German Collective Bargaining Law

An Introduction for Foreign Businesses

GESAMTMETALL
Die Arbeitgeberverbände der Metall- und Elektro-Industrie

Imprint

© März 2016

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A. Preface

Germany's 1949 Collective Agreements Act (Tarifvertragsgesetz, TVG) has scarcely changed in more than 60 years.

The German collective bargaining system has its roots in the Basic Law (Grundgesetz, GG), Article 9 (3) of which provides a constitutional guarantee of tariff autonomy (also known as "free collective bargaining"):

> *"[…] The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful."*

Collective bargaining law in Germany is heavily shaped by case law and specialist literature.

This introduction to German collective bargaining law gives the reader an overview of what is, in parts, the complex system underpinning this area of law.

B. The Collective Agreements Act

I. Origins

Origins

The existence of employers' associations and trade unions is today taken for granted in the Federal Republic of Germany. The social partners are free to reach "autonomous" agreements, i.e. without government control of wages and working conditions, in the form of collective agreements. These agreements also specify the minimum working conditions for contracts of employment.

1. The period up to World War I and the Weimar Republic

World War I

Initial attempts to form associations during the Industrial Revolution in Germany were blocked by the prohibition on associations enshrined in Prussian Common Law in 1794.

After many years in which the workers' movement was suppressed, the rapid advance of industrialization gave rise to the General German Workers' Association (Allgemeiner Deutsche Arbeiterverein, ADAV) in 1863. Despite being in contravention of state laws, this and similar organisations were mostly tolerated. The reason was that, given the ever growing number of members, it was no longer possible to contain social disputes merely by suppressing such organizations.

2. Developments under the Weimar Republic

Weimar Republic

After the end of World War I, the trade unions and employers' umbrella associations signed what became known as the Stinnes-Legien Agreement on November 15, 1918. This agreement introduced the eight-hour day, guaranteed the freedom of association and gave the green light to further collective agreements in all branches of industry.

The Weimar Constitution, which became law on August 19, 1919, guaranteed the right to form "associations to safeguard and improve working and economic conditions". At the time, these were revolutionary developments that drove huge growth in the membership of trade unions.

3. A temporary end to collective agreements

Period of National Socialists

Amid the economic turbulence in the years that followed 1922, unemployment was rampant. The trade unions, no longer able to protect the economic situation of their members by means of collective agreements, saw their membership decline dramatically.

Under National Socialist (Nazi) rule, trade union buildings were occupied and union assets were confiscated. The trade unions were replaced by the German Workers' Front (Deutsche Arbeiterfront, DAF).

4. The development of collective bargaining law after World War II and since the Collective Agreements Act became law

After World War II

Despite the difficulties of the post-war years, new trade unions and employers' associations took shape after 1945. The Federal Republic of Germany was founded on May 23, 1949, and the Collective Agreements Act (Tarifvertragsgesetz, TVG) took effect in the same year.

When it resurfaced in 1949, collective bargaining attained to considerable significance in the newly minted Federal Republic. Since the corresponding act first came into force, more than 400,000 collective agreements have been concluded. Roughly 6,400 a year have been signed since German reunification in 1990. Around 70,000 collective agreements currently exist for over 300 branches of industry.

II. Structure of the Collective Agreements Act (TVG)

Collective Agreements Act (TVG)

The Collective Agreements Act breaks down into 13 sections covering 15 sets of provisions. Here is a brief synopsis:

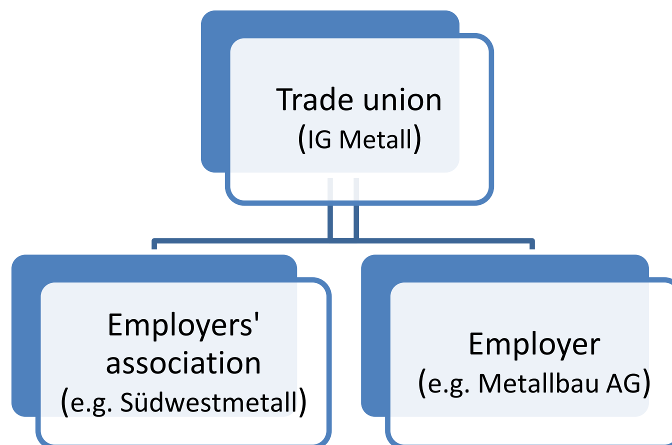
- Section 1 contains provisions covering the content and form of a collective agreement.
- Section 2 outlines the binding rules governing who can be parties to a collective agreement.
- Section 3 deals with which parties are bound by collective agreements and to which legal entities the agreements apply directly.
- Section 4 details how the legal norms in a collective agreement apply to whom. It also stipulates the effect of these legal norms after collective agreements expire.
- Section 4a (new) spells out the requirement for uniformity based on the principle "one company, one collective agreement".
- Section 5 creates the legal framework based on which collective agreements can, on request, be declared to be of general application.
- Sections 6 to 11 govern formal matters such as entry in the register of collective agreements, the public announcement of collective agreement and implementing regulations.
- Section 12 defines what are known as umbrella organisations.
- Section 12a details the rules for persons of a similar status to employees.
- Lastly, section 13 governs the circumstances under which the Act enters into force.

C. The parties to a collective agreement

Parties to a collective agreement

On the employees' side, only trade unions can be parties to a collective agreement. On the employers' side, either individual employers or employers' associations can be parties (Section 2 (1) TVG).

