



Houses of the
Oireachtas
Tithe an Oireachtais

An Comhchoiste um Poist, Coimirce Shóisialach agus Oideachas

Tuarascáil Ghrinnscrúdaithe AE

COM (2012) 130: Togra le haghaidh Rialacháin ón gComhairle maidir leis an gceart a fheidhmiú chun comhghníomhaíocht a dhéanamh i gcomhthéacs saoirse bunaíochta agus saoirse chun seirbhísí a sholáthar, agus

Com (2012)131: Togra le haghaidh Treorach ó Pharlaimint na hEorpa agus ón gComhairle maidir le forfheidhmiú Threoir 96/71/CE a bhaineann le hoibrithe a shuíomh i gcreat soláthair seirbhísí.

Meitheamh 2012

Joint Committee on Jobs, Social Protection and Education

EU Scrutiny Report

COM (2012) 130: Proposal for a Council Regulation on the exercise of the right to take right to collective action within the context of the freedom of establishment and the freedom to provide services, and

COM (2012)131: Proposal for a 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.

June 2012

Joint Committee on Jobs, Social Protection and Education

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Contents

1. Introduction	2
2. Summaries of the Proposals	3
3. Presentation by officials from the Department Jobs, Enterprise and Innovation and Enterprise Ireland.	6
4. Observations of the Committee.....	6
5. Decision of the Joint Committee.....	8
 Appendix 1: Presentation made to the Joint Committee.....	10
Appendix 2: Information Note provided by the Department of Jobs, Enterprise and Innovation	16
Appendix 3: ICTU Observations on COM(2012)130	26
Appendix 4: ICTU Observations on COM(2012)131	37
Appendix 5: Orders of Reference	43
Appendix 6 List of Members	47

Joint Committee on Jobs, Social Protection and Education

EU Scrutiny Report

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and

Com (2012)131: Proposal for a 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.

1. Introduction

Com (2012) 130 – 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; the so-called “Monti II” Regulation.

The Committee first considered this proposal at its meeting of 9 May 2012. The Committee decided at that meeting to further scrutinise the draft regulation and agreed to invite representatives from the lead Department – the Department of Jobs, Enterprise and Innovation to attend a meeting of the Committee to outline the proposal in greater detail to the Committee and to assist it in its scrutiny.

At that meeting, the Committee also agreed to scrutinise a related proposal, *Com (2012) 131* - a proposal for a 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.

Follow-up correspondence issued accordingly and the Committee subsequently scrutinised the proposals in detail at its meeting on 16 May 2012. The Committee heard a detailed explanation of both proposals from officials from the Department of Jobs, Enterprise and Innovation. The Committee had also received detailed briefing on the power of National Parliaments in relation to the monitoring of compliance by the Commission with the principle of ‘Subsidiarity and Proportionality’ and the related procedures, in advance of the meeting.

On the basis of the information provided in all forms to the Committee and its analysis of this information, the Joint Committee has prepared the following report.

2. Summaries of the Proposals

Com (2012) 130 – Proposal for a Council Regulation on the exercise of the right to take right to collective action within the context of the freedom of establishment and the freedom to provide services, *and*

Com (2012) 131 - Proposal for a 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.

These two proposals launched by the European Commission in March 2012 are intended to strike a balance between protecting workers and facilitating cross border service provision in the context of fair competition in Europe's Single Market.

Com (2012) 131

This proposal for an enforcement Directive aims to remove uncertainties that have arisen in the implementation of the 1996 rules on the posting of workers. It aims to ensure better information for workers and companies about their rights and obligations and better coordination between national competent authorities. In Ireland's case, the competent authority is the National Employment Rights Authority. A brief summary of the draft Directive is outlined below:-

- General Provisions (*Articles 1 to 3*). Articles 1 and 2 sets out the purpose and defines some of the terms used in the draft. Article 3 seeks to 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".
- Access to information (*Articles 4 and 5*). Require Member States (MSs) 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
- Administrative Cooperation (*Articles 6 to 8*) Require MSs to provide "mutual assistance" to help implement and enforce the draft Directive

- Monitoring Compliance (*Articles 9 and 10*) Article 9 provides an exhaustive list of the administrative requirements and control measures which MSs may impose on service providers posting workers to their territory. Article 10 requires MSs 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.
- Enforcement (*Articles 11 and 12*) Article 11 requires MSs 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. Article 12 requires MSs to introduce the principle of joint and several liabilities in the construction sector.
- Cross-Border Enforcement of Administrative Fines and Penalties (*Articles 13 to 16*). Articles 13 and 14 provide for mutual assistance to recover administrative penalties or fines, based on the principle of mutual recognition and enforcement. 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 specified circumstances. (*Articles 17 and 18*) Article 17 requires MSs to establish penalties for non-compliance with national provisions implementing the draft Directive. Article 18 provides administrative cooperation and mutual assistance.
- Final Provisions (*Articles 19 to 23*) which concern technical matters, inter alia the date of transposition and entry into force.

(Com (2012) 130) or “Monti II”

This Regulation is intended to take account of recent case law of the European Court of Justice and to confirm that the freedom to provide services does not have primacy over social rights, or the other way around. It is intended to confirm that the fundamental right or freedom to strike and economic freedoms must be placed upon an equal footing. A brief summary of this draft Regulation is outlined briefly below:-

- Article 1 sets out the subject matter referring to scope of the Regulation;

- Article 2 sets out the general principles regarding the exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms;
- Article 3 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;
- 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.

Implications for Ireland

In its initial information note to the Committee on *Com (2012) 131*, the Department of Jobs, Enterprise and Innovation indicated that Ireland supports the proposed update of the Posting of Workers Directive, which seeks to protect these categories of workers. It noted that the implications for Ireland will not be significant in view of the labour laws currently in force and the low level of workers affected.

In relation to *Com (2012) 130*, it is noted by the Department that this complex proposal seeks to address the issue of equity of fundamental rights. It also notes the possibility of subsidiarity concerns among Member States, in view of the legal basis used by the EU Commission in proposing the Directive, Article 353 of the TFEU – the flexibility clause. The Department also outlined details of conditions to be met by the Commission in relation to the use of this clause in order to mitigate these subsidiarity concerns.

The Department confirmed that negotiations on the draft proposals are likely to continue into the Irish Presidency of the EU in 2013.

3. Presentation by officials from the Department Jobs, Enterprise and Innovation and Enterprise Ireland.

The Committee heard a detailed presentation from a Departmental official on the proposed Directive and Regulation (*see Appendix 1*) on 16 May 2012, following which there was a question and answer session with members of the Committee. The discussion focussed in particular on the following areas of interest:-

- i. the process and likely timeframe for agreeing (or otherwise) the proposals;
- ii. the legal opinion of the Attorney-General regarding, in particular the issue of 'joint or several liability' as proposed in the draft Directive, in the Irish context;
- iii. the Government position of the proposals, in view of the divergent view of stakeholders on the proposals;
- iv. the numbers of posted workers in the Irish context and the position of agency workers vis-à-vis the proposals; -
- v. the legal instruments used by the Commission for the proposals.

4. Observations of the Committee.

Based on its analysis of the information gathered on the proposed legislation the following are the Committees' observations:

- 4.1 The Committee would like to thank the Department officials for the informative presentation and detailed explanation of the proposals and other related matters at short notice.
- 4.2 The Committee notes that the proposed enforcement Directive on Posting of Workers [*Com (2012) 131*] is more likely to progress than the proposed Regulation [*Com (2012) 130*], which has raised subsidiarity concerns in a number of Member States' parliaments.
- 4.3 The Committee, having been fully briefed on the subsidiarity issue and also informed of the related 'Yellow and Orange' flag procedures open to the Committee to record its subsidiarity concerns at EU level, concludes that it is satisfied with the explanation provided on both

proposals, and agreed instead to send its observations to the Minister on the matter.

- 4.4 Since scrutinising the proposals, the Committee has since been informed that the yellow card procedure provided for in the Lisbon Treaty was triggered on proposal *Com (2012) 130* - Monti II. As such, under Protocol 2 of that Treaty, the Commission must now review the proposal and then decide to maintain, amend or withdraw the proposal. Following this review, the Commission must then justify its subsequent decision to maintain, amend or withdraw the proposal. This justification will issue to national parliaments and to the European Parliament and to the Council.
- 4.5 In this context the Committee will await developments at EU level on *Com (2012) 130*.
- 4.6 The Joint Committee would like to be kept informed of the results of the departments consultations with stakeholders in relation to both *Com (2012)130* and *Com (2012)131*.

