

## Decision n° 2007-556 DC – August 16th 2007

Act on Social Dialogue and the Continuity of the Public Service in Regular Public Land-based Passenger Transport.

On August 6<sup>th</sup> 2007, the Constitutional Council received a referral, pursuant to paragraph 2 of Article 61 of the Constitution, for review of the constitutionality of the Act on Social Dialogue and the Continuity of the Public Service in Regular Public Land-based Passenger Transport, from Mr. Jean-Pierre BEL et al..... Senators and on August 7<sup>th</sup> 2007 from Mr Jean-Marc AYRAUT et al.... Members of the National Assembly

### THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution;

Having regard to Ordinance n° 58 1057 of November 7<sup>th</sup> 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to the Employment Code;

Having regard to the Criminal Code;

Having regard to Act n° 78-17 of January 1978 as amended on Data Processing, Data Files and Individual Liberties;

Having regard to Act n° 82-1153 of December 30<sup>th</sup> 1982 as amended on Guidelines for Domestic Transport;

Having regard to the observations of the Government registered on August 10<sup>th</sup> 2007;

Having heard the Rapporteur;

### ON THE FOLLOWING GROUNDS

1. The parties have referred for review by the Constitutional Council the Act on Social Dialogue and the Continuity of the Public Service in Regular Public Land-based Passenger Transport. The Senators contest the conformity with the Constitution of all or part of sections 2 to 5 thereof; the Members of the National Assembly contest the conformity with the Constitution of sections 2 to 6 and 9 thereof.

#### - WITH RESPECT TO SECTIONS 2 AND 3:

2. Section 2 of the statute referred for review introduces a mandatory procedure for the prevention of industrial disputes in companies entrusted with a public service mission of ensuring regular transport by land of persons for non

tourist purposes. I of this statute provides that notice to strike may only be given after prior negotiations between the employer and Trade Union representatives who are contemplating giving such notice. The organisation and holding of said negotiations shall be governed by rules fixed by a company framework agreement or by a branch agreement or, failing the reaching of an agreement by January 1<sup>st</sup> 2008, by a Decree issued by the Council of State (Conseil d'Etat). The rules applicable to the procedure for preventing industrial disputes shall, under II of this section, define the nature of the information which the Trade Unions and the employer will exchange before and during such negotiations, the conditions, in particular the timeframe, applicable to prior negotiations, the conditions for drafting the record of conclusions of such negotiations and lastly, the information of employees as to the grounds, unfolding and outcome of the prior negotiations. III of this section provides that agreements for preventing industrial disputes signed before July 1<sup>st</sup> 2007 shall be made to conform to these principles;

3. Section 3 of the statute referred for review provides that a same Trade Union organisation may not give notice of a further strike for the same reasons until the current strike notice has expired;

4. The parties making the referral contend that these provisions adversely affect the applicable law in such matters, infringe the right to strike and freedom of contract;

- As regards the powers of Parliament:

5. The parties making the referral argue that by leaving it to a decree of the Council of State to organise the procedure for the prevention of industrial disputes applicable in companies where no framework agreement has been signed and no branch agreements apply as of January 1<sup>st</sup> 2008, Parliament has failed to exercise the powers vested in it regarding the regulation of strikes;

6. Paragraphs 7 and 8 of the Preamble to the Constitution of 1946 provide : "The right to strike shall be exercised within the framework of the laws governing said right" – "All workers shall, through the intermediary of their representatives, participate in the collective determination of their working conditions and the management of companies". Under Article 34 of the Constitution, statutes determine the basic principles of Employment law and Trade Union law;

7. These provisions thus allow Parliament to have recourse to a Decree or to collective bargaining to specify the manner in which rules laid down by it for the exercising of the right to strike are to be applied;

8. In the absence of a framework agreement or a branch agreement as of January 1<sup>st</sup> 2008, a Decree of the Council of State will determine, in the conditions provided for by the Act, the organisation and unfolding of the procedure for the prevention of industrial disputes. The Act determines the purpose, provides for the contents and specifies the conditions of implementation of this Decree, which is merely required to specify the manner in which the Act is to be applied. This being the case, Parliament has not failed to exercise the powers vested in it by Article 34 of the Constitution

- As regards the right to strike

9. The Members of the National Assembly and Senators making the referral argue that the obligation to enter into negotiations before issuing notice to strike excessively restricts the right to strike in view of the duration of the imposed negotiation and the absence of any taking into account of the demands at the origin of the strike. The Senators contend for their part that the confirmation and increased importance attached to the prior mandatory intervention of representative Trade Unions before commencing a strike constitutes a serious infringement of the exercising of the right to strike;

