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What is This?
Collective bargaining unity and fragmentation in Germany: Two concepts of trade unionism?

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Abstract
In recent years established collective bargaining arrangements in some sectors in Germany have been challenged by an upsurge of sectional union activity that has contested the status of industry-level incumbents. Gauging the impact of this development has proved difficult for both observers and insiders, with a range of responses from labour market actors and government. This article explores recent developments and actor responses and locates them in the wider context of the German political economy. It argues that of all these actors trade unions, in particular in organized forms of capitalism, are confronted by strategic dilemmas related to managing the difficult ‘variable geometry’ of mobilization and systemic accommodation.

Keywords
Collective bargaining, industrial relations, institutional change, labour legislation, labour unions

Introduction
Coordinated forms of collective bargaining, typically at sectoral level, promoted by a supportive institutional framework that includes industry-scale trade unions, are held to constitute a central element of coordinated market economies. In recent years, relatively stable arrangements in Germany, the prime exemplar of such an economy, have been challenged by the emergence of new sectional trade unions1 and a fresh assertiveness on the part of more long-standing occupational unions previously accommodated within single-table bargaining arrangements with industry unions. The particular configuration of the principle of ‘one plant = one agreement’ in Germany, seen as constitutive of stable bargaining arrangements, created both constraints and opportunities for small unions due both to its somewhat fragile legal foundations and the way in which the courts over
the years acted to resolve competition between collective agreements. In 2010, a further shock was administered when the courts abandoned long-standing case law that sustained ‘one plant = one agreement’ (often referred to as ‘bargaining unity’ or Tarifeinheit), raising further concerns about the system’s governability and highlighting differing union strategies towards the resolution of inter-union competition as well as more broadly their relationship to the regulatory framework and collective self-regulation. As such, events since the mid-2000s have served to re-emphasize the strategic problems confronting German trade unions, characterized by Hyman (2001: 140) in terms of navigating a ‘Bermuda triangle’ of class, market and society.

After considering some of the main approaches to coordination and disorganization in the industrial relations literature, the article discusses the changing institutional and legal context of trade union and bargaining structures in Germany, focusing on a major recent court ruling. We then turn to the emergence of sectional unions and look at some specific examples. Finally, we consider how these developments and actor responses might be located in the wider context of the German political economy.2

The context: Germany’s coordinated market economy in transition?

Coordination and disorganization

While much of the discussion of the challenges to established German industrial relations structures over the past decade or so, and in particular industry-level bargaining, has been through the ‘variety of capitalism’ (VoC) lens, exploring the impact of globalization on labour as mediated through national institutions (Thelen and Van Wijnbergen, 2003: 860), other researchers have focused on the reconfiguration of labour markets. Doellgast and Greer, for example, have highlighted the ‘vertical disintegration’ of production prompted by ‘new intermediate markets in previously integrated production processes’ (2007: 56) as a source of ‘increased pressures on co-ordinated industry-level wage negotiation’ (2007: 71) through peripheral labour markets that undermine union bargaining power. Other researchers have noted the protracted phase of concessions bargaining in which employers have wrung scope for deviation from agreed industry standards, arguably undermining the regulatory role of the industry-level agreement (Bispinck, 2011). Falling union density, shrinking bargaining coverage and the formation of employer associations that exempt members from adherence to collective agreements (OT-Verbände) (Behrens, 2011: 138) have also hampered union resistance to undercutting.

This constellation led Doellgast and Greer (2007: 71) to question Thelen’s thesis that German employers wish to maintain the system and ‘that the stability of centralised bargaining to date can be traced back in no small part to employers’ continuing interest in institutions that have traditionally guaranteed a high degree of peace and predictability on the shop floor’ (Thelen and Van Wijnbergen, 2003: 860), albeit subject to the heterogeneity of employer interests and a desire to sustain coordination without official mediation (Thelen and Van Wijnbergen, 2003: 875). In contrast, for Doellgast and Greer, vertical disintegration threatens the system by confining its central features to a core workforce surrounded by a disorganized periphery: although employers might formally
support sectoral agreements, these are simultaneously weakened by decisions on outsourcing (Doellgast and Greer, 2007: 71).

The responses of industrial relations actors during the crisis – paradoxically – lend weight to both positions; they are summarized as follows:

1. ‘Social partnership’ has been reaffirmed by the peak union and employer institutions, which acknowledged the ‘centrality of free collective bargaining … that has proved itself once again in the crisis’ (BDA/DGB, 2010), with a new ‘responsibility partnership’ (Verantwortungspartnerschaft) to secure industrial relations order. This formed the basis for a joint initiative to (re-)stabilize collective bargaining by law in response to recent challenges, lending some weight to Thelen’s stance on organized employer support for current arrangements.

2. Employer and union lobbying won improved state support for short-time working (Kurzarbeitergeld) in the crisis. This enabled unions to meet their priority of retaining jobs and allowed employers to engage in subsidized labour hoarding. This development, seen as further evidence of a recrudescence of social partnership, was validated in public discourse by the subsequent pace of recovery.

3. Reaffirmation from the employer side has been predicated on union concessions and political exchanges that have made industry agreements more flexible (Bispinck, 2011).

4. The main employer association (Bundesvereinigung der deutschen Arbeitgeberverbände [BDA]) has continued to resist a more effective wage floor, such as a national minimum wage or extension of collective agreements, lending weight to Doellgast and Greer’s position as disorganized labour markets grow.

Less attention has been paid, especially outside Germany, to ‘lateral disorganization’ understood as ‘a continuous weakening of the organizing capacities of employers’ organizations and unions’ (Traxler, 1995: 3). In this article this is posed in terms of the cohesiveness of union and employer organizations, their capacity to act politically and as counterparties, and the stability of their relationships. Our main focus is on recent developments in union pluralism, with challenges from sectional unions to incumbents among the most controversial recent issues in industrial relations.

