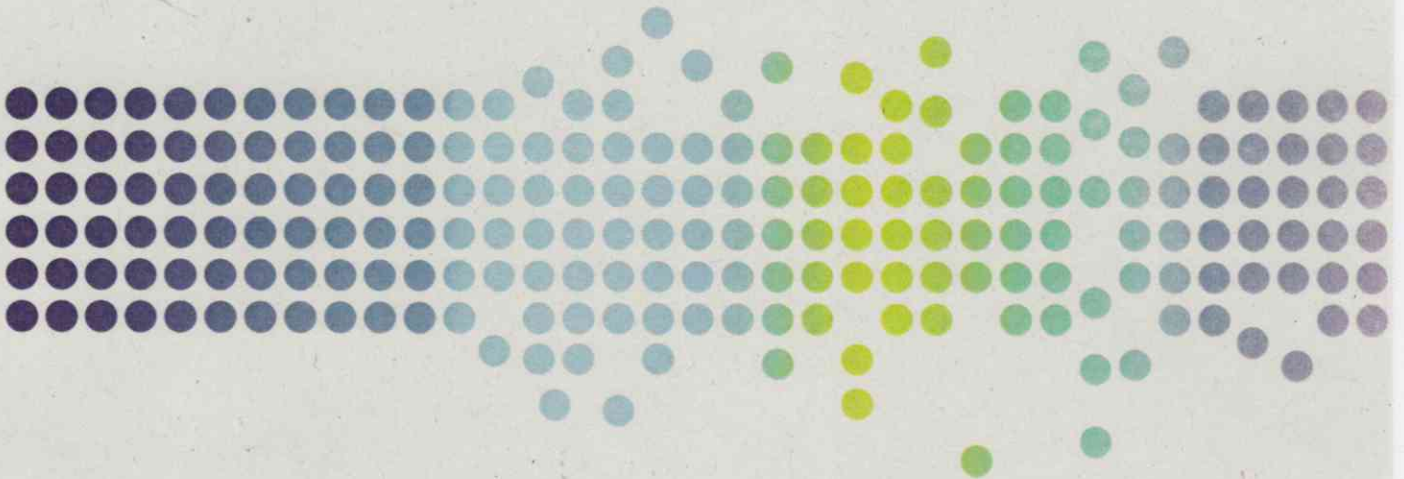


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# 쟁의행위와 책임

Industrial Action and Liability

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법학연구소

# Industrial Action and Liability The Situation in Germany

Wolfgang Däubler (University of Bremen)

## I. Introduction: The right to industrial action

### 1. Dualistic System and number of Strikes

In Germany, the number of strikes is quite low. According to statistical figures published by the scientific institute of the German Trade Union Congress,<sup>1)</sup> about one million of employees participated in strikes in 2013. In relation to 36 million employees, this is a quite modest number: About 3 % of all workers went to strike. In the typical case, a strike took some hours, because only 550.000 working days were lost.<sup>2)</sup> This needs some explanation.

In Germany, workers' interests can be represented via three channels:

1. works councils elected by all employees in a plant;
2. workers' representatives on the supervisory board of large companies; and
3. trade unions whose main function is to conclude collective agreements.

The three channels are closely interrelated, and various sets of formal and informal rules are applied to ensure that representatives' activities are all moving more or less in the same direction. This contribution is focused on trade union rights, especially collective bargaining and strike. *Their role can be understood only if one bears in mind the other forms of conflict resolution.* Some information about the works council system seems to be necessary.

In all plants employing at least five employees a works council must be elected. At least, this is what the law on works councils provides, but the reality is very different.

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<sup>1)</sup> WSI - Wirtschafts- und Sozialwissenschaftliches Institut.

<sup>2)</sup> Details see *Dribbusch*, *Böckler impuls* 5/2014 p. 3.

Only in about 10% of plants, works councils are elected. However, since these are generally the larger ones, nevertheless about 50% of all employees are represented by a works council.<sup>3)</sup> A works council is elected by all employees working in the plant the union membership being legally without any importance. The works council has a well elaborated position.

Works councillors are entitled to exercise their functions during working time, paid by the company.<sup>4)</sup> This is especially important for their weekly meetings and for contacting workers. The latter are subject to similar conditions when attending the consulting hours of the works council or contacting one of its members:<sup>5)</sup> they are entitled to bring forward grievances or ideas to works council members during working time without losing pay. Contacting union spokesmen would be possible only during breaks or before the beginning and after the end of the work.

In plants with at least 200 employees, one member of the works council has the right to function on a full-time basis.<sup>6)</sup> The wages of all works councillors must not be reduced because of their activities. Members of the works council may go to seminars to acquire the know-how they need to exercise their functions. During their absence, their wages are paid by the employer as are the costs of participating in the seminar.<sup>7)</sup> Comparable possibilities for trade union activists do not exist. The employer must also provide the works council with the necessary equipment, such as meeting room, office, phone, computer and internet access. Unconceivable to give similar rights to trade union spokesmen; it would be considered to endanger the independence of the union from the employer's side.

Works council members can be dismissed only for grave misconduct.<sup>8)</sup> Even in that case, a second condition applies: an employer's dismissal request needs to be approved by the works council.<sup>9)</sup> If the works council does not agree the employer may ask the local labour court to decide. In the course of the lawsuit (which may take between 6 and 12 months) the works councillor continues to exercise his or her functions and to work at the

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3) *Ellguth*, Quantitative Reichweite der betrieblichen Mitbestimmung, WSI-Mitteilungen 56 (2003), 194 - 199

4) Article 37 § 2 Works Constitution Act

5) Article 39 § 3 Works Constitution Act

6) Article 38 § 1 Works Constitution Act

7) Articles 37 § 6 and 40 Works Constitution Act

8) Article 15 § 1 Act Protecting against Dismissals

9) Article 103 Works Constitution Act

plant. Once more, union representatives are never protected in the same way.

The works council has a comprehensive right to be informed by the employer about everything related to the plant.<sup>10)</sup> The council may also obtain information from other sources such as newspapers, websites or the workforce. Having sufficient information is considered to be an elementary condition for the council to exercise its rights of consultation and codetermination.

The rights to consultation and codetermination are laid down in the law but can be extended by collective agreement (and sometimes are). With regard to consultation, there is a general rule that planned changes in working conditions (in a broad sense) must be communicated to the works council and discussed with its members.

The right to codetermination is much more important. Codetermination means joint responsibility for certain decisions taken together with the employer. This requires an even higher standard of information. In fields in which codetermination applies, council and employer must take a joint decision. In practice, the decision is made by the employer with the consent of the council. A unilateral decision would have no legal effect; no employee would be obliged to follow it. In addition, the works council could go to the labour court asking for an injunction.<sup>11)</sup> Within a few days, a court decision would force the employer to withdraw the measure until an agreement with the works council has been reached.

If negotiations between employer and works council fail, either side may ask a conciliation board to decide. Normally, the board consists of two or three members from each side and an impartial chair from outside the plant. As a rule, the board reaches a compromise; in exceptional cases it takes a majority decision. Its legality can be supervised by the labour court if one side requests it. A strike must not occur during the whole procedure; it is explicitly forbidden by the Works Constitution Act. Even outside codetermination, the works council is generally forbidden to organize or support a strike.<sup>12)</sup>

The areas of codetermination are laid down in the law. They comprise rules to employees, which are not directly linked to work.<sup>13)</sup> This includes for instance the

<sup>10)</sup> Article 80 § 2 Works Constitution Act

<sup>11)</sup> BAG 3.5.1994 - 1 ABR 24/93, DB 1994, 2450; BAG 23.7.1996 - 1 ABR 13/96, DB 1997, 378.

<sup>12)</sup> Article 74 § 2.

