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# Collective voice in fixing minimum wages: social partners' participation from the ILO and EU perspectives

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1. Introduction. 2. Background of the analysis. 3. Types of mechanisms for fixing minimum wages. 4. Participation of the social partners in the minimum wage fixing mechanism. 5. Participation of other actors in the minimum wage fixing mechanism. 6. Conclusions.

## Abstract

This paper examines the involvement of social partners in the mechanisms of fixing minimum wages in the light of the pertinent ILO Convention No. 131 and the proposal for a Directive on adequate minimum wages in the European Union. The author draws attention to the differences between the said Convention and the draft Directive with regard to the types of wage-fixing mechanisms as well as the form, scope and significance of involvement of social partners and other entities in their operation. The paper further analyses the influence of ILO Convention No. 131 on the draft EU Directive and the significance of the latter for the dissemination of standards applicable to minimum wage fixing mechanisms in the EU Member States. These issues are examined against the backdrop of their growing importance—as observed in recent years—in the international legal and EU discourse concerned with adequate working conditions to ensure more sustainable and inclusive social-economic development.

**Keyword:** ILO Convention No. 131; Proposal for a Directive on adequate minimum wages; Minimum wage; Mechanism of fixing minimum wages; Collective bargaining.

## 1. Preliminary remarks.

The matter of minimum wage is referred to in international and European legislation in varying degrees of detail. The instrument in question is explicitly regulated only in several Conventions and Recommendations of the International Labour Organisation, most notably in Convention No. 131 of 1970 concerning Minimum Wage Fixing, with Special Reference

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to Developing Countries and its supplementary Recommendation No. 135. The aforementioned Convention lays down legally binding criteria for establishing the minimum wage. For this purpose, it invokes both social factors and economic indicators. It also sets out detailed requirements applicable to the establishment and operation of the mechanism for fixing the minimum wage. Currently, Convention No. 131 is considered to be the legal act which formulates the most comprehensive standard of the minimum guaranteed wage. The solutions adopted there are deemed valid today, given new challenges in the world of labour.<sup>1</sup> The vital contribution of Convention No. 131 to national rules which govern minimum wage fixing is evinced by the fact that the UN Committee on Economic, Social and Cultural Rights draws on it to monitor the compliance of national legislation with Article 7(a)(ii) of the International Covenant on Economic, Social and Cultural Rights.<sup>2</sup> The Committee admonishes those states which have not ratified Convention No. 131 and calls for its adoption. Moreover, domestic laws which fail to specify the procedure for determining the minimum wage receive a negative assessment.<sup>3</sup>

The minimum wage is also the subject of the 2020 proposal for a Directive on adequate minimum wages in the European Union.<sup>4</sup> The draft Directive is concerned primarily with the mechanisms employed to fix minimum wages, seeking to ensure that workers are guaranteed minimum wages—in an adequate amount—by way of statutory instruments or collective agreements.<sup>5</sup> The actual wage rates are not specified, but their adequacy is linked to assuring decent working and living conditions, as well as the pursuit of social cohesion and positive convergence. Moreover, it formulates a catalogue of national criteria for the adoption and adjustment of statutory minimum wages. The draft Directive on adequate minimum wages is the EU's first legally binding instrument which provides for the coordination of national policies to raise minimum wages and strengthen collective bargaining in the European Union.<sup>6</sup> The latest development should be emphasized. On the 7th of June 2022, the Council and the European Parliament have reached a provisional political agreement on the abovementioned draft EU directive<sup>7</sup>. On the part of the Council, the agreement will still have to be approved by COREPER, meaning the Committee of Permanent Representatives of the Governments of the Member States to the EU. This

<sup>1</sup> Cunningham W., *Minimum Wages and Social Policy. Lessons from Developing Countries*, World Bank, 2007, XVI.

<sup>2</sup> Saul B., Kinley D., Mowbray J., *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*, Oxford University Press, Oxford, 2016, 413.

<sup>3</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Portugal (Macau)*, E/C.12/1/Add.9, 6.12.1996, United Nations, Economic and Social Council, Section 15.

<sup>4</sup> Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, COM(2020) 682 final, Brussels 28.10.2020.

<sup>5</sup> The proposal for the directive in question is in line with the Council Recommendation of 13 July 2021 on economic policy in the euro zone, Official Journal of the European Union of 15 July 2021, C 283/1. Recital 13 states, among other things, that supporting the creation of quality jobs and improving working conditions, in particular by ensuring adequate minimum wages, reducing labour market segmentation and eliminating barriers to labour mobility, are crucial for supporting sustainable and inclusive economic recovery.

