

Compliance with and enforcement of minimum wages in Germany

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1. Introduction

For a long time, compliance with labour standards had not been regarded as a problem in Germany. One trusted the social partners who not only negotiated wages, working hours and many other working conditions autonomously, but were also responsible for the observance and control of their agreements – in particular concerning the co-determination of the works councils. This had been changed with the adoption of the Posted Workers Act (Arbeitnehmer-Entsendegesetz – AEntG) in 1996, with which the state took over the task of monitoring compliance with the minimum wages in the construction industry and sanctioning violations of these lower wage limits. While in the 1990s there had been a double control structure of the former employment offices and customs, since 2004 the department "Financial Control of Undeclared Work" (FKS) of customs is the main actor for control activities. From the outset, the audit mandate for wage payments was limited to the social security contributions and taxes due to the state or social insurance funds. Unlike in some other countries, employees in Germany are therefore left to their own devices to enforce their minimum wage entitlements. With the extension of the AEntG to more sectors since 2007 and in particular with the introduction of the statutory minimum wage in 2015, the tasks of customs (Financial Control of Illicit Work – FKS) have been expanded significantly.

The protection of employees sought by the minimum wages and the creation of a level playing field for companies can only be guaranteed if wage standards were observed. However, several studies revealed that up to 3.2 million employees in Germany had been paid below the minimum wage in recent years (Pusch 2019; Fedorets et al. 2019). This clearly illustrates that the effectiveness of controls needs to be increased and that the problems of inadequate compliance have not yet been sufficiently addressed by politicians. There are various approaches in the literature on how compliance could be improved.

Based on the extensive international research and literature on compliance and enforcement of minimum wages and other minimum standards, the following section discusses the causes of violations, analyzes the different strategies of the actors with their strengths and weaknesses and discusses approaches for more strategic control (2). Afterwards, the work of customs their organisational structure, the staff level of the FKS and strategic approaches as well as the results of the customs work will be analysed (3). Finally, proposals taking into account international experience are developed for improving the controls of minimum working conditions in Germany (4).

2. Causes and background of violations of working conditions in the literature

The extensive international literature on various forms of precarious employment impressively illustrated the emergence of "parallel worlds in work" (Holst/Singe 2013). The poor working conditions in the growing segment of precarious work have not only been the result

of regulative changes, but also of systematic non-compliance with minimum standards. Research has also indicated that government controls have become more urgent than in the past due to the growing heterogeneity of forms of work, the increasing intransparency of employees' claims and rights, the loss of compliance with classical norms of fair pay in unleashed competition, and the weakening of trade unions as effective decentralised control actors (Dickens 2009). The advantage of self-regulation by the social partners had not only been that it supported the enforcement of individual claims in the event of corporate misconduct, but above all that it had evolved a preventive effect so that such misconduct was not really widespread.

Weil (2010 and 2014) sees the most important reason for the growing compliance problems in shifting the boundaries of companies. As coordination costs have fallen significantly as a result of new technologies, companies have been able to subcontract parts of their value chain activities, but still manage that by setting detailed standards with a close monitoring of compliance. Large companies are replacing many functions in internal labour markets by market relationships and are thus disposing of their legal employer function, even though they continue to monitor some of the work processes in the value chain down to the smallest details. The result are "fissured workplaces", i.e. a fragmented working world with many small suppliers that squeeze wages and social benefits in order to survive against the competition in this fierce competition.

Weil (2015) focuses primarily on companies that manage the entire value chain in detail, such as franchise companies. The concept of fragmented companies is similar, but somewhat broader. The starting points are also changes in working conditions due to the splitting up of companies or the outsourcing of activities to save costs (Marchington et al. 2005). In fragmented enterprises, it is often unclear who the entrepreneur responsible for working conditions is. The fragmentation of companies multiplies the costs of external controls, since it is not only necessary to find out who the actual employer is, but also to apply different regulations to the companies in most cases. Moreover, unlike in vertically integrated companies, it is more difficult for employees to represent their common interests, as statutory and negotiated co-determination rights are limited to companies or enterprises and end at the company borders.

The fragmentation of companies needs to be distinguished from the precarisation of employment relationships, although the overlaps are obvious. Employees of contract work companies, workers posted from abroad or temporary workers belong to other companies, but are in fact subject to instructions from the contracting company, as are bogus self-employed workers. This creates legal grey areas that allow companies at the top of the value chain to get rid of their legal and social employer obligations. Furthermore, short part-time employment contracts such as mini-jobs are particularly vulnerable for violations of labour standards (Bosch/Weinkopf 2017).

Last not least, certain sectors are considered to be particularly affected by infringements and non-compliance with minimum wages and other labour standards. This is, for example, frequently true in sectors with constantly changing employment locations for employees, such as for instance the construction industry, the transport of goods and in sectors with a high proportion of simple standardized and low-language activities where regular employees can easily be replaced by migrants without knowledge of the national language, such as in meat

processing and agriculture. The same applies to sectors with small company structures without effective employees' representation and a focus on price competition which applies to large parts of the private service sector in Germany (Artus 2013).

Employees are often unaware of their rights and entitlements, which is particularly pronounced among migrant workers with language barriers. However, knowing one's own rights is a basic prerequisite for being able to claim them. So-called "self-enforcement" is given high priority in the enforcement of minimum wage entitlements. "Awareness among workers of their right to the minimum wage is key to compliance." (Croucher/White 2007: 151) Employees (and also companies) need to know the level of the minimum wage and which groups are entitled to receive it. Moreover, transparent rules on the eligibility of bonuses and other wage components for the minimum wage are considered necessary for this purpose. Clear regulations on what counts as working time and the correct recording of employees' working hours in companies are also regarded as very important (Skidmore 1999). The British government has prepared and supported the introduction of the statutory minimum wage through several nationwide information campaigns and poster campaigns (Benassi 2011: 12f) and repeated them several times in the following years. In Germany, on the other hand, such campaigns had been largely dispensed when the statutory minimum wage had been introduced.