In the context of the metal and electrical industry (M+E), this principle can be illustrated as follows:



I. Tariff autonomy

Tariff autonomy

The principle of tariff autonomy asserts that everyone is guaranteed the right to form associations to safeguard and improve working and economic conditions (referred to in Section 9 (3) GG as the "freedom of association"). This fundamental right of the individual gives rise to the collective right of such associations to freely negotiate collective agreements, hence "tariff autonomy".

Bound by the principle of neutrality, the state must uphold this constitutional principle by leaving it to the parties to regulate individual working conditions and refraining from intervention in industrial disputes.

II. The freedom of association

Freedom of association

Trade unions are associations of employees and employers' associations are amalgamations of employers. Both are associations which enjoy constitutional protection pursuant to Section 9 (3) GG.

This constitutional protection expresses itself in the positive and negative freedom of association.

1. Positive freedom of association

Positive freedom of association

Positive freedom of association protects the right of the individual to form associations, join existing ones and remain a member of them.

Example

Employers are not permitted to ask about trade union membership when interviewing potential new recruits. Employees do not have to answer such questions; they have the "right to lie". This, too, is a product of positive freedom of association, as affiliation with a trade union must not be impaired.

2. Negative freedom of association

Negative freedom of association

Negative freedom of association – another principle anchored in Section 9 (3) GG – concerns the right of each individual not to join associations or to leave them.

Example

No pressure or compulsion to join may be exercised in respect of individuals who are not members of trade unions. Accordingly, any clause stipulating membership of a trade union as a condition of employment at a given company would be null and void in a collective agreement.

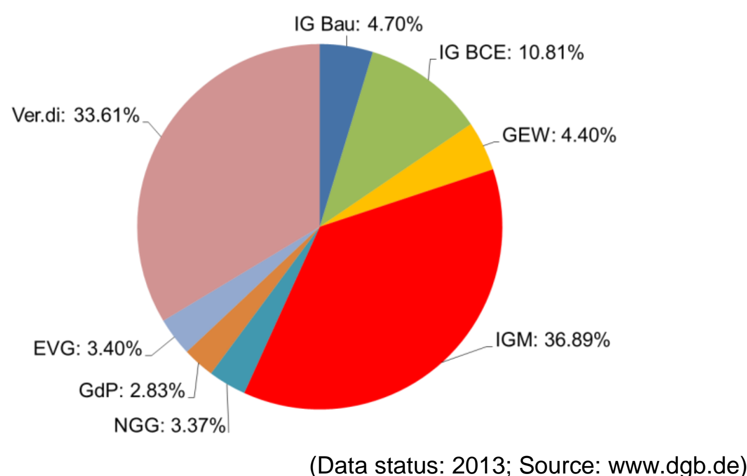
III. Trade unions and employers' associations

1. Trade unions

a) General

Confederation of German Trade Unions (DGB)

The largest umbrella organisation for individual trade unions in Germany is the Confederation of German Trade Unions (Deutscher Gewerkschaftsbund, DGB), which has 6.1 million organized members. Eight trade unions in different industries currently belong to the DGB.



(Data status: 2013; Source: www.dgb.de)

Legend:

IGM	= IG Metall (metal and electrical industry, textiles, wood and plastics, iron and steel etc.)
ver.di	= Service sector union
IG BCE	= Mining, chemical and energy union
IG Bau	= Construction, agriculture and environment union
GEW	= Education and science union
EVG	= Railway and transport union
NGG	= Food, beverages and catering industry union
GdP	= Police union

b) Industrial Union of Metalworkers (IG Metall)

IG Metall (the Industrial Union of Metalworkers) represents the interests of employees in the metal and electrical industry. A membership of 2.27 million makes this the biggest trade union in Germany and, indeed, in the world. IG Metall breaks down into seven districts (Baden-Württemberg, Bavaria, Berlin-Brandenburg-Saxony, Sea Coast, Frankfurt, Lower Saxony and Saxony-Anhalt, and North Rhine-Westphalia).

One key feature of trade unions is that they are industry-specific rather than company-specific. There is no "Daimler union", for example. Instead, there is a single union for the metal and electrical industry, which also includes automotive engineering.

Example

A car maker employs people who are tool makers, coach builders and engine developers. Irrespective of the differing focus of these three occupations, the trade union "responsible" for all of them is IG Metall.

Membership of trade unions is voluntary. Each individual is therefore free to join or not to join a union (freedom of association).

Unions representing specific professional groups

Alongside the industrial unions we have talked about already, there are also unions which only represent specific professional groups. Examples include the Marburger Bund (for doctors) and Cockpit (for pilots and air-craft engineers).

c) Purpose of trade unions

Purpose of trade unions

The trade unions see themselves as associations which give employees a level playing field on which to negotiate with employers as equals. Since unions represent a large number of employees, they collectively represent the interests of these employees towards the relevant employers or employers' association.

2. Employers' associations

Employers´ associations

An employers' association is a group of companies which join forces to jointly represent their interests in respect of the trade unions. Unlike employees, employers face no risk of being disadvantaged by a disparity of power with regard to their negotiating partner. Accordingly, each employer also has the right to conclude its own collective agreements.

The option of joining employers' associations is nevertheless attractive to companies, as negotiations with the trade union can then be delegated to such an association. Moreover, membership gives companies the guarantee of "industrial peace" for the duration of collective agreements concluded by the association to which they belong. The obligation of industrial peace means that industrial actions – in particular strikes – are not permitted during the term of the collective agreements. Employers' associations can also serve as a "mouthpiece", representing the interests of their member organizations towards the government and its institutions.

