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RIGHT TO STRIKE UNDER ATTACK

Legal Counterstrategies

European Labour Law Conference, 28 February and 1 March 2025, Berlin

Foreword

‘Right to strike under attack - legal counterstrategies’ was the title of an international conference on the right to strike, which took place on 28 February and 1 March 2025 in Berlin. It was the result of a collaboration between several organisations: European Lawyers for Workers Network (ELW) as coordinator was supported by the lawyer’s organisations ELDH, ILAW, VDJ and by the Hugo Sinzheimer Institute. Fortunately, the United Services Trade Union, the German Trade Union Confederation and the European Trade Union Confederation also participated on behalf of the trade unions.

Once again, it became clear that despite the shared history and similar legal systems of the European countries, the concepts of the right to strike diverge significantly. Reports from Italy, Spain, Germany and other countries, but also from international and supranational legal systems, showed a picture of defensiveness, but also new ways and ideas to give the right to strike greater recognition and adapt it to actual challenges.

This working paper compiles important contributions from the conference. It highlights the urgent need to defend the achievements of collective labour law. The right to strike is essential for effective collective bargaining and thus for good working conditions, but also for human dignity and democracy in the world of work.

We wish you an inspiring read!

Frankfurt am Main in June 2025 Ernesto Klengel

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§ 1 Report on the European Labour Law Conference

Pascal Annerfelt / Laurens Brandt

The international conference on the right to strike took place on 28 February and 1 March 2025 in Berlin. It was organised by the European Lawyers for Workers Network (ELW). Experts from 13 countries gathered at the Hans Böckler House of the German Trade Union Confederation (DGB) to discuss current developments. From the international level to the case law of European courts and tribunals to reports from individual countries, the conference painted a comprehensive picture that unfortunately gave cause for concern in view of the numerous restrictions on the right to strike.

At the beginning of the conference, *Isabel Eder* (DGB, Berlin) welcomed the participants. *Esther Lynch* (European Trade Union Confederation, Brussels) then opened the conference with a speech in which she emphasised the importance of the right to strike for major democratic achievements such as equal pay and the democratic transition in Poland. She argued that strikes are fundamental given the power imbalance in employment relationships and pointed out that this must also be repeatedly brought to the attention of the courts. The necessity to respect the courts, she stated, does not preclude criticism of individual decisions. In view of the shift to the right in many countries, she emphasised the need for joint action, but also for new ideas.

A. International Strike Law

The first panel on international strike law was moderated by *Dimitrios Vassiliou* (Lawyer, Athens).

First, *Jeffrey Vogt* (International Lawyers Assisting Workers Network [ILAW], Washington D.C.) introduced the conflict over the right to strike in the International Labour Organization (ILO).[1] For years, the employers' group has disputed that ILO Convention No. 87 (C 87) protects the right to strike because it does not explicitly mention it. In November 2023, the ILO asked the International Court of Justice (ICJ) for an advisory opinion on this matter. *Vogt* explained that C 87 was only intended to regulate general principles, but that the right to strike is covered by the wording of Articles 3 and 10 C 87. According to this, the activities of trade unions,

[1] The thoughts of *Vogt* and *Hendy* can be found in the following publication: Vogt et al., The Right to Strike in International Law, 2021.

which include strikes, are protected. They are intended to promote and protect the interests of workers, which requires the right to strike in order to establish a balance of power and bargaining power. According to Article 31 of the Vienna Convention on the Law of Treaties, the decades of practice in applying C 87, in which the right to strike was undisputed, must be taken into account. Other international law, which generally recognises the right to strike, must also be taken into account. According to *Vogt*, a decision by the ICJ is expected before the end of this year.

Lord John Hendy KC (London) then provided further background information and reminded his audience that strikes had been practised long before they were legally recognised. Strikes were legalised in the United Kingdom in 1906. When the ILO was founded in 1919, freedom of association and collective bargaining were given a central role, which implied the possibility of strikes. This development reached its peak after the Second World War with C 87 and ILO Convention No. 98 (C 98). The ILO committees have recognised the right to strike since 1952. *Hendy* traced the beginning of a counter-movement to the 1970s: neoliberalism, which is still entrenched in the EU Commission today. Observing that the democratic parties have failed to represent workers, *Hendy* concluded that the defence of the right to strike is therefore particularly important. *Hendy* underscored the global implications of C 87 referring, as an example, to the 2015 decision of the Canadian Supreme Court in *Saskatchewan Federation of Labour*.

The first panel was concluded by a presentation by *Prof. Dr. Reingard Zimmer* (Berlin School of Economics and Law) on the topic of strikes in and along the value chain. The topic is becoming increasingly important due to the global interdependence of companies in network structures. She cited the strike by the Swedish union IF Metall against Tesla as a current example. Other employees, such as those at the post office and electricity companies, went on strike in solidarity with IF Metall, something that is permitted in Sweden. According to the ILO Committee on Freedom of Association, a general ban on solidarity strikes is inadmissible. The legality of solidarity strikes depends solely on the legality of the main strike. According to *Zimmer*, the threshold for economic interdependence between the companies affected by the strike, as required by the German Federal Labour Court (BAG), must therefore be set low. Numerous other EU states violate ILO law because solidarity strikes are generally prohibited there.

B. European Strike Law

The second panel, moderated by *Dr. Ernesto Klengel* (HSI, Frankfurt am Main), dealt with the exercise and defence of the right to strike at European level.

Rudolf Buschmann (Kassel) began with a presentation on EU law. Beginning with Article 28 of the Charter of Fundamental Rights, which guarantees both trade union organisation and the right to negotiate and strike, he noted that Article 51 of the Charter severely restricts the scope of application. According to the General Court, the right to strike is covered by the EU Staff Regulations. After discussing the landmark and highly critical decisions of the European Court of Justice (ECJ) in *Viking* and *Laval*, *Buschmann* moved on to more recent cases. In response to an action for annulment brought by Hungary against the amended Posting of Workers Directive, the ECJ ruled that the right to strike must be assessed in accordance with the Court's interpretation. *Buschmann* interpreted this as a continuation of previous case law, with the ECJ in part still strongly influenced by fundamental freedoms. The second half of his lecture dealt with the case law of the European Court of Human Rights (ECtHR) on the right to strike under Article 11 of the ECHR. *Buschmann* divided this into a positive and a negative phase. The former consolidated a broad personal scope of application of the right to strike under the ECHR. Since 2014, however, a negative trend has been noticeable, with the non-recognition of solidarity strikes, the acceptance of compulsory arbitration and a wide margin of discretion for states in imposing restrictions, and finally the decision on the German ban on strikes by civil servants. *Buschmann* concluded that in this phase, in contrast to other decisions, the ECtHR has “contextualised” and rejected the question of whether the right to strike is an essential component of freedom of association. His critique begs the question of why the right to strike is an essential fundamental right in Turkey but not in Germany.

Klaus Lörcher (Frankfurt am Main) then spoke about experiences with enforcing the right to strike before the European Committee of Social Rights (ECSR). The European Social Charter explicitly recognises the right to strike in Article 6(4), as the first international agreement to do so. Before the ECSR, there is a reporting system with limited scope of control and a complaints system, which, however, must be ratified. *Lörcher* reported on the relevant findings regarding the right to strike. In 2022, 24 violations were identified in the reporting system and five in the complaints system. *Lörcher* cited five positive examples from case law regarding the right to strike: no blanket wage deductions, no blanket ban on strikes by police officers, and no restrictions on the right to strike for posted workers, in addition to

no judicial restrictions on interim legal protection and no bans on certain groups of workers. He cited four negative examples: the admissibility of certain court decisions in interim legal protection, the obligation to engage in strike-breaking activities, a ban on strikes for members of the armed forces, and the lack of an obligation to provide evidence of disproportionate wage deductions for the duration of the strike. The decisions in the appeal proceedings to date have showed a negative trend with regard to guaranteeing the right to strike. Positive results could be achieved in national court proceedings, but this would require greater trade union involvement.

ETUC General Secretary Isabelle Schömann (Brussels) called for the right to strike to be defended in the EU. She said that current political developments affected trade unions because the extreme right would attack them first, thereby also attacking the right to collective bargaining and strikes. *Schömann* cited numerous examples of restrictions, such as the criminalisation and stigmatisation of strikers in France and Belgium, and a broad definition of essential services in Hungary, Moldova, Montenegro and the United Kingdom. She referred to support offered by the ETUC (ETUC Lex; ETUC Strategic Litigation Guide; ETUC Strategic Litigation Support) and the ETUC for national trade unions and court proceedings. In conclusion, she pointed to ongoing legal policy disputes and observed that, whether in relation to the Anti-SLAPP Directive, the Regulation on the Emergency Instrument for the Internal Market, the Minimum Wage Directive or the EU Supply Chain Directive, trade unions everywhere must fight for their participation and against threats to the right to strike.

C. Strategies against Restrictions on the Right to Strike in Individual States

The third panel, moderated by *Tamar Gabisonia* (ILAW, Tbilisi), focused on legal strategies against restrictions on the right to strike in individual states.

Prof. Dr. Jan Buelens (Lawyer/University of Antwerp) spoke from a Belgian perspective about experiences with strategic litigation. According to *Buelens*, this requires a precise analysis of power relations that also takes into account actual and unlawful influences. Building on this, non-legal means (campaigning, mobilising the public) can be used or those directly affected (strikers, union representatives) can be more closely involved in legal processes. This may require legal training and can give them a voice, helping them to become more self-effective and offering

the court a different perspective. According to *Buelens*, an effective approach requires careful preparation. In Belgium, for example, it was possible to prevent restrictions on the right of assembly that would have affected strike rallies.

Dr. Rüdiger Helm (Lawyer, Munich) then spoke on “Strikes under liability pressure”. He addressed this topic on the basis of the latest round of collective bargaining in the German retail sector. Among other things, the German service union ver.di had demanded that employers agree to the application of universal declaratory relief (Allgemeinverbindlicherklärung, AVE) for collective agreements. The background to this is that collective agreements in the retail sector were regularly declared universally binding until 2000, but employers continue to block this even after the 2014 reform of the AVE, and collective bargaining coverage in the retail sector is declining significantly. Because of this strike objective, employers have sued the union in numerous locations for large amounts of damages. *Helm* reported on the numerous legal issues that arise in this context. Beyond the specific case, he observed that case law on liability hinders the necessary adaptation of the exercise of the right to strike to changed conditions and found this to be exacerbated by the so-called “scrambled egg theory”. *Helm* countered this with an opposing theory: that industrial action must be regarded as an integral part of our economic system and the costs incurred by the other side in the exercise of this fundamental right must be accepted.

The panel was rounded off by a presentation by *Prof. Dr. Giovanni Orlandini* (University of Siena) on restrictions on the right to strike in so-called essential services in Italy. The Italian Constitution guarantees the right to strike without restriction in its Article 40, but this can be restricted on the basis of conflicting constitutional law. *Orlandini* presented the Italian case as a paradigmatic example of how such a balancing act can largely render the right to strike meaningless. Employees who provide essential services, which include transport and museums, are subject to numerous restrictions. Notice and cooling-off periods must be observed, strikes are limited in duration and generally prohibited during certain periods of the year (public holidays, summer holidays, city festivals), and minimum staffing levels must be maintained. The public authorities can compel strikers to work. According to *Orlandini*, only procedural irregularities can be successfully challenged before the administrative courts. A complaint is pending before the ECSR (No. 208/2022 – *USB v. Italy*).

D. New Challenges and Responses in Various Countries

The fourth and final panel, moderated by *Thomas Schmidt* (Lawyer, Düsseldorf), discussed new challenges and possible (legal) responses in various countries.

Declan Owens (Lawyer, Ireland) addressed the specific legal situation in Ireland. Due to the continuing division of the island into the Republic of Ireland and Northern Ireland, which is a part of the United Kingdom, there are two legal systems. *Owens* therefore began his presentation with a quote from the famous Irish independence fighter James Connolly from 8 April 1916: 'The cause of labour is the cause of Ireland.' Since Brexit, Union law also applies in the Republic of Ireland, but not in Northern Ireland. Northern Ireland has no written constitution. Its right to strike is subject to the same regulations as in the rest of the United Kingdom. However, the Trade Union Act of 1975 allows for the formation of cross-border trade unions between Ireland and Northern Ireland. Although the Constitution of the Republic of Ireland guarantees freedom of association, it does not explicitly include the right to strike. The Industrial Relations Act of 1990 regulates industrial disputes in general. As a current example from case law on the right to strike, *Owens* cited the decision of the Irish Constitutional Court in *O'Neil/Unite the Union*.

The contribution by *Dr. Theresa Tschenker* (Lawyer, Berlin) focused on political strikes in Germany and their historical origins. The current occasion was joint actions by Fridays for Future and ver.di, which used the collective bargaining round in the public sector to demand a transport revolution. Following legal action by employers against the strikes, the Leipzig Labour Court ruled that the overall presentation of the strike call did not cross the line into political strike action. A "mixing of politics and trade union-protected activity" was legally possible. *Tschenker* sees in the ruling an artificial separation between collective agreements and politics, with the latter allegedly taking place outside of trade union activities. She argued that a participatory democracy combines freedom of expression, freedom of assembly and freedom of association and backed up her assessment by referring to the deliberations of the German Parliamentary Council from the late 1940s, in which no mention was made of a collective-agreement context for the right to strike. Pointing out that only strikes aimed at overthrowing the system and strikes by civil servants were controversial and that the newspaper strike in 1952 was the first major strike in the Federal Republic of Germany that was explicitly political, *Tschenker* concluded that the fundamental decision of the Federal Labour Court based on this strike remains legally questionable. Finally, *Tschenker* discussed the prospects for a change in case law on the basis of international legal sources.

In the last substantive contribution of the conference, *Armando García López* (Trade union lawyer, Madrid) reported on successful cases in Spain. There, the right to strike is recognised in Article 28.2 of the Constitution as a human right, in line with ILO Convention No. 87. In the past, the right to strike in Spain has been both a crime and a civil liberty. It is an individual right of every employee, but is exercised collectively. During a strike, employers are not allowed to hire new employees or close their businesses. Political strikes and strikes during the term of a collective agreement are not permitted. *García López* presented several recent rulings by the Spanish Supreme Court. In one, it ruled that a communication by a company aimed at preventing certain employees from participating in a strike may constitute a violation of the right to strike. In 2015, it declared a mass dismissal invalid due to a violation of the right to strike, holding that the company's conduct significantly interfered with consultation rights under the Mass Redundancies Directive. In another case, the Court had to rule on whether several middle managers had replaced striking workers. It found that the lack of direct instructions from the employer was not prejudicial. Preferential treatment of strike breakers was unlawful. It also ruled that outsourcing work beyond the usual extent during industrial action was unlawful.

E. Conclusion

Overall, the event revealed a negative trend towards further restrictions on the right to strike, particularly in European international law. These are poor conditions for averting the threat of a deterioration in workers' social rights. It is to be hoped that the ICJ's decision on the ILO's right to strike will send a counter-signal and influence other international institutions, as well as individual states, to move towards greater freedom to strike.

Bibliography

Vogt, Jeffrey/Bellace, Janice/Compa, Lance/Ewing, K D/Hendy, John/Lörcher, Klaus/Novitz, Tonia (2021), The Right to Strike in International Law, Oxford/New York.

§ 2 Strikes in and along the Value Chain

Reingard Zimmer

A. Introduction

The internationalization of the economy and outsourcing in the course of globalization have led to extensive changes in the value chain. Companies work internationally with numerous contractual partners and subcontractors, which has led to an intensive interlinking of legally independent companies. This is reflected with regard to the responsibility of transnational companies from industrialized countries in the new supply chain regulations such as the German Supply Chain Due Diligence Act (LkSG) or the EU Corporate Sustainability Due Diligence Directive 2024/1760/EU.Trade unions have already started to target actors behind the direct employer, including brands and retailers higher up the chain and their "investors, reputation, customer base, and relationship with lawmakers".[1] Strikes along the value chain, on the other hand, are hardly documented. However, given the changes in the supply (or value) chain, solidarity strikes along the value chain are likely to occur more frequently in the future. The changes in the supply (or value) chain should also be reflected in the assessment of the legality of solidarity strikes. The ILO has settled practice on solidarity strikes, but in some countries this is only partially recognized – and there have not yet been any cases on strikes along the value chain evaluated by the ILO supervisory system. This paper presents the settled practice of the Committee on Freedom of Association and applies it to the law on solidarity strikes in Germany, taking into account sociological findings on current structures of global value chains.

B. Terminology: Solidarity Strike

Jurisprudence in Germany now uses the terminology of "support strike";[2] previously it was referred to as "sympathy strike".[3] However, this choice of words is not appropriate, as the motive for the strike is not "sympathy" but solidarity. Trade union solidarity is an expression of mutual support among employees in pursuing and

[1] Fudge/Shamir, Strike Law and Workers' Power Resources in Global Supply Chains and Platform Giants, Comparative Labor Law and Policy Journal (forthcoming); Anner/Fisher-Dal/Maffie 2021, ILR 3/2021, p. 689 (700).
[2] Federal Labour Court (Bundesarbeitsgericht, BAG) 19.6.2007 – 1 AZR 396/06, NZA 2007, 1055: *Unterstützungsstreik*.
[3] Older case law of the BAG used the term *Sympathiestreik*. See 12.1.1988 – 1 AZR 219/86, DB 1988, 1270; 5.3.1985 – 1 AZR 468/83, AuR 1986, 220.

enforcing their interests[4] and therefore based upon a political background. Although a solidarity strike indeed is carried out in support of another industrial action, the political aspect of trade union solidarity is ignored when the terminology "support" is used for the strike. Solidarity has always been an important value for trade unions,[5] as was declared as early as 1848 by Stephan Born, co-founder of the General German Workers' Brotherhood (Allgemeine Deutsche Arbeiterverbrüderung): "Free competition! Everyone for himself!" is opposed here by the principle of "solidarity" and "brotherhood".[6] As the weaker party of the social partners, trade unions rely on the support of other trade unions as an important element to strengthen union work and struggle.[7] Therefore in this paper, the term "solidarity strike" is used.

C. Practical Examples of Strikes in and along the Value Chain

Strike activities are possible in and along the value chain. Practical examples will be given here for both.

I. Strike in the Value Chain: The Example of Gräfenhausen

In 2023, sixty truck drivers from Georgia and Uzbekistan who worked for a Polish haulage company, the Mazur Group, went on strike for more than two months at a motorway service area in Gräfenhausen (Germany), as the company owed them more than €300,000 in wages. The aggrieved drivers joined forces and contacted the Georgian trade union federation, which simultaneously contacted the Dutch trade union FNV and the German DGB.[8] The company's owners, Polish entrepreneurs Lukasz and Agnieszka Mazur, tried to break the strike with thugs who arrived in armoured vehicles, but they were soon arrested by the German police. There was not only a great deal of press coverage, but also a wide range of support for the striking truckers. In the end, the outstanding wages were fully paid, although it was probably not only the solidarity campaigns and demonstrations that contributed to the success, but rather the pressure from the (large) companies in the supply chain.

[4] Berg/Kocher/Schumann, TVG/AKR (2025), marginal No. 181; *Zimmer*, Solidarity as a central aim in collective labour law? (2022), p. 43 (44); similar, but more generally on solidarity: *Bude* (2019), p. 11; *Ludwig* (2019), p. 43.
[5] *Hoffmann* (2004), p. 34 ff; *Zimmer* (2022), p. 43 (46).
[6] *Born*, in the Brotherhood's journal "Die Verbrüderung": "Freie Konkurrenz! Jeder für sich! Wird hier gegenübergestellt dem Prinzip der Solidarität, der 'Verbrüderung', 'Jeder für Alle!'" ("We counter 'Free competition! Every man for himself!' with the principle of solidarity and 'brotherhood'! 'Everyone for all').
[7] *Zimmer* (2022), p. 43 (46); *Lohmeyer* et al., 2018, p. 401 (403).
[8] On behalf of the DGB, the DGB network "Fair Mobility" was on site.