2.1 Control tools and strategies

A distinction between reactive and proactive approaches in the core tasks of the control authorities is important. With the reactive approach, the control authorities investigate violations on the basis of specific complaints from affected employees or other interested parties such as trade unions or competitors. Reactive procedures also need to be organised. Easily accessible, well-known and sanction-free complaint channels that can be used anonymously are urgently needed, too (Vosko/Thomas 2014: 645).

Within proactive strategies, the control authorities do not wait for complaints, but also monitor compliance with minimum wages without suspicion. The effectiveness of proactive strategies also depends on the quality of the assessment of risky and less risky companies (Hampton 2005). The accuracy of the chosen strategies depends on access to reliable, complete and updated sources of information on companies, sectors, workers, previous inspection visits, sanctions imposed and interventions by other authorities. Policy options, studies, official statistics and complaints from trade unions, workers or other interested parties are also considered as indicators on which future action can be based (Bignami et al. 2013: 70).

Relevant studies indicate that different actors need to be involved in the control and enforcement of minimum standards:

- The state control authorities, which have the power to control minimum working conditions and at the same time have scope for preventive strategies. It is important that they are adequately staffed for these tasks.
- The social partners, who can alone or jointly develop national or sector-specific strategies for information, advice and arbitration in the event of complaints (construction industry in the Netherlands; cf. Bosch et al. 2011: 132f) or can even carry out joint controls as in the Swiss construction industry (Lutz 2018).
- The works councils, which in Germany have the legal mandate to monitor compliance with labour laws and collective agreements.

- Employees who have individual rights under the employment contract, laws or collective agreements and who can try to assert their claims through various channels (individual legal action, representation by company interest representatives and trade unions).

The empirical studies on compliance strategies had come to the conclusion that cooperative enforcement were considerably more effective than separate or uncoordinated enforcement (e.g. ILO 2013). However, the conditions for this are not everywhere given, so that enforcement strategies can differ significantly depending on the industry. As we know from comparative minimum wage research, the reasons for this lie in country-specific traditions and in the varying strength of social partnership at company, sectoral and national level (Grimshaw/Bosch 2013). In countries with almost universal trade union representation at company level, such as Sweden, and strong co-determination rights, workplace control by trade unions still plays a crucial role. Accordingly, trade unions are in a position to negotiate effective minimum wage limits on their own merits and there is no need for a statutory minimum wage with state enforcement powers behind it. We call this case "autonomous control". However, recent experience revealed that even this system for defending against criminal activities cannot properly work without state controls on tax evasion and social security fraud (Bosch/Weinkopf 2015).

2.2 Pathways to establish more strategic controls

Recent empirical research considers the traditional focus on reactive controls which investigate specific complaints to be less effective and increasingly problematical in the view of growing fragmentation of companies and the spread of precarious forms of employment (Saunders/Dutil 2005: 17; Dickens 2009: 4). Reactive strategies tend to not change behaviour, as individual cases do not have long-lasting effects. Targeted strategies are regarded as necessary in order to make it clear to the public how important fair working conditions for the government are.

Weil (2015) points out the criticism of the reactive approach in the literature and criticized that this strategy would overlook many violations. If targeted controls were always only carried out at the end of the value chain, one would certainly find grievances and violations, but not come across with systematic changes in behaviour. It is not sufficient to demand for more staff and better training as the number of violations is increasing. If considering the rising complexity of value chains and employment relationships, the question arises whether and how behavioural changes can be achieved (Weil 2010: 78ff.) – must be asked much more critically. Weil (2010: 93f.) called for a strategic approach based on the following principles:

- **Prioritisation:** Each inspection authority follows a scale of industries and jobs with the worst jobs, often based on experience. These ranking scales, which determine the priorities of strategic controls, should be developed more systematically with the help of empirical studies. In addition, one has to ask oneself where controls have the greatest impact on changes in company behaviour. The best way to answer this question is to link it to other principles such as deterrence and sustainability. One conclusion could be that controls should not necessarily start in industries with the highest number of breaches, but should start with the "perpetrators" who may belong to another industry.
- **Deterrence:** Controls are most effective in deterring other companies from voluntarily meeting the required standards. Deterrence can multiply the effect of individual controls.

Deterrent effects result from the estimation of the probabilities of controls and the sanctions to be expected thereby. The leverage effects of controls are greater if one starts at the top of the value chain: "Fissuring means that enforcement policies must act on higher levels of industry structures in order to change behavior at lower levels, where violations are most likely to occur." (Weil 2010: 2)

- **Sustainability:** Controllers often complain about the problem of repeat offenders in individual case controls. This is promoted by concentrating only on solving individual problems that are the subject of complaint. Sustainability can only be achieved if the required change processes in the companies are linked with other important corporate goals. As an example, Weil cites health protection, which is more effective if it is linked to a new culture of occupational safety and health promotion in companies.
- **Systemic effects:** Violations of labour standards are often the result of specific organisational and competitive structures in certain regions, sectors or product markets. They can only be effectively limited if the rules within these systems are changed sustainably. This may concern, for example, tender conditions or the responsibility of general contractors for the working conditions of dependent subcontractors.

Such a strategic reorientation requires significantly more capacity to investigate the functioning of sectors and value chains and a fundamental change in internal structures and coordination processes in the supervisory authorities.