In the German context, union pluralism could be understood as the coexistence of more than one trade union for the same category of employee within a single bargaining area (typically an industry but also an individual company), in effect offering employees a choice of representative agent and potentially creating inter-union competition. This merits some qualification in that some occupational unions in Germany have aspired to redefine bargaining areas by organizing specific groups of workers, possibly in competition with other unions, and extracting these from existing industry-wide bargaining arrangements, creating an occupational level of bargaining alongside an industry level. At a minimum, this has the potential for complicating industry-level bargaining through adding actors: it could also promote fragmentation that might undermine coordination between actors. As Table 1 illustrates, there is currently a multiplicity of types of union in Germany, and differing assessments of their legitimacy by different actors. Although pluralism is not thought likely to overturn industry bargaining and remains confined to
specific sectors (Schroeder and Greef, 2008), these developments might be seen as a ‘critical event’ from the standpoint of ‘varieties of capitalism’, given the claimed ‘fit’ between industry bargaining and the exigencies of a coordinated market economy.

Coordinated market economies (CMEs) (Hall and Soskice, 2001) are built on non-market forms of inter-firm coordination, one prerequisite for which is a supportive industrial relations system. For Hall and Soskice (2001: 24) firms in CMEs are ‘vulnerable to “hold up” by their employees and the “poaching” of skilled workers by other firms, while employees who share the information they gain at work with management are open to exploitation’. Whitley (1999: 60) ventures that a ‘collaborative hierarchy’ is supported by the institutional ensemble of ‘strong’, sectoral union organization and centralized bargaining. The resultant system of industrial relations, in which wages are set at industry level, is seen as a risk management and sanctioning mechanism to enable firms and individuals to make appropriate investments in the skills required by the production regime; for Culpepper (1999, 2001), stable industry-level bargaining is critical for the maintenance of this ‘high-skill equilibrium’. At the same time, Howell (2003: 112) bemoaned the ‘near invisibility of labour’ in VoC thinking, which appears as a ‘minor actor’ and in which unions ‘often appear to exist only in order to solve collective action problems’.

Couched in terms of ‘semi-sovereignty’, the capacity of organized capital and labour to provide coordinated private governance, as an alternative to ‘full voluntarism’, and the non-market mechanisms needed to steer a CME, depends on the ‘willingness and ability of trade unions to put their political and institutional loyalties above the articulated interests of their members’ (Streeck, 2005: 140). Writing in the 1990s, Traxler suggested several forces that might prompt disorganization:

… one could draw the conclusion that the competitive pressures of the single market will make national industrial relations converge by bringing about disorganization. In addition, … the declining role of associations … is attributed to shifts in the industrial and occupational structure of advanced economies, namely the rise of the service sector. (Traxler, 1995: 4)

He dismissed this argument as ‘functionalist’ reasoning, instead focusing on the ‘contingent interplay’ of the institutional framework, power relations in the labour market and the ‘organizational properties’ of the actors (Traxler, 1995: 5).

**Industry unionism vs trade union pluralism**

Germany, despite its ‘organized’ reputation, has a high level of nominal union pluralism. Schroeder (2008: 2) notes as many as 500 organizations that represent employees. Of these, eight are affiliated to the DGB (Deutscher Gewerkschaftsbund), circa 40 to the civil service federation (dbb)3 and 18 to the Christian confederation (Christlicher Gewerkschaftsbund [CGB]). Many of the rest are small associations that act mainly as professional bodies. However, there are some significant independent organizations that engage in collective bargaining: examples include the Marburger Bund (doctors, 110,000 members), Deutscher Journalisten-Verband (journalists, 40,000) and Vereinigung Cockpit (pilots, 8200). The number and militancy of such unions has grown in recent years.4

The German union movement has seen two long-running divisions: one religious, the other status-based. The conflict between DGB unions and the CGB is an ongoing one,
centred on whether CGB affiliates are sufficiently strong to be viable unions and their competition with DGB unions, mostly through undercutting. Prior to the establishment of the services union ver.di in 2001, there was also a division between DGB affiliates and the Deutsche Angestellten-Gewerkschaft (DAG), which represented a tradition of separate white-collar unionism and was a founding member of ver.di. In contrast to DGB unions, DAG organized across sectors. However, in terms of bargaining, the principle of ‘bargaining unity’ meant that it negotiated sectorally, typically in separate talks to DGB unions and with marginally different demands. Ultimately, there was only one settlement covering both DAG and DGB affiliate members. Conflicts arose where the DAG was recognized at company level and negotiated company agreements that displaced an industry agreement, taking advantage of prevailing case law (see below).

Regulation of the bargaining system rests on the constitution, statute and case law. There is a constitutional right ‘to form associations to safeguard and improve working and economic conditions’ granted ‘to every individual and to every occupation or profession’. To facilitate this, according to the Federal Constitutional Court, the state must ‘guarantee a legally regulated and protected system of collective bargaining’ (cited in Richardi, 2007: 13). As a ‘delegated state regulatory competence’ (Henssler, 2006: 12), bargaining is governed, in the first instance, by statute (Collective Agreements Act; CAA): this specifies the bargaining parties (unions, employers, employer associations) and the status of agreements. Agreements are binding and apply directly to the parties subject to them. There is no statutory union recognition procedure.

Organizations that wish to act as a union must meet criteria set by case law. They must aim to collectively bargain, be independent of employers and demonstrate their competence to bargain (Tariffähigkeit) by having sufficient members or economic strength to exert pressure through lawful industrial action. Despite the scope for pluralism, one of the notable features of the system has been the domination of industry unionism. The DGB, organized on industry lines, accounts for some 80% of all members of the three main centres (EIRO, 2004).

In the past the courts largely reinforced industry-level bargaining, expressed in the formula of ‘one plant = one union’. The principle led both sides to function on an inclusive basis. While employer associations had to enable marginal firms to remain within the scope of an industry agreement, unions had to ensure that pay differentials were sufficiently narrow to secure internal cohesion but wide enough to respond to skilled worker expectations and labour market forces. It should be noted that these aspirations are also met by company supplements, not guaranteed by collective agreement, which afford some leeway in facilitating inclusiveness: however, the cushion provided by this mechanism has been diminished by a long period of negative wage drift (Allen et al., 2006).