Observations specifically on *Com (2012) 131*

- The Joint Committee shares the view of the Department, of the importance of the principles behind this new proposal – that is, the free movement of workers within the EU and the protection of those workers’ rights on the one hand and the freedom of businesses to provide services anywhere in the EU’s internal market on the other.
- The Joint Committee noted that Ireland already has robust protections in place for posted workers and having said that, the relevance of posting in the Irish employment context is very low.
- Notes the work of the Joint Committee on European Affairs in relation to workers’ rights, in particular its Seventh Report entitled “The Lisbon Treaty & Workers’ Rights” dated September 2009.
- Supports the Department’s efforts to ensure that:-
 - no unnecessary administrative burdens are introduced for MSs or for business, which is particularly important for protecting growth in the SME sector, the driver of the domestic economy, and,
 - duplication of existing national structures in MSs is avoided.
- Would like to be kept informed of progress with regard to concerns about Joint and several liability, proposed in the context of the

construction industry, which the Department advised is not a feature of existing employment law in Ireland.

Observations specifically on *Com (2012) 130*

- As already mentioned, the key concern is to ensure that any additional legislative intervention in this area brings clarity and legal certainty
- The Committee also wishes to ensure that the proposal respects the diversity of the different industrial relations systems across the Member States, including the role of the Labour Relations Commission and the Labour Court in the Irish context.
- Notes that the views of other MSs on this proposal, in particular in terms of the specific subsidiarity concerns expressed by them and wishes to ensure that these are examined, clarified and addressed by the EU Commission in any revision of this proposal.

5. Decision of the Joint Committee.

It was agreed on 13 June 2012 that the report of the Joint Committee be laid before the Houses of the Oireachtas, published and placed on the Oireachtas website, and a copy forwarded to the Minister for of Jobs, Enterprise and Innovation for consideration in the context of the on-going negotiation of these measures.

Damien English, TD.
Chairman
13 June 2012.

Appendix 1: Presentation made to the Joint Committee

Joint Committee on Jobs, Social Protection and Education

16 May 2012

COM (2012) 130 – Proposal for a Council Regulation on the exercise of the right to take right to collective action within the context of the freedom of establishment and the freedom to provide services, and

Com (2012) 131: Proposal for a 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.

General/Introduction:

- The two proposals launched by the European Commission in March are intended to strike the right balance between protecting workers and facilitating cross border service provision in the context of fair competition in Europe's Single Market.
- The proposal for an enforcement Directive aims to remove uncertainties that have arisen in the implementation of the 1996 rules on the posting of workers. It aims to ensure better information for workers and companies about their rights and obligations and better coordination between national competent authorities. In Ireland's case, the competent authority is the National Employment Rights Authority.
- The parallel "Monti II" Regulation is intended to take account of recent case law of the European Court of Justice and to confirm that the freedom to provide services does not have primacy over social rights, or the other way around. It is intended to confirm that the fundamental right or freedom to strike and economic freedoms must be placed upon an equal footing.
- The posting of workers plays an important role in the cross-border provision of services, in particular in such sectors as construction, transport and temporary agency work. It is also important for service activities requiring a specialised, highly skilled workforce — for instance in the IT sector.
- The original 1996 Posting of Workers Directive (96/71/EC) set out a core of mandatory working conditions applicable to posted workers in the host Member State. It guarantees fair competition between all service-providers and a level playing field. It also ensures that posted workers enjoy an adequate degree of protection during their postings and prevents a race to the bottom in terms of working conditions.

- The Commission's package of proposals will be examined in the Council of Ministers and by the European Parliament. Ireland's key concerns will be to ensure that any additional legislative intervention in this area brings clarity and legal certainty to this area.
- The Minister's concern is to ensure that core working conditions like minimum rates of pay, working time and provisions on health and safety at work are well defined. The Minister does not want to see the temporary posting of workers used as a way to sidestep minimum entitlements in relation to pay and conditions.
- A priority will also be to ensure that the new proposals respect the diversity of the different industrial relations systems across the Member States, including the long-established role of bodies such as the Labour Relations Commission and the Labour Court.
- Department officials are engaged in the Council's deliberations on the new proposals, via the Working Party on Social Questions. The Department has also initiated a round of consultations with the social partners and other key stakeholders in order to ascertain their views on the overall package of measures.

Specifically on the Directive:

- Ireland has welcomed the Commission's draft proposal for a Directive on the enforcement of the original Posting of Workers Directive (96/71/EC). Ireland attaches great importance to the two fundamental principles at the heart of this new proposal –the free movement of workers within the EU and the protection of those workers' rights on the one hand and on the other hand, the freedom of businesses to provide services anywhere in the EU's internal market. The challenge in getting the text of this Directive agreed between Member States will be to strike an appropriate balance between these two fundamental principles.
- An improved system of enforcement of the Posted Workers Directive should be capable of being achieved without creating excessive administrative burdens for either the competent authorities of the State or for business, particularly small and medium-sized businesses which are disproportionately affected by administrative burdens, and without creating new institutional systems or entities for the purpose.
- Any improved system of enforcement of posted workers' rights should build on, and not duplicate, existing compliance and enforcement arrangements that exist at national level. In the Irish context, there are robust employment rights enforcement arrangements in place and significant inspection resources committed to this end.
- Any new arrangements should also be proportionate and in this context, the Committee will be interested to note that, according to the

Commission statistics¹, the relevance of posting in the Irish employment context is very low (workers posted from Ireland as a percentage of employment in private sector was an average of 0.1%, and workers posted to Ireland as a percentage of employment in private sector averaged 0.5% between 2007 and 2009).

- The provisions of the draft Directive which provide for greater access to information across Member States are welcome. The objective here (Article 5) is to improve access to information about working and employment conditions in other member states where a business is considering providing services. Many small and medium sized businesses – which are a cornerstone of job creation in most member States – are hampered by the lack of clearly and readily accessible information of this nature and this proposal can bring greater transparency in the area of information provision.
- There is also a welcome emphasis on providing information electronically, whether it is through an opening up of business registers or the use of the Internal Market Information System to exchange information between sending and host Member States on companies engaged in the temporary posting of workers.
- The principles governing administrative cooperation between Member States to facilitate the implementation and enforcement of the Directive (Article 6) are also welcome, even as some of the finer detail concerning response times to requests for assistance remains to be agreed. The key to making such mutual assistance workable is to find realistic response times that do not create an excessive administrative burden for the Member State the subject of the request.
- Article 12 proposes introducing a provision whereby, for the construction industry, a contractor may be held jointly and severally liable for remuneration (at minimum rates of pay) owed to a posted worker and taxes and social insurance contributions owed to the State by a sub-contractor. The purpose of this Article is to provide enhanced protection for posted workers in the event that their employer (the sub-contractor) disappears or fails to pay them what they are owed. This Article also provides that a main contractor may avoid such liability by undertaking 'due diligence' in conformity with a system to be created by the Member State. We are aware of the concerns of employers in this regard.
- A further concern articulated in respect of Article 12 is that, in the 19 Member States which do not currently provide for joint and several liability there is the prospect of creating a two-tier system of protections, for posted workers on the one hand, and for workers of the Member State on the other.

¹ Annex 1, Table 6 in Commission Impact Assessment SWD (2012) 63 Final – Part I

- Joint and several liability is not a feature of existing employment law in Ireland and we have sought the AG's advice as to whether this proposal is feasible in an Irish context.
- The Commission recognises that there are differing views among Member States and stakeholders on the feasibility and /or desirability of such an instrument at EU level. Only 8 Member States have joint and several liability provisions for parties other than the direct employer with regard to wages, taxes or social security contributions.
- In Articles 13 and 14 of the draft Directive, some general principles are articulated concerning cross-border enforcement of administrative fines and penalties for those companies found by a host Member State to be in breach of its employment legislation. However, this is not to underestimate the considerable challenges and difficulties inherent in putting in place a framework for such cross-border enforcement. The existence in some Member States of administrative fines and penalties for non-compliance with the relevant legislation, versus the criminal sanctions applied in jurisdictions such as Ireland is but one such challenge. We are engaging in further consultation with the relevant national authorities which will inform our position on this crucial issue.

