HOUSE OF COMMONS

President of the European Commission
European Commission
Rue de la Loi 200
1049 Brussels
Belgium

22 May 2012

Dear Mr President,

EUROPEAN UNION DOCUMENT NO. 8042/12 AND ADDENDA 1 TO 3, DRAFT 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

On 22nd May 2012, the House of Commons of the United Kingdom Parliament resolved as follows:

That this House considers that the draft Council Regulation on the exercise on the right to take collective action within the context of freedom of establishment and the freedom to provide services (European Union Document No.8042/12 and Addenda 1 to 3) does not comply with the principle of subsidiarity for the reasons set out in Chapter 1 of the First Report of the European Scrutiny Committee (HC 86-i); and, in accordance with Article 6 of Protocol (No. 2) of the Treaty of the Functioning of the European Union on the application of the principles of subsidiarity and proportionality, instructs the Clerk of the House to forward this reasoned opinion to the Presidents of the European Institutions.

I enclose the relevant extract of the report.

Yours sincerely,

Robert Rogers

Robert Rogers
Clerk of the House & Chief Executive

Robert Rogers, Clerk of the House of Commons
London SW1A 0AA T: 020 7219 1310/3758 F: 020 7219 3727

Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality

concerning

a Draft 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[1]

Treaty framework for appraising compliance with subsidiarity

1. The principle of subsidiarity is born of the wish to ensure that decisions are taken as closely as possible to the citizens of the EU. It is defined in Article 5(3) TEU:

> "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

2. The EU institutions must ensure "constant respect"[2] for the principle of subsidiarity as laid down in Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

3. Accordingly, the Commission must consult widely before proposing legislative acts; and such consultations are to take into account regional and local dimensions where necessary.[3]

4. By virtue of Article 5 of Protocol (No 2), any draft legislative act should contain a "detailed statement" making it possible to appraise its compliance with the principles of subsidiarity and proportionality. This statement should contain:

- some assessment of the proposal's financial impact;
- in the case of a Directive, some assessment of the proposal's implications for national and, where necessary, regional legislation; and
- qualitative and, wherever possible, quantitative substantiation of the reasons "for concluding that a Union objective can be better achieved at Union level".

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1 COM (2012) 130

2 Article 1 of Protocol (No. 2).

3 Article 2 of Protocol (No. 2).

The detailed statement should also demonstrate an awareness of the need for any burden, whether financial or administrative, falling upon the EU, national governments, regional or local authorities, economic operators and citizens, to be minimised and to be commensurate with the objective to be achieved.

5. By virtue of Articles 5(3) and 12(b) TEU national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol (No. 2), namely the reasoned opinion procedure.

Previous Protocol on the application of the principle of subsidiarity and proportionality

6. The previous Protocol on the application of the principle of subsidiarity and proportionality, attached to the Treaty of Amsterdam, provided helpful guidance on how the principle of subsidiarity was to be applied. This guidance remains a relevant indicator of compliance with subsidiarity. The Commission has confirmed it continues to use the Amsterdam Protocol as a guideline for assessing conformity and recommends that others do.[4]

> "For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.
>
> "The following guidelines should be used in examining whether the abovementioned condition is fulfilled:
>
> - the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
> - actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
> - action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States."[5]
>
> " The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures".

Proposed legislation

7. The content of the draft Regulation is set out in detail in the European Scrutiny Committee's Report to which this Reasoned Opinion is attached.

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4 See, respectively, pages 2 and 3 of the 2010 and 2011 Reports on Subsidiarity and Proportionality (COM(10) 547 and COM(11) 344).

5 Article 5.

Legislative objective

- *Summary*

8. The Commission's explanatory memorandum explains that 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."[6]

- *Article 2, relationship between fundamental rights and economic freedoms — general principles*

9. The Commission describes the effect of this Article as follows:

> "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 law.
>
> "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."[7]

- *Article 3, dispute resolution mechanisms*

10. The Commission describes the effect of Article 3 (1)-(3) as follows:

> "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."[8]

- *Article 3 paragraph 4, role of national courts*

11. The Commission says this paragraph:

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[6] Page 10 of the Commission's explanatory memorandum.

[7] As above, page 12.

[8] As above, page 13.

"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 others. The Court of Justice also acknowledged that the competent national authorities enjoy a wide margin of discretion in this respect."[9]

- *Article 4 - alert mechanism*

12. Article 4:

"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".[10]

Impact assessment

13. The conclusion the Commission draws from its impact assessment is summarised as follows:

"The Impact Assessment identified negative economic and social impacts of the baseline scenario. Continuing legal uncertainty could lead to a loss if 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

[9] As above, page 13..

[10] As above, page 14.

provide services' and the most coherent for the general objectives. It is therefore in essence the basis for the present proposal."

Aspects of the Regulation which do not comply with the principle of subsidiarity

14. The House of Commons considers that the draft Regulation fails to comply with the principle of subsidiarity because the Commission has failed to adduce clear evidence of necessity for EU legislative action, which should include how it will achieve its stated objectives.

15. In the House of Commons' view, necessity is a pre-requisite both for action at EU level and for conformity with the principle of subsidiarity.

16. This view is confirmed by the Commission:

> "Subsidiarity cannot be easily validated by operational criteria. The Protocol, as revised by the Lisbon Treaty, no longer mentions conformity tests, such as 'necessity' and 'EU value added'. Instead it has shifted the application mode towards the procedural aspects ensuring that all key actors can have their say. The Commission has continued to use 'necessity' and 'EU value-added' tests as part of its analytical framework and recommends the other actors to do likewise."[11]

17. Necessity for EU action has to be substantiated by evidence collated and assessed in an impact assessment, rather than by a perception of a need to act. The House of Commons considers that the Commission's explanatory memorandum and impact assessment are largely based on perceptions of a need to act, which are necessarily subjective, in contrast to objective evidence of a need to act. These perceptions appear to arise from the "wide-spread and intense debate" and "controversy"[12] about the consequences of the *Viking-Line* and *Laval* judgments of the Court of Justice, the views of the European Parliament, reports from the European Social Partners and Professor (as he then was) Mario Monti, and the Commission's own consultations. There is no clear *evidence*, as opposed to supposition, however, of why EU legislation on the right to take collective action within the context of the freedom to provide services and the freedom of establishment is necessary, or of what it will achieve.

18. This led the Impact Assessment Board (IAB), in its report of 21 December 2011, to comment that:

> "While the [Commission's] revised report presents the problem relating to the right of collective bargaining and action separately, and designs alternative policy options, it does not fully separate the set of corresponding objectives for the issue. The report still does not clearly explain why this problem is being addressed at the same time as revising the Directive on posting of workers, and fails clearly to demonstrate the *necessity* and proportionality of legislative EU action in this matter."[13]

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[11] See page 3 of the 2011 Report on Subsidiarity and Proportionality (footnote 4).

[12] Page 2 of the explanatory memorandum

[13] Page 2.

It concluded that "the evidence base to demonstrate the necessity and proportionality of further EU regulatory action ... for the right of collective bargaining and action ... remains *entirely absent*".[14]

19. In response, the Commission says "[a]s far as justified, the recommendation for improvement have been taken into account. The evidence base has been further strengthened".[15] It does not explain, however, how the evidence base has been strengthened, if at all.

