

ETUI Policy Brief

European Economic, Employment and Social Policy

N° 4/2012

Critical assessment of the proposed Monti II regulation – more courage and strength needed to remedy the social imbalances

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Policy recommendations

Monti II provides an opportunity for the European Union institutions to show that Social Europe is not dead. But the Commission proposal needs substantial rewriting. The Monti II draft claims to stipulate the equality of economic freedoms and the right to take collective action. The authors put forward that there are good reasons to argue for the priority of fundamental social rights over economic freedoms, with full equal status of social rights constituting the minimum level of compromise.

The proposal should no longer adhere to the principle of proportionality and instead make a clear commitment in Art 2 to international law and labour standards. It should recognise the autonomy of social partners and a margin of manoeuvre for trade union action, foreseeing only limited judicial review bound by existing examples from international practice. An alternative legal basis for binding guidelines is Art 26 para. 3 TFEU which only requires the realistic qualified majority.

Introduction: background and summary of the proposal

The Viking, Laval and Rüffert judgments have triggered – more than almost any other jurisprudence of the Court of Justice of the EU (CJEU) – a political and academic debate on the balance between market integration and social justice. The European Commission is now making a move to address these problems by presenting a proposal for a regulation which is supposed to balance fundamental social rights and economic freedoms. This article presents the proposal and conducts a critical assessment of whether it can contribute to reconciling economic freedoms and social rights.

The inspiration for the proposal is the so-called 1998 Monti Regulation¹ which deals with obstacles to the free movement of goods and includes an Art. 2 according to which 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". This Regulation bears the informal name of Monti since Mario Monti was Internal Market Commissioner in 1998. It is therefore not surprising that Monti, given the task of coming up with "A New Strategy for the

Single Market" by the Barroso Commission, proposed introducing a similar provision in the context of the free movement of services and freedom of establishment.²

In October 2010 this proposal found its way into proposals 29-30 in the 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". These proposals have to be understood against the background that the ETUC had actively lobbied for legal measures and had presented its own alternative, "A Social Progress Protocol".³ Moreover, several EU institutions, including the European Parliament and the European Economic and Social Committee, had expressed support for legal reforms.⁴ As a result

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of this Barroso expressed his will to introduce legal changes when he stood as candidate for re-election to the post of President of the European Commission.⁵

The Proposal for the Council Regulation (hereinafter referred to as Monti II) was submitted on 21 March 2012.⁶ The preparation of the proposal was marked by a rather exceptional "leak" of a draft early in January 2012. This draft was largely commented upon by different stakeholders.⁷ In comparison with the draft the final proposal is a simplified and shortened version (only 5 articles). Shortening was achieved by shifting certain contested provisions into the Explanatory Memorandum.

The content of Monti II is rather simple: it starts by defining the subject matter (Art. 1) and the general principles (Art. 2). Art. 3 regulates dispute resolutions mechanisms, Art. 4 the alert mechanism, and finally Art. 5 defines the regulation's entry into force.

What are the implications of proposing a regulation?

The Commission considers a regulation to be the most appropriate instrument for clarifying the general EU-level principles and rules reconciling the exercise of fundamental rights with economic freedoms in cross-border situations. According to the draft the advantages of a regulation over a directive include clarity and the reduction of regulatory complexity. These arguments do not however address the issue of whether a regulation is an appropriate instrument within the framework of the hierarchy of norms within EU law. Consideration needs to be given to whether a regulation is appropriate in view of the topic's "constitutional" nature.

A topic of "constitutional" nature

The subject matter of the draft - 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 hand - is of fundamental relevance for the democratic and economic order of the EU and should therefore be addressed by primary law. The scope of application of Monti II is broad, covering all forms of collective action and following the terminology adopted in the EU Charter of Fundamental Rights (Art. 28).

Since the jurisprudence of the CJEU is based on primary law we have to ask whether secondary law is strong enough to change the jurisprudence. In this respect there are important limitations. Although the CJEU has to follow secondary law, in general it is clear that primary law has supremacy over secondary law.⁹

This means the CJEU will not interpret the freedom of establishment and freedom to provide services in light of a future Monti II regulation, having instead a legal obligation to interpret a possible Monti II as far as possible in consistency with primary law which means in consistency with its previous jurisprudence on economic freedoms. For this reason a possible Monti II regulation should avoid any ambiguity in its wording, explicitly stating the issues to be changed. Unfortunately the draft Monti II is not precise.

