



*Committee on Legal Affairs
The Chair*

17.6.2015

Mr Thomas Händel
Chair
Committee on Employment and Social Affairs
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC (COM(2013)0798 – C7–0409/2013 – 2013/0390(COD))

Dear Mr Chair,

By letter of 20 May 2015, the Committee on Employment and Social Affairs asked the Committee on Legal Affairs, pursuant to Rule 39(2) of the Rules of Procedure, to provide an opinion on the appropriateness of the legal basis for the above-mentioned proposal.

The initial legal basis proposed by the Commission¹ was Article 153(2) of the Treaty on the Functioning of the European Union (TFEU), which relates to the adoption of measures by the European Parliament and the Council in order to promote employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion in the Member States.

The final compromise text agreed between the institutions purports to modify the legal basis of the proposal, with the aim of specifying it, to Article 153(2)(b) TFEU, which relates to the adoption of minimum requirements for gradual implementation by means of directives in accordance with the ordinary legislative procedure, in conjunction with Article 153(1)(b) and (e) TFEU regarding Union support and completion of Member States' activities in the fields of working conditions and of the information and consultation of workers.

¹ Proposal for a directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC (COM(2013)0798 - 2013/0390(COD)).

I - Background

The proposal aims at improving the level of protection of the rights guaranteed under the EU Charter of Fundamental Rights in the area of EU labour law and to ensure a level playing field at EU level.

The EU labour law directives generally apply to all sectors of activity and all categories of workers. However, seafarers are or can be excluded from the scope of five directives,¹ without any express justification. As a result, depending on the situation at national level, these exclusions could have negative repercussions on certain rights guaranteed under the Charter, namely the right to information and consultation within the undertaking (Article 27) and the right to fair and just working conditions (Article 31).

Currently, there is considerable divergence in the national approaches to the possibility to exclude seafarers from the scope of application of the above five directives. Consequently, certain companies are exempted from certain information and consultation obligations which are mandatory for competing companies based in other Member States.

The proposal amends the five Directives by introducing an unconditional right to information and consultation of seagoing workers in order to improve corporate governance and reduce the negative consequences of sudden restructuring.

According to the Commission proposal, the type and sectoral nature of the amendments in conjunction with the principle of procedural economy, suggest that the five Directives should be amended by means of a single Directive.

II - Relevant Treaty Articles

The following Article of the Treaty on the Functioning of the European Union, under Title X on 'Social Policy' of Part Three of the TFEU, entitled Union Policies and Internal Actions, is presented as the legal basis in the Commission proposal:

Article 153

(ex Article 137 TEC)

1. [...]

¹ Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version), OJ L 283, 28.10.2008, p. 36; Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), OJ L 122, 16.5.2009, p. 28; Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002, p. 29; Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16; Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16.

2. *To this end, the European Parliament and the Council:*

(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

III - The proposed legal basis

The following modification to the legal basis of the proposal, with the aim of specifying it, features in the agreement reached with the Council (emphasis added):

Article 153

(ex Article 137 TEC)

2. *To this end, the European Parliament and the Council:*

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

Together with Article **153(1)(b) and (e)** TFEU:

1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

(a) ...

(b) working conditions;

[...]

(e) the information and consultation of workers;

Article 151 TFEU has the following wording (emphasis added):

Article 151

(ex Article 136 TEC)

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

IV - Case-Law

It is settled case-law of the Court of Justice that "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure".¹ The choice of an incorrect legal basis may therefore justify the annulment of the act in question.

¹ Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission v. Council* [2007] E.C.R. I-9097; Case C-411/06 *Commission v. Parliament and Council*

Article 153 TFEU (ex Article 137 TEC) constitutes the legal basis in the Treaty for the approximation of national legislation in the field of social policy.¹ Paragraphs (1) and (2) confer on the Union the power to support and complement the activities of the Member States with a view to achieving the objectives of Article 151 TFEU (ex Article 136 TEC).²

With regard to Article 153(1) TFEU, it is settled case-law that the term ‘working conditions’ may encompass pay and pension matters, to the extent that this does not amount to fixing a Union minimum wage.³

Moreover, Article 153(2)(b) TFEU "indeed means that the particular economic interests of small and medium-sized undertakings are to be taken into account, but does not preclude those undertakings from being the subject of binding measures."⁴

V - Aim and Content of the final compromise

Recital 13 in the final compromise recalls that "[t]his Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, notably the right to information and consultation within the undertaking and the right to fair and just working conditions. This Directive has to be implemented in accordance with those rights and principles."

