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Proposal for a

COUNCIL REGULATION

**on the exercise of the right to take collective action within the context of the freedom of
establishment and the freedom to provide services**

(Text with EEA relevance)

{SWD(2012) 63}
{SWD(2012) 64}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

General context

In its judgments in the Viking-Line¹ and Laval² case the Court of Justice for the first time recognised that the right to take collective action, including the right to strike, as a fundamental right forms an integral part of the general principles of EU law the observance of which the Court ensures³. It also explicitly stated that since the European Union has not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include improved living and working conditions, proper social protection and dialogue between management and labour⁴. Moreover, it equally acknowledged that the right to take collective action for the protection of workers constitutes a legitimate interest, which, in principle, justifies restrictions on the fundamental freedoms guaranteed by the Treaty. The protection of workers is thus one of the overriding reasons of public interest recognised by the Court⁵.

Despite this clarification, the Court rulings triggered a wide-ranging, intense debate on their consequences for the protection of the rights of posted workers, and more generally the extent to which trade unions can continue to protect workers' rights in cross-border situations. In particular, they sparked controversy on the adequacy of existing EU rules to protect the rights of workers in the context of the freedom to provide services and the freedom of establishment⁶.

This debate has attracted a wide range of stakeholders including the social partners, politicians, legal practitioners and academics. While some participants in the debate welcomed the rulings as a needed clarification of the Internal Market rules, many perceived the rulings of the Court as acknowledging the primacy of economic freedoms over the exercise of fundamental rights and entailing the risk of, if not a licence for, 'social dumping' and unfair competition. A particular aspect emphasised by the critics has been that the Court, while recognising that the right to take collective action, including the right to strike, as a fundamental right forms an integral part of the general principles of EU law, nevertheless explicitly acknowledged that 'the exercise of that right may none the less be subject to certain restrictions'⁷. The latter would in particular hamper the ability of trade unions to take action to protect workers' rights.

¹ Judgment 11.12.2007, case C-438/05.

² Judgment 18.12.2007, case C-341/05.

³ Points 44 (Viking-Line) and 91 (Laval).

⁴ Points 79 (Viking-Line) and 105 (Laval).

⁵ Point 77 (Viking-Line); cf. point 103 (Laval).

⁶ Report on the joint work of the European social partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases, 19 March 2010.

⁷ Last part of the first sentence of point 44 (Viking-Line) and 91 (Laval).

According to Professor Monti⁸, the Court rulings in 2007 and 2008⁹ have exposed the fault lines that run between the Single Market and the social dimension at national level. They ‘revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level’. He likewise pointed out that ‘the revival of this divide has the potential to alienate from the Single Market and the EU a segment of public opinion, workers’ movements and trade unions, which has been over time a key supporter of economic integration’.

The Lisbon Treaty

According to Article 3(3) of the Treaty on European Union, the internal market shall work towards a highly competitive social market economy, aiming at full employment and social progress. In defining and implementing its policies and activities, the European Union must take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection and the fight against social exclusion¹⁰. Moreover, with the Treaty of Lisbon, the enshrinement of fundamental rights in primary law has been strengthened by the fact that the Charter of Fundamental Rights of the European Union now has the same legal value as the Treaty¹¹.

The social dimension is thus a core component of the internal market, which cannot function properly without a strong social dimension and the support of citizens¹².

The Court of Justice has also acknowledged that the Union has not only an economic but also a social purpose. The rights under the provisions of the Treaty on the Functioning of the European Union (TFEU) on the free movement of goods, persons, services and capital have thus to be implemented in accordance with the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 151 TFEU, inter alia, improved living and working conditions, proper social protection and dialogue between management and labour.

Furthermore, under Article 152 TFEU, the Union aims to recognise, promote and further strengthen the role of social partners at EU level, and to facilitate dialogue between them, taking account of the diversity of national systems and respecting the autonomy of social partners.

In its Solemn Declaration of 18/19 June 2009 on workers’ rights, social policy and other issues, the European Council also reiterated that the Treaties as modified by the Treaty of Lisbon provide for the European Union to recognise and promote the role of social partners.

The right to collective bargaining — right to take collective action — right or freedom to strike

⁸ Report ‘A new strategy for the single market’ to the President of the Commission, 9 May 2010, p. 68.

⁹ Apart from the already mentioned Viking-Line and Laval rulings, see also the Rüffert and Commission v Luxembourg case.

¹⁰ Article 9 TFEU.

¹¹ Article 6 TEU.

¹² Opinion of the European Economic and Social Committee on ‘The Social Dimension of the Internal Market’ (own initiative opinion) by Mr Janson, OJ 2011 C44/90.

