Collective Actions Short of Stoppage of Work

MASTER'S THESIS

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List of Abbreviations

ESC	European Social Charter
ESCR	European Committee of Social Rights
EU	European Union
ILO	International Labour Organisation
UK	United Kingdom
UN	United Nations

Introduction

"The right to strike is a fundamental social right, one of the essential means through which workers and their organisations can promote and defend their economic and social interests."[1] As such it is recognised by a number of international and regional instruments, like those of the International Labour Organization, Council of Europe or European Union, with the main aim to guarantee the workers' right to codetermine their working conditions and to counterbalance their weaker bargaining position in relation to an employer. Because, as a famous phrase coined by the German Federal Labour Court says, "the collective bargaining without the possibility of a resort to the instrument of the strike would be no more than collective begging".[2]

It should be stressed from the beginning that there is no universal definition of "strike", but the comparative analysis of model countries indicates that strike is generally perceived as "a collective and concerted withholding of labour in pursuit of specific occupational demands exercised peacefully".[3] Thus, it includes mainly the situations of stoppage of work, when workers refuse to perform work for a shorter or longer period of time.

However, the new realities in the world of work cause that nowadays it is increasingly difficult to organize a traditional strike, partly due to the unwillingness of workers to give up their wages, but also due to other factors having impact on labour relations. "The classic all-out strike is increasingly losing its adequacy and its effectiveness."[4] [5]

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[1] International Labour Office: *"Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO"*, fifth (revised) edition, Geneva, 2006, p. 109.

[2] Blank, M: *"Collective Bargaining in the European Union: The Standpoint of IG Metall"*, in *"European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics"*; edited by Lecher, W.E. and Platzer, H., Routledge, London, 2002, p. 166.

[3] Ben-Israel, R.: *"Introduction to Strikes and Lock-outs: a Comparative Perspective"*, in *"Strikes and Lock-outs in Industrialized Market Economies"*, Bulletin of Comparative Labour Relations, Volume 29, edited by Blanpain, R. and Ben-Israel, R., Kluwer Law and Taxation Publishers, Deventer, the Netherlands, 1994, p. 10.

[4] Jacobs, A.T.J.M.: *"The Law on Strikes and Lockouts"*, in *"Comparative Labour Law and Industrial Relations in Industrialized Market Economies"*, edited by Blanpain, R., Xth and revised edition, Kluwer Law International, the Netherlands, 2010, p. 715.

[5] Kohl arrived to the similar conclusion when he noted "... if we look at the situation in Eastern Europe at least in the private sector, we see that while this method of exerting pressure was relatively widely used at the start of the transformation process in Europe, it has now clearly lost its effectiveness." (See Kohl, H.: *"Freedom of Association, Employees' Rights and Social Dialogue in Central and*

Trade unions therefore try to find (new) ways and strategies how to cope with these challenges and at the same time stay successful in reaching their goals. In doing so, they sometimes resort to an action which does not consist of a cessation of work of any kind, but where the work is continued and performed in such a manner that it negatively affects the employer's productivity or smooth functioning. Examples of such actions include the "go-slow", "work-to-rule" including "non-co-operation" and "voluntary overtime ban", and "refusal to perform certain tasks and duties".

But in this regard the question arises, whether these actions are also protected by "the right to strike" as enshrined in a number of international and regional instruments and/or whether they should be. We can observe a certain shift in the terminology – the term "right to strike" is often replaced by the term "right to collective action", but does this in fact mean that these irregular forms of actions should be recognized as acceptable means of putting pressure on the employer in an industrial dispute?

The aim of this thesis is to examine this issue. What is the wording of the relevant international and regional instruments, and what is the standpoint of their supervisory bodies? Are these actions protected according to national legislations and are national judges inclined to accept them as lawful? What are the arguments pro and contra their recognition, and which prevail? I will attempt to answer these questions.

The thesis itself is divided into five parts. The first part examines what motivates trade unions and workers to resort to actions short of stoppage of work. The second part focuses on the analysis of relevant international and regional instruments, and the approach of their supervisory bodies. The third part enumerates the most common forms of action short of stoppage of work with examples from the history and related case-law of national courts. The fourth part deals with the issue of entitlement to wages during actions short of stoppage of work and finally, the fifth part outlines the main arguments pro and contra their recognition as acceptable means of putting pressure on the employer in an industrial dispute.

Eastern Europe and the Western Balkans", Results of a survey of 16 formerly socialist countries in Eastern Europe, Friedrich-Ebert-Stiftung, Berlin, 2009, p. 33).

Concerning the methodology, the various literature (publications, digests and articles) has been used combined with websites and databases of international and regional organizations (Council of Europe, European Union, International Labour Organization and United Nations); international, regional and national trade union confederations (International Trade Union Confederation, European Trade Union Confederation and national trade union confederations); research institutes (European Foundation for the Improvement of Living and Working Conditions and European Trade Union Institute); national courts and press.

1. What motivates trade unions and workers to resort to actions short of stoppage of work?

As already mentioned in the beginning, it appears that the traditional all-out strike is increasingly losing its adequacy and its effectiveness. This is caused by a number of reasons. Since the time the right to strike started to gain its recognition, the world of work has changed significantly. We have witnessed the era of globalization, the emergence of multinational enterprises and central decision-making, the opening of borders for capital and the consequent delocalization of production, the shift from the manufacturing to the service sector and the boom of new technologies, the rise in non-standard employment forms, etc. All these factors have had an influence on labour relations, including the exercise of the right to strike. However, in this part, I will analyze only those factors which I think might lead trade unions and workers to resort to forms of actions that do not involve the stoppage of work of any kind, but nevertheless, put pressure on the employer to accede to their (occupational) demands.

First of all, I believe that trade unions are well aware that a **traditional all-out strike is extremely expensive**. In most countries, the suspension theory applies during the strike, which means that the core obligations arising from the employment contract – the duty of a worker to perform work and the duty of an employer to provide wages – are suspended. Thus, striking workers are not entitled to pay from their employer for the duration of strike. This being the reason why many workers did not take part in strikes, trade unions started to establish "strike funds" with the main purpose to compensate the pay loss during the strike.

However, nowadays wages are high and providing the compensation can constitute a substantial financial burden on trade unions. For instance, as Weiss and Schmidt confirm, "due to the obligation to pay strike benefits granted in the unions' standing rules, a normal strike has become very expensive for German trade unions".[6] Moreover, strike funds can become quickly exhausted when a major strike occurs.[7]

[6] Weiss, M. and Schmidt, M.: *"Labour Law and Industrial Relations in Germany"*, fourth revised edition, Kluwer Law International, 2008, p. 205.
[7] See footnote 4, p. 714.

Besides that, we should keep in mind that although strike funds are well established in some countries, such as Belgium, Germany, Sweden or the United Kingdom, they are less common in for example Czech Republic, Italy or Slovakia.[8] Workers here are often not compensated from any other source and thus the pay loss can be a main motivator for a worker's decision to not to join a strike. In addition, even in countries where strike funds are established, strike benefits can be provided only to trade union members,[9] or the amount of benefit can be much lower than the normal pay.[10] Thus, workers usually have more to lose than to gain by taking action when it comes to a financial aspect. "If a worker has an obligation towards a family, then the prospect of a strike may not appeal to him or her very much".[11]

However, calling an action where work is not interrupted could solve this problem. Trade unions advocate that since work is not ceased, wages should not be withheld, which consequently enables them to gain greater support from workers and also to hold on longer in a dispute.

But not only **actions short of stoppage of work are** less costly for workers and their unions, **in some instances** they are also **less risky with regard to the termination of employment** and the replacement of striking workers. Although in the vast majority of countries the participation in lawful strike does not constitute a valid cause for dismissal, there are exceptions such as Austria or the United Kingdom, where an ordinary (stoppage-of-work) strike results in a fundamental breach of the employment contract allowing an employer to summarily dismiss a striking worker.[12] In such cases, an action short of stoppage of work constitutes an effective alternative of putting pressure on the employer provided that it is considered lawful. Since, if there is no breach of contract, the worker cannot be dismissed lawfully for taking part in an action.

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[8] For example, see Treu, T.: *"Italy"*, in International Encyclopaedia for Labour Law and Industrial Relations, edited by Blanpain, R., Kluwer Law International, supplement 368, 2010, p. 219.
[9] See http://www.eurofound.europa.eu/emire/GERMANY/STRIKEPAY-DE.htm, 9.4.2011.
[10] See http://www.eurofound.europa.eu/emire/UNITED%20KINGDOM/STRIKEPAY-EN.htm, 9.4.2011.
[11] See footnote 4, p. 714.
[12] Barrow, C.: *"Industrial Relations Law"*, Cavendish Publishing Limited, London, 1997, p. 267; and Grillberger, K. and Felten, E.: *"Austria"*, in "*The Laval and Viking Cases – Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia"*, Bulletin of Comparative Labour Relations, Volume 69, edited by Blanpain, R., Kluwer Law International, 2009, p.11

Another possible drive for trade unions to resort to these irregular forms of actions can be the changed structure and composition of the workforce, and **the attempt to engage a wider range of workers**. Compared to the early history of labour relations, the workforce is now more diversified and it is more difficult to organize and engage all categories of workers.

Traditionally, the workforce comprised of a homogenous group of unskilled industrial workers who identified themselves with the working class in the terms of its low living standard and deplorable working conditions.[13] These were predominantly male full-time workers, who understood that as individuals they did not have the power to bring about the change and to impose better working conditions, but as a group their position strengthened and they could defend their interests more effectively. They could submit their demands collectively and push an employer to the bargaining table. And if an employer did not wish to make concessions, they could put down work and strike. Thus, they were "all on the same board", in a very similar position and usually had more to gain than to lose by taking action, because at that time pay and working conditions were indeed poor. Moreover, the vast majority of workers could be reached within the "company", may it be a mine, plant or factory.

In contrast, what we see today is the diversified and heterogeneous workforce composed of different groups of workers - from the low-skilled manual workers to the high-skilled top professionals - which have less common identifiers and thus lack solidarity. "The workforce solidarity was replaced by conflicting interests which exist between the various classes of workers."[14] Logically, to make most of these workers go on a classic strike (while bearing in mind that in some countries, a pre-strike ballot is a necessary prerequisite to call a lawful strike) is extremely difficult. In addition, the recent spread of outsourcing and temporary agency work caused that a number of workers has been formally pushed out of companies. The rise in a non-standard employment is another phenomenon. These "atypical workers" are less likely to be unionized and less likely to be interested in classic stoppage-of-work strike.[15]

[13] See footnote 3, p. 2.
[14] See footnote 3, p. 2.
[15] See footnote 4, p. 714.

Furthermore, **as regards certain categories of workers**, e.g. in essential services or services of general public interest, **classic strikes might be forbidden by law or might be at risk of being prohibited or restricted by courts.** Although it sounds paradox, since irregular strikes are more likely to be declared unlawful than traditional strikes, this is not always the case. For example in the past, courts in the Netherlands justified actions which had allowed passengers to use public transport without payment,[16] but they limited a general strike in the regional bus companies by allowing it to take place only outside rush-hours.[17] Or for instance, workers in the hospital sector might be prohibited to strike by law whatsoever, since the interruption of these services could endanger the life or health of the population, but if they refuse to file the billing slips for drugs, lab tests, treatments and therapy instead (like the workers at Mercy Hospital in France did),[18] patients do not stay untreated and the workers exert pressure on their employer at the same time.

