Germany
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1. General regulations of labor law

1.1 Implementation of international legislation into domestic law

Only EU Regulations are directly binding. Due to the dualistic approach of the German Constitution all EU Directives and other international law has to

be transformed into domestic law previous to its application. EU-Directives and international law is usually implemented by parliamentary legislation. As Germany is a federal system, international law has to be adopted either on Federal or on State (Länder) level depending on its content. If the content is subject to regulatory competences exercised by the Federation (Bund), the transitory act is a Federal law. Otherwise the transition takes place on the State (Länder) level. Inclusion in collective agreements is not considered sufficient. International treaties (other than the EU treaty) which have been ratified by Parliament as well as implemented international law are of the same rank as regular German law, only the German Constitution rests superior to international treaties.
German courts are obliged by the «effet-utile» of EU-law to interpret domestic law in accordance with the EU-legislation whenever possible. This is not the case for other sources of international law to the same extend. But as the German Constitution (Grundgesetz) has a generally friendly approach to international law the courts have to take international law (such as ILO conventions) into consideration.

1.2 Formation of union representation in order to subscribe collective agreements
Legislation does not provide rules for the subscription of collective agreements. It is up to the trade unions themselves to set up respective rules in their statutes. Usually, a commission is elected by the trade union members, which will represent the union, back up the negotiations, discuss the ongoing collective bargaining process and decide about proposals as well as acceptance or refusal of proposals. The signature itself will be fixed by the person(s) legally representing the trade union in question.

1.3 Trade union representation and activity in the workplace
The largest and most representative German trade unions are associated within the Confederation of German Trade Unions, DGB (Deutscher Gewerkschaftsbund).
The eight trade unions affiliated in the DGB unite 6.2 million members (2010 figures). Since the German trade unions were due to political differences and adherence to several political parties unable to unite during the Weimar Republic (1919-1933) the DGB unions understand themselves as politically neutral in order to bundle their force effectively. Even though they are open to Christian and conservative members it can nevertheless be said that the trade unions affiliated in the DGB have political positions in tendency close to those of the Social Democratic Party (SPD). Each of the DGB unions is covering one sector of industry or service (one company =one union-approach). For example the Mining, Chemical and Energy Industry Union (IG BCE) is open for all employees working for companies who operate in that sector. This way the IG BCE can negotiate collective agreements for all employees of the respective companies. It is also ensured that the trade unions affiliating in the DGB do not

have to compete for members within one and the same company.
There are several other trade unions not member of the DGB. Most of them exclusively represent employees of certain professions. Some of them represent employees of vital importance for the employing company such as railway engine drivers or airplane pilots. Those trade unions are able to conclude comparatively favourable collective agreements for their members. The contrary is true especially for so called «Christian Trade Unions» who are much closer to the employers than the DGB-unions are. The Christian unions usually conclude collective agreements less attractive for the employees and are neither willing to initiate strikes nor to participate in strikes called for by other trade unions.
Germany has a dualistic system of union representation in workplaces. At first only trade unions can bargain on the employees' side for collective agreements. Since these agreements have regulatory function for numerous employees their negotiation is one main activity of the trade unions.
A second form of union representation in workplaces is the Works Council. Works Councils can be established in companies according to the Act on Works Councils (Betriebsverfassungsgesetz, BetrVG): Members of the Works Council are elected by all employees in the company. Although German trade unions were against the establishment of Works Councils in the first place, it is now common that Works Council members are at the same time trade union representatives. The Works Council represents all workers concerning various issues and conflicts with the employer which may occur. Larger enterprises are subject to «Mitbestimmung» –codetermination. In these enterprises the Works Council has the right to conclude collective agreements with the employer concerning certain issues if they are not already subject to a collective agreement between the employer and a trade union, see Sec. 87 of the Act on Works Councils (BetrVG).
Historically one company was only bound by one collective agreement even if there were several concurring collective agreements theoretically applicable. This changed due to a landmark decision of the Federal Labour Court in 2010. Since any union might now negotiate a separate collective agreement for their members, it is possible that more and more unions representing smaller groups of employees will appear.