Even if the relevant instruments may not always explicitly refer to the right or freedom to strike, the right to take collective action, which is the corollary of the right to collective bargaining, is recognised by various international instruments which the Member States have signed or cooperated in¹³. It is included in instruments developed by those Member States at EU level¹⁴ and in the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000¹⁵, as adopted at Strasbourg on 12 December 2008¹⁶. It also enjoys constitutional protection in a number of Member States.

In this context, Article 28 of the Charter of Fundamental Rights of the European Union expressly recognises the right to collective bargaining, which, in cases of conflicts of interest, includes the right to take collective action to defend interests, including strike action¹⁷.

According to the European Court of Human Rights, the right to collective bargaining and to negotiate and enter into collective agreements constitutes an inherent element of the right of association, i.e. the right to form and join trade unions for the protection of one's interests, as set out in Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁸.

The European Court of Human Rights¹⁹ has equally acknowledged that, in the area of trade union freedom, in view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the wide degree of divergence between national systems in this field, the Contracting States enjoy a wide margin of appreciation as to how the freedom of trade unions to protect the occupational interests of their members may be secured. However, it notes that this margin is not unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with the freedom of association as protected by Article 11 of the European Convention on Human Rights (ECHR).

However, as recognised by the Court of Justice and the European Court of Human Rights²⁰, the right to strike is not absolute and its exercise may nonetheless be subject to certain restrictions, which may also result from national constitutions, law and practices. As reaffirmed by Article 28 of the Charter, it is to be exercised in accordance with European Union law and national laws and practices.

Therefore, trade unions play an important role in this respect and should, as confirmed by the Court of Justice, continue to be able to take action to protect workers' rights, including the

¹³ Such as the European Social Charter, signed at Turin on 18 October 1961 — to which, moreover, express reference is made in Article 151 TFEU — and Convention No 87 of 9 July 1948 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise.

¹⁴ Such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 151 TFEU.

¹⁵ OJ C 364, 2000, p. 1.

¹⁶ Cf. Article 6 of the Treaty on European Union.

¹⁷ By the general reference to the Charter in Article 6 TEU the right to collective bargaining is thus now expressly incorporated in primary law (cf. Opinion AG Trstenjak in case C-271/08, *Commission v Germany*, point 80).

¹⁸ Judgment ECHR 12 November 2008, *Demir*, points 153/154 with 145.

¹⁹ Judgment ECHR, 27 April 2010, case of *Vördur Olafsson v Iceland*, point 74/75.

²⁰ See for instance judgment 21.4.2009, *Enerji Yapi-Yol Sen v Turkey* (68959/01), point 32.

possibility of calling their members out on strike and ordering boycotts or blockades to protect the interests and rights of workers and ensure the protection of jobs or terms and conditions of employment, provided this is done in compliance with European Union and national law and practice.

Economic freedoms — restrictions — Protection of workers' rights

The freedom of establishment and the freedom to provide services are part of the fundamental principles of EU law. A restriction on those freedoms is, according to the case law of the Court, warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest. If that is the case, it must be suitable for attaining the objective which it pursues and not go beyond what is necessary in order to attain it.

The protection of workers, in particular their social protection and the protection of their rights, as well as the desire to avoid disturbances on the labour market have been recognised as constituting overriding reasons of general interest justifying restrictions on the exercise of the fundamental freedoms of EU law.

Moreover, the Court has recognised that Member States enjoy a margin of appreciation and discretion when it comes to the prevention of obstacles to freedom of movement arising from the conduct of private actors.

In summary, economic freedoms and fundamental rights, as well as their effective exercise, may thus both be subject to restrictions and limitations.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

2.1. Consultation with interested parties

As indicated above, the rulings of the Court in the Viking-Line, Laval, Rüffert and Commission v Luxembourg cases in 2007-2008 have fuelled an intense debate in particular on the consequences of the freedom to provide services and freedom of establishment for the protection of workers' rights and the role of trade unions in protecting workers' rights in cross-border situations.

The European trade unions see these judgments as anti-social. They want the legislation to be amended to clarify the legal situation and prevent judges ruling against what they perceive as workers' interests in the future. To this end, they have put forward two key demands for:

- a revision of the Posting of Workers Directive (Directive 96/71/EC) to include a reference to the principle of 'equal pay for equal work' and allow the 'host Member State' to apply more favourable conditions than the core terms and conditions of employment in accordance with Article 3(1) of the Directive;
- the introduction of a 'Social Progress Protocol' in the Treaty to give priority to fundamental social rights over economic freedoms.

Other stakeholders take a different view. BusinessEurope has welcomed the clarification the Court's rulings have brought and does not consider that the Directive needs revising. Many

Member States have expressed similar views. Some Member States (SE, DE, LU and DK) have modified their legislation in order to conform to the rulings.

