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Decline in Collective Bargaining Coverage: Insights and Experiences from Germany

Contents: **1.** Introduction. **2.** Statistical and economic background. **2.1.** Development of collective bargaining coverage. **2.2.** Causes. **2.3.** Economic and social impacts. **3.** Possible countermeasures. **3.1.** Measures to strengthen collective agreements. **3.1.1.** Statutory minimum wage. **3.1.2.** Facilitated general application of collective agreements. **3.1.3.** Collective bargaining coverage in the awarding of public contracts. **3.1.4.** Assessment. **3.2.** Measures to increase the attractiveness of trade union membership. **3.2.1.** Differentiation clauses in collective agreements. **3.2.2.** Tax privileges. **3.2.3.** Financial participation of outsiders (solidarity contribution). **3.2.3.1.** General background. **3.2.3.2.** Swiss law as a potential model. **3.2.3.3.** Lessons from the Swiss model. **3.2.3.4.** Constitutional issues. **4.** Summary and conclusions.

1. *Introduction*

Collective bargaining is a traditional institution for wage setting. It describes a system in which trade unions and employers' associations or individual employers bargain over wages for the employees at the respective firms[1]. This system is regarded as the key instrument for improving employees' incomes and working conditions: collective agreements negotiated by trade unions and employers or employers' associations respectively ensure social peace and social cohesion to a considerable extent. They are the benchmark for transparency and fair competition in the world of business and labour and enable fairer redistribution and fair participation of employees and their families in the social market economy[2]. In addition, collective

[1] Bellmann *et al.*, *Collective bargaining coverage, works councils and the new German minimum wage*, in *EID*, 2021, p. 269.

[2] Löw, Oldehaver, *Stärkung der Tarifautonomie, der Tarifpartner und der Tarifbindung*, in *NZA*, 2024, p. 88.

agreements reduce the burden on the state by allowing the social partners to regulate labour relations independently and resolve conflicts together[3]. According to the German legislator, it is "the task of the parties to collective agreements to equalise the structural inferiority of individual employees when concluding employment contracts at a collective level and thus to enable an approximately equal negotiation of wages and working conditions"[4]. Collective bargaining coverage is defined as the share of employees covered by collective agreements. Higher rates of collective bargaining coverage are therefore essential for pushing down the share of workers on below-decent pay[5]. Competitiveness based on low wages is not sufficient to restart growth in the European Union. This is reflected in recent European Commission programmes, such as the Recovery Plan and Next Generation EU. A new European growth strategy focuses on wages and living standards, alongside digitalisation and decarbonisation as two fundamental priorities. Given tight labour markets, labour shortages and the need to upskill workers a sound wage structure that does not rely on an exploitative low-wage sector is complementary to an investment strategy in infrastructure, digitalisation and education[6]. Hence, supporting collective bargaining may serve as a reference point for policy to make sure that within Member States good and well-paid jobs are part of a growth strategy towards the knowledge economy[7]. However, collective bargaining coverage is declining in many Member States, which has undesirable impacts overall. One important reason for this development is the cost-free participation of outsider employees ("free riders"), which reduces the incentives to be a member of a union and to pay dues. Here, the interest in a high level of collective bargaining coverage collides with individual contractual freedom, which sets limits to the legal discrimination of outsider employees. This paper discusses possible legal countermeasures with a focus on Germany. With regard to solidarity contributions, a possible regulatory model from Switzerland is examined.

[3] German Federation of Trade Unions, *Positionen zur Stärkung der Tarifbindung*, April 2019, p. 1.

[4] Printed Matter 18/1558 of Deutscher Bundestag, p. 26.

[5] Haapanala, Marx, Parolin, *Decent Wage Floors in Europe: Does the Minimum Wage Directive Get It Right?*, in *IZA DP*, October 2022, No. 15660, p. 29.

[6] Hassel, *Round Table. Mission impossible? How to increase collective bargaining coverage in Germany and the EU*, in *Transfer*, 2022, p. 491.

[7] Cazes, Garnero, Martin, *Negotiating our Way Up: Collective Bargaining in a Changing World of Work*, in *OECD Publishing*, 2019; Hassel, *cit.*, p. 491.

2. *Statistical and economic background*

2.1. *Development of collective bargaining coverage*

Strong collective bargaining developed during the era of industrialisation. It peaked during the 1960s when trade unions forcefully pushed up living standards, while economies were growing strongly. The labour share of GDP was at a historic high and inequality low. The late 1960s and early 1970s were a turning point for trade union strength and collective bargaining. Tight labour markets, industrial unrest, and rising inflation shifted the macroeconomic paradigm of Western governments. Instead of approving strong unions and collective bargaining, governments started to either fight them (in the United Kingdom and United States) or neglect them (Germany)[8]. Collective bargaining and strong trade unions were seen by economists as obstructing economic restructuring, innovation, and flexible adjustment to a new economic regime[9]. In western Europe, the decline of unions and collective bargaining was gradual and also not universal, as some countries maintained high levels of bargaining coverage and strong trade unions[10]. In 2021, for example, only 30 percent of companies in Germany were still bound by collective agreements, and the degree of employee organization has halved since 1980[11]. For several decades, the organizational power of German unions has been characterized by an eroding membership base, a patchy membership structure and an enforcement crisis in collective bargaining policy. The European average is at least over 30 percent union density. But even in Member States with traditionally high levels of organization, such as Belgium, Italy and the Scandinavian countries, membership figures are declining[12].

In Germany, the membership in employers' associations is in decline, too[13]. Many employers left their association in order to quit their collective agreements: according to Section 3 German Collective Agreements Act (*Tar-*

[8] Hassel, *cit.*, p. 491.

[9] Aidt, Tzannatos, *Trade unions, collective bargaining and macroeconomic performance: A review*, in *IRJ*, 2008, p. 258.

[10] Hassel, *cit.*, p. 491.

[11] Höpfner, *Partizipation und Kostenausgleich: Nutzungsentgelt für Tarifverträge*, in *ZA*, 2020, p. 178.

[12] Henssler, *Stärkung der Tarifbindung durch den Gesetzgeber?*, in *RArbeit*, 2021, p. 1.