20. The consequence of an absence of evidence is that the premise for EU legislation is speculative:

> "The Impact Assessment identified negative economic and social impacts of the baseline scenario. Continuing legal uncertainty *could* lead to a loss if 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".[16]

21. And that the proposed Articles 1 to 3 are either redundant or optional.[17] As the UK Government explains:

> "General principles on the relationship between collective rights and economic freedoms. Article 2 states that each must be respected – so the exercise of collective action must respect economic freedoms and the exercise of economic freedoms must respect collective action. There is no attempt to specify the relative priority of either and the approach is consistent with the CJEU case law in the Viking-Line and Laval cases. This role of national courts in applying the proportionality test as laid out by European case law is stated explicitly in Article 3, para 4. The Government regards these CJEU judgements as clear and does not see the need for clarification in a Council Regulation. The CJEU judgements are directly applicable, so while this article may not be necessary, it will not require any change to UK law or policies.
>
> "Dispute resolution mechanisms. Article 3 aims to speed up the resolution of transnational disputes by requiring that dispute resolution mechanisms which are available within Member States extend to those involved in cross-border disputes (para 1). There is no requirement for such mechanisms to be established where they are not already present. This article would be relevant to the Advisory, Conciliation and Arbitration Service (Acas) in Great Britain and to the Labour Relations Agency (LRA) in Northern Ireland. However, both Acas and the LRA are already available – on a voluntary basis - for any dispute in the UK, including those with a cross-border element. For this reason there would be no changes required to the UK system. The article also allows for European Social Partners at Union level to reach agreements about how disputes should be settled (para 2). The article makes clear that none of the alternative dispute mechanisms (including any social partner agreements) can prevent recourse to national courts in the event that the dispute is not resolved within a reasonable period

[14] Page 1.

[15] Page 17 of the impact assessment (8042/12 ADD 1).

[16] See paragraph 13 above.

[17] Explanatory Memorandum submitted by the Department for Business, Innovation and Skills on 18 April 2012.

(para 3). Acas and the LRA are voluntary services which do not prevent recourse to courts - thus the current UK system would satisfy these requirements."

Conclusion

22. In the House of Commons' opinion, the Commission confirms the primary reason for the draft Regulation when it adds to the list of justifications for EU legislation in the explanatory memorandum that: "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".[18] The confirmatory language here is to be contrasted with the speculative language above.

23. The perception of a need for the Commission to "express a more committed political approach" should not, in our view, be a replacement of evidence of necessity for the EU to act.

24. For these reasons we find that Articles 1-3 of the Regulation do not confirm with the principle of subsidiarity.

[18] See footnote 11.

1 The posting of workers and the right to take collective action

(a) (33787) 8040/12 COM(12) 131	Draft Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services
+ ADDs 1–3	Commission staff working documents: Impact assessments
(b) (33788) 8042/12 COM(12) 130	Draft 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
+ ADDs 1–3	Commission staff working documents: Impact assessments

Legal base	(a) Articles 53(1) and 62 TFEU; co-decision; QMV (b) Article 352 TFEU; unanimity; EP consent
Document originated	(Both) 21 March 2012
Deposited in Parliament	(Both) 29 March 2012
Department	Business, Innovation and Skills
Basis of consideration	(Both) EMs of 18 April 2012
Discussion in Council	No date set
Committee's assessment	Legally and politically important
Committee's decision	(a) Not cleared; further information requested (b) Not cleared, but for debate on the Floor of the House on a draft Reasoned Opinion before 22 May

Background

1.1 The freedom to provide services is one of the core elements of the EU's internal market. A 1996 Directive on the posting of workers established a legal framework for businesses to send ("post") workers from their home Member State to another (host) Member State in order to provide a service for a limited period of time. The Directive applies to three types of temporary cross-border provision:

- where an employer enters into a contract to provide services in another Member State and posts workers for that purpose;
- where an employee moves to another Member State as part of an intra-company transfer; and
- where a temporary agency worker is hired out to a business in another Member State.

1.2 The Directive seeks to facilitate the provision of cross-border services whilst also ensuring a minimum level of protection for posted workers. It does so by guaranteeing a core set of terms

and conditions of employment, as set out in laws, regulations or administrative provisions in force in the host Member State. These cover:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay, including overtime rates (but excluding supplementary occupational pension schemes);
- the conditions governing the temporary hiring out of workers;
- health, safety and hygiene at work;
- measures for the protection of pregnant or nursing women, children and young people; and
- equality of treatment between men and women and other provisions on non-discrimination.

1.3 The content of this core set of terms and conditions may also be determined by means of collective agreements which meet certain criteria (for example, they have been declared to be universally applicable in the host Member State, or are generally applicable within a particular industry or profession and apply throughout the host Member State). A number of exemptions are available and Member States may also supplement the core set of terms and conditions "in the case of public policy provisions", provided they do so on a non-discriminatory basis.

1.4 According to the Commission, the 1996 Directive "provides a significant level of protection for workers who may be vulnerable given their situation (temporary employment in a foreign country, difficulty of obtaining proper representation, lack of knowledge of local laws, institutions and language)." It also promotes "a climate of fair competition [...] by guaranteeing both a level playing field and legal certainty for service providers, service recipients, and workers posted for the provision of services."[1]

The case for further EU action

1.5 The Commission estimates that roughly one million workers are posted each year by their employers to work in another Member State and that posted workers accounted for approximately 0.75% of private sector employment across all 27 EU Member States from 2007–09 (0.2% in the UK).[2] It suggests that the posting of workers is "a significant phenomenon in terms of labour mobility", but "remains a relatively small phenomenon" in the overall EU labour market.[3] Although some Member States have far more posted workers than others, all are affected, either as sending or as receiving countries.[4] Moreover, the Commission believes that

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1 See p. 2 of the Commission's explanatory memorandum accompanying the draft Directive.

2 See p. 86 of ADD 1.

3 See p. 5 of the Commission's explanatory memorandum accompanying the draft Directive.

4 The Commission's Impact Assessment indicates that the number of workers posted by their UK employer to another Member State in the period 2005–09 varied from 32,000 to 38,000 per year. A similar number of workers were posted to the UK. Nearly all outward postings were to the services sector. See ADD 1, Annex 1, Tables 1 and 7, pp. 79–87. According to the Government, inward postings to the UK are concentrated in health and social care, finance and business, and manufacturing.

"[t]he economic importance of posting [...] exceeds by far its quantitative size", helping to fill temporary shortfalls in labour supply and promoting international trade in services.

