



# **The right to strike in the public services**

## **Austria**



## **Right to strike in the public services: Austria**

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This factsheet reflects the situation in January 2021. It was elaborated by Nina Büttgen (independent expert), updated by Diana Balanescu (independent expert), reviewed by EPSU/ETUI; and sent to Austrian EPSU affiliates for comment.

## 1. Legal basis

### International level

Austria has ratified:

#### UN instruments<sup>1</sup>

**International Covenant on Economic, Social and Cultural Rights**

(ICESCR, Article 8)

**International Covenant on Civil and Political Rights**

(ICCPR, Article 22); upon ratification of the ICCPR, Austria made a declaration to the effect that Article 22 ICCPR will be applied provided that it is not in conflict with the restrictions provided for in Article 16 of the European Convention on Human Rights (ECHR).

#### ILO instruments<sup>2</sup>

**Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise**

(ratification on 18 October 1950)

**Convention No. 98 concerning the Right to Organise and to Bargain Collectively**

(ratification on 10 November 1951).

Austria has not ratified:

Convention No. 151 concerning Labour Relations (Public Service)

Convention No. 154, Collective Bargaining Convention, 1981

### European level

Austria has ratified:

**The European Social Charter of 1961** (1961 Charter)

(ratification on 29 October 1969 and entry into force on 28 November 1969), but included in the instrument of ratification a declaration providing for an exemption from the application of Article 6(4) (the right to collective action)<sup>3</sup>

**The (Revised) European Social Charter** (Revised Charter)<sup>4</sup> while retaining the exemption from Article 6(4) (ratification on 20 May 2011 and entry into force on 1 July 2011)

This reservation is based on the principle of state neutrality (Austrian (labour) law does not recognise an individual right for employers and workers to take collective action in cases of conflict of interest, nor does it contain any general prohibition on strike action);<sup>5</sup>

Austria has signed but not ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (signed on 7 May 1999).

Austria has ratified Article 11 (the right to freedom of assembly and association)

of the **European Convention on Human Rights**<sup>6</sup> (ratification and entry into force on 3 September 1958).

## National level

### Austrian Constitution

Article 12 of the Austrian Constitution (*Staatsgrundgesetz*, hereinafter StGG) lays down the principle of freedom of assembly and association. This provision merely protects employees' right to form and join trade unions, irrespective of whether they work in the private or the public sector. It has not, however, been interpreted to guarantee Austrian workers a right to take collective action, including strike action.

The Constitution does not contain any provisions on the right to strike, nor does it contain restrictions on the right to strike, let alone a ban on strikes.<sup>7</sup>

### Applicable law(s)

- **In general:** The Austrian Labour Constitution Act (*Arbeitsverfassungsgesetz*, ArbVG) regulates labour relations in the private sector. It covers the individual employment relationship and collective relations.
- **Specific law(s) applicable to the public sector:** Under the Constitution, labour law in Austria is deemed to be a federal competence. The Austrian Public Service Act (*Beamten-Dienstrechtsgesetz*, BDG) regulates the labour relations of federal employees, who are allowed to join a trade union and form interest groups.
- **Collective bargaining** in Austria is based on the principle of social partnership (*Sozialpartnerschaft*). The Austrian Trade Union Confederation (ÖGB) has voluntary membership and is divided into sub-unions (seven affiliates) relating to the industrial sector. It is effectively the only trade union in Austria that concludes sectoral collective agreements (even though procedures exist to recognise the capacity of other collective interest organisations to conclude collective agreements).<sup>8</sup> The ÖGB negotiates within the Chamber of Labour (AK), which convenes meetings of the employee interest group (of which all employees are compulsory members) and the union. Its counterpart is the Federal Economic Chamber (WKO) of which all Austrian employers – with the exception of those in agriculture, the liberal professions and the non-trading public sector – are compulsory members and which, together with the Federation of Industry (IV), forms the employers' group.
- **Collective agreements** are negotiated by the appropriate bargaining unit and, once concluded, affect practically all workers in the relevant branch of industry. This results in quasi-universal application, although trade union density has declined considerably (26.9% in 2016).<sup>9</sup> This broad coverage (over 95%) derives from the rule laid down in the ArbVG which stipulates that, regardless of their union membership, all workers employed by an employer who is party to a collective agreement, are covered by this collective agreement. Since most employers are covered by collective agreements, the vast majority of employees are also covered.<sup>10</sup> As a result of this balanced collective bargaining system, strikes very rarely occur in Austria.

