Balancing Fundamental Social Rights and Economic Freedoms: Can the Monti II Initiative Solve the EU Dilemma?

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This article evaluates the recent (March 2012) legislative initiative by the European Commission for a regulation (known as Monti II) 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 authors put forward a critique of the legal basis, content and form of the proposal, which has already been challenged by Parliaments in twelve Member States. The authors propose the adoption of a revised initiative that would make a clear commitment to international law and labour standards. It should recognize the autonomy of the social partners and a margin of manoeuvre for trade union action, foreseeing only limited judicial review in accordance with international practice. The proposed articles on dispute resolution and an alert mechanism should be deleted, and the appropriate form of the revised proposal could be based on guidelines adopted on the basis of Article 26(3) TFEU.

Keywords: *Cross–border collective action, fundamental social rights, economic freedoms, Monti II regulation, subsidiarity, dispute resolution*

1 INTRODUCTION

The *Viking* and *Laval*[1] judgments have become synonymous with a social imbalance in the case law of the Court of Justice of the European Union (CJEU). The debate over these judgments has demonstrated the extent to which the topic is embedded in a complex and challenging legal, economic and political context: against the background of economic tensions between old and new Member States economic freedoms and social rights needs to be balanced. Whatever the Court of Justice decides has

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1 ECJ, Case C-438/05 *Viking* [2007] ECR I-10779; ECJ, Case C-341/05 *Laval* [2007] ECR I-11767.

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an impact on the development of a legal framework for transnational industrial relations. The entry into force of the Lisbon Treaty has led to a new and positive momentum, giving a significant boost to the relevance and development of fundamental rights within the EU. In the spring of 2012 the European Commission presented the Monti II proposal[2] which claims to establish the equality of economic freedoms and the right to take collective action. Shortly after the Monti II proposal was presented, national parliaments rejected the European Commission's initiative on the grounds that it infringes the subsidiarity principle enshrined in Article 5(3) TEU. This paper briefly describes the development of the proposed Monti II Regulation (section 2) and critically analyses and assesses its content (section 3) before drawing conclusions on the subsidiarity objection of national parliaments (section 4). Finally the authors outline their view that a clear commitment to international law could point the way out of the dilemma.

2 HISTORY, CONTENT AND DEVELOPMENT OF THE PROPOSED MONTI II REGULATION

The idea for the Monti II proposal was taken from Council Regulation (EC) No. 2679/98,[3] which was proposed in 1997 by Mario Monti, at that time the Commissioner for the Internal Market. The intention of this Monti regulation was to oblige Member States to take all necessary and appropriate measures against private individuals interrupting the proper functioning of the internal market in the field of free movement of goods. The European Commission had previously brought an action against France for failing to take sufficient measures against violent acts committed by private individuals and French farmer protest movements attempting to stop the import of agricultural products.[4] Trade unions were concerned about these developments, fearing they could also be used to stop collective action. They therefore wanted to make clear that the right to strike was not threatened in this connection. As a result Article 2 of the Monti regulation stipulated that:

> the Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognized 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.

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

[3] Regulation (EC) No 2679/98 of Dec. 7,1998 on the functioning of the internal market in relations to the free movement of goods among the Member States. OJ L 337/8 (1998); for an analysis of the influence of this regulation on industrial relations: Orlandini, ELJ 2000, 341–362.

[4] ECJ, Case C-265/95 *Commission v. France* [1997] ECR I-06959. For a comment, see G. Orlandini, *The Free Movement of Goods as a Possible "Community" Limitation on Industrial Conflict,* 4 Eur. L. J. 344–352 (2000).

It came as no surprise when Mario Monti, in his capacity as an independent adviser (at the time pursuing an academic career in Italy), was given the task of proposing 'A New Strategy for the Single Market' by the Barroso Commission. He came up with the proposal to introduce a similar provision to safeguard the right to strike and an informal mechanism for resolving labour disputes in the context of the free movement of services and freedom of establishment.[5]

In October 2010 this proposal found its way into proposals 29–30 of the European Commission's Communication 'Towards a Single Market Act – For a highly competitive market economy – 50 proposals for improving our work, business and exchanges with one another.'[6] These proposals have to be understood against the background that the European Trade Union Confederation ETUC had actively lobbied for legal measures, presenting its 'Social Progress Protocol'[7] as an alternative. Moreover, several EU institutions such as the Parliament and the European Economic and Social Committee had expressed support for legal reforms in the aftermath of the *Viking* and *Laval* judgments.[8] As a result, the President of the European Commission, Barroso, expressed his intention to introduce legal changes in this regard when he stood as a candidate for re-election to the post of President of the European Commission.[9] The Proposal for the Council regulation was submitted by the European Commission on 21 March 2012.[10] The preparation of the Proposal was marked by a rather exceptional 'leak' of a draft in January 2012, that was widely discussed and commented upon by different stakeholders.[11]

In comparison with the first unofficial draft, the final proposal is a simplified and shortened version. The shortening was achieved mainly by shifting certain contested provisions to the Explanatory Memorandum, for instance, the controversial principal of proportionality. The content of the proposal is fairly basic: it starts by defining the subject matter in Article 1, laying down the general principles and rules applicable at EU 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. At the same time it is stated

5 Mario Monti, *A New Strategy for the Single Market*, 80 et seq., http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf (last visited Jun. 8, 2012).

6 Communication of the Commission, COM (2010) 0608 final.

7 European Trade Union Confederation (ETUC), see http://www.etuc.org/a/5175 (last visited Jun. 9, 2012).

8 EP resolution of Oct. 22, 2008 on challenges to collective agreements in the EU, 2008/2085(INI); EESC Opinion, SOC/360 – EESC 970/2010.

9 José Manuel Durão Barroso, *Speech/09/391*, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/391 (last visited Jun. 9, 2012).

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

11 For example the Draft Regulation was subject of a conference held in the European Parliament on Mar. 7, 2012.

that the Regulation shall not affect in any way the exercise of fundamental rights as recognized in the Member States. Article 2 sets forth the general principles, Article 3 – the dispute resolution mechanisms, Article 4 – the alert mechanism, and finally Article 5 defines the Regulation's entry into force. The Explanatory Memorandum preceding the proposed regulation and providing its background and reasoning states that the regulation is part of a package[12] which includes a proposal for amending the Posted Workers Directive,[13] known as the Enforcement Directive. Regarding the intention of this package the Explanatory Memorandum states that it is intended to clarify the general principles regarding interaction between the exercise of social rights and fundamental freedoms, without however reversing the case law of the CJEU.[14]

Both the first unofficial draft and the final proposal were the subject of intense discussion in political[15] and academic[16] circles, and were criticized from the very beginning. After the European Commission had – in accordance with Article 4 of the Subsidiarity Protocol[17] – forwarded its proposal to the national parliaments,[18] twelve Member States[19] decided to make use of the subsidiarity objection as set forth in Article 6 of the Protocol. The European Commission confirmed that the quorum of one-third of the votes allocated to national

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12 COM (2012) 130 final, 10.

13 Directive 96/71/EC of the European Parliament and of the Council of Dec. 16, 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18 (1997), 1–6; M. Rocca, *The Proposal for a (So Called) Monti II 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*, 3 Eur.Lab.L.J 19–34 (2012).

14 COM (2012) 130 final, 10.

15 ETUC, *Declaration on the Commission Proposal,* http://www.etuc.org/a/9917 (last visited Jun. 9, 2012); S&D Conference on posted workers and fundamental social rights in the single market, held on Mar. 7, 2012.

