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ANSWERS
TO
YOUR
QUESTIONS

EDITO

During a webinar on April 2, 2020, which many of you attended, we answered the first questions you had about the respective rights and obligations of officials, agents and institutions within this unusual and difficult period we are going through.

We then agreed that a special issue of *the OFFICIAL* would also be dedicated to this issue, updating the various issues raised.

You are now discovering this special edition.

You will not find your usual columns, which will be back in the next issue. Instead, we will cover the following topics:

- The concept of force majeure and exceptional circumstances in European Union law;
- The application of the general principles of the civil service: loyalty, duty to have regard for the welfare of officials, good administration;
- The possibility for the institutions to restrict the freedom of movement of officials and agents;
- The national containment rules and the European or international civil servant. What about immunities?
- What are the applicable leave rules during the Covid-19 crisis?
- The legal framework of teleworking;
- The possibility for the administration to require the physical presence at work of officials and agents;
- The protection of medical data;
- The consequences of the outbreak crisis on fixed-term employment contracts.

The period we are going through is anxiety-provoking and complex. Every day, we realize that it keeps affecting the way we see things, live and work for a long time to come. In this context, it is not our intention in any way to encourage disputes and polemics between officials, other agents and their institutions. Above all, this period requires solidarity and mutual understanding. They are both reflected in our responses below.

1. FORCE MAJEURE AND EXCEPTIONAL CIRCUMSTANCES

The crisis we are experiencing leads to exceptional circumstances and situations of force majeure that never happened in the institutional history of the European Union.

On several occasions, the Court of Justice has ruled on the concept of force majeure. For the Court, this concept implies that the unforeseeable situation entails consequences which cannot be avoided (CJEU, 4/68, Firma Scharzwaldilch). The Court of Justice and the Court of First Instance have also held in various judgments that this concept differs according to the branches of law concerned. It is therefore necessary to look at the context in which the unforeseeable element occurs in order to see or not the existence of a situation of force majeure.

In the context of the public service, we will consider abnormal difficulties which are not under the control of the person(s) concerned. On the opposite, force majeure cannot be considered when a normally prudent or diligent person could objectively have avoided a situation.

What can we deduce from this in view of the current situation? For instance, the failure to respect a deadline for submitting complaints or requests will not automatically be seen as a case of force majeure. The judge will examine the situation on a case-by-case basis. This is provided, inter alia, by Article 45 of the Statute of the Court. Of course, if a person is unconscious or is placed by the crisis in a situation of isolation where he or she does not have access to electronic or other means of communication, the situation of force majeure may be taken into consideration (see to that extent, TEU, 16 September 2019, (Ord.), T-617/18, ZH v. ECHA).

It is therefore necessary to refrain from generalizing. The Covid-19 crisis is a situation of force majeure, but it is does not necessarily recognized in relation with the difficulties occurring within the performance of daily acts. Each time, the behavior involved will be compared with that of a normally prudent and diligent official, in a similar situation.

2. THE GENERAL PRINCIPLES OF PUBLIC SERVICE

Here we briefly review some general principles of the public service that will apply in this period.

The **duty of loyalty** is the basis for any relation between officials and the administration. As we know, this obligation weighs on the official in the performance of his/her duties, but also in all circumstances which may directly or indirectly involve the institution's reputation. Article 12 of the Staff Regulations provides for this obligation, which also refers to dignity. Loyalty implies respect for the effectiveness and quality of the work even if it is carried out in special circumstances. Also, it implies in no way abusing the special situations imposed by the containment.

The **duty to have regard for the welfare of officials** is ultimately an obligation of reciprocity with regard to the duty of loyalty of the official. It takes on even more meaning in times of crisis.

This obligation creates a real obligation to ensure protection. As we know, this is a jurisprudential construction. This principle means that the interests of the service, which must have priority in the management of an administration, must not be examined in opposition to the particular interests of officials.

In times like these, this implies that the protection of public health is an imperative obligation that must be respected and that the obligation to provide information and good communication is particularly important.