<sup>6</sup> Schulten T., Müller T., *A paradigm shift towards Social Europe? The proposed Directive on adequate minimum wages in the European Union*, in *Italian Labour Law e-Journal*, 14, 1, 2021, 6. <https://doi.org/10.6092/issn.1561-8048/13368>

<sup>7</sup> European Commission - Press release, Commission welcomes political agreement on adequate minimum wages for workers in the EU, Brussels, 7.6.2022:

[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_3441](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3441)

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approval will be followed by a formal vote in the Council and the European Parliament. The political agreement increases the chances of the directive being adopted.

This study examines the differences between the ILO Convention No. 131 and the draft Directive to regulate the mechanisms of fixing minimum wages for labour, focusing on such elements as the type of mechanisms for determining the minimum wage, as well as the scope, modalities in the role of participation for social partners and other actors. Furthermore, it also analyses the impact of ILO Convention No. 131 on the solutions adopted in the proposal for a directive concerning the mechanisms of fixing minimum wages and the significance of the draft Directive for the propagation of ILO standards across the EU member states.

## 2. Background of the analysis.

The minimum wage standard stipulated in Convention No. 131 is one of the ILO's indicators for measuring the progress made by States in ensuring decent work<sup>8</sup>, within the framework of the sustainable development paradigm.<sup>9</sup> On the one hand, the paradigm presupposes that the rules to be set forth will enable enterprises to develop and natural resources to be respected; on the other, it involves undertaking measures to ensure full and productive employment and decent work for all. Within this paradigm, the requirements of the social aspect of sustainable development are determined by labour protection standards which, at the same time, have an impact on the accomplishment of economic and environmental objectives, whereby they contribute to ensuring decent work in the broad sense.<sup>10</sup> This perspective rests on the assumption that the interplay between economic, social and political measures may be decisive in ensuring decent work.<sup>11</sup> According to the ILO, a well-designed minimum wage policy requires that the benefits of progress be equitably and equally distributed among all people<sup>12</sup> and that a minimum living wage be guaranteed for all employed persons.<sup>13</sup> The above position draws on the objectives of the United Nations 2030 Agenda for Sustainable Development and its Sustainable Development Goals<sup>14</sup>. Although the 2030 Agenda does not address minimum wages directly, the direction for development it adopts remains closely linked to policies in this respect. In particular, attention should be drawn to Goal 8 of the Agenda, which calls for the promotion of sustainable, inclusive and balanced economic development, full and productive employment as well as decent work.

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<sup>8</sup> International Labour Organization, *Declaration on Social Justice for a Fair Globalization*, Geneva 2008, 13.

<sup>9</sup> Bomba K., *Minimalne wynagrodzenie za pracę w działalności Międzynarodowej Organizacji Pracy*, in *Praca i Zabezpieczenie Społeczne*, 10, 2021, 17. DOI: 10.33226/0032-6186.2021.10.2

<sup>10</sup> Novitz T., *Engagement with sustainability at the International Labour Organization and wider implications for collective worker voice*, in *International Labour Review*, 159, 4, 2020, 464-465. <https://doi.org/10.1111/ilr.12181>

<sup>11</sup> International Labour Organization, Report of the Director-General, Decent Work, International Labour Conference, 87<sup>th</sup> Session 1999, Geneva 1999, 3-4.

<sup>12</sup> International Labour Organization, *Global Wage Report 2020-21. Wages and minimum wages in the time of Covid-19*, International Labour Office, Geneva, 2020, 166.

<sup>13</sup> International Labour Organization, *Declaration on Social Justice for a Fair Globalization*, Geneva, 2008, 6 ff.

<sup>14</sup> United Nations, Resolution adopted by the General Assembly on 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development.

Despite the ILO's universal mandate in the field of labour protection<sup>15</sup>, the minimum standards it stipulates may or may not be adopted by the member states. Minimum wage conventions are binding on states subject to ratification. A. Supiot observes that non-fundamental conventions are optional for the ILO member states which, in effect, undermines the pursuit of social justice stated in the Philadelphia Declaration.<sup>16</sup> Since ILO Convention No. 131 is not directly applied by the ILO, other means of exerting influence need to be sought. For instance, in 2019, the Council of the EU promulgated its conclusions on promoting the ILO Centenary Declaration on the Future of Work.<sup>17</sup> The Declaration in question sees an adequate minimum wage established by law or negotiation as an instrument to ensure decent work for all workers.<sup>18</sup> The ILO Conventions and Recommendations have been one of the inspirations for the European Pillar of Social Rights within the European Union. The preamble of the Pillar also draws on a 2016 ILO study entitled *Building the Social Pillar for European Convergence*, in which the ILO indicates that a balanced approach to minimum wage policy based on the principles detailed in the ILO legal instruments could reduce in-work poverty in the EU and help decrease low-wage competition while promoting sustainable enterprises and economic development.<sup>19</sup> Meanwhile, it is noted in pertinent literature that there is nothing to prevent the Court of Justice of the EU from interpreting or filling gaps in EU legislation through reference to international law. However, the fact that some countries have not agreed to meet internationally agreed minimum standards may explain the limited importance that the CJEU attaches to the ILO conventions in its rulings.<sup>20</sup>

