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Sector-level bargaining and possibilities for deviations at company level: Germany

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Research project: The functioning of sector-level wage bargaining systems and wage-setting mechanisms in adverse labour market conditions

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Basic features of German collective bargaining

The legal basis of collective bargaining in Germany is laid down by the Collective Agreements Act, 1949 (*Tarifvertragsgesetz*) (Kempen and Zachert, 2006). Collective agreements can be concluded between employer associations (or individual employers) and trade unions. In contrast, works councils – statutory employee representation bodies elected at workplace and company level – may only conclude works agreements (*Betriebsvereinbarung*). Under the Works Constitution Act (*Betriebsverfassungsgesetz*), these ‘shall not deal with remuneration and other conditions of employment that have been fixed, or are normally fixed, by collective agreement’ (Article 77, Para 3).

Collective agreements are directly binding on all members of the parties concerned – that is, employees who are members of signatory unions and all companies who are members of the signatory employer associations, or a single company in the case of a company agreement. In practice, employers bound by a collective agreement usually apply agreed provisions to all employees, regardless of whether they are trade union members or not. Collective agreements can also be extended by the Minister of Labour to include those employers and employees in the relevant sector who are not directly bound by the agreement. There is no statutory minimum wage in Germany. However, in a limited number of sectors (such as construction) the state has extended collectively agreed minimum wages to the whole sector.

According to the ‘favourability principle’ (*Günstigkeitsprinzip*), departures from collectively agreed provisions are usually possible only when these favour employees. For example, a works agreement can provide better employment conditions than a collective agreement, but may not worsen them. However, the bargaining parties may agree ‘opening clauses’ in collective agreements that allow, under certain conditions, a divergence from collectively agreed standards, even if this changes employment conditions for the worse.

There are two basic types of collective agreements: association-level or sectoral agreements (*Verbands- oder Branchentarifverträge*) and company agreements (*Firmentarifverträge*) for individual companies or establishments. At the beginning of 2010, there were 72,797 officially registered valid collective agreements, of which 6,351 were pay agreements (WSI, 2010). In 2009, overall collective bargaining coverage was 61%. A total of 52% of all employees were covered by a sectoral agreement. There are some 250 sectors with wage agreements concluded either at national or regional level. The most important sectors are metalworking, chemicals and public services. Settlements in these sectors often set the pattern for the overall bargaining round. There is also an increasing number of company agreements between trade unions and individual firms that are not members of an employer association. Such agreements cover about 9% of the entire workforce. The remaining 39% of the workforce are not covered by a collective agreement. However, a significant number of companies that are not formally subject to an agreement have stated that they use sectoral agreements as a benchmark for their own pay-setting (Ellgut and Kohaut, 2010).

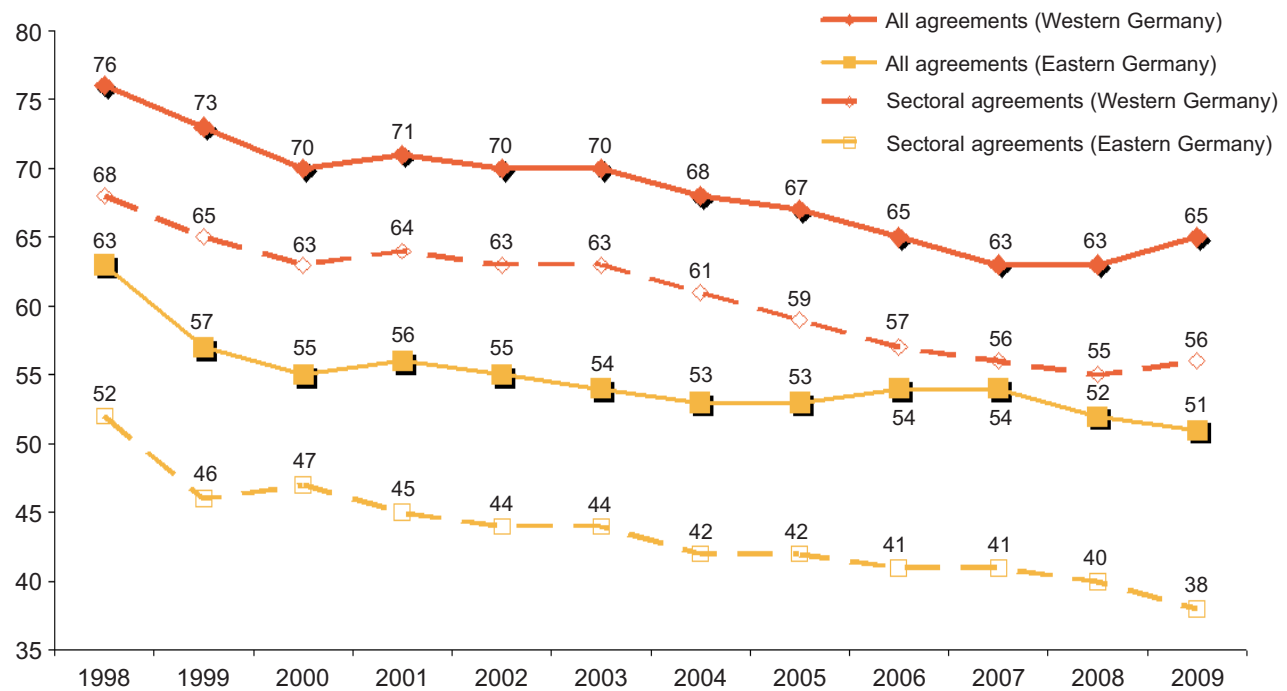
Main trends in collective bargaining

The German system of collective bargaining has always been characterised by a highly differentiated interplay between sector-level and company-level regulations. Trade unions and employer associations agree on certain minimum conditions at sectoral level in order to limit competition on labour costs and to demarcate a level playing field. Management and works councils implement agreements at company level and typically negotiate additional social benefits.