More recent reports note that, however, an increase in trade union membership has been recorded since 2016 for three consecutive years, which can be attributed to a comparatively large membership gain of the Union of Public Employees (GÖD).<sup>11</sup>

- Despite the decline in employment, the public sector is considered a stronghold of unionisation in Austria, next to manufacturing. There are four public-sector bargaining units, relating respectively to the local authority services; the arts, media and liberal professions; postal services and telecommunications; and the civil services. The first three are represented in a joint negotiating committee, which together with the civil service union negotiate on public service issues with the negotiating committee that represents the national and regional authorities. However, public-sector employees are excluded from concluding collective agreements, which are essentially confined to the private sector. Their employment relationships are generally governed by statute.<sup>12</sup>
- **Case law** is very limited and hardly any rulings of last-instance courts exist, given that strikes or collective action rarely occur in Austria.<sup>13</sup>

## **2. Who has the right to call a strike?**

The right to initiate a strike is reserved for workers, irrespective of trade union membership (i.e. this right does not apply to students, for example). There is a common understanding that such collective action requires a certain minimum level of participation in order to keep up the momentum and the pressure on the other party.

There is no formal system in place for calling a strike. Strike action is usually initiated by the trade union. It is also possible for employees to start a strike without the union's support, but initiating strike action without such support puts them at risk of a civil lawsuit for breach of contract (see section 6 below).

### 3. Definition of a strike

In Austria, there is **no statutory definition of a strike**. The literature states that there has been no need for codification because conflicts of interest are usually resolved through the well-established and effective collective bargaining system (see section 1 above). The social partnership implies a system of dialogue and consensus-forming, where the interest representations of employees and employers are closely tied in with lawmakers and the political process (in Parliament).<sup>14</sup> Nevertheless, strike action and other forms of collective action are occasionally undertaken.<sup>15</sup> Austrian case law has established that ‘strikes are carried out by employees who stop working’, excluding from the notion of a strike the conscious infliction of damage while still working.<sup>16</sup>

In Austria, a strike’s objectives do not have to be the subject of collective bargaining for the collective action to be lawful. Political strikes are also permitted. Thus, in addition to strike action being taken with a view to bringing about a collective agreement or enforcing an existing one, it is also acceptable for strike action to seek to make changes to existing laws by proposing legislative amendments, target employers’ voluntary payments, or raise public awareness of specific issues.<sup>17</sup> As long as they comply with the requirements of *bonos mores*, different forms of industrial action (such as warning strikes, sit-ins, blockades, picketing, etc.) are permitted under Austrian law.

A distinction has been made in legal theory between, in the case of strike action, an economic strike (*wirtschaftlicher Streik*), political strike (*politischer Streik*), unofficial strike (*wilder Streik*), selective strike (*Schwerpunktstreik*), token strike used as a warning (*Warnstreik*) and partial strike (*Teilstreik*) and, in the case of lock-outs, between an offensive lock-out initiating a dispute (*Angriffsaussperrung*) and a defensive lock-out as a reaction to a strike (*Abwehraussperrung*). However, it should be noted that since so few industrial disputes occur in Austria, even the expert approach is essentially theoretical.<sup>18</sup>

#### **4. Who may participate in a strike?**

All workers, irrespective of trade union membership, may participate in a strike.<sup>19</sup>

**Public sector** (see ETUI Reports 105 and 108)

- In principle, federal employees and public servants enjoy the same rights as private-sector employees with regard to taking collective action.
- Suitable restrictions may be imposed only on certain public servants with a specific duty of allegiance or in response to a threat of impairment of government business.
- There is no statutory definition of essential services. Strikes in essential services are permitted, provided that a minimum level of service is guaranteed. In such cases, the lawfulness of collective action is considered in the light of the general statutory standards of conduct.<sup>20</sup>



## 5. Procedural requirements

- No specific procedural requirements are imposed by legislation. A strike as a means of *ultima ratio* is not prescribed by law, but is used in practice.
- The law does not require employees to vote on whether or not to hold a strike. Nevertheless, it is customary to hold secret strike ballots, usually as a means of last resort.
- Collective agreements may require that the dispute first be brought before an arbitration board, where one exists (Article 39(1) ArbVG).
- Giving notice or allowing for a waiting period are not required.
- **Peace obligation:** Industrial action may be regarded as a conscious disruption of the peace (in the workplace). To ensure the stability of the bargaining system, almost all collective agreements contain '**no-strike**' clauses. Violations of an obligation to maintain industrial peace may entail the liability of supporting labour organisations for breach of contract. Strike action taken over an issue covered by a collective agreement would be regarded as such a violation, thus ruling out strike action concerning matters settled within the agreement (relative peace obligation). The peace obligation, however, may also be absolute, i.e. prohibiting any form of industrial action for the lifetime of the agreement. Where the parties reach a collective bargaining agreement on a given topic, this simultaneously implicates their agreement to the respective peace obligation. This implies that there is no absolute peace obligation unless explicitly stated otherwise in the agreement (immanence theory).<sup>21</sup>