Instead the Explanatory Memorandum to the draft regulation states that it wants to clarify the interaction between social rights and economic freedoms without however reversing the case law of the CJEU.¹⁰ If the draft really wants to improve the situation to the benefit of social rights it is essential to state clearly that the intention is to change the current status.

Primacy over national and international law?

The relationship between Monti II and national law is basically clear. A regulation is directly binding as national law in the Member States. In general national courts tolerate this concept of supremacy. However there are exceptions. Some national courts have contested the principle of supremacy in defence of the sovereignty of their national constitutional orders. Poland for example rejects the notion that EU law is different to other forms of international law and claims primacy for its own constitutional law. Other countries like Belgium, Denmark, Germany, Hungary, Italy or the United Kingdom acknowledge the supremacy of EU law and give it validity, but only – with certain differences according to the specifics of each country – on condition that EU law does not violate certain constraints of national constitutional law. This means that in the case of conflict between a future Monti II and national legislation, 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 Monti II with the European Convention on Human Rights (ECHR). At present the accession of the EU to the ECHR is yet to be implemented. Although the EU is not a contracting party, yet a regulation could become the subject of proceedings against a Member State. In this case compliance with EU law by the contracting party might be seen as a legitimate general interest objective restricting the fundamental right to take collective action. However the European Court of Human Rights would in such a situation check whether EU law guarantees comparable - not necessarily identical - protection of human rights. Assessment of the compatibility of Monti II with the ECHR will become easier once accession is completed. The specific procedures under which a provision of EU law can be challenged are still under debate. In any case it is clear that EU law – in this case Monti II – is ranked lower than the ECHR and will be examined under the Convention.

Furthermore the EU Member States have ratified the ILO Conventions 87 and 98 (on respectively Freedom of association and protection of the right to organise and Right to organize and to bargain collectively), regarded as belonging to the ILO's core conventions. Although the EU itself is not directly bound to 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 (1 recital) 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 27 EU Member States have ratified all eight fundamental rights conventions, including Conventions No. 87 and 98. Therefore the 'Level of protection' (title of Article 53 CFREU) provided for must not be lower than the Convention's protective content.

Legal basis

A core problem regarding the adequate legal basis for the regulation is that the Treaty on the Functioning of the European Union (TFEU) clearly stipulates that the provisions of Art 153 TFEU (which lists the European social competencies) do not apply to the right to take collective action. The Commission is seeking a way out of this dilemma by basing the draft on Art 352 TFEU (flexibility clause allowing to expand EU competencies). As a procedural consequence the draft needs to be adopted unanimously by the Council and the European Parliament will only have to approve or disapprove it. These procedural rules will make it very difficult not only to get Monti II adopted, but also to introduce the necessary improvements.

It is therefore relevant to explore other possible legal bases. Art 26 para. 3 TFEU could be an option, according to which the "Council – on the basis of a proposal from the Commission – shall determine the guidelines and conditions necessary to ensure balanced progress in all sectors" of the internal market. This provision must be seen as a central element of the EU's economic constitution. This article addresses possible conflicts between different policy aims such as market integration, social progress or environmental protection.¹⁵ As an instrument for balancing such conflicts it provides for the adoption of guidelines. The legal status of such guidelines is not defined in the Treaty. For similar cases (e.g. Art 68, 171 or 192 para. 3 TFEU) the prevailing view in literature considers these guidelines binding for other EU institutions¹⁶ meaning that these guidelines would also be binding for the CJEU. Since the Council acts by qualified majority (Art 26 para 3 TFEU) the prospects for reaching consensus on the text are better than under Art 352 TFEU. The shortcoming of this approach is that such guidelines are adopted without any European Parliament participation, thereby limiting their democratic legitimacy. As far as we can see this option has not been used so far.

While this provision provides a legal basis for guidelines (but not for a regulation), the basic principle of Art 153 must not be violated and the European legislator must respect Member States' sovereignty and the diverse forms of national systems and national practices (subsidiarity).

How shall the reconciliation be designed?

With regard to the relation between fundamental social rights and economic freedoms the draft Monti II only states that economic freedoms shall respect the right to take collective action and vice versa (Art 2). The Explanatory Memorandum is more explicit, stating under Art 2 that fundamental rights and economic freedoms are considered equal with no primacy of one over the other.¹⁷

This raises the question whether one should accept fundamental social rights and economic freedoms as having equal status or whether one should argue for priority to be given to fundamental social rights in line with the Social Progress Protocol proposed by the ETUC.

