



National Background Paper Germany



European Commission
Employment, Social Affairs
and Equal opportunities

27 National Seminars Anticipating & Managing Restructuring

- A.R.E.N.A.S -

VC/2008/0667

ITC 
International Training Centre



European Commission
Employment, Social Affairs and Equal opportunities

National Seminar – Germany National Background Paper

Anticipating and Managing Restructuring Germany

April 2010

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This document is part of an initiative from and funded by the European Commission, Directorate-General for Employment, Social Affairs and Equal opportunities, unit working conditions and adaptation to change.

Executive Summary	5
Introduction	7
2. Economic and labour market developments.....	9
2.1 Long-term developments	9
2.2 Structural and economic challenges	13
2.3 Recent developments.....	17
3. Importance of restructuring, redundancies and dismissals	21
3.1 The lack of official statistics.....	21
3.2 What surveys say about restructuring and redundancies	22
4. Anticipation issues	23
4.1 Forecasting skills gaps	23
4.2 Continuing vocational training	26
4.3 R&D spending.....	28
4.4 Regional regeneration and industrial policies	30
5. Negotiated restructuring: the institutional framework	31
5.1 Principal actors in negotiating company restructuring	31
5.2 Concepts, rules and procedures	33
5.3 Enforcement and coverage	36
6. Managing redundancies through re-deployment on the internal and the sectoral labour market.....	39
6.1 Case study (2): Re-deployment on the internal labour market	39
6.2 Case study (3): a regional ‘labour pool’ in the engineering industry	40
7. Managing redundancies through job transfer schemes	43
7.1 The trilateral transfer deal	43
7.2 Short-time allowances as the public subsidy for the transfer deal.....	44
7.3 Job transfers supported by transfer companies	46
7.4 Case study (4): Transfer Company Nokia Bochum.....	47
8. Trajectories of workers affected by restructuring, and outcomes of job transfer schemes	49
8.1 Trajectories of displaced workers in general	49
8.2 Outcomes of job transfer schemes.....	49
9. Critical issues.....	51

9.1 The legal framework of employment relations and protection	51
9.2 The trap of early retirement	51
9.3 The historical emergence of the institutional structure of job transfer and the lack of a positive political message on restructuring.....	52
9.4 Ambiguity of status during job transfer	52
9.5 Structural problems.....	53
9.6 Quality issues and the job transfer network in North-Rhine-Westphalia	54
9.7 Case study (5): The Association for Innovative Employment Promotion in North-Rhine-Westphalia	56
10. Concluding remarks	50
References.....	52
Figure 1: GDP (price adjusted) and employment, rates of change against previous year	9
Figure 2: Employment (including self-employment) and unemployment	10
Figure 3: Annual transitions from unemployment into employment and vice versa, annual stocks of persons employed	11
Figure 4: Entry rates, exit rates, and labour turnover rates (only employment subject to social insurance contributions).....	12
Figure 5: Quarterly announcements of job reductions for some large EU countries.....	12
Figure 6: Structure of employment by sectors.....	13
Figure 7: Foreign trade surplus as a percentage of GDP in comparison with important trade partners, 2008	14
Figure 8: Foreign trade surplus as a percentage of GDP, 1991 to 2008.....	15
Figure 9: Per unit labour costs in manufacturing, water and energy supply	15
Figure 10: Labour income share in selected EU countries	16
Figure 11: Quarterly GDP and employment change (compared to same quarter of previous year, GDP price adjusted)	17
Figure 12: Workers receiving short-time allowances	18
Figure 13: Number of restructurings in past 10 years (as reported in 2006 survey of works councils in establishments with at least 20 employees)	22
Figure 14: Percentages of employees who participated in continuing vocational training in EU Member States, 2005	27
Figure 15: Entries into continued vocational training publicly sponsored in the framework of active labour market policy, 1992 to 2007	28
Figure 16: Aggregate R&D spending as a percentage of GDP	26
Figure 17: Three axes in addressing of restructuring.....	32
Figure 18: The trilateral jobs transfer deal	43
Figure 19: Number of workers receiving short-time allowances, by type of provision	45
Figure 20: Status of participants in transfer schemes immediately after leaving	50
Table 1: Estimation of job losses due to insolvencies	21
Table 2: Participants in job transfer schemes in December 2009, by federal state.....	55

Executive Summary

Germany is still among the leading export nations. Only through growing foreign trade surpluses has it been able to maintain a still relatively large industrial base. Traditionally a high-wage country, Germany has lately resorted to wage restraint and labour cost competition in order to defend its international competitiveness. As a result, restructuring, which was dramatic between about 1985 and 1995 with German unification in the middle of the period, seems to have recently slowed down.

Because of its dependence on the global market and the weakening of internal demand, Germany has economically been particularly hard hit by the current crisis. However, the impact of the crisis on the labour market is almost negligible to date. Using financial reserves accumulated during the last upturn, highly developed mechanisms of internal flexibility, a pronounced willingness on the part of workers to make concessions for job stability, and generous provisions for short-time allowances, German firms are currently still hoarding labour in expectation of an early recovery. Instead of restructuring, we see both a willingness on all sides concerned, and the ability and resources, to maintain existing structures.

In cases when restructuring becomes inevitable, the main mechanism for managing this socially is what we describe as ‘job transfer schemes’. The basic idea is to avoid unemployment by extending employment status beyond the end of the notice period and using this extra time for occupational re-orientation, training and assisted job search. These schemes developed out of an intricate interplay between legal employment protection, representation by works councils, and public provision of short-time allowances. It is not by chance that the fundamental features of job transfer schemes evolved in the aftermath of German unification, when restructuring was dramatic. Innovation in this field has since decelerated, and job transfer is currently not at the top of the political agenda. Since job transfer provisions developed by bending, stretching and re-defining existing provisions and regulations in reaction to irrefutable practical needs, both a positive political job transfer agenda and a straightforward institutional design are lacking.

Against this background, ‘anticipation’ of restructuring is not a major issue in Germany, neither in the sense of forecasting nor in the sense of making firms and workers more adaptable to radical change. Since the mid-1990s, the public debate has concentrated on deregulating the employment relationship in order to increase ‘flexibility’, and some inroads have been made with regard to EPL coverage and the regulation of temporary employment. Ironically, as a result of facilitating external flexibility of firms, we observe more fear of job loss, less labour turnover and an even stronger focus on internal rather than external flexibility. (It must be acknowledged, however, that since the fourth step of the “Hartz” reforms transitions from unemployment into employment have accelerated without an increase in transitions in the opposite direction, thus reducing unemployment.) Other presumably more important dimensions of preparedness for change to come – for example educational attainment, life-long learning and technological innovation – are on the agenda but without noticeable effect.

Introduction

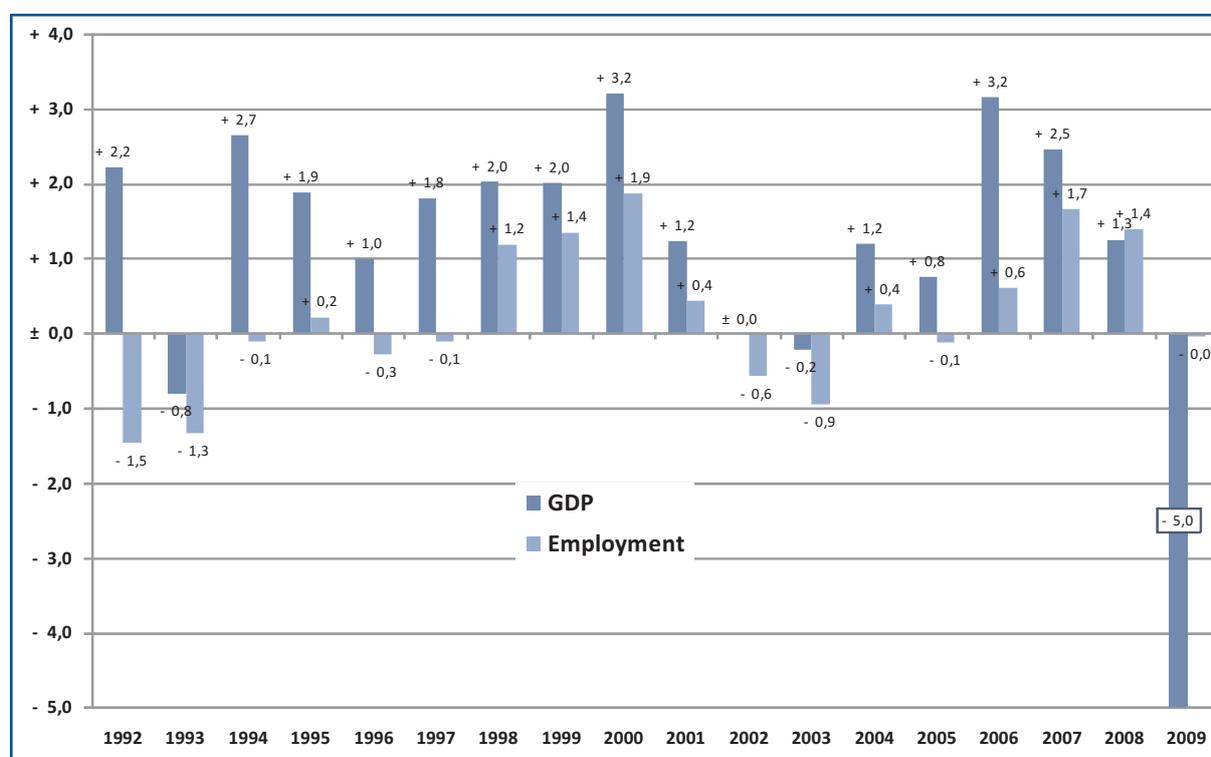
This paper provides a description and analysis of how restructuring is managed in the framework of the German employment model, its industrial relations system, its labour law, its systems of social protection and its labour market policies. Our thesis is that measures and practices for addressing restructuring were greatly spurred on through the steel crisis of the late 1980s and through the economic rupture in the wake of German unification during the 1990s, but that their further development is currently stagnating. This seems to be caused by institutional, economic and political factors. In institutional terms the present positioning of provisions for dealing with restructuring seems to lock them into the narrowly bounded rationale of industrial relations at enterprise level. In economic terms, the structural resilience of the German economy appears in stark contrast to the dramatic slump in economic activity, so it appears that pressure for structural change is building up and might eventually break surface, finding the relevant actors insufficiently prepared. In political terms, the peak of the crisis coincided with a federal election which explains politicians' unusual readiness to cushion the shock of the crisis regardless of fiscal consequences. With regional elections in the most populous state coming up in May 2010, which are seen as the writing on the wall for the fortunes of the new federal coalition, the political climate of election campaigning has continued since the spring of 2009. As from the summer of 2010, the position may be different.

The report is organised in eight chapters plus this introduction and a conclusion. Chapter 2 will review Germany's economic and labour market development both in a longer term perspective and with a focus on the most recent developments. Chapter 3 aims at assessing the quantitative importance of restructuring and of the resulting redundancies. Chapter 4 tackles the concept of 'anticipation' as propagated by the European Commission. This is followed (chapter 5) by an attempt to explain, to a foreign audience, the legal and industrial relations framework of dealing with restructuring, not primarily from a normative but also from an actors' perspective: Who are the actors in the game, what are the rules that apply, what practices are likely to follow, and how does this affect the outcomes? One of the consequences of the rules is a high preference for internal solutions and avoidance of redundancies – chapter 6 contains two case study examples. Where restructuring is so far-reaching that internal solutions are not feasible, job transfer schemes are the dominant method of managing the consequences of restructuring (chapter 7). Chapter 8 reviews the scant evidence on the effectiveness of such schemes, while chapter 9 explores some of the critical issues related to them. The concluding remarks of chapter 10 are an attempt to make sense of the whole story in terms of Germany's history, economic structure and institutional set-up.

2.1 Long-term developments

The latest economic upturn (2004 to 2008), which was ended slightly prematurely by the current financial crisis, did not bring about higher GDP and employment growth rates than the previous upturn (1997 to 2001 - see Figure 1). Nevertheless, this cycle was perceived more positively since (1) it reduced unemployment more than the previous cycle, and (2) it reversed the decade-old trend of base unemployment escalating over each business cycle (see Figure 2).

Figure 1: GDP (price adjusted) and employment, rates of change against previous year

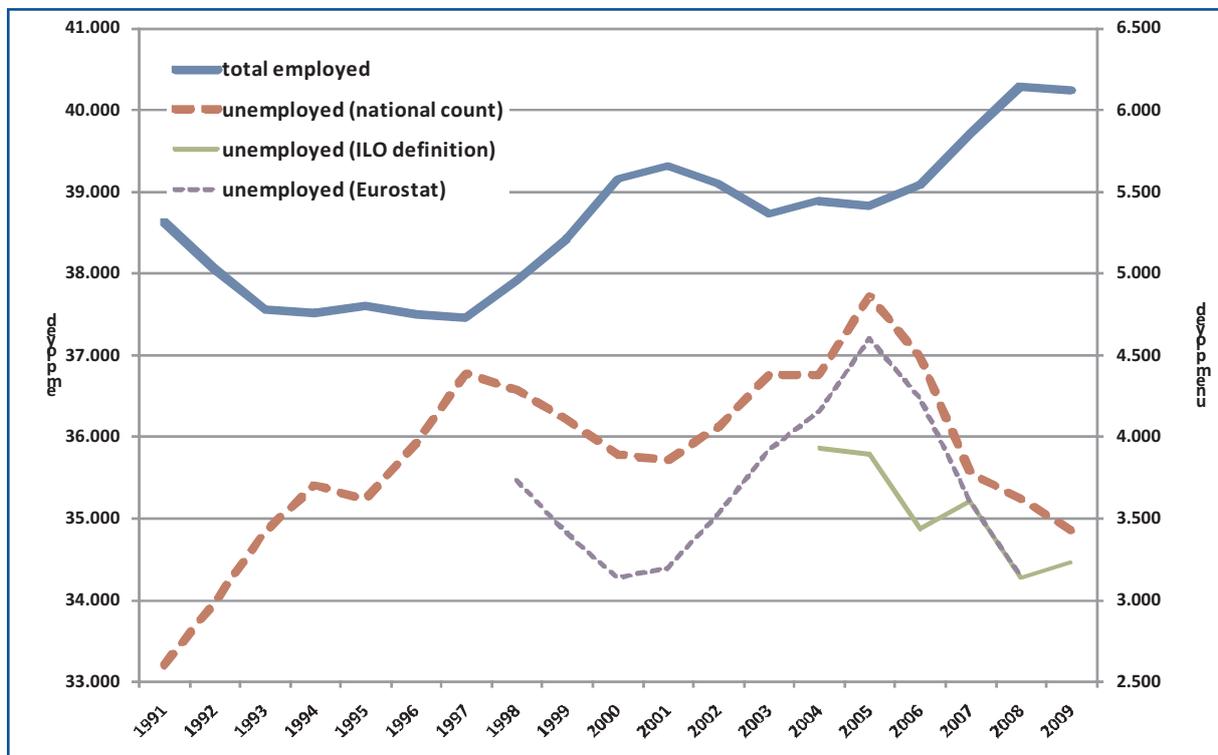


Sources: Federal Statistical Office; calculations by Institute for Employment Research

The first effect – the considerable reduction in the unemployment figures – is in part due to an artificial base effect: by including previously inactive spouses and former recipients of social assistance in the unemployment count, the fourth step of the Hartz reforms boosted the national unemployment count in 2005/2006 (Knuth 2007, p. 17). It seems that a reduction from this artificial inflation of numbers was easier than it would have been without it. In contrast, the ILO count does not show a peak in unemployment in 2005. It does however confirm a considerable reduction since then (see Figure 2).¹

¹ Unfortunately, there is no longer a time-series of the 'true', survey-based ILO count available. As Figure 2 shows, the Eurostat count used to mirror the national count by using correction factors, until it recently coincided with the newly-introduced survey-based ILO count.

Figure 2: Employment (including self-employment) and unemployment

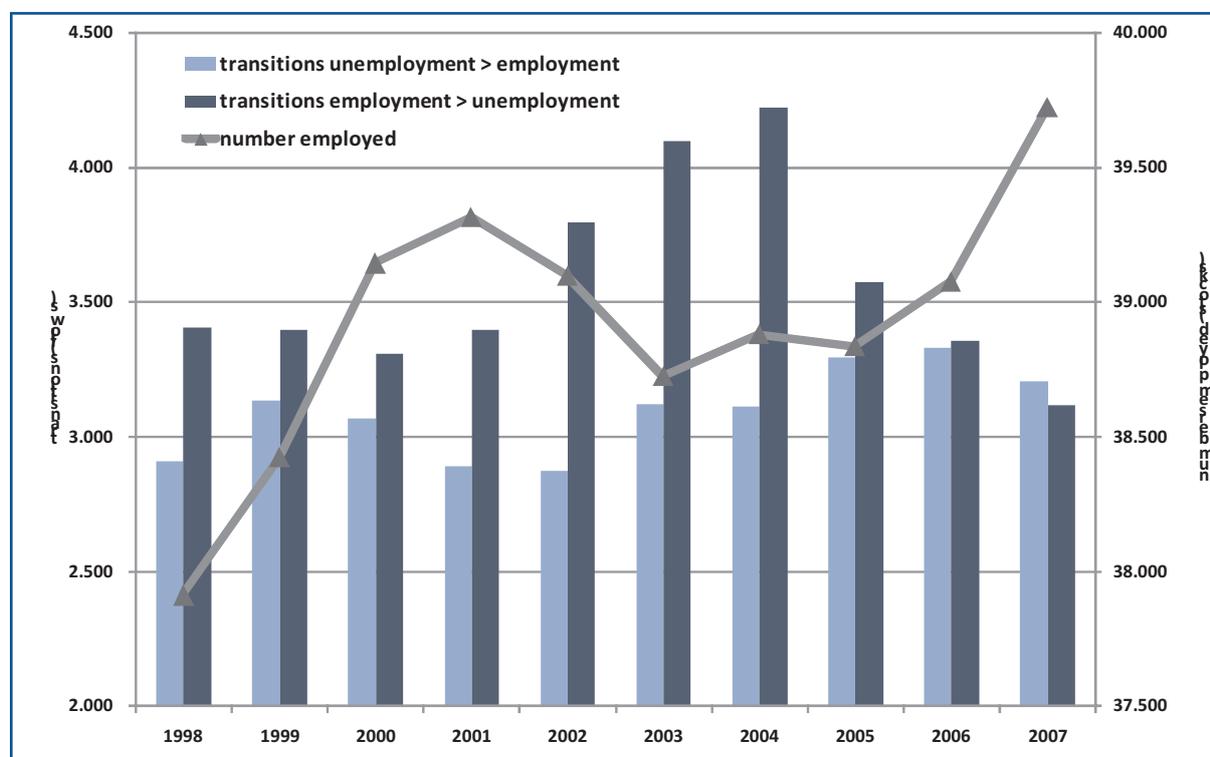


Sources: Federal Employment Agency website; Federal Statistical Office website; Employment in Europe 2009

Figure 3 gives a hint of the dynamics behind this remarkable change: Outflows from unemployment into employment started to grow from 2003, when total employment was still falling, and they were higher throughout the most recent cycle compared to the previous one. But even more important – and more immediately related to the subject of this paper – is the fact that transitions from employment into unemployment, which had been at an all-time high in 2004, fell dramatically from 2005 onwards, to a level clearly below that at the peak of the previous upturn.