On the one hand, the companies for which the freight was destined wanted to receive their cargo,[9] but above all they came under pressure when the truck drivers decided to publish the names of the mostly well-known companies in Mazur's supply chain, as many of these companies fell under the German LkSG.[10] Not in all cases did these companies have direct supply contracts with companies of the Mazur Group; numerous freight conveyors had placed transport orders with subcontractors, who in turn directly or indirectly commissioned the Mazur Group.[11] The labor law violations against the truck drivers therefore became a value-chain issue of numerous German companies which fall under the LkSG. The drivers' strike at Gräfenhausen ultimately led to the Federal Office for Export Control, which is responsible for monitoring the LkSG, launching investigations against the German companies in Mazur's supply chain. Such a strike in the value chain therefore must be analysed less on the basis of the right to strike than on the basis of the regulations of the LkSG, which is not the subject of this paper.[12]

II. Strike along the Value Chain: The Example of Tesla

Tesla is a good example of (solidarity) strikes along the value chain. As it had refused to conclude a collective agreement for its garage employees with IF Metall in Sweden for five years, the latter called for a strike on 27 October 2023.[13] This ongoing action has received support from numerous trade unions through solidarity strikes. First IF Metall extended the strike to repair shops of other companies that service Tesla vehicles. In addition, IF Metall called for a boycott of Hydro Extrusion, as the company manufactures a component required for the production of Tesla's Model Y in Germany. This was intended to hinder the production of new vehicles in Germany. In addition, nine other Swedish trade unions have joined the solidarity strikes. Their employees are not carrying out any activities in connection with Tesla. Tesla is thus not receiving licence plates in Sweden for its vehicles due to partial strike activities by postal workers. Furthermore, the electricians' union does not carry out any electrical work such as the maintenance or repair of Tesla's charging stations and repair shops. The union in the cleaning sector has stopped

[9] *Meiners, Kay*, Jenseits des Gesetzes, in: Magazin Mitbestimmung 3/2023.
[10] These were DHL, Kühne und Nagel, Porsche, Audi, VW, DB Schenker and other companies; see: Verfassungsblog of 3.10.2023, online: https://verfassungsblog.de/powered-by-the-supply-chain/ (20.02.2025).
[11] See in more detail (in particular on transport law aspects): *Miskovez, Alexej*, Streik in Gräfenhausen - Haftung in der Lieferkette, LogR 2023, p. 166-167.
[12] See: *Zimmer, Reingard*, Das Lieferkettensorgfaltspflichtengesetz 2023, online: https://www.hugo-sinzheimer-institut.de/faust-detail.htm?produkt=HBS-008496 (20.8.2025); *Zimmer*, Gewerkschaften als Akteure zur Durchsetzung des Lieferkettensorgfaltspflichtengesetzes, AuR 4/2024, 139-144; *Zimmer*, Möglichkeiten der Beteiligung von Betriebsrat und Wirtschaftsausschuss an der Umsetzung des Lieferkettensorgfaltspflichtengesetzes, AuR 1/2024, 7-14.
[13] Tesla does not operate any factories in Sweden, but only offers vehicle maintenance, repairs and charging infrastructure.

cleaning Tesla's garages and offices;[14] the transport union has stopped the disposal of industrial waste from the garages[15] and is also preventing the unloading of Tesla cars at the 50 or so Swedish ports, meaning that virtually no more Tesla cars are being delivered to Sweden.[16] To circumvent the blockade by the dockers, Tesla initially tried to divert the ships to other northern European ports. As a result, the conflict spread internationally, as transport workers' unions from Denmark, Norway and Finland decided to support IF Metall with solidarity strikes and to ensure that no more Tesla vehicles were unloaded in Scandinavian ports.[17] Tesla is now forced to transport the vehicles from its factory in Germany to Sweden by land, which is likely to be more time-consuming and significantly more expensive than shipping.[18] It was possible to carry out solidarity actions so intensively in Sweden and in the other Scandinavian countries because solidarity strikes are (so far) legally permissible there. This paper analyses the legal criteria to be observed when (legally) classifying solidarity strikes along the value chain.

D. Global Value Chains

In order to enable a precise legal analysis, it is necessary not only to define supply or value chains, but also to highlight the immense changes that have taken place in production and service structures and the interlinkage of legally independent companies. With the outsourcing of large areas of production from the global North to low-wage countries in the global South (and East), a global division of labor is known to have set in, leading to a fragmentation of production with globally distributed players. In social science research, the complex relationships between companies and their suppliers and subcontractors in particular have been analyzed in order to understand how the chains are controlled and which power relationships can be identified.[19] The laws on corporate due diligence boldly use the term “supply

[14] See Global Union UNI 16.11.2023, online: https://www.uni-europa.org/news/cleaners-join-solidarity-strike-at-tesla-in-sweden/ (10.4.2025).
[15] Reuters 13.12.2023, online: https://www.reuters.com/business/autos-transportation/swedish-labour-union-stop-collecting-tesla-waste-sweden-2023-12-13/ (10.4.2025).
[16] *Bender, German*, IPG-Journal 4.3.2024, online: https://www.ipg-journal.de/rubriken/wirtschaft-und-oekologie/artikel/lektion-fuer-elon-7319/ (10.4.2025).
[17] Washington Post of 29 Dec 2023, online: https://www.washingtonpost.com/world/2023/12/29/tesla-strike-sweden-elon-musk/ (10.4.2025).
[18] *Bender*, IPG-Journal 4.3.2024, online: https://www.ipg-journal.de/rubriken/wirtschaft-und-oekologie/artikel/lektion-fuer-elon-7319/ (10.4.2025).
[19] *Fichter/Sydow*, Using Networks Towards Global Labor Standards? Organizing Social Responsibility in Global Production Chains, Industrielle Beziehungen, IB 4/2002, p. 357 (364); *Gereffi* (1994), The Organization of Buyer-Driven Global Commodity Chains: How US Retailers Shape Overseas Production Networks, p. 95 ff; *Hassler*, The Global Clothing Production System: Commodity Chains and Business Networks, Global Networks 10/2003, p. 513 (518).

chains", but this is imprecise, as service companies should also be covered. Sociology, in contrast, has developed the term "global value chains", as it better reflects the central goal of global activities of transnational corporations to generate profit.[20]

Value chains can be differentiated as producer-driven or buyer-driven chains. Value chains in which the producers have a central position are referred to as producer-driven. A typical example of this is the automotive sector, with global subsidiaries and a stable network of suppliers, some of which even belong to the group.[21] In demand-driven sectors, producers are dependent on the decisions of large retailers or transnational brand companies; these commodity chains are categorized as buyer-driven.[22] In buyer-driven commodity chains, in which marketers and distributors play a central role alongside large retailers, orders for predominantly labor-intensive products are passed on by the dominant company to formally independent companies, which in turn subcontract and sub-subcontract as required.[23] A classic example of this is global textile and clothing production.

It has become clear that, despite their complexity, the coordination and control of global "production systems" is also possible without formal ownership structures.[24] Overall, it can be said that the process in both models is controlled by transnational corporations, the "lead firms".[25] However, a network of contractual partners and subcontractors (i.e. their contractual partners) can also be identified in the service sector. Whereas formerly close relationships between companies used to be limited to group structures, there is now a close intermeshing of different companies in the value chain to be detected. These real changes must also be taken into account when assessing the legality of a solidarity strike.

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[20] *Gereffi/Humphrey/Sturgeon*, RIPE 2005, 78 ff.; *Hübner*, Globale Wertschöpfungsketten organisieren, p. 6.
[21] ILO (2016), Decent work in global supply chains, p. 7.
[22] *Gereffi* (1994), The Organization of Buyer-Driven Global Commodity Chains: How US Retailers Shape Overseas Production Networks, p. 95 ff; *Gereffi/Humphrey/Sturgeon*, The Governance of Global Value Chains, RIPE 1/2005, p. 78 (82); ILO (2016), Decent work in global supply chains, p. 7; *Zimmer*, Die Umsetzung und Weiterentwicklung des LkSG (2025), p. 28 f.
[23] *Fichter/Sydow*, IB 4/2002, p. 357 (362 f.); *Macdonald/Macdonald*, Non-Electoral Accountability in Global Politics, EJIL 2006, p. 89 (94); *Zimmer*, Die Umsetzung und Weiterentwicklung des LkSG (2025), p. 28 f.
[24] *Fudge/Shamir*, Strike Law and Workers' Power Resources in Global Supply Chains and Platform Giants, in: Comparative Labor Law and Policy Journal (forthcoming); *Gereffi/Humphrey/Sturgeon*, The Governance of Global Value Chains, RIPE 1/2005, p. 78 (81).
[25] *Dünhaupt/Herr/Mehl/Teipen* (2022), p. 2; ILO (2017), ILO (2016), Decent work in global supply chains, p. 5; and furthermore: UNCTAD, World Investment Report (2013), 20; *Zimmer*, Die Umsetzung und Weiterentwicklung des LkSG (2025), p. 31.

E. Settled Practice of the ILO Committee on Freedom of Association on Solidarity Strikes[26]

Convention No. 87 of the International Labour Organization (ILO) does not itself contain any statement on the right to strike and therefore does not include any regulations on solidarity strikes. Rather, the interpretation of the conventions is the responsibility of the relevant committees within the ILO supervisory system. Two such committees are responsible for monitoring compliance with ratified ILO Conventions, the Committee of Experts (on the Application of Conventions and Recommendations, CEACR) and the Committee on Freedom of Association (CFA), insofar as compliance with Convention No. 87 (freedom of association) is concerned.

I. General Information on the Right to Strike

The right to strike is categorized by the ILO supervisory bodies as an essential component of Convention No. 87,[27] as strikes are an essential means of exerting pressure to enforce workers' economic interests.[28] A general ban on strikes is not permissible, interventions only within narrow limits. However, in order to be permissible, a strike must fall within the scope of freedom of association, that is, it must be aimed at promoting and protecting workers (see Art. 10 Convention No. 87) and be peaceful. The right to strike has a collective and an individual dimension. Although a strike is practiced collectively, the right to strike also applies to the individual who takes part in the strike;[29] reprisals based on strike participation are not permitted.[30] Strike activities can be organized by an individual trade union as well as by an association or a trade union confederation;[31] non-representative trade unions may also call a strike.[32]

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[26] This chapter is based upon *Zimmer*, Vereinigungsfreiheit und Recht auf Kollektivverhandlungen in der Praxis: Die Bedeutung der ILO-Übereinkommen Nr. 87 und Nr. 98 für das deutsche Arbeitsrecht, in: Soziales Recht (SR) 3/2020, p. 85-95. New findings have been added.

[27] ILO, Compilation of Decisions, para 752 ff; ILO-CEACR, General Survey 1994, para 26, 66; ibid, General Survey 2012, para 12, 46.

[28] ILO, General Survey 1994, para 148; ILO, General Survey 2012, para 117; 6th Report of the CFA, case No. 12 (Argentina), para 205.

[29] Cf. *Ewing*, IJCLLIR 2/2013, Vol. 29, 145 (150 f.); *Gitzel*, Der Schutz der Vereinigungsfreiheit, S. 186; *Novitz*, International and European protection of the right to strike, p. 275 ff. as well as *Zimmer* (2019), Internationale Arbeitsorganisation (§ 5), para 94.

[30] ILO, Compilation of Decisions, para 756.

[31] ILO-CEACR, General Survey 2014, para 122.

[32] E.g. Conclusions 2014 (Montenegro, Romania); this applies all the more to a restriction to a majority trade union ("most representative"), Conclusions 2014 (Frankreich).

II. Permissible Limitations of the Right to Strike

The ILO supervisory committees do not carry out a classic proportionality test to determine the legality of a strike. Nevertheless, the right to strike is not guaranteed indefinitely. The basic concept of the Committee on Freedom of Association presupposes that strikes must not jeopardize the fundamental functioning of the state and society.[33] In addition, according to the ultima ratio principle, a strike may only be called after all negotiation channels have been exhausted.[34] Members of the armed forces and the police can be excluded from the freedom of association and thus also from the right to strike in accordance with Article 9 Convention No. 87. Restrictions on the right to strike are also permissible in the event of national emergencies,[35] in sectors that are categorized as "essential services" or for state employees who are working in a narrow sovereign capacity.[36] The right to strike must also be guaranteed in the public service sector;[37] restrictions are only permissible as exceptions within narrow limits.[38] In order to avoid damage to the public, the union must organize emergency services if necessary. The ILO's supervisory bodies do not use the terminology "services of general interest", which is common in Germany, but that of "essential services". A narrow interpretation is applied, which, according to established case law, is based on the fact that an interruption of necessary (or essential) services would jeopardize the life, personal safety or health of the population or a large part of it.[39] Hospitals, for example, are recognized as necessary services within the meaning of this narrow interpretation.[40]

However, significant export losses[41] or long-term disadvantages for the economy due to strikes[42] are not able to threaten the security of part of the population.[43] The same applies to public transport and air services. The categorization of a service

[33] Däubler-Lörcher, Arbeitskampfrecht § 10, para 70.
[34] Cf. *Gitzel*, Der Schutz der Vereinigungsfreiheit, p. 207.
[35] However, this only applies for a limited time. More detailed information: Novitz, International and European Protection of the Right to Strike (2003), p. 313 ff.
[36] ILO-CEACR, General Survey 2012, para 140; ILO, Compilation of Decisions, para 824, 828 ff.
[37] On the right to strike in public service: Rudkowski, Der Streik in der Daseinsvorsorge, 2010.
[38] ILO-CEACR, General Survey 1994, Report III (4B), para 159; see also: Ben-Israel, The Case of Freedom to Strike, p. 109 ff.; Schlachter, AuR 2017, 10 (11).
[39] ILO-CEACR, General Survey 2012, marginal No. 131; 243rd Report of the CFA, case No. 953 (El Salvador), para 410; 272nd Report, case No. 1503 (Peru) para 116 f.; 277th Report, case No. 1528 (Germany), para 285; 279th Report, case No. 1576 (Norway), para 114; 294th Report, case No. 1629 (South Korea), para 261.
[40] 199th Report of the CFA, case No. 910 (Griechenland), para 117; 202nd Report, case No. 949 (Malta), para 276; 208th Report, case No. 1003 (Sri Lanka), para 336; 211th Report, case No. 1074 (Germany), para 365; 217th Report, case No. 1099 (Norway), para 467; 338th Report, case No. 2399 (Pakistan), para 1171; for further examples of “essential services”, see Däubler-Lörcher, Arbeitskampfrecht, § 10, para 74.
[41] 294th Report of the CFA, case No. 1629 (South Korea), para 261.
[42] 234th Report of the CFA, case No. 1255 (Norway), para 190.
[43] For economic damage that is not sufficient grounds for limiting the right to strike, see also *Jaspers,* in: Dorssement/Jaspers/van Hoek (eds.), Cross-Border Collective Action: A Legal Challenge, p. 52 ff.

as necessary depends on the particularities of the respective Member State; general statements are not possible.[44] This means that a non-essential service may become essential over time due to special circumstances.[45] In order to avoid damage to the general public in these areas, the unions on strike may be required to guarantee emergency services.[46]

III. Solidarity Strikes

The Committee of Freedom of Association emphasizes that a general ban on solidarity strikes is not permissible; on the contrary, such a ban could lead to abuse. Solidarity strikes are therefore considered permissible provided that the original strike supported is itself lawful.[47] As the Committee of Experts (CEACR) holds, this is particularly true in the context of globalization, which is characterized by an increasing interdependence of production and mutual dependence.[48] The CFA does not provide for any further conditions or restrictions on the admissibility of solidarity strikes, although a clearer outline of the permissible limits of solidarity strikes is still pending.[49] However, the generally permissible limitations on the right to strike are also to be applied to solidarity strikes; the fundamental functioning of the state and society must therefore not be jeopardized by solidarity actions. In areas in which a limitation of the right to strike is permissible overall, such as in the case of state employees who work in a narrow sovereign sense ("essential services"), the right to solidarity strikes may therefore also be limited, as the CEACR also states.[50] If solidarity strikes, secondary boycotts and industrial action in support of sectoral collective agreements are not recognized as permissible industrial action, the right to strike would not only be unreasonably restricted, but the right of trade unions to seek and negotiate sectoral collective agreements would also be impaired.[51]

[44] 230th Report of the CFA, case No. 2212 (Greece), para 749; 238th Report, case No. 2373 (South Korea), para 381.
[45] ILO, Compilation of Decisions, para 837.
[46] ILO-CEACR, General Survey 2015, Dominica (p. 67 f.); Kasachstan (p. 105).
[47] 357th Report of the CFA, case no. 2698 (Australia), 20.2.2009, para 220; 346th Report of the CFA, case No. 2473 of (United Kingdom of Great Britain and Northern Ireland), 16.12.2005, para 1543.
[48] CEACR, Direct request (Republic of Korea), published 112nd ILC Session 2024; ILO, General Survey on the fundamental convention. Giving Globalization a Human Face. International Labour Conference 101st Session 2012, para 125; ILO, General Survey 1994, 16 para8, CEACR Direct request (Great Britain), published 85th ILC Session 1997.
[49] Däubler-Lörcher, Arbeitskampfrecht, § 10, para 84.
[50] CEACR, Direct request 2023 (Burundi), published 112nd ILC Session 2024.
[51] 357th Report of the CFA, case no. 2698 (Australia), 20.2.2009, para 220.

F. Implications for Solidarity Strikes under National Law

I. Solidarity Strikes in the EU Member States

Solidarity strikes, however, are not always considered lawful. Only in some EU Member States are solidarity strikes lawful if they support a lawful strike (Austria,[52] Cyprus,[53] Denmark,[54] Iceland,[55] Italy,[56] Malta,[57] Portugal,[58] Sweden[59]). In Belgium, solidarity strikes can even be permissible if the original strike is not legal,[60] although the new right-wing government is currently planning to cut back on the right to strike in Belgium.

In other legal orders solidarity strikes are only legally admissable if there is some sort of link to the main labor conflict, so that the employer may influence the negotiations and thus exert some influence the ending of the strike activity (France,[61] Germany,[62] Greece,[63] Iceland,[64] Malta,[65] Romania,[66] Spain[67]). Sometimes solidar-

[52] In Austria, solidarity strikes are not explictly regulated, and therefore considered lawful; *Burger*, The right to strike: Austria, p. 121 (126).
[53] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Cyprus - Right to strike in the public sector - factsheet upd 2021_0.pdf (03.04.2025).
[54] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Denmark- Right to strike in the public sector - factsheet upd 2021_0.pdf (03.04.2025).
[55] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Iceland - Right to strike in the public sector - updated 2021.pdf (03.04.2025).
[56] *Pascucci*, The right to strike: Italy, 2014 p. 331 (341).
[57] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Malta - Right to strike in the public sector - updated 2021.pdf (03.04.2025).
[58] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Portugal - Right to strike in the public sector - updated 2021.pdf (03.04.2025).
[59] *Malmberg/Johansson*, The right to strike: Sweden, 2014, p. 525 (526).
[60] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Belgium - Right to strike in the public sector - factsheet upd 2021_0.pdf (03.04.2025).
[61] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/France - Right to strike in the public sector - updated 2021.pdf (online: 03.04.2025); *Kessler*, The right to strike: France, p. 207 (224 f.).
[62] ErfK-Linsenmaier, Art. 9 GG, para 278; *Waas*, The right to strike: Germany, 2014, p. 235 (249).
[63] Art. 19(1) of Law No. 1264/1982, *Bakirtzi*, The right to strike: Greece, 2014, p. 259 (276).
[64] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Iceland - Right to strike in the public sector - updated 2021.pdf (03.04.2025).
[65] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Malta - Right to strike in the public sector - updated 2021.pdf (03.04.2025).
[66] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Romania - Right to strike in the public sector - updated 2021.pdf (03.04.2025).
[67] Solidarity strikes are admissable if the professional interests of the striking workers are in some way affected; *Guastavino*, The right to strike: Spain, 2014, p. 509 (517).

ity strikes are lawful in principle, although subject to specific rules, such as in Bulgaria,[68] Croatia,[69] The Czech Republic,[70] Estonia,[71] Hungary,[72] Finland,[73] Ireland,[74] Lithuania,[75] The Netherlands,[76] Romania[77] and Slovakia,[78] or considered lawful only under specific (restricted) conditions, as is the case in Poland.[79] In other countries, like Slovenia, it is still disputed whether solidarity strikes are admissable.[80] Solidarity strikes are classified as illegal in Latvia if the dispute does not concern a general agreement (sectoral-level CBA),[81] whereas in Luxembourg,[82] solidarity strikes are considered unlawful.

