



# The right to strike in the public sector

## Germany

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## 1. Legal basis

### International level

Germany 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, Germany made a declaration to the effect that Article 22 ICCPR will be applied within the scope of 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 20 March 1957)

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

(ratification on 8 June 1956)

Germany did not ratify

Convention No. 151 concerning Labour Relations (Public Service)

Convention No. 154, Collective Bargaining Convention, 1981

### European level

Germany ratified :

##### **Article 6(4) (the right to collective action) of the European Social Charter of 1961 (1961 Charter) with reservations**

(ratification on 27 January 1965 and entry into force on 26 February 1965).

In relation to the provisions of Article 6(2) (the right to collective bargaining) and Article 6(4) (the right to collective action) the Government had made a Declaration in 1963 stating the following:

*"In the Federal Republic of Germany, pensionable civil servants (Beamte), judges and soldiers are subject to special terms of service and loyalty under public law, based in each case on an act of sovereign power.*

*Under the national legal system of the Federal Republic of Germany they are debarred, on grounds of public policy and State security, from striking or taking other collective action in cases of conflicts of interest. Nor do they have the right to bargain collectively since the regulation of their rights and obligations in relation to their employers is a function of the freely elected legislative bodies. Hence, with reference to the provisions of items 2 and 4 of Article 6 of Part II of the Social Charter the Permanent Representative of the Federal Republic of Germany to the Council of Europe feels obliged to point out that in the view of the Government of the Federal Republic of Germany those provisions do not relate to the above-mentioned categories of persons. The above declaration does not relate to the legal status of non-pensionable civil servants (Angestellte) and workmen in the public service."*

Germany has signed (on 29 June 2007) but not ratified the (Revised) European Social Charter (Revised Charter of 1996)

Germany has neither signed nor ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints as well as the Protocol amending the European Social Charter (so-called 'Turin Protocol' of 1991)

Germany has ratified **Article 11 (the right to freedom of assembly and association) of the European Convention on Human Rights** (ratification on 5 December 1952 and entry into force on 3 September 1953).

## National level

### The Constitution of Germany

In Germany, the right to strike is guaranteed by the Constitution. It forms part and parcel of the principle of collective bargaining autonomy (*Tarifautonomie*), and both are considered prerequisites for the effective exercise of the freedom of association guaranteed by Article 9(3) of the German Basic Law (*Grundgesetz*, GG). German law on collective action has been developed through case law with reference to this provision.

- As regards the exercise of sovereign authority on a regular basis, the Constitution (Article 33(4) GG) provides specifically that this shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law.
- The long-standing legal prohibition that **public servants** may not and must not strike is based on a conservative interpretation of Article 33(5) GG. This provision states that the law governing the public service 'shall be regulated with due regard to the traditional principles of the professional civil service'. These principles partly date back to customs of the 19th century that have been continuously developed by judges and legal scholars. They have, however, never been decided upon by Parliament. They include, among other principles, the special duty of loyalty or the principle that public servants are guaranteed an adequate standard of living (principle of 'alimentation') to enable them to commit fully to the exercise of their office free from existential hardship. Evidently, these principles do not (expressly) prohibit the right to strike, but they have been interpreted in that way.<sup>5</sup>

## Applicable law(s)

- While the **rights to bargain collectively** and take **collective action** are not found in any statutes, employee representation in the public service is regulated at federal level by the Federal Staff Representation Act (Bundespersönalvertretungsgesetz - BPersVG) and at the regional states ('Länder') level by the respective (16) Staff Representation Acts (Landespersönalvertretungsgesetze). The staff representation is not allowed to take part in collective action (see, for example, § 66(2) BPersVG).
- The **Federal Law on the Public Servants** (*Bundesbeamtengesetz*, BBG), in its version of 5 February 2009, regulates the position of civil servants at federal level. The regional states (*Länder*) maintain their own legislation on public servants applicable to their territory, which is drawn up within the framework of the federal legislation and Constitution.
- In Germany, most **collective agreements** are concluded at **branch level**. In the public service, the main collective agreements are at federal and community (Tarifvertrag für den öffentlichen Dienst – TVöD) and 'Länder' level (Tarifvertrag für den öffentlichen Dienst der Länder – TV-L).