10. Paragraph 7 of the Preamble of 1946 provides : "The right to strike shall be exercised within the framework of the laws governing said right". When including this provision, the constituent power wished to state that the right to strike is a principle of constitutional status but is not unrestricted and thus empowered Parliament to determine such restrictions by achieving the necessary conciliation between the defence of professional interests, where striking is a means to an end, and the safeguarding of the general interest, which a strike may adversely affect. In particular where public services are concerned, recognising the right to strike should not result in precluding Parliament from determining the necessary limits of such a right in order to ensure the continuity of public service which, like the right to strike, is a principle of constitutional status;

11. Firstly, the provisions of 3° of II of section 2 extend from five to thirteen days the maximum period of time which may be imposed between the time the Trade Union organisation notifies the employer of the reasons for which strike action is contemplated and the beginning of such strike action. This period of time is designed firstly to make it possible to open effective negotiations likely to avoid such strike action, and, if need be, to put together appropriate transport alternatives in order to ensure the continuity of the public service. The introduction of this extended period does not impose any unwarranted restrictions on the exercising of the right to strike ;

12. Secondly, the fact that collective action is based on demands cutting across various professions does not mean that any internal negotiations within a

company become pointless. The argument that the obligation to enter into prior negotiations before taking strike action is not reserved for collective action based on reasons peculiar to the company involved should be dismissed;

13. Thirdly, given the particular nature of the right to strike, Parliament may, as it has already done, entrust representative Trade Unions with special prerogatives as regards the starting of strike action. The part played by such organisations in the issuing of strike notice leaves every employee free to decide whether or not to take part in the strike. This argument also should therefore be dismissed;

14. Fourthly, it is up to Parliament to lay down the measures which it deems best to avoid repeated recourse to strike action of short duration which adversely affects the continuity of the public service, to ensure the necessary conciliation between the defence of professional interests, and the safeguarding of the general interest which a strike may adversely affect. The provisions of section 3 of the statute referred for review which, to this end, prohibit a same Trade Union from issuing a fresh strike notice for the same reasons before the expiry of the previous period of notice, do not impose any excessive restrictions on the exercising of the right to strike;

15. The consequence of the foregoing is that sections 2 and 3 of the Act do not run counter to constitutional requirements as regards the exercising of the right to strike;

As regards freedom of contract :

16. The Members of the National Assembly making the referral consider that by requiring that all previous dispute prevention agreements be made to conform to these provisions before January 1<sup>st</sup> 2008, III of section 2 of the statute referred for review disregards the constitutional principle of freedom of contract;

17. Parliament cannot take measures likely to adversely affect contracts already lawfully entered into unless such measures are warranted by a reason of general interest, on pain of failing to comply with the requirements deriving from Articles 4 and 16 of the Declaration of the Rights of Man and the Citizen of 1789, and the principle of the participation of workers in the collective determination of their working conditions as stated in paragraph of the Preamble of 1946;

18. Parliamentary debate shows that the challenged provision is designed to render mandatory and no longer optional previous procedures designed to prevent industrial disputes, in particular those provided for in framework agreements signed with the Paris Transport Authority and the French National Railways Board. Hence, without calling in question the economy of said

agreements, the challenged provision is designed to reinforce the continuity of the public service which these companies are responsible for ensuring, while guaranteeing the respect of the principle of equality before the law. In these conditions, this provision does not unconstitutionally adversely affect the economy of contracts lawfully entered into;

- WITH RESPECT TO SECTION 4

19. I of section 4 of the statute referred for review entrusts the authorities responsible for organising transport with the task of defining service priorities in order to enable the population to go about its business in the case of a strikes or any other foreseeable disturbances of normal services. In order to ensure the continuation of such services, the authorities must determine varying service levels depending on the extent of said disturbances. A minimum level of service, corresponding to that required to meet the essential needs of the population, should ensure that there is no disproportionate infringement of rights and freedoms and also make it possible to organise transport for children going to school. II of the same section 4 provides that Transport companies shall draw up a transport plan suitable for ensuring priority services and a plan for keeping transport users informed. III requires these plans to be incorporated into operating agreements entered into by transport organising authorities and companies providing transport facilities and that current agreements be modified to take such requirements into account before January 1<sup>st</sup> 2008. IV provides that the State representative shall be able, in the event of failure by the transport organising authority to do so and formal notice to said effect remaining ineffective, to personally determine servicing priorities or to approve such plans.

