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Much ado about little: The Commission proposal for a Directive on adequate wages

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Abstract

The European Commission recently presented a proposal for a Directive on the topic of adequate minimum wages. The purpose of the directive is to prompt an upward convergence of national minimum wages, so as to ensure their adequacy in all EU countries. This article aims to analyze the actions included in the draft Directive and evaluate the adequacy of its legal basis, eventually drawing some critical conclusions.

Keyword: Minimum Wage; Statutory Mechanism; Collective Wage bargaining; Article 153.5 TFEU; Directive legal basis.

1. Introduction.

The recent Commission proposal for a Directive on adequate minimum wages in the European Union[1] comes after a long discussion about the desirability of a European instrument aimed at coordinating national wage policies.[2] No concrete step towards a legislative initiative was, however, moved before the Commission's proposal here under consideration.[3] On the contrary, the main concern of the European institutions, expressed

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[1] Proposal for a directive of the European Parliament and of the Council on adequate minimum wages in the European Union, 28.10.2020, COM(2020)682 final.

[2] *See* the overview of the debate on an EU common minimum wage policy Schulten T., *Towards a European Minimum Wage Policy? Fair Wages and Social Europe*, in *European Journal of Industrial Relations*, 2008, 14(4), 421.

[3] As reported by Schulten T., *Contours of a European Minimum Wage Policy*, 2014, Friedrich Ebert Foundation, 3, https://www.epsu.org/sites/default/files/article/files/Contours_of_a_Minimum_Wage_Policy_Schulten.pdf, already the former President of the EU Commission Jean-Claude Junker, once elected, declared the intention

with some insistence in the framework of the European semester, was that of wage moderation, based on the arguments of austerity and internal devaluation.[4] Nevertheless, the Commission seems now distancing itself from those countries which have not paid much attention to the adequacy of minimum wages, most concerned about ensuring cost competitiveness to their companies.[5] And it does so by an initiative that primarily targets the social objectives connected to an upward convergence of minimum wages, such as: reduction of wage inequalities, including the gender pay gap and in-work poverty; enhancement of social cohesion; support for a more inclusive post covid-19 recovery.[6] The social objectives are accompanied by the complementary target of economic progress facilitated by a level playing field, where competition is based on productivity and innovation and not on wage dumping.[7]

The goals pursued by the Commission's proposal find support in a wide range of EU primary law rules: article 3 TEU seeing out the general objective of the development of "highly competitive social market economy, aiming at full employment and social progress", which could be achieved by improving "living and working conditions" (article 151 TFEU); article 31 of the Charter of Fundamental Rights of the European Union, providing a general "right to working conditions which respect [workers] … dignity".[8] Although remuneration is not expressly mentioned in the text of this last provision, the connection with 'dignity' can form a basis for the right to a decent pay, ensuring a satisfactory standard of living for workers and their families, since pay is the principal means of subsistence for them.[9]

The Commission's proposal is also "politically" supported by the European Pillar of Social Rights; in particular, by principle no. 6 recognizing the right to "adequate minimum wages … in a way that provide for the satisfaction of the needs of the worker and his / her family".[10] A directive on adequate wages, if approved, would therefore include another piece

to present a proposal for a EU minimum wage in order to relaunch the idea of the European social market economy. However, such a proposal was never formulated.

[4] Menegatti E., *Challenging the EU Downward Pressure on National Wage Policy*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2017, 33 (2), 195.

[5] *See* recital no. 5 of the draft Directive.

[6] As for the impact of the covid-19 crisis on poverty and wage inequality, and the importance of the current initiative in this regard *see* Müller T., Rainone S., Vandaele K., *Fair minimum wages and collective bargaining: a key to recovery*, ETUI and ETUC, *Benchmarking Working Europe*, Brussels, ETUI, 2020, 97, https://www.benchmarking2020.eu/chapter-4.