3. Control in Germany: Financial control of illicit work

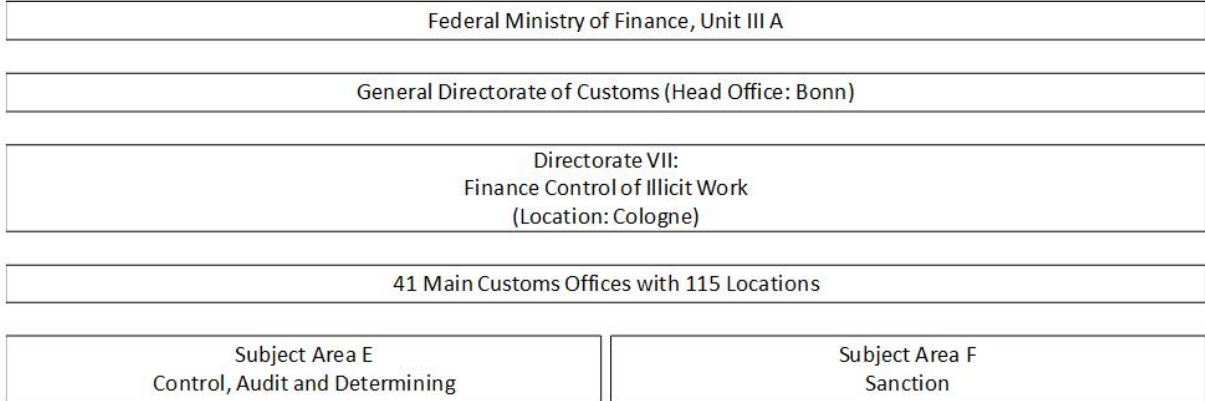
The Financial Control of Illicit Employment (FKS) which had been existed in its present form since 2004, is responsible for monitoring compliance with minimum wages in Germany. The audit is based on the Act to Combat Illicit Work (Schwarzarbeitsbekämpfungsgesetz – SchwarzArbG) of 2004, which focuses on compliance with social security regulations. The FKS pursues a holistic audit approach which means that all relevant audit fields resulting from the SchwarzArbG are processed during each audit. This includes checking compliance with working conditions in accordance with the Minimum Wage Act (Mindestlohngesetz – MiLoG), the Posted Workers Act (Arbeitnehmer-Entsendegesetz – AEntG) and the Act on the Provision of Temporary Agency Workers (Arbeitnehmerüberlassungsgesetz – AÜG). The audit assignment for wage payment is limited to the contributions and taxes to which the state and the social insurance funds are entitled. The enforcement of the net wage remains an individual task of the employees, although the FKS can check with the support of the pension insurance if employees had received too little wage.

Since 2009, FKS has concentrated primarily on sectors that are considered as particularly susceptible to infringements and are therefore named in § 2a SchwarzArbG. These include, among others, the construction industry, the meat industry, the hospitality industry, the cleaning industry as well as the logistics industry. Employees in these sectors are obliged to carry an identity card, passport or other documents with them during their work. The target set by the Ministry of Finance is that at least 70% of inspections should be carried out in particularly vulnerable sectors (Zoll 2018) – an aim which is frequently achieved according to our interviews.

3.1 The organisational structure of the FKS

The administrative structure of the FKS is organised in several stages, with the Federal Ministry of Finance being the responsible federal and supervisory authority. The organisation and performance of customs tasks are managed by the General Customs Directorate based in Bonn, which is divided into two central directorates for internal administrative tasks, seven thematic specialist directorates and eight customs investigation offices (Deutscher Bundestag 2015). The specialist directorates are spread across various locations. The Financial Control of Illicit Work is located in the Special Directorate VII based in Cologne, which is responsible for fundamental issues, task management and the exercise of legal and technical supervision for 41 main customs offices at 115 locations (Figure 1).

Figure 1: Organisational structure of FKS since 1 October 2014



Source: own presentation

Until 2014, the tasks were divided into three areas: prevention (subject area C), examinations and investigations (subject area E) and punishment (subject area F). The task of subject area C was to ensure the nationwide presence of the FKS, to investigate suspected cases and to carry out checks independent of suspicion. In colloquial terms, this subject area was also referred to as "patrol duty". In work area E, inspection orders and investigation procedures were carried out in particular, which did not fall within the competence of subject areas C and F. This concerned audits from the service without the external service. Subject area F is responsible for punishing administrative offences for which no external service is required. In addition, this department is authorised to carry out fine proceedings.

In May 2014, the German Federal Ministry of Finance issued a decree reorienting the Financial Control of Illicit Work. In October 2014, subject area C was integrated into a restructured subject area E "Control, audits and investigation" (BMF 2014). Subject area F was retained in its existing structure. Since then, the task of subject area E has been to investigate suspected cases of undeclared work and illegal employment on the basis of reports and information. In addition, suspicion-independent audits are carried out as well as priority audits several times a year, which concentrate on a specific economic sector nationwide or regionally per audit. In addition, the department conducts all investigative proceedings that do not fall within the responsibility of the Penalty Department.

Even after the previous organisational reforms, customs still has two parallel enforcement services, FKS and Customs Investigation, which are assigned to different central directorates, although they often have similar tasks, require sufficient equipment (e.g. telephone surveillance, IT equipment and vehicle fleet) and apply comparable control methods. This separation of the two services runs through all the main customs offices. The lack of pooling of resources in the FKS leads in part to considerable shortages on the ground, above all in IT equipment or

telephone surveillance, although this equipment has gained in importance for the planned more intensive control of organised crime. The patchwork organisation of customs impairs the efficient use of resources. In addition, there are hardly any understandable differences in legal regulations.

In a decree of May 2014, it was explicitly stipulated that audits should continue to be carried out both on the basis of indications and independently of suspicion. In addition, a "visible, nationwide presence" should be ensured (BMF 2014). The implementation of the decree was left to the respective main customs offices. In a survey of members conducted in spring 2016, the GdP stated that the restructuring had not been implemented in accordance with the provisions of the decree: "The mandate of prevention to carry out random – but risk-oriented – controls on the labour market is classic patrol duty. This was largely discontinued." (GdP 2016a) At the same time, this meant that most controls were now carried out only on the basis of indications and no longer without cause. Therefore, there could no longer be talk of a nationwide presence. For the police union, there is a clear link between the introduction of the statutory minimum wage and the restructuring of the FKS. Instead of strengthening the supervisory authority, the organisation was weakened.