Looking at flows from the perspective of employment, Figure 4 shows that labour turnover, which is usually driven by increasing demand and the resultant lengthening of vacancy chains, failed by some distance to retain its 2000 peak level in 2007. Taken these indicators together, it appears that German employers, during the last business cycle and compared to the preceding ones, have hired more from the pool of the unemployed and attracted less from those already employed, thus triggering fewer vacancy chains and keeping aggregate labour turnover rates at moderate levels. Alternatively the same phenomenon might be expressed by saying that employees have clung more to the jobs they had, even during a period of increased demand. Paradoxically, there was a more widespread fear of job losses while actual job tenure was increasing (Erlinghagen 2010).

Figure 3: Annual transitions from unemployment into employment and vice versa, annual numbers of persons employed



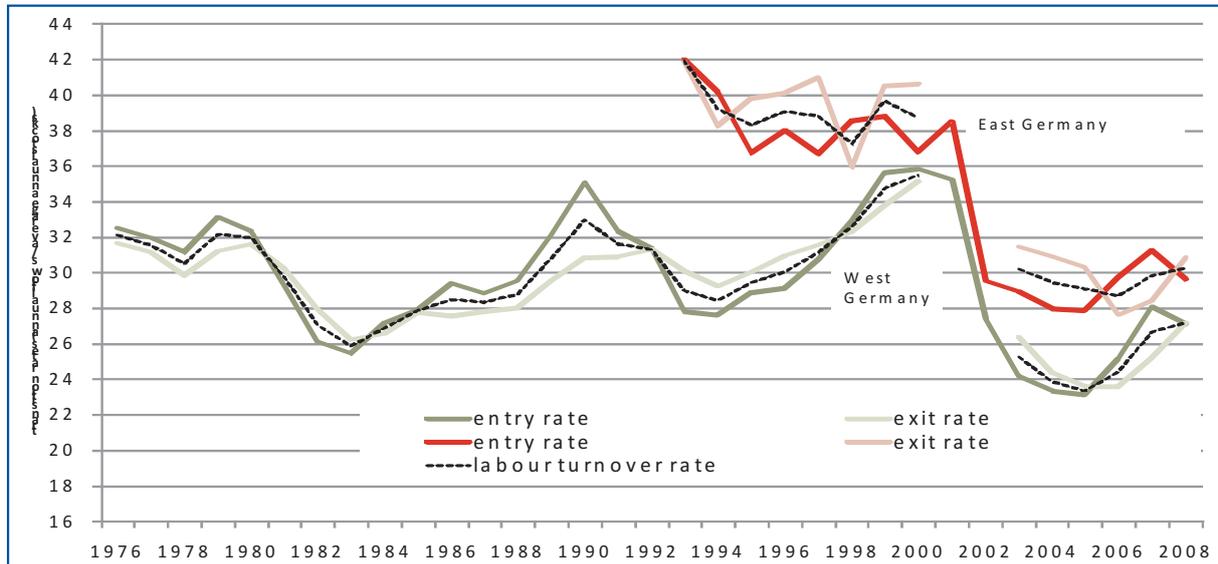
Sources: Federal Employment Agency, Federal Statistical Office websites

The increasing polarisation of the German job market may serve as an explanation: the coverage of collective agreements is deteriorating (Ellguth, Kohaut 2008) and, in the absence of a legal minimum wage, low wages are expanding (Bosch et al. 2008). Vacancies now tend to be offered on terms inferior to those of incumbent workers: or in outsourced subsidiaries not covered by the same, or by any, collective agreement; or via temporary work agencies for whom the European 'equal pay' directive is undercut by collective agreements with trade unions outside the Federation of German Trade Unions (Vanselow, Weinkopf 2009; Weinkopf, Vanselow 2008). The share of fixed-term contracts which always rises in upturns because there are more new hires, rose more steeply in the recent upturn than during the previous cycle (Grau 2010). In consequence vacancies have become less attractive to incumbent workers, while the labour market reforms of 2003 to 2005 have tightened the criteria of acceptability of job offers and generally lowered the reservation wage (Bender et al. 2007).

The results of these changes are ambiguous: In a labour market policy perspective, the German labour market has become somewhat more open to 'outsiders', resulting in decreasing unemployment, partly at the cost of on-going benefit receipts because earnings are often too low to meet a household's needs² (Knuth 2008b). In the perspective of firms' human resource policies, the ties between employers and the shrinking core of their workforces have become even stronger than before, resulting in increased tenure. In part, this is probably related to demographic change, that is to the ageing of incumbent workforces – job mobility decreases with age – and to progress made in curbing the patterns of 'early exit'.

² In the German system of basic income support, continuation of part of the benefit takes the role of earned income tax credits available in other countries.

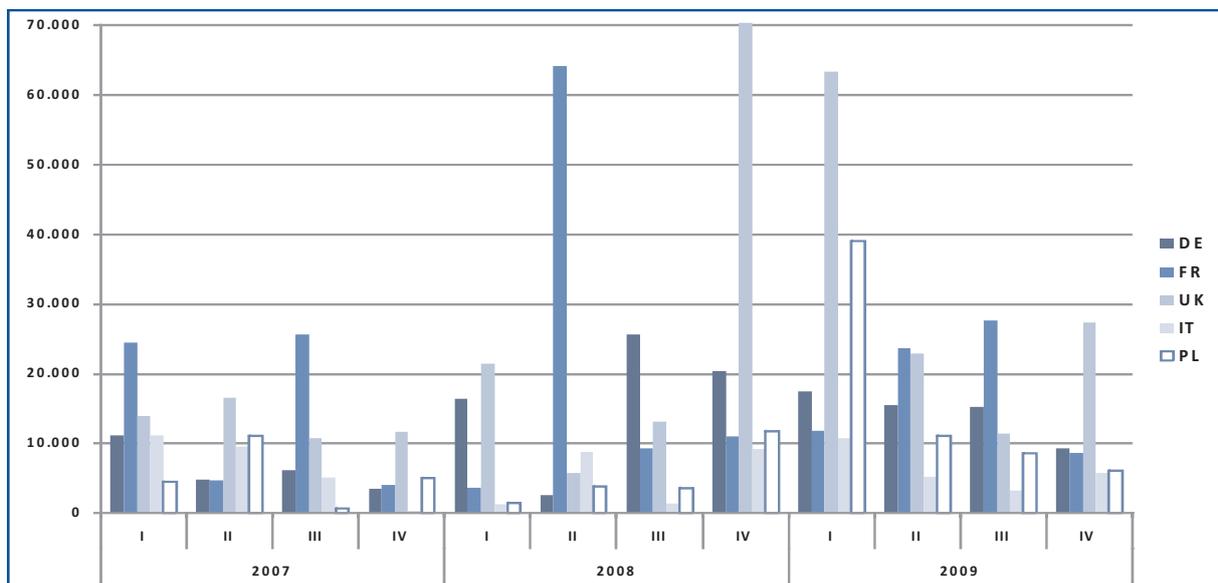
Figure 4: Entry rates, exit rates, and labour turnover rates (only employment subject to social insurance contributions)



Taken from Erlinghagen 2010, based on data from the Federal Employment Agency. No valid exit data available for 2001 and 2002.

To date the pattern of increasing attachment of workers to employers seems to be continuing well into the current crisis: for reasons to be discussed below (2.3), employment levels are far from following the slump in economic activity. For 2009, the net employment change is zero, while the decline in GDP is 5% (see Figure 1). In international comparisons, the ratio between these two figures is extremely favourable; in other words, Germany's capacity to maintain employment in spite of the economic downturn is unparalleled so far (Leschke, Watt 2009; Möller 2010; see also Figure 11).

Figure 5: Quarterly announcements of job reductions for some large EU countries



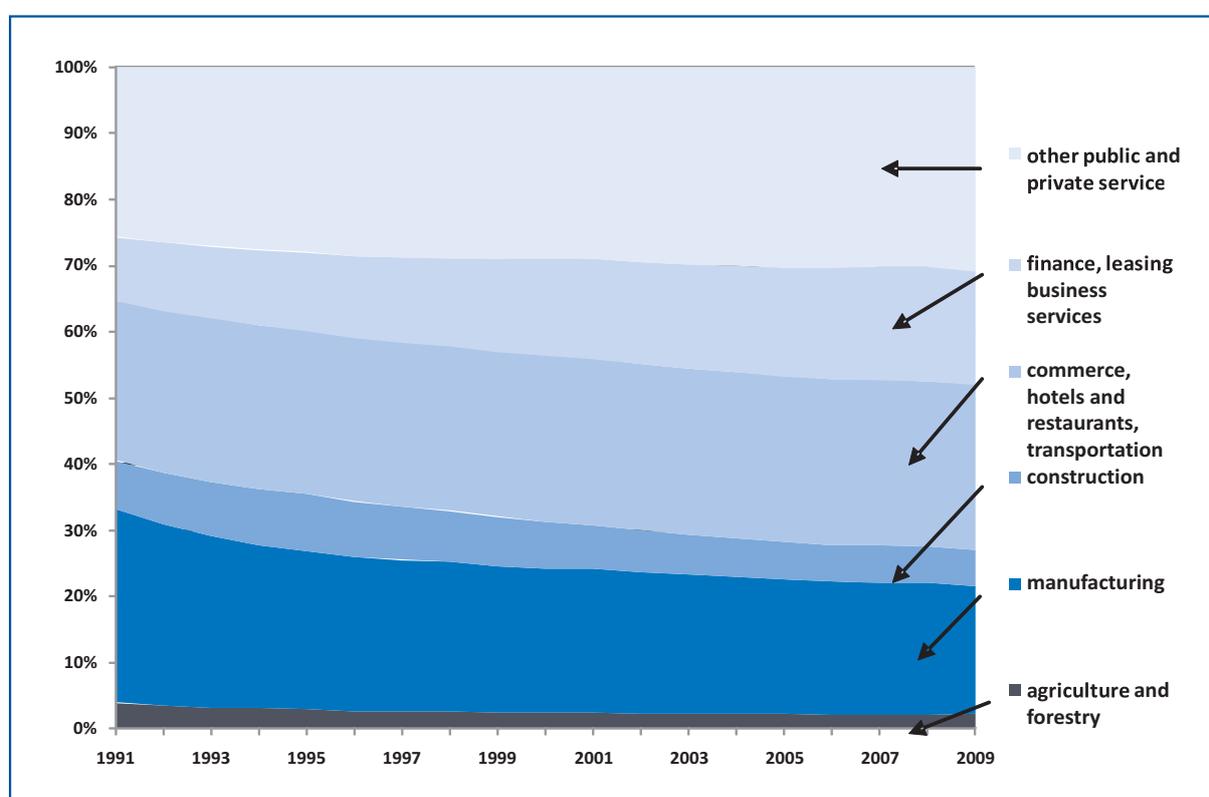
Source: European Restructuring Monitor Quarterly (Eurofound website)

Whereas it is doubtful whether such country reports based on press releases are at all comparable across countries, at least these data (cf. Figure 5) confirm a tendency towards stabilisation in Germany since the outburst of the financial crisis, which is not as clear for other countries. This is undoubtedly a virtue which will be explored further in chapter 6, but it is not without risk.

2.2 Structural and economic challenges

As favourable as employment stability in the face of the financial and economic crisis may appear to be in a short-term perspective, considerable challenges emerge when adopting a longer-term perspective. As shown in Figure 6, structural change which used to be rapid in the wake of German unification has displayed a tendency to slow down since the late 1990s. Except for the financial and business services sector (with temporary employment agencies figuring in the latter group), relative growth in services appears to have stagnated. This is most notably the case for public service employment which has actually declined as a result of privatisation and fiscal constraints.

Figure 6: Structure of employment by sectors

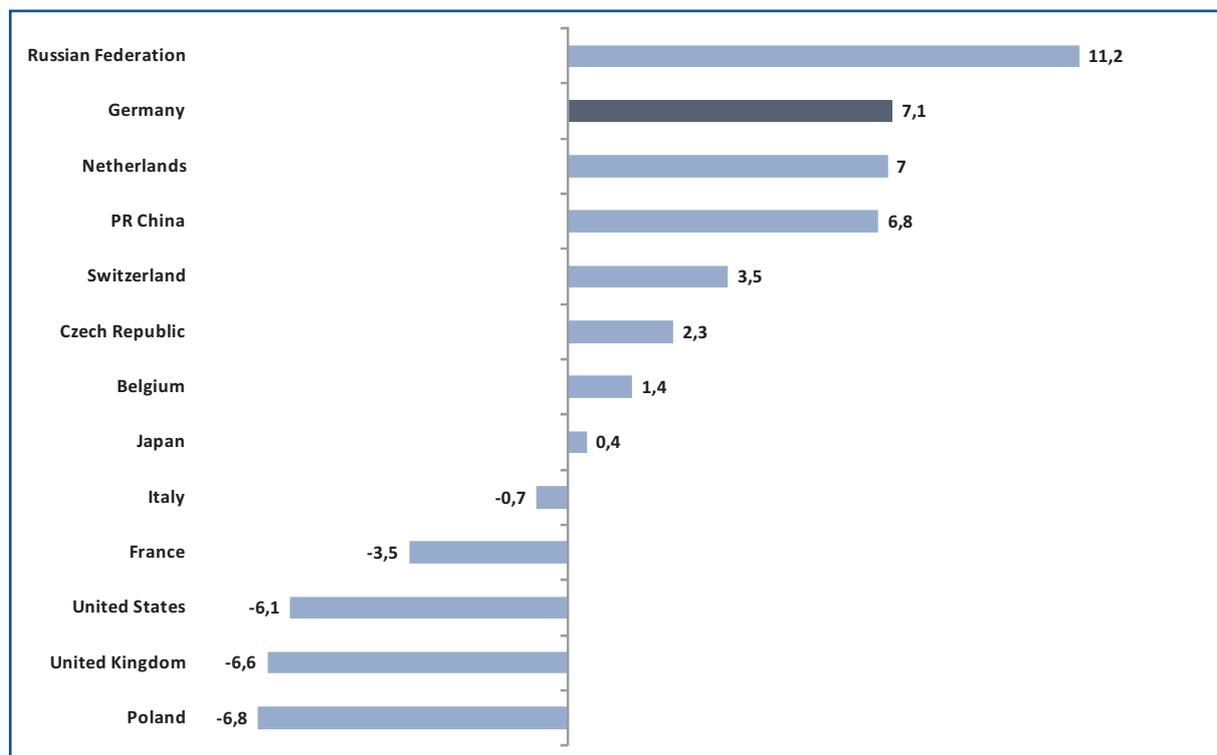


Source: Federal Statistical Office website

The story behind this is that Germany has defended its still relatively high share in manufacturing employment³ by boosting its exports. It is only with massive (Figure 7) and growing (Figure 8) foreign trade surpluses that a relatively large and ever more productive manufacturing sector can be maintained, the output of which inevitably surpasses any possible domestic demand. As a result, the German economy is extremely sensitive to cyclical variations in the world market. Industrial production in 2009 slumped by 17.8% as compared to 2008, which is the main reason for the overall decline in GDP shown in Figure 1.

However, the high technological and qualitative competitiveness of German manufacturing is only the traditional part of the story. The more contemporary part of it has already been hinted at: it consists of wage restraint for core workers and a decline in wages at the lower end of the labour market. Real wages have been virtually stagnating (Joebges et al. 2009b), per unit labour costs in manufacturing have been declining for several years and only grew slightly at the end of the last cycle (see Figure 9), and the labour income's share has become lower than in many other European countries (Figure 10). Since 2000 income inequality and poverty have risen more in Germany than in any other OECD country (OECD 2008). Germany, once a high-wage economy, has entered into international price competition via wage-cost cutting.

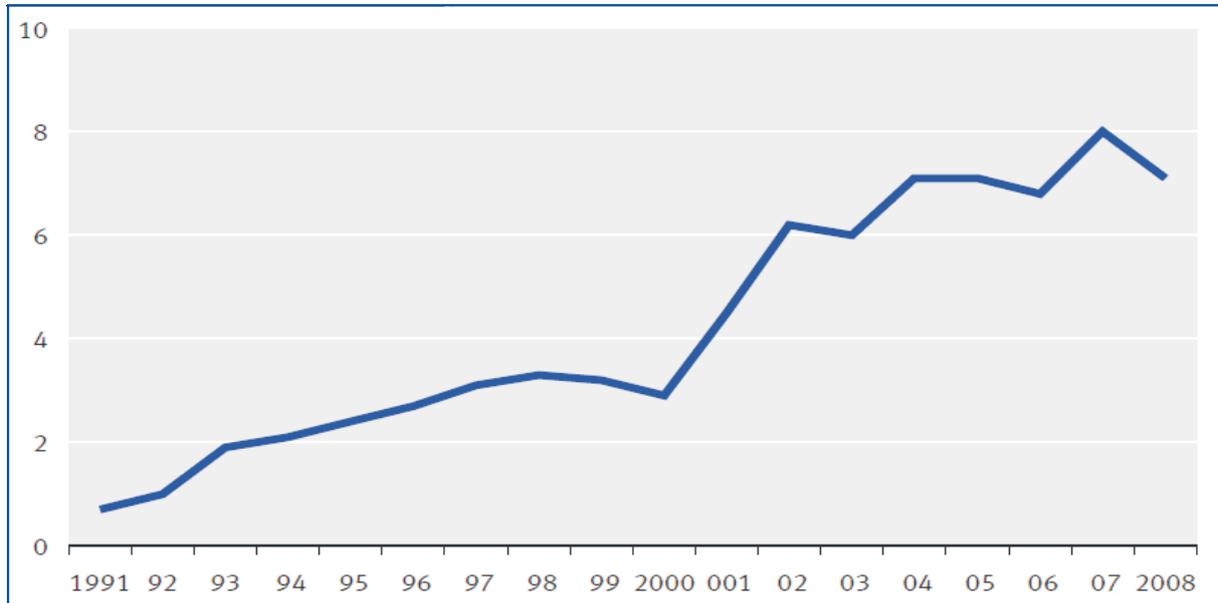
Figure 7: Foreign trade surplus as a percentage of GDP in comparison with important trade partners, 2008



Taken from Gehle-Dechant et al. 2010, p. 33

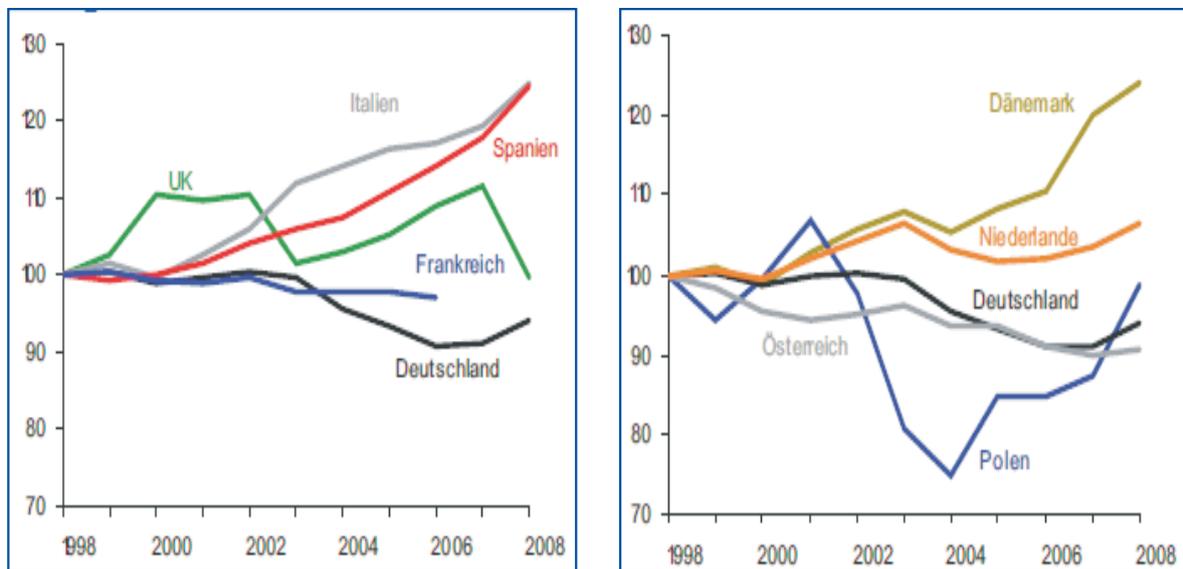
³ It must be noted here that Figure 6 shows the employment structure by persons employed. Owing to much higher shares of part-time employment in services, a full-time equivalent count would reveal a considerably higher share of employment in manufacturing.