1.6 The Commission says that its evaluation of the operation of the 1996 Directive has revealed deficiencies and problems with implementation which have not been resolved by means of guidelines which were issued in 2006. A number of rulings by the Court of Justice have sought to clarify the meaning of some of the key provisions of the 1996 Directive and, more controversially, to strike a balance between the freedom to provide services within the internal market and the protection of fundamental rights, notably the right to take collective (including strike) action. In his report proposing a new strategy for the Single Market in 2010, Professor Mario Monti, the former competition Commissioner and current Prime Minister of Italy, suggested that the Court's rulings "have exposed the fault lines that run between the Single Market and the social dimension at national level."[5] Concerns have been expressed in some quarters that the Directive may be used as a vehicle for "social dumping", exacerbating wage differentials between local and posted workers, undermining local terms and conditions of employment, and making it more difficult for indigenous workers to defend their rights.[6]

1.7 In its 2010 Communication "*Towards a Single Market Act*", the Commission launched a public consultation on 50 proposals to re-launch the Single Market. Proposal 29 said that the Commission would conduct an in-depth analysis of the social impact of all new Single Market legislation and seek to ensure that rights guaranteed in the EU Charter of Fundamental Rights, including the right to take collective action, are taken into account. Proposal 30 indicated that the Commission would put forward a legislative proposal to improve implementation of the 1996 Directive, and that it would be supplemented by "a clarification of the exercise of fundamental social rights within the context of the economic freedoms of the Single Market."

1.8 According to the Commission, these two proposals attracted "huge interest and support" from trade unions, individual citizens and NGOs.[7] Trade unions have called for a thorough revision of the 1996 Directive and for a new "Social Progress Protocol" to ensure that fundamental social rights are not subordinate to economic freedoms. By contrast, businesses have recognised the need to clarify some elements of the Directive to ensure better implementation and enforcement, whilst underlining the importance of respecting Article 153(5) of the Treaty on the Functioning of the European Union (TFEU), which excludes any EU legislative competence in the following areas: pay, the right of association, the right to strike or the right to impose lock-outs.

1.9 Proposals 29 and 30 are now reflected in the Commission's Single Market Act of 2011 which identifies 12 levers or actions to boost growth. Under the heading "social cohesion", the Commission proposes legislation to improve and strengthen the implementation and enforcement of the Posting of Workers Directive, including measures to prevent and sanction any abuse or circumvention of the rules, and legislation to clarify "the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights."[8] The approach proposed by the Commission was subsequently endorsed by the Competitiveness Council in its Conclusions adopted in May 2011.

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5 See p. 11 of the Commission's explanatory memorandum accompanying the draft Directive.

6 See the examples given in the Commission's Impact Assessment — ADD 1, pp. 20–22.

7 See pp. 7–8 of the Commission's explanatory memorandum accompanying the draft Directive.

8 See p. 8 of the Commission's explanatory memorandum accompanying the draft Directive. See also our Report chapter on the Single Market Act: HC 428-xxvii (2010–12), chapter 7 (18 May 2011).

1.10 The Commission has proposed the draft Regulation and draft Directive as a package, designed to address the following problems:

- inadequate implementation, monitoring and enforcement of the working conditions applicable to posted workers, including protection of the rights of posted workers;
- improper use of the status of posted workers where, for example, the employer has no genuine link with the sending Member State or the posting is not of a temporary nature;
- insufficient clarity as regards the terms and conditions of employment applicable to posted workers; and
- increasing tensions between the right of establishment and freedom to provide services, on the one hand, and national industrial relations systems, on the other.[9]

Document (a) — the draft Directive on enforcement

1.11 The draft Directive is intended to strengthen the application and enforcement of the 1996 Posting of Workers Directive without, however, amending its content. The draft Directive is divided into seven chapters. The main provisions of each chapter, and the Government's assessment, as described in the Explanatory Memorandum provided by the Minister for Employment Relations, Consumer and Postal Affairs (Norman Lamb), are summarised below.

Chapter I — General provisions

1.12 Article 1 describes the purpose of the draft Directive — to guarantee a minimum level of protection for the rights of posted workers while also facilitating the cross-border provision of services and promoting fair competition — and says that it will not "affect in any way the exercise of fundamental rights as recognised in Member States and by Union law, 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." The Commission notes that this formulation is familiar in other EU legislation.[10] ***The Government agrees and says that there will be no impact on UK law on collective action.***

1.13 Article 2 defines some of the terms used in the draft Directive and Article 3 sets out a number of indicative factors to be taken into account in determining, first, whether a company posting workers to another Member State "genuinely performs substantial activities" in the sending Member State in which it is established and, second, whether a worker has been posted to a Member State other than the one in which s/he normally works and the posting is for a temporary period. Article 3 is intended to help clarify the circumstances in which the 1996 Directive applies and to prevent it being used for forms of employment which do not properly qualify as a "posting". ***The Government considers that the proposed non-exhaustive lists of***

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9 See p. 27 of ADD 1.

10 For example, see Article 2 of Council Regulation (EC) No 2679/98 on the functioning of the internal market in relation to the free movement of goods (OJ L No. 337, 12.12.1998, pp. 8–9) and Article 1(7) of the Services Directive (OJ L No. 376, 27.12.2006).

qualitative criteria will assist enforcement authorities in establishing whether a posting is genuine.

Chapter II — Access to information

1.14 Articles 4 and 5 require Member States to designate a competent authority responsible for carrying out information, mutual assistance, monitoring and enforcement activities under the draft Directive, and to make available information on the terms and conditions of employment applicable to posted workers "in a clear, comprehensive and easily accessible way", including dissemination via the internet and, if possible, in summarised leaflet form. The information should be accessible for those with disabilities and should be provided in other languages. The Commission suggests that better access to information on applicable terms and conditions will be of particular benefit to SMEs, while also ensuring better protection of the rights of posted workers. ***The Government welcomes the principle of improving access to information and considers it to be one of the key elements in improving compliance. It already provides online information on terms and conditions which apply to workers posted to the UK. However, the requirement to provide information in formats which are accessible to people with disabilities and in different languages, as well as in leaflet form, would have financial implications. Although the Government would also have to collect and publish information on any applicable collective agreements, this is unlikely to be a significant burden as universally applicable collective agreements are not a feature of the UK labour market.***

Chapter III — Administrative cooperation

1.15 Article 6 requires Member States to provide "mutual assistance" to help implement and enforce the draft Directive. This may include responding to reasoned requests for information, carrying out checks, inspections and investigations, and collating information on cross-border service providers established in their territory. Information should be provided within two weeks and, in urgent cases, within 24 hours.

1.16 Article 7 describes the responsibilities of the home Member State (the one in which the employer of posted workers is established), which include: monitoring, supervisory and enforcement action (in accordance with national law and practice) and the provision of mutual assistance and information to help ensure compliance with the 1996 Directive and additional measures set out in the draft Directive.

1.17 Article 8 makes provision for financial support to improve practical cooperation and mutual trust and to promote the exchange of best practice and of officials.

1.18 ***The Government notes that Member States already cooperate to exchange information and that a pilot project on the use of the Commission's electronic Internal Market Information System appears to have simplified the exchange of information, a development which the Government welcomes. UK law protects certain information, such as tax and National Insurance records, so the Government will seek to clarify the type of information which may be requested and shared and consider whether any legislative changes would be required in the UK. The Government will also seek to ensure that requests for information or inspections are only required in a limited number of genuine cases in order to minimise the impact on enforcement bodies and businesses and to maintain sufficient capacity to carry out other inspections. The Government questions whether the two-week deadline for responding to***

requests (or 24 hours in urgent cases) is realistic, especially if inspections are required. A new obligation on the home State authority to inform the host Member State if it is aware of "specific facts" indicating possible irregularities as regards the posting of workers from its territory would require the Government to put in place processes for passing on such information. As the Government expects such situations to be relatively rare, it does not anticipate that this obligation will impose a significant burden.

