

# Proposal for a Directive on adequate minimum wages in the European Union: a look at French law

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## Abstract

On October 28, 2020, the European Commission published a Proposal for Directive 2020/0310 on adequate minimum wages in the European Union. The project was expected and the result is both ambitious and modest. Ambitious because the Commission calls for the determination of criteria to define an “adequate minimum wage” or “decency threshold”: reality of purchasing power, general level of wages and their distribution, average wage increases, labour productivity. To achieve this result, the project intends to promote the action of the social partners and the lever of collective bargaining. But the project is also modest because the difficulty lies in avoiding the opposition of Member States that would result from their legal competence in determining wages and representing workers in collective bargaining. The drafting of the proposal is both cautious and often not very restrictive. The impact on French law will undoubtedly be relative, as the French tradition of collective bargaining on the minimum wage seems both well anchored in the national landscape and more demanding than the elements delivered by the proposal. France, however, was arguably not the core target of the minimum wage proposal.

**Keywords:** Proposal for a Directive; Minimum Wage; Adequate minimum wage; Threshold of decency; Social partners; Collective bargaining; Subsidiarity principle; French Law.

## 1. Introduction.

The idea of a European minimum wage has long been debated on the European scene. Supporters of a minimum wage put forward several arguments in its favour. First, a social argument has to be underlined. Introducing a European minimum wage standard would help to keep workers out of poverty by guaranteeing a threshold below which it is not possible to pay a worker, giving a certain value to work and telling workers that they have the right to a

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decent income that allows them to live adequately. Then, it is time to highlight an economic argument. Wages, beyond their inclusion in the cost structure of companies, are a component of demand. By ensuring that the least well-off workers receive a minimum wage, it is possible to envisage an increase in consumption and participation in the economic recovery. Wages are also a determinant of competition between companies and of healthy competition in the market. The introduction of a European minimum wage would reduce the problems of social dumping by leading to the overall development of wages at the EU level and by harmonizing social standards. If the Member States agree to set a minimum value for work, they show their willingness not to lower wages below this limit to be more competitive than their neighbours. It is because the minimum wage is also an economic requirement that the European Union has been able to take up the issue.

It is in this context that Mrs Ursula von der Leyen, President of the European Commission, wanted to establish a minimum wage throughout Europe to guarantee the standard of living of employees. Recently, the Commission published a draft directive on “an adequate minimum wage in the European Union”.<sup>1</sup> The directive still needs to be approved by the European Parliament and by the European Council, which brings together the heads of government of the member countries. This work, carried out after several months of consultation with the social partners, is not disconnected from the current health crisis. In the words of Ursula von der Leyen, “the proposal for adequate minimum wages is a strong signal that, even in times of crisis, the dignity of work must be sacred. This directive aims to ensure “the basis for a fair, inclusive and resilient recovery”. With this draft legislation, Brussels aims to show that the social aspect of recovery is not forgotten. It complements the measures of the Green Pact to ensure the ecological transition of the European Union. However, it is not a question of setting an identical minimum wage in all the countries of the European Union, as living standards differ from one country to another. The project plans to set some common rules to ensure a decent standard of living. The Commission thus aims to strengthen collective bargaining processes to set minimum wages. It invites the States to adopt various measures to ensure the application of the minimum wage (monitoring of companies in the context of public tenders, setting up appeal mechanisms for employees, strengthening controls, etc.). The Commission also envisages that the States will report on the subject every year.

What could be the effects of the promulgation of such a directive from the point of view of French law? After having briefly recalled the content of the draft Directive (I), we will consider the main principles governing French law on the question of the minimum wage (II) and finally underline the virtuous characteristics of the regime resulting from the Directive in French law.

## **2. The proposed Directive.**

The proposal for a Directive opens with a particularly substantial explanatory memorandum (1), followed by a presentation of the actual content of the provision (2).

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<sup>1</sup> Proposal for the Directive 2020/0310 on adequate minimum wages inside European Union.

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## 2.1. The Explanatory Memorandum.

In a very traditional way, the proposal for a Directive opens with a particularly substantial explanatory memorandum (1), followed by a presentation of the actual content of the enacting terms (2).

