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Association-Level Agreements and Favourability Principle

– Summary of an empirical and legal study of the application of association-level agreements at the establishment level –

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Foreword

Labour law debates have periods distinguishable according to topic. Association-level agreements have without a doubt been the predominant topic since the mid 1990s. For many of the enterprises dealing with modernisation and cost pressures the association-level agreement seems outdated or at least inappropriately inflexible with its branch and regionally-wide standardised employment conditions and its direct and binding legal obligations. The capability of the association-level agreement which has been proven over decades particularly with respect to conflict avoidance, just distribution, equality in competition and progress in productivity falls easily out of perspective. What remains in the view of a growing number of employers is the impression of being burdened and forced. The company's goal becomes to withdraw at the nearest opportunity, achievable through leaving the employers' association or – quantitatively more influential – by not joining the association. Together with declining union organisation levels, a growing sector outside of the formative influence of collective bargaining autonomy is developing in this way, more so in the newly incorporated than in the former federal states. But erosion is also visible inside the scope of regulatory powers of the association-level agreements. Association-level agreements are occasionally not strictly applied but rather only applied under conditions of the capability of enterprise performance (or company discretion). The principle of favourability in labour law seems to be transforming into its negative version: something unfavourable is all the more favourable than the least unfavourable, namely the constraining or closing of the enterprise. The dispute over the rehabilitation of Germany's second largest construction corporation, Philipp Holzmann AG, which has persisted since November 1999, reveals the lines of conflict of such a situation: collective bargaining autonomy before company autonomy; the enterprise's individual benefit in opposition to the collective good of equal conditions of competition; the almost to 100 percent employee interest in job security over the interest of the parties to collective agreement in an unfaltering association-level agreement for the construction industry (Bundesrahmentarif-vertrag Bau) which has been in effect here.

These and many other prominent disputes symptomatically demonstrate changing conditions in the relationship between association-level agreements as above enterprise-level regulation with functionally required uniformity and temporal stability, on the one side, and rapidly changing market, production and cost conditions at the enterprise level, on the other side. Do broadly based collective agreements still make sense under such conditions?

Despite a strong interest among the media on the topic of association-level agreements little is known about the specific application of such collective agreements at the enterprises. This does not just point to a lack of knowledge in regard to the status of knowledge in the sociology of law and industrial sociology but also points to the need of an evaluation of prospects with respect to legalities and to strategies and goals of collective bargaining. To what extent and in what way can the association-level agreement be opened for individual enterprise concerns without losing its predominant scope of application? How are the parties to collective agreement at the enterprise level dealing with the offer to introduce opening clauses into the collective agreement? What do they do if such offers are not made? What do the parties to collective bargaining do if those parties to collective agreement at the enterprise level do something which according to collective bargaining and works constitution laws they are not allowed to do? What can the parties to collective bargaining do to learn from parties to collective agreement at the establishment level and how should this be done?

The empirical and legal elucidation of this field of application of collective agreements at the establishment level was the aim of the research project "Association-Level Agreements and Favourability Principle" financed by the Hans Boeckler Foundation and carried out at the Centre of European Law and Politics (ZERP) from November 1997 to August 1999. The application of association-level agreements in enterprises in the metalworking industry and the chemical industry was to be subsequently examined led by social scientific and legal questions and methods. Special attention was thereby to be paid to the importance of the principle of favourability in labour rights according to sec. 4 subsection 3, 2nd Alternative Law on Collective Agreements (TVG).

After barely twenty months the final project report "Flächentarifvertrag und Günstigkeitsprinzip" (translated: "Association-Level Agreement and Favourability Principle") appeared this year as Volume 44 of publications of the Hans Boeckler Foundation. The following has been submitted as a ZERP working paper, which is a translation of a working paper published in March 2000 (ZERP-DP 1/2000). It presents a summary of the main results of the final report with the aim of including a larger circle of interested persons in the discussion. The translation was completed by Faith Dasko who we would like to especially thank once more at this point.

Bremen und Halle (Saale), October 17, 2000 Armin Hoeland

I. Introduction

The research project "Association-Level Agreements and Favourability Principle"[1] aimed to examine social and legal issues as well as methods of application of association-level agreements at the establishment level in the metalworking and chemical industries. It was based on an empirical study of the implementation of association-level agreements in 23 establishments of the metalworking industry and 7 establishments in the chemical industry. Guided expert interviews[2] were conducted with representatives of works councils and management of each of these establishments.[3] The data collection was supplemented by 13 interviews with local administrative authorities of the IG Metall (the Metalworkers' Union) as well with a representative of a local employer association of the metalworking industry. All of the expert interviews were carried out between December 1997 and March 1999. In addition, a short postal survey was conducted in autumn of 1998 in which 139 enterprises of the chemical industry participated.

Special attention was paid to the importance of the *principle of favourability* for labour rights as stipulated in sec. 4 subsection 3, 2nd Alternative Law on Collective Agreements (TVG). The relationship of the principle of favourability to an association-level agreement was expected to be problematic. Previous knowledge of labour law court decisions lead to the assumption that a considerable part of the need for flexibilization among enterprises bound to collective bargaining agreements could be satisfied with the principle of favourability.[4] It was suspected that favourability's collision rule ("Kollisionsregel der Günstigkeit"), the aim of which is to make possible the improvement of individual employees' chances, was used by establishments to justify deviations contravening association-level collective agreements – since the strict upholding of the collective agreement would prove to be disfavourable to business. Research results did not confirm this assumption. Besides the fact that the legal principle of favourability is hardly

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1 *Höland / Reim / Brecht*, Flächentarifvertrag und Günstigkeitsprinzip, 2000.

2 For the methods used for the expert interviews, see *Meuser* / *Nagel* in: Garz / Kraimer (ed.), Qualitativ-empirische Sozialforschung, 1991, pp. 441-471.

3 Since works councils did not exist in three of the companies in the chemical industry, discussions were only held with management; in three of the establishments in the metal industry, interviews were solely conducted with the works councils.

4 Compare in particular the case of the enterprise Viessmann, *ArbGer Marburg* 7.8.1996, NZA 1996, pp. 1331 ff.

known at the establishment level or is otherwise misunderstood, deviations from the association-level agreements are generally not implemented by individual agreement in the true sense of the principle of favourability.

The obvious and – in the course of a shift of decision-making to the establishment-level – the growing need for flexible application of collective agreements or laws has been to a larger extent satisfied at the collective level of negotiations through "local" legal practice set by both parties to works agreements, work councils and employers. In this sense legal practices are local, provided that they are undertaken by both works councils and management at the enterprise level according to guidelines stipulated by collective agreement or to selective reference to law. They may be commonly defined or politically implemented. They also do not seldom represent interpretations of terms of collective agreement approved of by local union offices as well as multiple negotiated agreements reflecting the law and interests of all parties involved.

There are thus two sides to the way an establishment, as the agency of flexibilization, influences a collective agreement. The frequency and constitution of deviations from collective agreements legally practised by establishments are decisive with respect to their outcome. This is steered by both parties to collective bargaining through the basic concepts of a collective agreement and its legal norms, especially by the nature and the extent of approval of deviating agreements at the establishment level. The other way around, establishment practice can affect legal rules introduced by both parties: be it through taking on tested models of regulation in the collective agreement; be it through a rather defensive attempt to hinder by means of collective agreement establishment practice of violating association-level agreements. Future collective agreement development should aim to more precisely conjoin the association-level collective agreement and that which is legally practised at the establishment level through legally-grounded rules of communication and evaluation.This brief review of the main research results taken from the project’s final report are followed by a summary of the most important findings. The summary closes with considerations addressing legal and research issues concerning the further development of association-level agreements.

