decision-making about motions and resolutions submitted to it, election of the National Executive Committee and revision of the statutes, if required.
- **The Federal Committee.** It comprises the members of the Managing Executive Committee, the chairpersons of the eight affiliates and 70 other members, including the chairpersons of DGB regional organisations elected by the Federal Congress. The Federal Committee convenes once a year and its tasks

include, for example, the issuing of statements on all union-relevant questions and other matters of importance, approving the budget of the Confederation, electing additional members to the Federal Executive Committee, if required, confirming the election of regional chairpersons, issuing management instructions for internal operations and deciding on the venue and date of the next Federal Congress.

- **The Federal Executive Committee and the Managing Executive Committee.** The Managing Executive Committee comprises the chairperson, one deputy and three more members. Together with the eight chairpersons of the member trade unions they form the Federal Executive Committee. Members of the Managing Executive Committee are elected by the Federal Congress every four years and represent the organisation internally and externally. They are responsible for all activities laid down in the statutes and must ensure union compliance with DGB national statutes. In addition, they must ensure smooth interaction between the trade unions; problems arising from organisational delimitation play a major role in this. The DGB regional chairpersons have a consultative vote in the meetings of the Federal Executive Committee which convenes once a month. The Federal Executive Committee is the “government” of the DGB, as it were.
- **The Audit Commission.** It monitors DGB cash management and audits the DGB’s annual financial statement. The Commission is elected by the Federal Committee and consists of members who will report audit results to the Federal Congress.
- **The regional organisations.** Nine regional organisations representing the Confederation at regional level have been set up to implement joint trade union activities. Elected regional executive committees and regional chairpersons comment on policies pursued by the government of the respective Land or

### Membership figures in percentage



province, submit legislative proposals to the Land government in the interest of workers at the regional level and deal with matters of union policy and organisation pursuant to the DGB statutes. This includes the coordination, support and monitoring of activities at the next lower, i.e. district level. The chairpersons and members of the executive committees are elected every four years at a regional congress held at the latest three months prior to the Federal Congress.

- The next level is represented by the **districts**; there are currently 94 district offices. Every four years, executive committees and full-time chairpersons are elected by representatives of the member trade unions at a meeting of district delegates. Decisions of the Federal Executive Committee, Federal Committee, regional congress and regional executive committee are binding on the districts.
- The **district executive committees** represent the Confederation at that level: they issue proposals, statements and demands pertaining to local, district and regional policy

matters affecting labour interests, deal with all matters of union policy and organisation of common interest at the district level and submit resolutions to the regional and national bodies. Support of the activities of member trade unions at the district and local levels is also part of their remit. They are accountable to the Federal Executive Committee and the regional executive committee.

- At the district level, an internal organisation is set up consisting of union officials in lay positions who form **county or local chapters**. In localities without a local branch office of a DGB affiliate, the DGB functions as the contact point for union members seeking advice.

Lay members take part in the activities of all DGB panels and bodies and hold the majority of seats in the decision-making or monitoring bodies at all levels.

In addition, the DGB legal protection agency usually has an office at the seats of local labour



courts and acts in the first instance of labour and social courts on commission of the DGB affiliates.

### The political role of the DGB in society and politics

The trade unions affiliated to the German Confederation of Trade Unions (DGB) see themselves as organisations for self-help and industrial action of dependently-employed workers in the succession of the precursor organisations which were destroyed by the Nazi dictatorship; the DGB unions lay claim to being the lobby for all workers in social, economic and cultural matters. Aspects of economic and social policies set out in the 1949 Munich Programme, at the time when the DGB was refounded, have been adapted to the situation in the Federal Republic under the 1963 Basic Programme and in subsequent policy declarations. There is one task, however, that has remained unchanged: the trade unions are still called upon to correct the imbalances resultant from the economic and social disadvantages of workers by fighting for better working conditions, higher earnings and co-determination in economic matters.

This is not only done by confrontations with the employers but by lobbying the government and political parties, urging them to cooperate with the trade unions in matters pertaining to economic and social policy and speaking up in favour of greater democratisation of the world of work, the economy and society. In consequence, the trade unions have been able to either initiate or influence a great deal of draft legislation in the interest of the workers by taking part in the legislative process started by the government of the day on social and economic policies.

The trade unions are actively involved in the shaping of the “Social State” and the rule of law since without comprehensive social security for workers, which exists owing to active union involvement only, the focus of union-political

activities would have had to be different: a failure to enshrine the system of the “Social State” in the Basic Law and the absence of effective unity amongst all trade unions for the sake of common interests in all areas, especially in economic, social and cultural policies, would have prevented a system of comprehensive social protection to be instituted for dependently employed workers in the Federal Republic, and confrontations between Capital and Labour would not have resulted in cooperation with the State and the business community which has so far been marked by the idea of joint social responsibility for the welfare system.

It is difficult to forecast to what extent this form of partnership can last in view of the new Anglo-American type of corporate philosophy oriented towards downsizing and relocation of production with its main focus on dividends. Even in the past, confrontations between the various social forces have not passed without frictions because of conflicting interests amongst the parties to collective agreements on the one hand – strikes and lock-outs in the Federal Republic being a good case in point – or without profound disagreements about economic and social policies between the trade unions and the government in power on the other.

Notwithstanding these differences of opinion, confrontations have always been marked by a sense of responsibility for the existing economic and social order since the 1960s. In their self-perception, trade unions in Germany have regarded themselves as both “a regulatory and countervailing force”. During the years of economic boom, they concentrated pragmatically on the day-to-day work; in so doing, they have made a great deal of headway in social policy. During the years of recession, they sought to act as countervailing force of dependently employed workers and to fight off plans by Capital to look for solutions to the economic and societal crisis at the expense of the workers.



## Membership figures DGB 2007

Data (as of 31-12-2007)	German Confederation of Trade Unions					
	male		female			
	total	in %	total	in %	total	in %
IG Building, Agriculture and Environment	290,791	82.7	60,932	17.3	351,723	5.5
IG Mining, Chemical and Energy Workers	576,155	80.8	137,098	19.2	713,253	11.1
Education and Science Workers' Trade Union	76,748	30.8	172,045	69.2	248,793	3.9
IG Metall	1,892,814	82.1	413,469	17.9	2,306,283	35.8
Food and Restaurant Workers' Trade Union	125,179	60.2	82,768	39.8	207,947	3.2
Policemen's Trade Union	132,278	78.5	36,155	21.5	168,433	2.6
TRANSNET	188,620	78.8	50,848	21.2	239,468	3.7
ver.di	1,105,088	50.1	1,100,057	49.9	2,205,145	34.2
DGB in total	4,387,673	68.1	2,053,372	31.9	6,441,045	100.0

	male		female			
	total	in %	total	in %	total	in %
blue and white-collar	3,797,597	67.9	1,793,849	32.1	5,591,446	86.8
civil servants	317,293	67.0	156,010	33.0	473,303	7.3
misc.	272,783	72.5	103,513	27.5	376,296	5.8
DGB in total	4,387,673	68.1	2,053,372	31.9	6,441,045	100.0

The trade unions' clout and ability to fight successfully for the interests of working people by means of either conflict or cooperation with the employers' associations and governments have strongly marked the development of German society and contributed to democratic stability. However, it has been becoming increasingly noticeable in recent times that values are changing in our society, that neoliberal forces in the economy and in politics are showing an inclination to end this consensus in society – demonstrated most impressively by activities of some hedgefunds which are buying and subsequently breaking up German companies. Given the changed situation, trade unions in Germany are confronted with momentous tasks. The 1996 DGB Basic Programme enumerates a few of them:

- “The globalisation of markets and resultant transformation of our production, labour and societal systems,
- mass unemployment and ensuing rifts in society,
- growing ecological degradation,
- individualisation and differentiation of lifestyles and value orientation of individuals,
- barriers and power structures in society that continue to cement the attribution of opportunities on grounds of gender,
- right-wing extremism and the eruption of ethnic conflicts,
- worldwide conflicts which are often resolved by military means,
- the consequences of the collapse of communist states ending a long period of ideological division in blocs, and

- ensuring equal opportunities in life in all the German Länder; this confronts us with the task of integration of an unprecedented scale in our country.”

Whether the instruments used until now as the basis of union activities will suffice to meet the enormous challenges with which they are confronted as a result of German-German unification on the one hand and the globalisation of markets on the other only time can tell; both developments are putting the entire political and societal system in Germany under a strain of an unprecedented scale.

### The role of the DGB in the European Union

The DGB is an affiliate of the International Trade Union Confederation (ITUC) and co-operates with the Global Union Federations (GUFs); it is also a member of the European Trade Union Confederation (ETUC).

Since its inception in 1949, the DGB has been accepted as a partner within the framework of what is nowadays the European Union in recognition of the fact that many trade unionists had lost their lives in the resistance against National Socialism and that those who survived the liberation had followed the traditions of the German labour movement in their commitment for peace, cooperation, mutual understanding and reconciliation. In the 1949 Munich Programme, reference is already made to the vision of Europe. Following the collapse of “really existing socialism” and the unification of the two German states, the creation of a united Europe is now called for to fulfil the expectation of a social and democratic “common house of Europe”.

Alongside its partners in the ETUC, the DGB comments on all social policy issues. Trade union influence on the drafting of directives is indispensable, especially at present when further steps are taken towards uniting Europe politically in the wake of the Amsterdam Treaty: it was entirely due to trade union interventions

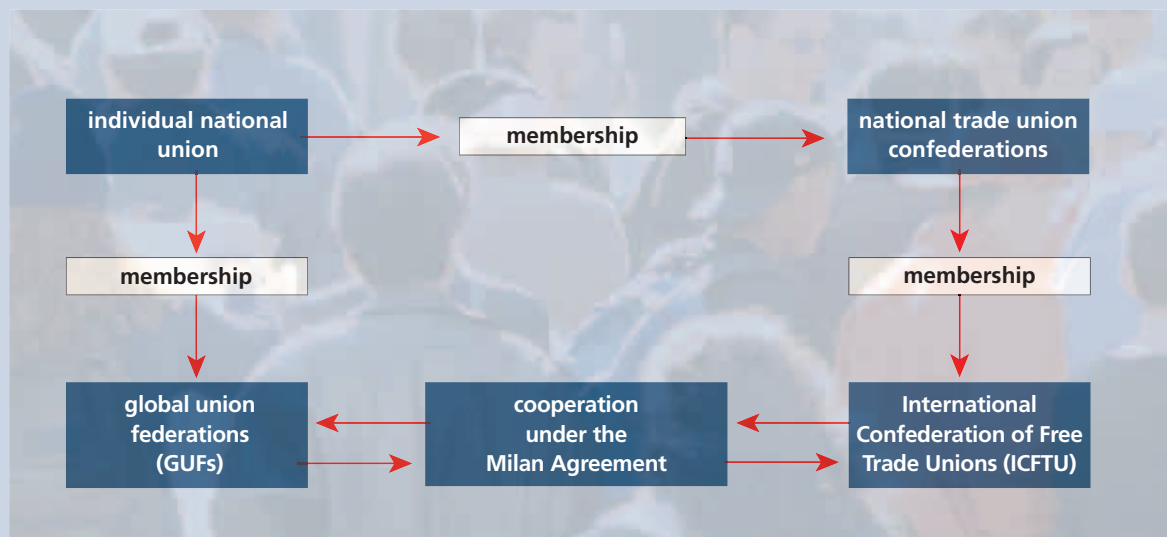
at both the national and international/European levels that employment became a focal point of the conference agenda! Moreover, European trade unions place a great deal of emphasis on extending the protection of fundamental rights and strengthening social policy in the European Union (EU). In addition, the DGB calls for greater democratisation of the common European institutions so as to enable the European Parliament, elected by Europe’s citizens in free and secret ballot, to exercise genuine parliamentary rights vis-a-vis the Commission which is set up by national governments.

The fact that trade union rights, such as the freedom of association, continue to be restricted to the national framework rather than apply across the board to the entire territory of the EU, is no longer acceptable. While economic interlinkages have been facilitated on the one hand, no corresponding link-up of labour organisations has yet been made possible under European legislation on the other. The empowerment of workers to exercise their rights, including at the European level, therefore remains a priority goal for the DGB.

In order to realise this goal, reinforcement of the European Trade Union Confederation and expansion of European trade union structures in the various areas and sectors will be needed. The future European Economic and Monetary Union requires new forms of bargaining policy and a response to confrontations with employers who are linked up across Europe; given the fact that these battles can no longer be won at the national level, the European trade unions must cooperate to a much greater extent.

When after prolonged initial difficulties and against fierce opposition from Great Britain, in particular, the EU Council of Ministers adopted the “Directive for the Establishment of a European Works Council or a Procedure in Community-scale Undertakings and Community-scale Groups of Undertakings for the Purposes of Informing and Consulting Employees” in September 1994 under pressure from the Eu-

## Relationship between national and international levels



European trade unions, the stage was set for the establishment of European works councils (EWCs) as of 1999. Since then, European works councils have gradually been set up in corporations covered by the directive (more on this in chapter 4).

The DGB is keen on expanding the Interregional Trade Union Councils and influencing regional social, economic, structural, and cultural policies in so doing. The DGB's involvement in many and diverse international trade union structures is also proof of the fact that its interest is not limited to Europe but that it holds international cooperation and solidarity among workers across the world to be of great and fundamental importance.

### The Global Union Federations (GUFs)

The trade unions realised early on that the struggle to shape the working and living conditions of their members, social security for all working people, and also to implement and protect human rights and the unions' right to organise could not be fought at the national

level alone. In consequence, they set up international trade secretariats (ITSS)<sup>81</sup> some 100 years ago as the first international organisations of workers. These global federations of national trade unions with members in specific areas of employment (occupations, sectors, or industries) gave up their historical name in 2000 and have called themselves Global Union Federations, or GUFs, since then; together with the International Trade Union Confederation (ITUC), to which national top-level confederations (such as the DGB) are affiliated, they form the group of independent, free international trade union organisations which hold up the banner of democracy and freedom as fundamental values of the labour movement.

The GUFs are autonomous organisations and not substructures of the ITUC; they consider themselves part of one international trade union movement in which they focus mainly on sector-specific issues, support of local industrial actions, comparative studies of working conditions and pay, and the implementation of health and safety regulations in specific areas of work, while the ITUC rather represents

81 A detailed description is available in the brochure "One World, One Voice, Solidarity" (Heinz Bendt) published by the Friedrich-Ebert-Stiftung.

the political body of the international labour movement. These organisations complement each other in their work and cooperate for the purpose of representing the political and social interests of labour at the international level in a comprehensive manner.

Central head offices of the GUFs have traditionally been based in Europe (Geneva, Brussels, London, and Antwerp). The GUFs started early on to set up occupational/trade groups and sectoral committees to meet the needs of specific sectors and represent the concerns of individual occupations. The International Transport Workers' Federation, for example, has had special committees for seafarers and railway workers for a considerable period of time. In addition, there are special committees for women and for youth. Regional committees and offices have been set up in order to ensure that the GUFs are also present in countries outside Europe and so are active in all parts of the world nowadays.

## 2. Organisational Structures of Individual Trade Unions – the Example of the Industrial Union of Metalworkers (IG Metall)

In Germany, neither the constitution nor any parliamentary legislation regulates the organisational structure of trade unions. Under the constitutionally guaranteed freedom of association the associations concerned, i.e. the trade unions and employers' associations, are granted the right to determine independently and in their own responsibility how they structure their association and decision-making process. The fundamental right of free association, however, implies a number of principles to be upheld in the work and organisational structure of the associations in order to enable them to act under extensive protection of the constitution. These fundamental principles are respected by all the trade unions affiliated to the German Confederation of Trade Unions. They have also been incorporated in the statutes of IG Metall.

### Fundamental principles of IG Metall

- unitary trade union
- industrial and sectoral trade union
- political and financial independence
- voluntary membership
- democratic structure

IG Metall is a unitary trade union, i.e. a union organising both blue and white-collar workers and trainees, pursuant to the principle “one shop, one union”. It is an industrial union, i.e. a union divided according to industrial sectors which organises workers in the metal industry, metal-producing industry (i.e. producing iron and steel), trades and services allied to the metal and metal-producing industries, the textile and garment industry and allied sectors as well as the timber producing and processing and plastics processing industries. The last two sectors came under IG Metall jurisdiction when the textile and garment workers’ union (GTB) and the wood and plastics workers’ union were dissolved in 1988, and 2000 respectively, and acceded to IG Metall. IG Metall is the largest DGB affiliate and has approximately 2.3 million members.

Another fundamental principle of IG Metall – and of all other trade unions affiliated to the German Confederation of Trade Unions (DGB) – is the political and financial independence of the organisation. IG Metall is a non-partisan organisation funded exclusively by contributions of its members; the monthly dues are equivalent to 1% of gross monthly pay. Membership is voluntary and may be terminated at any time without giving reasons. Another fundamental principle is related to the democratic structure of union organisation and decision-making (bottom-up approach). All decisions are majority decisions, the majority has the final say, and the minority which has lost a vote supports majority decisions as a matter of solidarity. This principle has to do with the fact that each union member has the same right to take part in the decision-making process. No hierarchical differences exist in matters of policy formulation and decision making; what counts is the legitimate status of the members or, in the case of union bodies, the mandate given by the members.

IG Metall statutes set out the following tasks and objectives:

- promoting the economic, social, occupational and cultural interests of its members,
- maintaining its independence of governments, public administrations, enterprises, religious denominations and political parties,
- expanding and protecting the welfare system and rule of law.

Its successful bargaining activities are among the most important achievements of IG Metall; during the last few years, it fought successfully for higher incomes, shorter working time and longer holidays. Moreover, its successful bargaining policy contributed to greater social security.

Each member paying the monthly dues regulated in the union statutes (one percent of monthly gross pay) is entitled to the following services:

support in the event of strikes, lock-outs and disciplinary measures. This means that in the event of a strike and ensuing loss of earned income, IG Metall pays strike benefits dependent on the duration of dues payment. Even members who have been locked out as a result of industrial action taken by IG Metall receive financial benefits, as do members who support the cause of IG Metall and because of that are dismissed or become unemployed.

An important service provided by the union is free legal protection to which members are entitled in connection with labour and social laws. Some 2000 lawsuits are filed each day in the labour and social courts in the Federal Republic of Germany (disputes about wage accounting, dismissals or accidents at work etc.). This figure gives an idea of how important free legal advice or representation in the labour and social courts is for workers.

In addition, IG Metall offers a wide range of educational and training programmes for works council members, shop stewards and members at the local and regional levels and in residential colleges. These seminars teach fundamental facts pertaining to the body of law in collective bargaining, labour and social matters; special training is provided for newly elected works council members or shop stewards to inform them about existing collective agreements, laws and ordinances to be applied at the shopfloor. Trade union education also includes seminars on, for example, the history of the workers' movement, questions of globalisation and environmental protection etc.

Moreover, a monthly magazine and information brochures inform the members about important issues related to union and societal policies and can be ordered by each member, including via the Internet.

As part of their membership dues, all members have insurance coverage against accidents at home in their leisure time.

### The organisational structure of IG Metall

Being a democratic organisation, IG Metall applies a bottom-up procedure to decision making, i.e. members take part in the decisions of the organisation through elections and the application of the principle of delegation. At the assemblies of delegates elected by 173 local branch offices, at the regional conferences of the seven regions and ultimately at the Union Congress, the supreme decision-making body of IG Metall, elected representatives of the members determine the policy of their trade union.

Trade union decisions originate at the grass-roots, i.e. the members at the workplace. All members elect their representatives to the **delegates' assembly** of a local branch – somewhat akin to the local union parliament. It convenes four times a year and takes all the decisions pertaining to local union matters,

with the groundwork being done by the local executive committee. The delegates' assembly is elected every four years by the workers in the enterprises; it elects in turn the local executive committee (including its full-time members), the members of the bargaining commission and the delegates to the regional conference and the Union Congress.

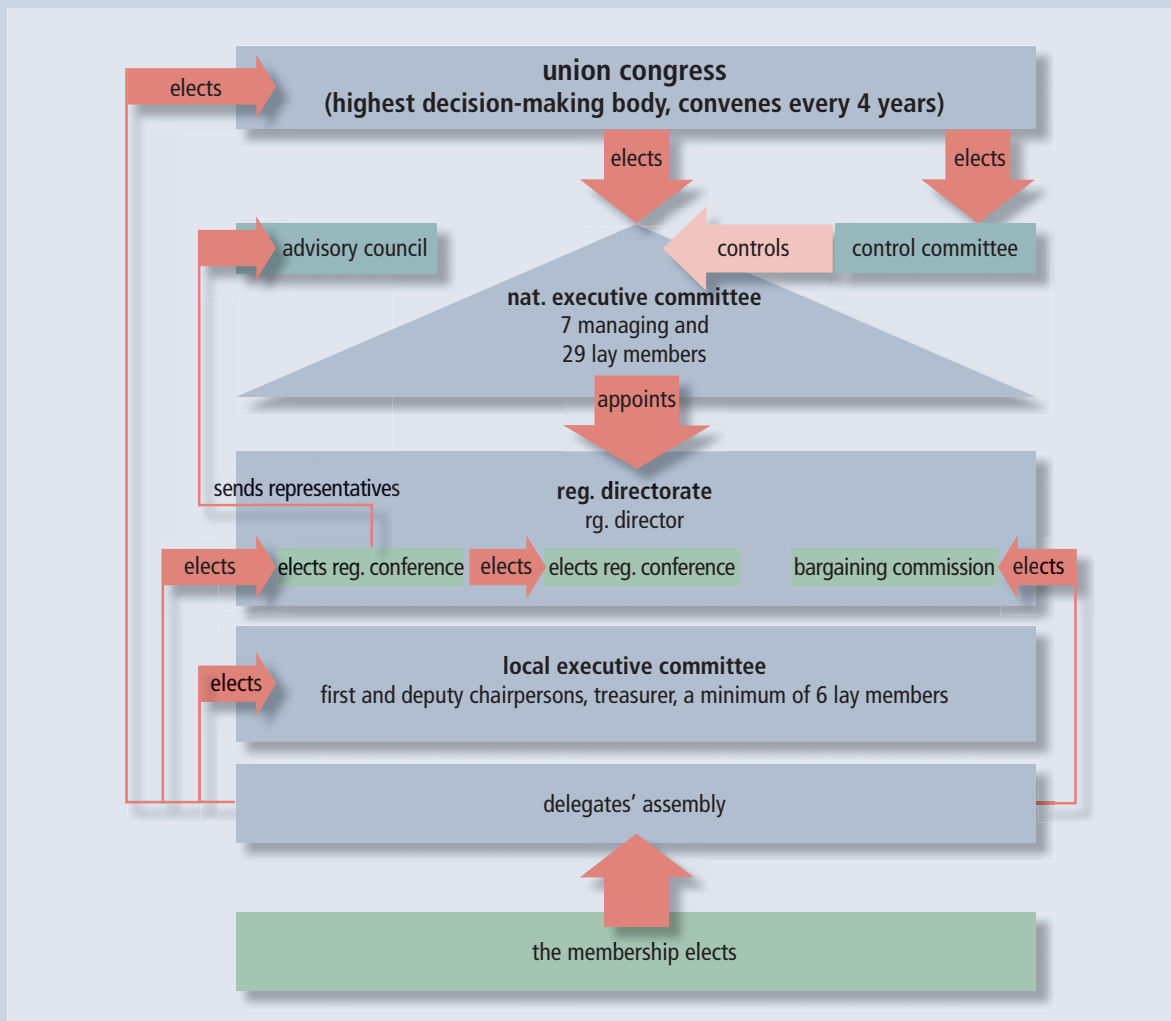
The **local executive committee** comprises full-time and lay union officials elected by the delegates' assembly every four years. It consists of three full-time union officers (the first and deputy chairpersons and the treasurer) and a minimum of six lay executive members. The number of lay executive members depends on the number of local branch members. The local executive committee manages the local branch office, implements decisions taken by the delegates' assembly and is responsible for the setting-up of committees and working groups. Its activities support the shop stewards in their work at the shopfloor; it is also in charge of union education at the local level.

IG Metall statutes provide for control bodies (**auditing**) at all levels of the organisation. At the level of local branches, three auditors are appointed from amongst the lay executive members; they audit the cash management and are accountable to the delegates' assembly. Audits may also be carried out by representatives commissioned by the regional or national executive committee. Regional funds are audited by the regional commissions.

Delegates to the **regional conference** are elected by the delegates' assemblies from all local branch offices in the region. It convenes once a year, confirms the members of the bargaining commission and elects the regional commission and members of the advisory council. The regional conference addresses issues related to collective agreements, organisation and union policy in the region and comprises delegates from the local branches, the regional director and regional secretaries as well as members of the regional committees and advisory council.



## Democratic structure of IG Metall



Source: IG Metall

The regional directorate consists of the regional director, the regional commission and regional secretaries; the **regional director** and regional secretaries are appointed by the Executive Committee. Bargaining policy is the regional directorate's most important task, i.e. it carries out collective negotiations together with the bargaining commission. In addition, it audits the local branch offices.

The **regional commission** is elected at the regional conference, it advises the regional director and the secretaries, audits the cash man-

agement at the regional level and takes complaints to be reported to the Executive Committee.

Delegates elected by the **delegates' assemblies** convene every four years for the Union Congress. The latter elects the Executive Committee and the Control Committee, adopts the statutes, decides on motions and resolutions submitted and determines union policy for the next term of four years. In addition, it confirms the financial statement prepared by the national treasurer.

The National Executive Committee elected by the delegates at the union congress consists of the First and Second Chairpersons and the national Treasurer and another six managing and 29 lay members. The Executive Committee implements decisions taken at the Union Congress in the day-to-day policy-making, monitors their implementation in the area of organisation and decides on the termination of collective agreements, original ballots and strike action. It represents IG Metall internally and externally.

The members of the advisory council are elected by the delegates at the regional conferences. The advisory council is the supreme decision-making body in between union congresses; it can arrange for by-elections to be held for vacancies of the Executive Committee and the Control Committee, if required, or decide to convene an extraordinary union congress. The Advisory Council convenes at least three times a year and comprises lay members (one council member per 30,000 members) and the members of the Executive Committee.

The Control Committee elected by the Union Congress consists of seven members. It monitors whether decisions of the Union Congress and the Advisory Council are implemented, takes complaints and deals with them. The Control Committee examines the audit reports and carries out audits itself; it has the right to submit motions to the Union Congress and reports about its activities to the Union Congress and once a year to the Advisory Council. Its members are not allowed to hold other positions in IG Metall.

IG Metall has currently some 2.3 million members who are funding the many and diverse activities of the trade union with their dues (1% of gross monthly pay); trade unions in Germany are not allowed to accept grants or donations so that membership dues are their only source of funding.

IG Metall's head office is located in Frankfurt/Main; the union is composed of seven regions and 173 local branch offices. The following graph illustrates how the dues are distributed; it shows that the largest amount is left to the local branches since they provide services to the members locally, support shopfloor activities in many and diverse ways and, last but not least, finance the staff costs for the union secretaries and clerical staff working for them from their share of the dues.

IG Metall is a **member of the German Confederation of Trade Unions (DGB)** and the **International Metalworkers' Federation (IMF)**; it is actively involved in international trade union cooperation. As part of this, IG Metall has been contributing to the funding of a project designed to train trainers for union education in a Vietnamese industrial union in cooperation with the Friedrich-Ebert-Stiftung and, in particular, has been providing teaching staff for a number of years despite the fact that the Vietnamese union has only observer status with the IMF. For example, IG Metall succeeded to negotiate binding social codes of conduct monitored by independent bodies with the Federal Association of the Garment Industry and Textile Employers' Association as well as with some corporations (such as the Daimler Group); these codes of conduct have to be complied with worldwide. This is particularly important to trade unions (and, of course, the workers in these companies) in emerging markets and developing countries because it helps to improve working conditions for the workers in these countries and contributes to the building-up of strong and democratic trade unions at the same time. The IG Metall working group "Codes of Conduct and World Works Councils" has a mandate to draw up proposals for the Executive Committee on how IG Metall should proceed in this field in future.

