A Worthy Import?: Examining the Advantages and Disadvantages of Sectoral Collective Bargaining in Germany

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Executive Summary

There is currently no formal legal mechanism by which to form sectoral collective-bargaining agreements in the United States. However, a political debate is now underway about whether this should change, with a specific focus on the hospitality industry and the so-called "gig" economy. By contrast, Germany has a long tradition of sectoral collective bargaining. For a better idea of the consequences a legislative initiative to enact such a mechanism might have in the United States, this report looks with due brevity at the legal and practical situation in Germany. From the employer's point of view, what are the advantages and disadvantages of sectoral collective bargaining in Germany? What are the incentives and disincentives for an employer to opt into collective bargaining? Quantitative data shows that sectoral collective bargaining is steadily becoming less prevalent in Germany. One reason for this decline could be that, for some employers, the disadvantages outweigh the advantages.

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Introduction

There is a long tradition of sectoral collective bargaining in Germany. The total number of German employees working under a sectoral collective-bargaining regime, however, has been in continuous decline. As of 1996, 70% of employees in western Germany and 56% of employees in eastern Germany were employed under a sectoral collective-bargaining agreement. By 2020, those numbers had fallen to 45% and 32%, respectively.[1] Still, there is new interest in the United States in German-style sectoral-bargaining arrangements. In legislative debates in the U.S. Congress, as well as in New York State, sectoral collective bargaining has been referenced as a model to emulate.

This issue brief discusses the advantages and disadvantages of sectoral collective-bargaining agreements in Germany. While we found no studies that offered a comprehensive assessment of the impact of each factor, it is plausible that the advantages and disadvantages described here are part of the calculus for a German business considering whether to opt into sectoral collective bargaining. One reason why fewer employers are opting into this mechanism could be that they collectively see the disadvantages of sectoral collective-bargaining agreements as preponderate over the advantages. There are other factors not addressed in this brief that have contributed to such agreements becoming less prevalent overall. These include changing industrial structures, less organization on the part of labor, and a trend toward more individualistic behavior in society at large. Weighing the advantages against the disadvantages, this brief concludes that the complexities and complications arising under a sectoral-bargaining system may, for some employers, outweigh the benefits that such schemes provide.

First, we present the various sources of German labor law (Part I), which should help readers to understand the advantages and disadvantages of sectoral collective bargaining as they are laid out here. Namely, when an employer opts out of sectoral collective bargaining, the decision is tantamount to choosing a different approach to setting the terms and conditions of employment. Basic knowledge of the various ways to set terms of employment in Germany is a prerequisite to understanding the advantages and disadvantages of sectoral collective bargaining from the employer's point of view (Part II).

1. Sources of German employment and labor law

Labor and employment relations in Germany are marked by a multilayered regulatory system.

[1] IAB, Tarifbindung und betriebliche Interessenvertretung 2020 – Ergebnisse aus dem IAB-Betriebspanel, table 5.

A. Employment contracts

The basis of every employment relationship is a contract of employment agreed upon by an employer and an employee. As a matter of constitutionally guaranteed private autonomy, it is true that the parties to an employment contract are fundamentally at liberty to include whatever terms they like in their agreement. But there are some limits, drawn mainly by law. The courts, as well as lawmakers, operate under the assumption that employees are the weaker of the two parties, structurally speaking.[2] In order to prevent employers from exploiting their economic strength against employees who come before them as individuals, employment contracts must not disadvantage employees in inappropriate ways (e.g., under section 307, para. 1 and section 310, para. 3, no. 1 of the German Civil Code). This principle is known as "review of standard terms and conditions" or "review of form contracts" (*ABG-Kontrolle*).

In addition to employment contracts negotiated individually between an employer and an employee, an employer can bind itself contractually to provide an agreement to some or all its employees through a mechanism called a "grant to the entirety" (*Gesamtzusage*). A grant to the entirety is an offer directed at all employees to modify the employment contract; and as a rule, employees tacitly accept it.[3] However, an employer proceeding with this course of action can only bind itself unilaterally and cannot extract any performance from the opposite side; a grant to the entirety is therefore a one-way street.

B. Works agreements

In the labor-and-employment-law hierarchy of authority, "works agreements" sit above employment contracts. They can be entered into at various levels: at the plant or facility level, at the company or enterprise level, and at the concern or conglomerate level.