II. The Principle of Favourability

In the literature in the 1990s on labour laws the principle of favourability plays a considerable role – not for the last time revived by collective agreement in the metalworking industry in 1984 reducing individual weekly working time.[5] A significant aspect of the controversy is the method of comparing favourability. Pursuant to the BAG's (Federal Labour Court) ruling, the comparison of regulations must be based on objective criteria ("group comparison" or: "Sachgruppenvergleich").[6] The criterion applied in the comparison is the individual interest of the employee concerned, using however an objective-hypothetical approach from a comparative perspective.[7]

Different as well as overlapping views in recent literature have been contrasted with this concept of a favourability comparison. This concerns firstly the issue of the right to choose. The Grand Senate of the BAG (*Großer Senat des BAG)* held in regard to an age limit regulation that it would be more favourable for the employee to be able to choose between continuation of employment and retirement.[8] This decision has been generalised beyond the area of limitation of working life to all areas of regulation by some authors. Consequently it should therefore be more favourable for the employee to be able to choose whether she/he would like to work in addition to the weekly working hours as determined by collective agreement[9] or also on Saturday.[10]

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5 The debate began with a paper by *Adomeit*, NJW 1984, p. 26 ff.; compare: *Bengelsdorf*, ZfA 1990, pp. 563 ff.; *Bergner*, Die Zulässigkeit kollektivvertraglicher Arbeitszeitregelungen und ihr Verhältnis zu abweichenden individualvertraglichen Vereinbarungen im Lichte des Günstigkeitsprinzips, 1995; *Blomeyer*, NZA 1996, pp. 337 ff.; *Buchner*, DB 1990, pp. 1715 ff; *Frik*, NZA 1998, p. 525; *W. Gitter*, in: FS Wlotzke, 1996, pp. 297 ff.; *Heinze*, NZA 1991, pp. 329 ff.; *Höland*, Lexikon des Rechts, Stand 1998, "Günstigkeitsprinzip"; *Junker*, ZfA 1996, pp. 383 ff.; *Käppler,* NZA 1991, pp. 746 ff.; *Krauss*, Günstigkeitsprinzip und Autonomiebestreben am Beispiel der Arbeitszeit, 1995; *Krummel*, Die Geschichte des Unabdingbarkeitsgrundsatzes und des Günstigkeitsprinzips im Tarifvertragsrecht, 1991; *Lesch*, DB 2000, pp. 322, 324 f.; *Löwisch*, in: FS für Rittner, 1991, pp. 381 ff.; *ibid.*, BB 1991, pp. 59 ff.; *Richardi*, DB 2000, p. 42, 47; *Schmidt*, Das Günstigkeitsprinzip im Tarifvertrags- und Betriebsverfassungsrecht, 1994; *Schweibert*, Die Verkürzung der Wochenarbeitszeit durch Tarifvertrag, 1994.

6 *BAG* 20.4.1999, DB 1999, p. 1555, 1559; *BAG* 23.5.1984, BAGE 46, 50, 58.

7 See *Höland*, Lexikon des Rechts, Stand 1998, "Günstigkeitsprinzip".

8 *BAG Großer Senat* 7.11.1989, AP item 46 on § 77 BetrVG 1972 under C II 3 b.

9 According to *Bengelsdorf*, ZfA 1990, p. 563, 598.

10 See *Buchner*, DB 1990, p. 1715, 1720.

The efforts to consider a subjective-real view in the comparative perspective go a step further. According to this view, the concrete evaluation of each employee should only matter to determine which of two competing regulations is to be assessed as favourable.[11]

The third more extreme form is finally the assessment of favourability in connection with exchanging poorer conditions for job security. For example, according to this view, in the case of an economic crisis of an enterprise it is assumed to be more favourable for an employee to receive less wages provided that this deviation from the collective agreement is met with the assurance that jobs will be secured.[12] The argument here is as follows: to earn less is better than no job at all.

Such new interpretations of the principle of favourability should be rejected. Particularly the exchange of poorer conditions for job security shows that in view of enduring high unemployment and steeper costs and intensified competition for local business investment the principle of favourability can easily be turned into a systemic principle of fear of "better less than nothing at all". The mass unemployment of the 1920s had the same effect. The labour rights activists of this period started a similar discussion on the scope of the principle of favourability,[13] which has time after another been more intensively lead since 1990. Even in a more moderate application of the objective-hypothetical view lies the danger that the protection of the individual employee provided by the collective agreement can no longer be guaranteed. Precisely in face of the fear of job loss not only employees but also in part the work councils lack the purported freedom of choice. With the favourability argument the door might be held open to a reduction or dismantling of collective bargaining rights. The principle of favourability – which is solely to enforce effective protective labour laws to the benefit of the employee[14] – could in this way turn to work to the contrary.

Additionally an alteration of the comparison of favourability would endanger collective bargaining autonomy. It can be shown in empirical cases that an increasing subjective orientation in the comparison of favourability – be it

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11 *Blomeyer*, NZA 1996, p. 337, 344; *Gitter* in FS. Wlotzke, pp. 297, 299 f.

12 As in the call by the Confederation of German Employers Associations *(Bundesvereinigung der Deutschen Arbeitgeberverbände)* for a corresponding legal appendage to the principle of favourability, BDA Geschäftsbericht 1999, p. 43.

13 See the critical consideration of this discussion from *Nipperdey*, Beiträge zum Tarifrecht, 1924, p. 8 ff.

14 Collective agreements cannot contain highest working conditions, see Wiedemann / *Wank*, Tarifvertragsgesetz, 6th ed. 1999, § 4 nr. 382 ff.

through the introduction of the right to choose, the application of a subjective-real view or the recognition of an exchange of conditions – can lead to a dismantling of basic concepts underlying collective bargaining. Should the parties to collective agreement intend, for instance, to limit overtime exceeding maximum working hours in that they be compensated for generally with free time in lieu, this collective bargaining goal could be thus thwarted by allowing for the right to choose between free time in lieu and remuneration of overtime at the establishment level.[15] Facilitating deviations from basic concepts at the establishment level would thus undermine the parties' to collective bargaining prerogative of setting norms.

The specific consequences of the intensely discussed new understanding of "favourability" in the juridical literature are difficult to trace in reality at an establishment. In this respect, there existed from the beginning of the project an unexpected divergence between the juristic discussion, on the one side, and its impact at the establishment level, on the other. Irregardless of whether the concept of the principle of favourability is not well known or needs to be elaborated at establishments, a careful balance of usefulness for employees, collective bargaining and the enterprise plays a considerable role. This is not, however, done following an explicit understanding of the principle of favourability and often also does not succeed in reaching the height of concretion of sec. 4 subsection 3, 2nd alternative TVG. The "principle of favourability" thus remains in general limited to the background of enterprise decision-making in the form of a resounding imperative of economic consideration of the business' well being. The direct reference by both parties to works agreements to an altered understanding of favourability to justify regulations deviating from the collective agreement has shown itself in the firms investigated in connection with the research project nonetheless to be an absolute exception.

Once informed of the principle of favourability a different awareness at the establishments is brought to light: one of improving works agreements. This not seldom practice is problematic from the point of view of collective bargaining law, since it ends up contradicting the Federal Labour Court's decision on the protection of collective bargaining autonomy also in face of more favourable collective bargaining regulations.[16] It reflects nonetheless the

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15 Concerning this see the detailed described case of the chemical establishment C4 in the report of the project; *Höland / Reim / Brecht*, Flächentarifvertrag und Günstigkeitsprinzip, 2000, pp. 98 ff.

16 Continual court rulings, see also, *BAG* 24.1.1996, BAGE 82, p. 89 (Leitsatz 1); *BAG* 18.8.1987, AP *item* 23 on § 77 BetrVG 1972 under B II 2; as also the prevailing opinion, *Rieble*, RdA 1996, p. 151, 153; Wiedemann / *Wank*, § 4 nr. 556 ff. with

increasing importance of the "enterprise" as areas of decision-making and jurisdiction and is therefore a feature of the growth of objective pragmatism at the establishment. In this sense more favourable establishment-level agreements are partially leftover from better economic times; in part they reflect an "increased orientation towards establishment-level interests" led by the strengthened "bargaining situation" of works councils.