[13] Löw, Oldehaver, *cit.*, p. 88.

ifvertragsgesetz, TVG), the binding by a collective agreement requires that the employee and the employer are members of the parties to the collective agreement, unless the employer has concluded the collective agreement by himself with the trade union. In response to this, some associations have developed the so-called membership "without collective bargaining coverage" (OT), in which the employers concerned are not affected by the collective bargaining agreement, but should nevertheless participate in the services of an employers' association (e.g. training, advice and labour court representation). Such membership is considered permissible by case law[14].

2.2. *Causes*

There are many reasons for this development[15]. One central cause is to be found in the social structure. Social milieus are eroding, and employees are emancipating themselves from large social organizations[16]. In Germany, most trade unions are mass organisations for employees in terms of their tradition and legal understanding. However, the era of trade unions, with whose ideas and objectives the majority of employees in an industry could identify, has long since come to an end in almost all sectors. The change in the world of work towards more and more qualified professions and jobs and equally qualified employees has led to the alienation of trade unions as mass organisations[17]. In general, it can be observed that the binding forces of large social organisations such as churches, political parties and trade unions have dwindled over the last 20 to 30 years. This is probably generally due to the increasing trend towards individualisation of all living conditions and can therefore only be controlled politically to a very limited extent with legal activities[18].

[14] German Federal Labour Court of 18.7.2006 - 3 AZR 374/05.

[15] In depth Günther, Höpner, *Why does Germany abstain from statutory bargaining extensions? Explaining the exceptional German erosion of collective wage bargaining, Economic and Industrial Democracy*, in *EID*, 2022, p. 88; Paster, Oude Nijhuis, Kiecker, *To extend or not to extend: Explaining the divergent use of statutory bargaining extensions in the Netherlands and Germany*, in *BJIR*, 2020, p. 532.

[16] Hassel, Schröder, *Gewerkschaftliche Mitgliederpolitik: Schlüssel für eine starke Sozialpartnerschaft*, in *WSI-Report*, 2018, p. 13.

[17] Loritz, *Rechtliche und tatsächliche Ursachen der gesunkenen Tarifbindung*, in *Festschrift für Ulrich Preis*, Verlag C.H.BECK, 2021, p. 795.

[18] Franzen, *Stärkung der Tarifautonomie durch Anreize zum Verbandsbeitritt*, Bund-Verlag, 2018, p. 14.

The changed work structure offers a less favorable environment for trade union activity than the industrial work of earlier decades, with communal standing in the production hall or collective driving into the pit in large factories. The world of work has become increasingly fragmented in a modern industrial and service society[19]. The service sector has grown larger, with an increasing share of companies with small local units and flat hierarchies. The disappearance of entire sectors such as coal mining and the massive reduction in capacity in the iron and steel industry, together with the increased use of robots and machines, particularly in the metal industry, have considerably reduced the size of the "traditional" physical labour force. As a result, large trade unions have simply lost a considerable proportion of their traditional membership potential. The digitalised areas of companies largely employ highly qualified workers whose remuneration often significantly exceeds the maximum collectively agreed salaries. Such employees often do not consider joining a trade union. The ongoing digitalisation of the world of work will continue to make many traditional jobs and workers and entire professions that are currently still within the scope of collectively agreed salaries redundant[20].

This is supported by empirical data: in the manufacturing industry, the proportion of union members among all employees in 2014 was 19.7 percent compared to 13.9 percent in the service sector. In the company size category of 10–24 employees, 9.9 percent of employees belonged to a union in 2014, between 25 and 99 employees 15.8 percent, in companies with between 100 and 499 employees 21.2 percent and in larger companies 26.5 percent. The breakdown of categories by age, gender and the form of work is also revealing, since the unionisation rate of part-time employees, women and younger employees is significantly lower than the average unionisation rate. In 2014, 12.1 percent of employed women in Germany were members of a trade union, compared to 19.1 percent of employed men[21]. These figures show that the trade unions are more strongly represented in larger companies, in the manufacturing industry and among older male employees in full-time employment. However, these areas are likely to decline due to economic

[19] Printed Matter 18/1558 of Deutscher Bundestag, p. 26.

[20] Loritz, *cit.*, p. 795.

[21] Dieke, Lesch, *Gewerkschaftliche Mitgliederstrukturen im europäischen Vergleich*, in *IW-Trends,* 2017, 3, p. 25.

and demographic developments; services and the associated smaller companies, part-time employment and female employment are likely to increase in the coming years. These developments pose major challenges for the trade unions in terms of their membership structure, which they will initially have to overcome in organisational terms themselves[22].

Furthermore, the benefits of collective bargaining are challenged by growing international competition and technological change. These developments lead to a rising demand for more flexible and tailor-made compensation systems, and hence the respective firms opt out of traditional collective bargaining[23]. Finally, probably the biggest problem is the cost-free participation of outsider employees ("free riders") by including the collective agreement in the employment contract, which is common practice in Germany: when employees receive the benefits of a collective bargaining agreement for free, the incentives to be a member of a union and to pay dues are reduced[24].

2.3. *Economic and social impacts*

From an economic point of view, collective bargaining is ascribed some desirable characteristics: it reduces transaction costs of wage negotiation and reduces the potential for conflicts between single employers and employees as it regulates the wage setting in a transparent manner[25]. Collective agreements lay down standardised working conditions for a large number of employees with different training and activities. A company that uses such a collective agreement would otherwise have to organise these matters itself. In addition, the company saves itself additional internal distribution debates with a collective labour agreement[26]. The disadvantages of collective agreements for employers are repeatedly cited: low flexibility, greater external control of individual companies and, as a result, personnel costs that may no

[22] Franzen, *cit.*, p. 15 ff.; Seiwerth, *Stärkung der Tarifautonomie - Anregungen aus Europa?*, in *ELLJ*, 2014, p. 450.

[23] Oberfichtner, *Works council introductions in Germany: Do they reflect workers' voice?*, in *EID*, 2019, p. 301; Bellmann *et al.*, *cit.*, p. 269.

[24] Höpfner, *cit.*, p. 178; Seiwerth, *Rechtliche Möglichkeiten zur Stärkung der Tarifbindung*, in *NZA*, 2025, p. 137 ff. On this in depth below 3.2.1.

[25] Oberfichtner, *cit.*, p. 301; Bellmann *et al.*, *cit.*, p. 269.

[26] Franzen, *cit.*, p. 17.

longer be commensurate with company circumstances. The parties to collective agreements have responded to this criticism in particular by introducing so-called opening clauses. This allows individual companies to deviate from the provisions of the collective agreement under certain conditions[27].

