



The right to strike in the public services

Germany



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Notes

This factsheet reflects the situation in July 2021. It was elaborated by Nina Büttgen (independent expert), updated by Stefan Clauwaert (ETUC) and Diana Balanescu (independent expert), and reviewed by EPSU/ETUI; it was also sent to the EPSU affiliates for comment and incorporates comments from Klaus Lörcher (former ETUC Legal/Human Rights Advisor).

1. Legal basis

International level

Germany has ratified:

UN instruments¹

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 instruments²

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 has not ratified:

Convention No. 151 concerning Labour Relations (Public Service)

Convention No. 154, Collective Bargaining Convention, 1981

European level

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)³.

Article 6(4) (the right to collective action) of the Revised European Social Charter⁴

(ratification on 29 March 2021 and entry into force 1 May 2021)⁵.

Germany has neither signed nor ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints⁶

National level

The Constitution of Germany

In Germany, the right to strike is guaranteed by the Constitution. It forms part 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.⁷

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 (BundespersVG) and at the regional states ('Länder') level by the respective (16) Staff Representation Acts (LandespersVG). The staff representation is not allowed to take part in collective action (see, for example, § 66(2) BPersVG).
- The **federal law on public servants** (*Bundesbeamtengesetz*, BBG)⁸, as last amended on 28 June 2021⁹, 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 the constitution.
- In Germany, most **collective agreements** are concluded at **sector level**. In the public service, the main collective agreements are at federal and municipal (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.¹⁰ 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**.

Article 9(3) GG states that "[t]he right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession."¹¹

3. Definition of a 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.¹² 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.¹³ **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 European Social 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.¹⁴

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.¹⁵ 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 the 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.¹⁶

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.¹⁷

Finally, **most labour disputes** take place at **sector 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 work.

The rights established by Article 9(3) GG are granted to every worker in dependent employment, including trainees and apprentices. Whether it applies also to the self-employed is disputed, but nevertheless indicated by the wording of the Constitution.¹⁸

Public sector

- Germany maintains a **general ban** on the right to strike for **civil servants**. The same restriction applies to soldiers and judges.¹⁹ 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 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. It has been noted that the tendencies of down-sizing the public service through privatisation of formerly public functions has led to the incongruous situation that civil servants excluded from the right to strike are not only employed by the state, but also by privatized, formerly state-owned companies providing postal services or rail services.²⁰

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 authorities are being carried out by private security firms; and civil servants and employees are working side by side in public administrations and schools doing the same work.

The view of the GEW education union is that such practices split the workforce into civil servants (who may not strike) and employees (who may). This incites distrust among members of the workforce and reduces their power to enforce their own demands.

- Furthermore, from a legal perspective, this **general ban** is in conflict with Article 8 International Covenant on Economic, Social and Cultural Rights, the relevant ILO Conventions No. 87 and No. 98 and Article 6§4 of the European Social Charter. Consequently, it has been repeatedly criticised by the respective supervisory committees (see section 7).
- There is no clear-cut concept of **essential services** in Germany. 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. Several proposals for a legislative regulation of strike in essential services remain without a concrete outcome.²¹

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.

Where no agreement can be reached between the parties on **minimum services**, the details may be decided directly by the court called to rule on an injunction request against a strike.²²

It was noted that statutory law does not address the question of strikes in essential services, nor gives a definition of the latter. The only difference between these strikes and ‘ordinary’ strikes is that an additional element is considered by the courts when deciding whether a strike might violate the proportionality principle: the strike might be illegal also due to an unacceptable detriment to the rights of third persons or the public interest.²³

Under international law, ‘essential services’ in the strict sense of the term have been defined by the ILO as those services ‘the interruption of which would endanger the life, personal safety or health of the whole or part of the population’.²⁴

Employees of religious institutions

Employees of religious institutions are subject to a general ex-ante exclusion from the right to strike and to significant limitations of the right to collective bargaining.²⁵

Articles 4(1), 4(2) and 140 of the Basic Law (GG) combined with Article 137(3) of the Weimar Constitution grant churches a fundamental right to self-determination. Beneficiaries of this guarantee include all establishments affiliated to a religious organisation whose purpose is in some way related to the implementation of the religious mission. Churches and their affiliated institutions are among the largest employers in health, child, elderly and disability care institutions in Germany.²⁶

