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from:	The Parliament of Malta
date of receipt:	22 May 2012
to:	Ms Helle Thorning-Schmidt, President of the Council of the European Union
Subject:	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 [doc. 8042/12 SOC 226 MI 194 COMPET 169 - COM(2012) 130 final] - *Opinion on the application of the Principles of Subsidiarity and Proportionality*[1]

Delegations will find attached the above mentioned opinion.

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[1] For available translations of this opinion see the interparliamentary EU information exchange site (IPEX) at the following address: http://www.ipex.eu/IPEXL-WEB/search.do

KAMRA TAD-DEPUTATI HOUSE OF REPRESENTATIVES
PARLAMENT TA' MALTA

L-iSpeaker *The Speaker*

28 ta' Mejju 2012

President tal-Kunsill tal-Unjoni Ewropea

Il-Parlament ta' Malta eżamina l-proposta għal Regolament tal-Kunsill dwar l-eżerċizzju tad-dritt li titħiedħed azzjoni kollettiva fil-kuntest tal-libertà tal-istabbiliment u l-libertà li tagħti servizz (KUMM(2012) 130) u kkonkludiet li din ma tissodisfax il-prinċipju tas-sussidjarjetà.

Għaldaqstant, skont id-dispożizzjonijiet tal-Protokoll Nru. 2 dwar l-Applikazzjoni tal-Prinċipju ta' Sussidjarjetà u Proporzjonalità, anness mat-Trattat dwar l-Unjoni Ewropea u t-Trattat dwar il-Funzjonament tal-Unjoni Ewropea, qed nghaddilek opinjoni motivata mill-Parlament ta' Malta, bid-data tal-lum, annessa ma' din l-ittra.

Dejjem tiegħek,

Michael Frendo

Michael Frendo

Proposta għal Regolament tal-Kunsill
dwar l-eżerċizzju tad-dritt li tittieħed azzjoni kollettiva fil-kuntest tal-libertà tal-istabbiliment u l-libertà tal-provvediment ta' servizzi.

KUMM(2012)130

Opinjoni Motivata tal-Kamra tad-Deputati, Parlament ta' Malta

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Bażi Legali

1. Il-bażi legali għal din il-Proposta huwa Artiklu 352 tat-Trattat dwar il-Funzjonament tal-Unjoni Ewropea. Fuq kollox, Artiklu 352 jirrikjedi bħala kundizzjoni assoluta illi jkun hemm in-neċessità li l-Unjoni tieħu l-azzjoni proposta. Din tista' tiġi meqjusa bħala espressjoni tal-prinċipju ta' sussidjarjetà.

2. Artiklu 352 jagħmel ukoll provvediment sabiex miżuri bbażati fuq dan l-artiklu "ma jinvolvux l-armonizzazzjoni ta' liġijiet u regolamenti tal-Istati Membri f'każijiet fejn it-Trattati jeskludu tali armonizazzjoni". Artiklu 153(1) tat-Trattat dwar il-Funzjonament tal-Unjoni Ewropea taħt Titolu X (Politika Soċjali) jagħti lill-Unjoni poter biex tagħti sostenn u tikkumplimenta l-attivitajiet tal-Istati Membri fil-qasam soċjali, inkluż taħt paragrafu (f) "rappreżentazzjoni u difiża kollettiva tal-interessi tal-ħaddiema u ta' min iħaddem, inkluż kodeterminazzjoni, skont il-provvedimenti ta' paragrafu 5». Il-Kummissjoni ma sserraħx fuq dan il-provvediment bħala bażi legali għar-Regolament, imma huwa meqjus relevanti li, filwaqt li Artiklu 153(2) jipprovdi li, għall-fini tas-suġġett suddett, il-Parlament Ewropew u l-Kunsill (dan tal-aħħar unanimament) jistgħu jaddottaw, permezz tad-direttivi, rekwiżiti minimi għal implimentazzjoni gradwali, b'kunsiderazzjoni għall-kundizzjonijiet u regoli tekniċi fid-diversi Stati Membri, Artiklu 153 sub-artiklu(5) espressament jisħaq li l-provvedimenti ta' Artiklu 153 ma għandhomx japplikaw għal salarji, id-dritt tal-assoċjazzjoni, id-dritt tal-istrajk jew id-dritt li jiġu imposti *lock-outs*. Din hija r-raġuni għaliex qiegħed jintuża mill-Kummissjoni l-Artiklu 352 tat-Trattat dwar il-Funzjonament tal-Unjoni Ewropea bħala bażi legali għal din il-miżura.

