REDUCING PRECARIOUS WORK IN EUROPE THROUGH SOCIAL DIALOGUE

THE CASE OF GERMANY (1ST PART OF NATIONAL REPORT)

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1 Introduction

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

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

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

Note: The different categories of atypical employment forms are partly overlapping and therefore cannot be added up to

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

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

- Other studies have highlighted how the proliferation of atypical employment produced negative feedback effects on trade unions’ overall bargaining power and exercised a ‘disciplining effect’ (Brinkmann/Nachtwey 2013) which wore on unions’ ability to effectively defend the interest of both core and non-core workers. In this account, the consent of unions to participate in exclusionary ‘cross-class coalitions’ is rather understood as a result of ‘shotgun weddings’. Unlike in the case of successful neo-corporatist arrangements of the past, these are not ‘shotgun weddings in the shadow of hierarchy’ (Thelen 2012: 13) – i.e. where the State, in a manner of speaking, puts a gun to the heads of both employers and employees in order to force them to agree on a compromise – but rather what we propose to term ‘shotgun weddings in the shadow of the market’, where employers’ ability to unilaterally withdraw from agreements and circumvent existing regulations force the trade unions to give in.

- Several studies have also pointed out that the rise in atypical employment is also a result of changing employers’ strategies making more systematically use of existing exit options (Jaehrling/Méhaut 2013; Eichhorst 2014). This matches with studies arguing that it is employers’ strategies and interests that to an important extent explain employment stability among core-workers (Crouch 2015). Hence the dualized nature of the labour market is largely a result of unilateral decisions and strategies of single employers, who meet little resistance from their workforce.

- At the same time, a number of studies have focused on a partly successful modernization of unions’ strategies aimed at reaching out for non-core workers through e.g. organizing campaigns (e.g. Pulignano et al. 2015; Bispinck/Schulten 2011; Dribbusch/Birke 2014; Rehder 2014; Haipeter/Lehndorff 2014; Bernaciak et al. 2014).

To sum up, the current situation is characterized by novel labour market structures where an all-time high for the level of employment co-exists with a stable and high level of atypical employment and precariousness. It is a contested issue among social partners, political actors and academic observers if and to what extent the latter is a necessary precondition of the
first. As we will see in the following paragraphs, however, recent trends both at the legislative level and in collective bargaining indicate that the novel structure is by no means a new equilibrium which would qualify for the term ‘New German Social model’. Instead, recent years have witnessed several reforms aimed at re-regulating the labour market, due not least to massive pressures from the trade unions, most importantly the introduction of the national minimum wage in 2015 (see section 2.1), and a partial re-regulation of temp agency work (see section 4). The following report will take stock of the different gaps in employment protection that have evolved both for core and non-core workers and will discuss the strategies of social partners and the government in addressing these gaps. The report is based on documents, available literature and 6 expert interviews (3 each with representatives from trade unions and employer associations).

2 Standard employment relationship

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

2.1 In-work regulatory gaps

Since the mid-1990s and in particular during the 2000s, wages have increased much slower than the GDP and from 2002 onwards real wages even fell up until the crisis (figure 2); in particular for the lowest quintile, but also for the median earner (Felbermayr et al. 2014:11). Although the rise in low wage employment is concentrated on employees in atypical employment, it has also spread among those in standard employment (table 1). Moreover, the declining prevalence of pattern agreements, the decentralization of collective bargaining, concession bargaining at company level and the rising share of companies not covered by collective agreements contributed to very moderate pay increases also for the middle income segment: in the manufacturing sector for instance median hourly earnings nominally grew by 13% between 2002 and 2010, compared to 3% in the services of the business economy (table 2).
Figure 2 Increase in GDP, nominal and real wages 1995-2014


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

<table>
<thead>
<tr>
<th></th>
<th>Low pay-incidence</th>
<th>Ø hourly pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mini-jobs (only as a main job; employees not in education or apprenticeship)</td>
<td>84.3%</td>
<td>8.19 €</td>
</tr>
<tr>
<td>Temp agency workers</td>
<td>67.7%</td>
<td>8.91 €</td>
</tr>
<tr>
<td>Fixed-term contracts</td>
<td>33.5%</td>
<td>12.06 €</td>
</tr>
<tr>
<td>Part-time ≤ 20 hours per week</td>
<td>20.9%</td>
<td>14.45 €</td>
</tr>
<tr>
<td>All atypical employees</td>
<td>49.8%</td>
<td>10.36 €</td>
</tr>
</tbody>
</table>

| SER (permanent full-time or part-time jobs > 20 hours/week, no temp agency employment) | 10.8% | 17.09 €|

Source: Statistisches Bundesamt 2012

Table 2: Median hourly earnings by sector, 2002-2010

<table>
<thead>
<tr>
<th></th>
<th>Industry and construction</th>
<th>Services of the business economy</th>
<th>Education; human health and social work activities; arts, entertainment and recreation; other service activities</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Euro area</td>
<td>Germany</td>
<td>Euro area</td>
</tr>
<tr>
<td>2002</td>
<td>11.2</td>
<td>14.79</td>
<td>10.3</td>
</tr>
<tr>
<td>2006</td>
<td>11.93</td>
<td>15.68</td>
<td>11</td>
</tr>
<tr>
<td>2010</td>
<td>13.39</td>
<td>16.64</td>
<td>11.84</td>
</tr>
<tr>
<td>2002-2010</td>
<td>120%</td>
<td>113%</td>
<td>115%</td>
</tr>
</tbody>
</table>

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

The decision to introduce the minimum wage was preceded by a long campaign of the DGB unions initiated by two large unions operating in the service sector – Ver.di (broad range of service industries) and the NGG (Food, Beverages and Catering Industry Trade Union), the latter one having demanded a national minimum wage as early as 1999. Since 2006 the campaign was officially supported by the trade union umbrella organization (DGB), thereby putting to a rest a controversial debate within the trade union camp. The two large and influential unions in the manufacturing sector, IG Metall and IG BCE (mining, chemical and energy industry) had been highly skeptical about the effects of a minimum wage and considered this to be a threat to the principle of ‘Tarifautonomie’. In more tangible terms, one major concern of the manufacturing sector unions was the possible wage depressing effect, with the minimum wage acting as a new wage norm for the lower pay grades in future collective bargaining rounds.

At the political level, the social democrats (SPD) officially supported the claim for a national minimum wage since the beginning of the union campaign. This was partly motivated by the wish to compensate for the ‘Hartz’ reforms (2002-2004) which had introduced cuts in unemployment benefits and helped to deregulate the labour market (temp work, minijobs etc.), thereby alienating the DGB unions from the SPD. During parliamentary term 2005-2009 a national minimum wage was rejected by the conservatives (CDU), the coalition partner of the SPD in the government led by Chancellor Angelika Merkel. Nevertheless, legally defined wage floors increasingly won the approval among both coalition partners as well as the electorate. As a result, an increasing number of legally binding industry minimum wages were introduced, based on the law on posted workers, which originally was restricted to the construction sector. A new paragraph had been introduced in this law by the red-green coalition in 1998, as a response to the blockade strategy adopted by the umbrella organization of the employers’ associations (BDA) towards extending collective agreements. This had resulted in a strong decrease in generally binding collective agreements during the 1990s (Kirsch/Bispinck 2002). The new paragraph allowed the government to declare the lowest pay grade in a collective agreement generally binding without the consent of the BDA and even if the employer association of the respective industry wouldn’t represent 50% of the industries’ workforce. Starting with the industrial cleaning sector in 2007, a succession of legislative reforms included additional industries in the Law on Posted Workers, and several unions and employers’ associations in these industries made use of the option to have their lowest pay grades transformed into an industry-wide minimum wage, covering all companies both from within the country and from abroad (see table 3). Hence, the law on posted workers which had originally been introduced as a means to cope with the EU’s eastward enlargement and the risk of dumping wages from companies abroad has thereby undergone a functional shift and been transformed into a means to reduce wage competition between companies within Germany. However, the progress was slower and more ‘uncertain’ than expected (Bosch/Weinkopf 2011) because employer organisations in large industries like e.g. retail or
hospitality refused to use the regulation, whereas others threatened to withdraw from the agreement if trade unions wouldn’t make concessions in other respects.

Table 3: Industry minimum wages introduced after 2006 based on Law on Posted Workers

<table>
<thead>
<tr>
<th>Industry</th>
<th>Year of introduction</th>
<th>Current Level (hourly wage in €)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business Cleaning</td>
<td>7/2007</td>
<td>8.50 East / 9.55 West (indoor)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>10.63 East / 12.65 West (outdoor)</td>
</tr>
<tr>
<td>Industrial laundries</td>
<td>10/2009</td>
<td>8.00 East / 8.50 West</td>
</tr>
<tr>
<td>Mining specialists</td>
<td>10/2009</td>
<td>Expired 2015</td>
</tr>
<tr>
<td>Waste</td>
<td>1/2010</td>
<td>8.68 (Expired 2015)</td>
</tr>
<tr>
<td>Elderly care</td>
<td>8/2010</td>
<td>8.65 East / 9.40 West</td>
</tr>
<tr>
<td>Private security services</td>
<td>6/2011</td>
<td>Expired 12/2013</td>
</tr>
<tr>
<td>Temporary agency work*</td>
<td>1/2012</td>
<td>8.20 East / 8.80 West</td>
</tr>
<tr>
<td>Further educational and vocational training</td>
<td>8/2012</td>
<td>12.50 East / 13.35 West</td>
</tr>
<tr>
<td>Staging</td>
<td>8/2013</td>
<td>10.25</td>
</tr>
<tr>
<td>Stonemasonry</td>
<td>10/2013</td>
<td>10.66 / 11.25</td>
</tr>
<tr>
<td>Hairdressers</td>
<td>11/2013</td>
<td>8.50</td>
</tr>
<tr>
<td>Meat processing</td>
<td>8/2014</td>
<td>8.60 (from 10/2015)</td>
</tr>
<tr>
<td>Textile/Clothing</td>
<td>1/2015</td>
<td>7.50 / 8.50</td>
</tr>
<tr>
<td>Agriculture and Forestry</td>
<td>1/2015</td>
<td>7.20 / 7.40</td>
</tr>
</tbody>
</table>

* based on Law on Temp agency work

Source: Own compilation based on BMAS 2015a.