Last but not least, **the public opinion can be a considerable motivator in choosing the concrete form of action**. Trade unions often face the anger of public when a regular strike takes place. "Earlier, an employer was the only target and supposed victim of a strike, as well as the only party who could put an end to the concerted activity. However, nowadays, we are confronted with a new kind of victim who is neither directly involved in the dispute, nor in a position to settle it."[19] Third parties, may they be non-striking workers, customers, suppliers or society as whole often become hostages in a dispute which they have no possibility to influence. But for instance, if a strike in railways occurs and train conductors only refuse to sell and to check passengers' tickets, the public is not affected and everybody gets (happily) to his/her destination. The only party harmed is the employer and the public opinion does not turn against trade unions which might even gain some sympathy in certain circumstances. Therefore, it might be also a way of "(PR) tactic" from the trade unions' side.

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[16] Jacobs, A.: *"Dutch Labour Law Report"*, in *"Cross-Border Collective Actions in Europe: A Legal Challenge"*, Social Europe Series, Volume 13, edited by Dorssemont, F., Jaspers, T. and van Hoek, A., Intersentia, Antwerpen - Oxford, 2007, p. 182.
[17] *FNV Transport Workers Union v. N.V. Verenigd Streekvervoer Nederland*, the Netherlands, 1995 (in International Labour Law Reports, Volume 17, Martinus Nijhoff Publishers, 1999, p. 125-127).
[18] Libcom website,
retrieved online at http://libcom.org/organise/workplace/articles/good-work-strike.php, 26.3.2011.
[19] See footnote 3, p. 3.

2. Are actions short of stoppage of work protected under the right to strike?

2.1. General Characteristics

Actions of workers and trade unions taken in order to protect their occupational interests can have different forms. Undoubtedly, the most traditional and common form of action is a "strike". Although there is no universal definition of "strike", based on the comparative analysis of model countries Ben-Israel suggests to define "strike" as "a collective and concerted withholding of labour in pursuit of specific occupational demands exercised peacefully".[20] This definition consists of four key elements.

Firstly, it is a **collective and concerted activity**. This implies that an action must be exercised simultaneously by several workers in order to be considered a strike. The individual refusal to work by one worker does not parallel a collective refusal to work.[21] This concept of collective exercise of the right to strike is accepted even in countries where the individualistic doctrine applies and where the right to strike is perceived as an individual right of a striking worker. Moreover, the collective nature of action implies that the decision to go on strike must be taken collectively, either directly by workers or indirectly by their representatives (for example by the trade union board), or possibly by a combination of both.

Secondly, the objectives of action relate to **the pursuit of specific occupational demands**.[22] In the early times of labour relations, strikes were linked to the conclusion of a collective agreement which would lay down more favourable pay and working conditions. However, nowadays, the range of acceptable demands is much broader, including almost all issues of workers' common (occupational) interests.

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[20] See footnote 3, p. 10.

[21] However, in exceptional circumstances, a strike undertaken by one individual worker at a plant can be considered to have a collective dimension, when the individual concerned coincides with the entire workforce of that plant, or when the worker is in fact participating in a strike at a more comprehensive (branch or national) level (See footnote 27, p. 256).

[22] Note: Lately, strict "occupational demands" have been replaced by "economic and social objectives". For example, the ILO Committee on Freedom of Association concluded that strikes with "social and economic objectives" are legitimate; such are strikes which are connected to the occupational demands and in the broader sense of the term also to specific economic and social policy issues that have direct impact on workers, for example to social security and social protection (See footnote 1, p. 110-113).

Thirdly, the action has to be **exercised peacefully**. No acts of violence are tolerated and an action which consists of behaviour of violent nature is not protected under the right to strike.

Finally, it involves **the withholding of labour**. This is the most controversial and debated element of the definition, because its interpretation determines the range of actions that fall under the notion of "strike". Traditionally, the withholding of labour was viewed as encompassing solely "the work stoppage", however, nowadays we see also actions which do not involve the work stoppage of any kind, but which consist of either partial non-performance of the employment contract or the performance of the employment contract in a counterproductive way. In this regard, the question arises, whether such behavior can also be regarded as the withholding of labour and consequently, whether such actions are also protected by the right to strike.

It could be so, if a broader definition of withholding of labour applied. For example, Ben-Israel suggests the new definition of withholding of labour as including "all collective and concerted action of the part of employees expressing any change from the daily routine, designed to exert pressure on the employer to accede to their demands",[23] but this change is not universally recognized. Other authors prefer to make clear distinction between the terms "strike" and "collective action", and call not to modify these definitions as a reaction to the changing stand on their legitimacy.[24] On that occasion, "strike" as encompassing only the situations of stoppage of work is regarded as a more narrow term in comparison to "collective action" which consists of a wider scale of behaviour, including actions short of stoppage of work.

But again, there is no universal accord on this matter and as will be shown further in the text, the particular international and regional instruments has not yet provided answers to this question. It is mainly up to the national law to draw the line.

[23] See footnote 3, p. 11.
[24] Dorssemont, F.: *"Collective action in Belgium - Looking for the right to strike"*, in *"Collective Action and Fundamental Freedoms in Europe, Striking the Balance"*, Social Europe Series, Volume 23, edited by Ales, E. and Novitz, T., Intersentia, Antwerpen - Oxford - Portland, 2010, p. 7.

2.2. International, Regional and European Law Perspectives

The ILO Convention no. 87 on Freedom of Association does not explicitly contain the term "strike" or the term "collective action", but according to the interpretation given by the ILO Committee on Freedom of Association and the ILO Committee of Experts on the Application of Conventions and Recommendations, "the right to strike" is implicitly protected by the Convention.[25] Thus, the ILO supervisory bodies recognize "the right to strike", however, in the broadest sense of the term, since certain forms of actions short of stoppage of work, such as the go-slow or work-to-rule, are viewed as constituting one of the types of "strike actions". According to the ILO, these actions are also protected by the right to strike.[26]

In contrast, **the (Revised) European Social Charter** of the Council of Europe in Article 6 para. 4 lays down that the Contracting States recognize "the right of workers and employers to collective action in cases of conflicts of interests, including the right to strike." This indicates that a "strike" is regarded as only one of the existing forms of collective actions. Until today, the European Committee of Social Rights (ECSR) did not further clarify whether forms of actions short of stoppage of work are also covered by the Article 6 para. 4 of the Charter.

"It seems that the ECSR is in a process of fact finding to verify whether other types of collective actions are protected under domestic law. It has taken an increasing interest in the legal definition of "collective action" by Member States. It can be assumed that this fact-finding process is a stepping-stone towards identifying other types of collective actions. The ECSR might profit from the approach of the Freedom of Association Committee which has developed a negative criterion for the recognition of other types of collective action than strike. Paramount for such recognition is the condition that these actions do not cease to have a "pacific" character."[27]

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[25] Gernigon, B., Odero, A. and Guido, H.: *"ILO Principles concerning the right to strike"*, International Labour Office, Geneva, 2000, p. 7-10.
[26] See footnote 1, p. 113 and 120.
[27] Dorssemont, F.: *"Labour Law Issues of Transnational Collective Action – Comparative Report"*, in *"Cross-Border Collective Actions in Europe: A Legal Challenge"*, Social Europe Series, Volume 13, edited by Dorssemont, F., Jaspers, T. and van Hoek, A., Intersentia, 2007, p. 255-256.

The International Covenant on Economic, Social and Cultural Rights of the United Nations in Article 8 para. 1(d) protects "the right to strike", but the content of this notion has not been further clarified by the UN Committee on Economic, Social and Cultural Rights.

However, in this regard, it should be mentioned that even if the relevant supervisory bodies took a clear stand on this issue, the significance of their view would be limited. As Jacobs notes, "the institutions that are supervising the application of the Conventions of the ILO, the Human Rights Conventions of the UN and the European Social Charter are not courts that can provide binding judgments like the European Court of Human Rights and the Court of Justice of the EU, and the opinions they give on the limitations of the right to strike, interesting as they may be, have no binding force on national legislators and courts."[28] [29]

As regards the relevant court bodies, the European Court of Human Rights only lately recognized the right to strike as implicitly falling under Article 11 of **the European Convention for the Protection of Human Rights and Fundamental Freedoms**, which guarantees the freedom of association and assembly.[30] Until today, there is no case-law dealing with the forms of actions short of stoppage work.

Concerning the European Union law and the case-law of the Court of Justice of the EU, the Community Charter of Fundamental Social Rights of Workers in point 13 lays down that "the right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements". Article 28 of **the Charter of Fundamental Rights of the European Union** 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."

[28] See footnote 4, p. 664-665.
[29] For instance, the Dutch Supreme Court and the German Federal Labour Court have adopted "autonomous" interpretations which are incompatible with the conclusions of the ESCR (See footnote 27, p. 251-252).
[30] Enerji Yapi-Yol Sen v. Turkey, application no. 68959/01, 21 April 2009.

The Court of Justice of the EU repeatedly stressed that "the right to take collective action, including the right to strike, must be recognised as a fundamental right, which forms an integral part of the general principles of Community law the observance of which the Court ensures", however, it also added that "the exercise of that right may none the less be subject to certain restrictions" and that "it is to be protected in accordance with Community law and national law and practices". Bearing in mind that according to Article 153 para. 5 of the TFEU, the freedom of association and the right to strike explicitly fall out of the EU competence, [31] **it remains a role of national lawmakers and judges to determine what action is considered a "strike"** and which particular forms of actions are protected under the law.[32] For example, as Humblet points out, although the Court of Justice of the EU did not reject "blockade" as a specific form of action,[33] this does not imply that "blockade" should suddenly become acceptable under the domestic law.[34]

2.3. National Law Perspectives

The following examples of national legal arrangements illustrate **the heterogeneity and dynamics regarding the notion of "strike"**. For instance in Belgium, France, Poland and Slovakia, only actions consisting of the stoppage of work are covered by the term "strike" and recognized as lawful. In contrast, in Israel and New Zealand, virtually any action of workers can amount to a "strike" and be considered lawful. In Japan, the Netherlands and Sweden, other forms of actions do not constitute a "strike", but nevertheless, are regarded as lawful means provided that they (usually) meet other requirements, for example the condition of a non-abusive nature, fairness or proportionality. However, in some countries, such as Austria and the United Kingdom, even the right to (classic) strike has difficulties with its recognition.

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[31] International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti ("the Viking case"), C-438/05, § 44; and Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan a Svenska Elektrikerförbundet ("the Laval case"), C-341/05, § 91.

[32] Note: The Court of Justice of the EU intervenes only if the fundamental freedoms of the Treaty are at stake (like it occurred, for instance, in the Viking and Laval cases).

[33] See footnote 31, the Laval case, § 107.

[34] See Humblet, P.: *"Belgium"*, in *"The Laval and Viking Cases - Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia"*, Bulletin of Comparative Labour Relations, Volume 69, edited by Blanpain, R., Kluwer Law International, the Netherlands, 2009, p. 21.