3. Il-Kummissjoni tgħid li l-għan tar-Regolament, filwaqt li jirrispetta bis-sħiħ il-liġijiet u t-tradizzjonijiet nazzjonali eżistenti fl-Istati Membri, huwa dak li 'jikkjarifika' l-eżerċizzju tad-dritt li tittieħed azzjoni kollettiva fil-kuntest tal-libertajiet ekonomiċi tas-Suq Uniku, partikolarment il-libertà tal-istabbiliment u l-libertà tal-provvediment ta' servizzi, saħansitra fid-dawl ta' sentenzi mogħtija mill-Qorti tal-Ġustizzja fil-każijiet ta' *Viking* (Każ C-438/05) u ta' *Laval* (Każ C-341/05). Il-proposta hija mressqa bħala każ ta' implimentazzjoni tal-libertajiet ekonomiċi anke skont l-għanijiet segwiti mill-politika soċjali. Il-Kummissjoni tinnota li l-Qorti, f'dawk il-każijiet, kienet tal-fehma li d-dritt tal-istrajk ma kienx assolut, għaliex għandu jintlaħaq bilanċ (fl-interess ġenerali li jinkisbu l-għanijiet tat-Trattati), u għalhekk id-dritt huwa suġġett għal ċerti restrizzjonijiet li jistgħu jirriżultaw mill-kostituzzjonijiet, liġijiet u prattiċi nazzjonali tal-Istati Membri varji. Barra minn hekk, Artiklu 28 tal-Karta tad-Drittijiet Fundamentali tal-Unjoni Ewropea jipprovdi li għandu jiġi eżerċitat skont il-liġi tal-Unjoni Ewropea u liġijiet u prattiċi nazzjonali.

Ir-rwol tal-qrati nazzjonali

4. Għalhekk, skont il-Qorti tal-Ġustizzja, kull restrizzjoni (imposta minn Stat Membru) fuq libertajiet ekonomiċi għandha tkun neċessarja u proporzjonata għal raġunijiet ta' interess pubbliku leġittimu. Huwa rikonoxxut li tali raġunijiet jinkludu l-protezzjoni tad-drittijiet tal-ħaddiema, u l-prevenzjoni ta' disturbi serji fis-suq tax-xogħol. Għalhekk, kemm il-libertajiet ekonomiċi kif ukoll id-drittijiet fundamentali jistgħu, taħt ċerti kundizzjonijiet, ikunu suġġetti għal restrizzjonijiet neċessarji u proporzjonati. Dawn il-prinċipji ġew dikjarati bl-akbar ċarezza mill-Qorti tal-Ġustizzja.

5. Madankollu, wieħed dejjem jifhem li huwa fil-kompetenza tal-awtoritajiet nazzjonali li jagħmlu l-valutazzjonijiet tagħhom u li japplikaw il-liġi nazzjonali u tal-Unjoni Ewropea, każ b'każ, fuq livell nazzjonali, u għalhekk f'parametri nazzjonali, u li dan isir b'mod meqjus. Wieħed għalhekk irid jeżamina r-Regolament bil-għan li jiġi valutat jekk il-miżura proposta tistax twassal għal indħil f'xi qasam li jaqa' taħt kompetenza nazzjonali.

'Kjarifikazzjoni' u 'Neċessità'

6. Il-Kummissjoni ddikjarat li huwa l-bżonn li tiġi stabbilita iċ-*ċertezza legali* li wassalha għad-deċiżjoni biex tressaq dan ir-Regolament, kif ukoll sabiex tesprimi d-determinazzjoni tagħha (tal-Kummissjoni) li tirreaġixxi għall-problema perċepita ta' tensjonijiet fi ħdan is-soċjetà Ewropea bejn sistemi nazzjonali ta' relazzjonijiet industrijali u l-libertà tal-provvediment tas-servizzi. (Komunikazzjoni tal-Kummissjoni, paġna 9).

7. L-intenzjoni hi, skont il – Kummissjoni, li jkun hemm 'kjarifikazzjoni' fil-bilanċ bejn il-libertajiet u d-drittijiet soċjali *sabiex titnaqqas il-ħtieġa ta' iktar kjarifikazzjoni permezz ta' litigazzjoni istitwita fil-Qorti tal-Ġustizzja jew fil-qrati nazzjonali* (referenza għar-Rapport Monti tad-9 ta' Mejju 2010, paġna 69). Id-dritt tal-istrajk għandu jkun wieħed reali, mhux sempliċiment għajta (*slogan*). (Komunikazzjoni tal-Kummissjoni, paġna 10). Madankollu, f'termini legali, il-Qorti tal-Ġustizzja diġà kienet ċara fuq dawn il-prinċipji.

8. Madankollu, il-Kummissjoni targumenta li l-għażla ta' Artiklu 352 tat-Trattat dwar il-Funzjonament tal-Unjoni Ewropea bħala l-bażi legali għall-miżura, kif ukoll l-għażla tal-istrument ta' tip 'Regolament' għal din il-Proposta huma neċessarji u adegwati għall-finijiet ta' kjarifikazzjoni (paġna 10 tal-Komunikazzjoni).