1.4 Discipline/Regulation of the collective agreement
Relevant legal regulation stems from:
1) the Constitutions (Federal and State) (see under 2. 2.),
2) the Act on Collective Agreements (Tarifvertragsgesetz, TVG from 1949, which was adopted even shortly before the entry into force of the Constitution) as well as the Works Councils Act,
3) the Act on the Posting of Workers,
4) case law (which is not binding),
5) the by-laws/statutes of employers' associations as well as the by-laws/statutes of trade unions.
The Act on Collective Agreements (Tarifvertragsgesetz) regulates the legal

requirements, validity and effects of collective agreements between «trade unions » and employers or employers' associations.
Collective agreements only have direct effect on individual employment relation if the employee is member of the signing trade union and the employer is member of the signing employer's association or party to the collective agreement himself.
It is also common to declare the respective collective agreement applicable by a stipulation in individual employment contracts. The individual agreements are then automatically changed according to newer collective agreements the employer or his association signs with the trade union.
In some cases collective agreements can be declared universally applicable for all employees working in certain sectors by the Federal Government. Both social partners, employers and the trade unions have to demand the Government to do so. Since Germany has no universally binding minimum wage some sectors experienced a race to the bottom of wages. This is especially the case in sectors with low union and employer's association adherence. Such an environment makes it almost impossible to conclude far reaching collective agreements.
To compensate this it is necessary to declare existing collective agreements universally applicable.

1.5 Reflection on the Viking and Laval judgments
German law applies to any undertaking in Germany, regardless of the nationality of the holder. The actions and/or judicial instruments do not differ in relation to foreign firms or foreign undertakings. The application of German law is regulated by the Rome I-Regulation. Unions could legally call for strike concerning a foreign enterprise operating in Germany. The fundamental freedoms of the EU-Treaty might however play a role to assess whether or not a strike against trans-border corporate activity protected under EU-Law is lawful.

1.6 Means of protection in case of violation of the collective agreement
Violations of collective agreements cannot be answered with strike by the employees. As the collective agreements have regulatory power comparable to laws any violation can be brought to court. The individual employee has to claim his rights as they are stipulated in the collective agreement. Trade unions can also take legal action against the employer, but have to disclose the names of their members to the court and consequently to the other party of the judicial conflict-the employer. Since trade unions hesitate to disclose their members' names, they rarely take legal action against the employer. Trade unions can however launch media campaigns in order to convince the employer to comply with the collective agreement.

1.7 Consultation of workers for signing the collective agreement or for the strike call
Trade unions are not legally obliged to organize a referendum prior to a strike. Some trade unions' statutes stipulate that a referendum has to be held before the

union calls for strike. Referenda are quite effective means to mobilize the own members and to show the employer that the union is ready to call for a strike.

2. Regulation of the right to strike

2.1 The right to strike as a fundamental right

The German Federal Constitution (Grundgesetz) does unlike as some State (Länder) Constitutions not expressively include a fundamental right to strike. This is why Labour Courts held for a long time that constitutional rights were not involved when deciding upon the legality of a strike. Art. 9 para. 3 of the German Constitution however guarantees the right of every citizen to form and adhere to collective organisations (so called «Koalitonsfreiheit»). As coalitions can only act for their members effectively if they are allowed to strike in certain cases, the right to strike is considered to be fundamental part of the freedom of association. Nevertheless the fundamental right to strike can unlike to other fundamental rights not be exercised individually. Only trade unions can legally call for a strike. That is why the right to strike is generally considered to be an individual right which is in collective (the unions') ownership.

2.2 Sources

The right to strike is (as mentioned) neither expressively regulated in the Federal Constitution, nor in regular parliamentary laws. Is constitutional origin and its shape have been elaborated by the Federal Labour Court (Bundesarbeitsgericht, BAG) and the Federal Constitutional court (Bundesverfassungsgericht, BVerfG) in numerous cases of these court's case-law. The judicial literature has also contributed to this process.

2.3 Persons authorized to proclaim a strike (legal ownership)

Strikes can only be initiated by trade unions. A collective organisation has to prove sufficient bargaining strength in order to be considered as a trade union. Only organisations of certain strength, especially in terms of members, are considered as trade unions. If a union is not sufficiently strong, the presumption is that it is not able to negotiate with the employer as an equal partner which is the reason why it is not supposed to participate in collective bargaining or industrial action. Workers cannot go on strike without a trade union behind. So called «wildcat-strikes» are therefore not legal.

2.4 Procedures and proclamations

There are no strict procedures provisioned by laws. Nevertheless unions usually follow a scheme of actions leading to a strike as last resort. The strike has in any case to be the «ultima-ratio» the last resort for the trade union when it is impossible to come to an agreement with the employer peacefully.

