



EUROPEAN CENTRAL BANK

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Draft version

STRIKES AND FORCE MAJEURE

ASSESSMENT OF THE ANSWERS TO THE QUESTIONNAIRE ON STRIKES AND FORCE MAJEURE CIRCULATED AMONG THE EFMLG'S MEMBERS

1. Community law context

The right of strike is a fundamental right in the different EU Member States and this principle often constitutes an integral part of the national Constitution. The conditions attached to the exercise of this right are a matter of national law. In this respect, it must be noted that Article 137 §6 of the Treaty expressly excludes any possible action at the Community level with respect to the right to strike.

Recently, the Charter of the Fundamental Rights of the European Union¹, has recalled the importance attached by Member States to “*the right of collective bargaining and action*”. Article 28 of the Charter notably stipulates that: “*Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action*”.²

Community legislation scarcely considers a strike in a private company or a public institution as a possible event of force majeure, which would exempt the company or the institution from liability in case of failure to perform an activity³. A few years ago, the ECJ has had the opportunity to examine whether a strike of employees (notably in a bank) may constitute an event of force majeure⁴. In this case, ECJ had to examine whether a Member State could plead force majeure in order to escape from the obligations to pay interest, where, as a result of a strike of bank employees, its financial contributions to the budget of the Communities were not entered in due time. The ECJ considered that the conditions were not met in this case to regard a general strike as an event of force majeure, as this event was known in advance or at least foreseeable and the delay in the entry of the financial contributions in question could have been avoided.

¹ Charter solemnly proclaimed by Community institutions on 7 December 2000 in Nice, EC OJ of 18 December 2000, C364/1

² Such provision is based on Article 6 of the European Social Charter (as entered into force on 1 July 1999) and points 12, 13, 14 of the European Charter of the fundamental social rights of the workers of 1989

³ It is to be noted, however, that the ECB TARGET Guideline entails such a concept

⁴ ECJ, 17 September 1987, European Commission/Greece, case 70/86

The ECJ recalled its constant case law, according to which “*apart from special features of specific areas in which it is used, the concept of force majeure essentially covers extraneous circumstances which make it impossible for the relevant action to be carried out. Even though it does not presuppose absolute impossibility it nevertheless requires abnormal difficulties which are independent of the will of the person concerned and appear inevitable even if all due care is taken*”⁵.

In another case⁶, dealing with interruption of supplies owing to a strike, the ECJ refused to qualify it as a force majeure event, due to the fact that the strike had been noticed in advance and that the entity concerned had the possibility to dispose otherwise but did not use it.

It may however be questioned, in the light of the case described above, whether a “wild” strike, without prior notice, may, under specific circumstances, be regarded as an event of force majeure, insofar as the event would be unforeseeable.

2. Preliminary assessments of the answers to the questionnaire on strikes and force majeure

This paragraph provides a preliminary assessment of the answers received for 13 EU jurisdictions to the questionnaire sent to the EFMLG Members, regarding strikes and force majeure.

The Members of the European Financial Market Lawyer Group have been invited to answer to a few questions regarding:

- the rules (constitutional law, labour law, etc.) which regulate the field of strike and force majeure;
- the possible relationship existing between strike and force majeure;
- the position of case law and legal doctrine about strikes affecting the financial sector;
- the nature of the strike, i.e. the existence of a substantial difference in terms of legal treatment between “external” and “internal” strikes.

Q1) Which national rules do apply to strikes (constitutional law, labour law, etc.)?

The right to strike is generally recognised under the legislation of each country. A number of Member States establish in the Constitution such right as a fundamental right (Italy, Portugal, Greece, Spain, Germany, Austria and France).

Other countries (Belgium, Denmark and Finland) consider strikes as an area of labour law regulated in the form of collective agreements characterised by the principle of universal binding force.

The Netherlands and Luxembourg, on the other hand, have no legislation on the subject and normally submits to the courts the determination of the lawfulness of collective actions of workers, such as strikes.

⁵ See also the judgement of 12 July 1984 in case 209/83, Valsabbia/Commission, 1984, ECR 3089

⁶ Danske Slagterier v Landbrugsministeriet (see above)

Q2) *Are there any national legal provisions, which expressly provide that a strike or any other related social conflict may be considered under certain circumstances as an event of force majeure?*

Q3) *If the answer No. 2 is affirmative, what are the legal consequences, e.g. in terms of exemption of liability for a service provider?*

As regards the possibility that a strike, or any other related social conflict, may be considered under certain circumstances as an event of force majeure, it should be emphasised that there are no specific rules providing such notion in any of those countries.