<sup>13)</sup> Article 87 § 1 No. 1 Works Constitution Act

obligation to wear a uniform or to discuss the medical or social reasons for an illness exceeding six weeks in a year if the worker agrees. Another field is overtime, short time work and beginning and end of working time.<sup>14)</sup> Monitoring workers by means of technical equipment, such as video cameras or listening into phone calls, is comprised, to o.<sup>15)</sup> Other important fields are the distribution criteria for fringe benefits among employees<sup>16)</sup> and the social plan in the case of "fundamental change" of the plant, such as its partial or total closure.<sup>17)</sup>

The system of works councils absorbs a lot of conflicts which are resolved without any industrial action. This is a feature which characterizes German industrial relations. It is one essential reason why much less strikes occur in Germany than in comparable industrialized countries like France or Canada.<sup>18)</sup>

## 2. The division of labour between unions and works councils

Article 9 § 3 of the German Basic Law (Constitution) guarantees the right of all individuals to form a union or to join an existing one. The Federal Labour Court and especially the Federal Constitutional Court have extended the guarantee to unions as such: their existence is protected as well as all their activities in pursuit of the defence and the improvement of working conditions and economic conditions.<sup>19)</sup> This includes, in particular:

1. the right to conclude collective agreements;<sup>20)</sup>
2. the right to strike or take other collective actions in pursuit of a new (and better) collective agreement (and perhaps other aims);<sup>21)</sup>
3. the right to cooperate with works councils and workers' representatives on the

<sup>14)</sup> Article 87 § 1 Nos. 2 and 3 Works Constitution Act

<sup>15)</sup> Article 87 § 1 No.6 Works Constitution Act

<sup>16)</sup> Article 87 § 1 No.10 Works Constitution Act

<sup>17)</sup> Article 112 § 2 Works Constitution Act

<sup>18)</sup> See *Dribbusch*, Böckler impuls 5/2014 p.3: In an average year between 2005 and 2012, in Germany 16 working days had been lost by strikes calculated on the basis of 1000 employees. In Canada the number of days was 112 and in France 150.

<sup>19)</sup> See BVerfG 18.11.1954 - 1 BvR 629/52, BVerfGE 4, 96, 106; BAG 24.2.1967 - 1 AZR 494/65, AP Nr. 10 zu Art. 9 GG

<sup>20)</sup> See BVerfG 18.11.1954 - 1 BvR 629/52, BVerfGE 4, 96 ff.; BVerfG 6.5.1964 - 1 BvR 79/62, BVerfGE 18, 18, 27

<sup>21)</sup> See BVerfG 26.6.1991 - 1 BvR 779/85, BVerfGE 84, 221, 224; BVerfG 4.7.1995 - 1 BvF 2/86 u.a., DB 1995, 1464 and 4b below.

- supervisory board;<sup>22)</sup>
4. the right to distribute leaflets and to send e-mails to workers;<sup>23)</sup> trade union representatives also have a right of access to workplaces;<sup>24)</sup>
  5. the right to represent workers' interests in relation to public authorities and political parties.<sup>25)</sup>

At the same time, the judge-made law conferring these rights to unions (and employers' associations) has established limits, too. Trade union rights must be balanced against the fundamental rights of the employer and can be restricted by statute in the public interest.<sup>26)</sup> Before 1995, the Federal Constitutional Court had decided that the union rights were only guaranteed in their 'core', a rule, which implied that only indispensable activities were protected by the Constitution.<sup>27)</sup> By this way, a lot of trade union activities were not protected by the Constitution: Election of trade union spokesmen within the plant? Not indispensable because it can be organized in a bus. Access of trade union representatives to the plant in order to inform workers on trade union activities? Not indispensable because it can be done by workers being already members of the union. All this has now been put away: all kinds of trade union activities are protected by article 9 § 3 of the Constitution, but have to be balanced against the fundamental rights of the employer: If the workflow is not seriously disturbed there is no reason to consider these activities to be unlawful.

If the works council would be completely independent from the union it would be the only representation of workers' interests in daily life. For an individual worker the best way to solve a problem would be to go to the works council and ask for support. The union would be marginalized. Why should one go during one's free time to an organization, which would have no real influence in the plant? It could publish a protest, nothing more. Its 'codetermination' would be the conclusion of a collective agreement, which normally applies to the whole branch or at least to a part of it. The small problem

<sup>22)</sup> BVerfG 30.11.1965 - 2 BvR 64/52, BVerfGE 19, 303, 313

<sup>23)</sup> BAG 20.1.2009 - 1 AZR 515/08, NZA 2009, 615

<sup>24)</sup> BAG 28.2.2006 - 1 AZR 460/04, NZA 2006, 798; LAG Niedersachsen 17.11.2008 - 11 SaGa 1433/08, NZA-RR 2009, 209

<sup>25)</sup> BVerfG 26.5.1970 - 2 BvR 686/65, BVerfGE 28, 295, 305

<sup>26)</sup> BAG 22.9.2009 - 1 AZR 972/08, NZA 2009, 1347

<sup>27)</sup> BVerfG 14.11.1995 - 1 BvR 601/92, BVerfGE 93, 352 et seq. The new case-law is described as an „interpretation“ of former judgments which were often “misunderstood.”

of an individual has no place in such a kind of collective negotiations.

Law and reality establish a much more balanced system. The legislator has established numerous coordination mechanisms to protect unions and prevent their replacement by works councils.

Unions play an important role in the creation of works councils. They can take the initiative to call for elections or install an election committee.<sup>28)</sup> However, the union's initiative is not essential and a works council can be established without any union support.

The union does not have a reserved seat on works councils and there is no formalized link between the two. Unions can participate in works council elections with a union list, made up of company employees and not trade union staff. However, if candidates on a trade union list are elected, they enjoy their mandate as individuals and not as union representatives.

Collective agreements must be respected by the employer and the works council; both can act only within the framework defined by the mutual decisions of unions and employers. In particular, codetermination with regard to wages and working time applies only to matters left unregulated by the collective agreement.

Individual works councillors are free in their union activities.<sup>29)</sup> They are not bound by the peace obligation, which is addressed only to the works council as such.

Unions help works councils to perform their functions if the latter accept it. Unions offer many courses to provide works councillors with the knowledge they need. The works council (even a minority of its members) can request that a union official take part in all its meetings.

Unions have the right to supervise the behaviour of works councils and to ask the labour court to end the office of a particular works council if it has neglected its duties to a considerable extent.<sup>30)</sup>

Normally, all these mechanisms lead to close cooperation between works councils and unions. About 70% of all works councillors are union members (whereas the union density among workers in general is nowadays less than 20%). In former times works councils

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<sup>28)</sup> For details see *Däubler*, *Gewerkschaftsrechte im Betrieb*, 11th edition, Baden-Baden 2010, para. 91 et seq.

<sup>29)</sup> Article 74 § 3 Works Constitution Act

<sup>30)</sup> Article 23 § 1 Works Constitution Act

had an important role in recruiting new trade union members despite the fact that there is a legal obligation of neutrality towards unions for works councils as such.

The most important instrument to make the union stronger than the works council is the collective agreement. It deals with wages, weekly working time and some fringe benefits whereas the main task of the works council is to influence the way how the work is performed (e.g., beginning and end of work, overtime, monitoring of workers by technical means etc.). If a collective agreement has regulated a certain matter the works council is prohibited to conclude works agreements on the same topic. According to Article 77 § 3 of the Works Constitution Act, these agreements are illegal even in the case that 'usually' the questions are regulated by collective agreement in the firm; it is not required that the concrete employer is bound by them. One may call this a division of labour between works councils and unions - the works council tries to solve the questions of daily life whereas the union deals with the fundamental questions of wages and working time. The union is the only agent entitled to organize a strike and to bring by this way real economic progress. The rights on workplace level like the right to accede to the premises of the employer are of a high importance in preparing negotiations about a new collective agreement or in trying to activate people for other aims.