2.5 Limitations on the right to strike

The overall limit to strikes (as well as to lock-outs) is the principle of proportionality. This principle has been elaborated by the Federal Labour Court in numerous decisions. A strike can as mentioned only be the ultima-ratio, the last means after failure of negotiations. It can only be called for in order to achieve a collective agreement. The strike must not be motivated or carried out in a way to eliminate the opponent. After its end works have to be recommenced as quickly as possible.
Strikes cannot include those works which have to be carried out in order to maintain essential services to the population for example in hospitals. Strikers have to provide that the machinery is not destroyed or severely damaged and that no harm is done to the environment or neighbours.
Strikes have to be terminated instantaneously if a preliminary injunction is issued by a Labour Court forbidding the strike.

2.6 The exercise of the right to strike in different sectors and categories of workers
A larger number of public servants have employment contracts not subject to private but to public law. Those servants, so called «Beamte», have a very strict obligation of fidelity to their employer and are therefore not allowed to go on strike. This is also the case for soldiers and judges.
The two main Christian Churches (Lutheran and Roman Catholic) are not included by regular collective negotiations. They determine the working conditions and wages in joint commissions with the employees and have until now not been subject to strikes.
Both, for civil servants and church employees' changes might come in the near future. The mentioned restrictions for these groups may not comply with the European Social Charter. It is therefore possible that the German system will change with regard to this issue.
For several other groups such as home workers, self employed but depended workers, freelancers in press and media, temporary agency workers and apprentices additional regulations apply. Even if employees of these groups are not always connected with an employer by an employment contract (freelancers, self employed) they can conclude collective agreements with the employers. This is however difficult as self employed workers cannot effectively act against the other side with collective actions as the employers are less dependent from self employed workers.
In the press and media sector the Freedom of Speech (art. 5 Para. 1 of the German Constitution) may limit collective conflicts. The media cannot be incapacitated by collective actions.

3. Trade union and strike

3.1 Reasons for the strike
Lawful reasons
A strike is only permissible if it pursues an aim that can be regulated in an

operative term of a collective agreement. Mixing up lawful and unlawful aims may make the strike unlawful as a whole.
Any claim can only be lawful reason for a strike, if the claim is not already regulated in an agreement which is currently in force since collective agreements create a peace obligation until their expiration.
It is also in principle lawful to strike for a company-wide collective agreement whilst a regional or sectoral collective agreement is still in force if the aims pursued by the strike are not exhaustively regulated in the regional or sectoral collective agreement.
After the expiration of a collective agreement it is also legitimate to strike for a companywide collective agreement in order to avoid that a single employer is bound to a regional or sectoral collective agreement whilst he would be economically able to grant better conditions for the employees in a company-wide collective agreement.

Unlawful reasons
Any other reason (i.e. a strike which does not intend to force the employer into a collective agreement) is unlawful. Strikes cannot be used as a mean to engage the employer in any random conflict occurring in a company.
It is for example not lawful to strike against unfair dismissal, for back pay or if the employer does not comply with the collective agreement he signed. It is also not admissible to strike if there is a conflict about the interpretation of an existing collective agreement. All those issues have to be brought to court.

3.1.1 Political strike
Political strikes occurred in the Weimar Republic (1919-1933) but are now generally considered unlawful both by the literature and the Labour Courts.

3.1.2 Solidarity strike
Solidarity strikes are only admissible under certain conditions. First of all solidarity strikes can only be lawful if the strike they support itself is lawful. A trade union cannot lawfully support an unlawful strike. Secondly solidarity strikes must have a connection with the main strike. This connection can be established if the solidarity strike is able to influence the main conflict i.e. if the solidarity strike is capable to increase the pressure already created by the main strike.

3.2 Methods of the strike

3.2.1 Anomalous forms of striking
There are a number of alternative forms of protest. Nevertheless «protest» can only mean an alternative way to force an employer or an employer's association into a collective agreement. Any other protest i.e. for political or social reasons cannot be exercised as means to strike or as strike replacing action.
A commonly applied method is warning strikes. They can be of short or even

very short duration (lasting of only several minutes) and/or carried out repetitively. Warning strikes are restricted by the principle of proportionality to a certain extend. They may not comply with latter principle if they do in their severity not differ from regular strikes. German Trade unions developed sophisticated strike tactics. As industrial companies are very closely linked together and not stocking large amounts of raw materials and supply products they are vulnerable for strikes in certain key companies. The whole automobile industry can be stopped if certain suppliers are out of business for some time. Such tactics have however become less attractive since employees in the affected industrial enterprises lose their right to get paid in these cases.