9. Il-Kummissjoni targumenta li, 'fid-dawl tal-'kontroversja' maħluqa mis-sentenzi tal-Qorti referuti', huwa meħtieġ li tittieħed din l-azzjoni mill-Parlament Ewropew u l-Kunsill. Madankollu, huwa wkoll ir-rwol tal-*Qorti tal-Ġustizzja tal-Unjoni* li tikkjarifika l-liġi tal-Unjoni Ewropea u li tespandi l-każistika tagħha. Hemm raġunijiet validi għaliex il-Qorti għandha titħalla tagħmel hekk skont il-każ. Din hija r-rotta l-iktar konsistenti mar-rwol tal-Kummissjoni u mal-awtonomija, flessibilità kif ukoll lealtà tal-Istat Membru. Madankollu, il-Kummissjoni qiegħda tisħaq dwar l-urġenza, u għalhekk fuq in-neċessità tal-intervent mill-Parlament Ewropew u mill-Kunsill.

10. Il-kwistjoni prinċipali hija jekk azzjoni ta' din ix-xorta, proposta mill-Kummissjoni, hijiex fil-fatt 'neċessarja'. Kwistjoni oħra hija dwar jekk l-użu tal-istrument ta' Regolament għal din il-Proposta huwiex neċessarju u proporzjonat għall-bżonn li tintlaħaq iktar 'ċarezza' dwar prinċipji ġenerali. Il-miżura tista' tkun biss possibbilment ġustifikata mill-aspett tan-'neċessità'

    (a) jekk l-Unjoni Ewropea, l-Istati Membri u l-partijiet kollha interessati ma jistax ikun illi jistennew elaborazzjoni jew kjarifika mill-Qorti tal-Ġustizzja (bħal ma ssostni l-Kummissjoni) b'mod li kjarifikazzjoni ulterjuri immedjata tkun tabilħaqq neċessarja minħabba l-urġenza, u

    (b) jekk il-miżura proposta fil-fatt tipprovdi tali kjarifikazzjoni ulterjuri (u kjarifikazzjoni biss) kif inhu meħtieġ fi kwistjonijiet li għandhom bżonn tali kjarifizzjoni.

11. Il-Preambolu tar-Regolament (recital 11) jirrikonoxxi li d-dritt li tittieħed azzjoni kollettiva, inkluż id-dritt u l-libertà tal-istrajk, u r-rekwiżiti relatati mal-libertajiet ekonomiċi, għandhom jiġu rikonċiljati, skont il-prinċipju tal-proporzjonalità. Dan, ħafna drabi, *jeħtieġ jew jimplika valutazzjonijiet kumplessi min-naħa tal-awtoritajiet nazzjonali*. Dan stqarritu wkoll il-Qorti tal-Ġustizzja bl-iktar mod ċar.

12. L-iskop ta' valutazzjonijiet tant kumplessi jkun li jiddetermina jekk l-eżerċizzju ta' dawk id-drittijiet kienx qed iseħħ skont il-liġijiet u l-prattiċi tal-Unjoni Ewropea u dawk nazzjonali (Preambolu, recital 9). Dak li jikkonċernana, f'dan ir-rigward, huwa jekk il-Proposta filfatt tagħtix kjarifika, kif inhu l-għan, bħala materja ta' neċessità urġenti ta' dak li huwa mistenni mil-liġi tal-Unjoni, u jekk, din il-kjarifika, il-Proposta tagħtihiex mingħajr detriment probabbli u sproporzjonat għal analiżi adegwata mill-awtoritajiet nazzjonali skont il-liġijiet, il-prattiċi u l-interess leġittimu nazzjonali, fid-dawl ukoll tal-liġi tal-Unjoni inġenerali.

13. Huwa ċar li valutazzjoni tant kumplessa għandha tkun, u tajjeb li tkun, esegwita fuq livell nazzjonali mingħajr 'kumplikazzjonijiet esterni' addizzjonali. L-Istati Membri għandhom ikunu fdati, abbażi tal-lealtà tagħhom, li jonoraw l-obbligazzjonijiet tagħhom, saħansitra meta l-kuntest huwa wieħed transkonfinali, fejn il-lealtà fil-konfront tat-Trattati hija maħsuba li tapplika.

14. Barra minn hekk, ir-Regolament jista' jopera facilment b'detriment għall-analiżi kalma u adegwata min-naħa tal-awtoritajiet nazzjonali kif ukoll partijiet li jfittxu li jaġixxu skont il-liġi u l-prattiċi nazzjonali u interessi leġittimi, kif mitlub mil-liġi tal-Unjoni.