The decline in collective bargaining coverage has clear consequences for wages and working conditions. Employees who are not paid according to collective agreements earn significantly less than employees in companies with collectively agreed wages. For trade unions, this development is existential. As membership organizations, they depend on a broad membership base, which not only forms the financial basis for the strength of their offerings and services, but is also the basis for legitimacy, representation, mobilization and thus ultimately for their ability to assert themselves in collective bargaining and social policy. The organizational power of the trade unions is a key to the future of the social partnership[28]. It is equally important that all companies, including small and medium-sized ones, perceive the collective agreement as a sufficiently flexible and appropriate instrument for shaping company working conditions[29]. A larger problem that is increasingly being seen more clearly is the low-wage sector that has emerged. The weakness of collective bargaining autonomy in the low-wage sector and the existence of the low-wage sector perpetuate each other[30].

3. *Possible countermeasures*

As shown above, collective bargaining coverage is a result of a number of factors, which derive from the wider industrial relations system. Against this background, the role of the legislator is limited, since collective bargaining coverage depends on the wider industrial relations system[31]. Two basic approaches can be considered: measures to strengthen collective agreements (sub 3.1) and measures to increase the attractiveness of trade union membership (sub 3.2).

[27] Franzen, *cit.*, p. 18.
[28] Hassel, Schröder, *cit.*, p. 6.
[29] Henssler, *cit.*, p. 1.
[30] Seiwerth, *cit.*, p. 450.
[31] Hassel, *cit.*, pp. 491 and 494.

3.1. *Measures to strengthen collective agreements*

The German legislator took this path in 2014 with the so-called Collective Bargaining Autonomy Strengthening Act (*Tarifautonomiestärkungsgesetz*). This law introduced a general minimum wage and lowered the requirements for collective agreements to be declared generally applicable. This is intended to strengthen the actual application of collective agreements where they still exist. Where there are only a few collective agreements or, in the opinion of the legislator, insufficient collective agreements, state law must close the gap. This approach is concerned with strengthening the collective agreement, as this is the typical instrument with which appropriate working conditions can be established. The legislator thus equates collective bargaining autonomy with its products, the collective agreements. The idea is: if you strengthen the collective agreement through various legal measures, you simultaneously strengthen collective bargaining autonomy[32].

3.1.1. *Statutory minimum wage*

The statutory minimum wage is a wage set by law that may not be undercut. Agreements on lower wages than the statutory minimum wage or the waiver of the minimum wage by employees are invalid, i.e. the employee can still assert their claim to it. Apart from Germany, there is also a statutory minimum wage in France, the Netherlands, Portugal, Spain and the United Kingdom, for example. There is no statutory minimum wage in Italy, Austria, Switzerland and the Scandinavian countries, as these countries place more emphasis on collective bargaining autonomy[33].

At European level, the new Directive 2022/2041 on fair and adequate minimum wages[34] was introduced in order to improve working conditions by increasing minimum wages and significantly increasing collective bargaining coverage. The Directive requires Member States to have a process for setting their minimum wage at a sufficiently high level to provide a "decent standard of living" and also encourages collective bargaining by requiring countries to create action plans if bargaining coverage is below 80

[32] FRANZEN, *cit.*, p. 13.

[33] Overview at Eurostat, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Minimum_wage_statistics, accessed 30.3.2025.

[34] Directive 2022/2041 - Adequate minimum wages in the EU, L 275/33.

percent[35]. Although the European Union does not have the legal authority to directly change member country laws on minimum wages or collective bargaining and the Directive is restricted to encourage Member States to comply and helps define a process for making plans through consultations with businesses and unions, it is sometimes regarded as a "big deal", since it represents a paradigm shift away from neoliberal policies that previously sought to weaken trade unions and towards the recognition that trade unions and collective bargaining help make economies work properly[36].

Theoretically, the minimum wage could indeed influence the bargaining over wages and strengthen the position of unions. This is because both parties bargain over a surplus and the minimum wage sets a lower limit for the bargaining result. If this lower limit is a reference point and potentially a fallback position for unions, it could influence the bargained wage in the employees' favour[37]. However, it is theoretically ambivalent whether the minimum wage leads to a rise or a further deterioration of employers' collective bargaining participation. On the one hand, the number of companies participating in collective bargaining may rise as the minimum wage lowers the marginal costs of participation. The minimum wage sets a new minimum that is paid by all employers. Hence, additional wage costs of firms that consider an adoption of collective agreements are limited to the difference between collectively bargained wages and the minimum wage. Before the introduction of the minimum wage, these marginal wage costs of joining a collective agreement may have exceeded this difference[38]. On the other hand, the marginal returns of collective bargaining may also fall in the course of the introduction of the minimum wage, which induces the incentive to leave collective agreements. The reduction of marginal returns is mostly because minimum wages impose an alternative minimum standard and thereby reduce the need to bargain over wages of minimum wage jobs. Therefore, the minimum wage

[35] Hassel, *cit.*, p. 491.

[36] Madland, *Historic New EU Law Part of Growing Push for Sectoral Bargaining*, in *onlabour* of 19.1.2023, https://onlabor.org/historic-new-eu-law-part-of-growing-push-for-sectoral-bargaining/, accessed 30.3.2025.

[37] Apel, Bachmann, Bender, *Arbeitsmarktwirkungen der Mindestlohneinführung im Bauhauptgewerbe*, in *JLMR*, 2012, p. 257; Avouyi-Dovi, Fourgere, Gautier, *Wage rigidity, collective bargaining, and the minimum wage: Evidence from French agreement data*, in *RES*, 2013, p. 1337; Dittrich, Knabe, Leipold, *Spillover effects of minimum wages in experimental wage negotiations*, in *CESifo ES*, 2014, p. 780; Bellmann *et al.*, *cit.*, p. 269.

[38] Bellmann *et al.*, *cit.*, p. 269.

limits the potential of collective agreements to serve as a tool to reduce the transactional costs of wage bargaining[39]. Furthermore, a statutory minimum wage may reduce the incentive for employees in low-wage sectors to seek protection from the trade unions because the state is already taking care of wage protection[40]. Other authors confirm that minimum wages crowd out industrial relations[41]. Since marginal costs and marginal returns are reduced by the introduction of a minimum wage, the resulting effect on employer participation is ultimately an empirical question that can be analysed in a reduced form analysis.