Under the Works Constitution Act (*Betriebsverfassungsgesetz*, the "BetrVG"), employees can elect a body called the "works council" (*Betriebsrat*) to represent them at their facility. The works council represents all employees at the facility regardless of whether they participated in its election. Roughly speaking, the Bundesarbeitsgericht [Federal Labor Court] takes a "plant" or "facility" (*Betrieb*)—as the term is used in section 1, para. 1, sentence 1 of the BetrVG—to be an organizational unit that operates under unitary leadership and within which an

[2] *Cf.* BVerfG, Case No. 1 BvR 1571/15 and *passim*, NZA 2017, 915, para. 146 (Jul 11, 2017); BAG, Case No. 7 AZR 716/09, NZA 2011, 905, para. 35 (Apr 6, 2011); BAG, Case No. 1 AZR 189/17, NZA 2019, 402, para. 32 (Nov 20, 2018); BT-Drs. 18/4062, p. 8, which cites language employed by the Bundesverfassungsgericht [Federal Constitutional Court] verbatim.

[3] *See, e.g.*, BAG, Case No. 5 AZR 424/16, NZA 2017, 1073, para. 13 (Mar 22, 2017) and *ErfK*-U. Preis, BGB § 611a, para. 218.

employer, having employees and facilities, seeks to carry out a purpose.[4] A plant or facility is thus a local unit, and there can be several of them within a single company. If a company comprises several plants or facilities, a "general works council" is formed at the company or enterprise level (see section 47, para. 1 BetrVG). If the company is part of a concern or conglomerate, the workforce may constitute a "concern works council" (see section 54, para. 1 BetrVG).

Pursuant to section 77, para. 4, sentence 1 of the BetrVG, works agreements apply directly to and are compulsory for all employees. "Directly" here refers to the fact that the parties to the employment contract need not stipulate to the validity of the works agreement: independently of the will of the parties, the employment relationship is subject to the works agreement as if it were law.[5] "Compulsory" means that the employment contract's provisions generally may not deviate from works agreements unless the difference redounds to the employee's advantage.[6]

At the same time, the parties are not free to negotiate on the full range of issues. Pursuant to section 77, para. 3, sentence 1 of the BetrVG, a works agreement cannot cover compensation and other terms and conditions of employment that are (or typically would be) covered under a collective-bargaining agreement.[7] The employer need not be subject to a collective-bargaining agreement, nor does a corresponding valid collective-bargaining agreement even need to exist; rather, so long as the contemplated provision is "typical" of collective bargaining, it cannot be covered by a works agreement.[8] The purpose of this rule is to ensure robust autonomy of the parties to collective bargaining.[9] Works councils, which are unlike labor unions in that employees are not obligated to pay dues, are not to come into competition with them.[10]

C. Collective-bargaining agreements

Collective-bargaining agreements are contracts collectively negotiated between an employer and its employees (by and through the representative body, if any, that each side opts to have represent it). Collective-bargaining agreements provide for the content, formation, and termination of employment relationships; see section 1,

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[4] For the more extensive and precise definition, *see* BAG, Case No. 7 ABR 38/04, JURIS, para. 18 (May 25, 2005).

[5] *Richardi*-R. Richardi/C. Picker, BetrVG § 77, para. 148.

[6] *NK-GA*-R. Schwarze, BetrVG § 77, para. 56.

[7] On the primacy of mandatory codetermination pursuant to § 87, para. 1 BetrVG over § 77, para. 3 BetrVG, *see* BAG (GS), Case No. GS 2/90, NZA 1992, 749, at 752-755 (Dec 3, 1991) and *ErfK*-T. Kania, BetrVG § 77, paras. 53-56.

[8] *Cf. ErfK*-T. Kania, BetrVG § 77, paras. 45-49.

[9] BAG, Case No. 5 AZR 36/19, NZA 2020, 868, para. 20 (Mar 18, 2020).

[10] *ErfK*-T. Kania, BetrVG § 77, para. 43.

para. 1 of the Collective Agreements Act (*Tarifvertragsgesetz*, the "TVG").[11] Only a union can enter into a collective-bargaining agreement on the employees' side. The employer's side might be an individual company or enterprise, or an association of employers. A collective-bargaining agreement entered into by a company or enterprise is known as a "firm-specific collective-bargaining agreement" (*Firmentarifvertrag*).