16 C. Barnard, *A Proportionate Response to Proportionality in the Field of Collective Action*, 37 (2) E. L. Rev., 117–135 (2012); Ewing, *Draft Monti II Regulation: An Inadequate Response to* Viking *and* Laval, http://www.lcdtu.org/eu-employment-rights-professor-keith-ewing-on-monti-11%E2%80%B3/ (last visited Jun. 6, 2012); G. Orlandini, *La proposta di regolamentoMonti II edildiritto di scioperonell'Europa post-Lisbona,* http://www.europeanrights.eu/public/commenti/Monti_II_final.pdf (last visited Jun. 20, 2012); Niklas Bruun & Andreas Bücker, *Critical Assessment of the Proposed Monti II Regulation – More Courage and Strength Needed to Remedy the Social Imbalances, Etui Policy Brief,* http://www.etui.org/Publications2/Policy-Briefs (last visited Jun. 9, 2012).

17 Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, OJ C 83 of Mar. 30, 2010, 206 et seq. See also Thomas Blanke, *The Principle of Subsidiarity in the Lisbon Treaty in the Lisbon Treaty and Social Europe* (Niklas Bruun, Klaus Lörcher & Isabelle Schömann eds. Hart 2012).

18 Eu Interparliamentary Exchange platform, see: http://www.ipex.eu/IPEXL–WEB/dossier.do?code=APP&year=2012&number=0064&appLng=EN.

19 For detailed information see the EU Interparliamentary Exchange website, http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120130.do (last visited Jun. 9, 2012).

parliaments stipulated in Article 7(2) of the Protocol was reached.[20] As a result the European Commission is required to review the proposed regulation (Article 7(2) Subsidiarity Protocol). This is the first time that national parliaments have officially made use of the warning system, showing a 'yellow card' in accordance with the Subsidiarity Protocol introduced by the Lisbon Treaty

3 CRITICAL REVIEW OF THE PROPOSED MONTI II REGULATION

In the following analysis of the proposed Monti II Regulation, we start by discussing whether a regulation is an adequate legal instrument (2.1), before looking at the regulation's general principles (2.2). We then critically examine the dispute resolution mechanism (2.3) and the alert mechanism (2.4) foreseen in the proposal.

3.1 Is a Regulation an Adequate Legal Instrument to Solve the Problem?

The European Commission considers a regulation to be the most appropriate legal instrument for clarifying the general EU-level principles and rules reconciling the exercise of fundamental rights with the economic freedoms in cross-border situations. According to the proposal the advantages of a regulation over a directive include clarity and the reduction of regulatory complexity.[21] These arguments do not however establish whether a regulation is an appropriate instrument within the framework of the hierarchy of norms within EU law. It needs to be considered whether a regulation is appropriate in view of the 'constitutional' nature of the topic, and if a regulation is sufficiently strong to change CJEU jurisprudence. Since the regulation may conflict with national law, we will also consider its relation to national and international law.

3.1[a] *A Fundamental Question of the Democratic and Economic Order of the EU*

The subject matter of the proposal – the balance between the exercise of the right to take collective action on the one hand, and the freedom of establishment and freedom to provide services on the other – is of fundamental relevance for the democratic and economic order of the EU and should therefore be addressed by primary law. Bearing in mind the hierarchy of EU law, primary law is the

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20 See information on the website of the Committee of the Regions/Subsidiarity Monitoring Network Early Warning System: First "yellow card", http://extranet.cor.europa.eu/subsidiarity/news/Pages/Early-Warning-System-First-yellow-card-.aspx (last visited Jun. 9, 2012).

21 COM (2012) 130 final, 11.

right form in this case. Even if primary law cannot officially be considered as EU 'constitutional law', there is broad consensus today that primary law must not be seen just as international treaties but as the highest level of the independent system of EU law.[22] Given that a broad range of economic issues is covered by primary law, there is no reason why the balance between economic freedoms and social rights should be addressed merely by a regulation belonging to secondary law – the lower level in the hierarchy of EU law – and not by the higher level of primary law. At most, pragmatic reasons could justify a solution at the level of secondary law, as for instance amending primary law is more complex than adopting a regulation or directive. However, one should be aware of the fact that only primary law is appropriate with regard to the fundamental relevance of the problem. A regulation can only be understood as a first step but not as substitute for an amendment of the Treaties.

3.1[b] *Practical Consequences of the Hierarchy of Rules*

Since the CJEU case law is based on primary law – in particular the freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU) – there is a question-mark over whether secondary law has the potential to change CJEU case law. In this respect there are important limitations we need to be aware of. Although the CJEU has to follow secondary law, in general there is consensus that primary law prevails over secondary law and that secondary law is to be interpreted as far as possible in compliance with primary law.[23]

This means that the CJEU will not interpret the freedom of establishment and freedom to provide services in the light of a future Monti II regulation, having instead a legal obligation to interpret a possible Monti II regulation as far as possible in compliance with primary law, i.e. consistent with its previous case law on economic freedoms. For this reason a possible Monti II regulation should avoid any ambiguity in its wording and needs to be precise in the issues to be changed. Unfortunately this is not the case. Instead the proposed Monti II regulation states in the Explanatory Memorandum that it aims to clarify the interaction between social rights and economic freedoms without however reversing the case law of the CJEU.[24] If the proposal is really meant to improve the situation to the benefit of social rights – as requested from various quarters

22 Grabitz/Hilf/Nettesheim, Das Rechte der Europäischen Union, 46. Suppl., 2011, Art. 1 TFEU recital 43.
23 Callies/Ruffert, EUV/AEUV Kommentar, 4. Aufl., 2011, Art. 288 AEUV, recital 9.
24 Monti II Proposal, COM (2012) 130 final, 10.

and as announced previously[25] – it is essential to state clearly that the intention is to change the current situation.

The Monti II proposal seems to indicate that the mere existence of the Regulation would reinforce the Charter since the EU institutions and Member States are bound by the Treaty only when implementing EU law.[26] This reasoning builds on the assumption that as long as there is no legislation, Member States are under no obligation. As we argue below, there are however international obligations already in place, requiring all Member States to respect the right to take collective action.

3.1[c] *Relation to National and International Law*

In view of the different national industrial relations systems, it seems important to discuss whether a Monti II regulation could claim primacy over national law, especially in the field of fundamental social rights. From the perspective of EU law the answer is simple: It is a cornerstone of EU law that it claims supremacy over national law.[27] It is different and more complicated from the perspective of national law. In general national courts tolerate the concept of supremacy, though there are exceptions. Certain national courts have contested the principle of supremacy in defence of the sovereignty of their national constitutional order. Poland for example denies that EU law is different from other forms of international law and claims primacy for its own constitutional law.[28] Italy, Denmark, the United Kingdom, Hungary and Germany acknowledge the principle of supremacy of EU law and recognize its validity, but they do so only on condition that EU law does not violate certain constraints of national constitutional law.[29] This means that in the case of conflict between a future Monti II regulation and national law, national (constitutional) courts can act as guardians of their national fundamental rights and constitutional values and identities.

Concerning international law, the most relevant question is the compatibility of a Monti II regulation with Article 11 of the European Convention on Human Rights (ECHR).[30] Although the accession of the EU to the ECHR has not yet

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25 See above footnotes 7 to 9.

26 Article 51, the EU Charter of Fundamental Rights.

27 ECJ, Case 6-64, *Costa v. E.N.E.L.*, ECR 1964, 585; Grabitz/Hilf/Nettesheim, Das Rechte der Europäischen Union, 46. Suppl., 2011, Art. 1 TFEU recital 72.

28 Damian Chalmers et al., *European Union Law*, 199 Cambridge Universtiy Press 2007.

29 Andreas Bücker, F. Dorssemont & Wiebke Warneck, *Reconcilling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert* 336 et seq. (Andreas Bücker & Wiebke Warneck eds.,) Baden-Baden, Nomos, 2011; Damian Chalmers et al., *European Union Law*, 203 Cambridge University Press, 2007.