15. Il-qofol tar-Regolament, f'termini tal-Oġġettiv, jinsab f'recital 13 tal-Preambolu: 'Sabiex tipprovdi ċ-ċertezza legali neċessarja, tevita l-ambigwità *u tipprevjeni soluzzjonijiet unilaterali fuq livell nazzjonali,* huwa meħtieġ li jiġu kjarifikati numru ta' aspetti relatati b'mod partikolari mad-dritt li tittieħed azzjoni kollettiva, inkluż id-dritt jew il-libertà tal-istrajk, kif ukoll il-limitu sa fejn it-trejdunjins jistgħu jiddefendu and jipproteġu d-drittijiet tal-ħaddiema f'każijiet transkonfinali'.

16. Dan joħloq tħassib reali. Huwa meqjus illi għan primarju, jekk mhux saħansitra l-għan primarju, u/jew l-effett tar-Regolament ippreżentat bħala wieħed ta' 'kjarifikazzjoni', huwa li jaffettwa dak li jista' jiġi determinat permezz tal-eżercizzju tal-prerogattiva nazzjonali, ifisser permezz tal-leġiżlazzjoni nazzjonali, il-qrati, it-tribunali, u l-mekkaniżmi, f'dak li jittratta il-kwistjoni jekk raġunijiet ta' interess pubbliku (u hawnhekk nisħqu li din hija referenza għal interessi pubbliċi nazzjonali jew ta' perċezzjoni nazzjonali) jeħtieġu, b'mod neċessarju, raġonevoli u proporzjonali, restrizzjonijiet fl-eżerċizzju tad-dritt tal-istrajk jew fl-eżerċizzju tal-libertajiet ekonomiċi. Artiklu 4 tal-Proposta, b'mod partikolari, jista' jiġi meqjus bħala l-ewwel pass biex jiġi stabbilit proċess multi-parzjali bl-involviment ta' skop, operat u effett nieqes minn parametri ċari u determinabbli, u li jkun kapaċi jaffettwa b'mod serju l-applikazzjoni ta' evalwazzjonijiet relevanti, u jaffettwa lill-awtoritajiet nazzjonali fir-rwoli preżenti tagħhom kif sa issa dawn ir-rwoli huma mfassla u preżervati skont it-Trattati. Din il-fehma tiġi msaħħa wkoll minn recital 12, li jisħaq il-bżonn li jiġi assigurat li kwalunkwe limitazzjonijiet *ġenwinament* imposti fuq drittijiet jew libertajiet ekonomiċi għandhom jilħqu l-oġġettivi tal-interess ġenerali rikonoxxut mill-Unjoni jew in-neċessità li jiġu protetti d-drittijiet u l-libertajiet. Madankollu, f'kuntesti oħra, il-Qorti tal-Ġustizzja saħqet li d-determinazzjoni (inkluża dik tal-ġenwinità) hija prerogattiva, sa mill-bidu nett u mingħajr indħil, tal-qrati nazzjonali, għaliex huwa mistenni minnhom li japplikaw kif xieraq il-liġi tal-Unjoni.

17. Huwa minnu li r-Regolament propost jirreferi b'xi mod għal dawn il-kunċetti. Skont recital 14 tal-Preambolu, 'ir-rwol primarju tal-imsieħba soċjali, bħala l-oqsma primarji fir-riżoluzzjoni ta' tilwim bejn il-ħaddiema u min iħaddem, ilu żmien stabbilit u għandu jiġi rikonoxxut. Barra minn hekk, ir-rwol ta' mekkeniżmi extra-ġudizzjarji għar-riżoluzzjoni ta' tali tilwim, bħal medjazzjoni, konċiljazzjoni u/jew arbitraġġ, provduti f'numru ta' Stati Membri, għandu jiġi rikonoxxut u preżervat'. Artiklu 3 wkoll jagħmel referenza għar-rwol tal-qrati nazzjonali.

18. Madankollu, bil-ħsieb, kif intqal, li jintlaħaq l-oġġettiv primarju li 'ma jintħallewx isiru restrizzjonijiet (fl-eżerċizzju tal-libertajijiet ekonomiċi – li hu l-għan ewlieni tal-Proposta) li jmorru lil hinn minn dak li hu adegwat, neċessarju u raġonevoli', il-Proposta, f'Artiklu 4, taħseb biex timponi obbligazzjonijiet ta' notifikazzjoni u informazzjoni f'sitwazzjonijiet li kapaċi jikkawżaw tfixkil serju għall-funzjonament xieraq tas-suq intern u/jew li kapaċi jikkawżaw dannu serju lis-sistemi tar-relazzjonijiet industrijali tal-Istat Membru jew li kapaċi jikkawżaw inkwiet soċjali serju. Għalhekk huwa maħsub illi l-Kummissjoni u Stati Membri oħra ikunu involuti b'xi mod sabiex jiżguraw li restrizzjoni ma tmurx lil hinn minn dak li hu permess. Mhuwiex ċar kif għandhom jiżguraw dan, ġaladarba informazzjoni tkun provduta. L-iskop ta' Artiklu 4 mhuwiex ċar. Fl-opinjoni tagħna, kellu jkun hemm artikolazzjoni ċara u sħiħa tal-iskop tal-obbligazzjoni u ta' dak li huwa mistenni bħala 'follow-up'. Kif inhi artikolata l-proposta tal-Kummissjoni, fl-opinjoni tagħna, ma tissodisfax il-kriterju tan-neċessità.