[7] See recital no. 6 of the draft Directive, recalling the importance of a competition in the Single Market "based on high social standards, innovation and productivity improvements ensuring a level playing field".

[8] An explicit reference to a fair wage is included in article 4 of the European Social Charter, providing for "the right of workers to a remuneration such as will give them and their families a decent standard of living". As is well known, the Charter is not binding for EU member state as such but as signatory parties to the Charter. However, the Union is not indifferent to the Charter. On the contrary, the preamble of the Treaty on European Union confirms the Union "attachment" to the Charter values, which the Union should have in mind while pursuing its social policy as set forth by article 151 TFEU. Nonetheless, it is widely believed that these declarations have mostly a symbolic value.

[9] The interpretation of the right to an equitable wage, grounded in a broad interpretation of the reference to "working conditions", is offered in Blanke T., *Fair and Just Working Conditions (Art. 31)*, in Bergusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights*, ETUI, 2002, 537, as well as in Bogg A., *Art. 31: Fair and Just Working Conditions*, in Peers S., Hervey T., Kenner J., Ward A. (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart, Oxford, 2014, 855-856.

[10] Available at the following link: https://ec.europa.eu/info/sites/info/files/social-summit-european-pillar-social-rights-booklet_it.pdf (last accessed 16 July 2021).

of the regulatory framework already inaugurated, among other instruments, by the directive on transparent and predictable working conditions.[11]
Still in EU primary law is also located the main obstacle for the draft legislation at stake. As is well known, article 153.5 TFEU provides for some exceptions to the EU competence in the field of labour law and social security. And one of those exception exactly refers to the topic of "pay". The lack of competence is the major argument put forward by the opponents of the Commission's proposal. Among these: the European employers' organizations, not opposing in principle an intervention on wages, but more inclined towards addressing the topic by a soft law intervention through recommendations;[12] Northern Europe countries concerned about the potential impact of such a Directive on their peculiar voluntary system of industrial relations, bearing in mind what happened in the *Laval* and *Viking* cases;[13] Central-Eastern Europe countries fearful of losing external cost competitiveness.

In this article, after examining the obligations for member states included in the draft directive (§ 2), we will try to assess the adequacy of its legal basis in the light of the Union's competences (§ 3), and eventually drawing some conclusions (§ 4).

2. The actions proposed by the Directive.

The guarantee of adequate minimum wages is pursued by the draft Directive in the framework of the Union competence on "working conditions" set out in Article 153.1.b TFEU. It does so by proposing four main actions: a) introduction of clear and stable criteria to set, update and assess the adequacy of the measure of the statutory minimum wages; b) support for collective bargaining, especially at the industry and cross-industry levels; c) inclusiveness of minimum wages, guaranteed by a broad scope of application of the Directive provisions; d) effectiveness of protection and monitoring.

These actions are pursued by a double differentiated system of obligations. The first one is addressed to the 21 member states where minimum wages are "set by law, or other binding legal provisions" (article 3). More limited obligations are, instead, targeted at the 6 member states where wage-setting is ensured exclusively via collective agreements (Austria, Cyprus, Denmark, Finland, Italy and Sweden). This differentiation can be explained by the need to respect the autonomy of social partners where they are the exclusive protagonists in minimum wage setting.[14]

[11] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.
[12] *See* the social partners responses presented for the two stages of consultation launched by the Commission under article 154 TFEU at
https://ec.europa.eu/social/main.jsp?catId=522&langId=en&moreDocuments=yes.
[13] Müller T., Schulten T., *The European minimum wage on the doorstep*, ETUI Policy Brief – European Economic, Employment and Social Policy, 2020, 1, 5. As for the Nordic countries perspective *see* Eldring L, Alsos K., *European Minimum Wage: A Nordic Outlook*, Fafo, 2012, 84.
[14] The safeguard of social partners' autonomy pervades the whole draft Directive. This has been made clear by the Commission in the documents published for the two phases of the consultation under article 154 TFEU. More precisely in *First phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges related to fair minimum wages*, 14 January 2020, C(2020)83 final, 2 the Commission stated that, in order to respect the autonomy of the Social Partners and collective bargaining, the initiative «would not seek to establish a uniform mechanism to set minimum wage and would not establish the level of pay which falls within the contractual freedom of the social partners at a national level». The same statement has been repeated in the