II. Application to German Labour Dispute Law

A solidarity strike is characterized by case law in Germany as a strike "which serves to support a main industrial dispute being waged in another geographical or sectoral collective bargaining area".[83] In classic solidarity strikes, pressure is exerted indirectly on the employer, who is the opponent of the original labor dispute, by harming a third party.[84] Since 2007, the Federal Labour Court has generally considered supportive industrial action to be permissible, as this also falls under the protection of the freedom of trade union activity guaranteed by Article 9(3) of the

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[68] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Bulgaria - Right to strike in the public sector factsheet upd 2021_0.pdf (03.04.2025).
[69] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Croatia - Right to strike in the public sector - factsheet upd 2021_0.pdf (03.04.2025).
[70] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Czech Rep - Right to strike in the public sector - factsheet upd 2021_0.pdf (03.04.2025); Section 16 (3) and 20 (e) Collective Bargaining Act; *Hurka*, The right to strike: Czech Republic, 2014, p. 169 (173); *Waas*, The right to strike: A comparative view, 2014, p. 3 (50).
[71] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Estonia - Right to strike in the public sector - factsheet upd 2021_0.pdf (03.04.2025).
[72] Solidarity strikes are the only strikes which have to be organized by a trade union; *Kajtár/Kun*, The right to strike: Hungary, 2014 p. 285 (294); *Waas*, The right to strike: A comparative view, 2014, p. 3 (51).
[73] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Finland - Right to strike in the public sector - factsheet upd 2021_0.pdf (03.04.2025); *Lamminen,* The right to strike: Finland, 2014
p. 193 (195).
[74] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Ireland - Right to strike in the public sector - factsheet upd 2021.pdf (03.04.2025); *Kerr*, The right to strike: Ireland, 2014, p. 303 (310).
[75] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Lithuania - Right to strike in the public sector - factsheet upd 2021.pdf (03.04.2025).
[76] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Netherlands - Right to strike in the public sector - factsheet upd 2021.pdf (03.04.2025).
[77] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Romania - Right to strike in the public sector - updated 2021.pdf (03.04.2025).
[78] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Slovakia - Right to Strike in the public sector - updated 2021.pdf (03.04.2025).
[79] *Grzebyk*, The right to strike: Poland, 2014, p. 427 (440 f.)
[80] *Končar*, The right to strike: Slovenia, 2014, p. 467 (472 f.); *Waas*, The right to strike, 2014, p. 51.
[81] Such sectoral agreements are rare; ETUI, https://www.etui.org/covid-social-impact/latvia/strikes-in-latvia-background-summary (12.08.2021).
[82] ETUI/EPSU, online: https://www.epsu.org/sites/default/files/article/files/Luxembourg - Right to strike in the public sector - updated 2021.pdf (03.04.2025).
[83] BAG 19.6.2007 – 1 AZR 396/06, NZA 2007, 1055
(para 9).
[84] Däubler-Rödl, AKR § 17, marginal No. 89; ErfK-Linsenmeier, Art. 9 GG, marginal No. 278; ErfK-Linsenmeier, Art. 9 GG, marginal No. 120; *Zimmer*, Boykottbedingte Streikaktivitäten von HafenarbeiterInnen als zulässige Arbeitskampfmaßnahme?, AuR 11/2018, 508 (510).

German Basic Law (Grundgesetz, GG). Substitute labor disputes, on the other hand, are considered inadmissible by the BAG due to a lack of accessoriness.[85] However, strikes in Germany must be appropriate, necessary and proportionate, in the case of a solidarity strike to support the main labor struggle.[86] A means of industrial action is proportionate in the narrower sense if, taking into account the freedom of action granted by Article 9(3) of the Basic Law, it is "appropriate for achieving the intended objective of the action, taking into account the legal positions of those directly or indirectly affected by the action".[87] In the case of a solidarity strike it must thus be examined above all within the framework of the proportionality test whether the solidarity activity is to be classified as appropriate and thus legally admissable. With regard to the suitability of the means of action and in view of the fact that there is no less severe measure than the one chosen that would be equally effective, the trade union has a prerogative of judgement. It therefore has a margin of discretion in determining whether an industrial action is suitable to exert pressure on the opponent.[88] The fact that the direct opponent of the strike usually has only limited possibilities to influence the main labor dispute is to be taken into account in the proportionality test. In this respect, a certain proximity to the main labor dispute is taken as a basis,[89] which is affirmed by the BAG in the case of close economic ties between the opponents.[90] According to the BAG, these connections can be of a corporate or contractual nature such as a supplier-customer relationship. In addition, the connection can also result from support provided by the employer in the original labor dispute.[91] The solidarity strike must be suitable in some way to increase the pressure on the social opponent, whereby the pressure can be not only economic but also psychological in nature.[92]

In addition to the decision on solidarity strikes[93] in 2007, the BAG also recognized in its 2009 flash mob decision that not only "a historically developed, conclusive numerus clausus of industrial action means" falls under the protection of Article 9(3) GG. Rather, it is "part of the constitutionally protected freedom of coalitions to adapt their means of struggle to changing circumstances in order to remain equal

[85] BAG 19.6.2007 – 1 AZR 396/06, NZA 2007, 1055.
[86] BAG 19.6.2007 – 1 AZR 396/06, NZA 2007, 1055 (marginal No. 9, 25 and 33 ff.); approving: Berg/Kocher/Schumann, TVG/AKR, marginal No. 185; Däubler-*Rödl*, *AKR* § 17, marginal No. 95 ff; ErfK-Linsenmaier, Art. 9 GG, marginal No. 121; *Hayen/Ebert,* AuR 2008, 19; BKS-*Berg,* AKR, marginal No. 499; critical: *Hohenstatt/Schramm,* NZA 2007, 1034; *Wank,* RdA 2009, 1, 3 f.
[87] BAG 19.6.2007 – 1 AZR 396/06, NZA 2007, 1055 (1058, para 28).
[88] Berg/Kocher/Schumann, TVG/AKR, marginal No. 185.
[89] *Zimmer*, Boykottbedingte Streikaktivitäten von HafenarbeiterInnen als zulässige Arbeitskampfmaßnahme, in: AuR 11 2018, 508 (511).
[90] BAG 19.6.2007 – 1 AZR 396/06, NZA 2007, 1055 ff. (para 33 ff.).
[91] BAG 19.6.2007 – 1 AZR 396/06, NZA 2007, 1055 ff. (para 46, 58).
[92] BAG 19.6.2007 – 1 AZR 396/06, NZA 2007, 1055 ff. (para 34).
[93] The court instead uses the term "sympathy strike", which is not used in this paper (see introduction).

to their opponents and achieve balanced collective agreements".[94] This interpretation of Article 9(3) GG has been confirmed by the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), which emphazises the scope for action in shaping the law on industrial action: "The Basic Law does not prescribe how the conflicting fundamental rights positions are to be delineated in detail; it does not require optimization of the conditions of struggle".[95] Together with the BAG's decision on solidarity strikes, this decision by the BVerfG opens the way for new forms of industrial action beyond the traditional form of strikes.[96] In this respect, the changes in the structure of global value chains and the resulting changes in strike tactics must also be taken into consideration when assessing the legality of solidarity strikes along the value chain.

Taking also into account that the ILO supervisory bodies do not impose any extra requirements on solidarity strikes, but merely take the legality of the main strike as a basis, the requirements for an (economic) interlocking of the different companies should not be set too high. If a solidarity strike is carried out in a German company to support a labor dispute along the value chain, several constellations are conceivable: In the first constellation, the original strike takes place in another company of the same group or even in another plant of the same company. If the same employer is the opponent of the industrial action, it can react directly to the strike by giving in, so that only the general criteria for assessing the legality of industrial action would have to be applied. Solidarity strikes within group structures have been considered permissible in (German) legal scholarship for many years due to the group connection,[97] as in the case of a solidarity strike within group structures, there is a direct relationship between the employer affected by the strike and the opponent of the main labor dispute. As the ability of the employer facing strike action to exert influence in group structures also extends beyond national borders, the legal situation does not change if the original strike takes place in another country. The BAG however states that a solidarity strike organized by a different trade union may be more readily be found inappropriate, as it would be a greater restriction on the freedom of association of the negotiating trade union to prohibit it from holding a solidarity strike than another trade union.[98] Nevertheless, this argument is not helpful for the analysis of the legality of a solidarity strike. A solidarity strike is proportional in the narrow sense if pressure can be built up that contributes

[94] BAG 22.9.2009 – 1 AZR 972/08, NZA 2009, 1347.
[95] BVerfG 26.3.2014 – 1 BvR 3185/09, NZA 2014, 493.
[96] *Wenckebach*, Arbeitskampf 4.0 – Streikrecht in einer Arbeitswelt im Wandel, p. 448 (451).
[97] BAG 19.6.2007 – 1 AZR 396/06, NZA 2007, 1055 ff. (para 46); Däubler-Rödl, AKR § 17, marginal No. 94 ff.; *Giesen*, ZfA 2025, 30 (47); *Hayen/Ebert*, AuR 1-2/2008, 19 (22).
[98] BAG 19.6.2007 – 1 AZR 396/06, NZA 2007, 1055 ff. (marginal No. 33 ff.).

to the strike's success, even if only to a small extent. This is independent of whether the strike is called by the same union or not. Trade union solidarity has always been an important value for trade unions anyway.[99] The BAG's statements are not tenable in view of the immense structural changes already taking place in Germany.[100] Outsourcing within Germany has now often led to an overlapping of the organizational areas of various German trade unions. However, a comprehensive legal analysis cannot ignore the changes in real life and corresponding social science analyses. This also includes taking into account the internationalization of the economy and the close integration and interconnection along global value chains. A solidarity strike within corporate structures that relates to an original struggle in another country, organized by the sister union there, would therefore have to be unproblematically classified as permissible, as the parent company would have the power to influence the industrial dispute in the area of responsibility of the foreign subsidiary.

However, taking into account the sociological findings on global value chains, there is also a close economic interdependence with at least the direct (foreign) contractual partners in the value chain. A German company that faces a solidarity strike could certainly exert influence on its foreign supplier (or service-providing contractual partner). Therefore, a strike along the value chain would also have to be considered proportional in this constellation. Since the Federal Labor Court classifies proxy industrial action as inadmissible due to a lack of accessory nature,[101] the solidarity strike would have to correspond to the original strike in terms of its intensity and duration.

G. Conclusion

Due to the internationalization of the economy, transnational companies based in Germany are economically interlinked with other companies worldwide, even across corporate boundaries. The realization that global value chains are structured across national borders and exist through close economic relationships, at least with direct suppliers, must therefore be taken into account when assessing legality. Pressure can be exerted by companies not only within a group but also on direct suppliers that are formally independant. Given such intensive interlinkages,

[99] *Zimmer*, Solidarity as a central aim of collective labour law?, in: Lopez-Lopez, Inscribing Solidarity. Debates in Labour Law and Beyond (2022), p. 43 ff.
[100] Criticism with a different argumentation: Däubler-Rödl, AKR § 17, marginal No. 94 ff.
[101] BAG 19.6.2007 – 1 AZR 396/06, NZA 2007, 1055.

solidarity strikes along the value chain are basically permissible not only in Germany but worldwide.

Bibliography

Anner, Mark/ Fischer-Daly, Matthew/ Maffie, Michael (2021), Fissured Employment and Network Bargaining: Emerging Employment Relations Dynamics in a Contingent World of Work, in: International Law Review Vol. 74, 3/2021, p. 689–714.

Bender, German (2024), Lektion für Elon, in: Journal für internationale Politik und Gesellschaft (IPG-Journal) 4.3.2024, online: https://www.ipg-journal.de/rubriken/wirtschaft-und-oekologie/artikel/lektion-fuer-elon-7319/ (10.4.2025).

Berg, Peter/ Kocher, Eva/ Schumann, Dirk (2020, Hrsg.), Tarifvertragsgesetz und Arbeitskampfrecht, 7. Auflage, Frankfurt.

Bude, Heinz (2019), Solidarität. Zukunft einer großen Idee, München.

Burger, Florian (2014), The right to strike: Austria, in: Waas, Bernd (ed.), The right to strike. A comparative view, Wolters Kluwer, p. 121-127.

Däubler, Wolfgang (2018), Arbeitskampfrecht. Handbuch für die Rechtspraxis, 4. Auflage, Frankfurt/Main (quoted: Däubler-Author, AKR, § … , marginal No. …).

Dünhaupt, Petra/ Herr, Hansjörg/ Mehl, Fabian/ Teipen, Christina (2022), Introduction: Governance, Rent-Seeking and Upgrading in Global Value Chains, in: Teipen, Christina/Dünhaupt, Petra/Herr, Hansjörg/Mehl, Fabian (Hrsg.), Economic and Social Upgrading in Global Value Chains. Comparative Analyses, Macroeconomic Effects, the Role of Institutions and Strategies for the Global South, Cham (Schweiz) 2022, p. 1–31.

Ewing, Keith D. (2013), Myth and Reality of the Right to Strike as a 'Fundamental Labour Right', in: International Journal of Comparative Labour Law and Industrial Relations (IJCLLIR) 2/2013, Vol. 29, p. 145-165.

Fichter, Michael/ Sydow, Jörg (2002), Using networks towards global labor standards? Organizing social responsibility in global production chains, Industrielle Beziehungen (IB) 4/2002, p. 357-380.

Fudge, Judy/ Shamir, Hila (2025), Strike Law and Workers' Power Resources in Global Supply Chains and Platform Giants, in: Special issue of the Comparative Labor Law and Policy Journal (forthcoming).

Gereffi, Gary (1994), The organisation of buyer-driven global commodity chains: how US retailers shape overseas production networks, in: Gereffi/Korzienewicz (eds.), Commodity Chains and Global Capitalism, Westport/Connecticut/London, 1994, p. 95–121.

Gereffi, Gary/ Humphrey, John/ Sturgeon, Timothy (2005), *The Governance of Global Value Chains, in:* Review of International Political Economy *(*RIPE) 2005, p. 78-104.

Giesen, Richard (2025), Streikziel Allgemeinverbindlicherklärung, in: Zeitschrift für Arbeitsrecht (ZfA) 2025, p. 30-49.

Gitzel, Sandra (2014), Der Schutz der Vereinigungsfreiheit, Lausanne.

Grzebyk, Piotr (2014), The right to strike: Poland, in: Waas, Bernd (ed), The right to strike. A comparative analysis, Wolter/Kluwer, p. 427-449.

Hassler, Markus (2003), The global clothing production system: commodity chains and business network, Global Networks 10/2003, p. 513-531.

Hayen, Ralf-Peter/ Ebert, Franz Christian (2008), Zulässigkeit von Unterstützungsstreiks. Aktuelle Rechtsprechung im Spiegel völkerrechtlicher und rechtsvergleichender Betrachtungen, in: Arbeit und Recht (AuR) 1-2/2008, p. 19-31.

Hübner, Carsten (2015), Globale Wertschöpfungsketten organisieren. Eine neue Herausforderung für Gewerkschaften, Friedrich-Ebert-Stiftung, online: https://library.fes.de/pdf-files/iez/11565.pdf (24.4.2025).

Hurka, Petr (2014) The right to strike: Czech Republic, in: Waas, Bernd (ed), The right to strike. A comparative analysis, Wolter/Kluwer, p. 169-176.

ILO – International Labour Organization (1994), Freedom of Association and Collective Bargaining. General Survey 1994, Report III (4B).

ILO – International Labour Organization (2016), *Report IV*. Decent work in global supply chains, Genever 2016, online: https://www.ilo.org/resource/conference-paper/ilc/105/decent-work-global-supply-chains-1 (10.4.2025).

ILO – International Labour Organization (2017), Purchasing Practices and Working Conditions in Global Supply Chains: Global Survey Results, in: INWORK Issue Brief Nr. 10, Genf 2017, online: https://www.ilo.org/publications/purchasing-practices-and-working-conditions-global-supply-chains-global (21.4.2025).

ILO – International Labour Organization (2018), Freedom of Association. Compilation of Decisions, Genever, online: https://www.ilo.org/publications/freedom-association-compilation-decisions-committee-freedom-association-pdf (25.4.2024).

Jaspers, *Teun* (2007), The right to collective action in European Law, in: Dorssement/Jaspers/van Hoek (eds.), Cross-Border Collective Action in Europe: A legal challenge. Study on the legal aspects of transnational collective actions from a labour law and private international law perspective, p. 23-74.

Kajtár, Edit/ Kun, Attila (2014), The right to strike: Hungary, in: Waas, Bernd (ed.), The right to strike. A comparative analysis, Wolter/Kluwer, p. 285-301.

Kerr, Anthony (2014), The right to strike: Ireland, in: Waas, Bernd (ed.), The right to strike. A comparative analysis, Wolter/Kluwer, p. 303-315.

Končar, Polonca (2014), The right to strike: Slovenia, in: Waas, Bernd (ed.), The right to strike. A comparative analysis, Wolter/Kluwer, p. 467-476.

Lamminen, Johannes (2014), The right to strike: Finland, in: Waas, Bernd (ed.), The right to strike. A comparative analysis, Wolter/Kluwer, p. 193-206.

Lohmeyer, Nora/ Schüßler, Elke/ Helfen, Markus (2018), Can solidarity be organized 'from below' in global supply chains? The case of ExChains, Industrielle Beziehungen, 4/2018, p. 400–424.

Ludwig, Carmen (2019), The politics of solidarity: Privatisation, precarious work and labour in South Africa. Frankfurt/Main.

Macdonald, Kate/Macdonald, Terry (2006), Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry, EJIL 2006, p. 89–119.

Malmberg, Jonas/Johansson, Caroline (2014), The right to strike: Sweden, in: Waas, Bernd (ed.), The right to strike. A comparative analysis, Wolter/Kluwer, p. 525-536.

Meiners, Kay (2023), Jenseits des Gesetzes, in: Magazin Mitbestimmung 3/2023, online: https://www.boeckler.de/de/magazin-mitbestimmung-2744-jenseits-des-gesetzes-50146.htm (24.4.2025).

Miskovez, Alexej (2023), Streik in Gräfenhausen - Haftung in der Lieferkette, LogR 2023, p. 166-167.

Müller-Glöge, Rudi/ Preis, Ulrich/ Gallner, Inken/ Schmidt, Ingrid (2025, eds.), Erfurter Kommentar zum Arbeitsrecht, München (quoted: ErfKo-Author, § …, marginal No. …).

Nogueira Guastavino, Magdalena (2014), The right to strike: Spain, in: Waas, Bernd (ed.), The right to strike. A comparative analysis, Wolter/Kluwer, p. 509-524.

Novitz, Tonia (2003), International and European protection of the right to strike, Oxford.

Pascucci, Paolo (2014), The right to strike: Italy, in: Waas, Bernd (ed.), The right to strike. A comparative analysis, Wolter/Kluwer, p. 331-350.

Rudkowski, Lena (2010), Der Streik in der Daseinsvorsorge, München.

Schlachter, Monika (2017), Streiks in der Daseinsvorsorge aus völkerrechtlicher Sicht, Arbeit und Recht (AuR) 1/2017, p. 10-12.

UNCTAD – United Nations Conference on Trade and Development (2013), World Investment Report 2013: Global Value Chains: Investment and Trade for Development, New York/Geneve.

Waas, Bernd (2014), The right to strike: A comparative view, in: Waas, Bernd (ed.), The right to strike. A comparative analysis, Wolter/Kluwer, p. 3-75.

Waas, Bernd (2014), The right to strike: Germany, in: Waas, Bernd (ed.), The right to strike. A comparative analysis, Wolter/Kluwer, p. 235-258.

Wenckebach, Johanna (2012), in: Deinert, Olaf/ Heuschmid, Johannes/ Kittner, Michael/ Schmidt, Marlene (Hrsg.), Demokratisierung der Wirtschaft durch Arbeitsrecht, Arbeitskampf 4.0 – Streikrecht in einer Arbeitswelt im Wandel, Frankfurt/Main, p. 448-454

Zimmer, Reingard (2019), Internationale Arbeitsorganisation (§ 5), in: Schlachter, Monika/ Heuschmid, Johannes/ Ulber, Daniel (Hrsg.), Arbeitsvölkerrecht – Eine systematische Darstellung, Berlin, p. 117–200.

Zimmer, Reingard (2020), Vereinigungsfreiheit und Recht auf Kollektivverhandlungen in der Praxis. Die Bedeutung der ILO-Übereinkommen Nr. 87 und Nr. 98 für das deutsche Arbeitsrecht**,** in: Soziales Recht (SR) 3/2020, p. 85-95.

Zimmer, Reingard (2022), Solidarity as a central aim of collective labour law?, in: Lopez Lopez, Julia (ed.) Inscribing Solidarity. Debates in Labour Law and beyond (2022), Cambridge University Press, p. 43-62.

Zimmer, Reingard (2023), The Supply Chain Due Diligence Act - Options for action for German co-determination actors and trade unions, Hugo-Sinzheimer Institute for Labour- and Social Law, open access: https://www.hugo-sinzheimer-institut.de/faust-detail.htm?sync_id=HBS-008712 (20.5.2025).

Zimmer, Reingard (2024), Gewerkschaften als Akteure zur Durchsetzung des Lieferkettensorgfaltspflichtengesetzes, Arbeit und Recht (AuR) 4/2024, p. 139-144.