In the current context, these principles imply a greater mutual trust, which is important during such exceptional period. For instance, if they are unable to produce a medical certificate in view of the circumstances or fail to comply with the formalities for taking sick leave that are usually required, staff members who belong to risk groups and cannot carry out missions that would involve their physical presence should be trusted. Of course, loyalty requires the staff member to be truthful in his/her statements. Where appropriate, after the crisis, possible breaches of these obligations could be examined more severely in the light of the context.

Situations should always be analysed on a case-by-case basis, respecting the principle of loyalty on the one hand and the duty to have regard for the welfare of officials on the other.

The principle of **good administration** is also to be mentioned. As you know, it is laid down in Article 41 of the EU Charter of Fundamental Rights. Basically, it guarantees access to documents, the right to be heard, the right to receive a reasoned decision and the right to have one's legitimate expectations respected.

This principle must be respected by administrations for all citizens of the Union, with a strengthened obligation for their officials and agents.

This principle obviously applies during this period. Decisions affecting individual rights must comply with the standards of good administration. Where possible, individuals must be heard (where appropriate in writing or by videoconference) before reasoned decisions are taken which may affect their rights.

But two cross-cutting principles remain also inescapable in this period. These are the precautionary principle and the principle of proportionality.

The **precautionary principle** implies that any measure should be taken in accordance with the prudence involved in protecting public health, which is undermined in the current situation. This is, of course, dictated by the national policies decided by governments regarding the absolute necessity of limiting all travel. Thus, in a European or international administration, only essential activities which are not compatible with teleworking can still be tolerated, provided that they respect the rules of social distancing.

The **principle of proportionality** means that, regarding any behavior of the administration, the following question must be asked: is the measure or behaviour which I encourage and which, if necessary, includes exceptional measures compared with a normal situation, proportional to the situation? In other words, does the balancing of the restriction on the rights or interests of an official with the objective pursued (protection of public health, combating the spread of the virus) make this measure necessary? Furthermore, is there not another less restrictive measure or behaviour that would be likely to meet the same objective, the same result?

3. CAN THE ADMINISTRATION IMPOSE RESTRICTIONS ON THE FREEDOM OF MOVEMENT OF ITS OFFICIALS AND AGENTS?

Apart from any exceptional circumstances, the answer to this question is obviously negative. Apart from carrying out their duties for the institution, staff and officials remain free to move.

However, there are basic rules to be observed. This is the case, for instance, with the residency obligation applied in the European civil service and in the statutes of most international institutions. Article 20 of the Staff Regulations provides that an official shall reside either in the place where he is employed or at no greater distance there from as is compatible with the proper performance of his duties. The official shall notify the Appointing Authority of his address and inform it immediately of any change of address. Under European Union law, the Staff Regulations do not specify what it means by distance so as not to interfere with the performance of his duties. The Civil Service Tribunal has ruled that a distance of 44 km is not in itself a factor of inconvenience (CST, 13 April 2011, Chaouch v Commission, F-30/09).

We will also examine below the impact that containment may have on leave and the possible barriers to movement that it implies.

It also seems to us that in a period of exceptional circumstances and force majeure, such as the one we are going through, an administration could impose a period of quarantine or containment on its officials or agents in the event that they return from a risk area. If necessary, this period could be compatible with teleworking. What is at stake here is a reasonable application of the principles of precaution, proportionality and good administration. Where appropriate, if teleworking cannot be organised, the institution may have recourse to special leave (see below).

4. NATIONAL COVID-19 REGULATIONS AND EUROPEAN AND INTERNATIONAL OFFICIALS

Officials and agents are, of course, obliged to comply with the law and police regulations in force in the State where they reside. This is reflected in Article 23 of the Staff Regulations, Article 1.1 of the United Nations Staff Regulations and Article 105 of the UN Charter, to cite a few examples. There is therefore no doubt that in such exceptional period, staff members are subject to the same rules of confinement as the rest of the population.