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

The question of who has the right to strike is the subject of ongoing debate among German legal scholars.<sup>6</sup> Most view Article 9(3) GG as providing a 'double' fundamental right. According to that view, the right to strike, as an element of the freedom of association, applies to **trade unions**. Individuals' consequent right to participate in a strike then derives from and depends on the constitutional guarantee of the unions' freedom of association.

However, trade unions must be able to demonstrate that they have the capacity to bargain collectively in order to be entitled to call a strike. This capacity depends on their 'social power', i.e. the ability to enforce their objectives. They must be capable of exerting sufficient pressure to induce the opponent to conclude a collective bargaining agreement. The requirement to demonstrate such capacity seems logical in view of the fact that German law guarantees the right to strike only in so far as that right is regarded as necessary to ensure **proper collective bargaining**.

### 3. Definition of strike

**Germany does not have a statutory definition of a strike.** German case law considers that a collective work stoppage carried out by employees according to a plan is the hallmark of a strike, the primary means for workers and trade unions to be engaged in a labour dispute.<sup>7</sup> Generally speaking, the aim of a strike is to exert pressure on the other party to a dispute in order to influence his/her willingness to negotiate. Collective action seeks to cause a temporary interruption of business operations, after which normal business activities are resumed.

The definition of a strike and the determination of its lawfulness are two separate legal issues. As a rule, the right to strike is restricted in terms of the objectives it pursues. Namely, as follows from the requirement incumbent on trade unions to demonstrate their capacity to bargain collectively, only strike action aimed at the conclusion of a collective agreement is lawful. Hence, **political strikes** may be proper strikes, but most are regarded as illegal in Germany.<sup>8</sup> **Wildcat strikes** are also prohibited in particular because they break the rules of a proper collective bargaining process. Nonetheless, such strikes may be legitimised with retroactive effect if a trade union comes forward and takes over the action.

However, in the light of Article 6(4) of the 1961 Charter, this exclusive notion has become increasingly untenable (see below). Notably, the Federal Labour Court reversed its stance on **sympathy strikes** in 2007, which in principle are now lawful. That lawfulness was previously denied by emphasising the 'auxiliary function' of sympathy strikes. Judges' subsequent change in position seemed driven less by a desire to comply with Germany's international obligations than by a change in approach to assessing the lawfulness of strikes. While, in the past, the principle of the parity of the parties provided the principal means for this assessment, it has been superseded by the principle of proportionality.<sup>9</sup>

The proportionality test for the **lawfulness of a strike** asks the following: whether the collective action is suitable in promoting the enforcement of the trade union's objectives; whether it is necessary, i.e. whether the objective could have been achieved by less radical means; and whether a strike is – strictly speaking – reasonable, by gauging whether the action is deemed appropriate to reach the desired goals when weighing up the trade union's freedom of activity against the legal position of the persons (in)directly affected.

The Federal Labour Court, however, required judicial restraint, emphasising that reasonableness (proportionality in the strict sense) cannot be affirmed or denied in general. This is because the very nature of industrial action is to put the opposing party under pressure by inflicting damage on him in order to achieve legitimate aims.<sup>10</sup> Thus, for example, a sympathy strike that is aimed at an employer who belongs to the same group to which the opposing party to the main dispute belongs may be lawful. It is also noteworthy that a trade union that calls a sympathy strike does not thereby violate the **peace obligation** arising from the collective agreement by which it is bound.

Nowadays, **warning strikes** are entirely subject to the principle of proportionality, as confirmed by the Federal Court of Labour. This constitutes recognition that this special type of strike used by a trade union while negotiating the terms of a collective agreement may already inflict considerable damage (e.g. as a result of accumulated temporary work stoppages). Previously, case law had practically exempted warning strikes from the application of the proportionality principle. This principle does not, in fact, require a formal declaration that negotiations have failed. A trade union's call to strike is regarded as having been freely assessed; it is not for the courts to question that assessment of whether all other means have failed.

**Rotating strikes** are lawful. However, they run the risk of non-employment, which in this case lies with the employee. Accordingly, the Federal Labour Court has held that workers lose their entitlement to pay if they cannot be employed because of a reasonable defensive measure taken by the employer.<sup>11</sup>

The **occupation of premises** is, in principle, unlawful. However, a sit-in may be legitimate if of short duration. Picketing with the aim of inviting others to join the work stoppage is allowed, while blockades that hinder workers willing to work and/or customers from entering the premises are not, as this may amount to an interference with the employer's right to conduct business and entail the strikers'/union's liability for damages under tort law (see below). Nor is it permitted to use force or threats to block access.