Chapter IV — Monitoring compliance

1.19 Article 9 provides an exhaustive list of the administrative requirements and control measures which Member States may impose on service providers posting workers to their territory. They include, for example, a simple declaration by the cross-border service provider of the anticipated number of posted workers, the services they will be providing and the duration of their stay, and a requirement to keep an audit trail of documents, such as the contract of employment, pay slips, time sheets, and proof of payment of wages. Member States must ensure that any procedures and formalities relating to the posting of workers are easy to complete. According to the Commission, Article 9 is intended to clarify existing case law which seeks to ensure that national control measures do not impose disproportionate burdens on cross-border service providers. Article 9 includes provision for a review of the need for, and appropriateness of, national control measures within three years of the Directive entering into force.

1.20 Article 10 requires Member States to put in place appropriate checks and monitoring mechanisms and to ensure that effective and adequate inspections are carried out in order to secure compliance with the 1996 Directive. Inspections would mainly be based on a risk assessment identifying sectors of activity in which there is likely to be the highest concentration of posted workers.

1.21 ***The Government notes that prior notification is not required when a company in another Member State posts workers to the UK, so Article 9 would have little direct impact in the UK. It may, however, help to reduce the administrative burden for UK businesses posting workers to the eighteen Member States which do operate a notification system. The Government expects that there will be a degree of overlap between risk assessments already carried out by enforcement bodies in the UK and those required under Article 10.***

Chapter V — Enforcement

1.22 Article 11 requires Member States to ensure that there are effective mechanisms to enable posted workers to lodge complaints against their employers, and to institute judicial or administrative proceedings, in their host as well their home Member State if they consider that a breach of EU rules on the posting of workers has caused loss or damage. Trade unions and other third parties which are recognised in national law as having a legitimate interest must also be able to "engage" in judicial or administrative proceedings to implement or enforce the draft Directive by acting "on behalf or in support of" posted workers or their employer. These provisions are stated to be without prejudice to national rules of procedure on representation in court proceedings and on time limits for bringing proceedings. ***The Government intends to seek further information on the nature of involvement envisaged for trade unions and other third parties in order to determine whether the UK's system of individual enforcement would be compliant with Article 11.***

1.23 Article 11(5) specifies, in particular, that posted workers must be able to recover any outstanding pay to which they would be entitled under the terms of the 1996 Directive, and to obtain a refund of "excessive costs" deducted from their pay to cover accommodation provided by their employer. ***The Government notes that the National Minimum Wage (NMW) is the relevant minimum pay rate for workers posted to the UK, and that any outstanding pay may be recovered through enforcement action taken by HMRC or through the Employment Tribunal system. The NMW Accommodation Offset enables employers to offset a set amount of accommodation costs against NMW pay, but it does not include a mechanism to assess the cost of accommodation as a proportion of salary or in terms of its quality, as required by Article 11(5). The Government questions whether it would be appropriate to bring accommodation issues within the scope of bodies responsible for enforcing employment and health and safety legislation or to require Employment Tribunals to make such assessments.***

1.24 Article 12 requires Member States to introduce the principle of joint and several liability in the construction sector, so that posted workers would have the option of pursuing either the contractor in the host State or the direct sub-contractor (the posting employer) in the home State in order to recover any outstanding pay or reimbursement of taxes or social security contributions unduly withheld from their salary. Contractors would not, however, be liable if they were able to demonstrate that they have undertaken "due diligence" by, for example, including checks on the payment of wages and compliance with tax and social security obligations as part of their sub-contracting procedures.

1.25 Although joint and several liability is limited (pending a review three years after the draft Directive takes effect in Member States) to contractors and their direct sub-contractors within the construction sector, Article 12(3) allows Member States to apply more stringent liability rules, if provided for in national law, to a wider range of sub-contractors and sectors and to include other core employment terms in addition to pay.

1.26 The Commission notes that only eight Member States, plus Norway, have established joint and/or several liability for parties other than the direct employer and that "The different legal traditions and industrial relations cultures in the countries concerned indicate that the systems adopted are highly specific to each national situation and few elements, if any, are transferable to a European solution."[11] It says that it has adopted "a cautious approach", adding that "[t]he proposed system of joint and several liability is limited to direct subcontractor situations in the construction sector where most of the cases of non-payment of wages have been reported" and excludes contractors who have shown due diligence. The Commission describes joint and several liability as "a mechanism of self-regulation between private actors" which offers "a far less restrictive and more proportionate system" than, for example, increased State intervention through more inspections and heavier sanctions. [12]

1.27 ***The Government recognises that the purpose of the draft Directive is to improve enforcement but adds that "the method of enforcement should usually be left to individual Member States to decide in line with their own methods of enforcing labour laws. The evidence about joint and several liability provisions is equivocal and may not justify the imposition of***

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[11] See p. 19 of the Commission's explanatory memorandum accompanying the draft Directive.

[12] See p. 20 of the Commission's explanatory memorandum accompanying the draft Directive.

such schemes at EU level."[13] Article 12, as drafted, would require changes to UK law as it does not provide for the joint and several liability of contractors/sub-contractors.

Chapter VI — Cross-border enforcement of administrative fines and penalties

1.28 Articles 13 and 14 provide for mutual assistance to recover administrative penalties or fines, based on the principle of mutual recognition and enforcement. Article 15 makes clear that, if the fine or penalty is contested, the cross-border enforcement procedure must be suspended until the matter has been resolved. Article 16 establishes the principle that Member States should not claim reimbursement of costs arising from the mutual assistance provisions of the draft Directive, except in cases where recovery creates a specific problem or concerns a very large amount.

1.29 ***The Government notes that Article 13 is intended to ensure that a business cannot avoid payment of penalties imposed on it for non-compliance with rules on the posting of workers once the posting activity has ended. Notwithstanding the principles of mutual recognition and assistance, the draft Directive recognises differences in enforcement approaches across Member States, thus ensuring that "they will not be required to enforce a penalty if their own regime does not provide for a similar penalty to be set." However, recognition and enforcement on the basis set out in these Articles will require specific provision in the UK, "both for the principle of recognition and for the procedure to secure enforcement."***[14]

Chapter VII — Final provisions

1.30 Article 17 requires Member States to establish "effective, proportionate and dissuasive" penalties for non-compliance with national provisions implementing the draft Directive. Article 18 provides for use of the Internal Market Information System to implement provisions on administrative cooperation and mutual assistance, but Member States may continue to apply bilateral arrangements to assist with the application and monitoring of the core employment terms and conditions applicable to posted workers under Article 3 of the 1996 Directive. Article 21 requires the Commission to report on the implementation of the draft Directive within five years of its transposition by Member States.