Looking at the development of the total staff of FKS, it can be seen that the number of posts rose from 6,865 in 2015 to 7,913 in 2019 (Table 1). However, the number of posts actually filled increased by just 654 during this period. The number of vacant posts has risen continuously since 2016 and stood at 1,304 in 2019. The Federal Audit Office (Bundesrechnungshof 2018: 12) also criticised in its assessment of the consultations on the federal budget for 2019 that there are considerable vacancies at the FKS.

Table 1: Permanent posts, occupied and unoccupied posts at FKS, 2015 – 2019

Financial year at 1 January	Permanent Posts	Occupied Posts	Unoccupied Posts
2015	6,865	5,955	910
2016	6,865	6,067	798
2017	7,211	6,268	943
2018	7,562	6,335	1,227
2019	7,913	6,609	,304

Sources: Deutscher Bundestag 2018a, 2019.

From the point of view of the police union (GdP), the increasing number of vacancies is caused by high staff turnover, which is seen to be due to an increasing dissatisfaction among long-term workers. In a survey of union members conducted in spring 2016, the union found that 63% of the FKS employees surveyed were dissatisfied with the reorientation of the FKS (GdP 2016a). In our interviews it was reported that, against this background, many control staff could be transferred to other areas, as a result of which a great deal of competence had been lost at the FKS, which could not be compensated by the recruitment of junior staff.

In autumn 2018, in addition to the existing plans to increase the number of FKS employees, Federal Minister of Finance Olaf Scholz announced that the number of FKS employees would

rise to 8,600 by 2022 and to 10,000 by 2026. In addition, the Federal Ministry of Finance has promised to increase the FKS by a further 3,500 jobs after 2026 (Hildebrand/Specht 2019).

3.2 Strategic approach and co-operations

In its work, FKS uses a mix of reactive and proactive approaches. The risk-oriented selection of companies to be audited is to be classified as proactive: Among other things, information and communications, experience and findings from previous audits as well as special regional features are taken into account. As regards risk assessment, FKS also cooperates closely with other authorities, social security funds and the collective bargaining partners. The risk-oriented selection of sectors also focuses on employment relationships that are particularly affected by infringements. From the point of view of the FKS, these include mini-jobs in particular, which are subject to special requirements for recording working hours in accordance with the Minimum Wage Act.

In addition, each FKS site is given a so-called customs target catalogue in which the annual number of checks and inspections of the business documents are determined. However, controls can also be carried out at short notice without prior notice. A further important component of the proactive approach are the so-called focus audits. For each inspection, a specific sector is inspected nationwide or in selected regions on a single day. These audits take place up to eight times a year and are frequently carried out in the risk industries.

The strategy of the FKS also includes targeted press work to make the results and successes of controls publicly visible and to send a deterrent signal to other companies. This applies in particular to priority inspections, for which regional or nationwide press releases are often issued. In addition, each year customs publishes a balance sheet with information on the number of inspections as well as the penalties and fines imposed.

Apart from these framework requirements, the main customs offices can plan and carry out their own audits and controls. At all sites, the respective departmental management decides which information is to be followed up and whether additional checks are to be carried out without cause. A coordinated overall strategy is not discernible. The only exceptions are the nationwide priority inspections, which are specified by the Directorate General of Customs. Due to the high degree of decentralisation of the strategy development, different opinions have arisen in practice as to how the statutory control mandate at FKS is to be fulfilled. An example of this is the selection of companies. In the opinion of several interviewees, some main customs offices now react exclusively to notes from the public and no longer carry out checks without cause. Other customs offices, however, continue to attach great importance to public presence and to carrying out part of the controls without cause.

The determination of employees' working hours is also handled differently. For example, we were told in interviews that some main customs offices have rigid working hours from Monday to Friday from 8 a.m. to 4 p.m., which means that companies are not checked at the weekend or in the evening. The GdP emphasises that area-wide checks around the clock are necessary, but in many cases cannot be guaranteed (Deutscher Bundestag 2018b). However, there are also FKS locations that practise flexible and needs-based working hours and check at weekends or at night. This is decided exclusively by the head of the respective department.

Closer cooperation exists between the Financial Control of Illicit Work and the so-called "co-operation authorities", with which formal agreements exist on coordinated controls and the

exchange of data and information (Figure 2). These include, among others, the public prosecutor's offices, the tax offices, the pension insurance, the offices for occupational safety and health and the trade offices as well as the Social Security Fund for the Construction Industry (SOKA-BAU). At regional level in particular, cooperation is institutionalised through regular meetings and the associated exchange of experience. On-site inspections are usually carried out by FKS alone. The situation is different in the case of more extensive inspections, which often involve in particular the tax investigation of the tax authorities and the German pension insurance. In particular, joint inspections, mutual training, data evaluation or investigation procedures are more frequently carried out at regional level with the tax authorities. In special cases, cooperation can also lead to the formation of a joint investigation team in order to avoid double investigations in cases of undeclared work (Deutscher Bundestag 2017).

In addition to the tax authorities, the German Pension Insurance is a central cooperation partner of customs. Every four years, the pension insurance company uses the wage documents to check whether the social insurance contributions have been paid properly. Approximately 800,000 companies are audited each year. The business documents can be used to determine whether the employees have been paid the minimum wages to which they are entitled. If violations or anomalies are detected, a report is sent to the FKS. Conversely, the pension insurance company carries out special audits of companies if this is initiated by the FKS. If necessary, automatic data exchange takes place between the two authorities. In addition, the FKS transmits the audit reports to the pension insurance in the event of established infringements so that the latter can calculate the loss amounts incurred for the criminal proceedings. The pension insurance is also responsible for checking and detecting bogus self-employment via the so-called declaratory procedure. A personal exchange between the FKS and the pension insurance usually takes place once a month, especially at regional level, for joint training courses, consultations on procedures and information on ongoing cases.