Figure 8: Foreign trade surplus as a percentage of GDP, 1991 to 2008



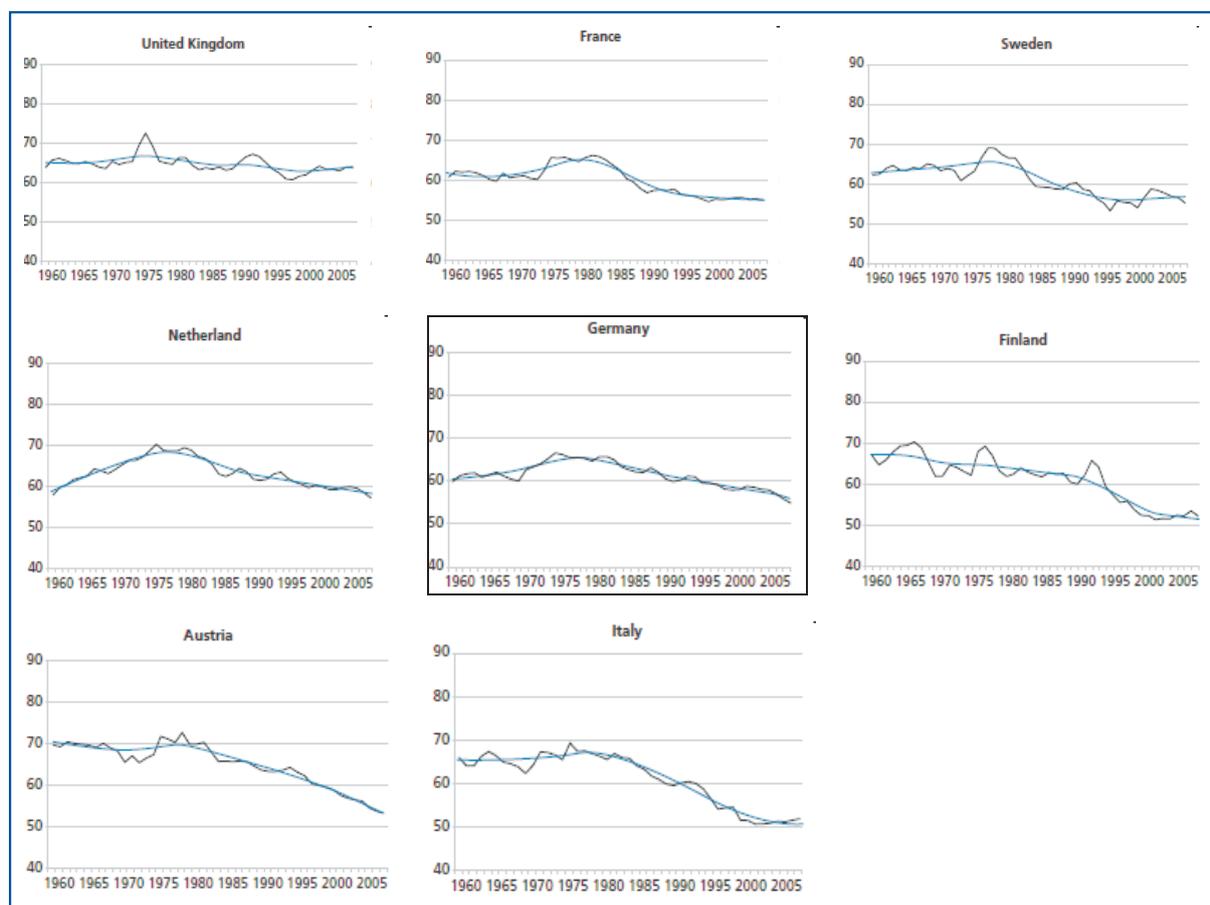
Taken from Gehle-Dechant et al. 2010, p. 29

Figure 9: Per unit labour costs in manufacturing, water and energy supply



Taken from Joebges et al. 2009a, p. 11

Figure 10: Labour income share in selected EU countries



Taken from European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2007, chapter 5.

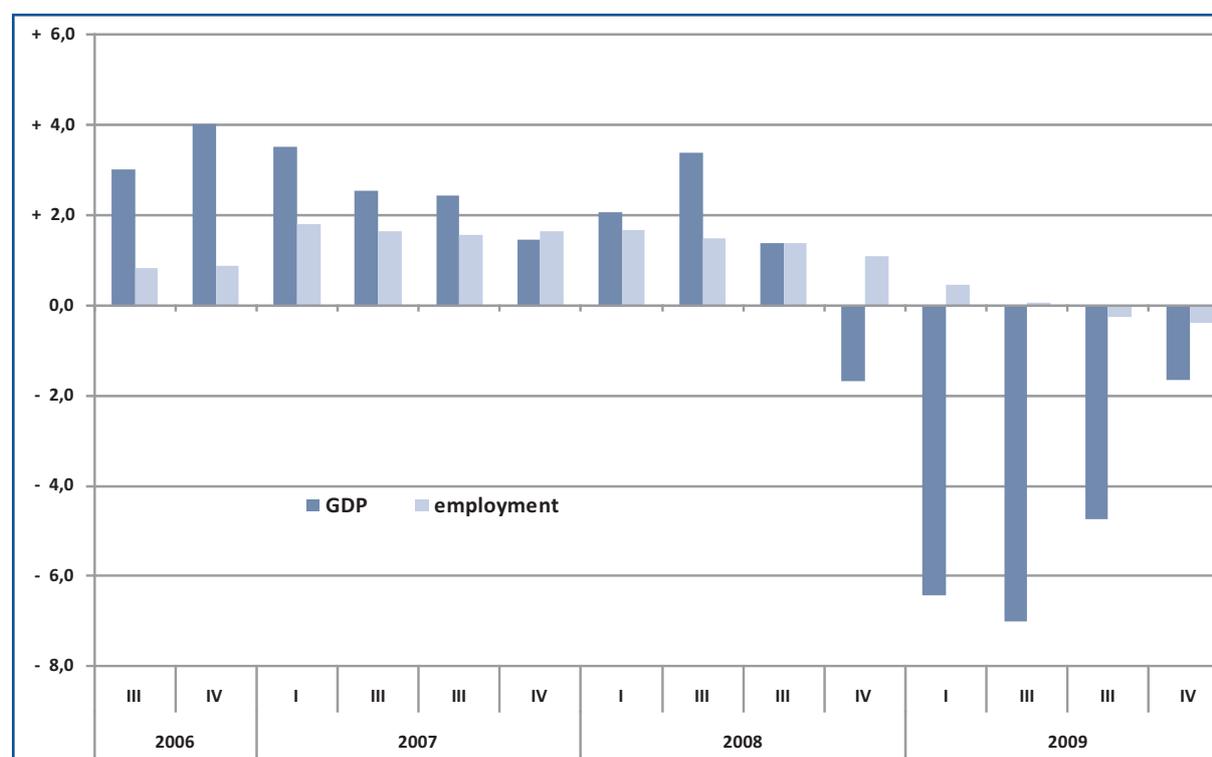
As a consequence of this strategy, private consumption and domestic demand have grown less than in neighbouring Western European countries, which is reflected in the slow growth of services in Figure 6. It can be shown through simulation that by defending and boosting its export shares through wage restraint and corporate tax cuts, Germany has saved fewer jobs in export-oriented manufacturing than it has failed to create in the domestic market. This is because of private under-consumption and because of the decline of the State as investor and employer (Joebges et al. 2009b; von der Vring 2009; Horn et al. 2010). In other words, the German case shows that it is quite possible to be simultaneously an export champion and a laggard in GDP growth. Lasting foreign trade surpluses that are not offset by service imports⁴ implies maintaining jobs while the wealth they produce goes elsewhere. This is mirrored by the accumulation of financial assets which may be devaluated in a financial crisis. The more successful Germany's export strategy is, the higher looms the risk that it cannot be sustained and that hitherto delayed structural change can no longer be deferred.

⁴ A principal source of service imports used to be Germans' preference for vacationing abroad – but holiday spending has suffered from wage restraint and from benefit cuts for long-term unemployed people.

2.3 Recent developments

Figure 11 repeats the exercise of Figure 1 in a quarterly perspective. It shows that employment normally follows GDP movements, albeit with a considerable time-lag, but seems to have become completely uncoupled in 2009. Whereas in the early 1990s we used to observe labour shedding even in periods of economic growth, and a disproportionate reduction in employment *vis-à-vis* economic decline at the beginning of the new century (Figure 1), this pattern has recently been completely reversed (Figure 11). Firms are now hoarding labour and accepting a temporary decline in productivity.

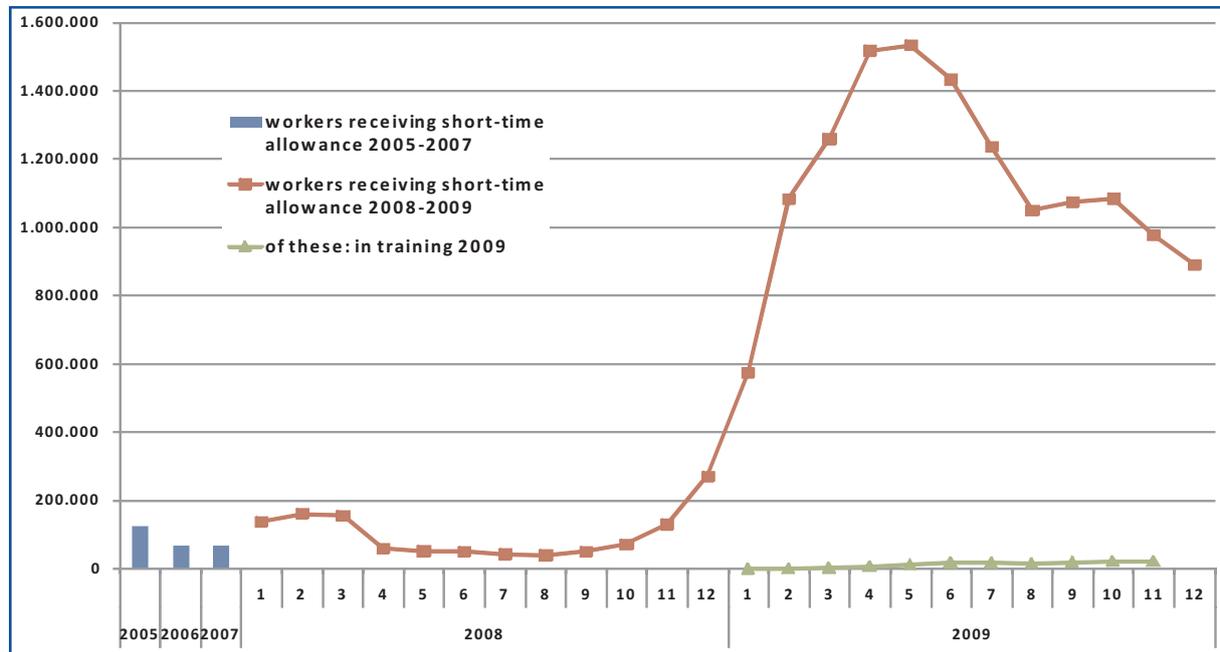
Figure 11: Quarterly GDP and employment change (compared to same quarter of previous year, GDP price adjusted)



Sources: Federal Statistical Office; calculations by Institute for Employment Research (monthly data mailing)

One obvious reason for this new pattern is the generous expansion of short-time allowances. Traditionally an instrument for stabilising jobs in business slumps through wage-replacements for employed workers whose working capacity cannot be fully utilised by their employers, the terms for receiving short-time allowances have been eased considerably in the current crisis in respect both of maximum duration and of taking over part of employers' fixed labour costs (see 7.2 for details). As a result, the number of workers receiving short-time allowances has risen to an all-time high since the aftermath of German unification when it was used to buffer the East German employment shock.

Figure 12: Workers receiving short-time allowances⁵



Source: Federal Employment Agency website

However these subsidies from the unemployment insurance fund cannot alone explain the high rate of retention of workers by firms. Given that the loss of work is rarely complete, the peak of almost 1.6 million workers receiving short-time allowances amounts to a full-time equivalent of only about 800,000.⁶ Assuming, by contrast, that a 5% reduction in output would result in an equivalent reduction in employment, this would be equivalent to around 2 million lost jobs. There are additional and forceful adjustment mechanisms in place such as stopping overtime work; reducing long-term working-time accounts to zero and even below (Herzog-Stein, Seifert 2010); reducing working time and pay even without compensation through short-term allowances; and trading job guarantees for temporary wage cuts or waiving of annual bonuses. There have even been reports of family owners pledging loyalty to their workers until their private assets are exhausted. So the seeds of public short-time allowances are falling on fertile grounds of the willingness, on the one hand, of employers to hold on to their workforces as long as possible, and on the other hand, of employees to compromise at great lengths in return for retaining their job. The motives behind these attitudes appear to be employers' experiences of skills shortages during the last upswing⁷ and employees' perceptions that (i) the prospect of unemployment has become more threatening than before owing to the 'Hartz' reforms of the

⁵ See Figure 19 for a breakdown by the three different types of short-time allowances.

⁶ The average percentage of hours lost in 2005, the last year with high numbers of recipients, is taken as a benchmark here (50.3%) since current data on hours lost is not available on the Federal Employment Agency website. – In a recent parliamentary hearing on the prolongation of the current rules for short-time allowances, the average percentage of hours compensated by short-time allowances in 2009 was assessed at 30%. Calculated against an average of 1.1 million persons receiving such allowances, the average annual full-time equivalent would be 330,000. This underlines that short-time allowances explain only the smaller part of workforce retention.

⁷ According to Möller (2010), the past experience of skills shortages was concentrated in those sectors that are now those hit hardest by the slump in export markets. This explains why these firms would hoard labour in order to be prepared for the hoped-for recovery of the world market. – See, however, 4.1 on the sporadic evidence of skills shortages.

benefits for workless people (Knuth 2007), and that (ii) any new job would be of lower quality than the current job (Erlinghagen 2008 and 2010).

In 2009 and 2010 it has been possible for training costs during periods of short-time working to be subsidised from the German Federal ESF programme⁸, with the percentage of the subsidy ranging between 25% and 80%, depending on personal and company circumstances and the kind of training. In addition, the Federal Employment Agency will compensate the employers' full social insurance contributions⁹ during periods of training. However, this incentive for firms to invest in human capital was thwarted when the government later announced that the unemployment insurance fund would in any case assume payment of employers' full social insurance contributions from the seventh month of short-time working onwards. The percentage of short-time workers participating in training is appallingly low (see Figure 12).¹⁰ Despite favourable financial conditions, firms in which a 'training culture' and the respective organisational infrastructure are lacking will not be able to re-invent training amidst an economic crisis (Heidemann 2010).

The *Bundestag* is currently debating legislation that would extend the unusually favourable conditions of short-time working allowances until March 2012. In the recent hearing before the Parliamentary Committee for Labour and Social Affairs¹¹, the representatives of the social partners unanimously endorsed this proposal of the government, and there was hardly any disagreement among the experts. There is a degree of social consensus on these measures for buffering the crisis that has been unparalleled in respect of other social issues for many years, if not for decades.

To sum up, despite (or even because of?) some reduction in legal employment protection (OECD 2006, p. 51), Germany's traditional preference for *internal* rather than *external* employment flexibility (Knuth et al. 2002) increased over the last business cycle. It is against this background that company-level restructuring needs to be discussed.

⁸ For transfer-oriented short-time working (see p. 7.2) this has been possible for a long time. The innovation in the current crisis was to allow this in conjunction with short-time working for cyclical reasons.

⁹ See p. 43 for the technical details of labour costs during periods of short-time working.

¹⁰ It must be noted, however, that these statistics include only training subsidized from the European Social Fund or from the Federal Employment Agency's own programme for older workers employed in SMEs. Where the employer finances training fully on his own account, the Public Employment Service will take no account of it.

¹¹ Deutscher Bundestag, Ausschuss für Arbeit und Soziales 2010.

3.1 The lack of official statistics

Unlike, for example, in Belgium, there is no officially recognised status in Germany as an ‘enterprise undergoing restructuring’¹², so there are no official statistics on restructurings. Social compensation plans negotiated by works councils (see p. 35) are considered to belong to the sphere of private law and, therefore, are not officially counted or documented. In contrast to countries, like France, with a tradition of administrative employment protection, there are no official statistics on dismissals in Germany. Notifications of collective redundancies in accordance with the respective European Directive are not statistically processed because firms tend to make such notifications far above dismissals actually implemented so as always to be on the safe side. Official statistics only reflect exits from, and entries into, employment liable to social security contributions¹³ (cf. Figure 4) as well as movements between employment and unemployment (cf. Figure 3), but they do not record why previous employment ended. So there is little evidence that would allow us to assess whether there is ‘more’ or ‘less’ restructuring in Germany as compared to other countries and over time.