III. Conditions for Application of Collective Agreement at the Establishment Level

The association-level agreement has cartel-like consequences in the area to which it applies for employers bound to the collective agreement.[17] A cartel is a form of economic associative relationship, in which participation for rational actors of enterprises is and remains useful as long as the total benefit exceeds the losses in potential individual gains resulting from cartel obligations. Since the beginning, inherent to this cartel-like form of associative relationship has been a relationship of tension between employers granted equal standing through membership, as the associated cartel-like structure (and thus a limited shutdown of internal branch competition), and establishment-level decision-making which has to answer to market and business conditions. Much points to signs that this normal relationship of tension has increased in the last years in West but even more so in East Germany.[18] Some of the possible reasons for this can, among others, be an increased individuality of businesses due to different market and cost data, to production and organisation methods, to a different and difficult foreseeable flow of incoming orders, to differentiated conditions of competition in each area of supply, to an increased pressure to

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further references; contrary opinion: *Blomeyer* NZA 1996, pp. 337, 344 ff., *Ehmann / Schmidt*, NZA 1995, p. 193, 197, *Schmidt*, Das Günstigkeitsprinzip im Tarifvertrags- und Betriebsverfassungsrecht, 1994, pp. 56 ff.

17 Wiedemann / *Wiedemann*, Einleitung nr. 34; with good reason critical of the term "cartel" *Söllner*, ArbRGgwart 35 (1997), pp. 21 ff.; *Söllner* does not deny the limited competition which results from collective agreements, rejects, however, setting a cartel equal to collective agreements..

18 See the empirical study of *Oppolzer / Zachert*, Krise und Zukunft des Flächentarifvertrages, 2000, p. 219. For a description of the situation of collective bargaining in East Germany, see in particular the study by *Artus / Schmidt / Sterkel*, Brüchige Tarifrealität: Tarifgestaltungspraxis in ostdeutschen Betrieben der Metall-, Bau- und Chemieindustrie, Jena 1998.

meet deadlines as well as to technically and economically required prolonging of operating hours.

1. Adaption Instead of Strict Application of Norms

The implementation of collective agreements at the establishment level does not occur by application of norms. Collective agreements open up much rather for the legally empowered actors at the establishment level, i.e. for employers and work councils, company works councils and group works councils, a process of law application which may entail word-for-word and numerically precise application as well as that which is normatively influenced and normatively qualified. Works councils assume in the practice of the application of law at the establishment level an "adaption function"[19] when interpreting collective agreement guidelines. The conditions and benchmark data of this process of application of law are – be it mainly but not exclusively – determined at the establishment.

2. Local Legal Practice at Establishments – Flexibility Through Buffering Methods

The intensified tense relation between benefits to be gained for collective bargaining with those for the individual establishment is being pulled "down" to the establishment level by the parties to collective agreement to solve every-day problems. The application of association-level agreements has practically become decentralised, irrespective of whether the parties have taken the due and proper legal steps to open collective agreements to such practices. This development is expressed in the several *buffering methods* of application of law. Such buffering methods encompass works agreements which are permitted as well as not permitted by collective agreement; other contractual understandings between the parties to works agreements to manage problems involved in the application of law ("operations agreements", semi-formal works agreements); the toleration of practices which are not in accordance with the collective agreement; or occasional politically implemented poorer terms of employment, pointing to the even less advantageous alternatives.

Many establishments are thus already burdened with the actual or presumed necessity to come to an agreement on the obliging data and norms for the

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19 *Schmidt* / *Trinczek* in: Müller-Jentsch (ed.), Konfliktpartnerschaft, 3rd ed. 1999, p. 103, 107.

"area" covered by the collective agreement with point for point provisions for establishments (taking account of specific business operations, conditions varying according to orders, deadline and competition, staff preferences, employer's power). The *buffering methods* applied go considerably beyond the often observed informal conventions in the relationship between the employer and works council. In a common process of coming to an understanding between works council and employer including the union, a legal practice ensues which has been by way of the establishment adapted to the terms of the collective agreement. It anticipates the development of forms of controlled opening of the collective agreement or the reform of regulations in collective agreements through the parties to those collective agreements.

In consideration of systemic necessities for an association-level agreement, the "untamed" decentralisation should be hindered by agreements by parties to collective agreement which are set within exemplary, in any case *procedural* rules and therewith at the same time limitations to supplementary or varying agreements at the establishment level. Among the numerous thinkable ways of designing such a procedural framework, preferably are again those which facilitate the transfer of information and learning processes.

3. Diversity and Forms of Agreement

Legal categories and establishment reality are often not brought to coincide with one another in the sphere of forms of works agreements. In a more detailed analysis of the legal dimension, the diversity of forms of agreements and terms can be attributed to the two basic forms of a normatively effective agreement with a third reference (works agreement) and of an informal agreement between the works council and employer without normative effect for the employees (semi-formal works agreement). Most of the not directly mandatory agreements between both parties can be classified into the group of semi-formal works agreements. The limits between both legal institutions are much less unambiguous than would be theoretically expected. Research shows that in practice establishments often do not distinguish between the sec. 77 IV subsection 4 Works Council Constitution Act (BetrVG) directly mandatory works agreement and the obligatory semi-formal works agreement. The description of the semi-formal works agreement as being distinguished by a missing formal structure,[20] referred to among others in the commentary literature, is not appropriate. Also many semi-formal works agreements are

20 *Fitting / Kaiser / Heither / Engels*, Betriebsverfassungsgesetz, 19th ed. 1998, § 77 nr. 184; Münchener Handbuch zum Arbeitsrecht / *Matthes*, 1993, § 319 nr. 90.

documented and signed by both parties after having made the decision collectively; at the surface they do not differ from works agreements. For both parties at the establishment-level, this is in part dependent on different distinguishing features. The semi-formal works agreement ("Regelungsabrede") is "not so binding", "not so precisely defined", "not so public", "not valid as long" or at times also a form of agreement with which "a fiery issue" can and yet cannot be touched. The advantages lie, seen from the point of experience, in the short period it is in effect or also in its more simple "elimination"; in addition, it does not have to be presented or submitted to anyone. Determining the legal character of such agreements in labour court proceedings provides for security at the earliest *ex post*. Beside the form, it depends on the content and intention of regulation of both parties to works agreements. In each case, it must be assessed whether the agreement commonly adopted, written and signed by the works council and employer *can* and *should* be made directly and obligatorily effective.

4. The Acceptance of a Deviation as a Form of Application of Law

An imperative for business operations or forced flexibility is also partly achieved through the forgoing of the adherence to norms by the works council. This may be simply conceded or connected with a negotiated benefit in return. The frequent, according to kind and scope, varying decision to sacrifice strict observation of a rule may be created into a negotiating position on the part of the works council which can be used on the market of exchange of resources at the establishment level. The use of limited waiving of a rule can succeed from the perspective of the works council only against the background of other legally binding normative provisions of collective agreements.

5. Rights as a Resource

Establishments are not spaces void of law. Although formal disputes between works councils and employers are rare, this should not mislead one to conclude that law and therewith the legal rights of the association-level agreement, as well, do not play a role in interaction at the establishment. To the contrary, works councils can often only forgo the mobilisation of legal rights in due form *because* they have the association-level agreement as a source of legal order and thus as a means of rejecting illegal attempts and, if needed, as a means of legal recourse. In their reports on experiences many works councils stress exactly this function of the association-level agreement as a resource in power relationships and negotiating positions at the

establishment. A collective bargaining agreement is thus not only a legal document but also a means which can be utilised at the discretion of the works council to force the observation of their interests and understanding of their rights by the employer.