## 6. Legal consequences of participating in a strike

### Participation in a lawful strike

- In principle, participation in a lawful strike also amounts to a breach of contract under Austrian law because any employee who goes on strike fails to fulfil his/her work obligations. Consequently, strike participation may entail legal consequences for the striking worker under the general provisions of the Civil and Criminal Code, such as criminal prosecution (illegal strike).
- The prevailing legal opinion holds that a worker on strike fails to fulfil his/her contractual duties without justification. Thus, in principle, termination of the employment contract would be the legal consequence of such a breach, regardless of the lawfulness of the strike action. In practice, however, it may be difficult to trace collective action back to an individual worker. More importantly, moreover, in view of Austria's commitment to its international obligations under the various fundamental rights documents (listed in section 1 above) that include the right to strike, dismissal can be an option only if the employee behaved in a wholly inexcusable manner.<sup>22</sup>
- In cases where the trade union supported the strike, it can impose as part of the settlement a solution prohibiting any negative treatment and stipulate the reinstatement of any dismissed strikers.<sup>23</sup>
- Since 2000, any legal prohibitions on the right to strike for public servants have been revoked. The trade union may therefore legally call a strike in the public service, but it is unlikely that civil servants would heed this call. In practice, restrictions may arise from the duty of loyalty towards the employer. The law protects members of the works council, or – in the case of the public services – members of a staff association, only from sanctions against participation in a demonstration.<sup>24</sup>
- With regard to those workers on strike, the employer's obligation to pay wages is suspended. The BDG (Public Service Act) provides that civil servants lose their entitlement to wages after three days.<sup>25</sup> The union may lend financial support to strikers for a limited period of time. With regard to those employees who are not on strike but are willing to work, the employer must pay their wages because it is not the fault of these workers that they are unable to fulfil their duties (employer's sphere of risk). It is only in the case of a general strike that the risk of lost wages lies with the employees.
- Strikers are not entitled to unemployment or any other social security benefits while taking collective action.<sup>26</sup>
- The employer may not replace workers on strike, either with temporary agency workers or with jobseekers placed by the public employment services.<sup>27</sup>

### Participation in an unlawful strike

- The employer is not permitted to seek a court injunction against the trade union in order to put a stop to the collective action.
- The legitimacy of the industrial action as a whole has to be assessed separately from the action of an individual (the so called “theory of segregation or separation” – *Trennungslösung*).<sup>28</sup>
- With respect to the industrial action as a whole (organisation), it has been interpreted that - apart from a violation of the peace obligation under the collective agreement and a ban on industrial action under a works agreement - such action is only unlawful if it can be classified as causing “unethical damage” pursuant to Section 1295 Para. 2 ABGB. A strike concerning working conditions (in the broader sense), with no disproportionate relationship between the goal of the strike and the damage caused, which addresses the employer and which is organised by a trade union, cannot be considered unethical.<sup>29</sup>
- A union can be held liable for damages only in the case of negligent conduct (civil law) or for general violations of penal law, such as incitement to commit an offence.
- In case of dismissal, workers have the right to appeal against the termination in court if it came about as a result of trade union activity (ArbVG).

## **7. Case law of international/European bodies**

### **International Labour Organisation**

There are no recent decisions of the Committee of Freedom of Association (CFA) or observations/requests of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) relevant for the right to strike.<sup>30</sup>

### **(Revised) European Social Charter:**

- **Collective complaints under article 6(4) of the ESC**  
Austria has not ratified the Additional Protocol on the Collective Complaint Procedure.
- **ECSR Conclusions**  
Austria did not accept Article 6(4) of the Charter.

### **Implementation of international treaties into domestic legal order (ECHR)**

According to the Austrian Constitution, Article 9, “the generally recognized rules of international law are regarded as integral parts of Federal law”.<sup>31</sup>

Austria has ratified Article 11 (right to freedom of assembly and association) of the European Convention on Human Rights (see section 1) and the Convention is part of the Austrian domestic law. However, the domestic courts are reluctant in interpreting the freedom of association as providing an express right to strike (in line with the ECHR established case law).