### 2.1.1. The explanatory memorandum.

**Justifications and objectives** - The draft begins with a statement of the justifications and objectives of the proposal. It recalls the international and European mechanisms in which the proposal for a Directive is embedded: the United Nations' Horizon 2030 sustainable development program, particularly in its sustainable development dimension; the European social rights floor to give concrete expression to the promise of a social Europe embodied for all (and in particular principle No. 6 of the floor providing for the establishment of adequate minimum wages and transparent and predictable wage setting); the political guidelines for the Commission 2019-2024 to build a strong social Europe for fair transitions.

The text goes on to state: “In many Member States, over the last decades, low wages have not kept pace with other wages. Structural trends that are profoundly changing labour markets, such as globalization, digitalization and the rise of atypical forms of work, especially in the service sector, have led to the increased polarization of jobs, with a growing share of low-paid and low-skilled jobs, and have contributed to the erosion of traditional collective bargaining structures. This has led to an increase in in-work poverty and wage inequality”.<sup>2</sup> To remedy this situation, the proposal calls for the promotion of better working and living conditions, including adequate minimum wages, for both workers and companies in the EU, to address the wide gaps in the coverage and adequacy of minimum wages.

To achieve this result, the proposed Directive proposes architecture based on several pillars.

The first is both the generality of the proposal and its ambition. The directive aims to ensure that workers in the EU are protected by adequate minimum wages that allow them to live in dignity wherever they work. The proposal establishes a framework to make minimum wages more adequate and to improve workers' access to minimum wage protection. The directive is designed to achieve these objectives while considering and fully respecting the specificities of national systems, national competencies, the autonomy of the social partners and contractual freedom.

The second pillar is the promotion of collective bargaining. The directive aims to promote collective bargaining on wages in all Member States. This is because countries with high collective bargaining coverage tend to have a lower proportion of low-paid workers, higher minimum wages relative to the median wage, lower-wage inequality and higher wages than

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<sup>2</sup> Proposition of the Directive, 2.

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other countries. By influencing overall wage developments, collective bargaining tends to result in wages above the statutory minimum level and leads to an improvement in the latter.

The third pillar is to ensure that the rules are respected and effectively enforced so that workers have effective access to the protection offered by minimum wages and companies are protected from unfair competition. The Directive, therefore, aims to promote compliance with the rules and to strengthen their application and monitoring in all Member States proportionately, so as not to create an excessive and disproportionate administrative burden for EU businesses, including small and medium-sized enterprises and micro-enterprises.

**Legal basis** - The proposal for a Directive is based on Article 153(1) (b) of the Treaty on the Functioning of the European Union (TFEU), which states that the Union shall support and complement the activities of the Member States in the field of working conditions, within the limits of the principles of subsidiarity and proportionality (Article 5(3) and (4) of the Treaty on European Union). As it does not contain measures with a direct effect on the level of pay, it respects the limits imposed on Union action by Article 153(5) TFEU.

In line with the principle of subsidiarity, the Directive will not require the Member States to introduce a statutory minimum wage or to make collective agreements generally applicable, nor will it affect the autonomy of the social partners. Nor does the text provide for the setting of a common minimum wage at the European level. On the other hand, action at the EU level is seen as more effective in strengthening minimum wage setting systems than action at a national level. The idea is to provide the necessary impetus for reform of national minimum wage-setting mechanisms and to ensure a level playing field in the single market by addressing significant differences in the coverage and adequacy of minimum wages that are not justified by the underlying economic conditions. According to the draft directive, this objective cannot be sufficiently achieved by uncoordinated action by the Member States. The proposed directive, therefore, establishes a framework for minimum standards and respects the right of Member States to set higher standards, without prejudice to the role that the Member States may entrust to the social partners, following national traditions and with full respect for the contractual freedom of the social partners.

In practice, the Member States that have already adopted more favourable provisions than those contained in the proposed directive will not have to change their systems for setting minimum wages. Member States may also decide to go beyond the minimum standards set out in the proposed directive. The proposal will also respect well-established national traditions of minimum wage setting. It will fully respect the competencies of the Member States and social partners to determine the level of their minimum wages under Article 153(5) TFEU. The protection offered by minimum wages will continue to be provided by collective agreements or by legal provisions, with full respect for national competencies and the contractual freedom of the social partners.

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### 2.1.2. Content of the Directive.

The proposal for a directive, after having set out all the justifications on which it is based, is structured in four chapters: the first relating to general provisions, the second to statutory minimum wages, the third to horizontal provisions, and the fourth to final provisions.