Finally, cooperation with the prosecution is also important when a case has to be heard in court. For this purpose, the FKS must prepare every case for the courts. In our discussions with employees of the FKS it was described as problematic that the public prosecutor's office might "disassemble" the cases under certain circumstances and only deal with the location concerned because it was not responsible for the other cases from other districts. In criminal proceedings, the public prosecutor's office may only deal with cases from its own district. Moreover, several interviewees believe that violations of working conditions do not have the highest priority in the courts. Only specialised prosecutions would often devote more attention to the cases.

There is no formal cooperation between the FKS and municipal control authorities such as the public procurement agencies. Here, communication is usually one-sided, with the awarding authorities reporting suspicious cases to customs without receiving any feedback on the cases. In addition, violations of the award procedure or of minimum working conditions are usually only known to the individual awarding authorities because there is no supra-regional exchange of this information. For this reason, awarding authorities often do not notice the misconduct of a company if infringements have been detected in another region.

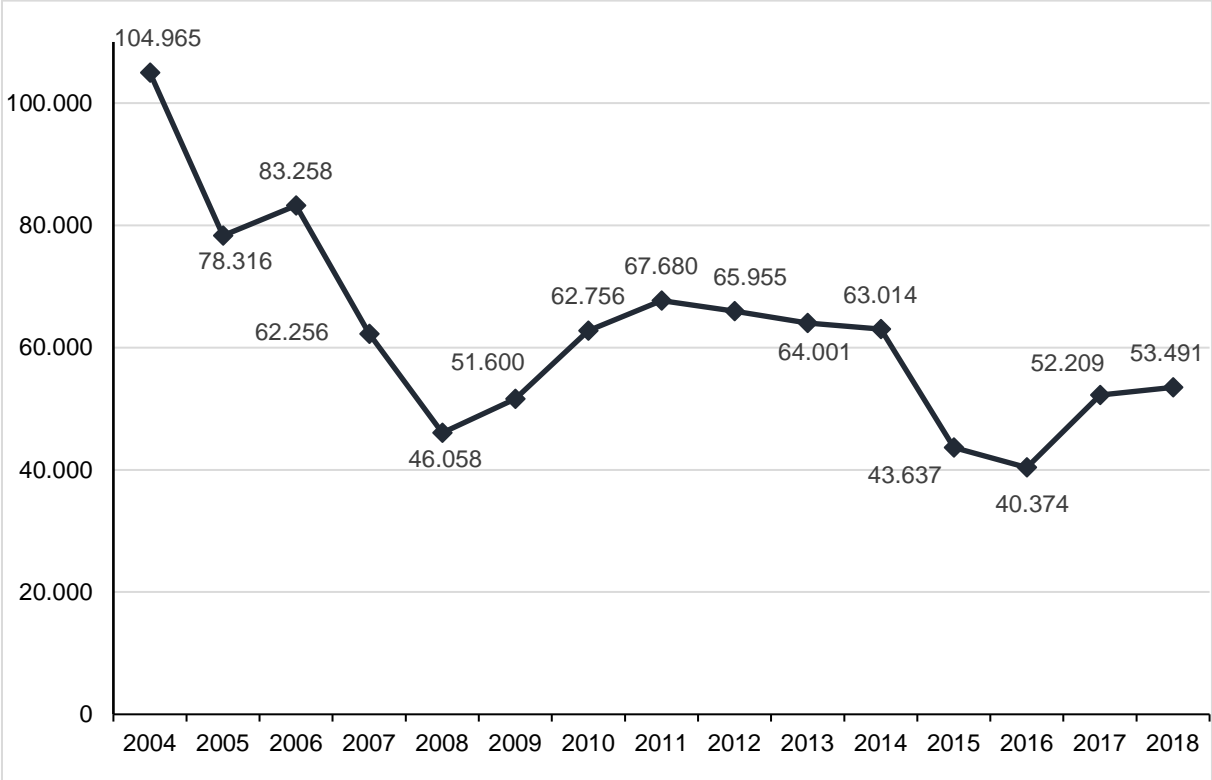
Moreover, there is no formal cooperation with the social partners. The associations in the construction industry in particular criticise the fact that the Financial Control of Undeclared Work does not give the associations any feedback on reported infringements and does not inform them of concrete investigation results. The main obstacle highlighted was data protec-

tion requirements, which prevented the customs authorities from better exchanging information. At the same time, positive aspects of the alliance talks were also highlighted, such as the regular exchange among each other and the possibility of discussing ambiguities and future procedures.

3.3 Control, detection, sanctions and enforcement of infringements

Since the existence of FKS, the number of checks has fluctuated considerably. Over 100,000 employers were inspected in 2004. With a high number of controls in the early years of the FKS, public awareness was to be created that customs would take stronger action against undeclared work. However, it was quickly recognised that a high number of controls alone would not lead to a better detection of violations and that undeclared work could not be contained more effectively (Deutscher Bundestag 2008). Until 2008, the number of checks had been reduced by over 50%, but increased again to just below 68,000 in 2011 as a result of the expansion of the law on the posting of workers. Since then, the number of employer checks has fallen continuously and even fell by around a third in 2015, when the statutory minimum wage was introduced. The number of checks continued to fall in 2016. It was not until 2017 that the number of checks was significantly increased again, but without reaching the level between 2010 and 2014 again (Figure 2).