Since there is no proscription on union activity, more than one agreement can exist in a sector (Tarifpluralität). This raises no legal difficulty if agreements apply to different groups of employees, as is quite common – although problems could arise in intra-industry bargaining coordination were an industry to have a plethora of agreements with different unions. Problems arise if there are competing unions and more than one agreement could be applied to an employment relationship (Tarifkonkurrenz). In the past, the courts applied the axiom of ‘bargaining unity’ (Tarifeinheit) in which ‘only one collective agreement would apply to employment relationships at a workplace’ (see Federal Labour Court, 29 March 1957 1 AZR 208/55, cited in BAG, 2010), potentially clashing with
freedom of association. The courts ruled that the applicable agreement should be the one ‘most specific’ (speziellere) in terms of scope (spatial, occupational) to the employment relationships in question. For example, a ‘poorer’ company agreement negotiated by a small union could take precedence over a ‘better’ industry agreement (Hans-Böckler-Stiftung, 2008: 36ff.). Previous case law upheld this principle on mainly functional arguments, including ‘legal certainty and clarity’ (BAG, 2010: No. 18). Although this could strip rights from members of an industry union, the role of the law was seen as guaranteeing the ‘core sphere of the collective bargaining system’ (see note 8), not rights of individual actors. All unions were also free to conclude the ‘most specific’ agreement and win members on this basis. However, the legal preference for bargaining unity meant that trying to establish a separate agreement at industry-level for an occupation would be fraught with risk and threaten cooperation on other issues of joint interest (Müller-Jentsch, 2008). As a consequence, this was a rare tactic. Instead, unions might compete for members, but would ultimately confirm one agreement either after single-table bargaining (Tarifgemeinschaft) or nominally separate but parallel negotiations.

**Shift in case law on collective bargaining unity**

In a significant step, and at a timely moment, this principle was overturned in 2010 by a judgement of the Federal Labour Court that overturned its previous stance (BAG, 2010). The ruling raises a number of issues related to the applicability of collective agreements, rights of association and, implicitly, the law on industrial action. It met with a variety of responses – some highly critical from jurists, and some, from IR actors – which saw the ruling as confirming the need to take urgent legislative action to shore up the system against threats of lateral disintegration.

The new ruling draws on a literal interpretation of the wording of the CAA, under which a collective agreement applies directly and with binding force on the members of the union that concluded it. In summary, the court noted: ‘There is no overriding principle that only one set of collective agreed provisions should apply to different employment relationships of the same type at a workplace’. The court argued that Tarifpluralität is ‘inscribed’ in the CAA, and rejected the purposive interpretation of previous case law of the court that had derived the principle of Tarifeinheit among other things from an ‘overarching principle of legal certainty and clarity’ (Hromadka and Schmitt-Rolffs, 2010: 687; BAG, 2010: 25aa). The court also argued that Tarifeinheit itself can lead to a lack of clarity, due to difficulties in establishing the most ‘specific’ agreement applying to an employment relationship (BAG, 2010: No. 27). The ruling also affirmed that freedom of association of individuals to establish, join or leave an organization, and of the activity of associations themselves, implies a freedom to engage in appropriate activities, including negotiating collective agreements ‘with whom, for which group of employees and for which firms’ they wish (BAG, 2010: No. 55). This right is contradicted by the denial of the validity of a collective agreement on grounds that it is less ‘specific’.

In a critical commentary that looked back to the genesis of the Collective Agreements Act in 1948, Hromadka and Schmitt-Rolffs (2010: 688) outlined the perspectives that guided the Act, in particular on the issue of competing agreements. The Explanatory Memorandum to the Act claimed that competing agreements would be a minor issue as it was expected that unions would be organized along industry lines through mergers of
independent organizations, and that the courts would resolve any clashes between agreements ‘in the spirit of collective bargaining unity’: hence ‘a detailed stipulation is not recommended’ (Hromadka and Schmitt-Rolffs, 2010: 688). Hromadka and Schmitt-Rolffs further emphasized the functional arguments that guided previous case law in closing the legal gap left by the ‘founding fathers’. In particular, they argued that the courts and legislator are not limited to affirming constitutional provisions but may also undertake an ‘appropriate development’ of the collective bargaining system; by extension it would also be valid ‘to deny the application of collective agreements that obstruct the reasonable ordering of working life’ (Hromadka and Schmitt-Rolffs, 2010: 690). They also noted that the 2010 ruling could have unforeseen consequences for the law on industrial action, itself virtually wholly developed by the courts. Deinert (2011) argued that the principle of Tarifeinheit also had a functional role by forcing unions to cooperate to manage the risks of having an agreement displaced by a ‘more specific’ one.

The discussion now turns to the responses of the main industrial relations actors to this judgement in the wider context of their responses to the emergence of sectional unions.

**Assessing the strategic challenges faced by German unions**

German industry unions have been confronted with several issues related to organizational strategy. The first is preventing internal sectional breakaways. The second is managing conflicts between unions. DGB unions have often had overlapping areas, leading to competition for members and bargaining representation: within the DGB this is resolved through an internal procedure. Relations between DGB unions and independent sectional unions (Spartengewerkschaften), have been more complex. For the most part in the past unions have been able to manage coexistence without the need for a statutory definition of ‘representativeness’. These voluntary forms of inter-union coordination took the form of single-table or parallel bargaining arrangements, many of which have been stable for many years but – as the cases below show – have now come under pressure.

To some degree these strains were mitigated in the past by a correspondence between unions and industries. In the early 1990s, 16 unions were affiliated to the DGB. By 2001, mergers had halved this number. In 2001, the largest – and most significant merger – took place when five unions amalgamated to form the service workers’ union ver.di, with a matrix organization to manage internal coordination (Keller, 2004). Ver.di’s constituent unions embraced a wide swathe of activities (post, finance, retail, printing, public services and transport), and the white-collar DAG. As Table 1 shows, ver.di has been the union most affected by sectional competition.

For background reference, we set out a highly condensed treatment of recent developments in three sectors where sectional unions have emerged in recent years: rail, aviation and hospitals. We also briefly note the emergence of unions (‘yellow dogs’) sponsored by employers with the express aim of weakening incumbents, a rash of which were reported in the mid-2000s.

