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'Monti rules': immunising collective action from market dynamics (or vice versa?)

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1. Introduction

The debate concerning the balance between the protection of the fundamental right to collective action and the need to preserve market integration has been re-sharpened by the *Viking Line* and *Laval* rulings, in which the CJEU has affirmed¹ and re-affirmed² that the exercise of the right to collective action, although excluded from the regulatory competences of the EU (Art. 153.5 TFEU), is not exempt from complying with EU law.

The most influential attempt to achieve that balance has materialised in a particular clause, referred to as the ‘Monti Clause’, taking its name from its proposer, the Italian Professor, former European Commissioner for the Internal Market (1995 – 1999) and Competition (1999 – 2004) and current Italian Prime Minister, Mario Monti.

After its first appearance in Regulation 2679/98 concerning the free movement of goods and known as the Monti I Regulation, and then a second appearance in Directive 2006/123 (the so-called Services Directive), in March 2012 the Commission issued two legislative proposals containing such a clause, the first regarding a Directive for the enforcement of Directive 96/71 on the posting of workers – hereafter respectively the Posted Workers Directive and the Enforcement Directive - and the second in the form of 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”, already labelled the Monti II Regulation.³

The versions of the ‘Monti Clause’ presented in these two proposals are the main focus of this paper, in which an overview of the previous forms of the clause will show its metamorphosis from a tool aiming at immunising the right to take collective action from market integration dynamics, into a ‘legal picklock’ for unhinging the exclusion of competence set by Art. 153.5 TFEU. The aim is to understand whether the most recent version of the ‘Monti Clause’ ensures a higher degree of

¹ *Viking Line*, case C-438/05, 11.12.2007, paragraphs 40 – 41.

² *Laval un Partneri*, case C-341/05, 18.12.2007, paragraphs 87 – 88.

³ Versions of the ‘Monti clause’ are also present within Regulation 1176/2011 on the prevention of micro-economic imbalances, and in the proposal for recasting Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I). However, such versions are excluded from the present analysis as not being related to the question issue of the balance between market freedoms and the right to collective action.

protection for the right to collective action, or whether – as we assume – it expands the regulatory competence of the EU in a field legally reserved for national legislations.

2. *Monti I: is the right to collective action an obstacle to market integration?*

As early as the beginning of the 1990's, attention to this issue was raised by a case concerning collective action taken by French farmers against the import of cheaper strawberries from Spain.⁴ Without analysing the details of the ruling,⁵ what is worthy to consider is the fact that *Commission v. France* has, perhaps for the first time, shown both that threats to the proper functioning of the market may arise from social conflicts, and that EU law has no instruments for avoiding it.⁶

In the wake of the anxiety raised by the ruling in the trade union movement,⁷ the European Commission had to revise the already proposed draft for a Regulation aimed at “creating a mechanism whereby the Commission can intervene in order to remove certain obstacles to trade”⁸ in favour of a Regulation more broadly – and less authoritatively – entitled “the functioning of the internal market in relation to the free movement of goods among the Member States”.⁹

Art. 2 of the Monti I Regulation includes the first version of the ‘Monti Clause’, which states that:

This 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.

The Monti I Regulation is thus a turning point: For the first time, the right to collective action and to strike is mentioned explicitly in a legally binding text in EU law, and is even included in the category of fundamental rights, although there emerges neither a recognition nor a definition of this right at EU level.¹⁰ Rather, it reaffirms the exclusion of the subject from EU competence, by stating the primary role of national legislation.¹¹ However, Monti I is exposed to a two-fold, divergent interpretation: it can be pessimistically deemed as imposing the free movement of goods as a

⁴ *Commission v. France*, case C-265/95, 9.12.1997.

⁵ For a commentary on the ruling, see Jarvis M. A., in *Common Market Law Review*, no. 6/1998, 1371 – 1383.

⁶ Orlandini G., The Free Movement of Goods as a Possible ‘Community’ Limitation on Industrial Conflict, in *European Law Journal*, no. 4/2000, 341 – 362, 345.

⁷ Bercusson B., European labour law and the social dimension of the European Union, in Bercusson B., *European Labour Law. 2nd edition*, Cambridge: Cambridge University Press, 2009, 18.