Zimmer, Reingard (2024), Möglichkeiten der Beteiligung von Betriebsrat und Wirtschaftsausschuss an der Umsetzung des Lieferkettensorgfaltspflichtengesetzes, Arbeit und Recht (AuR) 1/2024, p. 7-14.

Zimmer, Reingard (2025), Die Umsetzung und Weiterentwicklung des LkSG. Rechtsfragen zum Schutz menschenrechtlicher und umweltbezogener Rechte in der betrieblichen Praxis, Frankfurt/Main.

§ 3 Experiences with the Judicial Enforcement of the Right to Strike before the ECJ and the ECtHR

Rudolf Buschmann

A. European Union and Court of Justice of the European Union

I. Relevant Provisions

Article 28 of the Charter of Fundamental Rights guarantees the right to collective action, including the right to strike:

> Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

The Charter of Fundamental Rights therefore guarantees the right to strike. However, pursuant to its Article 51(1), in the Member States the Charter applies exclusively within the scope of application of Union law. This provision must be seen in conjunction with Article 153(5) TFEU, which excludes EU legislative powers for certain important areas: “The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.”
The Union therefore has no legislative competence for designing details of the exercise of the right to strike. This exclusion considerably reduces the scope of application of this fundamental right. Still, it applies to the staff of the institutions of the Union; it is also conceivable that the scope of application of Union law is opened up on the basis of other provisions, such as the economic freedoms of the TFEU, creating conflicts with fundamental social rights, such as the right to strike, which could be decided by the ECJ. The Court has clarified:

> According to Article 2(6) of the agreement on social policy, which is reproduced in Article 137(5) EC, as amended by the Treaty of Nice, the provisions of that article ‘shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs’. However, as the Court has already held in relation to Article 137(5) EC, since that provision derogates from paragraphs 1 to 4 of that article, the matters reserved by paragraph 5 must be interpreted

> strictly so as not to affect unduly the scope of paragraphs 1 to 4, nor to call into question the aims pursued by Article 136 EC (see Del Cerro Alonso, paragraph 39, and Impact, paragraph 122).[1]

But obviously, the Union has no competence to concretise the fundamental right of Article 28 of the Charter through secondary Union law.

There are no specific provisions relating to the right to strike in secondary Union law, nor in the staff regulations.[2] The right to strike is explicitly mentioned in Article 8 of the Conditions of Employment of the European Central Bank (ECB): “The right to strike shall be subject to prior written notice from the organising body and to the maintenance of such minimum services as may be required by the Executive Board. The Staff Rules shall further specify these limitations."

An action brought by two trade unions against a letter from the Vice-President of the ECB dated 7 July 2000 to the plaintiffs concerning the content of the service regulations including the exercise of the right to strike was dismissed as inadmissible by the General Court.[3]

II. Relevant Case Law of the ECJ and the European General Court

1. Strikes by European Officials

In view of the limited regulatory competence of the European Communities / the European Union, it is not atypical that the first ECJ judgement did not concern strikes in a Member State, but a strike by European officials.[4] The Commission had individually cut the salaries of striking officials for the strike period, against which the officials concerned brought an action before the Court. The result: The salary deduction in reaction to the strikes was lawful; the Commission had correctly treated these strikes in accordance with strike principles and had not imposed disciplinary measures, as had been demanded by German ministers. This is what the court held:

> 11 It must first be ascertained whether, as a general rule, an official who has taken part in a general stoppage of work described as a strike is entitled to receive salary in the absence of service rendered.

[1] ECJ 10.6.2010 – C-396/08 – *INPS*, para 35.
[2] See EGC 29.1.2020 – T-402/18 – *Aquino*.
[3] See EGC 18.4.2002 – T-238/00 – *IPSO and USE*.
[4] ECJ 18.3.1975 – Joined Cases 44, 46 and 49-74 – *Acton et al.*, para 11-16.

> 12 On this point, according to a principle recognized in the labour law of the Member States, wages and other benefits pertaining to days on strike are not due to persons who have taken part in that strike.
>
> 13 This principle may be applied to relations between the institutions of the Communities and their officials, as the Commission has already stated on a previous occasion, in its decision of 16 December 1970, according to which 'it stands to reason that there can be no payment for days on strike'.
>
> 14 That statement in no way implies any decision in relation to the existence of an official's right to strike or in relation to the detailed rules which may govern the exercise of such a right.
>
> 15 Although certain Member States deny their public servants or certain categories of public servants the right to strike, whereas other Member States allow it, the Staff Regulations of Officials of the European Communities remain silent on the subject.
>
> 16 In the present case it is sufficient to note that the collective stoppage of work in relation to which the decisions in dispute were taken was considered by all concerned to be a method of defending collective interests of the staff and was therefore described as strike action. …
>
> 21 However, the deductions were made not as a punishment for a disciplinary offence but merely as the consequence of failure to perform duties; accordingly, the provisions of Title VI are inapplicable in this case.

The next ruling of the General Court also concerned a strike by European officials in a similar constellation.[5] It held “thirdly and finally, that the Commission, by sufficiently reasoned decisions, rightly made deductions from their pay because of their participation in those strike actions”.

While these first judgements could still leave open the question of whether European officials are allowed to strike or whether European employers can prohibit them from doing so, the General Court in the *Aquino* judgement[6] has clarified that European officials (here: interpreters in the European Parliament) can also invoke the fundamental right under Article 28 of the Charter and that there are no staff regulations or general principles of civil service status law prohibiting this:

> 56 In that regard, it follows from Article 28 of the Charter that workers and employers, or their respective organisations, have, in accordance with EU law and national laws and practices, the right to negotiate and conclude collective

[5] EGC 15.7.1994 – T-576/93 – *Browet et al.*, para 67.
[6] EGC 29.1.2020 – T-402/18 – *Aquino*.

agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

88 … It is clear from the Staff Regulations in particular that, unlike any other individual, an official or other member of the Union's staff is connected to the institution or body to which he belongs by a legal relationship of employment involving a balance of specific reciprocal rights and obligations, which is reflected in the institution's duty to have regard for the welfare of the person concerned.

94 In the present case, it follows from paragraphs 72 to 81 above that, as a result of the decision of 2 July 2018, the applicants were requisitioned for the day of 3 July 2018 without any legal basis authorising the Parliament to take such measures and were therefore unable to exercise their right to strike for the duration of the requisitions.

2. Priority for Economic Freedoms

The original widespread recognition of the ECJ's social competence was jeopardised when the Court decided in the *Viking* and *Laval* judgements, which were handed down in immediate succession and apparently coordinated with each other, to give priority to economic freedoms, specifically the freedom of establishment and to provide services, and to subordinate the freedom of association recognised in the constitutions of all Member States to these economic freedoms of employers. The *Viking* judgement of 11 December 2007[7] concerned the (convenience) reflagging of the ferry Rosella, which travelled between Helsinki and Tallinn, from Finland to Estonia with the aim of removing the higher Finnish collective agreements and replacing them with cheaper Estonian collective agreements. The Finnish trade union FSU gave notice of a strike and the International Transport Workers' Federation ITF called on all member organisations not to negotiate with Viking and not to conclude cheap collective agreements. Following a referral from the British Court of Appeal, the Court ruled in favour of Viking:

1. Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.

2. Article 43 EC is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

[7] ECJ 11.12.2007 – C-438/05 – *Viking*.

> 3. Article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce a private undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article.
>
> That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

With this concept, the ECJ legitimises considerable interference in the right to strike by allowing and even requiring a judicial review of the necessity of trade union collective action, of less limited means available to reach a collective agreement and of whether these means have been exhausted before industrial action is initiated.

The *Laval* judgement[8] also arose at the interface between highly developed Scandinavian collective labour law (here: Sweden) and an accession country (Latvia). The Latvian company Laval had been awarded a contract to build a school at Vaxholm, Sweden, which it carried out via its subsidiary of the same name under Swedish law with Latvian personnel on the basis of Latvian low-cost collective agreements. Swedish trade unions demanded the application of the higher Swedish collective agreements and effectively staged a strike at the construction site. The ECJ ruled in this case:

> Article 49 EC and Article 3 of Directive 96/71/EC of the EP and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative

[8] ECJ 18.12.2007 – C-341/05 – *Laval*.

provisions, while other terms relate to matters not referred to in Article 3 of the directive.

In the *Laval* judgement, the Posting of Workers Directive does not appear as a minimum level of protection for posted workers, but rather as a ceiling to employee protection, which is intended to exclude trade union measures going beyond this. These rulings have been rightly perceived as a frontal attack against trade union self-organisation in cross-border situations, not only in Scandinavia.

There are good reasons to argue that the *Viking* and *Laval* judgements have become obsolete due to the entry into force of the Charter of Fundamental Rights and the amendments to the Posting of Workers Directive in 2018. After all, Article 1 of the Posting of Workers Directive 96/71/EC now contains a guarantee of the right to collective action to enforce collective agreements:[9]

> Article 1 Amendments to Directive 96/71/EC
> (1) Article 1 is amended as follows: …
> (b) the following paragraphs are inserted: …
> -1a. This Directive shall not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, to conclude and enforce collective agreements, or to take *collective action* in accordance with national law and/or practice.

However, this is only a directive. It should be noted that in the aforementioned judgements, the ECJ had derived the subordination of the fundamental right to freedom of association from the primacy of fundamental economic freedoms, i.e. primary treaty law, which has not been amended in this respect. The fact that the ECJ could possibly assume such a position becomes clear in a formulation from the judgement on Hungary's action for annulment against the amended Posting of Workers Directive. Hungary unsuccessfully complained of an alleged violation of Article 56 TFEU and the *Laval* judgement. In the grounds for its judgement of 8 December 2020[10] the ECJ stated:

[9] Amendment by Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC (emphasis added).
[10] ECJ 8.12.2020 – C-620/18 – *Hungary/European Parliament*, para 168.

> 168 However, while that provision states that the amended Directive 96/71 'shall not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level', it is in no way a consequence of that provision that the exercise of those rights is not subject to EU law. On the contrary, since that provision refers to fundamental rights as recognised at Union level, it means that the exercise by workers of their rights of collective action, in the context of a posting of workers subject to the provisions of the amended Directive 96/71, must be assessed in the light of EU law, as it has been interpreted by the Court.

The wording "EU law, as it has been interpreted by the Court" could be understood to mean that *Laval* is not obsolete and that the Court still sticks to its neoliberal interpretation on this issue.

3. Strike no Extraordinary Circumstance within the Meaning of the Passenger Regulation

Two further rulings concerned disputes not between employers and workers and their unions, but between customers and airlines on the occasion of strikes. Here, the Court ruled that strikes do not constitute an extraordinary circumstance within the meaning of the Passenger Regulation. In both judgements, the Court refused to link the interpretation of the concept of the exceptional nature of strikes to the question of the legality of strikes.[11] The judgement in *AirHelp / SAS*[12] states:

> Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, must be interpreted as meaning that strike action which is entered into upon a call by a trade union of the staff of an operating air carrier, in compliance with the conditions laid down by national legislation, in particular the notice period imposed by it, which is intended to assert the demands of that carrier's workers and which is followed by a category of staff essential for operating a flight does not fall within the concept of an 'extraordinary circumstance' within the meaning of that provision.

[11] *Dorssemont*, AuR 2021, 494 ff.
[12] ECJ 23.3.2021 – C-28/20 – *AirHelp*.

And similarly the order in *Ryanair* reads:[13]

> Article 5(3) of Regulation (EC) No 261/2004 of 11 February 2004 ... must be interpreted as meaning that strike action taken to enforce the demands of flight attendants and pilots of an operating air carrier following a call for strike action by a trade union is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision. In this respect, it is irrelevant whether negotiations with employee representatives took place beforehand.

4. Contemptuous Attitude towards the Right to Strike as Justification for Sanctions

European courts are apparently best placed to develop a positive attitude towards the right to strike when assessing the behaviour of Eastern European despots on European sanctions lists. The General Court's judgement of 18 September 2024 states:[14]

> 118 In that regard, it should be noted that the alleged intimidation emanated from both the applicant itself and the public authorities. On the one hand, in so far as concerns the intimidation on the part of the applicant, the scale of the dismissals, which were linked to worker participation in a peaceful protest,[15] quite reasonably spawned a climate of fear among those workers. In that sense, the applicant used dismissal as a tool in deterring its workers from taking part in any form of challenge.
>
> 119 On the other hand, in so far as concerns the intimidation brought to bear by the public authorities, it should be observed that participation in the strike gave rise to numerous instances of violence against and the detention of the applicant's workers. …
>
> 120 President Lukashenko's statement that the protestors could be replaced by miners from Ukraine takes on a particular relevance in that context, contrary to the applicant's claims. That statement forms part of a wider trend of threats and intimidation on the part of the public authorities. It in fact reveals an attitude of *contempt*, on the part of President Lukashenko, *for the right to strike* and the concerns of the applicant's workers. …
>
> 124 It follows from the foregoing that the Council did not err in finding, when adopting the initial acts, that the intimidation and dismissal of the applicant's

[13] ECJ 10.1.2022 – C-287/20 – *Ryanair*.
[14] EGC 18.9.2024 – T-528/22 – *Belaruskali* (emphasis added); appeal pending before the ECJ – C-816/24 P – *Belaruskali*.
[15] The German version of this paragraph uses the word "Streik" ("strike") here.

workers who had taken part in the strikes and peaceful protests in the aftermath of the August 2020 presidential elections were sufficient for it to be considered that the applicant was responsible for the repression of civil society in Belarus and supported the regime of President Lukashenko within the meaning of Article 4(1)(a) of Decision 2012/642.

B. European Convention on Human Rights and European Court of Human Rights

I. Legal Basis: Article 11 ECHR Freedom of Assembly and Association

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

II. Case Law of the ECtHR

In the case law of the Court, an open, positive phase and a restrictive, rather negative phase can be distinguished with regard to the guarantee of the right to strike.

1. Positive Phase

The Swedish employer Gustafsson complained that a trade union action to enforce a collective agreement violated his (negative) freedom of association. The application was unsuccessful. Although the ECtHR recognised the legal concept of negative freedom of association, it clarified that this is not associated with negative freedom of collective bargaining. Negative freedom of association only includes the right to freely join or leave an association and therefore does not immunise employers against trade union collective bargaining actions. It simply states: “Art 11 ECHR does not guarantee the right not to be bound by a collective agreement”.[16]

[16] ECtHR 25.4.1996 – 15573/89 – *Gustafsson v. Sweden*, AuR 1997, 408 ff. as well as ECtHR 30.7.1998, 18/1995/524/610 – *Gustafsson v. Sweden*, AuR 1998, 494.

This position was later confirmed by the *Geotech Kancev* judgement.[17] An employer had attempted to invoke negative freedom of association in order to defend himself against a demand to pay contributions to the social security fund of the construction industry (Soka Bau), which it was obliged to do on the basis of a collective agreement that had been declared generally binding. However, the ECtHR did not consider the negative freedom of association to be violated by the generally binding nature of collective agreements.

The case law of the ECtHR gained particular significance as a result of the judgements in *Demir and Baykara* and in *Enerji Yapi-Yol Sen*, both against Turkey. The judgement of the Grand Chamber in *Demir and Baykara* stands out in particular because the ECtHR here developed its special methodology of the "living instrument" and gave special reasons for it. *Demir and Baykara* states:[18]

> 85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.
> 86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (see, mutatis mutandis, Marckx, cited above, § 41).

Of course, this methodology was not entirely new, especially since the ECtHR had already used similar, albeit not as detailed, formulations in its *Tyrer* judgement, where it stated:[19]

> The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced

[17] ECtHR 2.6.2016 – 23646/09 – *Geotech Kancev*, AuR 2016, 301.
[18] ECtHR 12.11.2008 – 34503/97 – *Demir and Baykara v. Turkey*, AuR 2009, 269.
[19] ECtHR 25 4. 1978 – 5856/72 – *Tyrer v. UK*.

by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.

The second important course setting concerned the basic decision for workers' protection, in particular through collective agreements in the public sector. *Demir and Baykara* continues:

> 97. …The Court further considers that municipal civil servants, who are not engaged in the administration of the State as such, cannot in principle be treated as "members of the administration of the State" and, accordingly, be subjected on that basis to a limitation of their right to organise and to form trade unions (see, mutatis mutandis, Tüm Haber Sen and Çınar, cited above, §§ 35-40 and 50).
> 98. The Court observes that these considerations find support in the majority of the relevant international instruments and in the practice of European States. …
> 107. The Court concludes from this that "members of the administration of the State" cannot be excluded from the scope of Article 11 of the Convention. At most, the national authorities are entitled to impose "lawful restrictions" on those members, in accordance with Article 11 § 2. In the present case, however, the Government have failed to show how the nature of the duties performed by the applicants, as municipal civil servants, requires them to be regarded as "members of the administration of the State" subject to such restrictions.
> 108. Accordingly, the applicants may legitimately rely on Article 11 of the Convention and the objection raised by the Government on this point must therefore be dismissed.

By applying the methodology of the living instrument, the Court was able to establish consistency with the essential elements of international labour law and their interpretation by the competent bodies, the standards of the UN Covenants, the International Labour Organization and the European Social Charter. It was then only logical that, a little later, a chamber of the ECtHR explicitly applied this broad scope of protection to the right to strike, which had the concrete consequence that restrictions on the right to strike, based on Article 11(2) sentence 2 ECHR, may not cover all civil servants on the basis of their status, but only those who exercise authority in the administration of the state:[20]

[20] ECtHR 21.4.2009 – 68959/01 – *Enerji Yapi-Yol Sen v. Turkey*, AuR 2009, 274; Original text in French only: (32) … Toutefois, si l'interdiction du droit de grève peut concerner certaines catégories de fonctionnaires (voir, mutatis mutandis,

> (32) ... However, while the prohibition of the right to strike may concern certain categories of civil servants (see, mutatis mutandis, Pellegrin v. France [GC], no. 28541/95, §§ 64-67, ECHR 1999-VIII), it cannot extend to civil servants in general, as in the present case, or to public employees in State-owned commercial or industrial undertakings. Thus, legal restrictions on the right to strike should define as clearly and narrowly as possible the categories of civil servants concerned.

This line was followed by further ECtHR rulings, which clarified that the right to strike is protected by freedom of association under Article 11 ECHR and that it is inadmissible to establish blanket exemptions for certain industries and sectors. It remained undecided whether the right to strike is an essential element of freedom of association. Other judgements along these lines include ECtHR 27.3.2007, 6615/03, *Karaçay*; 15.12.2009, 30946/04, *Kaya and Seyhan* (teachers); 13.7.2010, 33322/07, *Çerikci*, all v. Turkey; see *Lörcher*, AuR 2011, 303; *Urcan et al*. 23018/04 et al.; *Sezer* 36087/07, *Güler* 56237/08; *Danilenkov* (dock worker) 67336/01; *Tymoshenko* (flight attendant) 48408/12; *HLS* (doctors) 36701/09; *RMT* 31045/10; *ER.N.E.* 45892/09; *Ognevenko* 44873/09; *Association of Academics* 2451/16. The following are excerpts from just a few of the important rulings that illustrate the spectrum of human rights and make it clear that the concept of essential services, in which restrictions on the right to strike are possible, must be narrowly defined.

> The right to strike of flight attendants is protected by Article 11 ECHR. The ban on strikes violated Article 11 ECHR because the legal situation was unclear and contradictory.[21]
>
> The ban on strikes against a specialised trade union for medical staff in Croatia in the case of collective bargaining plurality (other trade unions had concluded a collective agreement) violates Article 11 ECHR. If there are several grounds for strike action, the ban on strikes violates Article 11 ECHR if only one of the grounds for strike action is considered legitimate.[22]
>
> 23. In view of the foregoing, the Court notes that by participating in the demonstration organised by his trade union, the applicant exercised his right to freedom of assembly. Bearing in mind that the applicant, a civil servant working in

Pellegrin c. France [GC], no 28541/95, §§ 64-67, CEDH 1999-VIII), elle ne peut pas s'étendre aux fonctionnaires en général, comme en l'espèce, ou aux travailleurs publics des entreprises commerciales ou industrielles de l'Etat. Ainsi, les restrictions légales au droit de grève devraient définir aussi clairement et étroitement que possible les catégories de fonctionnaires concernées.

[21] ECtHR 02.10.2014 – 48408/12 – *Tymoshenko v. Ukraine*, AuR 2015, 114.

[22] ECtHR 27.11.2014 – 36701/09 – *HLS v. Croatia*, AuR 2015, 146.

the Istanbul Municipality, was absent on 1 May 2008 to participate in Labour Day demonstrations that were organised and announced by his trade union, namely the KESK, the disciplinary sanction complained of, although very light, was such as to dissuade trade union members from participation in trade union activities (see Karaçay v. Turkey, cited above, § 37, Kaya and Seyhan v. Turkey, no. 30946/04, § 30, 15 September 2009; and Şişman and Others v. Turkey, no. 1305/05, § 34, 27 September 2011).