Firstly one may note that specifying equal status is an important step forward compared to the current situation. In addition there are structural similarities between economic freedoms and fundamental social rights that plead for equal status.¹⁸ Furthermore the Treaty does not establish a clear hierarchy: Economic freedoms and fundamental social rights have the same legal value under Art 6 para. 1 TEU.¹⁹

On the other hand one can argue that fundamental social rights are superior due to their different backgrounds and functions. Whereas economic freedoms refer primarily to Member States, EU fundamental social rights are granted primarily to citizens. Furthermore economic freedoms do not provide an appeal system for individuals as fundamental social rights do.²⁰ What might be most important are the different paradigms. Whereas the major objective of economic freedoms is "merely" to realize an internal market, fundamental social rights protect citizen's freedoms.²¹

Therefore one should argue for fundamental social rights being given priority over the Treaty's economic freedoms and absolute equal status for social rights constituting the minimum level of compromise.

Why the principle of proportionality is the wrong approach

According to the draft there is no inherent conflict between economic freedoms and fundamental social rights. Nevertheless situations may arise where their mutual 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 Art. 2 of the draft 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 draft as well as in the Explanatory Memorandum.

It is interesting that recital 13 provides for the principle of proportionality being applied equally against both the economic freedom and the fundamental right in question. Although the equal application of the principle of proportionality, a well-established principle of EU law and national constitutional laws, seems at first sight plausible, this approach is not adequate in this case.

Firstly it needs to be stressed that applying the principle of proportionality does not comply with international law. As the ILO Committee of Experts (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 which leads to an omnipresent threat of an action for damages that could bankrupt a union.²²

Secondly this approach is not in line with the idea of equal status as the use of an economic freedom never needs to be justified, with the whole point being that it can be used by

a business entity whenever it so wishes. Only restrictions of a fundamental economic freedom need justification. If – as in the BALPA case – the 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 applied the principle of proportionality in accordance with the draft Monti II regulation, the Court could not do more than note that setting up an undertaking abroad or to provide services is appropriate, necessary and reasonable in order to realize the fundamental freedom (and private interest) of establishment or freedom to provide services. The use of the right to take collective action however would need to be justified as laid down in the decisions of the CJEU. This means that another more appropriate approach is needed in order to implement the idea of equal status in this context.

International law could point the way out of the dilemma

We think that a clear commitment to international law and 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. Basic elements of an approach relating to the model and examples of international labour law should be

- (1) the recognition of a social partner's 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" etc.

In the body of international labour law, and in particular the principles and decisions of the ILO supervisory bodies²³ and the assessments and conclusions of the European Committee of Social Rights²⁴, we find no obligation for trade unions to take into consideration the economic interests of the other side 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 and 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 Commission to draw upon this jurisprudence when designing Monti II, as it reflects the know-how and competence of international institutions and actors.

Furthermore there is strong legal support for such an approach. According to Art 52 para. 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 a known fact that the European Court of Human Rights has highlighted in its jurisprudence 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.²⁵ So there is already today a clear connection between EU law (i.e. Art 28 of the Charter), the ECHR (i.e. Art 11) and international labour law and standards.²⁶

In addition such an approach is appropriate for implementing 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 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 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.

Limited judicial review bound by examples

International labour standards have developed established practice on when limitations to the right to collective action can be justified. In the extensive ILO practice, national emergency and providing of essential services (water supply, certain services in the hospital sector, public health, etc.) in the strict sense of the term are the most important. Furthermore a restriction guaranteeing certain minimum services can be justified.²⁷ Within the framework of the ECHR and the European Social Charter the general approach to restrictions applies, stating that they should be described by law, necessary in a democratic society for the protection of rights and freedoms of others or for the protection of the public interest, national security, public health or morals. No protection is granted to actions with illegitimate reasons or constituting a misuse of the right to take action.²⁸

Alternative resolution mechanism and the alert mechanism

Art 3 of Monti II has the objective of strengthening alternative resolution mechanisms as an option. As an optional instrument it does not limit the freedom to take collective action and deserves approval. The criteria for triggering the alert mechanism (Art 4) are not very clear, but its main intention is to guarantee that information will be provided in defined exceptional circumstances. In this context it is not possible for us to analyze this issue further.

