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## **Derogations from Collective Bargaining Agreements in the German Metalworking Industry: Erosion or Renewal of the Collective Bargaining System?**

### **INTRODUCTION: BACKGROUND AND METHODS**

Decentralisation has often been cited as one of the main features of development in the German system of industrial relations (e.g. Jacobi et al. 1998). From the 1990s onwards, decentralisation has been driven by the spread of the so called "Pacts for Employment and Competitiveness" particularly (Seifert/Massa-Wirth 2005). In the German dual system of industry collective bargaining and plant level codetermination, employment pacts by industrial relations' actors aim at providing greater leeway for local actors to engage with bargaining, thus opening pathways to decentralised collective bargaining on a large array of issues directly or indirectly connected with the safeguarding or promotion of employment and employment security. As Sisson (2005) pointed out, even though "there is no 'typical' employment pact, most of them have two objectives: (1) to minimise employment reductions or to stabilise employment, and (2) to reduce costs of organisations or to improve their ability to adapt.

In the last years, shifts in practice on this topic can be observed. It is now the *derogation* from collective agreements, with the declared intention to enhance competitiveness and to protect jobs that has come into prominence. This shift in emphasis towards what will be called in the paper "deviant collective bargaining agreements" reflects more recent moves towards local job guarantees in exchange for an explicit undercutting of norms laid down in multi-employer collective agreements on wages, working times or other topics. It is this difference that makes derogations a special and far more radical form of decentralisation than employment pacts, although both forms are quite similar in their appearances as local deals. For employment pacts usually have respected the labour standards defined in the collective bargaining agreements that traditionally are minimum standards in the German system of industrial relations (and if not, the pacts were examples of an informal, wild decentralisation of collective bargaining norms). In the case of derogations, collective bargaining norms are put into question in a legitimised way by derogation clauses in collective bargaining agreements. The effects of derogations on the system of collective bargaining depend, this is the hypothesis I will track in this paper, on the degree of control the collective bargaining actors have on the processes and material contents of derogations.

Using the example of the metalworking industry, I will try to analyse how widespread derogations are, what their contents are with respect to wage and working time concessions, what the processes of local negotiation look like and what their consequences are for the system of collective bargaining in the industry as a whole. Can they be regarded as a factor of erosion of centralised collective bargaining, or are they stabilising the system by adapting it to new challenges? My empirical analysis rests on a) a content analysis of all the 850 deviant collective bargaining agreements that were negotiated in the metalworking industry from 2004, the year of the "Pforzheim Agreement", until the end of 2006; b) on interviews with collective bargaining experts from the metalworkers' union IG Metall and the employers' associations of the industry; and finally c) on case studies in several plants analysing the processes of local coordination, negotiation and membership participation.

### **THE DEVELOPMENT OF DEROGATIONS**

Derogations from collective agreements, the undercutting of collectively agreed standards by individual firms in order to safeguard jobs, first emerged in the German metalworking industry

in the 1980s. They were used to deal with crises in individual firms but were not part of a more general trend towards the widespread use of such derogations or increased concession bargaining. This changed with the profound cyclical and structural crisis into which the metalworking industry was not alone in plunging at the end of the reunification boom in the late 1990s (Jürgens & Naschold 1994). Since then, the use of derogations has become more and more widespread. The crisis saw the emergence of two 'launching pads' for the practice: hardship clauses in the East German collective bargaining areas and the negotiation of restructuring agreements in West German collective bargaining areas.

The hardship provision negotiated for East Germany in 1993 constituted one of the first arrangements of this kind in the German collective bargaining system as a whole. The provision was part of a compromise that the negotiating parties had agreed in order to resolve the dispute surrounding the amendment of the East German step-by-step equalisation agreement, which provided for the gradual harmonisation of wages and working times with those in West Germany (see Schröder 2000). The hardship provision stipulated that the parties to collective bargaining should negotiate the substantive content of any derogation as members of a joint commission. At the same time, derogations from the collective agreement were restricted to a certain type of firm, namely those experiencing acute economic difficulties.

