



ASSEMBLEIA DA REPÚBLICA

EUROPEAN AFFAIRS COMMITTEE

Reasoned Opinion

COM(2012) 130

Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services



ASSEMBLEIA DA REPÚBLICA

EUROPEAN AFFAIRS COMMITTEE

PART I – INTRODUCTORY NOTE

In accordance with the terms of Articles 6 and 7 of Law 43/2006 of 25 August, on monitoring, assessment and pronouncement by the *Assembleia da República* within the scope of the construction of the European Union, and in accordance with the procedures for the scrutiny of European draft acts approved on 20 January 2010, the European Affairs Committee received the Proposal for a Regulation of the European Parliament and of the Council on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services [COM(2012) 130].

In view of its object, the above draft act was referred to the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees and to the Committee on Social Security and Labour, which analysed the draft act and approved the Reports annexed to this Reasoned Opinion, of which they form an integral part.

PART II – RECITALS

1 – This draft legislative act arises from the jurisprudence of the Court of Justice of the European Union which, in its judgments in the Viking-Line¹ and Laval², cases, recognised the right to take collective action, including the right to strike, as a fundamental right which forms an integral part of the general principles of EU law³.

The judgments equally acknowledged that the right to take collective action for the protection of workers constitutes a legitimate interest, which, in principle, justifies restrictions on the fundamental freedoms guaranteed by the Treaty. However, the

¹ Judgment 11.12.2007 of the CJEU, case C-438/05.

² Judgment 18.12.2007 of the CJEU, case C-341/05.

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



ASSEMBLEIA DA REPÚBLICA

EUROPEAN AFFAIRS COMMITTEE

Court acknowledged that the exercise of the right to strike is not absolute and its exercise may be subject to certain conditions and restrictions, which may result from national constitutions, legislation and practices.

2 – The Court considered that the freedom of establishment and the freedom to provide services are part of the fundamental principles of EU law. A restriction on those freedoms is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest.

3 – Consequently, the Court considered that the exercise of the right to take collective action, including the right to strike, and the freedom of establishment and the freedom to provide services must be reconciled, as they are both rights and freedoms of equal legal value.

4 – The Court's jurisprudence has given rise to many interpretations in the EU and the debate has attracted a wide range of stakeholders including the social partners, politicians, legal practitioners and academics⁴.

5 – The proposal therefore aims 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”*.

Mindful of the provisions of this proposal, the following issues should be raised:

a) Legal Basis

The European Commission invokes Article 352 TFEU as the legal basis for the proposal, recognising that it is *“reserved for cases where the Treaties do not provide the necessary powers to implement actions necessary, under the policies defined in the Treaties, to attain one of the objectives of the Treaties”*.

⁴ Since the context of the proposal is amply discussed in the first paragraph of the Explanatory Memorandum of the Proposal for a Regulation, we do not repeat it here.



ASSEMBLEIA DA REPÚBLICA

EUROPEAN AFFAIRS COMMITTEE

This Article enshrines the so-called ‘flexibility clause’ according to which *“If action by the Union should 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 Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures”*, which legal doctrine asserts as the basis of the implicit powers of the European Union.

For this Article to be used by the European Commission, the Commission must justify that objectives set out in the Treaties for which it does not have *“the necessary powers”* are intended to be achieved by the present proposal. The European Commission has not done so, however.

Even if it is considered that the European Commission intends by this proposal to pursue the objectives set out in Article 151 TFEU, which establishes the objectives in the social policy sphere and, generally, to contribute to the development of the single market based on the freedom of establishment and to provide services enshrined in Article 3(3) TEU, that should not circumvent the exclusion established in Article 153(5) TFEU.

The definition of the competences of the European Union is governed primarily by the principle of conferral⁵, which stipulates that the EU *“shall act only within the limits of competences conferred upon it by the Member States in the Treaties”*. Article 153(5) TFEU explicitly excludes the right to strike from the fields in which the social policy objectives provided in Article 151 TFEU may be pursued.