In **Austria**, the definition of "strike" cannot be found in the legislation or the case-law, and there are no specific legal sources which determine what is considered a legal or illegal measure (this is based mainly on the academic theories). However, it is clear that every action must comply with the "bonos mores" and it must not show an obvious inadequacy with regard to the intended objectives. Worthy to be mentioned - Austria is a country which guarantees only the freedom to strike, meaning that a striking worker can be lawfully dismissed as result of his/her participation in a strike action.[35]

The **Belgian** statutory law does not provide the definition of "strike", but deriving from the case-law, a "strike" involves a temporary and voluntary cessation of work. Thus, the right to strike does not cover actions which cannot be construed as an omission to perform the contracted work, for example actions involving the performance of work in a way which is counterproductive for the employer due to the working pace or due to the formalistic observance of working rules. The go-slow and work-to-rule are considered unlawful.[36]

France also has no statutory definition of "strike" and this definition results only from the case-law. According to the courts, a "strike" involves "a collective stoppage of work with a view to sustaining professional claims", which implies that any action not entailing a stoppage of work is unlawful and does not enjoy legal protection. A worker may not perform his work in other conditions than those laid down in his employment contract and therefore the behaviour which resembles a "strike", but does not show the specific characteristics of stoppage of work is unlawful.[37]

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[35] Grillberger, K. and Felten, E.: *"Austria"*, in *"The Laval and Viking Cases - Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia"*, Bulletin of Comparative Labour Relations, Volume 69, edited by Blanpain, R., Kluwer Law International, the Netherlands, 2009, p. 7-11; and Risak, M.: *"Austria"*, in International Encyclopaedia for Labour Law and Industrial Relations, edited by Blanpain, R., Kluwer Law International, Supplement 365, 2010, p. 217-219 and 221-226.

[36] See footnote 24, p. 10-11; See footnote 34, p. 18; and see Blanpain, R.: *"Belgium"*, in International Encyclopaedia for Labour Law and Industrial Relations, edited by Blanpain, R., Kluwer Law International, Supplement 366, 2010, p. 384.

[37] Palli, B.: *"French Labour Law Report"*, in *"Cross-Border Collective Actions in Europe: A Legal Challenge"*, Social Europe Series, Volume 13, edited by Dorssemont, F., Jaspers, T. and van Hoek, A., Intersentia, 2007, p. 125-126; Rojot, J.: *"France"*, in International Encyclopaedia for Labour Law and Industrial Relations, edited by Blanpain, R., Kluwer Law International, Supplement 372, 2011, p. 333-335; and Betten, L.: *"The Right to Strike in Community Law"*, T.M.C.Asser Instituut, the Hague, 1985, p. 145.

Likewise in **Germany**, virtually no statutory provision relates to a "strike" which is regulated by the judge-made law. With regard to various forms of actions, the Federal Labour Court recognized the principle of "free choice" and trade unions now have the possibility to develop other forms of pressure outside classic strikes. However, all forms of pressure must comply with the core principles of German strike law, such as the principle of proportionality and fairness.[38]

In **Israel**, one finds no statutory definition of "strike" in the private sector. In public service, the Settlement of Labour Disputes Law defines a "strike" as an "organized total or partial work stoppage by a group of employees including slowing down or other organized disruption of the normal course of the work". This perception of "strike" influenced the courts which developed the definition that is very broad in terms of the applied means of pressure. It was held that "striking includes all forms of co-ordinated collective action, which serve as means of applying pressure on an employer to meet the employees' demands." The means of applying pressure by way of industrial action can be any sanctions affecting the performance of work.[39]

In **Italy,** the right to strike is enshrined in the Constitution, but the legislator has not taken further steps and thus, the notion of "strike" was clarified by the case-law. The definition brought by the courts coincides with "the abstention from work decided by several workers to achieve a common goal", which consequently excludes forms of actions that do not consist of the mere abstaining from work. The prevailing case-law considers the go-slow and work-to-rule to be unlawful.[40]

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[38] See footnote 6, p. 203-205; Daubler, W.: *"German Labour Law Report"*, in *"Cross-Border Collective Actions in Europe: A Legal Challenge"*, Social Europe Series, Volume 13, edited by Dorssemont, F., Jaspers, T. and van Hoek, A., Intersentia, 2007, p. 140; and Warneck, W.: *"Strike rules in the EU27 and beyond – a comparative overview"*, European Trade Union Institute for Research, Education and Health and Safety, Brussels, Belgium, 2007, p. 32.

[39] Goldberg, M.: *"Israel"*, in *"Strikes and Lock-outs in Industrialized Market Economies"*, Bulletin of Comparative Labour Relations, Volume 29, edited by Blanpain, R. and Ben-Israel, R., Kluwer Law and Taxation Publishers, Deventer, the Netherlands, 1994, p. 84; Bar-Mor, H. and Ben-Israel, R.: *"Israel",* in International Encyclopaedia for Labour Law and Industrial Relations, edited by Blanpain, R., Kluwer Law International, Supplement 350, 2009, p. 181-183; and ILO website, National Labour Law Reports, retrieved online at http://www.ilo.org/public/english/dialogue/ifpdial/info/national/is.htm, 26.4.2011.

[40] Orlandini, G.: *"Italian Labour Law Report"*, in *"Cross-Border Collective Actions in Europe: A Legal Challenge"*, Social Europe Series, Volume 13, edited by Dorssemont, F., Jaspers, T. and van Hoek, A., Intersentia, 2007, p.150-152; Treu, T.: *"Italy"*, in International Encyclopaedia for Labour Law and Industrial Relations, edited by Blanpain, R., Kluwer Law International, Supplement 368, 2010, p. 218 and 230-231; and see footnote 38, Warneck, W., p. 42.

The **Japanese** Constitution guarantees "the right to act collectively", which is seen as synonymous with "the right to engage in dispute acts". A dispute act is defined by the Labour Relations Adjustment Law as "a strike, slow-down, lock-out and other act and counter-act hampering the normal course of work in an enterprise and performed by the parties concerned with labour relations with the object of attaining their respective claims." Standards determining the "propriety of dispute acts" are formed by the case-law and academic theories. In fact, there is a remarkable tendency in Japanese industrial relations to admit the legality of a variety of actions that hamper the normal course of business. To be considered "proper", the acts do not need to involve a work stoppage of any kind.[41]

In **the Netherlands**, the right to strike is not couched in the Constitution or statutory law. All strike law is a result of the case-law and hence very casuistic. In the landmark ruling of 1986, the Supreme Court stated that Article 6 para. 4 of the European Social Charter is directly applicable in the Netherlands and thus the right to strike is recognized in principle. The recognition-in-principle is not narrowly limited to the ordinary form of strike. Also other forms of action can be justified, if they meet the requirement of proportionality.[42]

New Zealand has a statutory definition of "strike" which is extremely broad and covers a variety of actions. It goes far beyond the classic perception of a "strike" as a stoppage of work (or even slowing down or working to rule), since also actions such as a resignation with a proper notice or a refusal to work overtime where there is no contractual obligation to do so fall under the notion of "strike", if they arise out of a combination. According to the Employment Relations Act, a "strike" ...

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[41] Sugeno, K.: *"Japan: Legal Framework and Issues"*, in *"Strikes and Lock-outs in Industrialized Market Economies"*, Bulletin of Comparative Labour Relations, Volume 29, edited by Blanpain, R. and Ben-Israel, R., Kluwer Law and Taxation Publishers, Deventer, the Netherlands, 1994, p. 105-107; Hanami, T. and Komiya, F.: *"Japan",* in International Encyclopaedia for Labour Law and Industrial Relations, edited by Blanpain, R., Kluwer Law International, Supplement 370, 2010, p. 182-186; and ILO website, retrieved online at http://www.ilo.org/public/english/dialogue/itpdial/info/national/jp.htm, 26.4.2011.

[42] Jacobs, A.: *"Dutch Labour Law Report"*, in *"Cross-Border Collective Actions in Europe: A Legal Challenge"*, Social Europe Series, Volume 13, edited by Dorssemont, F., Jaspers, T. and van Hoek, A., Intersentia, 2007, p. 180-182; Grapperhaus, F. and Verbung, L.: *"Employment Law and Work Councils of the Netherlands"*, Kluwer Law International, 2009, p. 6; and see footnote 38, Warneck, W., p. 52.

a) is the act of a number of employees who are or have been in the employment of the same employer or of different employers –

(i) in discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it; or

(ii) refusing or failing after any such discontinuance to resume or return to their employment; or

(iii) in breaking their employment agreements; or

(iv) in reducing their normal output or their normal rate of work; and

b) is due to a combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by the employees.[43]

In **Poland**, the Law on Labour Disputes defines a "strike" as "an organized work stoppage undertaken in order to solve a labour dispute concerning economic, professional, social and trade union interests." Actions short of stoppage of work, such as the go-slow or work-to rule, are not covered by the term "strike" and they are considered unlawful.[44]

In **Slovakia,** the Constitution enshrines "the right to strike" and lays down that further conditions shall be defined by law. In fact, the only legislation adopted in this field is the Collective Bargaining Act which defines a "strike" as "a partial or total interruption of work by workers". The concrete forms of actions are not specified, but educing from this notion, the only forms of actions which enjoy the legal protection are those that rest on the stoppage of work.[45]

In **Spain**, the right to strike is guaranteed by the Constitution and by the Royal Decree Law on Labour Relations. Although the Law itself does not provide the legal

[43] Rudman, R.: *"New Zealand Employment Law Guide"*, CCH New Zealand Limited, 2009, p. 116-117; Anderson, G.: *"New Zealand"*, in *"Strikes and Lock-outs in Industrialized Market Economies"*, Bulletin of Comparative Labour Relations, Volume 29, Kluwer Law and Taxation Publishers, Deventer, the Netherlands, 1994, p. 128-129; and Anderson, G.: *"New Zealand"*, in International Encyclopaedia for Labour Law and Industrial Relations, edited by Blanpain, R., Kluwer Law International, Supplement 371, 2010, p. 208-209.

[44] Swiatkowski, A.: *"Poland"*, in *"Strikes and Lock-outs in Industrialized Market Economies"*, Bulletin of Comparative Labour Relations, Volume 29, Kluwer Law and Taxation Publishers, Deventer, the Netherlands, 1994, p. 147; Frankowski, S. and Bodnar, A.: *"Introduction to Polish Law"*, Kluwer Law International, 2005, p. 294; and see footnote 38, Warneck, W., p. 56.