In October 2008, the European Parliament adopted a resolution calling on all Member States to properly enforce the Posting of Workers Directive and asking the Commission not to exclude a partial review of the Directive after assessing in depth the problems and challenges²¹. At the same time, it emphasised that the freedom to provide services as ‘one of the cornerstones of the European project should be balanced, on the one hand, against fundamental rights and the social objectives of the Treaties and on the other hand, against the right of the public and social partners to ensure non-discrimination, equal treatment and the improvement of living and working conditions’²². On 2 June 2010, the Employment and Social Affairs Committee organised a hearing of three experts (representing the Commission, ETUC and BE) where S&D, Left and Green MEPs called for action to be taken by the Commission very much along the same lines as proposed by ETUC.

On a joint invitation from Commissioner Špidla and Minister Bertrand (acting as President of the Council) at the October 2008 Forum, the European social partners agreed to carry out a joint analysis of the consequences of the Court rulings in the context of mobility and globalisation. In March 2010²³, the European Social Partners delivered a report on the consequences of the ECJ rulings. The document exposed their wide divergences. While Business Europe is opposed to revision of the Directive (but accepts the need for clarification of certain aspects related to enforcement), ETUC wants it thoroughly amended.

In 2010, the European Economic and Social Committee adopted an opinion on the ‘Social Dimension of the Single Market’²⁴, asking for more effective implementation of Directive 96/71 and expressing support for a Commission initiative to clarify the legal obligations for national authorities, business and workers, including a partial revision of the Directive. The opinion further encourages the Commission to exempt the right to strike from the Single Market and to explore the idea of a ‘European Social Interpol’, supporting the activities of the labour inspectorates of the various Member States.

Recognising the controversy fuelled by the Court rulings in his report ‘A new Strategy for the Single Market’, Professor Monti recommended to:

- Clarify the implementation of the Posting of Workers Directive and strengthen dissemination of information on the rights and obligations of workers and companies, administrative cooperation and sanctions in the framework of the free movement of persons and the cross-border provision of services;
- Introduce a provision to guarantee the right to strike, modelled on Article 2 of Council Regulation (EC) No 2679/98 (so-called *Monti II Regulation*) and a mechanism for informal resolution of labour disputes concerning the application of the Directive.

²¹ Resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)), points 25 and 30.

²² Point 1; see also points 17 and 31.

²³ The text was presented during the Oviedo conference in March 2010, organised by the Spanish Presidency. The debates once again showed divided opinions among stakeholders.

²⁴ Opinion 2011/C 44/15.

In October 2010, the Commission launched a public consultation on how to reinvigorate the Single Market with its Communication ‘Towards a Single Market Act — For a highly competitive social market economy — 50 proposals for improving our work, business and exchanges with one another’²⁵. It put forward two proposals (numbers 29 and 30) designed to restore confidence and support among citizens, one on the balance between fundamental social rights and economic freedoms and one on the posting of workers.

- Proposal 29: ‘Pursuant to its new strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, the Commission will ensure that the rights guaranteed in the Charter, including the right to take collective action, are taken into account. ...’
- Proposal 30: ‘In 2011, the Commission will adopt a legislative proposal aimed at improving the implementation of the Posting of Workers Directive, which is likely to include or be supplemented by a clarification of the exercise of fundamental social rights within the context of the economic freedoms of the Single Market.’

The public consultation showed huge interest and support for these actions from unions, individual citizens and NGOs.

Proposal 29 on the effective implementation of the Charter of Fundamental Rights and the social impact assessment is considered one of the most important issues by the 740 respondents (out of the more than 800).

The European social partners responded to the consultation along their established lines. ETUC reiterated its request for a ‘Social Progress Protocol’ amending the Treaty and maintained that the Commission should not only clarify and improve the implementation of the Posting of Workers Directive, but also thoroughly revise it. BusinessEurope supported the Commission’s approach for better implementation and enforcement of the existing Directive.

The idea of a so-called Monti II regulation was seen by ETUC as a positive step in the right direction (and also expressly mentioned in several replies from national trade unions) in addition to a Social Progress Protocol. BusinessEurope’s contribution does not make a clear statement, but seems to question its added value, clearly indicating that it should not call into question the exclusion of the right to strike from EU competences.

Following the wide-ranging public debate and on the basis of the contributions made during the public debate, the Commission adopted the Communication ‘A Single Market Act — Twelve levers to boost growth and strengthen confidence’ on 13 April 2011²⁶. Legislative initiatives regarding the posting of workers are among the twelve key actions included under the social cohesion chapter: ***‘legislation aimed at improving and reinforcing the transposition, implementation and enforcement in practice of the Posting of Workers Directive, which will include measures to prevent and sanction any abuse and circumvention of the applicable rules, together with legislation aimed at clarifying the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights’.***

²⁵ COM(2010) 608 final/2, 11.11.2010.