It is less clear to what extent **boycotts** – and new forms of collective action such as **flashmobs** – can be considered lawful. There is uncertainty surrounding the situation where a trade union's call to stop buying a company's products is used to inflict additional damage on the employer. In the past, the Federal Labour Court regarded boycotts as lawful instruments that were firmly rooted in history. With regard to flashmobs, it has interpreted the constitutional guarantee of the right to strike as not necessarily being exhaustive in terms of the tools that can be used in an industrial dispute. Flashmob actions represent an active disruption of business operations, while not being detrimental to the participants. However, when such actions accompany a strike, they should not automatically be regarded as disproportionate, as in principle the parties have the right to adapt the weapons of industrial conflict to changing circumstances in order to be at eye-level with the opponent.<sup>12</sup>

Finally, **most labour disputes** take place at **branch level**. It is, however, also possible for a single employer to become the target of a strike for the purpose of negotiating a company collective agreement with the relevant trade union. The employer's possible membership of an employers' association does not affect his/her capacity to conclude such an agreement.

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

All workers, unionised and non-unionised ('outsiders') alike, have the right to participate in a strike, as long as they are included in the call to strike. More specifically, union members' right to participation derives from the constitutional protection of the right of individuals to active trade union membership (Article 9(3) GG). It is, however, a requirement that each individual worker must notify his/her employer of his/her intention to strike, whether explicitly or implicitly. Usually, however, an implicit statement can be drawn from the fact that the worker does not show up for/at work.

##### Public sector

- Germany maintains a **general ban** on the right to strike for **civil servants**. The ban on public officials' collective action is justified by the reference to be one of the traditional principles underlying the professional civil service in Germany (Article 33(5) GG). Moreover, as the right to strike is confined to issues that can be settled by collective agreement, public servants are consequently excluded from that right because the terms and conditions of their employment are established by legislation.
- In the **public service** two main categories of people are employed.

First, the workers whose employment is based on a **labour contract** and mainly collective agreements; they enjoy the right to strike without such restrictions.

Second, the **civil servants** whose employment is governed by public law and who are prohibited to go on strike. As their number is still important, this ban is consequently barring a large number of public-sector workers (including teachers, postal workers, etc. employed as civil servants) from the fundamental right to strike.

The German Education and Science Workers' Union (GEW), for instance, deplores the fact that, for years, the special mutual relationship of service and loyalty underlying the public service is being undermined by public employers: civil servants are working in market-listed companies; tasks of public authority are being executed by private security firms; and civil servants and employees are working side by side in public administrations and schools doing the same work.

Such practices split the workforce into civil servants (who may not strike) and employees (who may). This incites distrust and malevolence among members of the workforce and reduces their power to enforce their own demands.<sup>13</sup>

- Furthermore, from a legal perspective, this **general ban** is in conflict with Article 8 ICECSR, the relevant ILO Conventions No. 87 and No. 98 and Article 6§4 ESC. Consequently, it has been repeatedly criticised by the respective supervisory committees (see below section 7).

- There is no clear-cut concept of **essential services** in Germany. In the literature, there have been calls to limit the right to strike as regards critical public services (*Daseinsvorsorge*), but these proposals are unlikely to receive legislative acknowledgement.

Nevertheless, the Federal Labour Court has recognised the need to ensure the supply of essential services and goods even during a strike. In effect, the provision of emergency services became a prerequisite for the lawfulness of a strike, since the former amounted to a basic obligation that derived from the need to protect the common good.

It seems that it is a regular practice for the parties to industrial disputes in Germany to reach agreements on what is required in such cases, by weighing the right to take collective action against the rights of those affected by the strike.