24. Having regard to its case-law on the subject and in view of the above considerations, the Court considers that there has been a violation of Article 11 of the Convention.[23]

59. Article 11 § 2 does not exclude any occupational group from its scope. At most, the national authorities are entitled to impose "lawful restrictions" on certain of their employees (see Tüm Haber Sen and Çınar, cited above, §§ 28-29; Demir and Baykara, cited above, § 107, and Sindicatul "Păstorul cel Bun" v. Romania [GC], no. 2330/09, § 145, ECHR 2013 (extracts)). However, the restrictions imposed on the three groups mentioned in Article 11 § 2 are to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association (see Tüm Haber Sen and Çınar, cited above, § 35; see also Adefdromil v. France, no. 32191/09, § 55, 2 October 2014, and Matelly v. France, no. 10609/10, § 71, 2 October 2014). These restrictions should therefore be confined to the "exercise" and must not impair the very essence of the right to organise (see Demir and Baykara, cited above, § 97).

73. Second, even assuming that railway transport was an essential service, serious restrictions such as a complete ban on the right to strike in respect of certain categories of railway workers would still require solid evidence from the State to justify their necessity. While a work stoppage on railway transport obviously could lead to negative economic consequences, the Court cannot agree that these would be sufficient to justify a complete ban on certain categories of railway workers' right to strike; any strike implies certain economic losses, but it does not follow that any strike could be prohibited for risk of those losses. The ILO also does not consider negative economic consequences to constitute a sufficient reason justifying a complete ban on the right to strike (see paragraph 20 above, section 592).[24]

[23] ECtHR 24.04.2018 – 56237/08 – *Güler* (civil servants' strike).
[24] ECtHR 20.11.2018 – 44873/09 – *Ognevenko v. Russia* (railwayman).

2. Negative Phase

The first signs of a trend reversal emerged with the *RMT v. UK* judgement in 2014, in which the ECtHR initially confirmed its previous case law, but then, in a surprising volte-face, ruled that the British ban on solidarity strikes did not constitute a violation of Article 11 ECHR.[25]

> 87. … Conversely, if it is not the core but a secondary or accessory aspect of trade-union activity that is affected, the margin is wider and the interference is, by its nature, more likely to be proportionate as far as its consequences for the exercise of trade-union freedom are concerned. …
> 104. The foregoing considerations lead the Court to conclude that the facts of the specific situation challenged in the present case do not disclose an unjustified interference with the applicant union's right to freedom of association, the essential elements of which it was able to exercise, in representing its members, in negotiating with the employer on behalf of its members who were in dispute with the employer and in organising a strike of those members at their place of work. In this legislative policy area of recognised sensitivity, the respondent State enjoys a margin of appreciation broad enough to encompass the existing statutory ban on secondary action, there being no basis in the circumstances of this case to consider the operation of that ban in relation to the impugned facts at Hydrex as entailing a disproportionate restriction on the applicant union's right under Article 11.
> 105. Accordingly, no violation of Article 11 of the Convention can be held to have occurred on the facts of the present case.

The negative trend continued with the judgement *Association of Academics*, which states:[26]

> In individual cases, compulsory arbitration ordered by law does not disproportionately interfere with the right to strike enshrined in Article 11 ECHR.

It was followed by *Norwegian Confederation of Trade Unions*[27] with the statement:

> States have a wide margin of appreciation regarding the way in which trade union freedom and the protection of trade union members' professional interests can be ensured. The Norwegian Supreme Court's decision to declare a

[25] ECtHR 8.4.2014 – 31045/10 – *RMT v. UK*.
[26] ECtHR 15.5.2018 – 2451/16 – *Association of Academics v. Island*
[27] ECtHR 10.6.2021 – 45487/17 – *Norwegian Confederation of Trade Unions*.

> trade union's decision to call on organised employees to boycott a haulage company (Holship) unlawful was not a violation of Article 11 ECHR.

The trend in the ECtHR case law not to declare general restrictions on the right to strike or restrictions relating to specific occupational groups as a violation of Article 11 ECHR culminated in the judgement *Humpert and Others v. Germany*. With knowledge of and as a consequence of the ECtHR rulings *Demir and Baykara* as well as *Enerji Yapi-Yol Sen*, the German teachers' union GEW had called both salaried and civil servant teachers to join trade union protest demonstrations against planned increases in teaching hours and for better working conditions. Numerous civil servant teachers followed these union calls, to which the employing federal states responded with disciplinary measures that were challenged in administrative courts via the trade union legal service. The proceedings were determined by European law from the outset and took an interesting course. The Federal Administrative Court found that:[28]

> 3. Article 11 ECHR, as bindingly interpreted by the ECtHR, guarantees all members of the public service who are not employed in the armed forces, the police or genuine public administration, as well as their trade unions, a right to collective bargaining and related collective action.
> 4. The status-related prohibition under Article 33(5) GG and the function-related guarantees under Article 11 ECHR are incompatible in terms of content with regard to civil servants who are deployed outside genuine public administration. It is the task of the legislature to resolve this conflict and to achieve a balance by means of practical concordance.

In order to fulfil the admissibility requirement of Article 35 ECHR, a constitutional complaint had to be lodged against this judgement. The Federal Constitutional Court took a step back from the Federal Administrative Court's statement, disregarded all of the teachers' arguments and pronounced a total ban on civil servant strikes based on status with the authority of a constitutional court:[29]

> 2.a) The ban on strikes for civil servants constitutes an independent traditional principle of the civil service within the meaning of the German Basic Law Article 33(5) GG.

[28] German Federal Administrative Court 27.02.2014 – 2 C 1/13, AuR 2014, 431.
[29] German Federal Constitutional Court 12.6.2018 – 2 BvR 1738/12, 2 BvR 1395/13, 2 BvR 1068/14, 2 BvR 646/15.

Eleven civil servant teachers lodged human rights applications (complaints) against this ban with the ECtHR. The applications alleged violations of Article 11 (freedom of association), Article 14 (prohibition of discrimination between civil servants and employees) and Article 6 (right to a fair trial due to lack of dialogue with international labour law).

The applications concerned the right of civil servants to strike. The applicants are teachers, all employed by different Bundesländer as civil servants. As an expression of their support for a social movement demanding an improvement in learning conditions, including in particular an improvement of the working conditions for teachers, they did not appear at work for between one hour and three days. They were subsequently subjected to disciplinary sanctions for having been on strike. Domestic remedies before different administrative courts and the Federal Constitutional Court were to no avail. The Federal Constitutional Court held that the Basic Law obliged civil servants not to strike, which it considered compatible with the exigencies of the ECHR and the Court's case-law.

The applicants complained under Articles 11 and 14 of the Convention that the ban on strikes was not prescribed by law, disproportionate and, in comparison with teachers employed on a contractual basis, discriminatory. They moreover complained under Article 6(1) of the Convention that the Federal Constitutional Court had failed to consider international treaties on the matter.

The complaints were unsuccessful. The Court held that there were no violations of the aforementioned human rights.[30] The reasoning is difficult to understand. The ECtHR does not answer the primary question of whether the right to strike constitutes an essential element of freedom of association, nor does it leave it open, as was previously the case, but states that this question should be context-specific. This means nothing other than that the right to strike may constitute an essential element in one contracting state but not in another. The ECtHR is thus opening up a way of recognising similar violations of human rights differently in different contracting states. This approach is new. Previously, the ECtHR had not contextualised other elements of freedom of association that it had previously recognised as essential. In its assessment, the Court reasons:

> 109. It follows that the question whether a prohibition on strikes affects an essential element of trade-union freedom because it renders that freedom devoid of substance in the circumstances … is context-specific and cannot therefore be answered in the abstract or by looking at the prohibition on strikes in

[30] ECtHR 14.12.2023 – 59433/18 – *Humpert et al*.

> isolation. Rather, an assessment of all the circumstances of the case is required, considering the totality of the measures taken by the respondent State to secure trade-union freedom, any alternative means – or rights – granted to trade unions to make their voice heard and to protect their members' occupational interests, and the rights granted to union members to defend their interests. Other aspects specific to the structure of labour relations in the system concerned also need to be taken into account in this assessment, such as whether the working conditions in that system are determined through collective bargaining, as collective bargaining and the right to strike are closely linked. The sector concerned and/or the functions performed by the workers concerned may also be of relevance for that assessment.

The ECtHR cannot but recognise that all bodies of international labour law agree that the mere status of a civil servant cannot restrict the right to strike, that this is only permissible in the administration of the state, that is, the exercise of authority on behalf of the state. It also acknowledges that these bodies have constantly criticised Germany for not complying with these conditions. However, unlike in *Demir and Baykara*, it disregards these aspects and declares them not to be decisive:

> 125. … The Court acknowledges that the practice of the competent monitoring bodies set up under the specialised international instruments, as well as that of other international bodies, shows a strong trend towards considering that civil servants should not per se be prohibited from strike action this trend also being reflected in the practice of the Contracting States. In as much as there is common ground among them as to the principle that bans or restrictions on the right to strike may be imposed on certain categories of civil servants or public sector workers, notably those exercising public authority in the name of the State and/or providing essential services, there is also a tendency to consider that the notion of essential services, despite some divergence as to its precise definition, is to be understood in the strict sense and as not including public education. The Court notes that the approach taken by the respondent State, namely to prohibit strikes by all civil servants, including teachers with that status, such as the applicants, is thus not in line with the trend emerging from specialised international instruments, as interpreted by the competent monitoring bodies, or from the practice of Contracting States.
>
> 126. The competent monitoring bodies set up under the specialised international instruments – notably the CEACR and the ECSR as supervisory bodies for the ILO standards and the European Social Charter, the latter containing a more specific and exacting norm regarding industrial action, but also the CESCR and the HRC – have repeatedly criticised the status-based prohibition of strikes by civil servants in Ger-

many, including, in particular, with respect to teachers with that status. Without calling into question the analysis carried out by those bodies in their assessment of the respondent State's compliance with the international instruments which they were set up to monitor, the Court would reiterate that its task is to determine whether the relevant domestic law in its application to the applicants was proportionate as required by Article 11 § 2 of the Convention, its jurisdiction being limited to the Convention.

127. Moreover, while any trend emerging from the practice of the Contracting States and the negative assessments made by the aforementioned monitoring bodies of the respondent State's compliance with international instruments constitute relevant elements, they are not in and of themselves decisive for the Court's assessment as to whether the impugned prohibition on strikes and the disciplinary measures imposed on the applicants remained within the margin of appreciation afforded to the respondent State under the Convention.

There is a concurring opinion on the judgement by Judge Ravarani, who does not share the main reasons for the majority ruling and only refrains from issuing a formal dissenting opinion because he believes that officials in Germany had a right to choose between civil servant and employee status or to switch from civil servant status to employee status with the right to strike. This overlooks the fact that there are no such rights under German civil service law and that the Federal Constitutional Court itself has emphasised that this decision is the sole responsibility of the employing state. Furthermore, it remains questionable whether such a right, even if it existed, could preclude the exercise of a human right such as the right to strike. The formal dissenting opinion of Judge Serghides is even clearer. He states that the right to strike is an essential element of freedom of association. Article 11(2) ECHR is not suitable to justify a total ban on the right to strike. The human right under Article 11 ECHR is therefore violated:

DISSENTING OPINION OF JUDGE SERGHIDES

47. In addition to my submission that the right to strike is an essential element of the right to freedom of association, it can be concluded that the impugned measures against the applicants could not be justified under either of the two sentences of Article 11 § 2 and that they, therefore, violated Article 11 § 1 of the Convention.

48. In particular, the impugned measures cannot [not] be justified under the first sentence of Article 11 § 2, because they were based on an absolute prohibition which does not have a place under this sentence, and they could not be justified under the second sentence of Article 11 § 2, because they do not concern members of any of the three groups specified therein.

49. Since the absolute ban in question fell neither under the first nor under the second sentence of Article 11 § 2, it directly confronted the right in question that is safeguarded under Article 11 § 1, which applies to “everyone” and therefore also to civil servants (see also Article 14 of the Convention on the prohibition of discrimination). Stated otherwise, the absolute ban in question, not falling under either of the two sentences of Article 11 § 2 and being inflexible in nature, per se and automatically rendered ineffective the right to freedom of peaceful assembly and association and, therefore, violated Article 11 § 1 of the Convention.

50. In my humble opinion, the methodological approach used by the Court regarding Article 11, as well as the interpretation and application followed by it regarding the same Article, were erroneous and wrong.

51. With all due respect, I regret to argue that the four applicants have not obtained the protection under the Convention they deserved, and along with them, at least for the time being, all civil servants in Germany or elsewhere in Europe who are not members of the administration of the State, who wish to exercise their freedom of association and in particular their right to strike in the present or future. As said above, the ban imposed on the applicants’ right to freedom of assembly and association was not only an absolute and total one, but also a general one. …

53. With due modesty, I believe that the present judgement is not in line with the fundamental Convention principles of effectiveness and respect for human dignity, and is somehow a setback to the application of the doctrine that the Convention is a living instrument to be adapted to the present-day conditions of society and to the development of international law…

55. By way of conclusion, I would find that there has been a violation of the applicants’ right to freedom of peaceful assembly and association, as provided for in Article 11 § 1 of the Convention. However, I see no need to address the issue of just satisfaction.

III. Conclusion

With its approach of contextualising the materiality of human rights – here, the right to strike – by including factors outside the right to strike, the ECtHR has created an instrument for itself to judge essentially identical restrictions differently in different countries and to privilege certain states.

Obviously, the Court finds it easier to condemn states such as Russia and, in the past, Turkey; it dares to approach democratic countries such as Great Britain and Germany less and less and kowtows to the Federal Constitutional Court, even though the latter had openly questioned its authority.

The methodological approach of the living instrument developed *in Demir and Baykara* has not yet been officially abandoned, but it is pushed aside if the result does not suit.

In labour disputes, the ECtHR should currently only be called upon if a state or a court – preferably from Eastern or South-Eastern Europe – provocatively questions its authority.

It is important to defend the jurisdiction of the competent bodies of international labour law.

Bibliography

Dorssemont, Filip (2021), Wann stellen Streiks außergewöhnliche Umstände dar?, in: Arbeit und Recht (AuR) 12/2021, p. 494–497.

Lörcher, Klaus (2011), Menschenrecht auf Streik im öffentlichen Dienst – Keine Disziplinierung bei Teilnahme, Arbeit und Recht (AuR) 7/2011, p. 303-306.

§ 4 Experiences with Right to Strike Litigation before the European Committee of Social Rights (ECSR)

Klaus Lörcher

A. Introduction

Within the framework of the Council of Europe (CoE), the European Social Charter (ESC)[1] is known not only as the social counter-part to the European Convention on Human Rights (ECHR)[2] but is specifically relevant in relation to the right to strike. Indeed, it recognises for the first time the right to strike explicitly in an international human rights instrument as early as 1961. It therefore appears particularly interesting to look in more detail at the substantive and procedural dimensions of its interpretation and application.

Generally speaking, the ESC offers – particularly in its revised version of 1996[3] – a comprehensive protection of social rights (Arts. 1-31). Not surprisingly, it has been named the "Social Constitution of Europe".[4] Although it is not necessary to ratify this human rights instrument when joining the CoE (in contrast to the ECHR, the ratification of which is required in order to become a CoE member) it is nevertheless widely recognised: Out of the 46 Member States of the CoE, the ESC has now been ratified by 42 European states[5] (and signed by four more)[6].

For any consideration on the right to strike the starting point is the wording of Article 6(4) ESC[7] recognising it explicitly in the following terms: "the right of workers and employers to take collective action, including the right to strike, in the event

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[1] European Social Charter of 1961 (CETS No. 35); for any information from the CoE, see https://www.coe.int/en/web/european-social-charter/home.

[2] See for more details Buschmann, Experiences with the Judicial Enforcement of the Right To Strike before the ECJ and the ECtHR in this volume.

[3] Revised European Social Charter of 1996 (CETS No. 163), including the rights enshrined in the ESC 1961 (see n 1) in Articles 1-19, and those contained in the mending Protocol of 1991 reforming the supervisory mechanism (CETS No. 142) in Articles 20-23) as well as new rights provided for in Articles 24-31.

[4] https://www.coe.int/en/web/european-social-charter.

[5] Out of which 36 states have ratified the (R)ESC 1996 (see n 3): Albania, Andorra, Armenia, Austria, Azerbaïjan, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy Latvia, Lithuania, Malta, Republic of Moldova, Montenegro, Netherlands, North Macedonia, Norway, Portugal, Romania, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Türkiye, Ukraine; and 6 states have only ratified the ESC 1961 (see n 1): Croatia, Czech Republic, Denmark, Luxembourg, Poland and United Kingdom.

[6] Out of which two states have signed the (R)ESC 1996 (see n 3): Monaco and San Marino; and two further states have only signed the ESC 1961 (see n 1): Liechtenstein and Switzerland.

[7] The wording remained unchanged when the ESC (see n 1) was revised in 1996 (see n 3).

of conflicts of interest, subject to any obligations arising from collective agreements in force".[8]

B. Monitoring Procedure

Any substantive right (such as the right to strike) can only be real if it is monitored effectively. In the framework of the ESC, two monitoring systems are available: the first is regulated in the ESC itself (reporting system),[9] and the second depends on the ratification of a specific Additional Protocol (complaints system, see below). But the competent monitoring body will be addressed first.

I. Monitoring Body: The European Committee of Social Rights

The European Committee of Social Rights (ECSR or Committee) is based on Article 25 ESC.[10] Currently it is composed of 15 experts who must be "independent experts of the highest integrity and of recognised competence in international social questions".[11]

The Committee monitors the proper implementation of the accepted ESC provisions. Its case law is summarised in the Digest of the Case Law of the European Committee of Social Rights, the current version of which dates from 2022.[12]

II. Monitoring Procedure: Two Systems

The first is the reporting system: States parties must report at certain intervals on their conformity with the provisions they have accepted. This system has developed over time but it is becoming more and more complex.[13] Moreover and even more importantly, it is characterised by a significant reduction of reporting obligations. Indeed, the scope of monitoring is becoming more and more limited in

[8] As Article 20 ESC and Article A (R)ESC allow for certain flexibilities in accepting only a specific number of provisions (i.e. numbered paragraphs), it should be noted that Article 6(4) ESC has not been accepted by all Contracting Parties (the Contracting Parties not having accepted this provision are: Austria and Türkiye for the (R)ESC and Luxembourg and Poland for the ESC).
[9] Part IV of the ESC (see n 1), consisting of Articles 21-29: It has been transposed into the (R)ESC (see n 3) by its Article C. However, according to the Amending Protocol of 1991 reforming the supervisory mechanism (CETS No. 142), which has not yet legally entered into force but is applied in practice to the extent that it does not contradict the previous formulations, certain practices have changed.
[10] It applies also to the (R)ESC by the respective reference in Article C (R)ESC.
[11] Article 25(1) ESC 1961.
[12] Hereinafter ‚Digest' https://www.coe.int/en/web/european-social-charter/-/updated-digest-of-the-case-law-of-the-european-committee-of-social-rights.
[13] For a more precise impression of its complexity one may click on "The table for reporting is currently the following" describing the calendar and the respective provisions to report on.

terms of the frequency of required reports and the number of provisions to report on.[14]

The ECSR's outcomes in this procedure are called "Conclusions" and are made available on the internet.[15]

The second system, the complaints system, requires additional action by the Contracting Parties: each state must ratify the so-called Collective Complaints Procedure Protocol (CCPP).[16] To date only 16 have done so.[17] In any event, the admissibility requirements are low, in particular no exhaustion of domestic remedies is required.

The ECSR's outcomes in this procedure are called "Decisions" and are made available on the internet.[18]

C. Outcomes in Relation to the Right to Strike

I. Statistical Information on the Right to Strike

In the reporting system, the Committee monitored the implementation of Article 6(4) for the last time in 2022. Of the 37 States parties that have accepted this provision, 29 delivered reports which were reviewed; of these, the Committee found a violation in 24 cases.

In the complaints system 13 cases have been submitted to the ECSR since the CCPP entered into force; of those, a violation was found in 5 cases.