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

Despite this succession of state interventions in the field of wage setting, the national minimum wage still came as a surprise to many observers, given the strong opposition by both employers’ associations and the majority of economists dominating the public discourse and important expert advisory bodies, such as the German Council of Economic Experts (Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung). Even after the introduction, the minimum wage remains a contested issue. While the BDA continues to
voice its fundamental opposition against the minimum wage\(^1\), the claims of individual employers’ associations have focused on questions related to the design (such as: more exceptions e.g. for interns\(^2\); clarifications which bonuses and wage supplements can be taken into account when calculating the minimum wage etc.) and the implementation of the minimum wage (see also below: enforcement gaps).

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

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

2.2 Representation gaps

A slight majority of employees remains covered by collective agreements, however this varies largely between East and West Germany and also by sector. Shares are below 50% in two low-wage industries (hospitality + retail), but also in the IT industry (see table 4). Roughly half of those not covered by a collective agreement however work in companies who state that they model their pay on a collective agreement (Ellguth/Kohaut 2013: 282). The strong erosion of collective bargaining (from 85% at the beginning of the 1990s) reveal the weaknesses of the German system of industrial relations, where unlike in the Scandinavian countries the high coverage of collective agreements was traditionally predominantly based on a high level of collective organisation on the employer side and less on powerful trade unions with high trade

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

\(^2\) Current exceptions from statutory MW apply to: Under 18 years, apprentices, interns (if internship is obligatory for education or if internship doesn’t exceed 3 months), long-term unemployed in the first six months of employment, voluntary work, family workers.
union density (European Commission 2009: 45-49). Accordingly, under increasing competitive pressures employers increasingly made use of their capability to unilaterally withdraw from collective agreements by exiting employers’ associations, or by changing into a so called ‘OT memberships (‘Ohne Tarifvertrag’ = without collective agreement) deliberating them of the obligation to comply with collective agreements, or else by not joining an employers’ association at all. Wage inequality however has also increased *between* industries, and among firms covered by collective agreements (Antonczyk et al. 2011). This was helped by the decentralization of collective bargaining and by the outsourcing of ancillary services from the public sector and manufacturing firms to industries with much lower collectively agreed wages (if any). The decentralization was partly a result of political pressures (or a shotgun wedding in the shadow of the state), as in the case of the ‘Pforzheimer Abkommen’ where IG Metall accepted the introduction of opening clauses in their collective agreements, allowing firms e.g. to cut annual bonuses. Their consent was ‘stimulated’ by the threat, voiced by the then chancellor Gerhard Schröder (SPD), to relax the statutory primacy of collective agreements over company agreements (‘Günstigkeitsprinzipip’) if the social partners wouldn’t agree on facilitating company pacts (Bispinck 2003).

The share of employees working in companies with a works council is even lower (42% in 2012), again particularly in the hospitality (13%) and retail (29%) sector, but also in the construction sector (15%) (table 4). The share of employees neither covered by a collective agreement nor represented by a works council increased strongly during the 2000s (from 21% in 1999 to 34% in 2012 in West-Germany, from 35% to 45% in East-Germany – c.f. Ellguth/Kohaut 2013).
Table 4: Share of employees with collective agreement and representation at workplace level 2012, in %

<table>
<thead>
<tr>
<th>Sector</th>
<th>Collective bargaining coverage of employees</th>
<th>Employees with works council (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>West</td>
<td>East</td>
</tr>
<tr>
<td>agriculture</td>
<td>53</td>
<td>19</td>
</tr>
<tr>
<td>Utilities, waste, mining</td>
<td>88</td>
<td>60</td>
</tr>
<tr>
<td>Production</td>
<td>64</td>
<td>37</td>
</tr>
<tr>
<td>construction</td>
<td>72</td>
<td>54</td>
</tr>
<tr>
<td>wholesale</td>
<td>47</td>
<td>26</td>
</tr>
<tr>
<td>Retail</td>
<td>45</td>
<td>42</td>
</tr>
<tr>
<td>Transport + logistics</td>
<td>59</td>
<td>37</td>
</tr>
<tr>
<td>IT</td>
<td>36</td>
<td>27</td>
</tr>
<tr>
<td>Finance +insurance</td>
<td>82</td>
<td>65</td>
</tr>
<tr>
<td>hospitality</td>
<td>44</td>
<td>32</td>
</tr>
<tr>
<td>Health + education</td>
<td>63</td>
<td>50</td>
</tr>
<tr>
<td>Economic, scientific + professional services</td>
<td>51</td>
<td>54</td>
</tr>
<tr>
<td>Non-profit</td>
<td>67</td>
<td>47</td>
</tr>
<tr>
<td>Public sector + social insurances</td>
<td>98</td>
<td>100</td>
</tr>
<tr>
<td>total</td>
<td>60</td>
<td>48</td>
</tr>
</tbody>
</table>

Source: Own compilation based on Ellguth/Kohaut 2013

Despite longstanding legal rights the establishment of works councils has often met with resistance by employers in the private service sector, as well as in small and medium sized companies in the manufacturing sector (Kotthoff/Reindl 1990). The absence of a works council entails the risk of a number of protective gaps: Apart from watching over the compliance with legal and collectively agreed employees’ rights they are also crucial for putting into effect collective labour law. Collective labour law includes information, consultation and co-determination rights for works councils which are aimed to enforce and supplement individual employee rights; e.g. works councils can require a firm to conclude a ‘social plan’ (Sozialplan) in case of dismissals for economic reasons. Moreover, although works councils are legally independent from unions, they remain the most important communication channel between unions and employees in practice, by facilitating the recruitment of union members, disseminating information on collective bargaining and organizing union members’ participation in collective bargaining rounds including organizing strikes. Changes in the works council act in 2001 have tried to address the representation gap in small and medium sized companies, e.g. by speeding up the procedures for setting up a works council in companies with 5-50 employees. However, in 2012, only 6% of small firms (5-50 employees) had a works council.

3 Since 2004, the law on dismissal protection exempts small firms with less than 10 employees (previously 5) from dismissal protection.
Other forms of informal collective interest representation have partly emerged in the absence of works councils, but with much weaker bargaining position and rights; hence “co-determination in the precarious service sector also means precarious co-determination arrangements.” (Artus 2013: 420). As Artus argues based on case studies carried out in the retail and hospitality sector, the relationship between union representatives and worker activists among precarious employees is sometimes difficult, partly due to different sociodemographic profiles of the two groups (gender, migration, age). But part of the difficulties seem also to be anchored in conflicting strategies or routines of collective action, where unions tend to stick to their co-management attitudes and their “bureaucratic patterns of union organizing”, whereas activists adopt more conflictual attitudes and strategies. “Union policies thus oscillate systematically between individualised support for the workers affected and the political wisdom of not fundamentally risking their corporatist arrangements with these large companies.” (Artus 2013: 421; see also Dörre 2010 in a similar vein).

Over the last two decades unions have however come to adapt their approach to the changing environment and have diversified their strategies. Within the core manufacturing industries, the IG Metall for instance launched a campaign titled ‘better instead of cheaper’ (Besser statt Billiger) aimed at changing the outcome of local concession bargaining by enabling works councils to develop alternatives to wage cutting and unpaid working time prolongation (Haipeter et al. 2011). Moreover, several unions have launched campaigns modelled after (or at least inspired by) the ‘organizing’-approach in anglo-saxon countries. These campaigns were partly quite successful, in terms of newly recruited union members and collectively agreed wage rises, even in low-wage industries such as retail, private security, industrial cleaning or temporary agency work (see e.g. Brinkmann et al. 2008; Brinkmann/Nachtwey 2013; Dribbusch 2010; Dribbusch/Birke 2014). The shift towards union revitalization strategies “comes as a partial strategic change, because the organizing-approach re-emphasizes the organizational power as a precondition of institutional power” (Brinkmann/Nachtwey 2013).