While collective-bargaining agreements, generally, are an important and relevant topic of discussion, this brief deals specifically with *sectoral* collective-bargaining agreements, a special kind in which the contracting party on the employer's side is an association or federation of employers. If a collective-bargaining agreement applies to a maximum number of employers in a particular sector of the economy, it is referred to as a "sectoral collective-bargaining agreement" (*Flächentarifvertrag*).[12]

Whereas individual employees are presumed, as a structural matter, to be the weaker party relative to employers, employees in a union have collectivized their power and thus are supposed to have achieved parity with the employer's side.[13] For this reason, a presumption of reasonableness is ascribed to collective-bargaining agreements. This is because the parties to collective-bargaining agreements treat one another as near-equals and, as a result, such agreements presumably provide reasonable terms and conditions of employment.[14] The legal requirements for collectively bargained rules and norms are therefore also not as strict; for example, they are not subject to the same kind of oversight as employment contracts, which must pass muster under "review of form contracts" principles (see section 310, para. 4, sentence 1 of the German Civil Code).

Similar to works agreements, collectively bargained rules apply directly and are compulsory pursuant to section 4, para. 1, sentence 1 of the TVG. In fact, they are said to possess "normative force" (*normative Wirkung*). Collectively bargained rules apply when both sides of the employment relationship are bound to the collective-bargaining agreement; the parties to an employment contract need not stipulate to it.[15] Unless the collective-bargaining parties have expressly agreed to sanction deviations from an agreement's terms, the parties to an employment contract are only

[11] Certain plant- or facility-level policies that apply to all employees regardless of union membership, as well as the fact that the establishment and organization of works councils can be negotiable in collective bargaining, see § 1, para. 1 TVG, have no bearing on this memorandum.

[12] *See* R. Rebhahn, NZA-BEILAGE 2011, 64 on the specific features of a sectoral collective-bargaining agreement.

[13] *Cf.* BVerfG, Case No. 1 BvR 1571/15 and *passim*, NZA 2017, 915, para. 146 (Jul 11, 2017).

[14] On the presumption of reasonableness, see for example BAG, Case No. 4 AZR 50/13, NZA 2015, 115, para. 29 (May 21, 2014) and *Wiedemann*-M. Jacobs, Einleitung, paras. 100-118; *see* BVerfG, Case No. 1 BvR 1571/15 and *passim*, NZA 2017, 915, para. 146 (Jul 11, 2017): "Richtigkeitsvermutung"; for an overview of the differences in terminology *see Wiedemann*-M. Jacobs, Einleitung, para. 103 m.w.N.

[15] *ErfK*-M. Franzen, TVG § 4, para. 1.

permitted to deviate from collectively bargained rules and norms if the deviation benefits employees; see section 4, para. 3, alternative 2 TVG.[16] Accordingly, collective-bargaining agreements set the floor for terms and conditions of employment.[17]

For collective-bargaining agreements to possess "normative force," both parties to an employment contract must have opted into collective bargaining. Collective bargaining becomes binding for employees when they join a union; see section 3, para. 1, alternative 1 TVG. If an employer enters into a firm-specific collective-bargaining agreement, that employer is bound to abide by it under section 3, para. 1, alternative 2 TVG. The terms of an association's collective-bargaining agreement become binding upon an employer when that employer joins the association that is party to it; see section 3, para. 1, alternative 1 TVG. Employer associations or federations are societies of employers organized by economic sector (and often by region). The validity of a sectoral collective-bargaining agreement thus requires that the employer in question be a member of an organization of this kind.

The Collective Agreements Act (the "TVG") does not call for any particular arbitration or dispute-resolution mechanism to resolve conflicts between the parties to collective-bargaining agreements. Because the employers' side regularly resists the demands of a union (for example, for higher salaries), there needs to be a mechanism to force both collective-bargaining parties to the table, as well as a source of pressure for them to reach an agreement. This mechanism is the "job action" (*Arbeitskampf*), which on the employees' side consists mainly in going on strike. The right to strike is constitutionally guaranteed under Article 9, para. 3 of the Basic Law (*Grundgesetz*, the "GG"),[18] and if a union goes on strike, any employee is entitled to participate.[19]

D. Other sources of law

German law, as well as European Union labor law, contains numerous additional rules and provisions that are relevant for employment relationships. The Basic Law (as Germany's constitution), on the other hand, provides hardly any rules that come to bear on employer–employee relationships.

[16] *ErfK*-M. Franzen, TVG § 4, para. 2.

[17] *See ErfK*-M. Franzen, TVG § 1, para. 2.

[18] *E.g.*, BVerfG, Case No. 1 BvR 1571/15 and *passim*, NZA 2017, 915, para. 131 (Jul 11, 2017).