20. The parties making the referral argue that, by requiring transport organising authorities to define servicing priorities in the event of a strike, these provisions disregard the powers which paragraph 7 of the Preamble of 1946 reserves for Parliament with respect to laying down rules governing the exercising of the right to strike. They contend that such provisions make it possible to "undermine in a totally disproportionate manner the right of transport employees to strike in order to satisfy a multitude of rights, principles and objectives not all of which are of constitutional status". They argue that such measures infringe the principle of equality between all transport users and that servicing priorities would not be defined in an identical manner throughout the territory, that the same holds good for transport companies in that they would favour major companies, and finally that they adversely affect the self-government of territorial communities by placing them under the control of a representative of the State;

21. Firstly, section 4 of the statute referred for review, which provides for determining servicing priorities and transport plans suitable for meeting needs is

not aimed at nor does it result in regulating the right to strike. Hence the arguments based on the infringement of paragraph 7 of the Preamble of 1946 are inoperative;

22. Secondly, the principle of equality does not preclude Parliament from treating different situations in different ways, nor from derogating from the principle of equality in the general interest provided that in each case the resulting difference of treatment is directly related to the purpose of the statute providing for such different treatment;

23. Far from infringing the principle of equality, the challenged provisions, which are designed to ensure the continuity of public service in certain land-based transport services throughout the territory, will in fact prevent just such an infringement of the equality of users having recourse to such transport services. They will not result in penalising small and medium sized transport companies once they do not derogate from rules guaranteeing the principle of equality before public requirements. In all events it is incumbent upon the competent administrative and judicial authorities to ensure respect for the principle of equality and free competition in delegations of public services and public procurement contracts entered into with the organising authorities;

24. Thirdly, under the final indent of Article 72 of the Constitution : "In the territorial communities of the Republic, the State representative, representing each of the members of the Government, shall be responsible for national interests, administrative supervision and compliance with the law". It is thus the task of Parliament to provide for the intervention of the State representative to remedy, under judicial supervision, difficulties arising from the failure by the competent decentralised authorities to take decisions by substituting for the latter when such a failure to take a decision is liable to adversely affect the operating of public services and the application of the law. Thus the provisions of IV of section 4 of the statute referred for review by the Constitutional Council do not run counter to Article 72 of the Constitution;

25. Section 4 of the statute referred for review is thus not unconstitutional;

#### - WITH RESPECT TO SECTION 5

26 I of section 5 of the statute referred for review provides that employers and Trade Unions shall engage in negotiations in transport companies for the purpose of signing, before January 1<sup>st</sup> 2008, a joint agreement providing for the services to be ensured in the event of traffic being disrupted or strike action. This agreement shall in particular establish "the categories of staff and their numbers ... indispensable for the provision .. of each of the levels of service provided for in the suitable transport plan". In the event of failure to reach an agreement

applicable as of January 1<sup>st</sup> 2008, Parliament has provided that a foreseeability plan shall be defined by the employer; under II of this same section 5, employees belonging to the categories of staff referred to in I are required to give their employer not less than 48 hours notice of their intention to participate in said strike action, failing which they shall be liable to disciplinary proceedings;

27. The Members of the National Assembly making the referral contend that Parliament has failed to exercise the powers vested in it when leaving it to employers and Trade Unions, and especially to employers, to designate staff "to carry out tasks needed to ensure the continuity of the public service". The Members of the National Assembly and Senators making the referral also argue that the requirement that these employees give prior notice of their intention to strike infringes the right to strike. They contend in particular that "employees wishing to participate in strike action once the latter has commenced would not be allowed to do so if they had not given the requisite 48 hours notice". The Senators are of the opinion that during this 48 hour period employers may put pressure on employees to dissuade them from striking. The Members of Parliament making the referral also contend that the disciplinary proceedings provided for in the event of employees participating in a strike without giving the requisite notice may vary from one company to another and thus be a source of inequality between employees, without this difference being justified by a reason of general interest. Lastly they consider that the requirement that employees declare their intention to strike infringes their right to privacy;

28 Firstly, Parliament is free, after having defined the rights and duties connected with working conditions and employer-employee relations, to leave it to employers and employees, or their respective organisations, to specify, in particular through collective bargaining, the means of application of the standards which it lays down. In the case in hand Parliament provided that the collective service foreseeability agreement "shall compile a list by job, position and level of skill or qualification" of the categories of staff and material resources which are "indispensable" for providing the service and determine the conditions in which, in the event of a foreseeable disruption, available staff shall be redeployed and work reorganised. Parliament has thus sufficiently delimited the scope of the authority conferred on employers and Trade Unions. In the event of failure to reach a joint agreement, it is in all events the task of the company responsible for providing public services to compile a list of the resources making it possible to ensure the continuity of the public service it is responsible for managing in the event of strike action;

29. Secondly, the duty to give prior notice imposed under said section does not apply to all employees, but merely to those whose presence is directly necessary for the provision of services. Disciplinary proceedings are solely intended to sanction failure to comply with procedural requirements provided for by

