

The minimum wage Directive proposal and the promotion of collective bargaining: the voice of SGI- Europe

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1. General remarks. 2. SGI Europe proposal for amendments. 3. The Directive impact on the collective bargaining systems. 4. The promotion of collective bargaining. 5. Other SGI amendment proposals. 6. Final Considerations.

Abstract

The contribution presents the points of view of SGI Europe, as one of the cross-sectoral European Employer Social Partners. In particular, it focuses on SGI Europe's position paper, highlighting some of the crucial points on the Directive linked to collective bargaining promotion and the role of Social Partners. The article also analyses SGI Europe proposals for amendments regarding some of the Directive provisions in the text presented by the Commission.

Keyword: Position paper; Legal basis; Collective bargaining promotion; Social Partner role; Social Partner and Member State autonomy.

1. General remarks.

The Directive proposal on adequate minimum wages has resulted in a complex debate, also among the social partners, both at the national and European level.¹

As European Social Partners, SGI Europe agrees with the overall objectives of achieving adequate minimum wages across the EU, including making work pay, fighting poverty and strengthening the role of social partners and social dialogue, in line with national industrial relation systems.

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¹ COM(2020) 682 final

The European Semester in particular has contributed and is still contributing to upward convergence and better coordination of national policies in these important areas. SGI Europe, when responding to the first and second stage Social Partners' consultation, clearly expressed a preference for a Social Partner negotiated solution to be implemented via a council recommendation. A recommendation is a more flexible instrument, that allows to adapt the solutions to the different national legislations and to different labour market models, fully respecting the autonomy and role of the Social Partners and collective bargaining.

The Directive proposal, as a binding legislative act, touching on many issues related to wage setting, has given rise to many concerns on the Employer's side. The first and key question being the viability of the legal base. However, there are still aspects, that are in need of further clarification as, for example, what the Directive would mean for other legislative acts to come and also how the ECJ will interpret the Directive in the future. Adopting the Directive with such a legal basis would shift the respective national and European competences.

On this point, SGI Europe still has questions regarding the legal base identified in the proposal, that the Commission has founded on art. 153.1b) of the Treaty on the Functioning of the European Union (TFEU). This article establishes that the Union shall support and complement the activities of the Member States in the issues linked to working conditions, but sub para 5 clarifies that the Union's competence is excluded in the case of "pay", that is reserved to Member State's responsibility.

However, the provisions in the proposal are de facto a mix between minimum wage setting – individual labour rights, e.g. in art. 11, and collective labour law/ rights, e.g. in articles 3 and 4 of the proposal. For issues in art. 153.1.f) TFEU about representation and collective defence of the interests of workers and employers, including co-determination, unanimity is required according to art. 153.2b) point 3 TFEU and not a qualified majority as for working conditions. The latter should have been used as regards the provisions in the proposal on promotion of collective bargaining.

What does the alleged legal base mean in relation to art. 153.5 TFEU? What implications could the Directive on minimum wages, seen as working conditions, in practice have for future proposals on other issues in art.153.5 TFEU, not only for wages but also, e.g. regarding the exemption from EU competence of the right to strike and the right of association? Could the right to strike or right of association in the future be interpreted as working conditions in art. 153, but not as an exemption according to art. 153.5? Having in mind the Laval case C-341/05 and the withdrawal of the Monti II proposal for a regulation, these are important questions.

SGI Europe is concerned that it may not be possible to keep the systems of the six Member States, whose wage setting systems are based on collective agreements, out of the rules on adequate levels of statutory minimum wage if the matter is raised before the Court of Justice of the European Union (CJEU).

It is uncertain whether the derogation, in art. 1.3 of the Directive, will be compatible with art. 31(1) of the EU Charter on Fundamental Rights (referred to in the Recital 2 of the Directive proposal) which gives "every worker" the right to working conditions which respect their dignity.

2. SGI Europe proposal for amendments.

All SGI Europe members have agreed to commit to an ongoing dialogue with the EU institutions on how to address the challenges that the Commission underlined in the proposal. For this reason, SGI Europe formally expressed its opinions on the Directive and actively contributed to the Commission's initiative with a specific position paper and detailed amendments to the proposal.

In this document, SGI Europe analysed several of the key Directive's provisions, putting forward amendments to the legislative text presented by the Commission whilst providing explanations supporting its proposals.²

The objective was to point out the need to respect Social Partner and Member State's autonomy on the wage setting systems and to stress the competence of the Social Partners and the role of collective bargaining. With this document, SGI Europe intends to provide a concrete contribution to overcoming the sensitive points of the Directive, proposing to promote debate at the European institutional level and advocate for changes in the Directive.