## 5. Procedural requirements

- **German law** does not lay down any procedural requirements for collective action as such. However, the principle of *ultima ratio* (proportionality) is applicable to strikes. Every possible means of negotiation must be exhausted prior to engaging in strike action as a means of last resort. However, in practice, this requirement is of limited significance, since a trade union is not required formally to declare bargaining a failure, nor are judges permitted to question the union's actions. The call to strike leads to the presumption that the *ultima ratio* principle has been fulfilled. This is to prevent unlawful censorship of collective agreements.<sup>14</sup>
- Most **trade unions** tend to have guidelines in place on the procedure for **holding a vote** among their members before calling a strike. However, most scholars agree that whether or not such a strike ballot has been held has no impact on the lawfulness of the collective action.
- According to the Federal Labour Court, the process of organising collective action requires the competent trade union to take the decision to **call the strike** and then **communicate** that decision to the opposing party. However, that information may be provided by practically any means, as long as it enables the employer to determine the strike's lawfulness and to decide on a future course of action. Accordingly, a public announcement through the media would suffice in absence of direct information (possibly even with retroactive effect), as would a leaflet distributed by the trade union among the employees of an establishment that is not being targeted by the call to strike.
- German law does not provide for an absolute **peace obligation**, but one may be agreed upon by the parties although this has happened only very rarely. All collective agreements are, nevertheless, understood to contain – either implicitly or explicitly – relative peace obligations, since the agreement as such is conceived as constituting an 'order' of peace.

However, the scope of this peace order does not extend beyond that which is regulated by the collective agreement. Consequently, it prohibits only those industrial disputes that seek to amend the collective agreement or are directed against its existence. The peace obligation extends both to the parties bound by the agreement, rendering it illegal for a trade union to call a strike to these ends, and to the union's members, equally requiring the latter to abstain from such action.

Accordingly, therefore, an employer can rely on a peace obligation that is part of a collective agreement concluded by an employers' association. It also protects him/her from strike action aimed at concluding a company collective agreement on subjects already covered by the branch-level agreement.<sup>15</sup>

## 6. Legal consequences of participating in a strike

### Participation in a lawful strike

- An employee's participation in a lawful strike means that his/her principal duties (obligation to work) are suspended for the duration of the collective action. Hence, there is no breach of contract, as the employee is under no obligation to work during the strike. Importantly, the **suspension** of the employee's **principal duties** does not automatically result from a call to strike but requires a statement from the worker him-/herself that s/he will participate in the strike (see above section 4). Meanwhile, the employer does retain a general duty of care. The employer may not, however, give notice of contract termination solely because of the worker's participation in a strike, since no breach of contract has occurred. Dismissal on other grounds, however, cannot be ruled out.
- Workers on **lawful strike** are not entitled to remuneration. Participation may even lead to a reduction in contractual bonuses.
- With regard to **unemployment benefits**, the principle of state neutrality is relevant, as the payment of such benefits during a strike could cause severe disruption to the balance of power between the parties concerned. Accordingly, the German Social Code III stipulates that the payment of unemployment benefits must not interfere with industrial disputes. It then specifies which kinds of action amount to unlawful interference. In particular, a worker may not claim unemployment benefits if s/he is likely to gain from the outcome of the dispute.<sup>16</sup>

This is reflected in judicial practice, such as where the courts have interpreted the neutrality principle as a 'parity-promoting' obligation of the State, implying that a policy of mere non-intervention would be detrimental to the weaker party (usually the workers). The State may therefore have to pursue an equal balance in the design of the legal framework for collective relations and industrial conflict and ensure that each party can act effectively.

- Strikers who are union members can receive **financial support** whilst participating in collective action. Eligibility for compensation from the trade union's strike fund usually starts after three months of membership, and the amount of compensation depends on the duration of membership fee payments.<sup>17</sup>
- Until recently, German law was fairly generous in allowing employers to make use of **substitute labour** or subcontract certain tasks to other companies in order to alleviate the impact of a strike. This continues to be possible in principle. However, existing staff members are not obliged to stand in for striking workers. If they refuse to take over such tasks, they are not in breach of contract. However, if they do accept to stand in for striking colleagues, this must be notified to the works council.

**Civil servants** are also not obliged to provide substitute labour during a lawful strike, unless legislation includes a special provision to this effect.<sup>18</sup>

Moreover, the use of temporary workers as **strike breakers** in non-essential services has recently been prohibited. In 2017, Germany adopted a legislative amendment to that effect, modifying Article 11(5) of the Manpower Provision Act (in effect from 1 April 2017). The employer (receiver) concerned is no longer allowed to hire agency workers as strike breakers if the business is directly involved in a labour dispute.<sup>19</sup>

### Participation in an unlawful strike

- The **obligation to work** is not suspended during an unlawful strike, which means that any worker who participates in such a strike is in breach of his/her principal obligation. If a trade union is responsible for the strike and if the strike seeks to bring about a collective agreement, then the strike is presumed to be lawful. This presumption would then also take effect with regard to the relationship between the employer and the individual striker.
- If the strike action fails to meet these criteria of legality, the employer can **claim damages** from the individual employee either on the ground of breach of contract or on the basis of tort law (or both).<sup>20</sup>
- An employer who is affected by an unlawful strike that has been organised by a trade union can claim **breach of the peace obligation** attributed to the applicable collective labour agreement. In addition, the employer can claim damages either based on tort law or on the ground that the peace obligation has been broken.