To illustrate how employers' associations are structured at the regional and national levels, the example below outlines the landscape of associations in Germany's metal and electrical industry.

a) Employers' associations at the regional level

Associations at regional level in the metal and electrical engineering industries

Member companies in the metal and electrical industry are served by 13 independent regional associations, whose geographical coverage roughly reflects the borders of Germany's federal states. (Südwestmetall is responsible for the state of Baden-Württemberg and Metall NRW for the state of North Rhine-Westphalia, for example.) These regional associations serve nearly 3.500 companies with around 1.9 million employees throughout Germany.

b) Umbrella association

Federation of German Employers' Associations in the Metal and Electrical Engineering Industries (Gesamtmetall)

All 13 regional employers' associations in the metal and electrical industry are themselves members of the Federation of German Employers' Associations in the Metal and Electrical Engineering Industries ("Gesamtmetall") in Berlin. Gesamtmetall is the umbrella association for the regional employers' associations in this industry. An umbrella association cannot conclude collective agreements unless it is specially commissioned to do so.

c) Umbrella organization for all employers' associations (BDA)

Confederation of German Employers´ Associations (BDA)

The Confederation of German Employers' Associations (Bundesvereinigung der Deutschen Arbeitgeberverbände, BDA) is the umbrella organization for all employers' associations in Germany, including industry-specific umbrella associations such as Gesamtmetall. Employers' associations from all kinds of sectors and industries (construction, chemicals, skilled crafts and catering, for example) can be members of the BDA. This umbrella organization primarily represents the political interests of its members, but cannot itself be party to collective agreements.

D. The collective agreement

The collective agreement is an agreement which is concluded by a trade union on the employees' side and by an employer or employers' association on the employers' side.

I. Form of the collective agreement

Written form

Pursuant to Section 1 (2) TVG, the written form is a legal requirement for collective agreements. Oral agreements are null and void. The parties to a collective agreement must sign their consent to this provision.

II. Effect and content of collective agreements

Legal norms

One key feature of collective agreements is their validity for third parties. This is because collective agreements contain legal norms which address not the parties to the collective agreement as such, but third parties, i.e. the employees and employers.

Practical tip (metal and electrical industry): IG Metall and Südwestmetall conclude collective agreements in the state of Baden-Württemberg. These agreements are binding for the employers who are members of the Südwestmetall employers' association and for the employees who are members of the IG Metall trade union.

In accordance with Section 4 (1) TVG, the collective agreements negotiated by the parties apply directly and with compulsory effect to employment relationships bound by the agreement. This means that a collective agreement takes effect as soon as the collective agreement comes into force. It cannot be amended to the detriment of the employee. This effect can be compared to laws which also apply with direct and compulsory effect.

This section of a collective agreement is also referred to as the "normative section", as the effect of collectively agreed provisions is similar to that of legal norms. In normative terms, employers are only bound by collective agreements concluded with an employers' association if they are members of the association which concluded the agreement.

Similarly, a collective agreement only has a "normative" effect for employees who are members of the trade union which concluded it. Apart from certain exceptions, employers are not allowed to ask employees about their trade union affiliation. Where employers wish to treat all employees equally on the basis of collectively agreed provisions, what is known as a reference clause is usually inserted in contracts of employment (see E. III). As a rule, it is in employers' interests to act in this way, as unequal treatment would create a de facto incentive for employees to join a given trade union.

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Practical tip: Membership of a trade union also gives employees in Germany the support of the unions in legal disputes which come before the labour courts. Members can be represented in lawsuits by union representatives in much the same way as by lawyers, but free of charge.

By contrast, the part of a collective agreement governed by the law of obligations concerns the reciprocal rights and duties of the parties to the agreement – in particular the obligation of industrial peace (see also section G. III) and the obligation of implementation.

1. Obligation of industrial peace

Obligation of industrial peace

The obligation of industrial peace states that the parties to a collective agreement are under obligation to refrain from industrial action for as long as disputed (collectively agreed) issues remain covered by the terms of the agreement.

Example

If a collective agreement contains a wage settlement for a period of two years, it is illegal to strike for new wage demands during this time.

2. Obligation of implementation

Obligation of implementation

The obligation of implementation requires the parties to a collective agreement to constrain their members to actually apply the provisions of the collective agreement.

Example

The trade union IG Metall and Bavarian employers' association vbm have negotiated a provision governing special payments (holiday pay and Christ-mas bonuses) in their collective agreement. The obligation of implementation requires the parties to the agreement to constrain their members to comply with this provision on special payments in practice. Employers in particular are thus required to pay the agreed wage components to the employees covered by the agreement.

III. Validity of collective agreements

1. Conclusion of a collective agreement

Conclusion by the authorised parties

Pursuant to Section 2 TVG, a collective agreement must be negotiated and concluded by the authorised parties responsible.

Authorised parties are organisations which have the legal capability to conclude collective agreements together with the corresponding social partner. In accordance with Section 2 (1) TVG, any individual employer and any employers' association can be a party to a collective agreement.

On the other hand, not every unionised association of employees meets the criteria to qualify as a party to a collective agreement. According to judgements passed by the Federal Labour Court

(Bundesarbeitsgericht), the crucial issue is whether the employees' association wields "social power", i.e. whether it can assert its demands. This is the case if the quantity of members or organisations it represents lead to the fact that its "adversary" – the employer or employers' association – has to take it seriously. A trade union must therefore be able to mobilise a sufficiently large number of members in order to threaten and stage strikes, for example, and thus be able to put enough pressure on the negotiating partner.

2. Termination of a collective agreement

Types of termination

Like any other contract or agreement, collective agreements can be terminated under a variety of circumstances, such as

- a fixed term,
- a specified condition,
- annulment or
- regular or extraordinary termination.

