European Financial
Markets Lawyers Group

- THE CHAIR -

CONFIDENTIAL

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Frankfurt am Main, DD March 2015

Dear Mr Faull,

Subject: Legal consequences of the introduction of a new index replacing the Euribor.

Survey on continuity of contracts across the euro area.

We refer to your letter dated 7 November 2014 and we would like to thank you for your response and for your attention to this matter.

For the benefit of the Commission work and as contribution to the debate on safeguarding continuity of contracts in the case of introduction of a new index replacing Euribor (or of addition / amendment of a number of elements to / of Euribor), we would like to draw your attention to the attached ***legal survey*** that the EFMLG has conducted.

The survey aims at identifying the legal risks associated with a possible change in Euribor methodology across all the euro area jurisdictions. Based on a general overview of the applicable civil laws and doctrines as well as an analysis of recent developments in jurisprudence in each jurisdiction, the survey aims at ascertaining whether, any or more of a number of possible changes in the methodology of Euribor would entail litigation risks (e.g. for frustration or equivalent, material adverse change, or other legal grounds) and at predicting the possible outcome of future litigation.

In most jurisdictions the principle of frustration of contract or equivalent is well recognised, which may well be a cause of action before the courts to review a financial instrument or contract containing a reference to Euribor.

At the same time, it is certainly not possible to predict the outcome of any future litigation, which it will also largely depend on the precise terms of the contract containing the reference to Euribor, the circumstances in which the contract was entered into and the actual final changes to the methodology of

Euribor. The courts have a number of tools at their disposal to achieve continuity (.e.g. contractual interpretation, implied terms) and they may also rely, to the extent possible, on any contractual interest rate fall-back provisions. It is noted that the courts will only find that the contract had been frustrated if all legal avenues have been exhausted.

The EFMLG trusts that this survey will be useful for the design of the arrangements and in particular the transitional arrangements to be put in place to support the move towards a reformed Euribor. [The EFMLG would be pleased in contributing further to the efforts of the Commission and the EU legislator in these fields. [Please ….]]. *(pending outcome of the EFMLG Copenhagen meeting).*

Yours faithfully,

Holger Hartenfels, Vice Chairman of the EFMLG

LEGAL SURVEY

QUESTIONNAIRE on contract law principles

(Frustration of contract, continuation of contract, *pacta sunt servanda*, *force majeure*)

Euribor (the Euro Interbank Offered Rate) Is used as the reference rate in a myriad of contracts (derivatives /interest rates swaps, mortgages, commercial loans, bond issues etc.) as the method to determine a periodic payment (e.g. interest due) in relation to a defined payment period. Euribor is currently calculated on the basis of quotes contributed to Euribor's administrator, Euribor-EBF, from some 30 euro area banks which form a panel of contributing banks ('panel banks'). The Euribor definition and calculation methodology is set out in the **Euribor Technical Features**[1]:

Some reforms to Euribor are already underway.[2] The governance of Euribor has been strengthened by amending its code of conduct in line with international best practice (IOSCO and EBA-ESMA principles for benchmarks) and parts of its definition have been clarified[3]. It is likely however that the current calculation methodology will also be changed. By *change in methodology* we mean for the purpose of this survey any of the below.

- Changing the definition of Euribor from the daily quote of the rate, rounded to three decimal places, that each panel bank believes one prime bank is quoting to another prime bank for interbank term deposits within the euro zone[4], to the rate that the panel bank **actually pays** in a transaction that day when **borrowing** unsecured funds (i.e. *own cost of funds*)[5].
- Allowing surveys or estimates of the bank's borrowing costs to be used in case that there are no (or too few) transactions on the market.
- Using data also from markets different than the ones currently sourced, e.g. from the wholesale funding market (i.e. including borrowing by the panel banks from corporates)
- Using data from only a minority of the panel banks
- Using data also or only from non-panel banks.

The following questions are meant to help assess the **legal risk** that a material change in the Euribor definition and/or the way it is calculated may entitle a party to a contract which references Euribor to withdraw from or seek to amend the contract.

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1 See http://www.euribor-ebf.eu/assets/files/Euribor_tech_features.pdf

2 For background information on what is happening see: http://www.euribor-ebf.eu/euribor-org/euribor-reform.html

3 For instance, a 'prime bank' is now defined as follows: "A "prime bank" should be understood as a credit institution of high creditworthiness for short-term liabilities, which lends at competitive market related interest rates and is recognised as active in euro-denominated money market instruments while having access to the Eurosystem's (open) market operations." (see amended Euribor Code of Conduct from October 2013).