⁸ COM (97) 619 final, O.J. C 10, 15.11.1998

⁹ Council Regulation (EC) no. 2679/98, O.J. L 337/8, 12.12.98.

¹⁰ Orlandini G., fn. 6

¹¹ Orlandini G., fn. 6, 358.

Community limit on collective action;¹² or to the contrary, it can be seen as explicitly protecting the right to strike as a fundamental right of the EU.¹³

However, Monti I *de facto* implicitly recognises the problematic co-existence of the exercise of collective action and the economic freedoms within the EU market. Nevertheless, the ‘Monti Clause’ undeniably aims at safeguarding the exercise of the right to collective action according to national rules: indeed, through an interpretation of the clause in conjunction with Art. 4 of the Regulation (“when an obstacle occurs, and subject to Article 2...”), the lawfulness of a collective action or strike is determined by national laws, even in a cross-border situation.

3. *The Services Directive: applying the ‘Monti clause’ to the services market*

The controversial relationship between the right to take collective action and market integration has been confirmed by the Service Directive regarding the internal services market.¹⁴

The Services Directive contains a different version of the ‘Monti Clause’, stating:

This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law.

The transit of the draft through the European Parliament was crucial in order to overcome the concerns raised by the trade union movement¹⁵, and to add such a clause to the text of the Directive.¹⁶ Nevertheless, the draft issued by the Parliament contained a double ‘saving clause’ providing for the exemption of the entire set of collective labour rights from the application of the Directive and including the Charter of Nice as a protecting source.¹⁷

The form taken by the final version is instead diluted, even in the language it uses.¹⁸ The shift with the greatest effect regards the insertion of the reference to “Community law”, that is able to impose

¹² In this sense, Giubboni S., *Social Rights and Market Freedoms in the European Constitution. A Labour Law Perspective*, Cambridge: University Press, 2006, 64.

¹³ Eklund R., The Laval case, in *Industrial Law Journal*, no. 2/2006, 202 – 208, 207.

¹⁴ O.J. L 376/36, 27.12.2006

¹⁵ Kowalsky W., The Service Directive: the legislative process clears the first hurdle, in *Transfer*, no. 2/2006, 231 – 249, 245 – 246.

¹⁶ The notorious “Bolkestein Directive”, COM(2004)2 final/3, included in Recital 72 is only a very generic reference to the respect due to fundamental rights and principles “which are recognised notably in the Charter of Fundamental Rights of the European Union and, in particular, in Articles 8, 15, 21 and 47 thereof”, therefore not explicitly mentioning Art. 28 on the right to collective bargaining and collective action. See Barnard C., *Employment Rights, free movement under the EC Treaty and the Service Directive*, in Rönnefar M. (ed.), *EU industrial relations v. National industrial relations. Comparative and interdisciplinary perspectives*, Alphen aan den Rijn: Kluwer Law International, 2008, 137 – 168, 152 et ss.

¹⁷ Text Adopted by Parliament, P6_TA(2006)0061, 16.02.2006.

¹⁸ The wording ‘shall not be interpreted’ and ‘shall not apply’ is substituted by the more vague ‘does not affect’, see Barnard, fn. 17, 161.

that only collective action taken in compliance with Community law is excluded from the application of the Directive, ultimately limiting the scope of the clause and opening the possibility for the Court to rule on the exercise of collective action.¹⁹ The original sense of the ‘Monti Clause’ seems thus to be overturned, since a substantial step towards the introduction of a European regulation on collective labour rights is accomplished.

