

The Right to Take Collective Action under Article 11 ECHR Against the Background of Different National Industrial Relations Systems



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Abstract: Although it has been nearly 20 years since the European Court of Human Rights has acknowledged that under Article 11 ECHR also strike action is protected, the boundaries of this right, which is not absolute, are still not clear. There is no complete body of case law, neither on the personal and material scope, nor on the possibility to justify restrictions under Article 11(2) ECHR. Yet, as national examples show, the effectiveness of the right to strike strongly depends on the industrial relations system it is embedded in.

Keywords: European Convention of Human Rights – Right to strike – Right to take collective action – Industrial action – Wildcat strike action – Secondary industrial action

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SUMMARY: 1. Introduction. – 2. Excursus: The (non-)importance of Article 11 ECtHR (for national jurisdictions) because of the ECtHR’s rank/status in national law. – 3. Historical Development and Principles of the Right to Strike under Article 11 ECHR. – 4. On the Boundaries of the Right to Strike. – 5. Reflections: Embedding the Right to Strike in the Different Industrial Relations Systems.

1. Introduction¹

For a long time, the European Court of Human Rights (in the following “the ECtHR” or “the Strasbourg Court”) was reluctant to acknowledge any specific rights to trade unions. Then, in 2008, the Court fundamentally revised its case law: In *Demir and Baykara*², it held that Article 11 guarantees the right to collective bargaining. Consequently, in *Enerji*³ and various other cases, it also decided that strike action is protected under Article 11 ECHR, although stating from the beginning that it is not a «droit absolu»⁴, and that it is no «essential element»⁵ under Article 11 (although, frankly, it is quite obscure which manifest consequences can be tied to a right being an essential element)⁶.

Yet, in several cases *post Enerji*, dealing with restrictions of the right to strike not only of employees or trade unions in Turkey, but for example also in the United Kingdom or in Germany, the Court referred extensively to Article 11(2) of the Convention. Although the Court acknowledged for example that secondary action is protected under Article 11, it can be restricted under Article 11(2). The same goes for the right to strike of public servants.

Thus, two steps forward, one step back? When analysing the Court’s case law, we certainly need to bear in mind that until now, the Court has not developed a complete body of “strike law”. This is one of the reasons why it is a

¹ The basis for this contribution was a keynote prepared for the 2025 ECOLL-seminar held in Salina, Italy. The keynote-style was maintained, with references inserted where appropriate. The author wants to thank the organizers of the seminar for the invitation to this inspiring event where fruitful discussions contributed to a deeper understanding of the right to strike, not only of aspiring young labour law scholars, but certainly also of the author herself.

² ECtHR, 12.11.2008, 34503/97, *Demir and Baykara v. Türkiye*.

³ ECtHR, 21.4.2009, 68959/01, *Enerji Yapı-Yol Sen v. Türkiye*, esp. para. 24 (referring to ILO supervisory bodies recognizing the right to strike as “corollaire indissociable” of trade union freedom protected by ILO Convention No. 87).

⁴ See, e.g. ECtHR, 20.11.2018, 44.873/09, *Ognevenko v. Russia*, para. 58, and sources cited therein.

⁵ See, e.g. ECtHR, 15.05.2018, 2451/16, *Association of Academics v. Island*, para. 24, and sources cited therein.

⁶ Critically as regards the essential element doctrine (Dorssemont 2025, p. 459 ff.).

dogmatically interesting field, given that the boundaries of Article 11 are not yet clear, simply because no cases have been decided by the Court yet, for example regarding limitations by laws on essential services, or on limitations by so-called peace-duties in collective bargaining agreements. Before looking at the boundaries of the right to strike, the paper offers some reflections on why the Court's case law can actually serve as important source, even though this might "only" mean that national law is interpreted in line with the Court's case law. In other words, what role for Article 11 ECHR in the different Convention States, depending on its status within national law? The Austrian case, where the Convention has constitutional rank, shall serve as example of the difference the Court's case law can actually make.