4 In other words the lending or 'bid' rate at which the prime banks are bidding for deposits from each other. See Main Specifications of the Euribor Technical Features, page 1.

5 I.e., the "ask" or loan rate. This is what the envisaged move to transaction-based contributions would amount to in essence.

Question 1:

Does your legal system recognise *frustration of contract (*or equivalent) or other legal ground such as "material adverse change"?

Austria	**YES** The doctrine of **'***Wegfall der Geschäftsgrundlage*' is not expressly mentioned in the Austrian Civil Code, but nevertheless unanimously accepted by courts and scholars.
Belgium	**YES** See 'théorie de l'imprévision'. The Courts until 2009 hesitated to accept the doctrine.
Cyprus	**YES** See section 56(2) of the Contract Law
Germany	**YES** See Section 313 of the German Civil Code
Estonia	**YES** See võlaõigusseadus (Law of Obligations Act) § 97 "Alteration of balance of contractual obligations".
Greece	**YES** See Article 388 of the Greek Civil Code (unforeseen change of circumstances)
Spain	**NO specific legal provision** However, the Courts may apply this principle under strict conditions.
Finland	**YES** The courts have a wide discretion to adjust or declare terminated contracts which they consider unfair.
France	**NO 'frustration of contract' as such** However the Courts recognise the "théorie de la cause de l'obligation" and have recently developed the 'théorie de l'imprévision'.
Ireland	**YES** In accordance with the common law and the law of equity. Irish courts have been influenced by judgments of the English courts on this issue and the similarities with English law are apparent.
Italy	**NO 'frustration of contract' as such** However, termination of contract may be sought on the grounds of excessive onerousness of performance (Article 1467 of CC) or by invoking the doctrine of 'presupposizione'.
Lithuania	**YES** See Article 6.204 (reference to Articles 6.2.1-6.2.3 of the UNIDROIT principles) of the Civil Code.
Luxembourg	**NO** However, a decision issued by the Court of Appeal on 15 December 2010 has however applied such theory in the context of a fixed-price contract, under which the service provider claimed the payment of a higher price further to the alleged disruption of the economy of the contract.
Latvia	**NO** There are some exceptions related to "excessive loss" in purchase, lease or works contracts, but they require bad faith on part of the other party.
Malta	**No 'frustration of a contract' as such** Under Maltese law the "lesion" doctrine (a serious disadvantage to one of the parties to the contract) is a general ground for annulment of a contract only in cases involving minors.
Netherlands	**YES** See Article 6:258 of the Dutch Civil Code

Portugal	**YES** See Articles 437 to 439 of the Portuguese Civil Code
Slovakia	**YES** See Article 356 of the Commercial Code
Slovenia	**YES** See Articles 112-115 of the Slovenian Code of Obligations

Question 2:

What are the conditions in law (legislation and/or case law), which a party claiming frustration or its equivalent has to fulfil?

Austria	Termination / avoidance is permissible, if: • the existence of particular circumstances must be considered an important basis or background of the contract from the perspective of both parties, • where the change of these basic circumstances was unforeseeable for both parties at the time of the conclusion of the contract and • where the change of circumstances is not the realization of a risk assumed by the disadvantaged party under the contract.
Belgium	The contractual obligation of one party must have been significantly aggravated further to unforeseeable and irresistible circumstances and must significantly disrupt the overall balance between the respective obligations.
Cyprus	The Courts have developed the following conditions: • Destruction of the subject matter: A contract is void for mistake if the subject matter is destroyed before the formation of the contract. If the subject matter is destroyed at a later stage, the doctrine of frustration applies. • Personal services: if an individual has agreed to provide services before making an agreement with another party, the subsequent incapability of that individual to perform the services will frustrate the contract, unless a substitute likely to be satisfactory is found. • Non-occurrence of an event: if the parties' agreement depends on the occurrence of a certain event which does not take place, the contract will be considered as frustrated. • Governmental interference: this situation is similar to the non-occurrence of an event, but it might be that the event could not occur due to the intervention of the government, which would render a contract frustrated. • Supervening illegality: if the purpose of the contract at the time of its making was legal but became illegal, the contract would be frustrated.
Germany	The conditions to claim frustration are set out in Section 313(1) and Section 313(2). Section 313(1) requires the following conditions: • Objective element: Subsequent change of objective circumstances which are essential to the contract • Hypothetical element: No contract would have been entered into in case these changes would have been foreseeable • Normative element: A party cannot reasonably be expected to accept the unchanged contract
Estonia	§ 97 (2) lists following conditions to be met: • at the time of entry into the contract, the injured party could not have reasonably expected that the circumstances might change; and • the injured party could not influence the change in the circumstances; and • the risk of a change in the circumstances is not borne by the injured party