This Committee therefore considers that the European Union does not have competence to legislate on this matter and that the explicit exclusion of a certain matter, in this case the right to strike, from the sphere of competence of the EU precludes the use of Article 352 to circumvent that exclusion.

⁵ Article 5(1) and (2) TEU.



ASSEMBLEIA DA REPÚBLICA

EUROPEAN AFFAIRS COMMITTEE

b) Principle of Subsidiarity

Be the question of competence discussed in the previous sub-section as it may, we now turn to the principle of subsidiarity.

Pursuant to the terms of Article 5(1) and (2) TEU, the exercise of competences by the European Union is governed by the principle of subsidiarity, respect for which the Commission considers is fully ensured since the proposal *“reconciles cross-border situations in practice, requires action at European Union level and cannot be achieved by the Member States alone”*.

Although it may be considered that the EU has competence in this matter (with which we do not agree), this Committee considers that the present proposal also does not respect the principle of subsidiarity because, as the Report of the Committee on Social Security and Labour states: *“in its current form, the Proposal for a Regulation under scrutiny limits the right to take collective action, does not effectively reconcile economic freedoms with fundamental social rights and in cases of conflict, reinforces the proportionality tests, leaving the decision on the need for collective action to national courts and, in the last instance, to the Court of Justice of the European Union.”*⁶.

In this context, it is necessary to analyse two aspects of the proposal for a Regulation: firstly, the provisions on general principles; and secondly, the provisions on dispute resolution mechanisms.

In relation to Article 2 of the present proposal, it is considered that since reconciling social rights and economic rights in the context of fundamental rights is not a competence of the Union, as argued in the proposal but, rather, of the Member States, this conflicts with Portuguese constitutional tradition and with the interpretation followed by the jurisprudence of the Portuguese Constitutional Court and in legal theory generally. Indeed, it is not uncommon for Portuguese constitutional law to accord greater legal value to social rights compared with economic rights, and to personal rights over political participation rights, and to the latter over the former.

⁶ P.8 of the Report, annexed hereto.



ASSEMBLEIA DA REPÚBLICA

EUROPEAN AFFAIRS COMMITTEE

Similarly, the Committee has many doubts about the provisions in Article 3 on dispute resolution mechanisms since, in this matter especially, there is unnecessary interference in Portuguese jurisdiction. Not only does it appear to be unnecessary, but the justification is lacking for the EU legislator to regulate dispute resolution mechanisms related to the right to take collective action.

Accordingly, the Committee considers that the principle of subsidiarity is not respected because the right to take collective action, including the right to strike, should continue to be regulated at national level. It is not considered that the objectives aimed at by the present proposal are sufficiently important to justify changing the balance of competences between the Member States and the Union established in the Treaty of Lisbon.

PART III – OPINION

Mindful of the above and having regard to the Reports of the Committees with responsibility for the matter in question, the European Affairs Committee is of the opinion that:

1. The present proposal breaches the principle of subsidiarity; accordingly, pursuant to the terms of Article 3(1) of Law 43/2006 the proposal for a resolution annexed to this Reasoned Opinion should be submitted to the Plenary.
2. As regards the issues raised in the recitals, and in the analysis of the Committee on Social Security and Labour, the *Assembleia da República* should continue to monitor the legislative process related to this draft act, in particular through the exchange of information with the Government.

