

Country report: Germany

1. Introduction

Most labour law reforms adopted before the crisis are still having an impact and are seen as one of the main reasons for the relatively stable economic situation in Germany throughout the economic and financial crisis.

The main reforms in Germany were the so-called Hartz I–III reforms adopted in 2003 and 2004, aimed at reforming and restructuring job centres, setting up temporary agencies and creating new forms of employment – such as ‘mini-jobs’ and ‘midi-jobs’ – with lower or incremental tax rates and insurance payments. The 2005 Hartz IV reform was aimed at reforming unemployment and welfare benefits. It was revised in 2006, in particular to limit access to unemployment and welfare benefits. A reform of the pension system was launched in 2006, raising the retirement age in steps to 67 between 2012 and 2029 and setting the level of pension contributions at 20 per cent by 2020 and 22 per cent by 2030. Pension reform was on the agenda again in 2011.

At the same time, subsidies were introduced to encourage enterprises to take on workers over the age of 50, with the intention of boosting the employment rate of this target group to 50 per cent. All in all, the reforms were aimed at ‘flexibilising’ the labour market. Deemed to be ‘necessary and good’ by the CDU government – in office since 2005 – they have led to precariousness in employment.

According to the OECD in its 2008 Economic Survey of Germany,

Reform momentum in the labour market needs to be maintained to achieve lasting improvements. The focus should be on increasing the low number of hours worked per person employed, notably of women (...) Long-term unemployment also remains a problem and while the increase in work incentives implemented with the Hartz IV reform has been a first step to improve the labour supply of this group, more could be done. On the labour demand side, lowering the strict employment protection legislation for regular job contracts and avoiding too high minimum wages are important challenges. Plans to further phase out early retirement options are welcome in order to raise employment rates for older workers and should be implemented soon. (<http://www.oecd.org/eco/surveys/40367952.pdf>).

2. Specific labour law reforms

2.1 Short-time working schemes

Short-time working schemes were one of the major measures used to counteract the economic crisis in Germany between 2008 and 2010 and again in 2012. The state subsidised 60 or 67 per cent of the net wages (depending on whether there were dependent children) of workers on short-time working for 6–12 months in 2012 (and 24 months at the height of the crisis in 2009). Working time adjustments and in principle the reduction of working time as a temporary measure, have also served to adapt to the economic crisis. According to the Institute for Employment Research (IAB), working time increased in 2012, up 1.1 per cent from 2011, even though annual working time went down by 0.7 per cent. This increase was due, among other things, to an increase in the active population and a decline in absenteeism.

Both short-time working schemes and working time adjustments have been at the heart of collective bargaining rounds, sometimes under difficult circumstances. As a study of the WSI shows, in 2011 there was a 15 per cent increase in industrial disputes compared with 2010 and a further increase in disputes was expected in 2012, in particular due to public sector strikes.

Like all other Member States, Germany has received annual recommendations drafted by the European Commission and adopted by the Council of the EU within the framework of the European Semester since 2011.¹ At the beginning, these country-specific recommendations (CSRs) sought to encourage labour market participation by reducing the high tax wedge, considering in particular its effects on low income earners. Increasing the number of full-time childcare facilities and reducing tax disincentives for second income-earners figured repeatedly as well. For three years in a row (CSRs 2012–2014), the EU institutions recommended wage growth in line with productivity developments, notably to support domestic demand. Additionally, in 2013–2015 Germany was advised to consider reform in the field of *employment protection legislation* with a view to facilitating the transition from non-standard employment, especially mini-jobs, to more sustainable forms of employment. Recently, this recommendation was rephrased (CSR 2015), specifying that the ‘fiscal treatment’ of such mini-jobs ought to facilitate the transition to other forms of employment. In 2014 and 2015, concerns were also expressed regarding the sustainability of the German public pension system and the need to increase incentives for later retirement.

2.2 Temporary agency work

Furthermore, recourse to *temporary agency workers* has been a key element of ‘flexibility’ in Germany; for example, the EU Directive has been implemented in a very loose manner (in particular, no definition of ‘temporary’ has been laid down). This has led to conflicting judgments by labour courts in Germany. For example, the 15th labour chamber of the Berlin-Brandenburg employment tribunal ruled on 9 January 2013 that employers who permanently employ agency workers to perform normal tasks in the company will have to offer them a permanent contract, whereas the 7th chamber of the same tribunal handed down a contrary ruling in a similar case in October 2012. The case went to the higher judicial body, the Erfurt Federal Labour Court, where the decision fell in favour of the employer. The ruling handed down on 10 December 2013 argued that lawmakers were at fault for failing to provide sanctions in the Act on Temporary Employment Agencies (*Arbeitnehmerüberlassungsgesetz*) governing instances when the temporary work clause is violated. In March 2011 the Act was amended to fight social dumping and also to transpose into German law the European directive on temporary work (2008/104/EC). As of 1 May 2011, the temporary sector is now subject to a minimum wage (EUR 7.79 in western Germany and EUR 7.01 in eastern Germany). Besides, it is no longer possible to temporarily re-hire a permanent employee within six months of their dismissal. However, according to the opposition, unions and experts, this provision is easy to circumvent. The principle of equal pay between agency workers and standard employees at a company has applied since 2004, but deviations are possible by collective agreement. Given the absence of a compromise within the government coalition on the issue, the 2011 reform did not change this broad opening clause.