2.1. Adequacy of statutory minimum wages.

The goal of ensuring adequate minimum wages is primarily pursued by requiring member states to adopt stable and clear criteria intended to guide the setting and updating of statutory minimum wages (article 5). These criteria shall be defined in accordance with national practices, which can include a direct legislative intervention, a prior decision of a competent body or even a tripartite agreement. The involvement of social partners is mandatory and it should be timely and effective (article 7), as well as the consultation of *ad hoc* advisory bodies (article 5.5).

As for the substance of the guiding criteria, member states are requested to include at least the four identified by the draft directive. That is to say, the purchasing power of statutory minimum wages, the general level and growth rate of gross wages and their distribution, the developments of labour productivity. These are rather vague criteria, which certainly need specification by national laws.[15] Therefore, member states will have much room for customization and, consequently, broad scope to decide which level of interference on wage-setting they want to grant to the Directive.

Potentially more intrusive on national wage policies is the provision included in article 5.3, imposing a self-assessment of the adequacy of minimum wages by making use of "indicative reference values". These values should be "those commonly used at international level", comparing statutory minimum to "the general level of gross wages". A more precise reference is included in recital no. 21, providing an adequacy threshold set at "60% of the gross median wage and 50% of the gross average wage". The key point is obviously the legal value of this indicator. A literal interpretation of the Directive provisions points towards a mere non-binding recommendation. At this point, however, one may legitimately think that the proposal cannot have any real impact by simply imposing to consider criteria for wage adjustment disconnected from binding benchmarks. The same concern is also shared by the EU Parliament, which draft report on the directive proposes to move the reference to "50/60% of median/average wage" from the recitals to the text of the directive, thus making it binding for member states.[16] It remains to be seen whether this proposal will be successful[17]. However, if it was the legal basis for the Directive would be at risk, as we are going to highlight later (§ 3).

Second phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges related to fair minimum wages, 3 June 2020, C(2020)3570 final, 3, as well as in the preamble of the draft Directive, at recital no. 16.

[15] This is clearly highlighted in the article published in this same issue by Mullen T. and Schulten T., *A paradigm shift towards Social Europe? The proposed Directive on adequate minimum wages in the European Union*. As for the reference to purchasing power, they conclude that it is unclear whether adequacy is calculated on a gross or a net basis. As for the "labour productivity developments" parameter they stress how this is even more ambiguous, not specifying what kind of productivity should be taken into consideration, whether national, sectoral, company or individual.

[16] European Parliament, *Draft Report on the proposal for a directive of the European Parliament and of the Council on the adequate minimum wages in the European Union*, Committee on Employment and Social Affairs, PE689.873v02-00, 6 April 2021, https://www.europarl.europa.eu/doceo/document/EMPL-PR-689873_EN.html. Also, ETUC is very supportive towards the inclusion of the reference value in the text of the Directive. See on this the contribution published in this issue by Visentini L., *Directive on Adequate Minimum Wages: European institutions must respect the promise made to workers!*.

[17] Mullen T., Schulten T., nt. (15) are skeptical on a positive outcome of this proposal too.

The draft Directive aims also at granting a wide accessibility to statutory minimum wages. To that end, it promotes a revision of the national provisions which negatively limit the measures of minimum wage for some workers. Member states are requested to allow the reductions of the rates of the minimum wage for specific groups (*variations*) and the *deductions* from the minimum only when they are "non-discriminatory, proportionate, limited in time if relevant, and objectively and reasonably justified by a legitimate aim" (article 6). This provision would presumably require some adaptation of national legislations, since variations are very common; mostly concerning those workers having a lower employability and/or lower productivity (young, long-term unemployed, migrants, engaged in on-the-job training, etc.).

