

21 May 2012

Regulation on the exercise of the right to take collective action

KEY MESSAGES



- 1** There is no legal basis for EU legislation on the right to take collective action and the EU should not legislate on this matter. Article 153 of the TFEU explicitly excludes the right to strike from EU competences. Given this explicit exclusion, Article 352 is not an appropriate legal basis for the proposed Regulation.
- 2** There is no need to clarify relations between economic freedoms and fundamental rights. The ECJ judgements in the Laval and Viking cases provide sufficient guidance on these issues.
- 3** Instead of providing clarity, the Regulation would lead to legal uncertainties, which would hamper the exercise of economic freedoms.

WHAT DOES BUSINESSEUROPE AIM FOR?



- BUSINESSEUROPE aims to demonstrate to the Council and the European Parliament that the proposal for Regulation goes against the Treaty and therefore should be withdrawn by the European Commission.



Commission's proposal for the 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

I. Introduction

1. On 21 March the European Commission adopted a proposal for the Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services [COM(2012)130] ("Monti II Regulation"). The stated objective of the proposal is to clarify the interaction between the exercise of social rights and the freedom of establishment and to provide services enshrined in the Treaty. The European Commission explains that the proposal is based on Article 352 TFEU, given the lack of explicit provision in the Treaty for necessary powers.

II. General comments

2. BUSINESSEUROPE requests the Commission to withdraw the proposal. This is because: (i) the EU has no competence to legislate on the right to strike, (ii) the EU intervention adds no value in terms of clarifying relations between fundamental rights and economic freedoms, (iii) the proposal would interfere with national labour laws and industrial relations systems.

No EU competence on the right to strike

3. BUSINESSEUROPE opposes EU legislative intervention in the area of the right to take collective action. There is no scope for EU legislation in this field, and we are seriously concerned with an attempt to use Article 352 TFEU as a legal basis for the proposed Regulation. In so doing, the European Commission abuses its prerogatives and disrespects EU competences as defined in the Treaty.

4. Indeed, Article 352 TFEU gives the EU a possibility to legislate on issues not covered specifically by the Treaties, "within the framework of the policies defined by the Treaties" and "to attain one of the objectives set out in the Treaties". However, Article 153 TFEU outlining EU powers to achieve the objectives of social policy, explicitly excludes the right to strike. We believe that due to this explicit exclusion, Article 352 TFEU is not an appropriate legal basis for the regulation concerning the right to take collective action.

No added value of the EU intervention

5. The proposed Regulation does not respect subsidiarity principle. While the Laval and Viking cases have unveiled some practical problems in some countries with respect to the application of the Posted Workers Directive, the affected Member States have modified their legislation to prevent similar problems in the future. We do not understand why a problem concerning a limited number of countries, which has been successfully addressed at national level where necessary, is transformed into a European problem requiring a European solution.



6. Moreover, the ECJ judgements in the Laval and Viking cases provide sufficient guidance on relations between economic freedoms and fundamental rights, and no further EU action to improve clarity in this area is needed. On the contrary, any EU intervention is likely to remove legal certainty that has been achieved.

Interference with national legislation and industrial relations systems

7. Some provisions of the draft Regulation would have an impact on the regulations on the right to strike at national level. Hence, while the Commission states that the proposal does not “affect in any way the exercise of fundamental rights as recognised in the Member States”, this is questionable.

III. Specific comments

Preamble

8. Recital 1 provides that the right to take collective action is recognised by a number of international instruments including ILO Conventions No 87 and 98. BUSINESSEUROPE underlines that there is an ongoing debate in ILO on whether ILO instruments cover the right to strike. Employers are of the opinion that this is not the case, and question the interpretation whereby the right to collective action is derived from the principle of freedom of association.

Article 1 Subject matter

9. According to Recital 13, the aim of the Regulation is only to “clarify” certain aspects relating to the exercise of the right to take collective action in cross-border situations. However, Article 1(1) goes further, stating the aim is to “lay down the general principles and rules applicable at Union level with respect to the exercise of the fundamental right to take collective action within the context of the freedom of establishment and the freedom to provide services.”

10. It also has to be noted that laying down principles at EU level with respect to the exercise of right to take collective action in cross-border situations will inevitably interfere with the existing national rules in this area, including for cross-border situations. Thus, Article 1(1) contradicts Article 1(2), which says the Regulation will not “affect in any way the exercise of fundamental rights as recognised in the Member States”.

11. Moreover, provisions of Article 1(1) would create uncertainty as it is not clear what exactly the scope of collective actions covered by the Regulation is. It is likely the proposed Regulation would be referred to in a variety of disputes, also such that would appear to be purely national. The boundaries of the proposed Regulation would have to be examined and its coverage defined by a number of new cases at national and EU level.

Article 3 Dispute resolution mechanisms

12. Article 3(3) of the draft Regulation encourages social partners to conclude agreements or establish guidelines at the EU level on a system of out-of-court settlement of disputes resulting from the exercise of the right to collective action in transnational and cross-border situations.



13. BUSINESSEUROPE notes that such a system would interfere with long-established and well functioning national systems to settle industrial disputes. The intention to establish such a system goes against the exclusion of the right to take collective action from the EU competences.

14. In addition to the problem of principle with the EU system of out-of-court settlement of industrial disputes, BUSINESSEUROPE questions the feasibility of establishing such a system. Given the very diverse rules that exist in Member States with respect to the right to take collective action as well as alternative dispute resolution mechanisms in place, it would not be a realistic option.

Article 4 Alert mechanism

15. The Commission fails to present any evidence of the need for the proposed alert mechanism. BUSINESSEUROPE is convinced there are no benefits of such a proposal.

IV. Conclusion

16. As argued in this position paper, the proposal for the Regulation on the exercise of the right to take collective action disrespects the explicit exclusion of the right to strike from EU competences in the Treaty. This is the main reason why BUSINESSEUROPE would like the European Commission to withdraw the proposal.

17. Moreover, the proposal does not provide any added value as there is no need for EU action to clarify relations between economic freedoms and fundamental rights. On the contrary, any EU legislative intervention on this matter would lead to legal uncertainties.