No provision equivalent to the hardship clauses was introduced in West Germany. And yet during the same period, a separate practice of undercutting collectively agreed standards emerged there. This undercutting took two forms. The first, which also existed of course in East Germany, was informal undercutting by the negotiating parties at firm level (so-called 'wildcat' derogations). The second was the negotiation of restructuring agreements by the parties (the trade union at least) in firms experiencing economic difficulties. From the mid-1990s onwards, this practice resulted in the negotiating parties in most collective bargaining areas reaching agreement on so-called restructuring clauses, which expressly permitted the parties to derogate from the industry-wide agreement when firms were experiencing economic difficulties. The restructuring clauses, combined with the 'wildcat' derogations, led to the creation of a 'grey area' in which collectively agreed standards were undercut but which lacked both transparency and central control by the associations, despite the fact that the negotiating parties had given it their blessing in the restructuring clauses that had been incorporated into the industry-wide collective agreements.

This situation changed with the signing of the Pforzheim Agreement by the negotiating parties in 2004. The negotiation of this agreement was to a certain degree a reaction on the political pressure that the then federal government had built up by threatening to introduce statutory 'opening' or derogation clauses. From the outset, however, the trade union advocates of such derogation clauses hoped that their introduction would provide them with an instrument they could use to control the increasingly uncontrolled undercutting of collectively agreed standards, whether through formal or informal arrangements. For the employers' associations, on the other hand, the demand for derogation clauses was from the very beginning of the bargaining round linked to the notion of an increase in working time without a compensatory pay increase.

Both of these objectives were reflected in the 'Agreement between the parties to collective bargaining on the safeguarding of existing and the creation of new jobs', which had eventually been signed on 12 February 2004 in the small town of Pforzheim in Baden-Württemberg in the course of that year's bargaining round. The agreement specified that derogation agreements were possible provided that jobs would be safeguarded or created as a result and they would help to improve competitiveness and ability to innovate, as well as investment conditions. In contrast to the restructuring agreements, the Pforzheim Agreement contained a number of provisions stipulating, among other things, that the measures should be scrutinised and negotiated by the bargaining parties at firm *and* industry level and that companies should make comprehensive information available.

### **THE PROBLEM OF CONTROL**

However, the procedural arrangements laid down in the Pforzheim Agreement quickly proved unsuited to controlling collective agreements. It soon became evident that the employers' associations themselves had no interest in controlling derogations and in many cases were

merely acting as advisers to companies engaged in negotiations. Consequently, it fell to the trade union to exercise control. However, IG Metall's faith in its own ability to control derogations had already received a bitter blow shortly after the conclusion of the Pforzheim Agreement, as a result of high-profile cases such as the Siemens mobile phone division. At Siemens – and in several other cases – the works council had already agreed to management's demand for a working time increase without a compensatory pay increase as the price for keeping production in Germany before the union had been even asked for its opinion or taken any part in the negotiations. However, the union could do very little as a negotiating party to counter the votes of the works council and the workforce. This was a classic case of wildcat cooperation between the parties at firm level.

The union executive concluded from this experience that effective control required tighter procedural standards than those laid down in the collective agreement. Consequently, coordination guidelines were drawn up during 2005 which specified the duties to inform, procedural arrangements and decision-making competences linked to the negotiation of undercutting agreements. The guidelines included the following points. Firstly, applications to negotiate undercutting agreements were to be submitted to the union's area headquarters (which is the organisational equivalent of the regional employers' associations) and to be decided on by officials at that level on the basis of extensive information about the company in question. Secondly, officials at area headquarters could give local union branches the power to conduct negotiations. Thirdly, negotiations were to be supported by firm-level collective bargaining committees, whose role was to ensure that union members took part in the negotiations. Finally, the outcome of the negotiations was to be communicated to the union executive, which had to authorise and take responsibility for the agreement.