To claim such damages, however, negligence on part of the competent trade union must be established, which is a delicate undertaking. The Federal Labour Court has established that a proportionality test applies. In particular, it maintains, as a standard of reasonableness to which the trade union must be held to account, that legal doubts as to the lawfulness of the strike and its underlying demands may not lead to the expectation that the union will refrain from taking strike action.

Nonetheless, the union's call to strike must occur in a measured way and only if it can reasonably expect that a court is likely to qualify the action as lawful. If these criteria have been met in the case of a strike that is subsequently deemed to be unlawful, the union cannot be blamed and there can be no claim for damages.<sup>21</sup>

- The employer concerned may also file for a court order **stopping the action**. The employer has access to such injunctive relief based on an infringement of his/her right to conduct business, as guaranteed by German tort law. Whether s/he can also apply for an interim injunction is heavily disputed. There is widespread agreement that courts should refrain from granting injunctive relief so as not to create a situation where the constitutional right to strike exists only on paper.
- German tort law also protects the **freedom of association**. In this regard, therefore, an employers' association can also seek injunctive relief and claim a breach of the peace obligation.

- The **breach of contract** resulting from an unlawful strike may constitute a valid reason for an ordinary or even an extraordinary dismissal.

Whether or not a termination is justified must be determined based on all the circumstances of the individual case. This weighing of the facts must include the worker's degree of participation and how easily recognisable was the unlawfulness of the strike. A worker's simple participation with a view to **exercising solidarity**, without taking a significant role in the action, will play out in his/her favour.

## 7. Case law of international/European bodies on standing violations

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

In its general observations to the 5th periodic report on Germany on the implementation of the International Covenant on Economic, Social and Cultural Right adopted at its 29<sup>th</sup> meeting 20 May 2011<sup>22</sup>, the Committee on Economic, Social and Cultural Rights (CESCR) stated that:

20. The Committee reiterates its concern, as in 2001, that the prohibition by the State party of strikes by public servants other than those who provide essential services constitutes a restriction of the activities of trade unions that is beyond the purview of the restrictions allowed under article 8(2) of the Covenant (art. 8).

**The Committee once again urges the State party to take measures to ensure that public officials who do not provide essential services are entitled to their right to strike in accordance with article 8 of the Covenant and ILO Convention No. 87 concerning the Freedom of Association and Protection of the Right to Organise (1948).**

This has been confirmed by CESCR during the most recent examination of the sixth periodic report held on 25 September 2018, by the Concluding observations adopted at its 58th meeting, held on 12 October 2018 in the following terms<sup>23</sup>:

#### **Right to strike of civil servants**

44. The Committee remains concerned about the prohibition by the State party of strikes by all public servants with civil servant status, including schoolteachers with this status. This goes beyond the restrictions allowed under article 8 (2) of the Covenant, since not all civil servants can reasonably be deemed to be providers of an essential service (art. 8).

45. The Committee reiterates its previous recommendation (E/C.12/DEU/CO/5, para. 20) that the State party take measures to revise the scope of the category of essential services with a view to ensuring that all those civil servants whose services cannot reasonably be deemed as essential are entitled to their right to strike in accordance with article 8 of the Covenant and with the International Labour Organization (ILO) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

## **International Labour Organisation**

### **Observations of the Committee of Experts on the Application of Conventions and Recommendations (CEACR)**

#### **ILO Convention No. 87**

- The CEACR is alarmed by the collision ascertained (in 2014) by the Federal Administrative Court between Article 33(5) of the Basic Law and Article 11 of the ECHR. For many years, the Committee has been highlighting the persisting need to bring the legislation into full conformity with the Convention with regard to the same aspect.
- The Committee requested the German Government, firstly, to refrain in future from imposing disciplinary sanctions against any civil servants not exercising authority in the name of the State who participate in peaceful strikes, and, secondly, to engage in a comprehensive national dialogue with representative organisations in the public service with a view to exploring possible ways of bringing the legislation into conformity with the Convention. Furthermore, it is awaiting a response from the Government to its request for information on any ruling handed down by the Federal Constitutional Court on the subject.<sup>24</sup>

#### **ILO Convention No. 98**

- In relation to Convention No. 98, the CEACR takes due note of the Federal Administrative Court judgment of 27 February 2014 and the pending decision of the Federal Constitutional Court on the related constitutional complaint.