### 3. The United Services Union (ver.di)

After three years of preparation and approval of the five amalgamating unions, the restructuring process amongst DGB trade unions reached its peak, and for the time being its conclusion, on 19 March 2001 when the **United Services Union (ver.di)** was founded. Prior to the foundation, the amalgamating unions – the German Salaried Workers' Union (DAG) (not affiliated to the DGB before), the Trade Union for Public Services, Transport and Haulage (ÖTV), the German Postal Workers' Union (DPG), the Trade Union for Commerce, Banks and Insurances (HBV) and the Industrial Union for Media, Printing and Paper – had to decide to dissolve and refound the organisation. Dissolution required the approval of 80 percent of the members, at least 75 percent in the case of IG Media.

The highest rate of approval was achieved in the Postal Workers' Union with 91.4 percent, delegates of DAG voted 89.3 percent, of ÖTV 87.1 percent, HBV 84.4 percent and IG Media 80 percent in favour of amalgamation.

With some 2.3 million members, the United Services Union ver.di is one of the largest free trade unions worldwide. By restructuring, the “ver.di trade unions sought to represent, organise and implement the interests of members and workers more effectively; to meet the differentiated expectations of members and potential members resultant from societal and social changes; to ensure greater participation rights and decision-making opportunities for the members; to fill in the ‘blank spots’ of union organising activities; to resolve jurisdictional conflicts in overlapping areas of organisation with the aim of creating a united representational organisation in the industries concerned...” (quote from the joint declaration of 4 October 1997).

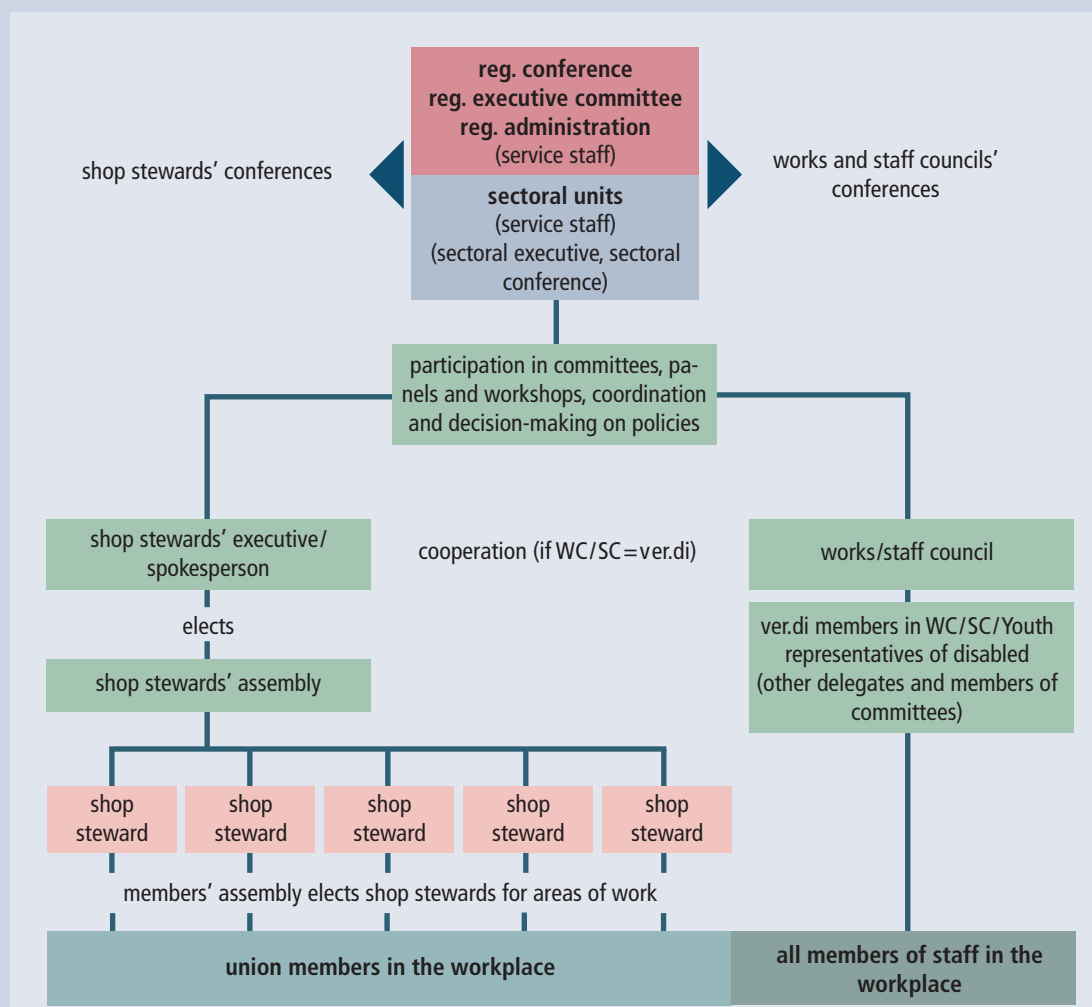
By merging, the workers' movement is seeking to halt a trend that threatens its very existence. Since 1991, DGB trade unions have lost one

third of their members, a total of four million. This is due to the disappearance of traditional jobs in industry on the one hand and the inability of trade unions to get their foot in the door of emerging industries on the other, i.e. to keep up with the profound transformation of the economy and society and ensuing changes of structures as well as of contents and forms of work in the corporate world. In this situation, ver.di is offering the opportunity of a new start, ending existing competition amongst trade unions in the public and private services sector and in the media, cultural and educational fields by combining their experiences and competences.

In order to be able to deal with the many and diverse policy areas, which a trade union structured like ver.di is, of necessity, expected to deal with, the organisation has been subdivided into four levels with different functions and competences.

These four levels comprise the local level, the district level, the regional level and the national level. At the lowest level, local branches may be set up to represent the interests of members working and living in that locality, for example a town. Delegates to the districts are elected locally, the district executive committee having responsibility for member recruitment, education programmes for works and staff councils, advice and legal protection, press and public relations and also for cross-sectoral (see below) political activities at district level. The lay members of the district executive and the lay chairperson, elected by a district conference for a term of four years, are in charge of activities at that level and represent the trade union ver.di in their area of jurisdiction. Based on the decisions of the executive committee, day-to-day business is managed by a full-time manager supported by union secretaries and clerical staff. Managers, union secretaries and administrative staff at all levels and for all sectors (see below) are employees of the Federal Executive at ver.di.

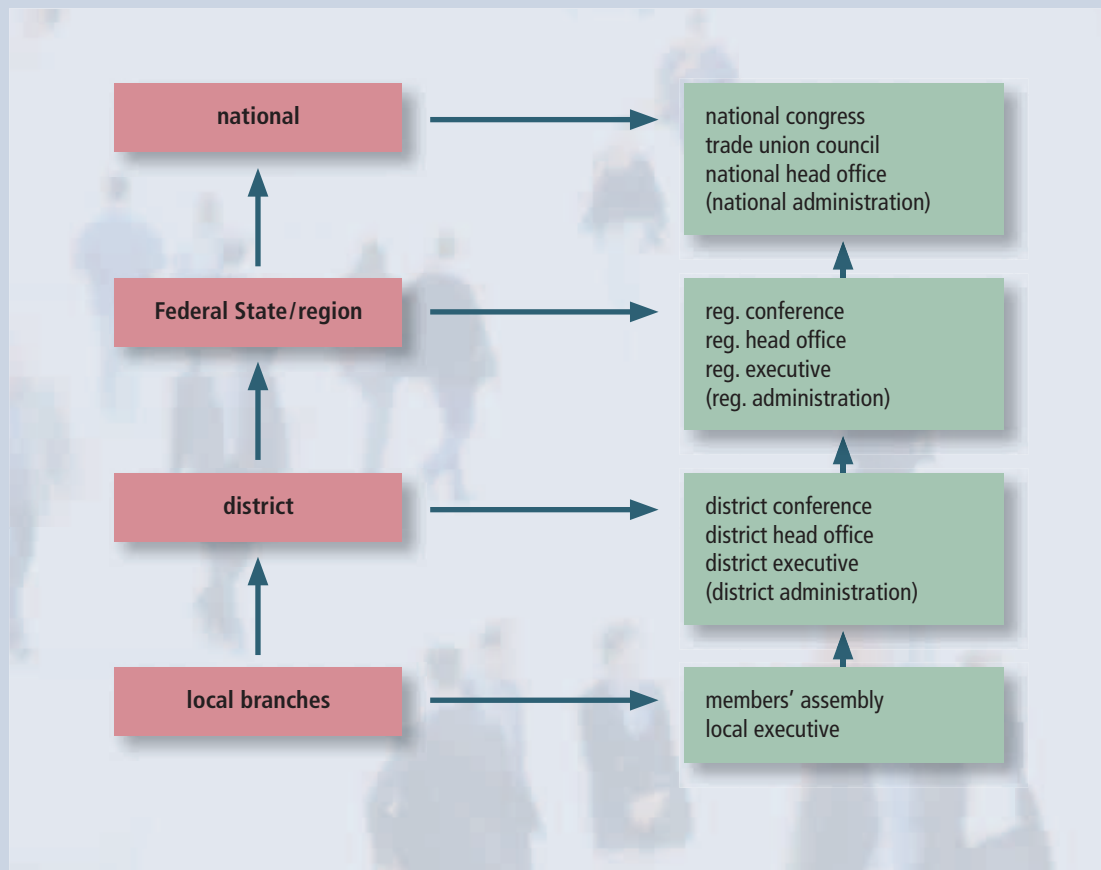
## Structure of ver.di



The next level comprises the regional organisation headed by the regional executive committee and the full-time regional union management. As a rule, the regional organisation corresponds to the territory of the Länder; at the federal (national) level, the various sectoral interests are coordinated. The Federal Congress is the supreme decision-making body of ver.di at which lay representatives of all levels and sectors (see below) are involved in equal measure. In between federal congresses, the Trade Union Council is the supreme decision-maker, while the Federal Executive Committee manages the day-to-day business of ver.di.

The sectors are represented at all levels in order to deal with the specific occupational and political concerns of the sector. This includes advice and services to the members, works and staff councils, representatives of youth and trainees in the sector as well as political lobbying related to the occupations represented in the sector. Sectoral representation also deals with collective bargaining issues and industry, shop floor and corporate policies in that sector. In addition, it is mandated to implement union education and cooperate in areas such as international union activities, women's and gender equality issues and youth activities. More-

## trade union bodies at level



General and policy decisions are made in committees consisting of lay members

over, education provided by sectoral groups is expected to ensure targeted activities for specific members and workplaces. Ver.di organises 13 sectors (see table page 100).

This list clearly reveals the opportunities and risks emanating from such a broad range of organisational areas. Opportunities arise because of the bundling of union strength in the service and industry-related service sectors, in the media, cultural and educational sectors, preventing friction resultant from competing jurisdiction and combining experiences and competences so as to be able to confront the

challenges of societal and economic changes. Risks arise because union clout may be weakened by minority interests, individual sectors may drift apart and specific group interests gain the upper hand over the “common good”. In the past, however, all founding organisations had to learn the lesson that disunity only weakens them; ver.di officials and members have realised in the short phase of growing together how beneficial a bundling of forces is for the workers so that ver.di can look into the future with great confidence.

## Ver.di sectoral units



Bargaining policy of the new services union is formulated and implemented by the sectoral groups which form their own bargaining commissions and conduct collective negotiations. Principles pertaining to ver.di bargaining policy are determined by a cross-sectoral bargaining committee, while a clearing unit monitors whether collective agreements are in line with the organisation's overall bargaining policy. In the final analysis, the Federal Executive Committee is responsible for wage demands and collective agreements as well as union-political activities.

Frank Bsirske, former Chair of the ÖTV union, was elected Chairperson of the United Services Union (ver.di) at the founding congress.

In the meantime, the process of consolidation has been making headway, and the original founding organisations are only playing a role

when it comes to the distribution of seats and positions. Provisions regulating the quota of seats for each of the founding organisations have been abandoned at the second Federal Congress in 2007, while a gender-related quota is incorporated in the statutes. Accordingly, equal opportunities for women and men will become part of the ver.di decision-making process on all economic and societal issues.

In consequence, women hold their own conferences at district, regional and national levels and are organised in specific women's executive committees at sectoral level. In appointments and elections, they must be considered at least in proportion to their share of the membership.

Ver.distatutesprovideforseparateorganisational structures and levels for the following groups:



- youth (all members until the age of 28)
- senior members
- blue-collar workers, civil servants
- master crafts or tradespersons, technical and engineering staff
- freelancing staff
- unemployed.

Activities of these groups are organised across sectors; in so doing, the groups ensure that their interests are properly considered. In addition to participation in other union bodies at all levels, sectors or for specific groups of persons, foreign workers may represent their interests in separate working groups.

Membership dues amount to 1% of gross monthly pay. They are collected centrally and subsequently passed on to the organisational units according to a pre-determined budget. The respective unit can make use of these funds

on their own responsibility. The budgetary amounts depend on the dues revenues of the unit concerned. This ensures transparency: decisions are taken centrally, the level of available resources is known and can be distributed accordingly.

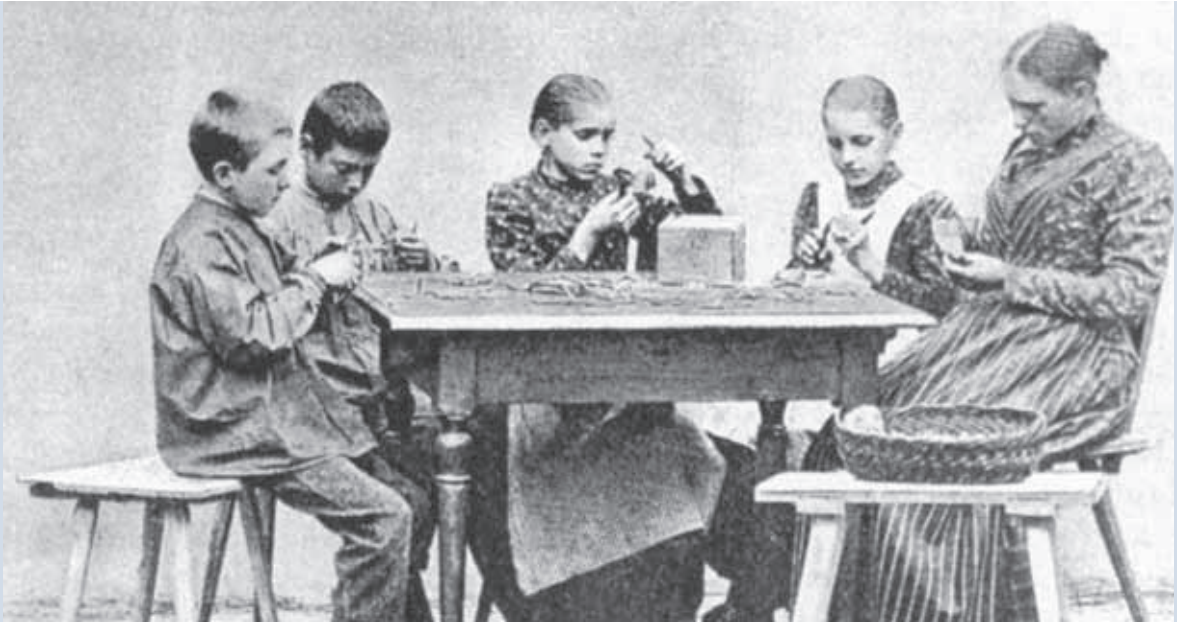
The Trade Union Council is responsible for financial matters with a guideline setting out the principles of how funds should be spent. For example, staff costs must not exceed 50 percent of the revenues from dues, three percent of dues go into the strike fund and two percent into a fund sponsoring innovative projects. The central educational facilities of the union receive 1.5 percent of the dues.

Affiliation dues to the DGB and the legal protection agency amount to 7 and 5 percent, respectively, of the current income from dues.

## Chapter 3

### Labour Law<sup>82</sup>

In der zweiten Hälfte des 19. Jahrhunderts wohnten ganze Familien in einem oder zwei Zimmern, die gleichzeitig als Werkstätten für Heimarbeit dienten.



#### 1. The structure of the Labour Law

The entire labour law constitutes a body of law regulating workers' protection. It responds to the conditions and requirements of Germany's economic order; the Federal Republic adheres to the concept of a social market economy, which means that priority is given to freedom of contract when legislation is formulated: workers on the one hand and employers on the other conclude agreements in their own responsibility; the socially weaker party, which would usually be the workers, is, however, protected by binding legal regulations; any deviation from these regulations is permissible only to the extent that it acts in their favour.

Current labour law is the result of close to a hundred years of evolution characterised by

1. the development of protective workers' rights,
2. the expansion of a system of collective agreements and
3. the drawing-up of a Works and Corporate Constitution Act.

To maintain and develop these elements of labour law is one of the most important functions of a social market-economic policy. This is becoming particularly important at present when neoliberal forces in society and politics are making efforts to abolish the guiding principles of German labour law described above.

The sources of labour law are ordered hierarchically: the European body of law takes precedence, followed by the Basic Law (constitution), general legislation etc.; in other words,

<sup>82</sup> The term „worker“ or „employee“ is used in a gender-neutral manner in this chapter.

higher-ranking regulations have priority over lower-ranking regulations.

Labour law is designed to function as protective legislation for dependently employed workers because the latter's livelihood depends on their labour and because they are obliged to do their job by force of contract (see below). They must follow the employer's instructions as regards the venue, type and date of work. In turn, the employer must ensure that any job-related risks to the worker's life and health are either restricted or removed altogether.

Under the welfare state regime, it is part of the obligations of the State to adopt laws and regulations to be applied in the work process (see also Chapter 1.8 statutory accident insurance).

No final Labour Code containing all applicable labour norms, which might be comparable to the Social Code for social law, has been compiled yet. Instead, labour-law regulations are dispersed and covered in many separate pieces of legislation. A distinction is made between individual and collective labour law.

This legislation is part of individual labour law and supplemented by laws related to collective labour law.

In addition, labour law is determined by rulings of the highest courts, i.e. decisions of the highest judicial instances, including:

- the Federal High Court of Justice,
- the Federal Labour Court,
- the Supreme Social Insurance Tribunal (Social Court),
- the Supreme Administrative Tribunal,
- the Federal Fiscal Court, and
- the European Court of Justice.

Decisions by these courts are particularly important with regard to the interpretation of laws and are used by other courts for guidance.

## Pyramid of labour-law standards



The sources of law are hierarchically structured in Germany: precedence is given to the European body of law, followed by the Basic Law, general legislation etc., in other words higher-ranking regulations have priority over lower-ranking ones.

## Individual labour law

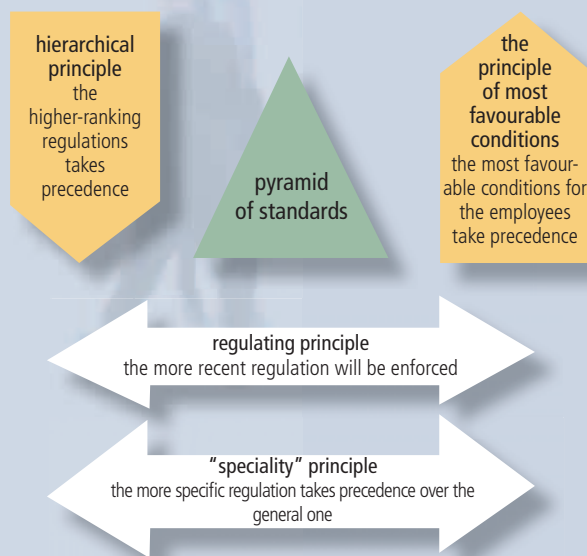
- Act on Partial Retirement for Older Workers
- Health and Safety Act
- WorkingTime Act
- Civil Code
- Federal Holidays Act
- Vocational Training Act
- Federal Act on Educational Allowance
- Act on Continuous Wage Payments for Sick Workers
- Trade Regulations
- Act on Protection of Working Youth
- Act on Protection against Dismissals
- Maternity Protection Act
- Social Code (different volumes)
- Act on Part-time and Fixed-term Contracts

## Collective labour law



- Works Constitution Act
- Act on European Works Councils
- One-Third Participation Act
- Collective Agreement Act
- Co-determination Act
- Co-determination Act for Coal and Steel and Supplementary Act
- Staff Representation Act

## Hierarchy of legal sources



There are two exceptions to the hierarchy-based principle described above, notably if the higher norm explicitly leaves scope for deviation or if the lower-ranking norm is more favourable to the workers (principle of most favourable condition).

This immense diversity of laws is complemented by provisions in many collective agreements, setting out standards which go beyond the statutory minimum and which are very important to the workers, materially and socially.

The following parts of the brochure describe some examples of important labour-law elements which affect directly the employment situation of the individual worker; the so-called collective standards (such as the collective bargaining system etc.) and other legal regulations (e.g. the Works Constitution) will be dealt with separately.

Labour law is subdivided systematically according to

- content,
- target groups and
- providers of health and safety at work.

Chapter 1.8 (statutory accident insurance) already described the providers of health and safety at work; the following part will therefore comment on the relevant matters of content and target groups by way of example.

## 2. The Health and Safety Regulations

### How to enforce the occupational health and safety regulations

The employer must put in place the organisational conditions for a statutory health and safety system at work, supply the necessary health and safety equipment and monitor the implementation of health and safety measures. In the case of businesses exposed to accident risks and occupational hazards according to the regulations of the **Health and Safety Act**, depending on

- their type of operation and resultant accident and health risks for the workers,
- the number and composition of the workforce and
- plant organisation,

the employer must appoint works doctors, safety engineers and other staff trained in

health and safety matters<sup>83</sup> who are responsible for accident prevention, appropriate workplace design and the implementation of all other health and safety measures, including occupational medicine and healthcare for the workers. Works doctors and trained staff for health and safety are directly accountable to the plant director in order to ensure that this group is not acting in a subordinated position in the company. They are not bound by any instructions in their special line of work. In the event that they disagree with the plant director about controversial matters, they can approach the employer directly. If the latter refuses their proposals, the reasons for refusing must be put down in writing and one copy passed on to the works council. Works doctors and health and safety staff are members of the health and safety committee<sup>84</sup> of their company.

In businesses with more than twenty workers, an honorary safety representative must be appointed pursuant to the regulations of the **Social Code (SGB VII)**. He/she cooperates closely with the works doctor, the health and safety staff and the works council and sits on the health and safety committee of that company, ensures that workers comply with the regulations on accident prevention by wearing, for example, protective clothing which has been made available. The number of safety representatives is determined by the factory inspectorate, a public body for the industry concerned (*Berufsgenossenschaft*). The safety representative has the task of supporting the employer in health and safety implementation and monitoring continuously the supply and functionality of mandatory protective equipment. Safety representatives are trained by the *Berufsgenossenschaft*, which also pays the costs incurred.

In companies in which a works council has been set up, the works council is obliged to support those in charge of health and safety by regulation of the Works Constitution Act, ensuring that health and safety provisions are complied with in the company.

In addition to the above-mentioned occupational health and safety measures, labour law contains a number of provisions regulating individual protection; some examples are described in the following section:

### The law regarding individual health and safety

#### The work contract

The work contract is the basis of employment; it regulates the rights and duties of the contracting parties arising from the employment relationship, i.e. those of the employees and the employers. Work contracts are usually concluded in writing nowadays, although the written form is not mandatory. By signing the work contract employees undertake to do the job assigned to them, while employers undertake to pay the corresponding wages or salaries.

As a rule, work contracts describe the general framework since only individual contractual terms and conditions are specified in most cases, such as

- type, scope and duration of job duties,
- holiday entitlements,
- “additional duties” if required, for example the duty to keep confidential any business information etc.,
- details regarding payment of wages or salaries etc.,

<sup>83</sup> such as technical staff, master craftspeople or skilled workers.

<sup>84</sup> The health and safety committee is a panel dealing with occupational health and safety which is mandatory for businesses with twenty workers or more pursuant to the Health and Safety Act. It comprises the employers or a person appointed by him/her, trained health and safety staff, works doctor, safety representative and two works council members appointed by the works council for that purpose. The health and safety committee has the task of dealing with issues related to health and safety and accident prevention and convenes every three months.

while reference is made to

- existing collective agreements
- internal agreements, works rules and regulations or
- other general job conditions

in respect of other rights and duties of both parties to the contract.

### **Employee's duties arising from the work contract**

A worker is obliged to fulfil the tasks assigned to him/her under the work contract. The more general the job description in the contract, the more comprehensive the employer's right to give instructions – and vice versa. If the work contract specifies the job to be one in the back office, for example, the employer cannot demand work in the sales division. This would require termination of that part of the work contract for the purpose of alteration. In contrast, a worker employed for an unskilled job may be asked to do different assignments.

The job must be done in the usual agreed period of time; the employer may demand overtime or short-time work in exceptional cases, but must furnish reasons for this. The works council, if any exists, must consent. The worker may refuse to work extra time if such demands continuously exceed the statutory maximum of 48 work hours per week.

A number of additional duties are laid down in labour law, for instance the duty of care or loyalty which the employee owes the employer. However, such duties may also be covered in the work contract, the collective agreements, internal instructions (for example, ban on alcohol in the workplace, dress code, no private use of the Internet etc.). Additional duties include

- the duty to report, i.e. the worker is obliged to report immediately his/her inability to work and present a medical certificate, if required,

- duties of care, i.e. the worker is obliged to handle carefully any equipment, tools, materials,
- the duty of loyalty owed to employers,
- non-disclosure of confidential business or trade information,
- non-competition with the employer during the period of employment etc.
- In legal practice, these duties are summed up under the heading of „employee's duty of loyalty“.

### **Consequences of a breach of duty**

If the employee has culpably infringed upon his/her main and additional contractual obligations, the employer is not obliged to pay a wage for a job not done. If the job has not been done well, the employee is usually entitled to a wage, possibly at a reduced rate. Damages may also be claimed provided the employee has caused the damage deliberately or negligently. If a fining system is in place in the enterprise, which needs to be regulated by collective or internal agreement, misconduct may also be penalised on that basis. Before a contractual notice of contract termination, the worker must be requested not to repeat the misconduct. Such an urgent request (reprimand) is a precondition for termination of contract except in very serious cases of employee misconduct.

### **Employer's duties arising from the work contract and consequences of a breach of duty**

The employer's main duty consists in the payment of wages/salaries at the agreed date. In the event of non-payment, the employee may demand an interest on default of payment equivalent to 5% above the base interest. If payment is delayed for a prolonged period, the employee is allowed to stop working after prior notification, while the employer is obliged to continue payment of wages/salaries, including for the period of temporary work stoppage. In the case of prolonged delays of payment, the employee is also entitled to terminate the work contract without notice. In such a situation,



the employer is obliged to continue wage payment until the contractual period of notice.

The employer's additional duties are not comprehensively covered in the work contract either, but largely exist by implication through the employer's duty of care, corresponding to the employee's duty of loyalty. This finds expression in protective legislation which the employer must implement for the purpose of protecting the employee's life and health. However, it also covers

- payment of wage tax and social insurance contributions at due date,
- protection of the employee's property while it is on the premises of the company,
- the duty to employ the employee who may be released from work with continued full pay in exceptional cases only,
- no disciplinary measures if, for example, the employee uses his/her rights in an appropriate manner,
- the duty to treat female and male workers equally in the workplace etc.

### **Payment of wages/salaries**

The employer's main duty consists in the payment of wages/salaries for work done. We distinguish the following types of payment

#### **Time-rate pay**

In the case of time rates, it is generally assumed that all workers who carry out jobs of the same value will produce the same output. Such a wage is determined on the basis of corresponding pay grades expressed in terms of hourly, daily, weekly or monthly rates. The latter is generally applicable in the Federal Republic. In collective agreements a monthly pay is calculated in terms of hourly, daily or weekly rates, for example, based on the usual collectively (in the case of part-time work individually) agreed working week.