The proposal for a Directive on adequate minimum wages in the European Union implements the demand expressed in Section 6 of the 2017 European Pillar of Social Rights<sup>21</sup> that an adequate minimum wage shall be ensured in a way that provides for the satisfaction of the needs of the worker and his/her family in the light of the national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented. It follows from the rationale of the draft that ensuring adequate wages to workers in the Union is essential if one is to guarantee adequate working and living conditions, as well as build fair and resilient economies and societies in line with the United Nations 2030 Agenda for Sustainable Development and its Sustainable Development Goals. Meanwhile, adequate wages are an essential component of the EU model of a social market economy. The preamble of the proposed directive on adequate minimum wages in the European Union explicitly invokes ILO Convention No. 131 and states that a minimum

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<sup>15</sup> Supiot A., *Labour is not a commodity: The content and meaning of work in the twenty-first century*, in *International Labour Review*, 160, 1, 2021, 126; Sengenberger W., *International labour standards in the global economy: past, present and future*, in *Polityka Społeczna*, 15, 1, 2019, 6 ff.

<sup>16</sup> Supiot A., *The tasks ahead of the ILO at its centenary*, in *International Labour Review*, 159, 1, 2020, 125 ff.

<sup>17</sup> *The Future of Work: the European Union promoting the ILO Centenary Declaration Council Conclusions* of 24.10.2019, 13436/1/19 REV 1.

<sup>18</sup> See Part III(B)(ii) of the ILO Declaration of 2019.

<sup>19</sup> See Part of the 2016 ILO study entitled *Building a Social Pillar for European Convergence*.

<sup>20</sup> Robin-Olivier S., *The relationship between international law and European labour legislation and its impact on the development of international and European social law*, in *International Labour Review*, 159, 4, 2020, 487-488.  
DOI: 10.1111/ilr.12195

<sup>21</sup> Inter-institutional Proclamation on the European Pillar of Social Rights, Official Journal of the European Union C 2017/428/10.

wage, fixed at an appropriate level, safeguards the income of disadvantaged workers, helps to ensure a decent living standard and limits the loss of income in adverse economic circumstances (Recital 7 of the preamble). It should be stressed that it was previously not common for EU directives to invoke the global standards set out in the ILO conventions in their preambles. In view of the discussed proposal, adequate minimum wages and strong collective bargaining are not an impediment to the free market, nor do they constitute factors which are detrimental to economic growth and employment levels but foster more sustainable and inclusive economic development.<sup>22</sup> In this approach, achieving economic development relies on increasing productivity and innovation rather than on wage dumping.<sup>23</sup>

### 3. Types of mechanisms for fixing minimum wages.

Under international law, the mechanism for fixing the minimum wage is indirectly governed by the laws pertaining to equal treatment and non-discrimination in employment, as well as freedom of association and collective bargaining<sup>24</sup>. However, the respective obligations of the states derive primarily from the ILO conventions and recommendations, which explicitly refer to minimum wages (Convention No. 131 of 1970, in particular). Pursuant to Article 1(1) of the Convention No. 131, each member of the ILO which ratifies this Convention undertakes to establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate. Article 4(1) of the Convention also stipulates that each member which ratifies this Convention shall create and/or maintain machinery adapted to national conditions and requirements whereby minimum wages for groups of wage earners covered in pursuance of Article 1 thereof can be fixed and adjusted from time to time. The mechanism in question is part of a more broadly construed minimum wage system which applies to all groups of workers whose employment conditions are such that the system will be adequate to provide for their protection. The system also includes the criteria for fixing the minimum wage (Article 3), a legal obligation to have it periodically adjusted (Article 4(1)), as well as legal guarantees associated with the said wage (Article 5).<sup>25</sup>

Convention No. 131 does not specify the exact form that the national mechanism for fixing the minimum wage should assume. Simultaneously, it is underscored that the adopted mechanism should be aligned to the domestic circumstances. Chapter IV(6) of the ILO Recommendation 135 lists several examples of such mechanisms without introducing a hierarchy between them. According to its tenor, the minimum wage fixing machinery provided for in Article 4 of the Convention may take a variety of forms, such as the fixing

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<sup>22</sup> Schulten T., Müller T., nt. (7), 1-2.

<sup>23</sup> Menegatti E., *Much ado about little: The Commission proposal for a Directive on adequate wages*, in *Italian Labour Law e-Journal*, 14, 1, 2021, 22. <https://doi.org/10.6092/issn.1561-8048/13369>

<sup>24</sup> See more broadly in Bomba K., *Minimalne wynagrodzenie za pracę jako instrument realizacji społecznych praw człowieka*, C.H. Beck, Warsaw, 2022, 81 ff.

