

Safeguarding the Right to Strike against Emergency Measures in the Single Market

Position adopted at the Executive Committee meeting of 27-28 October

ETUC key messages

- The EU Single Market Emergency Instrument (SMEI) must respect fundamental trade union rights and the autonomy of the social partners
- A strike must never be considered as a crisis or be restricted by emergency measures whether under the SMEI or otherwise
- Stronger safeguards for social, workers' and trade union rights must be included in the SMEI, including a 'Monti clause' to protect the right to strike

Trade unions are part of the solution to a crisis

In times of crisis, human rights are not only put to the test, but their protection is of utmost importance to uphold the respect for fundamental values, the rule of law and democracy. The respect for human rights is fundamental to the successful management of any crisis. It can never be used as a pretext to dismantle human rights standards or justify their violation, as repeatedly recalled by the United Nations, the International Labour Organisation and the Council of Europe.¹ This holds true for the protection of fundamental rights of individuals as well as the respect for collective rights, including fundamental trade union rights and notably the right to strike.

The COVID-19 pandemic and the cost of living crisis triggered by the war in Ukraine demonstrate the importance of collective agreements to provide for a resilient economy mindful for workers' and citizens' needs during such crises. At the same time, the economic crisis almost a decade ago remains a painful reminder of how trade union rights in several Member States were dismantled by neoliberal austerity measures, disregarding fundamental labour rights and the autonomy of the social partners. Similarly, infamous judgements from the EU Court of Justice, such as the *Viking* and *Laval* rulings from 2007, also bear witness to the negative consequences of an unconditional promotion of economic market freedoms at the expense of social, workers' and trade union rights.²

Be it in times of crisis or normality, the right of workers to collectively defend themselves against unfair conditions and abuses of power must always be respected. Workers will be at the frontline in tackling any given crisis, and their engagement and trust will be key to build and rebuild resilient societies.

¹ [ETUC COVID Watch Briefing Note on Trade Union Rights](#) (2020)

² CJEU judgements in cases [C-438/05 Viking](#) (11 December 2007) and [C-341/05 Laval](#) (18 December 2007)

Therefore, trade unions must not be considered the problem but rather be a key part of the solution to successfully manage the emergencies of tomorrow. Social dialogue and social partner involvement are key in order to develop effective crises response and implement joint solutions together. Collective bargaining is the primary instrument for putting workers' right into practice and preserving the social fabric, even more so when it comes to managing challenges and change.

In this context, the right to strike is indissociable from the trade union prerogatives of negotiating, concluding and enforcing collective agreements. As such, these elements are all fundamental aspects of the exercise of the right to collective bargaining and action, and inherent to the effective enjoyment of freedom of association and assembly.

Crisis measures must respect the autonomy of social partners

Drawing on the experiences and lessons learnt from the COVID-19 crisis and the war in Ukraine, the European Commission on 19 September 2022 put forward a proposal for a Regulation for a Single Market Emergency Instrument (SMEI).³ The proposal sets out a crisis governance framework with the aim to preserve the free movement of goods, services and persons as well as the availability of essential goods and services in the future emergencies affecting the EU single market.

While the proposal recognises the role the single market, including the free movement of workers, can play in mitigating shocks and building strategic autonomy within the EU, it also raises important concerns regarding the respect for fundamental trade union rights and the autonomy of the social partners.⁴ This respect necessitates that the social partners be consulted on relevant measures with an impact on labour markets and the free movement of workers. The smooth implementation of such measures also requires social partners to be duly informed and involved in a timely manner. The primary aim of any such measure should always be the protection rather than the restriction of rights. As such, any emergency measure triggered under the SMEI must comply with fundamental rights.

As part of the SMEI proposal, the Commission also proposes to repeal the 2679/98 Regulation on the functioning of the internal market in relation to the free movement of goods among the Member States.⁵ This so-called 'Strawberry' or 'Monti I' Regulation was adopted in 1998 as a result of obstacles perceived by the Commission in relation to protests of farmers affecting the cross-border transport of agricultural products.⁶ In fact, the Commission's evaluation of the 'Strawberry Regulation' indicates that 34% of all obstacles reported in the period 2007-2019 were the cause of demonstrations or strikes.⁷

Against this background, the Commission's recent SMEI proposal once again raises concerns in relation to the right to strike. In particular, the right to collective bargaining and action have not at all been considered in the Commission's impact assessment, neither in relation to the SMEI proposal nor the proposed repeal of the 'Strawberry Regulation'.⁸ Regrettably, the fundamental rights analysis contained in the impact assessment is almost non-existent and

³ Commission proposal [COM\(2022\)459](#) for a regulation of the European Parliament and of the Council establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98 (19 September 2022)

⁴ [ETUC Position for an EU open strategic autonomy with a strong social agenda](#), adopted at the Executive Committee of 22 June 2022

⁵ Council Regulation ([EC No 2679/98](#)) of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States

⁶ [Eurofound industrial relations dictionary article on the Monti Regulation](#) (2016)

⁷ [Commission evaluation of Regulation \(EC\) 2679/98](#) (2019)

⁸ [Commission impact assessment report accompanying the proposal for a Single Market Emergency Instrument](#) (2022)

only considers the perspective of economic operators in relation to data protection, privacy and the freedom to conduct a business. Apart from the freedom of movement, the impacts on social, workers' and trade union rights are completely missing from the assessment.

