

Posting of workers

Monti II: Reconciling economic freedoms and fundamental rights

By Sophie Petitjean | Monday 06 February 2012

The European Commission is considering authorising, in cases of posting of workers, restrictions on fundamental rights by economic freedoms and vice versa, “provided these do not go beyond what is appropriate, necessary and reasonable”. It also places national courts in the country where the industrial action is planned or implemented in charge of ruling on any disputes.

This is what emerges from the so-called ‘Monti II’ draft regulation, seen by *Europolitics*, which clarifies exercise of the right to take collective action in the context of economic freedoms in the single market.

The text, whose publication date is increasingly uncertain, forms part of the posting of workers package. With the draft directive on implementation of Directive 96/71/EC (see *Europolitics* 4352), its aim is to regulate situations where a worker is sent to a member state other than the one where he normally works, for a limited period and in the framework of providing a given service. The regulation also deals with restructuring and/or relocation situations involving more than one member state.

The Commission’s objective is to reconcile two key principles: on the one hand, the right to take collective action to defend the rights of posted workers, including the right to strike, and on the other, economic freedoms, in particular freedom of establishment and freedom to provide services. Working on the basis of EU Court of Justice case law (Viking, Laval, Rüffert and Luxembourg cases), the Commission reiterates that there is no inherent conflict between these two concepts, nor does one take precedence over the other. Consequently, this equality of status implies that economic freedoms may be restricted in the interest of fundamental rights and vice versa. The executive nevertheless introduces a rebuttable presumption of lawfulness of collective action, whereby the action should be considered as not constituting a breach of freedom of establishment or freedom to provide services. This provision places the burden on employers to prove the existence of a cross-border situation where cross-border elements are lacking or hypothetical.

FRAMEWORK FOR RESOLVING DISPUTES

To prevent forum shopping, the Commission provides that the courts closest to the industrial action (ie those in the member state where the action is planned or taken) must assess the facts and interpret national law to determine whether and to what extent collective actions do not go beyond what is necessary to achieve the objective of protecting workers or workers’ rights. The Commission recognises the role and importance of existing national practices relating to exercise of the right to strike, including alternate dispute settlement practices, such as mediation and conciliation. However, it states that such mechanisms may have to be adapted to be used in a cross-border context and suggests that employers and workers may establish guidelines at European level if they wish.

The regulation also introduces an alert mechanism by obliging member states to inform and notify the member states concerned in case of serious social unrest or major disruptions to the proper functioning of the single market.

This text is based on Article 352 of the Treaty on the Functioning of the European Union, which means that the Council acts unanimously after approval by the European Parliament. The entire posting of workers package, set to be published on 8 February, has been removed from the agenda of the Commission's meeting. BackgroundNegotiated for over five years, Directive 96/71/EC on the posting of workers establishes that a number of minimum working and employment conditions in force in the host member state also apply to posted workers. In 2007 and 2008, the Court of Justice interpreted the directive's provisions in four judgements, which were widely criticised due to the imbalance they impose between market freedoms and fundamental rights. The cases were Laval (C-341/05), Rüffert (C-346/06), Luxembourg (C-319/06) and Viking (C-438/05).

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