A study provides an empirical investigation by estimating the effect of the introduction of the German minimum wage on employer participation in collective bargaining, which also contributes to a highly relevant policy question, mostly because the parliamentary justification of the new law was substitutive by design, i.e. the minimum wage was introduced to compensate for the employers' decreasing bargaining participation[42]. This study assessed the role of the recent introduction of the minimum wage for collective bargaining coverage. It shows that a statistically significant probability that an affected companies opts out of collective bargaining contracts. However, the authors also observed a small positive probability for affected companies to join bargaining contracts in the course of the introduction of the minimum wage. Since the latter effect falls short of significance and is dominated by companies leaving collective bargaining, their net effect is a slight reduction in bargaining participation. The result that a significant fraction of affected companies leave collective bargaining suggests that the minimum wage has a small substitutive mechanism when it comes to collective bargaining as a central institution of industrial relations. This substitutive mechanism can be explained by lowered marginal returns from collective bargaining, but the minimum wage may also constitute a substitutive norm replacing the traditional norm of collectively bargained wages. This result implies that the minimum wage should not be interpreted as an institution that strengthens the

[39] *Ibid.*

[40] Löwisch, Rieble, *Tarifvertragsgesetz*, Verlag C.H.BECK, 4th edition, 2017, § 5 point 9; Lobinger, *Stärkung oder Verstaatlichung der Tarifautonomie?*, in *JZ*, 2014, p. 810; Henssler, *cit.*, p. 1; Löw, Oldehaver, *cit.*, p. 88.

[41] Aghion, Algan, Cahuc, *Civil society and the state: The interplay between cooperation and minimum wage regulation*, in *JEEA*, 2011, p. 3.

[42] Bellmann *et al.*, *cit.*, p. 269.

bargaining autonomy as proposed by the German government in its official justification of the minimum wage legislation[43].

However, the data situation is, as always, inconsistent. Other economic findings are more encouraging, since countries working towards the European objective of 80 percent collective bargaining coverage can directly benefit from lower wage inequality and the absolute purchasing power at the effective wage floor appears predominantly driven by the system of minimum-wage setting: higher levels of collective bargaining coverage directly influence the wage floor in countries without statutory minimum wages, whereas this is not the case in countries with statutory minimum wages where the lowest rate of pay is fixed in legislation[44].

In order to strengthen the autonomy of collective bargaining, the collective bargaining partners and collective bargaining commitment, some authors support a partial return to the determination of minimum wages by the collective bargaining partners. The proximity and dialogue between the collective bargaining partners could lead to solutions that are better tailored to the respective region and sector, in contrast to the "one size fits all solution" provided by the minimum wage. It would also create an incentive for both trade unions and employers to organise themselves and take matters into their own hands – at present, the collective bargaining partners are relieved of this work by government measures[45].

3.1.2. *Facilitated general application of collective agreements*

Another element of the German approach to strengthening collective bargaining autonomy is the facilitation of the general application of collective agreements. The general application of a collective agreement means that this agreement also covers employment relationships that are not covered by a collective agreement if and to the extent that they fall within its scope. This serves several purposes. Firstly, general applicability has a social protection function: employees who are not covered by a collective agreement should be guaranteed appropriate working conditions[46]. According to sec-

[43] *Ibid*.

[44] Haapanala, Marx, Parolin, *cit.*, p. 30 ff.

[45] Löw, Oldehaver, *cit.*, p. 88.

[46] Franzen, in *Erfurter Kommentar zum Arbeitsrecht*, Verlag C.H.BECK, 25th edition 2025, § 5 TVG point 1.

tion 5 TVG, the Federal Ministry of Labour and Social Affairs may in agreement with a committee composed of three representatives each from the umbrella organisations of employers and of employees declare a collective agreement to be generally applicable where the declaration of general application appears necessary in the public interest. As part of the German reform, the declaration of the general applicability of collective agreements was made easier by abolishing the previous 50 percent quorum. This is now replaced by a "specified public interest", which is generally deemed to exist if the collective agreement has become "predominantly important" for the organisation of working conditions in its area of application, or if a declaration of general applicability is required to safeguard the effectiveness of the collective agreement against the "consequences of undesirable economic developments".

The autonomous behaviour of the parties to collective agreements declared to be generally applicable is also burdened because it is shaped by the foreseeable extension of collective agreements and the regulatory power invites tie-in deals to the detriment of third parties. There is also a risk that those collective bargaining parties will be dependent on the state's extension of collective agreements because they are no longer able to conclude such agreements autonomously. This creates a structural dependency on the ministry that is incompatible with the model of state-independent coalitions. Just imagine if the ministry refused to extend all collective agreements in the construction industry. It is unclear whether the collective bargaining parties there would then still be able to exercise any regulatory power at all, or whether they become minimum wage organisations that are unable to conclude autonomous collective agreements and lose their collective bargaining capacity due to their dependence on the state[47].

3.1.3. *Collective bargaining coverage in the awarding of public contracts*

In Germany, the Green Party and the Left Party demand that public contracts may only be awarded to companies bound by collective agreements[48]. This demand is also shared by the German Federation of Trade

[47] Löwisch, Rieble, *cit.*, § 5 point 11.
[48] Printed Matter 20/14345 of Deutscher Bundestag.

Unions (DGB) and some legal experts[49] and was taken up in a draft law by the German government of 20 December 2024, with is due to come into force on 1 July 2025 if it is passed by parliament. According to this draft law, federal contracts shall only be awarded to companies that pay according to a representative collective agreement for the respective sector. With this law, the federal government wants to limit predatory competition based on wage and personnel costs and thus ensure fairer competition, greater wage justice and more collective bargaining agreements. The law is to apply to the awarding of federal supply and service contracts with a contract value of 30,000 euros or more and to the awarding of federal construction contracts with a contract value of 50,000 euros or more.