Further Government observations

1.31 The Government notes that the posting of workers represents a relatively small element of UK labour market activity, but adds:

> "The ability of businesses to send their workers overseas to win and deliver contracts is central to making the Single Market work in Europe. It is a crucial means for businesses to take advantage of new opportunities and get European economies growing. Safeguards against unfair competition through employers evading their responsibilities and protections for vulnerable workers support the Single Market but must be proportionate

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[13] See para 25 of the Minister's Explanatory Memorandum.

[14] See para 26 of the Minister's Explanatory Memorandum.

and must not amount to barriers for genuine businesses and workers doing business overseas."[15]

1.32 Workers posted to the UK enjoy the same degree of employment protection as UK workers, including the national minimum wage, and Government authorities responsible for enforcement take a "risk-based approach", targeting resources at areas where there is a particular risk of non-compliance.

1.33 The Government intends to consult stakeholders on the draft Directive in order to inform its negotiating strategy and has also provided a "Checklist" setting out the likely impact of the proposal in the UK. The Checklist notes that the Commission's own Impact Assessment Board described the evidence base to demonstrate the necessity and proportionality of further EU regulatory action as "very weak" and the Government questions whether the problems of implementation and enforcement which the draft Directive seeks to address apply in the UK.

1.34 The Government considers that the Commission's estimate of one-off implementation costs of €3,000 in the UK, and annually recurring costs of €7,000, substantially underestimate the real costs, especially if more inspections are required. Costs for UK businesses resulting from the introduction of joint and several liability for contractors and their direct subcontractors in the construction sector is likely to be relatively small, as fewer than 1% of workers posted from the UK to other EU countries, and only 3.5% of workers posted to the UK, work in the construction sector. Cross-border enforcement of fines will only affect UK companies to the extent that they fail to comply with the 1996 Directive when posting workers abroad.

1.35 UK businesses may benefit from a reduction in the administrative and notification requirements which apply when posting workers to another Member State and enhanced cooperation and mutual assistance between Member States will make it easier to expose cases of bad practice or abuse of the rules on the posting of workers.

Document (b) — the draft Regulation on collective action

1.36 The draft Regulation is a response to a number of judgments by the Court of Justice, notably in the *Viking-Line* and *Laval* cases, which have sought to clarify the principles which national courts should apply in determining whether restrictions on the exercise of economic freedoms guaranteed by the EU Treaties are justified, particularly when those restrictions result from industrial action to protect the rights of workers.[16] In both cases, the Court described the right to strike as a fundamental right which forms an integral part of the general principles of EU law. The Court added that the protection of a fundamental right may, in principle, justify restrictions on the exercise of economic freedoms if it satisfies the following tests:

- the restriction pursues a legitimate objective which is compatible with the EU Treaties and is justified by overriding reasons of public interest;
- the restriction is an appropriate means of achieving the desired objective; and

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15 See para 19 of the Minister's Explanatory Memorandum.

16 In Viking Line (Case C-438/05), a Finnish ferry operator reflagged its vessel to Estonia where wage costs were lower. It argued that the threat of industrial action to protect the jobs and pay of Finnish seamen amounted to an unlawful restriction on its freedom of establishment. In Laval (Case C-341/05), a Latvian company posted construction workers to Sweden and refused to sign a collective agreement establishing working conditions or to pay the hourly wage rate requested by Swedish trade unions. The unions therefore took collective action to prevent the Latvian workers gaining access to the construction site. Laval argued that this action was an unlawful restriction on its freedom to provide services.

- the restriction does not go beyond what is necessary to achieve the objective.

1.37 Although the Court determined, in the *Laval* case, that collective action to protect local workers against possible "social dumping" by lower paid posted workers could constitute an overriding reason of public interest sufficient to justify a restriction on the freedom to provide services, it also held on the facts of that case that the action taken by Swedish trade unions (blockading access to construction sites) amounted to an unlawful interference.

1.38 The *Laval* ruling (and others) have exposed difficulties in ascertaining the core employment terms and conditions which posted workers are entitled to in the host State of temporary employment, and in determining the extent to which EU law may inhibit or prevent trade unions taking action to defend the rights (and jobs) of the indigenous workforce. The Court's rulings clearly establish, however, that industrial action falls within the scope of EU law when it concerns disputes which have a cross-border dimension because one of the parties has exercised a fundamental economic freedom.

1.39 The purpose of the draft Regulation is to set out "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" (Article 1).

1.40 Article 1(2) repeats the wording used in Article 1 of the draft Directive on enforcement (see paragraph 12 above) in order to make clear that the draft Regulation does not affect in any way national laws and practices determining how strike action or other forms of industrial action may be taken. The Commission notes that this provision is similar to the so-called "Monti clause" in a 1998 Regulation which establishes a system for notifying the Commission of any obstacles or impediments which may seriously disrupt the free movement of goods within the internal market.[17]

1.41 The remaining Articles seek to clarify the relationship between fundamental rights and economic freedoms, ensure that any existing dispute resolution mechanisms can also be used for disputes with a cross-border dimension, and establish an early warning system to notify Member States and the Commission of action which may seriously disrupt the internal market. These Articles, and the Government's views on them as described in the Explanatory Memorandum provided by the Minister for Employment Relations, Consumer and Postal Affairs (Norman Lamb), are summarised below.

1.42 Article 2 seeks to ensure that the exercise of economic freedoms under the EU Treaties (in this case, the right to set up a business in, or provide services to, another Member State) respects "the fundamental right to take collective action, including the right or freedom to strike" and, conversely, that the exercise of the fundamental right to take collective action respects the economic freedoms guaranteed by the Treaties. The purpose of this provision, according to the Commission, is to make clear that economic freedoms and fundamental rights, both guaranteed by the EU Treaties, have an equal status in EU law. However, "Article 2 recognises that situations

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[17] The similarity of purpose between the 1998 Regulation as regards the free movement of goods and this draft Regulation as regards freedom of establishment and the freedom to provide services, means that they are often referred to as Monti I and Monti II.

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 law."[18]

1.43 ***The Government says that Article 2 is consistent with the case law of the Court of Justice and would have no further impact on UK law than is already the case by virtue of the Court's rulings in the Viking Line and Laval cases. However, the Government considers that the Court's rulings are clear and therefore sees no need for clarification in a Council Regulation.***

1.44 Article 3 concerns dispute resolution mechanisms. Article 3(1) requires Member States to ensure that any existing extra-judicial mechanisms for resolving labour disputes, established in accordance with their national law, tradition or practice, are also available for the resolution of labour disputes which have a cross-border dimension. The Commission notes that this provision does not propose any changes to existing alternative dispute resolution mechanisms at national level; nor does it "contain or imply an obligation to introduce such mechanisms" if they do not already exist. Rather, its purpose is to establish the principle of equal access for cross-border cases.[19] ***The Government notes that the Advisory Conciliation and Arbitration Service (Acas) in Great Britain and the Labour Relations Agency (LRA) in Northern Ireland are already available, on a voluntary basis, for any dispute in the UK, including those with a cross-border element. No changes would therefore be required to existing UK systems.***

1.45 Article 3(3) makes clear that judicial remedies remain available for those involved in out-of-court settlement procedures if a satisfactory resolution is not achieved within a reasonable period. Article 3(4) confirms the role of national courts in assessing the facts at issue in an industrial dispute, interpreting national legislation, and determining whether any collective action taken within a cross-border context is proportionate (does not go beyond what is necessary to obtain the objective of the action). The Commission notes that the Court of Justice has recognised that competent national authorities "enjoy a wide margin of discretion" in determining whether any limitations on the exercise of fundamental rights or economic freedoms are appropriate, necessary and reasonable.[20] ***The Government notes that Acas and the LRA do not prevent recourse to the courts and that UK dispute resolution systems therefore comply with Article 3(3). Article 3(4) explicitly recognises the role of national courts in applying the proportionality test set out in the case law of the Court of Justice.***

1.46 Article 3(2) makes provision for EU social partners (management and labour) to conclude voluntary agreements at EU level, or to establish guidelines, for the extra-judicial resolution of cross-border labour disputes which may, for example, establish procedures for mediation or conciliation.

