
Changing without Reversing, Regulating without Affecting

Marco Rocca

Abstract

On the 21 March 2012 the European Commission adopted its proposal 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. Conceived as both a response and a clarification of the case law of the Court of Justice, the new Regulation should address the widely debated problem of the relationship between fundamental freedoms and fundamental social rights. The present contribution seeks to identify the objectives of the proposal, through a critical reading of its text and of the explanatory memorandum, to assess its potential effect. The analysis is developed around two main themes: the relationship of the proposal with the recent case law of the European Court of Human Rights regarding the right to strike, and its consistency with the doctrine developed by the CJEU in Viking and Laval.

Keywords: freedom of establishment; freedom to provide services; fundamental social rights; right to take collective action

1. A LONG EXPECTED PARTY (?)
It is extremely hard to look with a neutral eye at the proposal by the Commission aimed at regulating the exercise of the right to take collective action in the context of the fundamental freedoms of establishment and to provide services. More than four years have passed since Judgment Day; during this ‘Laval & Viking era’ streams of ink were spent analysing these decisions, while social actors were occupied in joint meetings and negotiations. In trying to evaluate the result of such a cumbersome procedure, it seems to me that the proposal should be weighed against the objectives put forward in its own text. A valuable source of inspiration in identifying these objectives is to be found in the so-called ‘Monti Report’. ‘this divide [between fundamental freedoms and fundamental social rights] has the potential to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration.’ Thus, one of the aims of the proposed Regulation is certainly to answer to these concerns by clarifying the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights.’ The Monti Report also stressed the importance of not leaving such a clarification to occasional litigation beyond the CJEU or national courts.

Before analysing the proposal, it is worth remembering that this text is considered by the Commission as corollary to other proposed legislation. This is the proposal for a Directive concerning the enforcement of the provisions applicable to the posting of workers in the framework of the provision of services. This second proposal is deemed to follow the second recommendation of the Monti Report in the area of posted workers. Still, the interrelationship between these two texts seems to be limited to their ‘proximity’ in the Report.

---

1 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, 21 March 2012.
3 Case C-438/05, Viking Line ABP v. The International Transport Workers’ Federation and the Finnish Seaman’s Union [2008]; and Case C-341/05, Laval un Partneri Ltd v. Svenska Bygnadsarbetareförbundet [2008].
4 It is virtually impossible to give a full account of the comments. The website of the ETUI provides a comprehensive list of the reactions to these judgments: http://www.etui.org/Topics/Social-dialogue-collective-bargaining/Social-legislation/The-interpretation-by-the-European-Court-of-Justice/Reaction-to-the-judgements/Articles-in-academic-literature-on-the-judgements
7 Monti Report, p. 69.
9 Monti Report, p. 72.
This is evident as the proposal that we are analysing here, although partially originating from the posting of workers (Laval), has a much wider scope than posting alone. Indeed, much wider than the whole provision of services. The first Article of the proposal, in identifying the subject matter, refers 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.

Finally, one should keep in mind that, notwithstanding the lack of competence of the EU in the area, this proposed piece of legislation deals with the right (or freedom) to take collective action. In this regard, a legislative framework for this social phenomenon is always influenced (if not dictated) by a power relationship in larger society. At present, one can easily see that the workers’ movement in Europe finds its strength deeply undermined by number of factors. Without any pretence of completeness, high unemployment and the one-sided debate about fiscal profligacy can be identified as causes of this weakness.

2. LISBON

The Monti Report has also inspired the proposal with its optimistic stance about the effects of the coming into force of the Lisbon treaty. In particular, the Report points out that the objective of a social market economy and the new binding effect of the European Charter of Fundamental Rights ‘should shape a new legal context, in which the issues and the concerns raised by the trade unions should hopefully find an adequate response.’ This argument mirrors the explanatory memorandum. There, the already-quoted idea that the new Treaty would bring social objectives (and hence, rights) of the EU to the same level as economic ones is expressed. The explanatory memorandum goes further. It affirms that the Court of Justice has already acknowledged such a radical change in perspective.