Figure 2: Employer controls of the Financial Control of Illicit Work, 2004-2018



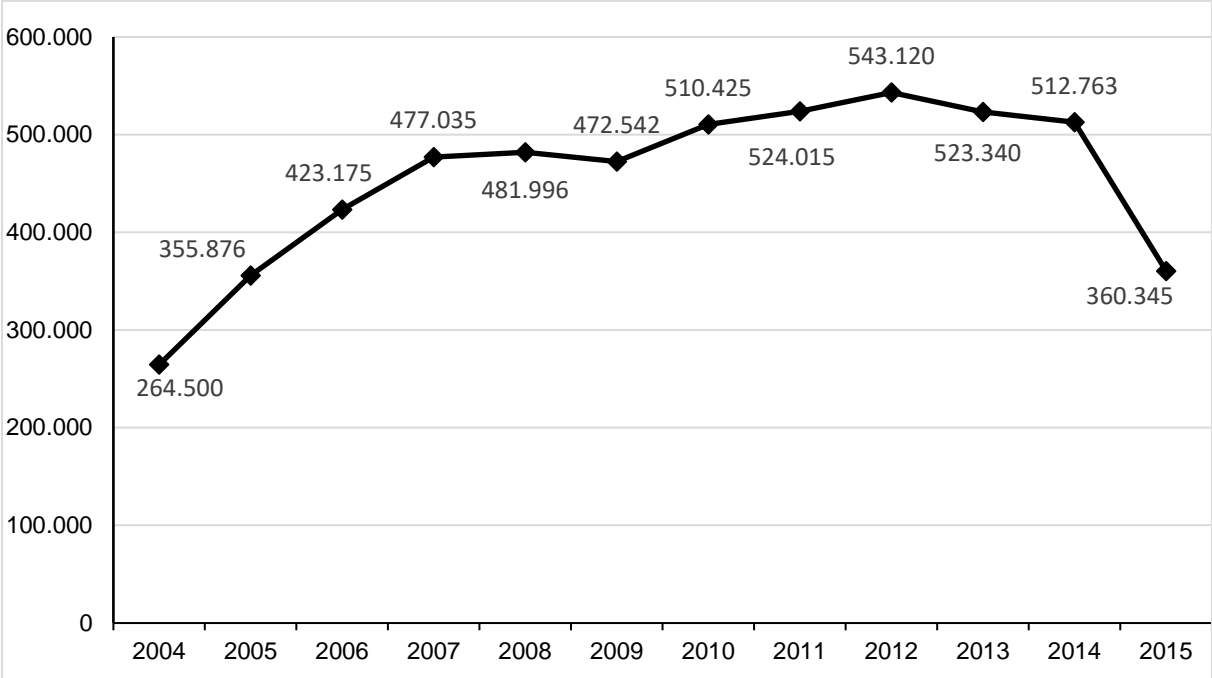
Source: Zoll 2019.

There are three different explanatory approaches for the significant reduction in the number of checks in 2015 and the only moderate increase from 2017. The FKS stated that customs had

focused more on the principle of "quality before quantity" and thus on a more risk-oriented approach. As Weil (2010) stated for the USA, Germany, too, did not want to waste time on a large number of small cases, but rather use its limited resources more specifically to combat misuse with large amounts of damage. In the course of this new orientation of the audits, the focus should therefore be placed more strongly on organized forms of undeclared work - among other things by more intensive examination of business documents. According to the head of the FKS, this was also the background for the fact that the number of inspections fell significantly in 2015 and 2016. For the FKS, it was not just the number of audits that was decisive, but rather the more targeted audits and in-depth investigations that would enable it to better detect illegal employment and undeclared work (BMF 2017). In addition, it was emphasised that the audits of the minimum wage obligations led to a high additional expenditure of time, so that fewer audits could be carried out in total (ibid.).

The GdP sees the decrease in the number of checks as a direct consequence of the restructuring of the FKS in 2014 and the discontinuation of the regular patrol service (GdP 2016b). For the police union, a balance between quality and quantity is crucial to ensure effective control pressure. In our discussions with experts, it was emphasised that inspections had often been very superficial before 2014, without examining the documents submitted in more detail. On the other hand, this principle had been reversed in 2015, when the depth of control had increased but the number of checks had decreased. In principle, the GdP welcomes the deeper examination of business documents and also the further training measures to improve the skills of the staff. However, according to the trade union's assessment, the technical equipment of the FKS is not sufficient at many sites in order to carry out more intensive audits.

Figure 4: Personal interviews of the financial control of undeclared work, 2004-2015



Source: Zoll 2019.

Another reason for the decline in the number of checks is that the introduction of the statutory minimum wage in the first half of 2015 officially applied the principle of "clarification before punishment". The FKS's initial aim was to provide intensive information to employers

who are noticed for violations of the Minimum Wage Act instead of directly imposing fines or initiating criminal proceedings (Zoll 2015). In this way, employers should be given the opportunity to inform themselves about the minimum wage regulations during the introduction phase of the minimum wage and to carry out necessary company adjustments. In the spirit of international research, such information campaigns can help to improve the implementation of the minimum wage and strengthen self-enforcement (Benassi 2011; Gallina 2005).

Until 2015, customs always published the number of personal interviews in its annual balance sheet, in addition to the number of employer audits (Figure 4). Between 2004 and 2012, the number of surveys had risen almost continuously. Since 2013, however, the number has declined and even dropped by 30% in 2015. As Customs has not published any information on this since 2016, it is not known how the number of employee surveys has developed since then.

A major weakness of the work results published by the FKS is that they do not indicate whether the changed audit practice has actually led to more effective detection and punishment of infringements. The figures on fines imposed, damages found, custodial sentences obtained and administrative offences fluctuate too much for a trend to be deduced from them. In the final analysis, the results of the work have hardly changed in recent years. In addition, customs do not know whether the penalties and fines imposed have actually been enforced. It is therefore a target rather than an actual statistic.

Already in 2008, the Federal Audit Office had criticised the fact that FKS had no knowledge of the amount of the fines and damages that could actually be claimed. A calculation by the Federal Audit Office on the basis of data from the German Pension Insurance concluded that only 2.6% of the contributions claimed by the DRV had actually been paid (Deutscher Bundestag 2008: 12). In most cases, it was no longer possible to collect subsequent payments of the contributions because the employers concerned had filed for insolvency. Customs also do not know how many fraudulent companies were successfully removed from the market. However, a more systematic evaluation of the control results could help to improve the prioritisation of strategic controls and bring about systemic changes in certain sectors and companies (Weil 2010). Last but not least, the lack of public visibility of companies removed or sanctioned from the market significantly reduces the deterrent effect of controls.