What is more, recital 4 confirms that "[t]he existence and/or possibility of introducing exclusions may prevent or limit the possibility for seagoing workers to fully enjoy the right to information and consultation and the right to fair and just working conditions."

Recital 9 provides that "having regard to the technological developments of recent years notably as regards communications technology, the information and consultation requirements should be updated and applied in the most appropriate manner, including the use of these new technologies for remote communication and by enhancing the availability of Internet and ensuring reasonable use on board, in order to improve the implementation of this Directive."

Finally, recital 11 states explicitly that "[t]his Directive contributes to achieving the objectives under Article 151 TFEU", whereas recital 13 unequivocally states that the objective of the Directive is "the improvement of working conditions of seafarers and their information and consultation".

[2009] ECR I-7585.

¹ See Case C-343/08 *European Commission v Czech Republic* [2010] ECR I-00275, para 67 with regard to the predecessor of Article 153, namely Article 137 TEC; See Opinion 2/91 *Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993] ECR I-01061, para 17.

² See Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA* [2006] ECR I-06467, para 4 with regards to the predecessor of Article 153, namely Article 137 TEC.

³ Case C-268/06 *Impact v Minister for Agriculture and Food and Others* [2008] ECR I-02483, para 35 with regard to the predecessor of Article 153(1)(b), namely Article 137(1) TEC.

⁴ Joined Cases C-184/02 and C-223/02 *Spain and Finland v European Parliament and Council* [2004] ECR I-07789, para 72 with regard to the predecessor of Article 153, namely Article 137(2) TEC.

In order to pursue this objective, the Directive amends five labour law Directives by suppressing "the existence and/or possibility of introducing exclusions [insofar as it] is not justified on objective grounds and seafarers are not treated equally" (recital 12 of the proposal - now in essence found in recitals 4 and 15 of the final compromise).

Specifically, the proposed Directive will suppress the possibility of excluding share-fishermen from the scope of the Insolvency Directive (Article 1); navy crews from the scope of the European Works Council Directive (Article 2); crews of seagoing vessels from the scope of the Collective Redundancies Directive (Article 4); and seagoing vessels situated within the territorial scope of the Treaty, from the scope of application of the Transfer of Undertakings Directive (Article 5).

It will also introduce a possibility to derogate from the provisions on the "cooling-off" period "when the envisaged collective redundancy is carried out as a consequence of a transfer, having as its object exclusively one vessel or more vessels, or when the employer only operates one vessel", in the case of the Transfer of Undertakings Directive (Article 4).

VI - Analysis and determination of the appropriate legal basis

Having regard to the fact that the aim and content of the proposal is to support and complement by means of a Directive Member States' activities with regards to (1) seafarers' working conditions and (2) seafarers' right to information and consultation with a view to achieving the social policy objectives of Article 151 TFEU, Article 153(2) TFEU constitutes the appropriate legal basis.

The proposed directive purports to amend five Directives in force with the aim of improving seafarers' working conditions and their information and consultation rights, suppressing for that matter the existence or possibility of introducing exclusions for seagoing workers from their scope of application of the five Directives.

Directive 2008/94/EC, the "Employer Insolvency Directive", is based on Article 137(2) TEC, which now corresponds to Article 153(2)(b) TFEU, and is aimed at improving "the living and working conditions of workers in the Community",¹ currently covered by Article 153(1)(b) TFEU.

Directive 2009/38/EC, the "European Works Council Directive", is based on Article 137 TEC (now 153 TFEU) and is "intended to support and complement the action taken by Member States in the field of information and consultation of employees",² currently guaranteed by Article 153(1)(e) TFEU.