Much hope is placed on the Deus ex Lisboa, and this hope will probably be tested by the Court sooner or later. Waiting for this test, such optimism can be tempered by the reference to a recent CJEU case, dealing once again with a conflict between fundamental rights and fundamental freedoms. Delivering her opinion in this case, AG Trstenjak proposed revising the Laval & Viking

10 The proposal is based on Article 352 TFEU (reserved for cases where the Treaties do not provide the necessary powers to implement actions necessary, under the policies defined in the Treaties, to attain one of the objectives of the Treaties); see the explanatory memorandum, p. 10. It is interesting to compare this with §57 of the opinion of AG Mengozzi in Laval: ‘If the effectiveness of Article 137(5) EC is to be upheld, the Community institutions could not of course resort to other legal bases in the Treaty in order to adopt measures designed to approximate the laws of the Member States in this field.’

11 Monti Report, p. 70.

12 Explanatory memorandum, p. 3.

approach, applying a ‘cross-proportionality test’.\textsuperscript{14} The AG argued that the Lisbon Treaty, although not applicable \textit{rationae temporis} to the issue at hand, would probably provoke the ‘overruling’.\textsuperscript{15} The final decisions shows that the Court did not follow the AG’s suggestion, thus sticking to the \textit{Laval & Viking} approach. Evidently, one should not overestimate this judgment (with the new treaty not being applicable yet). Still, it casts somewhat of a shadow on the \textit{deus ex machina}. By proposing the Regulation on which I am commenting here, the Commission seems to share this vision: the Monti Report itself called for an intervention with secondary legislation, only in the hypothetrical situation that the coming into force of the Lisbon Treaty was not considered as being sufficient to solve the issue at stake.\textsuperscript{16}

Turning now to the proposal, it is necessary to analyse a number of critical issues that seem to be crucial to its assessment. Without the pretence of touching upon every possible juridical aspect of the proposal, as regards the legal text, the analysis is focused on those Articles addressing (more) directly the relationship between fundamental freedoms and fundamental rights, \textit{id est} Articles 1 and 2. The contribution is organised around two main themes: the relationship between this text and the recent case law of the ECtHR regarding Art. 11 ECHR (which I address in Section 3), and the relationship between the text and the CJEU case law (Section 4). In Section 5, I identify more specifically the different objectives of the proposal. Finally, Section 6 presents some (still) unanswered questions.

3. ‘CERTAIN RESTRICTIONS’

The evolution of the case law of the European Court of Human Rights regarding Art. 11 ECHR, the right to collective bargaining,\textsuperscript{17} and the right to strike,\textsuperscript{18} probably represents the most important legal evolution regarding these rights during the period between \textit{Viking}, \textit{Laval}, and the present proposal. As is well known, the decision in the \textit{Enerji} case acknowledged the right to strike as an essential element of the freedom of association protected under Art. 11 of the European Convention on Human Rights. Such an evolution did not go unnoticed: the explanatory memorandum does refer to this case law when giving account of the acquired fundamental nature of the right to strike.\textsuperscript{19} However, this reference does raise some doubt as to the interpretation of the ECHR (and of the jurisprudence of the ECtHR) presented in the proposal.

\textsuperscript{14}Opinion of AG Trstenjak in Case C-271/08, §190.
\textsuperscript{15}Id., §79.
\textsuperscript{16}Monti Report, p. 70.
\textsuperscript{17}European Court of Human Rights, 12 November 2008, \textit{Demir and Baykara v. Turkey}, no. 34503/97.
\textsuperscript{18}European Court on Human Rights, 21 April 2009, \textit{Enerji Yapi-Yol Sen}, no. 68959/01.
\textsuperscript{19}Explanatory memorandum, p. 4. Interestingly, such a reference is not present among the Recitals; the case law of the ECtHR is cited there only as regards the right to collective bargaining (hence, \textit{Demir}), in Recital number 2.
In this sense, the whole issue comes down to the expression ‘certain restrictions’. In fact, the explanatory memorandum presents the recognition of the right to strike by the ECtHR as perfectly mirroring the one delivered by the CJEU: ‘[. . . ] as recognised by the Court of Justice and the European Court of Human Rights, the right to strike is not absolute and its exercise may nonetheless be subject to certain restrictions [. . . ]’ (emphasis added). Thus, are these ‘certain restrictions’ to be interpreted in the same way, following the case law of the two Courts? Even though a clear-cut answer may be difficult to formulate, it seems that the odds would be in favour of a negative one.\textsuperscript{20} Indeed, the facts in \textit{Enerji} were extremely different from the ones in \textit{Viking} or \textit{Laval}, as the restriction imposed by the Turkish government upon collective action was absolute, and extended to all civil servants\textsuperscript{21}. Still, the difference between the two approaches is staggering:\textsuperscript{22} on the one hand, the court of Strasbourg considers the right to take collective action as the starting point, assessing the limitation to this right on the basis of Article 11(2) ECHR. On the other, the judges of Luxembourg interpret the (fundamental) right to strike as a limitation of the fundamental freedoms, so that the exercise of this right should be considered as legitimate, only inasmuch as it is carried out in a proportionate way.\textsuperscript{23}