<sup>25</sup> Seweryński M., *Minimalne wynagrodzenie za pracę – wybrane zagadnienia*, in Sanetra W. (ed.), *Wynagrodzenie za pracę w warunkach społecznej gospodarki rynkowej*, Wolters Kluwer Poland, Warsaw, 2009, 54.

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of minimum wages by- (a) statute; (b) decisions of the competent authority, with or without formal provision for taking account of recommendations from other bodies; (c) decisions of wages boards or councils; (d) industrial or labour courts or tribunals; or (e) giving the force of law to provisions of collective agreements. On that basis, J.-M. Servais concludes that a minimum wage fixing mechanism may take the form of “legislation, decisions of wages boards or councils, court rulings or acts giving force of law to provisions of collective agreements”. The author also notes that domestic legal mechanisms need not be homogeneous in terms of type or internal design. However, he cautions against formulating them in an excessively complex manner which could undermine the freedom of collective bargaining.<sup>26</sup>

Regardless of the type of national mechanism, the minimum wage rate it establishes should be legally binding. Consequently, minimum wage compliance is compulsory for workers and employers within the scope of such wage, with no possibility of reducing it, whether by agreement or contract. With this stipulation, Article 2 of Convention No. 131 guarantees the freedom to conclude collective agreements. Ensuring freedom of agreement—subject to the legally binding nature of the minimum wage thus determined—means that within the framework of the agreement mechanism, there is no obligation to apply the social and economic criteria stated in Article 3 of the Convention No. 131 to determine that wage. As a result, the application of the agreement-based mechanism entails greater freedom for the social partners to negotiate than if a statutory mechanism were chosen.

Now, with respect to the draft Directive, one should draw attention to Article 1(2) and (3), according to which the Directive shall be without prejudice to the choice of the Member States to set statutory minimum wages or promote access to minimum wage protection provided by collective agreements. Nothing in this Directive shall be construed as imposing an obligation on the Member States where wage setting is ensured exclusively via collective agreements to introduce a statutory minimum wage or make the collective agreements universally applicable. Compared to the ILO regulations, the draft Directive refers to the form of national mechanisms for setting minimum wages in very general terms, stating only two essential types: statutory and agreement-based. The draft EU Directive merely lays down a framework to improve the adequacy of minimum wages and increase workers’ access to minimum wage protection, yet it does not aim to either harmonize minimum wage rates across the Union or establish a uniform mechanism for fixing minimum wages. Nor does it affect the freedom of the Member States as they fix statutory minimum wages or support access to minimum wage protection provided for in collective agreements. Moreover, those Member States in which minimum wage protection is only provided for by collective agreements are not obligated to institute a statutory minimum wage or to apply collective agreements across the board. Furthermore, the draft does not define a hierarchy between statutory solutions and collective bargaining as methods to fix minimum wages, allowing the States to choose their preferred mechanism freely in line with the particular features of their

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<sup>26</sup> Servais J.M., *International Labour Law*, Wolters Kluwer International, Alphen aan den Rijn, 2014, 197-198.

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national systems, national competencies, the autonomy of the social partners and freedom of contract.<sup>27</sup>

The method adopted in the draft implements the "positive" model of European integration, in which the common market would be governed by norms accommodating diverse national solutions in economic and social affairs.<sup>28</sup> However, the obligations of the Member States arising from the Directive differ depending on the type of mechanism for fixing the minimum wage that they adopted. Article 3 of the draft applies to the 21 EU Member States with a statutory mechanism, as it formulates general criteria for fixing the national minimum wage. As for the six countries where an agreement-based mechanism is in force (Austria, Cyprus, Denmark, Finland, Italy and Sweden), this provision does not apply, leaving the social partners free to determine the minimum wage. In none of these cases does the draft formulate detailed solutions to be adopted by the countries.<sup>29</sup> Such an arrangement is due to the EU's limited competence with regard to pay (Articles 153.1(f), 153.5 TFEU);<sup>30</sup> consequently, the Union has to respect the autonomy of the Member States in shaping their minimum wage systems, especially those based on collective bargaining.<sup>31</sup>

Thus, none of the discussed pieces of legislation requires that a statutory mechanism be adopted in countries where such a mechanism does not exist, or that collective agreements be universally applied. All the while, these legislative acts leave considerable discretion to States in how they choose the appropriate mechanism and formulate the rules which govern it, subject to a guarantee that the minimum wage fixed by the mechanism is legally binding. Such a solution arises from the necessity to leave states at liberty to opt for and shape particular mechanisms, given that the process of choosing the minimum wage fixing modality in a given country should respect other domestic solutions and the autonomy of social partners. However, the obligations of States under these legal instruments vary. Both Convention No. 131 and the draft Directive provide that, in the case of a statutory mechanism, States should take into account the criteria formulated therein for fixing the minimum wage. This obligation does not apply to countries where the minimum wage is established exclusively through collective bargaining. Such a regulation respects the autonomy of the social partners in shaping the minimum wage.