4. *The Monti Report: new strategy, old remedies*

The next episode of this saga is then represented by the report that former Commissioner Mario Monti was asked to draft by President of the European Commission Barroso, in October 2009. The so-called Monti Report was presented on 9 May 2010, with the title “A new Strategy for the Single Market – At the service of Europe’s economy and society”.²⁰

Here, Monti acknowledges that the CJEU decisions extend the reach of EU law to collective labour disputes, and underlines the fact that clarification on this aspect should not be left to occasional litigation.²¹ With a view to conjugating the protection of workers’ rights with the avoidance of protectionist drifts, the former Commissioner identifies the inclusion in the Posting Workers Directive of a clause modelled on the original ‘Monti Clause’ as the only practicable ‘third strategy’ beside the revision of the Treaty, in order to include a ‘social progress clause’ – as claimed by the ETUC – and the direct regulation of the right to strike – explicitly excluded by the Treaty itself.²² Such a new version of the ‘Monti Clause’ would aim to ensure that

the posting of workers in the context of cross-border provision of services, does not affect the right to take industrial action and the right to strike as it is protected by the European Charter of Fundamental Rights and in accordance with national law and practices which respect Community Law.²³

The degree of tension in attempting to bend to Union law the national laws protecting the right to strike is increased: the EU Charter is mentioned as the primary protecting source, and the national laws are not recalled, whereas the last words might introduce the need for national laws and practices referring to the right to collective action to respect Union law. Therefore, an indirect regulation of the right to strike takes shape.

¹⁹ Novitz T., Labour Rights as Human Rights: Implications for employers’ free movement in an enlarged European Union, in *The Cambridge Yearbook of European Legal Studies*, 9, 2006-07, 357 – 386, 374.

²⁰ http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf

²¹ *Ibid.*, 69.

²² *Ibid.*, 70.

²³ *Ibid.*, 71.

5. *Latest updates: the Commission's initiatives*

In November 2010, in the wake of these suggestions, the European Commission issued the communication “Towards a Single Market Act”²⁴ and committed itself to adopting a proposal regarding the enforcement of the Posting Workers Directive, “which is likely to include or be supplemented by a clarification of the exercise of fundamental social rights within the context of the economic freedoms of the single market”.²⁵

Pursuant to this declaration, the Commission has presented two legislative proposals, concerning, respectively, the Enforcement Directive²⁶ and the Monti II Regulation.²⁷

The impact assessment document accompanying these two proposals acknowledges the existence of a “tension between the freedom to provide services/establishment and national industrial relations systems”,²⁸ and recognises the negative ‘spill-over’ effects that the CJEU rulings may have on cross-border industrial disputes, deriving from both the risk of damage claims for collective action to which the trade unions are exposed, as confirmed by the recent BALPA case,²⁹ and the dangerous protectionist drifts that collective action can take, as demonstrated by the case of Lindsey oil refinery in the UK.³⁰

The Commission hence insists on the urgency of clarifying both, so that no primacy exists between the economic freedoms and the right to collective action, and that workers’ rights may continue to be defended, individually or collectively through trade union action in cross-border situations.³¹ Furthermore, the Commission aims at avoiding regulatory uncertainty in case of cross-border labour disputes, because of its two-fold negative impact on the economic and social spheres of integration.³²

6. *Enforcing the Posted Workers Directive: The ‘Monti Clause’ as smokescreen?*

At first glance, the proposal for the Enforcement Directive appears to be very attentive in dealing with the two-level (national and European) protection of collective labour rights. As a matter of fact, Recital 7 recalls that “respect for the diversity of national industrial relations systems as well as the

²⁴ COM(2010) 608 final/2, 11.11.2010

²⁵ *Ibid.*, 23.

²⁶ COM(2012) 131 final, 21.03.2012

²⁷ COM(2012) 130 final, 21.03.2012

²⁸ SWD(2012) 63 final, 21.03.2012, 27.

²⁹ See Report III (1A): Report of the Committee of Experts on the Application of Conventions and Recommendations, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_123424.pdf. For the impact of Laval case law in the UK system with regard to the BALPA case, see Novitz T., Applying the Laval quartet in a UK context: chilling, ripple and disruptive effects on industrial relations, in Bucker A. / Warneck W., *Reconciling fundamental social rights and economic freedoms after Viking, Laval and Rüffert*, Baden Baden: Nomos, 2011, 195 – 244.

³⁰ For further details see Barnard C., ‘British jobs for British workers’: The Lindsey Oil Refinery dispute and the future of local labour clauses in an integrated market, in *Industrial Law Journal*, no. 3/2009, 245 – 277.

³¹ *Impact Assessment*, 44.