Institutional power, on the other hand, has seen a revival during the economic crisis, too, when both traditional (short-time working) and more recent (e.g. working-time accounts) provisions for working time flexibility which require the consent of employee representatives were used expansively and thereby helped to cope with the negative demand shock by means of internal rather than external flexibility. It thereby contributed to rehabilitate the ‘social partnership’ model, which until then had come to be considered as obsolete, growth-retarding and rigid in the eyes of many employers and politicians (Helfen 2013). Unions and employers associations were also consulted for the design of investment programs for the hardly hit export-oriented industries. However, as observers note, ‘crisis corporatism’ is different from the neocorporatist negotiations of the past, in that it is much more selective and punctual (Haipeter 2012) and in that it doesn’t call into question the segmentations of the labour market which have developed over the past 20 years (Dörre 2011). The mass dismissal of temporary agency workers for instance leads Dribbusch/Birke to conclude that “safeguarding core workforces at the expense of employees with more precarious terms of employment was a key instrument in stemming the crisis” (Dribbusch/Birke 2014: 18). On the other hand, it should be noted that unions continued to support the integration of young people into the labour market throughout the crisis, e.g. by negotiating minimum annual quota for new apprenticeships in the chemical industry, or by guaranteeing all young journeymen to be employed for at least one year after apprenticeship in the metal industry (Bosch 2011). The
social partners thereby helped to prevent a massive increase in unemployment among young people. Meanwhile, industrial disputes have gained importance in the service sector. Although the overall number of industrial disputes remains low in comparison with other countries, there has been a shift from the manufacturing sector: In 2014 nine out of ten labour conflicts occurred in the service sector (Dribbusch 2014). A number of large industry wide strikes attracted public attention over the last few years, such as the strike in the retail sector in 2009 and 2013, in the airport security industry in 2013, or in public child care and social work in 2015. However, in line with the decentralisation of collective bargaining, there is a trend towards strikes limited to the local level and/or in single companies, such as the ongoing strike at Amazons. These strikes have partly been quite successful, not only in terms of wage increases (e.g. an increase by up to 26% within one single year in the airport security industry) but also in terms of newly recruited members. Industrial disputes are therefore “increasingly being perceived by trade unions as ‘opportunities’ for organisation. This applies in particular to ‘untypical’ industrial disputes in little organised and highly precarious domains” (Dribbusch/Birke 2014: 25). This is probably also a reason why the law on tariff unity (Tarifeinheitsgesetz) that was passed in Mai 2015 also met with resistance from part of the unions (Verdi, NGG). The law restricts the right to conclude collective agreements to the union with the highest share of members within a given company. While supporters of the law claim that this is an important means to restore social peace (employers’ associations) and/or to counteract a fragmentation of collective bargaining to the benefit of occupational groups with greater structural and organisational power, such as pilots, train drivers or physicians (unions), critics consider this as a severe encroachment on the right to strike. Even law experts have diverging interpretations of the law and of the effects it will have on collective bargaining.

2.3 Enforcement gaps

Compliance with minimum labour standards hinges essentially on the ability of employees and employee representative to ‘mobilise’ the law in cases of non-compliance or conflicting interpretations of legal norms (McCann 1994, Albistone 2005; Kocher 2009). This in turn depends on their awareness of norms and on the available resources and costs as well as the potential benefits and risks associated with giving ‘voice’ to complaints. Employees in atypical employment forms might therefore be more likely to shy away from ‘voice’ as they usually bear a higher risk of losing their job (because it is fixed term or because they are not covered by employment protection, like posted workers). However, employees on permanent jobs arguably have similar concerns, and studies in law sociology have often emphasized that employees in general seldom complain during ongoing contractual relationships for fear of retaliation (dismissal, unfair treatment in promotion and other work related decisions at the employer’s discretion) (Kocher 2012: 67). National laws and law enforcement systems provide a range of instruments and mechanisms which try to address this fundamental asymmetry, most importantly state inspections and participatory rights for collective actors which can enhance the organisational capacity of social partners for self-regulation and ‘self-enforcement’—such as the right for unions to file a collective claim. In Germany, unions don’t have a right to file collective claims. They nevertheless play a very important role in rule enforcement: Firstly, by offering free legal advice and assistance to their members, including a legal expenses insurance, and secondly, by offering a large variety of training courses for unionised works council members in order to support them to effectively enforce rights at company level. One of the core tasks of works councils according to the law consists of watching over the proper implementation of all types of regulations that are „to
the benefit of employees”, i.e. labour law and by-law, decrees on health and safety, collective agreements, company agreements (§ 80 (1) BetrVG). In the case of non-compliance with minimum labour standards, however, works councils can only enter into consultations and negotiations with the management and thereby exert pressure on management to comply with the rules, but they lack rights to effectively enforce individuals’ entitlements (Kocher 2012: 67). More importantly, as noted above, nearly 60% of employees nowadays work in companies without a works councils. Hence the majority of employees is left without access to a collective body supporting the enforcement of their rights. Union members can access legal advice offered to them by their unions – but the large majority of employees abstains from joining a union.

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

With regard to state enforcement, a special department of customs service with ca. 6.300 employees is responsible for controlling minimum wages, including industry wide minimum wages, and illicit work. The number of staff will be increased by 1600 employees following the implementation of the national minimum wages, but due to skill shortages this will take until 2019. Further control institutions partly exist at the regional level, for instance in order to watch over the proper implementation of pay clauses in public procurement laws; there are also some voluntary institutions set up by social partners: In the federal state of Hamburg, for example, there is an independent control and advice agency for commercial cleaning (Prüf- und Beratungsstelle für das Gebäudereiniger-Handwerk e.V., http://www.pbst.de/) which gives advice to their member companies on relevant labour standards, conducts spot check on firms among its member companies and issues yearly certificates documenting, among others, that the firm complies with relevant legal and collectively agreed rules. Finally, the pension insurance agency (Deutsche Rentenversicherung) carries out company audits in every firm every four years in order to control for the correct payment of social security contributions.

Evidence from state inspections with regard to the industry wide minimum wages suggest that non-compliance with minimum wages often occurs in the form of an incorrect calculation of hours worked, or incorrect calculation of wage elements taken into account (e.g. including bonuses, costs for travel and lodging etc.), or a resort to bogus self-employment, bogus internships or bogus voluntary work (e.g. Cremers 2013). A proper documentation of working time (among others) is therefore considered as indispensable for the effective enforcement (albeit that this documentation can be manipulated as well). When the national minimum
wage was introduced, much criticism was levelled against perceivedly ‘excessive’ bureaucratic requirements imposed on companies, such as the obligation to document working hours of employees on a daily basis. In line with the unions the government however has refused to make substantial concessions on this point. Unlike in other countries, such as the UK, the obligation to document working hours anyway only applies to part of the workforce: to minijobbers (across all industries) and to employees with a monthly wage of up to 2950 € in those industries that are included in the ‘law on combating illicit work’ (Schwarzarbeitsbekämpfungsgesetz), such as industrial cleaning, meat industry, construction – but not, for instance, retail, eldery care, postal service or private households.

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

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

In sum, the public or collective support for individual employees affected by a violation of their rights is somewhat patchy, at least for non-union members. This is one more reasons why it seems safe to assume that employees in atypical employment are more exposed to violations of minimum labour standards: not only because they risk more (losing their job and maybe even their residence permit) but also because they lack access to institutions and organizations who either prevent non-compliance through their sheer existence (works councils) or who support them to enforce their rights. The scarce empirical evidence indeed reveals that a considerable share of posted workers or minijobbers do in effect experience a violation of their rights (see sections below). However, it should be noted that non-compliance is also an issue among core-workers, possibly as a feedback effect, since non-compliance has become so common among non-core workers. For instance, a survey among more than 1.000 union members in the construction industry in 2009 revealed, among others, that more than 40 per cent of them had experienced non-compliance with collectively agreed annual bonuses; and 28 per cent even reported that employers paid below the collectively agreed hourly wage (Bosch et al. 2011).

2.4 Social protection and integration gaps

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

\* Very recently, the government has lowered the maximum threshold for jobs covered by the obligation to document working time 2000 €/month, i.e. jobs with higher wages are excluded from the obligation, provided that employees have effectively received wages exceeding 2000€ over the previous 12-month period; thereby excluding e.g. seasonal workers in the agricultural sector from this exemption.
To begin with old-age benefits, entitlements from the statutory pension insurance are closely related to the earnings during the working life. Due to a rather strict ‘principle of equivalence’ (‘Äquivalenzprinzip’) between wages and pensions, net replacement rates for low wage earners are not higher than for average or high wage earners, unlike in many other countries – which is all the more severe as the replacement rates are quite low by international comparison (Figure 2). This is to an important extent due to the pension reforms since 2001 which, among others, introduced a so-called ‘sustainability’ or ‘demographic factor’ preventing pensions to increase at the same rate as wages. It thereby contributed to lower replacement rates from 52,6% in 2000 to currently 47,1% of the previous wage. The replacement rates will decrease further in the future, at the lowest down to 43%, which is the legally defined minimum target from 2030 onwards.

**Figure 3: Net pension replacement rates of low earner (50% of average wage) and high earner (150% of aw) after full career (as % of individual net pre-retirement earnings), single person, 2013**

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

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

Source: OECD 2014: 141

Accordingly, low earnings and periods without employment entail a particular high risk for income poverty in old age in Germany. Even 45 years of full-time employment on the level of the current minimum wage of € 8,50 are not sufficient to build up pension entitlements at the level of the means-tested ‘basic allowance for old-aged and disabled’ (‘Grundsicherung im Alter und bei Erwerbsminderung’) for a single person, corresponding currently to roughly € 700 net/month (2015). Exemplary calculations show that in order to reach this minimum level, an employee retiring in the year 2028 after 45 years of full-time employment (37,7 hours/week), would currently need to earn an hourly wage of € 10,98, provided that the replacement rate would stay at the current level. However, since the replacement rate is bound to decrease even further, the current minimum wage would even have to be €11,94

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

6 Note: The replacement rates are calculated based on wages and pensions before taxes (but after deduction of social security contributions). The replacement rate based on net wages and pensions after taxes will be higher, since taxes on wages are higher due to the progressive nature of the tax system.
(and would have to increase steadily up to a level of € 17.84 in 2028) (Steffen 2015, based on current projections on wages and pension replacement rates by the pension insurance agency). Hence, the share of those who have to rely on the non-contributory means-tested minimum income benefit (currently: 3% among those aged 65+) are likely to grow strongly, unless either strong wage rises or supplementary pension schemes will compensate for the increasing ‘pension gap’.