Termination of a collective agreement affects the normative section and the "rights and duties" section of the agreement in different ways:

As with many other contractual forms, the binding obligations on the parties to the collective agreement – primarily the obligation of industrial peace and the obligation of implementation – end at the time when the agreement is terminated.

By contrast, the Collective Agreements Act prescribes a continuing effect for the normative section of a collective agreement even after the agreement has expired. The parties to the collective agreement can, however, preclude any such ongoing effects.

Example

The collective agreement for temporary employment contains a condition precedent: The agreement must end with no continuing effect six months after any material amendment to the German Temporary Employment Act (Arbeitnehmerüberlassungsgesetz, AÜG). If current plans for a law on temporary employment do indeed come into force in 2016, the existing collective agreement would end with no continuing effect if the employers' associations in the metal and electrical industry and IG Metall fail to agree a follow-up regulation.

3. Continuing effect after expiry

Legal norms remain valid after end of collective agreement

To prevent the emergence of a regulatory vacuum, the legal norms enshrined in a collective agreement remain valid after the end of a collective agreement until they are replaced by a new agreement, pursuant to Section 4 (5) TVG. Since this continuing effect is prescribed by law, the norms included in the content of the last agreement must continue to be observed for contracts of employment even after termination of that agreement.

In other words, this provision is designed to prevent situations from arising in which contracts of employment are rendered meaningless as soon as a collective agreement ends and before the parties reach agreement on a new collective arrangement.

4. Continued validity

Consequences of withdrawal from the employers' association

A similar problem with meaningless contracts of employment could arise if an employer leaves an employers' association. That is precisely why Section 3 (3) TVG does not permit employers to escape the validity of a collective agreement for their company merely by withdrawing from the employers' association.

Instead, employers remain bound to all collective agreements which were valid at the time of their withdrawal. They are released from this binding commitment only when the collective agreement in question expires. This, too, leads to far-reaching consequences in corporate practice.

Without this provision, the parties to contracts of employment could simply withdraw from binding collective agreements if they did not like them. The statutory ruling thus serves to ensure that collective agreements are honoured. It applies to employers and employees alike.

Example

Employer X is a member of an employers' association. Employee Y is a member of a trade union. Both are bound to an existing collective wage agreement. Employer X feels that the wage structure under the newly concluded collective agreement is too expensive, and is therefore thinking about withdrawing from the association which concluded the agreement in order to save money. However, withdrawing from the employers' association after a collective agreement has been concluded leads to the continued validity of the agreement. Even if it did withdraw from the employers' association, employer X would therefore remain bound to the collective wage agreement until it expired.

Practical tip: If an employer legally withdraws from an employers' association while collective wage negotiations are currently in progress because it fears it will not be happy with the final settlement, the trade union involved must be duly informed. If this information is not provided, the employer will remain bound to the concluded collective agreement despite having withdrawn from the association.

IV. Different kinds of collective agreements

Different kinds of collective agreements

The vast majority of collective agreements in Germany are shaped by the "industry association principle". This means that the organisations which represent employees and employers are structured along the lines of industries and sectors, rather than reflecting professional groups (subject to the exceptions discussed in C. II. 1. a).

In most cases, a given industry does not have only one collective agreement, but a whole bundle of individual collective agreements. The most important and most widespread kinds of collective agreement are outlined below:

1. Distinctions based on the party to the collective agreement

a) Collective agreement with an association

Regional collective agreements

Collective agreements concluded with associations (also referred to as regional collective agreements) are concluded between a trade union and an employers' association. Each one is then valid for a large number of companies in a particular region of Germany. For companies in the metal and electrical industry with nationwide operations, this can create a situation in which different regional collective agreements can apply depending on the location of a plant or factory.

Example

The Bavarian metal and electrical employers' association vbw negotiates and concludes collective agreements with IG Metall Bayern exclusively for the Bavarian tariff zone.

b) Collective agreement with a company ("in-house collective agreement")

In-house collective agreements

Unlike collective agreements with associations, trade unions can also conclude collective agreements with a single employer. Any such agreement is then valid for the whole company or corporate group (group-wide collective agreement).

Example

The employer Volkswagen AG concludes a collective agreement with IG Metall.

2. Distinctions based on the content of the collective agreement

a) Industry framework collective agreement

Industry framework

General provisions which stake out the framework for contracts of employment are normally specified and subsumed under what are known as industry framework collective agreements. These agreements frequently contain provisions governing work time, overtime and compensation agreements, notice periods, modes of compensation payment and the handling of paid leave.

b) Collective wage agreement

Wage agreements

Wage levels are mostly governed by special wage agreements.

Example

In the 2015 pay round, the "Collective agreement governing wages and trainee allowances for employees and trainees in the metal and electrical industry in Baden-Württemberg" was concluded in the metal and electrical industry in the region in question. This agreement essentially governs the amount of compensation paid to employees and trainees. It dates back to February 24, 2015, and IG Metall has served notice that the collective agreement will be terminated on March 31, 2016. As a result, wage levels will have to be renegotiated.

c) Collective restructuring agreement

Restructuring agreements

In troubled economic times, companies frequently conclude collective restructuring agreements with the trade unions. These agreements tend to revise collective agreements with associations downwards in order to overcome the current crisis. Collective restructuring agreements are a subset of in-house collective agreements.

Example

Department store chain Karstadt concluded several collective restructuring agreements with the trade union ver.di in which employees waived their wage entitlements, for example.