Relying on this constitutional entitlement to self-determination, both Catholic and Lutheran religious institutions have adopted a model known as the “Third way”, in which no collective bargaining takes place between unions and representatives of churches, and working conditions are determined by joint commissions in which employers and workers are represented. Alternatively, the modified “Second way”, as practiced by parts of the Lutheran church, envisages collective bargaining and the conclusion of collective agreements with a union, which however involve both an absolute peace obligation and binding arbitration in case of disputes. Both models strictly **exclude the right to strike**.²⁷

In late 2012, the Federal Labour Court²⁸ confirmed that both models practised by the churches were in principle compatible with the constitution, as far as certain guarantees of employee involvement prevented the rights enshrined in Article 9(3) GG from becoming meaningless. For example, with regard to the “Third way” model, such guarantees could be the establishment of an autonomous bipartite body within the institution for determining working conditions, in which the representation of the employees’ side is granted and which provides for an impartial arbitration procedure in case of disputes. The decision taken in this framework must be binding for the employer as minimum standards. As regards the modified “Second way” model, the Court made it clear that failure to ensure a genuine involvement of the workers’ side in collective bargaining entitles the latter to engage into measures of collective action.²⁹ It was commented that, in the light of this case-law, the ex-ante prohibition of strike in religious institutions is actually a conditional one (other than for civil servants).³⁰

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 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.³¹
- 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 sector-level agreement.³²

6. Legal consequences of participating in a strike

Participation in a lawful strike

- If employees participate in a lawful strike then their principal duties (obligation to work) are suspended for the duration of the collective action. Hence, there is no breach of contract, as the employees are 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 workers themselves that they will participate in the strike (see 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 a 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, workers may not claim unemployment benefits if they are likely to gain from the outcome of the dispute.³³

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. It was noted that the obligation of neutrality of the state implied that the resolution of collective labour disputes by compulsory arbitration is forbidden.³⁴

- 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.³⁵
- 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.³⁶

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.³⁷

Participation in an unlawful strike

- The **obligation to work** is not suspended during an unlawful strike, which means that any workers who participate in such a strike are in breach of their 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).³⁸
- 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.³⁹

- The employer concerned may also file for a court order **stopping the action**. Employers have access to such injunctive relief based on an infringement of their right to conduct business, as guaranteed by German tort law. Whether they 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 and European bodies

International Covenant on Economic, Social and Cultural Rights

In its **concluding observations** on the sixth periodic report of Germany adopted on 12 October 2018, the Committee on Economic, Social and Cultural Rights (CESR) noted and recommended the following⁴⁰:

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. 20⁴¹) 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)

Observation (CEACR) - adopted 2017, published 107th ILC session (2018), ILO Convention No. 87⁴²

The Committee recalled that it had been requesting for a number of years the adoption of measures to recognize the right of public servants who are not exercising authority in the name of the State to have recourse to strike action. In its previous observation, the Committee had noted with interest a ruling handed down by the Federal Administrative Court on 27 February 2014 holding that, given that the constitutional strike ban depends on the status group and is valid for all civil servants (*Beamte*) irrespective of their duties and responsibilities, there is a collision with the European Convention on Human Rights in the case of civil servants (*Beamte*) who are not active in genuinely sovereign domains (*hoheitliche Befugnisse*), for instance teachers in public schools, and this collision should be solved by the federal legislator; and that, in the case of civil servants (*Beamte*) who exercise sovereign authority, there is no collision with the European Convention on Human Rights and thus no need for action.

The Committee had further noted the Government's indication in this regard that, for civil servants (*Beamte*) not exercising sovereign authority, the legislator must bring about a

balancing of the mutually exclusive legal positions under Article 33(5) of the Basic Law and the European Convention on Human Rights (ECHR); that, in the meantime, the constitutional strike ban for civil servants (*Beamte*) remained in force; and that, given that union representatives would refer the matter to the Federal Constitutional Court and that two proceedings on the same subject matter were already pending before it, legislative measures should not forestall the clarification and resolution of the issues by that Court.

In light of the above, the Committee had requested the Government to refrain in the future from imposing disciplinary sanctions against any civil servants not exercising authority in the name of the State who participate in peaceful strikes; and to engage in a comprehensive national dialogue with representative organizations in the public service with a view to exploring possible ways of bringing the legislation into conformity with the Convention. The Committee also requested the Government to provide information on any ruling handed down by the Federal Constitutional Court on the subject. (...)