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

Empirical evidence on the share of employees opting in these supplementary schemes however show that employees in low-wage jobs and industries are much less likely to accumulate supplementary pension entitlements that can effectively substitute for the cuts in the statutory pension levels. With regard to personal pension schemes (‘Riester’ in particular), this is despite the fact that the public subsidies are disproportionally high for low incomes; and that indeed low-wage earners (including female part-timers) have above average participation rates (TNS Infratest 2012: 35). Hence these subsidized personal pension schemes do contribute to close the gender and skill gap in terms of access to additional pension schemes. However, the level of private pension entitlements among low wage earners is relatively low (TNS Infratest 2012: 86). Moreover, many of the women with low individual wages who opt in the Riester scheme live in households with additional earners and therefore do not necessarily belong to the group of households at risk of poverty or precariousness. When looking at the household level the picture is therefore different: In the two lowest quintiles the take up rate is under 25 per cent (Geyer 2011: 19). So, even though there is a relatively strong redistributive element in the architecture of the state subsidies, it is obviously not sufficient to incentivize low income households to build savings high enough to make up for the pension gap. Instead, the Riester scheme de facto mainly subsidizes high-income households: A recent study finds that about 38% of the aggregate state subsidies go to the top quintile of the income distribution, and only about 7% to the bottom quintile (Corneo et al. 2015).

Similarly, with regard to occupational or company pension schemes, these are much more prevalent in large firms and in the manufacturing industries as well as in the credit and insurance industry. By contrast, they are much less common in service industries with lower

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

8 In a similar vein, the abolition of publicly financed early retirement options have passed the responsibility to negotiate and finance early retirement schemes on the social partners alone. While previously collective agreements tended to top up the public subsidies, collective or company agreements now substitute for these, but for obvious reasons do not fully compensate the public cuts and hence often secure less generous levels of wage replacement than before, if they continue to exist at all (Fehmel 2013).
profit margins and a high share of small firms. Occupational pension schemes in the private sector covered less than 40% of employees in 2011 (TNS Infratest 2012: 80), ranging between 84% in the credit and insurance industry and 26% in the hospitality industry (BMAS 2012: 138). Coverage rates strongly increase with wages, ranging from less than 15% among employees with monthly wages below € 1.000 to around 75% among those with wages above € 5.500 (ibid: 161). Hence unlike in the case of the Riester scheme, inequality between low and high earners already translates into differential access to occupational and company pensions. Moreover, more than 25% of employees covered by an occupational or company pension did not receive any subsidy from their employer but paid the whole contribution on their own (ibid: 140). This type of occupational pension (with no or low contributions by employers) has gained in importance and is particular wide spread in small companies. As a consequence, here again the level of pension entitlements is quite low for a relevant share of those covered by a company pension (ibid.).

Overall, an important share of employees are either not covered by additional pensions at all – 29% had neither an occupational nor a personal pension scheme in 2011; and even more than 40% among those with earnings below €1500 (BMAS 2012: 161) – or have entitlements that will probably be too low to transform their statutory pension into a ‘living pension’.

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

The DGB unions’ primary political objectives over the last 10 to 15 years has been to secure a decent pension level for the majority, rather than to strengthen the redistributive character of the pension system to the benefit of the (increasing) minority with very low pension entitlements. Unions at first even rejected a reform proposal by the then conservative Labour Minister, Ursula von der Leyen, on a ‘lifelong achievement pension’ (Lebensleistungsrente), arguing that the proposal would distract attention from the low and falling general replacement rates (DGB 2012). The proposal was about introducing pension top ups for those with a contribution history of at least 35 years. Instead, core union claims were to maintain the previous levels of the pension replacement rate and to preserve options for early retirement for certain groups. Both claims also motivated the DGB’s strong opposition

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9 An example: In the hotel and restaurant industry, the pension reform in 2001 spurred the conclusion of a collective agreement in 2002 introducing a national occupational pension scheme for the HORECA industry. But employers contribution is only 150 € / year for each full-time employee, and employees can convert up to 4% of their yearly wage into tax-free employee contributions.
towards the gradual increase of the statutory retirement age to 67, because this implies pension reductions for those retiring at an earlier age (63 at the earliest), following unemployment or poor health conditions\textsuperscript{10}. The increase in workloads documented by many studies in both high and low skilled occupations is indeed likely to increase the number of health-related early exits of the labour market (see e.g. Jaehrling/Lehndorff 2012). Given that public schemes subsidising early retirement schemes were abolished as well (see Footnote 8), trade unions assumed that an important share of those entering retirement will be affected by reduced pension levels. Accordingly, the unions made a partial reversal of this reform their priority, and during the coalition negotiations between Christian Democrats (CDU) and Social Democrats (SPD) in 2013 successfully lobbied for a temporary extension of the early retirement option at the age of 63 for those with 45 contribution years. This reform was passed in 2014. By contrast, so far no legislative initiatives have been taken to implement the ‘solidary lifelong achievement pension’ on which SPD and CDU have agreed in their coalition agreement as well. Hence the very recent pension reforms have done little to prevent poverty in old age to increase among employees with precarious working lives. Rather to the contrary: since additional expenses for the reform measures are financed out of contributions (not taxes) this will contribute to decrease pension levels, due to the adjustment mechanism in the pension system (Bäcker 2014).

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

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

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

\textsuperscript{12} More than 50% among male unemployment benefit recipients received a monthly benefit of less than 900€ in 2014; among female benefit recipients the share was 75% (Source: Sozialpolitik aktuell).
3 Less than guaranteed full-time hours

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

3.1 In-work regulatory gaps

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

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

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

Minimum working hours

As indicated by the strong growth in marginal part-time employment over the 1990s and the first half of the 2000s (Figure 1), contracts with very low working hours have increased substantially. Employers generally have important incentives to make use of part-time work as a means to cut cost. On the one hand, it allows them to closely match paid working hours with variable work loads. No legal regulations define minimum working hours or rule out split shifts. Moreover, the working volume of part-time jobs can be adapted more flexibly and at lower costs for employers, compared to full-time work. This is because existing regulations compensating employees for their willingness to work overtime and protecting them from excessive overtime demands are mostly ineffective in the case of part-time employees. The law on working time only defines maximum daily and weekly working hours, hence for someone with a part-time contract the gap between contracted (minimum) hours and legally permissible maximum hours can be much higher than for a full-time worker. The same is true for compensation of overtime work: In most collective agreements, bonuses for overtime (if any) are usually made mandatory for hours exceeding the regular hours of a full-time employee. Additional hours of part-time workers will therefore mostly not qualify for overtime bonuses.\(^{13}\) Furthermore, overtime hours usually don’t have to be factured into the statutory sickness and holiday pay, hence if part-time employees constantly work longer hours, their compensation for absent times will only be calculated based on their lower contracted hours. Employers have exploited this regulatory gap to an important extent, and in some instances excessively so, as a case in the airport security industry illustrates: Employees used to be given a contract over 80 hours but worked 120 hours on average instead. This malpractice has eventually been addressed by a collective agreement stipulating that employees are entitled to an increase of their contracted working hours up to the number of hours actually worked on average in the previous year. In a similar vein, the regional collective agreement for the retail industry in North Rhine Westphalia (NRW) stipulates that employees are entitled to an increase of their contracted working hours if their actual working hours continuously exceed their contracted hours by more than 20% over a period of 17 weeks (Bispinck 2014). Very few collective agreements so far prescribe an absolute minimum of weekly or daily working hours (see Bispinck 2014); a notable exception being the already mentioned collective agreement for the NRW retail industry, which makes a minimum of 4 hours per day or 20 hours per week mandatory, unless the employee prefers fewer working hours.\(^{14}\) According to a trade unionist however, the persistently high share of marginal part-

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

\(^{14}\) Similar concessionary rules exist in company agreements stipulating that the company shall abstain from offering minijobs (Büntgen 2013).
time employment in the regional retail industry indicates that the regulation of the collective agreement is often neglected and lower working hours are imposed on employees nevertheless (Interview with Ver.di NRW, June 2015).

**Work on demand and zero-hours contracts**

The law on part-time work (TzBfG) stipulates that employers and employees can agree by contract on ‘work on demand’ (§ 12 TzBfG). The law also defines minimum requirements: The contract has to fix the duration of the daily and weekly working hours; if this is not fixed in the contract, a minimum of three hours per day and 10 hours per week is deemed as agreed. If employees have effectively continuously worked more than 10 hours per week in the past, the higher number of working hours is deemed to be agreed, according to several rulings by the Labour Court (Absenger et al. 2014: 38). Moreover, the law stipulates that the employer has to notify the employee at least four days in advance, otherwise the employee is not obliged to work.

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

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

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15 Albeit that, both in the case of ‘work on demand’ and ‘equal pay for temp agency workers’, the incentive is respective legislation allows employers not covered by a collective agreement to make use of these collectively agreed deviations as well.
Federal Constitutional Court ruled in 2006 that contracts can indeed fix minimum working hours, but that the number of hours worked on top of this minimum number shall not exceed 25% (1 BvR 1909/06) – a ruling that reconfirmed previous rulings by the Labour court, but was commented critically by observers for legalizing so-called ‘Bandbreiten-Verträge’ (hours-range-contracts) entitling employers to unilaterally vary the volume of working hours (e.g. Schlichting 2007). At the same time, the ruling has also set limits to these ‘Bandbreiten-Verträge’, which according to a trade unionist from the retail industry could be much larger in practice (Interview with Ver.di NRW, June 2016).

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

According to the only available quantitative survey dating from 2010, work on demand is more prevalent among part-time workers than among full-time workers, particularly among minijobbers, 13% of which stated that they had a work-on-demand contract (compared to 7,5% for regular part-time workers and 3,7% for full-time workers) (Schultz/Tobsch 2012). It is assumed however that informal types of work on demand are more widespread.

3.2 Representation gaps

Part-time workers, including minijobbers, formally enjoy the same rights with regard to interest representation as full-time workers. A reform of the works council constitution act in 2001 also clarified that part-time worker are to be counted pro rata when calculating the number of obligatory works councils mandates. In practice, participation of part-time workers, and in particular of minijobbers, can be hampered by the fact that their working hours are often outside the core working hours of regular employees, because they are often used to cover unsocial hours, e.g. in the late afternoon and evening or on Saturdays and Sundays. As a trade unionist from Ver.di explained in an interview, employees meetings are usually scheduled during regular working hours, in order to enable participation to as many employees as possible.