II. General Case Law

According to ECSR case law,[19] the *right to strike is guaranteed* in principle (that is, there may be exceptions for individual cases)

- for trade unions, but only if they can be established without major formalities (in any case, it is not restricted to representative trade unions),
- in the event of conflicts of interest (not legal issues),

[14] https://www.coe.int/en/web/european-social-charter/reporting-system#{%22263920490%22:[2]} (irrespective of the question of conformity with Article 21 ESC 1961).
[15] The following link is related to the database HUDOC-ESC containing all relevant data – also in this respect: https://hudoc.esc.coe.int/eng#{%22sort%22:[%22escpublicationdate%20descending%22]}.
[16] Additional Protocol of 1995 providing for a system of collective complaints (CETS No. 158).
[17] Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Slovenia, Sweden and Spain.
[18] See n 15 above.
[19] See for more details Digest (n 12), p. 89 f.

- vis-à-vis employers in general (including future and de facto),
- especially in relation to collective bargaining.

According to ECSR case law, *restrictions* may be permissible. However, generally speaking, economic freedoms and interests should not have a higher priority:

> [Economic freedoms] cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater a priori value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers.[20]

In general terms, restrictions must always comply with the principle of proportionality (Article G (R)ESC). Indeed, the Appendix to Article 6(4) explicitly refers to Article G in the following terms:

> It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G.

In turn, Article G(1) provides:

> The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

In its case law the ECSR has recognised that certain restrictions are permissible (but no general ban) for certain areas if special conditions (e.g. function-related) are met:

- essential services,
- public service (however, no general ban on strikes by civil servants),[21]

[20] ECSR 3.7.2013 – No. 85/2012 – *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, para 122.
[21] See below for Germany, n 33.

- (if applicable) by parliamentary decisions in very specific cases (but compulsory arbitration is generally inadmissible).

III. Specifically: Complaints Procedure

The outcomes in the complaints system are of particular interest because the Committee has examined the situation in more detail than in the (ordinary) reporting system. The analysis will start with the cases in which the ECSR has found a violation and then proceed to the other cases.

The ECSR has *found a violation* of the right to strike in 5 cases (in chronological order):

- Consequences of a strike: no flat-rate wage deduction of one day's remuneration if the strike was shorter than one day,[22]
- Strike bans: no blanket strike ban for police,[23]
- Restrictions on the right to strike: no restrictions for posted workers,[24]
- Prohibitions and restrictions on the right to strike: through court decisions in interim legal protection (so-called "unilateral application procedure" filed by employers),[25]
- Prohibitions and restrictions on the right to strike: Prohibitions and restrictions for certain categories of workers (e.g. railway workers).[26]

In contrast to the positive outcomes the ECSR found that the restrictions on the right to strike were justified and therefore did *not find a violation* in 4 cases:

- Interference by court decisions in interim relief,[27]
- Interference by obligation to strike-breaking work,[28]
- Strike ban for army personnel,[29]

[22] The case concerned the "indivisible thirtieth" rule (whereby any non-performance of service during part of one day gives rise to a deduction of earnings equal to the indivisible fraction of one thirtieth of monthly salary, each month being deemed to have 30 days), and which applies to strikes lasting less than one day in the state civil service, ECSR 14.9.2022 – No. 155/2017 – *Confédération générale du travail (CGT) / France*, see para 1.
[23] ECSR 2.12.2013 – No. 83/2012 – *European Confederation of Police (EuroCOP) / Ireland.*
[24] ECSR, see n 20 above.
[25] The case concerned court intervention in collective disputes since 1987 under the urgent procedure, particularly in the so-called "unilateral applications procedure", 13.9.2011 – No. 59/2009 – *European Trade Union Confederation (ETUC)/Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/Confédération des Syndicats Chrétiens de Belgique (CSC)/Fédération Générale du Travail de Belgique (FGTB) v. Belgium*, see para 1 and 16, respectively.
[26] ECSR 16.10.2006 – No. 32/2005 – *Confederation of Independent Trade Unions in Bulgaria, Confederation of Labour "Podkrepa" and European Trade Union Confederation (ETUC) / Bulgaria*.
[27] ECSR 24.1.2024 – No. 201/2021 – *European Trade Union Confederation (ETUC), Netherlands Trade Union Confederation (FNV) and National Federation of Christian Trade Unions (CNV) / Netherlands*.
[28] ECSR 21.3.2018 – No. 116/2015 – *Matica Hrvatskih Sindikata v. Croatia.*
[29] ECSR 12.9.2017 – No. 112/2014 – *European Organisation of Military Associations (EUROMIL) / Ireland*.

- No evidence of disproportionate wage deduction for strike time.[30]

The decisions in those four cases appear particularly problematic because they accept very far-reaching restrictions on the right to strike.[31]

In 4 further cases the ECSR found that the complaint had been insufficiently motivated (possibly for lack of evidence).[32]

IV. Specifically: Reporting Procedure – Germany

Taking Germany as an example, one can at least see that important restrictions on the right to strike are criticised. Although no results are available in the complaints system because Germany has not ratified the CCPP, the ECSR has – for decades and as confirmed in its last "Conclusions"[33] – criticised three specific restrictions as follows:

- The prohibition on all strikes not aimed at achieving a collective agreement constitutes an excessive restriction on the right to strike;
- The requirements to be met by a group of workers in order to form a union satisfying the conditions for calling a strike constitute an excessive restriction on the right to strike;[34]
- All civil servants, regardless of whether they exercise public authority, are denied the right to strike.

However, all points of criticism continue to exist and are still disputed by the Federal Government.

[30] ECSR 12.10.2004 – No. 16/2003 – *Confédération française de l'Encadrement CFE-CGC / France*.
[31] This is not the place to deal in detail with those decisions. However, they may beg the question how somewhat contradictory decisions are to be justified; consider for instance those on
- court interventions: The Belgian case was ruled a violation (see n 25), but the Netherlands case no violation (see n 27);
- deductions from remuneration: one French case was a violation (see n 22), the other no violation (see n 30).

[32] ECSR 22.3.2022 – No. 159/2018 – *Associazione Professionale e Sindacale (ANIEF) / Italy*, 30.6.2021 – No. 147/2017 – *Unione Nazionale Dirigenti dello Stato (UNADIS) / Italy*, 9.9.2020 – No. 144/2017 – *Confederazione Generale Sindacale (CGS)/Italy*, 7.7.2020 – No. 146/2017 – *Associazione Professionale e Sindacale (ANIEF) / Italy*.
[33] ECSR Conclusions XXII-3, p 30 (https://rm.coe. int/conclusions-xxii-3-2022-germany-e/1680aa9854).
[34] The underlying problem here is the union's power to assert itself (*Durchsetzungsfähigkeit*).

D. Conclusions

I. Evaluation

In general terms, the ECSR's previous case law[35] provides a good basis for a better understanding of the scope of protection and the restrictions on the right to strike that are permissible in the Committee's view.

Concerning more specifically the decisions to date in the complaints procedure, they show a rather negative trend: While the earlier decisions (up to 2013) tended to be more strike-friendly, the most recent decisions (especially against the Netherlands) indicate a more strike-restrictive approach.

II. Recommendations

In the *reporting system* it is particularly important that trade unions submit observations on the report of the respective government (of the states that have not ratified the CCPP) by 30 June 2025; they have the opportunity to criticise all restrictions on the right to strike.

In the *complaints system*: When considering to lodge a complaint, it is especially important to check the prospects of success very carefully and in any case to prepare any complaint on the right to strike very well.

[35] As summarised in the Digest (n 12).

§ 5 Spain: Successful Cases before the Supreme Court

Armando García López

A. Introduction

The right to strike is recognized in Article 28.2 of the Spanish Constitution and is classified as a fundamental right, which means it enjoys special protection compared to other rights also recognized in this fundamental law. Historically, the right to strike has had different classifications in the Spanish legal system, ranging from being considered a crime in the Penal Code to being seen as a simple freedom. Currently, the right to strike is regulated in Royal Decree-Law 17/1977 on labor relations, a regulation that predates the Spanish Constitution.

The right to strike is enjoyed by employed workers but is exercised collectively, since an individual strike would be considered a breach of the employment contract. During a strike, the employers' rights are limited, as they cannot hire new workers or close the company except in exceptional situations such as the existence of a clear danger of violence against people or serious damage to property or illegal occupation of the workplace. To exercise the right to strike, the requirements established in Article 3 of the Royal Decree-Law must be met: express agreement to declare a strike adopted by the workers or their representatives, prior notice to the employer and the labor authority, and formation of a Strike Committee to guarantee the safety of people and property.

Strikes with political purposes or those called to alter what has been agreed in a collective agreement during its validity are considered abusive or illegal. The right to strike is also limited in the event that it affects essential services for the community. To guarantee the maintenance of these services, minimum services must be established by the governmental authority.

The next section provides comments on some interesting judgments in this area in which both the right to freedom of association and workers' right to strike have been declared violated.

B. Key Judicial Rulings on the Right to Strike

I. Union Liberators[1]

This conflict is very interesting because here the company prevented the so-called "union liberators" from going on strike. "Union liberators" are representatives of the workers who, due to the accumulation of union working hours that other representatives of the workers give them, are exempt from going to their workplace.

This case unfolded as follows: A General Strike was called and the UGT union issued a statement to its delegates in the public company Paradores de Turismo, stating that for the day of the strike the licenses of its union liberators would be suspended, so the same deduction would be made in their salaries as any worker going on strike.

The company replied with a statement that union liberators would not be considered workers on strike, nor would the corresponding salary be deducted.

A lawsuit was filed by UGT before the National Court requesting that the company's anti-union behavior be declared null and void due to the content and publication of the statement.

The National Court upheld the lawsuit and the company appealed to the Supreme Court, which ruled that the company's communication constituted an act contrary to the right to strike and that it must be dceclared as null and void, since the company's refusal deprived the union of its power to freely manage the use of the hourly credit and thereby violated its right to freedom of association.

II. Employer Coercion[2]

It is a common occurrence that a company puts pressure on its workers not to go on strike. During a deadlock in the negotiation of the Tecnocom engineering company agreement, the Comisiones Obreras union called a strike. The day before the strike, the company's CEO sent a statement to all the workers in which, among other things, it stated:

> If the strike is followed tomorrow, it is quite certain that some of our clients will decide to look for another provider for their services, and

[1] Supreme Court 6.4.2004 – Rec. 40/2003 (RJ\2004\5150).
[2] Supreme Court 12.2.2013 – Rec. 254/2011 (RJ\2013\2866).

> it is also certain that this will force us to take traumatic measures, such as the dismissal of the people dedicated to the provision of said services. This is not a threat but only an advance notice of what will happen if the strike is supported.

Faced with this, the Comisiones Obreras union filed a collective dispute lawsuit before the National Court for violation of the right to strike, and this Court upheld the lawsuit.

The company appealed to the Supreme Court and the Court confirmed the ruling of the National Court, holding that the company harmed the right to strike by the statement sent by the CEO. The judgment indicated that the statement had a clear coercive and threatening nuance by threatening with dismissals not only the workers who were going to go on strike, but also the workers who provided service in contracts that could be canceled by client companies. In addition, the judgment indicated that the statement could have caused the workers who did not intend to go on strike to put pressure on those who did intend to go on strike to go to work.

III. Improper Strikebreaking[3]

In this case, a collective dismissal was declared null and void for violating the right to strike. The Coca-Cola company initiated a collective dismissal process and during the negotiation in the consultation period that must be carried out to avoid or reduce the effects of the dismissal (Article 2.2 of Directive 98/59) by the Comisiones Obreras and UGT unions, a strike was called in the company.

Because all the workers followed the call to strike in the bottling plant of the town of Fuenlabrada (Madrid), Coca-Cola used bottling plants of other companies of the Coca-Cola group that were in other towns, to supply the product to customers who dealt exclusively with the Fuenlabrada plant.

The collective dismissal procedure ended without an agreement, and Comisiones Obreras, together with other unions, filed a lawsuit challenging the collective dismissal. It requested, among other things, that the dismissal be declared invalid for violation of the right to strike, since the company adopted production measures aimed at counteracting the effects of the strike called during the negotiation of the

[3] Supreme Court 20.4.2015 – Rec. 354/2014 (RJ\2015\1249).

consultation period of the collective dismissal. This is called “improper strikebreaking” and it consists of the use of the workers from other companies of the group to replace the workers on strike.

The case reached the Supreme Court, which held that these facts constituted a violation of the right to strike and also that the company’s conduct significantly interfered in the consultation period of the collective dismissal: since the strike by the workers of the Fuenlabrada plant did not have negative effects on the company (since it continued to supply its customers with the product from other bottling plants), the position of the workers’ representatives at the negotiating table was weakened.

The consequence was that the collective dismissal was declared invalid and the company was ordered to reinstate of all the dismissed workers and to pay their salaries.

IV. Managerial Substitution of Striking Workers[4]

A strike began in the company B.S.H. Electrodomésticos España, and the question that the Court had to resolve was whether the right to strike was violated in a case in which several middle managers replaced the employees who were going on strike on their own initiative and without authorization from the employer, although the employer did not prevent the substitution.

The Court concluded that the substitution of workers who had gone on strike by other workers of the company constituted an abusive exercise of the employer’s management powers. It is not necessary for there to be direct orders from the employer in this sense, since the violation of the right to strike also occurs as a consequence of by the employer’s not exercising the power of direction to prevent violations of fundamental rights from occurring in the company on the part of the people subject to that power of direction.

V. Coercion by Airline[5]

During September 2019, several strikes were called at Ryanair to prevent the closure of several of the company’s bases in Spain and thus the dismissal of workers. The company issued the statements reproduced below, but before this, two unions

[4] Supreme Court 5.5.2021 – Rec. 4969/2018 (RJ\2021\2159).
[5] Supreme Court 13.4.2023 – Rec 217/2021, Number 273/2023.

filed lawsuits before the National Court and this court upheld the lawsuits condemning the company to compensate each plaintiff union for moral damages caused in the amount of 30,000 euros and to reinstate the workers who participated in the strike in the productivity bonus.

The company appealed to the Supreme Court. In the statements to the staff, the company, among other things, claimed that "the strike is designed to cause unnecessary problems to our Spanish passengers"; "if these strikes continue, there may be attempts by the workers who go on strike and their unions to intimidate and threaten the people who want to work"; "the crew that does not attend their scheduled flight will not receive the basic salary, extras, payment for flight hours, nor will they be entitled to the September productivity bonus".

Based on this last affirmation of the loss of the productivity bonus, the Supreme Court found that the workers who intended to go on strike were threatened with a loss of salary greater than the equivalent of the deduction of the strike day, which made many workers give up their intention to go on strike. The statements contained other affirmations, such as that "no worker who goes on strike or their unions will be able to intimidate or interfere with you". The company also offered those who intended to go to work on those days the possibility of doing so by taxi, which the Court took to mean that preferential treatment was given to these workers that was not usual during normal work days. Finally, with the statement "If you are not scheduled to work, but you want to volunteer to do so during your day off to help our passengers, please let us know," the court presumed that the company intended to promote "internal strikebreaking," that is, to use workers of the company itself to replace those who were on strike.

In conclusion, the Court found that the conduct of the company constituted a violation of the workers' right to strike and of the freedom of association of the unions calling the strike, in addition to the abusive use by the company of its power of organization.

VI. Replacement of Striking Workers with Others[6]

In this case, the Court had to determine whether the company had engaged in a case of "internal strikebreaking" by entrusting the presentation of a radio program to a worker other than its usual presenter on the day that she went on strike.

[6] Supreme Court 16.10.2024 – Rec. 211/2022 (JUR\2024\396843).

A strike was called in the company Agencia Pública Empresarial de la Radio y Televisión de Andalucía. The presenter of a radio program decided to exercise her right to strike and the company replaced her with another presenter. The replacement of the usual presenter of this radio program by another presenter normally only occurred occasionally in cases of illness, vacations and the like.

The court found that the replacement of the worker constituted a business abuse and that the company has violated her right to strike by allowing the program to be broadcast despite the fact that the worker who customarily presented it was on strike.

VII. Infringement of the Right to Strike of the Workers of a Subcontractor by the Main Company[7]

Finally, one recent judgment confirms that companies continue to violate the right to strike with all kinds of stratagems. The diversion of service orders to other companies of the group was mentioned above with regard to the Coca-Cola case. In this judgment, however, the particularity is that work orders were diverted to subcontractors of the main company and, therefore, not members of the same group of companies. The company is Telefónica. When this company subcontracts services, it includes in these contracts a clause that allows it to divert to any of the subcontracted companies, the service orders corresponding to geographical areas different from the one they have been assigned.

A strike was called in Cotronic, one of the subcontracted companies, and the main company, Telefónica, diverted work orders to other subcontracted companies. The works council of the Cotronic subcontractor filed a lawsuit for collective dispute in which it had to be resolved whether the action of the co-defendant company, which was not the employer of the workers who supported the strike, constituted a violation of their right to strike.

The Court found that it was proven that during the strike, Telefónica used the strategy of moving service orders to other subcontractors in the geographical area assigned to Cotronic in a percentage much higher than was usual during periods not coinciding with the strike. In addition, the court found that this action was not justified by the existence of a clause in the contracts allowing the main company to assume any of the activities of the collaborating companies. Said clause was only valid in ordinary circumstances of business activity, but it could not be activated

[7] Supreme Court 14.11.2024 – Rec. 227/2022, Number 1.246/2024.

when fundamental rights of third parties were at stake and with the intention of preventing the called strike from achieving its purpose. Finally, it declared that Telefónica violated the right to strike of the workers of Cotronic, exploiting the special link between the two companies.

C. Conclusion

In all these judgments, fundamental rights such as the right to freedom of association or the right of workers to strike have been declared violated. But companies continue to interfere in the exercise of these rights, so we must continue fighting to defend these rights.

§ 6 Italy: The Right to Strike in Public Interest Services

Giovanni Orlandini

Italy deserves attention in the European context because it shows how the right to strike can be severely restricted even in a system in which this right is expressly and solidly recognised as a fundamental right in the Constitution. In particular, the Italian case shows very well how through the technique of balancing it with other rights and freedoms protected by the Constitution, the right to strike can be deprived of much of its content and rendered de facto an ineffective weapon.

A. The Right to Strike in the Italian Legal Order

The right to strike is recognised by Article 40 of the Italian Constitution, which delegates the ordinary law to regulate its exercise. However, no law in this matter was adopted until 1990, when Law No. 146/90 was approved to regulate strikes in the area of public services. Until then, the regulation of the right to strike came about only through case law, thanks to the principles developed by the Constitutional Court and the High Court (Corte di Cassazione). The latter in particular has progressively strengthened the status of this right, recognising that its content, not being specified in any way by the Constitution, coincides with "the common meaning that is attributed to it in the factual industrial relations context"[1]. Consequently, no limit to the right to strike can be configured by interpreting Article 40 in relation to its mode of exercise and the purposes it pursues. The only legitimate limits permitted by the Italian legal system are those aimed at protecting other constitutional rights (the so-called external limits), as also affirmed by the Constitutional Court.[2]

According to absolutely settled case law, the right to strike is considered an individual right of workers, albeit to be exercised collectively. The "individual" nature of the right to strike reflects the extremely pluralist nature of the Italian industrial relations system, in which many different unions coexist. As an individual right, it is inaccessible to the trade unions. There is therefore no peace obligation and the peace clauses included in collective agreements have little effect because they do not legally bind workers.

It is precisely the extreme pluralism of the industrial relations system that explains the origin of Law 146/90 regulating strikes in essential public services. The law was

[1] Corte di Cassazione – Judgment No. 711/80.
[2] Corte Costituzionale – Judgment No. 222/76.

adopted with the consensus of the main trade union confederations (CGIL, CISL, UIL) with the main objective of limiting the confrontational conduct of the so-called autonomous unions (grassroots unions). In 2000, the law was substantially reformed to strengthen and broaden its scope (Law No. 83/2000). These two dates are not random: 1990 was the year of the World Cup in Italy and 2000 was the year of the "Great" Jubilee called by Pope John Paul II.

B. Law No. 146/90 on the Exercise of the Right to Strike in Essential Public Services

The purpose of Law 146/90 is to balance the right to strike with the rights that (like the right to strike) are based on the Constitution and which are held by the users of public services (for this reason defined as "essential"). This balancing is concretely carried out, in compliance with the principles laid down by the law, in the various public service sectors by rules determined through a procedure involving the social partners and an administrative authority (the Commissione di Garanzia), which has the task of assessing the content of collective agreements identifying the minimum services ("prestazioni indispensabili") to be guaranteed during strikes and of supervising compliance with the rules laid down by the law and by the agreements themselves.

It is therefore up to the social partners, through collective bargaining, to define the rules applicable to the individual sectors and the concrete content of the "minimum services" in each sector. But this is a fictitious collective autonomy, because the content of the agreements is conditioned by the provisions of the law and the intervention of the Commissione, which can also replace the social partners and directly dictate the rules to be observed in the individual sectors.