In the absence of reliable data on collective bargaining coverage in Germany, it is currently impossible to predict what benefits such a law could offer. In particular, the existing data does not currently indicate the extent to which the sectors commissioned by the federal government would even fall within the scope of a collective agreement and how many of the commissioned companies are already bound by collective agreements. It is also to be expected that the planned regulations will entail a high level of bureaucracy for companies due to the obligation to provide evidence. This is likely to increase the risk that small and medium-sized companies in particular will be excluded from public procurement procedures at federal level for purely practical reasons[50]. The Council for the Review of Standardisation therefore demands that the law only be applied from significantly higher contract values[51]. From a legal perspective, concerns have been raised against the preliminary working version, particularly with regard to European and constitutional law: in particular, a collective bargaining law would create a de facto collective bargaining obligation, which would constitute a violation of the negative freedom of association[52]. After the change of government in Germany, the fate of the draft law remains to be seen anyway.

[49] German Federation of Trade Unions, *Positionen zur Stärkung der Tarifbindung*, April 2019, p. 1; see also Pelke, *Im Blickpunkt*, in *BB*, 2021, p. 1523.

[50] Löw, Oldehaver, *cit.*, p. 88.

[51] Https://vergabeblog.de/2025-01-14/gesetzesentwurf-fuer-ein-tariftreuegesetz/, accessed 30.3.2025.

[52] Hartmann, *Unionsrechtliche und verfassungsrechtliche Grenzen für ein Bundestariftreuegesetz*, in *ZA*, 2023, p. 510.

3.1.4. *Assessment*

According to its original idea, collective bargaining autonomy is based on an individual and collective, membership-based right of freedom for employees and employers and their associations, which is independent of the state. Instead, the German approach, with its introduction of minimum wages and the lowering of the requirements for a declaration of general applicability of collective agreements, seeks to impose collective bargaining instead of strengthening collective bargaining autonomy[53]. This assigns the social partners a new function, namely to implement certain public welfare interests specified by the state under sovereign control. Collective bargaining autonomy is understood as the autonomous, non-state regulation of working conditions by the collective bargaining partners, whose decisions are in turn legitimised by the autonomous decision of their members to join. It is based on collective self-organisation and acts on the basis of free, not externally controlled organisation, i.e. on its own initiative. The state merely provides a legal framework for autonomous organisation. In contrast, the models for extending collective bargaining coverage, which have recently been massively expanded by the legislator, create working conditions by an act of the state that are only based more or less loosely on collective agreements. At best, one can still speak of "collectively agreed" state labour conditions[54].

With regard to the original idea of collective bargaining autonomy, a broad membership base in both the trade unions and the employers' organisations is desirable, since the legal effects of the collective agreement are primarily legitimised by the membership of the parties to the employment contract in the parties to the collective agreement[55]. Unfortunately, membership-based legitimisation plays no discernible role in the concept of the German approach. According to the legislator's concept, collective agreements can also be concluded, for example, if the relevant regulations are drawn up jointly by chambers of labour and chambers of commerce organised under public law. This can be called the "nationalisation of collective bargaining autonomy" and is a misguided path that weakens the associations

[53] Löw, Oldehaver, *cit.*, p. 88.

[54] Henssler, *cit.*, p. 1 ff.

[55] Franzen, *cit.*, § 1 TVG point 6; Thüsing, in Wiedemann (ed.), *Tarifvertragsgesetz*, Verlag C.H.BECK, 9th edition 2023, § 1 point 42 ff.

and discredits the collective bargaining system[56]. Ironically, 10 years after the Collective Bargaining Autonomy Strengthening Act came into force, the strengthening of collective bargaining is still being discussed[57].

State replacement of collective bargaining reduces the attractiveness of the prevailing trade unions in particular: Why should employees join and pay union dues when they already receive adequate protection from the state? The collective bargaining system also loses legitimacy: anyone who is dissatisfied with the collective bargaining conditions will not benefit from leaving the union, and at the same time the rights to have a say within the union are devalued[58]. The law is appropriately dubbed as "law to weaken the bargaining autonomy"[59]. Instead of tackling the causes, it merely combats the symptoms, and does so one-sidedly and with unsuitable means. It moves away from a free market economy labour constitution, provokes a progressive turning away of the labour contract parties from the associations and will foreseeably lead to compulsory state regulation of working and economic conditions. The collective bargaining system will only survive in the long term if companies are convinced by its intrinsic advantages to voluntarily submit to collective bargaining[60]. The German approach fails to recognise the difference between collective bargaining autonomy and collective bargaining. In the worst case, it leaves only losers, in particular weakened trade unions and inadequate employee representation. Measures to strengthen collective bargaining autonomy must therefore address the causes rather than the symptoms, namely collective bargaining coverage by virtue of membership[61].

3.2. *Measures to increase the attractiveness of trade union membership*

Another way to strengthen collective bargaining autonomy is to focus on precisely this functional condition of collective bargaining autonomy, namely the strengthening of the membership base. For the evaluation, one

[56] Lobinger, *cit.*, p. 810; Franzen, *cit.*, p. 14.

[57] Seiwerth, *cit.*, p. 137.

[58] Löwisch, Rieble, *cit.*, § 5 point 10.

[59] Forst, *Die Allgemeinverbindlicherklärung von Tarifverträgen nach dem sogenannten Tarifautonomiestärkungsgesetz*, in *RArbeit*, 2015, p. 25.

[60] Henssler, *cit.*, p. 1.

[61] Seiwerth, *cit.*, p. 450; Löw, Oldehaver, *cit.*, p. 88.

must ask to what extent the legal system itself provides incentives to join employee or employer associations. The product of collective bargaining autonomy, the collective agreement, must first be placed at the centre and the question must be asked to what extent it can provide incentives for trade union membership. The legal system cannot stop the demographically and economically induced decline in trade union membership. However, it can create favourable conditions under which membership of a trade union appears attractive to employees – and this against the background that the task of shaping collective bargaining autonomy cannot be achieved without a sufficient membership base of the coalitions, especially the trade unions[62].

3.2.1. *Differentiation clauses in collective agreements*

Since the cost-free participation of outsider employees reduces incentives to be a member of a union and to pay dues, trade unions frequently demand that differentiation clauses be permitted in collective agreements. For the most part, employees who are employed by an employer who is bound by a collective agreement are in any case covered by the collective agreement by virtue of a reference clause. Employers bound by collective agreements have a considerable interest in treating their employees uniformly as if they were all bound by the collective agreement, and not just the members of the union concluding the collective agreement, as the system of German collective agreement law itself provides for under Sections 3 (1) and 4 (1) TVG. Only the uniform treatment of all employees in accordance with the collective agreement to which the employer is bound ensures the essential standardisation function of the collective agreement. Employees of companies bound by collective agreements therefore do not need to join the trade union in order to benefit from the blessings of the collective agreement. And for employees of non-unionised companies, participation in the collective agreement is primarily the result of a decision by the employer to apply the collective agreement in the employment contract. The result is therefore a curious picture: the collective agreement as the trade union achievement per se is not at all suitable as an argument in favour of joining a trade union due to the legal and factual circumstances. Employees receive the benefits of a collective agreement anyway if they

[62] FRANZEN, *cit.*, p. 15 ff.

work for an employer who is bound by a collective agreement; and in the case of an employer who is not bound by a collective agreement, the fact of union membership has no effect at all on the employer's decision to apply the collective agreement[63].