30 In this respect, see F. Dorssemont, *How the European Court of Human Rights gave us Enerji to cope with Laval and Viking,* in *Before and After the Economic Crisis. What implications for the 'European Social Model'?*

become reality,[31] a future Monti II regulation could be subject to judicial review by the European Court of Human Rights (ECtHR), should an applicant claim infringement of Article 11 ECHR by a Member State applying the regulation and when the reason for the alleged infringement is the regulation. In this case the conformity of the regulation with Article 11 ECHR would be examined indirectly. The *Bosphorus* case,[32] in which a Member State (Ireland) acted according to an EU regulation, exemplifies the concept that the European Court of Human Rights (ECtHR) applies in such cases. The ECtHR considers compliance with EU law by the contracting party a legitimate general interest objective that can justify the restriction of a fundamental right.[33] However, in the ECtHR's view the Member State's action is only justified as long as the EU is considered to protect fundamental rights, as regards both substantive guarantees and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the ECHR provides. If this is the case, the presumption will be that the Member State's action is in accordance with the ECHR. However, this presumption can be rebutted with regard to the circumstances of the particular case, if the protection of the human rights in the specific case was manifestly deficient.[34] Since the CJEU principally accepts fundamental social rights and since the Charter of Fundamental Rights of the EU entered into force in 2009, the relevant question would be whether a manifest deficit regarding the protection of Article 11 ECHR can be observed with regards to the specific circumstances of the particular case. Considering the *Bosphorus* case, scepticism seems appropriate, as the ECtHR did not demonstrate any willingness to enter into a detailed examination of the specific circumstances, instead limiting itself to general observations.[35]

The situation will change and the assessment of the compatibility of a Monti II regulation with the ECHR will become easier when the accession procedure is completed. The limitations of the *Bosphorus* jurisprudence will become obsolete, as the protection afforded by Article 11 ECHR does not need

217–235 (M.A. Moreau ed., Edward Elgar, 2011), and Council of Europe, Accession of the European Union to the European Convention on Human Rights http://www.europeanrights.eu/public/commenti/Monti_II_final.pdf (2,3).

31 For the current status see: *Giovanni Orlandini, La proposta di regolamento Monti II ed il diritto di sciopero nell'Europa post-Lisbona*, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp (last visited Jun. 9, 2012).

32 ECtHR, Jun. 30, 2005, no. 45036/98 (*Bosphorus v. Ireland*), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69564 (last visited Jun. 10, 2012); Andreas Bücker, F. Dorssemont & Wiebke Warneck, *Reconcilling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert* 345 et seq. (Andreas Bücker & Wiebke eds.) Baden-Baden, Nomos, 2011.

33 ECtHR, Jun. 30, 2005, no. 45036/98 (*Bosphorus v. Ireland*), recital 149 et seq.

34 ECtHR, Jun. 30, 2005, no. 45036/98 (*Bosphorus v. Ireland*), recital 155 et seq.

35 ECtHR, Jun. 30 2005, no. 45036/98 (*Bosphorus v. Ireland*), recital 159 et seq.; Schohe, EuZW 2006, 33; Syrpis, Industrial Law Journal 2008, 219, 233.

to be conveyed through Member States. The legal acts of the EU will become direct subjects of ECtHR judicial review. The limited scope of examination – the presumption of a comparable level of protection of fundamental rights that can be rebutted with regard to the circumstances of the specific case – can be omitted,[36] with the result that a Monti II regulation can then be tested against Article 11 ECHR in the same way as other actions of contracting parties.

Finally there is the question of whether a Monti II regulation can claim primacy over International Labour Organisation (ILO) Conventions and whether the regulation needs to comply with ILO Conventions 87 and 98 (on, respectively, freedom of association and protection of the right to organize, and on the right to organize and to bargain collectively), both regarded as belonging to the ILO core conventions. Although the EU itself is not directly bound by ILO Conventions, these two Conventions can be regarded as part of the European constitutional traditions which in turn are part of EU law. In addition, it is worth noting that the Monti II preamble (recital 1) explicitly refers to these Conventions. Even more directly, these Conventions represent a minimum level of protection in EU primary law by virtue of Article 53 of the EU Charter of Fundamental Rights (CFREU). Indeed, all twenty-seven EU Member States have ratified all eight fundamental rights conventions, including Conventions No. 87 and 98.[37] Therefore the 'Level of protection' (title of Article 53 CFREU) provided for by Article 28 CFREU is intensified by Article 53 CFREU[38] and must not be lower than the Conventions' protective content. This means that a Monti II regulation needs to comply with Articles 28 and 53 CFREU in conjunction with ILO Conventions 87 and 98, and can be challenged if this is not the case.

3.2 The General Principles of Monti II

Key elements of the proposed regulation are the general principles laid down in Article 2. We start by looking into how Article 2 must be understood and if one should accept an equal status of fundamental social rights and economic freedoms or if one should argue for a ranking in favour of fundamental social rights. Then we will set out why the principle of proportionality is not the right approach to reconcile social and economic rights.

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36 Obwexer, EuR 2012, 115, 147.

37 See: http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C87 and http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C98 (Jun. 10, 2012).

38 Meyer, Charta der Grundrechte der EU, 3rd Edition, Baden-Baden, Nomos, 2010, Art. 53 recital 19 et seq.

3.2[a] *Equal Status or Priority of Social Rights over Economic Freedoms?*

Concerning the relation between fundamental social rights and economic freedoms, the proposed regulation only states that the exercise of economic freedoms shall respect the right to take collective action and vice versa (see Article 2 of the proposal). The explanatory memorandum to the proposed regulation sets out more explicitly that according to Article 2, fundamental rights and economic freedoms are considered equal, with no primacy of one over the other.[39] This raises the question of whether one should accept the equal status of fundamental social rights and economic freedoms, or whether one should argue for a ranking in favour of fundamental social rights in line with Article 3(1) of the Social Progress Protocol proposed by the ETUC.[40]

Prescribing equal status is an important step forward in comparison to the current situation. In addition there are structural similarities between economic freedoms and fundamental social rights that plead for equal rank.[41] Furthermore the Treaty does not establish a clear hierarchy: Economic freedoms and fundamental social rights have the same legal value according to Article 6(1) TEU and the Charter of Fundamental Rights of the EU and the European Charter of Human Rights grant rights such as the freedom to conduct a business which overlap with economic freedoms.[42] On the other hand, one can argue that fundamental social rights have primacy because of different backgrounds and functions. Whereas economic freedoms primarily refer to Member States, fundamental social rights are granted primarily to citizens. Furthermore, economic freedoms do not provide an appeal system for individuals as is the case with fundamental social rights.[43] Most important are the different paradigms. Whereas the major aim of economic freedoms is 'merely' to achieve an internal market, fundamental social rights protect the freedom of citizens.[44] Therefore one should argue for fundamental social rights being given priority over the Treaty's economic freedoms, with full and absolute equal status for social rights constituting the minimum level of compromise.[45]

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39 COM (2012) 130 final, 12.
40 European Trade Union Confederation, see http://www.etuc.org/a/5175 (last visited Jun. 10, 2012).
41 Frenz, Handbuch Europarecht, 2012, 21.
42 Dauses, EU-Wirtschaftsrecht, 29. Suppl., 2011, B.I. Rechtsquellen, recital 109.
43 Frenz, Handbuch Europarecht, 2012, 19.
44 Frenz, Handbuch Europarecht, 2012, 26, recital 61.
45 See also C. Kollonay-Lehoczky, L. Lörcher & I. Schömann, *The Lisbon Treaty and the Charter of Fundamental Rights of the European Union* in *The Lisbon Treaty and Social Europe* 61–104 (Niklas Bruun, Klaus Lörcher & Isabelle Schömann eds Hart Publishing 2012).

3.2[b] *The Principle of Proportionality*

According to the proposal there is no inherent conflict between economic freedoms and fundamental social rights, but situations may arise where their exercise may have to be reconciled in accordance with the principle of proportionality in line with standard practice by courts and EU case law. Even though Article 2 of the proposal does not mention the principle of proportionality, it is referred to as the methodological instrument to reconcile both rights in recital 11 and 13 of the proposal as well as in the Explanatory Memorandum.

