IRISH CONGRESS TRADE UNIONS

Observations and Recommendations on the

EU Commission Proposals 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

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Statement of ICTU position

1. The Irish Congress of Trade Unions is the representative body for trade unions on the island of Ireland representing over 800,000 workers from all occupations and industries in both the private and public sector.

2. Our analysis is that the Commission proposals for a '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', the so called MONTI II Regulation, fall substantially short of correcting the problems brought about by the European Court of Justice Rulings in the *Viking*, *Laval,* and *Ruffert* cases. Indeed the text of the proposed Regulation threatens to confirm the unacceptable case law and to damage workers' rights and social Europe further.

3. **Congress therefore rejects the Commission proposals and we call on Government to put forward credible proposals in order to ensure that the right of workers and their unions to take collective action to defend their interests is not undermined in the context of economic freedoms in the single market.**

Summary of key points

Not the same Monti

4. The judgments of the European Court of Justice in the Viking-Line, Laval, Rüffert and Commission v Luxembourg cases (Viking (C-438/05), Laval (C-341/05), Rüffert (C-346/06), Commission v Luxembourg (C-319/06) triggered an intense debate focused on two major issues. The first concerned how to set the right balance between the exercise by trade unions of their right to take collective action, including the right to strike, and the economic freedoms enshrined in the Treaty on the Functioning of the European Union (TFEU) in particular the freedom of establishment and the freedom to provide services. The second was how to interpret some key provisions in Directive 96/71/EC, such the concept of public policy, the material scope of the terms and conditions of employment protected by the Directive and the nature of mandatory rules, in particular the minimum wage.

5. On the first question, respecting the right to strike, the idea was to introduce a provision to guarantee the right to strike, modelled on Article 2 of Council Regulation (EC) No 2679/98 (the so-called Monti Regulation), The 1998 MONTI I Regulation was clear that the free movement of goods could not be used as a means to undermine the right to take collective action, Council Regulation (EC) No. 2679/98, Article 2 stated:

   'This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised 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'.

6. The Commission proposals have none of this clarity, in wording or in purpose. The main objective of the Regulation is still stuck on the same old refrain: economic freedom always prevails over social and human rights.

Problematic inclusion of 'proportionality'

7. Congress is concerned about the use of 'proportionality' as a methodological instrument to reconcile conflict between economic freedoms and fundamental human rights. The proposals, if adopted, would give rise to an omnipresent threat to a trade union's ability to take collective action, as employers would undoubtedly threaten legal action for damages, while injunctions on collective action while any questions of 'proportionality' are decided in Irish courts would likely render the action taken some months later irrelevant and meaningless. The International Labour Organisation has recently considered the operation of the 'proportionality' principle and ' considers that the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention ' (BALPA case). Congress therefore calls on Government to seek the removal of the 'proportionality' test from the Regulation.

8. Congress argues that Commission has over-interpreted the scope of the ECJ rulings. The *Laval* case involved the use of collective action in the form of a 'Blockade'. Interestingly the right to take collective action in the form of a Blockade was upheld. It was the absence of a system for establishing universally binding collective agreements, such as exists in Ireland (Registered Employment agreements) that gave rise to the proportionality issue. This is almost the mirror opposite of the situation in Ireland. In Ireland, the right to strike is not recognised in law (contrary to obligations under the ECHR) and collective action must meet a number of overly stringent and restrictive conditions, in 'furtherance of a trade dispute' . Secondary picketing (i.e. picketing of an employer other than the primary employer involved in the dispute) is lawful only in situations where it is reasonable for those workers picketing to believe that the second employer was acting to frustrate the industrial action by directly assisting their employer. (Section 11(2)Industrial Relations Act 1990).

9. It remains unclear, what if any role the ECJ would assign to 'proportionality' if it was to consider its application in the context of a strike taken under the Industrial Relations Act in Ireland. **http://www.djei.ie/publications/employment/2002/industrialrelationsguide.pdf**

10. In the proposed Regulation the Commission seek to take the ruling of the ECJ made on the basis of a specific situation and apply it everywhere and to all situations. Congress does not accept this approach as it will add another layer of restriction further undermining the right to strike in Ireland.