IV. Application of Normative Provisions Through Interaction at the Establishment

Against the background of a "political culture" which is expressed in different patterns of interaction by the employers and works councils specific to each establishment,[21] works rights are created in the form of works agreements and semi-formal works agreements in a complex process characterised by interactions within and outside of the establishment.

The study shows that with the extension of the (collectively bargained or "untamed") areas of regulation above all in establishments with co-operative patterns of interaction, decisions within the domain of co-determination are made more strongly in consideration of the establishment as project capable of competing in the market than of the basic conflict of interests in the relationship of exchange between employer and employee. In the context of this development, problem situations at the establishment are increasingly pragmatically solved; in addition to other ways, they are also solved by both parties at the establishment agreeing to regulations which deviate from the collective agreement stipulations or by works councils tolerating employer practices which do not conform to the collective agreement. This way the association-level agreement is subjected to the pressure of a strong opportunistic evaluation of its specific application by *both* parties.

As actors at the cross section between collective bargaining and works rights, the next division of the union closest to the establishment level (local union offices: "Verwaltungsstellen") and the works councils are of special importance in the course of implementation of the normative provisions of the collective agreement at the establishment. Scale and nature of the communication and decision-making process between them are also decisive

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21 Patterns of interaction between the employers and works councils are especially typologised by *Bosch / Ellguth / Schmidt / Trinczek*, Betriebliches Interessenhandeln, 1999; *Kotthoff*, Betriebsräte und Bürgerstatus, 1994; *Müller-Jentsch / Seitz*, Industrielle Beziehungen 4/1998, pp. 361, 382 ff.; *Trinczek / Schmidt* in: Aichholzer / Schienstock (ed.), Arbeitsbeziehungen im technischen Wandel, 1989, pp. 135, 140 ff.

for the extent to which normative provisions will be observed by works regulations. In the process of these interactions, due to their multiple involvements in the negotiating of works agreements and other settlements regarding the relationship of the rights at the establishment to collective bargaining rights, the local union offices assume a supervisory as well as an adaption function. The in no way rigorous manner in which the union deals with regulations which deviate from collective agreements show that a currently in practice far-reaching, considerate adaption of collective bargaining demands to the economic concerns of the establishment can work. An optimal harmonisation of works rights and collective bargaining rights can however only be assured by involving the union in processes of establishment reorganisation and setting of legal provisions.

Despite the tight overlapping of personnel with the union and their involvement in the setting of legal provisions at the establishment, works councils maintain a high degree of independence in the determining of the content of semi-formal works regulations. In case that provisions stipulated by collective agreements cannot be brought to coincide with that which they have assumed to be specifically required for the establishment, they give priority to establishment concerns in regard to the setting of legal provisions at the establishment – not seldom with well-informed local union offices. Owing to their proximity to the establishment the local union offices are important agencies of information on application of collective bargaining agreements for the union's regional directorates ("Bezirksleitungen"), which are responsible for the negotiations. For the regional directorate a pre-settlement by the local union representative provides the assurance that the derogating settlement is necessary and acceptable. A further opening of the collective agreement to works agreements – be it through the transfer of prerogatives to works councils and employers to regulate or through the extension of the possibility to conclude separate collective settlements specific to establishment needs – will reinforce the necessity of communication between works councils and local union offices to observe collective bargaining rights.

As a whole, it can be said that the conventional triad of co-determination at the establishment – employer, works council, union – has in its works council-and-union axis been weakened. At the same time the giving up of prerogatives to both parties to works agreements has strengthened the partnership at the workplace. This development does not stand in contradiction to a continuous intensive consultation between works councils and the union which offers security in questions of rights and collective bargaining to works councils as the regulations at establishments are approaching the popular "grey areas" in practice. Then, even with intensive consultation, works councils often reserve the decision for themselves concerning the application of a regulation which

has received union approval. Irregardless of all verbal protests, when in doubt works councils will decide pragmatically ("sachbezogen pragmatisch")[22] in the relationship of tension between loyalty to collective bargaining and interests of the establishment. In face of this establishment-related pragmatism the effectiveness of the normative provisions laid down in the collective agreement have become weakened.

V. Precedential Effect of Establishment Rule Making on Normative Provisions of Collective Agreements

According to the absolutely dominant opinion the relationship of collective agreements to works agreements is shaped by the primacy of collective bargaining autonomy.[23] It is in fact, however, not seldom establishment practice which influences the formation of collective agreements.

1. Empirical Findings

It can be shown that there is a mutual relationship between normative provisions laid down at the establishment and those by collective agreement. The influence regulations created at the establishment level have on normative provisions of collective agreements can be effected by qualitative as well as quantitative developments.

For one, establishment practice can be recognised as reasonable by the parties to collective bargaining and because of its beneficial qualities be integrated into the collective agreement. Establishments thus not only serve as a source of ideas but also as a manageable field of experimentation. In this way regulations which are not functional can be recognised early on and problematic details can be corrected. In order to facilitate an optimal learning process, close involvement of the parties to collective bargaining in test phases is important. The supplemental collective agreement[24] can be used as a legal

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22 *Bosch*, Vom Interessenkonflikt zur Kultur der Rationalität, 1997, p. 151.

23 *Fitting / Kaiser / Heither / Engels*, § 77 nr. 61 with further references; contrary opinion: *Ehmann* / *Lambrich*, NZA 1996, p. 346.

24 On the legal permissibility of supplemental collective agreements (betriebliche Ergänzungstarifverträge), see *Wendeling-Schröder*, NZA 1998, pp. 624 ff.; *Zachert*, ZTR 1998, p. 97, 99. Supplemental collective agreements cannot only be designed as company agreements (also known as "Haustarifvertrag" or "Werktarifvertrag"

means of regulating in such instances.

If deviations from collective agreements are practised in numerous establishments, pressure on the association-level agreement is hereby generated by these numbers to take these modifications into account. It is not important whether the establishment practice is stipulated in a works agreement or as a part of a semi-formal works agreement. Much rather, decisive is the recognition of the establishment practice by other establishments and by the parties to collective bargaining. Due to processes of communication which cannot be controlled an attempted secrecy of establishment regulations may also unreliably hinder the pressure to adapt. This is especially true for large-scale regulations, for long-term practices as well as for large establishments. It is precisely large establishments that play an influential role in collective bargaining rights because of their public recognition, since they are well-represented in collective bargaining committees and since they have a large capacity to develop their own regulation models for changes in establishment practice.

During negotiations at the establishment level as at the collective bargaining level, deviations from the collective agreement can be used in order to make demands for a similar regulation. The more common such deviations are practised, the better the chance this demand has to be agreed on. The more establishments which thus deviate from the collective agreement, the stronger the pressure to agree to such alterations the parties to collective bargaining are subject to. In order not to relinquish the power of the legal standing of the association-level agreement in this area, it is necessary in such a case to legalise the deviating establishment practice through the establishing of corresponding normative provisions in the collective agreement. To succumb in such a way to pressure to adapt coming from the establishments by further opening up the collective agreement can further the dynamics of this process and thus in the end lead to a loss in the normative function of the collective agreements.[25] If a deviation from the collective agreement is practised on a large scale, the path to return to the legal function is therefore only accessed with difficulty. This phenomenon shall be characterised as a precedential effect of deviating works agreements on collective agreements.

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collective agreements between individual employers and the union), but also as establishment-specific bargaining agreements ("firmenbezogene Verbandstarifverträge"); for an example, see *LAG Baden-Württemberg* 9.11.1998, 15 Sa 86/98, unpublished.

25 For more detail on the normative function of collective agreements, see Wiedemann / *Wiedemann*, Einleitung nr. 13 ff. with further references; critical: *Reuter*, ZfA 1995, pp. 1, 37 ff.; *Rieble*, Arbeitsmarkt und Wettbewerb, 1996, nr. 1307.