According to recital 13 the principle of proportionality shall be applied equally against both the economic freedom and the fundamental right. Although it seems plausible at first sight to harmonize two rights by the equal application of the principle of proportionality as a well-established principle of EU law and national constitutional laws, this approach is inadequate and will not be able to reach its aims in this case.[46]

First it needs to be stressed that the application of the principle of proportionality is not in accordance with international law. As the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) pointed out in the *BALPA* case, the Committee has never interpreted ILO Convention 87 in such a way as to include the need to assess the proportionality of interests bearing in mind the notion of freedom of establishment or freedom to provide services. It also observed with serious concern the practical limitations on the exercise of the right to strike that follow from the fact that the outcome of a proportionality test is difficult to foresee, leading to an omnipresent threat of an action for damages that could bankrupt a union.[47]

As Catherine Barnard has pointed out, the proportionality test should at least be complemented by another limb. This limb would consider whether the application of the proportionality principle could result in undermining the essence of the right being protected.[48]

Moreover, this approach is not in line with the idea of equal status because the application of an economic freedom has never needed to be justified, with a

[46] See also M. Rocca, Case C-271/08, *Commission v. Germany* [2010], 2(1) Eur. Lab. L. J., 76–79(2011).
[47] Report of the Committee of Experts on the Application of Conventions and Recommendations, issued on Feb. 24 2010, 209(2010) (http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_123424.pdf, (last visited Jun. 10, 2012).
[48] See C. Barnard, 37 (2) E.LRev., 117–135 (2012).

business entity being able to apply it whenever it wishes to do so.[49] Only restrictions of a fundamental economic freedom need justification.[50] If for example – as in the *BALPA* case – a company intends to set up an undertaking abroad, this project does not need to be justified by any legitimate objective in the public interest. And even if in future the CJEU were to apply the principle of proportionality according to the proposed Monti II Regulation, the Court could not do more than take note that setting up an undertaking abroad or providing services abroad is appropriate, necessary and reasonable in order to realize the fundamental freedom of establishment or freedom to provide services. The use of the right to take collective action however would need to be justified, as set forth in the CJEU rulings. This means that another approach is needed, better suited to implementing the concept of equal status in this context.

3.3 Problems with the Dispute Resolution Mechanism[51]

Article 3 of the Monti II proposal is analysed from an industrial relations and collective labour law perspective. It can be argued that the provision is problematic, insofar as it is at odds with the classical understanding of industrial relations dynamics. The question is then considered whether and to what extent a supplementary layer of transnational industrial relations is being shaped or whether the European Commission is disrupting existing layers of a domestic industrial relations system. Last but not least, an attempt is made to demonstrate that two unique opportunities to mitigate to a certain extent the 'chilling effect' of the infamous *Viking* and *Laval* judgments have been lost.

From a right to access to equal access. The Monti II Proposal introduces a provision on dispute resolution mechanisms,[52] in contrast to the Monti I Regulation, which contains nothing in this area. The mechanisms concerned are qualified as 'alternative' and 'non-judicial mechanisms'. The disputes concerned are qualified as *labour* disputes. The notions 'industrial dispute' and 'industrial action'[53] are thus avoided.

The disputes are said to:

> originate from the exercise of the right to take collective action, including the right or freedom to strike, in transnational situations or situations having a cross-border character

[49] See the opinion of AG Trstenjak, Case C-271/08, recital 189 et seq. who argues that the proportionality test should be applied equally against the fundamental freedom and the fundamental right; Rocca, ELLJ 2011, 76, 78.

[50] Callies/Ruffert, EUV/AEUV Kommentar, 4. Aufl., 2011, Art. 36 AEUV, recital 87.

[51] See also *Giovanni Orlandini, La proposta di regolamento Monti II ed il diritto di sciopero nell'Europa post-Lisbona*, http://www.europeanrights.eu/public/commenti/Monti_II_final.pdf, 11–15.

[52] Article 3 Monti II Proposal.

[53] See e.g. Article 9 EU Regulation nr. 864/2009.

> in the context of the exercise of the freedom of establishment or the freedom to provide services, including the application of Directive 96/71/EC.

Unlike the so-called Monti Report,[54] the Monti II proposal does *not* urge Member States to introduce any mechanism for the informal resolution of labour disputes. The Proposal's approach is based on a principle of *equal* access to dispute resolution mechanisms. It does not provide a principle of access to such mechanisms. Where Member States provide such a mechanism, equality needs to be ensured. A principle of equality can only work in practice when the holder of a right to equal treatment and a comparator (fictitious or real) can be identified. Neither the holder nor the comparator is identified. A contextual interpretation seems to suggest that equal access needs to be guaranteed for the benefit of the holder of the freedom of establishment or the freedom to provide services. Insofar as an employer has in fact exercised the right of establishment in a host State, the principle of non-discrimination based on nationality might be sufficient to safeguard equality.[55] Insofar as the holder is an undertaking which is being prevented from establishing itself or a service provider prevented from providing a service, the principle might have an added value in relation to Article 18 TFEU. This provision prohibits discrimination on grounds of nationality within the scope of application of the Treaties. In theory, the workers' organization in the state of origin potentially responsible for protecting the interests of posted workers should benefit from the principle of equal access as well.

The European Commission approach is reminiscent of the equality principle enshrined in EU Regulation 492/2011 on the free movement of workers, Article 8 of which reiterates the rules of the repealed Regulation 1612/68. This analogy calls for a short excursus with an analysis of that provision. A worker who is a national of a Member State and who is employed in the territory of another Member State is entitled to equality of treatment in terms of membership of trade unions and the exercise of union rights. The provision does not encroach on the autonomy of trade unions to draft internal rules on membership. These rules should however be applied without any nationality-based discrimination of a worker moving freely from one Member State to another. The scope of trade union rights would seem to be a matter of the law of individual Member States. However, a hard core of trade union rights is identified. Thus trade union rights need to include the right to vote and to be eligible for posts as trade union officials. The approach to trade union rights is purely internal. It does not extend to rights relating to the promotion and defence of workers' interests *in foro*

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54 Mario Monti, *A New Strategy for the Single Market* 72.
55 Article 18 TFEU.

externo, in other words vis-à-vis the State or the employer.[56] This purely internal approach is at odds with the progressive development of a number of corollary rights, considered to be an essential means to defend workers' interests, in the case law of the European Court on Human Rights. Considering the fact that the Regulation was adopted in 2011, when these corollary rights were well-established, the approach could be seen to be outdated. Let us examine this further.

National industrial relations systems. Alternative and non-judicial dispute resolution mechanisms are often intertwined with national industrial relations systems.[57] The principle of equal access points to a reluctance to shape a cross-border industrial relations framework. In fact, no supplementary layer is constructed, with existing national layers merely being extended to cover foreign actors.

Although the State has a potential role in promoting alternative dispute resolution mechanisms, such mechanisms have often been shaped in an autonomous and voluntary way. Giving foreign service providers an enforceable right to access existing alternative dispute resolution mechanisms on the basis of an equal treatment principle may be in contrast with the purely voluntary character of such methods as mediation and conciliation. The voluntary nature of such procedures is an essential prerequisite for mediation to be able to function. Another objection relates to a paradox. The CJEU has established an ontological and economic fallacy by stating that posted workers not recruited as agency workers have no right of access to the host State labour market.[58] If this fallacy is upheld in a consistent way, it is inconsistent to give their employers any access to an industrial relations system closely intertwined with the functioning of such a market. Furthermore, the question arises as to whether such access to a system of industrial relations can be granted to the sole benefit of foreign service providers as opposed to posted workers. Access to a host State industrial relations system can take many forms. It suggests that posted workers could participate in the election of workers' representatives in the host State. It might imply that they could participate in strikes being organized in the host State under the same conditions as permanent workers, or that host State workers' representatives could play a role in enforcing host State legislation applicable to posted workers. At present, the Posting of Workers Directive adopts a rather ambiguous stance on

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[56] F. Dorssemont, *The Right to Form and Joint Trade Unions for the Protection of His Interests under Article 11*, 2 Eur, Lab, L, J, 185–235 (2010).