In fact, the law requires collective agreements to provide for pre-strike notice (minimum 10 days), cooling-off and conciliation procedures; to indicate the maximum duration of a strike (which normally can never exceed 24 hours); to establish minimum intervals between one strike and the next that affects the same service (even if called by a different union); to establish percentages of service to be guaranteed during the strike (as a rule, 50% of the norm) and of workers who provide them (as a rule, 1/3 of the total); to establish daily time slots and exemption periods during the year (primarily, Christmas, Easter and summer holidays) in which it is forbidden to strike (i.e. during which the service must be 100% guaranteed).

To understand the real impact of these rules, one must consider the breadth of their scope, as becomes clear from the long list of activities qualified as "essential

services" laid down in Article 1, Law 146/90. To give just one example: even the opening of museums is considered by the law an essential public service because it guarantees the right to the protection and enjoyment of the country's artistic and cultural heritage.

Moreover, this list has increased over the years because the notion of "essential public service" is not determined by law in an exhaustive manner. A public service is considered "essential" if it can be traced back to a constitutional right, but the number of constitutional rights listed by the law is extremely high and practically any public service can be traced back to them, regardless of the public or private nature of the body providing it. It is up to the Commissione to broaden the scope of the law by defining the type of activities to be included in the notion of "essential public services".

On the other hand, not only "strike" actions fall within the scope of the law, but any conduct that affects the service, such as a workers' assembly[3] or even the simultaneous sick leave of a "too high" number of workers[4].

Lastly, the law gives the public authority (Minister or Prefect) an extraordinary power to adopt back-to-work orders (orders of "precettazione"), normally at the request of the Commissione, in the event that the strike causes "a well-founded danger of serious and imminent harm to the rights of the person" (Article 8 Law 146/90) (obviously, in the opinion of the Minister and of the Commissione). The order can be adopted (in theory) even if the rules on minimum services are complied with. Violation of this order results in very heavy fines for the union calling the strike and for the workers participating in it (who, however, cannot be dismissed).

It is a very incisive authoritative power, the use of which varies (of course) as governments change. The current minister of transport has made and is making massive use of it. And this despite the fact that the number of strike hours has not increased at all in recent years.

C. Data on Strikes in the Public Services in Italy

The data on strikes in Italy indicate that the number of strike hours in public services since the law was approved has remained more or less constant, with some

[3] Commissione di Garanzia – Resolution No. 04/212.
[4] Commissione di Garanzia – Resolution No. 15/61, confirmed by Corte di Cassazione – Judgments No. 13206, 13220, 13181, 13537/2024

fluctuations and in a context of general reduction in conflict (as is the case in almost all European countries).

In this graph, showing the hours of strike by sector (per 1000 working hours), the yellow line refers to strike hours in the service sector since 2005 to 2022, while the black line refers to strike hours in the industry.

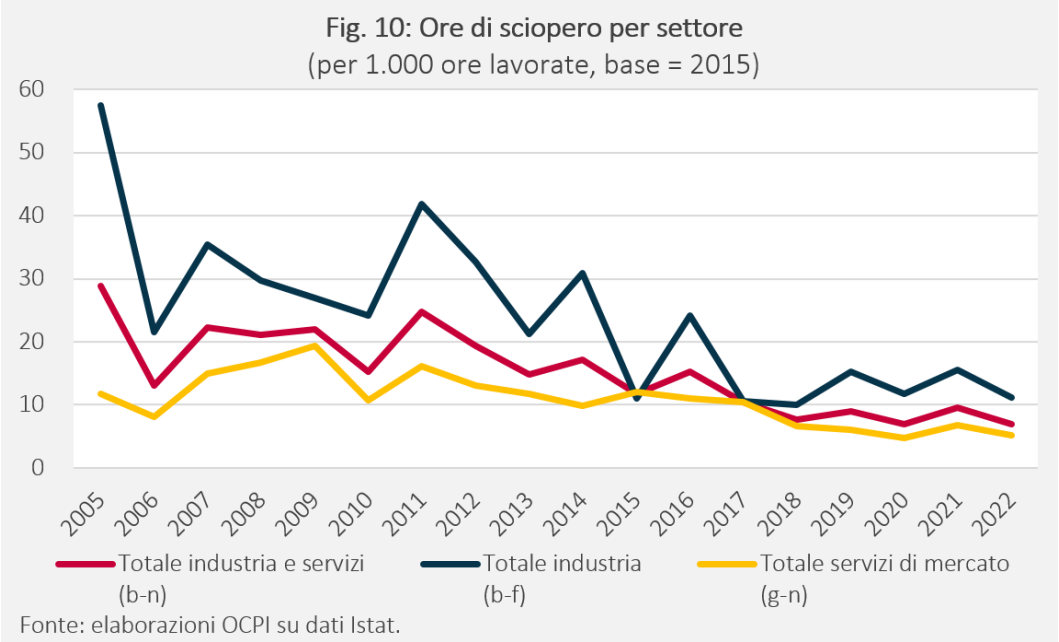

Illustration 1: Strike hours per sector.[5]

It is true, however, that the law has produced a sort of paradoxical effect, at least in some sectors (like transport and cleaning services): since a single strike action is ineffective and essentially harmless, unions tend to multiply strike actions, exploiting the few spaces that the law leaves open. In other words, instead of a single strike completely blocking the service, numerous strikes of a few hours are called over several months, with the consequence that the inconvenience and the impression of disorder for the users increases, instead of decreasing.

The following graph shows the trend in the number of strikes in the different service sectors since 2015. The lines refer, from top to bottom, to national health service – regional and local authorities – railway transport– air transport – local public transport – telecommunications – cleaning – enviromental sanitation.

[5] Maroccia/Turati, Quanti sono gli scioperi in Italia?, online: https://osservatoriocpi.unicatt.it/ocpi-Quanti%20sono%20gli%20scioperi%20in%20Italia.pdf (3.6.2025), based on data of the National Institute of Statistics.

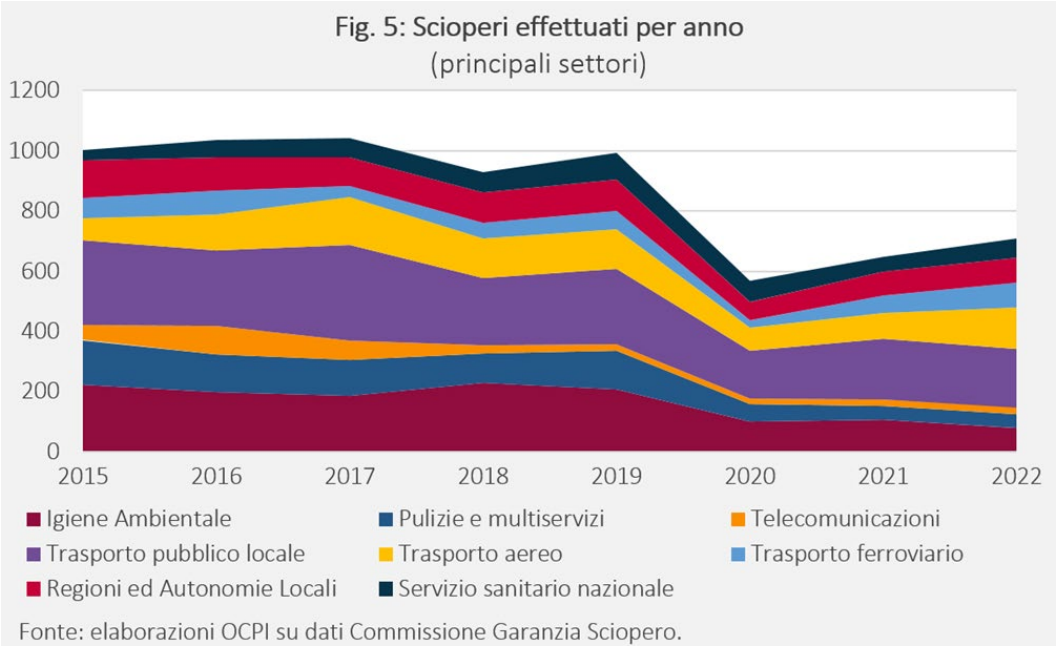

Illustration 2: Strikes carried out per year (main sectors).[6]

The reason for this persistent conflict in some public services is mainly to be found in the public budget cuts and wage austerity policies pursued by all governments since the 1990s. Italy is the European country with the lowest wage growth rates, and this is particularly the case in some service sectors (such as cleaning and transport services) where private companies operate under concession from the state or local authorities. The harmlessness of strikes, on the other hand, does not allow trade unions to effectively counter these policies nor to adequately support collective bargaining, in a sort of vicious circle fostered precisely by the law on strikes.

D. The Legal Strategies of Trade Unions to Defend the Right to Strike

What legal strategies have been adopted by trade unions to defend the right to strike in such a legal framework?

[6] Maroccia/Turati, Quanti sono gli scioperi in Italia?, online: https://osservatoriocpi.unicatt.it/ocpi-Quanti%20sono%20gli%20scioperi%20in%20Italia.pdf (3.6.2025), based on data of the Commissione Garanzia Sciopero.

I. The Choice of Administrative Courts

First, the trade unions, both confederations and autonomous unions, have acted at the level of domestic law, challenging acts of the Commissione and public authority orders before the administrative courts.

The actions have been brought before administrative courts, not labour courts, because their purpose is not to challenge employers' conduct but the exercise of administrative power, on which the limits on strike actions depend. This makes action in court more difficult, because administrative judges, on the one hand, are less used to dealing with labour issues, and on the other, tend to respect the discretion of administrative bodies, unless there are obvious violations of the law. Legal disputes are therefore rarely favourable to the union, because Law 146 does not provide for clear and precise limits to administrative power, in particular that of the Commissione, which is granted wide discretionary powers in dictating the rules on strikes.

Moreover, to effectively counter a back-to-work order (adopted a few days before the strike), it is necessary to obtain an immediately enforceable measure (injunction) that "suspends" the order. But such a measure is rarely granted by administrative courts.

II. Recent (Partly) Union-Friendly Administrative Case Law

In the last two years, however, there have been some (weak) signs of change in the case law, evidence that both the Commissione and the government authority have really gone too far in exercising their powers to restrict the right to strike.

For the first time, in March 2023, the Consiglio di Stato (the Supreme Administrative Court) annulled a resolution of the Commissione which had amended the collective agreement on minimum services in local public transport because it provided for an interval of "only" 10 days between one strike and the next (the so-called "rarefaction rule"): this was too short for the Commissione, which had imposed an interval of 20 days (resolution No. 18/138).[7] The increase in the duration of the interval was necessary (in the opinion of the Authority) to counter the excessive frequency of strikes in the sector that had occurred in recent years. According to the administrative tribunal, however, the Commissione acted unlawfully because in reality, as the data clearly show, there had been no increase in strikes in local

[7] Commissione di Garanzia – Resolution No. 18/138.

public transport: therefore the further restriction of the right to strike was to be considered unjustified.[8]

Most of the recent legal actions have concerned the back-to-work orders adopted by the current minister of transport to prevent general strikes called (autonomously) by the main confederations (CGIL and UIL) and autonomous unions. These legal actions produced case law that was in some cases positive for the trade unions, and in any case important, because with it the Tribunali amministrativi regionali (TARs, regional administrative courts) reduced the authoritative powers of the government authority, subordinating them to those of the Commissione.

In particular, the TARs rigorously applied the rule of Law 146/90 that conditions the Minister's power on a previous warning by the Commissione, except in the case of particular reasons of "necessity and urgency" that the Commissione has not considered (Article 8, para. 2). For this reason, the Lazio TAR in March 2024 annulled an order of the minister that had reduced to from 24 to 4 hours the duration of a national strike in the public transport sector called by the autonomous trade unions[9] and in December suspended a new order adopted against the same trade unions.[10] But, for the same reason, another order adopted to reduce to 12 hours the duration of a strike called by CGIL and UIL was instead judged legitimate, having been preceded by a warning from the Commissione.[11]

These judgments reduce the government authority's power to prohibit or hinder strikes. On the other hand, however, they strengthen the role of the Commissione, which, as mentioned, has very broad powers both in dictating the rules on strikes (imposing them on the social partners) and in ensuring compliance with them by workers and trade unions (who are subject to its sanctioning power). These powers are de facto unquestionable on the merit. Even the recent judgment of the Consiglio di Stato on "rarefaction", mentioned above, confirms that judicial review only concerns procedural aspects, such as, in that case, a defect in the motivation of the contested act. In other words, before the administrative judge one cannot challenge the specific rules on strikes as such, but only the manner in which they were adopted by the Commissione.

It is true that the Commissione is supposed to be a neutral and impartial body (as opposed to the minister), given that it is an authority composed of experts and not politicians. However, it cannot be ignored that these experts are chosen by the

[8] Consiglio di Stato – Judgments No. 2115 and 2116/2023
[9] TAR Lazio – Judgment No. 6084/24.
[10] TAR Lazio – Decree No. 13467/24.
[11] TAR Lazio – Judgment No. 5939/24.

presidents of the two branches of parliament, who are members of the government parties. The Commissione is therefore an expression of the current government and, in fact, its orientation changes as the governments change.

E. USB's Collective Complaint before the European Committee of Social Rights

In addition to domestic law, international law has also been used by unions to implement legal strategies in defence of the right to strike.

The main autonomous trade union (USB) in 2023 lodged a collective complaint before the European Committee of Social Rights (ECSR) asking for recognition that Law 146/90, read in the light of its application practice, is contrary to Article 6(4) (concerning the right to strike) and Article G ("restrictions") of the Revised European Social Charter.[12] As is well known, Article G allows restrictions and limitations to the rights recognised by the Charter only if "necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals".

The object of the complaint is not only the rules and principles provided for by Law 146/90, but the way in which these rules and principles are implemented and specified by collective agreements and the acts of the Commissione. In particular, the complaint challenges the breadth of the discretion and powers attributed to the Commissione and the public authority in inhibiting or limiting the exercise of the right to strike, such as to render their acts almost removed from judicial review.

The complaint puts emphasis on particularly stringent sectoral rules and on emblematic cases involving the complaining union that demonstrate the degree of compression of the right to strike produced by Law 146. For example, it is pointed out that both the duration of the mandatory interval between two strikes affecting the same sector and the duration of the conciliation procedure, also taking into account the mandatory notice period, in some sectors is equal to or greater than 30 days; and that the strike, even in these cases, can be further postponed by the Commissione.

The duration of the periods of the year in which it is forbidden to strike is also deemed excessive by the complainant trade union. These limits are particularly strict in the transport sector. Local transport workers are not allowed to strike for a large part of the summer period (continuously, from 28 July to 3 September) nor

[12] Complaint No. 208/2022 – *USB v. Italy.*

"in connection with significant events".[13] For this reason, for example, the Commissione has declared strikes during the Chocolate Festival in Perugia, the Motorshow in Bologna, the Household Furniture Exhibition in Rho and the Friuli DOC Wine Festival in Udine unlawful, and the Prefect of Milan prevented strikes because they risked creating troubles for a local marathon[14] and for the traditional local Christmas market.[15]

I. ECSR Precedents on Strikes in Public Services

The ETUC submitted its own observations in support of the complaint, even though USB is not one of its members. Both the complaint and the ETUC's observations are based on the principles of international law (ILO standards, primarily) and on the previous conclusions and decisions of the ECSR, which has repeatedly censured the legislation and case law of several states because they restrict the right to strike in public services in a manner not consistent with the Charter.[16] Italy was likewise judged not in compliance with Article 6(4) due to the limits on the duration of the strike and the excessive breadth of the power of the government authority to adopt back-to-work orders.[17]

The government's reply is mainly based on a broad interpretation of Article G of the Charter, according to which limitations on the exercise of the right to strike would always be allowed to guarantee the continuity of public services that a state considers "essential".

The risk that ECSR will adhere to the government's argument has increased after its recent decision on the Netherlands,[18] which followed the infamous *Humpert* case before the ECtHR.[19] In this decision the Committee emphasises the distinction between, on the one hand, the "regulation" of the right to strike, which may be permissible in itself under Article 6(4) of the Charter, and, on the other hand, any further "restriction," which must meet the conditions set out in Article G of the Charter. Such a distinction could legitimise many of the limits provided for in Law

[13] Commissione di Garanzia – Resolution No. 18/138.
[14] Prefettura di Milano – Order of 9 April 2019.
[15] Prefettura di Milano – Order of 6 December 2018.
[16] Among others, ECSR Conclusions 2018 – Ukraine and Iceland; 2004 – Norway; XVII-1 – Czech Republic; XIV-1 – Cyprus; ECSR 21.3.2018 – No. 116/2015 – *Matica Hrvatskih Sindicata v. Croatia*; 16.10.2006 – No. 32/2005 – *Confederation of Independent Trade Unions, Confederation "Podkrepa" and ETUC v. Bulgaria.*
[17] ECSR Conclusions 2014 – Italy.
[18] ECSR 23.7.2024 – No.201/2021 – *ETUC, FNV and CNV v. the Netherlands*
[19] ECtHR 14.12.2023 – 59433/18, 59477/18, 59481/18 and 59494/18 – *Humpert and Others v. Germany*.

146/90, because the Committee considers the obligation to give notice, the cooling-off period and conciliation procedures to be "regulation". Thus, the ECSR might not even consider Article G to justify most of the limitations in the Italian law.

However, as Carmen Salcedo notes in her dissenting opinion, the distinction between regulation and restriction is not at all clear and precise, because the former, if it excessively limits the exercise of the strike, can overlap with the latter. In the past, regulations have in fact been considered legitimate by the Committee with certain limitations: notice and cooling-off period not too long; conciliation procedures not too onerous; rules sufficiently precise and foreseeable by law, etc.

On the other hand, prohibitions to strike for long periods during the year and the obligation to guarantee "minimum services" should fall under "restrictions". Here again, however, the recent decision increases the uncertainty of the outcome of the complaint, because the ECSR in it states that there is no violation of Article G if the restrictions on the right to strike are not "systematic".

In conclusion, the outcome of the complaint will depend on a rather unpredictable (because very subjective) assessment of the proportionality of the rules limiting strikes, considering their practical application since the entry into force of Law 146/90. Certainly the decision concerning the Netherlands does not justify optimism, since the Dutch courts' wide discretion to limit, postpone or prohibit strikes that create inconvenience or damage "towards the person and the goods of others" was not found to be contrary to Art. 6(4).

II. The Possible Effects of the ECSR Decision in the Italian Legal Order

In case of a decision of non-compliance, the problem of its effects in the Italian legal order will arise. It must be considered that in Italy (as in many other states) ECSR decisions are not considered legally binding, that is, they do not produce direct legal effects in the domestic legal system, since they are not binding on national courts.[20] However, they should at least be considered by judges (of both lower and higher courts) when interpreting domestic law. The Constitutional Court should also take them into account when assessing the constitutionality of a law. It is anyway extremely unlikely that it could declare Law 146/90 contrary to the Constitution, having declared the opposite in the past.[21]

[20] As has been repeatedly affirmed by the Corte Costituzionale, most recently in Judgment No. 7/24.
[21] Corte Costituzionale - Judgment No. 344/96.

The main objective of the claimant is therefore to obtain a decision that can indirectly affect the various authorities (judicial and administrative) that, at different levels, concur in interpreting and applying Law 146/90. Above all, the hope is to influence the activity of the Commissione, inducing it to greater self-restraint in evaluating the content of collective agreements and intervening in trade union disputes.

On the other hand, it is illusory to think of legislative reform as moving in a more worker-friendly direction. At most, a censure by the ECSR could induce the current government to give up on plans to reform it in order to further restrict the right to strike (for example, by introducing compulsory pre-strike ballots), as announced by the minister of transport.

§ 7 Germany: Political Strike – Legal Situation and Recent Climate Protests

Theresa Tschenker

A. Introduction

The climate activists from Fridays for Future have regularly called for climate strikes since 2019. These protests have mainly been organized by school students. However, workers have also been invited to this “strike”. Some of them responded to the call. However, the trade unions under the Deutscher Gewerkschaftsbund (German Trade Union Confederation) did not call on their members to strike, but instead asked them to take leave, work overtime or ask their superiors for permission to take part in the protests. The trade unions acted in accordance with the legal situation: in Germany, strikes that are not aimed at collective bargaining are illegal. If the unions had called on their members to take part in the climate strike, they would have risked facing claims for damages from their employers. The German ban on political strikes therefore weakened the climate movement.

The ban on political strikes is almost as old as the Basic Law. To be precise, it is only a few years younger, because shortly after the Basic Law came into force and the first strikes took place in the young Federal Republic, a dispute arose over the interpretation of this legal text. The question arose as to how far the newly born right to strike actually extended.