The Committee noted with concern that the ruling of the Federal Administrative Court on 26 February 2015 upheld the disciplinary action imposed on a teacher with civil servant status (*Beamte*) for having participated in industrial action. The Federal Administrative Court reiterated that the conflict between the general strike prohibition on civil servants who are not engaged in genuinely sovereign domains pursuant to Article 33(5) of the Basic Law and, on the other side, the right to freedom of association under Article 11 of the ECHR, can only be solved by the federal legislator and not by the tribunals. Noting that the Federal Constitutional Court was soon to decide on the constitutional complaint raised following the Federal Administrative Court judgment of 27 February 2014, the Committee requested the Government to provide a copy of that decision, as soon as it is handed down, as well as any other pending decision to be issued by the Federal Constitutional Court on the subject.

In view of the collision ascertained by the Federal Administrative Court between Article 33(5) of the Basic Law and Article 11 of the ECHR, and in light of the need highlighted by the Committee over many years to bring the legislation into full conformity with the Convention with regard to the same aspect, the Committee once again requested the Government to: (i) refrain, pending the relevant decision of the Federal Constitutional Court, from imposing disciplinary sanctions against civil servants not exercising authority in the name of the State (such as teachers, postal workers and railway employees) who participate in peaceful strikes; and (ii) to engage in a comprehensive national dialogue with representative organizations in the public service with a view to finding possible ways of aligning the legislation with the Convention.

Observation (CEACR) - adopted 2017, published 107th ILC session (2018), ILO Convention 98⁴³

The Committee recalled that it had been highlighting for many years that, pursuant to *Articles 4 and 6* of the Convention, all public service workers, other than those engaged in the administration of the State, should enjoy collective bargaining rights. Taking 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, the Committee requested once again that the Government engage in a comprehensive national dialogue with representative organizations 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 recognize 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 organizations in the public service.

European Convention on Human Rights

Pending cases before the **European Court of Human Rights**:

Humpert v. Germany (no. 59433/18) and 3 other applications⁴⁴ concerning **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 requesting an improvement of 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.

On 12 June 2018, in its judgement on the four 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** was constitutional and also compatible with the guarantees of the European Convention of Human Rights (ECtHR).⁴⁵ The latter was heavily contested by trade unions, including ver.di and the DGB confederation.⁴⁶ The GEW⁴⁷ education union supported its members in filing the application to the European Court of Human Rights and the cases are pending.⁴⁸

The applicants complained under **Articles 11 and 14 of the Convention** that the obligation not to strike was not prescribed by law, was 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.

European Social Charter

On 29 March 2021, Germany ratified the Revised European Social Charter accepting 88 of its 98 paragraphs. However, Germany has neither signed nor ratified the Additional Protocol to the European Social Charter providing for a system of collective complaints.⁴⁹

European Committee of Social Rights Conclusions

In previous conclusions, the European Committee of Social Rights (ECSR) found, 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 civil servants, and the possibility of labour court injunctions prohibiting strikes.⁵⁰

In its **Conclusions XX-3 (2014)**, the ECSR focused on the following two aspects:

- First, it considered that the requirements that had to be met so that a group of workers can form a union that has the right to call a strike constituted an excessive restriction on the right to strike. The ECSR found therefore that the situation in Germany was not in conformity with Article 6(4) of the 1961 Charter on this point.⁵¹
- 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. The ECSR reserved its position on this point.⁵²

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. With no changes to this situation, the Committee reiterated 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. With no changes to this situation, the Committee reiterated its previous conclusions.