Insufficient account taken of legal developments since the ECJ rulings

11. Congress questions why the dramatic new jurisprudence developed by the European Court of Human Rights during the intervening period has been ignored. (***Demir and Baykara v. Turkey*** (Application No. 34503/97) delivered on 12 November 2008*; and* ***Enerji Yapi-Yol Sen v. Turkey*** (Application No. 68959/01) delivered on 21 April 2009) These developments at the

ECrtHR change the legal landscape and oblige recognition and an increase in the level of protection afforded to the right to strike, however the implications of these ECrtHR rulings are totally absent from the text of the draft Regulation.

The Treaty of Lisbon (TFEU) and the ECHR has been ignored

12. Other relevant developments in the intervening period include the modification of the EU treaties by the passing of the Treaty of Lisbon, incorporating the EU Charter of Fundamental Rights and requiring the EU (and its institutions including the ECJ) to accede to the European Convention on Human Rights. Today, the decisions of the ECJ in the cases Viking, Laval, Ruffert would likely be different, as the Charter of Fundamental Rights of the European Union is as legally binding as the Lisbon Treaty itself. Moreover the EU has determined to acceded to the European Convention on Human Rights introducing a new hierarchy with fundamental human rights accorded a superior position.

13. Yet the proposed Regulation adheres to the original ECJ rulings and takes insufficient account of the radically transformed legal landscape. Although at times it hints to the contrary, the draft regulation seeks to confirm and expand the scope of the original case law as if there had been no developments in the intervening period.

Fundamental Human Rights are not equal to economic rights

14. The ICTU does not accept that economic rights have an equal status with fundamental human rights. Fundamental human rights, due to their nature and function are superior to economic rights and we reject the draft proposal to ascribe equal legal value (although we note that the use of an economic freedom never has to be justified...) to fundamental human rights as an unacceptable and backwards step contrary to proper observance of the ECHR and other human rights treaties. In this context, the Commission proposals should be dismissed and instead the Commission should be asked to finally recognize the primacy of human social and economic rights in the European treaties by promoting a social progress protocol (see ETUC draft for social progress protocol at end of submission).

Conclusion

15. Congress' view is that there will be no solution until there are clear rules indicating that collective action may be taken in accordance with human rights principles. The level of protection for the right to take collective action afforded by the EU and Member States cannot be lower than the European Court of Human Rights and the ILO Conventions stipulate. What is needed is a clear commitment to respect European and International law and labour standards.

16. The seriousness with which the trade union movement and human rights advocates view this matter cannot be over-estimated. This issue has the potential to alienate trade unions, as well as the millions of workers they represent across Europe, from the legitimacy of the European project and from the concept of the single market in particular.

17. **Congress therefore joins with trade unions throughout Europe in rejecting the Commission proposals. We call on Government to put forward credible proposals in order to ensure that the right of trade unions to take collective action to defend their interests is not undermined in the context of economic freedoms in the single market.**

Proposals for a Social Progress Protocol

18. The idea of a Monti II Regulation can be supported only in so far as it constitutes a viable stepping stone to a long term solution. Given the difficulties posed by achieving unanimous acceptance by 27 member States for a Regulation and the extent to which the legal context for the proposals has changed in the intervening period, we question if a Regulation is the appropriate legal instrument and we remind Government of our call for a social progress protocol. The ETUC have drafted such a protocol and we set out their proposals below.

ETUC

Proposals for a Social Progress Protocol

THE HIGH CONTRACTING PARTIES,

HAVING REGARD to Article 3(3) of the Treaty on the European Union,

CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers,

RECALLING that the Union shall work for a highly competitive social market economy, aiming at full employment and social progress, (Article 3(3) sub par. 1 of the TEU)

RECALLING that the single market is a fundamental aspect of Union construction but that it is not an end in itself, as it should be used to serve the welfare of all, in accordance with the tradition of social progress established in the history of Europe;

WHEREAS, in accordance with Article 6(1) of the Treaty on the European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights and in particular the fundamental social rights enshrined in this Charter,

BEARING IN MIND that, according to Article 9 (new horizontal social clause) of the Treaty on the Functioning of the EU, in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health,