3.2.2 Forms of collective action different from the strike

Picket-lines are generally admissible as long as they do not result in a complete blockade of the employer's premises. Picketing can also be used as a means to keep customers away or to endorse non striking workers to take participate in the strike.

It is also lawful to boycott or to issue boycott appeals concerning the employer's company.

There are additional lawful actions such as to take off-days collectively or to consult the Works Council in extensive or excessive way. Employees have a number of rights connected with the Works Council. For example the Works Council has the right to organize a companywide assembly with the entire staff. Such an assembly can last several hours or even days. Workers can collectively refuse to work overtime. Inadmissible are however, according to the Federal Labour Court, go-sick and go slow strikes. Sabotage is illegal and subject to criminal prosecution. Unlawful actions such as a go-sick strike or sabotage might lead to immediate dismissal of the employee. Recently, a new alternative form of protest occurred, the so called «flashmob» where activists subversively try to stop the employers' business.

3.2.3 Virtual strike

The German trade unions use the internet to communicate their positions and to launch campaigns against certain employers known for bad working conditions or anti-union behaviour. There were also incidents where activists attacked some companies' internetservers. This has until now however not been the case in a collective conflict.

3.3 Unlawful strikes

The State and its authorities have an obligation to stay neutral and not to involve themselves in industrial conflicts. This is why the German authorities are generally reluctant to intervene. However they do so in certain cases. Felonies for example committed during strikes will be punished according to the criminal law. The police can stop a strike if it is grossly illegal and/or violent or if the companies' machinery poses danger to third parties or the environment because

it is not maintained.
The Labour Courts can interdict any strike for example if the strike does not comply with the principle of proportionality. In this case the employer can demand the Labour Court to issue a preliminary injunction in order to stop the strike instantaneously.

3.4 Sanctions in the collective conflict
The trade unions as legal persons cannot be subject to criminal sanctions. They can however be subject to civil claims brought to court by the employers suffering from illegal strikes endorsed by trade unions. These claims can in the first place aim to stop the strike for example by a preliminary injunction. Preliminary injunctions end a strike instantaneously and are only issued by the Labour Courts under certain conditions. The employer has to argue plausibly that the strike is manifestly illegal and causing severe disadvantages for the employer. Secondly an employer who was subject of an illegal strike can demand the union to compensate all damages suffered during the strike. Unions may be able to exonerate themselves if there was no fault on their side. Additionally unions might be held responsible for damages their representatives caused or for degradations caused by participants of picket lines.
No strike clauses exist, but are not commonly content of collective agreements. If they are included they are deemed valid and any strike contrary to a no-strike clause is illegal. Additionally collective agreements create a peace obligation.
Any collective action such as strike is prohibited as long as a collective agreement is in force. Only after a collective agreement expires and negotiations for a new one commence collective action can legally be taken.

4. Adhesion to the strike

4.1 Modalities of adhesion
Employees can liberally participate in any strike which has been called for by a trade union. Union membership or a declaration to the employer is not necessary.

4.2 Effects of the lawful strikes on the employment relationship
Lawful effects of a legal strike
The employment contract of striking employees with their employer is suspended during strike. Going on strike might have various effects on the social security situation of employees since the social security system is widely dependent from a persons' status as employee. As long as the employment contract is suspended the workers are not considered employees in the sense of the Codes on Social Security. Nevertheless employees rest inside their health insurance and are also entitled to welfare payments if they cannot support themselves.

Handling of wages for striking employees

As the contractual relation to the employer is suspended, the employee is not entitled to demand wages. Union members may get a certain amount of money from the unions but this is subject to the unions' statutes.
Employees who do not participate in strikes can in principle demand to get paid if they go to their workplaces. Only if the whole company has to be closed temporarily as a result of the strike, non striking employees cannot claim their wages.
Strikers can generally not demand any public subsidiaries unless they are in existential financial difficulties. The State is due to its neutrality not allowed to support striking employees financially. Otherwise the economic consequences for the striking employees would be considerable less severe and hence the employer's
position weaken.

Consequences for the trade union
Trade unions generally pay their members a certain amount of money during strike. Additionally they may be held responsible for example if their representatives voluntarily cause damages to the employer's property. Collective agreements usually include a nonvictimisation clause according to which any claims concerning damages are excluded.