The employee benefits from time rates since he/she will receive the predetermined rate des-

pite varying levels of output, yet the downside is that outstanding performance is not recompensed in addition. This is why collective agreements provide for bonus pay to compensate for this disadvantage, primarily regarding specific levels of job difficulty. Collectively agreed bonuses are usually paid for

- output resultant from extra work in general,
- night, shift and swing shift work,
- work of a particularly dirty and dangerous type or
- as personal bonuses (bonus for master crafts-persons, technicians, computer programmers etc.).

Collective agreements include provisions for overtime worked for operational reasons. The trade unions seek to restrict the number of extra hours as much as possible so that new workers are recruited for extra work to be done.

#### **Piece-rate pay**

Piecework is intended to be paid according to the amount of work done. Trade unions believe that a simple piece-rate pay could be dispensed with, yet accept this system of remuneration if it is transparent from the point of view of the workers and controllable by an objective third party.

The following types of piecework apply:

- Piecework per unit produced. Pay is calculated on the basis of quantitative output (number of dresses made, machine parts produced etc.).
- Piecework per weight. Pay is calculated on the basis of the weight of transported materials (for example, unloading inland waterway vessels, trucks etc.).
- Piecework per area. Pay is dependent on the area covered with tiles, house walls plastered etc.).
- Generalised piecework. If the assigned job is not uniform, but piecework targets relate to various work contents, piecework is defined in general terms.

A distinction is also made according to the manner in which pay is calculated between **money and time-related piece-rate pay**. Money-related piece rates apply for piecework per unit, weight, measurements or area etc., provided the unit produced is directly multiplied by the monetary factor (for example, piston ring 2.00 Euros, tailored seam 0.30 Euros).

Time-related piece rates apply if the time to produce a specific work piece is specified; they are paid even if it takes less or more time to produce.

In the meantime, time-based piece rates have come to be the prevalent system of pay as pre-determined times can be used for work preparation and targets do not need to be re-negotiated for collective agreements.

#### **Piecework standards**

The basis for piecework pay is a so-called piecework standard which defines the relationship between the amounts paid and level of output. These standards are subject to collective bargaining and may be supplemented by in-house agreements depending on the agreement concerned.

#### **Piecework target rate**

It is equivalent to the hourly wage of a piece worker with normal output. The target rate is determined in the corresponding collective agreements and normally consists of the basic wage of the pay grade concerned and an additional piecework factor. The target rate is a controversial feature in the wage-setting process; the trade unions, for example, hold the view that more technology accelerates the work processes anyway and that this ought to be taken into account by increasing basic pay accordingly.

#### **Premium/bonus pay**

It can be designed more flexibly than piecework rates since a premium bonus can be linked to all operationally relevant parameters which can be influenced by the workers, such as volume

and quality of work. In addition, bonuses may not be linked to performance but conduct: a bonus for attendance or being on time, for example. Trade unions are greatly opposed to such bonuses since the worker may decide to reduce the time off which he/she is entitled to (sickness, maternity etc.) for the sake of obtaining the bonus pay.

Conventional piecework systems are a point of contention nowadays since they link pay to the number of pieces produced; they only ensure a specific level of performance which is not changing and do not offer any incentive to the workers who take the initiative by improving the work process themselves, for example, and thus contribute to the success of their company. Moreover, such piecework systems are intended to increase individual performance and are therefore in contradiction to new work structures based on successful work in teams. Some enterprises have introduced pay systems which apply such performance criteria, but link them to the output of the entire team. Generally, we are heading in a direction where pay is linked to the contribution made to the success of the company or to targets agreed in negotiations with individual employees or work teams in advance. Such a system is intended to utilise the workers' whole potential, i.e. their know-how, skills and talents, for the purpose of attaining the corporate goals. Work in teams is expected to enable the employees to deal with as many partial functions of the work process as possible.

#### **Minimum wage**

Currently, Germany does not have a general cross-sectoral minimum wage regulated by statute. Whether to introduce a minimum wage or not is at the centre of current political controversies and is a point of contention. The DGB trade unions call for the immediate introduction of a minimum wage on the basis of 7,50 Euros per hour and make reference to the regulations in place in 18 of the 25 EU Member States, the Social-Democratic Party of

## Minimum wages in Europe

	weekly working time	hourly wage	monthly wage
France	39 hours	8.03 €	1,218.– €
Netherlands <sup>1</sup>	37 hours	7.96 €	1,273.– €
Great Britain	39 hours	7.36 €	1,273.– €
Ireland <sup>2</sup>	39 hours	7.65 €	1,293.– €
Belgium	38 hours	7.48 €	1,234.– €

1) varying working time, lower rates for fewer hours per week

2) workers 18 +

Source: Eurostat, calculations of WSI for January 2006/©Hans Böckler Stiftung 2006

Germany (SPD) supports their demand, while the business community and the Christian-Democratic Union (CDU) and the Christian-Social Union (CSU), as partners in the grand coalition, are opposed to the nationwide introduction of a minimum wage arguing that it would jeopardise a considerable number of jobs in the low-pay sector.

For the time being, the coalition partners have settled for a compromise solution by granting some sectors the opportunity to negotiate a minimum pay on the basis of the Act on the Posting of Workers (*Arbeitnehmerentsendegesetz*). This compromise extends the original number of sectors in which minimum wages must be paid<sup>85</sup> and which are enumerated in the law, by another ten. If 50 per cent of a sector is covered by corresponding agreements, the parties to the agreement may submit a joint request to make it generally binding at the latest by 31 March 2008. It may also be possible to include other sectors at a later date. The bargaining committee, consisting of three representatives each of the

employers and employees, will vote on whether to submit such an application. If there is consensus in the committee about the minimum amounts involved, which may vary by region or qualification, an application is submitted to the Federal Ministry of Labour to make this wage generally binding. If no consensus is reached by the bargaining committee, the Federal Minister of Labour may determine a minimum wage by ordinance, provided the Cabinet agrees.

The Act on Minimum Working Conditions of 1952 has been revised at the same time. It is now also possible to introduce minimum wages in sectors with less than 50% coverage. In this case, a standing committee consisting of six experts is set up and elects a seventh committee member for its chair. If no agreement is reached, the Federal Cabinet will appoint a chairperson proposed by the Minister of Labour. Furthermore, the sectors concerned (such as meat processing, horticulture, agriculture and forestry etc.) will each establish an expert committee consisting

85 Currently, collectively agreed minimum wages are paid in the construction and building industry (some 700,000 employees), equivalent to 10.42 Euros/hour in West Germany and 8.90 Euros/hour in east Germany for unskilled labour and 12.40 Euros/hour or 9.80 Euros/hour, respectively for skilled labour and in the property cleaning sector (7.87 Euros/west and 6.36 Euros/east). These regulations are planned to be extended to include ten additional sectors (for example, hair dressing, meat processing, sub-contracted labour, security staff, postal services etc.). While having agreed to the above-mentioned compromise, the SPD will continue to support a statutory minimum. This topic may therefore play a central part in the election campaigns 2008/2009.

### Collectively-agreed weekly working time in the EU

regular average working time per week for full-time workers in the EU (in hrs)



of three representatives of the employers and employees who will also appoint a neutral chairperson. Again, this chairperson may be appointed by the Federal Minister of Labour if no agreement is reached amongst them. The expert committees negotiate the minimum pay applicable to each of the sectors. This procedure requires a four-to-three majority in favour. On recommendation of the Federal Minister of Labour the Cabinet will then enforce these minimum wages by ordinance.

These compromises are no substitute for statutory minimum wages of the kind that most Member States of the European Union have put in place; at best, they are a step in the right direction. Statutory minimum wages may put an end to a deplorable situation in which individuals working full-time do not receive a living wage but depend on supplementary support from unemployment benefits.

#### Working time

Working time regulations are part of protective labour legislation and are laid down in the Working Time Act. It is permissible to deviate from them in collective or internal agreements.

Generally speaking, the law states that each working day should consist of no more than eight hours. This figure defines the actual time worked excluding breaks.

But, having said that, the employer may request an extension of the working day to ten hours anytime provided the average working time of eight hours per working day is not exceeded within a so-called balancing period<sup>86</sup>. The collective agreement may leave scope for an even greater level of flexibility and allow for increased readiness time during the period of work. It is permissible to exceed the established maximum hours in cases of emergency.

Bargaining activities of the trade unions have reduced the weekly working time in West Germany (the old *Länder*) to 37.5 hours on average; a 35-hour work week had been agreed for the metal industry as early as 1990. Average working time, including collectively and non-collectively agreed weekly working time, is equivalent to 39.9 hours (collectively agreed average 36.7 hours) in West Germany and 39.8 hours in East Germany (collectively agreed average 37.2 hours). In the last five years,

<sup>86</sup> The balancing period is either six months or 24 weeks.

however, so-called working time corridors<sup>87</sup>, working time accounts<sup>88</sup>, limited working time reductions without full pay and several other differentiation clauses have been agreed by the bargaining parties so as to enable the enterprises to adjust collectively agreed regulations to shopfloor requirements.

Since 2006, the weekly working time has been increasing to up to 42 hours for civil servants whose working conditions are determined by Federal or Länder governments by force of law; more flexible regulations regarding maximum hours worked per day and breaks have also been introduced.

### Extra hours/overtime

They are defined as working hours in excess of the average collectively or internally agreed working time. As a matter of principle, the worker is not obliged to work overtime if no agreement is in place. This problem seldom arises since there may be an obligation to work extra hours in times of critical constraints or in special economic situations. A refusal to work overtime without good reasons may be sufficient to terminate the contract immediately. The extent and timing of extra hours is subject to codetermination if a works council exists in the enterprise.

The percentage of workers working overtime on a regular basis, i.e. at least once or twice a month, is approximately 54 per cent<sup>89</sup>. It is less the volume of extra hours but the manner in which they are remunerated which has noticeably changed during the last few years. The share of paid overtime is continuously decreasingly, while overtime is increasingly compensated for by giving workers more free time. However, although, in tendency, overtime

is mostly worked in small businesses, it is under-represented in the statistics of the economic institutes.

### Breaks and rest periods

A health and safety regime in the workplace entitles workers to breaks, rest periods and time-off for relaxation. After having worked more than six hours, workers are entitled to a half-hour rest period or, alternatively, to two breaks of a quarter of an hour each. The works council, if it exists, has the right to co-determine how breaks are organised time wise. The Workplace Ordinance forces companies with more than ten members of staff to have a break room which is easy to reach.

In shift-operated or in transport companies, the total break period may be subdivided into several short breaks of “adequate duration”. Yet short break periods are considered to be part of the working time in these enterprises and therefore need to be paid.

The Working Time Act stipulates that workers are entitled to an uninterrupted rest period of no less than eleven hours after work. Depending on the workplace, this may be reduced to between 10 to nine hours for hospitals, passenger transporting companies, broadcasting, agriculture etc. to be balanced during a predefined period of time negotiated between the employer and the employee.

### The timing of working hours

There is no general statutory regulation on how to organise working hours time wise. In addition to forms of work such as flexitime, part-time work, working from home and telework, night and shift work calls for special efforts in the organisation of work. Specific health hazards

87 Working time corridors describe a predefined period of time during which working hours may exceed continuously the collectively agreed time of individual workers, groups of workers, corporate departments or entire plants.

88 In many enterprises, working time accounts are maintained for each individual worker, especially in connection with flexitime: it is a record of the working time target, actual working time, including extra hours and resultant plus and minus deviations, hours lost etc. Collectively agreed regulations stipulate in detail the working time to be recorded, maximum hours plus/minus and the modalities of balancing any extra hours.

89 See ISO study on working time 2003, amongst other things.

may be the result of night and shift work, in particular. The law therefore includes protective regulations and stipulates that these jobs must be designed in line with research findings describing what constitutes humane working conditions.

### **Night and shift work**

The European Foundation for the Improvement of Working and Living Conditions has made the following recommendations for the organisation of night and shift work which have been specified by the Federal Agency for Industrial Health and Safety. Important requirements of a fundamental nature include:

- avoiding massive volumes of work by taking into account working time,
- rest periods between shifts should be long enough to ensure effective relaxation, in other words a minimum of 24 hours,
- time off for the entire weekend is better than one day off at a time at the weekend,
- shift workers should have more free days than day workers,
- avoiding unfavourable shift schedules by organising forward-rotating shifts (i.e. a sequence of early, late and night shift) with early shifts not starting too early and late shifts not ending too late,
- there should be scope to adjust to individual requirements of workers (such as flexible starting times),
- workers should be informed about the shift plan in due time.

In major industries regulations under the Working Time Act are usually supplemented by collective agreements providing greater protection beyond the statutory standards for workers doing night and shift work.

### **Flexible working time**

Flexible working time, or flexitime, is understood to mean that a worker is not obliged to carry out the work according to a pre-defined work schedule on each working day, but it is left to him/her to determine when the work is done

within a specified timeframe. Internal agreements between the employer and the works council usually define a core working time in which attendance is mandatory for operating reasons. The worker is free to determine the actual beginning and end of the working time, which needs to be balanced in order to reach the usual working hours at the company concerned. So-called qualified flexitime enables workers to start earlier or end later than usual and also save up time or catch up lost time. Collective agreements may also include long-term arrangements such as annual working time or working-life time accounts (see below).

It is usually not feasible to flexibilise working time in the case of cycle-time or assembly-line work.

### **Part-time work**

The application of new technologies, changes in the work environment and the growing dismantling of full-time jobs have resulted in a continuous increase of part-time work.

Part-time work offers employers the opportunity to adapt fast to changing conditions, while employees enjoy a greater level of flexibility by working part-time, provided they can afford to live on the resultant reduced income. This affects not only their current income situation, but provisions for their old age since the pension system in Germany is inflexible in responding to deviations from full-time employment.

In addition to the conventional form of part-time which reduces the number of hours worked per day, several other models exist offering variations of the weekly or annual hours of work and a combination of part-time and full-time work. Specific work time models have been designed with the aim of balancing production above or below capacity in seasonal enterprises; they prevent the dismissal of workers by flexibilising working time. Moreover, two workers may freely decide to share a full-time job (job-sharing model). In addition, some



schemes offer the possibility of saving time-related or monetary “credit points” on long-term accounts to balance prolonged periods of time off or an early retirement (Teilzeit-Invest/sabbatical). The sky is the limit when it comes to the development of models, but it is more difficult to use them in view of problems related to social insurance law.

### Telework

Telework is a new form of work organisation with work done both at home and in the enterprise, while tele-homework is always carried out at home. The costs incurred for the workplace are paid by the employer, including the purchase of office equipment, communication devices as well as service and repairs. In addition, the employer must pay a share of the rental costs and of heating and lighting. The employer is responsible for health and safety in this context. If a works council exists in the enterprise, it is also responsible for staff doing telework. A number of collective telework agreements have already been concluded in areas of union jurisdiction. The employee status will usually be maintained and insurance coverage against accidents is the same as in the company as a matter of principle.

Telework has the advantage of saving time since there is no need to drive to and from the company, making it easier to reconcile family and work; on the downside, it may lead to a greater level of self-exploitation and isolation.

### Home-based work/work from home

Home-based work in dependent employment is a form of paid employment where the worker can choose the place of work and the employer supplies the means of production. There are statutory regulations for the protection of home-based work because of the special economic dependence that may ensue. Home workers are covered by statutory social insurance. The employer has to examine health and safety conditions before placing a job order for work at home. Remuneration is usually paid per piece/unit. Supplements must be paid to

compensate for holiday entitlements, continued payment of remuneration during sickness or breastfeeding. The labour ministries of the *Länder* must employ so-called remuneration inspectors to monitor remunerations and other contractual conditions.

### The Shop Closing Act

The Shop Closing Act is intended to prevent unfair competition on the one hand and to protect the workers' occupational health and safety on the other. In the retail industry, the Shop Closing Act determines the organisation of working time of the employees. If works councils exist, they take part in the implementation of statutory and collectively agreed regulations. There are provisions regulating pay supplements for work during late opening hours, for night work in the retail industry and for work on Sundays and holidays. No such regulations are in place for a large part of the small businesses where now and then local authorities control after a fashion whether statutory regulations are complied with.

The strict regulations under the Shop Closing Act of 1956 have always been at the centre of controversial debates; market-liberal forces, in particular, have been very keen to liberalise opening hours. Since the German federalism reform of 30 July 2006, the German *Länder* have been responsible for regulating shop closing hours. At present, different regulations are in place in almost all German *Länder* regarding the opening hours on Sundays and holidays and in the early and late hours. Opening hours range from 0.00 to 24.00 hours (on working days) in Berlin to 06.00 – 22.00 hours in Rhineland-Palatinate.

It is noticeable that only larger department stores and grocery shops are currently using the extensively liberalised closing hours, while smaller shops in the city centres are returning to the usual opening hours.

### The Youth Worker Protection Act

The Youth Worker Protection Act is intended to protect children and youth against excessive stress, excessive workloads and workplace hazards. The Act applies to all individuals below the age of 18. It prohibits as a matter of principle the employment of children who are under 15 or still subject to compulsory schooling. The factory inspectorates may grant exceptional permission for a defined period of time to do some non-demanding work suitable for children (such as theatre and music performances etc.). Youth above the age of 15 is permitted to work during school holidays, but is covered by specific protective regulations, as are young trainees (no work underground and in workplaces where they are exposed to serious hazards, noise, heat, cold or intensive humidity etc.). In addition, trainees must be given the opportunity to attend courses in vocational training centres, including the time to get there and back. Depending on their age, young workers are entitled to a minimum period of leave of 25 to 30 working days per year.

### The Maternity Protection Act

In addition to protective legislation for the benefit of all women, the Maternity Protection Act grants special labour-law protection for the period prior to and after delivery. The Act regulates, among other things

- workplace design for pregnant women,
- a ban on physically demanding work or work exposing the pregnant woman to hazardous substances, gases, vapour etc. and also
- a general ban on work in the last six weeks before and eight weeks after delivery,
- the ban on work at night, on Sundays and extra hours (overtime),
- granting breastfeeding breaks without loss of pay etc.

Moreover, a woman cannot be dismissed during pregnancy and a period of four months after the baby is born. In contrast, she herself is entitled to terminate the contract during pregnancy or the period of protection in disregard of any

notice periods. During the period of protection, a female worker receives maternity benefits paid by her health insurance and a wage subsidy from the employer.

### The Disabilities Act (Social Code IX)

Severely disabled individuals are people whose earning capacity is permanently reduced by at least 50 per cent owing to a loss of physical, intellectual or mental faculty. The degree of impairment is determined by a statutory agency. The constitution prohibits discrimination on the grounds of disability; the Disabilities Act offers general protection and special support in their working lives to this group of persons.

The law stipulates that all public and private employers with more than 20 workplaces must leave at least 6% of these jobs to persons with severe disabilities. Employers who do not fulfil this obligation must pay a compensatory charge, irrespective of whether they are willing to employ severely disabled persons or not. The amounts depend on the number of jobs the company offers and the number of severely disabled persons it employs, but it is a relatively small sum – a maximum of 260 Euros a month. This is why many employers simply pay the charge without employing the required number of severely disabled persons.

Severely disabled persons who are employed are entitled to a job in which they can use and develop their skills and know-how to the best of their ability. Moreover, a representative body for the severely disabled must be elected in companies with more than five severely disabled persons to promote their collective and individual interests. It cooperates closely with the works council to this end.

Severely disabled persons enjoy special protection against dismissal. Any dismissal with notice requires the approval of the welfare authority, which is a body of the Länder responsible for activities laid down in the Disabilities Act. There must be well-founded reasons for an application for dismissal and proof

submitted. The welfare authority invites the job centre to comment as to whether there are chances of placing the worker in another job and asks for a statement from the works council and the representative body of the severely disabled. It is not possible to dismiss a severely disabled worker without the consent of the welfare authority.

Severely disabled workers are entitled to five additional workdays off during the calendar year.

In addition to the protection offered through labour-law provisions, severely disabled workers enjoy other advantages to compensate for their reduced earning capacity, for example tax advantages, they are entitled to free public transportation locally etc.

### **The Dismissal Protection Act**

This law protects workers against unfair and arbitrary dismissal and resultant job loss. Whether the Dismissal Protection Act is applicable depends, however, on the size of the enterprise and the start of the employment relationship:

- If the employment relationship started on 1 January 2004 or later, the law applies in companies with regularly more than ten employees, excluding trainees.
- If the employment relationship already existed on 31 December 2003, the law applies in companies with regularly more than five workers, excluding trainees, who were still employed by the companies at the date when the employment relationship was terminated. Employees recruited after 31-12-2003 are not considered.
- As of 1 January 2006 the provisions of the Dismissal Protection Act apply to newly-recruited workers after two years of service in the firm only.

Employees are counted as full-time workers if they are regularly employed for more than 30 hours a week. Individuals with shorter working hours are counted in percentage figures.

The law distinguishes between general and special protection against dismissal:

General protection against dismissal is granted to all employees covered by the provisions of the Dismissal Protection Act. Statutory notice periods apply to them accordingly (see below).

Special protection is granted to groups of workers in need of special protection:

- pregnant women and mothers for up to four months after giving birth (see Maternity Protection Act),
- severely disabled workers according to regulations of the Social Code, vol. IX (see Disabilities Act),
- employees during parental leave (pursuant to regulations of the Federal Act on Parental Allowance),
- employees doing their national military service or community service, alternatively or as a soldier serving a limited period (pursuant to regulations of the Job Protection Act).

Dismissals of these groups of persons are either completely prohibited or only permitted in exceptional cases if permission is granted by a government authority (see, for example, Disabilities Act).

Furthermore, special protection against dismissal is also granted to members of the works council, youth and trainee representatives, elected or potential board members of bodies specified in the works constitution (see Chapter 4).

According to the law, protection against dismissal is granted only after a waiting period of six-month continuous service with the firm.

### **Dismissal with and without notice (summary dismissal)**

A dismissal with notice means that statutory, collectively agreed or contractual notice periods are complied with (see on this “notice periods”).

A dismissal without notice means that no notice periods are applicable; this is only possible in serious circumstances, however (for example in the case of refusal to work, insulting discrimination against foreigners, physical confrontations, thefts on company premises etc.). The employee is also entitled to resign without notice if certain conditions are met (considerable wages in arrears, grave contract violations etc.).

#### **Written form of dismissal**

A dismissal will only take effect if it is submitted in writing. A verbal dismissal must be repeated in writing for it to be effective.

#### **Unfair dismissal on social grounds**

The Dismissal Protection Act protects employees from unfair dismissals on social grounds. In principle, only reasons related to the employee's personality or conduct justify a dismissal on social grounds or if urgent operational reasons call for a termination of the employment relationship. Socially unfair dismissals are ineffective.

#### **Dismissal on personal grounds**

This applies to cases related to the employee's personal qualities and skills, such as: lack of physical or intellectual ability to do the agreed job, no work permit in the case of foreign workers, permanent incapacity to produce the agreed output (prolonged incapacity to work, frequent short spells of ill health, permanently reduced capacity to work for reasons of ill health resulting in an unacceptable burden on the firm, and similar reasons).

#### **Dismissal on grounds of conduct**

A dismissal may also be justified by the employee's conduct. The reasons for this may be: refusal to work, being habitually late, physical attacks against supervisors and colleagues, theft on company premises etc. A dismissal on grounds of conduct must be preceded by a

written request to desist from such conduct<sup>90</sup>. The onus of proof rests with the employer.

#### **Dismissal for operating reasons (compulsory redundancies)**

Operating reasons may be related to internal circumstances or external factors (declining demand for labour owing to reduced orders or sales, change of production process, plant closures or rationalisation measures). In controversial cases the employer must prove that a management decision has been taken in favour of a compulsory redundancy.

If, owing to compelling operating reasons, several workers with comparable jobs must be dismissed, the employer must select these employees according to social criteria. Only workers who have been with the firm for more than six months and can therefore be dismissed with due notice qualify for selection. Criteria for selection on social grounds include the length of service, age, obligations to pay alimony and severe disabilities. The employer must apply these criteria to determine which of the workers are least affected by a loss of employment. The workers concerned must be informed about the social criteria applied for selection.

If a collective or works agreement stipulates how the above-mentioned criteria are to be ranked in order of importance, a labour court can only examine whether the selection procedure has been seriously deficient. This also applies if the employer and the works council have agreed on how to settle conflicting interests in the case of a change of production.

#### **Dismissal for variation of contract**

If the employer terminates the employment relationship and at the same time wishes to continue it, but alter its terms and conditions (for example by lowering pay), the procedure is called a dismissal for variation of contract.

<sup>90</sup> In a written request or adhortatory letter the employer expresses disapproval of the employee's conduct and threatens to take legal actions in future unless the conduct is changed.

Statutory, collectively agreed and contractual notice periods must be observed in these cases as well.

The dismissal for variation of contract is a genuine dismissal and can be accepted, refused or accepted with the reservation that it is not socially unjustified.

- If it is accepted, the employment relationship will be continued under changed conditions,
- if it is refused, the employee can institute proceedings in the labour court within a period of three weeks to contest the dismissal,
- if it is accepted with the above-mentioned reservation, it must be asserted by instituting proceedings in the labour court. Again, this needs to be done within a period of three weeks.

Until the labour court has ruled on the reservation made, the employee must work under the changed conditions. If the labour court rules that the dismissal for variation of contract has indeed been socially unjustified, the employment relationship continues under existing contractual conditions and the employer is obliged to compensate for lost wages. If, in contrast, the labour court decides that the dismissal for variation of contract has been socially justified, the employment relationship may be continued under changed conditions. The advantage of the procedure is that the worker can keep the job whatever the outcome.

If there is a works council in the enterprise, it must be heard before each dismissal. The employer must explain the reasons for the dismissal. A dismissal without hearing the works council is legally ineffective.

If the works council has reservations about a dismissal with due notice, it must inform the employer accordingly within a period of one week at the latest, or a reduced period of three workdays in the case of a dismissal without

notice. The works council can contest the dismissal with notice during such periods if it holds the dismissal to be unjustified. If the works council has raised objections and the worker has instituted proceedings in the labour court, the employment relationship must be continued until the case has been closed.

### **Legal action to protect against dismissal**

The employee can launch legal action in the labour court to protect him/herself against dismissal. The case must be filed within three weeks after having received notice. As part of the proceedings, the employee must file a request for the labour court to decide that the employment relationship still continues since the dismissal has been socially unjustified or is legally ineffective for other reasons. To this end, the facts necessary to prove the case must be made available to the labour court. If the worker fails to contest the dismissal in the period mentioned, the dismissal becomes legally effective, unless the worker can prove that he/she was not able to respond in time for reasons which are easy to comprehend. Under such circumstances, the labour court may belatedly admit the case by way of exception.

### **Severance pay when the employment relationship ends**

In the case of a dismissal for operating reasons the employee may decide not to sue and opt for a severance pay instead, provided that it is offered in the letter of dismissal. This option is available under the Dismissal Protection Act and amounts to half a monthly pay per year of employment.

If the labour court decides that the dismissal is socially unjustified, but ends the employment relationship on request of either the employer or the employee on the grounds that it would be unreasonable to continue it or no positive cooperation would come out of it in the future (because the relationship of trust was destroyed during the court proceedings through no fault of the employee), the labour court may dissolve the work relationship in return for payment of

compensation. The sums involved may amount to up to twelve times the monthly pay, for older workers between 50 and 55 years of age up to fifteen times and for those 55 plus up to eighteen times the monthly pay.

A collective agreement, a severance plan negotiated between the works council and the employer or an out-of-court settlement between the employer and employee may stipulate that compensation be paid for loss of job. The amounts paid are not subject to the restrictions quoted above, but income tax must be paid.