Coming back to ‘certain restrictions’, a quick glance at the two legal bases - Art. 28 of the Charter of Fundamental Rights of the EU and Art. 11 of the European Convention on Human Rights - reveals the difference between the two approaches. Indeed, the two Articles by no means imply an absolute right, both providing for the possibility to impose ‘certain restrictions’ to the right. So far, so good. The scope of the right, as well as its possible limitations, are, however, different. As is well known, Article 28 recognises the right to take collective action ‘in accordance with Community law and national law and practices.’ On the other hand, Article 11 (which is now interpreted as including the corollaire indissociable of the right to strike)\textsuperscript{24} recognises the right at hand, and only afterwards, in Art. 11(2), provides for its possible limitation.\textsuperscript{25} The wording of Art. 28 seems to imply that the right to take collective action only exists as long as


\textsuperscript{22} Id., pp. 220-221.

\textsuperscript{23} \textit{Viking}, §74, \textit{Laval}, §96.

\textsuperscript{24} \textit{Enerji}, §24.

\textsuperscript{25} ‘No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.’ In fact, the Court of Strasbourg found the Turkish ban (which was prescribed by law) on collective action to be in violation of Article 11 exactly on the ground of necessity in a democratic society (or lack thereof). See \textit{Enerji}, §29.
its exercise does not conflict ‘with Community law and national law and practices’. Also, the quoted listing only provides for the minimum standard of protection granted by any of the three sources.

Thus, the difference between the recognition of the right to take collective action by the two Courts can be safely affirmed, even though the extent of this difference cannot be exactly measured yet. It is then interesting to wonder on what basis the two Courts have been considered as converging on the same recognition. Two hypotheses come to the mind, provided that a third one, a forecasted lack of impact of the ECtHR jurisprudence on the CJEU, should not be discarded a priori.

In the first place, this process of convergence could have been envisaged by the drafters as the result of a mutual influence. In particular, the firm position of the CJEU in Viking and Laval could have exerted an influence upon Strasbourg, paving the way for an interpretation of the ‘protection of [. . . ] rights and freedoms of others’ which could include the fundamental freedoms of the EU legal order. Even though the decision in Enerji seems to go into another direction, one should not overlook the different stance of the Court in UNISON,26 where an economic interest was at least taken into account while assessing the proportionality of the restriction of the right to take collective action.27

Second, the convergence could be a necessity, although in the long run. In fact, when the European Union accedes to the Convention, the two approaches will have to converge, since an open conflict between the two Supreme Courts of the European arena seems unlikely to happen.28 That being said, the agreement relating to the accession is still being negotiated; a draft agreement was reached, but then the afterthoughts of some European governments brought about a slowing down (if not a stalling) of the whole process. In view of this, the second hypothesis of convergence can be considered only in the long run. It is, however, interesting to note that the explanatory memorandum acknowledges the role of the European Court of Human Rights as the court of last instance in assessing the rights protected under Art. 11 ECHR.29 This could be reconciled with the role of the CJEU in interpreting the law of the EU through the mechanism of ‘prior

27 UNISON, page 11.
29 ‘[. . . ] supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with the freedom of association as protected by Article 11 of the European Convention on Human Rights (ECHR)’ Explanatory Memorandum, page 4 (emphasis added).
involvement’ provided in the draft agreement\(^{30}\) (whose fate, however, is, at present, still unknown).