4.3 Consequences of the unlawful strike
With respect to the individual employment relationship: how are individual employees sanctioned under the law for unlawful strikes? Any employer can react to unlawful strikes with the instruments provided against employees who do not fulfil their work contract obligations regularly. Usually, a dismissal would not be permissible without prior warning. Striking employees may also be sued for damages they caused either because the company was out of business and/or because the employee damaged property. Any criminal offense committed during a strike is subject to prosecution by the competent authorities. If however the unlawful strike leads to a collective agreement any claims or retaliation against striking workers can be excluded by a non-victimisation clause.

Consequences for the trade union
If a strike is unlawful the employer's side can in the first place demand any trade union which is organizing unlawful strike to stop that activity. Secondly the employer can demand compensation for his losses suffered during the strike and for damages to his property. Although claims of that kind can sum up to comparatively high amounts employers rarely if ever pursue them. In addition the trade unions might be able to exonerate themselves if a comparable action has already been deemed lawful by the Labour Courts. In such a case the union did not commit fault in calling for strike.

4.4 Wildcat strikes and strikes called by occasionally organized workers

Spontaneous strikes, so called «wildcat strikes» occur but are illegal unless a trade union takes them over. In case of such an «adoption» a spontaneous strike becomes legal.

5. Employers during the strike

5.1 Anti-union conduct
The constitutional protection of associations (art. 9 para. 3 of the Constitution (GG)) applies equally to employers. The German vision on the legality of certain industrial action is widely influenced of the idea of a fair and equitable battle carried out on even ground. Employers and employer's association therefore cannot be deprived of any means to defend themselves against collective actions taken by trade unions. They can try to replace strikers with non striking employees or agency workers. No worker can however be forced to perform strike breaking work. This is also the case for unemployed or temporary agency workers hired during a strike in order to replace the strikers. Employers can offer payments to endorse workers not to participate in strike. They cannot record strikers on «black lists». Against illegal actions originating from the employer legal action can be taken by the union. Collective agreements also mostly contain a non-victimisation clause which prohibits any retaliation subsequently to a strike.

5.2 Lock-out
Employers can lock-out employees in reaction to a strike but lock-outs did not occur in Germany since 1984. According to the judiciary employers cannot be left without any possible answer to a strike carried out by a union. Any lock out has however to be in compliance with the principle of proportionality. There are several limitations to the right to lock-out employees. Lock-outs can for example not be selective i.e. only applicable for trade union members. The legal effect of a lock out is that the employment contract between employer and employee is suspended. Formerly employers dismissed their employees in order to lock them out which is now considered as not proportional.

5.3 Consequence of the strike on no-striking workers
Not striking workers are generally entitled to demand their wages as their employment contract is not affected by a strike they do not take part in. It is however possible for the employer to close the whole company down temporarily. The employer can proceed that way if production seems not possible or profitable because of the strike. If the employer closes his enterprise, the entire staff does not get paid anymore. This is called «cold-lock out».

6. External elements linked to the effectiveness of the strike
International solidarity and an increasingly strong connection between the European and international trade unions is part of all DGB (German Coalition of Trade Unions) Unions values and general policies. This includes support of

international collective actions. The German trade unions assess however that the exercise of solidarity between the European trade unions is still (even if there are examples of successful cooperation) in its beginnings whereas markets are open and businesses are already operating internationally.

6.1 External elements impeding the strike

The difficult economic parameters, a persistently high unemployment rate and the possibility for employers to relocate or downsize their businesses are having negative effects on the trade unions' ability to mobilize. Another problem is that the German labour market has become more flexible allowing it to replace striking workers easier. Also German trade unions suffered a loss of members and the employers' adherence to employer's association is diminishing. It is therefore increasingly difficult to conclude sectoral collective agreements.

6.2 External elements supporting the strike

The German population historically has a friendly view on trade unions and their actions. Unions consequently receive high rates of approval in polls. Another aspect is that companies try to give their products a social image. They are therefore vulnerable on this side for example if unions publicly attest bad working condition or extremely low wages.

7. Alternative means of dispute resolution

There is no legal obligation to use alternative dispute resolution with respect to a strike, although some «Länder» provide respective procedures for voluntary use by the parties. An arbitrator can however be called if the parties agree on this. Especially in collective disputes with intense media coverage arbitration regularly takes place.