2.2. Promotion of collective bargaining.

The other main area of intervention of the draft directive concerns the promotion of collective wage bargaining in all member states. The goal is that of stimulating the expansion of the coverage of multi-employer bargaining (industry and cross-industry level), as a way for improving adequacy of wages. The connection between coverage of collective bargaining and the level of minimums can be easily explained by looking at empirical data. They show a direct proportionality relationship between multi-employer collective bargaining coverage and minimum wage standards[18], even in the countries where minimums are set by law.[19]

In order to support collective bargaining, member states are required to adopt under article 4.1, in consultation with social partners, measures to "promote 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" and to "encourage constructive, meaningful and informed negotiations on wages among social partners". These very generic obligations become a bit more concrete in the following paragraph 2 for those countries – currently more than half of the member states – where collective bargaining coverage is lower than 70%: they are requested to elaborate an action plan, either by law after consultation with social partners or by tripartite agreement, "providing for a framework of enabling conditions for collective bargaining".

The choice of drafting such vague prescriptions, which do not specify any mandatory measure to be adopted, stems from a combination of political and technical reasons. First of all, the already mentioned need to preserve the autonomy of national wage-setting systems, especially that of collective bargaining. Furthermore, the necessity to contain the legal basis of the proposal within the perimeter of letter b) of Article 153.1 TFEU ("working conditions"), carefully avoiding any measure falling within letter f) of the same article 153.1 ("representation and collective defense of the interests of workers and employers"), which

[18] Hayter S., Visser J. (eds), *Collective Agreements: Extending Labour Protection*, ILO, 2018, 26. The positive correlation between high coverage and wage adequacy is also recently confirmed by Marchal S., *An EU minimum wage target for adequate in-work incomes?*, in *European Journal of Social Security*, 2020, 22 (4), 452.

[19] As highlighted by the Commission in the second phase of the consultation nt. (14), 8-9, in countries where the minimum wage is set by statutory law collective bargaining has a strong effect on minimum wage adequacy since "minimum wage updates are directly or indirectly linked to general wage developments, which in turn are drive by collective agreements".

would involve the unanimous decision of the Council (Article 153.2 TFEU). For the same (technical and political) reasons, the Commission's proposal specifies at its very beginning that the solutions to be implemented by member states in view of the Directive's goals do not involve neither the obligation to introduce a statutory minimum wage nor to make collective agreements universally applicable (article 1.3).

Within this framework, we can imagine two different steps of intervention for the development of national action plans aimed at supporting multi-employer collective bargaining. A first level could involve provisions facilitating the development and dissemination of autonomous industry (and cross-industry) collective wage negotiations. These measures could range from initiatives aimed at strengthening the social partners ability to engage in collective bargaining, such as capacity building and training; provisions facilitating trade unions access to workplaces; incentives or benefits for businesses linked to the application of sectoral collective agreements or to the membership of employers' associations. A second step could involve a heteronomous intervention in support of collective bargaining, such as the introduction of an extension mechanism for sectoral agreements. As already mentioned, the Directive does not impose it, but member states are obviously not prevented from opting for this solution, in consultation with social partners.

2.3. Horizontal provisions.

The guarantee of adequate minimums also passes through a series of provisions, referred to as "horizontal", intended to increase the effectiveness of the Directive.