	pursuant to the law or the contract; and • the injured party would not have entered into the contract or would have entered into the contract under significantly different terms if the party had known of the change in the circumstances.
Greece	According to Article 388 of the Greek Civil Code (unforeseen change of circumstances) and relevant case law: (a) The contract must be of a reciprocal nature. (b) At the time of the conclusion of the contract both parties must have acted in good faith (Article 288 of the Greek Civil Code) and according to business practice rules. (c) Negligent parties / parties in error are not protected by Article 388 of the Greek Civil Code. (d) The circumstances under which the reciprocal contract was concluded must have changed subsequent to the conclusion of the contract. (e) The causes of the change of the circumstances must be exceptional and impossible to have been foreseen at the time of the conclusion of the contract. (f) The change in circumstances may be of a global or local nature, with factual and/or legal effects. (g) Fulfilment of the debtor's obligations must have become excessively onerous for the latter in comparison with the creditor's obligations, without necessarily amounting though to the total financial destruction of the debtor. (h) The aforementioned difficulty in the fulfilment of the debtor's obligations must be a result of this unforeseen change. (i) The change of the circumstances must be of a rather permanent nature.
Spain	According to case law: • The onerous, purposeful contract involved must be a long-term contract or a contract in which none of the obligations have yet been performed or where one of the parties has performed but the other has not, or where full performance is still pending. • There must be an extraordinary alteration of the basis of the contract. It is possible when: a) the contract has become excessively and disproportionately burdensome for one of the parties or both of them; b) the purpose of the contract is totally frustrated. • The change of circumstances must be extraordinary and unforeseen. Neither of the parties could reasonably have taken the impediment into account at the time of the conclusion of the contract. • Neither of the parties should take the risk of the change of circumstances (as a contractual obligation). The doctrine of the 'cláusula rebus sic stantibus' would not be applicable to aleatory contracts. • The person invoking the change of circumstances should act in good faith and not be accountable for it according to the contract or common opinion. • Contractual revision is the only way to restore 'contractual equilibrium' (and rescission applies only when revision is impossible).
Finland	The conditions are listed in the Contracts Act (228/1929) Section 36: If a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside. In determining what is unfair, regard shall be had to the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and to other factors. If a term referred to in paragraph 1 is such that it would be unfair to enforce the rest of the contract after the adjustment of the term, the rest of the contract may also be adjusted or declared terminated.

	A provision relating to the amount of consideration shall also be deemed a contract term.
France	• Cause de l'obligation: the doctrine is complex and difficult to sum up. The "cause de l'obligation" in a contrat synallagmatique (reciprocal commitments of the parties), if the reason for contracting of one party disappears, the conditions for a valid contract are not met. The cause must exist upon the signature of the contract for the contract to be valid. • Theorie de l'imprévision: the change in circumstances (after the signature of the contract) must be quite significant and alter the balance of the contractual arrangement.
Ireland	The Irish Supreme Court has held that: • frustration takes place when a supervening event occurs without the default of either party and for which the contract makes no sufficient provision; the event must so significantly change the nature of the contractual rights and obligations that it would be unjust to hold the parties to the stipulations of the contract. • The court will compare the contract or position of the parties at the time the contact was entered into with that if there were to be performance of the contract after the allegedly frustrating event • The supervening event must be so unexpected and beyond the contemplation of the parties, even as a possibility, that neither party can be said to have accepted the risk of the event taking place when contracting it • Finally, a contract cannot normally be discharged through the doctrine of frustration if a contract term covers the events which are alleged to constitute frustration. If one party anticipated or should have anticipated the possibility of the event which is alleged to cause the frustration and did not incorporate a clause in the contract to deal with it, he should not be permitted to rely on the occurrence g of the event as the ground for frustration.
Italy	Termination on the grounds of **excessive onerousness** (severe hardship) may be granted provided that the following requirements are met: • contracts entails obligations of both parties; • continuous or periodic performance has been agreed; • the performance has become excessively onerous at the time of the demand for dissolution; • the onerousness is excessive due to extraordinary circumstances; • such circumstances where unforeseen unforeseeable Termination can be sought on the basis of the '*doctrine of presupposizione'* where: • a certain situation has been considered both parties as being certain and fundamental to the contract even though explicit provision has not been made for it in the contract; • the situation later turns out to be radically different; • the situation (factual or legal, actual or future) is totally external to the contract i.e. the situation cannot be influenced by the parties; • the parties could not have foreseen it when they concluded the contract and the situation was not in their contemplation.
Lithuania	Article 6.204(2) of the Civil Code provides that : *"2.* The performance of a contract shall be considered obstructed under such circumstances which fundamentally alter the balance of the contractual obligations, i.e. either the cost of performance has essentially increased, or the value thereof has essentially diminished if: 1) these circumstances occur or become known to the aggrieved party after the conclusion of the contract;