Specifically on the Regulation:

- This legislative proposal for a Council Regulation, the so-called Monti II Regulation, has been proposed by the European Commission in order to complement the parallel proposal for a partial revision of the Directive on the Posting of Workers focusing on enforcement issues and to build upon the significance of the European Court of Justice judgments in the Viking-Line and Laval cases. These cases recognised for the first time that the right to take collective action, including the right to strike, constitutes a fundamental right and an integral part of the general principles of EU law.
- The purpose of the draft Regulation, accordingly, is to clarify the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights, including the right to take collective action, in accordance with national law and practices and in compliance with EU law. A Regulation has the advantage of giving much more legal certainty than the revision of the Directive itself, which would still leave too much room for diverging transposition, and take longer to produce real effects on the ground.
- The Regulation is intended to confirm that the freedom to provide services does not have primacy over social rights, or the other way around. The proposal explicitly states that it may not be interpreted as affecting the right to strike. It avoids reversing or re-interpreting the case law of the Court of Justice of the European Union. It does not give primacy to economic rights. Nor does it give primacy to social rights. Instead it sets out to uphold a balance not only between those

important rights, but also between the different social models and industrial relations within the Union.

- The draft Regulation lays down general principles with respect to the exercise of the right to strike within the context of the freedom of establishment and the freedom to provide services.
- The proposal provides for a new alert mechanism for industrial disputes in situations that affect the proper functioning of the Single market, but leaves national law governing the right to strike unaffected.
- Undoubtedly some of the concerns of Member States about the proposed Regulation stem from the fact that the Treaty on the Functioning of the European Union (TFEU) clearly stipulates that the provisions of Art 153 TFEU (which lists the European social competencies) do not apply to the right to take collective action. The Commission is seeking a way out of this dilemma by basing the proposed Regulation on the so-called “flexibility clause” at Article 352. This article may be used if a measure by the Union should prove necessary in order to attain one of the objectives set out in the Treaties. The precondition is that the Treaties do not provide the necessary powers for this.
- IBEC is opposed to the proposed Regulation and considers that there is no legal basis for EU legislation on the right to take collective action. IBEC objects to the Commission’s reliance on Article 352 in furtherance of the proposed Regulation. IBEC considers that the legal base chosen for the proposed Regulation constitutes a distortion of the purpose for which Article 352 is intended, and operates to undermine the specific exclusions outlined in Article 153.
- IBEC’s view is that Ireland already has well established industrial relations mechanism which gives expression to the right to collective bargaining and action, underpinned by statute. Any significant change in this, such as is being proposed, especially in the current climate, runs the risk of upsetting the careful balance that has been struck between workers and employers in this jurisdiction.
- For its part, the Irish Congress of Trade Unions consider that the proposals on the right of unions to take strike action could result in the right to strike being undermined across Europe and could well be in contravention of International Labour Organisation conventions.. Their view is that neither economic freedoms nor competition rules should have priority over fundamental social rights.
- What is clear from the reactions of the Social Partners at both the national and the European level is that they both have significant concerns about the proposed Regulation for altogether divergent reasons. The Department is aware of the sensitivities that surround these issues. The Joint Oireachtas Committee on European Affairs has

previously examined some of these issues in its 2009 report on “The Lisbon Treaty and Workers Rights”

- Your Committee may have noted that a majority of Parliaments of Member States have not submitted reasoned opinions to the Commission in respect of this proposal. This is undoubtedly because
- [As already mentioned]. Our key concerns will be to ensure that any additional legislative intervention in this area brings clarity and legal certainty to this area.
- We will also want to ensure that the new proposals respect the diversity of the different industrial relations systems across the Member States, including the role of the Labour Relations Commission and the Labour Court.
- The Department has commenced consultations with the social partner and other stakeholders on the proposals. The Department has also sought advice from the Office of the Attorney General.
- We are fully involved in the Council’s deliberations on the new proposals, and will be taking steps to consult directly with the social partners in order to ascertain their views on the overall package of measures. The Council Working Group and ultimately the Council of EPSCO Ministers will only manage to attain unanimity on the proposed instrument if they can be convinced that it will bring real “added value” in terms of legal certainty.

Appendix 2: Information Note provided by the Department of Jobs, Enterprise and Innovation

Information Note: Com (2012) 130

1. Proposal

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

2. Date of Commission document

21/03/2012

3. Number of Commission document

COM (2012) 130

4. Number of Council document:

8040/12

5. Dealt with in Brussels by

László Andor, EU Commissioner responsible for Employment, Social Affairs and Inclusion and the Directorate-General for Employment, Social Affairs and Inclusion

6. Department with primary responsibility

Department of Jobs, Enterprise and Innovation

7. Other Departments involved

Department of Justice and Equality

8. Background to, Short summary and aim of the proposal

This legislative proposal (topically known as the Monti II regulation) As a result of its origins in a recommendation of the Report entitled "*A new Strategy for the Single Market: at the service of Europe's economy and society*" made to the President of the Commission by Professor Mario Monti on 9 May 2010. The report is now widely known as the Monti Report.

See: http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf. The report distinguishes two sets of issues. Firstly, there are those "*strains to which the current regulatory framework for posting of workers is subject, in a context of divergent social and employment conditions among Member States and acute sensitivity about the perceived risks of social dumping and unfair competition*". Secondly, "*the Court's decisions showed that the reach of the EU law extends to collective labour disputes. This has brought social partners and collective action straight into the heart of the economic constitution of the single market. (...) Both national systems of industrial relations and the exercise of the right to strike might have to adjust to fit with the economic freedoms established by the Treaty*". The report makes two recommendations in this context:

(1) *Clarify the implementation of the Posting of Workers Directive and strengthen dissemination of information on the rights and obligations of workers and companies, administrative cooperation and sanctions in the framework of free movement of persons and cross-border provision of services;*

(2) *If measures are adopted to clarify the interpretation and application of the Posting of Workers Directive, introduce a provision to guarantee the right to strike modelled on Art. 2 of Council Regulation (EC) No 2679/98 and a mechanism for the informal solutions of labour disputes concerning the application of the directive.*

) has been proposed by the European Commission in order to complement the parallel proposal for a revision of the Directive on the Posting of Workers and to build upon the significance of the European Court of Justice (ECJ) judgments in the Viking-Line and Laval cases which recognised for the first time that the right to take collective action, including the right to strike, constitutes a fundamental right and an integral part of the general principles of EU law. The purpose of the draft Regulation, accordingly, is to clarify the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights, including the right to take collective action, in accordance with national law and practices and in compliance with EU law.

9. Legal basis of the proposal

Article 352 TFEU.

The so-called “flexibility clause” at Article 352 TFEU provides for action by the Union to attain one of the objectives set out in the Treaties, but where the Treaties have not provided the necessary powers. Such measures shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.

The maintenance of a requirement for a unanimous decision by the Member States, and the involvement of national parliaments together provide safeguards that should help to ensure the proper use of the flexibility provision. The requirement that any action must be within the scope of policies already defined in the Treaties provides an additional safeguard.

10. Voting Method

Unanimity

11. Role of the EP

The EP must give its consent to the Regulation under the assent procedure which is part of the *special legislative procedures* under Article 289(2) of the Treaty on the Functioning of the European Union (TFEU). The consent procedure gives the EP a right of veto. The EP must express its approval on a Council draft act by an absolute majority vote, without possibility to amend it.

12. Category of proposal

Regulation

13. Implications for Ireland and Ireland's Initial View

The Commission's intention to legislate at EU level to achieve a balance between the exercise of freedom of establishment and the freedom to provide services on the one hand, and the exercise of fundamental social rights, including the right to take collective action on the other hand, has already proved highly controversial. Prior to the Commission's proposal being adopted the prospect of legislative intervention in this area has divided opinion politically within the European Parliament and between the European Social Partners and also between the Irish social partner interests. This is an extremely sensitive issue and the combination of this instrument with the proposed revision of the Posting of Workers Directive will prove a difficult challenge for the Irish Presidency of the European Union which is likely to take over responsibility for steering negotiations on these proposals at Council level in the first half of 2013.

The judgements by the European Court of Justice (ECJ) in the Laval, Viking, Rüffert and Luxembourg cases were considered in the 7th Report of the Joint Committee on European Affairs entitled “*The Lisbon Treaty & Workers' Rights*” which was published

in September 2009. In the Conclusion to that Report it was noted that the issues raised by the ECJ judgments, particularly by the Laval case, are not due to the Posting of Workers Directive in itself but due to the way in which the Member States transpose and implement the provisions of the Directive so as to be in conformity with Article 49 of the TEC as interpreted by the ECJ 7th Report of the Joint Committee on European Affairs, see especially (vii) on page 34. The European Parliament therefore suggested a partial review of the Posting of Workers Directive “after a thorough analysis at national level of the actual challenges to different models of collective agreement”.