The first of those provision (article 9) is dedicated to public procurement and concession contracts. Economic operators shall be requested by member states to comply with the wages set out by collective agreements for the relevant sector and geographical area and, where existing, with the statutory minimum wages. This obligation works as a specification of the Directives 2014/24, 2014/25, 2014/23, all imposing to economic operators to comply with applicable obligations in the fields of labour law established by international, supra-national and national sources, including collective agreements.[20]

Article 10 entails the establishment of a mechanism for monitoring the coverage and adequacy of minimum wages. To this end, member states are obliged to collect and report to the commission, on an annual basis, data on the level and coverage of statutory minimum wage, coverage of collective bargaining, variations and deductions, distributions in deciles of collectively bargained wages, wage level for those workers not covered neither by statutory minimum wages nor by collective agreements. The monitoring can work both as a means for self-assessment and as an instrument permitting a review by the EU institutions, leading eventually to recommendation issues in the framework of the European Semester.

Lastly, article 11 takes care of the effectiveness of individual rights recognized by the Directive. Member states are asked to guarantee the access to effective dispute resolution mechanisms and to take the necessary measures against retaliations related to the attempt of

[20] *See* article 18, Directive 2014/24/EU on public procurement, article 36.2, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, article 30.3, Directive 2014/23/EU on the award of concession contracts.

enforcing compliance with the directive rights. On top of that, effective, proportionate and dissuasive penalties applicable to infringements of national provisions should be provided.

2.4. Scope of application.

The inclusiveness of minimum wages is another important target pursued by the draft Directive. As stressed by the Commission during the two phases of the consultation, many non-standard workers are not covered by statutory and collectively bargained minimum wages. The preamble of the Directive at recital no. 17 makes mention of "domestic workers, on-demand workers, intermittent workers, voucher based-workers, bogus self-employed, platform workers, trainees and apprentices". Nonetheless, the definition of the scope of application included in article 2 of the directive looks apparently not suitable to the purpose of grating the Directive a broad scope of application, since it refers to "workers in the Union who have an employment contract or employment relationship as defined by law, collective agreements or practice in force in each Member State, with consideration to the case-law of the Court of Justice of the European Union". The ambiguous formula chosen for the draft directive is the literal reproduction of article 1.2 of the Directive 2019/1152 on transparent and predictable working conditions in the European Union, which is the result of a difficult compromise reached between the Council and the Parliament.[21]

More into detail, linking the access to the rights offered by EU Directives to those who are "employees" under national law, giving at the same time relevance to criteria established by the ECJ for determining the status of a worker is quite contradictory. That because the concept of "worker" elaborated by the ECJ is broader than most of the national concepts of employee. According to a widespread interpretation, the EU concept is able to accommodate workers 'without adjectives', excluding only those self-employed workers with a 'direct' access to the markets they work in, where they normally perform services for multiple clients, without any functional and operational subordination to an alien business entity.[22]

Nonetheless, it seems plausible that the ECJ will soon solve the contradiction in relation to the Directive on transparent and predictable working conditions – and hence for the draft directive we are commenting - by resorting to a purposive interpretation of its provision. More precisely, looking at the goals of the Directive, it could turn out to be of little help if its scope was narrowed to national concepts of employee. That because its main target is that of providing a basic level of universal protection for workers in more precarious and

[21] As reported by B. Bednarowicz, *Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union*, in *Industrial Law Journal*, 2019, 48 (4), 609, the Commission proposal included in the first place a more audacious solution, linking the scope of the Directive to the concept of worker elaborated by the ECJ jurisprudence. A concept which is much broader than most of the national concept of "employee". However, a very heated debate took place in the Council, which eventually opted for a referral to the national concept of employee. The Parliament was then able to include again the consideration of the ECJ concept of worker, thus leading to the ambiguous solution outlined in the text.

[22] On the evolution of the ECJ jurisprudence about the concept of worker see: Risak M., Dullinger T., *The Concept of 'Worker' in EU Law: Status Quo and Potential for Change*, ETUI Research Paper - Report 140, 2018; Countouris N., '*The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, 2017, 47, 202; Giubboni S., *Being a Worker*, in *European Labour Law Journal*, 2018, 2; Menegatti E., *Taking EU labour law beyond the employment contract: The role played by the European Court of Justice*, in *European Labour Law Journal*, 2020, 11, 26.

unpredictable employment, and the national concepts of employee often do not include those atypical workers. The same is true for the proposal here under consideration, aiming at extending minimum wage protection beyond standard employees. Thus, to preserve Directives *effet utile*, the ECJ interpretation will most likely confirm the endorsement of a broad concept of workers in place of the narrower national concepts.