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

Conclusion

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

- the prohibition of 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 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.⁵³

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Notes

- ¹ Status of ratification by Germany of UN instruments, available at: <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=en> (accessed 15 July 2021).
- ² 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 (accessed 15 July 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, p. 72.
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- ⁵ Before ratifying the Revised European Social Charter, Germany was bound by Article 6(4) of the 1961 Charter which it ratified on 27 January 1965.
- ⁶ Status of ratifications of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?module=signatures-by-treaty&treatyid=158> (accessed on 15 July 2021);
- ⁷ 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>).
- ⁸ https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=52842
- ⁹ Law of 28 June 2021 to regulate the image of civil servants and to amend further regulatory provisions on service performance: http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s2250.pdf
- ¹⁰ Waas, B., p. 237.
- ¹¹ Art. 9 para. 3 s. 1 Constitution (Grundgesetz, GG).
- ¹² 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.
- ¹³ Waas, B., p. 235
- ¹⁴ Waas, B., p. 257
- ¹⁵ Waas, B., p. 249
- ¹⁶ Waas, B., p. 248
- ¹⁷ Waas, B., p. 251
- ¹⁸ Schlachter, M. and Hießl, C., p. 184
- ¹⁹ Schlachter, M. and Hießl, C., p. 203
- ²⁰ Schlachter, M. and Hießl, C., p. 205
- ²¹ For more details regarding the proposals, see Schlachter, M. and Hießl, C., pp. 205-206
- ²² Schlachter, M. and Hießl, C., p. 200
- ²³ Schlachter, M. and Hießl, C., p. 197
- ²⁴ Compilation of decisions of the Committee on Freedom of Association (ILO CFA), 6th edition, 2018, Chapter 10, paras. 836 - 841 – ILO CFA has defined and listed as “*essential services in the strict sense of the term*” where the right to strike may be subject to restrictions or even prohibitions, the following: the hospital sector, electricity services, water supply services, the telephone service, the police and armed forces, the fire-fighting services, public or private prison services, the provision of food to pupils of school age and the cleaning of schools, air traffic control. The ILO CFA has stressed that compensatory guarantees should be provided to workers in the event of prohibition of strikes in essential services and the public service, see paras. 827, 853 - 863; See also Schlachter, M. ‘Regulating Strikes in Essential Services from an International Law Perspective’ in Mironi, M. and Schlachter, M (eds) 2019, *Regulating Strikes in Essential Services: A Comparative 'Law in Action' Perspective*, Netherlands: Wolters Kluwer International, pp. 29-50.
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- ²⁶ Schlachter, M. and Hießl, C., pp. 200-201
- ²⁷ Schlachter, M. and Hießl, C., p. 201
- ²⁸ BAG 20 November 2012 – 1 AZR 179/11 and 1 AZR 611/11

²⁹ Schlachter, M. and Hießl, C., pp. 207-208

³⁰ Schlachter, M. and Hießl, C., p. 208

³¹ Waas, B., p. 241.

³² Waas, B., p. 243.

³³ Waas, B., p. 258 (note 116).

³⁴ Schlachter, M. and Hießl, C., p. 184

³⁵ Waas, B., p. 257.

³⁶ Waas, B., p. 253.

³⁷ Observation (CEACR) – adopted 2017, published 107th ILC session (2018) – on the application of Convention No. 87 (freedom of association) – Germany:

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³⁸ Waas, B., p. 255.

³⁹ Waas, B., p. 256.

⁴⁰ Available at:

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fDEU%2fCO%2f6&Lang=en.

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⁴² See the full text of the Observation (CEACR) – adopted 2017, published 107th ILC session (2018) – on the application of Convention No. 87 at:

https://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 .

⁴³ See the full text of the Observation (CEACR) – adopted 2017, published 107th ILC session (2018) – on the application of Convention No. 98 at:

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⁴⁴ See *Humpert v. Germany and other 3 applications* at: <http://hudoc.echr.coe.int/eng?i=001-196446> (consulted on 15 July 2021).

⁴⁵ The judgement can be found -in German- at

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⁴⁶ Ver.di (2018); Buschman (2018).

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⁴⁸ See *Humpert v. Germany and other 3 applications* at: <http://hudoc.echr.coe.int/eng?i=001-196446> (consulted on 15 July 2021).

⁴⁹ European Social Charter, Country profile: Germany: <https://www.coe.int/en/web/european-social-charter/germany>

⁵⁰ See ECSR, previous Conclusion on Article 6(4) in respect of Germany at:

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⁵¹ ECSR, Conclusions XX-3(2014), Article 6(4), available at: <http://hudoc.esc.coe.int/eng?i=XX-3/def/DEU/6/4/EN> .

⁵² *Ibid.*

⁵³ ECSR, Conclusions XXI-3(2018), Article 6(4), available at: <http://hudoc.esc.coe.int/eng?i=XXI-3/def/DEU/6/4/EN> .