2. *Legal Conclusions*

Within the scope of protection of the autonomy in collective bargaining laid down in art. 9 para. 3 Basic Law (GG) there also lies the competence of the coalitions to collectively negotiate regulations.[26] As part of the basic legal protection the collective bargaining parties' prerogative to set normative provisions precedes any provisions set by parties to works agreements.[27] The precedential effect of practices contravening collective agreements at the establishment level presents an infringement of this bargaining privilege held by the parties to collective agreement. From a legal standpoint there are several conclusions which may be drawn here – in particular with regard to the interpretation of the collective agreement proviso ("Tarifvorbehalt") as in sec. 77 subsection 3 BetrVG:

For one, this refers to the adequacy of an analogous application of sec. 77 subsection 3 BetrVG to semi-formal works agreements. In legal studies, it is highly controversial whether the temporary suspension of the collective agreement proviso only refers to the works agreements[28] or also to the semi-formal works agreements.[29] The protection foreseen by sec. 77 subsection 3 BetrVG of collective bargaining autonomy is endangered by deviating regulations at the establishment level in that they generate a precedential effect. Such an effect emerges, however, consequent to semi-formal in the same way as to formal works agreements.[30] An analogous application of sec. 77 subsection 3 BetrVG to semi-formal agreements thus seems appropriate.

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26 Continual court rulings (*BVerfG)* since the decision of 18.11.1954, BVerfGE 4, p. 96, 106.

27 *Säcker* / *Oetker*, Grundlagen und Grenzen der Tarifautonomie, 1992, p. 99; Wiedemann / *Wank*, § 4 nr. 555.

28 For those speaking out against the temporary suspension of the semi-formal works agreement: *Fischer*, Die tarifwidrigen Betriebsvereinbarungen, 1998, pp. 217 f.; *Fitting / Kaiser / Heither / Engels*, § 77 nr. 90; Betriebsverfassungsgesetz - Gemeinschaftskommentar / *Kreutz*, 6th ed. 1998, § 77 nr. 114; *Waltermann*, Rechtsetzung durch Betriebsvereinbarung zwischen Privatautonomie und Tarifautonomie, 1996, pp. 269 f.; Wiedemann / *Wank*, § 4 nr. 560; recently also the *BAG* 20.4.1999, DB 1999, p. 1555, 1557.

29 According to D/K/K-*Berg*, Betriebsverfassungsgesetz, 6th ed. 1998, § 77 nr. 78; *Hanau* RdA 1973, p. 281, 285; Münchener Handbuch zum Arbeitsrecht / *Matthes*, § 318 nr. 71; *Richardi*, Betriebsverfassungsgesetz, 7th ed. 1998, § 77 nr. 278; *Zachert*, RdA 1996, p. 141, 145.

30 That is ultimately the reason why the BAG gave the unions the right to take action for injunction against the semi-formal works agreements violating collective agreements. See *BAG* 20.4.1999, DB 1999, p. 1555, 1558.

Moreover, based on the empirical results, an assessment of the scope of application of the principle of favourability can be made in the relation of the collective bargaining agreement to the works agreement. In the prevailing opinion the collective agreement proviso according to sec. 77 subsection 3 BetrVG also suspends works agreements which allow for more favourable terms for employees.[31] This is doubted in particular by *Thomas B. Schmidt*, since evidence of endangerment to collective bargaining autonomy due to more favourable works agreements has not in the least been provided.[32] In view of the precedential effect which has been shown to exist this must be challenged. In principle, a pressure on the parties to collective bargaining to adapt collective agreements may not only ensue as a result of unfavourable but also of more advantageous works regulations. The endangerment of collective bargaining autonomy will, however, become relevant in practice if alignment pressures "from the bottom up" coincide with favourable economic conditions. At times of mass unemployment the idea of a competitive situation resulting in benefits in excess of those foreseen in the collective agreement therefore seems anachronistic. An endangerment of collective bargaining autonomy through agreements at the establishment level favouring the employee can thus be theoretically deduced. In establishment practice, under the given economic conditions, this seems, however, not to exist. Only when such establishment regulations are considered more favourable due to a changed basis for comparison of favourability do they become precarious. They open a door of opportunity for value-laden decisions with which basic normative provisions of collective agreements can be suspended.[33] In any case the scope of sec. 77 subsection 3 BetrVG can therefore be extended to agreements favouring the employee if these can lead to a dismantling of normative concepts underpinning collective bargaining agreements.

As always the relation of the collective agreement proviso according to sec. 77 subsection 3 BetrVG and the precedence of collective agreements ("Tarifvorrang", sec. 87 subsection 1 BetrVG) continues to be controversial. A large portion of the literature follows the so-called "double-restraint theory" ("Zwei-Schranken-Theorie")[34], according to which both regulations are

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31 Wiedemann / *Wank*, § 4 nr. 556 with further references.

32 *Schmidt*, Das Günstigkeitsprinzip im Tarifvertrags- und Betriebsverfassungsrecht, 1994, pp. 113 f.

33 On this matter, see above in section II.

34 See especially *Fitting / Kaiser / Heither / Engels,* § 77 nr. 98; GK-BetrVG / *Wiese*, § 87 nr. 47; *Glaubitz* in Hess / Schlochauer / Glaubitz, Betriebsverfassungsgesetz, 5t^{h} ed. 1997, § 87 nr. 62; *Hromadka,* DB 1987, p. 1991, 1992; *Stege / Weinspach*, Betriebsverfassungsgesetz, 7th ed. 1994, § 87 nr. 35 ff.; *Waltermann,* Rechtsetzung durch

applicable side by side. In contrast the *Federal Labour Court* bases its court decision on the "precedence theory" ("Vorrangtheorie")[35] for which in sec. 87 subsection 1 BetrVG the more specific norm is stipulated. The decisive difference between both regulations is that according to sec. 87 subsection 1 BetrVG an establishment regulation may not oppose a *definitive* normative collective agreement provision, while according to sec. 77 subsection 3 BetrVG works agreements are suspended by matters which are already *usually* regulated by collective agreement. Since a precedential effect influencing collective agreements may follow from establishment regulations in establishments not bound to collective agreements, this is an argument in favor of applying the double-restriction theory in protection of collective bargaining autonomy. However, the Federal Labour Court explicitly recognized this precedential effect in its landmark decision of February 24, 1987.[36] The court decided in favour of the precedent theory, since the infringement upon collective bargaining autonomy was put in opposition to the necessary employee protection in establishments not bound to collective agreements.[37] This line of argumentation has not become doubtful in the light of empirical findings. Therefore despite the detriment to collective bargaining autonomy the application of the precedent theory is justifiable due to the needed protection of the employee in establishments not bound to collective agreements.

Finally as a result of the precedential effect of works regulations contravening collective agreements it is necessary for the parties to collective bargaining to be able to take action against such violations of collective bargaining autonomy with the appropriate procedural legal means.[38]

Betriebsvereinbarung zwischen Privatautonomie und Tarifautonomie, 1996, pp. 285 ff.; *Wank,* RdA 1991, pp. 129 ff.

35 *BAG* 24.2.1987 AP *item* 21 on § 77 BetrVG 1972; *BAG Großer Senat* 3.12.1991 BB 1992, pp. 1418, 1423 ff. The precedence theory is based on *Säcker,* ZfA 1972 Sonderheft, p. 41, 63 ff. Further advocates are e.g. D/K/K-*Berg* § 77 Rnr. 66; *Ehmann / Schmidt*, NZA 1995, p. 193, 197*; Kempen / Zachert*, Tarifvertragsgesetz, 3rd ed. 1997, Grundlagen nr. 279; Münchener Handbuch zum Arbeitsrecht / *Matthes* § 318 nr. 68 f.