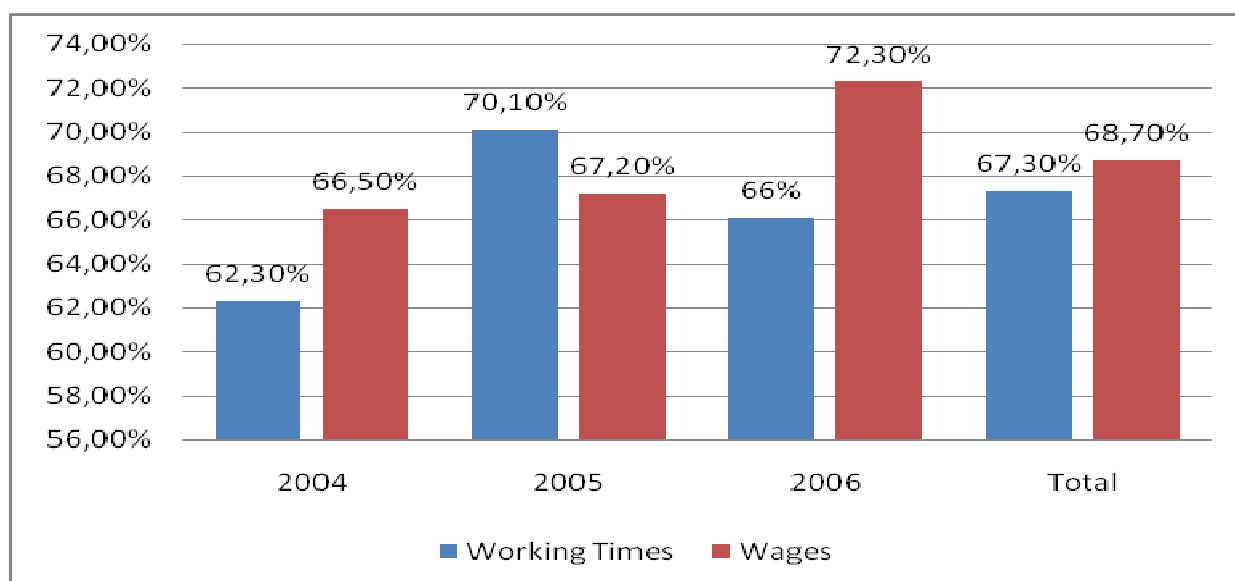
According to collective bargaining experts on both sides, the union executive's coordination guidelines actually did lead to extensive standardisation of procedures between and within the union's collective bargaining areas, which are largely coextensive with the spheres of application of the industry-wide collective agreements. The requirements regarding information flows and decision-making competences have now become part of established collective bargaining practice. According to the experts on collective bargaining, standardisation has also led to a professionalisation of the bargaining procedures, which has moderated disputes and enabled the two sides to engage in businesslike discussions. At the same time, a new form of transparency can be observed with regard to the extent and contents of derogations. The union executive now has a comprehensive database on the derogation agreements and their contents, in which scanned copies of the actual derogation clauses are stored. This database constitutes an internal memory bank on derogations that is retrievable at any time, which has been of benefit not least to the present study. Moreover, according to the experts of union and employers' associations, even the wildcat decentralisation, which had been increasing up to 2004 but could not be quantified because of its informal nature, has been curtailed as derogations have increased and procedures have been standardised. It can at least be said that informal derogations from the industry-wide collective agreement are now virtually a thing of the past.

Thus undeniable successes have been achieved in exerting procedural controls. But what about the actual substance of the derogations that have been negotiated?

### **DEROGATION AGREEMENTS: MATERIAL CONCESSIONS AND COUNTER-CONCESSIONS**

Between the signing of the Pforzheim Agreement and the end of 2006, a total of 850 derogation agreements had been concluded in the metalworking industry. Of these, 412 or almost 48.5% were concluded in 2005, 271 (32%) in 2006 and 167 (about 20%) in 2004. In 2006, excluding the agreements that had expired by then, a good 10% of firms in the sector bound by collective agreements had negotiated a valid derogation from the relevant agreement. The *material concessions* of the employees are clearly dominated by two topics or issues, namely working time and wages. Over the entire observation period, well over 60% of the derogation agreements contained provisions on these two issues (Figure 1).