#### **Reasons for dismissal and practice in Germany**

During the last ten years<sup>91</sup>, the number and quota of legal action in connection with dismissals have been increasing. Compared to the period covered in the previous survey the number of dismissal cases has increased threefold (some 328,000 in 2003), the percentage of dismissal suits compared to all cases closed at the labour courts has increased from 44 to 52 per cent. Although the quota of legal action has doubled from 8 to 16 per cent, every sixth worker dismissed only contested his/her dismissal by taking legal action.

In two out of three cases, the reasons given for a dismissal nowadays have to do with compelling operating requirements, while in 1978 two out of three dismissals were based on conduct or performance-related arguments and one third on the basis of operating requirements. Almost 60 per cent of all suits instituted by employers related to operating requirements in 2003. In 1978 this applied to merely 18 per cent. The "... results of this shift of argument are, amongst other things, a considerable decline in the number of dismissals without notice, greater attention paid to the legal requirements for a dismissal on operating

grounds, especially to social selection, a greater willingness on the part of the works council to contest a dismissal and a greater frequency of and increased amounts paid for compensation in out-of-court settlements..."<sup>92</sup>

The labour courts ruled that something was wrong with the social selection procedure in connection with dismissals on operating grounds in every fifth case only (22 per cent at the local labour courts, 19 per cent at the regional courts), and in a total of 62 per cent of all suits filed the dismissal was not revoked; everything considered, only eight per cent of all dismissals for operating reasons handled by both courts failed because of faulty or non-existent social selection.

The works council members interviewed lodged a protest against dismissals in 34 per cent of cases at the local labour courts and in 38 per cent of cases at the regional level. Four out of ten protests lodged by works councils were dismissed as ineffective.

No more than every eleventh employee appears in court on his/her own, i.e. without legal counsel. Legal protection provided by the trade unions has become considerably less important, and so has the representation of employers by employers' associations. In contrast, legal representation by lawyers has gone up from 52 per cent in 1979 to 82 per cent; the authors of the above-quoted survey believe this to be the result of declining membership in trade unions or employers' associations, respectively, and the spread of private insurance for legal protection.

The percentage of controversial court decisions has gone down to eleven per cent at the local labour courts and 30 per cent at the regional

91 The last but one nationwide survey regarding dismissal protection and practice was carried out by the Max Planck Institute for Foreign and International Private Law, Hamburg, in the years 1978 – 1981. Data quoted in this paper originate from a survey at the labour and regional labour courts regarding dismissal-related disputes. The survey was carried out as part of a project by A. Höland from the Faculty of Law at the Martin Luther University Halle-Wittenberg in cooperation with Hans Böckler Stiftung in the period from 2003 to 2005.

92 Paper presented by Prof. Dr. A. Höland at the 5th Hans Böckler Forum on labour and social law in Berlin on 15 April 2005.



labour courts, while the number of suits closed by out-of-court settlements between the parties concerned has increased from 60 to 65 per cent. Equally, the percentage of compensatory awards to settle dismissal disputes has increased sharply from 63 per cent in 1979 to 75 per cent in 2003, at the regional labour courts to 81 per cent of the cases. Everything considered, just eight per cent of all dismissed workers are awarded compensation following legal action in the labour courts, while the large majority of them is paid according to so-called “social plans” (severance plans) or collective agreements. Every third controversial decision of the labour courts (out of a total of eleven per cent) is subject to appeal on issues of fact or law.

The main effect of the Dismissal Protection Act is of a preventive nature, i.e. the decision to terminate an employment relationship needs to be well-founded given the many protective mechanisms offered by the law, since an independent court of law can verify the situation; in consequence, the law contributes to a more rational and “to some extent a more humane approach when decisions on dismissals are taken”.<sup>93</sup>

#### **Continued payment of remuneration/sick pay**

Falling ill may prevent an employee from fulfilling his/her obligations under the work contract; this interrupts the exchange of work performance in return for wage payments and thus endangers the livelihood of those in dependent employment. It is therefore an important part of social security to ensure that sick workers are financially protected.

The different regulations for white and blue-collar workers of the past<sup>94</sup> were combined in the Act on Continued Payment of Remuneration

in 1970. In case of illness, blue and white-collar workers and trainees receive continued payment of wages for six weeks and 100 per cent of their net wages since 1999<sup>95</sup>. The following conditions must be met:

- the incapacity to work due to ill health must not be caused by the employee,
- the employment relationship must have been effective for four uninterrupted weeks, irrespective of the daily, weekly or monthly working hours.

If the worker is again unable to work due to the same illness, he/she does not lose the entitlement to continued wage payment provided

- he/she was not unable to work for the same reasons for a period of at least six months prior to the recurrence or
- 12 months have elapsed since the onset of the initial inability to work.

If these conditions are not met, wage payments are no longer made by the employer, but the health insurance responsible steps in by paying sick pay (see Chapter 1.5, statutory health insurance).

Other arrangements may be agreed in collective or individual agreements provided they benefit the worker. For example, the collective agreements in the public sector provide for an allowance to be paid for a period of between 26 to 39 weeks to supplement considerably lower sick benefits.

It is mandatory for the employee to inform the employer immediately, including by phone, about the inability to work and how long it will probably take. If it takes more than three

<sup>93</sup> A. Höland (see above).

<sup>94</sup> Regulations regarding continued payment of remuneration for sick salaried workers already existed in the mid-19th century, while blue-collar workers were worse off until the 1950s; this situation only improved in the wake of the large-scale strike of IG Metall in Schleswig-Holstein in 1956. At that time, the sick pay equivalent to 50 per cent of basic pay was increased in stages by pay supplements of the employers to 100 per cent by the time the Continued Wage Payment Act came into force in 1970, and waiting periods were abolished.

<sup>95</sup> This also applies to health cures (if indicated).

calendar days, a medical certificate needs to be presented which indicates for how long the worker will probably be unable to work<sup>96</sup>. If it takes longer than anticipated, a new certificate is required. It is not necessary to explain the medical symptoms. The employer may request a medical certificate at an earlier date.

If the employer has any doubts about whether the worker is genuinely unable to work, he/she may refuse to continue wage payments and even request an expert opinion of the health insurance in suspicious cases. Such doubts often arise in cases where the worker is unable to work for short periods with conspicuous frequency or if he/she is regularly unable to work at the beginning or end of the working week. Very serious cases may result in a dismissal for feigned inability to work.

The worker may be given time off with continued wage payment to look after a sick child, if there is a medical certificate to prove the need and no other person is available. Court decisions are based on the assumption that a period of five days should suffice for the worker to organise an alternative carer. Collective agreements or individual work contracts may either expand, restrict or exclude entitlements of this kind. If the worker is not entitled to time off for such purpose, he/she may be released from work on the basis of Social Code vol. V (health insurance) with the health insurance responsible paying sick benefits<sup>97</sup>.

Working time lost due to illness plummeted to a record low last year and reached the lowest level ever since the Continued Wage Payment Act was enacted in 1970; the average rate for 2006 amounted to 3.29 per cent of the set target in working time, or an average of 7.2 working days. During the last ten years, sickness ratios

have declined by more than 20 per cent. This decline is thought to be the result of workers feeling concerned about their job future and therefore going to work despite being ill.

### **Costs of continued wage payment**

All enterprises, irrespective of the number of staff, share the reimbursement costs incurred in connection with maternity and continued wage payments. The employers pay contributions for their workers to the latter's health insurance; in turn, the insurance refunds the cost resultant from maternity and continued wage payment due to illness. The levels of contributions vary: depending on the amounts reimbursed, the health insurances demand on average between 1 and 3.5 per cent (one can choose, for example, between reimbursements of 50, 65 or 80 per cent of gross pay to be paid in case of illness). The maximum to be paid, however, is the amount equivalent to the contribution assessment ceiling in the pension insurance (see Chapter 1.7 statutory pension insurance). The employers' share of social security contributions are not reimbursed in this context.

For the duration of maternity protection coverage (see Maternity Protection Act), female workers are refunded the full amounts of lost pay. The costs are shared between the employer and the health insurance: the insurance pays maternity benefits of 13 Euros a day and the employer makes up the difference to reach the net wage level. The employer must share the costs incurred for reimbursements of maternity protection and pays a contribution amounting to 0.18 per cent of the gross pay of the female worker for this purpose. In turn, employer expenditure will be refunded to 100 per cent. The employer's share of the total social insurance contributions is paid as a flat rate of 20 per cent of gross pay.

<sup>96</sup> This also applies to falling ill abroad (during the holidays, for example).

<sup>97</sup> See also footnote 2 in Chapter 2.5.

### The Federal Leave Act

Under the Federal Leave Act every employee is entitled to paid leave of 24 workdays in each calendar year.

Under the Youth Worker Protection Act (see above), the statutory minimum holidays range between 25 and 30 workdays, depending on the age of the youth. Severely disabled workers are entitled to an additional five days leave (see Disabilities Act). Having said this, most employees in Germany are, in fact, entitled to a leave of 30 workdays under existing collective agreements (see Chapter 4.2). This is slightly above the average among industrial nations.

If a worker falls ill during the holidays, sick days are not counted as part of his/her annual leave provided a medical certificate has been presented. Holidays must be scheduled according to workers's wishes unless this is impossible for operational reasons. Holidays must be combined into one continuous period, if possible, dividing them up is possible, fragmenting them into smaller units, however, is not permissible. To transfer leave entitlements to the next year is possible in exceptional cases only and must be used in the first quarter of the year. It is prohibited to take up any employment during annual leave.

### The principle of most favourable conditions

The principle of most favourable conditions is a principle of law applied mainly in labour law. It means that if various legal norms are in conflict, the norm most favourable to the worker concerned will be applicable. If a collective agreement (see below) stipulates the payment of an hourly wage of 15 Euros, the employer may agree an hourly wage of 17 Euros in the work contract, yet a wage below the collectively agreed level, say 14 Euros, would not be permissible.

## 3. The Collective Bargaining System

### Freedom of association

In their statutes, the trade unions affiliated to the German Trade Union Confederation have pledged allegiance to the constitutional system of the Federal Republic of Germany. It is above all an expression of their belief in the fundamental democratic rights of persons in dependent employment and the crucial right of trade unions, notably the freedom of association. The constitution (Basic Law) of the Federal Republic states in Article 9, para. 3, line 1 and 2:

"The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades and professions. Agreements which restrict or seek to hinder this right are null and void; measures directed to this end are illegal."

**Article 9 para. 3** of the Constitution distinguishes between individual and collective freedom of association.

**Individual freedom of association** is a right enjoyed by all working individuals, be it blue or white-collar workers, civil servants or trainees, both men and women, irrespective of whether they are German nationals or foreigners working on the territory of the Federal Republic. Every employee has the right to join a trade union and support the goals of his/her trade union. No one should be subjected to repressive measures in the workplace because of his/her union commitment. For example, measures taken by an employer against trade union members to penalise them for pursuing trade union goals are illegal. Conversely, no one can

be forced to join a trade union either. The struggle for other fundamental individual rights such as religious freedom, freedom of speech or right of ownership was always associated with freedoms granted to individuals, while the fundamental right to free association is a collective right since employees need to join trade unions before they are able to claim these rights.

In other words, article 9 para. 3 of the constitution protects the individual union member and guarantees his/her right to union activities in the workplace or in public without interference from the employer.

### Collective freedom of association

In addition, the trade union, as an association, is similarly protected against State and corporate interference in exercising its constitutionally guaranteed functions. In practice, it means that a trade union must not go through a State licensing procedure at its foundation because an association is free to formulate its statute and design its internal structures without being bound by State regulations. However, these associations must profess their loyalty to the free and democratic order, i.e. the constitution of the Federal Republic of Germany, they must be structured democratically themselves and follow a “bottom-up” decision-making approach as part of their statutes.

Some trade unions are even organised as a registered association and therefore act as legal persons governed by private law. This applies particularly to ver.di, the newly-founded united services union<sup>98</sup>. Even trade unions, which are not registered associations, are considered to be legal persons, notably incorporated associations to be precise.

The same rights and conditions apply to employers’ associations, which are equally protected under the provisions of Art.9, para. 3 of the constitution; in other words, the constitution protects the associations of both employees and employers against interference from third parties. This is why Germany has no statutory regulation regarding government arbitration in industrial disputes.

The trade unions and their members may also refer to other – international – regulations in support of their rights, in addition to the constitutional fundamental freedom of association, notably

- **Article 11 of the European Convention on Human Rights** (“... the right to ... freedom of association with others, including the right to form and join trade unions for the protection of his interests...”)
- **Conventions of the International Labour Organisation (ILO)** guaranteeing the right to freedom of association (Convention No. 87, Art. 2,3 and 8, No. 98, Art. 1 and No. 135)
- and relevant **treaties of the European Union**.

The bargaining parties:  
trade unions and employers’ associations

### The trade unions

The complexities of the industrial society result in constantly changing constellations bundling the many and diverse interests of individuals. This is why a great many different associations are operating in the Federal Republic for representation of their members in a trade or profession. The following features distinguish trade unions – as constitutionally protected associations – from such associations:<sup>99</sup>

<sup>98</sup> The United Services Union (ver.di) has been introduced in Chapter 2.

<sup>99</sup> These criteria have been developed on the basis of decisions of the highest instances (decisions of the Supreme Court) and are used for the purpose of assessing the status of an association protected under Art. 9, para. 3 of the constitution.

- the voluntary nature of membership: associations with compulsory membership are not constitutionally protected;
- they are non-adversarial and non-partisan: the decision-making process of labour organisations needs to be free from intervention by employers, the State, political parties and churches;
- they are external organisations: so-called “company unions” sponsored by the enterprises are not associations protected under the constitution;
- their purpose must be the safeguarding and promotion of working and economic conditions; they must see themselves as counterparts to the other social partner;
- their permanent nature: this form of association calls for a large number of permanent members and consequently exists irrespective of the level of membership at a given point in time;
- their willingness and ability to conclude collective agreements: a democratic decision-making process must ensure legitimacy to

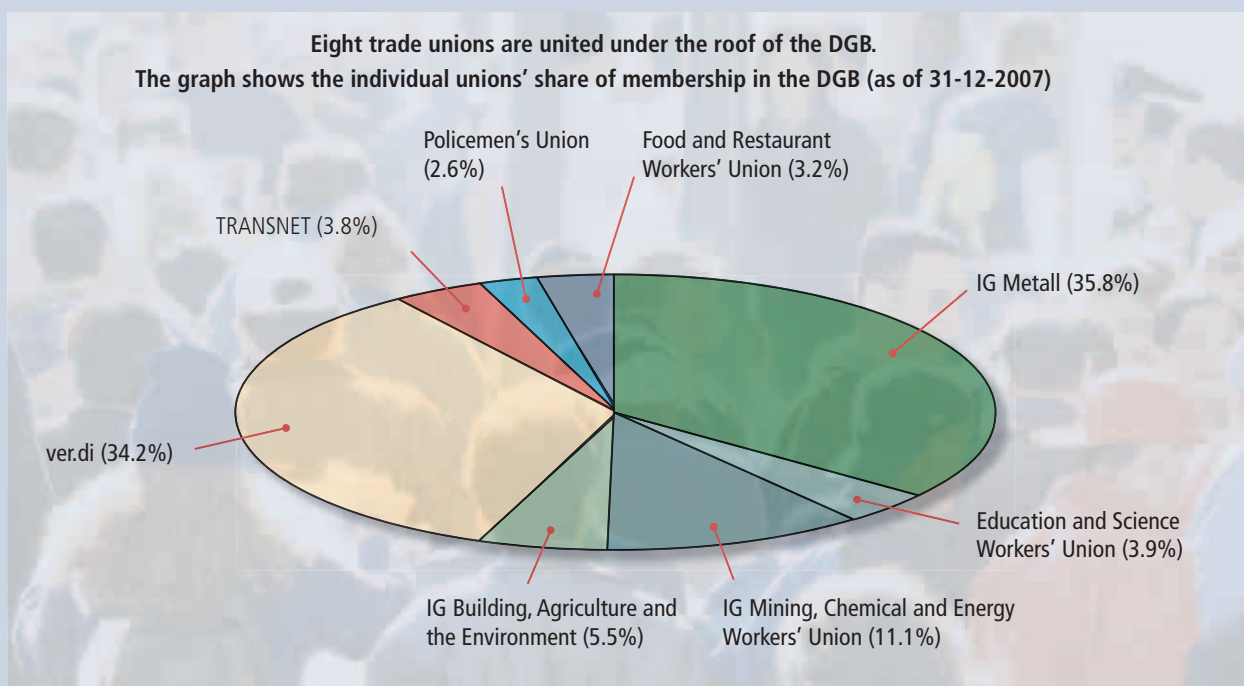
enable the association to conclude collective agreements on behalf of a group of workers;

- their willingness and ability to strike: the size, financial strength and policy objectives must enable the association to take strike action; in other words, trade unions must be willing and able to enforce their members’ interests by taking industrial action.

### Organised labour

The eight trade unions united under the roof of the German Confederation of Trade Unions (DGB) with some 6.5 million members meet all the above-listed criteria. They are represented in all sectors of the economy, including large sectors such as the metal and electrical industries, the public and private services sector or the chemical industry and minor sectors such as horticulture or the trades, and conclude more than 50,000 collective agreements regulating working and income conditions of their members. Between 6,000 and 7,000 collective agreements are renegotiated each year.

## Labour organisations



The DGB affiliates represent some 6.5 million members

The German Civil Servants' Association represents the interests of civil servants, but as a top-level association is not a trade union; however, it functions as a federation uniting 42 affiliated trade unions in the public and private services sector which have formed a bargaining union. This bargaining union is a competitor of the DGB affiliate ver.di<sup>100</sup>. The member trade unions organise white and blue-collar workers in addition to civil servants and therefore formally qualify as an organisation able to strike. The Civil Servants' Association and the bargaining union have some 1.2 million members.

Moreover, sixteen individual trade unions have united in the Christian Trade Union Federation (CGB) and organise 300,000 members in total (according to their own information). CGB affiliates organise in various industries and enterprises. They compete with the DGB affiliates in the same industry and usually conclude collective agreements which fall significantly short of those concluded by DGB trade unions. A good case in point is the temporary work industry where the bargaining union of Christian trade unions have agreed hourly rates, which are up to 15 per cent below those negotiated by the bargaining union of the DGB<sup>101</sup>. Similar cases are known from the metal and carpenters trades. CGB trade unions usually organise in areas where the pressure from employers to lower pay standards is particularly strong and the level of workers's organisation very weak.

In addition, various professional associations exist which represent the interests of specific groups of employees and conclude agreements for these groups.

Among those is the trade union of air traffic controllers (GdF), which had formed a bargaining union with the German Salaried Employees Union (DAG) up to 2003 when the latter merged with the DGB union ver.di. After disagreements about the merger between DAG and the DGB union ver.di, the GdF has acted independently as a bargaining party for air traffic control since the end of 2003 and concluded its first collective agreement for air traffic controllers in 2005. The GdF has currently some 2,900 members.

The German Cockpit Association organises air pilots and flight engineers and has some 8,200 members (according to its own information). The association concluded its first collective agreement in 2001 after having left the bargaining union with ver.di. In areas with overlapping interests of cockpit and cabin crews, the association cooperates with the union ver.di.

The Independent Flight Attendants' Organisation (ufo), founded in 1992, competes directly with the union ver.di and attempts to conclude agreements in its area of organisation. A new statute was adopted in spring 2007 after intense internal conflicts. According to information from the organisation, ufo organises some 10,000 flight attendants from all airlines operating in Germany.

The "Marburger Bund", an association with some 110,000 members representing salaried doctors and doctors from the civil service, plays a key role in hospitals and other healthcare institutions. This lobby group founded in Marburg in 1947 by medical doctors and students left the bargaining union with the union ver.di in 2005 and has carried out independent negotiations since a nationwide industrial dispute.

100 The united services union (ver.di) is the second largest DGB affiliate. More on this in chapter 2.

101 In the temporary work industry, six DGB trade unions (IG Metall, the Education and Science Union (GEW), the United Services Union (ver.di), the Industrial Union of Construction, Agricultural and Environmental Workers (IG BAU), the Railroad Workers' Union TRANSNET and the Police Union (GdP) have formed a bargaining union in order to negotiate a cross-sectoral agreement with the employers' association (Bundesverband Zeitarbeit) in this fast-growing industry (for example, temporary work increased by 23.6 per cent in 2007 compared to the previous year).



How the bargaining situation has been changing in Germany owing to the development of smaller occupation-specific sectoral unions is illustrated by the trade union of German train drivers (GdL). According to information from the organisation, this union organises some 18,000 of the total number of 20,000 train drivers and some 3,400 other operating staff. The total number given is approximately 35,000 members. Until the year 2002, the GdL was a member of the bargaining union comprising the German Civil Servants' Association and the DGB affiliate Transnet. After having unsuccessfully tried to negotiate a separate agreement for train drivers only in 2003, the GdL again opted out of the bargaining union of affiliates of the German Civil Servants' Association – at least de facto – when the Union of German Railroad Employees (GDBA, with some 50,000 members), which formed part of the bargaining union, concluded a collective agreement for the employees of German Rails (Deutsche Bahn, DB) in 2007 together with the DGB affiliate Transnet (some 240,000 members<sup>102</sup>). This collective agreement provided for a pay rise of 4.5 per cent for all employees of German Rails. In contrast, the GdL demanded a separate agreement for the train drivers and a pay rise of 31 per cent, which the employer turned down with reference to the existing collective agreement.

After the failed negotiations between the GdL and German Rails and negative results in arbitration, an original ballot was taken in which more than 96 per cent of train drivers organised in the GdL voted in favour of strike action to enforce a separate agreement.

Following the original ballot, the employer filed a request at some labour courts (Düsseldorf, Nürnberg and Chemnitz) for a court injunction against strikes because of “disproportion of means”. The courts of first instance followed

the employer's arguments in parts and permitted strike action in local and regional transport only, yet prohibited industrial action in long-distance and freight transport. Attention needs to be drawn to the fact that while strikes in local and regional transport affect millions of commuters, they exert relatively little economic pressure on the employer, since most commuters have already paid for their monthly ticket. In contrast, strikes in long-distance transport, and in freight transportation, in particular, would really hit the employer with costs of between 25 and 50 million Euros a day according to estimates of experts<sup>103</sup>.

The labour court injunctions and resultant prohibition of strike action described above are a novelty in the development of the right to strike in Germany. A ban on strike action is a fundamental contradiction to the constitutionally guaranteed freedom of association, and third parties are not allowed to interfere with the activities of bargaining parties as a matter of principle. The regional labour court of Saxony, to which the GdL submitted an appeal as the court of second instance, decided accordingly to cancel strike restrictions.

Whatever the outcome, a new page has been turned regarding the manner in which the autonomy of bargaining parties is handled in Germany:

On the one hand, the Saxon regional labour court denied labour courts the right to interfere with the autonomy of bargaining parties and left the decision on how to enforce union demands to the trade union concerned. On the other, the principle of bargaining unity (one shop, one agreement), introduced in 1957 by the Federal Labour Court in a leading decision, was put into question by a decision of court.

102 Of those, approx. 100,000 members work for German Rails (DB), the rest for other employers in the transport sector. In fact, Transnet and GDBA form a bargaining union for negotiations with DB and conclude agreements for some 130,000 staff.

103 Claudia Kempfert from the German Institute for Economic Research (DIW) in Berlin which is close to industry

The “triumph of bargaining autonomy” is a welcome development, yet the inroads made on bargaining unity appear problematic; they may motivate a growing number of professional associations and occupational groups to split away from their union in the pursuit of a separate collective agreement in disregard of the rest of the workforce in an enterprise. It has not taken some specialist groups long to react: approx. 125 flight rescue pilots of the ADAC<sup>104</sup> are demanding their own collective agreement and pay rises of 20 per cent.

While it may have been assumed thus far that fragmentation into occupational associations is a problem affecting primarily formerly public enterprises, in which the many and diverse professions and trades do not feel adequately represented by large trade unions such as ver.di with its 13 sectoral groups or Transnet, the current case of ADAC pilots proves that tendencies towards greater autonomy amongst small functional elites have reached the private sector and makes the bargaining activities of sector-wide trade unions more difficult.

Professional associations exist in almost all sectors of the economy, but they have not yet developed a high profile as parties negotiating a collective agreement. One of the largest associations is that of the healthcare professions, a registered association negotiating nationwide agreements for medical and veterinary assistants and regional agreements for dental assistants. This association has some 28,000 members (according to its own information).

### The Employers' Associations

The top-level organisation of German employers is called the Confederation of German Employers' Associations (German abbrev. BDA). It is a voluntary association of organised private employers and consists of 54 sectoral associa-

tions from manufacturing, commerce, financial services, transport, trades, services and agriculture, as well as 14 regional associations, which are subdivided into sectoral and regional associations. Approximately 75 per cent of all German private employers are a member of the BDA.

The BDA as the top-level organisation represents corporate interests in social policy at the national, European and international levels in connection with expert hearings in preparation of legislation and on the self-governing bodies of the social insurance. The BDA itself does not conclude collective agreements; this is the function of the individual national or sectoral association in the industry concerned as the negotiating counterpart of the trade union in that sector. As parties to the system of bargaining autonomy, the employers' associations are important partners of trade unions.

The largest BDA affiliate is the top-level organisation of all metal employers (**Gesamtmetall**), combining the employers' associations in the metal and electrical industries. The **National Chemical Employers' Association** is another large and influential BDA affiliate.

The associational policy of some private employers' associations is based on a special feature, i.e. the foundation of associations, which are not bound by collective agreements.

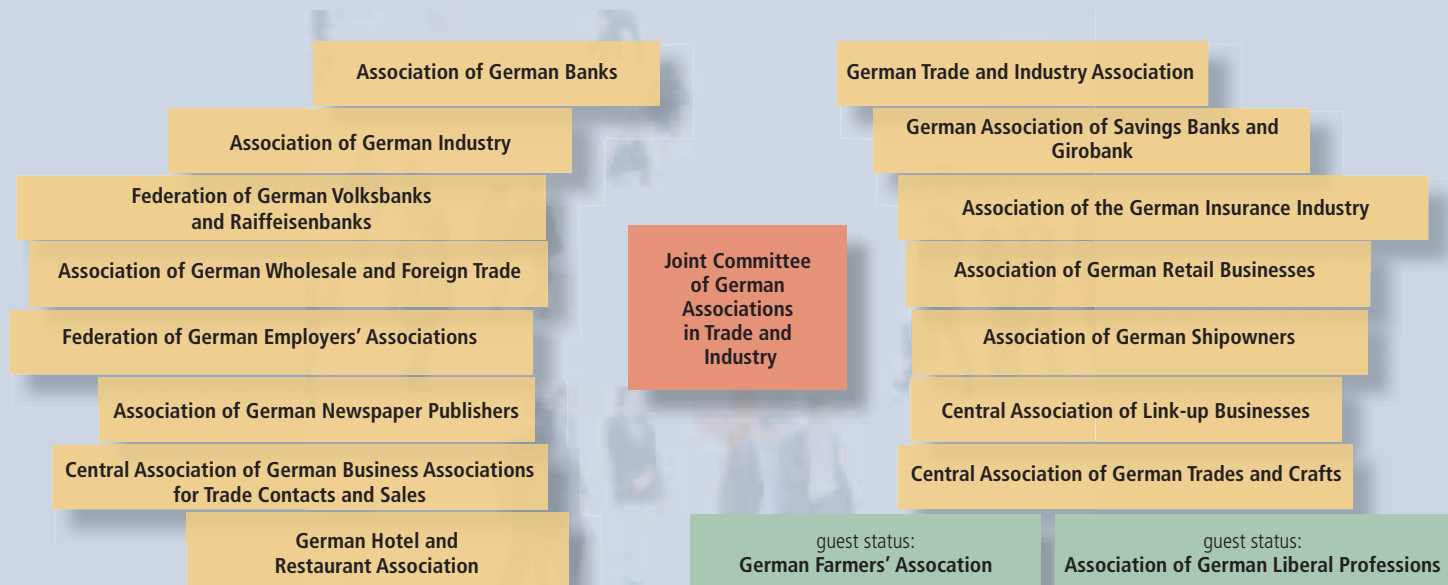
### Public employers

#### The Federal Government

Public employers are also organised in associations. For the purpose of bargaining, the Ministry of the Interior (German abbrev. BMI) is the employer of blue and white-collar employees of all national government institutions. In addition, the Ministry is responsible for administrative framework legislation for all

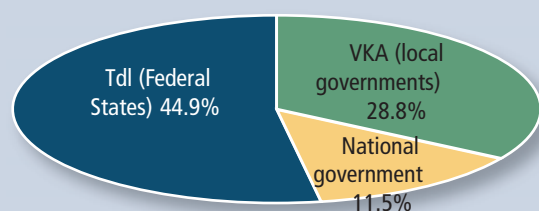
104 Allgemeiner Deutscher Automobilclub (German Automobile Association) which maintains its own flight rescue teams

## Organisations in trade and industry



civil servants, specified in the Civil Service Act at national and *Länder* levels. National government employees, including civil servants, make up approx. five per cent of all public-sector employees in Germany.