[57] See S. Dubled and R. De Quénaudon, *Les modes alternatifs de règlement des conflits (collectifs) du travail: généralités*, in M. Rigaux and P. Humblet, *Conciliation, médiation et arbitrage* (Brussels, Bruylant, 1–49 (2011)).

[58] See CJUE, C-113/89, *Rush Portuguesa,* §15 (without at any time gaining access to the labour market of the host Member State).

this issue, with Article 5 stating that adequate enforcement procedures should be available to workers *and/or* their representatives. The 'and/or' does not seem to impose workers' representation, nor does it indicate in which State such representation should be situated.

Unfortunately, the CJEU has not upheld this fallacy in a consistent way either. In *Portugaia Construçöes*[59] the Court held that foreign service providers should have access to the collective bargaining system of the host State under the same conditions as employers of the host State.

In this case, the hierarchy of collective agreements under German law was at stake. Under German law, sectoral agreements declared to be generally binding do not have priority over agreements concluded at company-level. Hence, there was scope for *in pejus* bargaining when a company concludes a collective agreement with a trade union willing to do so. Foreign service providers were not considered to have the capacity to conclude such company-level agreements under German law. The CJEU ruled that this exclusion from company-level collective bargaining was discriminatory.

In sum the principle of equal access is far from unproblematic.

Labour disputes originating from the exercise of the right to take collective action: a prolepsis? Another problem is of a conceptual nature, relating to the way Monti II construes the relation between 'labour disputes' and 'collective action'.

The European Commission considers (labour) disputes to result from collective action.[60] In our opinion, trade unions have recourse to collective action within a context of labour disputes. Thus, Article 6 §4 of the European Social Charter recognizes a right to take collective action *in cases of conflict of interest*. Recourse to strike action in the case of a *legal conflict* is said to fall outside the scope of the Charter. Although the borderline between conflicts of interests and a legal conflict is narrow, the idea is that collective action stems from conflicts of interests. Trade union and workers have recourse to collective action in order to promote and further their interests. The only 'conflicts' stemming from collective actions are legal disputes, not labour disputes, as seen in the *Viking* and *Laval* cases. These cases deal with the question of whether recourse to collective action is lawful. Alternative dispute resolution procedures are non-jurisdictional by nature, since they seek to resolve a conflict of interest.

Cooling off collective actions or judicial intervention? Recourse to alternative dispute resolution mechanisms might entail a mandatory or voluntary *cooling off* period. The conflicting parties will be obliged or might be willing to suspend

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59 CJEU, Case C-164/99, Jan. 24, 2002 (*PortugaiaConstruçöes*).

60 It is our opinion that all the disputes considered in Article 3 are *labour* disputes in the meaning of Art. 3 §1 of the Monti II proposal. The word 'dispute' needs to be interpreted in the meaning of Art. 3 §1.

collective action for the duration of the alternative measures. The cooling off relates to the collective action. In Article 3 §3 Monti II a different kind of cooling off is described. It is suggested that alternative disputes resolution procedures might help to cool off parties in having recourse to *judicial remedies* for their disputes or conflicts if the mechanism fails to lead to a resolution after a reasonable period. Such a 'reasonable period' can be qualified as a 'cooling off period'. There is a shift in the focus. In a classical view, alternative dispute resolution procedures are seen as a means to avoid recourse to collective action. In Monti II they are all about avoiding, if possible, recourse to judicial remedies. The fact that *non*-judicial dispute resolution mechanisms are qualified as 'alternative' corroborates that view. In a more classic view, *judicial* intervention in the context of a labour dispute is seen to be an unsatisfactory, hence an alternative approach to the genuine resolution of labour disputes. The fact that dispute-resolution mechanisms are construed in a way that deviates from alternative dispute-resolution mechanisms (as we know them) has important consequences. First, it means that the recourse to the mechanism will take place at a much later stage. In fact, it could be argued that it will take place too late to prevent or to suspend the collective action. It also alters the very object of the dispute-resolution mechanism. It will not focus on a conflict of interest, but rather on the lawfulness of the collective action. A legalistic approach is unable to go to the heart of the matter. It can only ascertain whether the conduct of parties in the conflict was lawful or not. It seems to suggest that there is scope for legal proceedings on the liability of trade unions, as opposed to summary proceedings in order to prohibit collective actions when they are contemplated or have been notified. In a recent observation the ILO CEACR seriously questioned the conformity of procedures entailing an unlimited liability of trade unions due to collective actions. [61] It does not provide a genuine solution for the conflict of interest at hand.[62] The fact that the European Commission does not explicitly focus on the fact that recourse to alternative dispute resolution procedures restricts the ability to have recourse to collective action, is consistent with the lack of any competence of the EU legislator with regard to strike action. It is probably for this reason that the European Commission suggests that

[61] See CEACR, Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) United Kingdom (ratification: 1949), 2011, (ILO lex no. 062011GBR087): 'the Committee considers that protection of industrial action in the country within the context of the unknown impact of the ECJ judgments referred to by the Government (which gave rise to significant legal uncertainty in the BALPA case), could indeed be bolstered by ensuring effective limitations on actions for damages so that unions are not faced with threats of bankruptcy for carrying out legitimate industrial action'.

[62] See in this respect the observation of M. Rigaux : "le juge n'interveniendrat qu'en marge du conflit". M. Rigaux, *L'intervention du juge dans les conflits collectifs du travail : marginale, mais essentielle*, in M. Rigaux and P. Humblet *Conciliation, médiation et arbitrage* (Brussels, Bruylant, 85 (2011)).

there is still scope for an autonomous agreement on the issue. [63] Although it is excluded that such an agreement between management and labour could be implemented by a Directive, no obstacle seems to exist to an autonomous implementation according to the procedures and practices specific to management and labour and the Member States.

*The chilling effect: on the danger of spillover and the role of national Courts***.** British labour lawyers have argued that *Viking* and *Laval* have had a 'chilling effect' on recourse to collective action.[64] The chilling effect relates to the fact that trade unions have a feeling of legal insecurity when planning recourse to collective action that might come under the scrutiny of the CJEU.

The sense of insecurity is related to two factors. First, there is unease about the borderline between collective actions that fall outside and those that fall inside the doctrine of the CJEU. In this respect, the chilling effect coincides with a spillover effect. Trade unions in Member States that are unfamiliar with a proportionality test in domestic law fear that the case law of the Court might be used as an argument to submit all collective actions to such a test. Such an approach is erroneous. First, the Court did not submit collective actions to a civil law test of proportionality, balancing the economic interests of the parties concerned. It claims to balance fundamental rights and fundamental freedoms. Furthermore, the Court's doctrine is restricted to collective action interfering with the exercise of the freedom of establishment and/or the freedom to provide services. Collective actions that do not interfere with one of these economic freedoms fall outside the ambit of the case law.

Monti II refers to collective actions in transnational situations or situations having a cross-border character in the context of the exercise of the freedom of establishment or the freedom to provide services. In our view this reference to the transnational dimension is superfluous and confusing. Indeed a collective action can be purely national in an industrial relations perspective, while interfering with free movement rules. Thus, there was nothing intrinsically transnational about the boycott at stake in *Laval*. The conflict did not transcend the perimeter of a construction site. Swedish trade unions were in fact putting pressure on a Latvian company established in Sweden that had recourse to posted workers working on Swedish soil. The mere fact that a collective action has a

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63 See Article 3 §2 Monti II Proposal.