Over the past two decades, however, German collective bargaining has undergone a number of profound changes (Bispinck and Schulten, 2010). Firstly, there has been a significant decline in bargaining coverage (Figure 1). In western Germany, the total proportion of employees covered by collective agreements has sunk from 76% in 1998 to 65% in 2009. In East Germany, the figures for the same period show a decline from 63% to 51%. Coverage of sectoral

agreements fell from 68% to 56% in West Germany and from 52% to 38% in East Germany. Today, Germany has one of the lowest levels of bargaining coverage in western Europe (Schulten, 2010).

Figure 1: *Collective bargaining coverage in Germany 1998–2009 (% of all employees covered by an agreement)*



Source: IAB

Although the German Collective Agreements Act provides for the possibility of an extension of collective agreements, in practice this occurs with only 1.5% of all collective agreements (Bispinck and Schulten, 2009). In addition, there are currently about 10 sectoral agreements on collectively agreed minimum wages that have been extended on the basis of the German Posted Workers Act, including sectors such as construction, cleaning and care work.

The second major development in German collective bargaining has been a marked trend towards differentiation and decentralisation through the widespread use of opening clauses in sectoral agreements (Bispinck, 2004; Bahn Müller, 2010). Since the mid-1990s, an increasing number of sectoral agreements have allowed companies – under certain circumstances – to go below collectively agreed standards. The following agreements have marked important steps in the spread of opening clauses.

- A key step was taken in the mid-1980s in the metalworking industry when the employers succeeded in instituting far-reaching flexibility on working time arrangements at company level in exchange for the first step in what became a progressive lowering of the average working week to 35 hours.
- Following German unification in 1990 and the transfer of the West German collective bargaining system to the East, trade unions have had to accept so-called ‘hardship-clauses’ that allow firms in economic difficulties to deviate from sectorally-agreed provisions. Such hardship clauses were subsequently introduced in western Germany.
- In the mid-1990s, as a consequence of the 1992–1993 recession, many agreements introduced the option of temporary cuts in working time and pay in order to safeguard jobs.

- After 2000, regulations on variable profit-related pay have been introduced in some sectors, transforming some elements of what was formerly guaranteed remuneration into a sum dependent on the company's profit and loss account.
- Since the middle of the last decade, an increasing number of opening clauses have been concluded that apply not only in the event of serious economic difficulties but also to improve competitiveness, safeguard employment and facilitate fresh investment. The most important agreement here has been the 'Pforzheim Accord', concluded in 2004 in the metalworking sector.
- In recent years, there has been an increase in the number of wage agreements that have allowed employers to postpone or cancel the payment of sectorally-agreed pay increases at company level.
- The focus of the 2010 bargaining round, because of the current financial crisis, has once again been that of safeguarding jobs. In exchange for rather low wage increases, agreements have featured a range of provisions for short-time work and other forms of working time reduction at company level (Bispinck and WSI Tarifarchiv, 2009).

Opening clauses: procedures and content

All important sectoral agreements now contain some opening clauses, which have become almost a normal feature of German collective bargaining (Bispinck and WSI Tarifarchiv, 2004). However, these clauses can vary widely, both as regards their content and the procedural rules for their implementation. As far as the *content* of opening clauses is concerned, the following types can be distinguished.

- *Hardship or general clauses:* These clauses allow for deviations from collectively agreed standards without defining exactly their content and scope. Sometimes the agreements provide a list of possible issues on which deviation can be made.
- *Basic pay:* Deviations from basic pay are regulated in two ways. The monthly basic pay can be reduced by up to a defined percentage for a certain period of time and/or negotiated pay increases can be postponed, reduced or cancelled.
- *Bonus:* Special payments such as annual bonuses and holiday allowances can be reduced, cut completely, or postponed. The same applies for overtime premia and other benefits.
- *Working time:* Regular weekly working time can be extended and/or reduced either with or without wage adjustment. There are also opening clauses to allow flexible working time arrangements.

In some cases, the use of an opening clause is restricted to a situation when a company is in serious economic difficulties and the deviation could contribute to avoiding bankruptcy or save jobs. In other cases, opening clauses can be used for wider purposes, such as improving competitiveness. In exchange for allowing a deviation from collectively agreed standards, which often leads to a deterioration in pay and working conditions, employees may be offered a degree of enhanced job security, such as a commitment by the employers not to resort to compulsory redundancies over a defined period of time. The following box provides a selection of cases for agreed opening clauses in various sectors.