14. Are there any subsidiarity issues for Ireland?

- Since Article 153(5) TFEU excludes the right to strike from the range of matters that can be regulated across the EU by way of minimum standards through Directives, there is concern in some quarters that EU legislative intervention in this area is inappropriate and could infringe not only EU law but also impinge upon Constitutional rights in Ireland.
- Subsidiarity concerns are always a factor where the “flexibility clause” at Article 352 TFEU is the chosen legal base. These concerns can, however, be mitigated in this instance to the extent that:
 - o priority attention will be given during the legislative process to ensuring that the initiative respects not only the autonomy of social partners but also the different social models and diversity of industrial relation systems in the Member States;
 - o the framing of the current proposal demonstrates respect for the subsidiarity principle through its recognition of the role of national courts in establishing (a) the facts in any dispute arising and (b) ascertaining whether actions pursue objectives that constitute a legitimate interest, are suitable for attaining these objectives, and do not go beyond what is necessary to attain them.
 - o the framing of the current proposal recognises the importance of existing national laws and procedures for the exercise of the right to strike, including existing alternative dispute-settlement institutions, such as the Labour Relations Commission and the Labour Court in Ireland, which will not be changed or affected by the proposed Regulation.

15. Anticipated negotiating period

2012 -2013

16. Proposed implementation date

n/a

17. Consequences for national legislation

The role of dispute resolution bodies under the Industrial Relations Acts 1946 – 2004 should not be affected by the Regulation. Nor would legislation necessarily be required to establish an early warning system to inform and notify any other Member States concerned and the Commission immediately in the event of serious acts occurring as a result of industrial action that could affect the proper functioning of the Single Market.

18. Method of Transposition into Irish law

In proposing a Regulation, the Commission is seeking to avoid the limitations of a Directive, which, by its very nature, is only binding through the process of transposition as regards the ultimate result to be achieved. Instead the direct applicability of a Regulation is intended to reduce regulatory complexity and to offer, in the view of the European Commission, greater legal certainty for those subject to the legislation across the Union by clarifying the applicable rules in a more uniform way.

19. Anticipated Transposition date

n/a

20. Consequences for the EU budget in Euros annually

The proposal has no implications for the EU budget.

21. Contact name, telephone number and e-mail address of official in Department with primary responsibility

Paul Cullen
Industrial Relations Unit
Department of Jobs, Enterprise and Innovation

Phone: 01 6313290

E-mail: paul.cullen@djei.ie

Information Note: Com (2012) 131

1. Proposal

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

2. Date of Commission document

21/03/2012

3. Number of Commission document

COM(2012) 131

4. Number of Council document:

8040/12

5. Dealt with in Brussels by

László Andor, EU Commissioner responsible for Employment, Social Affairs and Inclusion and the Directorate-General for Employment, Social Affairs and Inclusion

6. Department with primary responsibility

Department of Jobs, Enterprise and Innovation

7. Other Departments involved

Department of Public Expenditure and Reform

8. Background to, Short summary and aim of the proposal

The purpose of the proposal is to strengthen the enforcement of the Posting of Workers Directive 96/71/EC which was intended to reconcile the exercise of the freedom to provide cross border services under Article 56 TFEU with appropriate protection of the rights of workers temporarily posted abroad for that purpose. The 1996 Directive does not grant substantive rights, as such, to posted workers. It was not, in that respect, a traditional harmonisation Directive. Rather, it requires each Member State to guarantee the same protection for posted workers as it already applies to those permanently working in that jurisdiction in certain core areas. It does not require specific types of protection (e.g. a national minimum wage or universally applicable sector level collective agreements) to be in place, but if they are, they must be extended to posted workers.

In the aftermath of the rulings of the European Court of Justice (ECJ) in the Viking-Line, Laval, Rüffert and Commission v Luxembourg cases in 2007-2008 an intense debate developed See 7th Report of the Joint Committee on European Affairs entitled "*The Lisbon Treaty & Workers' Rights*" which was published in September 2009. in particular on the consequences of the freedom to provide services and freedom of establishment for the protection of workers' rights and the role of trade unions in protecting workers' rights in cross-border situations. Following a wide-ranging public consultation and debate orchestrated at European level by the European Commission, the Commission adopted the Communication '*A Single Market Act — Twelve levers to boost growth and strengthen confidence*' See COM (2011) 206 final. adopted by the European Commission on 13 April 2011 in which it announced its intention to bring forward a revision of Directive 96/71/EC with the objective of improving and reinforcing the transposition, implementation and enforcement in practice of the Posting of Workers Directive and to include measures to prevent and sanction any abuse and circumvention of the applicable rules.

The debate at national level in EU Member States on the protection of mobile workers often fails to distinguish clearly between posted workers and the broader

phenomenon of migrant or foreign workers. As a result, the specificities of the situation of posted workers and how this situation is linked to the issue of the transnational provision of services are not always apparent. See the report *Posted workers in the European Union*, European Foundation on the Improvement of Living and Working Conditions, (2010) especially p.2. Indeed, posted workers may share – to varying extents – the employment and working conditions that characterise some categories of migrant work. However, their position in the labour market is much more particular, as they find themselves between the regulatory framework of the host country and that of the country they habitually work in. The issue at stake is how to combine or balance these two sets of rules and regulatory frameworks with a view to guaranteeing – simultaneously – freedom of service provision and the protection of the workers involved, as well as a level playing field for domestic and foreign companies.

By facilitating the cross-border provision of services and improving the climate of fair competition, the Commission's legislative initiative is intended to boost the potential for growth offered by the posting of workers and to enable jobs for posted workers to be tapped as a key element in the provision of services in the internal market. The Commission has also introduced a parallel legislative proposal to clarify the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights, including the right to take collective action, in accordance with national law and practices and in compliance with EU law. Having regard to a key recommendation of the Report entitled "*A new Strategy for the Single Market: at the service of Europe's economy and society*" made to the President of the Commission by Professor Mario Monti on 9 May 2010.

9. Legal basis of the proposal

Article 53 (1) and 62 TFEU. These Articles are identical to those on which Directive 96/71/EC is based and allow for the adoption of directives under the ordinary legislative procedure (i.e. co-decision).

10. Voting Method

QMV

11. Role of the EP

The EP must give its consent to the Directive in line with the ordinary legislative procedure. Ms Danuta Jazłowiecka, MEP (PL-PPE) of the EP Employment Committee has been appointed rapporteur and an opinion will be provided also by the EP's Internal Market and Consumer Protection Committee.

12. Category of proposal

Directive

13. Implications for Ireland and Ireland's Initial View

The original objective of the Posting of Workers Directive was to reconcile the need to facilitate the cross-border provision of services and the protection of employment conditions for posted workers. Ireland considers that this objective remains valid and that the 1996 Directive continues to strike the right balance between worker protection and economic freedoms, including worker mobility. Ireland has broadly welcomed the practical approach pursued to date by the European Commission in order to resolve problems of implementation and interpretation that have arisen with a view to improving the application and enforcement of the Posting of Workers Directive.

The combination of the proposed revision of the Posting of Workers Directive with the parallel legislative proposal for a directly effective Regulation (topically known as the

Monti II regulation) will nonetheless prove a difficult challenge for the Irish Presidency of the European Union which will take over responsibility for steering any continuing negotiations at Council level on these dossiers in the first half of 2013.

The judgements of the European Court of Justice in the Viking-Line, Laval, Rüffert and Commission vs. Luxembourg cases in 2007-2008 fuelled an intense debate that focused on the interpretation of the Posting of Workers Directive 96/71/EC, as well as more generally on their consequences for the protection of workers' rights and the right of collective action by trade unions. That debate resonated in Ireland in the run-up to the second referendum on the Lisbon Reform Treaty and prompted the Ireland's request that the European Council adopt the Solemn Declaration on Workers' Rights, Social Policy and Other Issues in June 2009 to reinforce the high importance to be attached to a number of social issues, including workers' rights.

The controversial judgements by the European Court of Justice (ECJ) were considered in the 7th Report of the Joint Committee on European Affairs entitled "*The Lisbon Treaty & Workers' Rights*" which was published in September 2009. In the Conclusion to that Report it was noted that the issues raised by the ECJ judgments, particularly by the Laval case, are not due to the Posting of Workers Directive in itself but due to the way in which the Member States transpose and implement the provisions of the Directive so as to be in conformity with Article 49 of the TEC as interpreted by the ECJ 7th Report of the Joint Committee on European Affairs, see especially (vii) on page 34.