On 1 January 2013 legislative measures in the fields of employment policy, labour law, pensions and health insurance came into force. These can be categorised as *anti-crisis measures*.

While pension contributions were lowered from 19.6 to 18.9 per cent (approximately EUR 3.1 billion less for employees and employers), the gradual increase in the retirement age, which started in January 2012, is increasing at a rate of one month per year, bringing the retirement age up to 67 by 2029.

Short-time working has been extended from six months to one year, starting in mid-December and scheduled to last until the end of December 2013.

We shall now provide an overview of the most important labour law changes in recent years, according to subject.

For a considerable time, German unions have been complaining about frequent abuse of temporary agency employment and so-called ‘service contracts’. Enterprises are evidently using such contracts increasingly to outsource individual production steps and even core tasks to external firms to reduce labour costs (for example, because the company’s own staff are covered by a sectoral agreement). In extreme cases, standard employees work side by side with agency and/or independent workers who are employed on lower wages. In particular since the

¹ See the European Commission’s recommendations and consolidated versions for the years 2011–2015 at http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm; for an overview see Clauwaert (2015) at 72–73.

introduction of a minimum wage for temporary workers, the use of service contracts has risen dramatically. Several initiatives have been launched to address these problems through legislation.

On 20 September 2013, Germany's upper chamber of parliament, the *Bundesrat*, introduced legislation to ameliorate current *overuse of service contracts (Werkverträge)*. The bill targets a common employer practice of subcontracting based on so-called 'civil law contracts', which critics have identified as a key element of social dumping. In addition, the Petitions Committee of the German Parliament unanimously referred a petition with the same objective to the Federal Ministry of Labour and Social Affairs on 24 September 2014.

While the *Bundesrat* bill is still pending in the legislative process (Draft law to combat abuse through services contracts and prevent the evasion of labour law obligations of 28 October 2013 BT-Drs. 18/14), the German Minister for Employment and Social Affairs Andrea Nahles (Social Democrats, SPD) presented Parliament with a similar initiative on 16 November 2015. In fact, this initiative represents one of the key projects originating in the current government's coalition programme. This draft seeks to address two issues simultaneously, notably deficiencies in the *regulation of temporary agency employment and service contracts*. It aims to limit recourse to temporary agency work contracts (*Arbeitnehmerüberlassung*) in the same company to a period of 18 months (possible extension, if collectively negotiated). The principle of equal pay can still be dealt with in a collective agreement, but now this option is to be limited to the first nine months of an assignment. At the same time, the law aims to restrict recourse to service contracts by introducing eight criteria aimed at preventing abuse.

However, the employers' federations expressed the view that such changes would lead to an 'administrative monster', as well as acting as a brake on the digitalisation of the economy and accordingly criticised – in particular – the proposal regarding service contracts. Also the German Chancellor expressed concerns about her employment minister's proposal, causing the latter to return to the drawing board. In early February 2016, the Green Party issued a parliamentary motion (18/7370) urging the government to present a (new) draft law on the matter.² On 18 February 2016, Minister Nahles presented a revised version of the draft law to regulate service contracts and temporary contracts simultaneously. This time the Minister attempted to take the edge off the proposal by replacing the list of criteria to prevent abuse through civil law contracts with a more general definition of the employment relationship along the lines of general case law. While the proposed law still aims to introduce more stringent legislative standards for agency work (limiting assignments to 18 months), the revised proposal even increased the room for deviation by collective agreement, including for companies not covered by collective agreements.