**Purpose of the Directive** - The first chapter begins by setting out the purpose of the Directive.<sup>3</sup> The aim is to improve working and living conditions in the EU by setting a framework for determining the appropriate level of minimum wages and for ensuring that workers have access to the protection offered by minimum wages, either in the form of wages set by collective agreements or in the form of statutory minimum wages, where they exist. This objective is thus based on two ambitions: to define the adequacy of remuneration and to guarantee the conditions of access to protection in such a way that no one is left on the side-lines. Immediately, however, the directive makes clear that it is without prejudice to the full respect of the autonomy of the social partners and their right to negotiate and conclude collective agreements and will be put in place without prejudice to the choice of Member States to set statutory minimum wages or to promote access to minimum wage protection as provided for in collective agreements. Even more firmly, the Directive specifies that nothing in this Directive may be interpreted as imposing an obligation on the Member States in which wage fixing is carried out exclusively through collective agreements to introduce a statutory minimum wage or to make collective agreements generally applicable. In other words, the Directive does not intend to impose anything, but rather to stimulate and encourage, through collective bargaining.

**Scope and non-regression principle** - The text will apply to EU workers “who have a contract of employment or an employment relationship within the meaning of the legislation, collective agreements or practise in force in each Member State, taking account of the case-law of the Court of Justice of the European Union”.<sup>4</sup> Furthermore, the Directive will not justify “any reduction in the general level of protection already afforded to workers in the Member States” and will not prevent the application of provisions or stipulations which are more favourable to workers.<sup>5</sup>

**Setting adequate statutory minimum wages** - States in which statutory minimum wages exist should “take the necessary measures to ensure that the setting and updating of such wages are based on criteria designed to promote their adequacy with a view to ensuring decent working and living conditions, social cohesion and upward convergence”.<sup>6</sup> The criteria should be defined “in a stable and clear manner” and in accordance with the national practice of each State, “whether in the relevant national legislation, in decisions of the competent bodies or in tripartite agreements”. These criteria should include at least the following elements: - “the purchasing power of statutory minimum wages, considering the

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<sup>3</sup> Art. 1 of the Directive.

<sup>4</sup> Art. 2 of the Directive.

<sup>5</sup> Art. 16 of the Directive.

<sup>6</sup> Art. 5 of the Directive.

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cost of living and the contribution of taxes and social benefits”; - “the general level and distribution of gross wages”; - “the rate of growth of gross wages”; and – “the evolution of labour productivity”. To guide their assessment of the adequacy of statutory minimum wages, States should use “indicative reference values, such as those commonly used internationally”. In addition, they should “ensure the regular and timely updating of statutory minimum wages to maintain their adequacy” and establish “advisory bodies to advise the competent authorities on matters relating to statutory minimum wages”.

**Participation of the social partners** - States should take “the necessary measures to ensure that the social partners are involved in an effective and timely manner in the setting and updating of statutory minimum wages, including through their participation in advisory bodies [see above], and in particular concerning the following above], and in particular about: - the choice and application of criteria and indicative reference values for determining statutory minimum wage levels; - updates of statutory minimum wage levels [...]; - the establishment of variations and deductions affecting statutory minimum wages; - the collection of data and the carrying out of studies for the information of the authorities responsible for setting statutory minimum wages”.<sup>7</sup>

**Variations in statutory minimum wages and deductions allowed**<sup>8</sup>- the Member States will be able to “authorize different rates of statutory minimum wages for specific categories of workers”, limiting such variations as far as possible and ensuring “that any variation is non-discriminatory, proportionate, limited in time where appropriate, and objectively and reasonably justified by a legitimate aim”. Alternatively, they could authorize deductions that reduce pay below the statutory minimum wage, ensuring that such deductions are “necessary, objectively justified and proportionate”.

**Enforcement of statutory minimum wages**<sup>9</sup> - To ensure the effectiveness of statutory minimum wages, States should, in cooperation with the social partners, strengthen labour inspection controls, develop “guidance for enforcement authorities to proactively target and prosecute non-compliant enterprises” and ensure that information on statutory minimum wages is made available to the public in a clear, comprehensive, and easily accessible manner.

**Promoting collective bargaining**<sup>10</sup> - In consultation with the social partners, States should take “at least measures” to “promote the establishment and strengthening of the capacity of the social partners to engage in collective bargaining for wage-setting at sectorial or cross-industry level” and to “encourage constructive, meaningful and informed negotiations on wages between the social partners”. In addition, states in which collective bargaining coverage is below 70% of employees will also have to provide “a framework providing conditions conducive to collective bargaining, either in the form of a law after

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<sup>7</sup> Art. 7 of the Directive.