²⁶ COM(2011) 206 final.

Following the adoption of the Single Market Act, the European Parliament adopted three resolutions on 6 April 2011²⁷. However, unlike the more general issue of mobility (and portability of pension rights), the posting of workers was not among the key priorities identified.

In contrast, the posting of workers and the economic freedoms do figure among the priorities identified by the European Economic and Social Committee²⁸.

In its Conclusions on the priorities for relaunching the Single Market, the Council:

‘14. CONSIDERS that proper implementation and enforcement of the Posting of Workers Directive can contribute to a better protection of posted workers’ rights and ensure more clarity regarding the rights and obligations of service providing businesses as well as national authorities and can help to prevent circumvention of the applicable rules; moreover CONSIDERS that more clarity in the exercise of the freedom of establishment and the freedom to provide services alongside fundamental social rights is necessary;’²⁹

The Conference on Fundamental Social Rights and the Posting of Workers (27-28 June 2011) gathered ministers, social partners, representatives of EU institutions and academics in order to discuss the regulatory options available and the possible content of legislative initiatives and to help identify feasible solutions³⁰. It was intended to contribute, through an open constructive debate, to a more shared vision and to present the results of recent studies.

Moreover, the Krakow declaration³¹ reiterated that the cross-border provision of services and the mobility of posted workers are essential elements of the Single Market. Facilitating the temporary cross-border provision of services should go hand in hand with guaranteeing an adequate and appropriate level of protection for workers posted to another Member State to provide these services.

2.2 Impact assessment

In line with its policy on better regulation, the Commission conducted an impact assessment of policy alternatives based on an external study³².

The problem drivers identified are grouped around four headings, problem 4 ('tensions between the freedom to provide services/establishment and national industrial relations') being directly relevant for the present proposal. The rulings of the Court, interpreting the Directive and Treaty provisions, in cases Viking and Laval, exposed underlying tensions between the freedoms to provide services and of establishment, and the exercise of fundamental rights such as the right of collective bargaining and the right to industrial action.

²⁷ On a Single Market for Enterprises and Growth [2010/2277(INI)], a Single Market for Europeans [2010/2278(INI)], and on Governance and Partnership in the Single Market [2010/2289(INI)].

²⁸ Opinion Ms Federspiel, Mr Siecker and Mr Voles, INT 548, 15 March 2011.

²⁹ 3094th Competitiveness Council meeting, 30 May 2011.

³⁰ See for more information, keynote speeches and related documents: <http://ec.europa.eu/social/main.jsp?langId=en&catId=471&eventsId=347&furtherEvents=yes>.

³¹ Single Market Forum, Krakow, 3-4 October 2011, in particular the fifth paragraph of the Declaration and point 5 of the Operational conclusions.

³² Multiple Framework Contract VT 2008/87, *Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of services*, (VT/2010/126).

In particular, the rulings were perceived by trade unions as imposing a screening of industrial action by EU or national courts whenever such action could affect or be detrimental to the exercise of the freedom to provide services or the freedom of establishment. Such perceptions have led in the recent past to negative "spill-over" effects as illustrated by a few transnational industrial disputes. The importance of this problem has been highlighted in the 2010 Report of the ILO Committee of Experts on the Application of Conventions and Recommendations which expressed 'serious concern' about the practical limitations on the effective exercise of the right to strike imposed by the CJEU rulings. The right to strike is enshrined in ILO Convention No. 87, which is signed by all EU Member States.

The policy options to address the drivers underlying this problem contain a baseline scenario (option 5), a non-regulatory intervention (option 6) and a regulatory intervention at EU level (option 7).

Options 6 and 7 were assessed against the baseline scenario in view of their capacity to address the drivers underlying the identified problem 4 and to achieve the general objectives, namely the sustainable development of the Single Market, based on a highly competitive social market economy, the freedom to provide services and promotion of a level playing field, the improvement of living and working conditions, respect for the diversity of industrial relation systems in the Member States, and the promotion of dialogue between management and labour. In addition, they were examined against the more specific and related operational objectives in particular improving legal certainty as regards the balance between social rights and economic freedoms, in particular in the context of the posting of workers. Based on the Strategy for the effective implementation of the Charter of Fundamental Rights of the European Union, the Impact Assessment was used to identify fundamental rights liable to be affected, the degree of interference with the right in question and the necessity and proportionality of the interference in terms of policy options and objectives.³³