Given that the Christian Democratic coalition partner and voices on the employers' side have received the revised proposal more favourably, it is likely that the government will formally adopt the proposal as a legislative initiative in early March.³ The reviewed proposal met with criticism from the trade unions and the Greens, however, who complained that the provisions had been too much watered down. Nonetheless, the leader of the German Metalworkers' Union (*IG Metall*) was optimistic that the social partners could swiftly reach an agreement on the new law.⁴

2.3 Fixed-term working

With regard to *fixed-term contracts*, concerns about their improper use are particularly strong in the German education sector. While the general provisions regulating fixed-term contracts are contained in the Law on part-time work and fixed-term employment relationships (TzBfG), the Temporary Academic Employment Act (*Wissenschaftszeitvertragsgesetz*) regulates temporary employment in the higher education sector. However, young academics in particular face a succession of short-term contracts at universities and uncertainty with regard to early career planning. Over 50 per cent of junior researchers have one year-contracts.⁵ On 2 September 2015, the Federal Cabinet approved a bill to amend the Temporary Academic Employment Act with the aim of improving working conditions in higher education by, in particular, preventing the widespread use of fixed-term contracts of short duration. On 11 November, the German

² <http://www.bundestag.de/presse/hib/201602/-/405650>

³ <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/nahles-entschaerft-gesetz-zu-zeitarbeit-und-werkvertraegen-14078003.html>

⁴ https://www.haufe.de/personal/arbeitsrecht/gesetzentwurf-zu-zeitarbeit-und-werkvertraegen_76_340212.html

⁵ <http://rsw.beck.de/aktuell/meldung/bundesrat-billigt-wissenschaftszeitvertragsgesetz>

Parliament held an expert consultation on the topic. Following the approval of the Bundestag in December 2015, the upper chamber of Parliament adopted the law on 29 January 2016. The new law entered into force in March 2016.⁶ The law's main aim is to create reliable career paths for young researchers, also to attract young academics from abroad, while offering higher education institutions the necessary flexibility in meeting their staffing requirements. In future, the qualification aspired to (for instance, to obtain a doctoral degree) shall determine the length of the contract. Academic assistants who are engaged in permanent university activities must be employed based on the general Act on part-time work and fixed-term employment relationships. The aim is to prevent abuses through successive short-term contracts.

3. Introduction of a national minimum wage

On 3 July 2014, the German Parliament passed the Act to strengthen the autonomy of collective bargaining or the Minimum Wage Act (*Mindestlohngesetz*) for short. The Federal Council approved this milestone in German labour law a month later. For the first time, the *Bundesrepublik* introduced a broad *national minimum wage* pegged at EUR 8.50 per hour. Generally supported by unions and denounced by business, the new legislation guarantees 3.7 million Germans a protected rate of pay. The new minimum pay became effective from 1 January 2015. There are some exceptions, however, primarily for interns, those under the age of 18 and long-term jobseekers (primarily apprentices who are paid little for their training period). The bill also amended the general coverage procedure (*Allgemeinverbindlicherklärung*), which currently regulates the extension of collective agreements to businesses in a sector. The reforms made conditions easier to meet, strengthening collective bargaining and allowing more sectoral collective agreements to come to fruition. An independent minimum wage board of social partners will review the level of the minimum wage every two years and decide whether it requires adjustment. The first review is scheduled for June 2016, to take effect from 1 January 2017. The Minimum Wage Act requires the board to give due consideration to appropriate minimum worker protection, fair and functioning competitive conditions and likely impact on employment.

Unions hailed the changes as a positive step forward but remained critical about applicable exceptions to the general minimum wage.⁷ Still in December 2014, the Federal Government approved two regulations to monitor implementation of the general minimum wage. The following January, however, government representatives stated that further measures regarding record-keeping with regard to minimum pay (for example, recording working hours to ensure the proper application of the Minimum Wage Act) would be stalled pending further results concerning the Act's implementation. On 30 June 2015, the Federal Labour Ministry issued plans to improve the practical implementation of the law. It envisaged clarifications on the principal liability that arises in the context of the new law. It also amended the Minimum Documentation Requirements Regulation (*Mindestlohndokumentationspflichten-Verordnung*) which entered into force on 1 August 2015. The new regulations actually abolish the obligation to keep records in accordance with the Minimum Wage Law, if the monthly gross income paid over a period of twelve months exceeds EUR 2,000 (instead of EUR 2,958). Finally, considering the wage-setting recommendations of the EU, it is noteworthy that the Federal Government issued two regulations in December 2015 according to which minimum pay will rise for roofers and teaching staff in education and training. Nonetheless, evaluations of the law's implementation upon its recent first anniversary were broadly positive.⁸

4. Reform of the legal framework on social dialogue

The legal framework on social dialogue in Germany has recently undergone further changes. On 11 December 2014, the Coalition Government advanced a draft law to reform the *provisions on*

⁶ <https://www.bundesregierung.de/Content/DE/Artikel/2015/09/2015-09-02-wissenschaftszeitvertrags-aenderung.html>

⁷ In February 2015, the Government suspended the application of the Minimum Wage Act on foreign truck drivers in transit operations in Germany due to uncertainties with regard to EU law applicable in that area. Also, the law excludes amateur athletes in football and other sports, who receive a fee for playing, even if they are registered as mini-jobbers.