2. Excursus: The (non-)importance of Article 11 ECtHR (for national jurisdictions) because of the ECtHR's rank/status in national law

Taking a look at the "status" of the Convention, the situation is quite outstanding, compared to other countries, in the United Kingdom and in Austria. Why is this the case? Because of its exceptional rank in the national body of law. Bearing in mind Kelsen's hierarchy of norms, also often referred to as Kelsen's pyramid, the Austrian example is the most striking one: the ECHR has constitutional character, i.e. that it does not need to be implemented into national law, contrary to other public international law conventions. Article 11 could be directly invoked in front of courts; any national norm would need to be interpreted accordingly; in the worst case not be applied. Any action by the employer (e.g. dismissal because of participation in strike action; other disciplinary measures) would be null and void, provided that the question of horizontal applicability is answered affirmatively. Thus, it comes of no surprise that for Austrian doctrine, the change in the Strasbourg Court's case law that came along with *Enerji* and others actually had «dramatic implications», as Ewing and Hendy (Ewing and Hendy 2010, p. 2) put it. Why is this the case?

Before 2008, prevailing doctrine in Austria was that albeit a "freedom to strike" was acknowledged, no human or fundamental right to strike was recognized, meaning that any strike action, even if "lawful" at the collective level, would lead to an infringement of the obligations under the employment contract, i.e. that the employer could have dismissed employees without notice; taking part in strike action was as good reason for lawfully dismissing employees.

The advent of the ECtHR's new line of reasoning was a paradigm-shift: from freedom to strike to a fundamentally protected right to strike. Consequently, the prevailing opinion now considers a lawful collective action as reason why the rights and obligations of the employment contract are suspended, an ap-

proach well known to other jurisdictions. Thus, for Austria the mere acknowledgment that Article 11 also encompasses a right to strike, led to a paradigm shift in the national doctrinal evaluation of strike action.

Yet, this was not reflected by actual strike numbers or hours, meaning that this did not lead to higher strike rates. In fact, the numbers remained at a very low level, comparable to the situation in Sweden, e.g. (average number of strike days/year: 1 per 1.000 employees; compared to around 100 per 1.000 employees in France or Belgium, 90/1.000 employees in Finland, 53/1.000 in Denmark, 18/1.000 employees in Germany). One might have expected a different outcome, given the famous quote that without collective action and without a right to strike, collective bargaining is not more than mere collective begging (e.g. German BAG (Federal Labour Court) in the 1980s, referring to scholars such as Blanpain; others referring to Lord Wright in 1942 (Ewing and Hendy 2010, p. 13; Hepple and Kahn-Freund 1972, p. 7). We will come back to potential reasons for that at the very end of this contribution.

Germany, on the other hand, is a country with extensive case law on the right to strike, deriving it from Article 9 of the Grundgesetz (German “Basic Law”), and with a huge body of literature. Yet, recently, Article 11 and the ECtHR proved essential because Strasbourg was called upon to solve a conflict between two national Supreme Courts. Why? Because, in a nutshell, this is one of the reasons why the *Humpert* case was referred to the Court. Until then, there was diverging case law of the Supreme Administrative Court (acknowledging that the prohibition of the right to strike for civil servants is a violation of Article 9 Grundgesetz, because the latter had to be interpreted in line with public international law, in particular Article 11 ECHR) on the one hand and the Constitutional Court (BVerfG) on the other (stating that the prohibition of the right to strike for civil servants did not amount to a violation of Article 9 Grundgesetz). After exhausting legal remedies at national level, the Strasbourg Court was called upon to solve the issue. It did so in the negative, stating that in the case at hand, the prohibition (and its violation by civil servants who went on strike despite the prohibition, and who then had to face negative consequences) did not amount to a violation of Article 11, because it was justified under Article 11(2).

3. Historical Development and Principles of the Right to Strike under Article 11 ECHR

Reflecting on the right to strike within the Strasbourg Court’s case law, one is tempted to assess it as “two steps forward, one step back”, the *Enerji*-case being the large step forward following the paradigm-shift in the *Demir and Baykara*-case, and further cases pushing boundaries as regards the material

scope of the right to strike (e.g. protection of secondary industrial action), but at the same time acknowledging the potential to restrict strike action under Article 11(2).