³² *Ibid.*, 65.

autonomy of social partners is explicitly recognised by the Treaty”, while Recital 33 affirms that “the directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, notably [...] the right to collective bargaining and action (Article 28)”, - even though no mention is made of international instruments such as the ECHR and the ILO Conventions.

The Enforcement Directive contains a subsequent version of the ‘Monti clause’, which combines the previous ones.³³ This new version, contained in Art. 1.2 of the Directive, states:

This Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and by Union law, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and practices. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and practices.

So, the controversial reference to ‘Community law’ disappears; whereas the right to strike is mentioned again, also in its declension as a freedom. Moreover, the primacy granted to national law and practices is reaffirmed, but on the other hand, the protection of the right to strike – as of protection of the other fundamental rights – is recognised as an inherent part of EU law.

Nevertheless, no European definition of the right to collective action emerges. Similarly, despite the undeniable transnational and cross-border impact of the Posted Workers Directive, its enforcement suggests that the “right to negotiate, conclude and enforce collective agreements” remains a dynamic anchored to the national spaces. Therefore, the legitimacy of collective agreements and collective actions having impacts that overcome national boundaries remains in question.

This version, however, appears more attentive in achieving protection of the right to collective action from a distorted use of the posting of workers. The Enforcement Directive shall indeed not affect the exercise of the right to collective action in “*any way*”, in line with the original ‘Monti Clause’. Nevertheless, a final reflection must be made: if the proposal is approved, the Directive will come abreast of the Posted Workers Directive (the main regulatory tool for the institution of posting within the EU) as an enforcing and clarifying legislative tool. Will then the statement “*this Directive shall not affect in any way...*” also refer to the Posted Workers Directive? A further element of tension within the secondary legislation of the EU would thus be added to the already tense relations between primary and secondary law with regard to the proposal for the Monti II Regulation (see below).

³³ COM(2012) 131 final, 12.

7. *Monti II Regulation: defusing the original clause*

In the intention of the drafters, the proposal concerning the Monti II Regulation should solve the conflict between market integration and the exercise of collective labour rights. Nevertheless, the Explanatory Memorandum affirms firstly that such a conflict is not inherent in the relationship between the exercise of the right to collective action and the economic freedoms of establishment and to provide services;³⁴ secondly, it reveals that reversing the CJEU case law is not the aim of the Regulation.³⁵ Moreover, although it reminds us that, according to Art 6.2 TEU, there is no primacy in EU law of the one over the other³⁶, it also states that a restriction on those freedoms is “warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest”³⁷. Therefore, no justification is required for the exercise of the economic freedoms.

The drafters hasten to recall that the European Court of Human Rights itself recognises that the right to strike “is not absolute and its exercise may nonetheless be subject to certain restriction”.³⁸ What the drafters seem to omit is the fact that in the referred case *Enerji Yapi-Yol Sen*,³⁹ the Court of Strasbourg refers to restrictions to the right to strike deriving from the particular tasks of certain categories of civil servant, rather than from an interest of the party subject to the strike – not even an economic interest – and, in general, the overall approach of the ruling concerns the legitimacy of restrictions to the right to collective action, and not vice versa.

The proposal has already been criticised with regard to both the form of regulation and its twofold relationship with national constitutions and international instruments.⁴⁰ The criticism of the legal form used concerns the fact that the case law determining the conflict is grounded on primary law (Arts. 49 and 56 TFEU), whereas the regulation is a source of secondary law and therefore cannot change or mitigate the case law (which however, does not seem to be the aim of the drafters). Moreover, as secondary legislation, it must be interpreted as far as possible as being consistent with the primary law, which includes the controversial CJEU case law.⁴¹

The second criticism regards compatibility with national legal orders and international law. In the first case, the directly binding effect of the Regulation within national legal orders creates possible conflicts in the context of the principle of supremacy of EU law: since several national constitutions explicitly protect a broad notion of the right to strike, a conflict between Monti II and the Constitution of a Member State could be resolved by the national Constitutional Courts in favour of

³⁴ COM(2012) 130 final, 12

³⁵ *Ibid.*, 10

³⁶ *Ibid.*, 12

³⁷ *Ibid.*, 5

³⁸ *Ibid.*, 4

³⁹ *Enerji Yapi-Yol Sen v. Turkey*, 68959/01, 21.04.2009, point 32.