	2) these circumstances could not reasonably have been foreseen by the aggrieved party at the time of the conclusion of the contract; 3) these circumstances are beyond the control of the aggrieved party; 4) the risk of occurrence of these circumstances was not assumed by the aggrieved party." In determining whether balance of the contractual obligations of the parties was fundamentally altered it should be taken into account principles of justice, reasonableness and good faith (Article 1.5 of the Civil Code). In addition, according to case law increase in interest rate, i.e. cost of contract performance, may be considered as obstruction of the contract.
Luxembourg	The overall economy of a fixed-price contract needs to be disrupted, either if the services effectively carried out go beyond the initially agreed contract, or if the amendments thereof trigger an increase of the prices which are no more in line with the initial forecasts.
Latvia	N/A
Malta	As set out in 1212-1216 of the Civil Code, the conditions for lesion in Malta are: 1. It can only be demanded by a minor (persons who are under 16 years of age); 2. It shall be a good ground for rescission in any kind of agreement not expressly excepted by law, and whatever the extent of the lesion, unless it is of very small consequence; 3. Lesion cannot be demanded if it is the effect of a fortuitous and unforeseen event. 4. It shall also be allowed in favour of a minor if, although no actual loss to his prejudice is made to appear, it is shown that the agreement renders him liable to litigation or to considerable expense, or causes to him the loss of any advantage to which he was entitled. 5. A minor may exercise the rescissory action on the ground of lesion even though the other party to the agreement be also a minor.
Netherlands	See Article 6:258 Unforeseen circumstances which provides that: "1. Upon a right of action (legal claim) of one of the parties to an agreement, the court may change the legal effects of that agreement or it may dissolve this agreement in full or in part if there are unforeseen circumstances of such a nature that the opposite party, according to standards of reasonableness and fairness, may not expect an unchanged continuation of the agreement. The court may change or dissolve the agreement with retroactive effect. 2. The court shall not change or dissolve the agreement as far as the unforeseen circumstances, in view of the nature of the agreement or of common opinion, should remain for account of the party who appeals to these circumstances. 3. For the purpose of this Article, a person to whom a right or obligation from the agreement has passed, is equated with an original party to that agreement."
Portugal	The criteria are as follows: 1. With regard to the "circumstances on the basis of which the parties decided to contract" only changes to conditions which were already present at the time of entering into the contract, and which were one of the reasons why it was concluded (i.e. the objective, bilateral, basis for the transaction), will be deemed relevant – a transaction entered into based on a misrepresentation of reality or error by one of the parties would not benefit from this provision. 2. Regarding the "abnormality" of the change, the contracting parties must have been totally unable to predict the change (e.g., war, revolution, unexpected legislative changes). Portuguese doctrine has maintained that

	the concept of "unexpected" is broader than that of "unforeseeable". Price changes, for instance, do not count as abnormal changes. 3. The change has to cause "significant damage to one of the parties", thus leading to an imbalance between the contractual benefits. If this not the case, the obligation must be fulfilled as it normally should. 4. Demand for performance of the obligation must seriously breach the principle of good faith, which would render unlawful such demand by the lender. 5. "Not covered by the risk of the contract" means that the injury suffered by the party must go beyond the perimeter of the risks considered normal in contracts of the same type.
Slovakia	There must be substantial change of circumstances resulting in frustration of the essential purpose of the contract, whereas the purpose of the contract must be expressly mentioned in the contract.
Slovenia	Pursuant to Article 112 of OZ, the party can request the court to rescind a contract on the basis of the change of circumstances if the following conditions are met: 1. after the conclusion of a contract circumstances arise: a)that render the performance of obligations by one party more difficult, *or* b)owing to which the purpose of the contract cannot be achieved; *and*, 2. in both cases (a) or b)) the changed circumstances have effect to such an extent that: - the contract clearly no longer complies with the expectations of the contracting parties, *and* - in the general opinion it would be unjust to retain it in force as it is. 3. In addition, the following must be fulfilled: - the party making reference to the changed circumstances could not have taken such circumstances into account at the time of the conclusion of the contract, nor could have avoided them nor could have averted the consequences thereof, *and* - the changed circumstances occurred prior to the deadline stipulated for the performance of the obligations of the party referring to the changed circumstances. The parties may waive in advance the right to refer to specific changed circumstances, unless such waiver contravenes the principle of conscientiousness and fairness

Question 3:

Could a contract party successfully claim frustration or its equivalent by proving that the economic cost of continuing to perform the contract became significantly higher as a result of the unforeseen event or change in circumstance?