In carrying out the checks, the FKS repeatedly encounters problems which make it difficult to detect infringements. A central obstacle is the inspection of working time documents, because these are often not stored on site, but in a tax consulting office. Checks could be made much easier if the documents had to be kept in the company. According to the head of the Financial Control's Undeclared Work Department at a conference in February 2018, the problem of finding out whether a normal employment relationship is involved or whether an internship or honorary position is involved repeatedly arises during inspections.

Last but not least, employees affected by minimum wage violations often turn out as witnesses because they are intimidated by their employer or do not provide information because they fear for their job. As a rule, no violations can be found in the working time records.

In addition, it has been criticised that affected companies who go to court against fine notices often achieve a reduction in the fine because the courts could not comprehend the amount. The trade unions and parts of the employers' associations see a lack of legal interest in such cases as a reason for lower fines. In addition, more complex investigations last several years

and penalties can only be partially enforced or can no longer be enforced at all due to insolvency. From the point of view of the FKS, however, this effort is nevertheless worthwhile in order to at least remove the companies from the market and to show fraudsters limits. In the course of investigations, FKS more frequently finds that companies under investigation often disappear quickly from the market. However, the persons in charge are setting up new companies without any problems and are continuing as before. The exclusion of sanctioned companies from the award of public contracts also generally does not work. This is partly due to the lack of information exchange between the authorities in different regions.

If the minimum wage is violated, employees in Germany have to sue for withheld wage components on an individual basis, whereby the duty of proof on the part of the employees is difficult to fulfil. In addition, the risk of losing one's job and the cost of litigation deter many employees from filing suit. In Germany, as in other countries (Dickens 2009), legal action is brought only after the employment relationship has ended, if at all.

In contrast to some other countries, employees in Germany are not supported by government agencies in enforcing their claims. The Financial Control of Illicit Work only enforces the payment of outstanding social security contributions and taxes by employers in the event of violations of the minimum wage entitlement. Experience has shown that even if a complaint is successful, those affected often receive only part of the outstanding wage. Against this background, the trade unions and legal experts have long been calling for the introduction of a right of collective action (Fechner and Kocher 2018). A further complicating factor is that employees always have to present proof of the hours worked in court, which, however, cannot often be provided by seconded employees. This is because working hours must not only be noted but also confirmed by a witness.

The control authorities argue that they are legally not in a position to claim the wages for the employees in court. This is because social security contributions are public law, so that customs can intervene here, whereas wages or labour law in general are civil law, in which the law in Germany must be individually enforced. Only the trade unions try to support their members – in exceptional cases also non-members – in enforcing withheld minimum wage claims. However, this is particularly difficult in the hospitality and meat industries because the NGG union is weakly represented in these sectors and has few financial and human resources. In the construction sector, it appears to be somewhat easier to demand outstanding wage payments. Since posted employees often lack proof of the hours worked, compromises often have to be made in the demands, so that the employees ultimately only receive part of the wage and have to forego the rest.

The trade unions offer advice and have produced information brochures and flyers in different languages on the legal framework for the minimum wage. Migrants who are denied minimum wages are also supported by the advice centres "Fair Mobility" and "Work and Life". In addition, the Federal Ministry of Labour and Social Affairs also provides information brochures on the minimum wage on its homepage and offers a smartphone app for recording working hours and a minimum wage calculator. In addition, the Ministry has set up a minimum wage hotline which received around 14,000 calls in 2017 – 39% from employers, 32% from employees and 14% from tax consultants (Mindestlohnkommission 2018: 60).

However, the hotline itself does not record any indications of minimum wage violations, but refers callers to the competent customs authorities and gives them the relevant telephone number (ibid.: 61). The establishment of an online portal such as ACAS in the UK, which could report minimum wage violations at any time and anonymously if necessary, could probably

facilitate access (Pusch 2019). This is all the more true given that any minimum wage claims withheld must be subject to limitation periods.

4. Conclusions

The older literature on the enforcement of labour standards in developed industrialised countries has largely focused on the analysis of actual control activities. In more recent literature, the analytical horizon has broadened considerably. Increasingly, the causes of the growing control problems are being investigated. The most important reasons for these problems are seen in the increasing fragmentation of companies due to the outsourcing of many activities from the companies to confusing subcontractor chains and in the growing heterogeneity of forms of employment. The splitting of the companies increases the effort for external controls many times over, because not only the actual employer must be identified, but also which specific regulations apply for the respective companies. Similar problems result from the growing heterogeneity of forms of work - especially if they are regulated differently.

All studies dealing with the exercise of individual rights find massive power imbalances at the lower end of the labour market with intimidated and uninformed workers afraid to sue for their entitlements. This path is usually taken - if at all - only after termination of an employment relationship and often only with external help (e.g. trade union legal protection) (e.g. Dickens 2009; Kocher 2012). The hopes that the companies at the top of the value chains would voluntarily assume their responsibility for downstream working conditions and remedy grievances themselves by complying with standards have not been fulfilled (Locke 2013). However, internal compliance strategies are indispensable if the state seriously combats the culture of irresponsibility on the part of clients, which has established itself in the complex value chains, with new instruments.

Minimum wage controls in Germany are the responsibility of the Financial Control of Illicit Work (FKS). However, the audit mandate of the FKS only includes the control of social security reporting, contribution or recording obligations as well as tax obligations. This means that it is primarily a matter of compliance with and payment of social security contributions and taxes. The enforcement of the net wage remains the individual task of the individual employees, for which they have the legal right to take legal action. The state does not support the individual enforcement of outstanding wage payments.