<sup>8</sup> Art. 6 of the Directive.

<sup>9</sup> Art. 8 of the Directive.

<sup>10</sup> Art. 4 of the Directive.

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consultation with the social partners or in the form of an agreement with the social partners and establish an action plan to promote collective bargaining”.

In summary, the Directive sets out four main principles of the framework it intends to impose:

- Firstly, to increase the coverage of collective bargaining - a) to promote the formation and strengthening of the capacity of the social partners to engage in collective bargaining for wage-setting at sectorial or cross-industry level; b) to encourage constructive, meaningful and informed negotiations on wages between the social partners);
- Secondly, where statutory minimum wages exist, take the necessary measures to ensure that the setting and updating of such wages are based on criteria designed to promote their adequacy to ensure decent working and living conditions, social cohesion and upward convergence - (a) the purchasing power of statutory minimum wages, taking into account the cost of living and the contribution of taxes and social benefits (b) the overall level and distribution of gross wages; (c) the rate of growth of gross wages; (d) the evolution of labour productivity;
- Thirdly, if the Member States are allowed to have different statutory minimum wage rates for specific categories of workers, they should keep such variations to a minimum and ensure that any variation is non-discriminatory, proportionate, limited in time where appropriate, and objectively and reasonably justified by a legitimate objective;
- Fourthly, to ensure the effectiveness of the system, firstly by taking the necessary measures to ensure that the social partners are effectively and timely involved in the setting and updating of statutory minimum wages, and secondly by strengthening on-the-spot checks and inspections by labour inspectorates or by the bodies responsible for enforcing statutory minimum wages, developing guidance for enforcement authorities to proactively target and prosecute non-compliant companies, and ensuring that information on statutory minimum wages is made available to the public in a clear, comprehensive and easily accessible form.

In the third chapter on horizontal provisions, the Directive sets out specific provisions for public procurement, monitoring and data collection, and ensuring the right to redress and protection against adverse treatment concerning minimum wages, including through a system of effective, proportionate, and dissuasive sanctions.

In the fourth chapter, on final provisions, the text provides for the dissemination of information and evaluation of the directive no later than five years after transposition, a principle of non-regression and more favourable provisions, and a transposition requirement.

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### 3. French law.

Regarding the proposal for a directive, it is not certain that French law, which has a long-standing tradition of both statutory and conventional minimum wages, will be affected by the proposal. It should be remembered that under French law, the minimum wage is first set by the legislator, who determines the legal inter-sectorial minimum wage. This wage makes it possible to guarantee every employee not only the promise of a living wage but also the satisfaction of a 'normal' wage, considering the degree of development of a social group<sup>11</sup> (1). However, minimum wages are also set by collective agreement. Since 1950, the collective level has played a decisive role in the framework of minimum wages, a trend that has become even more pronounced since the law of 13 November 1982 made wage negotiations at the company level compulsory (2).

#### 3.1. On the legal side: The inter-sectorial minimum growth wage.

The Smic - the inter-sectorial minimum growth wage - succeeded, in 1970, the guaranteed minimum wage created by the law of 1950. In the law of 11 February 1950, the setting of the legal minimum wage was the sole responsibility of the Government, depending on general economic conditions and the evolution of national income, and on the advice of the National Commission for Collective Bargaining (CNNC). Because of the slow progress of the minimum wage, the legislator introduced a sliding scale clause in a law of 26 June 1957 to speed up the increase in the minimum wage. However, the effects of this clause were insufficient. Thus, the law of 2 January 1970 set itself a twofold objective: to abandon the notion of maintaining the means of subsistence and replace it with that of participation in the fruits of economic growth and progress; to prevent certain companies from living solely by underpaying their staff. Under the terms of Article L. 3231-2 of the Labour Code, the minimum wage must guarantee the purchasing power of the weakest employees and participation in the economic development of the nation. The result is a national and inter-sectorial minimum wage, the amount of which is set by the public authorities and corresponds to one hour's work. Three questions arise about the minimum wage: its scope, its fixing, and its implementation.