Table 1: Estimated job losses due to insolvencies

year	no. of jobs lost (thousands)	rate of change against previous year (per cent)
1999	471	- 6.0
2000	448	- 4.9
2001	503	+ 12.3
2002	590	+ 17.3
2003	613	+ 3.9
2004	605	- 1.3
2005	563	- 6.9
2006	473	- 16.0
2007	440	- 7.0
2008	447	+ 1.6
2009	521	+ 16.6

Source: Verband der Vereine Creditreform e.V. (2010)

Only the number of jobs lost due to insolvencies is estimated each year by the credit risk management association, based on headcounts immediately before insolvency (see Table 1). The association points out that normally dismissals will also occur before the official registration of insolvency, but these numbers are not reflected in the statistics. As Table 1 shows, the current crisis is taking its toll, but hitherto in no way above and beyond what we saw in previous recessions.

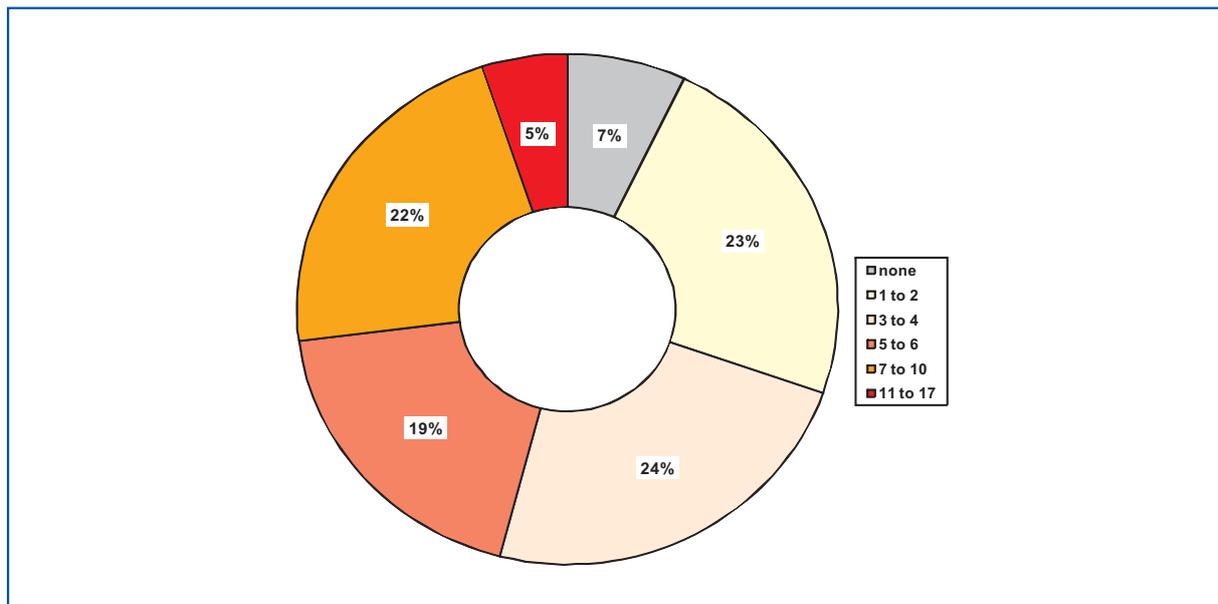
¹² There is, of course, the status of insolvency, but this covers only part of the subject.

¹³ These statistics do not cover self-employed and unpaid family workers, civil servants and ‘marginal’ part-timers earning not more than €400 per month and who are exempt from paying social security contributions and therefore not eligible for unemployment benefits.

3.2 What surveys say about restructuring and redundancies

Given the lack of official statistics on the subject, one has to rely on surveys. Not surprisingly, dismissals are the most important reason for job search among workless people, and this percentage is higher among older than among younger job searchers who may be new entrants or re-entrants into the labour market (Statistisches Bundesamt 2004). However, dismissals are not necessarily associated with restructuring, nor does this finding imply that dismissals are the dominant way of leaving a firm. Rather, those workers quitting voluntarily will normally do so because they have a more attractive offer (see also p. 8) or because they are retiring, so they will not subsequently appear as jobseekers. Even involuntary exits may result in re-employment without intermittent unemployment, which is the very objective of job transfer schemes (see chapter 7).

Figure 13: Number of restructurings in the past 10 years (as reported in 2006 survey of works councils in establishments with at least 20 employees)



Source: Behrens, Kädtler 2006

Actually, dismissals are generally less frequent than voluntary departures in Western Germany, while it is the other way around in the East (Erlinghagen 2005 a+b). This finding underlines the fact that the East and West German economies and labour markets are still distinctly different. From a long-term perspective, over several business cycles, dismissals in the West also seem to be growing slightly, both in absolute numbers and in relative importance. Since the late 1970s dismissals have drastically shifted from those for individual or disciplinary reasons towards those for 'operational' reasons (see p. 33 for explanation), which are potentially related to restructuring (Falke et al. 1981; Bielenski et al. 2003; Höland 2005). In repeated surveys of works councils, issues relating to restructuring have been continuously at the top of the agenda (Schäfer 2003; 2005; 2008). Responses by works councils to a survey question about the number of restructurings experienced demonstrate that restructuring is a continuous process (see Figure 13).

“Anticipation”, as the term is used in European discourse on restructuring, has no exact equivalent in German in relation to restructuring or other potentially challenging socio-economic events. The way it is used in French and “Eurospeak” appears to carry a double meaning:

- (1) foresight, forecasting or prognosis;
- (2) readiness or preparedness.

With regard to (1), few attempts have been made in Germany to forecast restructurings. One reason is the lack of data, as already been described in section 3.1. The second and related reason is that Germany, as was shown in section 2.2, has not really embraced restructuring as a key issue. The third reason ostensibly justifying this indifference lies in the country’s apparent ability to absorb a major external shock such as the current financial and economic crisis without any dramatic acceleration of restructuring, as was shown in section 2.3.

One potential source of data would be the IAB Establishment Panel, an annual representative survey of establishments (cf. Fischer et al. 2009). The questionnaire regularly contains items about the occurrence of partial closures, spin-offs or mergers in the year prior to the survey; total closures, however, cannot be asked about as the unit will already have vanished. With regard to future expectations as itemised in the questionnaire, only ‘manpower surplus’ bears some relevance to our subject. In published analyses of these data, items on past restructurings have never been highlighted.

With regard to (2) – preparedness – the availability of tools and networks for the management of restructuring is discussed in this paper in various contexts, in sections 2.3 and 7.2 (short-time allowances), chapter 6 (schemes to maintain labour contracts even in the case of restructuring), chapter 7 (job transfer schemes), and section 9.7 (networking for better job transfer schemes). In the remainder of this chapter some potential ways of preparing a national employment system for restructuring will be briefly discussed.

4.1 Forecasting skills gaps

The German discussion of impending skills shortages follows a peculiarly cyclical path: in each economic upturn there are complaints by employers in some sectors that they have difficulties in filling vacancies; but before this actually becomes a political issue, the tide of the business cycle will turn and the discussion will subside. The issue must also be seen against the background of Germany’s high unemployment figures, partially caused - in international comparison - by the institutional propensity to ascribe unemployment status rather than incapacity status to workless people (Erlinghagen, Knuth 2009). Whenever, for example, complaints about a shortage of fully qualified engineers arise they will be countered by a reference to the large numbers of unemployed engineers. Consequently, there is no generally accepted definition of how to ascertain the existence of a skills gap; and there is no consensus on whether there is one, or when one might emerge, or how serious it will be (Mesaros, Vanselow & Weinkopf 2009).

Furthermore, Germany's success in exports (see 2.2) does not exactly support the idea that its workforce is not properly prepared to do their jobs.

The dilution of the skills gaps issue is also related to the fragmentation of the German educational system in which the federal states are responsible (and keenly defend their responsibility) for general, including tertiary, education. Vocational apprenticeship training, by contrast, is managed by the social partners under a broadly-defined national framework, and the offering of apprenticeships in practice is at the discretion of individual employers. The focus of the discourse about vocational training has always been on meeting the training demands of school leavers, rather than on maintaining a proper supply of skills. So if there were such a thing as a skills gap, whose responsibility would it be to react? Consequently a skills gap cannot be politically recognised since there is no political actor who could embrace the issue and stand to benefit from offering a skills gap agenda. The chancellor's initiative in establishing an 'education and skills summit' remained inconclusive owing to tacit resistance from the federal states. Obviously, Germany's institutional inability to develop a coherent human resource agenda is a risk in the face of demographic change and restructuring.

In international comparison, matters are obscured further by the lack of internationally comparable concepts of skill levels. The OECD repeatedly criticises Germany for its comparatively low share of tertiary level graduates in successive waves. However, in countries without an apprenticeship system, people will attend tertiary institutions in order later to perform occupations that in Germany are filled through the apprenticeship system. Therefore, international comparisons of skills structures based on the hierarchy of institutions producing them do not help to identify a potential German skills gap. Though it may be true that Germany could use more labour market entrants with academic training, it would be very foolish to emulate countries where academic training is nearly the only pathway to a skilled job. Thus international comparisons of human resource development are still institutionally biased and lack comparable measures of competence and of functional substitutability. Whether this situation will really improve with the introduction of the European Qualifications Framework is still doubtful since it appears difficult – in Germany at least – to agree on an assessment of competences that is independent of the hierarchical ranking of the institutions in which they were developed.

 **Case study (1): Employers' Alliances**

Regional unemployment and skills shortages may well exist simultaneously. This is the case in many East German regions from where the young and the skilled have moved to the West. Another type of skill shortage can be experienced by small enterprises when they have a need for highly skilled and specialised workers but do not have enough work to employ them permanently or full-time. However such workers will not be available on a part-time or casual basis. Since temporary work agencies have a rather bad reputation among German workers, they offer mostly no alternative where skilled labour is concerned, and in any case SMEs are unaccustomed to using them in Germany.

Against a similar background, 'employers' alliances' (*groupements d'employers* - cf. Dalichoux, Fadeuilhe 2008) emerged in France, with about 4,500 such alliances employing some 32,000 workers (*Bundesverband mittelständische Wirtschaft* 2009). In the framework of several projects this approach started to be transferred to Germany in 2004. As with labour pools (see 6.2, case study 3), employers' alliances aim at expanding the scope of action in their human resource policies beyond the boundaries of the single enterprise. However whereas, in the case of labour pools, the employer function remains with the respective members of the pool, employers' alliances create a common 'meta-employer' which concentrates the irregular labour demand of the member firms into permanent and full-time jobs under standard conditions.

- Employers' alliances allow their members to emulate, even as SMEs, the human resource policies of larger enterprises, in particular combining a high degree of flexibility in work assignments with stability and security of employment relationships which thus become attractive for skilled workers. Without the alliance, SMEs would not have this opportunity because their small size offers an insufficient degree of freedom in work assignments. Emulation of the flexibility in deployment common in German large enterprises includes the use of adequate instruments for working time management such as annual working time accounts.
- The alliance is managed with the purpose of breaking even, not of generating profits. Its labour is therefore cheaper for the member firms than agency work. Furthermore the alliance allows them to co-operate with the same workers already experienced with their processes and organisation, which is something a temporary employment agency cannot guarantee.
- From the perspective of the member firms, the use of workers employed by the alliance can serve several functions: They may share specialists rotating between several member firms; they may periodically have recourse to such specialists in order to launch new projects; or finally, just as in the labour pools (see 6.2 case study 3), peak loads occurring asynchronously can be levelled out between the member firms.
- In a legal perspective, the employers' alliance is an enterprise of its own which, in Germany, takes the form of a co-operative society or a limited company. As shareholders, the member firms share the employer's responsibility and risks for the workers directly employed by the alliance. Since Germany lacks a legal framework specific to the functions of such an alliance, it is legally treated as a temporary work agency and must obtain a licence to operate as such.

- From the perspective of the alliance's employees, their occupational perspective is more stable and foreseeable than in a normal temporary employment agency since the range of potential workplaces is limited to the member firms. In practice one employee will serve a maximum of four jobs at a time.
- The legal framing of the alliances' operations as temporary agency work implies, in conformity with the applicable European Directive, that the alliances' workers will receive pay equal to that of their co-workers doing comparable work in the firms to which they are seconded, except when the alliance concludes a collective agreement of its own or joins an employers' association of temporary employment agencies where such a collective agreement is in place. In the first case, wages may actually vary according to the assignment, which may impede flexibility of deployment.
- The alliance can assume functions of continuing vocational training or at least organise access to it – not only for its own employees but also for the employees of the member firms. There is also potential for centralising further functions of human resource management in the alliance as a service to member firms.
- The employers' alliance can organise composite apprenticeship training among the member firms which may individually lack the range of activities that would qualify them for training apprentices in accordance with nationally defined vocational standards but which may collectively be able to offer all the practical experience required. In this way, the alliances can underpin the production of skills for the future of the member firms and the regions where they are located.

Employers' Alliance Spreewald/Brandenburg

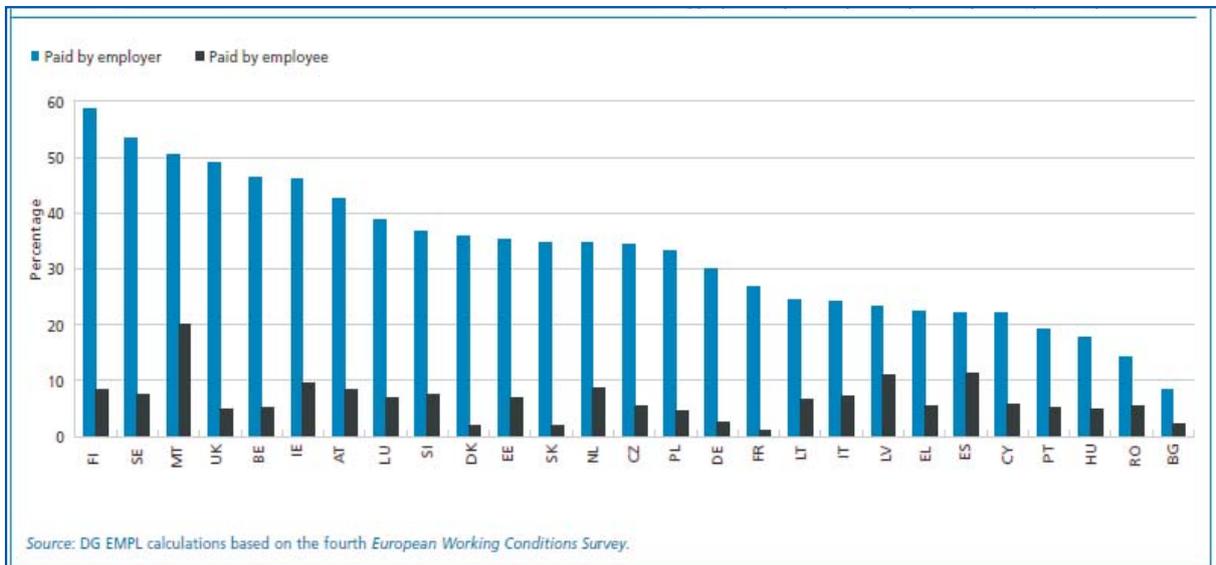
The employers' alliance was founded in January 2005 in the course of an EU-funded project. Up until the summer of 2009 it grew to 47 member firms, employing 54 employees. Its sectors of activity are agriculture, forestry, food processing, hotels and restaurants. The alliance employs full time, at regional market wages, and on open-ended contracts for two thirds of its workers.

4.2 Continuing vocational training

Continuing vocational training (CVT) might be a means of adapting to working environments and of maintaining employability even in the face of restructuring. However, it is well known from comparative surveys that Germany is not a champion of participation in CVT (see Figure 14). It shares its laggard position with some other large and older EU Member States, namely France, Italy, and Spain.

As pointed out before, the current regulations governing short-time working include very generous provisions for CVT during periods without work (see p. 17); but it is hardly used by employers (see Figure 12, 16, bottom curve), so it would appear that CVT is not perceived as an urgent need by employers, employees or their representatives.

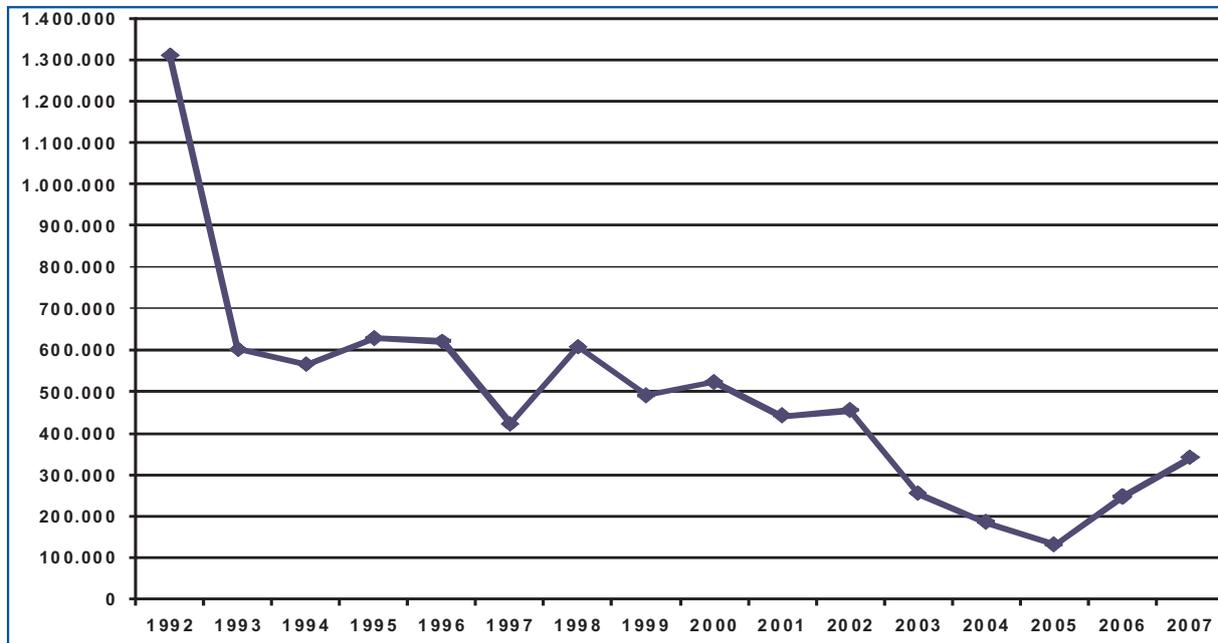
Figure 14: Percentages of employees who participated in continuing vocational training in EU Member States, 2005



Taken from European Commission, *Employment in Europe 2007*, p. 211

Finally, continued vocational training is a traditional instrument for improving the employability of unemployed people and for upgrading the skills structure of the workforce. However, since the reforms of labour market policies in Germany, CVT for the unemployed – whether measured by entries, by number of participants or by spending – has declined owing to an increasing ‘work first’ orientation (see Figure 15). At first sight at least, the increased numbers of transitions from unemployment to work since the reforms (see Figure 3, p. 9) appear to justify this strategy, even though it may turn out to be a mistake in the long run. In contrast with the 1970s and 1980s, active labour market policies no longer contribute to the long-term development of human capital.