[19] On the right to strike for nonunion workers or for workers organized elsewhere, *see* BAG, Case No. 1 AZR 142/02, NZA 2003, 866, at 867-868 (Feb 18, 2003).

II. Advantages and disadvantages for employers of sectoral collective bargaining

Based on the sources of German labor law laid out in Part I, the advantages and disadvantages of sectoral collective-bargaining agreements from the employer's perspective will be easier to see. What incentives lead an employer to opt into sectoral collective bargaining (Section A)? Why do employers go down this path in arranging their employee relationships, rather than managing those relationships by means of a firm-specific collective-bargaining agreement, a works agreement, or employment contracts? What has led more employers to opt out of sectoral collective-bargaining agreements or to never opt in to begin with (Section B)?

A. The advantages of sectoral collective-bargaining agreements

Employers benefit from sectoral collective-bargaining agreements in multiple ways. The advantages are sufficiently alluring to motivate an employer to opt in if, in its estimation, they outweigh the accompanying disadvantages of such agreements (on the disadvantages, see Section B).

1. Reduced risk of job action

Collective-bargaining agreements are generally viewed as being attended by what is known as a "relative duty to keep the peace" (*relative Friedenspflicht*).[20] This duty to keep the peace is the reason a union is prohibited from striking to achieve terms already settled under a collective-bargaining agreement to which it is a party. The duty applies for the entire term of the agreement, during which the union must conduct itself "peacefully."

Once the validity of that agreement has expired, however, a union is allowed to strike to try to force its way into a renewed collective-bargaining agreement on more favorable terms. If the expired collective-bargaining agreement was firm-specific, then the target of this kind of strike will necessarily be the employer party to that agreement. Thus, being bound to the terms of a firm-specific collective-bargaining agreement comes with a risk of periodic job action.

An employer can reduce this risk by opting into sectoral collective bargaining by joining an association or federation of employers that enters into such agreements on its behalf. Namely, in the event of a strike over a sectoral collective-bargaining agreement, a union in most cases will strike not against all but only select firms within the association or federation. This lowers the risk that any one employer will have to suffer production or revenue losses because of a strike it cannot do anything about.

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[20] On which *see, e.g.*, BAG, Case No. 1 AZR 160/14, NZA 2016, 1543, para. 27 (Jul 26, 2016) and more thoroughly *FJK ArbeitskampfR-Hdb*-C. Mehrens, § 4, paras. 122-157.

2. *Labor disputes play out outside the company or enterprise*

Sectoral collective bargaining enables plants and facilities, as well as companies or enterprises, to insulate themselves from disputes over terms and conditions of employment. Such disputes are shifted up to the association level, lowering the risk that such a dispute will affect the atmosphere at the plant.[21]

Alternatively, an employer might provide for terms and conditions of employment collectively, seeking a firm-specific collective-bargaining agreement or a works agreement. But firm-specific collective-bargaining places the locus of discussions about the terms and conditions of employment *inside* the company or enterprise. Dissatisfaction with the outcome of negotiations is, therefore, felt directly within the company. Relatedly, there is more of a tendency for it to be directed at the employer itself than would be the case if negotiations were conducted at further remove—i.e., at the level of the association or federation as the negotiating partner. If an employer decides, on the other hand, to set terms and conditions of employment collectively through works agreements (to the extent that this option is legally viable in the first place[22]), it can have a negative impact on its working relationship with the works council. Namely, negotiations about terms and conditions of employment are much more contentious than the day-to-day matters, such as hiring decisions, which require the works council's involvement.

3. *The trust effect: No race to the bottom with competitors*

Sectoral collective-bargaining agreements are legally sanctioned contracts that create a trust or syndicate.[23] While valid, these agreements foreclose the possibility of (among other things) competition among the participating companies with respect to terms and conditions of employment. As coordinated via the collective-bargaining agreement, all the association or federation's members will pay at least the same salaries for comparable job specifications and qualifications.[24] An employer can thus be confident that a German competitor who is bound to the same collective-bargaining agreement will not be able to outbid it by betting on worse terms and conditions of employment. Because they do not apply across companies and enterprises, firm-specific collective bargaining and works agreements cannot accomplish what sectoral collective bargaining can in terms of shutting down competition within an industrial sector.

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[21] J. Lessner, RDA 2005, 285, at 286; C. Schnabel, NZA-BEILAGE 2011, 56, at 58; *cf.* K. Hering, NZA-BEILAGE 2011, 61, at 63; *cf.* W. Boecken, in: *Arbeitslosigkeit*, 113, at 123.