Austria	**YES** If the economic costs become significantly higher and this leads to a gross inequivalence of performance and counter-performance, under Austrian law, this could be treated as: • an issue of impossibility of performance (§ 920 ABGB), • as *laesio enormis* (§ 934 ABGB) or • as "*Wegfall der Geschäftsgrundlage*" (alternatively "mutual mistake").
Belgium	**YES**
Cyprus	**YES** It is, however, worth noting that, pursuant to the Abusive Terms in Consumer Contracts Laws of 1996 to 2007, a clause establishing a right for a financial

	services provider to change the interest rate without any notice to the consumer is not to be considered as an “abusive term”, provided there is a valid reason for such change.
Germany	**YES** The economic cost plays a role in this context if it is significant. However, in that case the parties would rather adapt the contract to the new circumstances and the disadvantaged party would receive a compensation in order to restore the economic equivalence.
Estonia	**YES**
Greece	**YES**
Spain	**NO**
Finland	**YES**
France	**NO** However, given the 2010 case-law, if the economic balance of the contract is seriously put into question, it could in theory lead to an implementation of the *theorie de l’imprévision.*
Ireland	**YES**
Italy	**YES**
Lithuania	**YES** The party may request to modify the contract. Nonetheless, it would be decided on a case by case basis pursuant to the conditions indicated above.
Luxembourg	**YES** Provided that there is a fixed-term contract
Latvia	**NO**
Malta	**NO**
Netherlands	**YES** If the circumstances in the case at hand comply with the definition of ‘unforeseen circumstances’ under Dutch law , the claim of the party claiming frustration may be admissible.
Portugal	**YES**
Slovakia	**NO**
Slovenia	**YES**

Question 4:

If any of the changes outlined above occurs, are there legal methods which your courts can use to facilitate continuation of the contract?

Austria	The courts may apply the principles on the interpretation of substantive contract law (the true intention of the parties and in accordance with practices of honest business dealings).
Belgium	The issue remains open.
Cyprus	The interpretative task of the courts is limited to the written terms of the contract, and does not extend to external factors. When the courts are invited to imply a term, then they must determine the true intention of the parties.
Germany	The courts will check first whether there is not a rule in the contract that would deal with the issue. If there is no contractual rule, then the court can apply supplementary interpretation of the contract and would try to determine the hypothetical intention of the parties so that an exact boundary between supplementary interpretation of the contract and frustration of the contract cannot clearly be established.
Estonia	The first remedy is amendment (i.e. continuation of the contract) and only last resort is termination.

Greece	The judge may discretionarily reduce the obligations to a suitable extent, thus allowing the judge to take into consideration all factual and legal aspects relevant to the case. The prerequisite of "inability to provide" has been interpreted by the Greek courts narrowly, so as to prevent to the extent possible derogations from the pacta sunt servanda principle.
Spain	The courts would have to base their decisions on the terms of the contract itself (Art. 1091 of the Civil Code). There is no room for a court to interpret or 'complete' a contract the clauses of which are clear and consistent with the purpose of the contract.
Finland	The main rule would be that the contract continues and only the contractual term which is deemed to be unfair is set aside or adjusted.
France	The principle is that the judge must apply the legal provisions and not interpret them.
Ireland	The court will always commence with an examination of the words used in the contract. The courts may also imply terms into contracts as a matter of law and in order to repair 'an intrinsic failure of expression' by the parties.
Italy	Fall back provisions dealing with the unavailability of the Euribor index are usually inserted in ECU-indexed loan agreements. Should Euribor index become unavailable due to substantive changes in its definition it would be necessary to renegotiate Euribor-indexed contracts and agreements and thus make reference to the reformed index.
Lithuania	Lithuanian law provides legal methods which can facilitate continuation of the contract which include interpretation of the contract, implication of contractual terms.
Luxembourg	The Luxembourg civil code and other specific laws provide for specific cases on which the judge may amend a contract. Jurisprudence allows exceptionally the judge to change a contract between parties.
Latvia	N/A
Malta	Article 1002 till 1008 deal with the interpretation of contracts in cases where difficulty arises on the proper interpretation of the contract.
Netherlands	The courts assume that continuation of the contract is the point of departure.
Portugal	The courts will always base their decisions taking into account rules of contractual interpretation –namely the principle falsa demonstratio non nocet (what counts is the real intention of the parties) as it is expressed in the Portuguese Civil Code– as well as the rules pertaining to formation of intent and the correspondence between intention and declaration, and, more specifically, rules relating to errors capable of affecting contract validity.
Slovakia	Courts do not have the power to amend or adapt the contract to reflect changed circumstances.
Slovenia	The court would use the rules on contractual interpretation, as laid down in Article 82 to 85 of OZ. Not be necessary to adhere to the literal meaning of the expressions used, but shall be necessary to identify the contracting parties' common intentions and interpret the provision so as to comply with the principles of law of obligations As regards *implying terms into the contract* and *alternative calculation mechanism* the Slovenian courts do not have a power to amend the contracts by way of inserting new words into the contracts Should the court establish that the reference to EURIBOR does not mean the reference to the new EURIBOR, and the old EURIBOR is no longer available, it may decide to determine the mutual rights and obligations of the parties in the concrete dispute on the basis of *fall-back provisions* contained in the contract.

