Reasoned Opinion of the House of Commons

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

concerning

a Draft Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services[1]

Treaty framework for appraising compliance with subsidiarity

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

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

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

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

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

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

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1 COM (2012) 130

2 Article 1 of Protocol (No. 2).

3 Article 2 of Protocol (No. 2).

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

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

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

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

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

Proposed legislation

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

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

5 Article 5.

Legislative objective

- *Summary*

8. The Commission's explanatory memorandum explains that the:

> "present proposal aims to clarify the general principles and applicable rules at EU level with respect to the exercise of the fundamental right to take collective action within the context of the freedom to provide services and the freedom of establishment, including the need to reconcile them in practice in cross-border situations. Its scope covers not only the temporary posting of workers to another Member State for the cross-border provision of services but also any envisaged restructuring and/or relocation involving more than one Member State."[6]

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

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

> "While reiterating that there is no inherent conflict between the exercise of the fundamental right to take collective action and the freedom of establishment and the freedom to provide services enshrined in and protected by the Treaty, with no primacy of one over the other, Article 2 recognizes that situations may arise where their exercise may have to be reconciled in cases of conflict, in accordance with the principle of proportionality in line with standard practice by courts and EU case law.
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> "The general equality of fundamental rights and the freedoms of establishment and to provide services in terms of status implies that such freedoms may have to be restricted in the interest of protection of fundamental rights. However, it equally implies that the exercise of such freedoms may justify a restriction on the effective exercise of fundamental rights."[7]

- *Article 3, dispute resolution mechanisms*

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

> "Article 3 recognises the role and importance of existing national practices relating to the exercise of the right to strike in practice, including existing alternative dispute settlement institutions, such as mediation, conciliation and/or arbitration. The present proposal does not introduce changes into such alternative resolution mechanisms existing at national level, nor does it contain or imply an obligation to introduce such mechanisms for those Member States not having them. However, for those Member States in which such mechanisms exist it does establish the principle of equal access for cross-border cases and provides for adaptations by Member States in order to ensure its application in practice."[8]

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

11. The Commission says this paragraph:

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

[7] As above, page 12.

[8] As above, page 13.

"further clarifies the role of national courts: if, in an individual case as a result of the exercise of a fundamental right, an economic freedom is restricted, they will have to strike a fair balance between the rights and freedoms concerned43 and reconcile them. According to Article 52 (1) of the Charter of Fundamental Rights of the European Union, any limitation on the exercise of the rights and freedoms recognised by it must respect the essence of those rights and freedoms. Furthermore, subject to the proportionality principle, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. The Court of Justice also acknowledged that the competent national authorities enjoy a wide margin of discretion in this respect."[9]

- *Article 4 - alert mechanism*

12. Article 4:

"establishes an early warning system requiring Member States to inform and notify the Member States concerned and the Commission immediately in the event of serious acts or circumstances that either cause grave disruption of the proper functioning of Single Market or create serious social unrest in order to prevent and limit the potential damage as far as possible".[10]

Impact assessment

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

"The Impact Assessment identified negative economic and social impacts of the baseline scenario. Continuing legal uncertainty could lead to a loss if support for the single market by an important part of the stakeholders and create an unfriendly business environment including possibly protectionist behaviour. The risk of damage claims and doubts regarding the role of national courts could prevent trade unions from exercising their right to strike. This would create a negative impact on the protection of workers' rights and Article 28 of the Charter of Fundamental Rights of the European Union. Option 6 and 7 would have positive economic and social impacts since they reduce the scope for legal uncertainty. The positive impact of option 7 would be more significant since a legislative intervention (Regulation) provides for more legal certainty than a soft law approach (option 6). An alert mechanism would have further positive impact. In addition, a legislative intervention would express a more committed political approach by the Commission to respond to a problem that is seen with great concern by the trade unions and parts of the European Parliament.

"The preferred option to address the drivers underlying problem 4 is option 7. It is considered the most effective and efficient solution to address the specific objective 'reducing tensions between national industrial relation systems and the freedom to

[9] As above, page 13..

[10] As above, page 14.

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

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

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

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

16. This view is confirmed by the Commission:

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

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

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

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

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

[12] Page 2 of the explanatory memorandum

[13] Page 2.

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

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

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

> "The Impact Assessment identified negative economic and social impacts of the baseline scenario. Continuing legal uncertainty *could* lead to a loss if support for the single market by an important part of the stakeholders and create an unfriendly business environment including *possibly* protectionist behaviour. The risk of damage claims and doubts regarding the role of national courts *could* prevent trade unions from exercising their right to strike".[16]

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

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

[14] Page 1.

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

[16] See paragraph 13 above.

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

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

Conclusion

22. In the House of Commons' opinion, the Commission confirms the primary reason for the draft Regulation when it adds to the list of justifications for EU legislation in the explanatory memorandum that: "a legislative intervention *would* express a more committed political approach by the Commission to respond to a problem that is seen with great concern by the trade unions and parts of the European Parliament".[18] The confirmatory language here is to be contrasted with the speculative language above.

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

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

[18] See footnote 11.