For a long time, the Court was reluctant to acknowledge any specific rights to trade unions. In the famous *Schmidt and Dahlström*-case⁷, the applicants referred to the right to strike as an «organic right» included in Article 11 ECHR (para. 36). The Court, however, recalled that although «the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible (*National Union of Belgian Police* judgment, 27 October 1975, Series A no. 19, p. 18, para. 39). Article 11 para. 1 (art. 11-1) nevertheless leaves each State a free choice of the means to be used towards this end» (para. 36). Although it stated that «[t]he grant of a right to strike represents without any doubt one of the most important of these means», it made clear that «there are others. Such a right, which is not expressly enshrined in Article 11 (art. 11), may be subject under national law to regulation of a kind that limits its exercise in certain instances» (para. 36).

Contrary to the ESC, which explicitly guarantees the right to strike subject, albeit, to such regulation, as well as to “further restrictions” compatible with its Article 31, the 1950 Convention (only) requires that «under national law trade unionists should be enabled, in conditions not at variance with Article 11 (art. 11), to strive through the medium of their organisations for the protection of their occupational interests» (*Schmidt and Dahlström* para. 36). Concluding that the applicants of the case had not been deprived of this very capacity, the Court established that there was no infringement of a right guaranteed by Article 11(1) ECHR (see for the details of the case in particular para. 9).

The right to strike was therefore perceived as one important aspect of the freedom to protect the occupational interests of trade union members by trade union action. Yet, States were left a wide margin of appreciation to choose the means to guarantee this freedom. Strike action not being guaranteed as an absolute right, the Court did not need to engage with any limitations regarding its exercise.

This assessment changed dramatically after the Court’s judgment in *Enerji*, where the Court acknowledged the importance of the right to strike as the «corollaire indissociable du droit d’association syndicale», invoking the respective guarantees under other sources of international law, a way paved by the famous *Demir and Baykara* judgment (cf. *Enerji*, para. 24).

⁷ ECtHR, 06.02.1976, 5589/72, *Schmidt and Dahlström v. Sweden*.

Thus, any measure, no matter how minor («si minime qu'elle ait été»), that is capable of deterring workers from exercising their fundamental rights under Article 11 ECHR may constitute an impermissible violation of Article 11 ECHR.⁸ As a result, not only bans of a strike action, but also negative consequences inflicted upon employees not adhering to the ban of strike action are classed as restrictions of Article 11. Examples include claims for damages, injunctions accompanied by interim measures (Brameshuber and Kain 2024, p. 42 ff.), but also the termination of employment relationships (Kohlbacher 2014, p.241 ff.).

However, already in *Enerji*, referring to cases *Urcan*⁹ and *Karaçay* (para. 36), the Court highlighted that the right to strike has no “absolute character” («n’a pas de caractère absolu»; *Enerji*, para. 32). Thus, the right to strike can be made subject to certain conditions and can also be restricted.

Still, though, the actual possibility to effectively exercise the right to strike needs to be safeguarded. As a result, sanctions which potentially discourage trade union members and any other person legitimately participating in such strike action can also unlawfully restrict the guaranteed right to strike, unless justified under Article 11(2) (see in this respect also *Enerji*, para. 33). This aspect is in line with the Court’s former case law, according to which Article 11 not only protects the individual against arbitrary interference by public authorities. In addition to these negative obligations, Article 11 also covers positive obligations to secure the effective enjoyment of the rights protected therein (Sagan 2018, para. 4; *Wilson*¹⁰).

4. On the Boundaries of the Right to Strike

Under Article 11 ECHR, there is no closed “body” of strike law i.e. that in particular the material scope is not as differentiated as it may be in national jurisdictions, where long-standing practice often exists. In addition, more recent cases might be assessed as “one step back”, nearly always accepting the limitations to the right to strike established under national law to be justified because necessary and proportionate under Article 11(2). Broad space is given to the peculiarities of the respective national systems of industrial relations. The Court repeatedly states that «whether the restriction of the right to strike and thus of trade union freedom is compatible with Article 11 ECHR must be assessed on the basis of the measures taken by the state as a whole. All cir-

⁸ ECtHR, 27.3.2007, 6615/03, *Karaçay v. Türkiye*, para. 30 (concerning a formal warning imposed as a disciplinary sanction for participating in a strike).

