

**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**

COM (2012) 130

Reasoned Opinion by the House of Representatives, Parliament of Malta

The Legal Basis

1. The Legal Basis for this proposal is Article 352 TFEU. Above all, Article 352 requires that it be necessary for the Union to take the action proposed. This can be regarded as an expression of the principle of subsidiarity.
2. Article 352 also provides that measures based on this article "shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation". Article 153(1) of the TFEU under Title X (Social Policy) grants the Union support and complementary power to support and complement the activities of the Member States in the social field, including under para. (f) "representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5". The Commission does not rely on this provision as the legal basis for the Regulation, but it is considered of relevance here that while Article 153(2) goes on to provide that to the above end, the European Parliament and the Council (the latter acting unanimously) may adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States, it is expressly provided in Article 153(5) that the provisions of Article 153 shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs. Hence, the attempted use of Article 352 TFEU as the legal basis for this measure.
3. The objective of the Regulation is stated by the Commission to be, while fully respecting existing national laws and traditions, that of '*clarifying*' the exercise of the right to take collective action within the context of the economic freedoms of the Single Market, in particular freedom of establishment and freedom to provide services, in the light also of the judgments of the Court of Justice in *Viking* and *Laval*. It is advanced as a case of implementing the economic freedoms also in accordance with the objectives pursued by social policy. The Commission points out that the Court had held in those cases that the right to strike is not absolute, for a balance must be struck (in the general interest of achieving the Treaty objectives), and the right is subject nonetheless to certain restrictions which may also result from national constitutions, laws and practices. Moreover, Article 28 of the Charter of Fundamental rights of the European Union provides that it is to be exercised in accordance with European Union law and national laws and practices.

The role of the national courts

4. According to the Court of Justice therefore, any restriction (imposed by a Member State) on the economic freedoms must be necessary for reasons of legitimate public interest, and proportionate. It is acknowledged that legitimate reasons include the protection of the rights of workers, and the prevention of serious disturbances to the labour market. Therefore, both economic freedoms and fundamental rights may, under certain conditions, be subject to necessary and proportionate restrictions. These principles were stated with utmost clarity by the Court of Justice.
5. However, it was always understood that it would be for the national authorities to make their own assessments and apply national and Union law case by case at national level, and therefore within the national remit, and to do so in equanimity; so that this matter is to be tested by analysis of the Regulation in order to assess whether the measure might lead to interference in the exercise of an area of national competence.

'Clarification' and 'Necessity'

6. A major consideration for the Commission in deciding to propose this Regulation is stated in the Communication to have been *legal certainty*, as well as to express the determination of the Commission to respond to the perceived problem of the tensions in European society between national industrial relations systems and the freedom to provide services. (Commission Communication, page 9).
7. It was intended that 'clarification' be made about the balance between the freedoms and social rights in order to reduce the need for further clarification through litigation before the Court of Justice or national courts (referring to the Monti Report of 9 May 2010 p.69). And the right to strike should be demonstrably real, not a slogan (Commission Communication page 10). However, in legal terms the Court of Justice had been very clear on these principles already.
8. Nevertheless, the choice of article 352 TFEU as the legal basis for the measure, as also the choice of the instrument of the Regulation, are argued by the Commission to be necessary and appropriate for clarification purposes (page 10 of the Communication).
9. It is argued by the Commission that, *in the light of the 'controversy' created by the Court judgments* referred to, this action is one that it is necessary that the Parliament and the Council should take. However, it is also the role *of the Court* to clarify Union law and to expand on its case law - and there are strong reasons why the Court should be left to do so as the occasion arises. This is the route more consonant with its own role and with Member State autonomy and flexibility, as well as loyalty. The Commission argues urgency, however, and therefore necessity for intervention by the Council and the Parliament.

10. The main question is whether action of the kind proposed by the Commission is in fact 'necessary'. Another question is whether the use of the instrument of the Regulation is necessary and proportionate to the need to have further 'clarity' about general principles. The measure could only possibly be justified by 'necessity' if
 - (a) the Union, the Member States and all interested parties could not possibly wait for the Court to elaborate or 'clarify' (as the Commission argues) such that further immediate clarification were indeed necessary as a matter of urgency and
 - (b) the proposed measure provided such further clarification (and only clarification) as was necessary of matters that require such.
11. The Preamble to the Regulation (recital 11) acknowledges that the right to take collective action, including the right or freedom to strike, and the requirements relating to the economic freedoms have to be reconciled, in accordance with the principle of proportionality, which often *requires or implies complex assessments by national authorities*. So much has been stated by the Court of Justice in the clearest of terms.
12. The purpose of such complex assessment would be to determine whether the exercise of those rights was being done in compliance with Union and national law and practice (Preamble, recital 9). What concerns us here is whether the Regulation does, as it purports, clarify as a matter of urgent necessity what Union law demands and does so without likely and disproportionate detriment to proper analysis by national authorities fully according to national law and practice and all legitimate interests, as well as taking into account Union law in general.
13. It is clear that such a complex assessment is to be, and is best, carried out at national level without additional 'outside' 'complications'. Member States must be trusted as a matter of loyalty to honour their obligations, even when the context is cross-border for that is when loyalty under the Treaties is meant to apply.
14. Further, the Regulation is just as likely to operate to the detriment of calm and proper analysis by national authorities and players seeking to act in accordance with national law and practice and having regard to all legitimate interests, as required by Union law.
15. The essence of the Regulation in terms of Objective is contained in recital 13 of the Preamble: " 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 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."