Selection of opening clauses in German collective agreements

Metal industry

- Working time: permanent extension possible from 35 up to 40 hours per week for 13%/18% of the workforce, 40 hours for up to 50% where half of the workforce is classified as highly skilled and in the highest pay grades or in case of shortages of skilled workers.
- Temporary reduction of working time from 35 to 25 hours with partial wage compensation.
- General clause: deviation from collectively agreed minimum standards in order to achieve a sustained improvement in employment in the establishment (for example, cuts in additional payments, deferral of payments, lengthening or shortening of working time with or without wage compensation).

Chemicals industry

- Working time corridor of +/- 2.5 hours relative to the standard agreed working week of 37.5 hours.
- Reduction of wages/salaries by 10% in the event of economic difficulties to safeguard jobs and/or improve competitiveness.
- Lower pay rates for newly hired employees in their first job, or formerly long-term unemployed people: 90%/95%.
- Annual bonus: scope for variation between 80%–125% of a month's pay, in place of a fixed amount of 95%.
- Annual bonus, holiday allowance, capital formation payment (*Vermögenswirksame Leistungen*): scope for deviation from agreed stipulations both on the amount or date of payment in the event of serious economic difficulties.

Recycling and waste disposal

- Pay, working time, holiday leave, annual bonus: reduction of up to 15% for four years to achieve or sustain competitiveness.

Retail trade

- 'Small business clause': pay may be lowered by 4%/6%/8% in establishments with 25/15/5 employees (Eastern Germany).
- Reduction of pay by 12% for 12 months in establishments with up to 20 employees in the event of an economic emergency to safeguard jobs (Saxony).

Banking sector

- Working time: temporary reduction to 31 hours a week; employees receive 20% of their usual hourly rate for the reduced working time.
- Hardship clause: deviation from agreed provisions (for example, lower annual bonus, reduced holiday allowance, postponement of pay increase) in difficult economic circumstances to safeguard employment.

Source: *WSI-Collective Agreements Archive*

There are also a number of variants of the procedural rules for implementing opening clauses, depending on the sectoral agreement concerned. Deviation at company level can be determined either by a *supplementary collective agreement* (*Ergänzungstarifvertrag*) between the individual employer and/or employer association and the trade union, or by a

works agreement between the management and the works council. In the case of the metal industry, for example, resorting to the opening clause laid down in the Pforzheim Accord (see below) requires the negotiation of a supplementary collective agreement between the company, the regional employer association and the regional trade union organisation. Unions also often establish a bargaining commission at company level, composed of trade union members from the company. Its task is to track the negotiation process and confirm the acceptability of the outcome. Before negotiations begin on implementing an opening clause, the employer is obliged to provide comprehensive information on the economic situation of the company.

If the opening clause is implemented via works agreements, in some cases this may also need the approval of the unions and employer associations (*Öffnungsklauseln mit Zustimmungsvorbehalt*). In the chemical industry, for example, implementing opening clauses on basic pay and additional payments (holiday allowance, annual bonus) requires, firstly, a works agreement between the works council and management; this must then be approved by the union and the employer association, giving each a *de facto* veto. In practice, however, unions and employers associations are often directly involved in negotiations over the works agreement.

There are also cases in which the works council and the management can decide on a deviation from a sectoral agreement without formal approval by the unions and employer association. This applies in the construction industry, where the annual bonus can be reduced via works agreement without the involvement of the sectoral bargaining parties. The same applies to performance-related variations in the annual bonus in the chemical industry.

A special case is represented by so-called ‘SME clauses’ that exist mainly in the eastern German wholesale and retail trade. These clauses allow small businesses, with up to a predefined number of employees, to lower their pay rates by a set percentage. In the retail trade in Brandenburg, for example, establishments with up to 25 employees can reduce collectively agreed basic pay by a maximum of 4%. Establishments with up to 15 employees can lower their rates by up to 6%, and those with up to five employees by up to 8%. Although there are no figures available, it can be assumed that a large number of small and medium-sized enterprises (SMEs) are using these clauses.

Both the conclusion of opening clauses within sectoral agreements as well as their implementation at company level are voluntary and cannot be legally demanded by a single bargaining party. If the parties disagree on whether an opening clause should be implemented in a particular case, it may not be applied. There is also no formal mediation procedure in the event of disagreement.

Theoretically, it would also be possible for extended pay agreements to have an opening clause. However, in practice, this is not the case. Regarding the few extended collectively agreed minimum wages, there are also no possibilities for companies to undercut the respective wage levels.