**Railways**

In 2007/2008, the train drivers union, GDL (Gewerkschaft Deutscher Lokomotivführer), the oldest union in Germany with some 34,000 members and an affiliate of the dbb-tarifunion,
won a separate agreement for its members in a high profile dispute. GDL put forward its claim in March 2007 when the industry agreement for Deutsche Bahn was due to expire. This was rejected by Deutsche Bahn, prompting GDL to begin a campaign for a separate agreement involving a series of strikes. GDL ultimately entered into government-brokered conciliation. Under the settlement, GDL won a separate agreement, with a substantial pay rise and a cut in hours. Within Deutsche Bahn, there is now a ‘basic agreement’, covering 80% of the workforce, and six functionally specific agreements for which GDL leads negotiations: HR managers at Deutsche Bahn hoped that unions would ‘coordinate their pay demands’, but this was prejudiced by competition for members (Fritz and Meyer, 2010). There were fresh strikes in 2011. GDL also negotiated at other rail service providers with the aim of achieving a national framework agreement for train drivers (GDL, 2011).

**Doctors**

A further challenge took place in 2004–2006 in the clinical sector involving the doctors’ union, the Marburger Bund (MB). MB had a single-table arrangement with the DAG from 1950. In 2005, MB announced its withdrawal from this, following the conclusion of a national agreement by ver.di (into which DAG had merged) for the entire public service, which included a longer working week and poorer pay terms. MB embarked on a campaign for a separate agreement for doctors, which included industrial action. In June 2006, MB concluded separate agreements for doctors in hospitals operated by regional governments. In August 2006, it negotiated an agreement for 70,000 doctors in local-authority run hospitals, applicable to all doctors, irrespective of their union. At the time of writing, the organization was engaged in renegotiating this and had indicated it would call doctors out on an unlimited strike (see Marburger Bund, 2012).

**Aviation**

There are several unions in aviation in addition to ver.di. Relationships with DGB unions are marked by cooperation and conflict. DAG used to organize in the sector in competition with the DGB public service and transport affiliate ÖTV (Gewerkschaft öffentliche Dienste, Transport und Verkehr). Some of the now independent unions in the sector were part of or had cooperation agreements with, DAG or ÖTV. It has been claimed that Lufthansa was not averse to sectional unions as a means of weakening ÖTV (Klebe, 2010).

Vereinigung Cockpit represents some 8000 pilots and flight engineers, is a recognized union and has agreements with several airlines. Some air traffic controllers are members of a specialist union, Gewerkschaft der Flugsicherung: this has negotiated separately since 2003, and previously had a single-table agreement with DAG. The union was close to strike action in 2011. The most serious competition for ver.di for cabin crew is the Independent Flight Attendants Union (‘ufo’). It claims a membership of 10,000 (disputed by Hensche, 2007: 1032) and recognition at a number of airlines. Vereinigung Boden (‘Ground Crew Association’), established in 2001 and with circa 1000 members, notes the ‘worsening of conditions occasioned by consensus policies’ as a motive for establishing the union (see Vereinigung Boden e.v., 2005), together with the failure of ‘rigid structures to represent the legitimate interests of occupational groups’. It mainly competes with ver.di for works council places.
‘Yellow dogs’

Recent years have seen a rash of exposures of various employer-backed organizations. In the post sector, deregulated from 1 January 2008, a minimum wage agreement was concluded shortly beforehand between an employer association dominated by Deutsche Post, the former state-owned incumbent most vulnerable to low-wage competition from new entrants, and ver.di. In order for this minimum to be legally extended to the whole sector, signatory employers had to employ at least half of employees in the sector and there should not be a rival agreement. Deutsche Post’s competitors set up their own employer association, and concluded a lower minimum wage with a new union, GNBZ (Gewerkschaft der Neuen Brief- und Zustelldienste). This was initially successful, blocking the extension of the first agreement. It then emerged that the GNBZ was employer-backed, and hence not competent to bargain.

Assessing the consequences: ‘Alternative’ union types and ‘incumbent’ responses

The emergence of competing sectional unions has raised strategic issues and dilemmas for incumbents. These were intensified in 2010/2011 by the Federal Labour Court ruling, discussed below, and the responses to this by the national union confederation and employer association (see BDA/DGB proposal below). As a prelude to discussing the significance of these developments for the wider system, we first classify some examples of new union types and tentatively outline actual and conceivable responses by what remain for the most part the incumbent unions.

Sectional unions can be categorized in four main ways, as summarized below and expanded upon in Table 1:

1. ‘Old’ occupational-professional unions: with long organizing traditions that have coexisted with other unions, often with single-table bargaining. Their desire for autonomy has been attributed to wage moderation by industry unions as well as identity issues. Lesch (2008), for example, argues that incomes losses due to the privatization of public services, which have cut economic rents for employees, provide an incentive for some workers to exit industry-level frameworks. Müller and Wilke (2008), by contrast, use a sociological approach, and focus on the re-emergence of occupational union identities, previously submerged within, or threatened by, conglomerate unions. Examples include doctors, train drivers and pilots.

2. ‘New’ occupational trade unions: such as aircrew and firefighters,13 which are possibly more problematic for incumbents as their organizing efforts might be less constrained. At the same time, challenge could activate an incumbent’s bargaining approach, possibly generating conflict with employers if the incumbent needs to show mettle and intensifying internal integration issues for industry unions. The success of these unions in some sectors has also challenged the incumbent status of larger unions, notably ver.di: this change has also led to an internal debate on the appropriate response to changes in the legal situation.

3. Traditional competitors: this includes unions affiliated to the Christian Trade Union Confederation (CGB). Although CGB trade unions are not regarded as
directly dependent on employers, they are a substantial irritant to the DGB. DGB unions have sought to use the courts, with mixed results, to have their negotiating capacity struck down.

4. **New competitors**: unions formed specifically to undermine incumbents. In some cases, there is a link between these and – legitimate – sectional unions, in that both reflect the upheaval in deregulated industries (in this case, undercutting by new entrants where wage costs are critical). Incumbent strategies centre on legal challenge.