### 3. Law and reality

The concept of a harmonious division of labour between works councils and unions cannot be identified with a general reality in German plants. Three points should be mentioned.

#### a) Influence of works councils on collective bargaining

Works councillors often share some economic views of their employers and prioritize the interests of the enterprise (e.g. to get sufficient profit). This will not be openly declared, but the existence of such an attitude is obvious for those who are involved in collective bargaining. This constrains radical trade union demands and the use of the right to strike. In practice, works council members play an active role in defining trade union policy because a strike depends normally on their readiness to influence workers at plant level in an informal way. In nearly all unions, one will find a collective bargaining committee in which works councillors have a clear majority. The committee offers only a



recommendation, not a binding opinion, but its position is of considerable importance. The legal principles of social partnership laid down in the Works Constitution Act influence, therefore, the behaviour of the union. The interaction between unions and works councils has certainly contributed to more modest wage demands over the past years. It is, therefore, not surprising that the average income of workers protected by collective agreements grew by only 4% between 2000 and 2008, whereas in comparable countries, such as France, Great Britain and Sweden, the percentage was much higher. If one takes the real wages of all workers, the development is still more striking: while in Germany wages have decreased by 0.8%, they have increased by 4.6% in Spain, 7.5% in Italy, 12.4% in the Netherlands, 17.9% in Sweden and 26.1% in Great Britain.<sup>31)</sup> It is not surprising that trade union membership has decreased from about 11.3 million people in 1993 to about 6.2 million in 2010;<sup>32)</sup> the price unions had to pay for their policy of social partnership and modesty is a quite high one. Will the 'German model' survive for long under these circumstances? The answer is still unknown. It may depend on the capacity of unions to link a more aggressive wage bargaining strategy with a campaign to increase membership.

#### b) The emergence of new unions

In recent years, groups of specialized employees have formed their own unions. Pilots and cabin staff (stewardesses and pursers) have done it in the beginning of the 1990s. They were followed by the air controllers and the doctors in hospitals. The engine drivers always had their own union, which closely collaborated with the big union of railwaymen renouncing on collective bargaining by their own. In 2002 a dissociation of the organizations took place. In all these cases, the specialists were dissatisfied by the results the big unions had attained in collective bargaining. Indeed, all the groups mentioned could reach better results by acting alone, normally organizing strikes.

The traditional unions reproached them to follow an egoistic trip. Financial means they receive would no more be available for the less qualified people who would need special support; the gap between the 'rich' and the 'poor' widens. On the other hand, this is true only if the quantity of money that is to be distributed cannot be influenced. The overview

<sup>31)</sup> Thorsten Schulten, Europäischer Tarifbericht des WSI 2007/2008, [www.boeckler.de/pdf/impuls\\_2008\\_14\\_1.pdf](http://www.boeckler.de/pdf/impuls_2008_14_1.pdf)

<sup>32)</sup> Until now, it has remained on this level.

on the wage increases between 2000 and 2008 shows, however, that this assumption does not seem to be very realistic. Another argument is that the big unions did not try to exercise pressure on the employers' side by calling these 'strong' groups to participate in a strike. The power of air controllers, engine drivers and doctors in hospitals is obvious, not only for the public but also for the employees themselves. Why should they accept, for example, a wage increase below the inflation rate because the union accepts the proposal of a mediator without trying to organize a strike? Never were they given a chance to fight for better wages for all workers of the sector; doing it alone was the ultimate way-out.

The emergence of new unions had a specific impact on the dualistic system. Doctors or engine drivers will rarely have a majority in the works council and cannot automatically count on the support of the other groups. Problems in daily work will not be solved by the works council like in other plants; it is up to the union to take the necessary steps. Let me give an example. Doctors in hospitals are often obliged to do an on-call service during the night. It is less paid than ordinary work. According to the collective agreements, on-call service permits only 50% of the time being spent with work. If this limit is not respected the doctor has to be paid as if he or she had worked during the whole night. It is, therefore, essential that each doctor writes a kind of diary about the work done during the on-call service. Under normal circumstances, the works council would tell the doctors to do so and even organize a coordinated action, but there are no examples for this in hospitals. It is up to the doctors' union to take the initiative and to take this (modest) step forward. The surprising consequence is that in these fields we have a one-channel system in Germany. Another important consequence of the emergence of new unions is the growing importance of strikes.

#### c) Workers without works councils and unions

What about the 50% of workers who are not represented by a works council and who will not be represented by a union? (To have a group of union members and no works council is an extremely improbable situation, because it is much more dangerous to create against the will of the employer a union group instead of a works council.) In this 'dark half' of our industrial relations there is only an informal kind of workers' representation whose character depends more or less on the employer. If he is convinced that workers

should be consulted because problems will become visible and can be solved afterwards, he will have an open ear to grievances or, in bigger plants, even install a representation body that can be the speaker of the workers.<sup>33)</sup> If he thinks to be always on the right way he will practice an authoritarian style and workers have to obey.<sup>34)</sup> A correction can only be realized by workers having a good position in the labour market; they can threaten to leave the plant or effectively do it. Union rights on the workplace exist as in other plants but one does not dare to use them. They are law in the books, not law in action.

#### 4. Right to industrial action - differences to other West-European Countries

##### a) The constitutional guarantee

Art. 9 § 3 contains implicitly a right to collective action, especially a right to strike. This is uncontested since the Constitutional Court has refrained from its former opinion that collective activities are guaranteed only in a "core area".<sup>35)</sup> Demands to create an industrial action act remained without any success because both sides were anxious to be restricted in their activities.

##### b) Limits of the right to strike

In practice, the most important limit is the peace obligation. If a collective agreement exists such a obligation is derived automatically from it, a kind of implied condition. As long as the collective agreement is not effectively denounced, both partners are obliged not to take any action against the other side related the subject-matters contained in the collective agreement. As to other subject-matters they are not bound. They can, however, extend the peace obligation to all possible matters what is done only in institutions dominated by the catholic or the protestant church.

Other limits of the right to strike are derived from the fundamental rights of the employer. As his freedom of professional activity and (perhaps) his property is affected the strike has to respect the principle of proportionality. The strike has to be the last

<sup>33)</sup> *Däubler*, Privatautonome Betriebsverfassung?, in Festschrift für Hellmut Wißmann, editors: Wolfhard Kohte, Hans-Jürgen Dörner & Rudolf Anzinger, München 2005, 275 et seq.

<sup>34)</sup> *I. Artus*, Interessenhandeln jenseits der Norm, Frankfurt 2008, 209 et seq.

<sup>35)</sup> BVerfG 14.11.1995 - 1 BvR 601/92, BVerfGE 93, 352 et seq.

resort (*ultima ratio*) which can be used only if all other means have failed. That could lead to a very detailed judicial control of collective bargaining but the Federal Labour Court did not pursue this way: It is up to the union to decide whether all other means besides the strike would be useless. Only for misuses an exception must be made but such a case never happened.

Do engine drivers have a right to strike so that people without a car cannot reach their workplaces or other destinations in order to fulfil their duties? When such a strike arrived some years ago, courts disagreed about the question whether such a work-stoppage would be disproportionate. The railway company tried to get an injunction forbidding the strike. In Nürnberg they succeeded,<sup>36)</sup> but after some time, the regional court of Saxonia in Chemnitz decided that such a strike is legitimate and cannot be forbidden.<sup>37)</sup> The case has not been decided by the Federal Labour Court, because the procedure on injunctions goes only to the regional court and a definite decision within the main proceedings was requested by neither of the parties.