São Bento Palace, 15 May 2012

Rapporteur – *Maria Ester Vargas*

Committee Chairman – *Paulo Mota Pinto*



ASSEMBLEIA DA REPÚBLICA
EUROPEAN AFFAIRS COMMITTEE

PART IV – ANNEX

Report of the Committee on Social Security and Labour

**REPORT OF THE COMMITTEE ON SOCIAL SECURITY AND
LABOUR**

Proposal for a COUNCIL REGULATION on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services [COM(2012) 130] and Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the enforcement of Directive 96/71/EC on the posting of workers in the framework of the provision of services [COM(2012) 131]

Rapporteur: Maria
Helena André, MP (PS)

PART I – INTRODUCTORY NOTE

Pursuant to the terms of Article 163 of the Constitution of the Portuguese Republic [CRP] and the provisions of Law 43/2006 of 25 August [*Monitoring, assessment and pronouncement by the Assembleia da República within the scope of the construction of the European Union*] and in accordance with the *Procedures for the Scrutiny of European Draft Acts* approved on 20 January 2010, it is the responsibility of the Assembleia da República to monitor the work of the European institutions and to pronounce on proposals for legislative acts which it sees fit to scrutinise by issuing reports and opinions.

On 28 March 2012, the European Affairs Committee [CAE] referred to the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees and the Committee on Social Security and Labour [CSST] the Proposal for a COUNCIL REGULATION on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services [COM(2012) 130] and the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the enforcement of Directive 96/71/EC on the posting of workers in the framework of the provision of services [COM(2012) 131] for “... *possible analysis and preparation of a report and opinion*”, to be sent to CAE by 2 May 2012. These draft acts have the following accompanying documents: Impact Assessment – 2 parts [SWD(2012) 63] and Executive Summary of the Impact Assessment [SWD(2012) 64].

In view of the importance of the above proposals for legislative acts of the Council and of the European Parliament in the context of EU and national policies on freedom of movement and freedom of establishment and on the posting of workers, as well as the development of a single market based on fair

competition and respect for workers' rights and fundamental social rights, and having regard to the specific responsibilities of CSST, this Report is issued pursuant to the applicable legislation and rules of procedure.

PART II – RECITALS

1. Context and justification of the Proposals

The two Proposals under scrutiny arise from the judgments of the European Court of Justice in the Viking-Line and Laval cases and the debate to which they gave rise involving a wide range of stakeholders: social partners, politicians, legal practitioners and academics.

While recognising the right to take collective action, including the right to strike, as a fundamental right which forms an integral part of the general principles of EU law, the judgements also recognised the primacy of economic freedoms over the exercise of fundamental rights, entailing the risk of unfair competition and 'social dumping'. In other words, while the Court of Justice recognised the right to take collective action, including the right to strike, as a fundamental right which forms an integral part of the general principles of EU law, it nevertheless explicitly acknowledged that the exercise of that right may none the less be subject to certain restrictions, which would hamper the ability of trade unions to take action to protect workers' rights.

For these reasons, these judgments of the Court of Justice have exposed, albeit in a different way, the fault lines between the single market and the social dimension, and between the exercise by trade unions of the right to take collective action, including the right to strike, and the freedom of establishment and to provide services established in the Treaty. These cases have also posed

a challenge to the application, in its current form, of the Directive on the posting of workers, in particular its ability to provide an appropriate basis for the protection of the rights of workers, given that social and employment conditions in the Member States differ widely.

Clarification of the intrinsic requirements of the single market and the maintenance of social rights protected at national and EU levels is therefore the major challenge for the proposals under scrutiny. Their success will be measured by the ability to retain the support for economic integration of a group that has been a key supporter of the deepening of the European project: workers and their trade unions.

The right to collective bargaining, the right to take collective action, the right to strike and economic freedoms

In practice, both economic freedoms and fundamental rights and their exercise may be subject to restrictions and limitations, as we will now see.

Successive European Treaties have recognised that that the Union has not only an economic but also a social purpose, establishing that the rights on free movement of goods, persons, services and capital have to be implemented in accordance with the objectives pursued by social policy, including improved living and working conditions, proper social protection and dialogue between management and labour.

They have also strengthened the enshrinement of fundamental rights, most recently by the fact that the Charter of Fundamental Rights of the European Union now has the same legal value as the Treaty and that it recognises, in its Article 28, the right to collective bargaining and, in cases of conflicts of interests, to take collective action to defend collective interests, including strike action.