[45] Barancova, H.: *"Slovakia"*, in International Encyclopaedia for Labour Law and Industrial Relations, edited by Blanpain, R., Kluwer Law International, Supplement 373, 2011, p. 192; and see footnote 38, Warneck, W., p. 64.

definition of “strike”, it is perceived as “a collective and concerted suspension of work by workers”. Most authors claim that the actions short of stoppage of work, such as the go-slow or work-to-rule, are considered unlawful,[46] but some authors disagree with this view. The latter group argues that this strict concept of strike, which covers only “a stoppage of work” actions (thus denying protection to all other forms of actions that are not associated with the cessation of work), applied prior to the landmark ruling of the Constitutional Court in 1981. The mentioned ruling, however, allowed atypical forms of actions provided that they are not abusive. The non-abusive nature of an action must be proved by workers in order to escape the presumption that an action is abusive.[47]

The **Swedish** Constitution guarantees “the right to strike/lock-out or to resort to any similar measure” unless otherwise provided by law or arising from an agreement. Hence, the Constitution acknowledges the possibility to resort to a “similar measure”. No statutory definition exists and what constitutes an industrial action is decided by the Labour Court. But in general, the spectrum of permissible actions is extremely broad due to the doctrine prevailing in Sweden that everything that is not specifically prohibited is lawful.[48] The only requirement is that it must be an “action” (something concrete must happen), it must have a collective concerted character and it must exert pressure on the opposite party in a work-related dispute (sympathy strikes form the only exception to the latter rule).[49]

In **the United Kingdom,** one finds no (generally applicable) definition of “strike” and also no “right to strike”, since under the UK common law an ordinary strike consisting of the stoppage of work results in a fundamental breach of the employment contract. Formally, also other forms of action, such as the go-slow and work-to rule are

[46] Rodriguez Sanudo, O.: *“Spain”*, in International Encyclopaedia for Labour Law and Industrial Relations, edited by Blanpain, R., Kluwer Law International, Supplement 356, 2009, p. 144-145; and see footnote 38, Warneck, W., p. 62.
[47] See Valdes Dal-Re, F.: *“Spanish Labour Law Report”*, in *“Cross-Border Collective Actions in Europe: A Legal Challenge”*, Social Europe Series, Volume 13, edited by Dorssemont, F., Jaspers, T. and van Hoek, A., Intersentia, 2007, p.140.
[48] Note: certain restrictions relating to the forms of action apply in the public service.
[49] Fahlbeck, R.: *“The Swedish Experience”*, in *“Strikes and Lock-outs in Industrialized Market Economies”*, Bulletin of Comparative Labour Relations, Volume 29, Kluwer Law and Taxation Publishers, Deventer, the Netherlands, 1994, p.167-169 and 178; Adlercreutz, A. and Nystrom, B.: *“Sweden”*, in International Encyclopaedia for Labour Law and Industrial Relations, edited by Blanpain, R., Kluwer Law International, Supplement 358, 2009, p. 205-206; and see footnote 38, Warneck, W., p. 68.

allowed, but the related case-law suggests that in the vast majority of cases, even these forms of actions will result in a breach of contract.[50]

In conclusion, these examples of national laws show that **the notion of "strike" markedly differs from a country to country and the judiciary plays an important role in designing its scope**. In many cases, the stance of courts is crucial due to the legislative gap in the field and judges are responsible for determining the limits on the acceptable forms of actions.

[50] See footnote 12, Barrow, C.,p. 267; Smith, I. and Baker, A.: *"Smith and Wood's Employment Law"*, 10th edition, Oxford University Press, New York, 2010, p. 658-659; Deakin, S. and Morris, G.: *"Labour Law"*, fifth edition, Hart Publishing, Oxford and Portland, 2009, p. 973-974; and see footnote 38, Warneck, W., p. 70.

3. Common forms of actions short of stoppage of work

As already mentioned in the previous text, a strike consisting of the (total) stoppage of work is the most traditional form of collective action. Sometimes, however, we also see collective actions which do not consist of the interruption of work of any kind, but which involve an "active" behaviour of workers in an industrial dispute. This behaviour entails either the performance of work in a counterproductive way, for instance by slowing down the working pace or by the strict adherence to the working rules and job description, or it involves the partial non-performance of work, for instance by refusing to perform certain tasks and duties from the job description. Sometimes, work is performed to the benefit of the public, but to the loss of an employer, or the pressure is put on the employer through informing the public about "what is going on" in the company. In fact, workers can be very inventive and sometimes resort to actions which do not fall into any of these categories.

By the time, certain distinct types of actions short of stoppage of work evolved and nowadays, the most common forms are the "go-slow", "work-to-rule" (including "non-co-operation" and "voluntary overtime ban") and "refusal to perform certain tasks and duties". In addition, we can observe other extraordinary forms of actions short of stoppage of work, which involve the defective work performance, but which have not been yet labelled a special term in the industrial relations' vocabulary. For example, the "good-work" strike has been suggested as a new form of collective action short of stoppage of work by the Libcom website,[51] but this term is not generally known and used. The same applies to the "open-mouth" which can be also viewed as a form of collective action short of stoppage of work provided that it relates to the workers' occupational demands and it seeks to exert pressure on the employer in an industrial dispute.

Below is the description of the most common forms of actions with examples from the history and related case-law of national courts.

[51] See www.libcom.org.

3.1. Go-slow

The go-slow (slowdown) is a form of collective action where workers perform all their duties from the employment contract, but seek to reduce productivity or efficiency in the performance of these duties by deliberately slowing down the working pace.

Interestingly, the go-slow has a long history and we can find examples of such action already at the end of the 19th century. For instance, “In 1899, the organized dock workers of Glasgow, Scotland, demanded a 10% increase in wages, but met with refusal by the bosses and went on strike. Strike-breakers were brought in from among the agricultural workers, and the dockers had to acknowledge defeat and return to work under the old wages. But before they went back to work, they heard this from the secretary of their union: "You are going back to work at the old wage. The employers have repeated time and again that they were delighted with the work of the agricultural labourers who have taken our place for several weeks during the strike. But we have seen them at work. We have seen that they could not even walk a vessel and that they dropped half the merchandise they carried; in short, that two of them could hardly do the work of one of us. Nevertheless, the employers have declared themselves enchanted with the work of these fellows. Well, then, there is nothing for us to do but the same. Work as the agricultural labourers worked." This suggestion was obeyed to the letter. After a few days the contractors sent for the union secretary and begged him to tell the dockworkers to work as before, and that they were willing to grant the 10% pay increase.”[52]

Another example comes from the 1970s, when workers at Ford's plant in Dagenham, UK introduced a slowdown as a reaction to increased production line speed from 18 to 21 feet per minute. This was a second speed increase and the workers viewed it as unfair. After a slowdown by the production line staff, Ford management reduced the production line speed back to 18 feet per minute.[53]

[52] Libcom website, retrieved online at http://libcom.org/organise/workplace/articles/go-slow.php, 26.3.2011.
[53] Wikipedia website, retrieved online at http://en.wikipedia.org/wiki/Slowdown, 26.3.2011.

Hence, both of these actions proved to be successful in reaching workers' goals. They demonstrate that a go-slow can be an effective way of putting pressure on the employer in an industrial dispute. Nevertheless, it should be mentioned that a go-slow includes a risk that an employer will be forced to close down due to the decreased production. Such situation occurred in California, USA, when two series of go-slows were carried out during the period of negotiations concerning wages and working hours. There was a 50 percent drop in production and the latest culminated in the suspension of operations by the employer and to the closing of the plant.[54] Thus, workers did not achieve better working conditions, but became unemployed instead.

Moreover, with regard to the legitimacy of a go-slow the question arises, whether the manifestation of workers to purposefully work in an inefficient manner can be viewed as a breach of the employment contract. In this regard, the UK courts concluded that by failing to work to full capacity, the employee is working less than contractually required and so is in a breach of contract, or that the operation of a go-slow can be regarded as "a wrongful repudiation of an essential obligation of the employment contract to obey reasonable orders in a reasonable manner."[55] The latter conclusion, however, is not surprising. The case related to a go-slow in essential services, where life, health and safety of the population can be endangered, which resulted in a fire engine taking 17 minutes to attend a fire although normally it would take three minutes (*General Engineering Services v Kingston & St Andrew's Corporation,* 1989).

The Industrial Court in Kenya was even more critical with regard to go-slow, since it viewed it as a fundamental breach of the employment contract, which an employer could treat as a repudiation of the employment relationship. The case related to the three-day go-slow carried out by the municipality workers in a labour dispute over salary increases (*Kenya Local Government Workers' Union and Municipal Council of Mombasa*, 1976).

[54] Employment Development Department (State of California) website, retrieved online at http://www.edd.ca.gov/uibdg/Trade_Dispute_TD_60.htm, 29.3.2011.
[55] See footnote 12, Barrow, C., p. 270.

The Court referred to similar cases decided upon in other countries and noted: “All the international authorities are unanimous in condemning the action of go-slow. Suffice to say, that it is considered to be an insidious and nefarious activity and arbitration tribunals wherever constituted, without exception, have adopted a critical attitude towards the employment of a go-slow. The Industrial Courts and the Labour Appellate Tribunal in India have in series of decisions laid down that go-slow is an insidious labour practice highly reprehensible as it disrupts the economy of the industry and that, the persons guilty of such misconduct are liable to be dealt with by suitable disciplinary action by the employer. It has been held in many cases that go-slow is a misconduct punishable with dismissal.”

The Court followed: “Generally, it has been held that go-slow has as its objective the reduction of production. It is an industrial practice used by unions as a means of enforcing demands without incurring the disadvantages of a strike such as a loss of wages and the loss of service which may subsequently affect rates of annual leave, severance pay, gratuity and the like. As mentioned earlier, it has been widely condemned as an unfair practice. In fact, an employee on a go-slow exposes himself to severe disciplinary action.” … “An employer has a right to discipline his workers for committing a breach of the contract, which they do if they are on go-slow, but his remedies are limited to warning, suspension or dismissal. An employer has no right to arbitrary deduct a worker’s wages on ground that he has performed only a certain percentage of his normal work. When a worker commits a breach of contract of employment by staging a go-slow, it confers on the employer a right to treat this fundamental breach of contract as a repudiation of the employment relationship.”

Thus, the Court labeled a go-slow an “unfair labour practice”, “insidious and nefarious activity”, unacceptable under any circumstances, but nevertheless, in this particular case it ruled in a favour of trade unions, since it did not allow the employer to deduct a part of the employees’ wages on the ground of the participation in a go-slow. [56]

[56] The Kenya Gazette, published by Authority of the Republic of Kenya, Nairobi, 22nd December 1967, Vol. LXIX – No. 66, Gazette Notice No. 4467, p. 1378-1379 (Note: The details concerning the entitlement to wages are included in the section 4, p. 43).

One could assume that this (critical) point of view of courts in the previous cases was affected by the common law (master-and-servant) tradition and that courts in the continental Europe would be more "go-slow-friendly". However, the following example from Germany shows that although the German Federal Supreme Court did not use the concept of a breach of contract, it still viewed a go-slow as "illegal and immoral".

In 1973, German air traffic controllers - at that time civil servants - tried to evade the prohibition to strike by entering a go-slow tactic. The action, which lasted almost six months, resulted in airports being shut and 50,000 flights being cancelled. It was dropped yet after the Chancellor promised to find a "fair solution". However, the Federal Supreme Court in the final ruling stated that "The action was illegal, immoral and it would not be allowed even in the private economy. Freedom of association has limits and these limits are the protection of more important interests."

In this regard, it was remarkable that medical doctors stood up on the side of the air traffic controllers, saying that it was one of the most strenuous jobs in the world. They named an example, where an air traffic controller was required to handle 12 airplanes simultaneously, although the psychological maximum did not allow to exceed four machines at the same time. During the go-slow, approximately six airplanes were handled by the air traffic controllers. In addition, the experts recommended not more than one and half hours of continuous activity before the radar screen, but in reality the rendered everyday performance of the air traffic controllers moved from six to eight hours. They asked for improvement for many years, but without any change. Thus, it was questionable, whether their action was indeed so "immoral".[57]

Last but not least, in some countries, where "the right to go-slow" is generally recognized, the courts made distinction between the overt and covert go-slows. For example in Japan, the court denied the "propriety" of a go-slow action taken by taxi drivers, which was carried out without notifying their employer about its execution (*Japan Texas Instruments Company Case, 1974*).[58]

[57] BGH v. 16.6.1977 AP Nr. 53 zu Art. 9 GG Arbeitskampf u. BGH v. 31.1.1978 AP Nr. 61 zu Art. 9 GG Arbeitskampf (See Spiegel website, retrieved online at http://www.spiegel.de/spiegel/print/d-40616667.html, 9.4.2011.
[58] See footnote 41, Sugeno, K, p. 107.