Final remark

The economic governance of the present economic crisis in Europe has been characterized by a lack of social policy considerations. The proposals from the European Commission in March 2012 are the first sign for a long time that social

policy has any relevance on its policy agenda. Unfortunately Monti II cannot, in spite its good intention, do its job in its form proposed by the European Commission on 21 March 2012. This proposal cannot be adopted without unanimous acceptance by all 27 Member States. We do not believe that this can be achieved. The more serious problem is that even if the proposal is adopted it does only confirm the present legal practice. It explicitly states that it does not intend to reverse any former legal practice of the CJEU, although there are some cautious hints to the contrary. If the EU Institutions wish to re-establish legitimacy for the European project, Monti II must be significantly improved, by clearly stating that its purpose is to change the restrictive practice regarding strikes established by the judgments in Viking and Laval as far as it is possible within the framework of the Lisbon Treaty.

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- 1 Council Regulation (EC) No 2679/98 of 7.12.1998 on the functioning of the internal market in relation to the free movement of goods among the Member States. OJ L 337/8, 12.12.1998.
- 2 See the Monti report "A new Strategy for the Single Market" (http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf, last visited 04.04.2012).
- 3 See <http://www.etuc.org/a/5175> (last visited 27/03/2012).
- 4 EP resolution of 22 October 2008 on challenges to collective agreements in the EU, 2008/2085(INI); EESC Opinion, SOC/360 – EESC 970/2010.
- 5 José Manuel Durão Barroso, Speech/09/391, Date 15/09/2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/391>.
- 6 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.
- 7 The authors of this article were invited to comment on the draft at a seminar held in the European Parliament 7.3.2012.
- 8 COM (2012) 130 final, p. 11.
- 9 Callies/Ruffert, EUV/AEUV Kommentar, 4. Aufl., 2011, Art. 288 AEUV, recital 9.
- 10 Monti II Proposal, COM (2012) 130 final, p. 10.
- 11 Chalmers/Hadjiemmanuil/Monti/Tomkins, European Union Law, 2007, p. 199.

- 12 Bücker/Dorssemont/Warneck, in Bücker/Warneck (eds.), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert*, p. 336 et seq.; Chalmers/Hadjiemmanuil/Monti/Tomkins, European Union Law, 2007, p. 203.
- 13 For the current status see: http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/default_en.asp (last visited 27/03/2012).
- 14 Bücker/Dorssemont/Warneck, in Bücker/Warneck (eds.), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert*, p. 345 et seq.
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- 16 Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, 46. Suppl., 2011, Art. 26 TFEU recital 18.
- 17 COM (2012) 130 final, p. 12.
- 18 Frenz, *Handbuch Europarecht*, 2012, p. 21.
- 19 Dause, *EU-Wirtschaftsrecht*, 29. Suppl., 2011, B.I. *Rechtsquellen*, recital 109.
- 20 Frenz, *Handbuch Europarecht*, 2012, p. 19.
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- 22 Report of the Committee of Experts on the Application of Conventions and Recommendations, issued on 24 February 2010, p. 209 (http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_123424.pdf, last visited 07/04/2012).
- 23 See e.g. ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth (revised) ed., Geneva, 2006 (www.ilo.org/ilolex/english/23e2006.pdf, last visited 1 April 2012).
- 24 See e.g. Council of Europe, *Digest of the Case Law of the European Committee of Social Rights*, Strasbourg 2008, (http://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestIndex_en.asp (last visited 1 April 2012).
- 25 European Court of Human Rights, 12 November 2008, Demir and Baykara v. Turkey, no.34503/97, recital 85.
- 26 See also Bruun and Lörcher, *Social innovation: the new ECHR jurisprudence and its impact on fundamental social rights in labour law*. In "Mélanges à la mémoire de Yota Kravaritou: a trilingual tribute" (ed. Schömann). ETUI 2011.
- 27 See Freedom of Association, *Digest 2006*. paras. 570-626 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*. Oxford University Press, Oxford 2003. pp 203.
- 28 See Mikkola, *Social Human Rights of Europe*, Porvoo 2010, Karelactio pp. 277-296.

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The ETUI is financially supported by the European Union. The European Union is not responsible for any use made of the information contained in this publication.