36 *BAG* 24.2.1987, AP *item* 21 on § 77 BetrVG 1972 under B II 4 b ee.

37 *BAG* 24.2.1987, AP *item* 21 on § 77 BetrVG 1972 under B II 4 b bb and dd.

38 See below in section VI 3.

VI. Resolving Conflicts Related to Collective Bargaining

A special aim of the empirical investigation was the settling of establishment disputes out of court (particularly through seeking out the establishment level arbitration committee or the committee of joint dispute resolution of collective bargaining) as well as by way of court proceedings. Irregardless of the low frequency of resolving conflict in such ways, the possibility of collectively mobilising claims to rights has a control function which is not to be underestimated.

1. Using Rights in a Conflict Situation at the Establishment Level

Court or extra-judicial proceedings in the settlement of collective bargaining disputes at the establishment level are only used in exceptional cases. This contradicts *Michael Hartmann* who suggested that an increasing substantive specification of law derived from labour court decisions and on the whole a long-term development towards the materialisation of central parts of collective labour rights would follow the so-called "Leber Compromise" of the 1984 framework agreement on employment conditions in the metalworking industry.[39] Without a doubt the system of labour courts has jurisdiction for hearing disputes in the two-dimensional relationships of collective labour law between the parties to collective bargaining and the parties to works agreements as well as between the parties to works agreements which serves again and again to resolve joint disputes and to provide for orientation in matters of disputes. A substantial augmentation of incidences is, however, not evident – provided that one disregards the years following 1984 which were in particular need of clarification.

The reasons for this are easily recognisable going by the research findings. Unions refrain as a rule from clarifying matters in labour courts in consideration of their allied works councils if they are formally (in hardship cases, in supplemental collective agreements at the establishment level) or informally (through the works council as a trustworthy institution at the establishment) involved in a deviating application of the association-level agreement at the establishment. Even if the unions are not involved, the consideration of opportunities with respect to various legal, economic and union policy aspects and doubts would often speak against formally taking legal action. Between the parties to works agreements the diversity of

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39 *Hartmann*, Zeitschrift für Soziologie 16, 1987, p. 16, 17.

adaptation and avoidance techniques in everyday interaction at the establishment (arrangements, tolerance, concession bargaining, "looking away" and the like) normally leads to the refraining from disputing rights. In addition, there is also a generally observable aversion of those involved in long-term social relations against a mobilisation of law in a legal dispute. The mobilisation of legal rights entails the involvement of external actors (be it the chair of the establishment level arbitration committee, the committee of joint dispute resolution of collective bargaining, legal attorneys, union lawyers or Federal Labour Court judges) in the dispute. This always means a moment of failure concerning one's own capability to negotiate or to make a decision. On the contrary, solutions are preferred which are based on negotiations or also occasionally on power relations *among* the parties to works agreements. This obviously does not exclude the procedures involving establishment level arbitration committees or committees of joint dispute resolution or involved in labour court cases; it is then however an exception in relation to the frequency of incidences of dispute. This exceptional case can for itself, once it has been tried, become imprinted in the collective memory of the parties to works agreements and serve for a long time as a case of reference.

2. Procedures for Dispute Settlement at the Establishment Level

The effectiveness of establishment mechanisms to resolve disputes cannot be inferred from the frequency of their usage. It is not through the implementation of such procedures but rather through the threat that the establishment-level arbitration committees or committees of collective bargaining joint dispute resolution are regularly capable of being influential. The parties to works agreements are thus under pressure to settle the dispute which then makes the use of these procedures superfluous. Similarly it is the relatively rare use of such dispute resolution which is indicative of how well these institutions function. The committees of collective bargaining joint dispute resolution have particular advantages compared to the arbitration committees foreseen by law: one of which is that the former directly involve the parties to collective bargaining. In this way the collective bargaining actors obtain a direct view into establishment practice, which they in turn may choose to shape in accordance with the further development of collective bargaining. The committee for collective bargaining joint dispute resolution can to an extent also function in the sense of a learning feedback loop between the collective bargaining and the establishment level.

This positive assessment of the committee for collective bargaining joint dispute resolution speaks for the extending of its scope of responsibility. To the extent that this, however, leads to an extension of an enforceable right to

co-determination of the works council, the legality of the respective collective bargaining regulations is controversial.[40] The doubt expressed against an extension of co-determination rights is, however, not understandable.[41] For one, secs 1 subsection 1, 3 subsection 2 TVG explicitly grants the parties to collective bargaining the right to determine the normative provisions of the company constitution, which was well-known at the time of the passing of the Works Constitution Act of 1972.[42] Secondly, in view of the comprehensive scope of authority to regulate of the parties to works agreements,[43] a broadening of co-determination rights does not infringe upon the negative freedom of association. The protection against invasion of employee rights by the works agreement provided in this connection is in no way undermined, since employees are guarded against inadmissible works agreements through court verification of lawfulness and equity.[44] Finally an extension of co-determination rights through collective bargaining in view of the strong shift of decision-making to the establishment level seems to be exactly called for: to the extent that the parties to collective bargaining abstain from exercising their powers of regulation in collective agreements in the interest of the parties to works agreements, this would present a shift in potential conflicts to the

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40 Affirming: *BAG* 18.8.1987, NZA 1987, p. 779, 783 f.; *Gaumann / Schafft,* NZA 1998, p. 176, 182; *Hanau,* NZA 1985, p. 73, 75; *Lohs,* DB 1996, p. 1722, 1724; *Säcker / Oetker,* Grundlagen und Grenzen der Tarifautonomie, 1992, pp. 78 ff.; *Weyand,* ArbuR 1989, p. 193, 201; *Zachert,* ArbuR 1995, p. 1, 5; GK-BetrVG / *Wiese*,§ 87 nr. 11 with further references. Against the permissability of an expansion of co-determination rights in collective bargaining, see: *Buchner,* RdA 1990, p. 1, 5; *v. Hoyningen-Huene* comment on *BAG*, AP *item* 23 § 77 BetrVG 1972; *Richardi,* NZA 1988, p. 673, 677; *Schaub*, Arbeitsrechts-Handbuch, 8th ed. 1996, § 206 II 7; *Walker,* ZfA 1996, p. 353, 368.

41 For more details, see *Höland / Reim / Brecht*, Flächentarifvertrag und Günstigkeits-prinzip, 2000, pp. 304 ff.

42 Against a restrictive interpretation of the BetrVG, as proposed by some, it can be argued that following the official justification of the legislative draft, the reliability of a broadening in collective bargaining of co-determination rights was explicitly left open; see BR-Drs. 715/70, p. 36.

43 BAG 18.8.1987, NZA 1987, p. 779, 780; contrary opinion: Waltermann, Rechtsetzung durch Betriebsvereinbarung zwischen Privatautonomie und Tarifautonomie, 1996, pp. 13 ff. with further references.

44 BAG 26.10.1994, AP *item* 18 on § 611 BGB Anwesenheitsprämie under II 3 c; it is true that the admissibility of a court's judgement of fairness of works agreements is controversial; however, it is the inadmissible intervening in basic rights in connection with the question dealing with the outsider-problem seen in the literature as unproblematic legal control which is salient; on the status of the dispute, compare *Fitting / Kaiser / Heither / Engels,* § 77 nr. 197 f.

establishment level.[45] Parties to collective bargaining must take this into account in that they provide for the appropriate procedures for dispute resolution. The extension of co-determination rights in collective bargaining is suitable for this.

3. Court Prosecution of Violations of Collective Agreements

Existing law regulating court prosecution of violations of collective agreement at the time of the study had proven to be ineffective. It has been confirmed again and again that complaints taken to court by individual employees to put an end to practices violating collective agreements have not been able to adequately serve their intended purpose. An individual complaint is most often faced with fears ranging from personal disadvantages to dismissal. Explicit statements made by interviewed personnel managers make it clear that such considerations are not at all unjustified. Such a risk can only be effectively hindered if a larger number of employees wage a complaint. Then the proceedings take on in effect, however, a character which has been legally denied: in its substance it has become a collective proceeding.