64 See, Ewing, *Draft Monti II Regulation: An Inadequate Response to Viking and Laval*, (http://www.lcdtu.org/eu-employment-rights-professor-keith-ewing-on-monti-11%E2%80%B3/ (last visited Jun. 9, 2012) and L. Hayes, T. Novitz & H. Reed, *Applying the Laval quartet in a UK context: chilling, ripple and disruptive effects on industrial relations*, in *Reconcilling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert,* 195–244 (Bücker/Warneck eds.,) Baden-Baden, Nomos, 2011; The discourse on the chilling effect has been triggered by the BALPA case See K.D. Ewing and J. Hendy QC, The new spectre haunting Europe, pp 68-72(Institute of Employment Rights 2011).

pan-European character does not constitute an obstacle *in se et per se* to free movement. The pan-European (indeed global) boycott based on the circular of the ITF did fall within the ambit of the Court's scrutiny, since the Court considered it to obstruct the freedom of establishment.

The unofficial draft of Monti II contained an explicit warning against such a spillover effect. A provision stated that 'where cross-border elements are lacking or hypothetical, any collective or industrial action shall be assumed prima facie not to constitute a violation of the freedom of establishment or the freedom or the freedom to provide service and therefore in principle legitimate and lawful under EU law'.[65] The formulation was unfortunate since it suggested that the presumption could be rebutted. In our view, such a collective action would not interfere with fundamental freedoms and could for this reason not be challenged under EU law. This formulation was improved in Monti II, clearly suggesting that the assumption could not be rebutted. Unfortunately, this clear cut signal was reshuffled in the Explanatory Memorandum.

Legal uncertainty also stems from the fact that the lawful character of collective action risks being assessed to a great extent by a court that is not characterized by proximity to the labour conflict. In *Laval* the question as to whether the collective action was lawful was in fact tackled high up at the Kirchberg (in Luxembourg). The judges ruled that the collective action did not serve a legitimate purpose. This approach did not even leave any scope to assess whether the collective action would pass the proportionality test. If the aim of the collective action is qualified to be illegitimate, the game is over. Hence, a *Viking* approach allowing the national referring judge to apply the proportionality test is less intrusive. It would provide more scope for respecting divergences in industrial relations systems. The previous draft of Monti II did prescribe an appealing Private International Law (PIL) rule relating to the competent judge at domestic level. It was provided that the court in the State where the industrial action was started or planned had jurisdiction. This preference for the *locus actus* as opposed to the *locus damni* is reminiscent of the approach in Regulation No. 864/2007 regarding the law applicable to non-contractual obligations. In this regulation a specific PIL rule was introduced. Thus Article 9 states that the law applicable to non-contractual obligations in respect of the liability of a person in the capacity of a worker or an employer or the organizations representing their professional interests for damages caused by

[65] See Article 3 of the Draft Proposal.

an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.[66]

In Monti II the European Commission completely shifts its focus. Rather than stressing the importance of a division between the role of the Court of Justice and that of the domestic judges, it focuses on the division between the role of the institutions and actors responsible for the alternative non-judicial dispute mechanisms and that of national courts. In the previous draft the European Commission distinguished between the role of the Court of Justice and that of national courts 'ultimately' applying the proportionality test.[67]

The sensitive issue of the division between the role of the CJEU and that of the national courts is addressed in the Explanatory Memorandum.[68] The European Commission pays tribute to the idea that competent national authorities enjoy a wide margin of discretion to apply the proportionality test. It breaks down the test into an assessment of appropriateness, necessity and reasonableness. The European Commission is mute on the quintessential issue as to which court deals with the assessment of the lawful character of the aim of the collective action. It takes the opportunity to repeat the idea that the proportionality test needs to be applied in both ways. Despite the reference to the Trstenjak opinion, no trace of the *converse* proportionality is found in Article 3 §4 of the Monti II proposal.

3.4 Critique of the Alert Mechanism

Monti II does not just copy the 'immunity' clause of Monti I, but also pays tribute to the alert mechanism. Despite this obvious inspiration, there are important differences between the alert mechanism and the information obligations under Monti I.[69]

The information obligation under Monti I cannot be dissociated from the more far reaching core obligation on the Member States to 'take all necessary and proportionate measures so that the free movement of goods is assured in the territory of the Member State in accordance with the Treaty'.[70]

This more far reaching obligation is a codification of a duty that the CJEU considered to flow from loyalty to the EU in the landmark case *Spanish*

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66 See for an analysis of Article 9: F Dorssemont and A. van Hoek, *Collective Action in Labour Conflicts under the Rome II Regulation*, 1 Eur. Lab. L, J, 48–75 (2011) and 2 Eur. Lab. L. J. 101–118.

67 See Article 3 of the Draft Proposal.

68 See p. 13.

69 See especially G. Orlandini, *The free movement of goods as a possible community limitation on industrial conflict*, Eur. L. J., 341–362 (2000) and R. Nielsen, *Free movement and fundamental rights*, 1.1. ELLJ, 19–32 (2010).

70 See Article 4 (1) of Council Regulation (EC) No 2679/98 OJ L 337, Dec. 12, 1998, 8–9.

strawberries.[71] In this case the French state was condemned for its omission to act against the violent attacks by French farmers over a decade against imported fruit and vegetables that was being 'dumped' on the French market. Monti I defines such an omission or inaction as:

> the case when the competent authorities of a Member State, in the presence of an obstacle caused by actions taken by private individuals, fail to take all necessary and proportionate measures within their powers with a view to removing the obstacle and ensuring the free movement of goods in their territory.

In sum the information obligations are part of a monitoring procedure related to Member States' obligations. In Monti II such an obligation on the part of Member States is not put forward. Neither *Viking* nor *Laval* makes it possible to construe such an obligation.[72] In this respect, Monti II does not go beyond the State obligations enshrined in Monti I. However, as far as the information obligations are concerned, Monti II can be considered as imposing more severe obligations. The information obligations under Monti II were subjected to conditions which were considered to be alternative, whereas in Monti I these obligations are essentially cumulative. Furthermore, the conditions are different. Thus, the obligations under Monti II arise as soon as:

> serious acts or circumstances affecting the effective exercise of the freedom of establishment or the freedom to provide services *which could cause* grave disruption to the proper functioning of the internal market and/or *which may cause* serious damage to its industrial relations system or create serious social unrest in its territory or in the territory of other Member States arise.

The conditional nature of the impact which is being described differs from the approach in Monti I, which focuses on more immediate 'obstacles'. It might be argued that information obligations under Monti II arise at an earlier stage.

The reference to a 'serious damage to industrial relations systems' or 'serious social unrest' is puzzling. In fact, it could be argued that collective actions do not provoke serious damage or social unrest but that it is the other way around. In fact, in *Viking* and *Laval,* it was the exercise of the economic freedoms in a way that could be construed as social dumping that disturbed a system of industrial relations in the host State. The collective actions did not provoke social unrest, but rather they were a symptom of social unrest. In sum, the European Commission once again seems to confuse cause and result.

71 ECJ, Case C-265/95 *Commission v. France* [1997] ECR I–06959.

72 See in this respect, the observations of Giovanni Orlandini, La proposta di regolamento Monti II ed il diritto di sciopero nell'Europa post-Lisbona http://www.europeanrights.eu/public/commenti/Monti_II_final.pdf.

Another difference is the structure of the information procedure. In Monti I the European Commission is informed and subsequently has to inform all the other Member States. In Monti II the European Commission and the Member States need to be informed simultaneously. Furthermore, the obligation to inform the Member States is restricted to the Member States concerned.

In our view, the information obligation is disconnected from an obligation on the part of the State to intervene in a collective conflict. Information should serve some purpose, and it has an ancillary role. In industrial relations, information is construed as a means to facilitate a more effective procedure. It thus might facilitate a process of bargaining or consultation. An isolated approach to information is puzzling. The Explanatory Memorandum of the Proposal only highlights that the alert mechanism is established in order to 'prevent and limit the potential damage as far as possible'.[73] It is however unclear how mere information could be sufficient to achieve such an objective.