It requests once again the Government to engage in a comprehensive national dialogue with representative organisations in the public service with a view to exploring innovative solutions and possible ways in which the current system could be developed so as to effectively recognise the right to collective bargaining of public servants who are not engaged in the administration of the State, including, for instance, as indicated by the BDA, by differentiating between areas of genuinely sovereign domains and areas where the unilateral regulatory power of the employer could be restricted to extend the participation of representative organisations in the public service.

## **European Social Charter**

Collective complaints under article 6(4) of the European Social Charter

Germany has not ratified the Additional Protocol on the Collective Complaint Procedure.

## **European Committee of Social Rights Conclusions**

In previous Conclusions, the European Committee of Social Rights (ECSR) found that with regard to Germany's application of Article 6(4), a non-conformity in relation to the limitation

of strike objectives, the overly restrictive requirements on groups of workers entitled to call a lawful strike, the absolute strike ban on career civil servants, and the possibility of labour court injunctions prohibiting strikes. In its 2014 Conclusions, it focused on the following two conclusions:

- First, it considers that the requirements that have to be met so that a group of workers can form a union that has the right to call a strike constitute an excessive restriction on the right to strike.
- Second, the ECSR changed its longstanding position with regard to Germany's non-conformity with the permitted objectives of collective action, in particular concerning the prohibition of strikes not aimed at achieving a collective agreement. It found that the specific German approach of leaving conflicts of rights to be determined by courts while requiring that collective action must be directed towards resolving conflicts of interest is, in principle, in conformity with Article 6(4), as long as this does not impose excessive constraints on the right of workers to engage in collective action in respect of conflicts of interest.<sup>25</sup>

In its most recent Conclusions XXI-3 (2018), the ECSR found and concluded the following:

#### **Collective action: definition and permitted objectives**

German law on collective action, based on Article 9§3 of the Constitution as interpreted by the courts, still prohibits strikes which are not concerned with the conclusion of collective agreements. Since its first conclusion (Conclusion I (1969)), the Committee has found this prohibition not to be in conformity with Article 6§4 of the Charter. It previously (Conclusions XX-3 (2014)) reserved its position in case specific situations might indicate conflicts of interest other than those aiming at concluding collective agreements which cannot be solved by a competent court. However, it now reiterates the finding of non-conformity as permitting the right to strike only when aimed at the conclusion of a collective agreement unduly restricts the right to strike.

#### **Entitlement to call a collective action**

The Committee previously found the situation not to be in conformity with Article 6§4 on the grounds that the requirements to be met by a group of workers in order to form a union satisfying the conditions for calling a strike constituted an excessive restriction on the right to strike. There have been no changes to this situation. Therefore the Committee reiterates its previous conclusion.

#### **Specific restrictions to the right to strike and procedural requirements**

The Committee previously found the situation in Germany not to be in conformity on the grounds that **prohibiting civil servants from striking** constituted an excessive restriction on the right to strike. There have been no changes to this situation. Therefore the Committee reiterates its previous conclusions.

The Committee recalls that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. In the light of Article 31 of the Charter, "the right to strike of certain categories of public servants may be restricted, in particular members of the police and

armed forces, judges and senior civil servants. However, the denial of the right to strike to public servants as a whole cannot be regarded as compatible with the Charter” (cf. Conclusions I (1969)). The Committee also notes that in the case of civil servants who are not exercising public authority, only a restriction can be justified, not an absolute ban (Conclusions XVII-1 (2005) Germany). According to these principles, all public servants who do not exercise authority in the name of the State should have recourse to strike action in defence of their interests.

The Committee refers to its general question regarding the right of members of the police to strike.