Differentiation clauses in collective agreements could offer a way out. This means that only members of the trade union party to the collective agreement can claim certain benefits from the employer. Such provisions are intended to incentivise employees to join the union. Differentiation clauses are intended – as the German Federal Labour Court put it in a famous ruling – "to compensate for the advantage that outsiders have in that they enjoy the successes of trade union work to a large extent without contributing financially to the union's work. At the same time, the differentiations are intended to financially compensate the organised employees for having borne the burden of their membership of the organisation[64]."

Those in favour of qualified differentiation clauses argue that creating financial incentives for trade union membership is a legitimate and lawful objective[65]. A working group has drawn up a draft law to regulate such differentiation clauses[66]. In the opinion of the Federal Labour Court, simple differentiation clauses are permissible insofar as such clauses are not linked to the core of the exchange relationship between performance and consideration and do not exert unreasonable pressure on outsider employees to join the union[67]. However, qualified differentiation clauses are deemed invalid: The German Federal Labour Court has ruled that qualified differentiation clauses that directly or de facto prohibit employers from granting collectively agreed working conditions to outsiders violate the negative freedom of association and are also outside the norm-setting competence of the collective bargaining partners, because the collective bargaining partners have access to employment relationships of those who are not organized or are organized differently[68]. Thus, there is only room for additional benefits within

[63] Franzen, *cit.*, p. 21.

[64] German Federal Labour Court of 29.11.1967 - GS 1/67.

[65] Deinert, *Negative Koalitionsfreiheit - Überlegungen am Beispiel der Differenzierungsklausel*, in *RArbeit* 2014, p. 129; Däubler, Heuschmid, *Tarifverträge nur für Gewerkschaftsmitglieder?*, in *RArbeit* 2013, p. 1; Waltermann, *Differenzierungsklauseln im Tarifvertrag*, Bund-Verlag, 2016, p. 72 ff.

[66] Benecke *et al.*, *Entwurf eines Gesetzes über Differenzierungsklauseln in Tarifverträgen*, in *AR*, 2021, p. 310.

[67] German Federal Labour Court of 18.3.2009 - 4 AZR 64/08.

[68] German Federal Labour Court of 23.3.2011 - 4 AZR 366/09.

the framework of agreements under the law of obligations between trade unions and companies.

3.2.2. *Tax privileges*

Numerous proposals have been made as to how tax incentives could be used to increase the degree of unionization. The most far-reaching idea here is to create genuine tax-exempt status for parts of wages in order to promote this through the membership of the persons concerned in the associations[69]. A less extensive solution would be the privileged treatment of union dues. It is a matter of debate whether the proposal to privilege union dues under tax law is constitutional. Critics argue that, in order to have a tangible incentivising effect, the tax advantage would have to result in a clear improvement in the position of union members and thus an equally clear disadvantage for outsiders, which would not be justified by objective reasons and would therefore be unconstitutional[70]. Other authors do not see any constitutional problems. For all those employees who have low income-related expenses, the result is that any tax advantage is lost. If one wants to provide an appropriate financial incentive, a corresponding tax concession would be justifiable[71]. However, most likely it will not in itself provide a sufficient incentive to join. With an average annual gross income of around 46,500 euros, the typical union dues amount to 465 euros per year. Since the average tax rate on this taxable income is just under 24 percent, the employee would have to pay more than three quarters of the membership dues out of his or her own pocket, even if they were deducted in full as income-related expenses[72].

3.2.3. *Financial participation of outsiders (solidarity contribution)*

3.2.3.1. General background

In view of the limited effect of tax benefits and their dependence on the individual tax rate, a financial participation of outsiders in collective bar-

[69] In depth Franzen, *cit.*, p. 46 ff.
[70] Loritz, *cit.*, p. 795.
[71] Franzen, *cit.*, p. 70.
[72] Höpfner, *cit.*, pp. 178 and 190.

gaining autonomy has been proposed in recent discussions. According to this proposal, employees who participate in the collective bargaining agreement on the basis of a contractual agreement with the employer without being a member of the union concluding the agreement should pay a solidarity contribution[73]. In addition to being independent of the individual tax rate, this has the following advantage: whereas in the case of tax privileges the state subsidizes membership with public funds and thus ultimately becomes involved in financing the associations themselves, it maintains its neutrality when solidarity contributions are introduced and merely ensures that outsiders share in the costs of collective bargaining autonomy insofar as they participate in it. It thus avoids making coalitions financially dependent on the state[74]. In Germany, for instance, solidarity contributions could not be levied through collective agreements under current law because this would exceed the collective bargaining power of the associations and burden outsider employees. Hence, the legislator would have to create an authorisation for the parties to the collective agreement to regulate a contribution obligation for outsiders with normative effect by means of a collective agreement[75]. Models can be found in Switzerland, but also in Turkey and the USA, for example.

3.2.3.2. Swiss law as a potential model

The following examines the regulation from Switzerland, where experience with solidarity contributions has been gathered for over 70 years[76]. In Switzerland, solidarity contributions are permitted under strict conditions. The first prerequisite is that the collective labour agreement, the Swiss equivalent of a collective agreement, provides for an obligation to pay solidarity contributions. However, since the collective labour agreement has no effect on outsiders under Art. 357 of the Swiss Code of Obligations (CO), an additional act is required to establish an obligation for outsiders to pay. There are two ways to do this:

[73] HÖPFNER, *cit.*, pp. 178 and 190.

[74] HÖPFNER, *cit.*, pp. 178 and 191.

[75] HÖPFNER, *cit.*, p. 178 and 198.

[76] For the historical development see MELZER, *Außenseiter und Solidaritätsbeiträge im Schweizerischen Recht*, University of Munich, dissertation, 1962, p. 4 ff.