Considering the described system as a whole it is quite obvious that collective agreements play a decisive role in trade union activities. If bargaining does not lead to an agreement, unions and employers normally recur to conciliation ("*Schlichtung*") which, however, is not compulsory. In some branches (e.g. banking), there is no such procedure at all, in others there is a voluntary agreement enabling each side to start a conciliation procedure if it considers this to be adequate. The result is normally not binding; each side keeps the right to refuse. Legally, one could establish a clause that the result would be accepted automatically, but in practice, this would be very exceptional. The importance of conciliation is a political one: The refusing side would have a bad image in public discussions.

c) Collective agreements or other aims, too?

Whether trade unions have a right to organize a strike for other aims than collective agreements is doubtful. Germany has ratified the European Social Charter which guarantees in its article 6 § 4 a much wider right to strike. The Committee of Ministers of the Council of Europe as recommended to Germany by a two-thirds majority to change the

<sup>36)</sup> ArbG Nürnberg 8.8.2007 - 13 Ga 65/07, AuR 2007, 320; in the same sense ArbG Chemnitz 5.10.2007 - 7 Ga 26/07, AuR 2007, 393

<sup>37)</sup> LAG Chemnitz 2.11.2007 - 7 SaGa 19/07, AuR 2007, 439

legal situation and to admit strikes for other aims and - which will be discussed in the next paragraph - to admit the so-called wild-cat strike.<sup>38)</sup> The legislator did not take any measures because both social partners are hostile to a legal regulation of industrial conflicts. The Federal Labour Court (Bundesarbeitsgericht) declared two times that this is an "open question" which had not to be decided in the concrete case.<sup>39)</sup> Considering civil liability which cannot be excluded trade unions would not dare to organize a strike having other aims than the conclusion of a collective agreement.

#### d) The illegality of the so-called wild-cat strike

Unlike France, Italy, Spain and Portugal Germany does not accept the wild-cat strike which is not organized by a union but by a group of workers. It is considered to be a breach of contract which can legitimate dismissals of the strikers and cause their civil liability. In September 1969, there was a "wild" strike movement comprising 160.000 workers from 69 plants but their demands were fulfilled and no sanction was inflicted. In 1973, 275.000 workers from 335 plants participated but there were some few dismissals. In 1996, there was another movement fighting for the full continued remuneration in case of illness; in order to restrict the legal risks, the work stoppages were normally disguised as staff "assemblies" which are permitted once every three months during working time.<sup>40)</sup> This was also the case in 2004 when the plant of Opel Bochum was threatened to be closed: Because the union did not (fully) support the workers they organized an assembly of six days (whose legality was quite doubtful but nobody questioned it).<sup>41)</sup>

#### e) Strikes and other means of pressure

"Industrial action" is not identical with strike. The Federal Labour Court has admitted a flashmob action organized by the union during the negotiations on a new collective agreement.<sup>42)</sup> In the concrete case, there was a strike in the retail trade which was not

<sup>38)</sup> Text of the recommendation in AuR 1998 p. 154 et seq.

<sup>39)</sup> BAG 10.12.2002 - 1 AZR 96/02, NZA 2003, 735, 740; BAG 24.4.2007 - 1 AZR 252/06, NZA 2007, 997, 994 para. 79

<sup>40)</sup> If it had already taken place: The Works Constitution Act provides for two additional assemblies during the year for urgent matters

<sup>41)</sup> Details in *Gester/Hajek*, Sechs Tage der Selbstermächtigung. Der Streik bei Opel in Bochum 2004, Münster 2005.

<sup>42)</sup> BAG 22.9.2009 - 1 AZR 972/08, NZA 2009, 1347

very effective because the employers recruited strike-breakers who took over functions of the strikers (e.g. at the cashpoints in supermarkets). The union, therefore, called members and other interested persons by SMS to be at a certain moment (10 o'clock in the morning) at a supermarket in East-Berlin. A group of about 50 people entered a supermarket. Most of them laid all kinds of goods into the trolleys and abandoned them afterwards. Some other people bought matches or other articles with ridiculous prices and queued up at the cashpoint. Two people filled their trolleys with numerous goods, went to the cashier and declared at the end: "Oh sorry, I have forgotten my purse". During two hours the supermarket could not function correctly. This kind of flashmob was considered to be an action within the field of application of article 9 § 3 of the Constitution - as the effect of a legal strike would be much higher, this method of exercising pressure was accepted by the labour courts. Recently, the Constitutional Court stated that this was not in contradiction to the Constitution.<sup>43)</sup>

#### f) Lock-out and other means of employers

The traditional counter-measure of employers against strikes is the lock-out. The labour courts have admitted it from the very beginning in 1955.<sup>44)</sup> In the following year they modified this decision: The lock-out would normally suspend (and not disrupt as said in the first decision) the labour relationship, it has to respect the principle of proportionality which means that the number of people being locked out should not be much superior to the number of persons being in strike.<sup>45)</sup>

Since more than 25 years, the lock-out has no more been applied. This corresponds to the fact that short-time strikes of one day are the dominating form of work-stoppages; lock-outs would often be disproportionate. Public opinion would not appreciate lock-outs very much because they would expand the conflict and make an agreement more difficult.

There are, however, other means how employers defend their interests. They offer additional money to those you do not participate in the strike. Recruiting strike-breakers is easy in sectors where workers do not need a special qualification. The cleaning service in households and hotels may stand as an example. The situation is different with people cleaning trains, aircrafts or some parts of hospitals: They all need a licence based on

<sup>43)</sup> BVerfG 26.3.2014 - 1 BvR 3185/09, NZA 2014 p. 493

<sup>44)</sup> BAG 28.1.1955 - GS 1/54, AP Nr. 1 zu Art. 9 GG Arbeitskampf

<sup>45)</sup> Detail Däubler, Das Arbeitsrecht 1, 16 th edition, Reinbek 2006, para. 600 et seq.

special courses; it would be extremely difficult to find a sufficient number of workers meeting these conditions.

g) The right to work as an argument

The activity of strike-breakers remains normally unchallenged despite of the fact that the ILO-committee for the freedom of association has decided that recruiting strike-breakers is a "grave violation" of the freedom of association in the sense of ILO-Convention 87.<sup>46)</sup> The "right to work" of strike-breakers may be evoked from time to time, but is of no real importance: It is just the freedom of the employer to conclude labour contracts with whom he wants that legitimizes the recruiting of strike-breakers. For the prevailing opinion this is a simple and apparently convincing solution because the right to strike has never been really integrated into the system of subjective rights. If one would do this the behaviour of the employer would be a violation of this right if there would be no explicit justification by referring e.g. to the right of property. One may add that the "right to work" has not been included into the German Constitution; to derive it from international conventions (which would be quite easy) is not a very popular argument among people who do not like strikes and trade unions.

## II. The Scope of Legitimate Industrial Action

### 1. Business prerogatives as limits to strikes and collective agreements?

As was explained in part I, a work-stoppage to get a (better) collective agreement is the main case of an uncontested legal strike. What can be part of a collective agreement can, therefore, be an object of industrial action, too. The question arises whether "entrepreneurial decisions" (Unternehmerentscheidungen) like closing or relocating the enterprise can be a legitimate object of a collective agreement. Or will there be "management prerogatives" which cannot be touched by industrial action?