The Impact Assessment identified negative economic and social impacts of the baseline scenario. Continuing legal uncertainty could lead to a loss of support for the single market by an important part of the stakeholders and create an unfriendly business environment including possibly protectionist behaviour. The risk of damage claims and doubts regarding the role of national courts could prevent trade unions from exercising their right to strike. This would create a negative impact on the protection of workers' rights and Article 28 of the Charter of Fundamental Rights of the European Union. Option 6 and 7 would have positive economic and social impacts since they reduce the scope for legal uncertainty. The positive impact of option 7 would be more significant since a legislative intervention (Regulation) provides for more legal certainty than a soft law approach (option 6). An alert mechanism would have further positive impact. In addition, a legislative intervention would express a more committed political approach by the Commission to respond to a problem that is seen with great concern by the trade unions and parts of the European Parliament.

The preferred option to address the drivers underlying problem 4 is option 7. It is considered the most effective and efficient solution to address the specific objective 'reducing tensions between national industrial relation systems and the freedom to provide services' and the most coherent for the general objectives. It is therefore in essence the basis for the present proposal.

³³ COM(2010) 573 final, p. 6-7

The draft impact assessment was scrutinised by the Impact Assessment Board (IAB) twice and its recommendations for its improvement were integrated within the final report. The opinion of the IAB as well as the final Impact Assessment and its executive summary are published together with this proposal.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. General context — summary of the proposed action

The Court of Justice cases referred to above exposed the fault lines that run between the Single Market and the social dimension in two ways. Firstly, the cases brought to light the need to ensure setting the right balance between the exercise of the right to take collective action by trade unions, including the right to strike, and the freedom of establishment and the freedom to provide services, economic freedoms enshrined in the Treaty. Secondly, they further highlighted the question whether the Posting of Workers Directive still provided an adequate basis for protecting workers' rights given divergent social and employment conditions among Member States. In particular, its application and enforcement in practice were questioned.

As acknowledged in Professor Monti's report mentioned above, the two issues are closely linked, but require different strategies to balance Single Market and social requirements. As highlighted in the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, people must be able to effectively enjoy their rights enshrined in the Charter when they are in a situation governed by Union law.³⁴ Clarification of these issues should also not be left to future litigation before the ECJ or national courts³⁵. Moreover, the right or freedom to strike should not be a mere slogan or a legal metaphor.

Therefore, the present proposal is part of a package. Together with the proposal for an Enforcement Directive, it constitutes a targeted intervention to clarify the interaction between the exercise of social rights and the exercise of the freedom of establishment and to provide services enshrined in the Treaty within the EU in line with one of the Treaty's key objectives, a 'highly competitive social market economy', without however reversing the case law of the Court.

The present proposal aims to clarify the general principles and applicable rules at EU level with respect to the exercise of the fundamental right to take collective action within the context of the freedom to provide services and the freedom of establishment, including the need to reconcile them in practice in cross-border situations. Its scope covers not only the temporary posting of workers to another Member State for the cross-border provision of services but also any envisaged restructuring and/or relocation involving more than one Member State.

3.2. Legal basis

Article 352 TFEU (reserved for cases where the Treaties do not provide the necessary powers to implement actions necessary, under the policies defined in the Treaties, to attain one of the objectives of the Treaties) is the appropriate legal basis for the proposed measure.

³⁴ COM(2010) 573 final

³⁵ The Monti report referred to above, p. 69.

A Regulation is considered to be the most appropriate legal instrument to clarify the general principles and applicable rules at EU level in order to reconcile the exercise of fundamental rights with the economic freedoms in cross-border situations. The direct applicability of a Regulation will reduce regulatory complexity and offer greater legal certainty for those subject to the legislation across the Union by clarifying the applicable rules in a more uniform way. Regulatory clarity and simplicity is particularly important for SMEs. This could not be achieved with a Directive, which, by its very nature, is only binding as to the result to be achieved, but leaves to the national authorities the choice of forms and methods.

3.3. Subsidiarity and proportionality principles

Given the lack of explicit provision in the Treaty for the necessary powers, the present Regulation is based on Article 352 TFEU.

Article 153(5) TFEU excludes the right to strike from the range of matters that can be regulated across the EU by way of minimum standards through Directives. However, the Court rulings have clearly shown that the fact that Article 153 does not apply to the right to strike does not as such exclude collective action from the scope of EU law.

The objective of the Regulation, to clarify the general principles and EU rules applicable to the exercise of the fundamental right to take industrial action within the context of the freedom to provide services and the freedom of establishment, including the need to reconcile them in practice in cross-border situations, requires action at European Union level and cannot be achieved by the Member States alone.