HAVING IN MIND that the Union and the Member States shall have as their objectives the improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained (Article 136 (1) EC Treaty = Article 151(1) TF EU),

RECALLING that the Union recognises and promotes the role of social partners, taking into account the diversity of national systems, and will facilitate dialogue between the social partners, respecting their autonomy (Article 136a new = Article 152 TF EU),

WISHING to emphasise the fundamental importance of social progress for obtaining and keeping the support of European citizens and workers for the European project,

DESIRING to lay down more precise provisions on the principle of social progress and its application;

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union:

Article 1 [Principles]

The European social model is characterised by the indissoluble link between economic performance and social progress, in which a highly competitive social market economy is not an end in itself, but should be used to serve the welfare of all, in accordance with the tradition of social progress rooted in the history of Europe and confirmed in the Treaties.

Article 2 [Definition of social progress and its application]

Social progress and its application means in particular:

The Union

improves the living and working conditions of its population as well as any other social condition,

ensures the effective exercise of the fundamental social rights and principles, and in particular the right to negotiate, conclude and enforce collective agreements and to take collective action,

in particular protects workers by recognizing the right of workers and trade unions to strive for the protection of existing standards as well as for the improvement of the living and working conditions of workers in the Union also beyond existing (minimum) standards, in particular to fight unfair competition on wages and working conditions, and to demand equal treatment of workers regardless of nationality or any other ground,

ensures that improvements are being maintained, and avoids any regression in respect of its already existing secondary legislation.

The Member States, and/or the Social Partners,

are not prevented from maintaining or introducing more stringent protective measures compatible with the Treaties,

when implementing Union secondary legislation, avoid any regression in respect of their national law, without prejudice to the right of Member States to develop, in the light of changing circumstances, different legislative, regulatory or contractual provisions that respect Union law and the aim of social progress.

Article 3 [The relation between fundamental rights and economic freedoms]

Nothing in the Treaties, and in particular neither economic freedoms nor competition rules shall have priority over fundamental social rights and social progress as defined in Article 2. In case of conflict fundamental social rights shall take precedence.

Economic freedoms cannot be interpreted as granting undertakings the right to exercise them for the purpose or with the effect of evading or circumventing national social and employment laws and practices or for social dumping.

Economic freedoms, as established in the Treaties, shall be interpreted in such a way as not infringing upon the exercise of fundamental social rights as recognised in the Member States and by Union law, including the right to negotiate, conclude and enforce collective agreements and to take collective action, and as not infringing upon the autonomy of social partners when exercising these fundamental rights in pursuit of social interests and the protection of workers.

Article 4 [Competences]

To the end of ensuring social progress, the Union shall, if necessary, take action under the provisions of the Treaties, including under (Article 308 EC Treaty=) Article 352 of the Treaty on the Functioning of the European Union

Consideration by ILO Committee of Experts Consideration of the Viking and Laval cases in BALPA

United Kingdom

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (ratification: 1949)

The Committee notes the comments made by the British Airline Pilots_ Association (BALPA) dated 22 October 2008, supported by the International Transport Federation (ITF) and Unite the Union, and the Government_s reply thereto. The Committee notes in particular that BALPA refers to two recent decisions of the European Court of Justice (ECJ), *International Transport Workers' Federation and the Finnish Seaman's Union* v. *Viking Line ABP (Viking)* and *Laval un Partneri* v. *Svenska Byggnadsarbetareförbundet (Laval)* which held that the right to strike was subject to restrictions under the European Union law where its effect may disproportionately impede an employer_s freedom of establishment or freedom to provide services. BALPA asserts that these judgements have negatively impacted upon their rights under the Convention.

In particular, BALPA explains that it decided to go on strike, following a decision by its employer, British Airways (BA), to set up a subsidiary company in other EU States. While efforts were made to negotiate this matter, in particular the impact that the decision would have upon their terms and conditions of employment, all attempts were unsuccessful and BALPA members overwhelmingly voted to go on strike. The strike action was, however, effectively hindered by BA_s decision to request an injunction, based upon the argument that the

action would be illegal under *Viking* and *Laval*. In addition, BA claimed that, should the work stoppage take place, it would claim damages estimated at £100 million per day. Under these circumstances, BALPA did not follow through with the strike, stating that it would risk bankruptcy if it were required to pay the damages claimed by BA. BALPA expresses its deep concern that the application of *Viking* and *Laval* by the UK courts will result in injunctions against industrial action (and dismissal of workers) if a strike_s impact on the employer is judicially determined to outweigh the benefit to workers.