[22] See above at I.2.

[23] M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, Grundlagen, paras. 44-45; on authorization under antitrust law *Wiedemann*-M. Jacobs, Einleitung, paras. 95-99; *see also* the thorough treatment in *Däubler*-D. Schiek/D. Ulber, Einleitung, paras. 556-589.

[24] *Cf.* A. Junker, ZFA 1996, 383, at 390 and C. Höpfner, *Die Tarifgeltung im Arbeitsverhältnis*, at 232.

This means that two conditions are needed to achieve the "trust effect": (i) the competition must be in Germany and (ii) it must be bound under the same sectoral collective-bargaining agreement. That, in turn explains why, over the course of decades, the trust effect has steadily waned as an advantage of sectoral collective bargaining. Where there is markedly less attachment to sectoral collective bargaining and vigorous competition from companies outside Germany in a given economic sector, the trust effect of sectoral collective bargaining is diluted.

Namely, most foreign competitors of German companies overwhelmingly are not tied to German sectoral collective-bargaining agreements. In fact, they are only obligated to follow German collective-bargaining agreements if they both generate labor output in Germany and the Bundesministerium für Arbeit und Soziales [Federal Ministry of Labor and Social Affairs] extends their scope to cover foreign employers who carry on activities in Germany, either by declaring the agreements generally compulsory under section 5 TVG or by issuing a regulation pursuant to sections 7 and 7a of the Act on Mandatory Working Conditions for Workers Posted Across Borders and for Workers Regularly Employed in Germany (*Arbeitnehmer-Entsendegesetz* – AEntG) (see sections 3 and 8 AEntG). The minute a foreign company or enterprise produces goods or delivers services abroad, German sectoral collective bargaining will cease to affect competition from it. To this extent, the sectoral collective-bargaining agreement serves no purpose in terms of eliminating it.[25]

Since more employers are not tied to sectoral collective bargaining and German companies compete with foreign companies all the time in this age of globalization, the trust effect is regularly not decisive in the calculus of whether to opt into sectoral collective bargaining.

4. Decrease in payroll costs for financially robust companies

An association or federation of employers normally will be an organization comprising multiple companies. A broader membership structure makes it more probable that the members, in terms of their finances and profitability, will differ. If salary and wages under a sectoral collective-bargaining agreement were oriented toward the most profitable company, it would not be feasible for all members. Thus, payroll levels are traditionally geared instead toward the productivity of the weakest one-third of member companies.[26] This is why it can make sense for a business that is thriving relative to its economics sector to join an association or federation of employers[27]: it is a way to prevent one's own financial strength from becoming the yardstick in salary negotiations, the way it would be in a firm-specific collective-bargaining environment.

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[25] R. Rebhahn, NZA-BEILAGE 2011, 64, at 66; M. Gentz, in: *FS Schaub*, 205, at 208-209.

[26] M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, TVG § 4, para. 473.

[27] J. Lessner, RDA 2005, 285, at 286.

5. *No need for in-house collective bargaining*

It is costly and difficult to prepare for and conduct collective-bargaining negotiations. The union's demands must be reviewed by counsel, and their feasibility and ramifications must be analyzed from a practical standpoint. The employer's side must develop its own position on what it would like to have in the collective-bargaining agreement. It must seek advice on whether (and how) those goals can be achieved with legal certainty and how the agreement would affect the company. It also needs to develop a strategy and narrative for both the interval leading up to the negotiations and the negotiations themselves.

As these activities crop up, a company or enterprise that manages its labor relations by means of firm-specific collective bargaining is required to employ specialists or resort to a significant volume of external support.[28] Companies pursuing firm-specific collective-bargaining agreements, therefore, incur expenses and could require additional hiring.

Consequently, one advantage of sectoral collective bargaining, from the employer's perspective, is that such negotiations need not be conducted in-house. Instead, these tasks are unloaded onto an association or federation of employers that bundles collective bargaining on behalf of all members so that the association or federation's central collective-bargaining division will adequately represent the employers' interests, while simultaneously managing the administrative tasks associated with bargaining. Even if the employers pay dues to the organization, this approach creates cost savings, because the costs are distributed across the entire membership. The more centralized the conduct of negotiations and the broader the scope of a collective-bargaining agreement, the lower the transaction costs for the employers.[29]

B. Disadvantages of sectoral collective bargaining

In addition to the suggested advantages of sectoral collective-bargaining agreements highlighted in Section A, there are also serious structural disadvantages.