Should works councils petition for a special procedure (the so-called "Beschlussverfahren") relating to violations in collective agreements, then this proceeding may in fact lead to a court injunction of collective agreement violations. In this context already the plausible threat would suffice to achieve the desired goal. The works council can only make its threat believable if lodging a complaint has a sufficient chance of succeeding. The often used example of the non-compliance with employment quotas set by the framework agreement on employment conditions in the area of the metalworking industry shows the difficulties posed by court proceedings initiated by the works councils. After the case law decision handed down by Land Labour Courts, no special sanctions are due works councils in these cases in order to contest employer violations of collective agreement obligations.[46] The restrictive interpretation of the Land Labour Courts should be rejected since they neutralise the supervisory function assigned to the works council pursuant to sec. 80 subsection 1 item 1 BetrVG.[47] Besides such legal difficulties an actual

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45 See also *Weitbrecht* / *Braun* in: Müller-Jentsch (ed.), Konfliktpartnerschaft, 3rd ed. 1999, p. 95.

46 *LAG Niedersachsen* 28.5.1998, BB 1998, p. 1535; *LAG Hamm* 10.11.1998 Az. 13 TaBV 57/98 (not legally binding yet).

47 For a more in-depth critique of the decisions, see *Höland / Reim / Brecht*, Flächentarifvertrag und Günstigkeitsprinzip, 2000, pp. 316 f.

problem also has to be considered: if the collective agreement violation refers to a works agreement or a semi-formal works agreement, then the works council is itself an actor to the practice contravening the collective agreement. It can thus not be expected in such cases that the works councils file a complaint against their own regulation. Therefore court proceedings lodged by works councils have proven to be only in a limited area an effective measure against violations of collective agreements.

A complaint to exert influence lodged by a union against a specific employers' association ("Einwirkungsklage") plays only a subordinate role in practice. This is due on the one hand to the fact that the employers' association has no appropriate means to apply pressure to take actions against an employer violating the collective agreement. The union can on the other hand not oblige the employers' association to use – out of the already limited possibilities – the most appropriate means. Moreover the use of a harsh sanction is not to be expected simply because the employer in doubt can always evade such employers' association sanctions by terminating membership. Thus given the nature of the complaint to exert influence, it does not offer suitable protection against violations of collective agreements: the dispute does not exist among the parties to collective bargaining in general but rather between the union and the employer. Accordingly the dispute can only be resolved by proceedings in which the disputing parties confront each other.

According to case law of the *Federal Labour Court* at the time of the study, the union had no claim to an injunction against an employer violating a collective agreement, provided that it related to a matter of enforceable co-determination according to sec. 87 subsection 1 BetrVG.[48] A court action taken by the union proved therefore to be connected with considerable legal uncertainties despite obvious collective agreement violations. With the *Federal Labour Court*'s decision of April 20, 1999 the right to a general injunction against an employer violating a collective agreement was granted the union.[49] In view of the empirically confirmed ineffectiveness of the other proceedings, this decision is welcomed. As shown above, deviating establishment regulations develop a precedential effect on collective bargaining agreements.[50] It must be possible to fight a violation of substantive law – as is the case here through the infringement upon collective bargaining autonomy –with

48 *BAG* 20.8.1991, AP *item* 2 on § 77 BetrVG 1972 Tarifvorbehalt.

49 *BAG* 20.4.1999, DB 1999, pp. 1555 ff.; approving: *Berg* / *Platow*, DB 1999, pp. 2362 ff.; *Däubler*, AiB 1999, pp. 481 ff.; *Kocher*, ArbuR 1999, pp. 382 ff.; *Wohlfahrt*, NZA 1999, pp. 962 ff.; rejecting: *Müller*, DB 1999, pp. 2310 ff. as the authors mentioned in footnotes 51 and 52.

50 See above under section V.

effective means for due process of law. With the granting of a general right to an injunction of the parties to collective bargaining in the case of works regulations deviating from the collective agreement, a deficiency which had existed until then was eliminated.

Among the first, in part drastic reactions, fears were expressed that the BAG decision would lead to a strong flight out of collective bargaining.[51] Beyond that the settlements at the establishment level to conduct concerted actions for employment to safeguard jobs in economic crisis situations were said many times to be headed for failure.[52] Such an assessment of the consequences of the decision seem unrealistic. With respect to the possibility of concerted actions among establishments, the instrument of supplemental collective agreements should be pointed out: the parties to collective bargaining have the liberty to conclude such agreements in times of economic crisis. It should not, however, be possible to set standards below those stipulated in the collective agreements by evading the parties to collective bargaining.

The expressed fear of an increased number of resignations from the employers' association is tacitly grounded on the assumption that a massive increase of actions for injunctions could take place consequent to the BAG decision. A permanent and drastic increase of union actions for injunctions cannot, however, be expected going by empirical findings. The danger of a fundamental disturbance of the relationship with the works council or with the employees connected to the union will move the union to more closely examine whether a court proceeding truly seems opportune.[53] As a rule they will therefore attempt to find a solution together with the parties to works agreements. In this context the entitlement to place a claim strengthens the union's negotiating position. With the basic option to take action for an injunction the possibility of working towards regulations conforming to the collective agreement is improved. To that extent the recognition of a union's right to an injunction facilitates the using of this right as a resource: it is not in the lodging of the complaint but rather in the avoidance of taking such actions by co-operating to resolve the dispute that the opportunity for the new case law lies.

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51 *Buchner*, NZA 1999, P. 897, 902; *Hromadka*, AuA 2000, p. 13, 17; *Trappehl / Lambrich*, NJW 1999, p. 3217, 3223; *Thüsing*, DB 1999, p. 1552, 1554; also implied by *Hundt*, Arbeitgeber 9/1999, p. 3.

52 *Bauer*, NZA 1999, p. 957, 961; *Göhner*, BDA Press release from 19.7.1999.

53 The related problem of the union is also recognized by *Hromadka*, AuA 2000, p. 13, 17.

VII. Establishment View of Association-level Agreement Reform

Although there have also been positive experiences with the application of collective agreements following negotiations and with supplemental works agreements, works councils are seriously troubled by the worry of being overburdened by the (further) shifting of regulating responsibilities to the establishment level. It has become clear through many discussions that for works councils the collective agreement has an indispensable function as a legal resource which serves, if need be, to help "apply pressure". In this matter the works councils expect the association-level agreements to give them backing in the legal sense and in the wording while also leaving them room for adapting to establishment needs.

If legal backing is assured by the association-level agreement, then works councils are definitely interested in, prepared for and from their perspective also capable of bringing an establishment situation into accordance with normative provisions of collective agreements.

Contrary to what employers' association rhetoric may lead one to expect, the employers bound to collective agreements see advantages as well as risks in the shifting of the regulating authority to parties to works agreements. The "professional" handling of disputes regarding distribution issues by parties to collective agreements meets above all in small and medium-sized establishments with disapproval and is consequently accompanied as a rule with additional costs; this ensures, however, peaceful co-operation within the establishment. The shifting of the negotiating and regulating authority to the establishment level, however, means the taking over of potentially conflictual, in any case time-consuming and costly tasks of specifying provisions of collective agreements. Nonetheless, and insofar contrary to the needs of the works councils, the employers' main aspirations in regard to reforms are more "guidelines" and fewer "regulations" in the association-level agreements. Desired is that association-level agreements have above all more room to address the everyday needs of the establishment – but they also should give legal orientation.