A number of collective agreements and company agreements are aimed at restricting the use of minijobs, by either securing participatory rights to works councils in recruitment procedures or by committing employers to abstain from offering minijobs at all, with the usual exceptions (Büntgen 2013).

Unlike in the case of temporary agency workers, there is little evidence on particular trade union strategies aimed at organizing minijobbers. In the case of the retail sector, a trade unionist explained to us, that it would make little sense to restrict organizing campaigns to minijobbers, because it would have little effect to call a strike at a certain company with the minijobbers only (Interview with Ver.di, 2015). This illustrates the general trend noted above, i.e. that industrial action in the service industries is often focused on single companies instead of the whole industry. For this kind of strike, organizing campaigns usually try to mobilize whole workforces of a certain company or establishment, without distinguishing according to the type of contrat, because it requires the unified effort of all employees in order to put weight on employees claims. Hence, part of the explanation for the limited campaigning efforts targeting minijobbers seems to be that they represent an – albeit large – minority in
most service sector industries, and that the representation gaps in these industries are so important even among ‘cor workers’ that trade unions primary concern is to firstly establish the basic structures for interest representation, such as collective agreements and works councils. Put differently, unlike in the case of TAW (see section 4), minijobs are not a ‘hole’ in the well-organised core (=manufacturing industries), where strong unions and works councils are able to advocate the rights of atypical employees, but a ‘hole in the margins’ of the labour market, where these basic structures of representation are missing.

3.3 Enforcement gaps
Enforcement gaps are particularly important with regard to minijobbers. They are since long entitled to equal pay and equal treatment by the law, but surveys repeatedly documented widespread deviations in practice concerning fundamental statutory employees’ rights like sick pay and paid holidays (see table 5). Other evidence from qualitative studies confirm the practice of paying minijobbers only for the hours they actually work (Benkhoff/Hermet 2008; Voss-Dahm 2009; Voss/Weinkopf 2012). Moreover, if almost 85 % of them earn low hourly wages (see table 2), this is partly due to non-compliance with equal pay: In the past, some collective agreements even included separate low-wage groups for marginal part-time workers, and it is not clear to what extent this kind of wage groups nowadays persist in practice. As qualitative studies revealed, this practice is to some extent deemed legitimate by employees and employee representatives and partly even the minijobbers themselves, because the lower gross wage doesn’t necessarily translate into lower net wages, due to the exemptions from taxes and social security contributions (Voss-Dahm 2009). The fact that minijobs have decreased since the introduction of the national minimum wage may also indicate that mini-jobs don’t pay off any longer for employers if mini-jobbers are entitled to the same hourly wage as regular employees – which de facto they weren’t before.

Table 5: Survey results on fundamental worker entitlements in mini-jobs

<table>
<thead>
<tr>
<th>Responses by</th>
<th>paid holidays</th>
<th>sick pay</th>
<th>pay for public holidays</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Not possible</td>
<td>Not possible</td>
<td>Not possible</td>
</tr>
<tr>
<td>employees</td>
<td>41.5%</td>
<td>26.1%</td>
<td>38.7%</td>
</tr>
<tr>
<td>companies</td>
<td>31.2%</td>
<td>11.1%</td>
<td>25.6%</td>
</tr>
</tbody>
</table>


Generally, collective agreements can be an important tool to facilitate compliance with laws. As seen above, oftentimes collective agreements or company agreements contain regulations which do not add protective standards, by e.g. restricting the use of atypical forms of employment like mini-jobs or work on demand, but by reconfirming and specifying the legal requirements, such as in the case of the rights of employees to reduce their working hours or to be treated preferentially when a full-time position becomes available.

3.4 Social protection and integration gaps
Employees in mini-jobs are not covered by the general obligation to pay social insurance contributions and they are exempt from paying income tax on their earnings. This form of state subsidy for low earnings is granted completely regardless of other earnings, assets or the household income of the employees. From the employers’ perspective, the attractiveness of mini-jobs is less obvious than it may seem at first glance. They have to pay a flat-rate
contribution of 30% (13% for health insurance, 15% for old-age pensions and a 2% flat-rate tax) on top of the monthly wages for mini-jobs, which is around 50% higher compared to other forms of insured employment (for which contributions average around 21%). This flat-rate employers’ contribution does not give marginal part-time employees any entitlement to social insurance benefits, except very low pension allowances. Since 2003 mini-jobbers can opt-in to pay contributions for the statutory pension; those who do are also entitled to state subsidies for additional personal pension schemes (Riester). Even if they opt-in, however, this would not allow them to build up substantial pension entitlements if they stay in this job for several years. As a survey shows however, stepping stone effect is very limited, hence a large share of female mini-jobbers either stay in the job for very long time or change back to inactivity or unemployment after some time (Wippermann 2012).

Against this background women groups within the DGB-unions, along with other womens’ rights organisations, have for a long time demanded the abolition of this atypical employment form. The claim has been adopted officially by the DGB in 2012. In previous years, part of the unions had tacitly welcomed the retention of this type of atypical employment, according to Palier/Thelen (2010), who attribute this to the prevalence of the male breadwinner/female second earner-model among union members in the male dominated manufacturing unions. Our interview partners from DGB largely shared the view that this probably explains why manufacturing unions are less engaged in lobbying activities aimed at an abolishment of the mini-jobs. Yet they stress that the basis for this reluctant attitude is dwindling, because the male breadwinner model is no longer the model of choice for younger workers (Interview with DGB, 2015).

Another reason might be the financial incentives for male union members taking up mini-jobs as a second job. As a study shows, male employees with a mini-job as their second job often belong to high earners: More than half of them are in the upper two quintiles of the income distribution (Voss/Schmidt 2014). Unlike overtime hours worked in the same job, mini-jobs as a second job are exempt from social security contributions paid by employees, which makes them a financially attractive even to middle and high earners. These reasons can be assumed to continue having a cushioning effect on the DGBs strategies towards mini-jobs. In 2012 the DGB decided to conceptualize a broad media campaign in order to solicit support for their reform proposal; this campaign was however postponed and is now intended to be launched in the run-up to the next parliamentary election in 2017, in order to influence the next coalition agreement, according to the our interview partners from the DGB.
4 Fixed-term work and temporary agency work in Germany

4.1 In-work regulatory gaps

Within Germany we can distinguish between fixed-term contracts and temporary agency work. The regulatory framework for fixed-term contracts was relaxed in the 1980s and 1990s. As a result, there was a considerable increase in the volume of fixed-term work. In 2012, the amount of fixed-term workers had almost doubled since 1996 and rose from 1.3 million in 1996 to 2.7 million in 2012 (IAB 2013). In comparison to other European countries, Germany ranked somewhere in the middle with regard to fixed-term work.\(^\text{16}\) However, the rates of fixed-term contracts were especially high in Germany with regard to certain groups such as unskilled workers, people working in academic professions or in the service sector (ibid.). Moreover, fixed-term contracts increased especially among newly employed (Rhein/Stüber 2014). In that sense fixed-term contracts contribute to employment instability for certain groups of workers but as such does not play as big a role as temporary agency work which will be discussed in the remainder of this section.

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

Since the mid-2000s there has been a significant rise in temporary agency work in Germany. From mid-2000 to 2013 the number of TAWs has doubled. Within this time period the number of temporary agency workers shortly decreased in the crisis years after 2009, but the number rose again soon afterwards and peaked in 2012 with 878 000 employees (Bundesagentur für Arbeit 2014a). In 2013, more than 839.000 TAWs were employed at approximately 17.700 temporary work agencies (Bundesagentur für Arbeit 2014a). TAW is particularly prevalent in the metalworking industry where 30% of all agency workers work (IG Metall 2013). These developments point to a trend as to how TAW is being used: as a labour cost saving measure instead of a short term instrument to adjust seasonal fluctuations (Holst et al. 2009; Holst 2014; IG Metall 2012).

\(^{16}\) [https://www.destatis.de/DE/ZahlenFakten/Indikatoren/QualitaetArbeit/Dimension4/4_2_BefristetBeschaftigte.html](https://www.destatis.de/DE/ZahlenFakten/Indikatoren/QualitaetArbeit/Dimension4/4_2_BefristetBeschaftigte.html)
The increase in TAW in Germany is related to the de-regulatory dynamics of the legal framework for TAW. Temporary agency work in Germany is regulated by the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz, AÜG). The act passed in 1972 but has since its adoption been substantially revised. The initial act limited the employment of the same agency worker to a maximum period of three months. It also banned temporary work agencies from ‘synchronising’ the period of the employment contract with the leasing period with the user-company; a regulatory measure that is being called the ‘synchronisation ban’ (Synchronisationsverbot). Moreover, it prohibited the temporary work agency to re-employ a worker after 3 months after which the worker has been let go (Wiedereinstellungsverbot). However, since the 1980s these regulatory measures were gradually relaxed. On the one hand the maximum assignment period was step by step extended and in 2003 even completely abolished. On the other hand, the so-called synchronization ban and the ban to re-employ agency workers after a 3-month period were removed in its entirety from the regulatory framework in 2003. Moreover, the 2003 reform introduced the equal pay principle for TAW with the possibility to lower wages through collective agreements and therefore ignore the equal pay principle. At first there was the concern within the TWA sector that the trade unions would refuse to enter into collective wage agreements in order to push through equal pay which was expected to increase market prices to an extent of around 20% (Weinkopf 2006). However, the first collective wage agreement was quickly concluded between a small employers’ association and a small Christian trade union providing for very low remuneration
with a gross hourly wage of only € 5.20 for low-skill occupations. This meant that there was no longer any possibility of enforcing the equal pay principle by refusing collective pay negotiations – the more so as the political pressure on the trade unions organized by DGB to support the implementation of the “Hartz”-labour market reforms was extremely high. Consequently, the bargaining power of the DGB-unions was lowered substantially and employers refused a negotiation of wages close to equal pay. Finally, the member unions of the DGB concluded collective agreements with the BZA and IGZ in May 2003, which at least provide for slightly improved conditions for temps (Weinkopf 2006). In hindsight, the equal pay reform with the possibility to derogate from the equal pay principle through collective agreements created a loophole to circumvent this principle. As a result, since 2003 the collective agreements increased significantly for TAW. These amendments were part of a broader package of labour market deregulation known as the Hartz reforms (Knuth/Kaps 2014). It was now much more attractive for both temporary employment agencies as well as user companies to take on agency workers.