The Committee notes the Government_s indication in its reply that BALPA_s application is misdirected and misconceived because any adverse impact of *Viking* and *Laval* would be a consequence of the European Union law, to which the United Kingdom is obliged to give effect, rather than of any unilateral action by the United Kingdom itself. The Government further asserts that BALPA_s application is premature because it remains unclear what, if any, impact the *Viking* and *Laval* judgements would have on the application of trade union legislation in the United Kingdom. The Government adds that these judgements would not likely have much effect on trade union rights because they are only applicable where the freedom of establishment and free movement of services between Member States are at issue. Moreover, the impact of the principles they set forth may differ considerably depending upon the facts of the case. There have been no subsequent analogous cases at the ECJ level, nor have there been any decisions by the UK domestic courts as to whether and to what extent the new principles might represent an additional restriction on the freedom of trade unions to organize industrial action in the United Kingdom. Finally, the Government indicates that it is not obvious that the current limit on damages in tort would be bypassed or overridden in a *Viking*-based claim since that limit has a sound basis in the protection of the freedoms of trade unions which would be taken into consideration if the limit were challenged as contrary to the European Union law.

The Committee first wishes to recall more generally its previous comments, in which it has noted the limitations on industrial action in the United Kingdom, including that it remains a breach of contract at common law for workers to take part in strike action and that trade union members are protected from the common law consequences (dismissal) only when the trade union has immunity from liability, i.e. when the strikes are in contemplation or furtherance of a trade dispute, which would not include secondary action or sympathy strikes (section 224 of the Trade Unions and Labour Relations (Consolidation) Act, 1992 (TULRA)). The Committee has asked the Government in this regard to indicate the measures taken or envisaged so as to amend the TULRA,with a view to broadening the scope of protection available to workers who stage official and lawfully organized industrial action.

With respect to the matter raised by BALPA, the Committee wishes to make clear that its task is not to judge the correctness of the ECJ_s holdings in *Viking* and *Laval* as they set out an interpretation of the European Union law, based on varying and distinct rights in the Treaty of the European Community, but rather to examine whether the impact of these decisions at national level are such as to deny workers_ freedom of association rights under Convention No. 87.The Committee observes that when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services. The Committee has only suggested that, in certain cases, the notion of a negotiated minimum service in order to avoid damages which are irreversible or out of all proportion to third parties, may be considered and if agreement is not possible the issue should be referred to an independent body (see 1994 General Survey on freedom of association and collective bargaining, paragraph 160). The Committee is of the opinion that there is no basis for revising its position in this regard.

The Committee observes with ***serious concern*** the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. The Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised. While taking due note of the Government_s statement that it is premature at this stage to presume what the impact would have been had the court been able to render its judgement in this case given that BALPA withdrew its application, the Committee considers, to the contrary, that there was indeed a real threat to the union_s existence and that the request for the injunction and the delays that would necessarily ensue throughout the legal process would likely render the action irrelevant and meaningless. Finally, the Committee notes the Government_s statement that the impact of the ECJ judgements is limited as it would only concern cases where freedom of establishment and free movement of services between Member States are at issue, whereas the vast majority of trade disputes in the United Kingdom are purely domestic and do not raise any cross-border issues. The Committee would observe in this regard that, in the current context of globalization, such cases are likely to be ever more common, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the

possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating. The Committee thus considers that the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention.

In light of the observations that it has been making for many years concerning the need to ensure fuller protection of the right of workers to exercise legitimate industrial action in practice, and bearing in mind the new challenges to this protection as analysed above, the Committee requests the Government to review the TULRA and consider appropriate measures for the protection of workers and their organizations to engage inindustrial action and to indicate the steps taken in this regard.

ENDS
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