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<sup>27</sup> COM(2020) 682 final, 3, substantiation.

<sup>28</sup> Schulten T., Müller T., nt. (7), 2-3.

<sup>29</sup> Delfino M., *The Proposal for an EU Directive on adequate Minimum Wages and its impact on Italy*, in *Italian Labour Law e-Journal*, 14, 1, 2021, 51. <https://doi.org/10.6092/issn.1561-8048/13370>

<sup>30</sup> For further analysis see Aranguiz A., Garben S., *Combating income equality in the EU: a legal assessment of a potential EU minimum wage directive*, in *European Law Review*, 2, 2021, 162; Sjödin E., *European Minimum Wage: A Swedish perspective on EU's competence in social policy in the wake of the proposed Directive on adequate minimum wages in the EU*, in *European Labour Law Journal*, 1, 2022, 6 ff. DOI:10.1177/20319525221090547

<sup>31</sup> Grenfors J., Gentile E., *The minimum wage Directive proposal and the promotion of collective bargaining: the voice of SGI-Europe*, in *Italian Labour Law e-Journal*, 14, 1, 2021, 43 ff. <https://doi.org/10.6092/issn.1561-8048/>

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#### 4. Participation of the social partners in the minimum wage fixing mechanism.

The ILO legislation imposes an obligation on states to cooperate with social partners while developing a minimum wage fixing mechanism and afterwards, once it has been put into effect. Under Convention No. 131 and Recommendation No. 135, the interaction between public authorities and social partners may proceed either as consultations or involve direct participation in decision-making.

Comprehensive consultation with the representatives of workers and employers is required when the minimum wage fixing mechanism is being established, operates or undergoes amendments. Pursuant to Article 4(2), Convention No. 131, the provision shall be made, in connection with the establishment, operation and modification of such machinery, for full consultation with representative organisations of employers and workers concerned or, where no such organisations exist, representatives of employers and workers concerned. Chapter IV(7), Recommendation No. 135, stipulates that the requirement to consult social partners is associated, e.g. with the selection and application of criteria for fixing the minimum wage, its adjustments, as well as with arising issues and gathering useful data and information.<sup>32</sup> The ILO Committee of Experts notes that the obligation to consult goes beyond providing information. It is a form of collaboration with the social partners, which is intermediate between sharing information and co-decision. Consultations should have a real impact on the decisions taken and must therefore be carried out beforehand, in such a way that the arguments put forward by the social partners may be duly considered. It should be genuine and ensure representatives of both employers and workers access to the information required to express their views. Thus, a consultation procedure which prevents comments made by the social partners from being considered and does not guarantee the opportunity to take a position on the basis of exhaustive information will not meet these standards.<sup>33</sup>

Where appropriate, in view of the nature of minimum wage fixing mechanisms, states should enable representatives of the employers and representatives of the workers to participate directly in their application. The obligation arises under Article 4(3a), Convention No. 131, which specifies that wherever it is appropriate to the nature of the minimum wage fixing machinery, provision shall also be made for the direct participation in its operation of representatives of organisations of employers and workers concerned or, where no such organisations exist, representatives of employers and workers concerned, on the basis of equality. The ILO Committee of Experts notes that this form of collaboration relies on the involvement of actors with different or conflicting interests and that the aim is to reach a consensus. Direct participation of social partners should therefore take place under the equality principle. Unlike consultation, the essence of which is to assist the competent authority in taking a decision, direct participation consists of the active involvement of the

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<sup>32</sup> Servais J.-M., nt. (24), 197.

<sup>33</sup> International Labour Organization, Committee of Experts on the Application of Convention and Recommendation, *General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), Report III (Part 1B)*, Geneva, 2014, 101 ff.



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employers' representatives and workers' representatives in the decision-making process.<sup>34</sup> In my opinion, the direct participation of the social partners may be deemed a qualified form of cooperation with public authorities in minimum wage fixing.

Irrespective of the form of cooperation adopted in a given country, i.e. consultation or co-decision, social partners are to participate in the minimum wage fixing mechanism on an equal footing, in equal numbers and with equal voting strength. Employers and workers should be free to choose their representatives. A choice free from external interference will enable entities with a social mandate to represent their interests to participate in the mechanism, which is important to ensure its effectiveness.

The important role of the social partners is also noted in the draft Directive on adequate minimum wages in the European Union. In the case of a statutory mechanism, states should ensure the actual participation of social partners in fixing and adjusting minimum wages. The provisions of the Directive do not set forth detailed rules for such cooperation but draw attention to the need to have social partners involved in the activities of advisory bodies. The actions of the latter are provided for in Article 5(5) of the Directive, according to which Member States shall establish consultative bodies to advise the competent authorities on issues related to statutory minimum wages. In particular, the consultation obligation pertains to selecting and applying criteria and indicative benchmarks for determining the levels of statutory minimum wages, adjusting rates of statutory minimum wages, establishing different rates and deductions in statutory minimum wages, as well as collecting data and studies to supply the bodies responsible for fixing statutory minimum wages with information.