Finally on the relationship with the case law of the ECtHR, one should not overlook the signs of divergence between the two Courts, as well as the issues that such a possible direction raises as regards the proposal at stake here. The case for divergence is founded on two intertwined grounds: the methodological approach of the ECtHR in *Demir*, and the conclusions of the International Labour Organisation’s Committee of Experts regarding the BALPA case.\(^{31}\) As far as the first ground is concerned, the importance of *Demir* goes beyond the recognition of the right to collective bargaining as an essential element of the right of association protected under Art. 11. In this decision the Court, recognised the pivotal role of taking into account ‘elements of international law other than the Convention’, as well as ‘the interpretation of such elements by competent organs’,\(^{32}\) while interpreting the Convention itself. Such an approach could allow for further developments through dialogue with more specialised bodies, such as the European Committee on Social Rights and the Freedom of Association Committee.\(^{33}\) This brings us straight to the second argument, which, as was discussed, is based on the conclusion reached by the ILO Committee about the BALPA dispute. In the BALPA dispute, the British Airways Pilots' Association had to abandon an already decided and balloted (by an overwhelming majority) strike action. This was because of the threat successfully made by British Airways that it would claim extremely high damages (estimated in £100 million per day) in the case of a strike, on the basis of *Viking* and *Laval*\(^{34}\). In delivering its conclusions on this dispute, the ILO Committee had to assess the impact of the doctrine developed in these two decisions, though stressing that its role was not to judge the correctness of the CJEU’s holdings. In the end, the Committee concluded that the doctrine was likely to have ‘a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention [No. 87].’\(^{35}\) Two main critical arguments brought it to this conclusion: first the recognition of the chilling effect\(^{36}\) that an ‘omnipresent threat of an action for damages that could bankrupt the union, possible now in the light


\(^{32}\) *Demir and Baykara v. Turkey*, §85.


\(^{35}\) Report of the Committee of Experts, cit., p. 209.

of the *Viking* and *Laval*’ was likely to have upon trade unions planning to have recourse to collective action. Second, the Committee explicitly excluded the proportionality test from the catalogue of possible restrictions to the rights protected under Convention No. 87. It is evident that if this stark critique of the CJEU’s approach would make its way to the judges in Strasbourg, through the cited *Demir* approach, then we could witness an increased divergence between the two Courts in their assessment of collective actions. This could be an issue for the present proposal, which, as recalled, seems to consider the case law of the two Court in the field of collective action as converging on the very same notion of ‘certain restrictions’. As is evident, reading the conclusion of the ILO Committee raises another question: how does the present proposal fare in terms of compatibility with the position of the ILO Committee? I will come back to this in the concluding section.

4. TO REVERSE OR NOT TO REVERSE . . .

Turning now to the relationship with the CJEU, we can once again identify one phrase which summarises this thorny issue. We find this phrase in the explanatory memorandum, where we are told that the aims of the Regulation should be achieved ‘without [. . .] reversing the case law of the Court’.\(^{37}\) Provided that ‘the case law’ refers essentially to *Viking* and *Laval*, the question takes on the characteristics of a driving test. Having excluded a complete 180° spin (‘without reversing’) and other sudden shifts, the proposal calls for some gentler steering. However, even these cautious corrections of the direction are not without issues, as regards the relationship at stake here.

Maintaining the focus on the CJEU, we can also identify another important source of inspiration for this proposal. In fact, the reference\(^ {38}\) to the opinion of AG Trstenjak in *Commission v. Germany* is, in this sense, revelatory. This reference introduces the interesting approach *proposed* by the Advocate General to striking a balance in cases of conflict between fundamental rights and fundamental freedoms: ‘A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom.’\(^ {39}\) Indeed, the symmetric construction of Article 2 of the proposal seems to mirror this approach.

---

\(^{37}\) Explanatory Memorandum, p. 10.

\(^{38}\) Explanatory memorandum, p. 13.

\(^{39}\) Opinion of AG Trstenjak in case C-271/08, §190.
Thus, on this the question can be formulated as follows: does this ‘inspiration’ respect the ‘without reversing’ constraint?

By looking at the decision delivered by the Court in Commission v. Germany, the answer can hardly be in the affirmative. In fact, closer scrutiny of the AG opinion easily reveals a direct critique of the Viking & Laval approach, described as sitting ‘uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms.’ In the words of the AG: ‘Such an analytical approach suggests, in fact, the existence of a hierarchical relationship between fundamental freedoms and fundamental rights in which fundamental rights are subordinated to fundamental freedoms.’ Now, before proceeding to analyse the reaction of the Court to the opinion, it must be borne in mind that the AG herself did not, in the end, apply the proposed ‘cross-proportionality test’ to the case of Commission v. Germany. Her analysis was, in fact, limited to noting that first, that the German government tried only to justify the restriction to fundamental freedoms by fundamental rights, and, second, that the ‘usual’ one-sided proportionality test would have facilitated the evaluation of the arguments put forward by the German government.