Therefore, the present contribution focuses on some of the key points of the SGI Europe Position Paper, especially regarding the promotion of collective bargaining, and highlights some amendment proposals for some articles of the Directive.

To coordinate the different parts of the Directive, the SGI proposal also involves amending, with similar revisions, the Recitals related to the relevant provisions.

This article does not present all of our amendments. Hence, we refer to our Position Paper for the full understanding of our proposals.

3. The Directive impact on the collective bargaining systems.

In the Directive Proposal, collective bargaining is considered as an instrument that plays a key role in ensuring fair wages and better working conditions. The countries with high collective bargaining coverage usually have a smaller percentage of low-wage workers, higher minimum wages in relation to the median wage, less wage inequality and higher overall wage levels.

The Directive imposes new obligations on Member States and Social Partners that must be very carefully considered, in order not to interfere with the national industrial relation systems and with Social Partner autonomy.

The Directive requires Member States to increase the "collective bargaining coverage", through compulsory measures, that include promoting the "*building and strengthening of the capacity of the social partners to engage in collective bargaining on wage setting at sector or cross-industry level*", as well as promoting "*constructive, meaningful and informed negotiations on wages*".

Moreover, art. 4(2) requires Member States with a collective bargaining coverage rate below 70% to provide for a framework and an action plan to enable and promote collective bargaining.

The impact of these provisions on national legislations is worrying for some Member States. The provisions can indeed be considered as an interference by the Commission in

² https://sgieurope.org/files/SGIEurope_Amendments%20to%20minimum%20wages.pdf

their competence in defining the national collective agreement system, especially for the Member States that, even if not reaching the 70% threshold, have a consolidated social dialogue system.

One problem is that the Directive does not seem to sufficiently take into account that, in the European Union, wage setting systems are very different among Member States. Whereas some countries have a well-functioning collective bargaining system and a strong industrial relations model, other countries have weaker collective bargaining systems and social dialogue structures.

Instead, the provisions of the proposal impose obligations on all Member States. It follows that in order, to achieve the above-mentioned objectives, Member States should adopt a specific regulation on the collective bargaining system. This would be incompatible with the national tradition of several countries that recognise the strong role of the Social Partners.

Many countries ground their collective bargaining system on full Social Partner autonomy, as they have the responsibility to set wages and working conditions and decide how and when they participate in collective bargaining and to which extent. Any intervention by the national authorities could be seen as a prejudice to their independence and entail negative consequences for the balance of industrial relations.

In this context, another sensitive issue is the compliance of the provisions of the Directive with the freedom of association, which is a fundamental right and is guaranteed by constitutional law in most Member States, as well as by other international law instruments.³

Hence, it is essential that the social dialogue practices must be adapted according to the different national backgrounds, safeguarding Member State and Social Partner autonomy, as a binding regulation at European level must support and not harm the consolidated national collective bargaining systems.

4. The promotion of collective bargaining.

SGI Europe supports the positive role of collective bargaining in improving the fairness of wages and better working conditions. It is important to strengthen the existing Social Dialogue structures and foster the setting-up of new ones.

In this broader perspective, SGI Europe put forward specific amendments to the Directive proposal, aiming at making the references to collective bargaining more adequate, making sure they do not compromise the Social Partner role and autonomy.

To carry out the above, it has been important to try to analyse which are the specific provisions that, in practice, may affect social dialogue, Social Partner autonomy and incentives to negotiate and conclude collective agreements, understanding how these provisions could be used to foster collective bargaining.

SGI Europe's approach was focused on three points. These are:

- to widen and emphasise the importance of collective bargaining;

³ See e.g. article 20 of the Universal Declaration of Human Rights (UDHR); article 8 of the International Covenant on Economic, Social and Cultural Rights; Freedom of Association and Protection of the Right to Organize Convention (ILO) 1948 (No. 87) ect..

- to respect Member State autonomy and national traditions;
- to safeguard the role of Social Partners.

Hence, our amendment proposals regarding art. 4 concern collective bargaining promotion.

For the first amendment, SGI Europe has considered it crucial to give full competence to the Social Partners for collective bargaining.

Under the Title, Promotion of collective bargaining on wage setting, and in para 1 a) and b), the Directive proposal mentions collective bargaining with reference to wage setting.