⁹ ECtHR, 17.7.2008, 23018/04, *Urcan v. Türkiye*, para. 34.

¹⁰ ECtHR, 2.7.2002, 30668/96, *Wilson v. United Kingdom*, para. 41.

cumstances of the individual case must be taken into account» (*Hellgren*¹¹; *Humpert*¹²). The following examples of the Court’s case law shall highlight first the question of opening of the material scope (to which the negative answer leads to an “inadmissible” decision by the Court), focussing in particular on wild cat strikes as well as on secondary/sympathy action. Second, attention is raised to potential restrictions on the right to strike, where also the case of secondary/sympathy action is scrutinized.

The following example shall highlight the importance of the question of whether wildcat strikes are covered by Article 11 in the first place or not:

According to prevailing doctrine in Austria, wild cat strikes, i.e. strike action not organized by trade unions, are in principle lawful; no case law exists¹³. Now let us imagine the following situation: There is a works meeting where all employees of an undertaking meet and are informed by their works council members about the current economic situation in the undertaking. Employees are upset; around 500 of the 3.000 employees shall be made redundant in the upcoming weeks. The meeting is formally closed, but all employees remain and decide, spontaneously, to call for a strike action the next morning which shall last two hours. Although some of the works council members are also trade union members, there is no official support for this action by the trade union, at least not until the strike action starts the next day. Only later, when the whole sector goes on strike, the trade union also “acknowledges” this very first 2-hour-strike. The employer has heard of recent case law by the Strasbourg court, according to which, supposedly, only strike action organized by a trade union is protected under Article 11. As a result, the employer dismisses for good cause more than 100 employees for participating in the wild cat strike, which comes in quite handy (in this way, the employer is exempt from continuous payment of wages as it would have been obliged to in case of “ordinary” termination procedure). Thus, for management and labour, it does matter whether wild cat strikes are covered by Article 11. In case they were not, there is more room for manoeuvre to argue that such strike action is unlawful in the first place.

Until recently, there has been no explicit case law by the Strasbourg Court on this question. Academics refer to the ECSR’s digest of its case law as well as to respective interpretation of ILO Convention No. 87, according to which «[p]reserving the right to strike to trade unions by prohibiting strikes without trade union authorization is regarded as compatible with Art 6 ESC and ILO Convention 87 and should also be compatible with Art 11» (Sagan 2018, para.

¹¹ ECtHR, 17.12.2024, 52977/19, *Hellgren v. Finland*, para. 60.

¹² ECtHR, 14.12.2023, 59433/18, *Humpert v. Germany*, para. 109.

¹³ (Löschnigg 2025, paras 13.022, 13.038); critically, though, (Marhold, Brameshuber and Friedrich 2021, p. 604, referring to the Strasbourg Court’s case law).

29). Thus, if a measure, e.g. disciplinary sanctions, is taken against those employees on strike because the strike was not organized by a trade union, this measure might not even make it to Article 11(2) and therefore to the exercise of balancing interests, because such strike action might initially already fall outside the scope of Article 11. The main argument supporting this line of reasoning would be that Article 11 covers only strike action by trade unions because of strike action being the “corollaire indissociable” to trade union freedom.

Yet, protection of wildcat strikes and therefore also of individual employees is supported by a respective interpretation of the *Tymoshenko*-case¹⁴, for example: There, all striking workers were trade union members, but the trade union itself only became involved after the strike was (ultimately unlawfully) prohibited by a court order, stepping in to challenge the injunction (*Tymoshenko*, paras. 7, 12, 21). The Court also emphasized the «dual nature of trade union action as a right of the trade union and of the individual union members» (*Ognevenko*, para. 55; *Humpert*, para. 104).