That being said, the decision of the Court is much more in line with Viking and Laval than with the opinion of the AG. This is evident especially in points 42-44, where the Court adopts the same wording of the two famous cases: ‘Exercise of the fundamental right to bargain collectively must therefore be reconciled with the requirements stemming from the freedoms protected by the FEU Treaty, which in the present instance Directives 92/50 and 2004/18 are intended to implement, and be in accordance with the principle of proportionality.’ As this very approach was criticised by the AG, we can safely say that the Court rejected her arguments on this point. In the end, the judgment seems much more an application of Viking and Laval than a deviation from this doctrine.

Coming back to the ‘without reversing’, the ‘inspiration’ should now be assessed against this constraint. On the one hand, one could read the constraint in a very strict way, bringing the wording of Art. 2 of the proposal in line with the Viking & Laval doctrine. In fact, the Court has already acknowledged that ‘the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy’, as well as that ‘the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by

40 Id., §181 and §183.
41 Id., §184.
43 Opinion of AG Trstenjak in case C-271/08, § 203.
44 Id., § 204.
45 Commission v. Germany, § 44; see also Viking, § 46 and Laval, § 94.
47 Viking, § 79; Laval, § 105.
Community law, even under a fundamental freedom guaranteed by the Treaty, even though in the end, striking this ‘balance’ with the one-sided proportionality test was criticised by AG Trstenjak. One could hence read Art. 2 as a codification of this theoretical equal ranking of fundamental freedoms and fundamental rights. Such a codification would then leave the proportionality test, as conceived by the Court in *Viking* and *Laval* (and confirmed in *Commission v. Germany*), untouched, in some way denying its ‘inspiration’ in favour of the ‘without reversing’ constraint.

On the other hand, precedence could be given to the ‘inspiration’. In such a case, Art. 2 could be read as an attempt to urge the Court to reconsider the approach proposed by AG Trstenjak, thus intervening modifying the proportionality test itself. Also, recital 13 of the proposal is (almost) a direct quote from the cited opinion, which may be an argument in favour of this second ‘option’. That being said, how this would fare in terms of respecting the ‘without reversing’ constraint is difficult to say. Even harder is assessing the actual effect that this attempt would have upon the Court. Provided that only future procedures beyond the Court will help solve this difficulty, it seems interesting to point out a specific issue regarding the efficacy of this proposal.

Indeed, the issue comes down to a question of hierarchy. It is evident that when fundamental rights have been analysed by the CJEU in their clash with other parts of EU law, excluding fundamental freedoms, the outcome has been quite different from the one of *Viking, Laval, or Commission v. Germany*. The refusal of the Court to apply the doctrine developed in *Albany* (and recently confirmed in *AG2R Prévoyance*) to these cases is the perfect example of this difference. The question here has always been approached from the point of view of the freedoms enshrined in the Treaty, hence of primary law. When fundamental rights were at odds with secondary legislation implementing fundamental freedoms (e.g., the Public Procurement Directive in *Commission v. Germany*), the Court referred directly to the ‘mother provision’ in order to resolve the conflict.

---

48 *Viking*, § 45; *Laval*, § 93.

49 ‘A fair balance between fundamental rights and fundamental freedoms will in the case of conflict only be ensured when a restriction imposed by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, a restriction imposed on a fundamental right by a fundamental freedom cannot go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom.’

50 Opinion of AG Trstenjak in case C-271/08, § 190.

51 Notwithstanding the fact that the explanatory memorandum, at page 10, stated (optimistically) that: ‘Clarification of these issues should also not be left to future litigation before the ECJ or national courts.’ See also the Monti Report, p. 69.

52 Case C-67/96 *Albany International v. Stichting Bedrijfsspengoentenfonds Textielindustrie* [1999].


54 ‘Exercise of the fundamental right to bargain collectively must therefore be reconciled with the requirements stemming from the freedoms protected by the FEU Treaty, which in the present instance Directives 92/50 and 2004/18 are intended to implement’, § 44.
Thus, coming to our issue, it is unclear how, and to what extent, an instrument of secondary legislation will be able to influence (if willing to influence, see above for the two options) a balancing exercise that deals first and foremost with primary sources, id est with fundamental freedoms and the right to collective action protected under Art. 28 of the Charter, which now have the same legal value as the Treaties. This, besides its possible effect of persuasive authority upon the judges in Luxembourg, as has been suggested, the democratic imprimatur of legislation may ‘alter its reception by the Court of Justice’.  