Question 5:

Does your legal system recognise the concept of *force majeure*?

Austria	**YES** The term force majeure ("höhere Gewalt") is not expressly mentioned in the Austrian Civil Code, but the Austrian Civil Code uses the term coincidence in several provisions. The Austrian Supreme Court held that only an irresistible elementary event means force majeure.
Belgium	**YES** The concept of force majeure requires that the unforeseeable events make it totally impossible to execute the obligations subject to the contract.
Cyprus	**YES** It follows from relevant case law that force majeure is recognised as the happening of some extraordinary natural occurrence, which a reasonable person would not have anticipated, and the consequences of which could not have been avoided by the exercise of reasonable care. There are no specific conditions in law which the party claiming force majeure has to fulfil but the court, on several occasions, interpreted force majeure as an of God, that is, the operation of uncontrollable natural forces, such as earthquakes, flood or storm which could not happen by the intervention of a man.
Germany	**YES** According to the case law, there are two conditions, namely (1) that the event that causes the damage is external (objective condition) and (2) that the event cannot be prevented even if applying the utmost due care (subjective condition). However, the German courts tend to apply the concept of force majeure narrowly.
Estonia	**YES** "Force majeure are circumstances which are beyond the control of the obligor and which, at the time the contract was entered into or the non-contractual obligation arose, the obligor could not reasonably have been expected to take into account, avoid or overcome the impediment or the consequences thereof which the obligor could not reasonably have been expected to overcome".
Greece	**YES** Greek Civil Code recognises the concept of force majeure, as an expression of the general legal principle nemo potest ad impossibile obligari ("no one is bound to do the impossible").
Spain	**YES** Codified as Article 1.105 of the Civil Code: 'Unless otherwise provided by law or contract, nobody shall be held liable for unforeseeable –or foreseeable but unavoidable- events'.
Finland	**YES** The event has to be unforeseeable and impossible to overcome (or at least overcoming the event must require sacrifices which are unreasonable in relation to the other party's interest in fulfilment of the contract); e.g. war, fire, natural catastrophes, etc
France	**YES** The traditional force majeure must be irresistible, unpredictable and external. The event should be unavoidable and absolutely beyond the control of the debtor.
Ireland	**YES** The term "force majeure" is not a principle that has often been considered by the Irish courts in delivering judgment in breach of contract cases