Our proposal is to recognise the concrete role of collective bargaining and negotiations, by deleting the words “on wage setting” in the provisions. Thus, the new version of art.4 involves all aspects of collective bargaining.

The second amendment is aimed at finding a solution to respond to the need to respect the national backgrounds in promoting collective bargaining. This need is linked to the existence of different social dialogue systems in the Member States, in order to avoid transposition models creating problems concerning compliance with the national economic and social context.

On this point, we suggest to insert the wording “*in accordance with national traditions*” in para. 1 of art. 4.

Similarly, as in point a), we suggest to add “*and promote their joint actions*” directly after the wording on “strengthening of the capacity of the social partners”

Furthermore, SGI Europe would also like to recall that there is a difference between *promoting* collective bargaining coverage, as stated in the title of the article, and *increasing* collective bargaining coverage. The term *promoting* should be retained in the article wording. It should also be underlined that the Member States have an important role to play in encouraging and assisting Social Partners capacity building whereby collective bargaining may be facilitated, rather than undergoing an EU direct intervention. Collective bargaining cannot be imposed, but should be promoted and practiced by the Social Partners.

In the second paragraph of art. 4, we suggest a complete revision in order to stress the need for favourable frameworks and recognition of the Social Partners and their role. We think that the original text contains provisions that could interfere with Member State and Social Partner’s autonomy.

In the light of the above, our main amendment proposal is to delete the reference to the 70% threshold regarding collective bargaining coverage.

SGI Europe highlights that setting a target of 70% is not recommendable. Coverage is not the only indicator for measuring the strength of social dialogue, and should be removed and replaced by having a favourable framework in place in the Member States. Therefore, SGI Europe advocates for abandoning the numerical target proposal and creating and developing enabling conditions and a supportive framework.

Moreover, it must be considered that to evaluate the above percentage of 70% for all Member States, would be very difficult, as social dialogue structures differ from one Member State to another. In some cases, unions and employers negotiate at national and sectoral levels. In other countries, such as Malta and Bulgaria, collective bargaining occurs almost exclusively at the enterprise level. This affects the employee collective bargaining coverage level.

In addition, union and employer organisation membership and collective bargaining coverage cannot be imposed. In some Member States – e.g., Malta, where trade union membership is in the region of 55% of the labour force – the unions are pushing for mandatory membership for all employees. This is being strongly opposed by employer bodies, as membership in a union, including an employer association, should be an individual choice by employee or company.

Another point deals with the consideration that the collective representation is a choice by employees and employers as provided by the Freedom of Association. It is not something which can be achieved through coercion or ‘action plans’. Each Member State has its own industrial relations culture which is also reflected in the extent of trade union and employer organisation membership in different countries, ranging in more than 70% in some Nordic countries to less than 15% in France.

Other variations in union membership and, hence, collective bargaining, in different Member States, is partly attributable to the different roles of trade unions. For example, in some countries with a high trade union density, unions use the Ghent system, where unions are responsible for paying unemployment benefits.

For all these reasons, in our proposal for amending point 2 in art.4, SGI Europe has eliminated the 70% threshold, changing the procedures and ways to promote collective bargaining, by replacing the obligations in the text of the Commission, with the possibilities for Member States to adopt softer instruments to guide and develop the collective bargaining process.

Our suggestion for a new text of point 2 is that:

“Member States may in addition have a framework supporting the recognition of sectoral and cross industry social partners and their role” and as well they “may have a framework of enabling conditions for collective bargaining, either by law after consultation of the social partners or by agreement with them. This framework shall include capacity building measures and joint actions.

Social dialogue’s development shall be monitored by the European semester process.

All the above Member States’ initiatives shall respect the fundamental freedom of workers and employees and the autonomy of social partners.”

Our rationale for the text in the last two paragraphs above is, instead of the notification to the Commission as proposed in the Directive, the Member States collective bargaining development should be monitored by the European semester process.

We think that the European semester, in its monitoring of Member State economic conditions, could promote the measure to set up a Social Dialogue system that matches their economic, social and cultural context.

Additionally, the European semester should offer a space to facilitate the exchanges of ideas or practices, where the developments in the wage-setting systems, Social Partner involvement and adequacy could be discussed and checked.

The last amendment of art. 4 includes the addition of another statement to point out that all the above initiatives adopted by the Member States must guarantee the respect of the fundamental freedom of workers and Social Partner autonomy.