A key debate has developed around the definition and limits of the core protections of the 1996 Directive that apply certain minimum protections to posted workers especially as regards the question of whether these core provisions can encompass the entire set of the national labour protection regime.

Directive 96/71/EC was transposed into Irish law by section 20 of the Protection of Employees (Part-Time Work) Act 2001. This section provides that all Irish labour legislation applies to workers posted to Ireland. Posted workers are also covered by the provisions of the Employment Regulation Orders (EROs) and Registered Employment Agreements (REAs) made in accordance with the Industrial Relations Acts 1946-2004. The latter have universal applicability in Ireland as "the industry norm" for the sectors involved – in line with Article 3.8 of Directive 96/71 EC. Similarly, the National Minimum Wage Act 2000 has universal applicability and transposes Article 3(1)(c) of the Directive.

In a decision of the Labour Court in February 2009 Labour Court, Case REP091 issued on 02/03/2009 the Court considered the inter-relationship between an REA and the Posting of Workers Directive 96/71/EC. The Court held that the REA was a universally applicable agreement within the meaning of Article 1 of the Directive and was enforceable against employers operating in Ireland who are based outside the jurisdiction by virtue of s.20 of the Protection of Employees (Part-Time Work) Act 2001 (by which the Directive is transposed in domestic law). On the authority of the CJEU Formally the ECJ in Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet [2008] IRLR 160 the Court held that in the absence of an REA contractors from other EU Member States could tender for contracts in Ireland, based on rates and conditions applicable in their country of origin subject only to the statutory minima in this jurisdiction, and use posted workers to undertake the work involved. In subsequent Judicial Review proceedings involving the Court's refusal to cancel the registration of the agreement McGowan and Others v Labour Court and Others, Minister for Enterprise Trade and Employment v Camlin Ltd; Bunclody Electrical Contracting Ltd and Others v Labour Court and Others, Unreported, High Court Hedigan J 30th June 2010. Hedigan J. held that the Labour Court's conclusions on this point were correct

There is a substantial lack of information about the extent of the posted worker phenomenon in European labour markets. In Ireland, in particular, there is no data available on the number and basic characteristics of posted workers. The implications of any additional national control measures, monitoring or inspections tailored specifically to the transnational provision of services are accordingly heightened in the context of current public financial constraints especially in the context of a shared land border between two separate jurisdictions on the island of Ireland.

14. Are there any subsidiarity issues for Ireland?

Adequate implementation and effective application and enforcement are key elements guaranteeing the effectiveness of the applicable EU rules. Differences and disparities in the way Directive 96/71/EC is being implemented, applied and enforced in the different Member States have the potential to undermine the "level playing field" that is required for the proper functioning of the Directive.

The introduction of more uniform rules for administrative cooperation, mutual assistance, national control measures and inspections reflect the heterogeneous nature of inspection and control systems across the 27 Member States, while also endeavouring to avoid unnecessary or excessive administrative burden for service providers. At the same time, moreover, respect for the diversity of the different social models and the unique industrial relations traditions and institutions in Member States like Ireland is guaranteed. Ireland will engage in consultations with social partner and business interests in the normal way to ascertain their views on the proposal and to ensure that it does not go beyond what is necessary in order to achieve its objectives.

15. Anticipated negotiating period

2012 -2013

16. Proposed implementation date

n/a

17. Consequences for national legislation

The revision of the Posting of Workers Directive (Directive 96/71/EC) may have the effect of limiting the scope of measures such as section 20 of the Protection of Employees (Part-Time Work) Act 2001 to apply more favourable conditions than the core terms and conditions of employment established in accordance with Article 3(1) of the 1996 Directive.

18. Method of Transposition into Irish law

To be determined

19. Anticipated Transposition date

Not before 2015

20. Consequences for the EU budget in Euros annually

Costs for grants (projects, seminars, exchange of good practice etc.) of 2 million EUR as well as for the Expert Committee on the Posting of Workers of 0,264 million EUR per year will be covered by PROGRESS (2013) and the Programme for Social Change and Innovation (2014-2020). Costs of 0.5 million EUR for an ex-post evaluation study in 2016 will be covered by the Programme for Social Change and Innovation. Other costs for human resources of 0.232 million EUR and other administrative expenditure on travel and the organisation of conferences will be covered under heading 5 of the Multiannual Financial Framework.

21. Contact name, telephone number and e-mail address of official in Department with primary responsibility

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Appendix 3: ICTU Observations on COM(2012)130



IRISH CONGRESS TRADE UNIONS

Observations and Recommendations on the

**EU Commission Proposals 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**

MONTI II

May 2012

Statement of ICTU position

1. The Irish Congress of Trade Unions is the representative body for trade unions on the island of Ireland representing over 800,000 workers from all occupations and industries in both the private and public sector.
2. Our analysis is that the Commission proposals for a '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', the so called MONTI II Regulation, fall substantially short of correcting the problems brought about by the European Court of Justice Rulings in the *Viking*, *Laval*, and *Ruffert* cases. Indeed the text of the proposed Regulation threatens to confirm the unacceptable case law and to damage workers' rights and social Europe further.
3. **Congress therefore rejects the Commission proposals and we call on Government to put forward credible proposals in order to ensure that the right of workers and their unions to take collective action to defend their interests is not undermined in the context of economic freedoms in the single market.**

Summary of key points

Not the same Monti

4. The judgments of the European Court of Justice in the *Viking-Line*, *Laval*, *Rüffert* and *Commission v Luxembourg* cases (*Viking* (C-438/05), *Laval* (C-341/05), *Rüffert* (C-346/06), *Commission v Luxembourg* (C-319/06) triggered an intense debate focused on two major issues. The first concerned how to set the right balance between the exercise by trade unions of their right to take collective action, including the right to strike, and the economic freedoms enshrined in the Treaty on the Functioning of the European Union (TFEU) in particular the freedom of establishment and the freedom to provide services. The second was how to interpret some key provisions in Directive 96/71/EC, such the concept of public policy, the material scope of the terms and conditions of employment protected by the Directive and the nature of mandatory rules, in particular the minimum wage.
5. On the first question, respecting the right to strike, the idea was to introduce a provision to guarantee the right to strike, modelled on Article 2 of Council Regulation (EC) No 2679/98 (the so-called Monti Regulation), The 1998 MONTI I Regulation was clear that the free movement of goods could not be used as a means to undermine the right to take collective action, Council Regulation (EC) No. 2679/98, Article 2 stated:

‘This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States’.

6. The Commission proposals have none of this clarity, in wording or in purpose. The main objective of the Regulation is still stuck on the same old refrain: economic freedom always prevails over social and human rights.

Problematic inclusion of ‘proportionality’

7. Congress is concerned about the use of ‘proportionality’ as a methodological instrument to reconcile conflict between economic freedoms and fundamental human rights. The proposals, if adopted, would give rise to an omnipresent threat to a trade union’s ability to take collective action, as employers would undoubtedly threaten legal action for damages, while injunctions on collective action while any questions of ‘proportionality’ are decided in Irish courts would likely render the action taken some months later irrelevant and meaningless. The International Labour Organisation has recently considered the operation of the ‘proportionality’ principle and ‘considers that the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention’ (BALPA case). Congress therefore calls on Government to seek the removal of the ‘proportionality’ test from the Regulation.
8. Congress argues that Commission has over-interpreted the scope of the ECJ rulings. The *Laval* case involved the use of collective action in the form of a ‘Blockade’. Interestingly the right to take collective action in the form of a Blockade was upheld. It was the absence of a system for establishing universally binding collective agreements, such as exists in Ireland (Registered Employment agreements) that gave rise to the proportionality issue. This is almost the mirror opposite of the situation in Ireland. In Ireland, the right to strike is not recognised in law (contrary to obligations under the ECHR) and collective action must meet a number of overly stringent and restrictive conditions, in ‘furtherance of a trade dispute’. Secondary picketing (i.e. picketing of an employer other than the primary employer involved in the dispute) is lawful only in situations where it is reasonable for those workers picketing to believe that the second employer was acting to frustrate the industrial action by directly assisting their employer. (Section 11(2) Industrial Relations Act 1990).
9. It remains unclear, what if any role the ECJ would assign to ‘proportionality’ if it was to consider its application in the context of a strike taken under the Industrial Relations Act in Ireland.