Those whose work involves travelling, for example to their usual place of work or to other places, must be particularly vigilant in complying with the rules in place in various Member States. For example, in France the restrictions are stricter than in Belgium since persons who are obliged to travel to work must carry a sworn statement that their current travel is justified by the need to get to work. In Belgium, such certificates are not required, but officials or other servants concerned are strongly advised to get around only with a certificate from their institution stating that they are obliged to go to work. Some institutions have anticipated these requests and automatically issue such documents.

Special rules have therefore been adopted by each of the Member States and since most European officials reside in Belgium, we have devoted our section on “Belgian law” in issue 56 of the *OFFICIAL* to the rules applicable in that country during this period. You can find this section by following the following link https://bit.ly/theofficial_56_en.

As regard to the sanctions that can be imposed by the national authorities in case of non-compliance with the containment rules, no immunity can be invoked. In Belgium, numerous checks are organised by the police forces. The imprecise nature of the ministerial orders on the organisation of containment gives a certain flexibility to the police, which may give rise to misinterpretations and fines that can be contested. In the event that you are confronted with a police check with a penalty that you consider to be undue, we advise you to keep calm and answer to the police officer who would issue the ticket that you contest the offence and that you wish to be heard. In any case you should refuse to pay immediately the €250 fine that could be imposed on you, explaining that you choose to pay it later. When you return home, you will put in writing the reasons why you consider that you were not in breach of the rules of containment. You will preferably send it in advance to the police or in any case you will make sure you have this document with you when you will be heard. In the event you actually are in a situation of violation of the containment rules, we invite you not to contest the fine and to pay it as quickly as possible. We draw your attention to the fact that various cases of repeated offences have already been brought before the country's criminal courts.

5. LEAVE REGULATIONS AND THE CORONAVIRUS CRISIS

Many of you wondered about the fate of annual leave in the context of the outbreak we are currently experiencing.

Under European Union law, leave for officials and other servants is governed by Articles 57 to 61 of Annex V to the Staff Regulations. Most of the institutions also have their internal rules (GIP) applicable in this area.

Of course, as explained above, the institutions' rules on leave shall not affect the freedom of movement of staff and officials. The only permissible restrictions are linked to the proper functioning of the service.

We have received various questions on leave policy during this period of coronavirus in various institutions. Requests for leave are being processed, but there is obviously no question of requesting leave to go abroad. The communication from certain institutions may raise questions in this respect, since they refer to bans on going abroad and, where appropriate, extensions of these bans beyond the periods currently covered by the police regulations of the various Member States.

Once again, let us be on the safe side. This is rather a question of communication in an extremely difficult period than a real infringement of freedom of movement. Freedom of movement is clearly limited in the European Union and beyond by police regulations taken in periods of special powers by national governments. Any leave outside the place of employment is therefore impossible for the time being and that requests for leave outside the place of employment are suspended, for the coming weeks or even months, until new developments and decisions taken by national governments. Of course, requests for leave within the duty station will normally be considered during this period and in some cases will even be encouraged.

As regard the effects of the health crisis on annual leave and leave requests, we do not believe that, as a matter of law, the administration can unilaterally require a staff member to take annual leave during the period of containment. Such a situation would require the adoption of special rules duly justified in the light of the principle of proportionality and the interests of the service.

In our view, the best response to the impossibility of replacing regular work by teleworking is to make use of special leave in view of the situation of force majeure. For instance, this possibility is provided in Article III.B.9 of the Commission's GIP (16-12.2013-(C/2013) 9051). This provision provides that special individual leave may exceptionally be decided on by the Director-General of a DG in cases of force majeure duly established as a result of exceptional circumstances which prevented officials of that DG from gaining access to their place of work and thus from performing their duties. However, it seems to us that, even in the absence of GIPs comparable to those of the Commission and taking into account the situation of force majeure, and in application of the principles of proportionality, precaution and good administration, the institution or another decentralized hierarchical authority within the institutions could take similar decisions.