A strike is not a crisis

The ETUC has raised concerns about the SMEI proposal in relation to the respect for trade union rights in general, and the right to strike in particular.⁹ Any lawful collective action carried out by trade unions cannot in any way be considered as a crisis under the SMEI or be targeted by a single market emergency measure. All crisis responses need to comply with fundamental rights and the rule of law, ensuring full respect for fundamental principles and rights at work in accordance with international labour standards.¹⁰

To make the SMEI futureproof, the Commission proposes a definition stating that a “*crisis*” means an exceptional unexpected and sudden, natural or man-made event of extraordinary nature and scale that takes place inside or outside of the Union”. Admittedly, it is difficult to predict the nature of any future crisis through exhaustive lists. However, such an open definition must be coupled with clear safeguards, in particular when it comes to the right to strike.

A strike cannot be considered as an exceptional, unexpected and sudden event for the purposes of the SMEI. As notably confirmed by the EU Court of Justice in its *Airhelp* ruling from 2021, a lawful strike action must not be considered as such an extraordinary circumstance.¹¹ The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices alone.

Likewise, any measure or action undertaken by Member States or economic operators under the SMEI must not be used to circumvent or undermine directly or indirectly a collective action undertaken by workers and trade unions to defend their economic and social interests through the exercise of their fundamental rights. The right or freedom to strike is something all Member States must both permit and make possible in accordance with their international and European human rights commitments under ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, the Council of Europe European Convention on Human Rights, and the European Social Charter. In this context, the ETUC recalls that the EU has still not fulfilled its own obligation under the Lisbon Treaty to accede to the European Convention on Human Rights. Similarly, EU accession to the European Social Charter would also further safeguard the right to strike.

Crises preparedness and response under EU law must never be used as means to undermine or set aside the fundamental right to collective bargaining and action. Article 153(5) of the Treaty on the Functioning of the European Union explicitly excludes the right to strike from the legislative competences of the EU. Article 28 of the Charter of Fundamental Rights of the European Union explicitly guarantees the right to collective bargaining and action, including workers' right to strike to defend their interests.

Safeguarding the right to strike against emergency measures

The ETUC has raised its concerns to the Commission about the lack of fundamental rights safeguards in its SMEI proposal.¹² In this context, the ETUC also recalls the highly

⁹ See ETUC press releases '[Right to strike at risk in new EU law](#)' (12 September 2022) and '[SMEI: Right to strike still not protected](#)' (19 September 2022)

¹⁰ [ETUC COVID Watch Briefing Note on Trade Union Rights](#) (2020)

¹¹ CJEU judgement in case [C-28/20 Airhelp](#) (23 March 2021).

¹² [ETUC letter 'SMEI must respect fundamental trade union rights'](#) on 6 September 2022 to the European Commissioners for the Internal Market and for Jobs and Social Rights

controversial 2012 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.¹³ This proposal for a so-called ‘Monti II Regulation’ ultimately had to be withdrawn by the Commission, and the ETUC will continue to oppose any similar attempts under EU law to interfere with the right to strike.

For the next steps of the legislative procedure regarding the SMEI, the ETUC is therefore calling on the European Parliament and Council to strengthen the fundamental rights safeguards in the instrument, in particular when it comes social, workers’ and trade union rights. The Commission’s attempt to accommodate trade union concerns by including a reference to Article 28 of the Charter of Fundamental Rights in the non-binding recitals of the proposal is not enough. The assurances given by the Commission at the press conference that the SMEI “*does not interfere whatsoever*” with the right to strike needs to be reflected in the legally binding articles of the Regulation.

The necessity to enshrine such a legal safeguard in this emergency instrument appears even more important in the light of the proposed repeal of the ‘Strawberry Regulation’, which contrary to the SMEI proposal contains a so-called ‘Monti clause’, explicitly safeguarding the right to strike. As set out in its Article 2: “*This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.*”

As affirmed by the ETUC Congress in Vienna in 2019: “*The jurisdiction of the European Court of Justice continues too often to foster negative internal market integration by giving precedence to the freedom of services, establishment and capital over national social and labour law protecting workers’ rights. It is of utmost importance to introduce a Social Progress Protocol. At the same time the ETUC will push for the inclusion of a ‘Monti clause’ in all relevant new internal market legislative initiatives, to protect the right to collective bargaining and collective action.*”¹⁴

A ‘Monti clause’ is a well-established concept in existing EU single market instruments, as a means to safeguard the right to negotiate, conclude and enforce collective agreements, and to take collective action in accordance with national law and practice.¹⁵ I.e. there is no reason not to include a similar clause in the SMEI, ensuring it respects and protects the fundamental values and objectives of the EU social market economy in the event of a crisis. Safeguarding the proper functioning of the single market in an emergency must never come at the expense of fundamental social, workers’ and trade union rights.

¹³ Commission proposal [COM/2012/0130](#) 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 (21 March 2012)

¹⁴ [ETUC Action Programme 2019-2023](#), adopted at the 14th Congress in Vienna on 21-24 May 2019

¹⁵ See e.g. Article 1(7) of [Directive 2006/123/EC on services in the internal market](#); Article 1(3) of [Regulation \(EU\) 2019/1149 establishing a European Labour Authority](#); Article -1a of [Directive \(EU\) 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services](#).