Kif dan japplika għar-Regolament propost

19. Recitals 1 sa 9 u 16 ittieħdu in kunsiderazzjoni fl-ambitu tal-prinċipju ġenerali tal-liġi tal-Unjoni. Dawn jistgħu jittwaħħdu ma' Artiklu 1, imsejjaħ il-klawsola Monti. Lanqas ma hemm oġġezzjoni għall-*kontenut* tal-istqarrija ta' prinċipju ġenerali f'Artiklu 2. Madankollu, dak li hu ta' relevanza f'dan il-punt huwa li Artiklu 1 u 2 *ma jagħmlu xejn ħlief jirrepetu dak li diġà ddikjarat il-Qorti tal-Ġustizzja* mingħajr ma joffru ebda valur miżjud għad-dikjarazzjonijiet tal-Qorti. Għaldaqstant, dawn l-artikli jidhru superfluwi u mhux neċessarji, filwaqt li la jikkjarifikaw u lanqas jiġġustifikaw din il-proposta.

20. **L-iskop ta' Artiklu 4 tal-Proposta mhuwiex ċar.**

Artiklu 4 (dwar il-mekkaniżmu ta' twissija) jobbliga l-istat ospitanti li jagħti informazzjoni immedjata lill-istat tal-oriġini u/jew lill-Stati Membri oħra u lill-Kummissjoni f'ċirkustanzi speċifiċi. Madankollu, l-applikazzjoni ta' dan l-Artiklu fil-prattika bla dubju ħa toħloq diffikultajiet, minħabba li l-istat ospitanti jeħtieġ li l-ewwel nett jevalwa jekk jeżistux 'atti jew ċirkustanzi serji' li 'jistgħu' jikkawżaw 'inkwiet serju' għall-funzjonament 'xieraq' tas-suq intern, u/jew 'jistgħu' jikkawżaw dannu 'serju' għas-'sistema' tar-relazzjonijiet industrijali tal-pajjiż jew joħolqu inkwiet soċjali 'serju'. Dawn il-kunċetti huma kollha miftuħa għal interpretazzjonijiet varjati, iżda jinsabu miġbura kollha f'Regolament direttament applikabbli intiż u propost bħala miżura ta' kjarifikazzjoni. Jibqa' l-fatt li dawn il-kunċetti mhumiex definiti u jibqgħu miftuħa għal firxa ta' interpretazzjonijiet. Għalhekk, dan il-provvediment hu meqjus bħala wieħed superfluwu u l-obbligazzjonijiet li jaħseb biex iqiegħed fuq Stati Membri mhumiex la ċerti u lanqas neċessarji, b'effett u riżultat indeterminat.

21. Ir-Regolament propost, mhux biss ma jgħinx biex jikkjarifika l-pożizzjoni legali fil-kuntest tal-liġi tal-Unjoni Ewropea, iżda saħansitra jaffettwa l-funzjonament ordnat tas-sistemi nazzjonali bl-introduzzjoni ta' obbligazzjonijiet ġodda b'elementi ġodda ta' inċertezza. Din il-miżura la hi neċessarja, la adegwata u wisq inqas addattata.

22. L-introduzzjoni tal-kunċett ta' linji gwida f'Artiklu 3 li għandhom jiġu mnedija mill-imsieħba soċjali huwa wkoll meqjus bħala żbaljat u inadegwat, minħabba li dan huwa qasam fejn l-imsieħba soċjali fuq bażi nazzjonali għandhom, u għandu jibqa' jkollhom, id-diskrezzjoni tagħhom. Mhuwiex aċċettabbli li jkun hemm diskussjoni fuq livell Ewropew, inkluż fuq livell ta' msieħba soċjali, li potenzjalment tista' taffettwa mekkaniżmi alternattivi ta' riżoluzzjoni diġà eżistenti fuq livell nazzjonali. Is-sistemi u prattiċi ta' relazzjonijiet industrijali huma differenti ħafna fl-Istati Membri u dan hu rifless fil-mekkaniżmi individwali fir-rigward tar-riżoluzzjoni tat-tilwim industrijali. Għaldaqstant huwa sew u proprju li 'nuqqasijiet' f'sistema nazzjonali jistgħu jiġu biss identifikati u ndirizzati bl-aħjar mod mill-partijiet li jkunu qed iħaddmu u jużaw dawn il-mekkaniżmi f'livell nazzjonali. Din hija prerogattiva nazzjonali u ta' msieħba soċjali fuq livell nazzjonali skont is-sistemi tar-relazzjonijiet industrijali ta' kull Stat Membru.