5. THE DISPLACED CLAUSE

Before taking the final step and proceeding with the assessment of the proposal against the objectives put forward by its own text, I will highlight a final, although probably minor, issue. This issue is, at a first glance, just a terminological one. The present proposal has often been presented and discussed as the ‘Monti II proposal’, echoing the ‘Monti I’ clause of the Regulation on the functioning of the internal market in relation to the free movement of goods among Member States. Proposed in the Monti Report, such a clause should set out a ‘prohibition of actions that cause grave disruption to the proper functioning of the internal market and inflict serious losses on the individuals affected whilst recognising that the right to strike is unaffected by that prohibition.’ The present proposal does include such a clause in Article 1; in the explanatory memorandum we are told that this clause has been modelled upon the ‘Monti I’ clause cited above and Article 1(7) of the Services Directive. However, there is a striking difference between the context of these ‘model’ clauses and that of the clause inserted in the present proposal. While the Regulation on the free movement of goods, as well as the Services Directive, were aimed at regulating other areas of EU law and could be used in order to impose limitations on the right to strike (hence the clause was included to avoid this possibility), the purpose of the present proposal, from its very title, is to regulate the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services. The ‘Monti II clause’ in its present form is, from a logical point of view, in contrast with the rest of the content of the proposal. Regulating the exercise of

---

57 Monti Report, p. 71.
58 ‘This Regulation shall not affect in any way the exercise of fundamental rights as recognised in the Member States, 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.’
the right to take collective action without affecting, *in any way*, such an exercise seems a difficult task, even for the former Commissioner. The Monti Report had indeed (more meaningfully) proposed the inclusion of such a clause in a completely different context (‘If measures are adopted to clarify the interpretation and application of the Posting of Workers Directive’) and with a different formulation (‘introduce a provision ensuring that the posting of workers in the context of the cross-border provision of services, does not affect the right to take industrial action and the right to strike’).⁶¹ What is more, the wording ‘this Regulation shall not affect [. . .]’ (emphasis added) seems rather pointless, as eventual restrictions to the exercise of the right to take collective action are much more likely to come from *other* sources, and in the end, as recalled before, from fundamental freedoms. In sum, if the present proposal will ever come into force, either the ‘Monti clause’ will be *de facto* treated as non-existent, otherwise it would render the whole text inapplicable. At least this should suggest that the present proposal (or to the future Regulation) should no longer be referred to as ‘Monti II’.

After this little detour into the territory of the ‘displaced clause’, I will now try to summarise the main aims of the proposal, from the text itself. These aims can be grouped under three different lines of argument, the third of which can only be traced back in the Monti Report, and will thus serve as an introduction to our last section.

That being said, the first line goes under the label of ‘clarification’. The explanatory memorandum explicitly states that ‘the objective of the Regulation’ is ‘to clarify the general principles and EU rules applicable to the exercise of the fundamental right to take industrial action within the context of the freedom to provide services and the freedom of establishment.’⁶² This objective finds its origin in the Monti Report, where it was suggested that such a clarification should ‘not be left to future litigation before the ECJ or national courts.’⁶³ Also, in presenting the Impact Assessment for the proposal, the explanatory memorandum stresses the risk that ‘legal uncertainty could lead to a loss if support for the single market by an important part of the stakeholders and create an unfriendly business environment including possibly protectionist behaviour’⁶⁴ - hence the recourse to legislation in order to offer detail and certainty, as well as to provide a reliable structure for social actors and market participants.⁶⁵ Notwithstanding the unavoidable imperfection of the legislative outcome, which renders rather naive the hope of avoiding future interventions by the Court, this aim is greatly undermined by the issue identified in Section 4. The political constraint of

---

⁶² Explanatory memorandum, p. 11.
⁶³ Monti Report, p. 69.
⁶⁴ Explanatory memorandum, p. 9.
‘without reversing the case law of the Court’ has led to a situation where we do not know whether the Regulation, and especially the balance struck at Article 2, should be read as a consolidation and codification of the case law or as a reaction to it.\textsuperscript{66} It is evident that, provided that the present proposal ever enters into force, this issue will only be resolved through . . . future litigation. Moreover, if we consider the proposal as a reaction to the CJEU case law, and thus we interpret it as pushing forward the approach proposed by AG Trstenjak in \textit{Commission v. Germany}, we end up with a renewed proportionality test entailing the cross test to which I referred above. Although more in line with the equal ranking of fundamental rights and freedoms, this approach is doubly obscure in terms of its outcome, and could thus function only on a case-by-case basis, once again frustrating the quest for clarity on which the proposal had embarked.