The aspect of negotiated outcomes in the 2004 pay round which became known in Germany as the Pforzheim Treaty was a clear commitment by the parties to collective agreements to Germany as a business location. The treaty agreed the possibility of lowering standard regional wage agreements with the involvement of the parties to the collective agreement. Supplementary collective provisions allow the Pforzheim Treaty to be applied in order to deviate from collectively agreed mini-mum standards for a limited period, provided that such a move is deemed necessary to safeguard or create jobs subject to due consideration of the social and economic consequences.
Supplementary collective agreements were already possible before the Pforzheim Treaty. However, this particular treaty made good use of the possibilities and improved participation under certain circumstances.

E. Other forms of binding collective agreement

Other forms of binding collective agreements

The legislator's high hopes that the fundamental tenets of employment contracts – in particular wages – would be hammered out by the parties to collective agreements have been fulfilled only in part. In 2014, only 58% of all employees throughout Germany were bound by collective agreements.

There are, however, other ways to extend collectively agreed provisions in order to include a large number of employees.

I. General application

General application

In Section 5 TVG, the legislator has created the option of declaring collective agreements to be of general application. When a collective agreement is declared to be of general application, the legal norms it contains are extended to include those employers and employees (within the agreement's scope of validity) who were not bound by the agreement hitherto, pursuant to Section 5 (4) TVG.

Declarations of general application are made by the Federal Ministry of Labour and Social Affairs, in consultation with a collective agreement committee consisting of three representatives from each of the employer and employee umbrella organisations and in response to a joint application by the parties to the collective agreement. The

condition precedent is that the declaration of general application must appear to be in the public interest.

Until the Tariff Autonomy Reinforcement Act (Tarifautonomiestärkungsgesetz, TAStG) came into force in 2014, declarations of general application were still possible only if the employer bound by the collective agreement in question gave work to at least 50% of the employees covered by the scope of validity of the collective agreement to be announced as of general application. The aim of this 50% clause was to ensure that collective agreements can only be declared to be of general application if they have a certain level of representativeness in their particular region. However, TAStG abolished this quota.

II. Posted Workers Act (Arbeitnehmer-Entsendegesetz, AEntG)

Posted workers

The Posted Workers Act seeks to enforce reasonable minimum working conditions which are to apply for foreign employees posted on a cross-border basis and domestic employees alike. The method that is pivotal to this law is to extend the applicability of industry-specific collective agreements to all contracts of employment in the industries concerned.

Section 3 AEntG widens the applicability of national provisions to include contracts of employment between employers domiciled abroad and their employees in Germany. This clause is valid for certain working conditions (Section 5 AEntG) which are in turn governed by collective agreements in certain industries (Section 4 AEntG). For this to take effect, the collective agreement in question must either have been declared to be of general application, or it must be covered by a statutory ordinance (in accordance with Sections 7 or 7a).

III. Reference clauses

Reference clauses

In practice, reference clauses are a very important instrument in the design of contracts of employment.

The legislator has defined what is "normal" for parties bound by a collective agreement in Section 3 (1) TVG. This provision states that the members of the parties to a collective agreement (i.e. union members and companies which are members of an employers' association) are bound by the collective agreement in question, as are employers who have individually become parties to a collective agreement. This, how-ever, means that a collective agreement will be valid for some of a company's employees but not for others.
Since employers are not permitted to ask about employees' union affiliations, practical implementation thus becomes a problem.

In practice, many employers who are bound by collective agreements therefore decide to include what are known as reference clauses in con-tracts of employment. This practice ensures equal treatment while also simplifying companies' administrative processes. Reference clauses thus cause collective agreements to also apply to any staff who sign a contract of employment. In such situations, it makes no

difference whether or not the individual employee is a member of a union. As a rule, it is in the employers' interests to establish this kind of level playing field, as unequal treatment would create a de facto incentive for employees to join a given trade union.

Practical tip: Gesamtmetall's model contracts include the following clause in reference to collective agreements:
"The contract of employment shall be governed by the current valid version of those collective agreements concluded with IG Metall which apply to the geo-graphic location and professional/occupational line, insofar as employees fall within the personal scope of validity. This clause shall apply only insofar and for as long as the employer is bound by these collective agreements pursuant to Section 3 (1) TVG."

F. Relationship to company agreements

Restrictions for company agreements

A strict distinction must be drawn between company agreements and collective agreements. German collective labour law allows for two different collective regulatory instruments. The content, the parties to the two forms of agreement and the responsibilities differ very considerably.

A company agreement is a contract concluded between the employer and the works council. The works council represents the interests of employees at company level and is elected every four years by the work force. It is regarded as the most important tool of internal regulation. Company agreements are anchored in the Works Constitution Act (Betriebsverfassungsgesetz, BetrVG). For further particulars we refer you to our plain brochure “The German Works Constitution Act (BetrVG) – An Introduction for Foreign Businesses".

Company agreements and collective agreements are comparable only in terms of their effect. Within the framework of company agreements, too, the parties to the agreement regulate issues relating to third parties, i.e. company employees, on whom the contents of company agreements have a direct and compulsory effect.

I. Relationship between company agreements and collective agreements

To avoid situations in which collective agreements and company agreements compete with each other (i.e. where both seek to regulate the same issues), Section 77 (3) BetrVG stipulates that wages and other matters "which are normally regulated by collective agreements" cannot be the object of a company agreement. This legal prescription is de-signed to safeguard the constitutional guarantee of tariff autonomy pursuant to Article 9 (3) GG, in which the parties to collective agreements are given precedence in the regulation of working conditions and are protected from competition from the parties to company agreements.

Example

The Siemens works council cannot conclude a company agreement with Siemens regarding the number of days of annual holiday for the employees, because these legal matters are already governed by collective agreements.