Figure 15: Entries into continued vocational training publicly sponsored in the framework of active labour market policy, 1992 to 2007

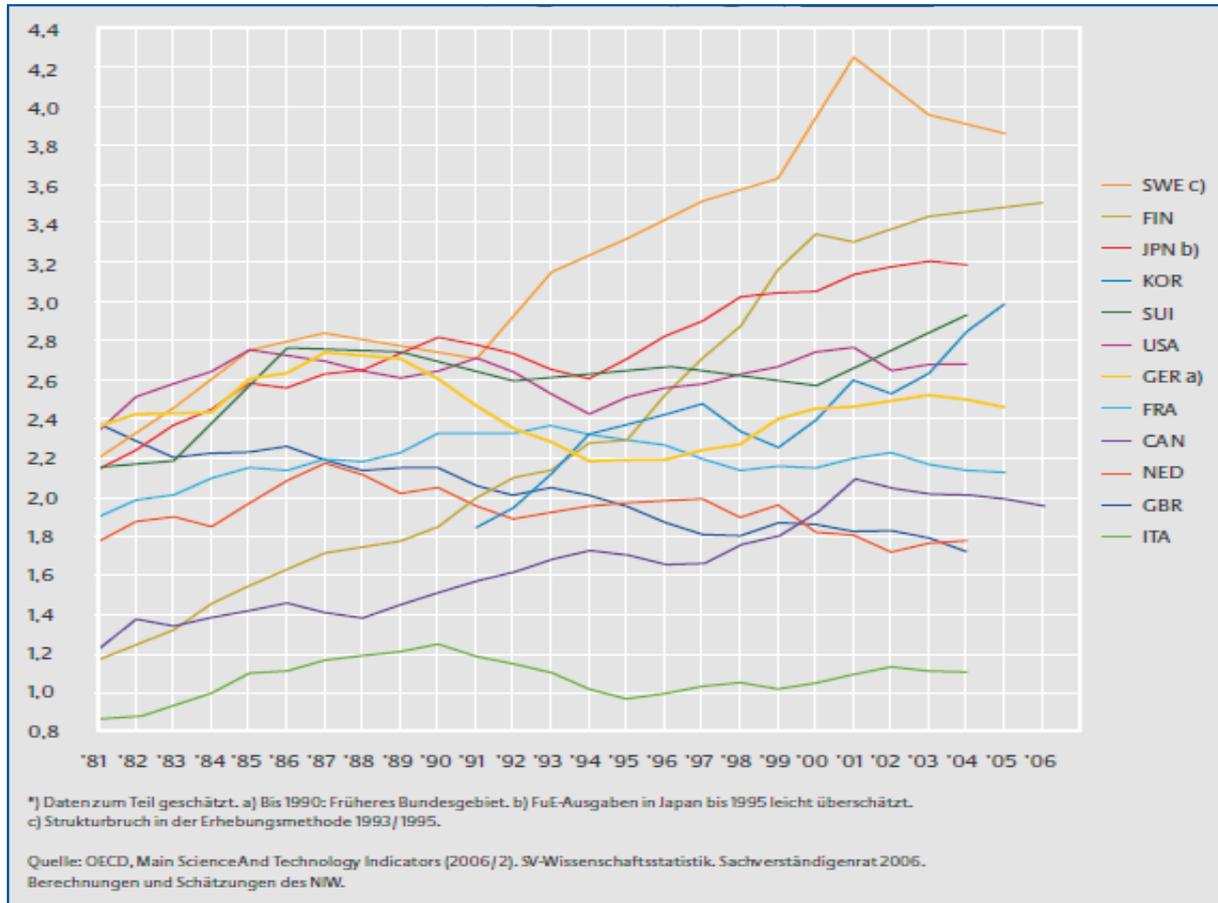


Source: Federal Employment Agency

4.3 R&D spending

Another means of preparing the economy for future challenges would be the boosting of research, development and technological innovation. However, in the latest report available from the former annual monitor of Germany technological performance (Bundesministerium für Bildung und Forschung 2007), Germany is shown as lagging behind important competitors (see Figure 16). As to the new monitoring structure implemented since then, the latest report (Expertenkommission Forschung und Innovation 2010) remains critical: the R&D spending share in GDP has only risen to 2.6% in 2008, and the public contribution to it has stagnated. The official political goal is to raise R&D spending to a level of 3% of GDP. The commission does not expect this goal to be realistically achievable before the period 2015-2020, and even then it would be clearly behind some of Germany's important competitors (see Figure 16).

Figure 16: Aggregate R&D spending as a percentage of GDP



Taken from Bundesministerium für Bildung und Forschung 2007

So this underscores what has already been highlighted in section 2.2: Germany is still successful in playing on its traditional virtues such as a strong industrial base; high quality production based on workforces with thorough initial training; high degrees of internal operational flexibility within firms with ample opportunities for further learning on the job (but with relatively little formal CVT – see Figure 14); and well developed customer relations and branding throughout much of the world. On the other hand, the leading industrial sectors of today are those that established their positions and reputations about 100 years ago. For more than a decade there has been growing concern among experts that this pattern may be too traditional to be sustainable in the long term. The fact that Germany recently seems to have only been able to defend its position in the world market through wage restraint and through deviating from its previous philosophy that high quality production can only come from high quality jobs (see p. 14) may justify this concern. So a period of perhaps accelerated restructuring may lie ahead.

4.4 Regional regeneration and industrial policies

In the aftermath of German unification, when 40% of formerly existing jobs were destroyed within three years (1991 to 1993), rapid restructuring was accompanied by vast endeavours towards environmental restitution, regional regeneration and the creation of new businesses. This must be seen against the background that the federal government had inherited the responsibility for the State-owned companies of the German Democratic Republic. The so-called *Treuhand* public holding was in charge of these vast restructuring processes, and the federal government was pressed hard to rapidly improve East Germany's infrastructure in order to attract investors and create jobs. In this period, restructuring, downsizing, and outplacement policies were closely intertwined with environmental and industrial policies: redundant workers were 'outplaced' directly into temporary direct job creation projects, financed as measures of active labour market policy, where they would clear up derelict industrial sites, regenerate landscapes devastated by open-cast coal mining, build hiking and bicycle trails, and restore public recreation parks, just to name a few ventures. In the relatively rare cases where new investors were eventually attracted to old industrial sites, these projects actually served as bridges from old to new jobs (Knuth, Bosch 1994; Knuth 1997).

The East German experience informed similar attempts when the West, too, experienced a period of accelerated restructuring between 1993 and 1997. Although on much smaller scales than in the East, regional governments – foremost among which was the government of North-Rhine-Westphalia – responded to closures of industrial sites with programmes for redevelopment, drawing heavily on European Structural Funds. In some spectacular cases of closure, pressures from the workers concerned, the trade unions and the regional government resulted in symbolic financial contributions by large employers to the regeneration of the localities from which they had retreated; however, the French idea that employers should directly be responsible for economic recovery in the places they left never gained much political ground in Germany.

Nowadays there is hardly any recall of these experiences of the 1990s. It is not immediately obvious why this is so. One explanation may be that the success of these costly activities, insofar as they would be directly visible in terms of jobs created, was limited. The second reason was that it turned out to be impossible to help the workers affected directly by restructuring in these ways: new jobs created on old sites would come too late for them, and in most cases these new jobs demanded skills far different from those which the erstwhile victims of restructuring possessed. There was no way back to the old industrial tradition, and the global tendency at the turn of the millennium was offshoring of production jobs from Germany to the NICs rather than attracting new industrial investments to Germany, no matter whether on "brown sites" or "green sites". A final explanation may be that the Social Democrats, who had been strong advocates of industrial policies while they were in opposition at the federal level, came to lead the federal government for two terms from 1998. Attempting to modernise their policy and thus conquer what they regarded the 'middle' of the electoral spectrum, they took a neo-liberal turn, hailing globalisation as the promise of a happy future rather than a challenge to be cautiously managed. In consequence, regional and industrial policies that would infringe on the free working of market forces, even in subtle ways of preparing the ground on which they could take root, lost their advocates.

During the German seminar, the representative of the Social-Democratic-led regional government of Brandenburg reported efforts to revive earlier experience by linking restructuring to regional development plans.

5.1 Principal actors in negotiating company restructuring

The German system of *labour relations* is highly legalistic, but wide areas of regulation relevant to work and restructuring are subject to negotiations between the social partners at industry and enterprise level. The legal framework tends to prescribe *procedures, not outcomes*. In most cases, legally-defined rights constitute a semi-dispositive minimum, which means that custom and practice may and does develop over and above the legal provisions. The predominant practices for managing redundancies are shaped by and compatible with the law, but much of this is nowhere explicitly laid down in legal texts. The observance of rights and the enforcement of rules depend entirely on the initiative of the individual and collective actors concerned, backed by the possibility of recourse to the labour courts. With the exception of matters relating to health and safety, there is no such thing as a public *labour inspectorate* in Germany.

Works councils elected by the whole workforce (regardless of trade union membership) and acting on the basis of legally-defined rights are the primary partners of employers in negotiating restructuring. However, in 89% of establishments (predominantly the smaller ones) which employ a bare majority of the German workforce, no works council exists (Ellguth, Kohaut 2008), either because the establishment does not reach the legal threshold of five employees or because the workforce has not elected one. In the absence of a works council, there is little scope for a collective and proactive approach to restructuring. In other words, works councils and not public authorities are the primary actors in enterprise restructuring in Germany. Works councils may negotiate and conclude plant agreements which are legally binding on the whole workforce irrespective of trade union membership.

Industrial unions are organised by sector rather than on the basis of political orientation or of white or blue collar status.¹⁴ Following several mergers, only a few unions remain. They bargain over pay and working conditions (including, for example, notice periods and employment protection for employees with long service), and they may initiate the election of works councils. Their advice to and support for works councils are crucial when it comes to negotiations on restructuring. Trade union representation on works councils has declined, but this is not as marked as the decline in union membership.

Supervisory boards are mandatory only in corporations with more than 500 employees. Depending on legal status and company size, they include employee representatives in varying proportions, but always in a minority voting position except in coal mining and steel companies. Restructuring will usually be subject to the kind of business decision that has to be approved by the supervisory board. Through union and works council representation, the supervisory board can thus be an important source of early information on developments that might lead to restructuring. However, in multinational companies with strategic headquarters abroad, supervisory boards at national levels are often bypassed, and even local management may be taken by surprise by decisions on restructuring.

Public actors (municipalities, regional governments (*Länder*), the federal government, the public employment service, regional agencies) have no formal responsibility or right to intervene in a

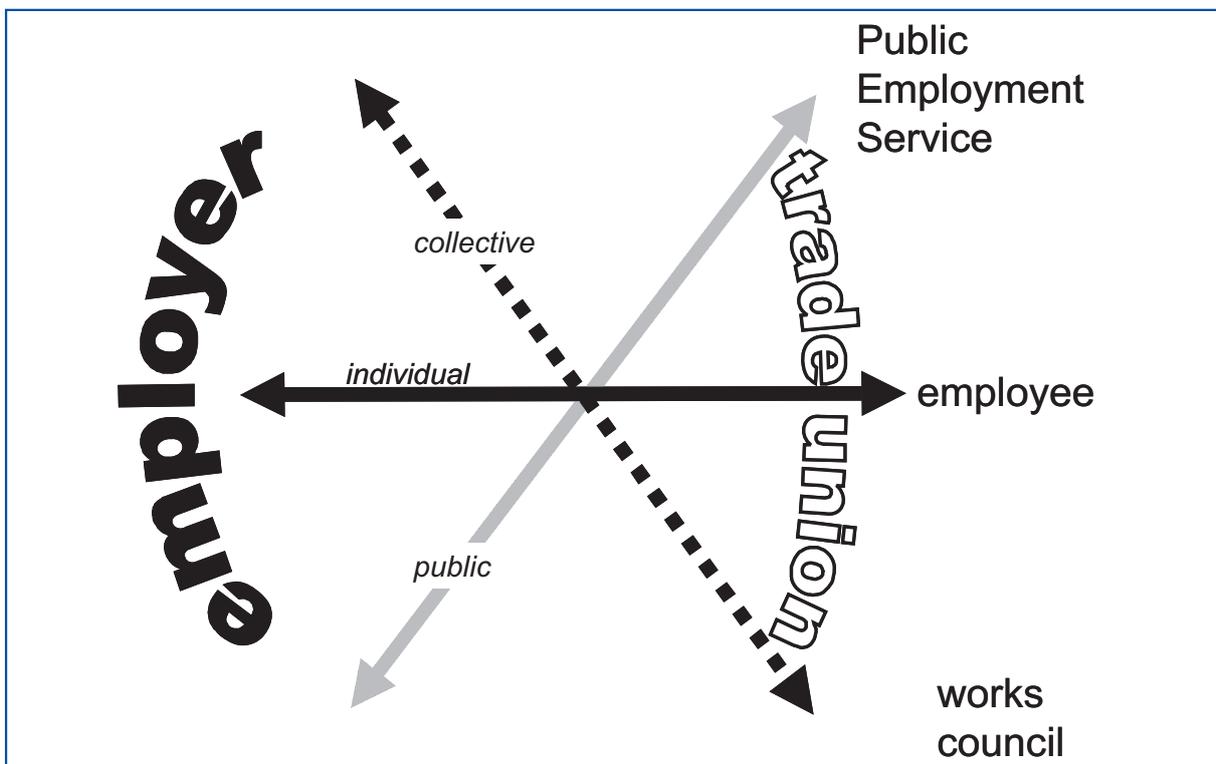
¹⁴ Small unions following such principles of organisation do exist, but they are marginal to the German system of labour relations.

restructuring process on their own account. Politicians may nevertheless play some role if they are invited to do so by the employer or by the works council and trade union. The *public employment service*, in addition to being informed about collective dismissals in accordance with the respective European Directive, provides two closely-related instruments for restructuring which are available at the employer's request (see chapter 7 for details). Such a request will usually emerge from negotiations in the works council, which in turn may be instigated by the trade union responsible for the sector.

Labour Courts form a separate and uniform branch of civil jurisdiction with their own organisation, procedures, career patterns, and court buildings. They are regionally based and are responsible for both individual and collective cases (employee vs. employer, works council vs. employer, trade union vs. employer).

It should be emphasised that the three negotiation axes for restructuring – collective, individual and public (see Figure 17) – operate largely independently of each other, although they may be interconnected at certain points. The individual threatened by dismissal can sue the employer even in the absence of a works council and without being a trade union member. The employer may apply for labour market policy instruments even in the absence of a works council, although this rarely happens in practice.

Figure 17: Three axes in addressing of restructuring



5.2 Concepts, rules and procedures

'Change of operations' (*Betriebsänderung*) is the pivotal legal concept, which comes very close to a comprehensive definition of restructuring (see box overleaf). Characteristic of the German institutional set-up, this concept is based on the relationship between the works council and the employer and thus within the 'private' sphere of the establishment. The legal concept of 'change of operations' is brought to bear only where a works council exists, which then has rights of information, consultation and negotiation in *three arenas* simultaneously:

- a) Collective negotiations over 'reconciliation of interests'¹⁵ and a 'social compensation plan'¹⁶ with regard to the restructuring;
- b) Consultation before each individual dismissal is actually invoked, with the possibility of the works council formally voicing an objection (which, however, takes effect only if the employee threatened by dismissal takes individual legal action);
- c) The provision of information within the framework of the European Directive on collective redundancies, incorporated into the German legislation on employment protection.

Change of operations (*Betriebsänderung*) _ restructuring

- "the reduction of operations through closure of the whole or of important departments of the establishment;
- the transfer of the whole or important departments of the establishment;
- amalgamation with other establishments or parts of establishments;
- important changes in the organisation, purpose or plant of the establishment;
- the introduction of entirely new work methods and production processes."

Wherever the employer envisages a 'change of operations', the works council has some legal leverage for intervention. The 'operational' framing of this concept defines the interests that have to be reconciled in respect of the organisational requirements of the management, on the one hand, and the social interests of the employees on the other. Unlike, for example, in France, the employer is not obliged to justify his or her decision to restructure in economic terms, nor is the regional impact of restructuring defined as a concern to be addressed. In other words, the employer's decision to abandon a product line, automate a production process or shut down a plant – to give only some examples of 'changes of operations' – are considered a management prerogative, even though there should be consultation with the works council regarding possible alternatives (cf. footnote 15).

¹⁵ Since this first step of negotiating alternatives to the restructuring proposed by the employer is highly theoretical and its outcome not legally binding, we do not deal with it in depth.

¹⁶ In order to clearly distinguish this from the French *plan sociale*, we translate the German *Sozialplan* as 'social compensation plan'.

The principal problem for employers in the process of restructuring is to ensure that they engage in all three arenas – negotiating the social compensation plan, consulting the works council about individual dismissals, and informing the public employment service about mass redundancies – simultaneously and with regard to the letter of the law. The potential penalty for non-compliance with due procedure is a strengthening of individual workers' positions should they contest their dismissal in court. The complexity of procedures and the possibility of legal action are at least powerful incentives for larger employers to negotiate alternative solutions that are less contingent and faster to implement.

Individual rights of employees with regard to dismissals are very important and deeply rooted in the German legal culture. They constitute a baseline of protection even in the absence or dormancy of a works council. However, such rights will only be invoked if the individual concerned takes the case to court within three weeks.

Legal *periods of notice* are laid down in the Civil Code (*Bürgerliches Gesetzbuch* – BGB), which contains the fundamental provisions of individual labour law. Depending on service, notice periods range between two weeks and seven months. These legal provisions apply only by default where there is no collective agreement. The length of notice periods laid down in collective agreements ranges from one week (before the weekend) for newly hired workers (in construction in general and, in some regions, in the metal and private transport industries) to six months before the end of a quarter (in public service) (Bispinck et al. 2003).

Employment protection legislation applies only to

- workers with an open-ended contract who have been employed, without interruption, for at least six months by their current employer;
- establishments¹⁷ with more than ten employees (the 'SME threshold'), which excludes 80% of establishments, but only 20% of the national workforce, from employment protection legislation.

Fixed-term contracts will end - if not renewed - when the term expires, not requiring dismissal and thus not triggering any protective mechanisms. On the other hand, dismissal is more difficult during the course of a fixed term as compared to an open-ended contract. Full-time or part-time status makes no difference with regard to the applicability of employment protection. However, when counting employees in order to define the SME threshold, part-timers with less than 20 hours per week count only 0.5, and part-timers between 20 and 30 hours maximum count as 0.75 employees. Although 'marginal' part-time employment (defined as employment at wages of no more than €400 per month) is in no way excluded from legal employment protection, these workers' special status of exemption from social security contributions creates the wide-spread assumption that they are not protected, and they hardly defend their rights if dismissed.

