



Reducing Precarious Work

Protective Gaps and the Role of Social Dialogue in Germany

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Overview

According to the basic understanding adopted here, ‘precariousness’ is not limited to non-standard forms of employment such as mini-jobs, temporary agency work or fixed-term employment. Instead, our study distinguishes between four different types of ‘protective gaps’ (employment rights; social protection and integration; representation; and enforcement) and investigates the extent to which these gaps affect both employees in a standard employment relationship and in different types of non-standard or ‘atypical’ employment. Key findings are summarized below. They reveal that atypical employees are disproportionately affected by protective gaps; but employees on regular jobs have not been spared either.

The second focus of our study was on Social Dialogue approaches which seek to reduce these gaps. Because collective bargaining or co-determination is often insufficient to provide effective protection, particular attention was paid to approaches that make use of and at the same time extend the classical instruments of Social Dialogue in Germany. A core aim of these approaches is, for example, the effective enforcement of legal minimum standards, where state actors play an important role too. Overall, the findings show that a close co-operation between all actors can substantially reduce the degree of precariousness. At the same time, they show that it already requires great efforts and considerable resources in order to achieve even limited ambitions (minimum standards). Further measures are therefore needed in order to enable actors to pursue more ambitious goals and thereby effectively combat precariousness. This would also require to go beyond attempts to establish ‘equal rights/equal treatment’ and to re-increase limits on the use of atypical employment forms.

The German ‘atypical’ employment miracle

The German ‘employment miracle’ is to a large extent based on a growth of atypical employment: more than 1.5 million (around 60 percent) of additional employment created between 2000 and 2015 was in either fixed-term contracts, temp agency work or part-time work with up to 20 hours per week, including mini-jobs (table 1).

Table 1: Employees* in atypical and standard jobs, 2000-2015 (in 1,000s)

	Solo Self-empl.	Dependent employment							Total
		Standard (open-ended)		Atypical					
		full-time	part-time > 20h	total*	fixed-term	part-time <20h	mini-job	TAW	
2000	1,697	22,130	1,720	6,012	2,265	3,944	1,749	n.a.	29,862
2.010	2,169	20,560	2,571	7,945	2,858	4,942	2,517	743	31,076
2.015	1,991	21,422	3,410	7,534	2,531	4,844	2,339	666	32,367
2000-15	294	-708	1,690	1,522	266	900	590	n.a.	2,504

Source: Federal Statistical Office Website (www.destatis.de), based on German Labour Force Survey.

*Figures refer to employees aged 15-64, not in education, and to their main-job only.

Since 2010 the number of atypical employees has slightly declined, but at 23.3% their share is still larger than it was at the last cyclical peak in 2000 (20.1%). Within standard employment (as defined by the Federal Statistical Office), there has been a shift from full-time to part-time jobs with more than 20 hours per week. Their inclusion in the definition of ‘standard employment’ is debatable, given that part of these long(er) part-time jobs provide relatively low earnings and limited upward perspectives. Moreover, the figures above exclude an important number of atypical jobs –for example those held by

students or elderly people aged 65. The assertion of a recent decline of the overall number of atypical jobs therefore needs to be treated with some caution.

Identifying ‘Protective Gaps’ in Germany

Changes in job security and quality have not been restricted to shifts with regard to the type of employment contract. There is therefore an urgent need to investigate in more depth the spread of ‘protective gaps’. Our research drew on expert interviews and secondary data.

i) Employment rights gaps

Wage inequality received a strong boost from 2003 until 2009, with a drop in real wages that was particularly strong in the lowest quintile of the wage distribution, but also led to decreases at the median wage level.¹ The share of low-wage workers has increased most strongly in fixed-term employment (2013: 42%) and mini-jobs (2013: 76%), but it has increased for those on open-ended contracts as well (2013: 24%)². The introduction of the national minimum wage in 2015 put an end to extreme forms of low pay and is an important first step towards reducing the pay gap between regular and atypical employees. However, it is still a far cry to ‘equal pay’ e.g. for temp agency workers who despite the European Directive on TAW usually receive much lower wages than their colleagues in the hiring firm, due to opening clauses of the respective law. The same is true for employees in subcontracting firms and posted workers. The main rationale behind using posted work and subcontracting is to circumvent the higher wage levels in firms covered by collective agreements.