Furthermore, under the Staff Regulations, an official or servant may be required to take compulsory leave following an examination by the institution's doctor if his/her health condition requires so, or if a contagious disease has occurred at home (Article 59(4)). This provision will rather apply when an official returns from a contaminated area to a place where containment is no longer compulsory or when he/she is confronted with relatives suffering from the disease and teleworking is not possible.

Finally, as regards annual leave, it should be noted they are preferably granted during summer, given the decline in the institutions' activities, having regard to the interests of all and the necessary continuity of service.

It is not impossible that, at the end of the containment, administrations may face massive requests for leave for the same periods, while the resumption of activity will precisely require a high level of attendance despite the summer period. Several institutions have clearly taken on board such possible situation since they encourage their staff members to take their annual leave or at least days of leave during the confinement period.

6. TELEWORK: WHAT LEGAL FRAMEWORK?

First of all, there are situations in which telework is not possible due to the nature of the work (security guard, catering, reception and greeting, etc.) or for other circumstances beyond the control of agents or officials, such as electro-sensitivity.

In these circumstances, if it is not possible to allocate other tasks to the official or servant concerned which correspond to his experience and grade, preference should be given to the use of the special leave referred to above (Article 57 of the Staff Regulations, Annex V and the GIP of certain institutions).

The situation of officials and other servants whose nature of work involves physical presence despite containment will be considered below under point 7.

Where should telework be carried out? It is normally carried out at the place of residence as laid down in Article 20 of the Staff Regulations. In principle, teleworking from another place is not allowed. It seems that exceptional authorisations have been granted by the hierarchy in some institutions. However, the obligation to carry out telework from the place of residence seems to us proportionate to the current situation, since in any event the place of containment is *a priori* the place of residence.

Obviously, depending on family or personal obligations or any other exceptional situation, derogations may be granted on an individual basis, in accordance with the principles of proportionality and good administration. Examples include the right to join one's partner and/or a

minor child leaving abroad, teleworking following special leave for serious illness of a relatives abroad, or staff members who were away from their place of residence at the beginning of the period of confinement and were unable to return home.

What is the current situation regarding the volume of teleworking in the light of the principles of equal treatment and non-discrimination? Some officials or agents told us that greater flexibility and availability may be required from single staff or officials without dependent children to compensate for the lack of availability of those facing childcare situations.

No formal instructions were reported to us at this stage. Once again, the principle of proportionality applies. Adults with children face undoubtedly greater difficulties when schools are closed and the usual childcare are not available. But this cannot justify either that more isolated or unmarried staff or officials must do all the extra work in return.

We are here outside the application of a normal regulated framework. Solidarity among the members of the civil service is most probably an adequate response which the line manager who organizes the work must bear in mind when allocating the various tasks equitably. He or she will also bear in mind that an overload of work while being isolated, without the possibility of communicating effectively, could have serious consequences on the mental health of the officer. It is also important to prevent burn-out situations from multiplying among members of the public service as a result of this containment.

7. CAN THE INSTITUTIONS REQUIRE OFFICIALS OR OTHER SERVANTS TO BE PRESENT AT WORK?

The statutes of the European institutions or other international organisations override labor law as applied in the Member States where they have their headquarters.

However, as mentioned above, officials and other staff must deal with the police regulations implemented in response to the pandemic by the various Member States. For their part, the institutions must respect the general principles of the civil service and, above all, the principle of good administration and duty to have regard for the welfare of officials.

Once these principles have been recalled, will a manager be able to require the presence of an official in the workplace? As provided by some ad hoc instructions adopted by the institutions, this is the case for essential and critical functions which cannot be carried out through teleworking. Security missions in particular come to mind. The manager may indeed require attendance at a meeting which cannot be held otherwise, or presence for security missions.

What about a manager who would require the presence of a civil servant at a meeting where health security conditions would not be met, or which would simply create unnecessary risks? What about, for instance, an immunocompromised person? The main statutes of European institutions or international organisations do not provide any right of disobedience or "right of withdrawal".