With the exception of employment guarantees to specific groups, general legal employment protection does not rule out dismissals as such but only '*socially unjustified*' dismissals. Aside from reasons of individual capacity and personal conduct at work, '*urgent operational requirements preventing the continuation of employment*' are accepted as social justification. As pointed out before, the employer's 'operational' decision to restructure, downsize or abandon a product line as such is made without the need for justification. However, if only some of a group of comparable workers are affected, the employer has to justify the selection for dismissal

¹⁷ The establishment, an important concept in German collective labour law, is the organisational entity in which work is performed. The enterprise may be much larger when it is running operations in several establishments. Keeping local units small can be an employer's strategy for remaining outside the applicability of the law.

on the basis of social criteria. In order to have the dismissal qualify as 'socially justified', the employer must be prepared to prove in court that the following employee characteristics were duly considered:

- service
- age
- obligation to support dependants
- recognised disabilities.

The employer must be able to explain and justify the weighting of the criteria mentioned above or any additional criteria used to arrive at a specific decision. However, if the employer and the works council manage to agree on a list of the workers to be dismissed, then social justification is presupposed and can only be challenged in court on the grounds of gross misjudgement.

Generally speaking, the implied social basis of the mechanism tends to protect more vulnerable workers. This can conflict with the aim of regaining economic viability through restructuring, a goal which may be shared by the works council in its endeavour to preserve jobs. This problem is most obvious when downsizing is massive, so that the establishment would be left with mostly vulnerable workers. Negotiations on restructuring are centred on a compromise between social and economic perspectives, and on designing the legal mechanisms by which the agreed outcome can be achieved.

Individuals may challenge their dismissal in court on the grounds of (1) doubts about its operational necessity, (2) improper selection of the workers to be dismissed and (3) the absence of due involvement by the works council. If they succeed in court, their dismissal will be void, and in theory they will have to be reinstated. At any stage of the procedure, the employer may aim for a settlement by offering financial compensation in return for the termination of the contract and procedure. There is no universal legal provision for financial compensation, the individual has no legal entitlement to outplacement services, nor does the employer have any obligation to offer such. Such provisions can only be negotiated individually if the worker concerned has a legal position that can be waived in the bargain, or collectively within the framework of a social compensation plan if a works council exists.

The *take-over* of an enterprise, one of its establishments, part of an establishment, or the merger of the enterprise with another enterprise do not as such qualify as an 'urgent operational requirement' that would justify dismissal. The legal entity acquiring the enterprise will succeed the former owner in all rights and responsibilities regarding labour contracts.¹⁸ Some job transfer schemes (see below, chapter 7) are designed to circumvent, in collaboration with the works council and the trade union, the regulations on transfer of undertakings in order to facilitate a buyout that will save at least some of the jobs concerned.

Social compensation plans are the principal outcome of negotiations between employers and works councils on restructuring. They grant the individual workers covered non-forfeitable rights that are enforceable in court. Legally, social compensation plans hinge on the aforementioned definition of 'change of operations' (cf. p. 33), not on unilateral dismissal in a technical sense.

¹⁸ The German regulation on transfers of undertakings is older than the respective European Directive 2001/23 EC, and it does not contain any of the exemptions for insolvency or economic crisis allowed in Article 5 of the Directive. Therefore, German regulations with regard to takeovers can have unintended and negative effects in cases of threatened crisis or insolvency when the only option is a takeover of the enterprise by a new investor. The investor may actually be deterred from buying the company if burdened with responsibilities for the whole workforce, and consequently all the jobs may be lost.

This is crucial for facilitating ‘negotiated restructuring’: by agreeing on a framework for voluntary solutions that will avoid dismissals, the works council does not forfeit its right to negotiate. The employer and the works council may thus co-operate in reducing procedural complexity and risk by creating a framework within which redundancies may be re-defined as voluntary annulments, as long as the individuals consent. In this way, the observance of notice periods can be shortened, and solutions may be arrived at that are not open to revision by lengthy and uncertain legal procedures. Large companies are prepared to spend considerable financial resources in order to achieve such solutions.

Social compensation plans have become increasingly *innovative* in the way that provisions for re-training and outplacement services have complemented redundancy payments. Thus, individual voluntary redundancies (‘buying the worker out of the contract’) have been reframed as collective pathways into new employment, called ‘job transfer schemes’ (*Transfermaßnahmen*) in which so-called transfer companies play a crucial role (see chapter 7).

5.3 Enforcement and coverage

The observance of individual employment protection can only be enforced by *individual legal action*. Only between 11 per cent (Bielenski et al. 2003 – employee survey) and 16 per cent (Höland et al. 2005 – labour court survey) of dismissals are contested through legal procedures. The remaining cases are either not covered by legal employment protection (see p. 29 for its limits), or the dismissal appears to be legally acceptable, or the individual does not challenge it. Of those legal actions taken, 65 per cent ended with a settlement rather than with a court decision, of which 75 per cent were settled through payments offered by the employer (op. cit.).

Where a *works council* exists it must be consulted before each individual dismissal. Within narrowly defined legal grounds, the works council can voice an objection. In a survey of dismissed employees (Bielenski et al. 2002), only 2 per cent reported an objection against their dismissal by the works council. However, among the dismissals brought to court, 34 per cent were supported by the works council’s objection. It may thus be inferred that the reaction of the works council to the dismissal has a powerful supportive as well as selective function with regard to individual legal action.

Only 8 per cent of employees affected by redundancies reported that they had benefited from a social compensation plan (op. cit.). If the number of workers affected by dismissal does not amount to ‘an essential part of the workforce’, there can be socially justified dismissals ‘for urgent operational requirement’ without triggering negotiations over a social compensation plan. If no works council exists, there can be no social compensation plan, anyway. A slight minority of the workforce is employed in establishments without works council, and these tend to be the smaller establishments where labour turnover is higher.

Contrary to a widespread belief both within and outside Germany, the empirical data presented above do not suggest that protection against dismissal is particularly strong in Germany. However, these data cannot reflect the deterrent effect of legal protection, and how it instigates voluntary solutions. In the public service (see case study 1, section 6.1), in companies close to the public sector (among these the recently privatised) and in other large companies with strong workers’ representation, dismissals because of operational requirements are still practically

impossible. This is why other ways of severing employment relationships or ways of internal adjustment are sought.

There is a very fundamental principle in German employment relations: the principle of self-activity. Apart from questions of health and safety, there is no public authority that would supervise the employer in this role. This implies, in particular that:

- observance of individual employment protection can only be enforced by *individual legal action*;
- election of works councils is a right of the workforce, but they are not obliged to exert this right; where they have not been disposed to do so, there will be no social compensation plan in cases of restructuring that put considerable parts of the workforce at risk;
- where there is a works council, it has the right to negotiate the consequences of restructuring – but there is no guarantee that a works council will effectively exercise this right;
- measures for support for restructuring are offered by the public employment service at the request of the social partners at company level – but the latter are not obliged to make use of this offer or even to be aware of its existence.

Only between 11% (Bielenski et al. 2003 – employee survey) and 16% (Höland et al. 2005 – labour court survey) of dismissals are contested through legal procedures. The remaining cases are either not covered by legal employment protection (see p. 34 for its limits), or the dismissal appears to be legally acceptable, or else the individual does not challenge it. Of the legal actions taken, 65% ended with a settlement rather than with a court decision, of which 75% were settled through payments offered by the employer (op. cit.).

Where a *works council* exists it must be consulted prior to each individual dismissal. Within narrowly defined legal grounds, the works council can voice an objection. In a survey of dismissed employees (Bielenski et al. 2002), only 2% reported an objection against their dismissal by the works council. However, among the dismissals brought to court, 34% were supported by the works council's objection. It may thus be inferred that the reaction of the works council to the dismissal has a powerful supportive as well as selective function in relation to individual legal action.

Only 8% of employees affected by redundancies reported that they had benefited from a social compensation plan (op. cit.). If the number of workers affected by dismissal does not amount to 'an essential part of the workforce', there can be socially justified dismissals 'for urgent operational requirements' without triggering negotiations over a social compensation plan. If no works council exists, there can anyway be no social compensation plan. A small minority of the workforce is employed in establishments without works councils, and these tend to be the smaller establishments where labour turnover is higher.

Contrary to a widespread belief both within and outside Germany, the empirical data presented above do not suggest that protection against dismissal is particularly strong in Germany. However, these data cannot reflect the deterrent effect of legal protection, and how it instigates voluntary solutions. In the public service (see case study 1, section 6.1), in companies close to the public sector (among them the recently privatised) and in other large companies with strong worker representation, dismissals because of operational requirements are still practically impossible. This is why other ways of severing employment relationships or means to internal adjustment are sought.

As alluded to before (2.3), the German employment model places high emphasis on internal flexibility of firms, on preserving existing employment relationships even in the absence of work by means of short-time allowances, and on avoiding dismissals. The possibility of dismissals seems to be perceived by German workers with greater fear than in some other countries where they are more commonplace (Erlinghagen 2008). This is why some companies, after negotiation with their works councils, go to great lengths to find possibilities for internal redeployment for workers no longer needed in their current functions or no longer fit or motivated to fulfil them (Kirsch, Mühge 2008). Even the social partners at regional or sectoral levels have created collectively-agreed frameworks through which workers from companies experiencing a temporary period of slack may be redeployed in a neighbouring company experiencing temporary excess demand, without severing contractual relations with the former employer (Mühge, Knuth 2009).

6.1 Case study (2): Re-deployment on the internal labour market



The 'JobChange'¹⁹ unit of Cologne University Hospital

"We are the internal jobcentre of the University Hospital" – this is how the head of the JobChange unit at Cologne University Hospital summarises his mission. Internal transfer units like JobChange have been set up in order to place employees threatened by job loss or wishing to switch into vacancies in the internal labour market of larger organisations.

JobChange was established in 2007 as part of the HR department of Cologne University Hospital. The hospital employs currently around 7,000 employees in about 60 clinical departments. They are responsible for treating and caring for around 50,000 in-house and 170,000 ambulant patients annually, plus research and university teaching. The establishing of JobChange was motivated by accelerated change of the institutional framework of the German health care system which hit the university hospitals particularly hard. From 2002 onwards the financing of hospitals was reorganised, involving a change from reimbursement of their inputs to treatment of an individual patient to fixed rates allocated to diagnosis-related groups. This created immense pressures for rationalisation and for cutting back on labour costs.

In order to be better able to adjust the allocation of human resources to changing demand in various departments, the human resource management group developed a concept of 'Consensus-oriented Management in Times of Crisis', of which the JobChange unit is a key element. Employment protection by collective agreement is an important background for developing this concept: As a public employer, the University Hospital is not in a position to reduce its staff through dismissals.

¹⁹ This not a translation but the actual name used, since Anglicisms are frequently used to signal modernity.

In a long-term perspective, JobChange aims at managing crises. However, in order to gather experience and to build up a reputation among the workforce, JobChange was first launched as a platform for voluntary internal mobility. The initial target group were employees motivated to find a new vocational perspective in the variegated fields of activity of a large hospital with universal profile. It was only later that the operations of JobChange were extended to employees affected by job loss through rationalisation. Currently an agreement is being negotiated between the hospital management and the works council, aimed at establishing the rules for involuntary internal transfers, to be concluded in the summer of 2010.

In January 2007 JobChange was launched with a staff of two. During the first three years of its existence, JobChange has counselled 600 employees, voluntary and involuntary movers alike. There is a broad programme of measures and methods available for facilitating internal job placements. Working with individual participants always starts with a one-hour interview centred on the possibilities JobChange has to offer and the vacancies available. Occupational aspirations and abilities are taken stock of in a standardised profiling procedure. Further steps such as training, internships in other departments and applications for a new position will be developed in subsequent interviews.

It should be pointed out that this model does not rely on any public funding schemes.

Recent research has demonstrated that constructive manipulation of the internal labour market has great potential for increasing the flexibility of resource allocation and thus for avoiding redundancies (Kirsch, Mühge 2010; Mühge 2008). Compared to internal transfer units in other hospitals and enterprises in other sectors (cf. Kirsch, Mühge 2008) JobChange distinguished itself by its cautious introduction, focusing on voluntary mobility at first. In this way trust could be built up that pays off in more critical cases of redundancy and involuntary transfer. Meanwhile, JobChange is preparing to cover other hospitals and evolve into a trans-company labour pool – similar to the one presented in the next case study.

6.2 Case study (3): a regional ‘labour pool’ in the engineering industry

The German legislation on temporary work agencies makes an exemption, among other things, for the mutual ‘lending’ of workers between employers in the same sector to avoid short-time working or dismissals if regulated by a collective agreement. In other words, under such a framework, potentially redundant workers would be sent by their employer to a neighbouring firm to work there, without severing contractual relationships with their ‘home’ employer, and without this employer being subject to the regulations applying to temporary work agencies. These exemptions from the temporary work regulation seemed more important when they were more

strictly regulated than today; nevertheless this clause has received more attention recently because of the current crisis. Its greatest potential is between firms whose processes are similar - facilitating the transfer of workers between tasks - but whose markets are different and develop in different patterns over a year's seasons or over the different phases of a business cycle, owing to the different purposes their products serve. This could be the case, for example, where one producer of harvesting machines specialises in those designed for crops grown in the northern hemisphere and the other on machines mainly used in the southern hemisphere.



The initiative for co-operation among machine tool manufacturers in the Braunschweig area

The co-operative initiative of the machine tool industry (KIM) in the Braunschweig area (Lower Saxony) was launched in 2000 by concluding a local collective agreement with the metal workers' union (IG Metall) which allows the participating employers to exchange staff for limited periods of time. This provides the participating firms with an additional instrument for managing cyclical and seasonal variations in demand (see also Mühge, Knuth 2009; Hertwig 2009). In 2008, KIM encompassed 22 enterprises, of which only 11 were covered by the collective agreement mentioned. Those not covered by the agreement cannot exchange staff but can take part in other joint activities that do not require regulation (see below). The participating enterprises range from 30 to 800 employees in size.

The collective agreement was concluded in November, 2000, between the regional association of employers in the metal industry and the regional branch of the metal workers' union. It was the first of its kind in Germany. In the start-up phase 20 of a total of 80 regional enterprises were selected and addressed by the social partners who co-operated in presenting the new idea and in winning the co-operation and commitment of managers and works councils. The collective agreement codifies the fundamental conditions and processes of temporary staff transfers and the rights of the workers affected: (1) Contractual relations with the 'home' employer remain intact, and wages continue to be paid by the original employer during the secondment to another employer; (2) previous wages are guaranteed to seconded workers, but if they should be put on to higher-grade tasks during the secondment, they will temporarily receive more; (3) secondment is only permissible if the works councils of the two firms and the employees affected agree.

In practice, most enterprises covered by the agreement make only sporadic use of its provisions. Secondments are typically triggered by excess demand due to a peak in orders, sickness of key workers or other reasons for temporary understaffing. The number of employees seconded tends to be small. Demand is concentrated on skilled workers and technicians, less on fully-qualified engineers. The duration of the secondments varies between one day and half a year, one day being the minimum unit. There appears a clear structure among the participating enterprises, where some act mainly as demanders and other mainly as suppliers of human resources. Exchange relations are mostly confined to two or three partners; there is no exchange across the board between all members of the initiative.

Although ‘labour sharing’ under the collective agreement is a central element of the initiative, it has since expanded into joint activities and the exchange of experience in such fields as human resource development, ICT, supply and logistics. Given the sporadic nature of staff transfer, this expansion of activities and the establishment of a coordinating hub have helped to professionalise and stabilise the network and win new members. Essential for its existence is the co-operative climate between the social partners in the region and the role of the president of the regional employers’ association (at the same time serving as the CEO of one of the participating firms) as an active promoter of the scheme.

Just as with case study (1), KIM does not require any public funding; rather, by avoiding short-time working and dismissals, it spares the unemployment insurance fund the paying of short-time allowances (see 7.2, p. 43) and unemployment benefits.

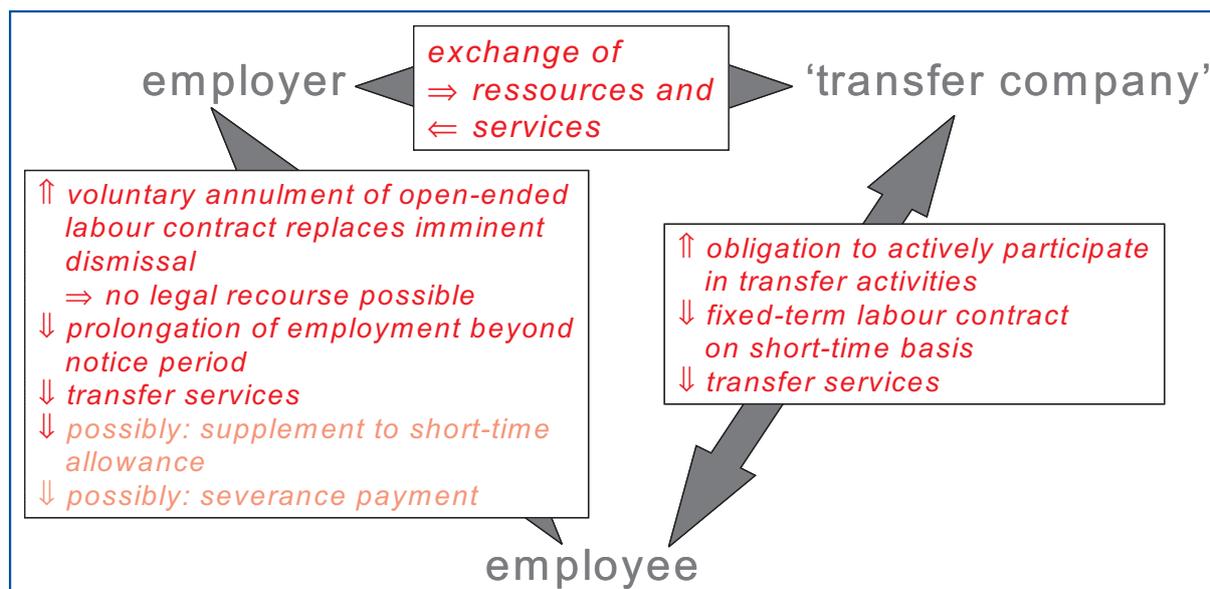
The example of KIM did not remain without followers. In December 2009, the regional branch of the metal workers’ union in North-Rhine-Westphalia concluded a similar agreement with the employers of the metal industries in the Ruhr district. This agreement is still too recent for a report on its implementation in practice to be possible.

Obviously the schemes presented in this chapter are only suitable for avoiding dismissals in the levelling out of peaks and troughs in labour demand between closely related units, that is departments of a highly diversified organisation (hospital) or between firms within a region (labour pool). When an organisation is suffering from an overall and lasting staff surplus and where potential new employers are still unknown, it is not possible to perpetuate existing labour contracts. But there are still alternatives to unemployment and to the standard involvement of the public employment service. These will be the focus of the next chapter.