II. Opt-out clause

Exceptions to the primacy of collective agreements over company agreements are admitted only in cases where a collective agreement itself expressly permits the conclusion of supplementary company agreements (see Section 77 (3) Sentence 2 BetrVG).

Example

The collective agreement for temporary employment in the state of Lower Saxony includes an obligation for permanent contracts to be offered to temporary employees who have been deployed for 24 months. However, the collective agreement also explicitly allows the parties to company agreements to conclude alternative provisions.

G. Right to industrial action

Industrial action

In the metal and electrical industry, industrial disputes normally concern the conclusion of collective agreements with associations. The two most common "weapons" of industrial action are strikes on the part of employees and lock-outs on the part of employers.

I. Legal basis for the right to industrial action

Legal basis

The legitimacy of strikes and lock-outs as forms of industrial action derives from Article 9 (3) GG. The right to strike and the right to effect lock-outs are logical consequences of the right of associations to conclude collective agreements.

However, Germany lacks explicit legal prescriptions on the right to engage in industrial action. Instead, the law governing the right to industrial action has been shaped by court decisions, effectively rooting this right in case law.

1. Strikes

Strikes in Germany

In Germany, a strike is defined as follows:
"A strike is the planned collective cessation of work by multiple employees with the aim of altering working conditions."

Given this definition, political strikes are illegal in Germany.

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Die Arbeitgeberverbände der Metall- und Elektro-Industrie

2. Lock-outs

Lock-outs

"A lock-out is the planned exclusion of multiple employees from work, prescribed by the employer with a view to realising certain working and economic conditions. Lock-outs resolved with the intention of warding off strikes are of the greatest practical significance."

Case law has established very narrow conditions governing the scope of lock-outs, with the result that this tool has not been used in industrial disputes in the metal and electrical industry in recent years. Another reason is that strikes, too, are now only called at very short notice.

II. Legality of industrial action

Regulation by case law

Although industrial action is not backed by any explicit law, the courts have, in recent years, crafted certain "rules of the game". Accordingly, industrial action is legal only

- if it has or acquires the backing of the trade union responsible or is resolved by the employers' association responsible;
- if it focuses on a legal objective which can be regulated in a collective agreement;
- if it does not violate the obligation of industrial peace under a cur-rent collective agreement or pursuant to a conciliation or arbitration agreement;
- if the peaceful possibilities of reaching agreement have been exhausted; and
- if it satisfies the principle of proportionality developed by case law in the highest courts.

III. Obligation of industrial peace

Illegal strikes

The obligation of industrial peace states that strikes are illegal during the term of collective agreements. Any parties who nevertheless go on strike during the obligation of industrial peace violate their contractual obligations (engaging in what are known as “unauthorised or wildcat strikes"). Any such action can thus incur labour law penalties – such as written warnings – for the employees concerned.

Practical tip: In 1980, the parties to collective agreements in the metal and electrical industry concluded an "Arbitration and Conciliation Agreement" in which a time frame was set for collective bargaining negotiations.

Section 3 of the Arbitration and Conciliation Agreement, for example, stipulates the obligation to refrain from strikes or lock-outs for a period of four weeks after a collective agreement expires.

H. Regional collective wage negotiations: standard procedure in the metal and electrical industry

Collective wage negotiations in the metal and electrical industry general follow the pattern outlined below:

Standard procedure

- IG Metall's head office issues recommendations to the tariff zones regarding the demands it believes should be asserted.
- The regional IG Metall districts accept these demands.
- Notice of termination of the existing collective agreement is served, together with the new demands, to the employers' association.
- Initial local negotiations begin in each tariff zone while the obligation of industrial peace is still in force.
- Please note: In almost all tariff zones, the obligation of industrial peace is extended for four weeks after a collective agreement expires.
- The employers make their first offer in one of the subsequent rounds of negotiations.
- Short strikes as a “ritual” are staged immediately after the obligation of industrial peace comes to an end.
- Please note: In accordance with past court decisions, brief strikes lasting up to several days and without a strike ballot are, in theory, permissible while negotiations are in progress.
- A collective wage settlement is reached as what is known as a pilot agreement in one tariff zone.
- Negotiations take place to adopt the pilot agreement in all other tariff zones.
- A collective wage settlement is reached in all other tariff zones.
- The pay round concludes.

I. Appendix

Collective Agreements Act
(Tarifvertragsgesetz, TVG)

Section 1 Content and form of a collective agreement

(1) A collective agreement shall set forth the rights and obligations of the parties to the collective agreement and shall comprise legal norms governing the content, conclusion and termination of employment relationships, in additional to operational matters and legal aspects of the works constitution.

(2) Collective agreements shall be valid only in the written form.

Section 2 Parties to a collective agreement

(1) Parties to a collective agreement shall be trade unions, individual employers and employers' associations.

(2) Amalgamations of trade unions and employers' associations (umbrella organisations) may conclude collective agreements in the name of the associations affiliated to them, provided that they have the appropriate authorisation to do so.

(3) Umbrella organisations may themselves be parties to a collective agreement, provided that the conclusion of collective agreements is one of their statutory duties.

(4) Where subsections 2 and 3 are applicable, both the umbrella organisations and the associations affiliated to them shall be responsible for discharging the mutual obligations of the parties to the collective agreement.

Section 3 Parties bound by a collective agreement

(1) Those parties bound by a collective agreement shall be the members of the parties to the collective agreement and the employer who is a party to the agreement.

(2) Legal norms in the collective agreement governing operational matters and legal aspects of the works constitution shall apply to all establishments whose employer is bound by the collective agreement.

(3) Parties shall remain bound by the collective agreement until termination of the agreement.