Firstly, it is possible to declare the collective labour agreement generally applicable, including the obligation to pay contributions. The legal basis for this is Art. 3 para. 2 lit. b of the Federal Law on the Declaration of General Applicability of Collective Agreements (AVEG). The prerequisite for the declaration of general applicability of the provisions on the obligation to pay contributions is that the contributions of the employers and employees not party to the collective labour agreement do not exceed the shares that would result from an equal distribution of the actual costs among all employers on the one hand and all employees on the other. In practice, it is indeed the case that provisions on the obligation of outsiders to pay contributions are declared generally applicable. However, the declaration of general applicability is rather uncommon. The second option, which is much more significant in practice, is to stipulate the obligation to pay contributions pursuant to Art. 356b para. 2 CO as a condition for the outsider's contractual affiliation. Contractual affiliation is not to be equated with the usual reference to collective agreements in Germany. It is a tripartite contract between the two parties to the collective labour agreement and the outsider, who thereby becomes a party to the collective labour agreement. The contractual affiliation establishes the direct and binding effect of the collective labour agreement. As a result, it is the contractual agreement between the parties to the collective labour agreement and the outsider that constitutes the legal basis for the obligation to pay contributions[77].

For the declaration of general applicability, Art. 3 para. 2 lit. b AVEG expressly stipulates that the regulations on the obligation to contribute can only be declared generally applicable if the contributions are limited to the actual costs of concluding and monitoring the collective labour agreement and if they are distributed equally among all employees and employers. This means that only the costs of negotiating the agreement, including attendance fees, for monitoring bodies and monitoring visits as well as for conciliation and arbitration negotiations may be allocated. On the other hand, outsiders may not share in the costs of other trade union activities that are not directly related to the specific collective labour agreement.

The limitation of the obligation to contribute to the inspection costs in the narrow sense does not apply to the contractual connection[78]. Art.

[77] Höpfner, *cit.*, pp. 178 and 191 ff.

[78] Geiser, Müller, Pärli, *Arbeitsrecht in der Schweiz*, Stämpfli-Verlag, 5th edition 2024, point 841.

356b para. 2 sentence 2 CO, following the case law of the Swiss Federal Supreme Court, only prohibits "unreasonably" high contributions as a condition of affiliation[79]. This is intended to prevent solidarity contributions from de facto creating an obligation to join[80]. This limitation is only understandable in light of the fact that in Switzerland the obligation to form a coalition is prohibited, but the obligation to enter into a contract is permitted, as a reverse conclusion from Art. 356b para. 3 CO shows[81]. Accordingly, an "agency shop" is permissible, i.e. an obligation of the employer towards the trade union in the collective labour agreement to employ only trade union members and employees covered by the agreement. The legislator has deliberately not regulated the level at which a contribution is unreasonably high in the Code of Obligations. The predominant view is that the upper limit should be two thirds of the membership fee[82]. According to the opposing view, contributions up to a full membership fee should be permissible, as is the case in Turkey in the public sector[83].

In practice, however, the problem of the maximum permissible limit for solidarity contributions does not arise when joining a contract in Switzerland, as the outsider contributions there are extremely low. Even today, they often amount to only five Swiss francs per month. The background to this low outsider burden is the extremely restrictive legal requirements for the use of contributions. According to Art. 356b para. 2 subpara. 2 CO, these may not be administered by one party to the collective labour agreement alone, but only by a joint fund and may only be spent for purposes that arise during the negotiation, implementation and further development of the collective labour agreement for the benefit of all employees. Expenses of the associations that are not covered by the collective labour agreement may not be financed. Solidarity contributions are expressly not an advertising tool or a means of pressurising employees to join an association. They do

[79] Swiss Federal Supreme Court of 13.9.1959, BGE 75 II, 305, 321 ff.

[80] Swiss Federal Supreme Court of 13.9.1959, BGE 75 II, 305, 312 ff.

[81] Geiser, Müller, Pärli, *cit.*, point 844.

[82] Swiss Federal Supreme Court of 13.9.1959, BGE 75 II, 305, 322, Kreis, *Der Anschluss eines Aussenseiters an den Gesamtarbeitsvertrag*, University of Bern, dissertation, 1973, p. 26; Biet-mann, *Differenzierungsklauseln im System des deutschen Tarifrechts*, Nomos-Verlag, 2010, p. 91.

[83] Meier, *Privatrechtlicher Schutz gegen Koalitionszwang*, 1979, pp. 87 and 97, https://-/ampark.law/wp-content/uploads/2022/01/meier_koalitionszwang_1979_87.pdf, accessed 30.3.2025.

not serve to promote the associations, but solely to strengthen the collective labour agreement as such. In view of the low level of solidarity contributions, there was, as expected, no pull effect and their advertising effect in Switzerland is zero[84].

3.2.3.3. Lessons from the Swiss model

In view of the experience with solidarity contributions in Swiss labour law, the aim should be to reduce negative incentives to join as far as possible. It is not primarily a question of allocating transaction costs, but rather of equalising the advantages that outsiders currently have over union members due to the lack of an obligation to pay contributions. Anyone who participates in the collective agreement without belonging to a trade union should not be in a better economic position than if they had to pay a contribution as a member. The aim must be to counteract the market failure of the collective agreement system by eliminating as far as possible the financial favouring of outsiders with reference to the employment contract. It is therefore necessary to look at the solidarity contributions from the perspective of the associations and their members rather than the outsider, as is the case in Switzerland[85].

This fundamental decision has several implications: Firstly, the "user fee" for outsiders should be set as high as possible in order to achieve the intended steering effect. Ideally, the amount should be equal to the membership fee of the trade union concluding the collective agreement. This would completely eliminate the financial disincentive that arises from a labour contract reference to outsiders. Secondly, this avoids the hardly practicable distinction between the costs incurred for the conclusion, implementation and monitoring of the collective agreement and the costs incurred for general association activities without reference to a specific collective agreement. If this distinction were to be maintained, the trade union would also have to be held accountable and monitored by an independent supervisory authority. This would be the first step towards a "nationalisation of the coalitions", which must be avoided as a matter of urgency, as this would put the free market economy labour market consti-

[84] Höpfner, *cit.*, p. 178, 191, 192 ff.
[85] Höpfner, *cit.*, pp. 178, 191 and 194 ff.

tution as a whole at risk. Thirdly, it is not necessary to impose restrictions on the use of contributions on the expenditure side. The aim is not to strengthen a specific collective agreement, as is the case in Switzerland, but to promote the associations and collective bargaining autonomy as a whole. Accordingly, equal administration by a fund or a joint organisation is not necessary. There is no reason why the contributions should not go to the respective association, which may use them for any purpose, including for political activities or to finance legal expenses insurance or other services in which the outsiders do not participate[86].