⁴⁰ Bruun N. / Bucker A., Critical assessment of the proposed Monti II regulation – more courage and strength needed to remedy the social imbalances, ETUI Policy Brief n. 4/2012, available at <http://www.etui.org/Publications2/Policy-Briefs/European-Economic-Employment-and-Social-Policy/Critical-assessment-of-the-proposed-Monti-II-regulation-more-courage-and-strength-needed-to-remedy-the-social-imbalances>

⁴¹ *Ibid.*, 2.

national values and identities.⁴² With regard to international law, despite the reference to ILO Conventions No 87 and No 98 and European Social Charter (Recital 1) and to Art. 11 of the ECHR (Recital 2), Monti II seems not to achieve the level of protection granted to the right to collective action by those international instruments which the EU shall respect.⁴³

A further controversial point regards the legal basis. Art. 352 TFEU, which concerns the ‘implicit powers’ of the Union, requires on the one hand unanimity, which for such a hot topic is unlikely to be reached, and on the other hand, the involvement of national Parliaments, which can express their opinions in the light of the principle of subsidiarity. Such a choice highlights a partial acknowledgment of the lack of direct competence for the EU to legislate on the issue. The Explanatory Memorandum does not explain the reason for opting for Art. 352 TFEU as the legal basis,⁴⁴ which might, however, be deduced from the statements concerning the aim of balancing the objective of establishing a “social market economy” (Art. 3 TEU) and the general social policy’s objectives (Art. 151 TFEU).⁴⁵

The contents of the proposal suggest an approach that is aware of the increasing significance of collective actions having a transnational or cross-border dimension. Indeed, Art. 3 deals with the possibility for actors involved in cross-border labour disputes to accede to alternative mechanisms of resolution provided by national systems. A particularly controversial provision is set by Art. 3.2, which grants to “management and labour at European level” the possibility to conclude agreements or establish guidelines for setting modalities and procedures for mediation, conciliation or other extrajudicial mechanisms of dispute resolutions. Nevertheless, such a prerogative shall not go beyond the rights, competences and roles established by the Treaty, restricting the autonomy of European social partners within legal boundaries.

Furthermore, the Regulation proposes an alert mechanism (Art. 4), which ought to improve a system for monitoring the rise of “acts or circumstances” in the context of the freedoms of establishment and providing services, which “could cause grave disruption of the proper functioning of the internal market and/or which may cause serious damage to [...] industrial relations system or create serious social unrest”. According to this system, the Member State concerned shall immediately inform and notify the other Member State involved, as well as the Commission.

⁴² *Ibid.*, 2. The European Affairs Committee of the Portuguese Parliament in its “*Parecer Fundamentado*” has explicitly expressed these concerns. The reasoned opinion has been then approved by the Assembleia da República on 18th May 2012 and then confirmed in the Resolution AR 76/2012, see <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheIniciativa.aspx?BID=36988>

⁴³ Bruun N. / Bucker A., fn. 40, 2. The non-compliance with the European Social Charter is then stressed by the Belgian Chamber of Representatives in its “*Avis de Subsidiarité*” submitted to the European Commission on 30th May 2012, available at <http://www.lachambre.be/FLWB/PDF/53/2221/53K2221001.pdf>

⁴⁴ It is only affirmed that “Art. 352 TFEU [...] is the appropriate legal basis for the proposed measure”, COM(2012) 130 final, 10.

⁴⁵ *Ibid.*, 3.

Therefore, a mechanism as such is able to create the obligation for Member States to adopt measures in order to put an end to cross-border collective actions.⁴⁶

In order to follow our *fil rouge*, the new perspective adopted to find a balance between the exercise of collective actions and economic freedoms needs to be highlighted. According to its Art. 1.1, the purpose of Monti II is to lay down

the general principles and rules applicable at Union level with respect to the exercise of the fundamental right to take collective action within the context of the freedom of establishment and the freedom to provide services.

Therefore, it does not hide the introduction of specific regulatory provisions in a field lying outside the competences of the EU.