Parliament, which does not in itself render the exercising of the right to strike unlawful; they are designed to make alternative arrangements more effective in order to facilitate the redeployment of available staff for the purpose of implementing the suitable transport plan. Furthermore, contrary to the contentions of the parties making the referral, the duty to give prior notice does not preclude an employee from participating in strike action already underway and in which he had not initially intended to participate or in which he had ceased to participate, as long as he/she gives his/her employer forty eight hours notice of his/her intention to strike. The modifications thus made to the conditions for exercising the right to strike are not disproportionate in view of the purpose Parliament seeks to achieve;

30. Thirdly, the disciplinary proceedings referred to above are provided for by company internal regulations which, under Article L 122-34 of the Employment Code, determine "the general and permanent rules pertaining to discipline, and in particular the nature and degrees of disciplinary measures which may be taken by the employer". The statute, by referring to the normal rules governing disciplinary proceedings of which the application is subject to court supervision, does not as such in any way infringe the principle of equality;

31. Fourthly, under section 5, information supplied in individual declarations can only be used for "organising the service during strike action". They are covered by professional privilege and their use by for other purposes or the communication thereof to any person other than those designated by the employer as being responsible for organising the service will render the person making such use or communication liable to the penalties provided for in Article 226-13 of the Criminal Code. When the statute referred remains silent, the provisions of the Act of January 6<sup>th</sup> 1978 as referred to above will automatically apply to any possible processing of data of a personal nature. The duty to make an individual declaration is thus accompanied by guarantees such as to ensure that employees' right to privacy is not infringed;

32 Section 5 of the statute referred for review is thus not unconstitutional;

- WITH RESPECT TO SECTION 6

33. Section 6 of the statute referred for review contains two paragraphs. I enables parties to an industrial dispute to designate a mediator at the outset of the strike in order to further the amicable settlement of the dispute. II provides that, after eight days of strike action, the employer or a representative Trade Union or the mediator, if one has been designated, may decide to organise a consultation of workers by the company, open to all the workers concerned by the reasons given in the strike notice, as to the continuation of the strike action.

34 The Members of the National Assembly making the referral claim that the consultation provided for in the second paragraph does not constitute " a necessary limitation of the exercising of the right to strike". They also argue that it confers upon a private individual police powers;

35 Section 6 merely provides for the possibility of organising a consultation as to the continuation of strike action. It specifies that this consultation is to be organised in conditions ensuring the secrecy of the ballot. It does not confer any police powers on a private individual. Furthermore Parliament has expressly stated that the result of the consultation "does not affect the exercising of the right to strike", since said result does not condition the continuation or cessation of the industrial action;

36 Section 6 of the statute does thus not infringe the right to strike nor any other principle of constitutional status;

- WITH RESPECT TO ARTICLE 9

37 Indent 1 of section 9 of the statute referred for review provides "In the event of failure to implement the suitable transport plan or the passenger information plan provided for in section 4, the transport organising authority shall require the company ensuring the transport, when it is directly responsible for said failure, to refund in their entirety passengers' tickets on the basis of the length of time such plans have failed to be put into effect;

38 The Members of the National Assembly making the referral argue that these provisions disregard the principle of self-government of territorial communities;

39 Article 4 of the Declaration of 1789 proclaims : "Liberty consists in being able to do anything which does not harm others: thus the exercise of the natural rights of every man has no bounds other than those which ensure to other members of society the enjoyment of these same rights". Article 34 of the Constitution provides that statutes shall determine the basic principles of the self-government of territorial communities, their powers and revenue, together with those of civil and commercial obligations. Lastly although under Article 72 of the Constitution, territorial communities "shall be self-governing through elected councils", each of them shall act "in the conditions provided for by statute";

40 The challenged provisions of section 9 of the statute referred for review merely implement the principle of responsibility which derives from Article 4 of the Declaration of 1789. They do not infringe the self-government of territorial

communities and do not run counter to any other principle or rule of constitutional status;

41 The Constitutional Council is not required proprio motu to review any other question of conformity with the Constitution,

**HELD**

Article 1 - Sections 2 to 6 and section 9 of the Act on Social Dialogue and the Continuity of the Public Service in Regular Public Land-based Transport are not unconstitutional

Article 2 - This decision shall be published in the Journal officiel of the French Republic

Deliberated by the Constitutional Council sitting on August 16th 2007 and composed of Mr Jean-Louis DEBRE, President, Messrs Guy CANIVET, Renaud DENOIX de SAINT MARC, Olivier DUTHEILLET de LAMOTHE and Valéry GISCARD d'ESTAING, Mrs Jacqueline de GUILLENCHMIDT, Messrs Pierre JOXE and Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Mr Pierre STEINMETZ