Other important regulatory changes were introduced in 2012. First, the implementation of a generally binding minimum wage for temporary work was agreed. Second, the introduction of a clause (a so-called ‘revolving-door-clause’) which forbids the re-hiring of former regular staff on poorer terms as agency workers if less than a period of six months passed after the termination of their previous regular employment (however, vocational training does not count) was decided as a regulatory measure. Thirdly, it was made obligatory for user companies to inform agency workers about any vacant posts in order to increase their chances of obtaining a regular job (but no mandatory transition).

Finally, the coalition agreement of the current government (a coalition of the Christian Democrats (CDU/CSU) and the Social Democrats (SPD)) formulated a couple of regulatory measures that should be implemented by the end of 2015. The coalition agreement aims to clarify the meaning of ‘temporary’ in relation to the maximum hiring period and to re-introduce a maximum period of hiring TAW of 18 months. Furthermore, it also wants to introduce the principle that agency workers should be entitled to equal pay and treatment with regular employees at the same user company from the ninth month of their assignment without any scope for this to be weakened by any collectively agreed arrangement. This regulatory provision re-regulates the type of TAW contract that falls above that threshold. However, it has little effect for those TAW contracts that fall below the 9-month threshold.

As such TAW work contracts share many similarities with the standards employment relationship: TAW are included in statutory social insurance, holiday entitlements and receive continued pay in case of sickness and are covered by statutory protection against unfair dismissals. However, TAW face a number of risks: they often work in difficult work situations, receive disproportionately low wages, face a reduced employment security, have substandard access to further training, and a lower job satisfaction (Artus 2014; Vogel 2004; Brehmer/Seifert 2007). Therefore, these equal rights have to be reevaluated in the light that they are very short term. As legal dismissal protection requires a minimum employment of duration of 6 months, a large proportion of temps are excluded. Even though in theory it is possible to employ temp workers more permanently, in practice this is mostly not the case. In 2012 TAW were employed for a period of 10.3 months on average. Almost half of the employment relationships end after a period of fewer than 3 months, and 9% even end in less than one week (Bundesagentur für Arbeit 2013). Only one fifth of temporary agency workers are employed longer than one year in the same temp work agency. Only a small minority of these short-term TAW jobs ends because the TAW is offered a permanent job at the user-
company. This indicates that one of the main intentions of the deregulation of TAW – to make TAW a stepping stone into permanent employment – has largely failed. Therefore, the risk of being unemployed is 5 times as high for temporary agency workers than for regular employees (Bundesagentur für Arbeit 2014b).

**Equal pay for equal work?**

Temporary agency workers have the second highest share of low wages leading to a gap in minimum standards between regular and temporary agency workers. According to the German Federal Employment Agency there is a large pay gap between agency and regular workers. At the end of 2013 an agency worker received on average 57.4% of the remuneration of a regular employee (BA 2014). Pay differences in the manufacturing industry were more than 40%. In the service sector a 30% pay gap has been identified. While many agency workers are on average either less qualified or do less qualified jobs, studies that have taken into account structural differences between agency and regular workers still identified a remaining pay gap between 15 and 25% (Jahn/ Pozzoli 2013).

Even though the Temporary Employment Act establishes the right to equal pay and equal treatment for TAW from the first day of an assignment at a user-company (already since 2003), the law still allows for deviations from this principle provided this is stipulated in a collective agreement which is generally the case (Weinkopf et al. 2009). Agencies suddenly had a great interest in concluding new agreements for the sector. Trade unions are on the one hand interested in regulating working conditions of TAW by means of collective agreement but some are also aware that this undermines the legal principle of equal treatment (Schulten/Buschoff 2015). Nevertheless, since 2003 all trade unions affiliated to the DGB have jointly concluded collective agreements with the largest TAW employer association BAP (Bundesarbeitgeberverband der Personaldienstleister) and iGZ (Interessenverband Deutscher Zeitarbeitsunternehmen). Next to the CLAs, there also exists a sector wide universally binding minimum wage since 2011. In 2014, this minimum wage stands at € 8.80 per hour in West Germany and € 8.20 per hour in East Germany. Overall, the way the ‘equal pay principle’ has been implemented in Germany has so far not helped to reduce the pay gap between TAW and core workers substantially. This leads to a situation in which two thirds of the temporary agency workers (67.7%) earned very low wages in 2012 (Kalina/Weinkopf 2014).

Trade unions supported this concessionary law (equal pay law with opening clause for lower collectively agreed wages) at first. At the time of its implementation trade unions estimated that this law would help them to organize the temp agency sector. However, this judgement underestimated the potential role of yellow unions and their willingness to agree on collective agreements with the lowest possible wages. As a result, the ability of DGB Unions to conclude more favourable collective agreements than the equal pay regulations was severely limited. Instead DGB unions concluded collective agreements with much lower wages than they had hoped for, in order to restrict the spread of ‘yellow’ collective agreements. In 2010, however, the federal court of labour in 2010 judged several collective agreements that were concluded with the yellow unions as unlawful. However, this judgement resulted in a strategic dilemma for trade unions: whether they should continue to conclude collective agreements which suspend the equal pay principle and thereby possibly widen their organisational base or

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17 It is possible for firms from other sectors to close permanent agency contracts with external temporary agency firms or to open a temporary agency company themselves as a daughter company (Weinkopf et al. 2009).
18 The low-wage threshold being at 9.13 € (Kalina and Weinkopf 2012).
whether they should now advocate to fully implement the equal pay principle. As of now, this remains a controversial issue within the trade unions. Those promoting such collective agreements argue that temporary agency is a regular sector that needs to be regulated by a collective agreement, and that this in turn requires some concessions with regard to equal pay in order to get an agreement. This might e.g. help to raise TAW wages in occupations and industries where ‘equal pay’ effectively means an entitlement for temporary agency workers to very low pay (see Matecki 2013). The question whether a collective agreement should be concluded or not will be on the agenda again in 2016, when the current collective agreement will expire.

4.2 Representational gaps

In Germany agency workers are entitled to vote in the company-level elections of employee representatives in the user firm after having worked there for at least three months. However, as stated above, almost half of the employment relationships end in fewer than 3 months and 9% end in less than one week (Bundesagentur für Arbeit 2013 quoted after Spermann 2013). Consequently, many TAWs are not entitled to vote in the user firms’ social elections. Moreover, after 3 months the TAW has an active voting right to vote in the works council elections but does not have the passive voting right to stand and be elected into the works council. Despite these efforts to involve TAW into collective channels of representation, recent studies argue that firms in which TAW is prevalent the general works council representation density is disproportionately low (Artus 2014). Even if a works council exists it is questionable if it feels responsible for TAW because they are formally not part of the workforce it has a mandate to represent (Artus 2014).

Nevertheless, since 2013 the number of temp agency workers within a firm must be taken into account when calculating the number of works council members employees are entitled to. Moreover, works councils at the hiring firm are at least partly responsible for TAW; namely, the co-determination rights of works councils also include TAW.

Trade unions have been seeking to regulate TAW in the aforementioned collective agreements. Some unions such as the IG Metall and the service sector union Verdi have tried to build structures to organize agency workers. Finally, campaigns have become an instrument for mobilization in favor of agency workers’ rights.

In 2008, the IG Metall launched a broad campaign for equal pay and equal treatment of agency workers in the metal industry (Initiative Leiharbeit fair gestalten: Gleiche Arbeit - Gleiches Geld). Subsequently, other unions, such as the services union, ver.di, and the chemical and energy workers’ union (IG Bergbau, Chemie, Energie, IG BCE) have developed similar initiatives. With these campaigns the trade unions aimed to 1) highlight the abuse of TAW and put pressure on the government to amend the Temporary Employment Act to make it into a more stringent equal treatment regulation; 2) provide practical support for agency workers and to organise them into unions; and 3) approach the user companies, where trade unions were often in a much stronger position.

19 http://www.gleichearbeit-gleichesgeld.de
20 http://www.hundertprozentich.de/
21 https://www.igbce.de/themen/leiharbeit-werkvertraege/
One major result of these efforts is the 2010 conclusion of a collective agreement in the steel industry for North-Rhine Westphalia, Lower Saxony and Bremen which for the first time stated that TAW have to receive the same pay as the core workers. Another result of the IG Metall campaign was that the trade union was able to conclude more than 1,200 workplace agreements on TAW over a period of four years (Meyer 2013: 294). These workplace agreements, or so-called ‘better-agreements’ (Besser-Vereinbarungen) have stipulated certain supplements that user companies must pay in addition to the minimum rates in the TAW collective agreement for agency workers and even introduce an obligation for equal pay after a certain period of time. Between November 2012 and July 2013 new collective agreements on TAW were concluded in eleven sectors in branches such as metalworking and the chemical industry. The main issue in these agreements is determining the sector-specific supplements for agency workers which user companies have to pay (Spermann 2013). These are calculated on the basis of the collective agreements with the temporary agencies and usually increase in line with the length of time that agency workers have been working on an assignment at a user company. In the metalworking industry, for example, an agency worker in a lower pay grade will receive a supplement of 15% in addition to the rate in the agency collective agreement from the 7th week of employment, 20% from the 4th month, 30% from the 6th month, 45% from the 8th month and 50% from the 10th month. After ten months the agency worker will reach a pay level which comes close to that paid for a regular worker. These ‘better-agreements’ exist in sectors where trade unions are traditionally strongly represented. They certainly close a regulatory gap but only in these sectors.