1. *Agreements are neither tailored nor flexible*

As a rule, sectoral collective-bargaining agreements apply to all member companies and enterprises in each region—e.g., to the metals and electronics-industry firms in the state of Bavaria. This means they apply both to companies and enterprises in densely populated areas with a lot of industry and high costs of living, as well as to those in rural areas. Additionally, sectoral collective-bargaining agreements apply to

[28] On this as a reason for opting into collective bargaining, *see* G. Schaub, NZA 1998, 617, at 618.

[29] *See* C. Schnabel, NZA-BEILAGE 2011, 56, at 58.

large organizations with several thousand employees, as well as to a smaller mid-sized company with only 50 employees.[30]

It is, therefore, practically impossible for a one-size-fits-all sectoral collective-bargaining agreement to promulgate employment terms that would be appropriate for all kinds of businesses. Differently sized employers that make different products in different locations do not necessarily expect the same outcomes when they commit their terms and conditions of employment to collective bargaining. In addition, the businesses within a broadly defined sector will vary in terms of profitability, depending on which subsector of the economy they are deemed a part of. This can make it challenging for a less-profitable business to fund payroll increases geared toward companies in the same sector that enjoy greater financial success.[31] Belonging to an association or federation of employers can, therefore, exacerbate a less-profitable company's financial situation.

The sectoral collective-bargaining parties have been criticized for putting overly rigid agreements in place and have reacted at times by writing savings clauses into their agreements.[32] The clauses "save" certain subject matter of the agreements for eventual plant- or facility-level regulation. To the extent provided under a savings clause, employers and works councils can enter into works agreements that deviate from the collectively bargained rules—even to the disadvantage of employees. Section 77, para. 3, sentence 2 of the BetrVG removes the legal impediment to works agreements addressing issues otherwise reserved for collective bargaining. Depending on how they are executed, such savings clauses serve as a basis for the works parties to stipulate to, *e.g.*, temporary reductions in hours (and, correspondingly, pay) or to temporary suspensions of rights under a collective-bargaining agreement.[33]

2. *In the near term, adjusting terms and conditions of employment at a given company or enterprise is exceedingly difficult*

Opting into sectoral collective bargaining has far-reaching consequences. Once an employer has opted into sectoral collective bargaining, it will have a tough time later if it seeks to extricate itself from the terms and conditions of employment under the

[30] This is also noted by C. Schnabel, NZA-BEILAGE 2011, 56, at 58, who thus concludes that the more centralized the sectoral-level negotiation process, the more leeway ought to be provided for plant-level solutions.

[31] *Cf.* H. Konzen, NZA 1995, 913, at 917.

[32] For an overview, see R. Bispinck, MITBESTIMMUNG 2003, 16, at 17; on the instruments that create flexibility in sectoral collective-bargaining agreements in the chemicals industry, *see* W. Goos, in: GS *Heinze*, 259, at 265-268; *Däubler*-W. Däubler, Einleitung, para. 59; M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, TVG § 4, para. 466; C. Schnabel, NZA-BEILAGE 2011, 56, at 61; T. Dieterich, NZA-BEILAGE 2011, 84, at 85-86; for in-depth discussion of savings clauses in collective-bargaining agreements, *see Wiedemann*-G. Thüsing, TVG § 1, paras. 252-302.

[33] *Däubler*-W. Däubler, Einleitung, para. 59; M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, TVG § 4, para. 470.

agreement.[34] This can become especially problematic if the company's finances take a turn for the worse. A company or enterprise also may find itself in an internationally competitive environment that makes it imperative to react with maximum flexibility, and in a decentralized way, to challenges created by innovative products and technologies.[35]

In principle, an employer is constrained by a sectoral collective-bargaining agreement if it is a member of the employers' association, and the agreement is effective. If an employer decides to leave the association or federation of employers *before* the agreed-upon expiry of the collective-bargaining agreement, section 3, para. 3 of the TVG binds the employer to the terms of the agreement through the end of the agreement's term. This principle is known as the "continuing commitment" (*Nachbindung*). Thus, until the collective-bargaining agreement has expired, an employer cannot deviate from the agreement to the employees' disadvantage, despite no longer belonging to the association or federation and even if its own workforce agrees to the change. In the short term, it can be unpleasant to be tied to collectively bargained salary and wage schedules, which usually run for a few years at a time.

