



28 June 2011

COMMISSION CONFERENCE ON FUNDAMENTAL SOCIAL RIGHTS AND THE POSTING OF WORKERS IN THE FRAMEWORK OF THE SINGLE MARKET

BRUSSELS, 28 JUNE 2011

PHILIPPE DE BUCK, DIRECTOR GENERAL

Dear Minister,
Dear Members of the European Parliament,
Dear Director General,
Ladies and Gentlemen,

- The Commission has invited us to discuss two priority legislative actions under the lever of “social cohesion” of the Single Market Act published last April:
 - EU legislation “clarifying the exercise of the freedom of establishment and the freedom to provide services alongside fundamental social rights” – hereafter the “Monti II regulation”.
 - EU legislation aimed at “improving and reinforcing the transposition, implementation and enforcement in practice of the Posting of Workers Directive” – hereafter the “posting proposal”.
- Both initiatives are expected before the end of 2011 or early in 2012. Contrary to what happens for EU social policy initiatives, there will be no formal consultation of the European social partners.
- However, the issues at stake concern companies and social partners directly. The proposed initiatives regard the interaction between the single market and the functioning of national industrial relations systems.
- Together with the European Commission and the EU Member States, it is clear that social partners are the main stakeholders for these initiatives.
- We have discussed the impact of the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases with the ETUC at length in 2009-2010. We came up with a joint report that comprises useful elements for future EU policy making. Both the elements on which we agreed and those on which we disagreed.
- As to the way forward, the Commission must find an appropriate and transparent way of involving social partners in its preparations.



Interlink and differences between the two initiatives

- The two announced initiatives are interlinked. This is because the idea of a Monti II regulation has emerged as a result of the ECJ Viking and Laval rulings, which assessed the legality of strike actions in the context of posting of workers.
- However, their content is different:
 - In 1998, the Monti I regulation was adopted to allow the Commission to intervene towards Member States in order to make sure that they take appropriate action to remove obstacles to the free movement of goods;
 - The posting of workers directive regulates the working conditions that must be observed by foreign service providers with respect to their posted workers in the host country as part of a cross-border service provision.
- In addition, we know much more about the Commission's intentions regarding its posting proposal than on the Monti II regulation, which was announced for the first time last April in the Single Market Act.
- Therefore, what I will tell you now on the Monti II regulation should be considered as a first business input on the matter. We will need more time to assess the Commission's rationale for EU action and the content of a Monti II regulation with our members.

Monti II regulation

- BUSINESSEUROPE believes that a Monti II regulation can be helpful if it aims, like in 1998, to set a procedure with short deadlines enabling the Commission and the Member State in question to remove unjustified obstacles to the freedom to provide services where they occur.
- However, we do not see the need for a Monti II regulation whose aim would be to reassess the balance between economic freedoms and fundamental social rights.
- ETUC believes that the ECJ rulings have undermined workers' right to take collective action. We do not agree with this interpretation, rather the reverse! Why?
- Because the real novelty of the Viking and Laval rulings is that the right to strike has been recognised by the ECJ as an EU fundamental right for the first time.
- Moreover, the fact that the EU Fundamental Rights Charter recognises the right to strike as a fundamental right does not mean that it is an absolute right.



- EU law has allowed limitations on the right to strike for many years. Already in 2003, the ECJ asserted that the right to strike, unlike other fundamental rights such as the right to life or the prohibition of torture, is not absolute.
- Different types of limitations also exist in many Member States. They vary a lot and reflect the diversity of national industrial relations systems in Europe.
- For example, proportionality is an overriding principle developed in the jurisprudence of the German Federal Labour Court. Likewise, article 11 of the Estonian Constitution sets out a proportionality principle which applies to the right to strike.
- At the end of 2009, the ratification of the Lisbon treaty has conferred binding force to the Fundamental Rights Charter. This has not altered the relative nature of the right to strike.
- Therefore, in line with the reasoning of the ECJ in the Viking and Laval rulings, the Monti II regulation should fully recognise that obstacles to the freedom to provide services which derive from a disproportionate use of the right to take collective action by trade unions are forbidden under EU law.
- The Treaty stipulates in article 153.5 that the right to strike is the exclusive competence of the Member States. Therefore, the definition of what constitutes, in the context of the freedom to provide services, a proportionate use of the right to strike or not should be defined at national level.
- In this respect, national courts are best placed to assess the proportionality of collective action taking into account national rules on the use of collective action and the facts of the case at issue.