Konklużjoni

23. Il-Kummissjoni ma wrietx kif ir-Regolament propost jissodisfa l-kriterji tan-neċessità, adegwatezza, adattament u proporzjonalità. Il-Parlament Malti jqis li l-Proposta tonqos milli tikkonforma mal-prinċipju tas-sussidjarjetà minħabba li l-Kummissjoni naqset milli tressaq evidenza ċara ta' neċessità għal azzjoni leġislattiva min-naħa tal- Unjoni Ewropea. La tressqet evidenza konvinċenti sabiex issostni tali neċessità, u lanqas ma toħroġ din in-neċessità mill-valutazzjoni tal-impatt preżentat mal-Proposta. M'hemm l-ebda evidenza ċara ta' għaliex il-leġislazzjoni fuq id-dritt li titmexxa azzjoni kollettiva fil-kuntest tal-libertà tal-istabbiliment u tal-libertà tal-provvediment ta' servizzi hija meħtieġa, jew ta' dak li ser jinkiseb permezz ta' din il-leġislazzjoni kif proposta, jew tal-bżonn ta' xi kjarifika permezz ta' Regolament. Lanqas ma jidher kif il-Proposta twassal "għal tnaqqis tat-tensjonijiet bejn is-sistemi nazzjonali ta' relazzjonijiet industrijali u l-libertà li jipprovdu servizzi", li hija mniżżla bħala l-għan essenzjali tal-Proposta. Ir-Regolament ma joffrix kjarifika, u jippreżenta effetti altament inċerti. Huwa possibbli, anzi probabbli, li din il-Proposta tinterferixxi fir-rwol tal-awtoritajiet nazzjonali, u għalhekk thedded li tfixkel serjament u taffettwa negativament il-funzjonament ta' sistemi ta' relazzjonijiet industrijali ferm stabbiliti fl-Istati Membri.

24. Għalkemm il-miżura proposta ma toħloqx mekkaniżmi ġodda ta' riżoluzzjoni ta' tilwim industrijali, il-Kamra tad-Deputati tal-Parlament ta' Malta tikkonkludi li l-proposta ma tissodisfax il-prinċipju tas-sussidjarjetà għar-raġunijiet kif deskritti f'din l-opinjoni motivata.

Għaldaqstant, il-Parlament Malti jirrisolvi li joġġezzjona għall-Proposta u li jwassal din l-opinjoni motivata skont il-proċedura definita fl-Artiklu 6 tal-Protokoll Nru. 2 dwar l-Applikazzjoni tal-Prinċipju ta' Sussidjarjetà u Proporzjonalità, anness mat-Trattat dwar l-Unjoni Ewropea u t-Trattat dwar il-Funzjonament tal-Unjoni Ewropea.

Il-Kamra tad-Deputati, Parlament ta' Malta

22 ta' Mejju 2012

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

Reasoned Opinion by the House of Representatives, Parliament of Malta

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The Legal Basis

1. The Legal Basis for this proposal is Article 352 TFEU. Above all, Article 352 requires that it be necessary for the Union to take the action proposed. This can be regarded as an expression of the principle of subsidiarity.

2. Article 352 also provides that measures based on this article "shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation". Article 153(1) of the TFEU under Title X (Social Policy) grants the Union support and complementary power to support and complement the activities of the Member States in the social field, including under para. (f) "representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5". The Commission does not rely on this provision as the legal basis for the Regulation, but it is considered of relevance here that while Article 153(2) goes on to provide that to the above end, the European Parliament and the Council (the latter acting unanimously) may adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States, it is expressly provided in Article 153(5) that the provisions of Article 153 shall not apply to pay, the right of association , the right to strike or the right to impose lock-outs. Hence, the attempted use of Article 352 TFEU as the legal basis for this measure.

3. The objective of the Regulation is stated by the Commission to be, while fully respecting existing national laws and traditions, that of *'clarifying'* the exercise of the right to take collective action within the context of the economic freedoms of the Single Market, in particular freedom of establishment and freedom to provide services, in the light also of the judgments of the Court of Justice in *Viking* and *Laval.* It is advanced as a case of implementing the economic freedoms also in accordance with the objectives pursued by social policy. The Commission points out that the Court had held in those cases that the right to strike is not absolute, for a balance must be struck (in the general interest of achieving the Treaty objectives), and the right is subject nonetheless to certain restrictions which may also result from national constitutions, laws and practices. Moreover, Article 28 of the Charter of Fundamental rights of the European Union provides that it is to be exercised in accordance with European Union law and national laws and practices.