However, more recently, one might argue that the Court does not seem to be convinced that wildcat strikes should be covered. In more recent cases, recalling previous case law (*RMT*¹⁵ or *Barış*¹⁶) it emphasizes that «strike action is clearly protected by Article 11 in so far as it is called by trade unions» (*Humpert*, para. 104; *Almaz*¹⁷). Yet, does this also mean that if industrial action is not organized by a trade union or its members, it does not fall within the scope of Article 11 ECHR, leading to inadmissibility of the case as regards its assessment by the Court, thus not even making it to the Article 11(2)-test (cf. *Barış*, paras. 45, 53 ff.; *Ateş*¹⁸; *Almaz*, para. 63)? The logical subsequent question must turn to the prerequisites for protection as ‘trade union’ under Article 11. In other words, what about so-called ad-hoc-coalitions? If those are protected, the problem seems to be a marginal one: If one interprets the notion of “trade union” rather widely (cf. Obermayer 2026), not linking it to formal prerequisites under national law, the scope of application of Article 11(1) is opened rather quickly, opening the doors for potential argumentation under Article 11(2).

As regards sympathy or solidary strike action¹⁹, on the contrary, it is clear that it falls within the scope of application of Article 11. According to contin-

¹⁴ ECtHR, 02.10.2014, 48408/12, *Tymoshenko v. Ukraine*.

¹⁵ ECtHR, 08.04.2014, 31045/10, *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, para. 84.

¹⁶ ECtHR, 14.12.2021, 66828/16, *Barış v. Türkiye*, para. 45.

¹⁷ ECtHR, 12.12.2024, 55789/19, *Almaz v. Türkiye*, para. 63.

¹⁸ ECtHR, 28.02.2023, 52051/17, *Ateş v. Türkiye*, para. 14.

¹⁹ Cf. generally speaking on that topic, (Zimmer (2022)).

uous case law, sympathy or solidarity action is clearly protected under Article 11, albeit as an accessory rather than a core aspect of trade union freedom. As a result, the states enjoy a broad margin of appreciation when it comes to restrictions (*RMT*, paras. 77, 87 ff., 99, 104; *Humpert*, para. 112). Thus, the Court upheld a complete ban on secondary action because the applicant trade union was only marginally affected by such ban (*RMT*, paras. 76, 91). This is assessed as inconsistent: If there is a right to secondary action, its total abolition cannot strike a fair balance (Sagan 2018, para. 29; similarly, Bogg and Ewing 2014, p. 240).

The states therefore enjoy a sometimes broader, sometimes narrower margin of appreciation when it comes to potential restrictions of the right to strike under Article 11(2). In *Humpert*, the Court offers a “cascade-like”-test of how far this margin of appreciation goes.

The margin of appreciation allowed to the State is reduced where measures affect an essential element of trade-union freedom (an aspect so far left open by the Court; very generally this is the case when a prohibition renders the freedom devoid of substance in the circumstances; *Humpert*, paras. 109, 111). The margin is also reduced «where restrictions strike at the core of trade-union activity», e.g. in case of «severe restrictions on “primary” or direct industrial action by public-sector employees who are neither exercising public authority in the name of the State nor providing essential services to the population» (*Humpert*, para. 111; *RMT*, paras. 87 ff.). In the proportionality assessment of such restrictions (of an essential element and of the “core” of trade-union activity), all circumstances of the case need to be assessed, i.e. «the totality of the measures taken by the respondent State to secure trade-union freedom, any alternative means – or rights – granted to trade unions to make their voice heard and to protect their members’ occupational interests, and the rights granted to union members to defend their interests. Other aspects specific to the structure of labour relations in the system concerned also need to be taken into account in this assessment, such as whether the working conditions in that system are determined through collective bargaining, as collective bargaining and the right to strike are closely linked. The sector concerned and/or the functions performed by the workers concerned may also be of relevance for that assessment» (*Humpert*, para. 109; *Hellgren*, para. 60).

On the contrary, in case «a substantial restriction on the right to strike concerns civil servants exercising public authority in the name of the State²⁰ or secondary action», the Member States’ margin of appreciation is wide (*Humpert*, para. 112).