<http://www.djei.ie/publications/employment/2002/industrialrelationsguide.pdf>

10. In the proposed Regulation the Commission seeks to take the ruling of the ECJ made on the basis of a specific situation and apply it everywhere and to all situations. Congress does not accept this approach as it will add another layer of restriction further undermining the right to strike in Ireland.

Insufficient account taken of legal developments since the ECJ rulings

11. Congress questions why the dramatic new jurisprudence developed by the European Court of Human Rights during the intervening period has been ignored. (*Demir and Baykara v. Turkey* ([Application No. 34503/97](#)) delivered on 12 November 2008; and *Enerji Yapi-Yol Sen v. Turkey* ([Application No. 68959/01](#)) delivered on 21 April 2009) These developments at the ECtHR change the legal landscape and oblige recognition and an increase in the level of protection afforded to the right to strike, however the implications of these ECtHR rulings are totally absent from the text of the draft Regulation.

The Treaty of Lisbon (TFEU) and the ECHR has been ignored

12. Other relevant developments in the intervening period include the modification of the EU treaties by the passing of the Treaty of Lisbon, incorporating the EU Charter of Fundamental Rights and requiring the EU (and its institutions including the ECJ) to accede to the European Convention on Human Rights. Today, the decisions of the ECJ in the cases Viking, Laval, Ruffert would likely be different, as the Charter of Fundamental Rights of the European Union is as legally binding as the EU Treaty itself. Moreover the EU has determined to acceded to the European Convention on Human Rights introducing a new hierarchy with fundamental human rights accorded a superior position.
13. Yet the proposed Regulation adheres to the original ECJ rulings and takes insufficient account of the radically transformed legal landscape. Although at times it hints to the contrary, the draft regulation seeks to confirm and expand the scope of the original case law as if there had been no developments in the intervening period.

Fundamental Human Rights are not equal to economic rights

14. The ICTU does not accept that economic rights have an equal status with fundamental human rights. Fundamental human rights, due to their nature and function are superior to economic rights and we reject the draft proposal to ascribe equal legal value (although we note that the use of an economic freedom never has to be justified...) to fundamental human rights as an unacceptable and backwards step contrary to proper observance of the ECHR and other human rights treaties. In this context, the Commission proposals should be dismissed and instead the Commission should be asked to finally recognize the primacy of human social and economic rights in the European

treaties by promoting a social progress protocol (see ETUC draft for social progress protocol at end of submission).

Conclusion

15. Congress' view is that there will be no solution until there are clear rules indicating that collective action may be taken in accordance with human rights principles. The level of protection for the right to take collective action afforded by the EU and Member States cannot be lower than the Charter of Fundamental Rights, the European Court of Human Rights and the ILO Conventions stipulate. What is needed is a clear commitment to respect European and International law and labour standards.
16. The seriousness with which the trade union movement and human rights advocates view this matter cannot be over-estimated. This issue has the potential to alienate trade unions, as well as the millions of workers they represent across Europe, from the legitimacy of the European project and from the concept of the single market in particular.
17. **Congress therefore joins with trade unions throughout Europe in rejecting the Commission proposals. We call on Government to put forward credible proposals in order to ensure that the right of trade unions to take collective action to defend their interests is not undermined in the context of economic freedoms in the single market.**

Proposals for a Social Progress Protocol

18. The idea of a Monti II Regulation can be supported only in so far as it constitutes a viable stepping stone to a long term solution. Given the difficulties posed by achieving unanimous acceptance by 27 member States for a Regulation and the extent to which the legal context for the proposals has changed in the intervening period, we question if a Regulation is the appropriate legal instrument and we remind Government of our call for a social progress protocol. The ETUC have drafted such a protocol and we set out their proposals below.

ETUC

Proposals for a Social Progress Protocol

THE HIGH CONTRACTING PARTIES,

HAVING REGARD to Article 3(3) of the Treaty on the European Union,

CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers,

RECALLING that the Union shall work for a highly competitive social market economy, aiming at full employment and social progress, (Article 3(3) sub par. 1 of the TEU)

RECALLING that the single market is a fundamental aspect of Union construction but that it is not an end in itself, as it should be used to serve the welfare of all, in accordance with the tradition of social progress established in the history of Europe;

WHEREAS, in accordance with Article 6(1) of the Treaty on the European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights and in particular the fundamental social rights enshrined in this Charter,

BEARING IN MIND that, according to Article 9 (new horizontal social clause) of the Treaty on the Functioning of the EU, in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health,

HAVING IN MIND that the Union and the Member States shall have as their objectives the improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained (Article 136 (1) EC Treaty = Article 151(1) TF EU),

RECALLING that the Union recognises and promotes the role of social partners, taking into account the diversity of national systems, and will facilitate dialogue between the social partners, respecting their autonomy (Article 136a new = Article 152 TF EU),

WISHING to emphasise the fundamental importance of social progress for obtaining and keeping the support of European citizens and workers for the European project,

DESIRING to lay down more precise provisions on the principle of social progress and its application;

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union:

Article 1 [Principles]

The European social model is characterised by the indissoluble link between economic performance and social progress, in which a highly competitive social market economy is not an end in itself, but should be used to serve the welfare of all, in accordance with the tradition of social progress rooted in the history of Europe and confirmed in the Treaties.

Article 2 [Definition of social progress and its application]

Social progress and its application means in particular:

The Union

improves the living and working conditions of its population as well as any other social condition,

ensures the effective exercise of the fundamental social rights and principles, and in particular the right to negotiate, conclude and enforce collective agreements and to take collective action,

in particular protects workers by recognizing the right of workers and trade unions to strive for the protection of existing standards as well as for the improvement of the living and working conditions of workers in the Union also beyond existing (minimum) standards, in particular to fight unfair competition on wages and working conditions, and to demand equal treatment of workers regardless of nationality or any other ground,

ensures that improvements are being maintained, and avoids any regression in respect of its already existing secondary legislation.

The Member States, and/or the Social Partners,

are not prevented from maintaining or introducing more stringent protective measures compatible with the Treaties,

when implementing Union secondary legislation, avoid any regression in respect of their national law, without prejudice to the right of Member States to develop, in the light of changing circumstances, different legislative, regulatory or contractual provisions that respect Union law and the aim of social progress.

Article 3 [The relation between fundamental rights and economic freedoms]

Nothing in the Treaties, and in particular neither economic freedoms nor competition rules shall have priority over fundamental social rights and social progress as defined in Article 2. In case of conflict fundamental social rights shall take precedence.

Economic freedoms cannot be interpreted as granting undertakings the right to exercise them for the purpose or with the effect of evading or circumventing national social and employment laws and practices or for social dumping.

Economic freedoms, as established in the Treaties, shall be interpreted in such a way as not infringing upon the exercise of fundamental social rights as recognised in the Member States and by Union law, including the right to negotiate, conclude and enforce collective agreements and to take collective action, and as not infringing upon the autonomy of social partners when exercising these fundamental rights in pursuit of social interests and the protection of workers.

Article 4 [Competences]

To the end of ensuring social progress, the Union shall, if necessary, take action under the provisions of the Treaties, including under (Article 308 EC Treaty=) Article 352 of the Treaty on the Functioning of the European Union

Consideration by ILO Committee of Experts Consideration of the Viking and Laval cases in BALPA

United Kingdom

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (ratification: 1949)

The Committee notes the comments made by the British Airline Pilots' Association (BALPA) dated 22 October 2008, supported by the International Transport Federation (ITF) and Unite the Union, and the Government's reply thereto. The Committee notes in particular that BALPA refers to two recent decisions of the European Court of Justice (ECJ), *International Transport Workers' Federation and the Finnish Seaman's Union v. Viking Line ABP (Viking)* and *Laval un Partneri v. Svenska Byggnadsarbetareförbundet (Laval)* which held that the right to strike was subject to restrictions under the European Union law where its effect may disproportionately impede an employer's freedom of establishment or freedom to provide services. BALPA asserts that these judgements have negatively impacted upon their rights under the Convention.