The same article also acknowledges that the right to strike is not absolute and must be exercised in accordance with European Union law and national laws and practices.

Economic freedoms – the freedom of establishment and the freedom to provide services – are also part of the fundamental principles of EU law. A restriction on those freedoms is, according to the case law of the Court of Justice, warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest. In such case, it must be appropriate for attaining the objective pursued and not go beyond what is necessary in order to attain it. In other words, such restrictions must necessarily and objectively be appropriate and proportionate to the objectives pursued.

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

2. Consultations with interested parties and impact assessment

As indicated above, a subject of this complexity has fuelled an intense debate over the past four years, culminating in the presentation of these proposals by the EU.

There is not even agreement between the various partners on the analysis of the causes and consequences, or on the present proposals.

The European trade unions regard it as essential to have a revision of the Posting of Workers Directive (Directive 96/71/EC) and the inclusion of a 'Social Progress Protocol' in the Treaty.

European employers do not consider that the Directive needs revising, while some Member States have modified their legislation in order to conform to the judgments.

The social partners carried out a joint analysis of the consequences of the judgments in the context of mobility and globalisation. Their wide divergence of opinion was maintained in the final document.

Both the European Parliament and the European Economic and Social Committee are of the opinion that the Directive should be revised at least partially.

Professor Mario Monti, in his report *'A new Strategy for the Single Market'*, proposes clarification 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, and a provision to guarantee the right to strike, modelled on Article 2 of Council Regulation (EC) No 2679/98 (the so-called *Monti II Regulation*) and a mechanism for informal resolution of labour disputes concerning the application of the Directive.

Following wide public consultation and the impact evaluation of policy alternatives based on an external study, the Commission presented its proposals for a Regulation and a Directive under scrutiny.

The reactions of the different partners to these proposals continue to be far from unanimous.

The two proposals, in the Rapporteur's view, go in the right direction: a proposal for a Regulation regulating the relationship between the fundamental social rights of workers and their representative structures and the economic freedoms (*Monti II Regulation*), and a proposal for a Directive on the implementation of the Posting of Workers Directive in the context of the provision of services.

However, to achieve their objectives, the legislative acts now under scrutiny must contribute to the implementation of a single market based on fair competition which protects workers' rights and avoids disrespect for fundamental social rights. In its current form, the Proposal for a Regulation under scrutiny limits the right to take collective action, does not effectively reconcile economic freedoms with fundamental social rights and in cases of conflict, reinforces the proportionality tests, leaving the decision on the need for collective action to national courts and, in the last instance, to the Court of Justice of the European Union. In other words, it does not fully resolve the issues raised by the judgments of the Court of Justice. The proposal for a Directive, by focusing on the implementation/application and not on the revision of Directive 96/71/EC on the posting of workers in the context of the provision of services, also does not fully resolve the problems of abuse that have been identified.

3. Purpose of the Proposal

The two proposals under scrutiny should be seen as a package whose objective is to clarify the interaction in the EU between the exercise of social rights and

the exercise of the freedom of establishment and to provide services established in the Treaty.

The proposal for a Council Regulation aims to clarify the general principles and rules at EU level as regards the exercise of the fundamental right to take collective action in the context of the freedom of establishment and to provide services, in particular the need to reconcile them in practice in cross-border situations. Its scope covers the temporary posting of workers to another Member State for the purpose of providing services and any envisaged restructuring and/or relocation involving more than one Member State.

For its part, the proposal for a Directive aims to improve the application and enforcement in practice of Directive 96/71/EC through a combination of effective preventive measures and appropriate and proportionate sanctions. It proposes more uniform rules for administrative cooperation, mutual assistance, national control measures and inspections, while also endeavouring to avoid unnecessary or excessive administrative burdens for service providers and respecting the diversity of the different social models and industrial relations systems in the Member States.