7.1 The trilateral transfer deal

The massive restructuring that followed German unification, first in the East and later in West Germany, triggered the development of so-called *job transfer schemes*. From a *worker's* perspective their attractiveness lies in the avoidance or postponement of unemployment plus the availability of immediate and more effective services than the public employment service would be prepared to deliver. By implementing a job transfer scheme, the *employer* may circumvent the restrictions of the need for social justification for dismissal and thus avoid the procedural risks inherent in legal actions that may be expected from the affected workers (see p. 34 for details). Job transfer schemes may also serve to shorten individual notice periods so as to speed up restructuring; to report favourable headcounts to international headquarters in order to counteract pressures for downsizing; or to enhance the attractiveness of a company to potential buyers.

Figure 18: The trilateral jobs transfer deal



Source: Knuth, Mühge 2009

Under a job transfer scheme, the employer will offer the workers the annulment of their existing open-ended contract in exchange for a fixed-term contract with a third party specifically created for such purposes, a so-called *transfer company*. In return for giving up legal employment protection by voluntarily entering into a fixed-term contract, the worker will receive a *temporal extension of his or her employment* beyond the notice period, plus outplacement-related services generally delivered by the transfer company. If the worker should later become unemployed, this will be regarded as the automatic result of the fixed-term contract expiring. Sanctions against entering unemployment 'voluntarily' or 'prematurely' (before the end of the notice period) will not apply – workers may keep whatever they receive in terms of redundancy payments or compensation, which would not be the case if they opted for unemployment directly and voluntarily.

As a rule, transfer schemes are negotiated by works councils within the framework of social compensation plans. Traditional redundancy payments will thus be supplemented by outplacement services, and financial subsidies may work as an *incentive for labour market transitions*. There may be premiums for opting for the transfer company instead of awaiting dismissal, for taking part in training and other active measures, and for taking up a new job as early as possible. Guarantees that workers may return to the transfer company in the event that a new job does not work out as expected will facilitate transitions, as will subsidies for initially lower wages in a new job. Occasionally there may also be provisions for the capitalisation of severance payments and the possibility of cheap loans for those who want to set up their own businesses. Unfortunately these examples of ‘propelling’ rules or provision are not standard practice but are found only in advanced transfer schemes.

7.2 Short-time allowances as the public subsidy for the transfer deal

The instrument of short-time allowances has already been introduced above (p. 16). In fact this provision takes three forms:

- (1) short-time allowances for cyclical reasons;
- (2) short-time allowances for seasonal reasons (introduced in 2007 for industries whose operations are interrupted by bad weather in the winter – mainly construction);²⁰
- (3) *transfer-oriented short-time allowances* for workers whose jobs have already disappeared but whose employment is to be continued for the purpose of occupational re-orientation and job placement.

Whereas the cyclical short-time allowance has in most cases to compensate only for a partial loss of work and wages, work will have stopped completely in the other two cases – for only a few days or weeks in instances of seasonal short-time, but indefinitely in the case of transfer-oriented short-time. Regardless of the type of short-time working, the basic mechanism is the same in all three cases: the days without work are compensated for from the unemployment insurance fund at the same rate as unemployment benefits – that is at 60% of standardised net earnings (67% for those financially responsible for at least one child). The employer still has to pay social security contributions for the whole period²¹ plus full wages for paid public holidays and days of paid leave – these being the days when work cannot be ‘lost’ since they would have been paid in any event. These costs are referred to as ‘residual wage costs’ of short-time working.

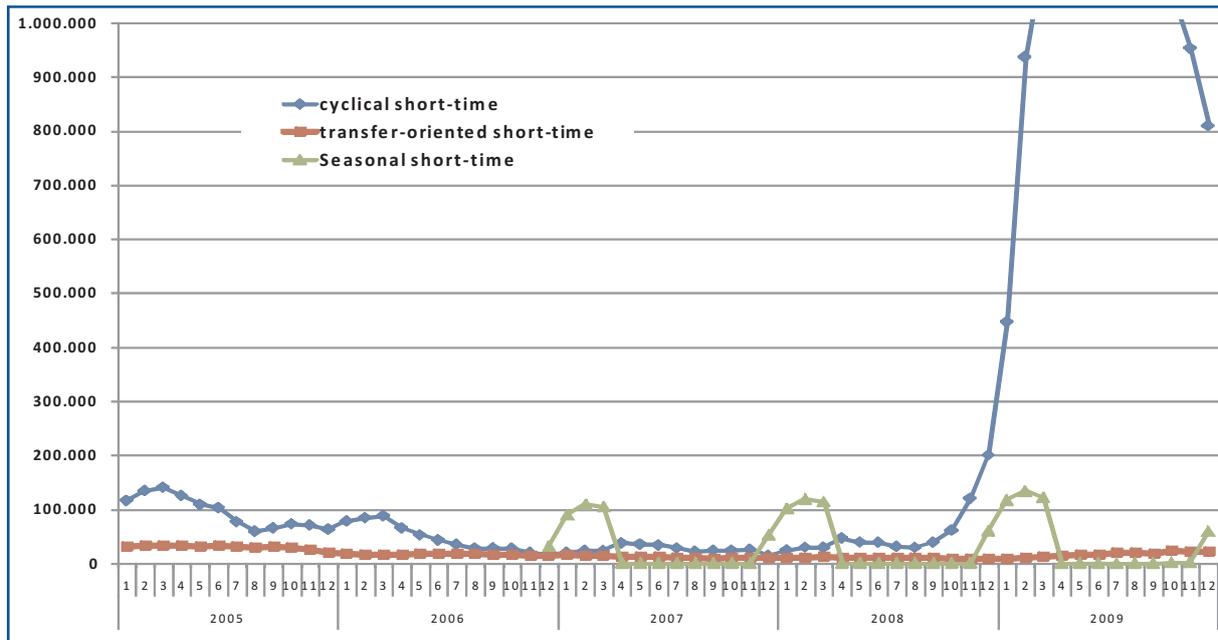
Although financed from the unemployment insurance fund, drawing a short-time allowance does not reduce eligibility periods for unemployment benefits. In other words, where transfer-oriented short-time allowances compensate for job loss and no new job is found before the end of the transfer period, those affected will have longer overall periods during which they enjoy a wage

²⁰ For further details see Kümmerling et al. 2008.

²¹ The recent surge in cyclical short-time allowances (see Figure 19) was facilitated by social security being temporarily taken over by the unemployment insurance fund from the 7th month.

substitute. Since recipients of short-time allowances are still employed, these payments are transferred to them via the employer’s payroll. This has ramifications for the scientific evaluation of these measures, since recipients of these allowances are not recorded individually in the Federal Employment Agency’s databanks.²² They are only counted from employers’ accounting documents, which yield the statistics shown in Figure 19.

Figure 19: Number of workers receiving short-time allowances, by type of provision



Source: Federal Employment Agency

As Figure 19 demonstrates, short-time allowances for cyclical reasons reached an all-time peak of 1.5 million in mid-2009, owing to the current crisis, a temporary increase in the generosity of their conditions, and the maximum periods of eligibility.²³ Short-time allowances for seasonal reasons seem to be slightly on the rise because of the increasing publicity given to this recently introduced instrument. In comparison, the instrument of concern in the context of this paper is being used only to a very modest extent, and the crisis has not yet brought usage up to the 2005 level. It is against this background, that the European Council recently voiced concern that the conservation of the existing employment structures might have the effect of delaying necessary restructuring and re-orientation.²⁴

Nevertheless, transfer-oriented short-time working allowances are the principal instrument of public support for job transfer schemes. But how exactly do they work?

²² Current draft legislation is going to change this.

²³ Normally at only six months, maximum periods for drawing short-time allowance for cyclical reasons was extended to 24 months throughout 2009 and is currently at 18 months. This is the first time that eligibility periods for the cyclical type exceed those for the transfer-oriented type, which have remained at 12 months. In addition, the unemployment insurance fund will take over employers’ social insurance contributions from the 7th month or during training, neither of which is the case with transfer-oriented short-time.

²⁴ Financial Times Deutschland, March 10, 2010, with reference to a paper prepared for the Ecofin meeting in the following week.

7.3 Job transfers supported by transfer companies

So called transfer companies offer 'employment' on the basis of *short-time 'working' at zero hours*, subsidised by the Public Employment Service through transfer-oriented short-time allowances. Under the framework of the social compensation plan negotiated by the works council with the former employer (see p. 35), short-time working allowances are usually supplemented by the former employer so that net income levels of between 75% and 90% are guaranteed during the transfer period. Together with the residual wage costs (see p. 43), the former employer will still have to bear 40%-50% of former gross wage costs. The overhead costs of the transfer company, as well as the cost of outplacement and training services it delivers, are additional. Under certain circumstances the European Social Fund – and, more recently, the European Globalisation Adjustment Fund – may provide a contribution to training costs. The maximum period for which transfer-oriented short-time allowances are granted is now 12 months (previously 24 up until the end of 2003). For the individual worker, this is the maximum period for which one can stay 'employed' by a transfer company.

Outplacement services provided by transfer companies are very much the same as those in other countries: they consist of profiling (assessment of competences), job search training and coaching, vocational training, and job placement. Internships or temporary work with other employers, with a guaranteed option for return into the transfer company, may play a role in supporting more lasting transitions. Some transfer companies are licensed to act as temporary work agencies, or they co-operate with such agencies. Given the status of participants as 'employees' of the transfer company, failure to actively participate in the measures offered can, in theory, be sanctioned by dismissal for reasons of conduct.

The use of transfer companies is costly for both the former employer and the unemployment insurance fund. Alternatively, there are the less expensive *'transfer measures'*, which subsidise outplacement training for workers selected for redundancy because of restructuring while they are still employed by their old employer. The subsidy is 50% of total cost up to a maximum of €2,500 per participant. The objective of transfer measures is to effect transitions into a new job even before the end of individual notice periods. Transfer measures and transfer companies may be used successively but not simultaneously, the transfer measure first filtering out those who are easier to place and the transfer company later taking over those harder to place. From the employers' perspective, transfer measures make sense if the worker is still needed for production during the notice period, whereas job transfer schemes make more sense in the context of immediate redundancies and long notice periods extending far beyond the intended usage of the workers' capacities.

The implementation of such schemes depends entirely on autonomous negotiations of the social partners at enterprise level, possibly (and mostly necessarily) with guidance from the social partners at sectoral level, and financially facilitated by the Public Employment Service. Transfer companies as such appear nowhere in the legal textbooks. They are an innovative construct, born out of the requirements of labour law (cf. 5.2m pp. 32ff.) and the available active labour market policy subsidies.

7.4 Case study (4): Transfer Company Nokia Bochum



The closure of the Nokia mobile phone plant in Bochum

In January 2008, Nokia, the world's largest manufacturer of mobile phones, announced its decision to close its manufacturing plant in Bochum (Ruhr District, North Rhine-Westphalia) with 2,300 jobs and another 800 temporary agency jobs (mid-2008 numbers) and to relocate production to a new plant in Cluj, Romania. The company attributed the restructuring to global cost-efficiency requirements. Employees, works council, trade union and local authorities were completely surprised by this decision. In the following weeks the trade union IG Metall organised a high-profile campaign with the aim of preventing the closure.

Simultaneously negotiations were initiated, as required by German labour law, between the employer and the local works council (supported by the IG Metall) aimed at a reconciliation of interests and drawing up a social compensation plan (see p. 35) designed to cushion the effects of the closure on the employees. At the end of April – when it had become obvious that the closure of the plant could not be stopped by the campaign – the works council and the trade union presented the results of their negotiations. In total, the employer would provide €200 million for the social compensation plan, of which €185 million were earmarked for severance payments and 'only' €15 million for supporting active labour market policies in a transfer company.

The individual amounts of severance pay were calculated according to the usual formula taking age, seniority and wage as essential parameters. The amounts of severance pay were within a range of €10,000 to €200,000, averaging €80,000. For instance, a 42-year-old employee who had been working for 13 years in the company would receive – depending on vocational status and related earnings – between €66,000 and €83,000 (gross value, subject to income tax). Since closure was certain there was, in this particular case, no point in presenting lean headcounts to investors or headquarters (cf. p. 42). Therefore, unlike in other cases, the workers affected would not switch over to the transfer company before the end of their notice periods, which ranged from one to seven months depending on previous length of service. As a consequence, entries into the transfer company were staggered in monthly cohorts between June 2008 and January 2009. The only active element during the notice periods was a 'sprinter bonus' for those who would find new employment on their own before their notice periods expired: during the remainder of their notice periods they would receive half of their wages as a bonus.

Before the transfer company took effect, alternative and more positive solutions were found for about 900 workers by transferring their jobs into other Nokia plants in Germany, by selling parts of the factory, and by individual placement in other companies by utilising the above-mentioned "sprinter bonus". Almost all the higher-skilled employees quickly found adequate new jobs within the region. In addition, about 70 older workers who had been on a gradual retirement scheme entered their period of leave while still being formally employed by Nokia.

At the end of their individual notice periods, those 1,380 dismissed employees who had not found a new job (60% of them female) would switch over to the transfer company for a maximum period of 12 months (the legal maximum) on the basis of the transfer-oriented short-time 'working' allowance. The allowance was topped up through the social compensation plan to 85% of the last net wage. During these 12-month periods, the workers were supported and assisted by the transfer company as their 'substitute employer' through personalised counselling and placement services as well as through relatively short-term vocational training courses lasting from three to six months and financed by the federal ESF programme. The main areas in which training was offered were storekeeping and logistics, driving licences for buses or lorries, materials testing, operating of CNC machines, and upgrading of clerical skills. Business start-up counselling was also a major service offered to the participants.

The transfer company – a relatively big and experienced outplacement service provider – found it extraordinarily difficult to activate the Nokia workers and find new jobs for them. There are several reasons for this. During their notice periods, workers had been left alone and idle with full pay. The announcement of individual dismissals (i.e. the beginning of the individual notice periods) had been scheduled for the end of June 2008, the date envisaged for closure. But then it turned out that most operations had ceased much earlier, which meant that the workers affected were released from work with full pay even before their periods of notice began. This situation continued during the individual notice periods, which were longest for the oldest workers who therefore were the last to start their job search, after the younger ones had perhaps filled vacancies for which they might have been qualified.

So the workers experienced several months with no work obligations at full pay before being told by the transfer company that now they should be actively earning their living at 85% of their former net pay. Moreover the large majority of the workers switching over to the transfer company had performed rather simple assembly-line jobs for relatively high wages, compared to current market rates. The Nokia wage structure had been shaped by the long history of the factory which had been a German producer of radios and television sets before being taken over by Nokia and later being converted to producing mobile phones. Somehow the spirit of the post-war era of the German 'economic miracle' had survived in the workforce who suddenly found themselves on a barren regional labour market, amidst a recession triggered by the financial crisis and in the country where the reality is that an unskilled worker can no longer earn a family wage. Wages offered on the labour market were far lower than the €4,000 of gross monthly pay some of the Nokia workers had received, and they were often even lower than what they received during their transfer period. Presumably the level of severance payments as reported above contributed to perceptions of being safe and of there being no urgent need to take up work. A provision like the above-mentioned 'sprinter bonus' was not foreseen after entering the transfer company, so whoever left the transfer company for a low wage before the maximum transfer period was over would appear to be giving up a claim and receiving nothing in return. This worked as a lock-in mechanism so that in December 2009 – two months before the last cohort of participants finished their transfer period – about 900 of the original 1,380 participants and ex-participants had still not found a new job, so it was clear that this job transfer scheme would wind up with disappointingly low re-employment rates.

The Nokia case illustrates some of the structural shortcomings of job transfer schemes in Germany, which will be further discussed in chapter 9. Before going into this, the scant empirical evidence of success records of job transfer schemes in general will be reviewed.

What do empirical studies tell us about workers' movements following redundancy and the effects of job transfer schemes?

8.1 Trajectories of displaced workers in general

In a survey of workers *displaced as a result of plant closures* in the 1980--1990 period in West Germany, it was found that the share of direct transitions into new employment (i.e., without intermittent unemployment) was higher for displaced workers than for workers that left for other (and in this survey unobservable) reasons, and the proportion of displaced workers making direct transitions slightly increased with service. Of those who did experience unemployment, the displaced workers were more rapidly reabsorbed by the labour market than those who left for other reasons (Bender et al. 2002). This corresponds with findings from case studies suggesting that the victims of closures experience less of a sense of "blame" than those dismissed for individual reasons or as a result of a selection process, and that they are thus better able to displace other workers (cf. Heseler, Osterland 1986; Gonäs 1990). In a more recent study of *dismissed male workers* it was found that about 50% were employed within the following year; of these, more respondents reported improvements in their job and working conditions than those reporting deterioration, although the rate of improvement was higher in a reference group of employees who had changed their employer on their own volition (Grund 2001).

So these findings suggest that the victims of restructuring are still relatively better off than the rank-and-file of the unemployed. The outcomes of job transfer schemes must be judged against this background.

8.2 Outcomes of job transfer schemes

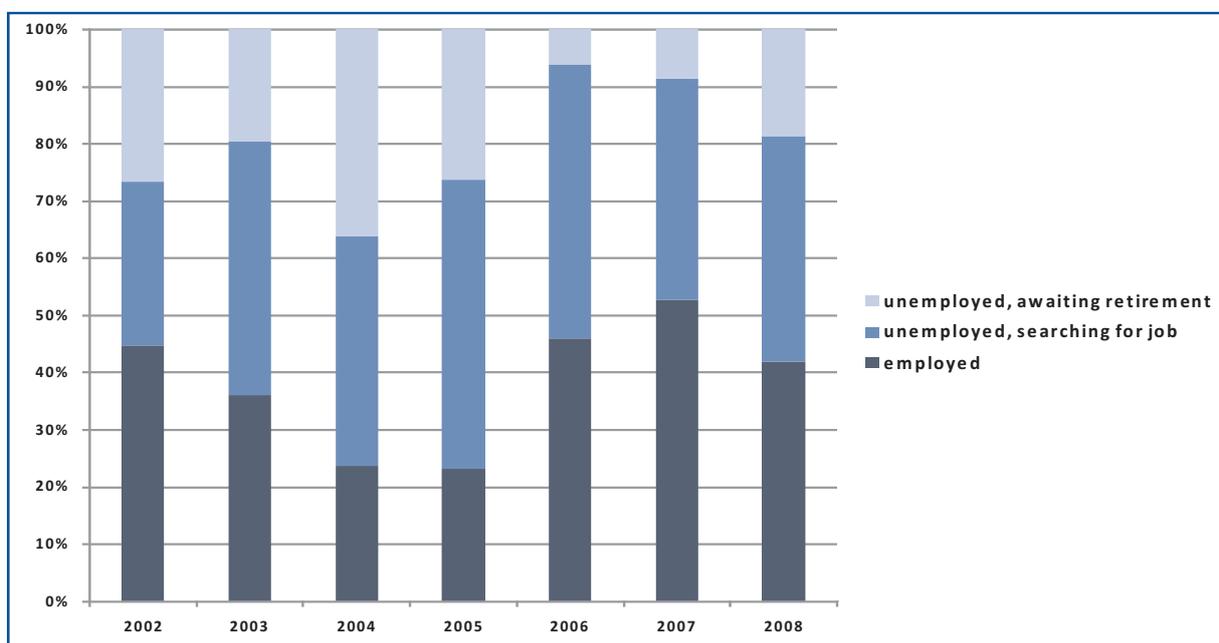
In an evaluation of job transfer schemes (Kirsch et al. 2001), 74% of respondents to a questionnaire and follow-up telephone interview were not unemployed subsequent to their participation in the schemes. However, some had gone on to further vocational training or had withdrawn from the labour market; only 60% were in new employment or had set up their own business. One-quarter of those who were re-employed had moved to their new job without any period of unemployment.