## Public Employers



Approx. 4.5 million individuals are working in the public sector, of whom some 1.8 million are civil servants and some 2.7 million blue and white-collar employees.<sup>105</sup>

The bargaining union of the German *Länder*

The German *Länder*, or States, have formed an employers' association as well which is called the bargaining union of German *Länder* (German abbrev. TdL). The TdL represents the interests of its members, especially with regard to collective agreements on pay and other matters. An employers' association, in which the Land concerned holds a dominating influence, may replace the *Land* itself as a member. This is currently the case in North-Rhine Westphalia and Baden Württemberg which left the TdL in 2007, or 1999 respectively.

14 *Länder* are currently members of the TdL; Berlin, as one of the *Länder*, was expelled in 1994 for non-compliance with TdL principles since it refused to accept divergent pay regulations for the eastern part of the city which is part of the acceding territory (formerly German Democratic Republic). In 2004, the Land of Hessen left the TdL. Bargaining partners of the

105 Federal Statistical Office 2006

TdL are the trade unions ver.di, the dbb bargaining union, the Marburger Bund and the construction workers' union IG BAU for the forest workers, while the GEW<sup>106</sup> union responsible for organising teachers, educators and scientists is represented by ver.di in negotiations. The TdL is funded through membership fees, each member pays the same amount. Some 27 per cent of public-sector employees in Germany, including civil servants, are employed by the Länder.

### The Association of Local Government Employers

Local governments and government enterprises form regional associations who are affiliated to the Association of Local Government Employers (German abbrev. Vka) as their top-level organisation. The Vka represents the interests of local government employers with some two million employees in matters of bargaining and labour law. Approx. 28,8 per cent of public employees, including civil servants, are employed by local governments.

If an individual employer is not affiliated to any employers' association, and this is true for almost half the employers in the new Länder, they may conclude a so-called company agreement with the trade union responsible for that sector; in contrast, employees can only conclude collective agreements through a trade union, while a works council, for example, or an organisation which does not fulfil the above-quoted requirements, is not qualified to do so.

### Bargaining autonomy

Bargaining autonomy, the backbone of union activities in the Federal Republic of Germany, also emanates from the fundamental right of free association. Art. 9, para. 3 of the constitution does not only enable the trade unions to exercise a fundamental right collectively, but

empowers them to regulate the working and economic conditions of employees in free and independent negotiations with employers and their associations within the scope defined by the constitution; such collective agreements have almost force of law and compliance with them can be enforced through the labour courts.

### Autonomy in collective bargaining means that (Art 9, para. 3 Basic Law)

... (3) the right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades, occupations and professions. Agreements which restrict or seek to impair this right shall be null and void; measures directed to this end shall be illegal. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91, may not be directed against any industrial conflicts engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.

Trade unions set their own bargaining agenda in terms of content and means to be used. As non-governmental organisations, they are empowered by the constitution to set minimum standards for the working and economic conditions in their area of organisation by means of collective agreements concluded with the employers in free and independent negotiations; it is not possible to go below these standards, which – similar to statutory regulations issued by the State – are enforceable in the courts, if required.

106 The industrial union of construction, agricultural and environmental workers and the education and science union were introduced in Chapter 3.

The underlying concept of social partnership is hereby implemented by the parties to collective agreements. There is a fundamental consensus about this amongst forces in society, which causes the State to refrain from intervention, for example during industrial disputes, or from forced arbitration.

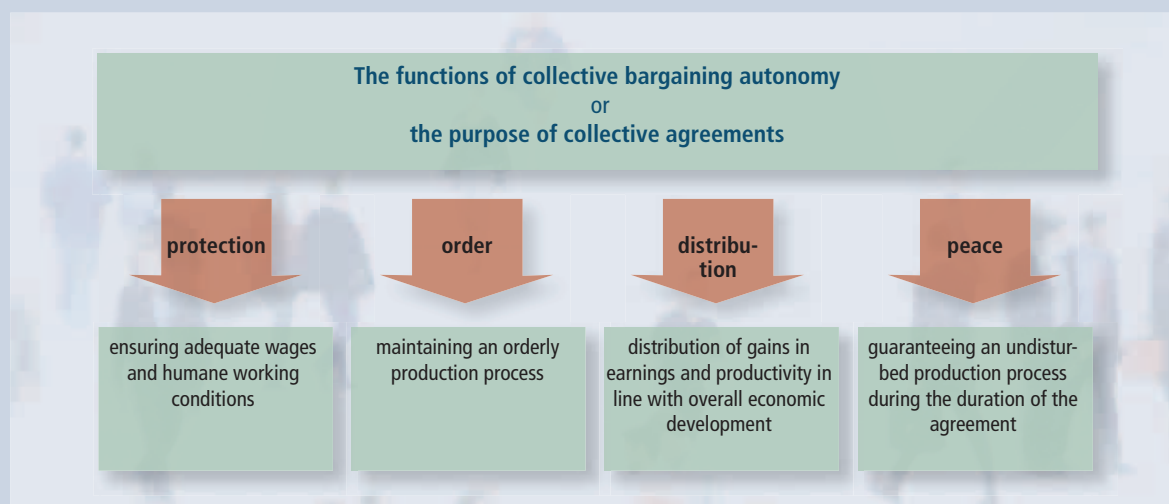
### The Collective Bargaining Act

The autonomy of bargaining parties is the result of decades of labour struggles in the 19<sup>th</sup> and 20<sup>th</sup> century. In the wake of the revolution of 1918, it was first enshrined in the constitution of the Weimar Republic and when the Federal Republic of Germany was founded in 1949 (see above) it also became part of the Basic Law. It was against this background that the Collective Bargaining Act was adopted in 1949, which regulates the rights and duties of the parties to the agreement, sets out legal standards applicable to the content, beginning and termination of employment relationships and deals with shopfloor and works constitutional matters. The Act describes in more concrete terms what the constitutionally protected freedom of association entails.

The Collective Bargaining Act sets out in detail the parties entitled to conclude collective agreements, notably an individual employer, employers' associations and the trade unions. In addition, it regulates the possible content of collective agreements and the parties bound by it. It also offers the option of declaring collective agreements to be generally binding provided this is in the public interest and the national or Länder governments believe this to be necessary, and the bargaining parties have given their consent<sup>107</sup>. A special form of generally-binding agreements on pay exists in the building industry, albeit based on the Posting of Workers Act regulating statutory minimum pay, since it does not require the consent of employers on the bargaining committee.

Moreover, the Bargaining Act formally regulates how to maintain a register of collective agreements and how to make them public. It does not contain regulations regarding industrial disputes. This is a matter settled by labour court decisions in the course of previous industrial actions.

### The functions of collective bargaining autonomy



<sup>107</sup> The Federal Minister of Labour may declare collective agreements to be generally binding if one of the bargaining parties submits a request; this procedure calls for approval by the bargaining committee, consisting of an equal number of employer and trade union representatives; the agreement may be declared generally binding if the employers covered by the agreement employ no less than 50 per cent of employees covered and if it is in the public interest. Generally-binding regulations of this kind exist in some sectors such as hairdressing and building-cleaning services. Some 500,000 employees are currently covered by such regulations.

### The collective agreement

The formal elements of the collective bargaining system are set out in the Bargaining Act. According to the law, only trade unions have the right to conclude collective agreements on behalf of employees. The German Confederation of Trade Unions (DGB), as the top-level organisation, does not conclude agreements although it may be authorised to do so by one or more of its affiliates. On the part of the employers, several employers' associations have also united in top-level organisations (see above).

Based on their mandate set out in the statutes, substructures of trade unions may also conclude collective agreements with regional employers' associations or individual employers. A good case in point are company or works agreements with individual employers who are not a member of an employers' association (e.g. a public local transport firm which is not part of the public sector) or for large corporations (e.g. collective agreements for Volkswagen plants).

Collective agreements are binding on the contracting parties for the time specified in the agreement. There is no opt-out clause for employers by simply leaving the employers' association.

Formally, a collective agreement is divided in two parts:

A **contractual** or **obligatory** part, which is binding only on the contracting parties – i.e. trade union and employers' association – and not on individual workers or employers. This section sets out the rights and duties of the parties to the agreement regarding the manner in which it comes into force, is implemented or terminated. The obligatory section also covers the duty to refrain from industrial action and the duty to exert a positive influence on the membership in favour of the agreement.

The **duty to refrain from industrial action** entails the contracting parties' obligation to

maintain industrial peace during the life of a collective agreement.

The duty to influence the membership entails the two contracting parties' obligation to ensure that their respective membership respects the collectively agreed terms and conditions.

The second **normative** section regulates the employment relationship between the members of parties to the agreement and deals with content, the beginning and termination of employment relationships and shopfloor and works constitutional matters. These legal standards must be directly and compulsorily applied (almost having force of law) by the parties to the collective agreements and do not require any separate contractual agreement between the individual employee and employer; in fact, it is not even necessary for the individual employee or employer to take note of the collective agreement. These legal standards continue to apply after termination of an agreement until a new collective agreement comes into force.

Collective agreements are directly effective and mandatory for specific groups of **persons, occupations or sectors and geographical areas** in the context of collectively regulated employment. This illustrates that a collective agreement may cover very different subjects.

**On a person-related level**, a collective agreement may apply to blue-collar workers only, for example, thus excluding other groups of persons. In addition, different wage or salary agreements exist for blue and white-collar workers. Trade unions usually conclude so-called agreements on pay nowadays and have abandoned the distinction between salaried and production workers which no longer reflects adequately current reality.

**On a sector or occupation-specific level**, a collective agreement may apply to a specific branch of industry and cover all occupations or jobs in



that sector. In theory, an employer who is bound by the agreement is free to employ unorganised workers under conditions diverging from those collectively agreed since the normative part applies to members of the respective parties to the agreement only. In practice, though, an employer will hardly use this option since it would certainly increase the level of unionisation amongst the workforce if he/she were to do so.

Moreover, a collective agreement may deal with standards related **to shop floor and works constitutional matters** (occupational health and safety, questions of how to maintain the internal order etc. or expanding participatory rights of the works council), which are mandatory even if only the employer is a party to the collective agreement, irrespective of whether the employee is bound by the agreement as well.

**Geographically**, a collective agreement may cover a specific district or region, one of the *Länder* or apply nationwide. In the area of jurisdiction of the trade union ver.di, for example, we distinguish geographically between the old and the new *Länder*. The unification treaty called for a successive transfer of the bargaining law applicable to employees in the old *Länder* to those in the public sector of the new *Länder*. Owing to the specific structures of public administrations and enterprises in the

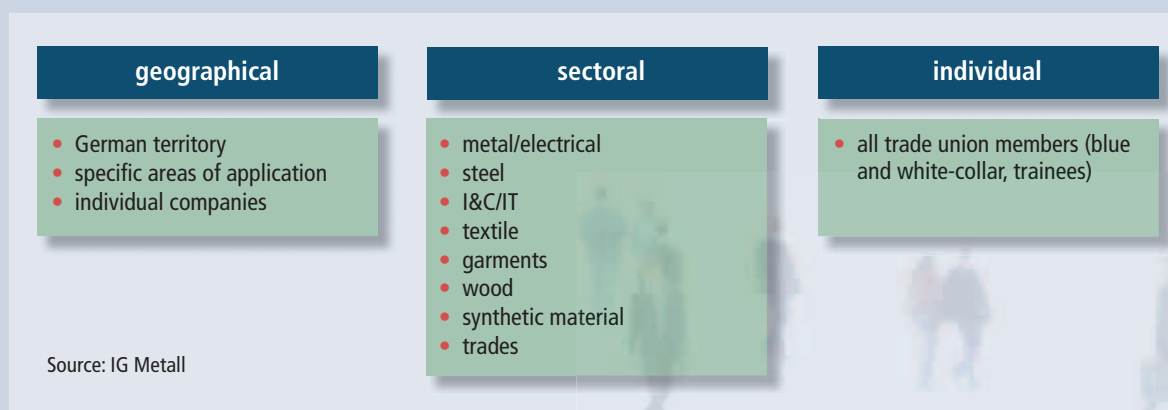
new *Länder*, the relevant collective agreements apply to either the western or eastern part of Germany since it has not yet been possible to completely harmonise existing terms and conditions of collective agreements.

The Federal Minister of Labour and Social Affairs, in consultation with the bargaining committee consisting of three representatives each of top-level organisations of the employers and employees, may declare a collective agreement generally binding, provided the employer employs at least 50 per cent of the employees covered by the agreement and this appears to be in the public interest.

Collective agreements have a protective function: they shield individual workers from having working conditions imposed by the employer unilaterally. They also have a regulatory function: millions of employment relationships are standardised by means of collective agreements. Collective agreements enforce the principle of most favourable conditions since standards defined within the framework of collective agreements may be expanded for the benefit, but never undercut to the detriment of workers. Additionally, they have a peace function: industrial action or lock-outs are prohibited during the life of collective agreements.

The advantages of such a system for the employees are self-evident: working conditions of

### Scope of application of IG Metall collective agreements



a large number of dependently-employed workers at different locations in a region or – in the case of ver.di across the nation – can be safely regulated by the trade union, and wage dumping amongst members of the same profession or trade be prevented.

On the part of the employers, collective agreements create a level playing-field geographically, sectorally and staffing-wise and exclude industrial action during the life of an agreement.

### The different types of collective agreements

We distinguish collective agreements according to the manner in which they have been concluded:

- association-wide or centralised agreements concluded between a trade union and an employers' association across an entire industry;
- house or company agreements concluded between a trade union and a single employer who is not affiliated to an employers' association;
- parallel agreements, i.e. agreements with the same coverage concluded between several trade unions and one employers' association or one employer, respectively, and
- generally binding agreements.

We also distinguish according to content:

- **wage/salary agreements (agreements on pay)** defining the level of wages/salaries or training allowances, respectively, while the collective agreement is in force. They are usually concluded for a period of one year since general economic conditions will normally change in the course of a year. However, a number of agreements apply for a longer period or even provide for phased increases beyond one year. Joint agreements for both blue and white-collar workers are increasingly being concluded, and the distinction between wage

and salary agreements<sup>108</sup> will soon become a matter of the past.

- **Skeleton and framework agreements.** Skeleton agreements regulate working conditions and deal with, for example, deadlines for contract termination or the length of the probationary period, the distribution of regular weekly working time, number of holidays, questions related to shift and swing-shift jobs or principles pertaining to in-house pension provisions. Skeleton agreements are largely concluded for a longer period of usually five years.

Framework agreements determine the various wage or salary grades, define the components of teamwork or regulate performance-related pay. The number of wage/salary grades varies according to trade union and/or industry. Blue-collar workers are frequently divided into 5 to 7 wage grades, technical and clerical workers into 5 to 6 grades, master crafts-persons/supervisors are usually paid according to 3 to 4 salary grades. Again, framework agreements are usually in force for a period of several years since framework conditions normally change only over a prolonged period.

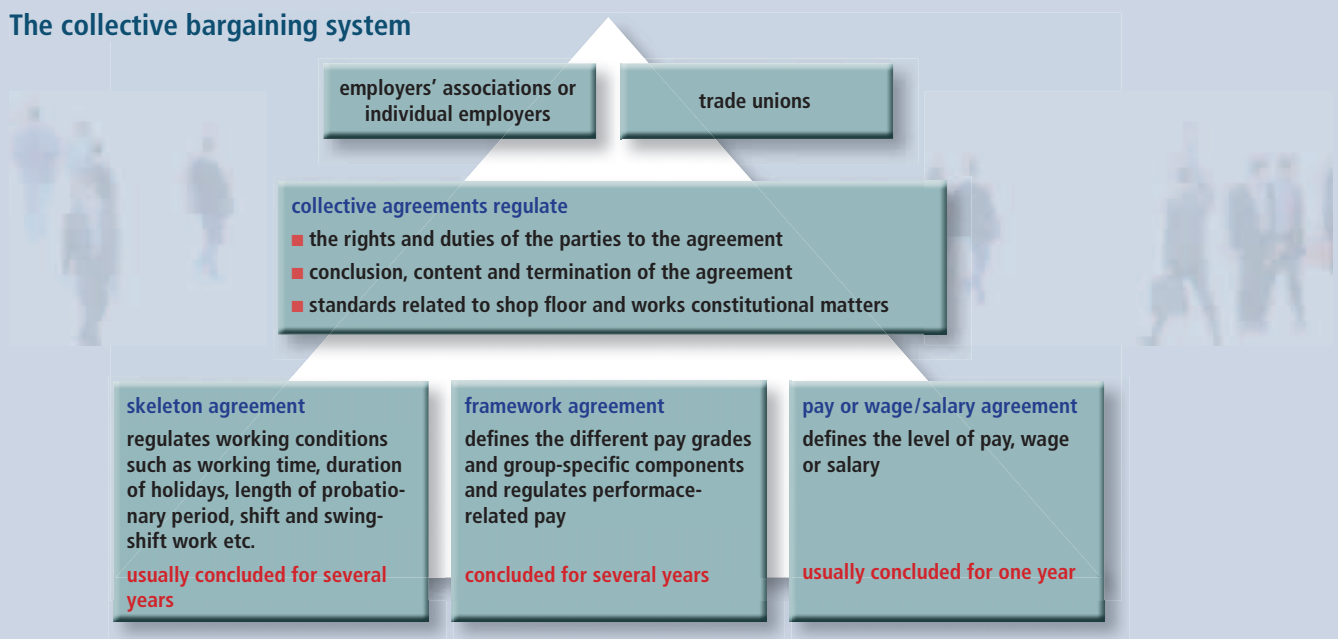
- **Special agreements.** In addition to the various forms of collective agreements described above, many and diverse agreements are in force: there are agreements regulating the details of in-house pension provisions, VDU jobs, protection against rationalisation, early retirement, questions of training and advanced training or flexibilisation of work time. Most special agreements are in force for a prolonged period of five or more years.

### Bargaining disputes

At the centre of public attention are mostly negotiations on pay rises. Wage and salary agreements are concluded almost every year for some 19 million workers in the western (old) and for some 3.5 million workers in the eastern (new) *Länder*.

108 Wage is the term used to describe the pay of blue-collar or production workers, salary the pay of white-collar or salaried workers. These differences are regarded as obsolete so that current agreements often use the term pay. (see above)

## The collective bargaining system



The IG Metall, for example, has seven regions subdivided into bargaining areas. This structure is determined by the concentration of members in specific geographical areas. Major production plants of the Daimler AG etc. and many supplier companies for the automobile industry are located in the region of Baden-Württemberg, for example, with resultant concentration of members; the region is divided into two bargaining areas – North Württemberg/North Baden, South Württemberg/Hohenzollern/South Baden, of which the first is the bargaining area with the largest membership. This is where negotiation results are usually attained which set a trend to be followed by other IG Metall bargaining areas, although they may not always be able to achieve the same in every respect.

At the start of negotiations, the IG Metall prepares an expert opinion about the economic situation, and its executive committee determines the framework for union demands. In the workplace, at assemblies of members and shop stewards and assemblies of delegates from local union offices, decisions are taken on the demands to be made based on this information. The bargaining commissions, consisting of

members from the companies in that area and local union officers, then decide on the actual demand, which needs to be confirmed by the executive committee. At the same time, the **bargaining commissions** ask the executive committee to give notice of existing collective agreements to be terminated after the required period. Four weeks prior to the expiry date of the agreement, the demands are submitted to the employers' association.

### The role of the bargaining commission

- it consists of union members from the companies in that area and local union officers;
- its members are elected locally and confirmed at a regional conference;
- it prepares negotiations for a new agreement;
- it determines demands to be made;
- it decides on whether to reject or accept the results of negotiations.

At the suggestion of the IG Metall regional director, the bargaining commission sets up a negotiation commission, and negotiations start two weeks prior to the expiry of the agreement.

The **duty to refrain from industrial action** (maintain industrial peace)<sup>109</sup> ends four weeks after expiry of the agreement. If negotiations are successful during this period and the result is accepted by the bargaining commission, a new agreement is put in place. If this period ends without results, the trade union may press the employers by organising **token ("warning") strikes, demonstrations or other forms of action** while negotiations continue.

One or both parties may declare negotiations to have failed. If the bargaining commission becomes convinced that no agreement can be reached through negotiations, it may declare negotiations to have failed. If the two bargaining parties agree to go into **arbitration**, an eligible non-partisan chairperson, to be agreed on by both parties, will be appointed immediately or be determined by drawing names. Similarly, the associate panel members of both parties will be nominated without delay. Following that, the arbitration panel will convene within a period of three workdays and is expected to submit an **arbitration proposal** within five workdays, which may be extended by another three days if major difficulties arise. If, for example, the bargaining commission does not accept the arbitration proposal, it will apply to the IG Metall executive committee for an original ballot to be held and strike action. The original ballot will be organised, and a minimum of 75% of members in the bargaining area concerned will have to vote in favour of strike action in a secret ballot. The start of industrial action will be determined simultaneously. In the event of strike, the trade union calls upon

its members to stop working, while union representatives (shop stewards) monitor compliance. While the strike is going on, bargaining talks are held with the employers. If an acceptable result is achieved, the bargaining commission will recommend its adoption provided a minimum of 25% of the members in that bargaining area vote in favour of adoption in a second original ballot. If this is the case, the strike will be called off and a new collective agreement signed.

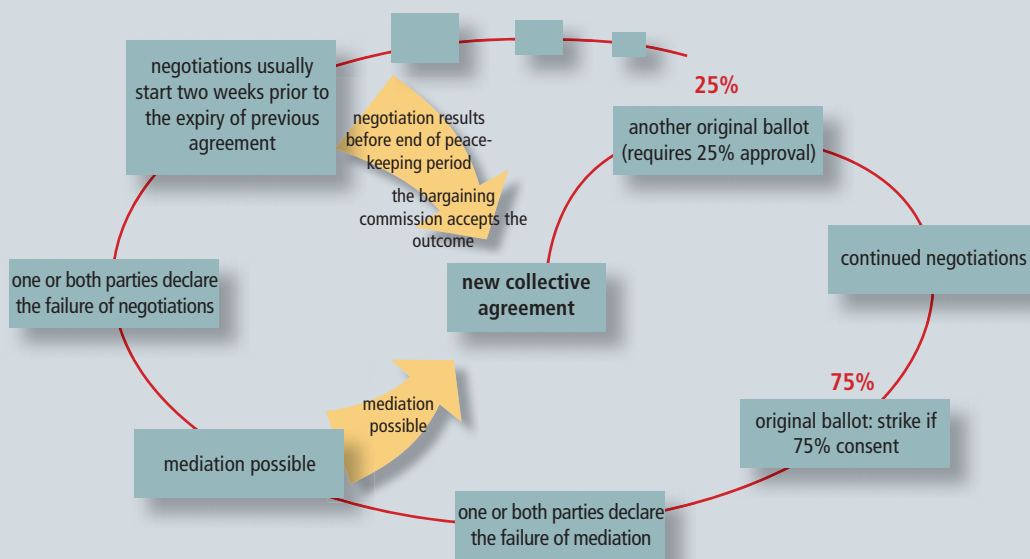
### Industrial action

A strike can only be carried out by trade unions. Organisations without trade union status are not allowed to strike. A strike needs to be reasonable in the sense that its objectives and implementation take into account what is economically feasible and should not be against the public good. In its jurisdiction, the Federal Labour Court has defined three criteria to be applied to a strike:

- The strike must be appropriate and to the point in order to attain legitimate goals. It must be used as a last resort when all other options have been exhausted. Arbitration must therefore be possible as a matter of principle.
- A strike must be carried out according to rules of fair play and not aim at destroying the opposite party. Moreover, bargaining parties must do everything possible to restore industrial peace once the strike is over.
- A strike must be carried out for the purpose of concluding a collective agreement. In consequence, strikes for political ends are not permissible, since in a parliamentary democracy the decision making process is the remit of political parties. The German Confederation of Trade Unions holds political strikes to be permissible only for the purpose of protecting the free democratic order of the State.

<sup>109</sup> During the life of a collective agreement until four weeks after it has been terminated, industrial action is prohibited: the parties to the agreement must observe the duty of maintaining industrial peace.

## Bargaining procedure – successful outcome of negotiations



The bargaining parties must agree on the type of emergency or essential services to be maintained while the strike is on. They have to see to it, for example, that operations are continued which are necessary for the protection of the company, or for the prevention of hazards emanating from the company. In addition, plant installations must be maintained in a manner that ensures immediate resumption of work after the strike. In the event that the strike parties cannot agree on such measures, the labour court responsible can take the necessary decisions. Co-determination rights of the works council have to be taken into account when these operations are identified.

As a matter of principle, a strike for the purpose of enforcing an agreement requires an original ballot of all union members in the bargaining area concerned. When the managing executive committee initiates the strike ballot, it also appoints a team of strike leaders. This team acts on behalf and on the instructions of the managing executive committee. It initiates procedures for a secret ballot in which every union member in the bargaining area affected is entitled to the same right to vote.

If a minimum of 75% of those entitled to vote decide in favour of industrial action, the managing executive committee will take the decision to strike. If industrial action results in new negotiations and an outcome deviating from the original union demands for which the ballot had been taken, another ballot is required on whether to adopt the new outcome. A minimum of 25% of those casting their vote in this second ballot must be in favour of adopting the result. In other words, while at least 75% of those entitled to vote in the bargaining area concerned must be in favour of strike action, a quarter of members who take part in the voting suffices for adopting the results.

As a matter of principle, a strike can only be called if there is no longer the duty to keep industrial peace, i.e. if the controversial collective agreement has effectively been terminated. In addition, all reasonable negotiating options available must be exhausted and arbitration procedures provided under the collective agreement must have ended without result.

Members opposing orders or instructions from the team in charge (of leading the strike) may be expelled from the trade union. There are usually strike pickets in front of the company gates in order to draw public attention to the fact that a strike is on and to deter staff members unwilling to strike from entering the premises. Persuasion, not physical force should be used to tell those willing to work that they ought to show solidarity with the colleagues on strike. Blocking access to company premises is not permissible either, i.e. the striking union may be sued for damages in such a case.

The basis for any industrial action is the right to strike enshrined in the Basic Law, and high court rulings, which spell out the right to strike by defining strict criteria applicable to such action.

### Lockouts

Lockouts are defined as the refusal by one or several employers to give workers in their employment access to the workplace and refusal to pay wages at the same time. All members of the workforce, those on strike or only specific groups of workers may be locked out. It would, however, be unlawful to lock out members of the striking union only, while non-organised workers are given access to the premises.