**Scope** - The minimum wage applies in metropolitan France, Saint-Pierre-et-Miquelon and the overseas departments.<sup>12</sup> It applies to all activities and occupations and all employees aged 18 and over.<sup>13</sup> It applies only to employees and does not apply to company directors - unless they can prove that they have an employment contract in addition to their corporate mandate - nor to apprentices, professional training contracts and employees under the age of 18. On the other hand, it does apply to private-law employees of public institutions. Unless the law provides otherwise, the minimum wage applies regardless of the terms of the

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<sup>11</sup> Auzero G., Baugard D., Dockès E., *Droit du travail*, 32<sup>ème</sup> éd., Dalloz, Coll. Précis, Paris, 2019, 1173.

<sup>12</sup> L. 3231-1 of the Code du Travail.

<sup>13</sup> D. 3231-5 of the Code du Travail.



employment contract and the method of remuneration. However, one situation may pose a problem: that of employees with no working hours. Indeed, as the minimum wage is an hourly wage, it seems difficult to calculate it in the absence of working hours. However, the Social Chamber of the Court of Cassation has consistently stated that “except in cases where the law provides otherwise and regardless of the method of remuneration used, an employee is entitled to remuneration at least equal to the minimum inter-sectorial growth wage”.<sup>14</sup> As a result, in general, the annual amount of the Smic is obtained by applying the following formula:  $12 \times 35 \times \text{Smic horaire} \times 52 / 12$ . On 1 January 2019, the hourly minimum wage was EUR 10.03 net, the annual value being EUR 18 254.60. This amount should be used for full-time employees working monthly and whose working hours correspond to the legal working hours. When it is not possible to determine the number of days worked, the annual value of the minimum wage is considered based on the legal working time (1,820 hours over the year) or by the collective working time applicable in the establishment where the employee is employed.

**Setting** - As regards the setting of the legal minimum wage, the law of 11 February 1950 had provided that the government should set the minimum wage considering the general economic conditions and the evolution of national income, as well as the opinion of the National Commission for Collective Agreements, the latter being competent to study the composition of the standard budget used to determine the minimum growth wage and to examine the evolution of the minimum growth wage.<sup>15</sup> After the 1950 Act, a law of 18 July 1952, amended by a law of 26 June 1957, introduced a sliding scale clause, allowing for the gradual evolution of the Smic in line with the average evolution of salaries, although the gap between the Smic and this average evolution has never stopped increasing. Therefore the legislator decided, by the Act of 2 January 1970, to abandon the notion of maintaining the means of subsistence and replace it with that of participation in the fruits of growth and economic progress, by enshrining, according to the legal formula, the guarantee of purchasing power and participation in the economic development of the nation. One of the key questions remains the determination of the standard budget used to set the amount of the minimum wage. In this respect, it should be noted that, since 2009,<sup>16</sup> the definition of the standard budget has been “transferred” to a group of experts responsible for producing a preliminary report on the minimum wage.<sup>17</sup> Thus, today, the setting of the level of the

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<sup>14</sup> Soc., 7 mars 2012, n° 10-19.073 ; Soc., 14 octobre 2009, 08-42.496 ; Soc., 24 juin 2009, 07-41.273 07-43.771 ; Soc., 25 mai 2005, 03-44.301; for employees paid on piecework the Cour de Cassation specifies that “la liberté laissée au salarié qui n'a pas le statut de VRP, d'organiser son travail et de n'être soumis à aucun horaire déterminé, n'est pas de nature à permettre à l'employeur de se soustraire à l'application des dispositions légales relatives au SMIC, la cour d'appel qui n'a pas vérifié si l'employeur avait respecté son obligation de rémunérer les heures réellement effectuées par la salariée à un niveau au moins égal à ce minimum légal”, Soc. 21 janvier 2009, n° 07-41.391.

<sup>15</sup> Former art. L. 136-2 of the Code du Travail.

<sup>16</sup> Décret n° 2009-552 du 19 mai 2009 relatif au groupe d'experts sur le salaire minimum de croissance prévu par l'article 24 de la loi n° 2008-1258 du 3 décembre 2008 en faveur des revenus du travail; Bargain G., *La revalorisation du salaire minimum: l'emprise de l'expertise économique*, in *Revue de Droit du Travail*, 3, 2018, 199.

<sup>17</sup> Under article L. 2271-1 of the Code du Travail, the Commission nationale des conventions collectives is responsible for “donner, après avoir pris connaissance du rapport annuel établi par un groupe d'experts désigné à cet effet, un avis motivé au ministre chargé du travail sur la fixation du salaire minimum de croissance dans les cas prévus par les articles L. 3231-6 et L. 3231-10”.