So although Art. 1.2 contains the same version of the ‘Monti Clause’ as in the Enforcement Directive, such a clause is not the provision that (according to Monti II) shall be applied in situations of cross-border labour conflict. The general principles are laid down in Art. 2, which contains a completely new provision affirming that

[the] exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms.

This ‘mutual respect clause’ has the effect of defusing the original ‘Monti Clause’, since the exclusion of the right to collective action and to strike from the scope of application of the provisions on economic freedoms may be limited or even denied by the application of the principle of proportionality. Recital 11 identifies the principle of proportionality as the approach for reconciling the exercise of the right to collective action and the exercise of the economic freedoms; whereas Recital 13 recalls that a “fair balance between fundamental rights and fundamental freedoms” requires that, in the case of a conflict, the restrictions (which may be placed reciprocally) shall not “go beyond what is appropriate, necessary and reasonable” to realise such a right or such a freedom. Nevertheless, this bilateral approach is unbalanced by the following statement in Recital 13 itself:

In order to provide the necessary legal certainty, avoid ambiguity and prevent solutions being unilaterally sought at national level, it is necessary to clarify a number of aspects relating in particular to the exercise of the right to take collective action, including the right or freedom to strike, as well as the extent to which trade unions may defend and protect workers’ rights in cross-border situations.

⁴⁶ Orlandini G. / Allamprese A, La proposta di regolamento Monti II: brevi note sulla versione definitiva, Ufficio giuridico e vertenze legali CGIL, available at http://www.cgil.it/Archivio/SegretariatoEuropa/Note_sulla_versione_def_reg_MontiII_23-3-2012_2.pdf

The exercise of economic freedoms is thus given as granted, and no justification is required for companies enjoying the economic freedoms of establishment and providing services,⁴⁷ even when the exercise of such freedoms could have the effect of limiting the exercise of the fundamental right to take collective action or the enforcement of other social rights, such as the right to fair and just working conditions (Art. 31 of the EU Charter), or the principle of non-discrimination (Art. 21 of the EU Charter).

With regard to the debate triggered by the Laval case law, the proposal at stake does not take a single step towards a solution. It only photographs the current situation, confirming the present legal practice and failing to achieve legal certainty in cross-border labour disputes.⁴⁸

In their on-the-spot comments, the European social partners have reacted by criticising both proposals. The European Trade Union Confederation has issued a press release in which the proposed enforcement directive is accused of being “too weak” for fighting social dumping, and Monti II is criticised for undermining the fundamental right to take collective action.⁴⁹ Later, in a more articulate resolution, the ETUC rejects Monti II as both contravening the international instruments by restricting the exercise of the right to take collective action, and for not ensuring that economic freedoms would not prevail on fundamental social rights in case of conflict.⁵⁰ The Enforcement Directive is opposed for its “minimalistic approach”, which does not propose adequate measures for preventing the phenomenon of letter-box companies.⁵¹

On the employers’ side, BusinessEurope have reacted only by issuing a press release criticising both proposals. According to the European employers’ association, the proposed Directive shifts the responsibility of enforcement onto the European companies, therefore undermining their competitiveness, since they would not have the power to obtain information from subcontractors regarding the individual wages of employees. The Monti II Regulation is then viewed as unnecessary and potentially capable of altering the national industrial relations models.⁵²

In the framework of the legislative procedure set by Art. 352 TFEU, twelve national Parliaments have further stopped the legislative procedure by commenting the proposal negatively. Unanimity among the Parliaments has been reached, both with regard to the infringement of the principle of subsidiarity set by Art. 5 TEU, and with regard to the failure to achieve the legal certainty required in

⁴⁷ In this sense also Bruun and B  cker, fn. 40, 4.

⁴⁸ *Ibid.*, 5.