### **Conclusion**

The Committee concludes that the situation in Germany is not in conformity with Article 6§4 of the 1961 Charter on the grounds that:

- the prohibition on all strikes not aimed at achieving a collective agreement constitutes an excessive restriction on the right to strike and
- 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 to the right to strike and
- the denial of the right to strike to civil servants as a whole, regardless of whether they exercise public authority, constitutes an excessive restriction to the right to strike.<sup>26</sup>

## 8. Recent developments

On 12 June 2018, in its judgement on the four pending cases (BvR 1738/12, BvR 646/15, BvR 1068/14 and BvR 1395/13), the **Constitutional Court** confirmed that the **ban on strike action for civil servants** is constitutional and also compatible with the guarantees of the European Convention of Human Rights.<sup>27</sup> In particular, the latter is heavily contested by the trade unions like Ver.di and DGB.<sup>28</sup> GEW provides legal assistance for their members who are concerned by the BVerfG judgment to file an application to the ECtHR.<sup>29</sup>

The relevant **German trade unions** (GEW, DGB and ver.di) plead that, on the contrary, the German Law on the Civil Service can and must (urgently) be reformed to re-interpret and adapt the duty of loyalty. This would not jeopardise the public status of civil servants, as the principles of loyalty, full professional commitment and an independent exercise of their official duties would merely be updated, not undermined.<sup>30</sup>

In that respect, and following the **Strasbourg Court's landmark judgment** on Article 11 ECHR in 2009 (*Enerji Yapi-Yol Sen v Turkey*),<sup>31</sup> the Federal Administrative Court found as early as February 2014 an obvious tension between Germany's binding international obligations under the ECHR and its own constitutional law. Recognising the rights to bargain collectively and to strike as fundamental human rights, the Strasbourg Court confirmed that public servants could also not simply be denied these rights because of their 'official' status.

Therefore, according to international law, restrictions on the right to strike are permissible only if based in law and only for those activities that represent genuinely sovereign domains in the narrow sense (police, the execution of justice, and the armed forces). The highest **German Administrative Court**, however, held that the prohibition of the right to strike for civil servants must remain in force until the legislator takes action to resolve this contradiction. Accordingly, a year later (February 2015), the **Federal Administrative Court** handed down a decision upholding a disciplinary action imposed on a teacher with civil servant status (*Beamte*) for having participated in industrial action.

Meanwhile, in its coalition agreement (March 2018), the **new German Government** states two relevant intentions. First, the collective pay agreements for the public services (Tarifabschlüsse für den öffentlichen Dienst zum TVöD) should, in principle, be immediately reflected in the pay of civil servants (Bundesbeamtenbesoldung). Second, the federal law on staff representation (Bundespersönalvertretungsgesetz) is to be renewed.

Another **potential conflict** – in the field of education – may also be relevant in this connection. In the Federal Republic of Germany, **education** falls within the competence of the regional states, the *Länder*.

These tend to hire (new) teachers on tenure track (only) when there is a shortage of staff and there is enough money available from the public purse. If there is a shortfall in the budget, however, the grant of tenure is either postponed or simply suspended, and staff needs are covered by means of temporary contracts.<sup>32</sup>

Such an approach may potentially come into conflict with European law that prohibits abuse resulting from the **excessive use of successive fixed-term contracts**,<sup>33</sup> as recently confirmed by the European Court of Justice in *Mascolo*.<sup>34</sup>

In practice, such abuse – coupled with rising pressure from staff shortages – may equally cause resentment among teachers with employee status and those who are civil servants.