Moreover, in line with the Treaty, any initiative in this area will need to respect not only the autonomy of social partners but also the different social models and diversity of industrial relation systems in the Member States.

As regards the contents of the proposal, respect for the subsidiarity principle is further ensured by recognition of the role of national courts in establishing the facts and ascertaining whether actions pursue objectives that constitute a legitimate interest, are suitable for attaining these objectives, and do not go beyond what is necessary to attain them. It equally recognises the importance of existing national laws and procedures for the exercise of the right to strike, including existing alternative dispute-settlement institutions, which will not be changed or affected. Indeed, the proposal does not create a mechanism for the informal resolution of labour disputes at national level with a view to introducing some form of pre-jurisdictional control over union actions (as suggested in the 2010 Monti report), and restricts itself to indicating the role of alternative informal resolution mechanisms that exist in a number of Member States.

This proposal does not go beyond what is necessary to achieve the envisaged objectives.

3.4. Detailed explanation of the proposal

3.4.1. Subject matter and so-called Monti clause

Apart from describing the objectives of the Regulation, Article 1 contains what is often referred to as the ‘Monti clause’. It combines the text of Article 2 of Council Regulation No

2679/98³⁶ and Article 1(7) of the Services Directive³⁷. It is also in line with the text of similar provisions in, for example, in the recent proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast Brussels I)³⁸ and the recently adopted Regulation on macroeconomic imbalances³⁹.

3.4.2. Relationship between fundamental rights and economic freedoms — general principles

While reiterating that there is no inherent conflict between the exercise of the fundamental right to take collective action and the freedom of establishment and the freedom to provide services enshrined in and protected by the Treaty, with no primacy of one over the other, Article 2 recognizes that situations may arise where their exercise may have to be reconciled in cases of conflict, in accordance with the principle of proportionality in line with standard practice by courts and EU case law⁴⁰

The general equality of fundamental rights and the freedoms of establishment and to provide services in terms of status implies that such freedoms may have to be restricted in the interest of protection of fundamental rights. However, it equally implies that the exercise of such freedoms may justify a restriction on the effective exercise of fundamental rights.

In order to prevent trade unions from being effectively hindered or de facto even prohibited from exercising effectively their collective rights due to the threat of claims for damages on the basis of the Viking-Line ruling on the part of employers invoking cross-border elements⁴¹ it should be recalled that in situations where cross-border elements are lacking or hypothetical, a collective action shall be assumed not to constitute a violation of the freedom of establishment or the freedom to provide services. The latter is without prejudice to the conformity of the collective action with national law and practices.

Indeed, such a broad risk of liability to damages on the basis of a rather hypothetical situation or one where there are no cross-border elements would render the use by trade unions of their right to strike rather difficult, if not impossible, in situations where the freedom of establishment or the freedom to provide services does not even apply.

³⁶ Council Regulation of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among Member States, OJ L337/8, 12.12.98.

³⁷ Directive 2006/123, OJ L 376/36, 27.12.2006; cf. recital 22 of Directive 96/71/EC.

³⁸ COM(2010) 748 final, 14.12.2010, Article 85.

³⁹ Article 1(3), last sentence, Regulation (EU) No 1176/2011 of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306/25 of 23.11.2011.

⁴⁰ Opinion AG Cruz Villalon in case C-515/08, dos Santos Palhota e.a., point 53. Cf Judgment ECJ in case C-438/05, Viking-Line, par. 46, case C-341/05, Laval, point 94 and case C-271/08, Commission v Germany, point 44. See also Prof. Dr. M. Schlachter's panel speech 'reconciliation between fundamental social rights and economic freedoms' <http://ec.europa.eu/social/main.jsp?langId=en&catId=471&eventsId=347&furtherEvents=yes>.

⁴¹ See for further details the report issued by the ILO Committee of Experts on this case, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_123424.pdf as well as 'The dramatic implications of Demir and Baykara', K. Ewing and J. Hendy QC, Industrial Law Journal, Vol. 39, no. 1, March 2010, p. 2-51, in particular pages 44-47.

3.4.3. *Dispute resolution mechanisms*

Article 3 recognises the role and importance of existing national practices relating to the exercise of the right to strike in practice, including existing alternative dispute settlement institutions, such as mediation, conciliation and/or arbitration. The present proposal does not introduce changes into such alternative resolution mechanisms existing at national level, nor does it contain or imply an obligation to introduce such mechanisms for those Member States not having them. However, for those Member States in which such mechanisms exist it does establish the principle of equal access for cross-border cases and provides for adaptations by Member States in order to ensure its application in practice.