At the same time, one of the principal goals of the draft Directive is to enhance collective bargaining in all member states of the Union.<sup>35</sup> The draft underlines the importance of collective bargaining in ensuring wage adequacy and states the need to create the conditions in which it may take place. Recital 18 of the preamble recognizes that well-functioning collective bargaining on wage fixing is a crucial means to ensure that workers are protected through adequate minimum wages. Therefore, pursuant to Article 4(1) of the draft, Member States should create a favourable environment in which the wages can be agreed upon regardless of the adopted type of mechanism. To this end—in consultation with the social partners—the states must take steps to increase the scope of collective bargaining in that they, for example, support social partners to develop and strengthen their capacity to engage in collective bargaining over wage-fixing at the sectoral or cross-sectoral level and encourage social partners to engage in constructive, substantial and informed negotiations concerning pay.

The above instrument embodies the conviction that there exists a strong correlation between collective bargaining coverage, the degree of wage dispersion and the size of the low wage sector. States with more extensive collective bargaining coverage tend to have lower wage dispersion and a more limited low wage sector. The positive impact of collective bargaining on ensuring adequate wages is also observed in those states which adopted a statutory mechanism of fixing minimum wages. In order to achieve adequate wage levels, the

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<sup>34</sup> International Labour Organization, nt. (31), 102.

<sup>35</sup> Visentini L., *Directive on Adequate Minimum Wages: European institutions must respect the promise made to workers!*, in *Italian Labour Law e-Journal*, 14, 1, 2021, 35. <https://doi.org/10.6092/issn.1561-8048/13371>

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statutory minimum wage does not suffice since comprehensive collective bargaining and broad collective bargaining coverage are prerequisites.<sup>36</sup> For this reason, the draft aims to increase the scope of collective bargaining so that most workers in the EU states are parties to collective labour agreements.<sup>37</sup>

Article 4 of the draft Directive provides that countries in which the scope of collective bargaining does not exceed 70% of the workforce should also establish a framework of favourable conditions for collective bargaining, in consultation or agreement with the social partners and adopt an action plan to promote collective bargaining. According to Recital 19 of the preamble, this framework should be established by law or by way of a tripartite agreement. Should the draft come into effect, the obligation to strengthen collective bargaining will apply to most EU Member States. Collective bargaining coverage exceeds 70% in only 10 out of 27 countries. In consequence, the implementation of the directive will be most challenging in Greece, Ireland and the Central and Eastern European countries, where collective bargaining coverage does not exceed 35%.<sup>38</sup>

It should also be noted that the draft Directive speaks of the important role of the state in enhancing collective bargaining and ensuring compliance with the applicable minimum wage, regardless of the fixing mechanism adopted. Article 9 of the draft binds the Member States to take appropriate measures to ensure that in the performance of public procurement or concession contracts, economic operators comply with the wages set out by collective agreements for the relevant sector and geographical area and with the statutory minimum wages where they exist. Article 10 of the draft provides for the establishment of national methods to monitor the coverage and adequacy of minimum wages, whether established by means of a statutory or agreement-based mechanism. Article 11, on the other hand, requires the Member States to provide for the impartial and effective pursuit of claims for workers for breaches of rights pertaining to the minimum wage fixed by law or a collective agreement; they should also ensure safeguards against unfavourable treatment by the employer and adverse consequences arising from action to enforce compliance with the rights pertaining to the minimum wage fixed by law or agreement.

A comparison of the legal solutions in Convention No. 131 and the draft Directive demonstrates that both introduce participation requirements for the representatives of employers and workers. However, they differ in terms of the scope and form of involvement of the social partners. Convention No. 131 requires that the latter participate both when the national mechanism is established and when it operates. It was recognised that participation of the social partners at both stages is a prerequisite for the adopted mechanism to be effective in practice<sup>39</sup>, while their involvement is a guarantee of a fair balance between the interests of those directly concerned.<sup>40</sup> Participation of the social partners should take the

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<sup>36</sup> Schulten T., Müller T., nt. (7), 12 ff.

<sup>37</sup> Schulten T., Müller T., nt. (7), 5.

<sup>38</sup> Source OECD, 2019 or more recent, <https://www.oecd.org/employment/ictwss-database.htm> (access: 30.06.2022).

<sup>39</sup> International Labour Organization, nt. (31), 46-49.

<sup>40</sup> The significance of the involvement of social partners in determining labour conditions is discussed in Hayter S., Weinberg B., *Mind the gap: collective bargaining and wage inequality*, in Hayter S. (ed.), *The role of collective bargaining*

form of consultation and, where possible, joint decision-making with the public authorities. In contrast, the draft Directive sets forth that the statutory mechanism should provide for advisory bodies which advise public authorities. Thus, social partners are entitled to become involved in the functioning of the mechanism, but only through consultation since it does not provide for making joint decisions with the public authority as a qualified form of cooperation.