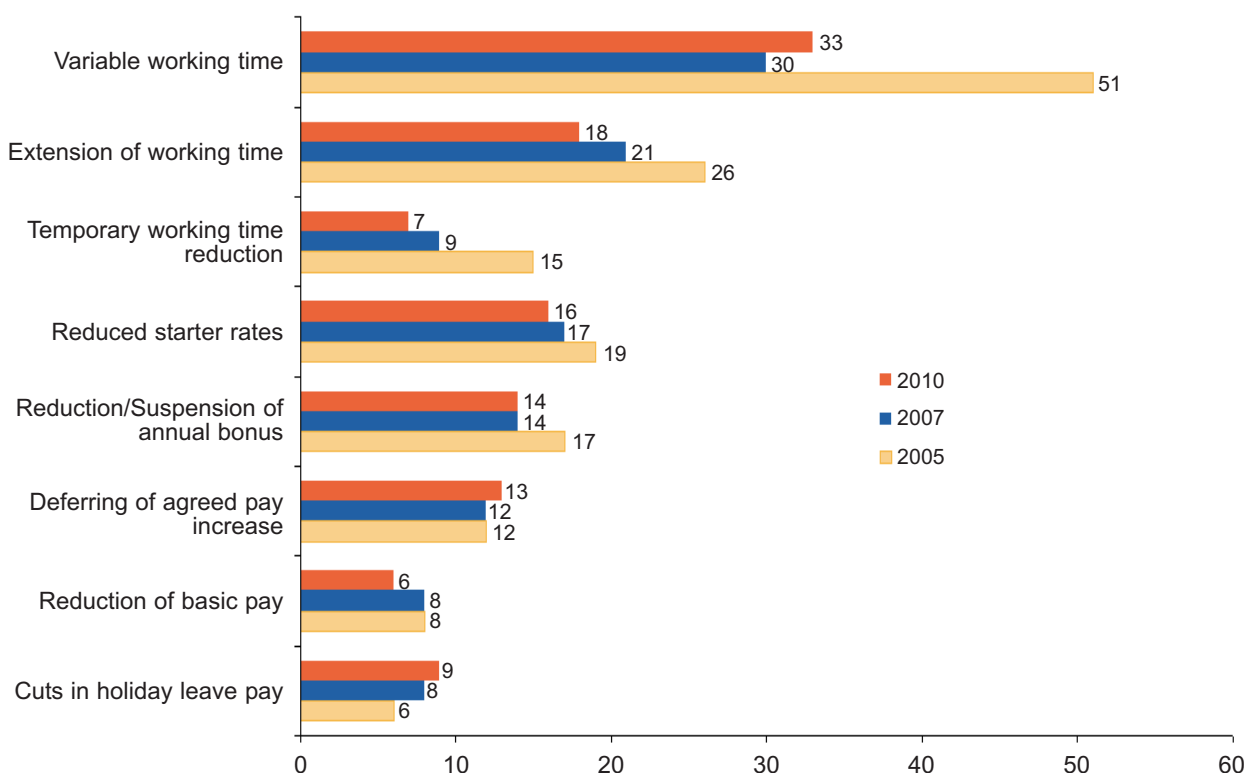
Use of opening clauses in practice

The use of opening clauses has been the subject of a number of empirical studies that have arrived at somewhat divergent results. Based on data from the IAB Establishment Panel, an annual survey of human resource managers in 16,000 establishments conducted by the Institute for Employment Research (IAB), Kohaut and Schnabel (2006) concluded that, in 2005, 13% of establishments and 29% of employees were covered by a collective agreement with scope for an opening clause. More than half of the affected establishments (53%) had made use of such a clause. Of these, 71% of companies in western Germany had adopted opening clauses on working time, but only 31% on basic pay or annual bonuses. In eastern Germany the figures were somewhat lower.

Data on the use of opening clauses is also regularly provided by the WSI Works Council Survey, which is a representative survey of all establishments with at least 20 employees and where a works council has been elected (Bispinck and Schulten, 2003; Bispinck, 2005). The data show that, in 2010, 58% of all establishments made use of an opening clause, while in 2007 the proportion was 53%. In 2005, the corresponding figure was 75% which, however, can partly be explained by the fact that there was a somewhat different sample of surveyed companies, which comprised a slight overrepresentation of larger establishments.

The majority of companies have used opening clauses on the regulation of working time (Figure 2). In 2010, 33% of the establishments that used opening clauses introduced variable working time arrangements, 18% extended the agreed working time and 7% temporarily reduced it. By contrast, the use of pay-related opening clauses was less widespread. In 2010, 16% of establishments provided lower pay rates for job starters, 14% reduced or suspended annual bonus payments, and 13% deferred agreed pay increases. Moreover, 9% of establishments introduced a cut in basic pay.

Figure 2: Issues of used opening clauses (% of all establishments)



Note: Data refer to establishments with more than 20 employees and a works council.
 Source: WSI Works Council Survey 2005, 2007 and 2010

In the following section, there is a more detailed analysis of the use of opening clauses in the metalworking industry and the chemical industry. These two manufacturing sectors represent the core of German industry and have served as a central point of reference for other sectors. Developments in these sectors are also well-documented by information provided by trade unions and employer associations as well as by independent research. In contrast, data for other sectors, such as public and private services, remain rather limited.