The role of the national courts

4. According to the Court of Justice therefore, any restriction (imposed by a Member State) on the economic freedoms must be necessary for reasons of legitimate public interest, and proportionate. It is acknowledged that legitimate reasons include the protection of the rights of workers, and the prevention of serious disturbances to the labour market. Therefore, both economic freedoms and fundamental rights may, under certain conditions, be subject to necessary and proportionate restrictions. These principles were stated with utmost clarity by the Court of Justice.

5. However, it was always understood that it would be for the national authorities to make their own assessments and apply national and Union law case by case at national level, and therefore within the national remit, and to do so in equanimity; so that this matter is to be tested by analysis of the Regulation in order to assess whether the measure might lead to interference in the exercise of an area of national competence.

'Clarification' and 'Necessity'

6. A major consideration for the Commission in deciding to propose this Regulation is stated in the Communication to have been *legal certainty*, as well as to express the determination of the Commission to respond to the perceived problem of the tensions in European society between national industrial relations systems and the freedom to provide services. (Commission Communication, page 9).

7. It was intended that 'clarification' be made about the balance between the freedoms and social rights in order to reduce the need for further clarification through litigation before the Court of Justice or national courts (referring to the Monti Report of 9 May 2010 p.69). And the right to strike should be demonstrably real, not a slogan (Commission Communication page 10). However, in legal terms the Court of Justice had been very clear on these principles already.

8. Nevertheless, the choice of article 352 TFEU as the legal basis for the measure, as also the choice of the instrument of the Regulation, are argued by the Commission to be necessary and appropriate for clarification purposes (page 10 of the Communication).

9. It is argued by the Commission that, *in the light of the 'controversy' created by the Court judgments* referred to, this action is one that it is necessary that the Parliament and the Council should take. However, it is also the role *of the Court* to clarify Union law and to expand on its case law - and there are strong reasons why the Court should be left to do so as the occasion arises. This is the route more consonant with its own role and with Member State autonomy and flexibility, as well as loyalty. The Commission argues urgency, however, and therefore necessity for intervention by the Council and the Parliament.

10. The main question is whether action of the kind proposed by the Commission is in fact 'necessary'. Another question is whether the use of the instrument of the Regulation is necessary and proportionate to the need to have further 'clarity' about general principles. The measure could only possibly be justified by 'necessity' if

    (a) the Union, the Member States and all interested parties could not possibly wait for the Court to elaborate or 'clarify' (as the Commission argues) such that further immediate clarification were indeed necessary as a matter of urgency and

    (b) the proposed measure provided such further clarification (and only clarification) as was necessary of matters that require such.

11. The Preamble to the Regulation (recital 11) acknowledges that the right to take collective action, including the right or freedom to strike, and the requirements relating to the economic freedoms have to be reconciled, in accordance with the principle of proportionality, which often *requires or implies complex assessments by national authorities*. So much has been stated by the Court of Justice in the clearest of terms.

12. The purpose of such complex assessment would be to determine whether the exercise of those rights was being done in compliance with Union and national law and practice (Preamble, recital 9). What concerns us here is whether the Regulation does, as it purports, clarify as a matter of urgent necessity what Union law demands and does so without likely and disproportionate detriment to proper analysis by national authorities fully according to national law and practice and all legitimate interests, as well as taking into account Union law in general.

13. It is clear that such a complex assessment is to be, and is best, carried out at national level without additional 'outside' 'complications'. Member States must be trusted as a matter of loyalty to honour their obligations, even when the context is cross-border for that is when loyalty under the Treaties is meant to apply.

14. Further, the Regulation is just as likely to operate to the detriment of calm and proper analysis by national authorities and players seeking to act in accordance with national law and practice and having regard to all legitimate interests, as required by Union law.

15. The essence of the Regulation in terms of Objective is contained in recital 13 of the Preamble: " 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 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."

16. This is of real concern. It is considered that it indicates that a, if not *the*, primary objective and/or effect of the Regulation , under the epithet of 'clarification', is to affect what has been the prerogative of national bodies to determine, through the national legislature and Courts, tribunals, and mechanisms, whether imperative reasons of public interest (and we emphasise here that this refers to the national and nationally-perceived public interest) necessarily, reasonably and proportionately require a restriction on the exercise of the right to strike or on the exercise of the economic freedoms. Article 4 of the Regulation, in particular, can be read as the first step in the establishment of a multi-party process involving outside involvement of highly undetermined, unclear and indeterminable purpose, operation and effect, and capable of seriously affecting the application of the relevant tests, and affecting national authorities in their current roles as hitherto considered allocated and preserved by the Treaties. This reading is encouraged by recital 12, which emphasises the need to ensure that any limitations on either rights or economic freedoms *genuinely* meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". Yet in other contexts also the Court of Justice has been clear that the determination (including that of 'genuiness') rests, in the first place and without intervention, with the national courts, for they can be expected to properly apply Union law.

