Freedom of establishment and freedom to provide services: right to take collective action

2012/0064(APP) - 21/03/2012 - Legislative proposal

PURPOSE: 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.

PROPOSED ACT: Council Regulation.

BACKGROUND: the **right to take collective action**, which is the corollary of the right to collective bargaining, is recognised both by various international instruments which Member

States have signed or cooperated in, such as the **European Social Charter** (1961) and **Conventions No 87 and No 98 of the International Labour Organisation** concerning freedom of association and protection of the right to organise and collective bargaining,

The right is also recognised by instruments developed by Member States at EU level, such as the **Community Charter of the Fundamental Social Rights of Workers adopted in 1989** and the **Charter of Fundamental Rights of the European Union** proclaimed in Nice on 7 December 2000, as adopted at Strasbourg on 12 December 2008 which has the same legal force as the Treaties. It also enjoys constitutional protection in a number of Member States. Lastly, the right to collective bargaining and to negotiate and enter into collective agreements constitutes an inherent element of the right of association, as set out in Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In **its judgments in the Viking-Line and Laval cases in 2007 and 2008**, the Court of Justice for the first time recognised that the right to take collective action, including the right to strike, as a fundamental right forms an integral part of the **general principles of EU law, the observance of which the Court ensures.**

However, the right to strike is not absolute and its exercise may be subject to certain restrictions, which may also result from national constitutions, law and practices.

The Court rulings triggered a **debate on their consequences for the protection of the rights of posted workers,** and more generally the extent to which trade unions can continue to protect workers' rights in cross-border situations. It is said that the Court rulings have exposed the **fault lines that run between the single market and the social dimension** at national level in two ways:

- the cases brought to light the need to ensure setting the right balance between the exercise of the right to take collective action by trade unions, including the right to strike, and the freedom of establishment and the freedom to provide services, economic freedoms enshrined in the Treaty ;

- they further highlighted the question whether the Posting of Workers Directive still provided an adequate basis for protecting workers' rights given divergent social and employment conditions among Member States.

In October 2008, the European Parliament adopted a resolution calling on all Member States properly to enforce the Posting of Workers Directive and asking the Commission not to exclude a partial review of the Directive after assessing in depth the problems and challenges.

At the same time, it emphasised that the freedom to provide services as one of the cornerstones of the European project should be balanced, on the one hand, against fundamental rights and the social objectives of the Treaties and on the other hand, against the right of the public and social partners to ensure non-discrimination, equal treatment and the improvement of living and working conditions.

Recognising the controversy fuelled by the Court rulings in his report **'A new Strategy for the**

Single Market', Professor Monti recommended:

- clarifying the implementation of the Posting of Workers Directive and strengthening dissemination of information on the rights and obligations of workers and companies, administrative cooperation and sanctions in the framework of the free movement of persons and the cross-border provision of services;

- introducing a provision to guarantee the right to strike, modelled on Article 2 of Council Regulation (EC) No 2679/98 (the Monti II Regulation) and a mechanism for informal resolution of labour disputes concerning the application of the Directive.

IMPACT ASSESSMENT: in line with its policy on better regulation, the Commission conducted an impact assessment of policy alternatives based on an external study. The problems identified are grouped around four headings, problem 4 ('tensions between the freedom to provide services/establishment and national industrial relations') being directly relevant for the proposal.

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

The preferred option to address the drivers underlying problem 4 is option 7, since a legislative intervention (regulation) provides for more legal certainty than a soft law approach (option 6).

LEGAL BASIS: Article 352 TFEU.

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

The 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.

Relationship between fundamental rights and economic freedoms — general principles: while reiterating that there is no inherent conflict between the exercise of the fundamental right to take collective action and the freedom of establishment and the freedom to provide services protected by the Treaty, with no primacy of one over the other, Article 2 recognises 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 proposed regulation states that the exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action,

including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms.

Dispute resolution mechanisms: the proposal 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. It 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.

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

Role of national courts: the proposal 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.

Alert mechanism: the text establishes an early warning system requiring Member States to 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.

BUDGETARY IMPLICATIONS: the proposal has no implications for the EU budget.