A confirmation of this possible outcome is the ECJ decision in *Betriebsrat der Ruhrlandklinik*.[23] Here the Court concluded that the reference made to the national concept of employee by the Directive 2008/104 on temporary agency work cannot "be interpreted as a waiver on the part of the EU legislature of its power to determine the scope of that concept for the purposes of Directive 2008/104".[24] On the contrary, the concept designates "any person who has an employment relationship" in the sense set out by the Court itself in its jurisprudence.[25]

3. The legal basis in light of the limited EU competence on wages.

Behind the significant opposition to the Commission's proposal stands another important technical argument: the EU limited competence in the matter of wages. More into detail, the Commission identifies the legal basis for the Directive in the social policy chapter and here in Article 153.1, lett. b) TFEU. This provision allows the Union to support and complement the action of member states on "working conditions", resorting to the ordinary legislative procedure, where the Parliament and the Council decide by majority.

The proposed legal basis looks coherent with the objectives pursued by the Directive and the actions here included. "Working conditions" is undoubtedly a big box, which to date has supported the directives dedicated to atypical work relations (part-time, fixed-term, agency work). Wages decency represents one of the core aspects of working conditions, perhaps the most important, as on some occasions the ECJ indirectly already confirmed.[26]

The principle of subsidiarity, governing the exercise of the EU action of not exclusive competence, seems complied as well. In this regard, the Commission's argument is that "large differences in standards for accessing an adequate minimum wage", stemming from different wage-setting mechanisms and systems of industrial relations, "create important discrepancies in the Single Market" which eventually reflects "in the coverage and adequacy of minimum wages that are not justified by underlying economic conditions".[27] This looks enough to justify the proposed action, which may help addressing those differences; an action which degree of intervention is kept to the minimum necessary, as our analyses above seems confirming, thereby complying with the principle of proportionality too.

Despite the above-mentioned convincing arguments, there are still many doubts about the Directive legal basis, because of the exclusion of competence on pay set forth in article

[23] ECJ, Case C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*.
[24] *Betriebsrat der Ruhrlandklinik gGmbH*, para. 32.
[25] *Betriebsrat der Ruhrlandklinik gGmbH*, para. 33.
[26] ECJ, 11 November 2004, *Delahaye*, C-425/02 interpreting the Transfer of undertaking directive concluded that a reduction of the remuneration should be regarded "as a substantial change in working conditions to the detriment of the employees" (para. 33).
[27] Explanatory memorandum of the Commission proposal for a Directive, nt. (1), 7-8.

153.5 TFEU. With Maastricht Treaty, by excluding the topic of "pay" from the competence of the EU, member states agreed to keep under their autonomy wage policies. That decision was motivated on the fact that wage-setting represents an important tool for domestic economic policy and for the functioning of national labour market[28]. Moreover, the exclusion of an EU interference on wages was considered a way for preserving collective bargaining autonomy at the national level.[29]

However, as made clear by the ECJ, the lack of competence cannot be "extended to any question involving any sort of link with pay"; otherwise, some of the areas referred to in Article 153(1) TFEU would be "deprived of much of their substance".[30] Instead, it should be given it a narrow interpretation, thus allowing EU legislation to deal *indirectly* with wage issues. And this is what exactly the EU did quite frequently, for example, with the Directives aimed at guaranteeing equal pay treatment in the face of possible different grounds of discrimination (sex, nationality, type of employment, etc.)[31] or by providing wage protection to posted workers.[32] All the mentioned legislations do not entail any intrusion on the level of wages set according to national practices.