⁴⁹ “ETUC says no to a regulation that undermines the right to strike”, press release on 21.03.2012, available at <http://www.etuc.org/a/9823>

⁵⁰ “ETUC Declaration on the Commission proposals for a Monti II Regulation and Enforcing Directive of the Posting Workers Directive”, Resolution adopted at the ETUC Steering Committee on 19.04.2012, available at http://www.etuc.org/IMG/pdf/EN-ETUC-Declaration_Monti-II-PWD.pdf

⁵¹ “ETUC position on the Enforcement Directive of the Posting of workers Directive”, Resolution adopted at the ETUC Executive Committee on 5-6 June 2012, available at <http://etuc.org/IMG/pdf/EN-ETUC-position-posting-2.pdf>

⁵² “Commission proposals on posting of workers undermine the development of the single market”, press release issued on 21.03.2012, available at <http://www.besnesseurope.eu/content/default.asp?PageID=568&DocID=30033>

cross-border labour disputes. However, most national Parliaments⁵³ strongly criticise the selected legal basis, by insisting on the incompetence of the EU and recalling the risk of an intrusive intervention within the labour law national legislations, there are three Member States that stand out: Latvia, Poland and the UK. The Latvian Parliament does not question the CJEU rulings and is not convinced that the regulation would ensure equal treatment to service providers from all Member States;⁵⁴ the Polish Parliament states that the right to take collective action and the economic freedoms are not threatened by each other, and affirms that a non-binding act would better clarify such a mutual relationship;⁵⁵ and the British House of Commons considers that the Commission evaluation is based only on perceptions of a subjective need to act, since the CJEU rulings are clear enough not to need further clarification.⁵⁶

At the time of writing (July 2012), no answer from the Commission has yet been reported. However, the Monti II Regulation might be re-proposed in the same way, since according to Art. 7.2 of the Protocol on the Application of Principles of Subsidiarity and Proportionality attached to the Treaty, the Commission is free to decide to “maintain, amend or withdraw the draft”, even in the case of reaching the threshold of National Parliamentary reactions claiming non-compliance of the draft with the principle of subsidiarity.

8. *To conclude: towards the subordination of the right to collective action to EU law*

This brief excursus on the different versions of the so-called ‘Monti Clause’ has shown that since its first approval, the original intention of immunising the right to strike from being limited by market integration has been progressively diluted in favour of an approach that, de facto, turns the proposed Monti II Regulation into blank ammunition.

The exercise of collective action in cross-border situations is definitively acknowledged as a factor hampering the integration of the market. Nevertheless, the solving approach is reversed: from the immunisation of the right to collective action from market dynamics to its inclusion in EU law, and thus its subjugation to market dynamics themselves.

In our opinion, through a constant rewriting of the ‘Monti Clause’, a regulatory (il-)legal framework for the exercise of such a right at EU level has been progressively introduced. The original intention of Monti I is thus not respected in Monti II. The provision of the ‘mutual respect’ and the

⁵³ Including Belgium, Denmark, France, Finland, Luxembourg, Malta, the Netherlands, Portugal and Sweden. Particularly interesting is the reaction of French Parliament which proposes to change Art. 2 in order to reverse the ‘mutual respect clause’ to a ‘unilateral respect clause’ in favour of the right to collective action, see “*Proposition de résolution européenne portant avis motivé sur la conformité au principe de subsidiarité de la proposition de règlement du Conseil relatif à l'exercice du droit de mener des actions collectives*”, 12, available at <http://www.senat.fr/leg/ppr11-509.pdf>.

⁵⁴ See the Reasoned Opinion of the Latvian Saeima at [http://titania.saeima.lv/LIVS/SaeimasNotikumi.nsf/0/5f9a3ec1a370a085c22579ff00335cdb/\\$FILE/Regulas%20projekts_COM%202012%20130%20LV.pdf](http://titania.saeima.lv/LIVS/SaeimasNotikumi.nsf/0/5f9a3ec1a370a085c22579ff00335cdb/$FILE/Regulas%20projekts_COM%202012%20130%20LV.pdf). For the official translation into English, we refer to <http://www.ipex.eu/IPEXL-WEB/scrutiny/APP20120064/lvsae.do>

⁵⁵ “Resolution of the Sejm of the Republic of Poland of 11 May 2012”, available at [http://orka.sejm.gov.pl/SUE7.nsf/Pliki-zal/reasoned%20opinion_com\(2012\)%20130.pdf/\\$file/reasoned%20opinion_com\(2012\)%20130.pdf](http://orka.sejm.gov.pl/SUE7.nsf/Pliki-zal/reasoned%20opinion_com(2012)%20130.pdf/$file/reasoned%20opinion_com(2012)%20130.pdf)