Figure 1: Shares of issues addressed in derogation agreements 2004-2006



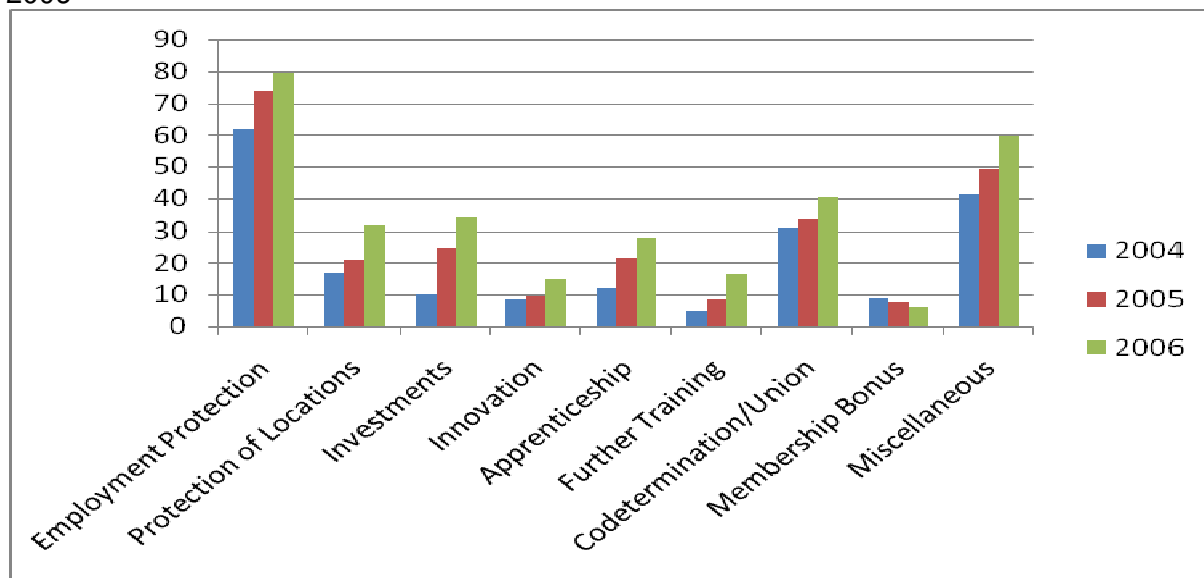
The extension of working time is by far the most important single issue in the derogations. Of all derogation agreements, 58.5% (and 86.9% of those concerning working time) contain provisions on the extension of working time. Other working time issues, such as working time flexibilisation (in 19% of all derogations from working time norms), working time scheduling and working time reduction (both under 6%), lag significantly behind. Among the various forms of working time extension, increases in weekly working time, which account for almost 65% of all derogations involving extensions of working time, are by far the most important parameter, followed by working time budgets containing a certain number of extra hours to be worked by employees (26%) and additional training periods to be used for further and advanced training (about 12%). In 2006, however, the share of agreements on the extension of weekly working time declined to 53.5%, which suggests that trade union control of the substance of derogations has improved. Further evidence pointing in this direction is the decline in the average length of weekly working time extensions (as a weighted arithmetic mean based on the upper cut-off point of the hour intervals) from 3.7 hours in 2004 to 3.3 hours in 2005 and 2006. In the overwhelming majority of cases, working time was extended without any compensatory pay increase. In an increasing number of cases, however, provision has been made for the working time increases to be reduced – usually in stages – while the derogation remains in force. In 2006, 28.6% of all weekly working time extensions contained provisions of this kind. This too suggests that control of weekly working time increases has improved.

In contrast to working time, the contents of the agreements on undercutting collectively agreed pay norms are more evenly distributed between a number of issues. The three most important are the Christmas bonus, holiday pay and wage increases. As far as control of derogations is concerned, the most important of these three major issues is the undercutting of collectively agreed wage increases, because this can result in a sustained reduction in current income. This issue crops up in precisely 32% of the collective agreements. The commonest provisions in the derogations concern the postponement or cancellation of wage increases, with postponements clearly gaining in relative importance over complete cancellations over the course of the observation period. Between 2005 and 2006, the share of postponements in agreements on wage increases rose from 27.2% to 37.8%. This development, and the decrease of cancellations of wage increases, can be interpreted as an improvement in control of the contents of derogations. Another indicator pointing in the same direction is the increase in the share of agreements containing provisions on reducing the cut in the wage increase while the derogation remains in force. Christmas bonuses and holiday pay account for the highest shares of derogations from the collectively agreed pay norms. Provisions on these two pay elements are found in 45.4% (Christmas bonus) and 36% (holiday pay) respectively of all the collective agreements examined. As with working time increases, the derogation agreements on pay also provide for reducing the cuts; these provisions take the form of reduction curves. Such curves are included in 16% of derogation agreements on

wage increases and in 8.5% and 9% respectively of agreements on bonuses and holiday pay. Taken together, these provisions constitute a clearly upward trend, albeit from a modest level.