There are no constitutional provisions regarding lockouts; the procedure evolved through rulings of the courts. Strike action is to be balanced by lockouts. The following principles need to be borne in mind:

Lockouts must be appropriate and necessary to attain the goals and also restore industrial peace subsequently,

- they may be used as a means of last resort only,
- they must observe the rules of fairness,
- they must not be intended to destroy the opposite party.
- In the case of a centralised agreement, the entire association must decide in favour of a lockout.

From the union perspective, lockouts aggravate existing imbalances between labour and capital resulting from the economic conditions. Trade unions regard lockouts as arbitrary and undemocratic and therefore demand a ban on lockouts.

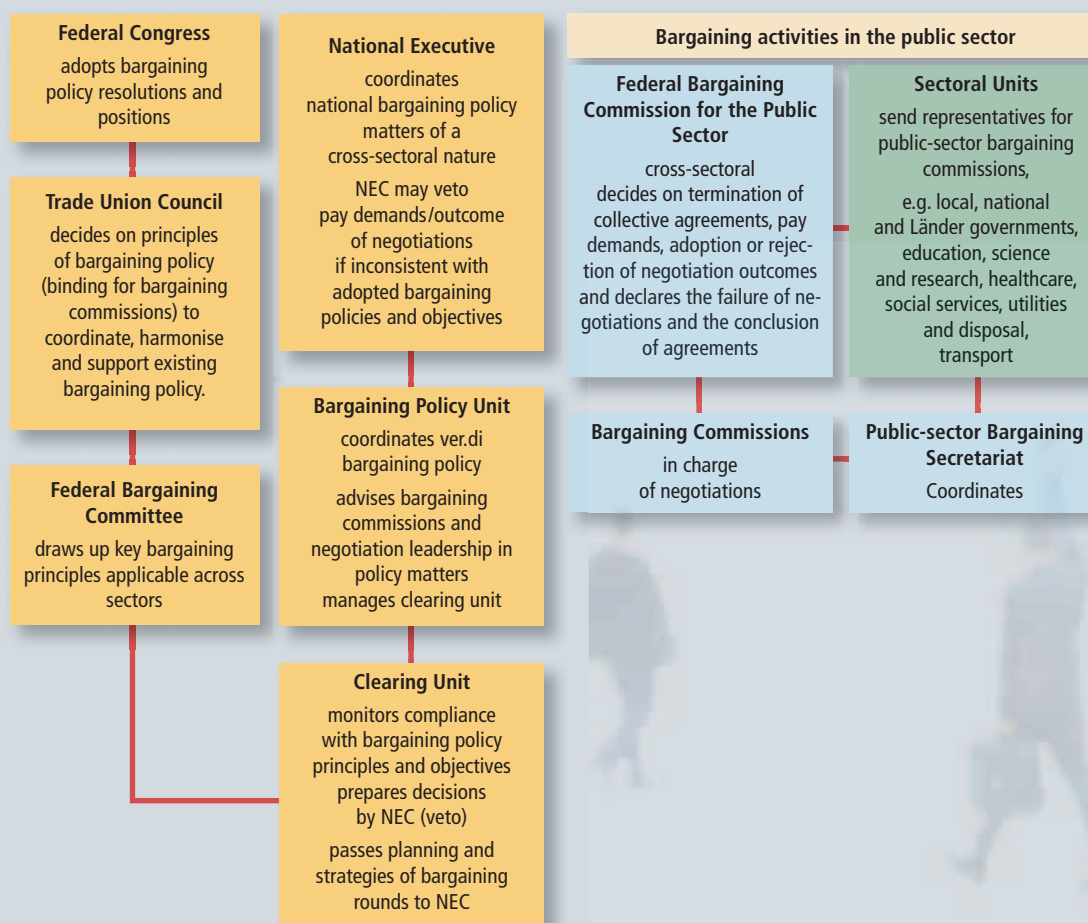
### How bargaining procedures are organised at ver.di

Owing to its specific structure, ver.di has set up a so-called clearing panel to coordinate and control bargaining activities by its 13 sections; this panel deals with overlapping activities and jurisdictional competition, which will inevitably arise.

It is tasked with monitoring compliance with policy positions in cases of controversy or hardship and examining the need for any deviations that arise. The clearing panel may impose conditions, request alterations or recommend to the executive committee to veto an agreement negotiated by the negotiating team, if required (see also section 3 of this chapter).



## Bodies involved in bargaining at ver.di



#### 4. The Future of the Centralised Collective Agreement

##### Retrospective

Steadily growing mass unemployment since the 1980s and 90s resultant from the enormous restructuring of all sectors of the German economy in the course of globalisation, and the transformation of the planned economy in the former GDR into a (social) market economy, associated with massive cutting of jobs protected by social insurance in the two parts of Germany, have caused liberal and conservative political parties<sup>110</sup>, representatives of business and eco-

nomic associations and market-oriented academics to query the concept of centralised collective agreements in the last few years and to demand reforms towards greater decentralisation and differentiation.

Another result of this development has been the loss of membership that affected all large organisations in society, ranging from political parties and churches to the trade unions and employers' associations. The way in which this development has affected the trade unions has already been described in chapter 2, but a similar, albeit not quite so dramatic, development could be observed amongst employers.

<sup>110</sup> The campaign started in the western Länder as early as 1982 with the so-called Lambsdorff paper which raised the question of Germany as a "business location" in the public debate. The paper argued that the German economy was no longer competitive, wages and non-wage costs were too high, operating time of machines too short, the fiscal burden too high for business, and that the State interfered too much in the free market.

## Systems of and coverage by collective agreements in Europe

	cross-sectoral	sector	enterprise/ firm	coverage in % of all workers
Belgium	●●	●	●	90% +
Ireland	●●	●	●	no data
Finland	●●	●●	●	70% +
Austria		●●	●	98%
Sweden		●●	●	90% +
Italy		●●	●	90%
Netherlands		●●	●	88%
Portugal		●●	●	87%
Denmark	●	●●	●	83%
Spain	●	●●	●	81%
Germany		●●	●	67%
Greece	●	●●	●	no data
France	●	●●	●●	90–95%
Luxembourg		●●	●●	59%
Great Britain		●	●●	36%

●● most important level of negotiations

● additional levels of negotiations

## Coverage by collective agreements

While it was generally assumed until the late 1980s that some 60 per cent of employers in the western Länder were organised in employers' associations, the situation has changed a great deal since then: a growing number of companies and firms leave the associations, and many employers in the eastern Länder never joined employers' associations in the first place. The level of organisation amongst businesses declined to 46 per cent in 1990, to 34.4 per cent in 1998 and finally to no more than 22.5 per cent in 2003.<sup>111</sup> An often-quoted reason for this drain of members is the associations' strong orientation of policy towards the interests of big companies, while small and medium-sized firms do no longer feel adequately served and so have left the association.

In order to compensate for these losses, the employers' associations have set up associations without coverage that offer members the benefits of being part of the organisation and obtaining corresponding services without the obligation to accept the standards set out in centralised agreements.

A good case in point is the metal and electrical industry<sup>12</sup> with 16 employers' associations and a top-level organisation for all employers' associations in the metal and allied industries called "Gesamtmetall" (German abbrev.). According to information provided by *Gesamtmetall*, 1,514 businesses with 171,590 workers were organised in associations without coverage, while 4,425 businesses with a total workforce of 1.76 million were affiliated to employers' associations covered by agreements across Germany

111 Thomas Haipeter and Gabi Schilling, Von der Einfluss- zur Mitgliedschaftslogik. Industrielle Beziehungen, 13th year, issue 1, 2006

112 Thomas Haipeter and Gabi Schilling. Tarifbindung und Organisationsentwicklung: OT-Verbände als Organisationsstrategie der metallindustriellen Arbeitgeberverbände. Institute for Labour and Technology in the Science Centre (North Rhine-Westphalia), Yearbook 2005/2006.

in 2005. In other words, one quarter of businesses with some 9 per cent of employees are not covered by a collective agreement. This tendency is far more conspicuous in the eastern Länder: the percentage of metal firms affiliated to an employers' association amounts to approx. 7.6 per cent in that part of Germany today!

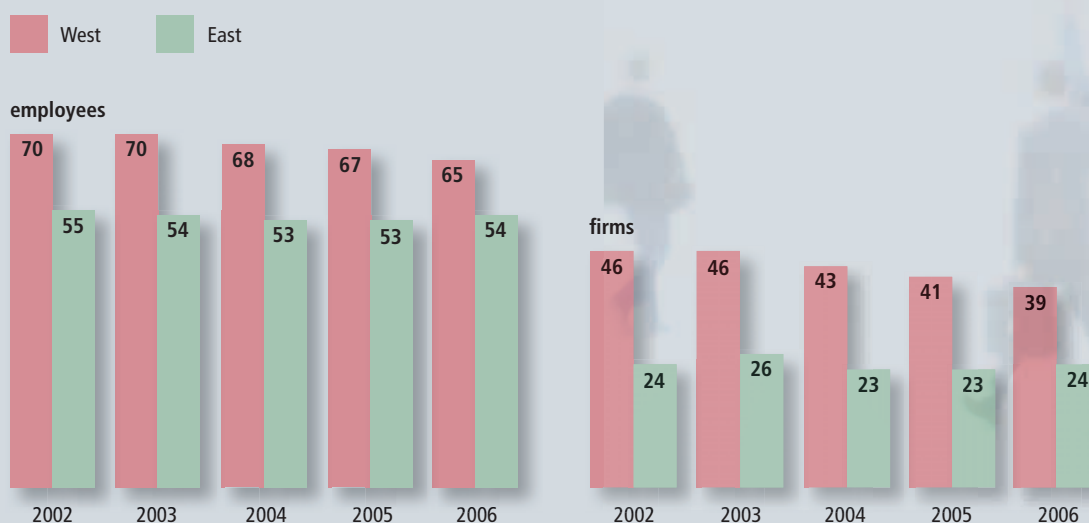
As regards the overall situation in all branches of the economy in the united Germany, mention needs to be made of the fact that approx. 64 per cent of workers are still working in enterprises covered by an agreement, of which 56 per cent are sectoral agreements and 8 per cent are company agreements<sup>113</sup>. The level of coverage by sectoral agreements declined in western Germany from 69 per cent in 1996 to 59 per cent in 2006, and in eastern Germany from 56 to 42 per cent over the same period: in other words, a little less than one third of the workforce (West) or one half of the workforce (East) are no longer protected by collective agreements.

Including the works and company agreements, the following situation emerges (see graph): coverage of workers by collective agreements came down from 70 per cent (2002) to 65 per cent (2006) in the western Länder, and from 55 to 54 per cent in the eastern Länder, while coverage of businesses declined from 46 per cent to 39 per cent (West) and remained unchanged at 24 per cent in eastern Germany. The fact that approx. 49 per cent of businesses without coverage have stated that they use existing sectoral agreements for orientation – which is not necessarily equivalent to the application of all collectively-agreed conditions – somehow puts the data into proportion. At any rate, the sectoral agreement functions to some extent as a frame of reference with which approx. half of all businesses without coverage are in compliance.

In the public sector, and again primarily in the eastern, but also in some western Länder, many local governments, district administrations and public companies and institutions have not joined the employers' association responsible, or left it, respectively.

#### A slow farewell (from „Einblick“ – „Abgang auf leisen Sohlen“)

coverage by employees and firms 2002-2006 (in percentage)



113 Reinhard Bispinck (ed.). *Wohin treibt das Tarifsysteem?* VSA Publishing Hamburg. 2007.

### Centralised agreements, company agreements, and mixed systems

Centralised collective agreements are still the predominant form of agreement in Germany, especially in the classical industries and the public sector. This is where the trade unions have most of their members, this is where they are strongest and able to maintain collectively-agreed conditions. Having said that, the number of company agreements, mixed systems of sectoral and company agreements and purely works-based agreements are also increasing in these sectors. The overall situation related to collective agreements is becoming ever more differentiated and confusing.<sup>114</sup>

**Sectoral or centralised agreements** prevail in the metal and electrical industry, in iron and steel, and also in the chemical industry. Most of the collective agreements in these sectors are concluded at the level of districts and regions, but usually do not differ much in content. Collective agreements usually apply nationwide in the public sector, and also in the banking and insurance industries.

The most important **company agreements** apply to the Volkswagen Company and the successors of formerly State-run services (railway, mail and telecom companies). Moreover, many service providers in the private sector (airlines, homes for the elderly, hospitals, IT companies, call centres, educational institutions) usually conclude company or works agreements.

Mixed systems of centralised and company agreements exist mainly in the energy sector, comprising a specific agreement for workers in the public energy utilities and agreements with

the associations of large private energy suppliers/utilities, while in parallel several municipal energy suppliers and large private energy companies have concluded separate works agreements for their workforce.

### Differentiation and decentralisation of bargaining systems

The fact that the system of centralised agreements is being eroded is irrefutable. In the wake of the drastic economic slow-down in the years 1992 and 1993 at the latest, employers' associations have pressed for clauses in the centralised agreements that allow deviations from the terms of the agreement given certain conditions. These special conditions have been negotiated by **IG Metall**, for example, under the so-called Pforzheim agreement<sup>115</sup> with the aim of "protecting existing or creating new jobs in Germany". With this in mind, the bargaining parties since then may allow for agreed standards to be undercut for a limited period in order to achieve the aim.

The IG Metall region North Rhine-Westphalia (IGM NRW), for example, agreed with its local branches a catalogue of permissible deviations from centralised agreements in order to

- safeguard and promote employment,
- prevent insolvency,
- in the event of a unilateral declaration by the employer that he will leave the employers' association and join an association without coverage by agreement,
- be covered by collective agreement for the first time if the enterprise had not yet been affiliated to an association with coverage,
- maintain coverage by collective agreement in, for example, outsourced service sectors.<sup>116</sup>

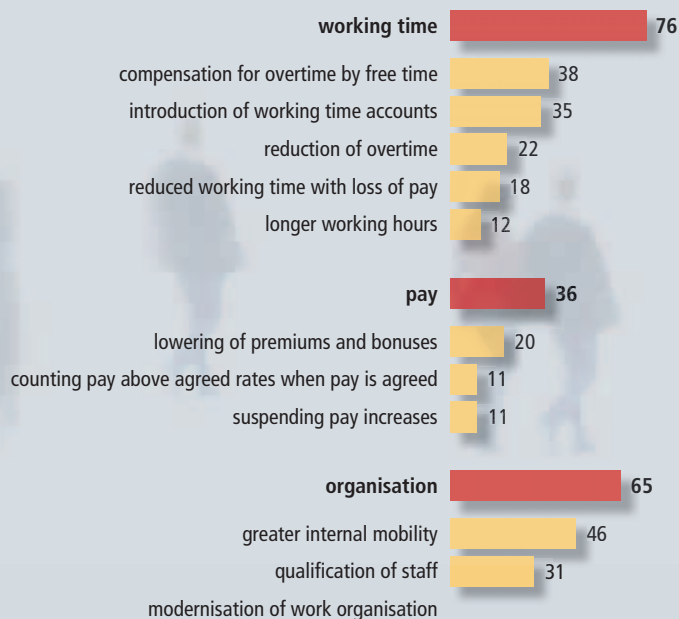
<sup>114</sup> *ibid.*, p. 13.

<sup>115</sup> In 2004, the employers' association of the region South-West and IG Metall concluded the so-called Pforzheim agreement to apply for the limited period up to 2007; it offers the bargaining parties the opportunity of lowering specific collectively-agreed standards for a limited period by concluding supplementary agreements.

<sup>116</sup> For example, IG Metall concluded an agreement with Daimler-Chrysler in 2004 covering operations such as catering, printing, security services, postal and communication services in order to prevent outsourcing at lower rates by, for example, changing to an external provider.

### Shopfloor alliances for work

in % of works council members polled



Another arrangement in the region of North Rhine-Westphalia provides for benefits negotiated for union members (member bonuses) in company-based disputes<sup>117</sup>. When internal agreements are concluded, union members obtain better terms than non-members; this had definitely a positive effect on membership development in the NRW region.

When IG Metall concluded the collective agreement of 1994 on employment protection, they already moved in the direction of deviation from agreed standards for the purpose of protecting jobs, and thus have years of experience of bargaining disputes at company level by now. Decentralisation of bargaining policy has thus come to be an important component of political strategy and action. Having said that, bargaining policy at company level is still under the control of union members in the company concerned; this control is exercised by

means of the company-based bargaining commission. And there is support provided by the regional union leadership. The idea behind this is to stabilise centralised agreements through company-based supplementary agreements and to actively engage the members in the process.

In the area of jurisdiction of the Miners, Chemical and Energy Workers Industrial Union (IGBCE), special clauses in the agreements allow for deviations from agreed standards for a limited period, especially in the chemical industry. It needs to be emphasised that a solution cannot be arranged exclusively by the parties on the company level and that the introduction of opening clauses is not possible without involvement, consultation and acceptance by the parties of the collective agreement. The national chemical employers' association and the IGBCE examine any deviation from the centralised agreement as to whether it is necessary, i.e.

<sup>117</sup> The member bonus, i.e. better conditions for union members as compared to non-members, is a variation of a supplement to the centralised agreement proposed by the trade unions in the event that lower standards are agreed for a limited period. This has proved particularly effective in disputes where better terms could be negotiated for union members than non-members in connection with qualification measures, work time regulation or issues related to wages and salaries.

whether it protects production at the location and employment. “Consensus-oriented bargaining policy pursued by the social partners in the chemical industry and the option of permissible deviations from agreements have resulted in a large number of enterprises covered by collective agreements. Some 90 per cent of businesses with more than 20 workers are covered by either a centralised agreement or a company-based agreement negotiated with a company affiliated to the employers’ association. The level of organisation and coverage by agreement is therefore considered to be the highest across all industries in Germany”<sup>118</sup>.

As regards the services union ver.di, lowering standards in centralised agreements is made dependent on whether economic difficulties exist that are threatening the very existence of the enterprise, and thus the jobs of the workforce. In controversial cases, ver.di insists on an independent expert opinion to examine the difficulties. Yet ver.di cannot altogether evade the trends towards differentiation and decentralisation arising from fundamental changes in the bargaining situation either, and so the union has developed a policy that combines “rejection of such ‘opening clauses’ in centralised agreements in principle with the definition of conditions under which it is permissible to deviate from such a fundamental position of rejection”<sup>119</sup>. In practice, this rigorous stance could not be maintained: a number of company agreements containing opening clauses, and agreements on member bonuses have been concluded in the meantime, especially in health care and with charitable organisations. Ver.di has set up a so-called clearing panel for the purpose of coordinating and controlling the bargaining activities of the union’s 13 sections since overlappings and conflicting responsibilities will inevitably arise.

This panel is tasked with monitoring compliance with policy positions in cases of controversy or hardship, and examining the need for any deviations that arise. The panel may impose conditions, request alterations, or recommend to the executive committee to veto an agreement negotiated by the negotiating team, if required (see also part 3 of this chapter). In the period 2002 to November 2006, it looked into some 600 bargaining results, of which approx. 70 per cent were related to provisions concerning economic difficulties and cases of hardship. This figure goes up to 885 collective agreements if we include those agreements for public administrations at Länder and municipal levels that were in place in the eastern Länder prior to the mid-1990s and contain an opening clause for lower working hours in return for job security within a margin regulated by agreement, the so-called corridor.

The final decision on whether to deviate from a centralised agreement or not rests exclusively with the bargaining commissions in consultation with the workers and their works councils and, if required, regional and sectoral commissions whom they may invite to comment.

In a 2005 poll, the WSI<sup>120</sup> asked 300 works council members about the extent to which opening and differentiation clauses had been used. According to the information provided, some three quarters of companies covered by collective agreements made use of such clauses. More than half of them (51 per cent) used the option of flexibilising working time, some 26 per cent used forms of extending working time, while merely 15 per cent of the companies preferred a reduction of working time for a limited period.

118 Karin Erhard, IGBCE. *Tarifliche Öffnungsklauseln als stabilisierende Instrumente des Flächentarifvertrages*. In „Wohin treibt das Tarifsysteem?“ Ed. Reinhard Bispinck. VSA Publishing, 2007. Hamburg.

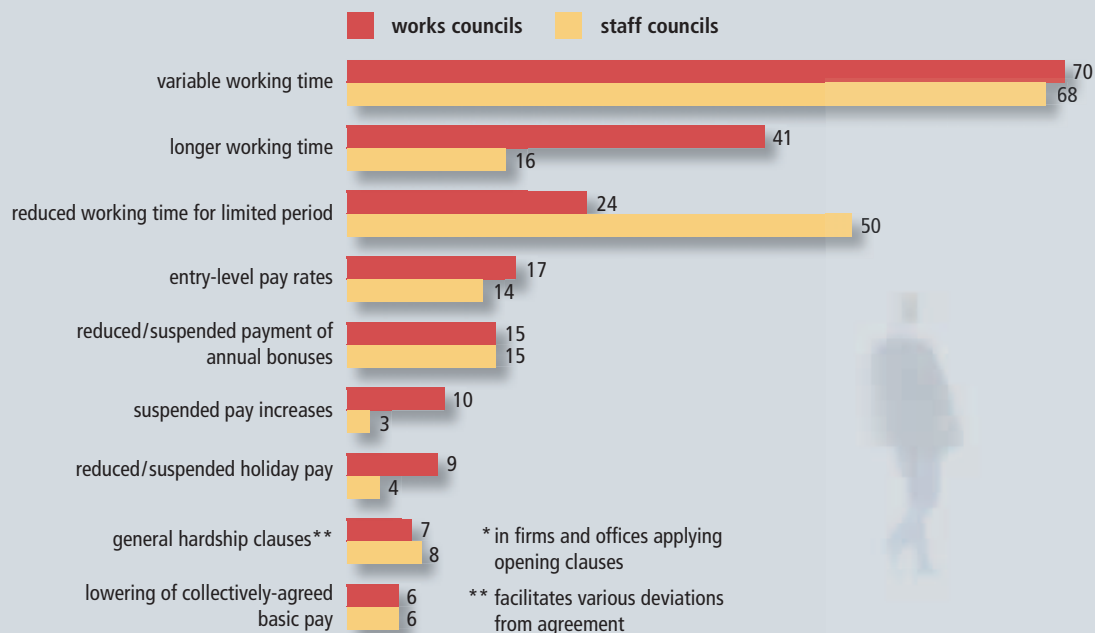
119 Jörg Wiedemuth, *ibid.*, p. 133.

120 The Economic and Social Science Institute (Wirtschafts- und Sozialwissenschaftliche Institut, WSI) is the research department of the Hans Böckler Stiftung of the DGB.



### Opening clauses in agreements

area of application/information from works and staff councils\* in %



Approx. 19 per cent of companies used the options provided under pay-related opening and differentiation clauses, and almost the same number (17 per cent) had either suspended or reduced annual bonuses (“Christmas bonus”), while no more than 8 per cent of companies used the option of reducing or lowering collectively-agreed basic pay or holiday pay, respectively.

The declining importance of centralised agreements and simultaneously increasing relevance of shop floor bargaining leave us with a twofold message:

Firstly, union clout is more limited today than ever before in the history of the Federal Republic; owing to the general economic and political situation, it is necessary to adopt provisions deviating from centralised agreements under clearly-defined conditions.

Yet it is, secondly, equally necessary to develop the centralised agreement in a pro-active manner in order to be able to respond to the fast reorganisation of corporate structures and operations; as stated, the fragmentation into independent units of hitherto monolithic enterprises, the outsourcing of some parts of operations, and also the emergence of start-ups that do not join an employers’ association and are thus not covered by collective agreements are processes which have gained momentum in the last few years across all industries, but especially so in the industry-related and private service sectors. These are sectors with predominantly small-sized firms and usually few unprotected individual jobs not covered by collective agreements. This is where the trade unions have to react by developing the existing reform concepts further in order to get their foot in the door and organise these new forms of employment, including by means of collective agreements.

Thirdly, for trade unions to retain their ability to bargain, they need to develop member-oriented strategies with a “shop floor focus”<sup>121</sup> in order to reinforce their clout and ability to act in industrial disputes over pay. Such strategies call for well-organised workers, who are informed, well-trained, self-confident, and thus able to react to the decentralisation of bargaining policy through their shop floor bargaining commissions.

The fact remains that autonomous bargaining and centralised agreements continue to be the mainstay of Germany’s societal model and an essential component of its “Social State” and democracy. It is therefore imperative to re-introduce and extend centralised agreements, or stabilise and improve collectively agreed standards through statutory measures in low-wage sectors, such as the introduction of statutory minimum pay, as a means to combat the prevalent trend of undermining existing standards.

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121 Detlef Wetzel, regional director of IG Metall North Rhine-Westphalia. Stabilisierung des Flächentarifvertrags durch betriebsorientierte Tarifpolitik. Aus: „Wohin treibt das Tarifsysteem?“ Reinhard Bispinck (ed.) See above.

## CHAPTER 4

### The Works Constitution



#### 1. The Works Constitution Act

The current economic order in the Federal Republic is based on guarantees for the free choice of economic activities and property rights (articles 2 and 14 Basic Law). In other words, the entrepreneur's position is restricted only to the extent required under the "Social State" provisions of the constitution (article 20,1 Basic Law). As regards business decisions, labour rights are therefore usually restricted to the right of information and consultation: workers have the right to co-determine issues affecting workers individually or when social concerns of the entire workforce are at stake.

After prolonged confrontations between various groups in society, the Works Constitution Act (German abbrev.: BetrVG), the Staff Representation Act (German abbrev.: PersVG) for employees of the national and Länder governments and the Co-Determination Act of 1976

were adopted to address these concerns; the trade unions affiliated to the DGB were actively involved in this process.

The Works Constitution Act regulates cooperation between the employer and the workforce of a company, the latter being represented by its elected works council. According to the WCA, such cooperation must serve the interests of both employees and the company. To this end, the Act calls for cooperation based on trust between the works council and the employer. In principle, the idea is to consider justified concerns of the workforce on the one hand and to safeguard the employer's managerial prerogatives and free economic decision-making on the other.

The organisation of operations, work processes and decisions regarding the recruitment and dismissal of workers are not left in the employer's discretion alone, but are subject to co-determi-

nation by the works council. In this context, we distinguish between works council co-determination in social and HR matters, and co-determination in business and economic matters (co-determination in managerial matters).

### The development of the Works Constitution Act

The fundamental concept of granting workers co-determination rights in matters related to the company is closely linked to the development of the trade union movement in Germany. As early as 1848, the National Assembly debated a law regulating the conduct of commercial and industrial activities, which provided for the establishment of workers' committees. Despite the failure of this piece of legislation, a number of enterprises declared their willingness to set up such committees voluntarily – probably in the hope of separating the workers from the trade unions and Social Democracy in so doing.

Similarly, policies pursued under Bismarck attempted to regulate by law the voluntary establishment of workers' committees in 1891 for very much the same reason. However, it was only after large-scale industrial action in the mining industry in the early years of the century that the establishment of workers' committees was made compulsory in 1905 under the Prussian Mining Act for mining companies with more than 100 workers; these committees were granted certain rights of information and consultation in social and personnel matters.

During the First World War in 1916, the imperial government adopted a law which forced companies with more than 50 staff to set up committees of blue-collar workers and also, for the first time, of white-collar workers; these committees had the competence to submit to the employer suggestions and complaints related to social matters. This was an attempt by the government to render compulsory services more palatable to the workers working in companies vital to the wartime economy.

When the war went on, attempts failed to make war policies and accompanying economic hardship more acceptable to the workers. In early 1918, massive strikes broke out in the arms industry, workers' councils were formed who spoke up on behalf of the workers. During the November revolution, the workers' and soldiers' councils negotiated with the State and entrepreneurs in 1918 to be granted a number of concessions, guaranteeing freedom of association and bargaining autonomy for the trade unions. In addition, the formation of workers' committees, with a mandate to represent the concerns of the workforce in the company, was permitted.