5. Other SGI amendment proposals.

Where the strengthening Social Partner autonomy is concerned, SGI Europe has proposed some other amendments with reference to art. 1.

Art. 1 presents the objectives of the Directive, establishing a framework for setting an adequate minimum wage level to improve working and living conditions in the EU at national level. In this context, SGI Europe believes that it is important to underline the principles of the respect for Member State autonomy and Social Partner competences. Indeed, even if these principles are emphasised by the Commission in different parts of the Proposal (Recital 16 or Explanatory Memorandum), they are not explicitly established in the Directive provisions. Therefore, also in the second stage of consultation, SGI Europe highlighted that, in the Directive, there is not enough attention placed on social dialogue and on the Social Partners role in the collective bargaining. The provision by the Commission on this point, mentioned in art. 1, point 1 foresees that *“This Directive shall be without prejudice to the full respect of the autonomy of social partners, as well as their right to negotiate and conclude the collective agreement”*.

In line with SGI Europe’s considerations, we suggest to reword this text with *“This Directive, fully recognising the autonomy and the competence of the Social Partners, shall be without prejudice to the full respect of their right to maintain, negotiate, conclude and enforce collective agreements.”*

We think that to fully reflect the role, work and autonomy of the Social Partners in negotiating collective agreements, the words *maintain, negotiate, conclude* and *enforce* the collective agreements, should be added, using the same wording as in art. 14 of the transparent and predictable working conditions Directive.

In the same logic as above, also in article 5, regarding adequacy addressed only to Member States with a statutory minimum wage, one of SGI Europe’s amendments to this art. is to involve the Social Partners in setting up a consultative body in the Member States. Art. 5, point 5: *“Member states shall promote the establishment of consultative bodies, with the participation of social partners in the Member States, to advise the competent authorities on issues related to statutory minimum wages.”*

Regarding Member State autonomy, another important amendment concerns art. 1, subpar. 3. This provision foresees that the Directive does not impose on Member States, where the wage setting is ensured *“exclusively”*⁴ by collective bargaining, to either introduce a statutory minimum wage or make the collective agreements universally applicable.

The word *“exclusively”* is quite ambiguous, its meaning being unclear. If *“exclusively”* means 100% collective bargaining coverage, this provision cannot be applied, as no single Member State has attained this percentage. Therefore, to achieve the objective of this provision, that is not to impose the obligation on some Member States, *“exclusively”* must be replaced with another term more fitting for the different situations of the Member States. We suggest the word *“primarily”*.

Furthermore, concerning the above amendments, another SGI Europe proposal should be highlighted, namely, art. 3 on *“Definitions”* - the established definitions linked to the Directive content. SGI Europe has proposed to eliminate the whole article, as there was the clear risk that these definitions would affect the respect for Social Partner independence and the right to negotiate and conclude collective agreements, contrary to the wording of the last

⁴ Emphasis added.

paragraph of art. 1 (1) and paragraph 3. SGI Europe believes that national definitions should prevail, as the EU definitions risk interfering with national definitions on these terms. Thus, it is not appropriate to introduce definitions regarding minimum wages, statutory minimum wages, collective bargaining, collective agreements and the coverage of collective bargaining as proposed in art. 3.

The aforementioned proposed European definitions would risk changing the corresponding current national definitions of these concepts, which play an important role in labour law and collective bargaining. Here, for example, collective agreement negotiations and collective agreements are mainly defined at national level. The proposed definitions are unclear, possibly leading to a number of legal issues and disputable. SGI Europe believes that this would not work in practice, having definitions of this in national laws and others in European law. According to the current principles of the primacy of EU law, European definitions would take precedence.

6. Final considerations.

Since the beginning of the process the Social Partners have recognised the strong impact of this legislative initiative on labour market dynamics and on the economic and social context of the Member States.

For this reason, SGI Europe has expressed our willingness to try to provide our contribution to the debate and initiative, while highlighting the importance of fully respecting Member State and Social Partner autonomy and roles and, more in general, the needs and the expectations of both workers and employers.

Therefore, if the Directive proposal becomes a reality, it is very important that it does not compromise the different well-established industrial relation systems and the development of social dialogue.

The consequences of the Directive are a very delicate issue for the co-legislators to handle, to assure that the future legislative text in practice will support the collective bargaining systems, and not harm them.

Therefore, it is also extremely important how the Directive provisions are formulated in the different articles. SGI Europe stands ready to contribute to this work.

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