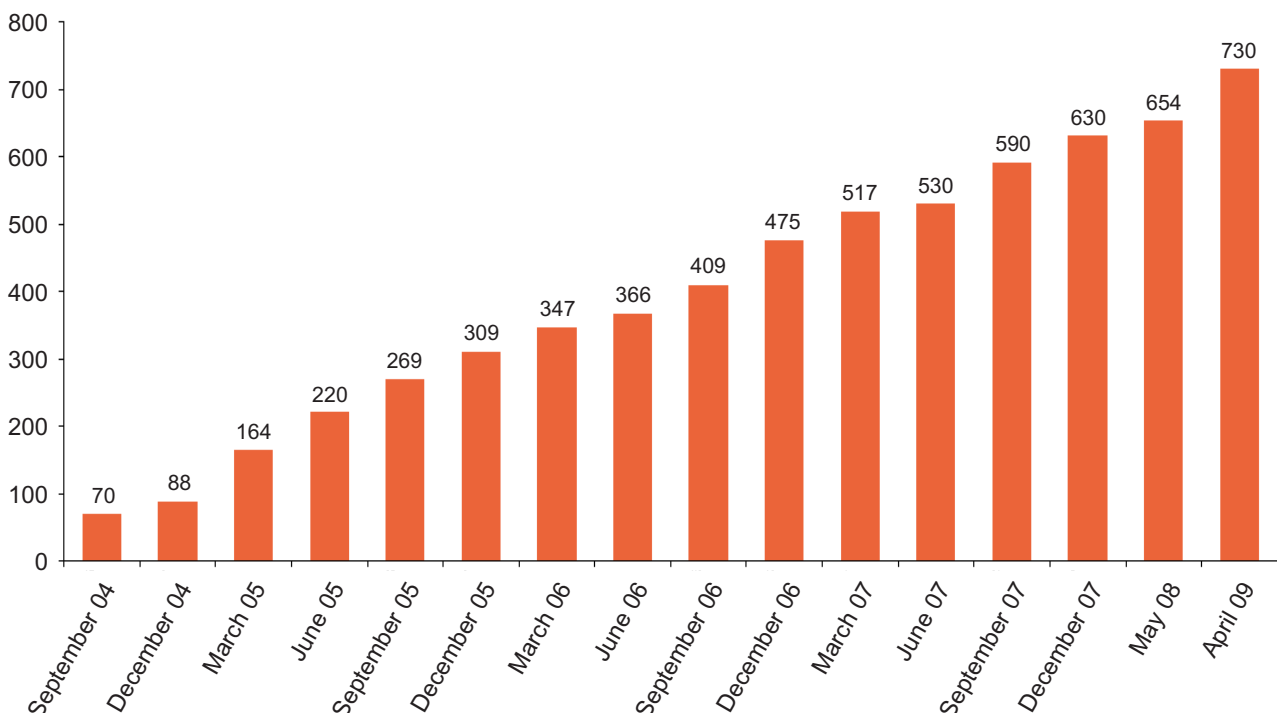
Metalworking industry

In the metalworking industry deviations from regional sectoral agreements became increasingly widespread during the 1990s (Haipeter and Lehndorff, 2009, p. 33ff.). While in eastern Germany the existence of the formalised hardship clause offered a defined procedure to regulate deviations at company level, in western Germany regional agreements contained only very general ‘restructuring clauses’ with no procedural requirements. As a result, a ‘grey area’ of company deviations emerged and grew. Some elements of this were backed by sectoral agreements, but in other areas there was no formally agreed foundation. Because of the lack of transparency and central trade union oversight of these company-level developments, there is also a lack of empirical data on the extent of such deviations.

The situation changed with the adoption of the Pforzheim Accord in 2004, which led to the establishment of common rules and procedures for deviations, as well as to a much closer control of these processes by the central office of the trade union and the employer association. Since then, the use of opening clauses and the conclusion of derogation agreements at company level are relatively well documented. Both the Employers’ Associations for the Metal and Electrical Industry (Gesamtmittel), as well as the German Metalworkers’ Union (IG Metall) have published data on developments, with some differences that are probably attributable to the large number of instances in which opening clauses have been used and the variety of types of deviation from the sectoral agreement.

According to data provided by Gesamtmittel, there was a steady rise in company-level deviations following the Pforzheim Accord (Figure 3). In September 2004, there were only 70 cases reported by Gesamtmittel, but by April 2009 the number had increased to 730.

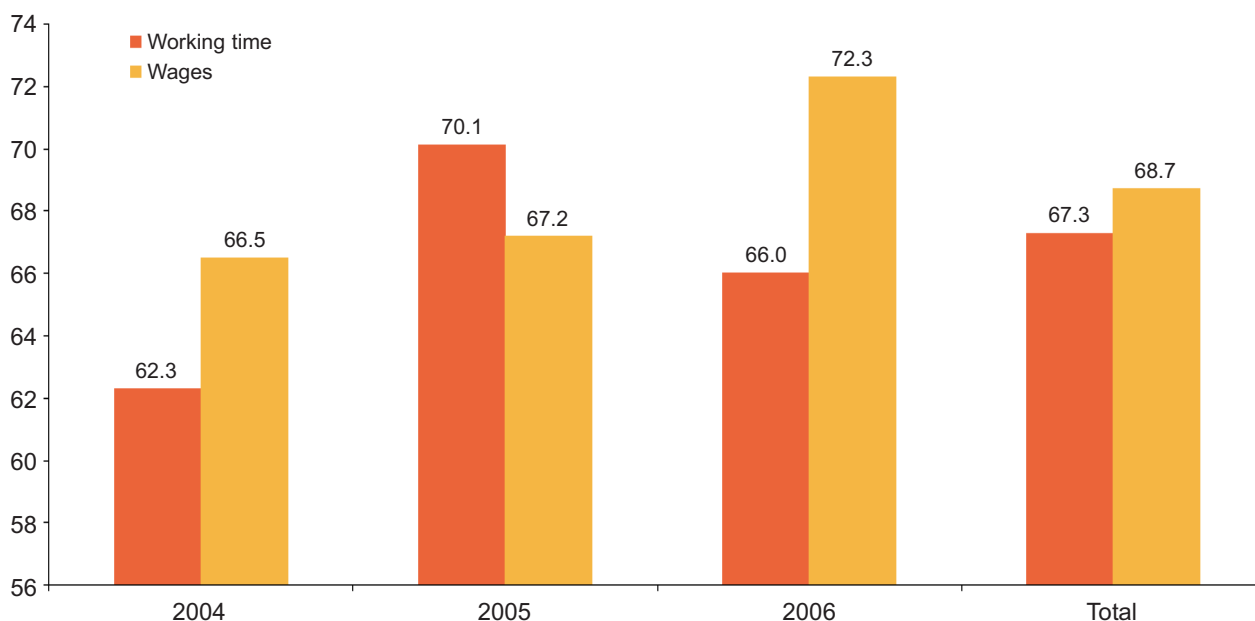
Figure 3: Number of company-level deviations from sectoral agreement in metalworking