3.2.3.4. Constitutional issues

The constitutionality of solidarity contributions is controversial and cannot be fully assessed in this context. In legal systems where only one trade union has the power to represent all the employees in the workplace, including collective bargaining on their behalf, it is widely considered justified to allow the union to take agency fees from employees who are represented by it: those who are members pay union dues; those who prefer not to become members have to pay agency fees[87]. However, in the United States, twenty-four states enacted "right to work" laws that prohibit this "agency shop" arrangement. It is argued that such "right to work" laws infringe freedom of association by preventing the collective parties from agreeing on agency fees even though the union must represent all the workers. If employees can enjoy the same benefits whether they pay union dues or not, many have incentives to save money and enjoy the benefits as "free riders"[88]. In Germany, however, some authors object that strengthening collective bargaining autonomy is not a task that the state should impose on non-unionised employees. They lack the proximity and group-specific, special responsibility that could justify a special levy. The funds would also flow into an organisation that is administered by the parties to the collective agreement. Special levies without state collection, administration and utilisation would be a novelty not covered by the constitution[89]. Ultimately, it depends

[86] *Ibid.*

[87] Davidov, *A Purposive Approach to Labour Law*, Oxford University Press, 2016, p. 221.

[88] Davidov, *cit.*, p. 222.

[89] Loritz, *cit.*, pp. 795 and 800.

on the constitution of each individual state and its interpretation by the courts.

4. *Summary and conclusions*

Collective bargaining describes a system in which trade unions and employer associations or individual employers bargain over wages for the employees at the respective firms. It is regarded as the key instrument for improving employees' incomes and working conditions, a guarantor of social peace and a mean to reduce the burden on the state. In many countries, collective bargaining worked well for a long time. However, membership in trade unions and employers' associations and, thus collective bargaining coverage is declining in many Member States. One central cause is the disintegration of traditional social milieus and the emancipation of employees from large social organizations. Furthermore, the world of work has become increasingly fragmented in a modern industrial and service society. Probably the biggest problem is the cost-free participation of outsider employees by including the collective agreement in the employment contract, since it reduces incentives to be a member of a trade union and pay the union dues. The decline in collective bargaining coverage has clear consequences for wages and working conditions and raises the question of legal solutions, since, according to the prevailing view, collective bargaining autonomy and collective bargaining coverage should be maintained and promoted[90]. Two different approaches can be identified in the various adopted and proposed solutions: The mandatory application of collective agreements including a statutory minimum wage ("more state"), as adopted in Germany, and the creation of incentives for voluntary union membership ("more legitimisation").

First of all, one has to bear in mind that legal considerations are of no help against the economic and social developments described above[91]. Hence, some of these problems cannot be solved by legal means at all. With regard to the "more state-approach", policy measures, such as extension mechanisms, can help to support coverage but even those require the acceptance

[90] SEIWERTH, *cit.*, p. 137.

[91] LORITZ, *cit.*, pp. 795 and 806.

of such measures by other actors and might encounter legal constraints[92]. Excessive state legislation can have negative effects. Instead of giving the collective bargaining partners room for collectively agreed solutions, more and more detailed questions of working and economic conditions are also being solved by legislation. From the perspective of collective bargaining law, it is particularly detrimental if solutions found through collective bargaining are devalued by statutory regulations, as was recently observed in the case of bridging part-time work. If the legislator makes collective bargaining achievements accessible to everyone by law, it deprives the trade union of its negotiating success and, from the perspective of the members, also devalues the activities of the collective bargaining partners that they finance. Increasingly imposed collective bargaining discredits the collective bargaining system as an unintentionally coercive system and makes it a foreign body in a constitutional order characterized by rights of freedom and equality. After all, freedom of associations is about freedom, not about compulsion. It further reduces the attractiveness of collective bargaining for companies and leads to increasing disassociation. The foreseeable long-term consequence of such a coercive system will be increasing pressure on employers' associations to avoid collective bargaining agreements in general[93]. The idealistic attachment of employees to a union lies outside the sphere of influence of the state. It is up to the trade unions alone to ensure that it is once again fashionable for the younger generation in particular to be a member of a trade union by means of a clever policy of promoting young talent and recruitment, especially in the social media. Legislators can, however, start at the economic level and take measures to reduce the economic disincentives to join. However, this can only ever be a matter of reducing the existing disincentives. The aim of a legal solution must not be to create genuine positive incentives, i.e. to put association members in a noticeably better financial position than outsiders. That would certainly not be in line with the constitution.

Strengthening collective bargaining autonomy would rather mean creating incentives for employers and employees to join the coalitions in order to create a broader basis for legitimisation and at the same time extend the normative collective bargaining coverage again. Possible means are tax privileges and solidarity contributions of outsiders. However, both means should

[92] Hassel, *cit.*, pp. 491 and 495.
[93] Höpfner, *cit.*, pp. 178 and 189.

not be intended as isolated measures, but as building blocks of an overall concept that can be coupled in particular with an attractive and forward-looking collective bargaining policy for the employer side. Furthermore, the constitutional limits of the respective jurisdiction must be observed in the law making.

Finally, if action is to be taken, time is of the essence, since there might be a "tipping point". From this point, the undesirable development accelerates rapidly und perhaps even uncontrollably. In some areas of labour and economic life, collective bargaining without state coercion is unlikely to develop in the foreseeable future. If nothing is done soon, it is feared that labour law will have the perspective of "more state"[94].

[94] SEIWERTH, *cit.*, pp. 137 and 144.

Abstract

Concern for the common good is directing the focus of labour law policy towards strengthening collective bargaining coverage. In many countries, the collective bargaining coverage is in decline, mainly because of the cost-free participation of outsider employees ("free riders"). The article discusses possible solutions for countermeasures with a special focus on Germany.

Keywords

Collective bargaining, Trade unions, Minimum wage directive, Public contracts, Solidarity contribution.