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minimum wage is determined by the opinions of the CNNC, the government and an expert group. And in the reports submitted by the expert group, there are analyses of 'estimated minimum monthly income to meet household needs' which are like the definition of a standard budget.<sup>18</sup>

To avoid too great a distortion between the minimum wage and the average evolution of wages, the hourly minimum is based on a double mechanism of indexation and taking growth into account. The minimum wage is adjusted annually<sup>19</sup> in line with the consumer price index (CPI) excluding tobacco for urban households headed by workers or employees,<sup>20</sup> to which is added half the change in the purchasing power of the basic hourly worker's wage (SHBO).<sup>21</sup> In addition, when inflation exceeds 2% of the CPI recorded when the immediately preceding minimum wage was established, the minimum wage is re-evaluated according to the inflation recorded on the first day of the month following the publication of the price index.

In addition, to ensure participation in the nation's economic development, the Government may, after consultation with and a reasoned opinion from the National Commission for Collective Bargaining, set an optional increase in the level of the Smic (this is the famous government "boost"). Decree No. 2009-552 of 19 May 2009<sup>22</sup> modified the conditions for this increase by setting up a group of experts - mentioned above - which gives its opinion each year on the evolution of the Smic. Subsequently, the Government itself and the CNNC are required to draw up an analysis of the situation and, if their diagnoses and recommendations diverge from those of the experts' report, they are required to justify their final decision. The government's "boost" is now constrained by the group of experts. The effects of the increase in the minimum wage entail a compulsory increase in pay that falls below the legal minimum. On the other hand, the increase does not in principle affect salaries above it, and any indexation of salaries to the minimum wage is prohibited. However, there is nothing to prevent following the evolution of the minimum wage, if indexation is not mandatory.

**Respect for the SMIC** - Regarding the implementation of the SMIC, failure to respect the legal minimum wage constitutes a fifth-class contravention.<sup>23</sup> Every employee is entitled to an hourly wage which cannot be less than the hourly amount. The wage to be taken into consideration is the one corresponding to one hour of actual work. For salaries that benefit from a working time arrangement, the calculation is made by reference to the average working time used to determine the smoothed remuneration. The salary to be taken into consideration is the basic salary plus benefits in kind and various bonuses in additional salaries. All sums paid in return for work are considered as additional wages.<sup>24</sup> As a result, the following are excluded from the calculation of the minimum wage: attendance or seniority bonuses, (collective) results bonuses, annual bonuses, or job supplements. Also

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<sup>18</sup> Rapports annuels du groupe d'experts SMIC 2015, 75.

<sup>19</sup> Prior to the 1<sup>st</sup> January 2010, the annual SMIC fixing took effect on the 1<sup>st</sup> July. The Loi du 3 décembre 2008 amended this date, with the SMIC revised by decree on the 1<sup>st</sup> January of each year.

<sup>20</sup> Art. L. 3231-5 of the Code du Travail.

<sup>21</sup> Art. L. 3231-2 of the Code du Travail.

<sup>22</sup> *See*, Bargain G., nt. (16).

<sup>23</sup> Art. R. 3233-1 of the Code du Travail.

<sup>24</sup> Soc., 13 juillet 2010, n° 09-42.890 ; Soc., 17 octobre 2012, n° 11-15.699 ; Soc., 4 février 2015, n° 13-18.523.

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excluded from the calculation of the minimum wage are overtime and professional expenses. On the other hand, a bonus that depends on both individual and collective work must be included in the basis for calculating the minimum wage.

### 3.2. On the side of the social partners: conventional minimum wages.

**Collective agreement minimum wages** - In addition to the system, there is a set of minimum wages defined by collective agreements. Since the law of 11 February 1950, wage scales, particularly minimum wages for each job category, have been determined mainly through collective bargaining at the branch level. Moreover, branch agreements can be extended, thus making it possible to set a national minimum wage by occupational category. The result is a kind of hierarchy of wages established by agreement. Each employee is entitled to the minimum wage for his or her occupational category according to the established classification. In the implementation, a comparison between the elements received by the employee and the conventional rates is necessary. In this respect, the Court of Cassation considers that “in the absence of contractual provisions to the contrary, all sums paid in return for work are included in the calculation of the remuneration to be compared with the guaranteed contractual wage”.<sup>25</sup>

As regards the frequency of branch negotiations on minimum wages, Article L. 2241-1 of the Labour Code stipulates that the social partners must meet at least once every four years to discuss the conventional minimum wages. Any agreement reached, which may not exceed four years, must specify the topics for negotiation and the timetable. If there is no agreement, the employers' federation can take a unilateral decision or a recommendation, sometimes for an increase.