1.47 Article 4 establishes an alert mechanism or early warning system to ensure that Member States inform each other and the Commission of "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

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18 See p. 12 of the Commission's explanatory memorandum accompanying the draft Regulation.

19 See p. 13 of the Commission's explanatory memorandum accompanying the draft Regulation.

20 *Ibid.*

in the territory of other Member States".[21] The purpose of this mechanism is "to prevent and limit the potential damage as far as possible."[22]

1.48 ***The Government notes that this provision is similar to a 1998 Regulation establishing a system for notifying the Commission of any obstacles or impediments which may seriously disrupt the free movement of goods within the internal market and is intended to speed up the resolution of disputes and limit the potential damage to the internal market. It would not require Member States to involve themselves in the resolution of industrial disputes, but to share information. The meaning of some of the terms used (serious acts or circumstances) and the extent of the information to be supplied will require further clarification.***

1.49 The Commission has proposed Article 352 TFEU as the legal base for the draft Regulation. This Article provides for the adoption of EU measures, should EU action "prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers". The European Parliament has no power of co-decision and cannot, therefore, propose amendments to the draft Regulation, but its consent is required before the Council, acting unanimously, may formally adopt the Commission's proposal.

1.50 The Commission notes that Article 153(5) TFEU expressly precludes the EU from adopting Directives establishing minimum requirements concerning the right to strike, but adds that Court of Justice 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."[23] As, however, there is no specific Treaty Article on which to base the draft Regulation, the Commission believes that its recourse to Article 352 TFEU is justified.

1.51 ***The Government notes that EU measures based on Article 352 TFEU are subject to section 8 of the European Union Act 2011 and that prior approval by an Act of Parliament would be needed before it could agree to the draft Regulation in Council unless one of the statutory exceptions applies. The Government also considers the extent of the EU's competence to legislate in the field of collective action, noting:***

> ***"[...] Article 153(5) TFEU does not provide competence for the EU to legislate under Article 153 specifically for a right to strike. However, as a derogation Article 153(5) TFEU must be read narrowly. Consequently, it is the view of Government that this does not necessarily mean that the EU could not adopt any measures at all under Article 153 TFEU in relation to strikes. Article 352 TFEU provides a legal base where no powers are given by the Treaties to fulfil an EU objective. The EU objectives on social policy include action in the field of the collective defence of workers' interests. Consequently, while Article 352 TFEU cannot be used to legislate specifically for a right to strike so as to circumvent the derogation in Article 153(5) TFEU, it is the view of Government that this does not mean that there is no competence for the adoption of other measures in relation to the collective defence of workers' interests."***[24]

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21 See p. 19 of the Commission's explanatory memorandum accompanying the draft Regulation.

22 See p. 14 of the Commission's explanatory memorandum accompanying the draft Regulation.

23 See p. 11 of the Commission's explanatory memorandum accompanying the draft Regulation.

24 See para 11 of the Minister's Explanatory Memorandum.

Further Government observations

1.52 As the draft Regulation would not require changes to UK law or policy, and any burdens would be largely administrative (for example, the early warning system), the Government does not intend to launch a formal consultation but will consult informally with selected stakeholders. An accompanying "Checklist" setting out the likely impact of the draft Regulation in the UK notes that the Commission's own Impact Assessment Board considered that the evidence base to demonstrate the necessity and proportionality of EU regulatory action was "entirely absent."[25] However, implementation and enforcement costs in the UK are likely to be small as existing alternative dispute resolution mechanisms are already available to workers involved in disputes with a cross-border dimension and the need to issue an early warning alert is likely to arise infrequently. Businesses in the UK may gain if alert mechanisms in other Member States enable them to avoid or mitigate the impact of any serious disturbances elsewhere, and workers posted from the UK may benefit from improved access to alternative dispute resolution mechanisms in other Member States.

Respect for fundamental rights and the principle of subsidiarity

1.53 The Commission considers that the draft Directive and draft Regulation are consistent with its Strategy for the effective implementation of the Charter of Fundamental Rights which seeks to ensure that individuals are "able to effectively enjoy their rights enshrined in the Charter when they are in a situation governed by EU law."[26] Together, the proposals constitute "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 [of Justice]."[27]

1.54 ***The Government's fundamental rights analysis for both proposals concludes that they are consistent with rights set out in the European Convention of Human Rights and the EU Charter of Fundamental Rights, notably Article 28 of the Charter which recognises the right to take collective action, including strike action, but provides that the exercise of that right is subject to national laws and practices and must also be in accordance with EU law.***

1.55 Turning to the justification for action at EU level, the Commission says that more even implementation and enforcement of the 1996 Directive on the Posting of Workers is intended to secure the objective, set out in Article 3(3) of the Treaty on the European Union (TEU), of establishing an internal market which is based on "a highly competitive social market economy, aiming at full employment and social progress." It believes that the draft Directive on enforcement will provide greater legal clarity and certainty, create a level playing field for service providers, and ensure that posted workers enjoy the minimum level of protection foreseen in the 1996 Directive. It says that the draft Directive respects the diversity of different social models and industrial relations systems in Member States and that the rules it has proposed "reflect the

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25 See SEC (2012) 195 at http://ec.europa.eu/governance/impact/ia_carried_out/cia_2012_en.htm.

26 See p.11 of the Commission's explanatory memorandum accompanying the draft Directive (p. 10 in its explanatory memorandum accompanying the draft Regulation).

27 See p.10 of the Commission's explanatory memorandum accompanying the draft Regulation.

heterogeneous nature of inspection and control systems across Member States, while also endeavouring to avoid unnecessary or excessive administrative burden for service providers."[28]

1.56 ***The Government considers that action at EU level is appropriate and that the draft Directive largely complies with the principle of subsidiarity. However, it questions whether Article 12 on joint and several liability is justified on the grounds that "[d]ecisions about the routes which individuals may have to enforce their rights and the definition of due diligence may more properly be made by Member States themselves."***[29]

1.57 The Commission similarly argues that clarification of the general principles and EU rules applicable to collective action affecting freedom of establishment and the cross-border provision of services can only be achieved by action at EU level. It believes that a directly applicable Regulation is the most appropriate legal instrument because it 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."[30] The Commission also emphasises that the draft Regulation respects the different social models and diversity of industrial relations systems in the Member States and the role of national courts in establishing the facts at issue in a dispute and applying the relevant tests set out in the case law of the Court of Justice, as described above in paragraph 36.