In Germany, this question was discussed especially in the 1990ies, when a lot of enterprises relocated parts of their activities to China, India or to countries of the third

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<sup>46)</sup> See *Lörcher*, in: *Däubler* (Hrsg.), *Arbeitskampfrecht*, 3. Auflage, Baden-Baden 2011, § 10 No. 93.

world. The views were divided before the Federal Labour Court took a decision.<sup>47)</sup>

The case was in a certain way an extraordinary one. A plant producing machines was to be closed; the production should continue in another country. The metalworkers union did not ask to give up this intention and to stay in Germany because the risks of getting a negative judgment and being obliged to pay damages in case of strike seemed to be too high. The union, therefore, demanded that the period of notice should be prolonged: Three months as a minimum and one additional month for each year of service. After the end of this period, the employer should continue to pay the salary for three years and take over the costs which would arise if the worker would qualify himself into a new professional activity. The Federal Labour Court decided that these subject matters can be regulated by collective agreement - period of notice and additional payments in case of dismissal are a traditional part of working conditions. And the court continued: Whether a demand is high or low, reasonable or unreasonable has not to be decided by the state; it is up to the social partners to find a compromise which will put aside inadequate or unreasonable rules. Whether "entrepreneurial decisions" could be an object of a collective agreement was not to be decided; the court characterized it to be an open question, but added an important phrase: If there is a demand whose realisation would influence an entrepreneurial decision, the legality of the collective agreement and the strike remains unchallenged. Even if the relocation of the enterprise would become in such a case economically "uninteresting" this would be just a consequence of the collective autonomy without triggering any legal consequence. The strike was, therefore, declared to be legal. Meanwhile one can find a lot of cases in which the threat of such a collective agreement modified or cancelled the decision of the employer,<sup>48)</sup> but there are much more cases in which the workers and their unions were not strong enough to consider such an action.

## 2. Essential services

German law does not use the notion of "essential services". Strikes must not violate fundamental rights of other citizens or damage the public interest. Both limits lead to a restriction of the number of persons and functions which could be affected by a strike.

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<sup>47)</sup> BAG 24.4.2007 - 1 AZR 252/06, DB 2007, 1924 = NZA 2007, 987

<sup>48)</sup> Examples see Däubler, in: Däubler/Kittner/Klebe/Wedde (Hrsg.), Kommentar zum BetrVG, 14. Aufl., Frankfurt/Main 2014, § 111 Rn. 15



Doctors in hospitals have a right to strike and use it, but patients have to be protected. Their right to life and health is guaranteed by article 2 § 2 of the Constitution. Some 50 years ago, doctors continued to work but refused to take notes of the concrete measures they had taken. The hospital could, therefore, not send complete bills to individuals or the health insurance - an important disadvantage accelerating the collective negotiations in a good sense for the doctors. This form of action was called "pencil strike" according to the technical means used at that time. With the computer, things have changed. In recent times, doctors continue to take care of their patients but do not accept new ones - urgent cases excluded. As the strike is always limited to certain hospitals, ill people can find a place in other hospitals. Due to bad working conditions in hospitals (very long working time) many strikes have taken place during the last ten years but there was not one case in which a patient could claim not to be treated correctly because of the strike.

Strikes in airports are relatively frequent. If people doing the security check refuse to work the whole airport is blocked for passengers taking a plane. This is accepted if an emergency service is upheld: The aircrafts of government members should always be able to start and land. This is fixed in "urgent services agreements" between the management of the airport and the unions. Other passengers can go to other airports in Germany or in the neighbour states like Switzerland, France, Luxemburg, the Netherlands or Denmark which can be easily reached by train. There is no "fundamental right" to get a flight at a certain time; passengers may become angry or disappointed but this is no sufficient reason to forbid a strike.

### 3. Concrete cases

According to Korean experiences, some concrete questions have been evoked.

(1) A union calling for withdrawal of an economic dismissal plan. Under German law, the situation is rather clear: The right of the employer to dismiss employees can be restricted. The ordinary dismissal can be prohibited for a certain group of workers or for everybody during a certain period. According to a well-known collective agreement, employees in the public service who are at least forty years old and who have worked in the public service for at least fifteen years can no more be dismissed for economic or other reasons. The only exception: extraordinary dismissal for grave misconduct.<sup>49)</sup> The

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<sup>49)</sup> § 34 Abs. 2 TVöD - Tarifvertrag für den öffentlichen Dienst (article 34 § 2 of the collective

exclusion of the ordinary dismissal for a certain time is often part of a special collective agreement with enterprises in an economically difficult situation: The workers agree to get lower wages for two or three years; on the other hand they get a strong protection against dismissals. Legally, there would be no obstacle to forbid collective dismissals in this way.

The situation changes if the dismissal is already pronounced: In this case a strike to withdraw the dismissals and get the workers reintegrated would be illegal because it is up to the courts to decide whether the dismissals are well founded or not. It would, however, probably be possible to accept the dismissals as such but demand new labour contracts for the workers concerned, but there is no court decision about this point.

(2) Fairness of broadcasting and independence from the state and big capital is a question which could not be solved by collective agreement in German law. It is a political question which the Parliament should deal with. There is one very small exception: If there is a strike in the media and the broadcasting station only refers to the employers' views the workers should have the right to pronounce their position in an adequate way, too. In a newspaper strike during the seventies, the printers have even refused to bring the employers' view; the (small) edition of the newspaper was published with so-called blank spots.<sup>50)</sup> Everybody knew what it meant.

(3) Privatization is treated as an entrepreneurial decision. It is therefore doubtful whether it can be an object of a collective agreement and a strike. As German unions are quite cautious they would never run the risk of organizing an illegal strike with all the consequences it can have. But they can regulate the consequences of privatization by collective agreements. This is done regularly in a more or less successful way. A good example is the privatization of the waste management in the city of Bremen. The workers became employees of the private firm, but with very special conditions: They did not only keep the rights they had acquired. Everybody who had worked in this sector for at least one year could no more be dismissed by the private enterprise except for grave misconduct. If the private enterprise would go bankrupt, the city of Bremen would be obliged to take all workers back and employ them in their field. In a certain way, they were better off after privatization.

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agreement for the public service)

<sup>50)</sup> See Hensche in: Däubler (ed.), *Arbeitskampfrecht*, op. cit., § 18 Rn. 122 ff.

(4) Hospitals creating a sub-company or a branch in order to reduce the wage costs are well known in Germany. There is even an important decision of the Federal Labour Court dealing with such a case.<sup>51)</sup> A hospital had outsourced the cleaning service to a sub-company keeping the power of telling the sub-company what to do. Some cleaning ladies refused to go to the sub-company (what is possible according to art. 613a § 6 of the German Civil Code) and were dismissed. The Federal Labour Court decided that the dismissals were illegal because there was no "redundancy" as the employer had not reduced the number of workplaces at his disposal. If the sub-company would have its own power of decision, the situation would be different. Whether a collective agreement and a strike could forbid the outsourcing, is doubtful; this is another case of an entrepreneurial decision. But the consequences of the outsourcing could be regulated by collective agreement like in the Bremen case mentioned in the preceding paragraph.

(5) Contract workers want to be employed by the principal's company. There would be two ways to reach such an aim under German law.

No legal risk would arise if the workers of the contractor's company would ask to get the same conditions as the comparable workers of the principal's company. This would be a kind of "equal pay" which is generally recognized in the field of temporary agency work.<sup>52)</sup> There is no legal obstacle to transfer this principle to contract workers. Wages and other working conditions can be fixed by copying what is valid for other people. Whether a pure reference to the conditions of the workers of the principal's firm would be correct depends on the way how the requirement of a "written" collective agreement is interpreted by the courts.

Another way is the transfer of the employment relationship to the principal's company. Workers may ask to be employed by a certain employer - that is a possible rule admitted as part of a collective agreement by article 1 § 1 of the Law on Collective Agreements. Workers may also ask the dissolution of an employment relationship - in this case to the contractor's company. Article 1 § 1 of the Law on Collective Agreements mentions also "the ending" of an employment relationship as a part of a collective agreement (normally dealing with a special protection against dismissal). The combination of both is quite unusual; I do not see that a court has ever decided over such a case. I would prefer the

<sup>51)</sup> BAG 26.9.2002 - 2 AZR 636/01, NZA 2003, 549

<sup>52)</sup> It can be found in the EU-Directive on temporary Agency Work

first way which will probably lead to the same effect as the contractor will not be willing (or able) to pay the same amount as the main company. In order to end the strike, there would be an offer of the main company to take over the workers (or some of them).