4 CONCLUSIONS REGARDING THE SUBSIDIARITY OBJECTION OF NATIONAL PARLIAMENTS

Given the weaknesses of the Monti II proposal, it comes as no surprise that it has been challenged by national parliaments. Reasoned opinions have been issued by twelve Member States[74] in accordance with the Subsidiarity Protocol. Most of the national opinions consider Article 352 TFEU an inappropriate legal basis for harmonizing collective labour law and emphasize that Article 153(2) and (5) TFEU exclude the right to strike from the areas which can be harmonized under the Treaties.[75] Many opinions also argue that the proposed regulation does not clarify the relation of fundamental social rights and economic freedoms but only reiterates CJEU case law.[76] Further points of criticism are that the proposal, if adopted in its current form, will give rise to new grey areas and uncertainties

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73 See Monti II Proposal, 14.

74 Belgium, Denmark, Finland, France, Latvia, Luxembourg, Malta, Poland, Portugal, Sweden, The Netherlands and United Kingdom have issued reasoned opinions, see Platform for EU Interparlimentary Exchange: http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120130.do (last visited Jun. 14, 2012).

75 The following institutions argue to this end: the Belgium Chamber of Representatives, the Czech Senate, the Danish Parliament, the Finnish Parliament, the Parliament of Latvia, the Luxembourg Chamber of Deputies, the Maltese House of Representatives, the Polish Sejm, the Swedish Parliament, the Dutch House of Representatives; all reasoned opinions can be downloaded from Platform for EU Interparlimentary Exchange: http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120130.do (last visited Jun. 14, 2012).

76 In this sense: the Czech Senate, the Finnish Parliament, the Luxembourg Chamber of Deputies, the Maltese House of Representatives, the Polish Senate and Sejm, the Swedish Parliament, the Dutch House of Representatives (see footnote 74).

(e.g., the unclear definition of cross-border situations)[77] and that the European legislator will interfere with existing and well-functioning national systems. This applies especially to national dispute settlement mechanisms.[78] The need for an alert mechanism is also contested.[79] There are also complaints that the proposed regulation restricts the right to take collective action in an inadmissible manner.[80] In this respect the Portuguese opinion underlines that it is not uncommon for Portuguese constitutional law to accord greater value to social rights than to economic rights.[81] In this context the proposal is also criticized as it does not correspond to the provisions of the right of collective industrial action laid down in fundamental rights instruments approved by the United Nations, the International Labour Organization and the Council of Europe.[82] But three national opinions also argue that there is no need for this regulation at all, because the right to take collective action is sufficiently protected and the CJEU case law does not need any further clarification.[83]

Since the number of reasoned opinions has reached the threshold of one-third of all votes allocated to national parliaments (Article 7(2) of the Subsidiarity Protocol), the Monti II proposal must be reviewed. After this review the European Commission may decide to maintain, amend or withdraw the proposal. In all cases, a reason must be given (Article 7(2.4) of the Protocol).

The reasoning found in the opinions reveals remarkable differences, with some countries emphasizing the lack of EU competences, while others focus on the weakness and lack of clarity of the proposal. We nevertheless consider it unlikely that the European Commission will stick to its proposal in the present form: On the one hand, it has become evident that the necessary unanimity will not be reached. On the other, the reasoned opinions of national parliaments demonstrate that the substance of the European Commission's proposal will not be accepted and that a different approach is needed.

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77 Finnish Parliament (see footnote 74).
78 The Danish Parliament, the Finnish Parliament, the Dutch House of Representatives (see footnote 74).
79 The Maltese House of Representatives, the Swedish Parliament (see footnote 74).
80 The Belgium Chamber of Representatives, the Czech Senate, the Portuguese Assembleia da República (see footnote 74).
81 The Portuguese Assembleia da República (see footnote 74).
82 The Czech Senate, the Finnish Parliament (see footnote 74).
83 The Polish Senate, the Maltese House of Representatives, the UK House of Commons (see footnote 74).

5 POSSIBLE WAYS OUT OF THE DILEMMA

In the following we present our view that a clear commitment to international law could point the way out of the dilemma. First, we examine the possible legal bases for a revised Monti II initiative.

5.1 Legal Basis for a New Initiative

A core problem regarding the adequate legal basis for the proposed Monti II regulation is that Article 153(5) TFEU clearly stipulates that the provisions of Article 153 TFEU do not apply to the right to take collective action. This leads to the dilemma that the CJEU has taken decisions on collective action, while the European legislator's legal power to change the jurisprudence is rather limited according to Article 153(5) TFEU.[84] The European Commission is seeking a way out by basing the proposed regulation on Article 352 TFEU. As a procedural consequence, the proposal needs to be adopted unanimously by the Council, with the European Parliament only having the chance to approve or disapprove (Article 352(1) TFEU). In light of the subsidiarity objection of the national parliaments, it simply seems unrealistic for Monti II to be adopted or to introduce the necessary improvements on the basis of Article 352 TFEU. Therefore there is a need to explore other possible legal bases.

Although Article 153 TFEU is the most important article in the field of social policy, it is ruled out due to paragraph 5. With a Monti Regulation already in place on the free movement of goods one could think of a Monti II Regulation for the domains of freedom of establishment (based on Article 50 TFEU) and freedom to provide services (based on Article 59 TFEU). One problem with such an approach is that both articles only allow for directives, and the transposition of such directives could lead to ambiguities. Second the nature of a directive is not consistent with the purpose of a Monti II initiative, which is – as Article 1(1) of the proposed Monti II regulation states – to lay down the general principles and rules applicable at EU level. A directive however addresses Member States, so the focus would be on the wrong level of governance. Finally Article 59 TFEU only allows for directives aiming to achieve the liberalization of specific services. This is not the intention of the Monti II initiative.

Taking the fundamental relevance of the issue into account, Article 26(3) TFEU could be an option. According to this provision the Council – on the basis of a European Commission proposal – would determine the guidelines and conditions necessary to ensure balanced progress in all sectors of the internal

84 Wißmann, AuR 2009, 149, 150.

market. This provision complements Article 3(3) TEU and must be seen as a central element of the economic constitution of the EU.[85] Article 26(3) TFEU addresses possible conflicts between different policy aims such as market integration, social progress or environmental protection.[86] As an instrument for balancing such conflicts, Article 26(3) TFEU provides for the adoption of guidelines. The legal status of such guidelines is not defined in the Treaty. For similar cases (e.g., Articles 68, 171 or 192(3) TFEU) the prevailing view in the literature considers these guidelines binding for other EU institutions[87] meaning that these guidelines would also be binding for the CJEU. An advantage of such guidelines – in comparison to directives – is that they address the correct level of governance. What needs to be changed is not the law or practice of Member States, but the case law of the CJEU. In this respect guidelines seem adequate since they do not address Member States and do not disturb national industrial relations systems: rather, they only address EU institutions. The adoption of such guidelines would also send a clear political message from the EU legislator to the CJEU.

Since the Council acts by qualified majority (Article 26(3) TFEU), the prospects for reaching a consensus on the text are better than under Article 352 TFEU. The shortcoming of this approach is that the guidelines would be adopted by the Council on a proposal from the European Commission without the participation of the European Parliament, thus limiting the democratic legitimacy. As far as we can see, the option of Article 26(3) TFEU has not been used so far. While this provision provides a legal basis for guidelines (not for a regulation) it needs to be underlined that, whatever the case, the basic principle of Article 153(5) TFEU must not be infringed and that the European legislator must not intrude on Member States' sovereignty and the diverse forms of national practices (principle of subsidiarity).

5.2 Commitment to International Law could Point the Way

Starting points. In our view a clear commitment to international law and internationally accepted labour standards could point a way out of the dilemma. International law and standards concerning freedom of association and the right to take collective action provide models and examples which can be taken as a point of reference for the development of a supranational solution for the EU.