The second objective can be described as (a way of) ‘responding to trade unions’ concern’. In this case also we can trace back the objective to the pages of the Monti Report.\textsuperscript{67} In this case the presence in the explanatory memorandum is more implicit. Only once and incidentally is the problem that the proposal is deemed to solve depicted as ‘seen with great concern by the trade unions’.\textsuperscript{68} More directly, drawing from the Monti Report, the memorandum warns of the risk of this issue alienating ‘from the Single Market and the EU a segment of public opinion, workers’ movements and trade unions, which has been over time a key supporter of economic integration.’\textsuperscript{69} It is clear that such an issue is mainly a political one. In this sense, the answer could be quickly found in the very critical press release from the ETUC that followed almost immediately the publication of the proposal.\textsuperscript{70} However, it is interesting to look at the proposal through the lens of this political objective. Here I will limit myself to two considerations.

In first place, one can see that the demand put forward by trade unions for a ‘Social Progress Protocol’ (which would give priority to fundamental rights over economic freedoms) to be attached to the Treaties was rapidly discarded in the Monti Report. There, we were told that ‘seeking Treaty changes does not seem a realistic option in the short term’,\textsuperscript{71} which was probably true from a political point of view. Still, from a legal point of view, even assuring the equal ranking of fundamental rights and fundamental freedoms (\textit{id est} the approach proposed by AG Trstenjak which I summarised in Section 4) would require a change in the Treaties. This is in view of the \textit{primary} nature of the conflict at stake, which I already stressed above.

---

\textsuperscript{66} Id.
\textsuperscript{67} Monti Report, pp.70 and 72.
\textsuperscript{68} Explanatory memorandum, p. 9.
\textsuperscript{69} Id., p. 3.
\textsuperscript{70} ‘ETUC says no to a regulation that undermines the right to strike’, press release, 21 March 2012, \url{http://www.etuc.org/a/9823}.
\textsuperscript{71} Monti Report, p. 70.
Second, the formulation of the first paragraphs of the explanatory memorandum suggests a certain disregard for the concerns of trade unions. Indeed, the *Viking & Laval* doctrine is presented only through the recognition of the right to take collective action as a fundamental right, and of the possibility, in principle, of this right restricting fundamental freedoms.\(^\text{72}\) Without mentioning the (many) problematic point(s) of these judgments, the memorandum then states (almost with astonishment) that ‘*despite this clarification*, the Court rulings triggered a wide-ranging, intense debate on their consequences for the protection of the rights of posted workers, and more generally the extent to which trade unions can continue to protect workers’ rights in cross-border situations’ (emphasis added). Again, after a few lines, the memorandum identifies another source of concern for trade unions in the fact that the Court has acknowledged ‘that the exercise of that right may none the less be subject to certain restrictions’. No reference is made to the proportionality test,\(^\text{73}\) or to the issue of claims for damages that could threaten the exercise of collective action in the context of fundamental freedoms. Ignoring these issues, it would be extremely difficult to ‘respond to trade unions’ concern’.

Remaining visibly open, these issues (and especially the threat of claims for damages) introduce the third potential objective of the proposal, which I mentioned above. This idea was only present, although maybe involuntarily, in the Monti Report, and then was quickly discarded. Indeed, in presenting his proposals under the chapter dealing with *Viking & Laval*, Professor Monti formulated the recommendation as follows: ‘If measures are adopted to clarify the interpretation and application of the Posting of Workers Directive, introduce a provision to *guarantee* the right to strike modelled on Art. 2 of Council Regulation (EC) No 2679/98 [. . .]’\(^\text{74}\) (emphasis added).

## 6. TRICKS AND THREATS

In fact, the proposal seems aware of the risk presented by the threat of claims for damages, which could hinder trade unions from exercising their collective rights.\(^\text{75}\) Such awareness is, however, limited to the topic of tackling the *abuse* of the *Viking & Laval* doctrine: the proposal contents itself with recalling that for the

\(^{\text{72}}\) Explanatory memorandum, p. 2. On the limits of this recognition, see S. Giubboni, ‘Social Rights and Market Freedom in the European Constitution: A Re-Appraisal’, *ELLJ*, Volume 1 (2010), No. 2, p. 181: ‘The only fundamental right to be recognized in the two judgments is, in fact, economic freedom, respectively of establishment and provision of services, while collective action with cross-border effects is reduced to strictly limited exception to trans-national market freedoms.’