Source: Gesamtmittel

The key topics addressed by derogation agreements were pay and working time. Between 2004 and 2006, about two-thirds of all agreements provided for company-level deviations on these two issues (Figure 4).

Figure 4: Issues addressed in derogation agreements in German metalworking, 2004–2006 (% of all agreements)



Source: Haipeter and Lehndorff (2009, p. 37)

In exchange for employee concessions on pay and working time, employers have usually had to offer a quid pro quo. By far the most important issue for such ‘counter concessions’ is job protection, whereby the employer makes a commitment to refrain from compulsory economic terminations during the lifetime of the derogation agreement. In 2006, four out of five agreements contained a provision on job security (Haipeter and Lehndorff, 2009, p. 39). Other important employer concessions have included extensions of workers’ and unions’ co-determination rights, and commitments to undertake new investment and retain operations at existing sites. Between 2004 and 2006, a rising proportion of derogation agreements have entailed such employer commitments in return for deviations from agreed terms.

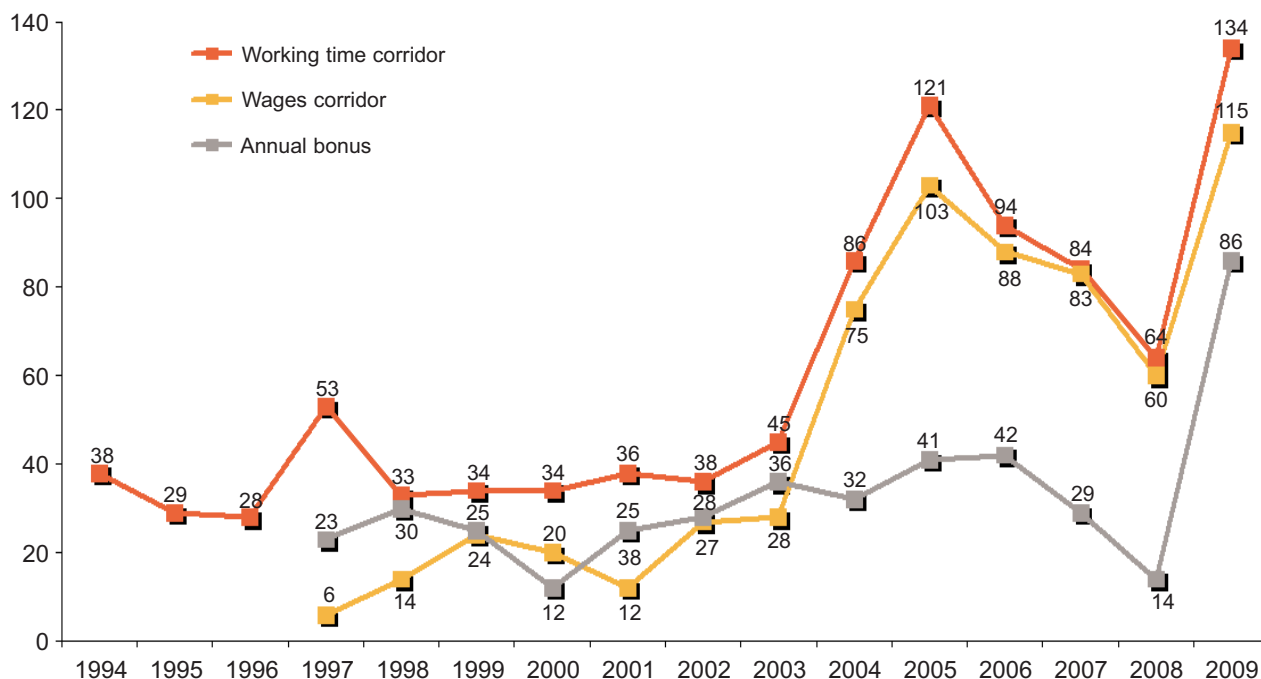
Chemical Industry

There are three major opening clauses in the chemical industry agreement, all of which were introduced in the 1990s (Erhard, 2007; Förster, 2008). The first, in 1994, was the introduction of the so-called ‘working time corridor’ which allowed companies either to extend or shorten the collectively agreed working time of 37.5 hours per week by up to 2.5 hours. As a result, there is a working time corridor of between 35 and 40 hours per week. In 1995, the bargaining parties in the chemical industry agreed on the introduction of an opening clause for the agreed annual bonus (usually 95% of a month’s pay): this gives companies scope to reduce or to postpone the payment. Finally, in 1997 a ‘wage corridor’ was introduced, which, under certain circumstances, allows companies to reduce collectively agreed pay by up to 10% for a limited period of time. In all three cases, the works council and management first have to conclude a works agreement which must then be approved by the Mining, Chemicals and Energy Industrial Union (IG BCE) and the German Federation of Chemicals Employers’ Associations (BAVC).