VIII. Considerations on the Further Development of the Association-level Agreement

The limited *generalisation* of results from a largely qualitatively oriented research project and the awareness of a lacking practice in collective bargaining pose narrow limits from the very beginning to any conclusive considerations on the further development of the association-level agreement. It is nevertheless legitimate to draw some conclusions – addressing less collective bargaining practice than future research in this field – on the implications of the research results for possible legal and collective bargaining developments.

1. Flexibility or Precision? The Demands of Normative Provisions of Collective Agreements

Based on the available empirical work, the question posed at the outset seeking a conceptually reasonable relation between precise and imprecise normative provisions ("rules and standards") in the relationship between the parties to collective agreements and those to works agreements cannot be answered unambiguously and conclusively but with some plausibility: and that would be in favour of the need to specify provisions. The position taken by the interviewed works councils in this matter was ambivalent. In part they favoured a formulation which would leave room for choice in the collective agreement since they felt secure enough in the practice of co-determination at the establishment in order to make an appropriate choice among options in each situation of co-determination. They are partially (which is most probably not in contradiction to this) in favour of the most precise stipulations in a collective agreement, in any case with respect to the main factual preconditions, values and restrictions. They only feel empowered to give shape to legal provisions at the establishment level, if they are equipped with discretionary rights and competencies in the area of collective bargaining.

It should be possible to further specify the ambivalence of information according to types of works councils and according to specific experiences in co-determination. With mutual respect and near parity of the establishment relations of co-determination, options in formulations of normative provisions have proven to be functionally appropriate, since the works councils can cope with the need to be more specific. In the case of unbalanced and conflictual establishment relations, works councils are better served by precise formulations of facts in association-level agreements. In some ways employers have also by the way shown interest in precise factual stipulations in the

collective agreement which help evade the burden of making establishment adaptions. In view of other research results in the fields of industrial sociology and sociology of law and irregardless of all modernisation of establishment interaction culture, as well, a "typical works council" independent of establishment size shall nonetheless be assumed to be one which is in need of the legal backing provided by an association-level agreement. Negotiations under conditions of parity between the works council and employer typically can only be reached by way of a compensatory legal framework. Compared to the resources which can be used for negotiations at the level of the parties to collective bargaining, the conditions under which works councils make decisions are much less on the basis of parity, with less capability to dispute, of less information of the legal situation and less capability of sanctioning. For good reason the assumption of correctness of the collective agreement is not valid for the works agreement.[54] That favours allocating the tasks of precise formulation of normative provisions of a collective agreement to where they can be best processed in terms of their correct and just normative content; and these are the proceedings to be undertaken by the parties to collective bargaining to set normative provisions.

2. Options at the Establishment Level and the Normative Function of Collective Agreements

The de-standardisation of conditions under which decisions are made at the establishment level creates a dilemma for the collective agreement which is dependent on broadly-based standardisation. The more the association-level agreement considers the variation in conditions at the establishments under which application takes place, the more it endangers its capability to fulfil its function. On the other hand, the capability to fulfil the function of the association-level agreement in the long run is guaranteed even less the less it normatively adapts the variance of establishment conditions of application. A way out of this problem lies in procedural regulation of collective bargaining norms. The different forms of opening of the association-level agreement which have been realised and have favoured the establishing of supplemental legal provisions at the establishment level follow this logic of development. One might say that this also repeats in certain respects the historical evolution of the collective agreement and collective bargaining autonomy. The surrendering of regulating responsibilities by virtue of procedural authority

54 Continual court rulings; see *BAG* 17.3.1987, AP *item* 9 on § 1 BetrAVG Ablösung under II 1.

can, however, not be unconditional. *Habermas* pointed out the limits of procedural arrangements for the state of law in the neo-corporatist-structured relationship to powerful organisations for example in the following statement:

> Even when it (the State, the author) takes on the role of an intelligent consultant or of a supervisor, who makes procedural law accessible, this establishing of law through programs of the legislators must maintain feedback in a transparent, understandable and controllable manner.[55]

This thought can be drawn in a parallel manner to the relationship between the parties to collective agreement and those to works agreements. The parties to collective agreement are not allowed to unconditionally surrender their authority in areas of regulation entrusted to them by the State. This is formulated in a specific expression in collective bargaining law: "the limits to self-disempowerment" – for example, with carte blanche references ("Blankett-verweisungen") to other collective agreements.[56]

3. Association-level Agreement or Company Agreement?

In her habilitation work[57] in the area of the juridical sciences, published in 1998, *Barbara Veit* arrived at a largely similar diagnosis[58] of another "remedy": the company agreement.

Veit's conclusion is of strategic importance for the further development of the association-level agreement. It seems problematical chiefly with respect to the aspect of the association-level agreement fulfilling a normative function. If the principle of development of variation is set against that of the opening of the collective agreement, then the association-level's normative function is dismantled even further than is unavoidable as a result of differentiating and

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55 *Habermas*, Faktizität und Geltung, 1992, p. 532: "Auch wenn er (der Staat, d. Ver.) in der Rolle eines intelligenten Beraters oder eines Supervisors auftritt, der prozedurales Recht zur Verfügung stellt, muss diese Rechtsetzung mit Programmen des Gesetz-gebers auf transparente, nachvollziehbare und kontrollierbare Weise rückgekoppelt bleiben".

56 Concerning carte blanche references see *BAG* 9.7.1980, BAGE 34, pp. 42, 50 ff. and *BAG* 10.11.1982, BAGE 40, pp. 327, 342 f.; generally regarding the inadmissibility to renounce on own substance of a collective agreement *BAG* 18.8.1987, AP *item* 23 on § 77 BetrVG 1972 under B II 3 b.

57 *Veit*, Die funktionelle Zuständigkeit des Betriebsrats, 1998, pp. 427 ff.

58 Necessity of differentiated collective agreement regulations responsive to establishment needs, a works council without the power of veto, for this reason no guarantee of rules conforming to the agreement, real and legal loss of obligation as stated in sec. 77 subsection 3 BetrVG.

opening the collective agreements by the parties. The principle has incidentally long become reality, namely in the newly incorporated federal states. Based on the total number there, the ratio of company agreements to association-level agreements is approaching 1:1 (in the West in contrast it is still 1:2).[59] With regard to the power to conclude an agreement and its content, the situation consequently attained is unquestionably better than that which would ensue under conditions in an establishment free of any obligations to a collective agreement. As far as the content is concerned, deviations from the association-level agreement occur nevertheless in a similar fashion by the conclusion of various company agreements with a variety of specifications, as otherwise can happen with a generous opening of collective agreements without feedback. The standardised effect of an association-level agreement from a legal, social, professional and economic view is thereby weakened or entirely undone. In addition, in contrast to the model preferred here of the association-level agreement capable of "learning", it is considerably more difficult for the parties to a collective agreement, which is also only negotiated by the union in the form of an association, to integrate the evaluations of experiences with several hundred or thousand company agreements in the development of a concept for collective bargaining agreements.

4. Opening of Collective Agreements Allowing for Learning

The previous considerations lead to a linkage – to be investigated and evaluated further – of the relationship between normative provisions of collective agreements and provisions in a collective agreement for proceedings for deviations therefrom. Should proceedings for specifications at the company level in connection with opening and differentiating clauses take the place of legal normative provisions in collective agreements, one must differentiate the following. As long as the normative limits or options at the establishment are well-defined, an assessment is not indispensable. Should the parties to collective agreement provide for open collective agreements through the use of unspecified legal terminology or through an otherwise not delimited scheme of discretion, they must provide for assessment through the obligation to submit, through obligatory provision of information, requirements to carry out voting procedures, the condition of approval, or similar arrangements. Assessment has, beyond the protection provided by law and collective bargaining agreements against self-disempowerment, the advantage that in the relationship between the parties to collective agreement and those to works agreements structures promoting communication and learning loops are built in.

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59 WSI-Tarifhandbuch 1998, pp. 62 f.

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