3.2. Work-to-rule

Another common form of action short of stoppage of work is the “work-to-rule” where workers obey each and every rule to the fullest extent, which consequently leads to the great reduction of productivity. In some languages (for example Polish, Russian, Finnish and Hebrew) it is known as "Italian strike", since it is believed that it was first utilized in Italy in 1904. In Italy, it is known as "sciopero bianco" or a "white strike".[59] This form of action is frequently used in the public transport due to the existence of strict health and safety regulations, but also in other sectors, since today almost every work is governed by a number of rules and regulations which, if followed literally, can significantly slow down production.

For instance, when railway workers were prohibited to strike in France, they used a work-to-rule to express their dissatisfaction. One French law required an engine driver to assure the safety of any bridge over which the train must pass. If after a personal examination he was still doubtful, then he had to consult other members of the train crew. Of course, during the action, every bridge was inspected, every crew was consulted, and none of the trains ran on time.[60] The same results were achieved by the action of air traffic controllers in Greece in 2010. When the court in Athens declared a planned 24-hour rolling strike unlawful, the air traffic controllers entered a work-to-rule instead. The strict compliance with international regulations in airspace capacity by allowing only a certain number of flights per hour caused that many international and domestic flights were delayed.[61]

Or an example from another sector – when Austrian postal workers were afraid of losing their jobs as a result of going on a regular strike, they decided to work-to-rule, namely to strictly observe the rule that all mail must be weighed to see if the proper postage was affixed. Formerly they had passed without weighing all those letters and parcels which were clearly underweight, thus living up to the spirit of the regulation,

[59] Wikipedia website, retrieved online at http://en.wikipedia.org/wiki/Work-to-rule, 31.3.2011.
[60] Libcom website, retrieved online at http://libcom.org/organise/work-to-rule, 31.3.2011.
[61] Keep Talking Greece website, retrieved online at http://webcache.googleusercontent.com/search?q=cache:bA5k0JxsLD8J:www.keeptalkinggreece.com/2010/07/25/greece-air-traffic-delays-and-cancellations-due-to-white-strike/+keep+talking+greece+2010+air+traffic+delays+cancellations+due+white+strike&cd=1&hl=sk&ct=clnk&gl=sk&source=www.google.sk, 31.3.2011.

but not to its exact wording. However, by taking each separate piece of mail to the scales, carefully weighing it, and then returning it to its proper place, the postal workers had the office congested with unweighed mail on the second day.[62]

However, the "work-to-rule" is sometimes described as including also the situations of so-called "non-co-operation" when workers refuse to perform any tasks which are above and beyond their explicit contractual obligations specified in the employment contract. A specific form of non-cooperation is the "voluntary overtime ban" which involves the refusal to perform any work outside the contracted working hours.

A landmark decision dealing with the issue of non-co-operation and work-to-rule was *Secretary of State of Employment v ASLEF* (1972). In this case, the trade union had instructed their members to work-to-rule by complying to their employment contracts and the provisions of the work's rule book, which meant that workers refused to work on rest days and to volunteer for overtime, thus causing disruption of railway services. In its judgment, the Court of Appeal concluded that although this action did not cause the breach of an express term of the employment contract, there had been a breach of an implied term. The three judges of Court of Appeal explained the content of this implied term in different ways, hence providing a number of grounds which had constituted a breach of contract.

Firstly, Roskill LJ considered that there had been a breach of an implied term of fact that the instructions in the rule book should be performed in a reasonable and efficient manner, which was automatically incorporated into the employment contract. In his view, an express term of this nature had not been necessary at the time of the formation of the contract as the parties had thought such a term self-evident.[63] There had been an implied term that the employee would not seek to obey lawful instructions in a wholly unreasonable way which "has the effect of disrupting the system, the efficient running of which he is employed to ensure". Thus, Rooskill LJ focused mainly on the impact of the action.[64]

[62] Libcom website, retrieved online at http://libcom.org/organise/workplace/articles/work-to-rule.php, 26.3.2011.
[63] See footnote 12, Barrow, C., p. 268.
[64] See footnote 50, Deakin, S. and Morris, G., p. 974.

Secondly, Buckley LJ referred to the obligation of "faithful service or fidelity" implicit in every employment contract and noted that "within the terms of the contract the employee must serve faithfully with a view to promoting those commercial interests, for which he is employed". By working to rule, the employees had performed the contract in such a way as to frustrate, rather than promote, the commercial objectives of the employer,[65] and thus, they were in a breach of contract.

Finally, Lord Denning identified an implied duty on all employees to perform their tasks in "good faith". In his opinion, the breach of contract consisted of taking steps willfully to disrupt the undertaking and to produce chaos. Lord Denning stated: "If an employee, with others, takes steps to disrupt the undertaking, to produce chaos so that it will not run as it should, then each one who is party to those steps is guilty of a breach of contract. It is no answer for any one them to say "I am only obeying the rule book"… That would be all very well if done in good faith without any willful disruption of services, but what makes it wrong is the object with which it is done."[66] Thus, it was the motive or object with which the action was done which rendered it unlawful.[67]

Besides the concept of "the implied terms of contract", the UK courts developed also the concept of "additional contract" which is supplementary to the employment contract. In *MBC of Sollihul v NUT* (1985), the trade union had instructed their members to refuse to cover for absent teachers and not to perform certain functions at lunchtime and outside school hours. The trade union argued that since most of these activities were not formal contractual obligations deriving from the employment contract and were carried out on a voluntary basis, there had been no breach of the contract. The Court, however, found that teachers "had entered into oral contractual obligations", for example, teachers who agreed to supervise pupils at lunchtimes were doing so in return for the consideration of a lunch provided by the school and thus, a failure to engage in lunchtime supervision was a breach of this collateral contract.[68]

[65] See footnote 12, Barrow, C., p. 268.
[66] Doorey's Workplace Law Blog website,
retrieved online at http://www.yorku.ca/ddoorey/lawblog/?p=2702, 4.4.2011.
[67] See footnote 50, Deakin, S. and Morris, G., p. 974.
[68] See footnote 12, Barrow, C., p. 270.

Moreover, in *Sim v Rotherham MBC* (1987), the court made a link to the seniority. It upheld that teachers as professional workers possess a high degree of discretion in a way they work and the duty of co-operation with the employer must be imputed to ensure the effective discharge of their function. On this view, the more senior the employee (who usually has wider and more general tasks to perform), the more applicable the implied term is.[69]

The existence of an obligation of co-operation was later reconfirmed in *Ticehurst and Thompon v Telecommunication Ltd*. (1992), where a managerial worker withdrew her co-operation with the employer during an industrial action. She had been asked to work normally and when she refused, she was sent home without pay. The court found that the withdrawal of goodwill constituted a breach of contract, namely a breach of the implied term "to serve the employer faithfully within the requirements of the contract." The court rejected the argument that this term could not be breached unless the intended disruption of the undertaking was achieved in practice. Instead, it upheld that the term was breached "when the employee does an act, or omits do to an act, which would be within her contract and the discretion allowed to her not to do, or to do, as the case may be, and the employee acts or omits to do the act, not in honest exercise of choice of discretion for the faithful performance of her work, but in order to disrupt the employer's business or to cause the most inconvenience that can be caused."[70] Hence, the Lord Denning's argumentation of "wilful disruption of the undertaking" found in *Secretary of State of Employment v ASLEF* was recalled.

But the logic of this approach would imply that even a voluntary overtime ban constitutes a breach of contract, if a worker's refusal to provide it is deliberately designed to cause disruption. In *Burgess v Stevedoring Services Ltd* (2002), however, it was held that workers are not in a breach of contract "for refusing to do things altogether outside their contractual obligations (like going to work on Sunday), merely because they do not have a bona fide reason for refusal. They do not have to have any reason at all."[71]

[69] See footnote 12, Barrow, C. p. 269 .
[70] See footnote 50, Deakin, S. and Morris, G., p. 974.
[71] See footnote 50, Smith, I. and Baker, A., p. 659-660.

As can be observed, the British courts have a lot of experience in dealing with the cases of work-to-rule (and non-cooperation) and they are not inclined to accept it as lawful. But even here, the ban on voluntary overtime is seen as a special category of industrial action which is considered to be acceptable.

The same approach was taken by the Italian Court of Cassation which recognized the ban on voluntary overtime as a legitimate form of action (although in Italy actions not involving "an abstention from work" are generally not allowed). This applies even in cases where the collective agreement allows for the overtime work.[72]

Furthermore, in South Africa, the distinction was made between the compulsory overtime ban which constitutes a strike and a voluntary overtime ban which does not constitute a strike. However, in this regard it is sometimes uncertain, whether there is a contractual obligation of workers to work overtime.

This was examined in the *Ford Motor Company of South Africa (Pty) Ltd. v National Union of Metalworkers of South Africa* (2007) case which related to the intended refusal to work scheduled overtime. The collective agreement laid down: "The Parties agree that due to operational requirements there is a need to work overtime, which will generally be of a voluntary nature save where otherwise agreed. The Parties further agree that such overtime will not unreasonably be withheld". However, when overtime was scheduled by the employer, the trade union viewed it as excessive and refused to comply with it.

During the proceedings, the trade union argued that overtime was "in any event, only worked once the parties have "negotiated" on the issue and only if an agreement has been reached on the issue of overtime, will workers be required to perform overtime". It was claimed that the employer had requested the workers to work overtime and that it was up to the individual worker to agree or reject the request provided that he/she would not withhold such consent unreasonably. Thus according to the trade union, there was no contractual obligation to work overtime.

[72] Cassazione civile, 28 June 1976, no. 2480, and Cassazione civile, 23 January 1992, no. 869 (See footnote 40, Orlandini, G, p. 150-152.

However, the Court disagreed with this view and noted that "it is clear that employees must work voluntary overtime if there is an operational requirement and only those employees with a legitimate excuse will be exempted from working such overtime". ... "Having concluded that there exists a contractual term to work voluntary overtime, it will necessarily follow that a refusal to work voluntary overtime will constitute a strike."[73]

In addition, concerning a voluntary overtime ban, in *National Union of Metalworkers of South Africa and Others and Macsteel* (1989) the Appellate Division found that a concerted refusal by workers to work voluntary overtime as a pressure tactic during negotiations, where it would seriously affect the employer and where it was introduced without notice, constituted an unfair labour practice.[74].

3.3. Refusal to perform certain tasks and duties

This form of collective action short of stoppage of work involves the situation where workers refuse to perform certain tasks and duties deriving from their employment contract. With regard to the duties and tasks concerned, these can be of any kind.

For example in Sweden, workers refused to go on business trips (e.g. the sales people), to drive during working time (e.g. the delivery people) or to work according to any other work-schedule than the one in force before the outbreak of the dispute (all these actions were considered lawful by the Swedish Labour Court).[75] In Ireland, civil servants refused to deal with telephone queries in the morning and to deal with counter queries in the afternoon, or bank officials refused to apply certain fees and commissions to various bank transactions.[76]

[73] The Labour Court of South Africa held at Johannesburg, Case No. J2080/07, 10 October 2007.
[74] International Labour Office: *"Special Report of the Director-General on the application of the Declaration concerning action against apartheid in South Africa"*, International Labour Conference 80th Session, 1993, Geneva, p. 27.
[75] See footnote 49, Fahlbeck, R., p. 169.
[76] International Labour Law Reports, Volume 23, edited by Gladstone, A., Martinus Nijhoff Publishers, 2004, p. 363-369.