1.58 ***The Government accepts that the Commission's objective of clarifying the general principles and EU rules applicable to collective action within the context of economic freedoms guaranteed by the EU Treaties can only be achieved by measures which are "European in scope." It agrees with the Commission's assessment that the draft Regulation would not change national laws or practices concerning the right to strike, adding that "[t]he Government would not accept any extension of EU powers in this area." Whilst the Government, therefore, "does not believe that the proposed Regulation contravenes the subsidiarity principle", it is not convinced that the draft Regulation, or the specific measures proposed in it, are necessary. Although Member States have not yet had an opportunity to express their official view of the draft Regulation, the Government notes that "there has been widespread dissatisfaction and questioning [...] from unions and business organisations."***[31]

Conclusion

1.59 **The Commission's proposals for a Directive to improve the application and enforcement of EU rules on the posting of workers and a Regulation to clarify the interaction between fundamental social rights and economic freedoms have been presented as a package. Both are an expression of the tensions which can arise within an internal market based on "a highly competitive social market economy" which seeks to remove barriers to cross-border trade while also guaranteeing an adequate level of social protection.[32] We think that they raise issues of legal and political importance.**

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28 See p.12 of the Commission's explanatory memorandum accompanying the draft Directive.

29 See para 18 of the Minister's Explanatory Memorandum.

30 See p. 11 of the Commission's explanatory memorandum accompanying the draft Regulation.

31 See para 21 of the Minister's Explanatory Memorandum.

32 See Article 3(3) of the Treaty on European Union and Articles 9 and 26 of the Treaty on the Functioning of the European Union.

1.60 We thank the Minister for providing full and informative Explanatory Memoranda. We would welcome his views on the following issues.

1.61 Turning first to the draft Directive — document (a) — we think that improving the implementation and enforcement of the 1996 Directive on the Posting of Workers without, however, amending any of its substantive provisions, is a commendable objective. In particular, the provision of clear information on the core terms and conditions of employment applicable to posted workers should make it easier for businesses to compete within the internal market, help to expose abusive practices, and strengthen the protection of core employment rights.

1.62 However, the case for further EU regulatory action is substantially weakened by the opinion of the Commission's own Impact Assessment Board (which assesses the quality of all Commission Impact Assessments). It considers the evidence base for the draft Directive to be very weak, stating that the magnitude of the problems encountered in applying and enforcing the 1996 Directive remains unclear, and that deficiencies reported by the Commission are based primarily on anecdotal evidence. It considers the evidence for the right of collective bargaining and action in the draft Regulation to be "entirely absent".

1.63 It is axiomatic that any action at EU level should be proportionate to the objectives which it seeks to achieve. It follows, therefore, that the requirements imposed by the draft Directive should be proportionate to the obstacles which businesses face in posting workers to another EU Member State and to the risks which posted workers encounter in securing recognition and enforcement of the core terms and conditions of employment to which they are entitled under Article 3 of the 1996 Directive.

1.64 We ask the Minister whether he is aware of, or will be seeking, any more robust evidence to demonstrate the extent of problems encountered by businesses and workers within the framework of current EU rules on the posting of workers, and to determine whether further EU regulatory action would be beneficial. We also ask him to provide a summary of responses to his call for evidence.

1.65 The Commission suggests that the non-payment of wages is particularly prevalent in the construction sector and has therefore proposed introducing a limited form of joint and several liability in order to improve enforcement. Whilst we share the Government's concern that Article 12 of the draft Directive may be unduly prescriptive, we would like to know whether the Minister accepts that posted workers in this sector are at particular risk of non-payment and, if so, how else this issue should be addressed.

1.66 Turning to the draft Regulation — document (b) — we thank the Minister for his careful examination of the proposed legal base and the application of the principle of subsidarity in this case. Article 352 of the Treaty on the Functioning of the European Union (TFEU) authorises the Council to adopt a measure in cases where EU action is "necessary, within the framework of the policies defined by the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers."

1.67 As we have already noted, establishing an internal market based on "a highly competitive social market economy" is one of the objectives of Union action set out in Article 3(3) of the Treaty on the European Union. Treaty provisions on social policy include, in Article 153(1)(f) TFEU, measures for the "collective defence of the interests of workers", but

Article 153(5) TFEU expressly precludes the EU from taking legislative action to define minimum standards concerning the right to strike. We agree with the Government that this provision does not prevent the EU from adopting any measures in relation to strike action. Indeed, the case law of the Court of Justice clearly establishes that strike action which affects fundamental economic freedoms guaranteed by the EU Treaties does fall within the scope of EU law, even though the EU lacks legislative competence.

1.68 **We therefore accept that the draft Regulation would attain a Treaty objective, and does fall within the framework of EU social policy, but we are not convinced that there is sufficient evidence of necessity for certain elements of the draft regulation. Unlike the Government, we think necessity is a prerequisite for EU action, and so is fundamental to the assessment of whether a proposal complies with the principle of subsidiarity. We therefore recommend the House sends the attached Reasoned Opinion to the Presidents of the EU institutions before 22 May, following a debate on the Floor of the House. We note also that necessity is a prerequisite for action based on Article 352 TFEU. In this regard, we do not consider that the draft Regulation provides any meaningful clarification of existing Court of Justice case law, a view reinforced by the opinion of the Commission's Impact Assessment Board that the case for regulatory action "remains entirely absent."**

1.69 **We may wish, at a later stage, to recommend a debate in European Committee to cover issues other than subsidiarity. In the meantime, the draft Directive and draft Regulation remain under scrutiny.**

Annex: Draft Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality

concerning

a Draft 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[33]

Treaty framework for appraising compliance with subsidiarity

1. The principle of subsidiarity is born of the wish to ensure that decisions are taken as closely as possible to the citizens of the EU. It is defined in Article 5(3) TEU:

> "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at

[33] COM(2012) 130

regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

2. The EU institutions must ensure "constant respect"[34] for the principle of subsidiarity as laid down in Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

3. Accordingly, the Commission must consult widely before proposing legislative acts; and such consultations are to take into account regional and local dimensions where necessary.[35]

4. By virtue of Article 5 of Protocol (No 2), any draft legislative act should contain a "detailed statement" making it possible to appraise its compliance with the principles of subsidiarity and proportionality. This statement should contain:

- some assessment of the proposal's financial impact;
- in the case of a Directive, some assessment of the proposal's implications for national and, where necessary, regional legislation; and
- qualitative and, wherever possible, quantitative substantiation of the reasons "for concluding that a Union objective can be better achieved at Union level".

The detailed statement should also demonstrate an awareness of the need for any burden, whether financial or administrative, falling upon the EU, national governments, regional or local authorities, economic operators and citizens, to be minimised and to be commensurate with the objective to be achieved.

5. By virtue of Articles 5(3) and 12(b) TEU national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol (No. 2), namely the reasoned opinion procedure.