The proposal does not propose a mechanism for the informal resolution of labour disputes concerning the application of the Posting of Workers Directive at national level⁴². Such a mechanism would introduce some form of pre-jurisdictional control over union actions, which not only could create or constitute an additional obstacle for the effective exercise of the right to strike but would also appear to be incompatible with Article 153(5) TFEU, which explicitly excludes legislative competences in this area at EU level.

Furthermore, in accordance with Article 155 TFEU, the proposal acknowledges the specific role of management and labour at European level, inviting them, should they so desire, to establish guidelines for the modalities and procedures of such alternative resolution mechanisms.

3.4.4. *Role of national courts*

Article 3 paragraph 4 further clarifies the role of national courts: if, in an individual case as a result of the exercise of a fundamental right, an economic freedom is restricted, they will have to strike a fair balance between the rights and freedoms concerned⁴³ and reconcile them. According to Article 52 (1) of the Charter of Fundamental Rights of the European Union, any limitation on the exercise of the rights and freedoms recognised by it must respect the essence of those rights and freedoms. Furthermore, subject to the proportionality principle, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others⁴⁴. The Court of Justice also acknowledged that the competent national authorities enjoy a wide margin of discretion in this respect. In line with the case law of the Court, a three-stage test is required where (1) the appropriateness, (2) the necessity and (3) the reasonableness of the measure in question have to be reviewed. A fair balance between fundamental rights and fundamental freedoms will in the case of a conflict only be ensured ‘when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom.’⁴⁵

⁴² As recommended in the Monti report .

⁴³ Cf. Opinion AG Trstenjak in case C-271/08, *Commission v Germany*, points 188–190. See also more generally C. Barnard, ‘Proportionality and collective action’, ELR 2011.

⁴⁴ Opinion AG Cruz Villalon in case C-515/08, *dos Santos Palhota e.a.*, point 53. Cf. judgment ECJ 12.10.2004, case C-60/03, *Wolff & Müller*, point 44.

⁴⁵ Opinion AG Trstenjak in case C-271/08, point 190.

This is without prejudice to the possibility that the Court may itself provide indications and clarifications, if need be, to a national court with respect to the elements to be taken into consideration⁴⁶.

3.4.5. Alert mechanism

Article 5 establishes an early warning system requiring Member States to inform and notify the Member States concerned and the Commission immediately in the event of serious acts or circumstances that either cause grave disruption of the proper functioning of Single Market or create serious social unrest in order to prevent and limit the potential damage as far as possible.

4. BUDGETARY IMPLICATIONS

The proposal has no implications for the EU budget.

⁴⁶ Cf. judgment 11.12.2007, case C-438/05, Viking-Line, points 80 et seq.

Proposal for a

COUNCIL REGULATION

on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 352 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the consent of the European Parliament⁴⁷,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) The right to take collective action, which is the corollary of the right to collective bargaining, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961, Conventions No 87 and No 98 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise and Collective Bargaining, and by instruments developed by those Member States at EU level, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989 and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000, as adopted at Strasbourg on 12 December 2008 which has the same legal value as the Treaties. It also enjoys constitutional protection in a number of Member States.
- (2) The right to collective bargaining and to negotiate and enter into collective agreements constitutes an inherent element of the right of association, as set out in Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention')⁴⁸.

⁴⁷ OJ C , , p. .

⁴⁸ Judgment ECHR, 12 November 2008, Demir.

- (3) The right to take collective action has also been recognised by the Court of Justice as a fundamental right which forms an integral part of the general principles of Union law the observance of which the Court ensures⁴⁹. However, the right to strike is not absolute and the exercise of that right may nonetheless be subject to certain conditions and restrictions, which may also result from national constitutions, law and practices.
- (4) As reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, the right to take collective action is to be protected in accordance with Union law and national law and practices.
- (5) In accordance with Article 152 of the Treaty on the Functioning of the European Union, the role of the social partners at Union level should be recognised and promoted, and dialogue between them facilitated, taking account of the diversity of national systems and respecting the autonomy of social partners.
- (6) Member States remain free to lay down the conditions for the existence and exercise of the social rights at issue. However, when exercising that power the Member States must comply with Union law, in particular the provisions of the Treaty on the freedom of establishment and the freedom to provide services, which are fundamental principles of the Union enshrined in the Treaty.
- (7) A restriction on those freedoms is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest. If that context, it must be suitable for attaining the objective it pursues and not go beyond what is necessary in order to attain it.
- (8) The protection of workers, in particular their social protection and the protection of their rights against social dumping, as well as the desire to avoid disturbances on the labour market have been recognised as constituting overriding reasons of general interest justifying restriction of the exercise of one of the fundamental freedoms of Union law.
- (9) Trade unions should continue to be able to take collective action to ensure and protect the interests, conditions of employment and rights of workers, provided this is done in compliance with Union and national law and practice.
- (10) Both fundamental economic freedoms and fundamental rights, as well as their effective exercise, may thus be subject to restrictions and limitations.
- (11) The exercise of the right to take collective action, including the right or freedom to strike, and the requirements relating to the freedom of establishment and the freedom to provide services may thus have to be reconciled, in accordance with the principle of proportionality, which often requires or implies complex assessments by national authorities.
- (12) Any limitation on the exercise of the rights and freedoms recognised by the Charter of Fundamental Rights of the European Union must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality,