The strategic orientation of FKS has also been criticised. Until 2014, the so-called suspicion-independent audits carried out by the patrol services were widespread. With the restructuring of the authority, the patrol service ceased to exist in many departments, which is considered as one of the main reasons for the significant decline in controls. In addition, Customs has two parallel enforcement services, FKS and Customs Investigation, which are assigned to different central directorates, although they often have similar tasks, require comparable equipment (e.g. telephone surveillance, IT equipment and vehicle fleet) and apply similar control methods. This patchwork organisation of customs as a whole prevents the efficient use of resources. Finally, control strategies are mainly developed decentrally by the main customs offices. This strong decentralisation, combined with insufficient learning from successful or less successful regional approaches, indicates a certain arbitrariness in strategy development and a lack of leadership.

Based on our findings, we see various levers to achieve more effective controls. We initially see three approaches to prevention.

- Firstly, self-regulation by the social partners needs to be strengthened. Minor problems with compliance with statutory minimum wage standards can be found in sectors where the traditional autonomous wage system still works. This applies, for example, to public services, the metal and chemical industries. By means of generally binding collective agreements with differentiated wage grids, even in sectors with high a high proportion of low-wages such as the hospitality industry, the retail trade and the meat industry, the collective wages of many employees could be raised significantly above the statutory minimum wage. To achieve this, the generally binding declaration of collective agreements needs to be facilitated. Strengthening collective bargaining is the most effective instrument for reducing bureaucracy in the economy. The social partners themselves guarantee fair pay and thus reduce the need for controls in their industries.
- Secondly, responsibility at the top of the value chain should be increased. One of the main drivers for the emergence of the large low-wage sector in Germany and the continuing significant compliance problems is the outsourcing of activities to subcontractors, who in turn outsource activities to subcontractor chains whose sole purpose is to squeeze wages and disguise these practices. The legislator has already reacted to this with the strict liability of the general contractor for the minimum wage. In addition, the general contractor is also liable for social security contributions in the construction and meat industries. These liability regulations force the clients at the top of award chains to implement compliance management in order to exclude risks as far as possible. The U.S. regulatory agency has become a partner of some companies in the implementation of effective subcontractor management. With such an approach, the scope of the controls can be significantly increased. Following this example, Financial Control Undeclared Work could support the establishment of effective compliance systems in large companies and the exchange of experience between companies in this area. If an above-average number of minimum wage violations cannot be reduced despite controls and voluntary commitments in industries with subcontractor chains, more drastic measures must also be taken if necessary. This applies, for example, to the limitation of sub-sub-chains to two or three levels, as in the Spanish construction industry.
- Thirdly, self-enforcement must be strengthened by transparent and simple rules so that employees can claim their rights. This applies first of all to the minimum wage itself, which is most effective if it applies to almost all employees with only a few exceptions, as is the case in Germany. But it must also be easy to communicate and remember. In Germany, this was the case for the entry in 2015 with a value of € 8.50, but not for the subsequent increases to € 8.84 (2018) or € 9.19 (2019). The basic rule should be rounded amounts that are easy to understand. If, when the statutory minimum wage was introduced, the value of €8.50 at the time was known throughout Germany due to the controversial debate on the minimum wage, this no longer applies to the subsequent increases. In order to improve the Compliance, the increases should be made well-known in the next years over the media (e.g. television commercials).

In addition to such preventive measures, controls need to be improved. Our study points to the counterproductive consequences of the last organisational reform of customs, such as the abolition of the compulsory patrol service, which took effect at the same time as the introduction of the statutory minimum wage. The high degree of decentralisation of responsibility for controls indicates a certain arbitrariness of action and a lack of coordination and exchange of experience. The high fluctuation in the financial control of undeclared work points to a dissatisfaction of the employees, whose background should be examined more closely.

Finally, the detection of violations stands and falls with the correct recording of working hours. The basic prerequisite for this is daily (electronic) recording of working times, to which employees have the right to inspect and correct. In addition, it should be mandatory that the working time records, as in France, must be available for checks in the company and cannot be deposited with the tax consultant, where they are easier to manipulate.

Cooperation with public prosecutors can also be improved. Experts from the FKS and the social partners have often criticised the fact that public prosecutor's offices often have to deal with very different issues and are therefore often insufficiently familiar with the social and economic dimensions of undeclared work. Such cases therefore often have no priority and the penalties proposed by customs are often significantly reduced in court proceedings. On the other hand, some cities show that specialised public prosecutors often pay more attention to undeclared work and that cooperation with the FKS works better. However, such specialised public prosecutor's offices only exist at a few locations in Germany to date. In view of the dimensions of this topic, they should become the rule.

In Germany, support for employees in enforcing their wage entitlements also appears to be completely inadequate. If minimum wage violations are established, the FKS or the social authorities demand only the social security contributions but not the net wages withheld from the employees. Employees in Germany affected by minimum wage violations are not even informed if the FKS has detected violations during inspections. In addition, employees often shy away from legal action against their employer for fear of being dismissed. This means that companies do not have to fear any serious consequences for withheld wage entitlements. The Federal Court of Audit, completely misjudging the power and exploitation structures at the margins of the labour market, has described wages withheld as "basically private 'loss of assets' which the employee suffers – predominantly with his consent – and which therefore do not represent any damage to public funds" (Bundesrechnungshof 2008: 23). Only if companies have to assume that violations of minimum wage entitlements will have serious consequences will their behaviour towards employees change. In addition, the limitation period of three years for withholding minimum wages is often too short, as it has often already expired at the end of court proceedings. A longer limitation period of e.g. five years (as with taxes and social security contributions) could offer more scope for withholding claims.

Some European neighbouring countries are much more advanced in supporting workers in the case of Minimum Wage violations. In France and Spain, for example, the labour inspectorates can also issue direct orders to companies to fulfil such employer obligations without having to refer employees to private legal recourse. In addition, employees in some countries also receive greater support in enforcing their claims. In Poland, for example, the State Labour Inspectorate advises employees on their rights and investigates complaints. In Belgium and the UK, workers are assisted by the control authorities in court actions and in countries such as the Netherlands and France trade unions have the right to bring collective actions.

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