**Collective bargaining at the company level** - The industry's agreed minimum wages are often much lower than the wages paid. This difference is the result of contractual negotiations, but also collective bargaining on wages at the company level. Article L. 2242-1 of the Labour Code requires the employer to engage in negotiations on pay, and on actual wages, at least once every four years - the social partners may reduce this frequency by agreement. The company level, therefore, appears to be a level at which minimum wages are defined, subject to compliance with the minimum wage, the industry minimum wage and more favourable provisions of the employment contract. Under Article L. 2254-1 of the Labour Code, only the more favourable provisions of the company's collective agreement can replace the clauses of the individual employment contract relating to pay. The company agreement therefore also plays a part in setting, often upwards, the conventional minima, although it is always possible to derogate from them by contract.

Thus, alongside the law, collective bargaining can always set collectively agreed minimum wages (whether at branch or company level), but with one guiding principle: collectively agreed minimum wages must always be more favourable than the law in terms of their level and basis of calculation, which constitutes a minimum that can never be derogated from.

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<sup>25</sup> In particular, Soc. 7 avril 2010, n° 07-45.322.

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#### 4. Virtuosity's in French law.

At the end of this rapid confrontation between the proposal for a directive and French law, one observation must be made: the influence of the directive will likely be relatively weak from the point of view of French law. Even though the legal minimum wage in France is one of the highest in Europe, the role of collective bargaining (and the improvement of the situation of employees) is particularly present in French law. Whether we look at the criteria for setting the amount of the minimum wage, the scope of the system, the promotion of negotiation or the guarantees of its effectiveness, French law seems particularly well equipped to meet European requirements.

However, two issues may require attention.

The first concerns the threshold for the adequacy of the minimum wage and the requirement of a decent wage. According to the terms of the proposal for a directive, adequacy essentially refers to the establishment of determination criteria such as purchasing power, considering the cost of living and the contribution to taxes and social benefits, the general level and distribution of gross wages, the rate of growth of gross wages, and the evolution of labour productivity. As such, the law already takes these criteria largely into account in determining minimum wages (whether statutory or contractual). Will the reference to adequacy (including productivity) or decency influence the content of collective wage negotiations? Perhaps the requirement of a decent minimum wage could modify the demands of the employee social partners (but decency must also be linked to economic sustainability, otherwise the whole system will lose its viability). More certainly, the question that currently arises in French law is that of subjecting platform workers to a minimum (and decent) wage. Could the directive be an opportunity for the legislator or the social partners to think about going beyond the boundaries of salaried employment and to consider non-salaried workers who are economically dependent on a minimum wage? In any case, the hypothesis deserves to be put forward.

The second question concerns the mechanisms for revaluing the minimum wage. As mentioned, the setting of the legal minimum wage level is determined by the opinions of the social partners, the government, and an expert group. This expert group (mainly composed of economists) has been holding back the annual revaluation of the statutory minimum wage (the so-called 'boost' to the SMIC) for several years because it is too costly and that it increases overall wages without any productivity gains. The relatively opaque nature of this group of experts and the authority it enjoys (since its decisions take precedence over the opinion of the social partners) could justify a question: should the promotion of collective bargaining by the draft directive not lead us to question the power of this group of experts? Would it be appropriate for the opinion of the social partners to be, at the national level, at least equal (if not superior) to that of the group of experts?

In conclusion, it must be emphasized that the proposed directive, while it will certainly not overturn French law, could, as was the case with the directive on fixed-term contracts, have some influence before the courts and in judicial debates. But for the time being, it is impossible to determine what the contentious uses of the envisaged directive will be. More certainly, above all, the directive could feed into and arbitrate in a debate that is very critical of the SMIC in French law. For years, the French SMIC has been criticized by some

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politicians, relayed by some economists. The adoption of the directive will certainly be a signal for the safeguarding of the SMIC in French law and a political and legal instrument to support the preservation of a decent wage, in line with the social and economic requirements of workers.

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