Instead, article 153.5 TFUE prevents a *direct* interference on national wage-setting such as "the establishment of the level of the various constituent parts of the pay"[33] or "the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed Community wage (Impact)".[34] Nothing (or almost nothing) in the draft directive seems directly interfering with wage-setting and the level of wages in the aforementioned sense. Not for member states where wages are set only by collective bargaining. By and large, they should only make sure that collective bargaining coverage stays above 70%, no matter the level of minimum wages is. But not even for those countries with statutory minimum wages. They are the addresses of some mandatory prescriptions on the "method" for the determination of the minimums and the enforcement of the related rights. Essentially, they are requested to formally consider the four criteria indicated by the directive (article 5.2), while making their own decisions on the level of minimum wages, and provide a reference value to assess the adequacy of statutory minimums (article 5.3). Things may be different if the reference value deemed to guide the assessment of adequacy of statutory minimum - linked to the parameter of 60% of the gross

[28] *See* the overview of the debate on the exclusion of pay from the Social Chapter in B. Ryan, *Pay, Trade Union Rights and European Community Law*, in *International Journal of Comparative Labour Law and Industrial Relations*, 1997, 13 (4), 305–325.

[29] See the conclusion that Advocate General Kokott delivered in Case C-268/06, Impact [2008], ECR I-02483173, pointing out that the protection of collective bargaining autonomy is "evidenced not least by the close association between pay and the other matters excluded from the Community's powers: the right of association, the right to strike and the right to impose lock-outs, which are particularly important in relation to fixing pay and, accordingly, are referred to 'in the same breath' as pay in Article 137(5) EC".

[30] ECJ, 13 September 2007, C-307/05, *Del Cerro Alonso*, para. 41*;* ECJ 15 April 2008, C-268/06, *Impact*, para. 125.

[31] Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, imposing a principle of non-discrimination, including pay, between fixed-term workers and comparable permanent workers.

[32] Directive (EU) 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, granting to posted workers the payment of host-state "remuneration, including overtimes rates".

[33] *Del Cerro Alonso*, para. 40.

[34] *Impact*, para. 124.

median wage and 50% of the gross average wage – was made mandatory, as suggested by the Parliament (*see* above § 2.1). Nonetheless, this would most likely make the Directive trespass the competence of the Union.[35]

Anyway, as things stand, except for some marginal provisions[36], the assumption included in the preamble of the Directive at recital no. 16 looks basically correct: "the Directive neither aims to harmonise the level of minimum wages across the Union nor to establish an uniform mechanism for setting minimum wages"; which is enough to exclude an interference "with the freedom of Member States to set statutory minimum wages or promote access to minimum wage protection provided by collective agreements". However, the respect of the boundaries of EU competence comes here with a sacrifice: an inevitably low level of efficacy of the instrument proposed by the Commission. So much that the achievement of the Directive main goal (wage adequacy) looks depending mostly on the level of engagement of member states, making therefore the Directive very similar to a recommendation.

4. Conclusions.

The instrument of minimum wages proposed by the Commission represents a confirmation of the change of pace of the integration process in the field of social policy, already marked by the launch of the pillar of social rights. However, in its substance the draft Directive shows a very light approach to the issues at stake, not including any prescription really able to influence the adequacy of statutory or collectively bargained minimum wages. As explained, this approach is largely forced by the Union limited competence in the field of pay. More "prescriptive" options would risk undermining the already vacillating legal basis chosen for the directive.

A question comes spontaneously to mind at this point: could the same results sought by the Commission's proposal be better achieved by a soft law instrument? For example, by recommendations issued in the framework of the European Semester and by adding to the social scoreboard[37] indicators related to salaries, such as coverage of statutory minimum wage and collective bargaining, the minimum wage levels in relation to average and median gross earnings.[38] This option would presumably lead to the same results as the Directive proposed

[35] The same conclusion seems suggested also by the legal opinion presented on 9 March 2021 by the Legal service of the Council of the European Union, it recognized that "while the criteria aim at enhancing the adequacy of statutory minimum wages, the operative obligation remains one of effort rather than of result", concluding therefore that "article 5(1) does not allow the conclusion that the Member States are required to set statutory minimum wages at an adequate level. The measures proposed in that regard rather set out a framework or a process towards improving the setting of statutory minimum wages".