⁵⁶ “The posting of workers and the right to take collective action”, 5th Report of the House of Commons, available at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeuleg/86v/86v06.htm>

proportional feature of the balance between the right to collective action and the economic freedoms indeed have the effect of defusing the clause. Furthermore, the entire regulation does not, in any way, solve such a ‘constitutional conflict’ but instead keeps the legal uncertainty untouched, since the solution of cross-border labour conflicts is left to case-by-case decision by courts, although the Monti Report explicitly suggests avoiding such a scenario.

Finally, the change introduced by the Monti II Regulation seems to acknowledge the right to collective action as part of EU law. If Monti II is adopted as such, the exclusion set by Art. 153.5 TFEU will be bypassed and the proportionality test will be legally recognised as the general principle for solving cross-border labour disputes. It is worth concluding by recalling that the proportionality test seems to be applied unilaterally, since no justification is required for the exercise of the economic freedoms. The result clashes with the original intention of the ‘Monti Clause’: economic freedoms are immunised from interference by collective actions, whereas the latter are encompassed in EU law as obstacles to be overcome in order to favour market integration.

9. Conclusive annotation: the principle of subsidiarity as last rampart for the workers’ right to strike?

Pursuant to the chorus of critics coming from the social partners and national Parliaments, on 12 September 2012, the Commission decided to withdraw the proposal for the adoption of the Monti II Regulation.⁵⁷ In particular, the decision seems to be motivated by the ‘yellow card’ shown by the national Parliaments to the proposal, which undoubtedly would have provoked a rift between the Member States and the Commission if the latter forced to present the same text.

Both the ETUC and BusinessEurope have welcomed the withdrawal of Monti II, nevertheless adducing opposite motivations. In welcoming the withdrawal of the proposal, the ETUC affirms that such a withdrawal does not solve the problems created by the CJEU rulings and relaunches its own proposal of a social progress protocol to be attached to the Treaty in order to ensure the right to take collective action prevailing on the economic freedoms.⁵⁸ On the contrary, BusinessEurope stresses the ‘yellow card’ shown to the proposal and recalls the diversity of national systems of industrial relations as main reason for not having an EU regulation on the right to strike. According to the European employers’ association, the proportionality test set by the CJEU rulings is ‘fair’ and clear enough for not needing any further EU regulatory initiative in this area.⁵⁹

At the very end, in the name of the supremacy of national social models, a clear will towards the refusal of an EU regulation concerning the right to collective action emerges. Nevertheless, a distinction must be made: the bulk of the national Parliaments as well as the ETUC refused Monti II

⁵⁷ See the letter by the President Barroso to the President of the European Parliament, Martin Schulz on 12 September 2012, at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/661&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁵⁸ “ETUC welcomes the decision to withdraw the Monti II Regulation”, press release issued on 12.09.2012, <http://etuc.org/a/10329>.

⁵⁹ “Commission made the right decision on the right to strike”, press release issued on 12.09.2012, <http://www.businessseurope.eu/content/default.asp?PageID=568&DocID=30658>.

because of the risk to undermine, also at national level, the right to collective action in cases of conflict with the economic freedoms set by the Treaty; instead, three Parliaments (see above) and BusinessEurope criticised the proposal as not needed, being the proportionality test set by the CJEU rulings already a clear rule to be applied. Therefore, the principle of subsidiarity adduced as reason for refusing the adoption of a regulation which would give legal certainty to cases of conflict between collective labour rights and economic freedoms has a controversial feature.

Claiming for legal inaction has thus a clear consequence: not only it prevents to clarifying the legitimacy of cross-border collective actions, but also paves the way to the ‘right of the stronger’ solution. On the other hand, regulating the right to take collective action by law without ensuring a broad protection as fundamental right also in a cross-border dimension is also hazardous: the result would be a restriction of this right concerning both the modalities and the finalities. Within a context such as the European market, in which cross-border economic activity is ‘constitutionally’ ensured and cross-border collective *counter-action* is still under question, both these scenarios are not acceptable.