17. It is true that the proposed Regulation pays service to these concepts. According to Preamble recital 14, "the key role of the social partners as the primary actors in resolving disputes concerning relations between employer and employee is well established over time and should be acknowledged. In addition, the role of the non-judicial dispute resolution mechanisms, such as mediation, conciliation and/or arbitration, provided for in a number of Member States should be acknowledged and preserved". Article 3 also refers to the role of the national courts.

18. However, in order, it is said, to achieve the primary objective of *not permitting a restriction (on the exercise of the economic freedoms - the main target of the regulation) to go beyond what is appropriate, necessary and reasonable*, the Regulation, in Article 4, would impose obligations of notification and information in situations which could cause grave disruption to the proper functioning of the internal market and/or which may cause serious damage to a member State's industrial relations system or create serious social unrest. *The Commission and other Member States are therefore to be involved in some way in ensuring that a restriction does not go beyond what is permitted'. What is unclear is how this will be ensured (including by them) once information has been provided. The purpose of Article 4 is not clear. In our view, there should have been very clear articulation of the purpose of, and follow-up to, this obligation. As it is, the Commission has in our opinion failed to satisfy the requirement of necessity.*

Applying this thinking to the Regulation:

19. We do take into account also the savings for all general principles of Union law, as per recitals 1-9 and 16. These can be coupled with Article 1, the so-called Monti clause. Nor is there objection to the *content* of the statement of general principle in Article 2. However, *what is of relevance here is that Articles 1 and 2 in effect merely repeat what the Court of Justice has said and add no value to the Court's declarations, so seem superfluous and unnecessary.* They hardly 'clarify'. They do not justify the present proposal.

20. ***It is not clear what Article 4 of the Regulation is intended to do.***
Article 4 (the alert mechanism) obliges a host Member State to "immediately" give information to the Member State of origin and /or other Member States and the Commission in specified circumstances. However, the application of this Article in practice is sure to cause difficulty, since that State has to assess whether 'serious acts or circumstances' exist, which 'could' cause 'grave' disruption' to the 'proper' functioning of the internal market, and/or which 'may' cause 'serious' damage to its industrial relations 'system' or create 'serious' social unrest. All these concepts are open to interpretation, but are to be found in what is proposed as a directly applicable Regulation intended to be a clarification measure. Yet these concepts are not defined and remain open to wide interpretation. It is considered that this provision is superfluous and poses an unnecessary and uncertain obligation on Member States, with indeterminate effect or result.

21. The proposed Regulation not only fails to add to the clarity of the legal position under EU law, but is sure to affect the orderly functioning of national systems by introducing new obligations with new elements of uncertainty. This is not a necessary, or appropriate, or suitable measure.

22. The introduction (Article 3) of the concept of guidelines to be set out by the European social partners is also inappropriate and mistaken since this is an area where the national social partners enjoy, and should continue to enjoy, discretion. It is not acceptable that there be discussion at European level, including at social partner level, which has the potential to affect alternative resolution mechanisms at national level. Industrial relations systems and practices vary widely across the Member States, and this fact is reflected in the particular mechanisms relative to the resolution of industrial disputes. It is therefore right and proper to recognise that any 'deficiencies' in a national system can only, and therefore best, be identified and addressed by the parties operating and using those systems at the national level. This is a prerogative reserved to the national level and to the social partners at that level according to the industrial relations system of each Member State.

Conclusion

23. The Commission has not shown how the proposed Regulation satisfies the criteria of necessity, appropriateness or suitability, nor proportionality. The Parliament of Malta considers that the Proposal fails the test of subsidiarity since the Commission has failed to provide clear evidence of the need for legislative action by the European Union. The Commission has not adduced compelling evidence to show such necessity, nor does any emerge from its impact assessment presented with the Proposal. There is no clear evidence to show why legislative action on the right of collective action in the context of the right of establishment or the freedom to provide services is required, nor as to the benefits to be derived through the legislation as proposed, nor of the need for clarification by means of Regulation. Nor is it clear how the proposed measure will lead to a "reduction in the tensions between the national systems of industrial relations and the freedom to provide services", which is stated to be an essential objective of the proposal. The Regulation does not clarify. It is of highly uncertain effect. It could, and is likely to, interfere with the role of the national authorities, and therefore threatens to seriously disrupt and negatively affect the good functioning of well-established systems of industrial relations in the Member States.

24. Although the proposed measure does not create new trade-dispute resolution mechanisms as such, the Parliament concludes that it offends against the principle of subsidiarity for the reasons stated above.

Therefore, Parliament has decided to file an objection on the Proposal in question and to deliver this reasoned opinion according to the procedure set out in Article 6 of Protocol No.2 on the Application of the Principles of Subsidiarity and Proportionality as annexed to the Treaty on the European Union and the Treaty on the Functioning of the European Union.

House of Representatives, Parliament of Malta
22nd May, 2012