During the 1990s, the use of the opening clauses in the chemical industry was rather low (Figure 5). While the sectoral agreement for the chemical industry covered about 1,900 establishments, only about 30 or 40 companies used the working time corridor. However, in 2004 there was a sharp increase in the use of the working time corridor which fell somewhat after 2007 but increased to a new peak of 134 cases in 2009. A similar trend could be observed by the use of the wage corridor and – albeit at a somewhat lower level – by the use of annual bonuses. Overall, the number of establishments using the opening clause options has remained limited. In 2007, only 13% of all establishments covered

by the chemical agreement used one or more opening clauses in comparison to 2%–3% at the time of their introduction (Förster, 2008).

Figure 5: Number of companies in the chemical industry using an opening clause, 1994–2009



Source: IG BCE

Impact of the use of opening clauses on collective bargaining

The driving forces behind this far-reaching decentralisation of German collective bargaining have been the employers, the major political parties and the German government (Bispinck and Schulten, 2005). In 2003, for example, the former German Chancellor, Gerhard Schröder, threatened the unions with the possible introduction of a statutory opening clause that would apply to all collective agreements. Other political parties went even further, with one demanding that the ban on works councils concluding proper collective agreements should be lifted.

In contrast, most German trade unions have been highly sceptical about collective bargaining decentralisation and originally opposed the introduction of opening clauses that allowed the undercutting of agreed sectoral standards. A somewhat different attitude was adopted by IG BCE, which took the view, from an early stage, that a process of ‘controlled decentralisation’ via opening clauses could help stabilise the entire bargaining system (Förster, 2008). In metalworking, the acceptance of derogations at company level by IG Metall was initially a more defensive reaction aimed at safeguarding jobs or preventing a relocation of operations. The Pforzheim Accord was also a response to the political threat of even more drastic changes to the legal basis of German collective bargaining. Given the seemingly irreversibility of decentralisation, IG Metall has now shifted to a new strategy that aims to build organisational strength through a more assertive bargaining policy at company level, using the scope for union monitoring and control of the trade-offs associated with agreed derogation (Wetzel, 2007).

The German employer associations have pressed the case for an across-the-board policy of collective bargaining decentralisation since the early 1990s, arguing that greater flexibility in sectoral agreements was needed to respond to the greater diversity of individual company circumstances. The employers originally supported demands for a change in

the legal framework to allow companies to diverge from sectoral agreements. More recently, the President of the Confederation of German Employers' Associations (BDA), Dieter Hundt, has acknowledged that the German bargaining system has become so flexible under the existing legal framework that such legal changes are no longer necessary (Hundt, 2009).

As research by Nienhüser and Hoßfeld (2008, 2010) has shown, there are wide differences in how the trend towards collective bargaining decentralisation is perceived by the actors at company level (see table). The large majority of managers take a rather positive view as, from their standpoint, decentralisation strengthens the position of both management and work councils, takes better account of the situation of the business, and weakens the power of the union at workplace level. In contrast, the majority of works councillors have a much more sceptical attitude. For them, the main winners of bargaining decentralisation are management; only a minority of works councillors believe that this process strengthens their own position. Only 32% of the employee representatives consider that decentralisation could help to secure jobs, compared with 82% of managers. A large majority of 78% of works councillors, but also 40% of managers, believe that the decentralisation of collective bargaining leads to more conflicts at company level.

Decentralisation of collective bargaining as seen by managers and works councillors (%)

Deviations from sectoral agreements ...	Managers	Works councillors
... strengthen the influence and power of the management	95	91
... strengthen the influence and power of the works council	89	43
... have better regard for a company's situation	93	51
... can help to secure jobs	82	32
... lead to lower wages	33	79
... cost unnecessarily time and resources	33	67
... lead to more conflicts	40	78
... overburden the management	14	39
... overburden the works council	42	64
... strengthen the power of the unions at the establishment	21	13
... weaken the power of the unions at the establishment	69	83

Source: *Nienhüser and Hoßfeld, 2010*

The sceptical or even negative view of employees has also been confirmed by data from the WSI Works Council Survey. The survey shows that since the late 1990s there has been a stable majority of works council members who see bargaining decentralisation as 'ambiguous' or 'generally problematic', while only 11%–18% welcome this trend. Again, decentralisation is seen by a large majority of employee representatives as a process that mainly strengthens the bargaining power of the employer side. According to the most recent survey, conducted in 2010, 37% of works councillors see decentralisation as 'ambiguous' while 50% view it as generally problematic. Only 11% welcomed this trend.