### Table 1. Union competition: Challenges and incumbent responses.

<table>
<thead>
<tr>
<th>Example</th>
<th>Union type</th>
<th>Recent action</th>
<th>Incumbent</th>
<th>Incumbent response</th>
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<td>DAG (white-collar staff)</td>
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<td>Coexistence and competition with DGB unions before 2001</td>
<td>DGB-affiliated unions</td>
<td>Coexistence and ‘incorporation’: DAG co-founder of ver.di (2001)</td>
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<td>GDL (train drivers)</td>
<td>Occupational union</td>
<td>Won separate agreement in 2007</td>
<td>TRANSNET (now EVG [Eisenbahn- und Verkehrsgewerkschaft])</td>
<td>Negotiated coexistence: competition if GDL recruits in EVG area.</td>
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<td>Marburger Bund (doctors)</td>
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<td>Won separate agreement</td>
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<td>Coexistence: contested definition of ‘incumbent’?</td>
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<tr>
<td>Cockpit (pilots, flight engineers)</td>
<td>New occupational union</td>
<td>Won separate agreement</td>
<td>ver.di</td>
<td>Reluctant coexistence</td>
</tr>
<tr>
<td>ufo (cabin crew)</td>
<td>New occupational union</td>
<td>Separate agreements</td>
<td>ver.di</td>
<td>Coexistence and competition</td>
</tr>
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<td>Deutsche Feuerwehr-Gewerkschaft (firefighters)</td>
<td>New occupational union</td>
<td>Aims to negotiate terms for firefighters: civil service status for white-collar staff</td>
<td>ver.di and dbb (Komba)</td>
<td>Coexistence and competition</td>
</tr>
<tr>
<td>GDF (air traffic controllers)</td>
<td>New occupational union</td>
<td>Separate agreement</td>
<td>ver.di</td>
<td>Reluctant coexistence</td>
</tr>
<tr>
<td>NAG (insurance)</td>
<td>New sectoral union for insurance</td>
<td>Seeks separate agreement and DGB membership as an ‘industry union’</td>
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<tr>
<td>CGB (Christian Union Confederation)</td>
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<td>Undercutting DGB-affiliate agreements</td>
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<td>GNBZ (postal delivery)</td>
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<td>Rival agreement to DGB affiliate</td>
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</tr>
<tr>
<td>AUB (Arbeitsgemeinschaft Unabhängiger Betriebsangehöriger)</td>
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<td>Contests works council elections</td>
<td>ver.di, IG Metall</td>
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Responses by incumbent unions have been in broad agreement on most of the cases listed above, often including using the courts to challenge their legal right to bargain. The main exception has been with occupational unions that see themselves as the principal union in an occupation and which practise ‘wage leadership’. In the case of the train drivers, for example, responses from within the labour movement highlighted profoundly different notions of union solidarity, ranging from hostility (‘breach of solidarity’) to support based on a more ‘vanguard’ concept of skilled and strongly organized workers acting as a spearhead against pay moderation. This was exemplified by Detlef Hensche (former head of the printworkers’ union):

The oft-invoked principle of collective bargaining unity is an invention of the Federal Labour Court of dubious legitimacy and now past its sell-by date. Of course, separate representation and division are of no use in the long term. Trade unions are formed … to eliminate competition within their own ranks [and] to prevent occupations and workforces being dragged into an undercutting war. … However, the demands and actions of the train drivers point in the opposite direction. … If individual groups of employees campaign for improvement, this should be not be an issue for rebuke. These … struggles are union struggles. … To succeed, unions need strong groups of workers. (Hensche, 2007: 1029ff.)

Other unionists expressed concern about the implication of occupational agreements for industry bargaining, and criticized the government for brokering such a step on the railways. Hubertus Schmoldt, the then head of the chemical and energy union IG BCE (Industriegewerkschaft Bergbau, Chemie, Energie), called the settlement a ‘fateful step’, in which the winners would be ‘sectional egoism’ and the loser ‘the principle of industry unionism’, and raised the spectre of ‘British conditions of the 1970s’ (Handelsblatt, 15 January 2008). These two broad positions have subsequently conditioned responses to the 2010 Federal Labour Court judgement, which are outlined further below.

When sectional unions first emerged (from 2005 to 2010), employer organizations did not express a consistent position, reflecting diverse interests. There were also tensions between the national employer association (BDA) and some industry bodies on issues of vertical organization. For example, the BDA refused to support calls by some industry associations to extend industry agreements, for which its assent is required under the Collective Agreements Act. The BDA has also been reluctant to participate in legislative initiatives to establish a pay floor and rejects proposals, floated in the autumn of 2011 by the Conservative–Liberal coalition, for sectoral minimums to be negotiated by national unions and employers. Some employer associations also engaged with non-DGB unions to put pressure on incumbents. On horizontal matters, however, the BDA has been clear on the need to maintain Tarifeinheit and in 2008 allied itself with calls from the head of Deutsche Bahn for legislation to enshrine the principle in statute and remove it from the scope of the courts.

German union responses: Joint action and strategic differences

The 2010 Federal Labour Court judgements on collective bargaining unity led to a variety of responses. A broad categorization might be termed thus:
1. Legislative to stabilize bargaining arrangements.
2. Accept the court rulings, and resolve differences via inter-union negotiation and accommodation.
3. ‘Don’t panic!’

Legislation

Following confirmation of the Federal Labour Court ruling the BDA called on the government to prevent an ‘unravelling of the collective bargaining system’ (BDA, 2010). The DGB general Secretary Michael Sommer also stated: ‘We fear that this decision could lead to a fragmentation of collective bargaining with negative consequences for employees and companies’ (DGB, 2010). Occupational unions welcomed the decision, arguing that ‘organizational diversity bolsters employee interests’. Vereinigung Cockpit threatened to appeal to the Federal Constitutional Court to block any legislation that aimed to nullify the ruling.

Using emphatic ‘partnership’ language, the DGB and BDA (BDA/DGB, 2010) jointly proposed legislation to re-establish the ‘core principle of collective bargaining unity’ as an ‘indispensable pillar of free collective bargaining’ in which ‘the interests of workforces as a whole ought not to be displaced by sectional interests’ (Einzelinteressen). The DGB and BDA continued that ‘Collective bargaining and workplace partnership can only function if it is borne by the joint will to regulate working conditions’ (BDA/DGB, 2010). The proposal envisaged that if several collective agreements, concluded by different unions, overlapped within a workplace (Betrieb), the collective agreement to be applied would be the one that applies to the majority of union members at that workplace.