[36] The refence is to the provisions included in article 6 of the Directive about variations and deduction. As highlighted by the mentioned opinion of the Council Legal Service, the need for variations to be limited in time and objectively and reasonably justified by a legitimate aim, as well as the Member States' obligation to ensure that deductions are necessary and objectively justified is in matter of fact a direct interference with the determination of minimum wages as an element of pay, therefore falling within the exclusion of competence provided by article 153.5 TFEU.

[37] The current social scoreboard (https://composite-indicators.jrc.ec.europa.eu/social-scoreboard) already includes some indicators related to wages such us income inequality and poverty.

[38] The solution of a non-legislative intervention by way of a Council Recommendation was proposed by the Commission itself in the second phase of consultation, nt. (14), but then abandoned in favour of the proposal for a Directive here commented.

by the Commission, without the criticisms and perplexities that the latter has attracted from many countries, especially in Northern Europe, and the employers' side of European Social Partners.[39]

Bibliography

Bednarowicz B., *Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union*, in *Industrial Law Journal*, 2019, 48 (4), 609;

Blanke T., *Fair and Just Working Conditions (Art. 31)*, in Bergusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights*, ETUI, 2002, 537;

Bogg A., *Art. 31: Fair and Just Working Conditions*, in Peers S., Hervey T., Kenner J. & Ward A. (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart, Oxford, 2014, 855;

Countouris N., '*The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, 2017, 47, 202;

Eldring L, Alsos K., *European Minimum Wage: A Nordic Outlook*, Fafo, 2012, 84;

European Commission, *First phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges related to fair minimum wages*, 14 January 2020, C(2020)83 final;

European Commission, *Second phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges related to fair minimum wages*, 3 June 2020, C(2020)3570 final;

European Parliament, *Draft Report on the proposal for a directive of the European Parliament and of the Council on the adequate minimum wages in the European Union*, Committee on Employment and Social Affairs, PE689.873v02-00, 6 April 2021;

Giubboni S., *Being a Worker*, in *European Labour Law Journal*, 2018, 2;

Hayter S., Visser J. (eds), *Collective Agreements: Extending Labour Protection*, ILO, 2018, 26;

Marchal S., *An EU minimum wage target for adequate in-work incomes?*, in *European Journal of Social Security*, 2020, 22 (4), 452;

Menegatti E., *Challenging the EU Downward Pressure on National Wage Policy*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2017, 33 (2), 195;

Menegatti E., *Taking EU labour law beyond the employment contract: The role played by the European Court of Justice*, in *European Labour Law Journal*, 2020, 11, 26;

Müller T., Rainone S., Vandaele K., *Fair minimum wages and collective bargaining: a key to recovery*, ETUI and ETUC, *Benchmarking Working Europe*, Brussels, ETUI, 2020, 97;

Müller T., Schulten T., *The European minimum wage on the doorstep*, ETUI Policy Brief – European Economic, Employment and Social Policy, 2020, 1;

[39] On the position of the European Employers' Organization *see* the contribution published in this issue by Grenfors J., E. Gentile, *The minimum wage Directive proposal and the promotion of collective bargaining: the voice of SGI-Europe.*

Risak M., Dullinger T., *The Concept of 'Worker' in EU Law: Status Quo and Potential for Change*, ETUI Research Paper - Report 140, 2018;
Schulten T., *Contours of a European Minimum Wage Policy*, 2014, Friedrich Ebert Foundation;
Schulten T., *Towards a European Minimum Wage Policy? Fair Wages and Social Europe*, in *European Journal of Industrial Relations*, 2008, 14(4), 421.