To what extent are the material concessions made by employees matched by *counter-concessions* offered by employers, and what are the issues addressed by such reciprocal considerations? Counter-concessions feature explicitly in no fewer than 83% of all derogation agreements, and the share of agreements containing counter-concessions rose sharply between 2004 (70.7%) and 2005 (86.9%) before stabilising in 2006 at 84.5%. The dominant issue addressed in these counter-concessions is employment security (Figure 2). The high share of the 'Miscellaneous' category can be explained primarily by the material concessions negotiated by employees not covered by collective agreements and management, on the one hand, and provisions on company bonuses, on the other. The most prominent trend as far as the counter-concessions are concerned is the continuous rise in the shares of the individual issues addressed. Except for the question of membership bonuses (special payments for members of IG Metall, which can range from one-off annual payments to extended employment protection), the counter-concession rate has increased considerably for all issues. This can be interpreted as an important indicator of improved union control over the substance of the counter-concessions.

Figure 2: Share of counter-concessions by issue in all derogation agreements from 2004 to 2006



Even within the individual issues, the quality of the provisions has in some cases been considerably improved. This can be demonstrated by taking the example of four of the issues addressed in the counter-concessions. The first of these is *employment security*, which in the view of the trade union experts is now almost a necessary condition for the conclusion of a derogation agreement. The forms of employment security that have increased in importance are those that either totally exclude redundancies for business operations reasons or at least make such redundancies subject to the agreement of the trade union and the works council. The share of such agreements has risen from just about 70% to 78%. The second of these issues is *investment*. The number of promises of investment has risen sharply. Investment is of particular significance among the counter-concessions because it is likely to have long-term consequences for job security. It has to be acknowledged, of course, that investment can also reduce labour requirements if the resultant productivity gains exceed the growth in production. By far the largest share of the commitments to invest - 72% - specifies a concrete sum. The total sum promised in these commitments to invest is a good 3 billion Euros; following a steep increase, the largest sum committed was 1.57 billion Euros in 2005, followed by the 1.35 billion committed in 2006. This equates to a volume of investment per commitment of around 21.5 million Euros in 2005 and 20.5 million Euros in 2006. Thus compared with the volume per commitment of 8.79 million Euros in 2004, the sums committed per agreement more than doubled. The sums committed in 2005 accounted for about 6.5% of

total investment in the industry. Thirdly, undertakings on *innovation* appear much less frequently in the derogation agreements, it is true, but they can be a means of achieving significant improvements. Such undertakings given by firms as counter-concessions make an important contribution to improving control of derogation agreements because they nourish the hope that the firms in question will strive to improve their competitiveness and thus make themselves strong enough to adhere to the standards laid down in the industry-wide collective agreement. *Co-determination* and trade union activities, fourthly, are also topics that play an important role in the agreements. The commitments that feature most commonly relate to improvements in the information provided to works councils and the inclusion of the trade union and/or the collective bargaining committee among the recipients of that information (31.4% of all derogations). These commitments are to be distinguished from those on active controlling, which feature in a good 8% of all derogation agreements. Such controlling involves not only the provision of specific information but also joint supervision of the implementation of the industry-wide collective agreement. Such an arrangement offers a far higher level of control, since employee representatives and management not only have the same information available to them but also have to work together to resolve control problems. Consequently, it is highly significant that the share of such arrangements is increasing.