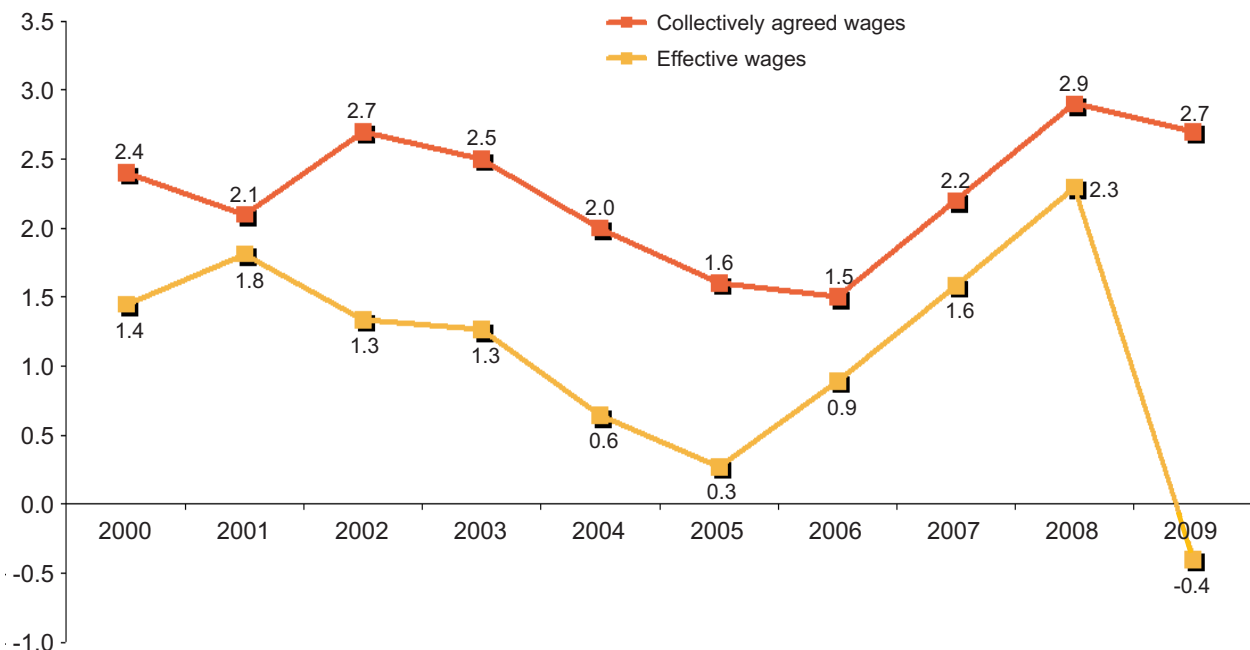
Fifteen years of practice and experience with collectively agreed opening clauses have changed the basic structure of collective bargaining in Germany. The widespread introduction of these clauses has triggered a process of decentralisation that has shifted an increasingly large part of bargaining responsibilities to the company level. This has led to a significant loss of regulatory power on the part of both employer associations and trade unions. Collectively agreed standards, once seen as formally inviolable norms, have now become objects of renegotiation at company level, with varying degrees of involvement of the signatories to sectoral agreements. As a consequence, unions have to engage much more directly with the needs and requirements of companies, and works councils have less scope to take refuge in

the mandatory character of sectoral regulations when confronted by management calls for local concessions. This requires more coordinating efforts from the unions in order to avoid a decline in standards within individual sectors. The functional differentiation between unions and works councils, which has been fundamental for the German dual system of interest representation, has become increasingly blurred.

Despite the hazards and side-effects of decentralisation, trade unions have sought to use the process as a starting point to build organisational power at workplace level through greater involvement of rank-and-file members in the process of renegotiation. Research shows that there are positive results in some cases, but there is little evidence that this strategy has been realised across the board (Haipeter, 2009a; Bahn Müller, 2010). Furthermore, only about 10% of all establishments, with around 45% of all employees in western Germany and 38% in eastern Germany, currently have a works council (Ellguth and Kohaut, 2010). There is an important ‘representation gap’, particularly in SMEs, depriving unions of a vital prerequisite for a proactive workplace strategy. Without adequate employee representation at the workplace and company level, however, there is a clear danger that the decentralisation of collective bargaining will strengthen unilateral decision-making by management.

One of the economic consequences is that the use of opening clauses, combined with the overall decline in bargaining coverage, has led to negative wage drift, under which the increase of actual wages as reported in official earnings statistics has consistently undershot average collectively agreed pay settlements (Figure 6).

Figure 6: Annual increase of collectively agreed and effective wages (wage drift), 2000–2009 (% to the previous year)



Source: National Statistical Office, WSI Collective Agreement Archive

Finally, the expectation that greater decentralisation could help stabilise the collective bargaining system as a whole could not be confirmed. The creeping secular decline in bargaining coverage has now been under way for more than a decade. Although sectoral collective agreements are still the dominant feature of the German bargaining landscape, by 2009 only 52% of employees in western Germany and 38% of the employees in eastern Germany were still covered by a sectoral agreement. Against the background of the ‘double erosion’ of German collective bargaining via declining bargaining coverage and the shift of bargaining competences to the company level, a debate is in progress about how to

reestablish sectoral bargaining (Bispinck and Schulten, 2009). In addition to the efforts of unions and employer associations in this respect, there is also discussion of the responsibilities of the state. This has primarily turned on growing calls for the introduction of a statutory minimum wage, and for reforms of the procedure for extending collective agreements to cover all employment in a sector.

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