The ‘peace obligation’, under which a union may not take action over a currently valid collective agreement, would apply both to this agreement and to any competing agreement rendered inapplicable under the proposed change. It would also apply to other trade unions, whose agreement would be set aside. For example, a ‘sectional trade union’ (Spartengewerkschaft) would be prevented from attempting to negotiate a separate agreement for an occupational group that was already subject to the more representative agreement and from taking industrial action to attain this (as was successful with the train drivers’ dispute: see above).

The proposal stresses that it is not intended to establish ‘a monopoly for certain collective bargaining parties’. However, the proposal notes that any plurality of agreements would need to be created through agreement between unions, and with agreements applying to differing occupational groups. Moreover, ‘such a statutory provision would not preclude trade unions competing with each other’, but this would only be possible once the main recognized agreement expired. In a commentary on the proposal Kempen (2011: 52) noted this would supplant case law on colliding collective agreements by replacing the principle of ‘specificity’ with a new procedure to assess representativeness of any agreement in the employment in which it was being applied (cf. Dieterich, 2011: 47 for a critique). Despite shifts in the union position, outlined below, the BDA has stuck by the call for a legislative solution, which was also supported by the Labour Minister, a Christian Democrat.
Internal union resolution

A number of union voices, many already uneasy about the notion of Tarifeinheit, were highly critical of the BDA/DGB proposal, and the haste in which it was brought forward. In particular, opinion within ver.di, the union most affected by sectional organizations, has been divided, in part because in some areas it is now a challenger rather than an incumbent and in part because of a militant tradition of some occupational groups within it. Initially, the proposal was welcomed by ver.di’s general secretary, Frank Bsirske. However, following criticism from within its own ranks, ver.di initially opted for a ‘careful assessment of the advantages and disadvantages’ of a legislative solution, and held back from full endorsement. Some groupings within ver.di rejected the proposal outright. For example, the executive of the printworkers’ section called on ver.di to ensure that the DGB returned to the path of ‘defending the right to strike and free collective bargaining’ (ver.di, 2010). Specifically, they rejected the implication of the BDA/DGB proposal that would widen the peace obligation to cover workers in unions whose agreement was not recognized, and prevent them taking industrial action to win a better agreement. The resolution also expressed the tension between the need for compromise in bargaining and the political rapprochement over a legislative intervention: ‘Despite the practice of bargaining partnership [Tarifpartnerschaft], it is a fundamental offence against the entire history, politics and culture of the trade union movement to come to an agreement with employer organisations to configure the right to strike and to call jointly for legal initiatives to this end’ (ver.di, 2010).

In May 2011, ver.di’s ‘general council’ (Gewerkschaftsrat) announced that the union would no longer support the BDA/DGB initiative (ver.di, 2011), suggesting a victory for the principle of ‘identity and opposition’ (Hyman, 2001: 140) over a more general political solution. The dilemma in which the organization and its leadership found itself was highlighted in an interview given by Frank Bsirske in September 2011 in which he emphasized that ver.di’s strategic response would entail ‘a greater focus on the membership and more differentiation [in approach] in order to meet the interests of all employer groups’ represented by the union’ (Bsirske, 2011: 7). Bsirske acknowledged that if some groups, such as pilots, wanted to pursue their own organizational option it would be hard for ver.di to retain them. On the BDA/DGB proposal, he commented that ‘the majority of ver.di officials was convinced that a statutory prescription of collective bargaining was the wrong path to take’ (Bsirske, 2011: 7). However, Bsirske also indicated the union’s strategic dilemma by adding that, although ver.di ‘rejected any form of statutory intervention into the law on collective bargaining or industrial action’, this did not rule out continuing ‘to fight politically for collective bargaining unity’ (2011: 7). He had previously noted that ‘the principle of collective bargaining unity has a high value for ver.di as a guarantee of a solidaristic and unified representation of the interests of all employees’. It ‘limited competition … and promoted the social acceptance of free collective bargaining’ (ver.di, 2011).

Following this switch, in early June 2011, exactly one year after the joint proposal, the DGB withdrew from the initiative despite its view that ‘the political aim of collective bargaining unity is and remains correct in order to strengthen and secure free collective bargaining’ (DGB, 2011), in a step officially regretted by the BDA, which indicated that it would continue to lobby the government and work ‘with those from
the union side who also continue to believe that a statutory solution is necessary’ *(Tagesspiegel, 8 June 2011).* This includes the chemical workers IG BCE and the metalworkers’ union IG Metall, which strongly argued for a ‘representative’ principle established in law over a ‘speciality’ principle, under which they had suffered undercutting from the Christian union federation, CGB (Klebe, 2010). IG Metall’s general secretary also emphasized the need for law rather than union resolutions ‘which are not sufficient – they do not change reality’ (Huber, 2011).

**Don’t panic!**

A number of voices counselled against a hasty reaction to the judgement. In addition to the trade union position arguing for an inter-union resolution of interests without fresh legislation, with its implication that the judgement does not represent an immediate crisis for labour, some senior jurists also advised caution, including the president of the Federal Labour Court. In an interview with the *Frankfurt Allgemeine Zeitung* (19 July 2010) she made a plea for ‘calm’. ‘A law in this overheated atmosphere would not be a good thing. … It would need to surmount an enormously high barrier set by the constitution. … This is not a matter of configuring free collective bargaining but an intervention into freedom of association. An association of employees cannot justify its existence if it cannot harvest the fruits of its labour.’21 Deinert (2011) also argued that fears of a disintegration of orderly bargaining could be dealt with appropriate adjustments to the (case)law on industrial action.

**Discussion: Collective bargaining unity and coordinated market economies**

The views of the president of the Labour Court (and by implication of Hensche [2007], and many other contributors to the debate, such as LabourNet.de [2011]) that unions must represent interests to acquire legitimacy, highlight a contradiction between ‘class’ and ‘society’, to frame this in the terms coined by Hyman (2001), or a contrary interpretation to Streeck (2005: 140) that unions must be prepared to place ‘political’ and ‘loyalties’ above the ‘articulated interests’ of members.