²⁰ See Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.), §§ 37-41, in respect of a prohibition on strikes by members of the police.

Given the reference to national industrial relations' systems, even in those cases where the margin of appreciation is a narrow one, assessment of future cases is hard without taking into account the specific circumstances and guarantees offered to trade unions and their members in the respective State, in particular when a functioning collective bargaining system can also be guaranteed by other alternative means.

5. Reflections: Embedding the Right to Strike in the Different Industrial Relations Systems

A comparative analysis of the right to strike is necessarily confronted with the difference of national industrial relations systems, given the mentioned margin of appreciation-doctrine of the Strasbourg Court which strongly relies on the circumstances in the respective State. As the Salina seminar has revealed once again, at a meta-level, States can be largely divided into rather collaborative systems, amongst which the countries such as Sweden or Austria with particularly low strike rates stand out, and more confrontational systems, with Italy or France being rather prominent examples²¹. In each of the systems, the right to strike is perceived as important cornerstone, but might serve different purposes. In rather collaborative systems, often the ultima ratio principle applies, meaning that strike action is only the last resort, and where lawful strike goals are more limited (e.g. narrow interpretation of a lawful political strike). Therefore, the right to strike is one (last) puzzle piece in a more comprehensive system of collective labour relations, with a strong role for collective bargaining. Contrary to that, in more confrontational systems, the right to strike serves as means to enforce employees' claims in a much broader sense, being an important means to create a successful bargaining position in the first place. Anecdotally speaking, in more collaborative systems, collective bargaining partners start the bargaining process around the table, whereas in more confrontational systems, the bargaining process is started on the streets. Reflecting on the functions of the right to strike, one could also state that in more collaborative systems, strike action is less frequently required since bargaining powers tend to be more equally buoyant, whereas in more confrontational systems, only the right to strike enables employees to effectively counterbalance the traditional inequality of bargaining power (cf. Sagan 2018, para. 3). The former systems rely on pre-existing bargaining parity, which, on the contrary, needs to be effectuated on

²¹ Cf. *passim* (Giugni 2014), (Lo Faro and Laulom 2014), (Novitz (2019)).

the streets in the latter ones (cf. also *Sindicatul “Păstorul cel Bun”*²², highlighting the importance of trade union freedom as tool in achieving social justice). Thus, the logical consequence must be that in collaborative systems, where trade union freedom is secured in several ways, there is more leeway to restrict the right to strike, which only serves as ultima ratio, compared to more confrontational systems, where the States’ margin of appreciation to restrict the right to strike is narrower in order to ultimately guarantee social justice. Thus, the right to strike has different functions, depending on the industrial relations systems it is embedded in.

The question of the material and personal scope of application is also a crucial one. As we have seen, the mandatory nexus between the right to strike and the rather narrow scope of Article 11, namely «to protect the occupational interests of trade union members by trade union action» (*Schmidt and Dahlström*, para. 36, confirmed by *Almaz* and various other cases) limits employees’ action in those cases where a trade union has not yet been formed. In other words, is employee action also guaranteed where no trade union exists (yet), and are wildcat strikes protected under Article 11? Given more recent structural developments, where traditionally strong industrial relations systems have been under pressure and where trade union membership is in decline (cf. Recitals 16, 22 AMWD 2022/2041; Müller, 2025), this question could become a quite crucial one in the not-so-distant future. It is therefore only logical to broadly interpret the term ‘trade union’ and cover ad-hoc associations. Thus, in order to reflect this decline and therefore changing industrial relations more generally speaking, the Court should adopt an evolutionary approach, unless it wishes to risk that freedom of association becomes devoid of substance. More recent sources of fundamental rights, such as Article 28 CFREU, reflect this by explicitly guaranteeing not only freedom of association and trade union freedom, but also a right to collective bargaining as well as to collective action. As the Austrian example and the Court’s margin of appreciation-doctrine show, this does not necessarily lead to more (lawful) strike action, provided that the industrial relations system guarantees bargaining parity and social justice.

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