In particular, BALPA explains that it decided to go on strike, following a decision by its employer, British Airways (BA), to set up a subsidiary company in other EU States. While efforts were made to negotiate this matter, in particular the impact that the decision would have upon their terms and conditions of employment, all attempts were unsuccessful and BALPA members overwhelmingly voted to go on strike. The strike action was, however, effectively hindered by BA's decision to request an injunction, based upon the argument that the action would be illegal under *Viking* and *Laval*. In addition, BA claimed that, should the work stoppage take place, it would claim damages estimated at £100 million per day. Under these circumstances, BALPA did not follow through with the strike, stating that it would risk bankruptcy if it were required to pay the damages claimed by BA. BALPA expresses its deep concern that the application of *Viking* and *Laval* by the UK courts will result in injunctions against industrial action (and dismissal of workers) if a strike's impact on the employer is judicially determined to outweigh the benefit to workers.

The Committee notes the Government's indication in its reply that BALPA's application is misdirected and misconceived because any adverse impact of *Viking* and *Laval* would be a consequence of the European Union law, to which the United Kingdom is obliged to give effect, rather than of any unilateral action by the United Kingdom itself. The Government further asserts that BALPA's application is premature because it remains unclear what, if any, impact the *Viking* and *Laval* judgements would have on the application of trade union legislation in the United Kingdom. The Government adds that these judgements would not likely have much effect on trade union rights because they are only applicable where the freedom of establishment and free movement of services between Member States are at issue. Moreover, the impact of the principles they set forth may differ considerably depending upon the facts of

the case. There have been no subsequent analogous cases at the ECJ level, nor have there been any decisions by the UK domestic courts as to whether and to what extent the new principles might represent an additional restriction on the freedom of trade unions to organize industrial action in the United Kingdom. Finally, the Government indicates that it is not obvious that the current limit on damages in tort would be bypassed or overridden in a *Viking*-based claim since that limit has a sound basis in the protection of the freedoms of trade unions which would be taken into consideration if the limit were challenged as contrary to the European Union law.

The Committee first wishes to recall more generally its previous comments, in which it has noted the limitations on industrial action in the United Kingdom, including that it remains a breach of contract at common law for workers to take part in strike action and that trade union members are protected from the common law consequences (dismissal) only when the trade union has immunity from liability, i.e. when the strikes are in contemplation or furtherance of a trade dispute, which would not include secondary action or sympathy strikes (section 224 of the Trade Unions and Labour Relations (Consolidation) Act, 1992 (TULRA)). The Committee has asked the Government in this regard to indicate the measures taken or envisaged so as to amend the TULRA, with a view to broadening the scope of protection available to workers who stage official and lawfully organized industrial action.

With respect to the matter raised by BALPA, the Committee wishes to make clear that its task is not to judge the correctness of the ECJ's holdings in *Viking* and *Laval* as they set out an interpretation of the European Union law, based on varying and distinct rights in the Treaty of the European Community, but rather to examine whether the impact of these decisions at national level are such as to deny workers' freedom of association rights under Convention No. 87. The Committee observes that when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services. The Committee has only suggested that, in certain cases, the notion of a negotiated minimum service in order to avoid damages which are irreversible or out of all proportion to third parties, may be considered and if agreement is not possible the issue should be referred to an independent body (see 1994 General Survey on freedom of association and collective bargaining, paragraph 160). The Committee is of the opinion that there is no basis for revising its position in this regard.

The Committee observes with **serious concern** the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. The Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised. While taking due note of the Government's statement that it is premature at this stage to presume what the impact would have been had the court been able to render its judgement in this case given that BALPA withdrew its application, the Committee considers, to the contrary, that there was indeed a real threat to the union's existence and that the request for the injunction and the delays that would necessarily ensue throughout the legal process would likely render the action irrelevant and meaningless. Finally, the Committee notes the Government's statement that the impact of the ECJ judgements is limited as it would only concern cases where freedom of establishment and free movement of services between Member States are at issue, whereas the vast majority of trade disputes in the United Kingdom are purely domestic and do not raise any cross-border issues. The Committee would observe in this regard that, in the current context of globalization, such cases are likely to be ever more common, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating. The Committee thus considers that the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention.

In light of the observations that it has been making for many years concerning the need to ensure fuller protection of the right of workers to exercise legitimate industrial action in practice, and bearing in mind the new challenges to this protection as analysed above, the Committee requests the Government to review the TULRA and consider appropriate measures for the protection of workers and their organizations to engage in industrial action and to indicate the steps taken in this regard.

ENDS
ICTU May 2012

Appendix 4: ICTU Observations on COM(2012)131



IRISH CONGRESS TRADE UNIONS

Observations and Recommendations on

2012/0061 (COD)

Proposal for a

**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

May 2012

Introduction

1. The Irish Congress of trade Unions is the representative body for workers and their trade unions on the island of Ireland. The ICTU is an affiliate of the European Trade Union Confederation (ETUC) and we work with and support the recommendations made by the ETUC and other EU trade union confederations.
2. The posted workers Directive, which came into force in December 1999, had as its basic principle, that pay and working conditions in a Member State should be applicable to workers from that State and to those from other EU countries posted to work there.
3. **Congress believes that the original objective of the Posted Workers Directive is more important than ever.** Providing a climate of fair competition and guaranteeing equality and respect for the rights of workers is essential. Especially as workers are faced with an economic era in which transnational provision of services is increasingly common and where the economic crisis is intensifying a downward pressure on wages and conditions of employment from organisations seeking competitive advantage on 'price'. The Posting Directive plays a key-role in protecting the workers and labour markets concerned, by ensuring that employers respect the framework of labour law and industrial relations of 'host' Member States.
4. It is of major importance to ensure that the main goals of this Directive are achieved, to maintain the confidence of workers that 'Europe' is not about organising social dumping and competition on wages in a race to the bottom of the welfare state, but rather 'Europe' is still aiming at the constant improvement of the living and working conditions of its inhabitants.

Congress analysis of the implementation of the Posted Workers Directive in Ireland on the whole is positive.

5. All workers posted to Ireland from other EU Member States have the protection of all Irish employment legislation in the same way as employees who have an Irish contract of employment. This is by virtue of the Protection of Employees (Part-Time Work) Act 2001, section 20, which states that all employment legislation which confers rights or entitlements on an employee applies to a posted worker in the same way that it applies to any other employee and that, a person, irrespective of nationality or place of residence, who works in the State under a contract of employment, has the same rights under Irish employment protection legislation as Irish employees (see copy in annex)
6. This means that posted workers have a statutory right to be paid at least the national minimum wage. Posted workers have entitlements under employment equality law e.g. on the 'nationality' ground. Posted workers are also entitled to be the pay, terms and conditions in each Registered Employment Agreements (REAs) not just those in the construction sector (and when reconstituted Employment Regulation Orders made by Joint Labour Committees JLCs).
7. Applying the full complement of Ireland's employment law to posted workers is permissible as employment law in Ireland is conceived and implemented as a matter of 'public policy' aimed at protecting a minimum 'decent work' standard for all workers regardless of their immigration status. It would be unacceptable and contrary to equality principles and rights under the EU Treaty (TFEU) if workers exercising their right

to EU free movement were afforded less protection than that afforded to third country nationals. Applying Ireland's decent work threshold to posted workers creates a climate of fair competition (a level playing field) for workers and employers alike and has been instrumental in preventing the growth of racism and xenophobia and creating an environment in which the free movement of persons and services can thrive.

8. It is worth recalling here that the European Court of Justice in its ruling on Laval showed a preference for the use of collective agreements or arbitration awards 'declared universally applicable' within the meaning of Article 3(8) and 3(10) as a means of securing the enforcement and application of collective agreements to posted workers. Posted workers' rights to coverage under REAs (and JLCs) is afforded double protection, explicitly under the Directive as collective agreements declared universally binding and secondly under Ireland's employment law framework. The Duffy / Walsh Report is instrumental in setting out the public policy dimension of the REAs and JLC.

Ensure posted workers are provided with full protection of all employment laws and all universally applicable collective agreements

9. We urge government to promote the benefits of including posted workers in the scope of a Member State's body of employment law, and of the REA/JLC system. **It is essential that this Directive promotes the right for all workers, regardless of their immigration status or where their employer is based, to have an entitlement to full protection of a host member state's employment law and that they will be entitled to 'equal pay and treatment' with their local colleagues.** Congress is calling on government to seek amendment to ensure that the Directive provides that host member states are not only free, but obliged to provide posted workers with full protection of all employment laws not just those defined in Article 3(1) of the Directive and to protection of all sectoral minimum wages and universally binding collective agreements not just in the construction sector.