### **LOCAL COLLECTIVE BARGAINING**

The importance of derogations for the union's collective bargaining policy and its role as an actor in the collective bargaining system can hardly be overstated. The accelerating decline in trade union density, particularly since the beginning of the new century, makes derogations from the industry-wide collective agreement appear at first sight to be a defensive reaction on the part of the trade union. From 2000 to 2006, trade union density decreased for about 10%. Derogations have been accepted by the trade union and negotiated with the aim of preventing the worst outcomes and halting the erosion of collective agreements through wildcat decentralisation, which is made possible by the union's dwindling power at firm level. However, the defensive interpretation accounts for only one aspect of the derogations which, against the background of declining union density, can also be viewed from another angle, namely as a launch pad for a membership offensive aimed at strengthening union density. This question is being discussed in IG Metall with increasing intensity and increasing approval (cf. Huber et al. 2006). The crucial link between derogations from collective agreements and membership acquisition is collective bargaining policy at firm or establishment level. Local collective bargaining is increasingly being seen as an opportunity to make a virtue of the necessity for derogations by turning it into a membership offensive (cf. also Schmidt 2007). The basic idea behind collective bargaining at firm level is to use company agreements to involve members in local labour disputes and bargaining to a greater extent than they have hitherto been involved in centralised collective bargaining and thus make the trade union more attractive to current and potential members and increase union density in the workplace.

Our case study analysis has shown that membership participation is positively influenced by the fact that in the metalworking industry – in contrast to the chemical industry for example – derogations are negotiated as collective bargaining agreements and not as plant level agreements. This makes sure, that, at least formally, the union – and not the works councils – is the master in its own house and that it is organising and leading the negotiation process. A central and obligatory element in this process is the formation of a collective bargaining committee. The bargaining committee plays an important role in the process of negotiation, because its members decide both about the start of negotiations and the acceptance of a deviant agreement as a result of negotiations. Furthermore, the members of a bargaining committee have to appoint the members of the smaller negotiation committee which is dealing directly with management in negotiations. Therefore, the bargaining committee offers at least two potential starting points for membership participation. The first one is the election of the committee members. Members of the committee should not be appointed by the works council or the local union representatives but rather be elected by the members. And the second one is the composition of the committee. Besides works councils and union representatives, who are usually members of the committee, it can also embrace normal members

out of the employees who in this way can participate in the decisions of the committee. A second important possibility of membership participation is to summon meetings of union members. Besides electing the members of bargaining committees, these meetings can fulfil the function to inform union members about the background and proceedings of negotiations and to discuss bargaining strategies. Moreover, in some of our cases in the meeting of members the acceptance or the refusal of an agreement was decided by the vote of all members of the union in the plant.

The most important function of participation with regard to membership recruitment is the fact that they make a difference between members and non members which is sensible for the employees. Being a member means to be able to decide together with the other members about the future of one's own employment security and labour standards. Collective bargaining policy no longer is the anonymous process it usually is on industry level. Now it can be experienced directly by the employees. It is this difference that gives incentives for non-members to join the union.

In fact, the full potential of membership participation entailed by the negotiation of derogations is seldom tapped. In our case studies we met several problems: Either the bargaining committees have not been elected by the union's members but have been appointed by the works councils, or no membership meetings have been made, or the bargaining committees were composed only of works councils and local union representatives but not of "normal" members out of the employees. The reasons for these shortcomings are quite easy to identify. In all these cases membership participation and membership recruitment has not been an explicit goal of the local actors. Of course they wanted to make a good deal with management and to eke out the best for the employees, but instruments of participation were not part of their action programme. Rather they acted in a traditional way as representatives who, once elected by employees or members, had to make deals for and not together with the employees.

By contrast, the cases where participation worked – and we found some of them – have shown a remarkable attention the collective actors paid to membership participation. In their eyes this was a way to strengthen both their *legitimation* among the employees and their *power* in the negotiations with management. In some cases membership density more than doubled in the course of the negotiation process and afterwards. The precondition for such a success has been an active policy of continuous information and discussion with members combined with the preparedness to adapt the own position to those of the majority of the members and to accept the votes the members made. Another important element is the willingness to mobilise members in conflict. The more conflict-ridden the process of negotiation is, the more successful it is in binding and attracting members. As a rule of thumb we can deduce from the experiences of our case studies that wherever participatory practices have been introduced consequently, the union has been successful in recruiting new members and, more generally, in consolidating its organisational power in the respective plant.