From an employer's perspective, however, it can be significantly more uncomfortable to be bound to collective-bargaining agreements with open-ended or unlimited timeframes.[36] For example, employers will often enter into open-ended collective-bargaining agreements that lock in basic elements of the employment framework, such as paid vacation or long notice periods for terminations or layoffs, for decades at a time. Such agreements are risky for employers because they never "end," and the "continuing commitment" only ends upon the agreement's expiration date. There is a debate in the labor and employment-law literature over when this potentially "perpetual constraint" ought to terminate.[37] As a matter of current law, however, the Bundesarbeitsgericht [Federal Labor Court] has rejected these considerations.[38]

The termination of the "continuing commitment" is at once also the beginning of what is known as the "continuing effect" or "aftereffect" (*Nachwirkung*); see section 4, para. 5 of the TVG. Once a collective-bargaining agreement has expired, its provisions remain in force until another agreement replaces it. Going forward, an

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[34] *Cf.* M. Franzen, RDA 2001, 1, at 4-5; M. Henssler, ZFA 1994, 487, at 507-508; P. Hanau, RDA 1998, 65, at 68-69.

[35] C. Schnabel, NZA-BEILAGE 2011, 56, at 59.

[36] *Cf.* G. Schaub, NZA 1998, 617, at 619.

[37] C. Höpfner, *Die Tarifgeltung im Arbeitsverhältnis*, at 399-406; *Wiedemann*-H. Oetker, TVG § 3, paras. 100-102; M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, TVG § 3, paras. 272-279; *BeckOK ArbR*-R. Giesen, TVG § 3, para. 24.

[38] BAG, Case No. 4 AZR 261/08, NZA 2010, 53, paras. 34-49 (Jul 1, 2009), according to which a continuing commitment that extended for more than a year beyond the earliest possible opportunity to terminate the collective-bargaining agreement was constitutional; C. Höpfner, *Die Tarifgeltung im Arbeitsverhältnis*, at 391-394 views a commitment continuing in perpetuity as unconstitutional.

employer who has left the association or federation can thus adjust terms and conditions of employment so that the workforce bears the burden, as well. But for this to happen, the employees must give their consent, which they have little incentive to do. Another option at this stage would be to modify the terms and conditions of employment by way of a works agreement. But terms and conditions that were included in collective-bargaining agreements will, in many cases, be barred as subject matter for works agreements under section 77, para. 3, sentence 1 of the BetrVG, a provision which has already come up in this brief.[39]

For an employer constrained by a sectoral collective-bargaining agreement that does not contain savings clauses, the only realistic way to modify terms and conditions of employment to cut costs is to enter into a firm-specific collective-bargaining agreement with the union. If an employer-employee relationship is governed by a sectoral as well as a firm-specific collective-bargaining agreement with the same union, the dominant view is that the firm-specific agreement, being more specific, controls—even if its terms are less favorable.[40] As long as a sectoral collective-bargaining agreement remains in force, however, the employer will have no means to exert pressure on the union to enter into a firm-specific agreement if worse terms and conditions are at stake for labor. It will instead have to consign itself to the good will of the union. The company will have to convince the union, based on its financial situation, that it and the jobs it provides can only be saved if the parties agree to less favorable terms and conditions of employment in a firm-specific collective-bargaining agreement.

Even this procedure can often be made more difficult by an employer's past lack of rigor in setting up its employment contracts. The employment contracts of employers who are under collective-bargaining agreements regularly contain clauses that incorporate by reference terms from the collective-bargaining agreement. The result is that the employer-employee relationship becomes subject to those terms even if the employee is not a member of the union, which results in the collective-bargaining agreement not having normative force. Depending on how the incorporation by reference clause is drafted, there is a risk from the employer's perspective that the "better" terms and conditions in the sectoral collective-bargaining agreement will continue to apply, alongside the worse ones in the firm-specific agreement. In such a situation, the terms more favorable to the employee would prevail under section 4, para. 3, alternative 2 of the TVG, leaving the employer constrained by sectoral collective bargaining—simply by force of its incorporation by reference in an employment contract.

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[39] See above at I.2.

[40] BAG, Case No. 4 AZR 655/99, NZA 2001, 788, at 789-790 (Jan 24, 2001); *BeckOK ArbR*-R. Giesen, TVG § 4, para. 15; for a critical take on the principle that more specific provisions prevail, *see Wiedemann*-M. Jacobs, TVG § 4a, paras. 481-491.