The consultation stipulated in the draft Directive as a form of cooperation between public authorities and social partners is in line with the solutions most commonly adopted in the EU Member States. Only a few countries, such as Poland and Austria (with regard to the minimum wage established by the Federal Conciliation Commission), provide for co-determination involving social partners, with the exception that in Poland, negotiations between the public authority and social partners are not always effective. In the latter country, should the negotiations fail, the decision on the minimum wage is taken by the Council of Ministers without the need to have social partners heard.<sup>41</sup> If the Directive is adopted, Poland will be required to introduce a consultation procedure between the public authorities and the social partners in the event of unsuccessful negotiations concerning the fixing of the minimum wage.<sup>42</sup>

At the same time, under the draft Directive in question, Member States are placed under obligation to define a framework for collective bargaining and to support such bargaining, having found that an agreement-based method for fixing minimum wages may have a positive impact on ensuring an adequate standard of living for workers. After all, increasing pay rates is the core objective of collective bargaining. However, in view of the very general nature of the provisions of the directive, resulting from the limited competencies of the Union in the matter of pay, E. Menegatti anticipates that the efficacy of this legal instrument will be limited.<sup>43</sup>

## 5. Participation of other actors in the minimum wage fixing mechanism.

In order for the minimum wage fixing mechanisms to be established and to function, public authorities may be compelled to cooperate with actors other than social partners. Under the ILO Convention No. 131, this applies to instances which are justified by the nature of the national mechanism. Pursuant to Article 4(3)(b) of the Convention, collaboration with other actors assumes the form of direct participation when the mechanism is implemented, involving persons having recognised competence for representing the general interests of the country and appointed after full consultation with representative

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*in the global economy. Negotiating for Social Justice*, Edward Elgar Publishing, Cheltenham—Northampton, International Labour Office, Geneva, 2011, 138.

<sup>41</sup> See more broadly in Hajn Z., in Hajn Z., Mitrus L., *Labour Law in Poland*, Wolters Kluwer International, Alphen aan den Rijn, 2019, 130-131.

<sup>42</sup> Surdykowka B., Pisarczyk Ł., *The Impact of the Directive on Adequate Minimum Wages in the European Union on Polish Labour Law*, in *Italian Labour Law e-Journal*, 14, 1, 2021, 97. <https://doi.org/10.6092/issn.1561-8048/13374>

<sup>43</sup> Menegatti E., nt. (21), 30.

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organisations of employers and workers concerned, where such organisations exist and such consultation complies with national legislation or practice. According to Chapter IV(9), Recommendation No. 135, persons who represent the general interests of the country should be independent and suitably qualified as well as, where appropriate, they may be public officials engaged in the field of labour relations, economic and social planning, or economic and social policy-making. Thanks to their involvement, the decision-making process is also informed by the general interests of the country, which transcend the perspective adopted by the social partners.

In contrast, the draft EU directive on adequate minimum wages does not provide for the participation of persons who represent the general interests of the country in the wage-fixing mechanism. Only where a statutory mechanism exists, Article 5(5) of the draft obliges Member States to establish appropriate advisory bodies, though it does not define their composition. Apparently, therefore, there are no obstacles to the participation of independent experts or persons representing the interests of the state in their proceedings.

The draft Directive is focused on collaboration with social partners, which follows from its objective to enhance collective bargaining by increasing its coverage and providing for increased autonomy of the social partners where pay is concerned. This position is due to a change in the hitherto neo-liberal methods of economic governance in the Union, in which wages and collective bargaining have been instruments of pressure on the Member States. For example, the Troika—the European Commission, the European Central Bank and the International Monetary Fund—made far-reaching demands on Greece and Portugal to reduce or freeze minimum wages when they received loans under the European Stability Mechanism (ESM) in the wake of the crisis of 2008 and 2009. Other countries, including France, have also faced pressure as the collective bargaining system became weaker.<sup>44</sup> Such an approach contributed to increased social inequalities and in-work poverty in the Union, undermined opportunities for economic growth in many countries and created fertile ground for Eurosceptic sentiments.<sup>45</sup> Given the circumstances, it has been argued that economic development and political stabilization require a change in the Union's labour and social policy discourse,<sup>46</sup> as evinced in the Directive's emphasis on the importance of autonomous collective bargaining in wage-fixing.

It follows from the above that Convention No. 131 and the EU Directive differ with respect to the involvement of actors other than social partners in the functioning of the mechanism; Convention No. 131 requires that persons representing the general interests of the country participate. Consequently, one ensures grounds for a comprehensive consideration of the country's social and economic factors in the decision-making process. Conversely, the draft EU Directive concentrates on establishing a legal framework to support collective bargaining.