Apart from low hourly wages, the spread of low and variable number of working hours adds to low and insecure earnings. Almost 60% of all part-time jobs are jobs with a maximum of 20 weekly working hours (see table 1); and most mini-jobbers work even less hours. The share of employees with variable working hours (called ‘work on demand’) are estimated to be between 5 and 17% of the workforce.³ So far, both legal regulations and collectively agreed rights have predominantly focused on reducing maximum weekly working hours and facilitating access to part-time employment. Securing minimum working hours, by contrast, is only an emergent issue. Zero-hours contracts are not legal, but the law on ‘work on demand’ in many respects fails to define clear limits. No legal regulations define minimum working hours or rule out split shifts. Many employers have benefitted from these and other regulatory gaps and made part-time work a dominant strategy to cut costs.

ii) Social protection and integration gaps

One of the most important and currently much discussed gaps in social protection is the relatively low level of pension entitlements even for medium wage earners. Unlike in many other countries, the net replacement rate for low wage earners is not higher than for average or high wage earners – which is all the more severe as the replacement rates are quite low by international comparison. Accordingly, low earnings and periods without employment entail a particular high risk for income poverty in old age in Germany. Even 45 years of full-time employment on the level of the current minimum wage are not sufficient to build up pension entitlements at the level of the means-tested social assistance for a

¹ Felbermayr, G., Baumgarten, D. and Lehwald, S. (2014): Increasing Wage Inequality in Germany. What Role Does Global Trade Play? Gütersloh: Bertelsmann-Stiftung.

² Kalina, T. and Weinkopf C. (2015): Niedriglohnbeschäftigung 2013: Stagnation auf hohem Niveau. IAQ-Report 2015-03. Duisburg: IAQ

³ DGB (2016): Arbeit auf Abruf Arbeitszeitflexibilität zulasten der Beschäftigten. Arbeitsmarkt aktuell Nr. 6/2016.

single person, corresponding currently to roughly €700 net/month. Moreover, the share of solo self-employed who don't pay into any pension scheme or life assurance has increased to more than 50%.⁴

Furthermore, the at-risk-of-poverty rate among unemployed is the highest in Europe, as a result of both the spread of low wages (and accordingly low benefit entitlements) and the shortened duration of wage related unemployment benefits since the Hartz reforms. Finally, access to affordable health insurance is problematic in particular for solo self-employed, as the minimum contributions are set relatively high, even for those with low earnings – and low earnings are widespread among solo self-employed.

iii) Representation gaps

A strong decline in collective bargaining has led to a situation where only a minority of employees in the private sector remain covered by both a collective agreement and a works council (34% in West and 25% in East), whereas those who are represented by neither of the two traditional pillars of the industrial relations system in Germany have strongly increased (see table 2). The representation gap is particularly large in small companies. Temp agency workers and mini-jobbers formally enjoy more or less the same participatory rights, but short contract durations, fragmentation of working time and working places as well as organizational boundaries inhibits the effective use of these rights.

Table 2: Employees covered by collective agreements and works councils, 2003/2015 (in %)

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

Source: Ellguth/Kohaut 2016 and 2004⁵; authors' compilation

iv) Enforcement gaps

Enforcement gaps are particularly important with regard to posted workers and mini-jobbers. In the case of posted workers rule circumvention is widespread by miscalculating working hours and wages or mis-categorising workers into lower pay scales. In the case of mini-jobs, surveys have repeatedly documented widespread non-compliance concerning fundamental statutory employees' rights like sick pay and paid holidays. Hence, contrary to expectations the proliferation of atypical employment has not substituted for non-compliance (because employers have more means to cut costs legally), but rather contributed to facilitate it, since it has moved many jobs out of unions' reach.

The issue of enforcement has gained in importance with the introduction of industry specific minimum wages and the national minimum wage, since it is now a large fraction of companies that can be targeted by state inspections. Moreover, a general contractor liability enforces employers to watch over their sub-contractors' compliance with labour laws, thereby (potentially) enhancing 'self-enforcement'. Considerable resources are deployed for the state inspections; additionally, an important fraction of trade unions' resources goes into counselling services for individual employees affected by a violation of their rights. Public and collective support for non-union members remains

⁴ Brenke, K. and Beznoska, M. (2016): Solo-Selbständige in Deutschland. Forschungsbericht Nr. 465. Berlin: DIW/BMAS

⁵ Ellguth, P. and Kohaut, S. (2004 and 2016): Tarifbindung und betriebliche Interessenvertretung: Ergebnisse aus dem IAB-Betriebspanel WSI-Mitteilungen 8/2004 and 4/2015

more patchy. However, since 2011 the German peak union organization (DGB) has established counselling services for migrant workers in several cities, co-financed by the government and European Social fund.

Four Case Studies of Precarious Work

The German research team selected four case studies from different sectors with the aim of illuminating how processes of social dialogue might reduce precarious work and identifying the challenges which remain (table 3). The findings reveal three main points in terms of the challenges, preconditions, successes and limits of Social dialogue.