After the proclamation of the republic and the establishment of the first Social-Democratic imperial government, the Works Council Act was adopted in 1920 providing for the establishment of works councils in companies with more than 20 employees; while these councils were granted the right to co-determine social and personnel matter, they had merely information and consultation rights in economic matters.

When they came to power in January 1933, the National Socialists not only banned the free trade unions as early as May the same year, but in 1934 repealed all co-determination rights of employees on the grounds that they were incompatible with the concept of the "Führer principle" in politics and the economy.

Only after the liberation from Nazi dictatorship was it once again possible to establish works councils and adopt a works constitution under the Allied Control Council Act No 22 of 1946. Shortly afterwards, most of the Länder in the Western zone passed works council legislation. When the Federal Republic of Germany was founded, a national law – the Works Constitution Act of 1952 – was adopted to replace existing legislation of the Länder. Essential parts of the Works Constitution Act of 1952 fell short of the Länder provisions since the Act was limited to the private sector and covered co-determina-

tion in personnel and social, but not in economic matters.

While the Works Council Act of the State of Hesse still stated in 1948 that “... pursuant to this law, the works council, as an equal partner of the employer, is entitled to co-determine social, personnel and economic matters...”, shopfloor representation was diminished under the 1952 Works Constitution Act by requiring “trust-based cooperation”, and separating works councils and trade unions. At the time, the DGB member unions believed this to be a wedge driven between shopfloor and union representation, and accordingly opposed it. When they failed, the trade unions introduced a system of shopfloor union representatives (shop stewards) with the aim of setting up independent grassroots organisations of their own, which were unrestricted in their activities by statutory regulations.

As late as 1972 and after long and hard battles between trade unions, law-makers and employers, the Works Constitution Act was passed; it is still in force today and offers extensive co-determination rights for the works councils and improved union rights to initiate proceedings, to control and to participate. It has been amended several times since 1972 on the initiative of the DGB. Since the economic and monetary union of 1-7-1990 between the Federal Republic of Germany (West Germany) and the GDR (East Germany), the Works Constitution Act has been applied in the new Länder as well.

### The scope of the Works Constitution Act (BetrVG)

The Works Constitution Act applies to enterprises covered by private law only (an individual entrepreneur, corporate groups, commercial companies etc.) and not to public-sector administrations (administrations of the national, Länder and local governments, and social security providers). Since 1974, national and Länder governments apply separate Staff Representation Acts (PersVG) that grant public-sector

workers similar, albeit qualitatively less substantial rights of participation and co-determination than those under the Works Constitution Act. Enterprises run as a private business, yet with public bodies as majority shareholders, are covered by the Works Constitution Act (for example, local government utilities and transport corporations operating as stock companies etc.).

The Works Constitution Act does not apply to small businesses with less than five employees (with the right to vote), and organisations propagating attitudes. The latter comprise faith-based institutions, including all Christian and non-Christian religious communities and their social, charitable, and educational facilities (kindergartens, schools, hospitals, old-age and nursing homes, care and training facilities for the disabled etc., run by religious communities although with State grants for the maintenance). In enterprises with a small workforce (less than 20 employees with the right to vote), a staff representative is elected instead of a works council, but without participation and co-determination rights regarding recruitment, job grading and transfers.

Organisations which are exempted from co-determination also include establishments that stand for specific attitudes or orientations (*Tendenzbetrieb*), in which works council involvement may affect the overall goals of the enterprise: for example, offices and firms of political parties, trade unions and employers' associations, theatres, orchestras or press companies, and also broadcasting and television stations. In the case of the latter, the law distinguishes between stations governed by public law and those under private law. Stations under public law are excluded from the Works Constitution Act and are covered by special provisions in the Staff Representation Acts of the Länder instead, while private stations fall under the provisions of the *Tendenzschutz*.

Specifically, it is still possible to establish works councils in such enterprises, but their rights are

### Number of works council members in firms of 5 to 1,000 employees

number of employees	works council members
• 5 up to 20	..... 1
• 21 up to 50	..... 3
• 51 up to 100	..... 5
• 101 up to 200	..... 7
• 201 up to 400	..... 9
• 401 up to 700	..... 11
• 701 up to 1,000	..... 13

restricted; if, for example, a newspaper editor constantly disregards the general orientation of the newspaper and is fired as a result, the works council is not entitled to participate in the decision-making because of the special nature of the enterprise. If the cleaner or driver of that same newspaper is dismissed, however, the works council's rights of participation apply. And if the editor is dismissed for any reason other than that of the attitudes propagated by the paper, the works council is obliged to fully protect him or her.

In other words, such organisations are covered by all provisions of the Works Constitution Act in social, general staff and economic, yet not in "orientational" matters.

Special provisions apply to employees working outside the scope of German laws (seamen, pilots, cabin crew) for maritime shipping companies and airlines, as well as for the railways' Deutsche Bahn AG and companies of the Telekom. Similarly, special provisions apply to the privatised railway, postal, and telecommunications enterprises, since there are still civil servants working in the privatised companies who would not be covered by the Works Constitution Act otherwise.

### Other qualifying conditions for the establishment of a works council

A works council must be elected in all companies with a regular workforce of at least five employees (with voting rights), of whom three are entitled to stand for office. The size of the works council depends on the size of the company: in smaller businesses (5-50 workers with voting rights), the number of those entitled to vote is the determining criterion, in companies with more than 51 workers it is the total number that counts.

The works council usually consists of

- one person in companies with 5 to 20 workers (with voting rights)
- three members in case of 21 to 50 workers
- five members in case of 51 to 100 workers
- seven members in case of 101 to 200 workers etc., depending on the number of employees in the company concerned.

In public-sector core areas, notably the administrations of the national, Länder, and local governments, and social insurance providers (statutory providers of health insurances, pensions, occupational health and safety etc.), the



above-mentioned regulations of the national and Länder governments for staff representation apply. Persons employed by religious communities, which run a considerable number of hospitals, old-age and nursing homes, childcare and other social facilities, are covered by staff representation systems which fall far short of the regular provisions for the public and especially the private sectors in terms of the quality of participation and co-determination.

### Employees within the meaning of the WCA

The term “employee” comprises salaried workers, production workers, and trainees/apprentices. Temporary or agency workers are covered by separate regulations. Employees in managerial positions (middle management) are not employees within the meaning of the WCA and are covered by only a few of its provisions. They are not represented by the works council, but have their own representation vis-a-vis the employer. It is the intention of the law that the works council and middle-management representatives should not work against each other. Moreover, the Act regulates that there be one joint meeting of the two bodies per year for mutual information.

Persons not defined as employees within the meaning of the law include, for example, executive board members of a joint-stock company or sisters of a religious order working as hospital nurses, prison inmates who are working or dependants of an employer.

Every employee of a company above the age of 18 years is allowed to vote in works council elections and can stand for office provided s/he has been with the company for six months. In other words, every foreign worker who meets the above-quoted requirements can vote or stand for office, respectively.

### Institutions under the works constitution

In addition to the employer who acts as the opposite party to the body representing the inte-

rest of the workforce and in this function is part of the works constitution, the following institutions exist:

- the works council,
- the youth representation,
- works or departmental meetings,
- the works committee,
- the economic committee, and
- the conciliation panel.

## 2. The works council

The central labour institution within the framework of the works constitution is the works council. Its term of office is four years. It is the joint representational body of all groups of employees, except middle management; it acts collectively in its own responsibility and name. The day-to-day business of the works council is dealt with by the council's chairperson who acts on behalf of the works council vis-a-vis the employer and the staff. The works council has a mandate to exercise participation rights on behalf of the workforce, i.e. it enjoys the right of information, consultation, participation and co-determination. It assumes functions and duties defined under the Act and is protected by the law in so doing.

The employer is not allowed to prevent the works council from carrying out its functions; on the contrary, s/he must take all measures necessary to enable the works council to carry out its statutory duties and exercise its statutory rights in an orderly manner, including to make available the necessary offices with the usual means of communications and, depending on the volume of work, administrative and secretarial staff. The works council is authorised to act only on the basis of a joint council decision; this also applies to the works council chairperson. The works council has no obligation to carry out assignments of individual workers or groups of workers.

Works council members must be released from their work duties in order to be able to carry out their statutory functions. In firms with more than 200 employees, a certain number of works council members must be released from regular work duties altogether. In firms with less than 200 employees, the number of council members released from their regular job depends on the volume of work of the works council. In the case of works councils with more than 9 members, a works committee must be established for carrying out the day-to-day business. In firms with more than 100 continuously employed workers, an economic committee must be set up; it has no co-determination rights, but is tasked with discussing economic matters with the employer, including matters such as the economic and financial situation of the enterprise, the production and sales situation, production and investment programmes, rationalisation projects, the introduction of new working methods, and also issues related to environmental protection inside the company.

The employer must bear the costs for the works council and its activities, including the costs for the conduct of its activities, release from work, further qualification or for consultation hours during work. The works council holds consultation hours during the regular working time; the employer may take part in an advisory function if s/he requested a meeting of the works council or if s/he was invited to take part. Trade union representatives may also take part at the invitation of the works council.

Works council members act in an honorary function and therefore receive no extra pay for serving on the works council, except the usual wages or salaries, which they received for their work in the company prior to their term of office. However, they are entitled to promotion in line with the usual procedures for any other worker in their job grade while serving on the works council.

## Works council elections

Works council elections are held regularly every four years. Works councils are elected directly in a secret ballot in all companies with a minimum of five workers (with voting rights). The elections are organised by an electoral board elected by the workforce, they take place during working hours and the costs are borne by the employer. The number of works council members depends on the number of staff employed by the company.

Elections are carried out in line with the principle of proportional representation, unless only one ballot proposal is submitted; in such an event, majority voting applies. Ballot proposals may also be handed in by a trade union with at least one member among the workforce; two signatures must be presented, including from union representatives from outside the company. However, even trade unions are only allowed to nominate members of the workforce for elections.

Proportional representation requires several lists of proposed candidates, and voters choose either of the complete list. In other words, they cast only one vote and cannot change the sequence of candidates on the list; candidates listed will be chosen according to the defined sequence of names on the ballot paper in relation to the total number of votes for that list. Ballot proposals must be signed by at least one twentieth of all employees with voting rights, or a minimum of three; this figure relates to the total workforce in case of joint elections. For majority voting, voters mark the names of persons on the ballot paper whom they wish to elect. In this procedure, voters may choose as many candidates on the ballot paper as there are works council members to be elected. In other words, what matters is the majority of votes cast for each candidate.

For small businesses with five to 50 employees, the election procedure has been simplified: an electoral board is elected at a first electoral mee-

## Position of works council members



ting, and the works council is then elected directly in a secret ballot at the second electoral meeting. There must be an interval of one week between these two meetings. Provided the electoral board and the employer are in agreement, the simplified election procedure may also be used in companies with 51 to 100 employees.

Elections to the works council must not be obstructed or interfered with. Normal campaign work in support of specific candidates, or lists, respectively, are not perceived as interference. Obstruction or undue influence may be penalised with a prison sentence of one year or a fine. Election costs are borne by the employer.

If an enterprise consists of several plants, in which works councils have been set up, a central works council must be formed. Each works council consisting of up to three members selects one of its members – in a gender-balanced manner – and with more than three members two are selected, to represent the council in the central works council. In other words, the central works council is not directly elected by the workforce, but is composed of delegates representing individual works councils of the enterprise. It is responsible for all concerns affecting the entire enterprise or several plants of that enterprise.

In a corporate group, which usually consists of several legally independent enterprises under the management of one dominating enterprise, individual central works councils, or the works councils of individual enterprises of the group, may decide to establish combine works councils. These councils are responsible for matters affected the entire group, and for enterprises of the group which have not set up a central works council, as well as plants of the group without any works council. Individual central works councils, or works councils, respectively, select two representatives who each is entitled to half the voting rights of the central works council posting them. Similar institutions have been set up in areas where staff representation legislation applies (public sector); in line with the administrative structures they represent, they are called central staff councils, regional staff councils, or general staff councils.

### Youth representation

A body representing young trainees may be elected in companies, which have a works council and employ a minimum of five youth under 18. The youth representation body is intended to ensure that concerns of young persons (without voting rights) are properly considered by the works council. The latter is ex-

pected to inform the youth representation body about matters affecting young persons. The youth representation, in turn, is mandated to monitor compliance with all relevant laws and youth protection regulations, and also the relevant collective agreements; it is expected to submit proposals supporting young persons (for example, related to vocational training) and accept suggestions and complaints from the young trainees to be discussed with the works council and resolved.

Elections to the youth representation body follow the same procedures as described above. Similarly, youth are represented at the various levels of the enterprise, as are the works or staff representation councils.

### Works or divisional meetings

It is the purpose of such meetings to provide an opportunity for an exchange of company-related information between the works council, the workforce and, to a lesser extent, the employer. The law stipulates that the works council must convene a works meeting once every quarter of a year to render an account of its activities and to inform the workforce about important staff-related, social and shopfloor issues. If it is not possible to invite all staff members to the works meeting for organisational reasons (shift work, size of the enterprise etc.), sections of the workforce or company divisions may be invited to attend instead. In urgent cases, the works council may convene one more – extraordinary – works meeting per quarter if the matters to be discussed with the employees call for an immediate urgent response. The costs for works meetings are borne by the employer. If works meetings, sectional or divisional meetings are held outside regular working hours for operational reasons (for example, uninterrupted machine running time), the time will be counted and paid as working hours, or overtime hours if certain conditions are met. In such an event, the employer must also pay travelling expenses.

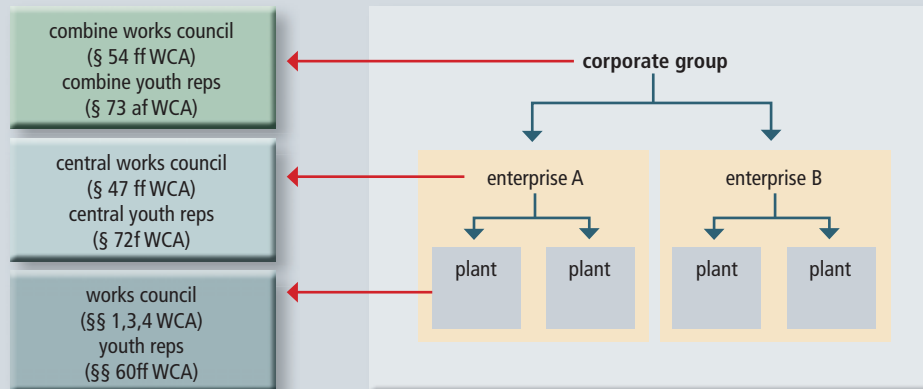
Subjects to be addressed at the works meetings are determined by the works council as part of the agenda. The meetings are chaired by the works council chairperson, who has “domiciliary rights” for the duration of the meeting, i.e. ensure that the meeting is conducted democratically. In addition to the works council’s report on its activities, any subject related to bargaining and social policies and economics – affecting the company or the employees – may be addressed at the ordinary works meetings. The range of subjects covered has been expanded as a result of the Reform Act to the Works Constitution (see below). Once a year, the employer must report about the current personnel, social and economic situation and development of the company at the works meeting.

Every employee, the employer and his/her representatives as well as representatives of the union responsible may attend the works meetings. The employer may invite a representative of the employers’ association to attend. The union representatives must be invited to the works meetings in due time and be informed about the agenda, they have the right to speak and to inform the workforce about all matters relevant to the trade union and matters related to social or economic policies.

### The economic committee

An economic committee must be set up in all enterprises with more than 100 permanent workers. The economic committee is a consultative body mandated to enhance cooperation between the enterprise and the works council in economic matters; it is not a body governed by the works constitution. By involving the economic committee, issues related to corporate policy are discussed at an early stage and clarified between the management and the works council before they develop into concrete plans; as soon as they have taken concrete shape, the works council must become involved owing to its rights of co-determination. This procedure offers the opportunity to inform the

### Multi-tier representation of works councils and youth reps



works council about corporate goals and their implementation comprehensively and in time before its co-determination, information and consultation rights are exercised. The economic committee must inform the works council about the outcome of all its discussions.

### Conciliation committee

Two options are available to resolve disagreement between the works council and the employer in matters in which the works council enjoys the right to co-determine: participation rights may be enforced through a procedure involving the conciliation committee or by decision of the labour court.

The labour courts usually deal with disputes related to the works constitution law (for example, the employer did not meet a request for a refund of costs, fails to comply with the obligation to provide information, ignores co-determination in social issues etc.). The works council may also take legal action to stop an employer from implementing a planned measure, which is subject to co-determination and has not been approved by the works council (for example, giving orders to work overtime).

Conflicts in the area of co-determination proper, especially social issues, are resolved by decision of the conciliation committee. However,

the conciliation committee has to decide on a number of legal issues as well (for example, whether works council members may take part in training for their function on the works council). The decision of the conciliation committee takes the place of an agreement reached between the employer and the works council. In taking its decision, the conciliation committee acts “with due regard to the interests of the establishment and of the employees concerned as reasonably assessed”, but its decision may be contested in court, if one of the parties is convinced that the committee has not met that specific requirement. The resultant decision of the labour court will then be binding.

A conciliation committee must be put in place if the need arises, and be composed of an equal number of assessors from the employers’ and employees’ side. The chairperson must be chosen by approval of the two sides and is non-partisan. If the two sides cannot agree, the chair will be appointed by the labour court. Both sides are free to select their assessors, including from outside the enterprise. Assessors, like the chairperson, are paid a remuneration for this assignment. The works council may nominate a union official, for example. The costs for the conciliation committee are borne by the employer. A permanent conciliation panel may be set up pursuant to a works agreement.

### General functions of the works council

The Works Constitution Act regulates the activities of the works council. It compels the works council to act in a cooperative manner: under § 2 of the Act it emphasises the spirit of compromise inherent in the Works Constitution Act: "... the employer and the works council shall work together in a spirit of mutual trust observing the collective agreements and in cooperation with the trade unions and employers' associations present in the establishment for the good of the employees and of the establishment..." This highlights the fact that conservative forces in the government and employers had the upper hand over the trade unions when legislative decisions were taken at the time: in a confrontation between the two parties, of which one is economically stronger than the other simply because it has control over the means of production, the balance will undoubtedly be tipped in favour of the employers given the fact that the works constitution bodies are obliged by law to consider the good of the establishment.

This principle of mutual trust and cooperation determines all the works council's activities. Irrespective of the specific rights of participation and co-determination granted to the works council under the WCA, the Act sets out a general framework for action which compels the works council to monitor compliance with laws, collective agreements, accident prevention regulations and internal agreements adopted for the protection of the employees. If the works council finds that regulations are not implemented, it is forced by law to take corrective action.

Another major function of the works council consists in the application for measures to be taken by the employer for the benefit of the enterprise and the workforce. In other words, the WCA compels the works council to become active in all social, staff-related and economic matters, and to discuss with the employer such

issues of an economic nature, for example, for which it has no statutory right of participation or co-determination. Of course, the works council is also obliged to accept suggestions and complaints from the workforce and the youth representatives for its own deliberations and subsequent discussion with the employer. Similarly, it is tasked with monitoring whether severely disabled workers are properly integrated in the enterprise. In addition, the law compels it to promote genuine equality of opportunities for men and women and foreign workers in the workplace. (see also section on "Reform of the Works Constitution Act").

For the works council to be able to fulfil these functions, the employer must provide comprehensive and timely information and make available the necessary documents in time so as to ensure that counter-proposals by the works council may be taken into account in a planned project. This includes, for example, examining the payroll or contracts with external sub-contractors providing cleaning services for the enterprise. On complicated subjects such as accounting systems or ergology, the works council may consult experts at the employer's expense, if required.

Monitoring the implementation of health and safety regulations is a particularly important function of the works council. As described under Chapter 1, the Health and Safety Act and accident prevention regulations are enforced as protection rights of the workers to prevent any hazards emanating from the technical installations and the production process.

Both sets of regulations primarily leave it in the employer's responsibility to create the necessary organisational health and safety conditions, make available protective gear (such as protective clothing and glasses etc.) and ensure the implementation of health and safety rules in the workplace. In the event that the employer does not observe these protective regulations, statutory bodies (more on this later) may



compel him/her to do so. Depending on how serious the violation of health and safety regulations has been, it is categorised either as a regulatory offence for which a fine is usually imposed on the employer, or as a criminal act subject to prosecution and law enforcement.

Employees, in turn, have the duty to observe accident prevention rules. They are obliged, for example, to wear the protective clothing, which is made available. In addition, they must notify the employer of any defect of the production installations or deficient safety measures. Employees may be held liable for any violation of accident prevention rules (liability for damages, dismissal etc.).

In companies with more than 20 staff members, safety representatives must be appointed by the employer with active works council involvement. The number of safety representatives depends on the size of the company. If deficiencies are identified by the safety representatives, they must inform the employer about them; if no corrective action is taken, the statutory health and safety agency must be brought in. Safety representatives are trained by the health and safety agency, which also provides the necessary funding, with involvement of the factory inspectorate.

In larger enterprises with specific health and safety hazards, the employer is compelled by law to employ works doctors, safety engineers and other health and safety experts. The works council must monitor compliance with health and safety regulations. Additional internal agreements may be concluded for the prevention of accidents at work. Monitoring rights may be enforced by order of the labour court.

Depending on the line of production, the employer may also have to appoint representatives for data protection, radiation protection, for severely disabled persons, for water protection, for waste management or emission protection at his/her own expense.

## Participation rights of the works council

These rights are subdivided into four groups with varying impact:

1. **Information rights.** This is the weakest form of works council involvement, and implies its right to be properly informed about all matters which are relevant to the enterprise and the workforce and required for fulfilment of its statutory functions (e.g. timely information by the employer about work structuring plans, human resource plans or corporate goals). The information needs to be supplied in due time, comprehensively and backed up with the necessary documentation so as to enable the works council to respond.
2. **Consultation rights.** They imply an obligation on the part of the employer to enable the works council to raise objections (e.g. dealing with complaints by the works council, planning of technical installations or workflow, human resource planning). Again, the employer must inform the works council in due time and comprehensively about the measures planned. For example, the works council must be heard before a worker is dismissed, and be informed about the reasons for dismissal. This applies to both dismissal with and without notice (the latter is mostly the result of misconduct by the employee). The works council can oppose the dismissal with notice if it is unacceptable on social grounds in its view; the works council can only express reservations about a dismissal without notice, though. The employer must inform the works council at least a week in advance about any dismissal or recruitment, job grading, job regrading or transfer, and make available the necessary documentation.
3. **Rights to oppose and veto a measure.** These rights are granted to the works council when measures are taken that affect individual

employees (recruitment, dismissal, transfer and posting to other locations). Such measures by the employer require the works council's consent, although the right of co-determination is not enforceable in this case. The employer cannot uphold such a measure against the works council's opposition, which needs to be brought into line with the interest of the company, though. If the works council opposes an individual staff-related measure (e.g. a dismissal with notice), the employer may replace the works council's consent with a labour court decision.

3. **The works council's right of co-determination in social and staff-related matters.** These works council rights of participation have the greatest impact since the employer cannot act in such matters unless the works council consents prior to implementation.

**a) conditions covered by co-determination on social grounds:**

- start and finish of daily work, including arrangements for rest breaks and the distribution of working hours in respect of individual weekdays (e.g. introduction or expansion of shift work, flextime or on-call arrangements etc.);
- regulations concerning prevention of workplace accidents and occupational diseases, and health and safety under the statutory framework. In these matters, the works council is allowed to expand existing statutory regulations to cover the enterprise concerned;
- introduction of short-time work or temporary prolongation of daily working time, orders given to work overtime and regulations on how to compensate for extra hours worked, unless regulated under collective agreements;
- issues related to the internal order of the enterprise and staff conduct (e.g. introduction of time clocks, penalties for infringement upon regulations, ban on smoking, amongst other things);
- issues related to internal wage structures such as adoption of principles or methodology of determining pay (time rate, piece rate, bonus pay);
- determining date, venue and form of payment of remuneration, drawing-up of severance plans etc.;
- principles pertaining to holiday scheduling and setting-up of a holiday schedule, scheduling holidays of individual workers who cannot agree with the employer on when to take their holidays;
- introducing and applying technical installations and equipment with the potential to control the conduct or performance of employees. Even if the employer does not intend to use the equipment directly for that purpose, the works council has a right of co-determination.
- setting up and managing social facilities such as canteens, recreation homes or company-owned sports facilities.

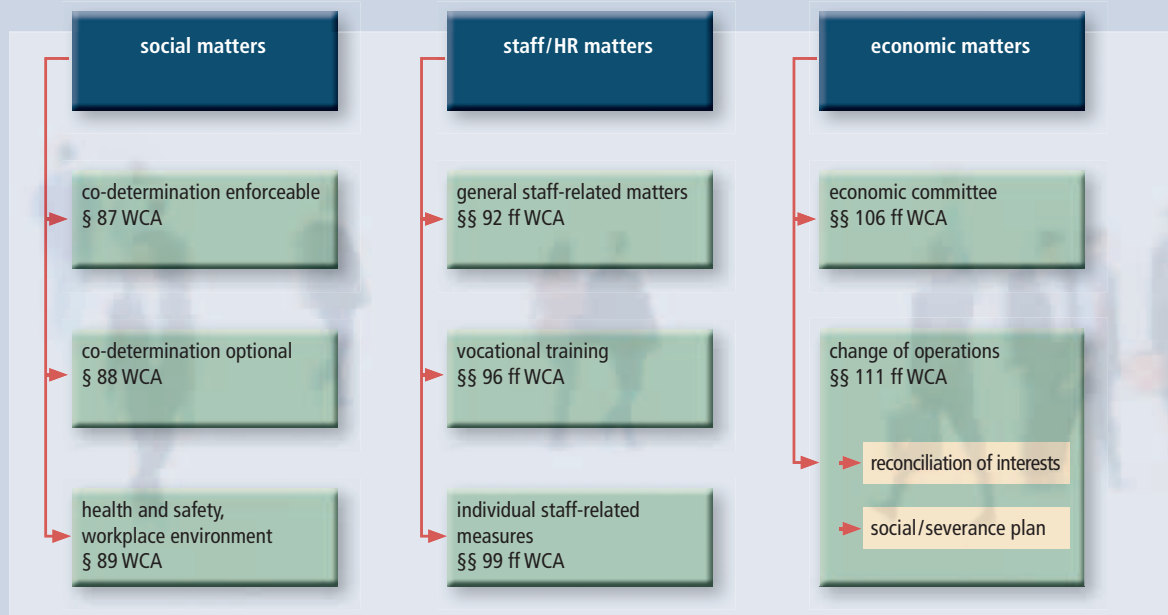
The works council has the right to take the initiative in these matters, i.e. it may submit to the employer unsolicited applications to implement such measures. The employer must negotiate these issues with the works council; in the absence of an agreement, the final decision rests with the conciliation panel.

In the event that the employer implements a measure in areas in which the Works Constitution Act grants the works council an enforceable right of co-determination, such a measure will be ineffective. These rights of co-determination apply provided no statutory or collectively-agreed regulation exists.

**b) conditions covered by co-determination in staff-related matters:**

- Works council involvement in formulating principles of human resources policy such as
- manpower planning,
- how to invite job applications,

### Works council participation in:



- the preparation of staff questionnaires and guidelines for assessments,
- and co-determination in measures affecting individual members of staff such as recruitment, job grading, transfer and dismissal.

As mentioned, the employer must inform the works council about these latter matters and ask for its consent. If the works council is in disagreement, it can only do so for reasons set out in the law, in other words, its right of co-determination in these matters is somewhat restricted.

The works council has no right to take the initiative in these matters, i.e. cannot force the employer to introduce manpower planning through conciliation or a labour court decision. However, if one of the listed measures is introduced by the employer, the works council must be involved; in case of disagreement between the employer and the works council, the conciliation panel may impose a binding decision.