4.3 Enforcement gaps

The demarcation between a temporary agency work and a subcontract exists in a grey zone. Oftentimes, so-called bogus subcontracts are actual temporary work agency arrangements. For the enforcement institutions but also for the individual workers it is often difficult to determine under which conditions the work is carried out. Indications for an employment relationship are the integration of the employee in the work process as well as the hierarchical supervisory structure. The personal dependence on content, execution, time, place and other modalities determines which contractual form is applied (Bonin/Zierahn 2013: 4).

In order to counter such practices the Employer association of the temporary agency firms established an independent arbitration board (‘Kontakt- und Schlichtungsstelle’). It is independend from the employers association and offers a free hotline to employees. In case malpractices are detected – such as the use of bogus subcontracting by a temp work agency – the firm can be excluded from a membership of the employers association (Interview with employer association, 2015).

4.4 Social protection and Integration gaps

The low stability of employment (often alternating with periods of unemployment) leads, in reality, to lower levels of social protection for the majority of temporary agency workers, which is exacerbated by the frequently low rates of pay. For example, in 2013 325,000 people started to work in the TAW sector after being unemployed. Of those 325,000, 61% (200,000) were employed after 6 and twelve months. By contrast, 39% of the 325,000 were again unemployed after 6 of twelve months of employment (Bundesagentur für Arbeit, 2015).

As noted in section 2.4, two forms of benefits exist for the unemployed in Germany: the contribution based unemploymentbenefit and the means-tested ‘basic allowance for job seekers’ (often referred to as ‘ALG II’ = unemployment benefit II). Whether temporary agency

22 http://www.igmetall.de/stahltarifrunde-2010-dritte-verhandlung-fuer-nordwestdeutschland-5555.htm
workers are entitled to the former or the latter depends on the previous income and the
duration of the previous employment. They are entitled to the full unemployment benefit if
they were employed for at least 12 months (this does not have to be consecutive months)
during the last 2 years. However, as described above, many temporary agency workers are
employed fewer than 10 or even 3 months. If they cannot accumulate 12 months during the
last 2 years in which they were employed then they are only entitled to ALG II which is lower.
Claimants must attend training courses, and be ready to step into any job offered them by the
Arbeitsagentur or Job Center, even a very low paid one.

TAW also affects health and safety at work substantially. TAW have to adapt to new work
requirements constantly. The tasks and responsibilities may change which each assignment
but also their position. In that sense, TAW are limited in acquiring similar training and
experience than their permanent employed colleagues. While the latter is able to acquire
tricks and skills in order to ease the workflow and to work safely, there is only limited
possibility for TAW to do the same. The dilemma here is that TAW need a good introduction
into the workflow in order to avoid health and safety issues, but the necessary time is often
limited for this workforce (Sczesny et al. 2008). If they are not introduced to the health and
safety regulations properly in the company they also do not know whom to contact if they
have questions with regards to these rules. The main reasons for the heightened accident risks
for TAW are: insufficient integration of TAWs in the workplace, heightened accident risk of
newcomers, insufficient adjustment to the new job, high pressure to get a permanent
contract, insufficient communication between the user and the sending company (Sczesny et
al. 2008).

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

5.1 In-work regulatory gaps

Posted workers

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

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

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

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

Especially the German construction industry has become a main destination country for posted workers, mainly from Eastern European countries, with a peak of 188,000 registered postings in 1996. In 2014, 98,214 postings were registered (HDI 2015). The drop in postings can be explained by the increase to solo-self-employed workers, also originating from Eastern Europe (see below).

The portable documents A1 are currently the only register of information on posting data. Employers posting workers to an EU member state are required to apply to the relevant national authorities for an A1 document. The document exempts workers from paying social security contributions in the country where they are temporarily working and proves they do so in their county of residence (Council Regulations 1408/71 and 574/72). In 2013 the 3 main sending countries of posted workers were Poland (262,714 PDs A1 issued), Germany (227,008 PDs A1 issued) and France (123,580 PDs A1 issued). In 2013, the three main receiving Member States were Germany (373,666 PDs A1 received), France (182,219 PDs A1 received) and Belgium (134,340 PDs A1 received). Moreover, the majority of posted workers to Germany was send from Eastern European countries while the postings to France and Belgium were more balanced with regards to the EU 28 member states (European Commission 2014).

Source: Hauptverband der Deutschen Bauindustrie 2015²⁴

²⁴ http://www.bauindustrie.de/zahlen-fakten/statistik/arbeitsmarkt/entsandte/
Subcontract workers and solo self-employed

For the purpose of our study a subcontractor can be a firm or a natural person and employs dependent employees. A self-employed can also fulfill a service as a subcontractor but does not have to. In general subcontract workers and self-employed have no right to equal pay. The number of solo-self employed has increased much more than the number of employees over the last years. For example, the number of dependendent employees has increased by 5% between 2000 and 2012, while the number of solo-self employed has increased by 40% in the same time period (Brenke 2013). Unlike in the beginning of the 2000’s solo-self employed now constitute the majority among self-employed (with or without employees), which overall account for 11.7% of the workforce – still a relatively low share compared to most other European countries. The most significant increase of solo self-employed was registered in the construction sector. The proliferation of self-employment in construction is related to the changes in the German Trade and Crafts Code (Handwerksordnung). Before 2004 establishing a business was only possible if the owner held a qualification as a ‘Master Craftsman’ (Meister) in their trade. The relaxation of this obligation allowed certain professions to set up a self-employed business as a registered handicraft entity either without such a diploma entirely or with a ‘qualification period’ of 6 years. Of the previously 80 listed professions, 40 professions are not anymore obliged to hold a ‘Master Craftsman’ diploma when offering services. This is the case for the profession of tiler, leading to a situation that many workers in other professions register themselves as tilers. Between 2004 and 2012 the number of registered handicraft tiling companies in Germany increased from about 12,000 to 68,000 of which 18,500 had a registered owner from Eastern Europe (IG BAU and ZDB 2013).

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

5.2 Representation gaps

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

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

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

Moreover, in recent years The Confederation of German Trade Unions (Deutscher Gewerkschaftsbund – DGB) has responded to increasing numbers of posted workers by establishing 6 “fair mobility” service centres in large cities across Germany. In these service centres project workers with relevant language skills inform posted workers and migrant workers more generally about labour law and social legislations in their native languages and across sectors to preserve the created norms within the German labour market. Despite these efforts to empower foreign subcontract workers, organizing them in order to effectively enforce their rights remains a difficult task for the trade unions and the campaign has had limited success so far, e.g. in terms of membership recruitment among foreign contract workers (Interview with NGG, 2015).

At the workplace level, an unfortunate event led to an in-house collective agreement for posted workers at the Meyer Werft. Due to a fire accident at on a posted workers’ housing sites two posted workers died in the fire who were employed at a subcontractor at the Meyer Werft. The fire was caused because of the precarious housing situation. As a consequence IG Metall Küste and the Meyer Werft negotiated a collective agreement (valid until March 2017) which covers the employment conditions of employees working at subcontracting firms. Moreover, it contains information-, control-, and participation rights for the works council in
the outsourcing process. The collective agreement obliges subcontracting firms to adhere to social standards (working times, health and safety, and interestingly adequate housing) as well as a minimum wage of 8,50€. A permanent working group consisting of works council and management controls the implementation. This working group also consults about the cancellation of a contractual relation and in the case of a disagreement about the scope of the subcontracts, the in-firm arbitration committee can be consulted. Moreover, the company committed itself to inform the works council in detail about the subcontracting relations and to consult the production and personnel development in relation to subcontracting with the works council. If the works council demands, it can look into the contracts and nature and scope of service work of the subcontractors. This collective agreement has by now been extended to Neptun and Rostock.

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

5.3 Enforcement gaps

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

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

Court proceedings to reclaim wages through the main contractor liability are relatively infrequent. Legal costs are a strain on union budgets and unions cannot initiate class actions in Germany. However, it is a very useful instrument for trade unions to use media pressure to

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25 [http://www.mediafon.net](http://www.mediafon.net)
get the main contractor to payback wages. Moreover, fines are often not high enough and companies may even calculate the fines into the cost frame when hiring subcontractors.

Moreover, even though a comparatively tight regulatory framework exists there is widespread non-compliance of the posting framework. One of the many cost-saving strategies of service providers is the deliberate manipulation of hours. Posted workers work 200-240 hours a month while the employer accounts for only 160 hours in the payslips and thereby reduces the actual hourly wage (union representative, interview 2012). To put it differently, workers work a 60 hour week while the payroll lists, a 40 hour week. This practice disregards the adherence to the maximum work period and at the same time undermines the hourly minimum wage. Even though workers earn an hourly wage on their pay slips, they do not receive overtime, night-time or weekend bonuses on top of their wage. However, working 100 hours overtime, without extra payment, reduces the hourly minimum wage to 5 or 6 €. These practices are very difficult to detect because the payslips and accounting books list the legally allowed maximum amount of hours worked. Even when enforcement agencies, such as a labour inspectorate, in addition check the bank accounts to see whether the sum on the payslips is actually transferred to the bank account of the worker, there are other practices via which firms may reduce the actual pay received (Wagner 2014).