16. This is of real concern. It is considered that it indicates that a, if not *the*, primary objective and/or effect of the Regulation, under the epithet of 'clarification', is to affect what has been the prerogative of national bodies to determine, through the national legislature and Courts, tribunals, and mechanisms, whether imperative reasons of public interest (and we emphasise here that this refers to the national and nationally-perceived public interest) necessarily, reasonably and proportionately require a restriction on the exercise of the right to strike or on the exercise of the economic freedoms. Article 4 of the Regulation, in particular, can be read as the first step in the establishment of a multi-party process involving outside involvement of highly undetermined, unclear and indeterminable purpose, operation and effect, and capable of seriously affecting the application of the relevant tests, and affecting national authorities in their current roles as hitherto considered allocated and preserved by the Treaties. This reading is encouraged by recital 12, which emphasises the need to ensure that any limitations on either rights or economic freedoms *genuinely* meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". Yet in other contexts also the Court of Justice has been clear that the determination (including that of 'genuineness') rests, in the first place and without intervention, with the national courts, for they can be expected to properly apply Union law.
17. It is true that the proposed Regulation pays service to these concepts. According to Preamble recital 14, "the key role of the 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 the 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". Article 3 also refers to the role of the national courts.
18. However, in order, it is said, to achieve the primary objective of *not permitting a restriction (on the exercise of the economic freedoms - the main target of the regulation) to go beyond what is appropriate, necessary and reasonable*, the Regulation, in Article 4, would impose obligations of notification and information in situations which could cause grave disruption to the proper functioning of the internal market and/or which may cause serious damage to a member State's industrial relations system or create serious social unrest. *The Commission and other Member States are therefore to be involved in some way in ensuring that a restriction does not go beyond what is permitted'. What is unclear is how this will be ensured (including by them) once information has been provided. The purpose of Article 4 is not clear. In our view, there should have been very clear articulation of the purpose of, and follow-up to, this obligation. As it is, the Commission has in our opinion failed to satisfy the requirement of necessity.*

Applying this thinking to the Regulation:

19. We do take into account also the savings for all general principles of Union law, as per recitals 1-9 and 16. These can be coupled with Article 1, the so-called Monti clause. Nor is there objection to the *content* of the statement of general principle in Article 2. However, *what is of relevance here is that Articles 1 and 2 in effect merely repeat what the Court of Justice has said and add no value to the Court's declarations, so seem superfluous and unnecessary.* They hardly 'clarify'. They do not justify the present proposal.

20. ***It is not clear what Article 4 of the Regulation is intended to do.***
Article 4 (the alert mechanism) obliges a host Member State to “immediately” give information to the Member State of origin and /or other Member States and the Commission in specified circumstances. However, the application of this Article in practice is sure to cause difficulty, since that State has to assess whether 'serious acts or circumstances' exist, 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. All these concepts are open to interpretation, but are to be found in what is proposed as a directly applicable Regulation intended to be a clarification measure. Yet these concepts are not defined and remain open to wide interpretation. It is considered that this provision is superfluous and poses an unnecessary and uncertain obligation on Member States, with indeterminate effect or result.

21. The proposed Regulation not only fails to add to the clarity of the legal position under EU law, but is sure to affect the orderly functioning of national systems by introducing new obligations with new elements of uncertainty. This is not a necessary, or appropriate, or suitable measure.

22. The introduction (Article 3) of the concept of guidelines to be set out by the European social partners is also inappropriate and mistaken since this is an area where the national social partners enjoy, and should continue to enjoy, discretion. It is not acceptable that there be discussion at European level, including at social partner level, which has the potential to affect alternative resolution mechanisms at national level. Industrial relations systems and practices vary widely across the Member States, and this fact is reflected in the particular mechanisms relative to the resolution of industrial disputes. It is therefore right and proper to recognise that any 'deficiencies' in a national system can only, and therefore best, be identified and addressed by the parties operating and using those systems at the national level. This is a prerogative reserved to the national level and to the social partners at that level according to the industrial relations system of each Member State.

Conclusion

23. The Commission has not shown how the proposed Regulation satisfies the criteria of necessity, appropriateness or suitability, nor proportionality. The Parliament of Malta considers that the Proposal fails the test of subsidiarity since the Commission has failed to provide clear evidence of the need for legislative action by the European Union. The Commission has not adduced compelling evidence to show such necessity, nor does any emerge from its impact assessment presented with the Proposal. There is no clear evidence to show why legislative action on the right of collective action in the context of the right of establishment or the freedom to provide services is required, nor as to the benefits to be derived through the legislation as proposed, nor of the need for clarification by means of Regulation. Nor is it clear how the proposed measure will lead to a “reduction in the tensions between the national systems of industrial relations and the freedom to provide services”, which is stated to be an essential objective of the proposal. The Regulation does not clarify. It is of highly uncertain effect. It could, and is likely to, interfere with the role of the national authorities, and therefore threatens to seriously disrupt and negatively affect the good functioning of well-established systems of industrial relations in the Member States.
24. Although the proposed measure does not create new trade-dispute resolution mechanisms as such, the Parliament concludes that it offends against the principle of subsidiarity for the reasons stated above.

Therefore, Parliament has decided to file an objection on the Proposal in question and to deliver this reasoned opinion according to the procedure set out in Article 6 of Protocol No.2 on the Application of the Principles of Subsidiarity and Proportionality as annexed to the Treaty on the European Union and the Treaty on the Functioning of the European Union.

House of Representatives, Parliament of Malta
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