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## Notes

- <sup>1</sup> Status of ratification by Germany of UN instruments, available at: <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=en> (accessed 8 March 2018).
- <sup>2</sup> Status of ratification by Germany of ILO conventions, available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102643](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102643) (accessed 8 March 2018); 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, p. 72.
- <sup>3</sup> Declaration contained in a letter from the Permanent Representative of the Federal Republic of Germany, dated 28 September 1961 - Or. Ger; available at [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035/declarations?p\\_auth=skOJruZb](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035/declarations?p_auth=skOJruZb)
- <sup>4</sup> The 'Turin Protocol' strengthens the supervision of the ESC; its formal entrance into force still depends from necessary ratifications from four contracting parties one of them being Germany.
- <sup>5</sup> See judgment of the Bundesverfassungsgericht (BVerfG) of 12 June 2018; and Bundesverfassungsgericht (2018) Ban on strike action for civil servants is constitutional, Press Release No. 46/2018 of 12 June 2018 (<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-046.html>).
- <sup>6</sup> Waas, B., p. 237.
- <sup>7</sup> The notion of a strike, according to German legal interpretation, can be defined as 'the jointly planned and executed stoppage of work by a substantial number of employees in an industry or plant, with the aim of achieving settlement of a collective labour dispute. Furthermore, the strike must be linked to a collective agreement and must be initiated by a trade union.' ETUI Report 103, p. 32.
- <sup>8</sup> Waas, B., p. 235.
- <sup>9</sup> Waas, B., p. 257.
- <sup>10</sup> Waas, B., p. 249.
- <sup>11</sup> Waas, B., p. 248.
- <sup>12</sup> Waas, B., p. 251.
- <sup>13</sup> GEW.
- <sup>14</sup> Waas, B., p. 241.
- <sup>15</sup> Waas, B., p. 243.
- <sup>16</sup> Waas, B., p. 258 (note 116).
- <sup>17</sup> Waas, B., p. 257.
- <sup>18</sup> Waas, B., p. 253.
- <sup>19</sup> Observation (CEACR) – adopted 2017, published 107th ILC session (2018) – on the application of Convention No. 87 (freedom of association) – Germany: [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID,P11110\\_COUNTRY\\_ID,P11110\\_COUNTRY\\_NAME,P11110\\_COMMENT\\_YEAR:3343814,102643,Germany,2017](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3343814,102643,Germany,2017).
- <sup>20</sup> Waas, B., p. 255.
- <sup>21</sup> Waas, B., p. 256.
- <sup>22</sup> Available at: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2fDEU%2fCO%2f5&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2fDEU%2fCO%2f5&Lang=en).
- <sup>23</sup> Available at: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2fDEU%2fCO%2f6&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2fDEU%2fCO%2f6&Lang=en).
- <sup>24</sup> Observation (CEACR) – adopted 2017, published 107th ILC session (2018) – on the application of Convention No. 98 (right to bargain collectively) – Germany: [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID,P11110\\_COUNTRY\\_ID,P11110\\_COUNTRY\\_NAME,P11110\\_COMMENT\\_YEAR:3343942,102643,Germany,2017](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3343942,102643,Germany,2017).
- <sup>25</sup> ECSR Conclusions XX-3 (2014), Germany.
- <sup>26</sup> ECSR Conclusions XXI-3 (2018), Germany, available at: [https://hudoc.esc.coe.int/eng/#{%22sort%22:\[%22ESCPublicationDate%20Descending%22\],\[%22ESCArticle%22:\[%2206-00-000%22,%2206-04-000%22\],\[%22ESCDcLanguage%22:\[%22ENG%22\],\[%22ESCDcType%22:\[%22Conclusion%22\],\[%22ESCStateParty%22:\[%22DEU%22\],\[%22ESCDcIdentifier%22:\[%22XXI-3/def/DEU/6/4/EN%22\]}](https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],[%22ESCArticle%22:[%2206-00-000%22,%2206-04-000%22],[%22ESCDcLanguage%22:[%22ENG%22],[%22ESCDcType%22:[%22Conclusion%22],[%22ESCStateParty%22:[%22DEU%22],[%22ESCDcIdentifier%22:[%22XXI-3/def/DEU/6/4/EN%22]}).
- <sup>27</sup> The judgement can be found -in German- at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/06/rs20180612\\_2bvr173812.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/06/rs20180612_2bvr173812.html). For a press release in English by Constitutional Court, see Bundesverfassungsgericht (2018).
- <sup>28</sup> Ver.di (2018); Buschman (2018).
- <sup>29</sup> Press release 20.11.2018, <https://www.gew.de/presse/pressemitteilungen/detailseite/neuigkeiten/streikrecht-fuer-beamte-elf-klieger-ziehen-vor-den-europaeischen-gerichtshof-fuer-menschenrechte/>
- <sup>30</sup> GEW.
- <sup>31</sup> ECHR of 21 April 2009 – 68959/01.
- <sup>32</sup> GEW.

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<sup>33</sup> Clause 5 of the framework agreement on fixed-term work annexed to the Fixed-Term Work Directive (Directive 1999/70/EC).

<sup>34</sup> Joined Cases C- 22/13, C- 61/13 to C- 63/13 and C- 418/13, *Mascolo and Others* [2014], ECLI:EU:C:2014:2401; see also Answer by Commissioner Thyssen on behalf of the European Commission to Parliamentary Question P-007013/2017 of 11 December 2017: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2017-007013&language=NL>.