4. Legal basis of the proposals

As we have seen, the proposal for a Regulation aims to clarify the general principles and rules at EU level reconciling the exercise of fundamental rights, including the fundamental right to take collective action, with economic freedoms, namely the freedom of establishment and the freedom to provide services, in cross-border situations.

The legal basis for the proposed Regulation is Article 352 of the Treaty on the Functioning of the European Union. This Article is reserved for cases where the Treaties do not provide the necessary powers to implement actions necessary, under the policies defined in the Treaties, to attain one of the objectives of the Treaties.

A Regulation is considered to be the most appropriate legal instrument. Unlike a Directive, which is only binding as to the result to be achieved but leaves to the Member States the choice of forms and methods, a Regulation has direct applicability, clarifies the applicable rules in a more uniform way, reduces regulatory complexity and offers greater legal certainty.

Further, the Commission considers that the objectives of the proposed Regulation requires action at European Union level and cannot be achieved by the Member States alone.

Although Article 153(5) TFEU excludes the right to strike from the range of matters that may be regulated by way of minimum standards through Directives, the judgments of the Court of Justice have shown that, notwithstanding this fact, collective action is not excluded from the scope of EU law. Moreover, any initiative in this area will need to respect the autonomy of social partners, the different social models and diversity of industrial relation systems in the Member States.

The proposal for a Directive aims to improve the application and enforcement in practice of Directive 96/71/EC through a combination of effective preventive measures and appropriate and proportionate sanctions. It proposes more uniform rules for administrative cooperation, mutual assistance, national control

measures and inspections, while also endeavouring to avoid unnecessary or excessive administrative burdens for service providers and respecting the diversity of the different social models and industrial relations systems in the Member States.

The legal basis for the proposal for a Directive is Articles 53(1) and 62 TFEU, which are identical to those on which Directive 96/71/EC is based.

The problems with respect to the implementation, application and enforcement of Directive 96/71/EC compromise the objectives set out in Article 3(3) TEU, concerning the establishment of a single market based on a highly competitive social market economy aiming at full employment and social progress, making it very difficult, if not impossible, to create the required level playing field for service providers and ensure that workers posted for the provision of services enjoy the same level of protection guaranteed by the Directive throughout the EU. The required legal clarity and certainty can only be achieved at EU level and cannot be sufficiently achieved by Member States.

PART III – CONCLUSIONS

Mindful of the above, the Committee on Social Security and Labour concludes as follows:

1. The proposal for a Council Regulation aims to clarify the general principles and rules at EU level as regards the exercise of the fundamental right to take collective action in the context of the freedom of establishment and the

freedom to provide services. Its scope covers the temporary posting of workers to another Member State for the purpose of providing services and any envisaged restructuring and/or relocation involving more than one Member State.

2. The proposal for a Directive aims to improve the application and enforcement in practice of Directive 96/71/EC through a combination of effective preventive measures and appropriate and proportionate sanctions. It proposes more uniform rules for administrative cooperation, mutual assistance, national control measures and inspections, while also endeavouring to avoid unnecessary or excessive administrative burdens for service providers and respecting the diversity of the different social models and industrial relations systems in the Member States.
3. The legislative acts referred to in the preceding paragraphs which are the subject of this Report are of considerable importance in the context of the protection of workers' rights at both national and EU level.
4. The Committee on Social Security and Labour considers that scrutiny of these draft acts should be continued through to completion of the approval process.

PART IV – OPINION

The Committee on Social Security and Labour is of the following opinion:



Committee on Social Security and Labour

Opinion

- a) The Committee on Social Security and Labour considers that this Report should now be referred to the European Affairs Committee in accordance with the terms of Law 43/2006 of 25 August for the applicable legal and procedural purposes.

- b) The Committee on Social Security and Labour considers that scrutiny of these draft acts should be continued through to completion of the approval process.

São Bento Palace, 30 April 2012

Rapporteur - *Maria Helena André*

Committee Chairman - *José Manuel Canavarro*