Directive 2002/14/EC, the "Information and Consultation Directive" is based on Article 137(2) TEC, (now 153(2)(b) TFEU) and is intended "to promote and enhance information and consultation on the situation and likely development of employment within the undertaking and, where the employer's evaluation suggests that employment within the undertaking may be under threat, the possible anticipatory measures envisaged, in particular in terms of employee training and skill development, with a view to offsetting the negative developments

¹ Recital 2.

² Recital 9.

or their consequences and increasing the employability and adaptability of the employees likely to be affected",¹ which corresponds to Article 153(1)(e) TFEU.

Directive 98/59/EC, the "Collective Redundancies Directive" is based on the general competence for the approximation of laws, namely Article 100 TEC (now 115 TFEU) requiring unanimity in the Council. Recital 6 of the Directive recalls that "Whereas the Community Charter of the fundamental social rights of workers, adopted at the European Council meeting held in Strasbourg on 9 December 1989 by the Heads of State or Government of 11 Member States, states, inter alia, in point 7, first paragraph, first sentence, and second paragraph; in point 17, first paragraph; and in point 18, third indent:

*'7. The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community (. . .).
The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies.
(. . .)
17. Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States.
(. . .)
18. Such information, consultation and participation must be implemented in due time, particularly in the following cases:
(- . . .)
(- . . .)
- in cases of collective redundancy procedures;(- . . .)';*

The Treaty of Amsterdam amended the EC Treaty by introducing Title XI (now X) on social policy, thus establishing a new specific legal basis for measures in the social field. As a result, Article 153(2)(b) TFEU now constitutes the specific and appropriate basis for legal instruments aimed at improving working conditions and information and consultation rights. As a result, a Directive amending Directive 98/59/EC should use this Article as its basis,² in conjunction with Article 153(1)(b) and (e) TFEU referring to the working conditions and the information and consultation of workers respectively.

Directive 2001/23/EC, the "Transfer of Undertakings Directive", has codified Directive Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. According to Recital 6 of the codifying Directive "In 1977 the Council adopted Directive 77/187/EEC to promote the harmonisation of the relevant national laws ensuring the safeguarding of the rights of employees and requiring transferors and transferees to inform and consult employees' representatives in good time" and has thus been based on Article 94 TEC (ex Article 100), which is now effectively Article 115 TFEU. As a result, with the specific legal basis for social policy measures introduced after the Amsterdam Treaty, Article 153(2)(b) TFEU is the

¹ Recital 8.

² See Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [1996] ECR- I-05755, para 12.

appropriate legal basis for the amendment of Directive 2001/23/EC,¹ in conjunction with Article 153(1)(e) TFEU, regarding the information and consultation of workers.

VII - Conclusion and recommendation

In light of the foregoing analysis, since all five Directives proposed to be amended lie in the field of social policy and are aimed at supporting and complementing Member States' activities with regard to working conditions or the information and consultation of workers, Article 153(2)(b) together with Article 153(1)(b) and (e) TFEU constitutes the appropriate legal basis for the proposed Directive on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC.

The Committee on Legal Affairs considered the above question at its meeting of 16 June 2015. At this meeting, it accordingly decided unanimously,² to recommend to the Committee on Employment and Social Affairs to include point (b) of Article 153(2) TFEU in conjunction with Article 153(1)(b) and (e) TFEU in the legal basis for the proposed Directive on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC.

Yours sincerely,

Pavel Svoboda

¹ Ibid.

² The following were present for the final vote: Pavel Svoboda (Chair), Lidia Joanna Geringer de Oedenberg (Vice-Chair), Jean-Marie Cavada (Vice-Chair), Axel Voss (Vice-Chair), Mady Delvaux (Vice-Chair), Max Andersson, Joëlle Bergeron, Marie-Christine Boutonnet, Therese Comodini Cachia, Pascal Durand, Angel Dzhambazki, Rosa Estaràs Ferragut, Laura Ferrara, Enrico Gasbarra, Jytte Guteland, Mary Honeyball, Kostas Chrysogonos, Sajjad Karim, Dietmar Köster, Gilles Lebreton, Angelika Niebler, Jiří Maštálka, Emil Radev, Julia Reda, Evelyn Regner, József Szájer, Cecilia Wikström.