However, as per Article 31 of the Charter of Fundamental Rights, every worker has the right to working conditions which respect his or her health, safety and dignity. Article 1(e)(2) of the Staff Regulations of European Officials also provides for:

"Officials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties."

Moreover, the Court of Justice has regularly recalled that the European administration must, as far as possible, interpret the Staff Regulations in accordance with the minimum standards defined in the EU directives on health and safety at work.

In this respect, Directive 89/391 provides in its Article 8 that workers who, in the event of serious, imminent and unavoidable danger, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences.

Those various elements provide the framework within which decisions shall be taken, in the light of the principles of proportionality, precaution, good administration and the duty to have regard for the welfare of officials.

However, it would be advisable for a person who feels weakened, suffering from certain symptoms or suffering from immunodeficiency to contact his/her general practitioner by telephone. If necessary, the doctor can issue medical certificates to be used as justification or as grounds for contesting an absence due to illness that is considered unjustified.

8. PROTECTION OF MEDICAL DATA

Can an organization disclose the names of staff members who are allegedly infected with Covid-19 in order to inform and protect other staff members?

The answer is clearly no. Any medical information or data are considered as sensitive (Article 10 of Regulation 2018/1725). Only exceptional circumstances may justify such disclosures. This is not the case

here since, under the principle of proportionality, other solutions may be found. It is of course the obligation of the staff member or official concerned to inform the medical service of the institution of his/her health condition. The institution will then be obliged to liaise with the colleagues of the staff member concerned, without disclosing his/her identity, and put in place the necessary security measures for them.

9. THE POSSIBLE CONSEQUENCES ON FIXED-TERM EMPLOYMENT CONTRACTS

What about the contracts of staff, particularly those of fixed-term contracts, whose functions would not allow them to carry out their work by teleworking? Can contracts be suspended? Could they be terminated?

In our opinion, such a risk is very limited. Nothing in the statutes of the main organizations would allow the suspension of a staff member's contract. In principle, suspension is foreseen for disciplinary reasons. On what basis could a contract be terminated early? Such a decision could be particularly at odds with the principle of good administration and the duty to have regard for the welfare of officials. Another solution we already considered here is to make use of the special leave provided for in the Staff Regulations.

However, care should be taken if a staff member on probation period does not meet the conditions or if other objective circumstances no longer make it possible to continue the employment relationship. The current crisis will not prevent the termination of the contract for objective and justified reasons.

Of course, the current crisis may have economic consequences on the budgets of European institutions and international organisations, imposing budget cuts and restructuring which could imply the non-renewal of certain contracts. Reference is made here to the judgment of 10 September 2014 in Case F-120/13 Tzikas v AFE (F-120/13, particularly paragraphs 81 to 83).

Another particularity. EPSO procedures for the recruitment of officials are suspended and appointments of officials have also been postponed. This could imply a one-off need to conclude more temporary or contract agent contracts in the coming months.

For staff members, the entry into service is also postponed. In exceptional cases, where it is not possible to have a medical examination or other tests, some organisations are considering the possibility of conditional recruitment. This would be a derogatory procedure involving legal risks for both the administration and staff members and should therefore only be used on a case-by-case basis and in exceptional circumstances.

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CONCLUSION

We are all looking forward to drawing a line under this unusual and stressful period.

We are going through a period of force majeure our continent has not experienced since the Second World War. Every decision must be taken in the light of this fact.

As we have seen, the statutes of international organisations or European institutions naturally help us to answer a number of questions. But it was of course impossible to predict what is happening at the moment. In the course of their day-to-day work, officials and contract staff as well as human resources services must think «out of the box» to find workable solutions that are proportionate and respectful of everyone in the situation we are going through.

Answers are not always in the Staff Regulations, and the general principles mentioned here, which are directly inspired by the set of values on which the European Union is based, should be applied to the best of our ability.

We wish you much courage in these difficult times. Take care of yourself and your loved ones.