Furthermore it should not be overlooked that there are a few regulations which, even if indirectly, put the right to strike (depending on its irresistible character) on a par with force majeure⁷. In Austria, the legal consequences in terms of the law of torts and liability (default of delivery, guaranty) is dependent on positive provisions in the Austrian civil law. In Belgium and probably in other countries, a distinction needs to be made between the consequences of the strikes in the relationship between employer and employees on the one hand and the consequences of the strikes in the relationship between the employer as a debtor and his creditor. It should be also examined whether the impossibility is or not of temporary nature. In Finland, the legal consequence of force majeure is either exemption of performance or exemption of penalty interest.

Q4) *Does national case law or legal doctrines provide orientations in this field, especially with respect to strikes affecting or within financial sector undertakings?*

According to the most important law cases and the prevalent doctrine, “strike” does not in principle constitute a force majeure event. Nevertheless such a position has to be verified on a case by case basis.

Generally, it should be pointed out that an event marked by the following characteristics may be considered as force majeure: it has to be 1) unpredictable, 2) unavoidable, 3) not due to the debtor’s behaviour, 4) able to make the obligation impossible to be executed, 5) cause of the breach.

Such assessment is often connected to the nature of the strike.

Q5) *Is a distinction made between ‘internal’ and ‘external’ strikes, i.e. external events, which could directly affect/impair the activity of the counterpart?*

Excluding the positions of Finland, Sweden and Spain, case laws and the doctrines of the other EU Member States distinguish between “internal” and “external” strikes and believe that only external strikes may constitute an event of force majeure, depending upon the particular circumstances of the case. This means that the event must not be dependant upon the debtor’s conduct (the force majeure event is not the result of an event internal to the debtor). When the cause of a strike is internal (for example a strike

⁷ For example the Decree 16 December 1998 of the Italian Ministry of Treasury states that “the bank is held harmless in case of any strike by their employees or any external subjects whom they resort to, as well as in any other causes of force majeure”. Given the nature of such secondary sources, it is possible to conclude that such sole regulations do not determine any consequences as for the responsibility of the service provider.

motivated by salary demands or general working conditions), it cannot be considered as a force majeure event because it constitutes a situation which can be resolved by the management through adequate negotiations.

Q6) *Are you aware of any market conventions or market practises dealing with this issue?*

In the banking's industry there are several regulations governing the banks' responsibility in case of force majeure events:

- Italy: the Uniform Customs and Practise for Documentary Credits 1993 Revision, International Chamber of Commerce, Publication n. 500;
- Denmark: in the relationship between Danish banks and their customers clauses regulating force majeure are customarily adopted;
- Sweden: the 'General Terms and Conditions for Trading in Financial Instruments' issued by the Swedish Securities Dealer's Association in 1999;
- The Netherlands: the General Banking Conditions – drawn up by the Netherlands Bankers' Association;
- France: the User's Guide to the 1992 ISDA Master Agreement.

Such market conventions establish the general rule of the "Limitation of a Bank's Liability", providing that banks assume no legal responsibility for the consequences arising out of the interruption of their business by Acts of God, riots, civil commotion, insurrections, wars or any other "*causes beyond their control*".

- In Germany, In the field of documentary credit business, Art. 17 of the UCP 500 provides that banks assume no liability or responsibility for the consequences arising out of the interruption of their business by any strikes. A similar rule is included in the Art. 15 of the URC 522 for documentary collections. It is admissible to agree in contracts on a clause that defines a strike as an event of force majeure. Such a definition is not contained in the common General Terms and Conditions of German banks. However, section 3(3) of the General Business Conditions of the German private-sector banks excludes liability of the bank for losses caused by force and "other events for which the Bank is not responsible (such as strikes ...)". The strike is thus not defined as, but in effect treated like, a force majeure event.
- A few of the above mentioned conventions (Italy, Denmark, Sweden and The Netherlands) expressly include strikes among such "*causes*".

Finland, Portugal, Greece and Spain, along with a few other exceptions, to date have not yet developed any product-specific force majeure clause.