What we can see lately in particular are the so-called “good-work” actions which can be characterized as collective actions where workers continue working, but provide free (or better) goods or services to the public at the employer’s expense. This form of action is frequently used in the service sector, especially in the public transport and it encompasses for instance the refusal to sell and/or to check passengers’ tickets. Here are some examples from the history.

In 1968 in Lisbon, Portugal, bus drivers and train conductors gave free rides to all passengers to protest a denial of wage increases.[77] Tram conductors in Melbourne, Australia, did likewise in 1990,[78] bus drivers in the Netherlands in 2002,[79] bus drivers in Aberdeen, Scotland in 2009,[80] train commuters in Sydney, Australia, in 2010,[81] and so on.

Examples from other sectors include for instance the hospital workers from France, who instead of going on regular strike refused to file the billing slips for drugs, lab tests, treatments and therapy; or restaurant workers from New York City, USA, who won some of their demands by heeding the advice of their unions to “pile up the plates, give double helpings, and figure the checks on the low side.[82]

The legality of this form of collective action is disputable, since work is purposefully performed to the loss of an employer, but it appears that in certain countries - where the judiciary gives a significant consideration to the interests of the public and where the statutory definition of strike/collective/industrial action is absent - courts tend be liberal and consider this form of action acceptable. The Netherlands can be used as an example.

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[77] Libcom website, retrieved online at http://libcom.org/organise/workplace/articles/good-work-strike.php, 26.3.2011.
[78] Libcom website, retrieved online at http://libcom.org/library/melbourne-tram-dispute-lockout, 26.3.2011.
[79] See footnote 16, p. 182.
[80] BBC News website, retrieved online at http://news.bbc.co.uk/2/hi/uk_news/scotland/north_east/8147672.stm, 4.4.2011.
[81] Sydney Morning Herald website, retrieved online at http://www.smh.com.au/nsw/free-ride-for-sydney-train-commuters-20100809-11rex.html, 30.3.2011.
[82] Libcom website, retrieved online at http://libcom.org/organise/workplace/articles/good-work-strike.php, 26.3.2011.

In the Netherlands, much emphasis has been given on a question of balancing the interests of the exercise of the right to strike against the interests damaged by the strike, in short on a question of proportionality. If a strike has "a major disrupting effect on a social life", it is likely to be prohibited or restricted by courts.[83] Since actions where services are provided free of charge are viewed as less disturbing for the social life than full-fledge strikes,[84] courts incline to accept them as lawful. Interesting is that this standpoint is rather new and courts were initially reluctant to do so. For instance, when the Utrecht court was requested to decide upon this exceptional form of collective action in 1983, it ruled in a favour of the employers, however, in 2002 it upheld that the industrial action in the public transport, which granted passengers two days of free public transport was not unlawful.[85]

The latter conclusion was upheld by the ruling of the Amsterdam Court in 2003.[86] The Court stated that this action, with regard to its objective and scope, could be viewed as collective action which was not so far from the normal type of collective action of workers, and thus it was protected by Article 6 para. 4 of ESC.

The Court did not accept the argument of the employers that the action should have been considered unlawful, because the workers had violated the employers' right to property while purposefully failing to comply with an essential part of their employment contract (selling and checking passengers tickets), but the Court noted that the consideration might have been different if the workers, for example, had used the equipment of the employers for other purpose than the transportation of passengers according to the prescribed schedule.

The Court also rejected the argument of the employers that the workers had not been subject to the authority of the employer, since in the case of a classic strike workers are not subject to it either.

[83] See footnote 17.
[84] See footnote 16, p. 182.
[85] Eurofound website, retrieved online at http://www.eurofound.europa.eu/eiro/2002/09/feature/nl0209103f.htm, 30.3.2011.
[86] Case no. 717/02 SKG, JAR 2003/34, 9 January 2003.

According to the Court, the action could be characterized by the fact that the workers continued to perform part of their duties - the one that was the most essential for passengers (the provision of transport), but failed to perform another part of their duties – the one that was essential for their employers (the sale and control of transport tickets). The employers argued that compared to a classic strike, this form of action placed them into a difficult position, because firstly, it was not easy to determine whether and to what extent the workers' wages could be reduced, and secondly, it caused them a disproportionate damage, since not only the revenues from the ticket sales dropped (which occurred also in the case of a classic strike), but the variable costs of transportation, such as gasoline and maintenance continued, too.

However, with regard to the first aspect, the Court emphasized that since the workers had not performed a part of their duties and inflicted a significant damage to the employers just like in the case of a classic strike – the employers had been entitled to deduct a significant part of their wages for the period of action. "In the case of an action like this, given the importance of work performed and the harm caused to the employer, the wage reduction of 50% in any case would have been justified." In addition, the Court noted that the employers had been entitled to apply the deduction of wages to the entire workforce, regardless of whether – and to what extent – the individual workers had participated in the action. Concerning the second aspect – the loss of earnings and continuation of variable costs (such as gasoline and maintenance), this had been comparable to a classic strike, where other kinds of damages (such as claims from passengers or local government subsidies) would have been suffered, while also third parties would have suffered.

Thus, on the whole, it could not be concluded that this form of action (compared to a classic strike) inflicted a disproportionate damage. In comparison to a "heavy" form of action - a general strike - it involved no disruption of public bus transportation for the public. The Court emphasized that in determining what is reasonable and fair in the relationship between trade unions (and workers) on one side and employers on the other side, the public interest involved in the case must be also taken into account. Employers therefore had to accept the decision of trade unions to resort to this form of action, if it was motivated by the public interest and the perception that the

industrial dispute should not unnecessarily disrupt the social life. In the light of this consideration, the action could not be held unlawful.

Hence, we can see that the courts in the Netherlands did not reject this form of action as unlawful. Likewise, the Labour Court in Sweden, which dealt with the action of train conductors who refused to check and sell passengers' tickets (*Labour Court ruling Ad 1986:111)*, viewed this action as lawful.[87]

Moreover, it can appear that an action short of stoppage of work does not involve the refusal to perform certain tasks or duties from the employment contract, but it rather consists of the refusal to apply a certain working method or organisation of work. For example, in *New Zealand Railways Corporation v Locomotive Engineers Association* (1990), workers refused to carry out immediate changes to methods of work after the employer failed to give the contractually required period of notice,[88] or in *Cresswell v Board of Inland Revenue* (1984) clerical officers refused to retrain on new technology due to the fear of redundancies the introduction of computerisation would bring.[89]

Last but not least, with regard to an action consisting of the refusal to perform certain tasks and duties, sometimes it is not easy to assess whether the action actually meets the core characteristics of "collective action".[90] For example, when teachers in *P v NAS/UWT* (2003) refused to teach a certain problematic pupil, the question arose whether the dispute related to their working conditions. The dispute emerged, because the head teacher said that the teachers were obliged to teach P. and they refused to do so. They argued that the head teacher's direction was unreasonable and thus the dispute was about whether there was a contractual obligation of the teachers to teach P. Finally, it was upheld that "a dispute about what the workers are obliged to do or how the employer is obliged to remunerate them..., is about the terms and conditions of employment" and the action was considered to be falling under the notion of industrial action.[91]

[87] See footnote 49, Fahlbeck, R., p. 169.
[88] See footnote 43, Anderson, G., p. 209.
[89] See footnote 12, Barrow, C., p. 269.
[90] See section 2.1., p. 11-12.
[91] Collins, H., Ewing, K.D. and McColgan, A.: *"Labour Law Text and Materials"*, second edition, Hart Publishing Oxford and Portland, 2005, p. 889-892.

3.4. Other forms of actions short of stoppage of work

Interestingly, the so-called "open-mouth" has been also suggested as a new form of action short of stoppage of work by the Libcom website.[92] This site, for instance, suggests that waiters can tell their customers about the various shortcuts and substitutions that go into creating the food being served to them, or it provides an example of Starbucks workers, who, when their complaints about poor hygiene were ignored, took photographs of rats and cockroaches in the coffee shop outlets and showed them to customers.

However, I think that we need to be careful here. No one doubts that workers have a freedom of speech at the workplace, but this freedom is not absolute; it is limited by the rights and interests of others, for instance, of their employer. It is most likely that making unfavourable statements and notes with an intention to harm the employer's business may be qualified as a misconduct and breach of the work discipline. As Vickers warns, "the actions of an employee who speaks in public about matters relating to work, or makes statements or opinions unfavourable to the employer, could have the effect of breaching the duty of mutual trust owed between employer and employee, resulting in a breach of contract." Workers who blow the whistle on wrongdoing at work may cause a financial loss to the employer or damage his good reputation and in this way, the implied duty of mutual trust can be breached.[93]

In this regard it is remarkable that in some countries, where the notion of "strike" is extremely broad, the behavior having signs of the "open-mouth" can indeed fall under the notion of "strike". For example, in *New Zealand Airlines Pilots Association v Air New Zealand* (1992) it was found that a media campaign relating to the safety of certain aircraft, which was initiated by pilots during a dispute of interest, was capable of being a "strike", if there was a breach of the pilots' duty of fidelity under their employment contracts.[94]

[92] See www.libcom.org
[93] Vickers, L.: *"Freedom of Speech and Employment"*, Oxford University Press, 2002, p. 115.
[94] See footnote 43, Anderson, G., p. 129.

Another form of collective action short of stoppage of work is a Japanese peculiarity. Here, trade unions and workers often resort to wearing ribbons, arm-bands and head-bands with their demands or other slogans written on them. Although this form of action is not formally regarded as a "dispute act", it nevertheless serves as an alternative measure to dispute acts by its function, since it is carried out mainly with an intention to disturb the normal functioning of the business and/or to embarrass the management. The wearing of ribbons, arm-bands and head-bands disturbs the normal course of business especially where the appearance of workers is important, such as in the service sector. For example, in the *Hotel Okura case* (1982), the workers wore a ribbon for about five days as a strategy to put pressure on their employer. However, Japanese courts usually do not consider such actions to be "proper trade union activities", if they are undertaken during the working time.[95]

Finally, the following example from New Zealand shows that here, virtually any action of workers can constitute a "strike".[96] In 2010, the High Court examined whether an instruction of the firefighters' trade union and the two individual members not to apply for the advertised "acting up" vacancies addressed to their colleagues could amount to a "strike".[97]

The Court firstly noted that the definition of strike was wide and "it has to be applied in such a way as to deal with the different forms of industrial action that may be taken by employees and employer". Afterwards, the consideration of the Court continued as follows: "What has happened here is the concerted action by the workforce not to apply for or take up temporary postings. While an individual employee might decide that he is not interested in taking an acting position at a higher level, the matter changes when the same stance is taken by the collective workforce. In that situation, something has gone missing from the employment relationship. In the normal course of events, some employees may not be interested in acting up, but others may be. But when the workforce acts collectively so as to prevent the employer filling temporary vacancies, then a normal incident of the employment has disappeared. From the employer's point of view, there is a normal expectation that if vacancies

[95] See footnote 41, Hanami, T. and Komiya, F., p. 187-188.
[96] See section 2.3., p. 18-19.
[97] Note: The term "acting up" has been used to define what happens when someone in the Fire Service temporarily takes a higher rank.

arise, it can look to its existing workforce to fill them. And from an employee's point of view, there is an expectation that if vacancies arise and he or she is qualified, he or she will have the opportunity to put himself forward to fill that vacancy. Once the workforce collectively decides that they will not apply to fill vacancies, then there is a discontinuance of part of the employment or a reduction in the normal performance of the employment by the workforce as a whole."