Posting proposal

- Posting is and remains a limited phenomenon on European labour markets. In 2007, posted workers accounted for an average of 0.37% of the active population of EU-15 sending countries and 0.74% of the active population of EU-12 sending countries.
- However, due to the high concentration of posting in some countries and sectors, its incidence can be much more significant in selected cases. For example, the number of posted workers received in the construction sector in Belgium in 2007 corresponded to 11.30% of the total number of employees in that sector.
- From the perspective of business, posting is closely associated with the trend towards internationalisation of production chains. The demand for posting is mostly driven by labour and/or skills shortages in the host market. Companies that are posting their workers abroad see in it a means to enter new markets while relying on their experienced workers.



- From workers' perspective, posting represents an opportunity to gain experience and learning, thereby contributing to better career and salary prospects throughout their career. In this sense, posting shares the positive features of other forms of international worker mobility.
- For BUSINESSEUROPE, ensuring a better enforcement of the posting of workers directive in practice requires to:

At national level

1. Ensure that the directive is correctly implemented at national level

The fact that several Member States apply the entire national labour law framework to posted workers does not respect the spirit of the posting of workers directive. Action in this domain should be taken by Member States in accordance with their national industrial relations systems. The Commission should take the required action to ensure that the spirit of the directive is respected at national level.

2. Remedy situations in which applicable rules are not observed by some employers

Action in this domain is essential in order to ensure a climate of fair competition between national and foreign companies. This is the main responsibility of Member States in accordance with their national judicial and administrative practices.

At European level

3. Improve administrative cooperation between the Member States

Access to information on the terms of employment that must be observed with respect to posted workers is the best way to ensure compliance with the directive in practice. Therefore, BUSINESSEUROPE welcomed the Council's decision of March 2011 to start a pilot project on an electronic information exchange system on posting of workers.

Moreover, we believe that an EU regulation focusing on administrative cooperation based on article 197 of the Lisbon Treaty could be examined more closely to assess its effectiveness in allowing better company and worker access to information on the terms of employment that must be observed with respect to posted workers in all EU Member States.

- Adopting additional European measures imposing new burdens on companies with respect to their posted workers in the country of origin or in the host country should be avoided.



- In particular, BUSINESSEUROPE strongly opposes the proposal to consider establishing an EU system of joint and several liability as a means to ensure compliance with the posting of workers directive in subcontracting chains.
- We also have strong doubts about the proposal to define in the posting proposal what constitutes a “temporary” posting. As the ECJ case law on service provision testifies, a reasonable definition of “temporary” depends on the specific circumstances of each cross-border service provision situation.
- Finally, considering that posting is a very small phenomenon in quantitative terms at EU level and that it is limited to a number of sectors and countries, a EU-wide system of notification of postings does not seem to be the appropriate way forward.

Conclusion

- BUSINESSEUROPE is willing to engage in the upcoming legislative debate on the Monti II regulation and on the posting proposal with a constructive mindset.
- A Monti II regulation can be helpful if it aims, like in 1998, to set a procedure enabling the Commission and the Member State in question to remove unjustified obstacles to the freedom to provide services where they occur.
- With respect to the right to strike, a strike is always regrettable. We should focus on alternative ways of conflict resolution before a strike occurs.
- When a strike cannot be avoided, the Monti II regulation should recognise that obstacles to the freedom to provide services which derive from a disproportionate use of the right to take collective action by trade unions are forbidden under EU law.
- In line with the Treaty, the concept of “proportionality” should be defined at national level in full respect of the diversity of industrial relations systems present in Europe.
- Finally, an EU regulation focusing on administrative cooperation based on article 197 of the Lisbon Treaty could be examined more closely to assess its effectiveness in allowing better company and worker access to information on the terms of employment that must be observed with respect to posted workers in all EU Member States.
- Thank you for your attention.