Italy	**YES** A party may petition for the remedy of dissolution in cases of supervening impossibility and excessive onerousness, a party may petition for the remedy of dissolution.
Lithuania	**YES** Principe of *force majeure* may be applied only in the exceptional circumstances. According to the above the conditions to fulfil in order to successfully claim *force majeure* are the following: • after conclusion of the agreement unforeseen circumstances or event occurs; • due to such unforeseen circumstances or event and subject to the objective criteria is not possible to perform the contract; • occurrence of unforeseen circumstances or event is beyond parties control; • the party has not assumed risk of occurrence of such unforeseen circumstances or event.
Luxembourg	**YES** The force majeure is met when (a) the event is unforeseeable, (b) irresistible (i.e., renders the execution of the contract totally and definitively impossible.
Latvia	**YES** In the context of a loss. The case law shows that in order to consider force majeure the event would have to render performance not merely difficult but impossible (in general and not only for the party concerned).
Malta	**YES** Maltese law recognises the concept of force majeure Force majeure is valid for non performance of a contract, for reasons beyond the persons' control. Therefore, force majeure does apply in Malta, if one is able to prove it.
Netherlands	**YES**
Portugal	**YES** Although not expressly called so, it can be argued that the concept of *force majeure* is contemplated in Article 790 of the CC In practice, this means that the article covers the cases where the impossibility is attributable to third parties, unforeseeable circumstances or force majeure, the creditor or the law itself.
Slovakia	**YES** The concept of *force majeure* – circumstances excluding responsibility – can be found in Article 374 of the Commercial Code.
Slovenia	**YES** The debtor shall be released from liability for damage if the debtor shows that he was unable to perform the obligation or was late in performing the obligation owing to circumstances arising after the conclusion of the contract that could not be prevented, eliminated or avoided.

Question 6:

Do your courts generally apply the principle *pacta sunt servanda* over the *principle rebus sic stantibus*?

Austria	**YES** "*Wegfall der Geschäftsgrundlage*" should only be used as a last resort.
Belgium	**YES**
Cyprus	Both principles are recognised and applied by the courts.

Germany	**YES** Section 313 is an exception.
Estonia	**YES** The contract must be really significantly unforeseeably altered in order to the party to be able to claim *rebus sic stantibus.*
Greece	**YES** The Greek legal system pays due respect to the principle of pacta sunt servanda.
Spain	**YES**
Finland	**YES** Finnish courts have a wide discretion to adjust contract and declare contracts terminated.
France	**YES** In France, the principle *pacta sunt servanda* (as incorporated in Article 1134 of the French Civil Code) prevails over the principle *rebus sic stantibus*.
Ireland	**YES** The High Court has said that if the doctrine of frustration does not apply (and evidently the circumstances in which a party may successfully claim frustration of contract are quite limited), the Court's task is to properly construe the parties' agreement as evidenced by the terms of the written agreement itself. *pacta sunt servanda* seems to be the more prevalent principle.
Italy	**YES**
Lithuania	**YES** The principle of *pacta sunt servanda* is of great importance in Lithuania, however, should conditions specified in question 2 be met, the *rebus sic stantibus* can be applied.
Luxembourg	**YES**
Latvia	**YES**
Malta	**YES**
Netherlands	**YES**
Portugal	**YES**
Slovakia	**YES**
Slovenia	**YES**

Question 7:

In your estimation, is there a significant risk that any of the above changes will result in parties to Euribor-referenced contracts and that are governed by <u>your</u> law withdrawing from or seeking amendment of the contract on grounds of frustration or equivalent, or other legal ground e.g. material adverse change?

Austria	Parties to Euribor-referenced contracts have already agreed that the interest rate considers fluctuations on the money and capital markets. Therefore, they may not rely on a fixed interest rate. The central question is whether the mentioned reforms (Euribor definition, calculation method) will massively influence the indicator or not. If the reforms cause significant changes to the Euribor (that the parties could not have reasonably expected), **<u>adjustments seem to be more realistic</u>** than terminations/ avoidances of contracts.
Belgium	In the absence of “any hardship” clause, and unless a judge would consider that the changes are so significant that the consent of the contracting party for the initial contract would be invalidated because of a fundamental mistake as to the subject matter of the said contract, there is **<u>no significant risk that</u>**