In a more recent evaluation of the subsequent reform of job transfer schemes (Isa et al. 2006), it was suggested that the halving of the maximum eligibility period for short-time allowances had resulted in the halving of the number of participants in the schemes. With regard to re-employment, no net effect could be established by econometric comparison with

non-participants. This finding was, however, interpreted as an improvement because it was contended that before the reform there had been negative net effects: According to this study, participants had previously been ‘locked into’ the scheme, deferring their re-employment. Our case study (3) gives some impression of how this could happen.

Since 1996, G.I.B., an agency of the Ministry for Employment, Health and Social Affairs of North-Rhine-Westphalia (see case study 4) has been conducting biannual surveys among the regional transfer companies, asking for their clients’ trajectories. The results are presented in Figure 20.

Figure 20: Status of participants in transfer schemes immediately after leaving



Source: Lindner 2009

Figure 20 shows the high degree of dependence of re-employment rates on the cyclical situation. It shows also how the share of participants oriented towards retirement shows an overall tendency to decrease, which is due to a decrease in the proportion of older participants: a result of discouraging early retirement (cf. p. 51) is that voluntary redundancies are no longer as age-biased as they used to be.

9.1 The legal framework of employment relations and protection

For the social actors, German labour law is rather difficult to operate and this makes professional legal advice almost indispensable. Labour judges estimate that about 20% of dismissals contested in court lacked social justification because of deficient observance of social criteria in the selection process, whereas 40% of challenges in which works councils had voiced an objection were legally turned down because of lack of substantiation (Höland et al. 2004). Such legal complexity gives rise to complaints by employers and disillusionment of employees who thought they enjoyed legal protection but then found that was not the case. Without such constraints and uncertainties, however, there would be far less of an incentive for employers to negotiate voluntary and perhaps innovative solutions in the quest for reduced legal complexity and procedural risk, and maybe also less incentive for employees to accept transfer deals offered to them.

Employees in small establishments enjoy less legal protection, and in reality there is also less protection in medium establishments (under 100) where there is often no works council. The pivotal role of the works council in negotiating restructuring means that half of the German workforce is not formally covered by the collective aspect of legal procedures. Even where a works council exists, pro-active approaches to restructuring are often inhibited by lack of expertise and prior experience, scarce financial resources of the enterprise, or because the number of workers concerned lacks 'critical mass'.

9.2 The trap of early retirement

Early retirement used to be the key instrument in managing redundancies (cf. Knuth, Kalina 2002), and any pro-active measures were only pursued where early retirement was insufficient to manage redundancies. Recent legislative measures aimed at cutting down on early retirement have had considerable impact (cf. Brussig, Knuth 2007), but the preference of large employers for early exit schemes remains despite rising costs for employers. Where transfer companies are used as a first stage in a pathway to retirement, they cannot meet the objectives of re-training and job placement. The age structure and the lack of job orientation of some transfer schemes participants who are in fact oriented towards retirement may account for poor re-employment outcomes in some cases.

Gradually-introduced pension reforms have now progressed to a point where people born in or after 1952 on will no longer qualify for an early pension by virtue of their unemployment. As a result of this, the use of transfer schemes and subsequent 'voluntary' unemployment as a pathway to early retirement is becoming less likely.

9.3 The historical emergence of the institutional structure of job transfer and the lack of a positive political message on restructuring

The historical evolution of job transfer schemes can be characterised as a long and gradual process of ‘bending’ and ‘stretching’ existing provisions and rules and of legislation hesitantly following practice (Knuth 2009). This explains, at least in part, the awkwardness of the institutional framing. Short-time working allowances, an instrument originally designed for preserving jobs during an economic downturn, were used from 1988 onwards – at first only in the coal and steel industry – to cushion job loss, extend the employment relationship beyond the disappearance of the job, and delay unemployment. It was only in 1991, during the process of extremely accelerated structural change in East Germany following German unification, that separate legal entities were accepted as substitute employers for taking over workers from State-owned companies on the basis of short-time working allowances, so as to slim those companies’ payrolls and make them attractive to private investors (Knuth 1997). Not until the ‘activation’ change in German labour market policies (1998, and more specifically 2003) was it made clear in legislation that the special type of short-time working allowances used in cases of redundancy was supposed to be implemented as a transfer mechanism, not as a means to de-activation and early retirement. These changes were presented more as curbing of malpractice than as offering new chances. There was little political discourse at national level affirming that restructuring was inevitable, that it would create new jobs for the future, that it would not be catastrophic for those directly affected, and that public provision would effectively support job transitions to good ends. The economic background sketched out in 2.2 will explain, to some extent, why this is so. There was never an attempt to design job transfer schemes anew from scratch; there was only minor tinkering with instruments and provisions that originally had a different purpose. This results in the structural problems that account for job transfer schemes’ tainted image and some of the qualitative problems it faces.

9.4 Ambiguity of status during job transfer

The lack of a straightforward institutional design results in paradoxical status ascriptions that are equally difficult to explain to those immediately concerned and to the general public, let alone an international audience:

- We see employees whose jobs have been closed down but who are nevertheless ‘employed’...
- ... by a substitute employer for whom they are not a factor of production but the clients of a service.
- So the employer has to serve the employees, and the employees are not serving the employer but themselves with regard to their career prospects. However those concerned

often seem not to fully understand this because they are 'employed' and therefore do not feel themselves to be job seekers.

- To complicate matters more, the participants in the transfer scheme are obliged to register as job seekers at the regional jobcentre which regularly gives them no job offer but leaves them in the care of the transfer company.
- Current draft legislation aiming at reinforcing the role of the public employment service in job transfer measures will exacerbate the paradoxical situation where job transfer participants have two carers possibly competing with each other.

9.5 Structural problems

Although transfer-oriented short-time working allowances financed by the unemployment insurance fund are an important financial resource for job transfer schemes, their concrete characteristic in individual instances of restructuring is determined, to large extent, by negotiations between the employer undergoing restructuring and the works council. It is in these negotiations that the funding of transfer companies' services by the employer will be decided, as well as the social compensation plan that frames workers' transitions from their old employer into the transfer company and, hopefully, from there to a new employer. A potential contradiction between the logic of social compensation plans and the logic of transfer and re-employment must be noted here. The logic of compensation would demand that the more a worker suffers redundancy, the more compensation she or he would receive. However, this logic may create incentives for the workers concerned to be "victims" – the aforementioned lock-in effect in transfer companies. If those who do not find a new job through the transfer scheme receive more compensation, many will be inclined not to find a new job. Allotting premiums to the 'fast movers' would favour successful transitions and accord with the paradigm of 'activating' labour market policies; but it appears unjust from the traditional perspective of compensation.

The second structural problem is related to the institutional positioning of the providers of transfer services. If we regard the transfer company as an 'agent', it is not the public employment service but the company under restructuring that plays the role of the 'principal'. Since companies' prime motive for involving a transfer company is the swift and easy severance of labour contracts, they tend to be satisfied with 'outplacement' in the narrow sense of the word. In many cases studied, a vigorous advocate of 'replacement' is absent – with the redundant workers resenting the change, the works council's attention focused on the 'surviving' workforce (its constituency in the next works council elections), the trade union pre-occupied with financial aspects of compensation, and the Public Employment Service not interested in seeing transfer companies outperform its own placement services. There is an absence of any institutionalised monitoring of the quality and performance of transfer companies and, despite the occasional evaluation of the schemes, there is no publicly available performance ranking of individual providers. One of the structural reasons for this is that job transfer, although heavily subsidised by the unemployment insurance fund and, possibly, European Structural Funds, is taking place in the sphere of private law: the contract between the old employer and the transfer

company is of a private nature, as also are the social compensation plan and the labour contracts between redundant workers and the transfer company.

This creates a situation of structural unaccountability: the old employer who has disposed of workers to the transfer company may have disappeared through closure or insolvency and, if not, the remaining enterprise striving for recovery no longer wishes to be identified with the victims of the past. The public employment service does feel responsible for the performance of the transfer company and mostly takes a passive stance, simply administering the short-time working allowances. Transfer companies themselves have to manage with the resources allotted to them. It is difficult to explain to the media that a job transfer scheme is not a standardised instrument but that each case is different, depending on the regional and cyclical situation of the labour market, the structure of the workers affected, the financial resources allocated by the company undergoing restructuring, and the availability or absence of additional funding from European sources (European Social Fund and Globalisation Adjustment Fund). In the end it is the very idea of job transfer schemes that takes the unjustified blame for unsatisfactory outcomes.

In most cases, new jobs that could potentially be obtained have requirements quite different from the lost jobs, even within the same sector and occupation. Restructuring and job losses often occur at the end of a period of under-investment and lack of innovation with the result that the victims of restructuring are unfamiliar with cutting-edge technologies and processes. Consequently, a considerable amount of retraining would be appropriate, but normally neither the timeframe nor the financial resources of job transfer projects are sufficient for actual investment in participants' human capital.

9.6 Quality issues and the job transfer network in North-Rhine-Westphalia

Though job transfer provisions are available country-wide, they have traditionally concentrated in the most populous German state, North-Rhine-Westphalia.

Table 2: Participants in job transfer schemes in December 2009, by federal state

	absolute number	per cent
Schleswig-Holstein	182	0.86
Hamburg	773	3.65
Lower Saxony	1,860	8.79
Bremen	35	0.17
Northrhine-Westfalia	6,505	30.73
Hesse	1,619	7.65
Rhineland-Palatine	724	3.42
Baden-Württemberg	3,713	17.54
Bavaria	3,271	15.45
Saarland	282	1.33
Berlin	794	3.75
Brandenburg	94	0.44
Mecklenburg - Western Pomerania	510	2.41
Saxony	395	1.87
Saxony-Anhalt	177	0.84
Thuringia	234	1.11
Total	21,168	100

Source: Federal Employment Agency

North-Rhine-Westphalia's Ruhr district has been a laboratory of restructuring, and the regional government has for long had an eye on the development of job transfer schemes. From 1998 to 2005 the government co-ordinated a regional 'Alliance for Jobs' in which the social partners, the government departments concerned, the regional branch of the Federal Employment Agency, researchers, and providers of relevant services together discussed the future of work in the regions. The promotion of job transfer schemes, the proliferation of regional know-how on them and the improvement of their professional quality was delegated to one of the committees. It produced a joint statement supported by the social partners in favour of job transfer schemes, it initiated local 'networks of competence', and it stipulated criteria of good practice and service quality (G.I.B. 2001). Since then, the regional Ministry's for Employment, Health and Social Affairs' Agency for Innovative Employment Policies has been co-ordinating a round-table of the relevant actors in the field.

9.7 Case study (5): The Association for Innovative Employment Promotion in North-Rhine-Westphalia



Networking and benchmarking for quality in job transfer

The Association for Innovative Employment Promotion (Gesellschaft für innovative Beschäftigungsförderung – G.I.B.) was founded in 1986 by the federal state of North-Rhine-Westphalia as a company under private law. It defines itself as a competence centre for promoting employment whose main objective lies in supporting the regional government in its fight against unemployment. The company is financed by the regional government and from European and national projects. Comparable organisations exist in only a few other federal states, none of which is of comparable size and scope.

Since 1996, one of G.I.B.'s multi-faceted activities is promotion of job transfer schemes and networking for improvements in their quality. Without acting as a job transfer company itself, G.I.B. will give independent counsel to the management and works councils of companies facing restructuring and redundancies. The G.I.B. consultants will explain the legal framework and the practical mechanisms, and they will give information about regionally-available transfer companies that could be commissioned. They will assist the management and works councils in selecting adequate offers applying certain quality standards such as caseloads per adviser (50 at the most), adequacy of skills of the advisers, local labour market involvement, and cost transparency. These quality standards originated during the regional Alliance for Jobs (see p. 55) and have been further developed since. They have high legitimacy since the social partners, the public employment service, independent researchers and the operators of transfer companies themselves, have all participated in drawing them up.

In addition to this, the G.I.B. convenes a biannual round-table at which transfer companies, representatives of the regional public employment service and government officers exchange information on recent developments. At these events the G.I.B. researchers present their biannual survey of the transfer companies (cf. Figure 20, p. 50). From these networking activities, the establishment of an association of transfer companies has emerged as a means of self-organisation which aims at developing the quality criteria into a quality certificate.

In a broad comparative perspective, employment and social policies in European countries reveal a peculiar three-layer characteristic (Knuth 2008a):

- (1) At the level of changes and challenges to be addressed, there is a high degree of similarity: demographic ageing, structural change from the industrial to a service-based and knowledge-based society, the increasing share of tertiary education, marginalisation and even exclusion of the unskilled, increasing participation of women at least in the old Member States, and increased diversity of the labour force due to migration with few national exceptions. In particular, as economic structures are becoming transnational and increasingly globalised, restructuring at company level tends to follow very similar rationales and patterns.
- (2) At the level of instrumental solutions and approaches, we find similarities as well. Countries are adopting ‘live longer – work longer’ agendas, reforming their pension systems, discouraging early retirement, tightening criteria for incapacity-related benefits, running integration programmes for ethnic minorities and so forth. In particular, in assisting workers facing redundancy as a result of company restructuring, there are few differences at individual and instrumental levels: assessment of occupational experiences and competences, personal action plans, job training and job search training, various approaches to boosting individual resources (‘empowerment’), job placement, and support for business creation, are all found to a greater or lesser degree in all countries envisaging any career support for redundant workers.
- (3) At the intermediate level of institutions, practices and discourses, however, where challenges are linked to instruments, European countries are still extremely diverse. Differing modes of governance of the nation state, differing institutional structures of social protection, differing traditions of industrial relations and labour law, differing family models, differing concepts of citizenship and differing sources, mechanisms and periodicities of immigration –to name just a few – account for the variety of employment and social policies in Europe and the different ways in which technically quite similar processes are discussed and framed in public discussion. In particular the management of redundancies, differing structures of the public employment service, differing provisions of social protection, differing labour legislation and differing structures of industrial relations make up very diverse patterns.

This report has endeavoured to explain how the ‘German way’ of managing restructuring is shaped by Germany’s institutional heritage. Highlighting the principal features would result in the following non-exhaustive itemisation:

- Germany’s legacy as an export-oriented industrial producer still shapes the way it deals with restructuring. German reunification has reinforced this pattern since East Germany’s economic structure before the fall of the Iron Curtain mirrored the West German structure 20 years earlier. From an Eastern perspective, unification has dramatically and painfully accelerated structural change; from a Western perspective, change has been retarded.
- Germany’s industrial tradition and an export strategy based on medium-tech diversified quality production are linked to high human capital investments through the apprenticeship system, a large vocational segment of the labour market and a tendency of firms to retain the labour they invested in. It seems that legal employment protection²⁵ and the legally reinforced position of workplace representatives are much less the cause of

²⁵ Möller (2010) found no statistically relevant correlation between the OECD employment protection index and the change in national unemployment rates in 2009 in 30 OECD countries.

employment stability and long tenure than is usually believed; rather, these may be seen as institutional buttresses for patterns that follow from an economic rationale. As a result, mechanisms and regulations for internal flexibility and capacity adjustment within firms are highly developed, reducing restructuring-related redundancies to the absolute indispensable minimum. Public perception, however, is quite the opposite, and fear of job loss is very strong.

- German social security is provided in a ‘Bismarckian’-type insurance system in which contributions and benefits are proportional to earnings, contributions are shared between employers and employees in equal parts, and in which the funds – under the ever-stronger influence of legislation and State supervision – are still at least symbolically administered through a tripartite ‘corporatist’ self-governing body. It is obvious how such a system would be inclined not to restrict itself to compensating for unemployment but to also allot some funding directly to employers and the employed, demonstrating to them the rationale for funding the system through their contributions. Short-time working allowances are perfectly suited for this purpose, as they support the preferred pattern of employment, thus serving the interests of employers and employees alike. Consequently, the current expansion and temporal extension of short-time working allowances is not a source of controversy between the social partners.
- German industrial relations did not emerge under the patronage of a ‘strong State’ but in situations when the State was extremely fragile: first out of the defeat of the imperial monarchy (1918-1920), and, in a second thrust, out of the defeat of the Nazi regime (1945-1952). This – plus the negative experience of an ‘administered’ labour market under Nazi rule – explains the high degree of autonomy of the social partners at national, sectoral and company levels, the low level of direct interference by the State, the absence of a legal minimum wage, the strong role of labour courts as mediators and the statistical obscurity of matters related to the ‘private sphere’ of labour contracts and the internal affairs of enterprises.

This institutional setting gave job transfer schemes in Germany their distinctive imprint. It is not an optimal setting for accelerating structural change and for effectuating successful job transitions. However, it can only advance according to its own logic. Studying experience from abroad can help to develop scenarios for reform, but such experience cannot simply be copied and pasted into the German script.

Out of the discussion at the German National Seminar, the following two issues emerged:

- Whenever transnational or multinational companies are concerned, the ignorance of management seconded from abroad or the sidelining of local management by decisions taken at headquarters abroad often create severe problems for the implementation of adequate measures to mitigate the effects of restructuring. This is not to say that foreign companies are particularly ruthless to workers or particularly stingy when it comes to financial provisions – quite the contrary, in some cases it was not the lack of finance but its uninformed use that was the problem. Of course it must be true that exactly the same occurs when companies based in Germany restructure their operations in other countries. It would therefore be very useful to provide information to managers not only about the legal rules but also about practices and the spirit behind them in the European countries. It is an illusion that there could be a universal European toolbox for restructuring; rather, managers must know how the tools can be wielded in a given national setting.

The European Social Fund and, in some cases, the European Globalisation Adjustment Fund play an important role in the financing of job transfer schemes in Germany, particularly with

regard to training. In fact, since governments are looking for possibilities for make use of these funds, they deliberately leave 'holes' in national funding schemes so that these schemes can function as the co-financing of European funds filling the holes. However, if decisions as to the availability of European funds become known too late, as is often the case, then European Funding is not really supporting but delaying the necessary training. This is a particular problem in the German job transfer schemes where the period during which short-time working allowances have been granted is limited and where training funds make no sense once the period for short-time has expired. To put it bluntly: in this particular case, if European money cannot be made available simultaneously with the beginning of a job transfer scheme, it might be better not to have it at all because then national sources would have to be tapped and could be better synchronised with periods of transfer-oriented short-time working.

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