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AK Position Paper

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

About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Herbert Tumpel
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Werner Muhm
Director

Executive Summary

European Commission President Barroso pledged to heal this split by means of a legal act which we now have. Unfortunately, the Proposal for a Regulation does not meet this requirement.

In his report on the single market Mario Monti remarked once again that the ECJ judgments concerning the relationships between market freedom and fundamental trade union rights of 2007 and 2008 revealed the fault lines which run between the single market and the social dimension achieved at the national level. They would revive “an old split that had never been healed” between market advocates and those who feel that the call for economic freedoms is a code-word for dismantling social rights.¹

Following up on this, European Commission President Barroso, in view of his candidacy for the second term of office, pledged to heal this split by means of a legal act² which we now have.

Unfortunately, the Proposal for a Regulation does not meet this requirement. Essentially, it confirms the legal practice of the ECJ and codifies it by means of secondary legislation, although the ILO meanwhile declared that this judicature infringes upon its Convention right.

¹ Report to the President of the European Commission A New Strategy for the Single Market, May 2010, pp. 80 and 81.

² <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/391>.

The AK position in detail

Background: Market freedom and human rights

Since the Proposal for a Regulation does not mention and accordingly plays down the main content of the ECJ ruling in Laval and Viking cases among its reasons, it is necessary to briefly sum up their importance at the beginning.

In both cases, trade unions resorted to industrial actions with cross-border implications under the circumstances or by conducting them, they threatened to prevent the companies from undermining the collective agreement wage level. In Viking case, Finnish ferry company Viking tried to register a ship in Estonia again, although its place of business had not changed. The only reason for this "flag changing" was an attempt to avoid the Finnish collective bargaining law and to make the ships' complement at that time, subject to significantly lower Estonian wage level. Faced with a question whether trade unions, by exercising their fundamental right to freedom of association, unlawfully interfered with entrepreneurial market freedom of establishment, the ECJ made even more

extremely problematic statements:

1) Not only states or legislative entities comparable to them in certain aspects³ must respect market freedom, but trade unions must also respect them.⁴

2) Collective actions with cross-border implications aimed at compliance with collective bargaining law, present a limitation of the corresponding market freedom.⁵

3) This limitation of market freedom can possibly be justified by protection of the employee through the exercise of a fundamental right, as long as this exercise of a fundamental right is suitable and necessary (proportionally) to achieve this aim⁶.

In other words, this means that trade unions and stakeholders of civil society states are equal. They should not only respect market freedom, but when exercising their constitutionally protected rights, they must also conduct a complex European law proportionality assessment themselves, which is often too challenging even for the state authorities. In earlier cases, the sit-in

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³ ECJ 12.12.1974, Circular 36/74, Walrave, Compilation 1974, 1405

⁴ Guideline 1 and 2 of the judgment in ECJ 11.12.2007, Circular C-438/05, Viking, Compilation 2007, I-10779, paragraph 91.

⁵ Guideline 3 of the Judgement in Viking case, paragraph 91.

⁶ Guideline 3 of the Judgement in Viking case, paragraph 91.

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on the Brenner motorway by Transitforum Tirol⁷ and the protest of French farmers⁸, where the ECJ was to check to what extent the action of civil society stakeholders protected due to the exercise of fundamental rights, aimed against market freedom, should be determined, the ECJ established on its own the state obligation to protect and thereby granted it "a wide discretionary authority".⁹ However, by Viking-Laval judicature, the ECJ obligated a third party to directly consider market freedom. For this reason, citizens initiatives, farmer and entrepreneurs organizations and also trade unions constantly run the risk that their scope of action actually guaranteed by the right to freedom of association and assembly will be curtailed by the market freedom of the European Union.

By means of the ECJ judicature the market freedom is not only raised to the same level as the fundamental rights, but is given a principal priority as compared to these. Then, according to the ECJ, the exercise of fundamental rights is possibly a legal justification for a limitation of market freedom (compelling reasons of public interest).¹⁰ Justifications are to be narrowly inter-

preted according to established judicature of the ECJ.

Legal assessment

The mentioned legal practice of the ECJ was not only discussed in jurisprudence extensively¹¹, but also infringes upon the ILO Conventions and the European Convention on Human Rights (ECHR). So regarding the judgments in Laval and Viking case and its compliance with Convention no. 87 on the Freedom of Association and Protection of the Right to Organise dated 1948, the ILO Committee of Experts established the following: "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."¹² Given that all Member States of the European Union have ratified ILO Convention no. 87 (Freedom of Association and Protection of the Right to Organise) and no. 98 (Application of the Principles of the Right to Organise and to Bargain Collectively), this legal matter deals with fundamental freedoms „as they result from the constitutional

⁷ ECJ 12.6.2003, Circular C 112/00, Schmidberger, Compilation 2003, I-5659.

⁸ ECJ 9.12.1997, Circular C-265/95, Commission/France, Compilation 1997, I-6959.

⁹ Schmidberger case, paragraph 82.

¹⁰ Viking case, paragraph 43-47

¹¹ See instead of many in C. Joerges/F. Rödl, Social Deficit of the European Integration Project, (together with the comment on ECJ, judgment v. 11.12.2007 - Circular C-438/05 - and ECJ, judgment v. 18.12.2007 - Circular C-341/05 -), Kritische Justiz 2/2008, 149-165; T. Blanke, Die Entscheidungen des EuGH in den Fällen Viking, Laval und Rüffert - Domes-tizierung des Streikrechts und europaweite Nivellierung der industriellen Beziehungen, Oldenburg Studies for Europeanization and Transnational Regulation, No.18/2008, 9 folia

¹² Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 99th Session, 2010, p. 209

The legal practice of the European Court of Human Rights is conducted quite contrary to the above mentioned judicature of the ECJ. Instead of market freedoms, the fundamental rights should principally not be limited.

traditions common to the Member States" (art. 6, point 3 of TEU), these are „general principles of the Union's law" (ibidem) and therefore, should be directly applied and respected by the EU bodies.