Thus, the Court concluded that "the ban on acting up" amounted to a "strike" within the meaning of the Employment Relation Act. However, it did not further assess the legality of this strike, since the Employment Court was the only court competent to decide upon this matter. Though, it appeared from the court file that the firefighters had "good health and safety grounds" for the acting up ban.[98]

The above mentioned examples demonstrate that in a number of countries, actions short of stoppage of work do not restrict merely to the most common forms of actions, such as the go-slow, work-to-rule or refusal to perform certain tasks and duties, but can involve a variety of behavior on the workers' side in an industrial dispute.

[98] The High Court of New Zealand Auckland Registry, CIV-2009-404-001088, between the New Zealand Fire Service Commission (Plaintiff) and Jeffery Reginald McCulloch (First Defendant) and Boyd Gordon Raines (Second Defendant) and New Zealand Professional Firefighters Union Inc. (third Defendant), 10 May 2010.

4. Entitlement to wages

Regarding actions short of stoppage of work, a widely discussed issue is the workers' entitlement to wages during the period of their participation in an action. In general, when workers are on a regular strike, the principle of "no work, no pay" applies. This means that the obligation of an employer to pay wages is suspended, same as the obligation of an employee to perform work. In this case, no work is done and thus no wages are due. This approach was upheld by the ILO Committee on Freedom of Association which stated that "salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles".[99]

However, with regard to actions short of stoppage of work, the suspension theory is not applicable, since work is not ceased and the question arises whether (and to what extent) the partial performance of work should be remunerated. In this case, a worker does not exact certain obligations from his employment contract or he performs the obligations from his employment contract in a counterproductive way. The question arises whether in such a situation, an employer is obliged to provide pay and if he is obliged to provide pay, then in what amount. It seems reasonable that when work is not performed normally, a certain amount of pay representing "the value of the service lost" should be deducted, but it stays unclear how to calculate this proportionate amount of pay.

This issue was touched upon in several rulings from the United Kingdom. In *Wiluszynski v London Borough of Tower Hamlets* (1989), workers refused to respond to certain enquiries from the council members. They continued to perform the vast majority of their tasks, but were informed by the employer that they would not be paid unless they worked normally and that any work they did would be treated as being exacted voluntarily. The Court of Appeal upheld that where an employee is not fully complying with the terms of the contract, and the employer makes it clear in advance that partial performance of the contract is not accepted, then the employer is entitled to refuse to remunerate the employee in any way.[100]

[99] See footnote 1, p. 132 .
[100] See footnote 12, Barrow, C., p. 273-274.

This point of view was reconfirmed in *Ticehurst v British Telecommunication* (1992), where a female worker, who was engaged in a campaign of non-co-operation and refused to sign a pledge that she would work normally, was sent home without pay. The Court of Appeal concluded that once the employer made it clear that partial performance of the contract was not acceptable, he was entitled to refuse to pay wages until the dispute was settled.

However, in both mentioned cases, the employer made it clear in advance that the partial performance of work would not be accepted and the wages would not be paid. But what applies in the case where an employer does not take such clear stand - is he still obliged to provide wages? It could be argued that in such a case an employer agrees with the partial performance of work and he is entitled to make deductions which are proportionate to "the value of the service lost".[101] The courts calculated this proportionate amount in different ways.

For example, in *Miles v Wakefield Metropolitan District Council* (1987), the worker who was a registrar of births, marriages and deaths, refused to perform marriage ceremonies on Saturday mornings. He carried out his other duties normally, including ceremonies on other days of the week. The House of Lords held that the authority were untitled to withhold 3/37ths of his weekly pay, since 3 of his 37 weekly hours were worked on Saturday.

In *Royle v Trafford Metropolitan Borough Council* (1984), the worker, who was a teacher, refused to take classes different from those for which he had been previously responsible or to accept additional children into his class. The High Court upheld that a deduction of 5/36ths of the teacher's salary was reasonable and this amount was calculated according to the number of children excluded by the teacher from the class.[102]

Deducing from these examples, one could assume that in the case of an action short of stoppage of work, the employer has two possibilities – either to refuse the partial or

[101] See footnote 12, Barrow, C., p. 274.
[102] Local Government Employers website, retrieved online at http://www.lge.gov.uk/lge/core/page.do?pageId=119717, 5.4.2011.

counterproductive work performance by the worker and not to provide wages at all, or to accept the partial or counterproductive work performance by the worker and to make a proportionate deduction from the wages. But this is the stance developed by the British courts, does it apply also elsewhere?

For example, in New Zealand, the Labour Appeal Court endorsed the right of the employer to refuse a partial performance of work and not to provide "striking" workers any remuneration [*3M (Pty) Limited v SACCAWU* (2001)]. Likewise in Ireland, *in Maher v Allied Irish Banks plc* (1998), the District Court upheld that the employers were entitled to refuse the unilateral decision by workers not to perform a significant part of their duties and not to provide wages (in this case, the trade union had instructed its members to engage in an overtime ban and refusal to apply certain fees and commissions to various bank transactions. The reaction of three of the banks was to deduct 20% of the salary of those workers who refused to sign a "loyalty pledge" and the fourth bank suspended such workers without pay).[103]

However, the Irish High Court was of a different opinion in *Marie Fuller and others v the Minister for Agriculture and Food and the Minister for Finance* (2003). The case related to the civil servants who refused to deal with telephone queries morning and afternoon, and to deal with counter queries in the afternoon. The workers received written warnings stating that were requested to deal with phone calls/fax messages and to perform counter duties which were described as part of their core duties, and they were warned that the failure to fulfill with these duties would result in removal from the payroll. Since the Civil Service Regulation Act stipulated that "a civil servant shall not be paid remuneration in respect of any period of unauthorized absence from duty", the Court mainly examined, whether in this situation, the workers were "absent from the duty".

The employer claimed that the failure to perform duties is the same as absence from duty, and duty must mean the full range of obligations under the terms of their engagement. The Court, however, viewed absence as physical absence. It upheld that the section of the Act regulating removal from the payroll envisaged "a physical

[103] See footnote 76, p. 368.

absence from work duties and not, as in this case, a physical presence but only performing part of the duties of the post." If a civil servant decides not to perform certain duties, this can be regarded as "neglect of official duties" and can result in disciplinary sanctions, but not to removal from the payroll. A partial withdrawal from work duties does not constitute unauthorized absence from duty and thus the removal of the workers from the payroll, while they were performing partial duties, was null and void.[104] [105]

Alike in Kenya, the Industrial Court refused to uphold the deductions of workers' wages on the ground of their participation in the go-slow action (*Kenya Local Government Workers' Union and Municipal Council of Mombasa*, 1976).[106] The Court examined "whether the principles of deduction of wage for the period the employees were on go-slow is acceptable or not, and if the principle is acceptable, how much should the deduction have been". Although the Court was very critical with regard to go-slow as such, it found that an employer could under no circumstances deduct a worker's wage on the ground of his/her participation in a go-slow.

The Court motivated its decision as follows: "To give the employer right, unless he is expressly given it in the contract of service to punish a worker by deduction of wages would be tantamount to giving him the arbitrary right of claiming damages from his workers due to the latter's breach of contract. This would mean passing to an employer the function of a court of law. … An employer has a right to discipline his workers for committing a breach of the contract, which they do if they are on go-slow, but his remedies are limited to warning, suspension or dismissal. An employer has no right to arbitrary deduct a worker's wages on ground that he has performed only a certain percentage of his normal work."… "The Court, while appreciating the practical difficulties of employers in such matters as go-slow, cannot rule that the employer has the right to deduct an employee's wage. The Court, therefore, finds that the principle of deduction of wages for the period the employees were on go-slow is not acceptable."

[104] See footnote 76, p. 363-369.
[105] Note: However, this conclusion could be influenced by the fact that the case related to the industrial action of civil servants who were regarded as "persons providing a service as holders of an Office" and not as „persons engaged under a contract of employment".
[106] See section 3.1., p. 24-25.

In contrast to this stance, the deduction of wages was explicitly suggested by the Amsterdam Court in (the mentioned judgment of) 2003.[107] Here, the action consisted of the refusal of public transport workers to sell and check passengers' tickets and since the Court concluded that the workers refused to perform an essential part of their duties and inflicted a significant damage to their employers (comparable to the damage in the case of a classic strike), the employers were entitled to deduct a significant part of workers' wages for the time of an action. "In the case of an action like this, given the importance of work performed and the harm caused to the employer, the wage reduction of 50% in any case would have been justified." Moreover, the employers were entitled to apply the deduction of wages to the entire workforce, regardless of whether – and to what extent – the individual workers had participated in the action.

Thus, we can conclude that **the point of view of national courts on the matter of workers' remuneration during actions short of stoppage of work is not uniform and there are three possible approaches**. Certain courts recognized the right of an employer not to provide wages at all (if it was clear in advance that the partial performance of work would not be accepted), others recognized the right of an employer to make a proportionate deduction of wages, or others denied the right of an employer to make deduction of wages whatsoever.

If I should express my view, I agree with the second option**. I think that in the case of an action short of stoppage of work, an employer should be entitled to make a proportionate deduction of workers' wages**, since work is not performed in a normal course and certain disruption is inflicted to an employer. Thus, workers should not be remunerated normally and the amount of pay representing the "value of the service lost" should be deducted from workers' wages. The concrete calculation of deduction should depend on the circumstances of the particular case and thus it is impossible to determine it in advance by a fixed sum or percentage. It can well occur that the application of the principle of "proportionate deduction of pay" will lead to the conclusion of "no pay at all" (if the part of work not performed is so essential and the damage inflicted to an employer so significant that it cannot be reasonably required

[107] See section 3.3., p. 34-36

from an employer to provide wages for the duration of an action), however, this has to be weighted in the light of all circumstances of the case. I disagree with the automatic application of the principle of “no work, no pay”, like in the case of an ordinary strike, simply because in the case of an action short of stoppage of work there is certain work and this work should be remunerated, unless it is contrary to what is considered just and reasonable in the light of all circumstances of the case. On the other hand, it would be also unfair to say that an employer is obliged to provide “full pay” and may not make any deduction of workers’ wages, since work is not performed in a normal course (certain value of the service is lost) and therefore workers should not be remunerated normally, as if there was no action. For these reasons, the stance of “no pay at all” or “full pay” seems to be too one-sided and imbalanced to me. I support the principle of “proportionate deduction of pay”, which appears to be the most fair solution.

5. Arguments pro and contra the recognition of actions short of stoppage of work

As already mentioned in the previous text, when involved in industrial disputes, trade unions sometimes resort to actions which do not involve the stoppage of work of any kind, but which consist of the “active” behavior on workers’ side. The legitimacy of these actions is, however, disputable, since not all the countries recognize them as acceptable means of exerting pressure on the employer in an industrial dispute. In this part, I will attempt to outline the main arguments pro and contra their recognition. Interesting is that some of these arguments have been used by both sides.

For example, the proponents of the recognition of actions short of stoppage of work often emphasize that we live in a “new world”. Compared to earlier times, we live in an era of a market-driven globalization with multinational companies and central decision-making, freedom of capital movement, cross-border delocalization of production and increased “exit options”. Due to these new world realities, the balance of power in labour relations has changed. The power of capital has strengthened and the power of workers and their representatives has weakened. It is often argued that in order to reverse this trend and **to restore the balance between the capital and labour, a new approach to collective action is needed**. Trade unions and workers need to have an access to other alternative means of enforcing demands besides a traditional strike, in order to protect their interests effectively.