(6) Workers (= abhängig Beschäftigte) who are no employees (= Arbeitnehmer) may participate in collective bargaining if they are persons "assimilated to employees" (= arbeitnehmerähnliche Personen). Such a person is defined by being self-employed on the one hand but economically dependant on one or two enterprises on the other. In order to distinguish them from firms which depend on a big company they have to work regularly without the help of other persons needing therefore protection in a comparable way as employees. Article 12a of the Law on Collective Agreements admits collective agreements for this group of persons; they are entitled to participate in a strike organized by a union, too. The Constitutional Court has acknowledged a lot of years ago, that workers assimilated to employees are covered by article 9 § 3 of the Basic Law which means that collective agreements can be concluded and strikes organized. In other fields of labour law, the "assimilation" is much more restricted; this group is not protected by the law against inadequate dismissals and not included in the Works Constitution Act. On the other hand, they have the same right to annual leave as employees, they can go to the labour courts (instead of the ordinary courts) and are included in many other labour law rules.<sup>53)</sup>

Especially in the state-owned broadcasting and television companies the "free riders" have attained collective agreements and participated in (short-time) strikes, too. Just to give an example: The workers of Radio Berlin-Brandenburg (RBB) negotiated about higher wages with the board of directors. In these negotiations participated two unions both representing "workers assimilated to employees", too. The unions organized different "warning strikes" but the radio and television station continued its programme working with strike-breakers and using the programme of other radio stations. One evening the strike-breakers had organized interviews with a lot of people in the centre of Berlin. The strikers came with big banners and stopped near the interview partners so that the spectators could see their slogans. After this moment, the negotiations came to an end quite quickly including, of course, the workers "assimilated to employees", too. In other

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<sup>53)</sup> Details Däubler, Für wen gilt das Arbeitsrecht? Festschrift Wank, 2014 (in print)

fields this would be much more difficult, because these independent workers are normally not unionized despite of bad working conditions.

### III. Criminal Liability

If a strike or another form of industrial action is illegal, the question of criminal sanctions may arise. Concerning the situation in Germany, it may be useful to go back to history.

#### 1. Criminal liability in the past

In the years before the First World War, there was no right to strike. But rules prohibiting the common representation of workers' interests were cancelled in 1869. A strike without previous denouncement was a breach of contract but it was not punishable. The supreme court of the Reich (Reichsgericht) condemned, however, workers who had asked an additional payment for the past: Their behaviour was considered to be an attempted blackmailing because the argument that a strike will take place was considered to be a threat of serious harm in order to enrich themselves and third persons (Section 253 of the Criminal Code).<sup>54)</sup> This was not the only judgment of this nature.<sup>55)</sup> Especially strikers having political aims were persecuted.<sup>56)</sup>

In the years of the Weimar Republic, nobody seems to be condemned to prison for unlawful striking. During fascism strike was forbidden. It happened rarely but some cases are known. In 1936, 262 workers at Opel Rüsselsheim stopped working because they could not understand why their wages had decreased due to a complicated system of piece-work. They went to the administration to get information and to correct the amounts. The administration was not ready to discuss with them and threatened to ask the police to come. The workers did not insist and went back to their workplaces. The whole action took twenty minutes.<sup>57)</sup> The police and other parts of the administration were informed;

<sup>54)</sup> RG 6.10.1890, RGZ 24.114, 119

<sup>55)</sup> See *Rainer Schröder*, Die strafrechtliche Bewältigung der Streiks durch Obergerichtliche Rechtsprechung zwischen 1870 und 1914, *Archiv für Sozialgeschichte* 1991, S. 85 ff.

<sup>56)</sup> Overview see *Däubler*, *Das Arbeitsrecht* - I, 16. Aufl. 2006, Rn. 88; *Kissel*, *Arbeitskampfrecht*, München 2002, § 2 Rn. 16 ff.

they urged the directors to dismiss the workers. This was done; the complaints of 12 workers were denied by the labour court of Mayence. Among the dismissed persons, 70 were members of Nazi organisations. A leading representative of the Nazi Party asked to expel them. A party court had to decide, but did not share the view of the leading person, because the system of piece-work payment was indeed quite unclear. They could remain in their organisations. Seven members of the "strikers" were arrested and sent to prison or a concentration camp, but after some months returned without any further sanctions.

## 2. The situation in the first years of the Federal Republic

After the Second World War, no strike was ever considered to be punishable. There is no court decision which would have condemned a worker or a trade union official. Even in cases of lock-out which were quite frequent in the 1950-ies and 1960-ies the employers did not try to get a worker into prison.<sup>58)</sup>

Legal literature was in its majority less indulgent. Numerous publications in the 1950-ies declared that specific kinds of strikes were punishable: Strikes with political aims, strikes organized by a works council, disproportionate strikes which take place before negotiations really fail, strikes preventing persons willing to work from entering the plant, strikes which paralyse the supply of electricity, gas and water etc.<sup>59)</sup> All these opinions may have developed a deterring effect on unions and their members but they had no consequence in court.

## 3. The actual legal situation

Today, this kind of literature is more or less marginalized. The manuals of industrial conflicts in Germany<sup>60)</sup> mention the question that illegal strikes may have criminal sanctions, but they do not pay much attention to it. *Kisse*<sup>61)</sup> mentions just the two main

<sup>57)</sup> See the description at *Kittner*, *Arbeitskampf. Geschichte - Recht - Gegenwart*, München 2005, p.532.

<sup>58)</sup> See *Kalbitz*, *Aussperrungen in der Bundesrepublik*, Frankfurt/Main 1979

<sup>59)</sup> *Siebrecht*, *Das Recht im Arbeitskampf*, Kiel 1956, S. 162; *Knodel*, *Der Begriff der Gewalt im Strafrecht*, München und Berlin 1962, S. 125; *Mertz*, *AR-Blattei, Arbeitskampf VI A I 1 b*; *Niese*, *Streik und Strafrecht*, Tübingen 1954, S. 82

<sup>60)</sup> There are no „commentaries“ because there is no law on industrial conflicts

articles of the Penal Code which could theoretically be applied: article 240 (using threats of force to cause a person to do, suffer or omit an act - Nötigung) and article 253 (blackmail - Erpressung). *Otto*<sup>62)</sup> even does not treat the problem writing that criminal law applies "in the first line" to excesses like insult, causing bodily harm and burglary committed by individuals at the time of an industrial action. *Reinfelder*<sup>63)</sup> picks up the problem writing that both articles require that the use of force or the threat of harm is deemed inappropriate for the purpose of achieving the desired outcome. This could be judged only in balancing all interests involved. Another author wrote more than 40 years ago that an action cannot be "inappropriate" ("verwerflich") if there are different views about its legitimacy in society.<sup>64)</sup>

#### 4. Reasons not to use criminal law

Which are the reasons for the reluctance of courts and authors to go into a deeper analysis? To apply criminal law rules would be obviously against the interests of the workers, but would be also in contradiction to the interests of the employers. What could happen if a works council member or just a worker would be sent to prison as a "gang leader" for one or two months? There would be a lot of solidarity with him and a lot of criticism against the employer and the court in the press and in television. Such a situation would disturb the social partnership so typical for industrial relations in Germany. Would it not be a contribution to the renaissance of class conscience? Would that not be a much bigger evil?

Another factor is the rareness of illegal strikes. Because of the civil liability and the risk to be dismissed for grave misconduct, unions and workers are quite cautious; normally one finds another possibility like long assemblies with a lot of discussion to impose pressure on the employer.

Finally there are some experiences confirming this position. During the peace movement in the end of the 1970-ies and the beginning 1980-ies a lot of people blocked the entrances of military installations of the US army. Many people were prosecuted based on

<sup>61)</sup> See Footnote 56, § 34 No. 21.