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## Notes

- 1 Status of ratification by Austria of UN instruments, available at: <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=en> (accessed on 8 January 2021).
- 2 Status of ratification by Austria of ILO conventions, available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102549](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102549) (accessed on 8 January 2021); see also Clauwaert, S. and Warneck, W. (2008), *Better defending and promoting trade union rights in the public sector. Part I: Summary of available tools and action points*, Report 105, Brussels: ETUI, p. 72.
- 3 Status of ratification of the 1961 Charter: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035/signatures?p\\_auth=85796KXD](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035/signatures?p_auth=85796KXD) (accessed on 8 January 2021).
- 4 Status of ratification of the Revised European Social Charter of 1996 at: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures?p\\_auth=ZPrR6Yru](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures?p_auth=ZPrR6Yru) (accessed on 8 January 2021).
- 5 See European Committee of Social Rights, First report on non-accepted provisions of the European Social Charter, September 2016, pp. 8-9, available at: <https://rm.coe.int/168070729c>.
- 6 Status of ECHR ratifications available at: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p\\_auth=jPYjkVEL](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=jPYjkVEL) (accessed on 8 January 2021)
- 7 European Committee of Social Rights, First report on non-accepted provisions of the European Social Charter, September 2016, p. 8, available at: <https://rm.coe.int/168070729c>.
- 8 Brameshuber, E., p. 229
- 9 EUROFOUND, Living and working in Austria, 14 October 2020, available at: <https://www.eurofound.europa.eu/country/austria>; see also on the establishment of free professional associations, Brameshuber, p. 228.
- 10 Brameshuber, E., p. 229; see also EUROFOUND, Living and working in Austria, 'Collective bargaining', 14 October 2020, available at: <https://www.eurofound.europa.eu/country/austria>.
- 11 EUROFOUND, Living and working in Austria, 'Actors and institutions – Trade Unions', 14 October 2020, available at: <https://www.eurofound.europa.eu/country/austria>.
- 12 ETUI Report 108, pp. 11-12; see also EUROFOUND, Living and working in Austria, 14 October 2020, available at: <https://www.eurofound.europa.eu/country/austria>.
- 13 European Committee of Social Rights, First report on non-accepted provisions of the European Social Charter, September 2016, p. 9, available at: <https://rm.coe.int/168070729c>.
- 14 This social partnership was born out of necessity in the second Republic, as a lesson drawn from Austria's civil war experience in 1934 and following the country's liberation in 1945. Waas, B., p. 121. Following the attacks on corporatism by the right-wing conservative government in the early 2000s, the Austrian social partnership has experienced a renaissance over the past decade. For further discussion on this subject, see <http://blogs.lse.ac.uk/netuf/2018/01/02/has-austrias-decade-long-revival-of-neo-corporatism-come-to-an-end>.
- 15 Such as during the public-sector pay negotiations in 2013, EPSU, 'Austria: 40000 join demonstration to unblock negotiations' (2013): <https://www.epsu.org/article/austria-40000-join-demonstration-unblock-negotiations>.
- 16 The notion of a strike, according to Austrian legal interpretation, can be defined as: 'A work stoppage carried out according to a plan by a fairly large number of employees of one trade or profession, or of a business, in the pursuit of a particular aim and with the intention of resuming work after achieving the aim, and/or after the end of the labour dispute.' Warneck, W. (2007), *Strike rules in the EU27 and beyond: A comparative overview*, Report 103, Brussels: ETUI-REHS, p. 14.
- 17 Waas, B., p. 124.
- 18 EUROFOUND, Living and working in Austria, 'Industrial action and disputes', 14 October 2020, available at: <https://www.eurofound.europa.eu/country/austria>.
- 19 European Committee of Social Rights, First report on non-accepted provisions of the European Social Charter, September 2016, p. 8, available at: <https://rm.coe.int/168070729c>.
- 20 Waas, B., p. 125; and ETUI Report 108, p. 12.
- 21 Waas, B., p. 125; see also EUROFOUND, Living and working in Austria, 'Collective bargaining – Peace Clauses', 14 October 2020, available at: <https://www.eurofound.europa.eu/country/austria>.
- 22 Waas, B., p. 126
- 23 ETUI Report 103, p. 15.
- 24 National Council (2009).
- 25 Der Standard, 'Beamte dürfen gar nicht streiken', 4 May 2009 – <https://derstandard.at/1240550190717/Beamte-duerfen-gar-nicht-streiken>.
- 26 Section 13 of the Unemployment Insurance Act (AIVG) lays down that workers are not entitled to unemployment benefits if their unemployment is the direct consequence of a strike or defensive lock-out, see the First report on non-

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27 ETUI Report 103, p. 14; see also First report on non-accepted provisions of the European Social Charter, September 2016, p. 8, available at: <https://rm.coe.int/168070729c>.

28 European Committee of Social Rights, First report on non-accepted provisions of the European Social Charter, September 2016, p. 9, available at: <https://rm.coe.int/168070729c>.

29 *Ibid*

30 Supervising the application of International Labour Standards for Austria, available at:

<https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:::NO::> (accessed on 8 January 2021)

31 European Committee of Social Rights, First report on non-accepted provisions of the European Social Charter, September 2016, p. 9, available at: <https://rm.coe.int/168070729c>.