REVOLUTION IN COLLECTIVE-BARGAINING LAW?

GENERAL For years, the public has been aware of the fact that the stable collective-bargaining system that has been in place for decades has started to crumble. Strikes by members of what are referred to as the elite occupations are becoming increasingly frequent in the public service area. In addition, these strikes are with increasingly frequency being called not by the major industry-wide trade unions that belong to the Confederation of German Trade Unions (Deutscher Gewerkschaftsbund – DGB), in particular ver.di and IG-Metall, but by occupational trade unions. It all started with a strike by physicians in 2006 and the locomotive drivers' strike in the fall of 2007; the walkouts by Lufthansa's pilots are the most recent example. A look at the previous case law of the Federal Labor Court would seem to suggest that these strikes are "actually" illegal, for the principle of uniform collective agreements had prevailed in Germany up to now. As a result, a single enterprise had a single collective agreement. The collective agreement that most closely approximated the situation of the enterprise in terms of geography, activity and personnel was consistently applied. As a rule, these were the collective agreements negotiated with the major trade unions that make up the Confederation of German Trade Unions. The judgment of the Saxony Higher Labor Court of 2 November 2007 (see Newsletter 1/2008) first signaled a departure from the principle of uniform collective agreements. According to this judgment, the strike by locomotive drivers was legal. The order of the Federal Labor Court of 27 January 2010, which may have marked the beginning of a "revolution" in the German collective-bargaining system, represented yet a further step in this new direction. In an opinion that deviates from opinions of other divisions of the same court, the Fourth Senate announced its intention to abandon the principle of uniform collective agreements. Following the argument advanced by the Saxony Higher Labor Court, the Senate found that that the principle of "one enterprise – one collective agreement" was not consistent with the constitutional freedom of association since the rights of smaller trade unions would be impermissibly curtailed.

COMMENTS Should the question at issue be decided in favor of the Fourth Senate, this would put the collective-bargaining system of the Federal Republic of Germany on a new footing. The principle of uniform collective agreements, which is not codified, would then be relegated to the past. The ultimate result would be significant excessive complication in the personnel area. Employers could find themselves confronted with the demands of several trade unions, and this would encourage the creation of splinter trade unions. Other elite occupations, besides locomotive drivers, pilots and physicians, could form trade unions and enforce their demands through strikes. It is to be feared that a new strike culture could lead to erosion of the relative social stability as compared with the situation in other countries, which was achieved on the basis of the principle of uniform wage agreements. Given existing law, there is something to be said in favor of the legal position of the Fourth Senate in terms of legal dogma. If necessary, it will be the task of the legislature to correct any aberrant developments in the area of collective-bargaining legislation.