<sup>62)</sup> *Arbeitskampf- und Schlichtungsrecht*, München 2006, § 15 Rn. 10

<sup>63)</sup> In: *Däubler, Arbeitskampfrecht*, third edition, Baden-Baden 2011, § 15 Rn 62

<sup>64)</sup> *Däubler, Strafbarkeit von Arbeitskämpfen*, in: *Baumann/Dähn (Hrsg.), Studien zum Wirtschaftsstrafrecht*, Tübingen 1972, p. 104 et seq.

article 240 of the Penal Code. But the outcome of all these proceedings was quite modest: The fines inflicted were small and in the end the Constitutional Court decided that sitting is not "use of force" but only an obstacle to the traffic. On the other hand, the peace movement got a lot of publicity because many prominent persons like writers and artists participated in the actions.<sup>65)</sup>

In a comparable case criminal law seemed to be inadequate, too. The German "Lufthansa" had transported people back to their countries because their request to get asylum was refused. To come back was a big risk for these people; an initiative of citizens tried to help them staying in Germany. In the internet, the initiative published a lot of resolutions criticizing Lufthansa for making money by this way ("they offer economy class, business class, and deportation class"). When a Sudanese citizen arrived dead in Sudan despite of the fact that he was accompanied by two policemen, the protest escalated. Some members of the initiative developed a software which sent three e-mails every second to the Lufthansa computer. Within a short time the computer was out of service. The action took about two hours. The procurator started a criminal procedure against one of the initiators based once more on article 240 of the Penal Code. The court of first Instance condemned him to pay 900 Euro, but he was acquitted by the court of appeal: <sup>66)</sup> There was no force applied and no threat; even a suppression of data (article 303a of the Penal Code) did not occur.

##### 5. Could the legislator change the situation?

The question whether it would be unconstitutional to make illegal strikes punishable is a quite theoretical one in Germany. The existing rules would be sufficient to declare an illegal strike punishable, but it is a question of public opinion and general attitude in society that this possibility is not used. After more than 50 years one may even say that the exemption of industrial actions from the Criminal Code has become customary law.

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<sup>65)</sup> Cf. *Vogel*, in: Rieble/Giesen/Junker (ed.), *Arbeitsstrafrecht im Umbruch*, München 2009, p. 152

<sup>66)</sup> OLG Frankfurt/Main 22.5.2006 - 1 Sa 319/05, MMR 2006, 547 = CR 2006, 684 = StV 2007, 244



## IV. Civil liability

In practice, civil liability is of a certain importance for unions. In law, trade union officials and individuals participating in an illegal strike would be liable, too, but there are very few cases in which this was taken into account.

### 1. Civil liability of unions

If a union violates the peace obligation which is derived automatically from an existing collective agreement it has to pay damages. It is sufficient that one of the union's demands is in contradiction to a rule in a valid collective agreement which it had concluded before and which has not been denounced.<sup>67)</sup>

An illegal strike may also interfere in the established and pursued business enterprise ("Recht am eingerichteten und ausgeübten Gewerbebetrieb"); the consequence would be an obligation to pay damages to the owner of the business enterprise. But there are two conditions which must be fulfilled: The interference must be directed against the enterprise and the union must have acted at least by negligence. That would be a claim in tort law whereas the violation of the peace obligation creates a claim in contract law. Both may co-exist under German law.

The "direct" interference makes sometimes problems.

Flight navigators at the Frankfurt airport have an employment contract with the "Deutsche Flugsicherung", a limited company owned by the Federal Republic. Their union organized a strike which violated the peace obligation. Air lines asked for damages of about 4 million Euros. Their complaint was dismissed by the regional labour court of Frankfurt<sup>68)</sup> because the strike was directed against the "Deutsche Flugsicherung" and not against the airlines. The fact that the airlines suffered damages was without legal importance; it is a normal consequence of a strike especially in the service sector that thirds will be affected. As to the peace obligation, its aim is to protect the partner of the collective agreement, not to protect third persons. It is therefore no legal basis for a damages claim.

Another problem is the question of negligence. The union can trust in the existing case

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<sup>67)</sup> See LAG Hessen 25.4.2013 - 9 Sa 561/12, LAGE Art. 9 GG Arbeitskampf Nr. 92a

<sup>68)</sup> See footnote 67.

law established by the labour courts. If it is overruled after the strike occurred, the union is not guilty of having broken the rules.<sup>69)</sup> What will happen if a question is discussed in legal literature with different results? The union can organize a strike but has to be very cautious as to the extent of the work-stoppage.<sup>70)</sup> If pickets or other members commit illegal actions like insults a legal strike will not become illegal.

The union is responsible not only if it is the organizer of a strike. According to the Federal Labour Court it would be sufficient to aid the strikers, e.g. to pay them some money which will enable them to continue their strike. In the case of a so-called wild-cat strike the union can take it over and transform it into an "official strike",<sup>71)</sup> but this is reasonable only if the peace obligation is not violated.<sup>72)</sup>

If the union's members go to strike without the union organizing it, the union has to clarify that it does not support the action. If it remains silent it can happen that it will be considered to be responsible, too.<sup>73)</sup>

## 2. Civil liability of individuals

Employees participating in an illegal strike commit a breach of their employment contract. They also interfere in the established and pursued business of their employer. In contract as in tort, they are liable to pay damages. The labour courts make no difference between the union and the individual worker.

In practice, it may often happen that a worker is not aware of acting unlawfully. According to general rules the worker should be deemed to have acted without guilt if the mistake was unavoidable. If the strike is organized by a union, there is a presumption in favour of its legality.<sup>74)</sup> If the union declares that the strike is lawful the worker will not be responsible for negligence.<sup>75)</sup> On the other hand, the Court was quite severe in an old decision (which would probably not be repeated today): even a guest-worker from Italy

<sup>69)</sup> BAG 9.4.1991 - 1 AZR 332/90, DB 1991, 2295 = NZA 1991, 815

<sup>70)</sup> BAG 21.3.1978 - 1 AZR 11/76, AP Nr. 62 zu Art. 9 GG Arbeitskampf; BAG 10.12.2002 - 1 AZR 96/02, NZA 2003, 734, 741

<sup>71)</sup> BAG 5.9.1955 - 1 AZR 480-489/54, AP Nr. 3 zu Art. 9 GG Arbeitskampf; BAG 20.12.1963 - 1 AZR 429/62, AP Nr. 33 zu Art. 9 GG Arbeitskampf

<sup>72)</sup> BAG 17.12.1958 - 1 AZR 349/57, AP Nr. 3 zu § 1 TVG Friedenspflicht

<sup>73)</sup> BGH 31.1.1978 - VI ZR 32/77, NJW 1978, 816

<sup>74)</sup> BAG 19.6.1973 - 1 AZR 521/72, AP Nr. 47 zu Art. 9 GG Arbeitskampf

<sup>75)</sup> BAG 29.11.1983 - 1 AZR 469/82, AP Nr. 78 zu § 626 BGB

was responsible and should pay damages despite of the fact that he did not speak sufficiently German and that in his country the so-called wild-cat strike was generally recognized.<sup>76)</sup>

The liability of trade union officials is no special subject-matter of discussion in Germany. They would be liable for interference into the established and pursued business enterprise, committed together with the union and the workers.

The liability of the union, the workers and the union officials is a common one; they are "joint and several debtors". In law, each person can be sued for the whole damage and may take recourse to the other debtors.

Example: 500 workers are liable for a damage of 500.000 Euro. One of them can be sued to pay the 500.000 Euros. Afterwards he can ask the other 499 to pay him 1.000 Euros per person. This is not a very realistic solution; a rule adequate for businessmen is not at all adequate for workers.