	any of these changes would result in parties to Euribor-referenced contacts governed by Belgian law withdrawing from or seeking amendment of the contract on grounds of frustration or equivalent.
Cyprus	The assessment of the risk of withdrawing from or seeking an amendment to a contract in case of changes of such nature and extent, depends primarily on the impact of such change on the subject matter of the contract as well as on the terms of the specific contract (which may recognise a unilateral right to withdraw from a contract in case of a fundamental, material, unforeseen and adverse change in circumstances). In addition, and without prejudice to the above, given that the frustration of a contract would result in the acceleration of the obligations of both parties to the contract until the advent of the frustrating event, **it seems unlikely, as a practical matter, that any of the parties would invoke the doctrine of frustration**.
Germany	Contracts that incorporate the 2006 International Swaps and Derivatives definitions, including the fall-back provisions that are set out there, or are based on the German Master Agreement for Financial Derivatives Transactions (Deutscher Rahmenvertrag für Finanztermingeschäfte) might be **unproblematic**. But in cases where individual contracts are affected no consistency could be achieved. In addition, there could be disagreement about the compensation to be paid to re-establish economic equivalence and this might result in litigation. **Therefore, in general there is a litigation risk.** The EUR Legal Analysis report has come to the conclusion that it is **unlikely that parties will succeed inarguing that the principle of "Störung der Geschäftsgrundlage" should apply to their contract**.
Estonia	As Estonian civil law is based on the European examples and mostly on German BGB then the case law will most probably also follow German and possibly other European doctrines and court cases when interpreting this issue. So **the risk is probably quite the same as in Germany**.
Greece	**It cannot be excluded that in the future Article 388 of the Greek Civil Code (unforeseen change of circumstances) may also be applied with regard to loan agreements**, in particular since forbearance schemes have been implemented by Greek law and enforced by the Greek courts, in the sense that **the Greek legal order is not dogmatically against allowing parties to rely on the remedy of 'alleviation of excessive burden due to exceptional and unforeseen reasons'**
Spain	There is **significant risk that parties to such contracts would claim contract revision in court**. However, this does not mean that they would be successful, at least on appeal, as the ***changes to be invoked do not seem to amount to the extraordinary alteration of the basis and purpose of the contract*** required by the Supreme Court.
Finland	The answer to this question depends on how severe adverse effects these changes would have and on whom. **There could be a significant risk if the changes would lead to significant adverse effects on private persons**. For other cases, it would be fair to say that the risk is not that significant.
France	It is up to the parties to decide whether it is possible at all to draw together an addendum to the contracts (if possible changes of circumstances have not been provided for in the contracts when they were drafted). **Parties might want challenge the contracts**. Note that Article 1142 of the French Civil Code provides that any obligation to do, or not to do, is compensated by damages whenever the debtor does not execute the obligation. Article 1148, however, specifies that damages are not due in the case of force majeure.

Ireland	A significant increase in cost for a party to a Euribor-referenced contract may very well result **in that party seeking to avoid such cost, although frustration of contract will be very difficult to establish as a defence**. If the threat of litigation arose, such parties would be advised on their chances of success *based on the individual contract*, including all the circumstances of the contract and the principles and terms of the contract. It should be noted that a contract cannot *normally be discharged through the doctrine of frustration if a contract term covers the events which are alleged to constitute frustration*. Moreover, if the contract does not cover such events, the likelihood that the court might imply a term into the contract based on the '**business efficacy' standard**, would need to be considered.
Italy	High **litigation risk**. However, in the light of the aforementioned principles, the terms and conditions of the banking contracts and of the factual assessments made by the courts, **their outcome is unpredictable.**
Lithuania	The parties and/or courts may rely on principal of contractual interpretation and argue that due to overall nature of the particular contract and intentions of the parties a reference to the EURIBOR **should be understood as reference to a newly introduced EURIBOR**. should the parties consider that due to EURIBOR change the equilibrium on contractual obligation of the parties has been fundamentally altered and performance of a contract became more onerous for one of the parties or one of the parties fails to perform due to *force majeure*, **it is possible that parties would start litigation in courts and seek to prove that one of the above mentioned principles should be applied**.
Luxembourg	This **depends on the impact of such changes on the agreement**, i.e., whether this would trigger an increase of the price of the contract which should go beyond 17% or a significant/dramatic change of the nature of the services to be carried out.
Latvia	**NO**
Malta	There should **not be any significant risk** in Malta if any of the above changes occur, since in Malta the application of lesion is limited to very few circumstances. On the other hand, adults **will be bound by the contract conclude**d unless it is proven that the consent is given by error, violence or fraud.
Netherlands	It is fair to say that there is **no significant risk**. It would depend to a large extent on the contractual provisions of the contracts, i.e. to what extent did the parties to the contract incorporate the unforeseen circumstances as defined above in their contract. Perhaps it would even be fairer to assume that the above changes would reduce the possibilities of invoking unforeseen circumstances within this context, because the changes aim at reducing the significance of factors that may trigger situations to be taken as a ground to invoke unforeseen circumstances.
Portugal	There is **a risk that changes in Euribor-referenced contracts might be challenged**. It should be noted that the courts´ positions have so far been very restrictive.
Slovakia	It would **be very difficult for a party to the contract to withdraw from it**. They would have to prove that the essential purpose of the contract explicitly stated in the contract was frustrated, or that the circumstances have changed so significantly that it would be against good manners to expect from them to adhere to the contract. **It is not possible to seek amendment of the contract in the courts.**
Slovenia	**A risk of litigation** on the basis of *change of circumstances* **could be estimated as significant**.