Thus, from the perspective of an employer, it is difficult, in practical terms, to opt out again once one has opted into sectoral collective bargaining. This can provide an especially serious disadvantage in times of rapid economic transformation, or for a business in crisis.

3. Overwhelming complexity of the rules

Sectoral collective bargaining, or rather its sum total—the aggregation of various sectoral collective-bargaining agreements—keeps growing in complexity. One can only speculate as to why. One factor will be the desire, on the part of both employer and employee, for more flexibility in the employment relationship. The complexity of the arrangements is a major challenge for small and mid-sized companies and enterprises. Locally and in a decentralized manner, with small human-resources departments, they must implement sectoral collective-bargaining agreements that were negotiated by large, dedicated commissions.

And often for a business, it may not elect to abide only by select parts of the aggregation of agreements. Employers instead face an all-or-nothing situation: either they implement the entire, complex body of agreements as an association or federation member, or they do not participate as members constrained by collective bargaining. The leading federation for labor and social policy for the entire German economy—the Bundesvereinigung der Deutschen Arbeitgeberverbände [Confederation of German Employers' Associations]—has acknowledged the problem of the complexity of these bodies of agreements.[41] One solution it has proposed is to permit companies and enterprises to select individual modules from the group of agreements, like building blocks. For that to happen, an employer's association must strike a corresponding arrangement in a collective-bargaining agreement with the union. Jörg Hofmann—head of the large and powerful union IG Metall—however, recently rejected such a proposal.[42]

4. Annual pay raises are virtually automatic

Another reason an employer may not opt into sectoral collective bargaining is that collective-bargaining agreements almost always provide for annual pay increases. In sectoral collective-bargaining agreements, the annual increases are not geared toward individual business performance. To that extent, employers who are not so constrained can proceed with greater self-determination and avoid this almost automatic annual rise in labor costs.

5. Uniform minimum compensation regardless of work quality

Even if collective-bargaining agreements help companies and enterprises save on transaction costs, this advantage comes with a loss of payroll flexibility. Uniform

[41] BDA, Arbeitsrecht und Tarifpolitik - Tarifvertrag.

[42] ZEIT Online, Arbeitgeber wollen Tarifverträge öffnen.

terms and conditions of employment means employees are on compensation schedules geared toward their job descriptions and qualifications, rather than their productivity; after all, a collective-bargaining agreement needs to contain some kind of abstract or generalized compensation scheme. While it is true that employers can still reward good job performance by paying bonuses beyond what the pay scale requires, for many employers, it is also a major challenge to set up a legally sound bonus system.

III. Conclusion: Relevance for the United States

Sectoral collective bargaining has played, and will continue to play, a significant role in the employment world, even if the prevalence of sectoral collective-bargaining agreements is steadily waning. Whether an employer opts into sectoral collective bargaining is a matter of weighing the pros and cons of such a scheme, as discussed here. Every employer must decide for itself whether the advantages of these agreements outweigh the disadvantages. From the perspective of a forward-looking company that values flexibility and wants to offer employment terms that are specific and tailored to its business, there is much to recommend not subjecting one's terms and conditions of employment to sectoral collective bargaining, unless the agreements in question provide enough in the way of savings clauses that permit more flexible (temporary or long-term) management of certain parts of the agreement that govern terms and conditions of employment

In sum, the challenges associated with sectoral bargaining in Germany are noteworthy. Policymakers in the United States who seek to import such a model would do well to understand these challenges arising in Germany.

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Abbreviations

Abbreviation	Full German Name	Full English Name
BAG	Bundesarbeitsgericht	Federal Labor Court
BAG (GS)	Großer Senat des Bundesarbeitsgerichts	Grand Senate of the Federal Labor Court
BDA	Bundesvereinigung der Deutschen Arbeitgeberverbände	Confederation of German Employers' Associations
BetrVG	Betriebsverfassungsgesetz	Works Constitution Act
BT-Drs.	Bundestags-Drucksache	Bundestag Publication
BVerfG	Bundesverfassungsgericht	Federal Constitutional Court
IAB	Institut für Arbeitsmarkt- und Berufsforschung	Institute for Employment Research
IG Metall	Industriegewerkschaft Metall	Trade Union of the Metal Industry
NZA	Neue Zeitschrift für Arbeitsrecht	– Law Journal –
RdA	Recht der Arbeit	– Law Journal –
TVG	Tarifvertragsgesetz	Collective Agreement Act
ZfA	Zeitschrift für Arbeit	– Law Journal –