Therefore, the effects of local bargaining have a big impact on union's control capacities. The more attractive the union becomes as a result of local collective bargaining, the greater its capacity to act as a party of collective bargaining and the higher its ability to control the undercutting of collectively agreed norms and to prevent firms' withdrawing from the industry-wide collective agreement. The membership offensive in collective bargaining at firm or establishment level can be regarded as a form of union revitalisation or strategic unionism being in-line with the institutional features of the German system of collective bargaining (Frege & Kelly 2003). Unlike organising campaigns of unions in Britain or the US that are appropriate if unions' recognition is weak or if unions have to fight for local representation, membership offensives in local conflicts on derogations seem to be an adequate form of union revitalisation if the institutional power of the unions is still high (albeit already eroding) and local representation is institutionally backed by works councils.

However, it should not be concealed that the strategy of participatory plant level collective bargaining can, even if it is successful, have some negative impacts for the binding power of collective bargaining agreements. For it can only be developed successful in plants where the union already has at least some starting points of organisational strength which can be mobilised and, maybe, improved during the process. Where the union is too weak to organ-

ise participation, the process cannot work. This is the reason why more and more plant level actors who want to negotiate derogations are told by the union that they have to improve membership density in advance and that otherwise the union would not be willing to negotiate. If they are not able or do not want to accept this, plant actors only have two alternatives: either not to negotiate a derogation or, in case the pressure of the employer is too high to prevent it, to negotiate a wild agreement falling short of the collective bargaining standards. Of course no exact threshold can be defined for the union to negotiate or not to negotiate; this always is to a certain degree a matter of gut feeling. Therefore, successful collective bargaining strategies in plants where the unions is strong can go hand in hand with a decline in the binding power of collective bargaining agreements in plants where the union has been weak and will remain weak. Hence a pressure on differentiation of labour standards is rather probable.

## CONCLUSIONS

Summarising the results, a first observation to be made is that, since the conclusion of the Pforzheim agreement, the union has achieved considerable success in controlling the processes contents of derogation agreements. This success is reflected in the fact that fewer material concessions are being made and counter-concessions are increasingly being extracted from the employers. Perhaps the most significant development in this regard, however, is the introduction of a policy on collective bargaining at firm/establishment level. By virtue of the participatory procedures put in place, collective bargaining at this level can strengthen member recruitment and hence the union's organisational power. However, if firms are not to be able to derogate or even withdraw so easily from the industry-wide collective agreement and, more generally, if they are once again to depend more heavily on the employers' associations to represent their interests, then it is imperative that the union be strengthened.

However, any such assessment must take into account the fact that the resulting stabilisation of the IR system can be achieved only at the cost of change. At least three elements of change should be emphasised here. The first important element is the *architecture* of the collective bargaining system. The derogation agreements have led to the establishment of a new bargaining level. The collective bargaining system is becoming a multi-level system, made up of the industry-wide collective agreements and the derogation agreements. True, the primacy of the industry-wide agreements is ensured in principle, but the coexistence of two collectively agreed norms automatically means that primacy is potentially subject to challenge. In such a system, control of derogation agreements becomes a permanent task. The second element of change is the new principle of *membership logic* driving the actions of both parties to collective bargaining. The two sides have reacted to the increase in firms' power resulting from financialisation and globalisation by making membership recruitment the cornerstone of their strategies. The employers' associations have done this by actively supporting their members in their pursuit of decentralisation, whether through the establishment of 'unbound' associations or demands for further decentralisation of collective bargaining regulation (Haipeter & Schilling 2006). On the trade union side, the most important contribution has been the adoption of a policy on collective bargaining at firm or establishment level based on involving members more closely in the resolution of workplace disputes. The third element of change concerns the culture of *interaction* in the so-called 'conflictive' partnership between union and employers. The actors are becoming increasingly conflict-oriented. The responsibility for this lies in the first instance with those firms that have called the collectively agreed norms into question by undercutting them or withdrawing altogether from the industry-wide agreement and then seeking to wring concessions out of the union in decentralised negotiations. Against this background, the conflictive partnership will not survive unless the union's ability to handle disputes at firm level is strengthened. Only on this basis can firms be forced, if necessary, to accept compromises and to take account of the other side's interests, so that the conflictive partnership can be sustained at a decentralised level as well.

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