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Right to strike, power and competition

by NORBERT F. TOFALL

Abstract

When do employee and employer cartels prevent welfare-enhancing market solutions? Which actions are incompatible with the protection of the individual freedom of all citizens? When should the right to strike be restricted?

Zusammenfassung

Wann verhindern Arbeitnehmer- und Arbeitgeber-Kartelle wohlfahrtssteigende Marktlösungen? Welches Handeln ist mit dem Schutz der individuellen Freiheit aller Bürger unvereinbar? Wann sollte das Streikrecht eingeschränkt werden?

A strike is the stoppage of work by a group of employees to achieve a common goal within the framework of the labour and employment relationship. In Germany, the collective stoppage of work does not violate the duty to work owed under the employment contract if it takes place within the framework of collective labour law. The freedom of association guaranteed in Article 9 (3) of the Basic Law of the Federal Republic of Germany and the labour disputes mentioned in this context do not mean that strikes may be taken for any purpose but are always to be understood in relation to collective bargaining autonomy and thus to the employment relationship. Stopping work to raise general demands for climate protection, for example, is unlawful.

While the right to strike follows from the Basic Law in the framework described above, the legislator has so far failed to define how far the actions of collective actors such as trade unions and employers' organisations may go. This is because a strike often not only harms the employer, but also third parties who have nothing to do with the collective bargaining disputes. In the case of pilots' strikes or train drivers' strikes, this effect on third parties is the real power lever in industrial action: "All wheels stand still if your strong arm wants them to..." But is this also legitimate? Or to put it more precisely: Which actions in the context of collective industrial action are compatible with the protection of the individual freedom of all citizens and which are not? Who is allowed to force whom to do what? And what harm to third parties is reasonable and proportionate? These questions are anything but clearly answerable but should be negotiated and answered in parliament.

As collective labour law is not based on a fully formulated legal basis by which the aforementioned issues could be decided and into which both political compromises and compromises between the interest groups concerned - and these are not only the trade unions and employers' associations - could be incorporated, but on "judge-made law", the boundaries of the legitimacy of strikes are very blurred. Based on the freedom of association guaranteed in Article 9 (3) of the Basic Law for the Federal Republic of Germany, two supreme court decisions from 1971 and 1991 are particularly authoritative.

In 1971, the Federal Labour Court ruled that industrial action is subject to the principle of proportionality.[1] Industrial action may only be taken if it is suitable and objectively necessary to achieve lawful objectives and subsequent industrial peace. Furthermore, the common good must not be obviously violated by the impairment

[1] AP No. 43 on Art. 9 GG Industrial action.

of third parties. Industrial action rules should be drawn up to determine which businesses vital to the public are exempt from industrial action. [2]

In 1991, the Federal Constitutional Court confirmed the principles of industrial action law developed by the Federal Labour Court in 1971, stating that this was a concretisation of Article 9 (3) of the German Basic Law. Thus, a lockout of employees ordered by employers (defensive lockout) in response to a strike (means of attack) must comply with the principle of proportionality and is otherwise inadmissible. [3]

Regarding strikes, however, the Federal Constitutional Court stated in 1991 that a judicial review of the collective bargaining objectives could hardly be avoided for a proportionality test of strikes. "However, such a review would contradict the idea of collective bargaining autonomy."[4] Although the Federal Constitutional Court states that not every restriction of industrial action is excluded from the outset and that such a restriction can be justified by the fundamental rights of third parties and other constitutional rights,[5] this ruling is likely to be decisive for the reluctance of labour courts to judge strikes as disproportionate. Which labour court judge would want to risk having his ruling overturned by higher courts due to a judicial violation of the principle of collective bargaining autonomy? Which labour court judge wants to violate the principle of collective bargaining autonomy at all?

This "judicial law" situation means that labour judges do not even seriously consider assessing the infringement of third-party rights. Collective labour law as judicial law has thus led itself into a dead end from which it can only find its way out if supreme court decisions are quickly subjected to a new "legal concretisation".

Furthermore, the current "judicial" situation means that no regulatory decision-making criteria are used to assess proportionality. The decisive questions are not even considered, but could be considered in a collective labour law to be enacted by the Bundestag: Which employee and which employer cartels prevent welfare-enhancing market solutions in which rule setting? Who is abusing their power? And how must the rules be set so that abuse of power is prevented? Which actions in the context of collective labour disputes are compatible with the protection of the individual freedom of all citizens and which are not? Who may force whom to do what? And what harm to third parties is reasonable and proportionate?

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[2] Cf. Deutscher Bundestag - Wissenschaftliche Dienste: *Grenzen des Streikrechts,* prepared by Patrizia Robbe, WD 3 - 274/07, 2007, p. 5.

[3] Deutscher Bundestag - Wissenschaftliche Dienste: *Grenzen des Streikrechts,* prepared by Patrizia Robbe, WD 3 - 274/07, 2007, p. 6.

[4] BVerfGE 84, p. 212 ff., p. 231.

[5] Cf. Deutscher Bundestag - Wissenschaftliche Dienste: *Grenzen des Streikrechts,* prepared by Patrizia Robbe, WD 3 - 274/07, 2007, p. 6 - 7.

As long as there is competition between providers, consumers can take evasive action if strikes threaten their supply. It is annoying for Lufthansa customers if they are unable to take their flight due to a cabin crew strike. However, in future they will be able to book their flights with other providers who are more reliable. Under competitive conditions, the abuse of power by strike-happy unions is therefore severely restricted. If they behave irresponsibly, the company ends up going bankrupt and the employees lose their jobs.

The situation is different in state-owned or state-affiliated monopoly companies such as Deutsche Bahn. There, a sectoral union such as the train drivers' union can paralyse an entire company without any risk to its members' jobs - and thus large parts of the economy if this company has a network function. In such companies, the right to strike should be restricted by law. It is conceivable that employees of such companies - like civil servants in the German state - should not be granted the right to strike at all. Anyone who objects to this does not have to become a civil servant - or a train driver. In other words, we should return to the demand made by the Federal Labour Court in 1971. Industrial action rules must be drawn up to determine which companies necessary for the public are excluded from industrial action.

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Publisher Flossbach von Storch AG, Research Institute, Ottoplatz 1, 50679 Cologne, Telephone +49. 221. 33 88-291, research@fvsag.com; *Management Board* Dr Bert Flossbach, Dr Tobias Schafföner, Dr Till Schmidt, Marcus Stollenwerk, Kurt von Storch; VAT ID DE 200 075 205; Commercial Register HRB 30 768 (Cologne Local Court); Responsible supervisory authority Till Schmidt, Marcus Stollenwerk, Kurt von Storch; *VAT ID* DE 200 075 205; *Commercial Register* HRB 30 768 (Cologne Local Court); *Responsible supervisory authority* Federal Financial Supervisory Authority, Marie-Curie-Straße 24 - 28, 60439 Frankfurt / Graurheindorfer Str. 108, 53117 Bonn, *www.bafin.de;* Author Norbert F. Tofall *Copy deadline* 14 March 2024