\(^{\text{73}}\) Some of the issues arising from the application of the proportionality test in *Viking and Laval* (and in the context of industrial action in general) have been analysed in this journal by N. Hős, ‘The Principle of Proportionality in Viking and Laval: an Appropriate Standard of Judicial Review?’, *ELLJ*, Volume 1 (2010), No. 2.

\(^{\text{74}}\) Monti Report, p. 72.

\(^{\text{75}}\) Explanatory memorandum, p. 12.
fundamental freedoms to be applicable, the industrial dispute should be characterised by cross-border elements. The consequence of this position is worth quoting in full, as it reveals more than it actually says: ‘Indeed, such a broad risk of liability to damages on the basis of a rather hypothetical situation or one where there are no cross-border elements would render the use by trade unions of their right to strike rather difficult, if not impossible, in situations where the freedom of establishment or the freedom to provide services does not even apply.’ Now, to this seemingly straightforward statement I shall apply a little work of *a contrario* logic. Removing the ‘hypothetical’ surface, we can thus formulate a much more problematic statement: indeed, such a broad risk of liability to damages in a situation where there are cross-border elements, would render the use by trade unions of their right to strike rather difficult, if not impossible, in situations where the freedom of establishment or the freedom to provide services does apply. The resemblance of this second statement, which does nothing more than transposing the logic of the first one into a situation where fundamental freedoms rightly apply, with the conclusions of the ILO Committee about the BALPA dispute cited above, is striking. As the question of the ‘chilling effect’ being inevitably linked to the constant threat of claim for (unlimited) damages has not been solved, it seems that the exercise of the right to strike will remain rather difficult, if not impossible, in the context of fundamental freedoms. This effect is increased by the lack of clarity of the proposal, which, at best, would entail a double proportionality test whose outcome would be extremely unpredictable (with the risk of becoming no more than a political evaluation of the interests at stake). On this basis, the proposal falls short of the objective it once knew but chose to forget: guaranteeing the feasibility of the exercise of the right to take collective action in the context of the freedom of establishment and of the freedom to provide services. It seems that the new situation is still in violation of ILO Convention No. 87, as interpreted by the Committee of Experts on the Application of Conventions and Recommendations, which is astonishing, as the conclusions of this Committee about the BALPA dispute are actually referred to in the explanatory memorandum.

76 Id.
78 This is especially problematic for those sectors characterized by cross-border situations, or better, in situations where fundamental freedoms are at stake, e.g. the transport sector, as shown by the BALPA dispute.
79 Who, as explained above, condemned both the proportionality test and ‘the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the Viking and Laval judgments’ (International Labour Conference, 99th Session, 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 208-209).
At this point, one might wonder if this situation is consistent not just with ILO standards, not even with Article 11 ECHR, but with Article 28 of the Charter of Fundamental Rights interpreted in light of Article 52(1) of the same Charter. This Article, dealing with limitations to the rights recognised by the Charter, states that the limitations must respect the essence of these rights. In light of this, one should also notice that the content of this Article is repeated verbatim in Recital 12 of the proposal. In need for some glimmer of hope, one could read this together with the (implicit) assumption about the excessive difficulty (if not impossibility) of exercising the right to strike in the context of fundamental freedoms, to draw up a suggestion directed at the CJEU, implying that such a situation would violate the essence of the right to take collective action protected under Art. 28. However, it must be borne in mind that the fate of recitals beyond the Court is difficult to assess: another ‘Monti clause’ was, in fact, present in the 22nd recital of the Posting of Workers Directive, but no trace of it can be found in the judgment delivered in Laval. Thus, we would be back to the moral suasion effect.

At the end of the day, the proposal falls short of its (more or less explicit) objectives of clarifying, reassuring and guaranteeing. That being said, its broader context should not be overlooked. True enough, this proposal is not the silver bullet that will end the Viking & Laval era: in the present political and economic situation, it would be extremely naive to expect such an outcome. Still, read side by side with Viking or Laval (and Commission v. Germany, although it deals with collective bargaining), it is difficult to tell how the eventual coming into force of the new Regulation could worsen the situation. In particular, its ‘symmetrical heart’ - Article 2 - should be carefully weighed against the present doctrine of the CJEU: ‘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.’ Although no one can foretell how this disposition could be interpreted by the Court, and what effect (if any) it could have upon its jurisprudence, it is impossible not to notice that, for now, we are stuck with just the second half of the symmetry.

---

81. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.


83. See the two options I described in Section 4.