⁴⁹ Judgments of 11 December 2007, case C-438/05, Viking-Line, point 44, and of 18 December 2007, case C-341/05, Laval, point 91.

limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

- (13) A fair balance between fundamental rights and fundamental freedoms will in the case of conflict only be ensured when a restriction imposed by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, a restriction imposed on a fundamental right by a fundamental freedom cannot go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom. In order to provide the necessary legal certainty, avoid ambiguity and prevent solutions being unilaterally sought at national level, it is necessary to clarify a number of aspects relating in particular to the exercise of the right to take collective action, including the right or freedom to strike, as well as the extent to which trade unions may defend and protect workers' rights in cross-border situations.
- (14) The key role of social partners as the primary actors in resolving disputes concerning relations between employer and employee is well-established over time and should be acknowledged. In addition, the role of non-judicial dispute resolution mechanisms, such as mediation, conciliation and/or arbitration, provided for in a number of Member States should be acknowledged and preserved.
- (15) A notification and alert mechanism should allow for an adequate and rapid exchange of information between the Member States and the Commission in situations causing serious disruption to the proper functioning of the internal market and/or inflict serious losses on the individuals or organisations affected.
- (16) This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, notably the freedom of assembly and of association (Article 12), the freedom to choose an occupation and right to engage in work (Article 15), the freedom to conduct a business (Article 16), the right to collective bargaining and action (Article 28), fair and just working conditions (Article 31), the right to an effective remedy and to a fair trial (Article 47), and has to be applied in accordance with those rights and principles.

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter

- 1. This Regulation lays down the general principles and rules applicable at Union level with respect to the exercise of the fundamental right to take collective action within the context of the freedom of establishment and the freedom to provide services.
- 2. This Regulation shall not affect in any way the exercise of fundamental rights as recognised in the Member States, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States in accordance with national law and practices. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and practices.

Article 2

General principles

The exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms.

Article 3

Dispute resolution mechanisms

1. Member States which, in accordance with their national law, tradition or practice, provide for alternative, non-judicial mechanisms to resolve labour disputes, shall provide for equal access to those alternative resolution mechanisms in situations where such disputes originate from the exercise of the right to take collective action, including the right or freedom to strike, in transnational situations or situations having a cross-border character in the context of the exercise of the freedom of establishment or the freedom to provide services, including the application of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services⁵⁰.
2. Notwithstanding paragraph 1, management and labour at European level may, acting within the scope of their rights, competences and roles established by the Treaty, conclude agreements at Union level or establish guidelines with respect to the modalities and procedures for mediation, conciliation or other mechanisms for the extrajudicial or out-of-court settlement of disputes resulting from the effective exercise of the right to collective action, including the right or freedom to strike, in transnational situations or situations with a cross-border character.
3. The modalities and procedures for out-of-court settlement may not deprive interested parties from recourse to judicial remedies for their disputes or conflicts if the mechanisms referred to in paragraph 1 fail to lead to a resolution after a reasonable period.
4. Recourse to alternative non-judicial dispute mechanisms shall be without prejudice to the role of national courts in labour disputes in the situations as referred to in paragraph 1, in particular to assess the facts and interpret the national legislation, and, as far as the scope of this Regulation is concerned, to determine whether and to what extent collective action, under the national legislation and collective agreement law applicable to that action, does not go beyond what is necessary to attain the objective(s) pursued, without prejudice to the role and competences of the Court of Justice.

⁵⁰ OJ L 18/1, 21.1.1997.

Article 4

Alert mechanism

1. Whenever serious acts or circumstances affecting the effective exercise of the freedom of establishment or the freedom to provide services which could cause grave disruption to the proper functioning of the internal market and/or which may cause serious damage to its industrial relations system or create serious social unrest in its territory or in the territory of other Member States, arise, the Member State concerned shall immediately inform and notify the Member State of establishment or origin of the service provider and/or other relevant Member States concerned as well as the Commission.
2. The Member State(s) concerned shall respond as soon as possible to requests for information from the Commission and from other Member States concerning the nature of the obstacle or threat. Any information exchange between Member States shall also be transmitted to the Commission.

Article 5

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 21.3.2012

For the Council
The President