85 Grabitz/Hilf/Nettesheim, 46. Suppl., 2011, Art. 26 AEUV recital 7.
86 Callies/Ruffert, EUV/AEUV Kommentar, 4. Aufl., 2011, Art. 26 AEUV, recital 20.
87 Callies/Ruffert, EUV/AEUV Kommentar, 4. Aufl., 2011, Art. 26 AEUV, recital 20.

The basic elements of an approach relating to the model and examples of international labour law should be:

(1) the recognition of the social partners' autonomy and a margin of manoeuvre for trade union action; and
(2) only limited judicial review bound by examples such as 'misuse', 'illegitimate interests' or 'ensuring essential services'.

In the body of international labour law, and in particular the principles and decisions of the ILO supervisory bodies[88] and the assessments and conclusions of the European Committee of Social Rights, we find no obligation on the part of trade unions to take into consideration the economic interests of the other party, and to balance their policies and demands by the principle of proportionality. Instead the social partners are provided with a margin of freedom or manoeuvre which is not subject to judicial control. At the same time we find a well-developed list of cases limiting the margin of manoeuvre, in which the right to take collective action may be restricted or even prohibited. From our point of view, it seems advisable for the EU and the European Commission to draw upon this jurisprudence when rethinking Monti II, as it reflects the know-how and competence of international institutions and actors.

ILO practice. The right to strike is not absolute as evolved and further elaborated in the ILO system. The most important limitations are – also in ILO practice – related to public welfare considerations. The practice under the Committee on Freedom of Association (CFA) and the CEACR allows that the right to strike may be restricted and prohibited in the following cases:[89]

– in the public service only for public servants exercising authority on behalf of the State;
– in essential services in the strict sense of the term, that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population;
– in the event of an acute national emergency and for a limited period of time;

The second point regarding the concept of essential service has been dealt with extensively by the CFA. Examples of essential services have been the hospital sector, water supply services, the police and armed forces, and air traffic control.

[88] See International Labour Office, *Freedom of Association*, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, paras 570–626, (2006), and Novitz, *International and European Protection of the Right to Strike; A Comparative Study of Standards set by the ILO, the Council of Europe and the EU* 203 (Oxford University Press 2003).
[89] See the CFA Digest 2006, para. 570–583. See also T. Novitz, 302 (2003).

The list of services that do not constitute essential services in the strict sense of the term is also long: ports, banking, radio and television, the petroleum sector, airline pilots, transport, the postal service and so on.[90]

This doctrine which gives the States the right to restrict collective action in essential services has been combined with a doctrine concerning 'compensatory guarantees'. This means that where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate for the limitations thereby placed on their freedom of action. Such compensatory measures might be impartial and speedy conciliation and arbitration proceedings or joint arbitration machinery.

The doctrine concerning restrictions on collective action in the ILO system also has an essential element usually referred to as the 'minimum service' doctrine. This doctrine gives a certain flexibility establishing a distinction between essential and non-essential services and introduces a kind of proportionality test into the reasoning. It places the State Party under an obligation not to impose too far reaching restrictions on collective action in essential services (if limited restrictions can eliminate the danger to public safety or health they should be used). On the other hand, the doctrine implies that the extent and duration of a strike, which as such does not qualify as being an essential service, might result in a serious crisis, which again makes it legitimate to apply restrictions. In accordance with this doctrine, the establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services); (2) services which are not essential in the strict sense of the term, but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population: and (3) public services of fundamental importance.[91]

The European Social Charter. Unlike the ILO Conventions, the European Social Charter incorporated from the beginning in 1961 an explicit obligation in Article 6.4 to ensure the right to take collective action, including the right to strike, in cases of conflicts of interest. This Article remained unchanged when the Charter was revised in 1996.

The scope of Article 6.4 has been developed and elaborated in the practice of the Committee of Social Rights. The right to take collective action is not absolute, but it can be restricted as long as the restriction can be justified as described by law and necessary in a democratic society for the protection of the

[90] See further the CFA Digest 2006, para. 587.
[91] CFA Digest 2006, para. 606.

rights and freedoms of others or for the protection of the public interest, national security, public health or morals.[92] Restrictions on the rights in the European Social Charter are regarded as exceptions and interpreted strictly. In a recent contribution, Orlandini has considered the restrictions put forward by the CJEU not to be in conformity with Article 6 §4 ESC.[93] No protection is granted to actions with illegitimate reasons or constituting a misuse of the right to take action.[94]

Evaluation. It is clearly reasonable that the European Union should follow the standards set by the ILO and the European Social Charter which all the Member States are bound to apply. Furthermore, there is strong legal support for such an approach. According to Article 52 paragraph 3 of the Charter of Fundamental Rights of the EU, the meaning and the scope of fundamental rights enshrined in the Charter shall be the same as those laid down by the ECHR. Again it is well known that the European Court of Human Rights has highlighted in its case law that the Court, in defining the meaning of the terms and notions of the Convention, can and must take into account elements of international law other than the Convention such as the European Social Charter (ESC) or ILO Conventions and their interpretation.[95] As a result there is already a clear connection between EU law (i.e., Article 28 of the Charter), the ECHR (i.e., Article 11) and international labour law and standards.[96]

In addition such an approach is appropriate for implementing the equal status of economic freedoms and fundamental social rights. As explained above, companies making use of economic freedoms do not need to justify the use of such freedoms. It is a cornerstone of the development of the internal market that EU institutions have always been strong in defending economic freedoms to the benefit of the development of the market and to the benefit of economic actors.

The same should apply to social rights. EU institutions should be equally strong in defending fundamental social rights to the benefit of the market's social dimension and that of the social partners. Just as companies do not need to justify using economic freedoms, trade unions should not need justification for collective action, and should be provided with a broad margin of freedom for negotiations and collective bargaining.

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92 See S. Evju, *The Right to Collective Action under the European Social Charter,* 2(3) Eur. Lab. L. J., 211(2011).

93 G. Orlandini, La proposta di regolamento Monti II ed il diritto di sciopero nell'Europa post-Lisbona http://www.europeanrights.eu/public/commenti/Monti_II_final.pdf, 7 (last visited Jun. 20, 2012).

94 See M.Matti, *Social Human Rights of Europe* 286 (Legisactio 2010).

95 European Court of Human Rights, Nov. 12, 2008, *Demir and Baykara v. Turkey*, no.34503/97, rec. 85.

96 See also Bruun and Lörcher, *Social innovation: the new ECHR jurisprudence and its impact on fundamental social rights in labour law* in *Mélanges á la mémoire de YotaKravaritou: a trilingual tribute,* (ed. Schömann), ETUI (2011).

6 CONCLUSIONS

With national parliaments challenging the Monti II proposal on the basis of the subsidiarity principle, it needs substantial rewriting. The Monti II proposal claims to uphold the equality of economic freedoms and the right to take collective action. The authors argue that there are good reasons for giving priority to fundamental social rights over economic freedoms, with full equal status of social rights constituting the minimum level of compromise.

The European Commission's concept of adhering to the CJEU case law and the principle of proportionality is not in accordance with international law, it cannot fulfil its purpose and has been rejected by national parliaments.

A revised proposal should contain a clear commitment to international law and labour standards. It should recognize the autonomy of the social partners and a margin of manoeuvre for trade union action, foreseeing only limited judicial review bound by existing examples from international practice. The dispute resolution and alert mechanism should be deleted from the proposal. The dispute resolution provision is not helpful in remedying the chilling effect.

Furthermore, the Court should respect the margin of appreciation to the benefit of national courts to assess whether collective action serves a legitimate purpose. The ultimate guardian of the assessment of the appropriate character of a trade union demand should be the trade unions themselves and the organized workers. The courts should stick to assessing the lawfulness and not the appropriate character of either a demand or the means to be used to enforce it.

Final conclusion: the European Commission should not propose a regulation based on Article 352 TFEU, but instead just guidelines to be adopted on the basis of Article 26(3) TFEU.