Section 4 Effect of the legal norms

(1) The legal norms contained in a collective agreement, which govern the con-tent, conclusion and termination of employment relationships, shall apply directly and with mandatory effect between the parties on both sides who are bound by the agreement and fall within its scope. This provision shall apply mutatis mutandis to legal norms contained in a collective agreement which govern operational matters and legal aspects of the works constitution.

(2) Where a collective agreement provides for and governs institutions jointly established by the parties thereto (leave and wage equalisation funds etc.), such provisions shall also apply directly and with mandatory effect to the by-laws of these institutions and to the relationship between the institutions and the employers and employees bound by the collective agreement.

(3) Arrangements which deviate from the foregoing shall be permissible only if they are authorised by the collective agreement or if an amendment to the arrangements is to the employee's advantage.

(4) Rights arising by virtue of a collective agreement may be waived only in a settlement approved by the parties to the agreement. Such rights may not be forfeited. Preclusive periods for the assertion of rights under a collective agreement shall be permitted only if the collective agreement provides for such periods.

(5) Upon expiry of a collective agreement, the legal norms set forth therein shall continue to apply until they are replaced by another arrangement.

Section 4a Overlaps between collective agreements

(1) Overlaps between collective agreements in a given establishment shall be avoided in order to safeguard the protection, distribution, peace-keeping and regulatory function of collective agreements.

(2) Pursuant to section 3, an employer can be bound to multiple collective agreements with different trade unions. Insofar as there are no overlaps between identical collective agreements with different trade unions, only those legal norms shall apply to an establishment that are contained in the collective agreement with the trade union which, at the time when the last overlapping collective agreement was concluded, represented the most members with valid contracts of employment at said establishment. Where collective agreements do not overlap until a later time, the membership majority shall be determined at this time. Companies as defined in Section 1 (1) Sentence 2 of the Works Constitution Act (Betriebsverfassungsgesetz, BetrVG) and establishments formed pursuant to Section 3 (1) Items 1-3 BetrVG shall be regarded as establishments, except where such a definition manifestly contradicts the intended purposes of Paragraph 1. This is the case in particular if the parties to the collective agreement have assigned the establishments to different branches of industry or their value chains.

(3) For the legal norms in a collective agreement relating to works constitution issues pursuant to Section 3 (1) and Section 117 (2) BetrVG, Paragraph 2 Sentence 2 shall apply only if the given works constitution issue is already regulated by a collective agreement with another trade union.

(4) A trade union can demand that the employer or employers' association mirror the legal norms in a collective agreement which overlaps with their collective agreement. The entitlement to mirroring includes the conclusion of a collective agreement which contains the legal norms of the overlapping collective agreement, insofar as the scopes of validity and the legal norms in the collective agreements overlap. The legal norms in a collective agreement mirrored pursuant to Sentence 1 shall have a direct and binding effect, insofar as the collective agreement reached by the mirroring trade union pursuant to Paragraph 2 Sentence 2 is not applied.

(5) If an employer or employers' association commences negotiations regarding conclusion of a collective agreement with a trade union, the employer or employers' association is under obligation to announce this circumstance in good time and in a suitable manner. Another trade union whose statutory duties include the conclusion of a collective agreement pursuant to Sentence 1 is entitled to verbally present its ideas and demands to the employer or employers' association.

Section 5 General application

(1) The Federal Ministry of Labour and Social Affairs (Bundesministerium für Arbeit und Soziales, BMAS) may, at the request of one of the parties to the collective agreement and in consultation with a committee consisting of three representatives from each of the employer and employee umbrella organisations ("collective agreement committee"), declare that a collective agreement shall be of general application, if a declaration of general application appears to be in the public interest. A declaration of general application normally appears to be in the public interest

1. if the scope of the collective agreement has become of paramount importance to the design of working conditions; or
2. if a declaration of general application is necessary to protect the effective ness of the standard-setting collective agreement from the consequences of undesirable economic developments.

(1a) On joint request by the parties to the collective agreement, the Federal Ministry of Labour and Social Affairs can declare a collective agreement governing a shared organisation to guarantee its proper functioning to be of general application if the collective agreement regulates the collection of contributions and the granting of benefits via a shared organisation which has the following objects:

1. holidays, holiday pay or additional holiday pay;
2. a company pension as defined under the German Company Pensions Act (Betriebsrentengesetz, BetrAVG);
3. the compensation of trainees or training at vocational training centres;
4. additional company or supra-company capital formation for employees;
5. wage compensation for lost working hours, reductions in working hours or working time extensions.

The collective agreement can regulate all rights and duties relating to the collection of contributions and the granting of benefits, including the underlying entitlements of the employees and duties of the employers. Section 7 (2) of the Employee Secondment Act is applied mutatis mutandis.

(2) Before a decision is taken regarding the request, the employers and employees who would be affected by the declaration of general application, the trade unions and employers' associations interested in the outcome of the proceedings, and the highest labour authorities in the federal states (Länder) within the scope of the collective agreement shall be offered the opportunity to submit written comment and to express an opinion as part of a verbal and public discussion.

(3) In the event that the highest labour authorities in one of the federal states (Länder) concerned raise an objection to the requested declaration of general application, the Federal Ministry of Labour and Social Affairs may grant the request only with the approval of the Federal Government.

(4) Following a declaration of general application, the legal norms in the collective agreement shall also apply, within the scope of application of the agreement, to employers and employees not previously bound by the agreement. The employer must comply with a collective agreement declared to be of general application pursuant to Paragraph 1a even if it is already bound by another collective agreement pursuant to Section 3.