As seen in the responses to the July 2010 court ruling and the BDA/DGB legislative proposal, in order to sustain an ‘ordered’ bargaining regime that can resolve coordination problems, the union movement must resolve the dilemma of retaining sufficient mobilizing power to encourage strong employer associations to form, but through a logic that distances itself from a potentially more disruptive traditional labour movement logic of campaigns, struggle and solidarity.

For employers, the emergence of serious competitive union pluralism, were it to become endemic in core sectors, could have far-reaching consequences for the governability of inter-firm coordination. The need to police this boundary is possibly one explanation for the somewhat disproportionate disquiet expressed by officials of employer associations of the two most ‘core’ sectors: metalworking and chemicals. For example, the then chief executive of Gesamtmetall, itself scarcely directly affected and previously an organization that supported not simply a plurality of agreements
but, on occasions, flirted with competing agreements, noted the threat of a ‘progressive breakdown of industry-based trade union structures (one plant = one union) and a progressive fragmentation of the collective bargaining landscape’ (Brocker, 2010: 122). Gesamtmetall could not remain indifferent as sectionalism could ‘pose a threat in the future as the formation of sectional unions is a self-reinforcing and accelerating process’ (Brocker, 2010: 122). The president of Gesamtmetall offered a link with the German production regime: ‘Our industry produces technology for the world, and the range of products is ever more complex. … Our highly networked industry, with its intricate division of labour, is based on [a] functioning partnership of workers and companies, and workers with each other. Rivalries between occupational groups would damage this delicate structure’ (Kannegiesser, 2011).

In this case, the work of reproducing the lateral prerequisites for industry bargaining as a key element of the German CME would appear to have been passed to the employers, who have continued to argue for a statutory solution, but reportedly have had difficulties in mustering political support (Huber, 2011). However, this is not a frictionless process. In contrast to the supposedly functionalist relationship between inter-firm coordination and coordinated industrial relations, Thelen emphasizes the political processes needed to balancing contrasting employer interests and the cognitive difficulties in achieving such a settlement since ‘employers disagree amongst themselves … and are in some ways quite unsure’ (1999: 141). Nonetheless, peak employer associations seem currently very clear that they want to limit the scope for lateral disorganization, which is seen as threatening the predictability of existing arrangements as well as the scope for ‘negotiated restraint’ via workplace derogation from industry agreements, which requires policing by employer associations and unions.

Some employer ‘uncertainty’, however, can be seen in the BDA’s earlier response to proposals made in late 2007 by the then Grand Coalition (when the Labour Ministry was controlled by the Social Democrats) to regulate relationships between collective agreements in a branch in order to set minimum pay levels by law. Based on extending collective agreements to non-signatory employers, one of the proposed provisions was that, in the event of competing collective agreements signed by different unions, representativeness criteria would be enshrined in statute to enable a decree to be issued that would privilege one agreement for extension. This met with a stinging repost from the BDA for trampling on the free collective bargaining rights of associations that might have concluded an agreement that deviated from the ‘majority’ agreement (BDA, 2008). Whether this represents genuine uncertainty, or whether the term ‘free collective bargaining’ is a trope used elastically depending on context, cannot be resolved here.

Up until 2010, the BDA was concerned to resist any incursion of the state into regulating minimum wages – even where this builds on the practice of extension already enshrined in law. Although this shifted somewhat in the light of concerns about the opening of the German labour market to some CEE countries from 1 May 2010, the BDA has remained hostile to measures that might put a statutory floor under ‘vertical disorganization’, but within a framework that insists on the ‘lateral’ predictability of deals struck with established unions. In line with Doellgast and Greer, there is no frontal attack on codetermination and industry bargaining, provided the state is kept out of pay and companies can make use of newly created markets. In the field of lateral
disorganization, however, the BDA’s stance appears to confirm Thelen’s position that employers do not wish to dismantle the system, and have advocated new laws to contain fragmentation.

Conclusion

Germany is marked by a nominally high degree of union pluralism, much of which has been managed for some years without impinging on the core features of industrial unionism, ‘collective bargaining unity’ and, with this, the retention of a moderately coordinated collective bargaining system. In the recent past, the political and interest settlements within and between trade unions appear to have been challenged. In particular, areas of inter-union competition may have been promoted by processes that both run counter to core elements of coordinated market economies but are also generated by these. For example, union mergers are arguably necessary to bolster unions’ institutional strength, a central element of Western European coordinated economies, and to create inclusive institutions that cannot externalize their costs. At the same time, ‘strong trade unions’ have played a contradictory role. First, the incorporation of specific occupational interests and the elimination of status-based unionism have created scope for breakaways, where other conditions have been met, such as a tradition of organizing, strong occupational awareness and a limited number of employers.

Industry unionism has also been important in achieving pay moderation. However, whereas these processes appear to have been managed in sectors where this has been most formalized (metalworking, chemicals), the major challenges – as evidenced in the cases noted above – have emerged elsewhere. In particular, whereas chemicals and engineering still fit the image of diversified quality production characteristic of coordinated market economies, competitive pluralism has emerged in sectors that are not part of this model – and which have been especially susceptible to the impact of deregulation, much of it emanating from the European Union.

The debate and responses triggered by the decisions of the Federal Labour Court in 2010 also raise the issue of the role of the courts and how they interpret constitutional principles. In its arguments, the Federal Labour Court emphasized that the courts needed to help ‘adapt law to changed circumstances’ due to the limited scope for response by the legislature ‘in view of the accelerating pace of social change’ (BAG, 2010: No. 38). However, the court also argued that it was not the role of the judiciary to ‘develop the law without limit’ or create new norms, unless statute law is ‘incomplete’. What might have led the courts to interpret the Basic Law in a way that could undermine a central organizing principle of Germany as a CME? At first sight, the way in which central associations responded to the autonomy of the judiciary appears as a conscious effort to reproduce the prerequisites for a CME. However, this has also collided with other organizational logics inherent to establishing a robust trade union culture. A large element of irresolvable contingency continues to surround the origins and nature of the German Basic Law and recent judicial decisions: answers might need to be sought in a more focused engagement with labour law and the judiciary from a political-economy perspective.