Table 3. Summary features of case studies 1-4

	1. Posted Work	2. Public Procurement	3. Socially sustainable sourcing	4. Mini-Jobs
Sector/occupation	Meat Processing	Construction, Cleaning, Catering	Steel industry	Service sector
Problems	Low pay Non-compliance with labour laws Bad housing conditions	Non-compliance with minimum wages and other minimum standards	Higher risk of occupational accidents at subcontractors Low(er) pay than in contracting firm Non-compliance with labour law (e.g. working time Bogus subcontracting	Not covered by social security Low hourly pay Non-compliance with sick pay/holiday pay Low hourly volume + limited upward mobility or possibility to increase hours
Social dialogue levers	Sector level collective agreement on minimum wage Voluntary commitments to improve working and housing conditions of migrant workers	Pay clauses and other public procurement practices aimed at enforcement of both statutory rights and collectively agreed standards	Sectoral and company level agreement on health and safety issues and 'fair work' standards in contracted companies; trade union organising strategies	Few attempts to restrict use; some efforts to combat non-compliance with minimum rights + support transitions into regular jobs.
Positive outcomes	Higher wage floor for migrant workers Move away from posted work contracts; instead direct employment under German labour law	Higher wage floor for sectors not covered by CA Improvements in controls/sanctions related to compliance with industry specific minimum wages	Substantial decline in work related accidents Reduced pay gaps Increased awareness about non-compliance with labour law	Positive effects of national minimum wage (higher wages and more transitions into jobs covered by social protection) Optional enrolment in pension system
Issues remaining	Restricted to minimum standards still strong use of subcontracts with inferior working conditions Few companies committed to voluntary agreement	Limited resources for effectively controlling enforcement Pay clauses for sectors not covered by CA recently abandoned	Goals beyond legal minimum rights are non-binding, Substantial pay gaps remain Difficulties to control compliance, due to abundant number of subcontracts	No minimum working hours, no rights to increase working hours Strong poverty risks in case of unemployment, old-age, sickness, unless married to (well-earning) first earner

i) Social Dialogue across organizational boundaries

The outsourcing of public services and companies' use of subcontracting, solo self-employment and temp agency work often does not only entail higher risks of precariousness among the affected workforce, but also moves them out of the organizational boundaries of the hiring company, thereby also moving them out of the reach of established forms of interest representation and collective bargaining. Three of our cases document novel forms of social dialogue that can be seen as attempts

to make up for this fragmentation, by stretching across organizational boundaries and setting up ‘negotiations on behalf or about third parties’, where the firms and employees primarily affected do not themselves sit at the negotiating table. The legal extension of collectively agreed wages is one well-known example as they also apply to all firms regardless whether they are members of employers’ associations. A similar example is the collective agreement in the steel industry (case study on **socially sustainable sourcing**) or the self-commitment in the meat industry (case study on **posted work**), which targets subcontracting companies that were not involved in the negotiations.

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

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

ii) Intertwining of collective bargaining and state regulation

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

- Firstly, new legal regulations can alter the basis for firms’ calculations. In the case of **posted work** in the meat industry and **mini-jobs** in the service sector, the statutory minimum wages considerably reduced the cost-advantage of using these forms of non-standard work. Although it was anticipated that firms would lapse into the use of informal labour and other illegal practices in order to maintain the cost advantage, the case studies document that companies can also adapt their employment strategies and convert non-standard employment into standard employment.
- Secondly, new legal regulations and even discussions on reforms can cast a ‘shadow of hierarchy’ that forces firms into action. This applies especially to the general contractors’ liability in respect of the minimum wages which increased firms’ willingness not to treat working and employment

conditions in subcontracting companies as a 'black box' but rather to take preventive measures to limit their own liability risks, as in the **posted work** and **socially sustainable sourcing** case studies.

- Thirdly, the case studies document examples of a combinatory regulation that is based on both legal and collective agreed norms. For instance, collectively agreed industry specific minimum wages are the norms controlled by the public authorities in the **public procurement** case. And conversely, the collective agreement in the steel duplicates existing statutory rights, with a view to improving enforcement and making it a concern to the social partners at company level.
- Finally, a close cooperation between state inspections and social partners is usually needed for the effective enforcement of statutory rights, e.g. through trade unions' support for **posted workers** in claiming their rights.

iii) Equal rights = universal minimum rights?

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

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

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

So what recommendations?

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

- **Introduce rights to minimum working hours and to increase working hours** (*in particular for those on short part-time jobs*)
- **Design levies and funds aimed at compensating for specific risks encountered by atypical employees** (*e.g. securing access to further training despite short contract durations; or supplements on company taxes for the use of fixed-term or temp, following the French example*)
- **Relax a too strict application of 'equivalence principle' and top up the pension levels for low wage earners** (*following the example of most other European countries*)
- **Facilitate access to health insurance and pension provision for solo self-employed** (*e.g. by lowering minimum contributions for the health insurance*)
- **Support social partners in their attempts to have collectively agreed wages extended by the law** (*by making more use of the respective legal options*)
- **Implement measures aimed at reducing the excessive use of atypical forms of employment** (*e.g. by strengthening works councils rights regarding the use of subcontracts, mini-jobs and temp agency work*).

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