### 3. The damage to be paid

The economic effects of strikes can be very different.<sup>77)</sup> If the employers have difficulties to sell their products the strike is welcome because it prevents stockpiling. In many cases the working hours which were cancelled because of the strike are caught up after some days or some weeks.

Example: During the strike in the printing industry in 1978 the newspaper "Süddeutsche Zeitung" lost 460 pages with (well-paid) advertisements. Four weeks after the end of the strike the newspaper had already published 400 additional pages with advertisements.<sup>78)</sup>

In some specific cases there may be real damages but it is difficult for the employer to prove it without opening completely his books. Damages to be easily proven are overtime payments or bonuses for those who did not participate in the strike and continued to work. In addition, the German Labour Courts facilitate the proof in the sense that the employer is supposed to have a so-called minimum damage comprising expenses for components and a certain percentage of the overhead costs.<sup>79)</sup>

<sup>76)</sup> BAG 20.12.1963 - 1 AZR 428/62, AP Nr. 32 zu Art. 9 GG Arbeitskampf; BAG 20.12.1963 - 1 AZR 429/62, AP Nr. 33 zu Art. 9 GG Arbeitskampf

<sup>77)</sup> Zöllner, Aussperrung und arbeitskampfrechtliche Parität, Düsseldorf 1974, p. 38

<sup>78)</sup> Wolter AuR 1979, 200

<sup>79)</sup> BAG 5.3.1985 - 1 AZR 468/83, AP Nr. 85 zu Art. 9 GG Arbeitskampf

#### 4. Law and reality

It is quite rare that unions are sued for damage and even rarer that courts decide in favour of an employer. The most important case dates from the 1950-ies.

The metalworkers' union had organized a strike ballot before the peace obligation had expired. The Federal Labour Court decided that the ballot violated the peace obligation and condemned the union to pay the whole damages.<sup>80)</sup> As it was one of the longest strikes in the history of the Federal Republic (taking 114 days) the damage was estimated to be more than 90 million Deutsche Mark. The union was sued and the Federal Labour Court stated that it was liable; the exact amount was never fixed. The threat to be forced to pay this enormous sum induced the union to conclude a conciliation agreement which was very favourable to the employers and influenced the outcome of collective negotiations during more than ten years.

The complaint was a strategic one to force unions to follow a policy of social partnership. Until nowadays, unions are quite cautious before starting a strike and do everything possible to follow the rules of the Federal Labour Court.

Example: Strike in a small firm with a very authoritarian owners' family. The management recruited strike-breakers from outside and continued a big part of the production. The Federal Labour Court did not pronounce itself clearly about the legality of such a behaviour until now. The Commission of Experts and the Commission for the Freedom of Association of the ILO both have declared that recruiting strike-breakers violates the ILO-Convention No. 87.<sup>81)</sup> Nevertheless the union renounced to make a lawsuit against the employer not to recruit strike-breakers any more.

Under these conditions, it is not surprising that unions are rarely condemned to pay damages. There is one case in which the union and the chairman of the works council had to pay 12.291,48 Deutsche Mark (about 6.500 Euros).<sup>82)</sup> In another case,<sup>83)</sup> a newspaper company from Düsseldorf sued 80 employees who participated in a wild-cat strike to pay more than 150.000,- Deutsche Mark (more than 75.00 Euros); the Federal Labour Court decided that this was well-founded in principle, but some details of the damage had to be clarified and remanded the case to the regional labour court. Both sides

<sup>80)</sup> BAG 31.10.1958 - 1 AZR 632/57, AP Nr. 2 zu § 1 TVG Friedenspflicht.

<sup>81)</sup> ILO, Genreal Survey 1994, para. 174; ILO Digest 2006 para. 632.

<sup>82)</sup> LAG Hamm 16.6.1981 - 6 Sa 436/78, DB 1981, 1571

<sup>83)</sup> BAG 7.6.1988 - 1 AZR 372/86, DB 1988, 2102.

made a compromise; the employer got 30.000 Euros which were paid (unofficially) by the union. The reason was that the newspaper company was anxious to lose readers and other customers if they would really send the bailiff to the workers' houses to get the money. The situation is similar to that of criminal sanctions: Get a definite judgment and execute it, would lead to a solidarity process which is not desired by the employers.

In the concrete case the workers had the plan to bring the sum in pieces of five pennies (Pfennig) to the firm and put a big heap in front of the entrance door. The local television had promised to come and make a report, another newspaper was very interested...

## V. Disciplinary liability

An employee participating in an illegal strike can be dismissed without notice. This is the rule which is laid down in a general formula ("grave ground") in Article 626 of the German Civil Code. But there are different exceptions to the rule.

Firstly, there is a formal one. Article 626 § 2 of the Civil Code provides that the dismissal has to be declared within two weeks. This delay starts when the strike ends or when the employee ends his participation.

The second exception may be much more important. The balancing of the interests of both sides has to justify the dismissal. One of the important points would be whether the employer has dismissed other strikers, too.

The employee A has just participated in the strike like B, C and D. B, C and D are not dismissed; the interest of the employer to dissolve the labour relationship with A is obviously not very convincing.

That would be different if A was one of the organizers of the strike, distributing leaflets or making a speech to an assembly.

In a famous case ("Erwitte"), striking workers had occupied the plant which was considered to be illegal by the Federal Labour Court. The employer dismissed nearly all his workers who immediately went to court. The Federal Labour Court decided that the dismissals were not founded. As the employer had neglected the prerogatives of the works council the workers thought that they acted legally and in a correct way. In the view of the Federal Labour Court this was wrong, but the mistake ("the error") was an important factor in favour of the workers. Another point was that the solidarity was a very broad

one (even deputies from all political parties came to the plant supporting the workers' demands) and that it would have been extremely difficult for a worker to break solidarity and go his own way.<sup>84)</sup> The victory arrived after two years, but it was still a victory.

In another case workers had participated in a strike for three days. They followed their union which organized the strike. But in reality the plant did not belong to a sector where the union was competent, so the strike was illegal. But the workers could not recognize this mistake; there was no sufficient reason for a dismissal without notice, even not for an ordinary dismissal for neglecting duties.<sup>85)</sup>

Another important exception deals with works council members and other persons having a comparable protection against dismissal based on article 15 of the Act protecting against dismissals and on article 103 of the Works Constitution Act. A dismissal is possible only for grave misconduct and with the agreement of the works council. If the agreement is not reached, the employer can go to court where it is replaced if there is really a grave misconduct.

In a case of strike, the right of the works council to deliberate about the dismissal is suspended but not the protection as such: The employer has to go directly to the labour court which will examine whether the behaviour of the works council member was really a grave misconduct or not.<sup>86)</sup> If only works council members shall be dismissed whereas other strikers can continue the court will normally think that this is an illegal discrimination of the works council members.<sup>87)</sup>

The long list of exceptions should not be misinterpreted in the sense that the rule disappears. The risk of being dismissed is high if the worker participates in a so-called wild-cat strike and it is low if the union organizes the strike. Even in cases of wild-cat strikes the decision of the employer depends on the support of the whole personnel and the public opinion on the local level: If the newspaper writes a friendly article on the strikers it is quite improbable (not: excluded) that a striker is dismissed.

If the strike ends with a compromise in the form of an agreement the partners normally include a clause which prohibits all kinds of sanctions based on the participation in the strike.

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<sup>84)</sup> BAG 14.2.1978 - 1 AZR 76/76, AP Nr. 58 zu Art. 9 GG Arbeitskampf

<sup>85)</sup> BAG 29.11.1983 - 1 AZR 469/62, NZA 1984, 34 = DB 1984, 1147 = BB 1984, 983

<sup>86)</sup> BAG 14.2.1978 - 1 AZR 54/76, AP Nr. 57 zu Art. 9 GG Arbeitskampf

<sup>87)</sup> LAG Hamm 10.4.1996 - 3 TaBV 96/95, AiB 1996, 736