The emergence of some instances of ‘lateral disorganization’ seems unlikely to ‘tip’ the German system into a pluralistic model. However, sectional organizations have
managed to establish an enduring presence in certain sectors and demonstrated a capacity for industrial militancy that has continued to polarize opinion within the wider labour movement and alarm employers. The 2010 Federal Labour Court judgements brought this issue back into public prominence, and initially elicited strong agreement by national employers and trade unions, and even industry employer associations barely impinged on by the issue, that industry-level ‘collective bargaining unity’ should be retained as a constitutive element of the German model. At the same time, it prompted a strategic discussion within and between unions about whether inter-union differences should be resolved through a fresh legal framework (society) or through negotiated and autonomous coexistence (class) in a process that remains – as yet – unresolved.

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**Notes**

1. A ‘sectional trade union’ is an organization that represents the interests of an occupational group within an industry where industry bargaining is the norm; it translates the German *Spartengewerkschaften* and in this context is not meant normatively (see McBride, 2011: 286–288).

2. This study draws on secondary output from the main institutional actors: various agencies of the German judiciary for court rulings; various agencies of the German state for policy positions; German union policy documents and press releases; German employer and employers’ organization documents and press releases; and German news media reports.

3. The dbb represents civil servants (*Beamte*), who do not have negotiating rights, and those working in the state or para-statal bodies.

4. Examples during 2010–2012 include actual and threatened strikes by pilots, train drivers and air traffic controllers.

5. Kahn-Freund notes that fundamental rights ‘had to be formulated in very general terms – terms so general that they left to the judges the power to read anything or nothing into or out of them’ (Kahn-Freund, 1976: 267).

6. According to the Federal Labour Court (BAG, 1998), collective bargaining without a right to strike is ‘collective begging’.

7. Paradoxically, the legal principle enabled sectional unions to lever industry unions out of a workplace: however, in practice, sectional unions lack the resources to engage in company bargaining on a large scale. There was widespread scepticism about the principle of *Tarifeinheit* both on the part of jurists and many trade unionists.

8. Bundesarbeitsgericht, Presse-Mitteilung 46/10. In the case, two members of the doctors’ union Marburger Bund sought to enforce an agreement that their employer no longer deemed applicable as it had been superseded by an agreement negotiated with ver.di for the whole public sector. The new agreement had not been signed by Marburger Bund, following the ending of its single-table arrangement with ver.di. The doctors claimed supplements due under the old agreement on the grounds it was still valid (agreements in Germany have an ‘evergreen’ status until validly replaced). The court agreed on the ground that to displace a freely concluded agreement is incompatible with freedom of association.

9. The terminology used by the court was tightened by legal commentators: *Tarifpluralität* is arguably the wrong designation; *Tarifkonkurrenz* more accurately describes the position.
10. DAG and DGB were expected to merge after the bad experiences of union competition in the Weimar period.
12. They argue, for example, that the case-law criteria for union ‘competence to bargain’ were developed to aid the functioning of the system, and, strictly speaking, contradict constitutional freedom of association (Hromadka and Schmitt-Rolffs, 2010: 690).
13. The most recent instance was the establishment of a firefighters’ union in May 2011. At the time of writing, this had circa 1000 members (out of a total 100,000 firefighters). This union has been categorized under ‘new’ occupational unions as the historical successors to the original German Fire Brigades Union (VDB), established in 1908, are part of ver.di. The NAG union (Neue Assekuranz-Gewerkschaft) was set up in 2010 for insurance staff in response to the ‘dilution’ of industry unionism through amalgamation.
14. This has enjoyed success and failure. A significant ruling in 2010 stated that the CGB affiliate for agency workers, the CGZP (Christliche Gewerkschaften für Zeitarbeit und Personal-Service-Agenturen), was not competent to bargain, and that agreements it had concluded were void, leaving employers liable to pay the difference between the CGZP rate and the DGB union rate.
15. German trade union literature has distinguished between unions that practise ‘undercutting’ and those looking for higher pay (‘overbidding’) (Überbietungs- und Unterbietungskonkurrenz) (see Bispinck and Dribbusch, 2008).
16. The government has increasingly used, and amended, the Posted Workers Act to apply negotiated minimums: under this statute, provided the sectors have been incorporated into the law, a BDA veto can be avoided.
17. Some regional affiliates of the national metaltrades employers’ association Gesamtmetall concluded undercutting agreements with the Christian Trade Union Federation in East Germany during the 1990s.
18. BDA president, Dieter Hundt, in expressing support stated that: ‘Companies must be able to rely on not being exposed to further demands during the lifetime of a collective agreement’ (BDA, 2007).
20. Discussions on such a proposal had been in train for some time, partly in response to the actions taken by sectional unions in 2007 and partly because the Federal Labour Court said that it expected to change its stance on the issue.
21. The president also noted practical problems that had, as yet, gone unconsidered, related to the timing and measurement of representativeness and how the process could be given sufficient transparency to make it legitimate.
22. In similar vein, the president of the Chemical Employers’ Association (BAVC) refers to the ‘irrational and unpredictable conduct’ of the train drivers’ union, which ‘has taken Germany hostage as a business location’, with its ‘deliberate assault on the [social] cement of solidarity that holds our social market economy together’, with ‘other sectional unions waiting in the starting blocks’ and ‘English conditions no longer a horror scenario conjured up by employers but a real danger for Germany’ (Handelsblatt, 10 March 2011).
23. Extension under the Collective Agreements Act requires the consent of the BDA. In part due to the BDA’s veto, the government adapted the law transposing the EU Posted Workers Directive to stipulate wage minimums in sectors brought into its scope: in these cases, industry-level actors may negotiate a rate that is then made binding by decree. The mechanism has been used in several sectors as an alternative to a statutory minimum wage, but is predicated on the pre-existence of viable industry-level bargaining arrangements.
24. Kahn-Freund noted: ‘the Basic Law had to fill the gaps left by a broken history. … The history of Germany and her geographic position may have made it inevitable to confer on the judiciary the overwhelming power which it enjoys through its function of interpreting and applying’ constitutional principles (Kahn-Freund, 1976: 266). The recalibrating of the once authoritarian state apparatus of a defeated ‘contender state’ (Van der Pijl, 2005) might offer other starting points beyond contingency.

References


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