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

In addition, in Germany management requires workers to attest in writing that they receive the minimum wage payment. The contracts and the statements workers have to sign that they received minimum wages, are sometimes written in the language of the host country, and therefore workers are unable to read what they are signing. Posted workers often have two contracts, one from the firm that sends them, and one contract specifying the work and employment conditions in the host country. This specification is often only provided to them in the language of the host country. Controls do take place by the FKS. However, official controls are not able to detect malpractices because the paperwork of foreign firms is in accordance with the rule system (Wagner 2014).

In this respect, two distinct gaps exist in relation to EU labour mobility. The first is a cooperation gap on an international or transnational level between enforcement actors. The cooperation gap and ensuing problems arise due to the underdeveloped cooperation between enforcement actors across EU member states. For example, host country enforcement institutions cannot enforce fines across borders and depend on sufficient collaboration with the respective labour enforcement agency in the home base of the subcontracting company. While such cooperation does exist between, for example, Germany and the Netherlands they are not as well developed with the Eastern European neighbours. The same is true for letterbox companies. In order to find out whether a company is an actual company or a letterbox company the host country institution has to rely on the effective cooperation with the respective institution where the company is registered. However, the administrative process is very long and complicated and takes too much time in order to be effective (that is: while the administrative institutions find out whether a company is a letterbox company, that company has plenty of time to de-register from the respective commercial register and reregister in another commercial register) (Wagner 2015b).
On a national level trade unions demand that the number of inspections on construction sites be significantly increased, and national inspection services be strengthened considerably (in terms of logistics, staff and powers). There is also a lack of cooperation and insufficient exchange of information within the national states between the actors and institutions involved in the enforcement of rights. Moreover, a big problem is the way in which enforcement of the local rules is hindered by the complicated mix of sending and host country legal standards, by the ability of transnational subcontractors shift between jurisdictions to avoid compliance, and by the unwillingness of most posted workers to confront their employers about their legal rights (Wagner 2015b; Berntsen/Lillie 2015; Cremers 2013; Wagner/Lillie 2014).

Another enforcement gap is the difficulty to determine whether a worker is a bogus ‘self-employed’. There is some evidence that regular employees have been replaced by bogus self-employed workers in the construction sector in order to circumvent the higher labour costs required under collective agreements (Gross 2009; Koch et al. 2011).

5.4 Social protection and integration gaps

In general, there are substantial risks involved in solo self-employment, especially with regards to old age and sickness insurance: the respective income has to cover the running living costs as well as provide financial stability for the pension. Moreover, these costs have to cover sick leave and holiday pay. Opt-in options do exists in social security but ask relatively high fees for low earners. Instead of being employed as a worker, subject to social security contributions, there is an increase in the strategic use of self-employees.

One important component of providing social security for a particular groups solo self-employed, namely self-employed in the creative industry is the Artists’ Social Welfare Fund (Künstlersozialkasse). The Artists’ Social Welfare Fund covers up until half of the contributions to sickness-, care and pension insurance for self-employed in the creative industry. The federal government pays 20% of the contributions, while approx. 1/3 of the contributions are covered by the companies that commercialize the artists outputs (such as publishing houses, galleries, advertising companies or museums) and the rest is paid by the members of the Artists’ Social Welfare Fund. This system can only properly function if the companies pay their contributions into the fund, which was only controlled randomly in the past years. This shall be improved in the future (Neugebauer 2014).26 With regards to posted workers, the employers of posted workers pay the social security contributions (i.e. sick and pension pay) in the sending and not in the country where the work is performed. The sending country social security contributions are usually much lower than the ones of the country where the work is performed leading to an overall reduction in labour costs (Fellini et al. 2007). This can lead to a situation in which a firm establishes a letterbox company as a way to lower the amount of tax and social contributions it has to pay.

6 Conclusion

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

The literature on the changing German employment relations identifies several strategies trade unions employ to position themselves within this changing context (i.e. dualization strategies, organizing strategies). Our analysis suggests that trade union strategies, within the context of the various existing employment groups and sector characteristics, cannot be easily grouped within one strategy. The results rather resonate with several streams of literature. For example, there has been a trend toward what can be called union revitalization strategies in various shapes and sizes. This is for instance true for the IG Metall which not only launched the ‘better instead of cheaper’ campaign but also negotiated a novel in-firm collective bargaining agreement for posted workers. Such organizing approaches re-emphasize organizational power as a precondition of institutional power (Brinkmann/Nachtwey 2013). The resulting strength in institutional power is visible in the 2012 reform package of temporary agency work. A number of court rulings of the German Federal Labour Court also strengthened the rights of works councilors to represent TAW which again strengthened the institutional power of worker representative bodies in relation to TAW. Still, the protection of the core workforce at the expense of TAW was a key instrument trade unions supported during the crisis. Moreover, industrial disputes have increased in the service sector. Strikes, mainly at the local level, have been successful in terms of wage increases and in terms of membership recruitment. These examples show a higher willingness of unions to use their power to strike and organize certain segments in the workforce in order to further strengthen their organizational and eventually their institutional power.

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

The case of temporary agency work is a similar case in point for what seems to be supporting the dualization thesis at first glance might not capture the full story at second glance. The German law implemented the equal pay principle for temporary agency workers as prescribed by the EU regulation, but left an important backdoor by allowing social partners to agree on lower wages. This backdoor (concessionary law) was originally introduced with the explicit consent of the trade unions, which at the time estimated that this would help them to organize the temp agency sector, probably bearing in mind other examples where concessionary law had indeed backed up unions’ institutional power by giving them a means to trade concessions in one area against improvements in others. In the case of temp agency work however this proved to be a fatal misjudgement, since it underestimated the potential role of yellow unions who stood by immediately and were willing to agree on collective agreements with the lowest possible wages. DGB Unions therefore were more or less forced to conclude collective agreements with much lower wages than they had hoped for, in order to restrict the spread of ‘yellow’ collective agreements. Hence, what might look like an example illustrating the ‘cross-class-coalition’ thesis in fact has developed into a case in point for what we have proposed to term ‘shotgun wedding in the shadow of the market’.

The story however doesn’t end with the shotgun wedding. Because at the same time, unions and employee representatives have nevertheless learned to use the opening clause to reduce the pay gap between TAW and the core workforce (at least part of them) through collective and company agreements, and also to use these agreements as a means to organize temporary agency workers and strengthen the unions’ membership basis. When the federal court of labour in 2010 judged several collective agreements that were concluded with the yellow unions as unlawful, this therefore led to a strategic dilemma for trade unions – between strengthening their own organizing power (by continuing to conclude collective agreements which suspend the equal pay principle) and fully implementing equal pay (by not concluding collective agreements any longer). The renewed conclusion of a collective agreement on temp agency work in 2013 for instance was therefore discussed quite controversially within the unions. Additional research is required in order to assess if this remains indeed a trade-off and a dilemma for the unions, or if there are powerful arguments justifying collective agreements also from the standpoint of TAWs. This question will be on the agenda in 2016 again, when the current collective agreement will expire.

Finally, another example of a ‘shotgun wedding in the shadow of the market’ is the trade unions’ strategy to re-insource workers that have been outsourced via subcontracts. For example, in the retail industry, the union Ver.di in the Länder North Rhine Westphalia and Baden Württemberg negotiated a collective agreement for stocking goods in the retail sector (Warenverräumung im Einzelhandel) which introduced lower pay grades in the collective agreements in order to give employers an incentive to re-insource outsourced retail store stocking jobs (similar to the introduction of a low-pay grade in the new collective agreement of the public sector in 2005). However, even after these measures have been implemented Ver.di noticed no massive return to in-sourcing by employers. Hence, it seems that the re-regulation by itself is not sufficient to alter the contractual arrangements, possibly because the use of subcontracts has already been institutionalized.
An important trend in Germany is thus that certain employer strategies still make use of the enforcement gaps or ‘exit options’ (Jaehrling/Méhaut 2013) that exist due to outsourcing, employer association free zones and the deregulation of the product market. The dualized nature of the labour market is thus also a result of the strategies of employers who meet little resistance from their largely unorganized workforce. Unlike what could be expected, 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 reach of trade unions and works councils. But this is partly even true for those in standard employment – particularly in smaller establishments and in the service sector, where the overwhelming majority of employees work in companies without works councils who are maybe the most important pillar in securing compliance with labour law.

Overall, we see that in certain sectors trade unions have been successful in strengthening their organizational power. The recent re-regulatory efforts aimed at counteracting the increase in low-wage work and precarious employment are also due not least to massive pressures from the unions. But the findings also show that trade union struggle to cope with the new situation of hybrid industrial relations and a high employment / large low-wage-work sector in Germany. Some strategies are not able to counteract the existing structures that cater toward precarious workers due to the legacy of de-regulatory policies. Other strategies tend to undercut workers’ statutory rights for the sake of upholding and/or strengthening the trade unions organizational power. Our findings illustrate the existence of a tense relationship between trying to protect the interests of core workers while equally trying to organize non-core workers and improve their working conditions. In the past, this tense relationship has manifested itself in conflicting strategies on various occasions: on the one hand between various trade unions such as between the services and the metal workers union in the case of the national minimum wage or the law on tariff unity; but also within trade unions. This is precisely because most unions meanwhile have come to adopt strategies aimed at including the non-core workers, whereas in the beginning the predominant approach was to simply try to restrict the use of all sorts of atypical employment. These pressures within the trade union movement have to be evaluated against the background of employer strategies that hit precarious workers the hardest but are equally relevant for core workers who are endangered to become part of the precarious workforce at some point in the future. The establishment of the statutory minimum wage, as part of larger efforts to re-regulate the German labour market, is certainly a very important step in securing employment conditions. Still, more encompassing strategies are required to increase wages further through collectively bargained agreements and to prevent that wages will not converge toward the lowest wage level.
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