Likewise, the ECJ judicature infringes upon the established legal practice of the European Court of Human Rights (ECHR). For European Court of Human Rights has unambiguously established that the right to bargain collectively¹³ and the right to strike as „an inseparable consequence"¹⁴ are covered by art. 11 of the European Convention on Human Rights.¹⁵ This right to strike may only be limited "by urgent social needs"¹⁶ (so especially, maintaining public security and order). Therefore, the legal practice of the European Court of Human Rights is conducted quite contrary to the above mentioned judicature of the ECJ. Instead of market freedoms, the fundamental rights should principally not be limited. The only exception is a proportional, state interference to secure urgent social needs (e.g., maintaining health-care). Beyond doubt, market freedoms do not fall into the category of this legal justification for an interference with fundamental rights according to the European Court of Human Rights.

Moreover, the existing Regulation is based, in the questionable manner, on the Flexibility clause of art. 352

TFEU, which envisages unanimity. Hence, one can only count on the resolution, if any, provided that the Regulation will still be "enriched" with concessions for Member States, where trade union fundamental rights still prevail over the standard of the present ECJ judicature.

Legislative stipulation on the judicature unfavourable to fundamental rights achieved by means of Monti's II-Regulation?

At the core of the Proposal for a Regulation lies art. 2, which initially states that by exercising the freedom of establishment and freedom to provide services "the fundamental right to take collective action, including the right to strike or freedom to strike is granted." At first sight, this sounds very promising. However, in Viking & Laval case, the ECJ also acknowledged the right to take collective actions in general. But only as long as they do not limit market freedom disproportionately.

It is obvious that the Regulation confirms this meaning of the ECJ judgments, when one follows further text formulation of art. 2 and interprets it in the light of the recitals. Art. 2, sentence 2 says: "Contrariwise, these economic freedoms are granted by means of exercising the fundamental right to take collective actions, including the

¹³ European Court of Human Rights, judgment v. 12.11.2008, Demir and Baykara

¹⁴ European Court of Human Rights, judgment v. 21.4.2009, EnerjiYapi- YolSen

¹⁵ Wedl, Neues aus der Judikatur des EGMR zugewerkschaftlichen Grundrechten, DRdA 2009, p. 458

¹⁶ European Court of Human Rights, judgment v. 21.4.2009, EnerjiYapi- YolSen

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right to strike or freedom to strike."For the interpretation of art. 2, we can refer to the recitals which form an integral part of the Regulation according to the established judicature of the ECJ. These recitals essentially repeat the judicature of the ECJ discussed above. Recital 7 states that „a limitation of this freedom" is only acceptable "if it is justified by imperative reasons of public interest. In this context they must be suitable for the implementation of the objective which they pursue and must not exceed what is necessary for achieving this objective."Correspondingly, this is also stated again in recital 11. Therefore, the Proposal for a Regulation presents little more than an attempt to confirm the legal practice of the ECJ in Viking and Laval case by means of a secondary legislation act.

Therefore, the Federal Chamber of Labour completely rejects the Proposal for a Regulation, as far as its content and scope is concerned. Irrespective of this general objection, it is noted that the obligation of art. 3, making Dispute Settlement Procedure also available in transnational situations, is excessive. Coherent with the aim and subject matter of the regularization, the Regulation alone would be a limitation to cases where the corresponding procedures on the national level regarding out-of-court dispute settlement by means of strikes and collective trade union actions are allowed, and the latter do not promptly arise,

once any labour law dispute can be solved by dispute settlement procedure on a national level.

Alternative: Improvement clause

Instead of the Regulation which questionably expresses legal competence, and is based on the Flexibility clause of art. 352 TFEU, a primary legislation amendment to the Treaty, which undertakes to clarify the relations between market freedom and fundamental rights, that could be carried out, if necessary, also by means of a Protocol to the next accession treaties, would be in our opinion the only reasonable way. The very fact that art. 153, point 5 TFEU explicitly excludes the right to strike from the competence of the Union, requires a procedure on the level of primary legislation, in the opinion of the Federal Chamber of Labour. Moreover, the incorporation of such improvement protocol, which European trade unions have been postulating for years¹⁷ and which would state that fundamental rights are more important than market freedom, would be the only solution which could effectively legally guarantee that the Union law does not contradict international law and the provisions of the European Convention on Human Rights. The ECJ must indeed acknowledge the secondary legislation and consider it in its judicature. However, the court has its problematic legal practice regarding market freedom and for this reason it relies on

the primary legislation. Therefore, a relevant attempt to close the thus created "split" must be made on this level of the hierarchy of the European legal order.

Final Assessment

The 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 contradicts the core labour standards of the ILO (which include Convention no. 87). Moreover, the Regulation infringes upon the established legal practice of the European Court of Human Rights, which will be the highest court for inspection of the compliance and guarantee of fundamental and human rights in Europe after the coming accession of the EU to the European Convention on Human Rights. Therefore, the Federal Chamber of Labour completely objects to the present Regulation, as far as its content is concerned.

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¹⁷ <http://www.etuc.org/a/5175>

Should you have any further questions
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