### c) Co-determination or participation in economic matters

The works council has no more than a limited right to co-determine or participate in economic decisions. In other words, the Works Constitution Act does not fundamentally restrict the employer's free decision-making. While the works council must be informed about major managerial decisions, it is entitled to co-determine only if changes in plant operation result in considerable disadvantages for the workers concerned, for whom a severance or social plan may be negotiated. If an economic committee is in place in a company, the works council has a right of being consulted in economic matters as well. The employer's duty to provide information about economic matters can be enforced through legal action.

A limited form of economic co-determination exists in larger companies in the form of board-level co-determination (see Chapter 5).

## Works agreement

The Works Constitution Act also provides for agreements between the works council and the employer. Remuneration and other working conditions regulated, or usually regulated, by collective agreements cannot be covered in works agreements. This restraint does not apply if the collective agreement explicitly refers to the conclusion of supplementary works agreements.

The scope of a works agreement is limited to the enterprise for which it has been concluded. However, it has a normative function, i.e. within the framework of the Works Constitution Act it represents objective law. Norms established under a works agreement are mandatory.

The Works Constitution Act distinguishes between enforceable and voluntary works agreements.

### **a) subjects covered in works agreements enforceable through the conciliation panel:**

- consulting hours of the works council;
- number of members of the central works council;
- co-determination in social matters;
- staff questionnaire;
- company-based vocational training programmes;
- preparation of a severance/social plan;

### **b) subjects covered in voluntary works agreements:**

- diverging number of members of the central works council;
- establishment of a permanent conciliation panel;
- regulating the details of the grievance procedure;
- agreement requiring consent in the case of dismissals etc.

Enforceable works agreements remain in effect until replaced by other agreements, vol-

untary works agreements end immediately on expiry date (e.g. when terminated by the employer).

### **c) Precedence of collective agreements**

Legislation and collective agreements take precedence over the works agreement. The restrictions resultant from collectively-negotiated regulations affect pay and other working conditions depending on the amount of collective regulations, i.e. any monetary remuneration and non-cash benefit and any condition which may determine the nature of the employment relationship. If a collective agreement includes, for example, regulations concerning the duration and daily timing of work, it is not permissible to regulate these matters in a works agreement.

Unless the collective agreement explicitly offers the option of wage payments above the collectively agreed rate, such wages cannot be paid under a works agreement either. The principle of most favourable conditions does not apply under these circumstances.

Analogous to this restriction, works agreements must not contain any less favourable regulations either (e.g. related to supplements or bonuses).

Exceptions to these restrictions are permissible only if explicitly mentioned in a collective agreement. Any such mention automatically cancels the restrictive effect of the collective agreement and offers the opportunity of concluding works agreements regulating wages above collectively agreed rates, lower output clauses or longer holidays.

The parties to the collective agreement may, in fact, allow for works agreements deviating from the collective agreement, provided the extent of deviation is clearly defined (e.g. introduction of analytical job evaluation instead of summary procedures in the collective agreements).

Chapter 3, part 3 has described the current situation in which parties to collective agreements often permit deviations from a centralised agreement in order to take account of the specific situation of individual companies. In so doing, the parties to the agreement enable the bodies under the works constitution, works councils and employers and the trade union concerned, to respond flexibly to the requirements of that specific establishment by deviating from the collectively-agreed centralised agreements.

### 3. The reform of the Works Constitution Act in 2001

#### General comments

The trade unions had high expectations for the reform of the Works Constitution Act because due to globalization, economic and industrial relations in Germany and Europe had undergone decisive changes during the 30 years since the last reform of the WCA came into force. In all sectors of the economy, a growing number of corporate groups and similar enterprises were being formed, especially in the 1990s, while work was simultaneously being decentralised in small entities to be outsourced, if required. As a result, the number of works councils went down since existing statutory provisions did not leave sufficient room for adaptation to the newly-created operating structures. At the same time, attempts to also set up the required works councils in smaller firms had failed.

With the amendment of the Works Constitution Act it became easier to elect a works council, especially in small firms. In addition, it became possible to “customise” the works council structure in line with the organisation of firms and corporate groups. In those cases where co-determination rights depend on the number of staff, account is taken of the overall enterprise, not only individual plants. The distinction between blue and white-collar staff, which had been constitutionally questionable and no longer reflected adequately societal development,

has been deleted, i.e. status-based elections and minimum representation of blue and white-collar staff are no longer required; instead, the works council is expected to consist of employees from the various areas of organisation and occupations. However, the gender, which is in a minority amongst the staff, must be represented on the works council in proportion to its number overall.

The general functions of the works council have been expanded to include societal functions: for example, the works council is now expected to ensure reconcilability of family and working life, advance the integration of foreign workers, oppose racism and xenophobia in the workplace and monitor environmental protection inside the company. Moreover, it has the right to take initiatives and propose measures to safeguard and promote employment, while the employer is compelled to give advice and justify his/her rejection of such proposals in writing (in companies with more than 100 employees). The works council may call in a representative of the National Employment Institute for this purpose without prior consultation with the employer.

From the unions’ point of view, the promise made in the red-green coalition agreement (of SPD and the Greens) “to strengthen co-determination and adapt it to the changes in the world of work” was fulfilled in parts only with the amendment of the Works Constitution Act, given improvements of a moderate scale. Greater co-determination rights in individual staff matters (banning racist or xenophobic activities) or social matters (introducing group work) may be viewed as negligible.

The law came into force on 28-7-2001 immediately following the promulgation, while the new provisions regarding a larger number of works council members, minimum representation of minority gender and representation on the central works council remained suspended until the re-election of existing works councils.

## Changes within the framework of the Works Constitution Reform Act (23-7-2001)

This is an Act amending specific articles: in Article 1 alone, comprehensive amendments of the 1972 Works Constitution Act are introduced under 84 different subsections; further 13 articles involve changes affecting other laws such as the Labour Contracting Act, the Transformation Act and the Social Code, including the amended Dismissal Protection Act in favour of individuals initiating works council elections in establishments without works council (Article 7), abolishing the principle of group-based elections to the supervisory board according to co-determination legislation and a transitional regulation concerning works councils which had been in place when the law came into force on 28-7-2001.

## The most important amendments of the Works Constitution Reform Act include:

### 1. The creation of modern and adaptable works council structures

In the event that the internal organisation changes as a result of a break-up or merger, or if it is sold or transformed, the then existing works council will retain a transitional mandate for six months, to be extended by another six months through collective or works agreements, if required. The transitional mandate entails all rights enshrined in the Works Constitution Act.

If an enterprise is dissolved by closure or merger, the existing works council retains a residual mandate covering participation and co-determination rights, amongst other things.

Works councils may be elected in joint ventures of several enterprises. The law offers the opportunity to set up works councils at divisional or branch level, or to combine plants and independent operating units which do not qualify for a works council individually. In other words, employees can decide informally to participate in the works council elections at head office.

This may also be initiated by the works council at head office. A company-wide works council may be set up under a collective agreement by combining several plants in a sensible manner. In the absence of a collective agreement, a works agreement without involvement of the parties to the collective agreement may determine the procedure involved.

Similarly, a collective or works agreement may permit other forms of structures to be set up representing workers, such as working groups or "additional representational bodies under the works constitution", yet without co-determination rights and solely for the purpose of cooperation with the works council.

### 2. Simplified formation of works councils

The election procedure has generally been simplified and facilitated by abolishing the group principle and by electing the one-person works council and his/her deputy in a single ballot in smaller businesses.

If no electoral board has been put in place eight weeks prior to the end of a works council's term of office, such a board may also be appointed by the central or combine works council.

In addition, employees who have issued an invitation to an assembly electing a works council or submitted an application to the labour court requesting the appointment of an electoral board enjoy special protection.

### 3. Coverage of new forms of employment

Owing to the development of information and communication technologies, work is increasingly being done outside established workplace structures. Irrespective of whether employees are employed out of office in field services, in telework or work from home, they are defined as employees in the meaning of the Works Constitution Act and entitled to exercise both an active and passive right to vote. The employer must inform the works council about all employees whatever their job.



#### 4. Improved job security and qualification

As regards general staff-related measures, the law has been improved to the extent that the works council has been given the right to submit proposals for manpower planning, including measures to enhance equal opportunity of women and men and to reconcile family and working life. The employer is obliged to take account of these issues in human resource planning and to discuss the necessary measures for vocational and advanced training with the works council. In this context, the works council has the right of initiative.

Moreover, co-determination rights have been expanded to include the works council's right to co-determine issues related to the implementation of partly autonomous work in groups. However, the decision about whether and when to introduce and end group work remains with the employer; the works council has no right to take the initiative in these matters and merely takes part when the principles related to group work are defined.

The works council's right of co-determination in the formulation of selection guidelines applies to establishments with 500 employees and more in contrast to the 1000 employees required previously. This new regulation takes account of the growing spread of restructuring in large enterprises.

When a social plan is negotiated, the conciliation panel must take into account the various forms of promotion offered under the Social Code, volume III with the aim of preventing unemployment.

There has been an improvement concerning the individual staff-related measures as the works council can now oppose any unlimited employment contract for new recruits unless the employer also considers temporary workers employed in the company by giving them the opportunity to continue employment on a permanent contract. In addition, the new regulation grants the works council an explicit right

to oppose the recruitment of any persons that may potentially disrupt peaceful cooperation in the company by racist or xenophobic activities. Incidentally, the general functions of the two parties, i.e. the employer and the works council, have been expanded to include the fight against racism and xenophobia, reconcilability of family and working life and the integration of foreign workers in the workplace.

#### 5. Improved worker participation in activities of the works council

In companies with more than 100 employees, the works council may delegate functions and rights to working groups who support the works council in specific areas. They may deal with questions related to employment security, environmental protection or other issues relevant to the company. In addition, the law explicitly enumerates issues on which the employer must report at least once a year, notably the status of equal opportunities for women and men in the workplace, the integration of foreign labour employed by the company and environment protection inside the company. Agency or contract workers have the right to vote provided they are planned to work in the company for three months.

#### 6. Improved opportunities to act for the works council and greater protection of its members

The number of works council members in companies with more than 100 employees has been increased. Persons who are planned to be employed for a minimum of three months need to be taken into account in calculating the size of the company.

Release and partial release from work are possible in companies with 200 employees and more, compared to the previous 300 employees; in fact, partial releases are available as an option provided by the law for the first time. This is intended to accommodate part-time employees and those full-time employees who are only partly released from their regular job to serve on the works council, thus enabling the two

groups to reconcile work and family life more effectively.

Mention is made for the first time of the application of modern information and communication technologies as necessary working equipment for the works council. This puts an end to the discussions arising from previous and often contradictory jurisdiction, which was restrictive in tendency: PC, telephone, mobile phone (if required for working out of office or in transportation companies), email, fax, internet, website on the intranet etc. must be made available.

Moreover, cooperation of the works council with knowledgeable employees has been facilitated, thus enabling the works council to make use of internal know-how from amongst the workforce in its search for problem solutions.

In the event that plant operations are planned to be changed in an enterprise with more than 300 employees, the works council is entitled to seek outside expertise without prior consultation of the employer. Consultation fees to be paid are subject to an agreement between the consultant and the works council, but must not exceed the usual levels paid for such services.

The establishment of a works committee has previously been possible for enterprises with 301 employees and more; according to the new provisions it may already be formed in enterprises with 101 employees and more, while the works council is entitled to set up additional committees with functions to be dealt with in their own responsibility, once a works committee is in place.

In the past, a member of the works council was not adequately protected against being transferred (e.g. to other locations of the same company) with resultant loss of his/her seat on the council; according to the new provisions, this requires the consent of the works council, as does dismissal without notice.

Similar provisions improve and strengthen the election and activities of youth and trainee representatives.

#### 4. European Works Councils (EWC)

##### Tasks and entitlement of the European Works Councils (EWC)

Adoption of the Directive 94/45 of the European Council of 22 September 1994 on the establishment of European works councils took account of facts such as Europe-wide or world-wide operations of transnational corporations, the disappearance of old enterprises in the consequence of mergers, and the foundation of subsidiaries abroad even by medium-sized businesses, while co-determination had an effect at the national level only, if at all.

The directive is applicable in all the member states of the European Union and the European Economic Area and, like all EU directives, had to be transposed into national law within a period of three years. The directive allows the establishment of European works councils in enterprises with a minimum of 1,000 employees and more than 150 employees each in at least two member states. Workers' representatives are granted information and consultation rights in this context. The detailed rights and duties of the EWC, its functioning and election procedure is negotiated in each individual case. However, corporate management needs to ensure that the necessary conditions are put in place for the establishment of an EWC and that the required resources are available. Unless corporate management itself initiates negotiations about such measures, it needs to do so at the request of at least 100 employees from a minimum of two plants from a minimum of two member states.

In Germany, the law on European works councils came into force on 1 November 1996. Six years after the adoption of the directive in 1994,

## Information and consultation rights of European works councils

The European works council has information and consultation rights for the following issues:



the European Commission took stock of it in a clearly positive manner: “the underlying principle of the directive – to enable the social partners to move ahead in their development through negotiations – has proved to be effective. It has evidently been successful since at least 600 agreements have been concluded during the last five years”. This is what the European Commission noted in December 1999. More than 800 agreements have been negotiated by now. An analysis of more than 100 of them has shown that elements of information and consultation seldom exceed the limited national framework<sup>122</sup>.

The Confederation of German Trade Unions (DGB) calls for a further development, long overdue since 1999, of the EWC directive. The most important demands are:

- improved working conditions for European works councils (e.g. by making available interpreters, including for preparatory and follow-up sessions, and translating all necessary documentation),

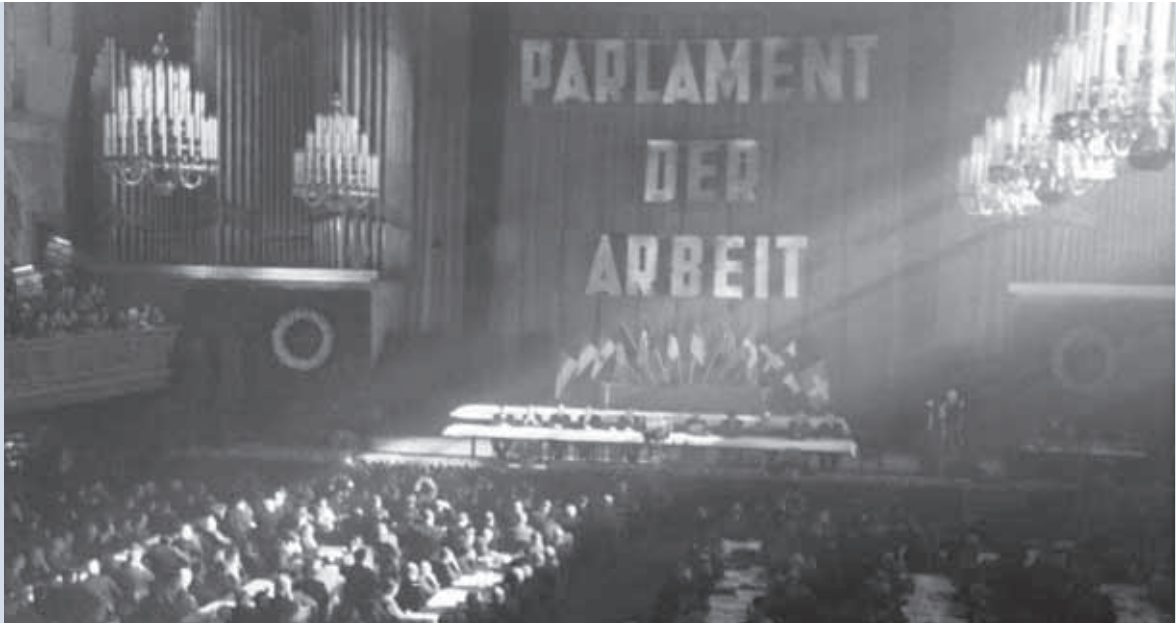
- strengthening the role of the trade unions (e.g. the right of union representatives and experts to take part in all negotiations and meetings of the European works council at head office and a general right of access to individual locations for union representatives),
- greater opportunities for the release from work for members of the EWC,
- lowering thresholds for the establishment of EWC (from the current 1,000 to 500 employees, of whom at least 100 must come from at least two countries) etc.
- There is an extensive catalogue of further demands regarding the inclusion of workers' representatives in the areas of occupational health and safety, data protection, environmental protection, equal opportunity policy and policy for the disabled.

Against the background of European Union enlargement and the advance of globalisation and Europeanisation of corporate strategies, in particular, an immediate update of the EWC directive appears absolutely imperative.

122 Hellmuth Gohde. Analyse und Handlungsempfehlungen, Betriebs- und Dienstvereinbarungen. Bund-Verlag, Frankfurt am Main. 2004.

## Chapter 5

### Co-determination



#### 1. Board-level Co-determination

The demand for co-determination in corporate decision-making has been a long-standing demand of the trade union movement. When, in 1918, political democracy had been successfully introduced in Germany, the General Federation of German Trade Unions (ADGB) believed that political democracy needed to be supplemented and protected by a process of economic democratisation in order...“to mould capitalism before it can be broken...”, a view shared by many at the time.<sup>120</sup>

Similarly, when the Federal Republic had been founded and large sections of the population believed that big industry and the important arms producers in coal and steel were partly to

blame for the rise of the Nazis and their seizure of power, political parties and the trade unions once again sought to restructure the economy because “the experience of the years between 1918 and 1933 taught us that formal political democracy does not suffice if the aim is to realise a genuinely democratic order of society...”<sup>121</sup>

In order to speed up the reconstruction of the economy at the end of the war, the allied occupational forces set up trusts to govern the large divested companies, in which parity-based supervisory boards were expected to control and manage corporate activities until the time when the question of ownership had been resolved. These supervisory boards with equal representation of Capital and Labour continued

120 Quote from a paper by Fritz Naphtalis, ADGB head of economic policy research at the ADGB Congress in Hamburg in 1928.

121 Minutes of the DGB founding congress in 1949.

to function in the coal and steel industry after the ownership issue had been settled, while the trade unions suffered a defeat in the other sectors of the economy where the introduction of the Works Constitution Act in 1952 prevented the coal-and-steel model from being applied to the entire economy. The following years saw considerable disagreement about co-determination between the German Confederation of Trade Unions (DGB) and the government of the day; it was as late as 1976 that formal (!) parity<sup>122</sup> was extended to include supervisory boards of other enterprises in the economy.

In the Federal Republic of Germany, we distinguish four different systems of statutory board-level co-determination under which employees and their trade unions are entitled to take part in corporate decision-making through their representation on the supervisory boards of corporate groups and enterprises.

Two of these systems apply to the coal, iron and steel industry, notably the Coal and Steel Co-determination Act of 1951 and the Co-determination Supplementary Act for the Coal and Steel Industry of 1956. The other two are the Works Constitution Act of 1952 and the Co-determination Act of 1976.

## 2. Co-determination in the coal, iron and steel industry

This form of co-determination is based on the above-mentioned legislation regarding the representation of employees on the supervisory and management boards of companies in the mining and iron and steel producing, yet not processing industries. It is applicable to companies with more than 1,000 employees. Shareholders and employees are represented on the supervisory boards of these companies in equal numbers, while the size of the supervisory

board depends on the number of workers employed by the company. Employees may be represented on the supervisory board by both internal and external representatives. External labour representatives are nominated by the trade union represented in the company concerned after consultation with the works council, and elected at the general meeting. These elections are just a formality since the general meeting is bound by the nominations made by workers' representatives.

Under the coal-and steel co-determination system, the management board includes a Labour Director with equal rights, who cannot be recruited or dismissed against the majority of votes from the workers' representatives on the supervisory board.

Nevertheless, equal representation, or parity, between Labour and Capital is somewhat restricted by a so-called "neutral", or non-partisan supervisory board member whom both parties, i.e. the shareholders and the workers' representatives on the supervisory board, must agree on.

Co-determination in coal and steel is the most highly developed form of board-level co-determination in Germany. However, owing to mergers with other industries and the "natural" relocation of key areas of production, the number of enterprises in coal, iron and steel is constantly declining, and so is the number of employees who are participating in this form of corporate decision-making. In order to prevent coal-and-steel companies from dropping out of the system (50% of key production of a holding must be in coal and steel to qualify for this form of co-determination), trade unions pressed for supplementary legislation, which was finally adopted in 1956; pursuant to this Act, the coal-and-steel co-determination system is guaranteed for another six years even if statutory

<sup>122</sup> This type of formal parity implies equal representation of the two parties on the supervisory board but, in controversial cases, a casting vote for the chair of the board (appointed by the Capital side) in a second round of voting, in other words a guaranteed majority for Capital in all such situations.

conditions are no longer met, yet the works council's and union's right to make proposals has been restricted and regulations concerning the labour director's appointment and dismissal have deteriorated.

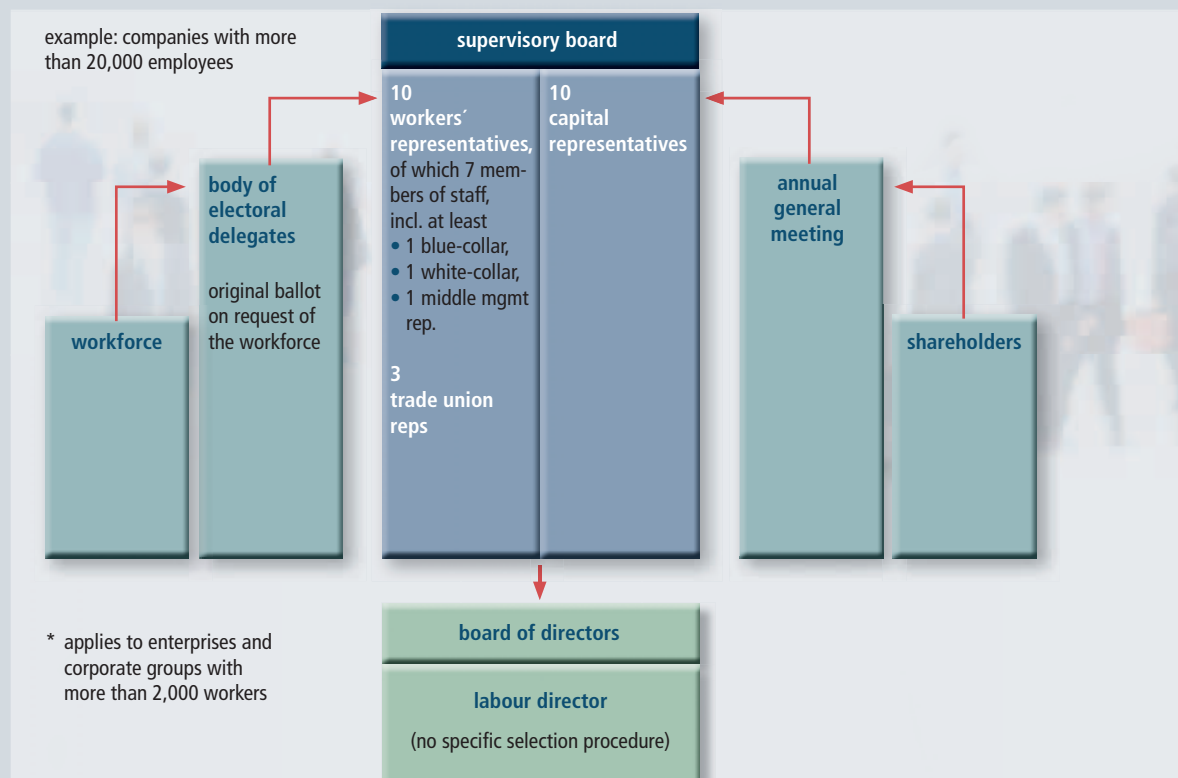
### 3. The Co-determination Act of 1976

This Act has replaced board-level co-determination regulated under the works constitution laws of 1952 and 1972. The scope of the Works Constitution Act of 1952, however, has been restricted to joint-stock companies and partnerships limited by shares with a workforce of up to 2,000 employees and to limited companies with more than 500 employees. For these types of companies a so-called one-third parity still applies to workers' representatives on the supervisory board, i.e. co-determination is de facto extremely weak given the imbalance of power.

The Co-determination Act of 1976 is applicable to all incorporated firms in commerce, trade and services with more than 2,000 employees. Depending on the number of workers employed, the supervisory board consists of 12, 16 or 20 members, representing both sides in equal numbers, yet with one additional middle management representative on the workers' bench, thus ensuring numerical parity, but diluting it in practice. Moreover, the chairperson is always from the shareholders' side as a matter of principle, and has a second vote in case of a stalemate; in other words, decisions need to be taken consensually under pressure of constructive cooperation, yet ultimately rest with the capital side in case of disagreement.

Labour representatives on the supervisory board are elected in a complicated procedure: depending on the size of the company, they are either elected in an original ballot or by an

#### Co-determination Act for the Coal, Iron and Steel Industries (1951/1976)\*





electoral body. The labour director can be appointed or dismissed by majority decision, i.e. even against the vote of the workers' representatives, if no agreement is reached. The introduction of genuine comprehensive co-determination in economic decision-making, which the trade unions have called for since the early years of the Federal Republic, has not been attained with this form of co-determination either.

Having said that, even this limited form of board-level co-determination has stood the test of time in Germany, as the government commission for the modernisation of board-level co-determination noted in December 2006. Prior to this commission, various proposals had been presented for the reform of the law, including the joint report of the Bertelsmann Stiftung and Hans Böckler Stiftung in 1998, or the radical reforms proposed by the German Employers' Association (BDA) and the Federation of German Industry (BDI) in 2004, and the proposals of the "Berlin Network", a group of market-liberal academics set on dismantling co-determination.

Owing to irreconcilable differences between the associations concerned, the expert view of the government commission was signed by just its three academic members headed by Prof. Biedenkopf, former CDU Prime Minister of the Free State of Saxony in eastern Germany. The commission clearly spoke out against a return to the former lower standards of co-determination, but equally opposed the union demand for a catalogue of minimum conditions laid down in the law requiring consent from labour representatives, e.g. lowering the minimum number of staff required to qualify for co-determination. In contrast, the commission turned down demands by the opponents of co-determination with almost unprecedented

clarity. The remit of the commission, which had been set up by the previous Red-Green Government and confirmed by the Grand Coalition Government, had been to explore "to what extent the German success model of co-determination is still keeping up with global and European challenges" and "to draw up proposals for a modern development of German co-determination which is fit for Europe". The commission's recommendations for the legislator included the proposal to open up board-level co-determination cautiously to decentrally-negotiated solutions and to supplement binding co-determination rules by optional provisions in three areas in which the social partners were allowed to negotiate deviating conditions:

- in shaping co-determination in companies dominated by the mother company;
- in determining the size of the supervisory board, and
- in integrating representatives of foreign members of staff in the workers' group of control bodies.<sup>123</sup>

In all other respects, the commission does not see any need for fundamentally revising the German system of co-determination. In contrast, both the employers and the trade unions have presented diverging recommendations. The trade unions explicitly welcome the commission's clear stand on the positive economic effects of German co-determination and the fact that board-level co-determination has been anchored successfully in the European context, yet do not agree with some of its recommendations, e.g. as regards the setting-up of a negotiating body to determine deviating co-determination standards; instead, they refer to the proposed supplementary regulations concerning binding conditions subject to co-determination, and point out that they are in principle open to negotiated solutions, but that

123 Höpner, Martin. Behutsame Modernisierung. Mitbestimmung 01 and 02/2007. Hans Böckler Stiftung.

“only conditions which would improve existing co-determination should be the subject of a negotiated solution covered in a collective agreement”.<sup>124</sup>

The fact that employers and employees have been in disagreement about fundamental ques-

tions in connection with board-level co-determination is not surprising given the employers' attempts during the last few years to discredit board-level co-determination as a disadvantage for Germany as a business location; in fact, it is an indication that this issue will soon become again a bone of contention in politics.

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124 Statement of the labour representatives of the commission. Commission's report on the modernisation of German board-level co-determination, 12/2006.

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