Previous Protocol on the application of the principle of subsidiarity and proportionality

6. The previous Protocol on the application of the principle of subsidiarity and proportionality, attached to the Treaty of Amsterdam, provided helpful guidance on how the principle of subsidiarity was to be applied. This guidance remains a relevant indicator of compliance with subsidiarity. The Commission has confirmed it continues to use the Amsterdam Protocol as a guideline for assessing conformity and recommends that others do.[36]

> "For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.
>
> "The following guidelines should be used in examining whether the abovementioned condition is fulfilled:

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[34] Article 1 of Protocol (No. 2).

[35] Article 2 of Protocol (No. 2).

[36] See, respectively, pages 2 and 3 of the 2010 and 2011 Reports on Subsidiarity and Proportionality (COM(10) 547 and COM(11) 344).

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States."[37]

"The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures".

Proposed legislation

7. The content of the draft Regulation is set out in detail in the European Scrutiny Committee's Report to which this Reasoned Opinion is attached.

Legislative objective

- *Summary*

8. The Commission's explanatory memorandum explains that 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."[38]

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- *Article 2, relationship between fundamental rights and economic freedoms — general principles*

9. The Commission describes the effect of this Article as follows:

"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

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37 Article 5.

38 P. 10 of the Commission's explanatory memorandum.

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 law.

"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."[39]

- *Article 3, dispute resolution mechanisms*

10. The Commission describes the effect of Article 3 (1)-(3) as follows:

"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."[40]

- *Article 3 paragraph 4, role of national courts*

11. The Commission says this paragraph:

"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 concerned 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 others. The Court of Justice also acknowledged that the competent national authorities enjoy a wide margin of discretion in this respect."[41]

- *Article 4 — alert mechanism*

12. Article 4:

"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".[42]

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39 As above, p. 12.

40 As above, p. 13.

41 As above, p. 13.

42 As above, page 14.

Impact assessment

13. The conclusion the Commission draws from its impact assessment is summarised as follows:

> "The Impact Assessment identified negative economic and social impacts of the baseline scenario. Continuing legal uncertainty could lead to a loss if 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."

Aspects of the Regulation which do not comply with the principle of subsidiarity

14. The House of Commons considers that the draft Regulation fails to comply with the principle of subsidiarity because the Commission has failed to adduce clear evidence of necessity for EU legislative action, which should include how it will achieve its stated objectives.

15. In the House of Commons' view, necessity is a pre-requisite both for action at EU level and for conformity with the principle of subsidiarity.

16. This view is confirmed by the Commission:

> "Subsidiarity cannot be easily validated by operational criteria. The Protocol, as revised by the Lisbon Treaty, no longer mentions conformity tests, such as 'necessity' and 'EU value added'. Instead it has shifted the application mode towards the procedural aspects ensuring that all key actors can have their say. The Commission has continued to use 'necessity' and 'EU value-added' tests as part of its analytical framework and recommends the other actors to do likewise."[43]

17. Necessity for EU action has to be substantiated by evidence collated and assessed in an impact assessment, rather than by a perception of a need to act. The House of Commons

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[43] See p. 3 of the 2011 Report on Subsidiarity and Proportionality (footnote 36).

considers that the Commission's explanatory memorandum and impact assessment are largely based on perceptions of a need to act, which are necessarily subjective, in contrast to objective evidence of a need to act. These perceptions appear to arise from the "wide-spread and intense debate" and "controversy"[44] about the consequences of the *Viking-Line* and *Laval* judgments of the Court of Justice, the views of the European Parliament, reports from the European Social Partners and Professor (as he then was) Mario Monti, and the Commission's own consultations. There is no clear *evidence*, as opposed to supposition, however, of why EU legislation on the right to take collective action within the context of the freedom to provide services and the freedom of establishment is necessary, or of what it will achieve.

18. This led the Impact Assessment Board (IAB), in its report of 21 December 2011, to comment that:

> "While the [Commission's] revised report presents the problem relating to the right of collective bargaining and action separately, and designs alternative policy options, it does not fully separate the set of corresponding objectives for the issue. The report still does not clearly explain why this problem is being addressed at the same time as revising the Directive on posting of workers, and fails clearly to demonstrate the *necessity* and proportionality of legislative EU action in this matter."[45]

It concluded that "the evidence base to demonstrate the necessity and proportionality of further EU regulatory action ... for the right of collective bargaining and action ... remains *entirely absent*".[46]

19. In response, the Commission says "[a]s far as justified, the recommendation for improvement have been taken into account. The evidence base has been further strengthened".[47] It does not explain, however, how the evidence base has been strengthened, if at all.

20. The consequence of an absence of evidence is that the premise for EU legislation is speculative:

> "The Impact Assessment identified negative economic and social impacts of the baseline scenario. Continuing legal uncertainty *could* lead to a loss if 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".[48]

21. And that the proposed Articles 1 to 3 are either redundant or optional.[49] As the UK Government explains:

> "General principles on the relationship between collective rights and economic freedoms. Article 2 states that each must be respected — so the exercise of collective action must respect economic freedoms and the exercise of economic freedoms must

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44 p. 2 of the explanatory memorandum.

45 *Ibid.*

46 p. 1 of the explanatory memorandum.

47 p. 17 of the impact assessment (8042/12 ADD 1).

48 See para 13 above.

49 Explanatory Memorandum submitted by the Department for Business, Innovation and Skills on 18 April 2012.

respect collective action. There is no attempt to specify the relative priority of either and the approach is consistent with the CJEU case law in the Viking-Line and Laval cases. This role of national courts in applying the proportionality test as laid out by European case law is stated explicitly in Article 3, para 4. The Government regards these CJEU judgements as clear and does not see the need for clarification in a Council Regulation. The CJEU judgements are directly applicable, so while this article may not be necessary, it will not require any change to UK law or policies.

"Dispute resolution mechanisms. Article 3 aims to speed up the resolution of transnational disputes by requiring that dispute resolution mechanisms which are available within Member States extend to those involved in cross-border disputes (para 1). There is no requirement for such mechanisms to be established where they are not already present. This article would be relevant to the Advisory, Conciliation and Arbitration Service (Acas) in Great Britain and to the Labour Relations Agency (LRA) in Northern Ireland. However, both Acas and the LRA are already available — on a voluntary basis — for any dispute in the UK, including those with a cross-border element. For this reason there would be no changes required to the UK system. The article also allows for European Social Partners at Union level to reach agreements about how disputes should be settled (para 2). The article makes clear that none of the alternative dispute mechanisms (including any social partner agreements) can prevent recourse to national courts in the event that the dispute is not resolved within a reasonable period (para 3). Acas and the LRA are voluntary services which do not prevent recourse to courts — thus the current UK system would satisfy these requirements."

Conclusion

22. In the House of Commons' opinion, the Commission confirms the primary reason for the draft Regulation when it adds to the list of justifications for EU legislation in the explanatory memorandum that: "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".[50] The confirmatory language here is to be contrasted with the speculative language above.

23. The perception of a need for the Commission to "express a more committed political approach" should not, in our view, be a replacement of evidence of necessity for the EU to act.

24. For these reasons we find that Articles 1–3 of the Regulation do not confirm with the principle of subsidiarity.

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[50] See footnote 43.