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<sup>44</sup> Menegatti E., *Challenging the EU Downward Pressure on National Wage Policy*, in *International Journal of Comparative Labour Law and Industrial Relations*, 33, 2, 2017, 200 ff.

<sup>45</sup> Schulten T., Müller T., nt. (7), 5.

<sup>46</sup> Lübker M., Schulten T., *WSI Minimum Wage Report 2022. Towards a new Minimum Wage Policy in German and Europe*, Report No. 71, March 2022, WSI Institute of Economics and Social Research 2022, 4.

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## 6. Conclusions.

The mechanisms for fixing minimum wages laid down in the ILO Convention No. 131 and in the draft Directive serve similar purposes, envisioning adequate pay and decent work within the paradigm of sustainable social and economic development.<sup>47</sup> For this reason, both the ILO Convention No. 131 and the proposal for a Directive on adequate minimum wages in the European Union share numerous elements in common.

Both legislative acts allow for the social and economic differences between the states. Consequently, they are left substantial leeway as they choose the mechanism and shape its principles taking into account national law and the accepted practices. However, the draft Directive confines the choice of states to the statutory and the agreement-based mechanism, capping the range of legal solutions which exist in the Member States of the European Union. Both legal instruments do not establish a hierarchy between particular types of mechanisms but provide for fewer obligations for the states where the agreement mechanism is in place. In such cases, social partners need not apply the criteria formulated for the statutory mechanism, which constitutes an expression of respect for their autonomy.

Concerning the modalities of involvement of the social partners in the minimum wage setting, the ILO Convention No. 131 is more accommodating than the draft Directive as far as the diversity of domestic legal solutions is concerned. Convention No. 131 provides for consultation or co-determination involving public authorities and social partners, while the draft Directive merely lays down compulsory consultation. In this case, as well, the draft Directive is in line with the solutions prevailing in the EU Member States.

As for the role of social partners in establishing the minimum wage, it has to be stated that the analysed legal instruments differ to some extent in their perception. In Convention No. 131, the involvement of the social partners is to ensure that the minimum wage is fixed while taking the needs of employees and the capabilities of employers into account; at the same time, it is intended to encourage compliance with the adopted regulation. The draft Directive additionally seeks to enhance the autonomy of social partners and extend the coverage of collective bargaining. The draft Directive should thus contribute to the sustainable development of Europe based on balanced economic growth and price stability and a highly competitive social market economy, as required by art. 3 of the Treaty in the European Union<sup>48</sup>.

The two instruments also differ with regard to the involvement of actors other than social partners (e.g. independent experts). Convention No. 131 sees their contribution as an opportunity to integrate a broader perspective which goes beyond the interests of workers and employers. The draft Directive, on the other hand, admits the participation of such actors on a consultative basis but links the fixing of an adequate minimum wage primarily to the involvement of the social partners.

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<sup>47</sup> On the idea being grounded in social human rights see Mertens T., *A Philosophical Introduction to Human Rights*, Cambridge University Press, Cambridge, 2020, 25; Collins H., Lester G., Mantouvalou V., *Introduction: Does Labour Law Need Philosophical Foundations?*, in Collins H., Lester G., Mantouvalou V. (eds.), *Philosophical Foundations of Labour Law*, Oxford University Press, Oxford, 2018, 13.

<sup>48</sup> Treaty on European Union, O.J. C 326, 26/10/2012, P. 0001 – 0390.

It follows explicitly from Recital 7 of the preamble to the draft Directive that it had been inspired by Convention No. 131 with regard to ensuring a minimum wage that enables decent living. In the author's opinion, references to Convention No. 131 relating to the wage-fixing mechanism can also be found in the Directive. They are discernible in how the draft Directive was formulated, specifically in terms of the allowances it makes for the distinct mechanisms adopted in the individual EU Member States. Following the example of the Convention, the draft Directive determines the obligations of the states differently, depending on whether they have opted for an agreement-based or a statutory mechanism. At the same time, the draft Directive as a legal instrument with a regional scope focuses on solutions tailored to the needs of EU Member States. It is also informed by the needs of the common EU market, e.g. it stresses the vital position of collective bargaining and seeks to enhance the social dimension of European integration. Thus, the draft Directive does not create an entirely new standard of adequate minimum wage. It draws on the solutions adopted in Convention No. 131 while adjusting them to the needs and circumstances of European countries.

The ILO Convention No. 131 and the draft Directive espouse similar objectives, rooted in the paradigm of decent work and sustainable development. Thus, the EU Directive on adequate minimum wage may potentially be an effective tool to implement international standards for minimum wage fixing in the EU Member States. Simultaneously, the draft Directive pursues more ambitious objectives with regard to the involvement of the social partners. As a result, it may boost the role of trade unions and employers' organizations in the process of establishing a minimum wage.

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