Extend the proposals for joint and several liability to all sectors of activity

10. The protection of workers' rights is a matter of particular concern in subcontracting chains, which are becoming widespread in numerous sectors not just the construction sector. There is evidence that, in a number of cases, posted workers are exploited and left without payment of wages or part of the wages they are entitled to under the Directive 96/71/EC.
11. **Congress therefore strongly supports the introduction of a joint and several liability mechanism as this is indispensable to protect workers from abuses.** In its judgment in the Wolff-Müller case, the ECJ declared that the German (chain) liability scheme for minimum wage payments under certain conditions could be considered as a justified measure recognising that in its absence a contractor can easily evade national regulations or collectively agreed labour standards and working conditions by creating extremely complex networks of subcontractors.

12. The Commission's proposal, however, is limited to the construction sector and direct subcontractor situations. It is also undermined by the stipulation that a contractor that has taken due diligence cannot be held liable. **Congress urges the government to seek amendments to ensure that joint and several liability will apply to any sector of activity.** The Directive should also introduce a mandatory chain liability, which stipulates that the main contractor(s) is liable for the compliance, by all subcontractors, with the applicable terms and conditions of employment, and social security contributions.
13. The concept of "due diligence" should be deleted. There is no definition at the European level and it would therefore vary from one Member State to the other. It might be sufficient for the contractor to check who the subcontractor is and its history to escape liability.

Improve inspection and enforcement to ensure that posted workers can enforce their rights

14. **For labour inspection to be effective, access to records is key.** In the *Finalarte* cases, the ECJ accepted that businesses established outside the host Member State could be required to provide more information than businesses established in that Member State, to the extent that this difference in treatment was justified by objective differences between those businesses and businesses established in the host Member State. Administrative cooperation and national control measures are thus two sides of the same coin and **Congress is calling on government to seek the inclusion of a requirement to maintain records on the host country and to declare to the labour inspectorate (NERA) prior to posting the location of the posted worker and the location of their employment records.**
15. Congress welcomes the obligation to designate a contact person, but this person must be a representative of the employer and its role should not be restricted to negotiations. The contact person should reside in the host Member State.
16. Congress is concerned that the proposed national control measures are restrictive and are not mandatory on Member States. Governments must be free to take measures, other than those listed in the Directive and it must be made clear that the article on national control measures applies to the host Member State. The onus should not be on the Member State of establishment to carry out the control and monitoring, but the host country in which the posted worker is actually working. It is not acceptable to Congress that the host Member States can only act at the request of the Member State of establishment. This proposal should be rejected.
17. Congress welcomes the recognition in the Directive of the role of trade unions in engaging in judicial or administrative proceedings on behalf or in support of a posted worker. In order to ensure that the article on enforcement is coherent with all national legal systems the engagement on behalf or in support of a posted worker by a trade union should be possible as well without the 'approval' of the worker.

18. The possibility for posted workers to lodge complaints should not be restricted to outstanding remuneration or refund of excessive costs, but the posted worker should be able to claim any entitlement due to him/her.

Improve the definition of 'posted worker'

19. According to the definition in Article 2(1) of Directive 96/71/EC42 'posted worker' means, for the purposes of this Directive, a worker who, for a limited period, carries out his or her work in the territory of a Member State other than the Member State in which he or she normally works. A 'limited period' is vague and has led to several problems with the implementation, application and enforcement in practice of the Directive in particular with obligations to pay social security contribution. To avoid circumvention of the rules and combat abuse of the application of Directive 96/71/EC, the present proposal contains in Article 3 paragraphs 1 and 2 an indicative list of qualitative criteria/constituent elements characterising both the temporary nature inherent to the notion of posting for the provision of services as well as the existence of a genuine link between the employer and the Member State from which the posting takes place.
20. Congress is concerned that the indicative list of criteria as proposed by the Commission gives Member States the possibility to pick and choose the least cumbersome criteria creating even more legal insecurity. Undertakings throughout the EU must abide by the same rules.
21. **Congress supports the development of criteria to determine who is a posted worker, such criteria should be precise, cumulative and must be binding in its entirety in every Member State.**
22. To reduce the possibility of circumvention of the Posting of Workers Directive and the Enforcement Directive through false self-employment, criteria based on the worker's economic dependency and subordination in relation to the employer should be added to determine the employment relationship.

Ends

Appendix 5: Orders of Reference

Joint Committee on Jobs, Social Protection and Education

a. Functions of the Committee – derived from Standing Orders [DSO 82A; SSO 70A]

- (1) The Select Committee shall consider and report to the Dáil on—
 - (a) such aspects of the expenditure, administration and policy of the relevant Government Department or Departments and associated public bodies as the Committee may select, and
 - (b) European Union matters within the remit of the relevant Department or Departments.
- (2) The Select Committee may be joined with a Select Committee appointed by Seanad Éireann to form a Joint Committee for the purposes of the functions set out below, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.
- (3) Without prejudice to the generality of paragraph (1), the Select Committee shall consider, in respect of the relevant Department or Departments, such—
 - (a) Bills,
 - (b) proposals contained in any motion, including any motion within the meaning of Standing Order 164,
 - (c) Estimates for Public Services, and
 - (d) other mattersas shall be referred to the Select Committee by the Dáil, and
 - (e) Annual Output Statements, and
 - (f) such Value for Money and Policy Reviews as the Select Committee may select.
- (4) The Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies, and report thereon to both Houses of the Oireachtas:
 - (a) matters of policy for which the Minister is officially responsible,
 - (b) public affairs administered by the Department,
 - (c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,
 - (d) Government policy in respect of bodies under the aegis of the Department,
 - (e) policy issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,
 - (f) the general scheme or draft heads of any Bill published by the Minister,
 - (g) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,

- (h) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,
 - (i) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in paragraph (4)(d) and (e) and the overall operational results, statements of strategy and corporate plans of such bodies, and
 - (j) such other matters as may be referred to it by the Dáil and/or Seanad from time to time.
- (5) Without prejudice to the generality of paragraph (1), the Joint Committee shall consider, in respect of the relevant Department or Departments—
- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 105, including the compliance of such acts with the principle of subsidiarity,
 - (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
 - (c) non-legislative documents published by any EU institution in relation to EU policy matters, and
 - (d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.
- (6) A sub-Committee stands established in respect of each Department within the remit of the Select Committee to consider the matters outlined in paragraph (3), and the following arrangements apply to such sub-Committees:
- (a) the matters outlined in paragraph (3) which require referral to the Select Committee by the Dáil may be referred directly to such sub-Committees, and
 - (b) each such sub-Committee has the powers defined in Standing Order 83(1) and (2) and may report directly to the Dáil, including by way of Message under Standing Order 87.
- (7) The Chairman of the Joint Committee, who shall be a member of Dáil Éireann, shall also be the Chairman of the Select Committee and of any sub-Committee or Committees standing established in respect of the Select Committee.
- (8) The following may attend meetings of the Select or Joint Committee, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:
- (a) Members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,
 - (b) Members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
 - (c) at the invitation of the Committee, other Members of the European Parliament.

b. Scope and Context of Activities of Committees (as derived from Standing Orders [DSO 82; SSO 70])

- (1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders.
- (2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil and/or Seanad.
- (3) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Dáil Standing Order 26. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.
- (4) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Dáil Standing Order 163 and/or the Comptroller and Auditor General (Amendment) Act 1993.
- (5) The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—
 - (a) a member of the Government or a Minister of State, or
 - (b) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle / Cathaoirleach whose decision shall be final.

Appendix 6 List of Members

Joint Committee on Jobs, Social Protection and Education

Chairman: Damien English (FG)

Deputies: Ray Butler (FG)
Áine Collins (FG)
Joan Collins (PBPA)
Michael Conaghan (LAB)
Barry Cowen (FF)
Seán Crowe (SF)
Damien English (FG)
Tom Fleming (Ind)
Brendan Griffin (FG)
John Halligan (Ind)
Seán Kyne (FG)
Anthony Lawlor (FG)
John Lyons (LAB)
Nicky McFadden (FG)
Mary Mitchell O'Connor (FG)
Willie O'Dea (FF)
Aodhán Ó Ríordáin (LAB) (Vice-Chair)
Aengus Ó Snodaigh (SF)
Brendan Ryan (LAB)
Brendan Smith (FF)
Peadar Tóibín (SF)

Senators Deirdre Clune (FG)
John Kelly (LAB)
Michael Mullins (FG)
Marie Louise O'Donnell (Ind)
Averil Power (FF)
Feargal Quinn (Ind)