⁸ 'On the first anniversary of the introduction of Germany's minimum wage, Andrea Nahles, SPD Minister for Social Affairs and Employment, trade unions, and research institutes have arrived at a similar conclusion in so far as they agree that no negative impact on the employment market has yet been felt. The Hans-Böckler union-based foundation goes even further in believing that the introduction of the €8.5 per hour minimum rate has actually been instrumental in kick starting employment.' Planet Labor, 6 January 2016, No. 9439.

collective bargaining. This was instigated by the controversial effects brought about by a decision of the Federal Labour Court in 2010 (Federal Labour Court of 7 July 2010 – 4 AZR 549/08) which abolished the so-called principle of collective bargaining unity (*Tarifeinheit*). Since then, the practicability of multi-union bargaining has increasingly been called into question. In effect, it means that various collective agreements concluded by different trade unions could apply within a single business entity. The public debate on the issue was heated up by the impact (for example, the disruption of transport services) and media attention to individual cases, such as the protracted negotiations between the German railways (*Deutsche Bahn*) and staff unions. The government proposal aimed essentially to re-establish the principle of collective bargaining unity by requiring that only the agreement to which the majority of workers in the undertaking are bound will apply in case of conflicting collective agreements. Meanwhile the CDU/CSU proposed mandatory arbitration before strike action is permitted. On 4 May 2015, the Bundestag consulted with experts on the pending reform. An academic opinion from Professor M. Schlachter concluded that the draft law was in breach of both ILO Conventions no. 87 and 98 and Article 1 of the European Convention of Human Rights. Eventually, the German Parliament enacted the Law on Multi-Union Bargaining (*Tarifeinheitgesetz*) on 22 May 2015, upon the recommendation of the Committee on Employment and Social Affairs (German Parliament document 18/4966). The law took effect on the day following its promulgation.

In this context, it should also be mentioned that two opposition parties, Die Linke and the Greens (BT-Drs. 18/5327, and 18/2750), recently proposed to *strengthen the rights of works councils*. They considered a need to reform the existing legislation especially with a view to strengthening voting rights (in smaller businesses) and dismissal protection. However, the Parliament's Social Committee rejected the proposals on 17 February 2016 due to disagreement among the coalition parties. Further attention ought to be drawn to the fact that there is now a case for a preliminary ruling pending before the Court of Justice of the EU (CJEU) brought by the Regional Appeal Court of Berlin on 16 October 2015. It concerns whether Germany's 1976 Co-Determination Act violated European law in terms of discrimination and the freedom of movement of workers. If the Court found that the Act did violate Union law, the decision may have far-reaching effects severely limiting workers' participation in large companies' supervisory boards, threatening similar national legislation operating in 19 of the 28 EU Member States.⁹

5. Labour market reforms

With a view to broader *measures to stimulate the labour market*, the government presented a draft law to reform the national system of job centres (unemployment agencies) on 3 February 2016. The proposal by Employment Minister Nahles aims at reducing bureaucratic burdens to facilitate in particular the centres' placement efforts for the long-term unemployed. For years, the number of long-term unemployed in Germany has remained unchanged (about almost 1 million). The opposition criticised the fact that the law simultaneously sought to sharpen the criteria for social assistance benefits (Hartz-IV) for the long-term unemployed.¹⁰

Recent *pension legislation* passed by the German parliament (*Bundestag*) is aimed at liberalising mandatory retirement thresholds. The law, which comes into effect on 1 July 2014, will create an ad-hoc model of negotiation between individuals and firms for extensions of employment beyond retirement age. The precedent established may lead to a new individualised approach ('flexible retirement') to pensions that will see an end to universal mandatory retirement. However, in return the mandatory retirement age has been lowered to 63 for those who have contributed towards pensions for 45 years.

There is evidence that the German economy is increasingly relying on short-term contracts and that workers seeking secure employment face substantial difficulties. Even the European Commission, a bastion of support for the 'flexicurity' model, expressed its concerns in its Country Specific Recommendation (CSR) for 2014, calling on the German government to develop policy initiatives to turn labour markets away from over-reliance on atypical employment.

⁹ Rehfeldt, U. (2016) EU: the Court of Justice of the European Union is called on in a case that threatens Germany's system of employee co-determination. Planet Labor, 8 February 2016, No. 9495.

¹⁰ Redaktion beck-aktuell, Verlag C.H. Beck, 3 February 2016.

On 1 January 2015, the new Act on Family Care (*Familienpflegezeitgesetz*, BGBl. I 2462) entered into force. In order to make life easier for workers providing care for seriously ill family members, the new law establishes a two-year family care leave and a paid break of ten days.

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