The very term “political strike” begs the question: Can there even be such a thing as a non-political strike? Isn't a strike that "merely" involves a pay rise or a reduction in working hours also political? In this author’s estimation, the answer is yes, because a strike, even if it is about supposedly everyday demands, is the central moment of self-determination in an externally determined world in the capitalist mode of production and bourgeois legal system. After all, it is hard to imagine anything more political than the demand to spend only seven instead of eight hours a day on wage labour and to have the rest of the time at one’s disposal.

Nevertheless, German case law distinguishes between strikes based on collective agreements and strikes that are directed not only at employers but also at the state. German courts have labeled the latter as a political strike and made it illegal.

The fact that this construction and separation of collective bargaining-related and political strikes has little in common with the actual interdependence of business and politics is shown, among other things, by the strikes in local public transport in 2024. On 1 March 2024, public transport workers went on strike in collective bargaining for better working conditions. In many German cities, the strikers took to the streets together with activists from Fridays for Future in the alliance of the climate protection movement and the Vereinte Dienstleistungsgewerkschaft (ver.di) (United Services Trade Union). They called themselves "Wir fahren zusammen" (We're traveling together) and demanded, among other things, an expansion of local public transport. The "Wir fahren zusammen" strike alliance makes it clear that the working conditions of local public transport workers are not only dependent on the results of collective bargaining, but also on government decisions regarding the expansion and financing of transport infrastructure.

Employees in Leipzig also went on strike. The Leipzig public transport company saw the strike not only as a work stoppage within a collective bargaining dispute, but also as a strike against transport policy and therefore an illegal political strike. The company brought an action before the Leipzig Labour Court for an injunction to stop the strike, but was defeated. The court ruled that the planned strike was not political, even if the chamber wondered in a marginal note: "However, the question arises as to whether the alliance does not lead to a mixture of politics and trade union-protected activity"[1].

From a trade union perspective, it is to be welcomed that the court only used the call to strike and the demands that can be regulated in the collective agreement to assess the legality of the strike. This means that the trade union can plan a strike with legal certainty and, due to the illegalization of political strikes, does not have to worry that, for example, demands outside the strike call or statements made at the strike rally will be used to assess the legality of the strike.

Nevertheless, the comment by the chamber of the Leipzig Labour Court reveals that a line may have been crossed here, or that the demarcation between lawful collective bargaining-related and illegalized political strikes is more problematic than the legal dogma with the prohibition of political strikes suggests. German case law marks a strike directed at state authorities as political and therefore considers it illegal. When and under what circumstances this differentiation and the prohibition of political strikes came about and whether the legal dogmatic derivation is

[1] Leipzig Labour Court 29.2.2024 – 14 Ga 5/24.

convincing is not only interesting for understanding the genesis of German strike law. This perspective also helps to further develop the German right to strike, as the current restrictions do not do justice to the strike and its significance in a democracy.

B. The Illusory Separation of Collective Agreements and Politics

The actual connection between the collective bargaining-related strike and political demands at the strike rally established by the chamber of the Leipzig Labour Court is hardly surprising, as the separation between these two matters is not as self-evident as it appears in German case law. The illusory nature of this can be seen in numerous examples of recent strike history, but also in the development of the right to strike as such.

Not only the call by the "Wir fahren zusammen" alliance for a climate strike, but also the strike movement for collective bargaining agreements in hospitals in recent years illustrate the intertwining of working conditions set by employers and the state. Employees in hospitals have gone on strike for better staffing ratios and successfully resisted the ever-increasing work intensification. At the same time, they took their criticism of the hospital financing system to the streets during their strike demonstrations: hospitals should not be run like a commercial enterprise but should be financed to cover demand.

The notion of a strict separation of collective agreements and politics also dissolves when one realizes that legal regulations in favour of employees are often based on collective agreements that were previously enforced by means of strikes. For example, ver.di considered the regulation for needs-based staffing requirements to be a success that was due to the strikes of the campaign to relieve the burden of clinic workers, even though the union criticized in particular the inadequate funding of clinics, which was not remedied by further reforms in the hospital sector.

A similar case that dates back several decades is in danger of being forgotten: The legal regulation on sick pay for workers, meaning the payment of full wages in the event of illness for up to six weeks, goes back to a long- and hard-fought collective agreement by Industriegewerkschaft Metall (IG Metall, the metal workers' union) in Schleswig-Holstein in 1957. The Minimum Wage Act also reveals that it is not a matter of course that the parties to collective agreements and legislation regulate specific and separate working conditions. With the Minimum Wage Act, legislation has regulated a classic collective bargaining issue – wages – because collective

bargaining coverage no longer applies across the board and over-exploitation in the form of low wages is taking place, particularly in precarious employment relationships.

If one takes a broader view and looks at the history of the right to strike in its entirety, it becomes completely clear that the separation of political and collective bargaining-related demands is artificial. Until the Basic Law came into force, every strike was a breach of the law. The strikers were not only fighting for the implementation of their specific demands, but also implicitly for the recognition of their right to strike. The strike is therefore genuinely political, as it first had to fight for acceptance as a legitimate means to exercise fundamental rights and has to prove its legality anew each time – as the recent attacks on the right to strike have shown. Among the attackers are employers who take legal action against strikes without being able to invoke a fundamental right on their side that appears to be protected.[2] Conservative and neoliberal parties,[3] as well as lawyers who specialize in conducting interim injunction proceedings to prohibit strikes,[4] are also calling for legislation to restrict the right to strike.

C. The Ban and Its Consequences for Trade Union Strike Practice

In the vast majority of strikes, trade unions adhere to the requirements of case law. Only a few exceptions can be found in the history of the Federal Republic of Germany.[5] The trade unions usually called on their members to go on strike against legislation if the legal position of employees or trade unions stood to suffer: IG Metall called on its members to strike in 1986 to prevent the reform of Section 116 of the Employment Promotion Act, and in 1996 to avert the Kohl government's restriction of employee protection. Some employers applied for interim injunctions to stop these strikes and were successful in all courts.

Employees also went on strike, some without a union call, against the so-called Emergency Acts in 1968 and the vote of no confidence in Willy Brandt initiated by the CDU/CSU in 1972. In 1983, the DGB called on employees to stop work for five minutes to express their rejection of the NATO Double-Track Decision. These strikes did not result in any legal disputes.

[2] See only as an example: *LTO*, Das Instrument des Wellenstreiks ist zulässig, 12.03.2024.
[3] Summarizing and critically: *Kocher*, Ein glühendes Stück Eisen, 01.04.2024.
[4] *Ubber/von Grundherr,* NZA 2025, 1.
[5] All statements below are based on *Tschenker*, Politischer Streik, 2023.

However, the rule-exception relationship, with regular collective bargaining-related strikes as the rule and so-called political strikes only in exceptional cases, must not be used to justify the prohibition of political strikes. Just because one form of strike is used less frequently than the other does not mean that it loses any legitimacy. Finally, it can be assumed that trade unions adapt their strike practice to the legal situation. As a rule, trade unions only include demands in their calls for strike action that can be the subject of collective bargaining between them and the employers. According to the case law of the Federal Labour Court, only such strikes are covered by Article 9(3) of the Basic Law. The trade unions want to avoid cease-and-desist orders and claims for damages against themselves and warnings and dismissals of their members.

Instead of being satisfied with the legal situation, the question of where the separation of collective agreements and politics and the ban on so-called political strikes comes from must be answered.

D. Emergence of the Right to Strike in Germany

The right to strike has a relatively short history in Germany compared to the practice of striking. The first serious debate on whether a right to strike could be derived from a legal source took place during the Weimar Republic. Most legal scholars and the courts decided against deriving it from the Constitution, citing the debate in the National Assembly. As a result, employees in the Weimar Republic had to terminate their employment relationship before every strike and the trade unions had to agree clauses on the reinstatement of strikers in collective bargaining – a practice that significantly weakened their enforcement power, as the bargaining chips consisted not only of demands to improve working conditions, but also of claims for reinstatement.

On 1 May 1933, the Nazis smashed the trade unions without much resistance and buried the young collective labour law for the next twelve years. In the workplace, “Führer” and “Gefolgschaft” (leaders and followers) were supposed to form a unit that worked for the good of the “Betriebsgemeinschaft” (company community).

It was only after the Allies had liberated Germany from the National Socialist system that the right to strike came to life in the deliberations of the Parlamentarischer Rat (Parliamentary Council) – the constitutional assembly that debated the Basic Law. The members of the Parliamentary Council were in agreement across the entire party spectrum, from the far right to the Communist Party, that the Basic Law

should guarantee the right to strike. They only argued about the legality of certain state-supporting or state-transforming types of strike: the civil servants' strike and the revolutionary strike to overthrow the system. In this discussion, however, even a CDU member of the Parliamentary Council emphasized the importance of the general strike against the Kapp-Lüttwitz putsch in 1920, as it was directed against a "Rechtsunordnung" (legal disorder). Nobody said a word about the collective bargaining aspect of the right to strike. The debate took place just a few days after the first and last general strike in the Federal Republic. On 12 November 1949, over nine million workers in the American and British occupation zones went on strike against price rises, for the transfer of basic industries and credit institutions into public ownership and for the democratization of the economy. The members of the Parliamentary Council mentioned the strike, but none of them suggested that such a form of strike should be excluded from the scope of protection of the fundamental right to strike.

The members of the Parliamentary Council were unable to agree on a specific formulation of the right to strike, which meant that the envisaged fourth paragraph in Article 9 of the Basic Law did not materialize. Trade union rights came into force in the form of Article 9(3) of the Basic Law without explicit mention of the right to strike. The Parliamentary Council had left the details of the regulation of the right to strike to the legislature, which, however, did not address the issue. It was therefore up to the courts to breathe life into this fundamental right.

E. The Illegalization of the Political Strike According to Nipperdey and Forsthoff

The so-called newspaper strike in 1952 gave rise to the first legal dispute over the right to strike. This discussion was to shape the basic lines of the interpretation of the right to strike to this day.

The trade unions called for the printing and publishing workers to go on strike to oppose the reform of the Works Constitution Act, which they said was not in line with the unions' ideas of co-determination in the workplace. The employees responded to the strike call and for two days hardly a newspaper was published in Germany.

The employers' associations sued the trade unions for damages and commissioned two expert opinions to legally substantiate their claims. They engaged the labour law scholar Hans Carl Nipperdey and the constitutional law scholar Ernst Forsthoff. Both were asked to examine whether the newspaper strike was a lawful

work stoppage. They each concluded that the strike, which was directed at the legislature, was unlawful as a political strike and the employers therefore entitled to compensation. However, except for this outcome, the reasoning of the two experts was not the same.

Ernst Forsthoff argued in terms of constitutional law. In doing so, he retained his decidedly anti-democratic and anti-union views, which he had already exhibited in the Weimar Republic and during National Socialist rule. He started from an abbreviated understanding of democracy, according to which a distinction had to be made between political and social decision-making. Social decision-making included collective bargaining. Citizens could influence political decision-making through elections. An interlinking of these decision-making processes is not provided for under the Basic Law. The newspaper strike therefore unlawfully influences the formation of political will as “parliamentary coercion”.

This understanding of democracy was not only opposed by Wolfgang Abendroth, a law and political science scholar commissioned by the German Trade Union Confederation, who argued that the Basic Law guaranteed a participatory democracy. In such a democracy, trade unions are allowed to use various means, including strikes, to influence all decision-making at the level of society and the state, since a separation of these spheres is artificial and contradicts the actual conditions of political decision-making. The Federal Constitutional Court has also consistently ruled in favour of broad social participation in the public opinion campaign and state decision-making. In contrast to Forsthoff, the court assumes that citizens have a broad range of opportunities to participate in democracy. By expressing their opinions, going to demonstrations or joining together in associations, people not only exercise their individual fundamental rights, but also form the cornerstone of democratic decision-making. However, the Federal Constitutional Court has not yet counted the right to strike among the fundamental rights that promote democracy and are necessary, even though it fulfills precisely this function.

Hans Carl Nipperdey developed his very own interpretation of Article 9(3) of the Basic Law. As a legal scholar, Nipperdey had already commented on the labour law of the Weimar Republic. He was able to continue his career under National Socialism and, as a member of the Akademie für Deutsches Recht (Academy of German Law), was involved in reshaping labour law in line with Nazi ideology. In his interpretation of the law during National Socialism, he was primarily concerned with the negation of class antagonism and the avoidance of any self-organization

on the part of employees. Instead, he promoted the “Betriebsgemeinschaft” (company community), which consisted of leaders and followers and was interested in increasing the productivity of each individual and the economic community as a whole.

In continuation of the idea that there was a common interest of employees and employers in economic growth and therefore in an undisturbed production process, Nipperdey considered strikes to be an undesirable and avoidable event under the Basic Law. In his interpretation of the Basic Law, the conflict of interests and inequality between employees and employers played no role. Nor did it take into account the historical recognition that employees are dependent on an effective means of enforcing their demands. He found the strike to be inadequate *per se.* The strike violated the “Recht am eingerichteten und ausgeübten Gewerbebetrieb” (right to the established and operating commercial enterprise) – a right of the employers that was only introduced into strike law by him. Previously, this legal concept only played a role in disputes between companies in competition and press law. He thus gave the economic damage suffered by employers, which as a regular financial loss enjoys no protection under constitutional law, the status of a constitutional right. Even today, the right to set up and operate a business is still weighed against the right to strike.

With regard to the question of how the newspaper strike should be assessed, Nipperdey argued that the actually inadequate strike could only be "socially adequate" if it was conducted within collective bargaining. He used the concept of social adequacy both to justify the right to strike and to restrict it. He thus established an interpretation of the Basic Law that was not only tautological in its legal dogmatics, but also undermined the purpose of the strike, which was to inflict economic damage on employers in order to exert pressure on them to act. The damage was accepted in the case of collective bargaining-related strikes, but not in the case of political strikes.

Even today, legal scholars justify the ban on political strikes with the argument that employers can only give in to the pressure to act within collective bargaining. This argument remains true to the illusory separation of collective agreements and politics. It fails to recognize the complex interdependencies between business and politics as well as the power of employers and their associations to act.

As President of the Federal Labour Court, which was founded in 1954, Nipperdey was finally able to establish his legal opinion on newspaper strikes as applicable

law in the first rulings on the right to strike. The decision of 28 January 1955, which laid down the guidelines for German strike law, was clearly written by Nipperdey. He had already published many of the legal principles contained in the court decision in his expert opinion on the newspaper strike. That Nipperdey dominated the decision-making process is largely due to the composition of the court. Apart from him, there was only one other judge at the Federal Labour Court who had previously been able to gain experience in labour law. Furthermore, it is rightly doubted whether the first judges at the Federal Labour Court were suitable to administer justice in a young democracy, as the majority of them had Nazi backgrounds. In his evaluation of archive materials, Erfurt Regional Court judge Martin Borowsky came to the preliminary conclusion that 14 of the first 25 federal judges had been members of the NSDAP, the SA, candidates or financial supporters of the SS or had passed death sentences and/or published anti-Semitic writings.[6] In 2021, the Federal Labour Court set up a commission of historians to examine its own history, but the results are not yet available.

Although the case law of the Federal Labour Court and the Federal Constitutional Court has changed in many respects, the collective bargaining reference of strikes still exists today. Today, the courts no longer speak of socially adequate strikes, but of proportionate strikes. Case law has also changed with regard to the necessity of strikes. Since the landmark rulings from 1980, it has been established case law that collective bargaining without strikes is “collective begging”. However, the courts have not yet come to terms with the fact that although this extremely important function of strikes is indispensable for fair collective bargaining, it is not the only one. Strikes must be understood in their manifold modes of action; after all, they not only serve the function of collective bargaining autonomy but also enable employees to balance out the asymmetrical bargaining positions on the labour market, contribute to material redistribution, promote democratic participation and enable the self-determined shaping of working and economic conditions for employees.

F. Change in Case Law Necessary, But Dependent on Strike Movement

The German right to strike is based on an anti-democratic foundation that obscures the conflict of interests between employees and employers and is legally flawed. If strikes such as those in the "Wir fahren zusammen" alliance or in the healthcare sector were also legally allowed to address state decision-makers, the democratic

[6] *Borowsky*, KJ 2022, pp. 399-411.

potential of Article 9(3) of the Basic Law could be fully realized. Among other things, case law must address the question of what functions a strike has in democracy and whether these are not just as worthy of protection as the effect of achieving fair results in collective bargaining. In addition, case law should question whether the economic damage suffered by employers is worthy of protection as a legal interest in the right to strike, even though assets as such do not enjoy protection under fundamental rights.

In a decision from 2002, the Federal Labour Court indicated that the reference to collective bargaining with regard to international law, specifically Article 6 No. 4 of the European Social Charter, required a new review.[7] The Council of Europe regularly criticizes Germany for limiting the right to strike by only considering collective bargaining-related strikes to be lawful, most recently in 2022.[8]

The right to strike is judicial law. The courts can interpret it fundamentally differently, as they did in the 1980s. However, this change in case law was not only based on a strong strike movement, but the courts also had to decide on tens of thousands of lawsuits filed by employees for their unpaid wages during illegal lockouts. The thousands and thousands of lawsuits were based on mass proceedings organized by the trade unions. They thus transferred the collective dimension of the strike to court proceedings. Courts will not change their case law solely on the basis of a convincing legal-historical and dogmatic critique. Rather, it takes the pressure of the strike and a broad-based trade union campaign to demonstrate the need for a change in the law.

Bibliography

Borowsky, Martin (2022), Die NS-Belastung des Bundesarbeitsgerichts - vorläufige Bilanz zur personellen Kontinuität, Kritische Justiz (KJ) 4/2022, p. 399-411.

dpa/jb/LTO-Redaktion (2024), Das Instrument des Wellenstreiks ist zulässig, LTO 12.3.2024, online: https://www.lto.de/recht/nachrichten/n/10gla22924-lag-hessen-gdl-bahn-streik-arbeitskampf-wellenstreik (25.3.2025).

Kocher, Eva (2024), Ein glühendes Stück Eisen, Verfassungsblog 1.4.2024, online: https://verfassungsblog.de/ein-gluhendes-stuck-eisen/ (25.3.2025).

Tschenker, Theresa (2023), Politischer Streik. Rechtsgeschichte und Dogmatik des Tarifbezugs und des Verbots des politischen Streiks, Berlin.

[7] BAG 10.12.2002 – 1 AZR 96/02.
[8] ECSR Conclusions XXII-3 (2022) Germany (https://rm.coe.int/conclusions-xxii-3-2022-germany-e/1680aa9854).

Ubber, Thomas/von Grundherr, Felicia (2025), Regelungsvorschläge zur gesetzlichen Gestaltung des Arbeitskampfrechts, Neue Zeitschrift für Arbeitsrecht (NZA) 2025, p. 1-12.

Abbreviations

AVE: Allgemeinverbindlicherklärung (Universal declaratory relief for collective agreements, Germany)
BAG: Bundesarbeitsgericht (Federal Labour Court, Germany)
CCOO: Comisiones Obreras (Workers' Commissions, Spain)
CCPP: Collective Complaints Procedure Protocol
CEACR: Committee of Experts on the Application of Conventions and Recommendations
CENDOJ: Centro de Documentación Judicial (Court Documentation Center)
CFA: Committee on Freedom of Association
CoE: Council of Europe
DGB: Deutscher Gewerkschaftsbund (German Trade Union Confederation)
EC: (Treaty establishing the) European Community
ECB: European Central Bank
ECHR: European Convention on Human Rights
ECJ: European Court of Justice
ECSR: European Committee of Social Rights
ECtHR: European Court of Human Rights
EGC: European General Court
ELW: European Lawyers for Workers Network
ESC: European Social Charter
ETUC: European Trade Union Confederation
EU: European Union
GG: Grundgesetz (Basic Law, Germany)
ICJ: International Court of Justice
IF Metall: Industrifacket Metall (Metal workers' union, Sweden)
IG Metall: Industriegewerkschaft Metall (Metal workers' union, Germany)
ILAW: International Lawyers Assisting Workers Network
ILO: International Labour Organization
ITF: International Transport Workers' Federation
LkSG: Lieferkettensorgfaltspflichtengesetz (Supply Chain Due Diligence Act, Germany)
Rec.: Recurso (Appeal, Spain)
RJ: Repertorio de Jurisprudencia (Case Law Repository, Spain)
TAR: Tribunale amministrativo regionale (Regional Administrative Courts, Italy)
TFEU: Treaty on the Functioning of the European Union
UGT: Unión General de Trabajadores (General Union of Workers, Spain)
USB: Unione Sindacale di Base (Autonomous Trade Union, Italy)
Ver.di: Vereinte Dienstleistungsgewerkschaft (United Services Trade Union, Germany)

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