(5) The Federal Ministry of Labour and Social Affairs may revoke the declaration of general application of a collective agreement in consultation with the committee referred to in subsection 1, provided that such revocation appears to be necessary in the public interest. Subsections 2 and 3 shall apply mutatis mutandis. The general application of a collective agreement shall end upon expiry of the said agreement.

(6) In certain cases, the Federal Ministry of Labour and Social Affairs may assign the right to make and to revoke a declaration of general application to the highest labour authorities of a federal state (Land).

(7) Any declaration of general application and any revocation of such a declaration must be announced publicly. This announcement shall also include the legal norms in the collective agreement which are covered by the declaration of general application.

Section 6 Register of collective agreements

The Federal Ministry of Labour and Social Affairs shall maintain a register of collective agreements in which the conclusion, amendment and repeal of collective agreements, and the commencement and termination of their general application, shall be entered.

Section 7 Duty to transmit and notify

(1) The parties to the collective agreement shall be obliged to transmit to the Federal Ministry of Labour and Social Affairs, free of charge and within one month of conclusion, the original document or a certified copy thereof, in addition to two further copies of each collective agreement and its amendments; they must also inform the said Federal Ministry of the expiry of each collective agreement within one month of the expiry date. They shall further be obliged to transmit to the highest labour authorities of the federal states (Länder) which fall within the scope of the collective agreement, free of charge and within one month of conclusion, three copies of each collective agreement and its amendments, and also to inform the said authorities of the expiry of each collective agreement within one month of the expiry date. If one party to the collective agreement fulfils the obligations, this shall be deemed to release the remaining parties to the agreement from these obligations.

(2) An administrative offence shall be deemed to be committed by any person who, in contravention of subsection 1, deliberately or negligently fails to comply with a duty to transmit or notify, or who complies with the said duty incorrectly, incompletely or not within the prescribed period. Any such administrative office may be punishable by a fine.

(3) The administrative authority within the meaning of section 36 subsection 1 no. 1 of the German Administrative Offences Act (Gesetz über Ordnungswidrigkeiten, OWiG) shall be the authority in respect of which the duty as de-fined in subsection 1 must be fulfilled.

Section 8 Publication of the collective agreement

The employers shall be obliged to display the collective agreements relevant to their establishment in a suitable location in the establishment.

Section 9 Determination of legal effect

Non-appealable decisions of the Labour Courts (Gerichte für Arbeitssachen) issued in legal disputes between parties to a collective agreement which arise from the collective agreement or concern the existence or non-existence of the collective agreement shall be binding for the courts and arbitration courts in legal disputes between parties bound to the collective agreement and between these and third parties.

Section 10 Collective agreement and wage schedules

(1) Upon the entry into force of a collective agreement, wage schedules and directives which have been enacted for the scope of application of the collective agreement or parts thereof shall cease to be effective, with the exception of those provisions which have not been covered by the collective agreement.

(2) The Federal Ministry of Labour and Social Affairs may repeal wage schedules; any such repeal must be announced publicly.

Section 11 Implementing regulations

The Federal Ministry of Labour and Social Affairs may, with the collaboration of the employer and employee umbrella organisations, enact the regulations required to implement the Act, in particular with regard to

1. the creation and management of the register of collective agreements and the collective agreement archive;

2. the procedure for declaring the general application of collective agreements and repealing wage schedules and directives, the public announcements in the case of application for, declaration of and termination of general application, and the repeal of wage schedules and directives and the costs thus incurred;

3. the committee referred to in section 5.

Section 12 Umbrella organisations

For the purposes of this Act, umbrella organisations shall be – without prejudice to the provision in section 2 – those amalgamations of trade unions or employers' associations which are of considerable importance in the representation of employee or employer interests in the workplace in the territory of the Federal Republic of Germany. Trade unions and employers' associations which do not belong to such an amalgamation shall be considered on a par with the above if they fulfil the conditions stipulated in the last half-sentence of sentence 1.

Section 12a Persons of a similar status to employees

(1) The provisions of this Act shall apply mutatis mutandis

1. to persons who are economically dependent and, like an employee, socially in need of protection (persons of similar status to employees), if they work under contracts of service (Dienstverträge) or contracts for work and services (Werkverträge) for other persons, perform the work personally and largely with-out assistance from employees, and

a) work predominantly for one person or

b) are entitled to receive from one person on average more than half the total income they are entitled to for their occupation; if this cannot be forecast, the calculation shall be based on the last six months or the entire completed period if the activity has been ongoing for less than six months, unless otherwise specified in the collective agreement;

2. to the persons referred to in number 1, for whom the persons of similar status to employees work, and to the legal relationships formed between them and the persons of similar status to employees as a result of the contracts of service (Dienstverträge) or contracts for work and services (Werkverträge).

(2) If the persons of similar status to employees work for several persons, these several persons shall be considered as one person if they form a collective similar to a corporate group (section 18 of the German Stock Corporation Act [Aktiengesetz, AktG]) or belong to a jointly established bureau company or a jointly established working group which is not of a temporary nature only.

(3) Subsections 1 and 2 shall also apply to persons who perform artistic, literary or journalistic services, and to persons who are directly involved in the performance and particularly the technical organisation of such services, if, notwithstanding the first half-sentence of subsection no. 1 letter b, they are entitled to receive from one person on average at least one third of the total income they are entitled to for their occupation.

(4) The provision shall not apply to commercial agents within the meaning of section 84 of the German Commercial Code (Handelsgesetzbuch, HGB).

§ 13 Entry into force

(1) This Act shall enter into force on the date of its promulgation.

(2) Collective agreements concluded before the entry into force of this Act shall be subject to this Act.