Moreover, when multinational enterprises are involved, a cross-border collective action often needs to be taken. However, **the significant divergence in national legal arrangements with regard to the admissible forms of action constitutes a hinder in organizing a cross-border collective action.** There is a risk that an action which involves the behavior of identical nature will be declared lawful in some countries, whereas it will be considered unlawful elsewhere. As Jaspers points out, “one may wonder whether it is acceptable that strike actions that simultaneously take place in several member states will be assessed completely differently depending on

the country where it is located."[108] Therefore, a certain harmonization in the field of acceptable forms of collective action would be conducive in preventing such (undesired) outcomes.

In addition, the supporters of **actions short of stoppage of work** claim that these actions **are less disturbing for the social life than full-fledge strikes**. This can be partly true, but much depends on the concrete form of action. For example, if train conductors refuse to sell and check passengers' tickets and the transportation is provided free of charge, the public is not affected and everybody gets (happily) to his destination. However, if train conductors resort to a work-to-rule policy and obey each and every rule to the letter, they create delays and trains do not run on time. Nevertheless, the disruption is still marginal compared to the situation when trains do not run at all.

Besides that, **the argument of legal certainty** is often emphasized. For example, if actions short of stoppage of work as such were recognized by law, their legal status would be clear. No one could, for instance, raise doubts about whether the categories of workers that are prohibited from taking strike action are also prohibited from taking action short of stoppage of work. As we have seen on examples of British fire-fighters or Greek air traffic controllers, currently it is not always so and the legal gap enables ambiguous interpretations. But as the ILO Committee on the Freedom of Association pointed out with regard to an air traffic control - forms of actions such as the go-slow or work-to-rule may be just as dangerous for the life, health and safety of the whole or part of the population as a regular strike.[109] This applies to all essential services. Thus, for the sake of legal clarity, it would be appropriate to give these forms of actions an explicit legal recognition and **to lay down restrictions where necessary**.[110]

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[108] Jaspers, T.: *"The Right to Collective Action in European Law"*, in *"Cross-Border Collective Actions in Europe: A Legal Challenge"*, Social Europe Series, Volume 13, edited by Dorssemont, F., Jaspers, T. and van Hoek, A., Intersentia, 2007, p. 24.

[109] See footnote 1, p. 120.

[110] These restrictions should not be excessive and should equate with the restrictions that are justified in the case of an ordinary strike, which can relate to the intended objectives of an action, specific nature or fundamental importance of certain services, state of national emergency or acute crises, procedural prerequisites, peace obligation, etc. (for more information, see footnote 1, p. 110-128, and footnote 4, 664-694).

However, some of these arguments have been also used by **the opponents** to the recognition of actions short of stoppage of work as acceptable means of putting pressure on the employer in an industrial dispute.

For example, the argument of the disruption of balance of power was used by the Dutch employers in the "free public transport" case. The employers argued that the balance of power could be easily disrupted, since this form of action brought them into a difficult position compared to a classic strike, mainly because it was uneasy to determine whether and to what extent the wages of workers could be reduced, and because of the disproportionate damage caused. In their view, the unions chose the form of action that involved "no sacrifice", which was unfair towards the employers.[111] The reference to **the principle of "fairness"** has been also made in other instances. For example, the Industrial Court in Kenya stressed that a go-slow action constituted an unfair labour practice, since **trade unions tried to maintain the advantages of striking, while attempting to avoid its disadvantages**.[112]

With regard to the disturbance for the social life and the engagement of the public in an industrial dispute, some authors even view it as an advantage on the trade unions' side. For instance, J Luski in Liberty of Modern State explained: "When trade unions seek for what they regard as justice, one of the most powerful sources of strength is the awakening of the slow and inert public to a sense of the position. Effectively to do this, in the real world, it must inconvenience the public; that awkward giant has no sense of its obligations until it is made uncomfortable. When it is aroused, if for instance, trains do not run, or coal is not mined, the public begins to have interest in the position, to call for action."[113] Of course, this book was published in 1937 and meanwhile, it has been agreed that a disruption in certain sectors is unacceptable. But in the sectors, which are vital for the every-day life of community, i.e. where the life, health or safety of the whole or part of the population can be endangered (essential services), or where an action can have severe impacts on other vital functions (services of general public interest),[114] **the major disruption can be prevented by introducing a minimum operational service**. The ILO Committee for

[111] See Amsterdam Court judgment, section 3.3., p. 34-36.
[112] See Kenya Industrial Court judgment, section 3.1., p. 24-25.
[113] See footnote 91, p. 865.
[114] See footnote 25, p. 20-23.

Freedom of Association draw a broad (non-exhaustive) list of sectors, where a minimum service can be established, which provides sufficient safeguards for the protection of the public in the case of an industrial dispute.[115]

Moreover, concerning actions short of stoppage of work, the British courts developed **the concept of** "**implied terms of the employment contract**", which contains certain logic and in my view deserves to be mentioned. Basically, this concept states that besides explicit obligations laid down in the employment contract, the employment contract contains also implicit obligations, for example, an implicit duty of a worker "to perform work according to his best knowledge and skills". Thus, if a worker purposefully fails to exact work to his full working capacity (go-slow), he violates this implied obligation arising from his employment contract. The same goes with a work-to-rule, where a worker violates the implied obligation "to obey lawful instructions in a reasonable way", "to promote, rather than frustrate employer's commercial interests" or "not to willfully disrupt the operation of an undertaking".

I agree with the view that an employment contract contains so-called "implied terms". I agree with the duty of mutual loyalty between an employer and employee, and with the idea that all rights and duties arising from the employment contract, either on the side of an employer or on the side of an employee, should be exercised in "good faith" and not to the detriment of the other party of the contract. However, I also believe that this obligation is two-sided and not absolute. It does not imply that every request of an employer has to be fulfilled - the instructions must be reasonable and they must be made in "good faith", too. If employees are, for instance, overloaded with work and an employer abuses his right to assign work, then he also violates the implied terms of the employment contract "to ensure healthy working conditions" and "to protect the working capacity of his employees in a long term". In such a case, an employer cannot invoke the violation of the implied terms of the employment contract by the employees, simply because he himself does not adhere to them. A different outcome would be contrary to natural justice.

[115] See footnote 1, p. 17-22.

Conclusions

The aim of this thesis was to examine whether actions short of stoppage of work are protected by the right to strike as enshrined in a number of international and regional instruments, and/or whether they should be. It tempted to answer a question, whether national legislators and judges are inclined to consider actions short of stoppage of work as acceptable means of exerting pressure on the employer in an industrial dispute and what their argumentation is.

The findings of this thesis show that there is no universal accord on this matter. For example, the ILO Committee on Freedom of Association considers certain forms of actions short of stoppage of work as "strike actions", but the European Committee of Social Rights stays silent on this matter. So far, it is mainly the domestic law which determines the limits and national arrangements vary considerably. For instance, in France, Belgium, Poland and Slovakia, only actions consisting of the stoppage of work are covered by the notion of "strike", whereas in Israel and New Zealand, virtually any action of workers (which meets the general requirements of collective action) can amount to a "strike". In other countries, for example Japan or Sweden, actions short of stoppage of work are not regarded as falling under the notion of "strike", but nevertheless, are considered lawful means of applying pressure on the employer in an industrial dispute.

Moreover, what we can see in a number of countries is the significant role of the judiciary in determining the scope of permissible forms of action. This is particularly evident in countries, where the statutory definition of "strike" is absent, for example in Belgium, France, Germany, or the Netherlands. In addition, we can observe certain tendency of the national courts to extend the scope of acceptable forms of actions. This, however, only means that the legality of such actions is not denied per se (solely on the ground of the form of action), but all circumstances of the case are examined by the courts.[116]

[116] Various national arrangements lay down different requirements (for instance in the Netherlands, the proportionality is examined; in Germany, the proportionality and fairness is assessed; in Spain, the non-abusive nature of the action must be proved, etc.)

With regard to the question whether national courts are inclined to accept actions short of stoppage of work as lawful measures in the particular cases, it is not possible to generalize. For example, we have seen that the courts in the United Kingdom have been very reluctant to consider these actions lawful, but the United Kingdom as such is a "special category", as it does not recognize (even) the right to a (classic) strike. Concerning other European countries, based on the examples of court rulings from the Netherlands or Sweden one could assume that the courts on the continent are more inclined to accept the actions short of stoppage of work as lawful, but due to the limited number of analyzed judgments from the continental Europe, stating such conclusion would be improper. Furthermore, many judgments presented in the thesis date back to 1970-1990s, and since then, the point of view of national courts could evolve.[117]

However, we have seen cases where the courts clearly upheld the legality of such actions. Indeed, in some instances, in the light of all circumstances of the case, an action short of stoppage of work seems to be more reasonable and appropriate than a classic strike.[118] This is especially evident, where the public interest is involved, like it was for example in the case of public transport workers who had refused to sell and check passengers' tickets, but who had continued to provide transportation to the public.[119]

Although this action was opposed by the employers with the argument of "unfairness" and "disruption of the balance of power", the Amsterdam Court rightly pointed out that in determining what is reasonable and fair in the labour relations, the public interest involved in the case must be also taken into account. This relates to the idea of Ben-Israel who emphasized that nowadays the third parties often become hostages in a dispute which they have no possibility to influence.[120] Moreover, these days, the argument of "disruption of the balance of power" becomes disputable even in the private economy.

[117] For example, when the court in the Netherlands was required to decide upon the „free public transport" action in 1983, it ruled in a favour of the employer, however, in 2002 it concluded that this exceptional form of collective action was not unlawful (see section 3.3., p. 34).
[118] For example, see the go-slow action carried out in Ford's plant (section 3.1., p. 23).
[119] See section 3.3., p. 34-36.
[120] See section 1, p. 10.

We live in an era of a market-driven globalization with multinational companies and central decision-making, freedom of international capital movement, cross-border delocalization of production and increased “exit opportunities”. Due to these new world realities, the balance of power in labour relations has already been disrupted. The power of capital has strengthened, and the power of workers and unions has weakened. The question arises how this worldwide trend can be reversed and how the balance of powers between the capital and labour can be restored.

Could the recognition of actions short of stoppage of work as acceptable means of putting pressure on the employer in an industrial dispute be one of the ways how to restore the balance of power in labour relations? It certain way, it could. If nothing else, the recognition of such actions as lawful “weapons” in an industrial dispute could ease the exercise of cross-border collective actions, which are often essential in disputes relating to multinational companies. As Blanpain explains, “… the law, which is itself an element of power, cannot abstain and must intervene to restore the balance of powers between the parties.”[121] Thus, it is also a role of the (labour) law to react to these new world realities and to seek to restore the balance of powers in labour relations.

In the light of these considerations, I have arrived to the conclusion that workers and trade unions should have the possibility to “show their muscles” and to resort to actions short of stoppage of work, which can constitute an effective alternative to regular strikes. The labour law should not hinder the exercise of these actions, if they are non-abusive, reasonable and appropriate. Finally, this stance corresponds with the opinion of the ILO Committee on Freedom of Association which stated that these actions are also protected under the right to strike, restrictions of which can be justified only in certain circumstances.[122]

[121] See footnote 36, Blanpain, R. p. 256.
[122] See section 2.2., p. 13; and footnote 110.

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