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Make me good…just not yet? The (potential) impact of the Adequate Minimum Wage Directive.

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Abstract

The Adequate Minimum Wage Directive has proven to be one of the most contentious pieces of EU labour legislation, with a variety of opinion on what impact the Directive may have, its significance, and its implications for labour relations regulation across the EU. This contribution focuses on the implications of the Directive for collective bargaining coverage in the EU, and takes a broadly optimistic view of what the impact of the Directive might be by using the example of Ireland as a case study. Ireland is one of the countries with a relatively low collective bargaining coverage rate, where measures will be required to promote collective bargaining. However, more broadly, the Irish journey in recent years seems to mirror that of the EU Institutions. From an emphasis on austerity measures and pressures to de-regulate following the financial crisis, allied with judicial decision-making which seemed to favour economic rights over social rights, to a "paradigm shift" of a (re)emphasis on social Europe, and on collective rights. The paper looks at the impact the Directive (pre-transposition) has already had in terms of social dialogue and collective bargaining, before turning to consider some of the transposition challenges. In the concluding section, the paper reflects on some lessons that might be of wider application across the Member States.

Keywords: Adequate Minimum Wage Directive; Collective Bargaining; EU Law; Ireland.

1. Introduction.

Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union (the Adequate Minimum Wage Directive, AMWD) has proven to be one of the most contentious pieces of EU labour legislation. Long before the deadline for transposition had expired (November 2024) the Directive had already generated significant commentary and debate amongst academics and

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policy-makers.[1] There is a variety of opinion on what impact the Directive may have, its significance, and its implications for labour relations regulation across the EU.[2] It is well-known that, although the Directive has been strongly backed by the European Trade Union Confederation (ETUC), it has not been well-received by ETUC affiliates in certain countries, notably Denmark and Sweden.[3] Moreover, there has been scepticism in some countries where social dialogue and collective bargaining structures are currently weak as to how much impact the Directive will have, as it devolves to Member States, and national social partners, much of the responsibility for achieving its goals.[4]

This contribution takes a broadly optimistic view of what the impact of the Directive might be by using the example of Ireland as a case study. This case is of wider interest for a number of reasons. First, the paper focuses on one aspect of the Directive; the goal of promoting collective bargaining. In Ireland, as in a number of Member States with an existing statutory minimum wage mechanism, the provisions of the Directive as they relate to minimum wage setting are seen as less of an implementation challenge, probably requiring (at most) some tweaking of the existing system.[5] However, Ireland is most certainly one of the Member States with sectoral bargaining coverage rate of below 80% (the 'trigger' for action under Article 4), and it is the Directive's requirements in this regard that have gained most attention.[6] Secondly, Ireland is one of the Member States where State support for collective bargaining has traditionally been relatively weak; in particular, legal supports for collective bargaining are largely absent. Thirdly, much comment has been made on the shift in approach from the EU institutions, from a focus on austerity and deregulation of wage-setting mechanism following the crisis post-2007 to a more recent (re) emphasis on "Social Europe", as exemplified by the Directive itself.[7] Ireland, of course, was one of the Member States that relied on financial support from the EU/IMF during the crisis, which was conditional upon carrying out certain reforms of wage-setting institutions. Ireland remains, as do all EU Member States, part of the European Semester, where annual recommendations on labour relations policy are issued.

The paper is set out as follows. It outlines briefly the "Anglo-Saxon" model of industrial relations (IR) that exists in Ireland, and outlines developments over past years (legal and policy-based), particularly in the wake of the crisis post-2007. It then looks at the impact the Directive (pre-transposition) has already had in terms of social dialogue and collective

[1] There are many, many references that could be provided here (and some will be referred to throughout the paper), but *see* the comprehensive commentary in Ratti L., Brameshuber E., Pietrogiovanni V. (eds), *The EU Directive on Adequate Minimum Wages. Context, Commentary and Trajectories*, Hart, Oxford, 2024.
[2] Many of these were expressed at the *XXI International Conference in Commemoration of Professor Marco Biagi* in Modena, March 2024, and will be, and have been, shared in the pages of this journal.
[3] de la Porte C., *The European Pillar of Social Rights Meets the Nordic Model*, Swedish Institute for European Policy Studies, Stockholm, 2019.
[4] *See*, for example, Florczak I., Otto M., *Poland*, in Ratti L., Brameshuber E., Pietrogiovanni, V. (eds), nt. (1).
[5] *See* Bell M., Eustace A., *Ireland*, in Ratti L., Brameshuber E., Pietrogiovanni, V. (eds), nt. (1).
[6] Ireland's collective bargaining coverage rate is estimated at approx. 34%: https://stats.oecd.org/Index.aspx?DataSetCode=CBC (accessed May 15 2024).
[7] Roland E., Sabina S., Golden D., Szabó I., Maccarrone V., *Politicising Commodification: European Governance and Labour Politics from the Financial Crisis to the Covid Emergency*, Cambridge University Press, Cambridge, 2024; 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.

bargaining, before turning to consider some of the transposition challenges, focusing on the role of the State and the social partners, the resolution of which will be crucial for assessing the impact of the Directive. In the concluding section, the paper reflects on some lessons that might be of wider application across the Member States.

2. Livin' in an Anglo World.

The Irish system of industrial relations, derived as it is from that of the UK, has traditionally been classified as 'voluntarist', meaning that there has been a preference for joint trade union and employer regulation of employment relations in which legal intervention is relatively absent. Voluntarism is premised on freedom of contract, what Kahn-Freund, in the employment context, referred to as that great "indispensable figment of the legal mind",[8] and on freedom of association whereby the employment relationship is essentially regulated by free collective bargaining between worker and employer representative groups. In such a model, there is no rejection of public intervention, or labour law, but the role of the state is limited primarily to providing a supportive framework for collective bargaining.[9] Although the characterisation of the Irish model as voluntarist has come under stress in recent years as the legislative regulation of working conditions has increased dramatically (due, among other things, to the legislative obligations of European Union membership),[10] labour legislation generally provides for individual employment rights (minimum wages, working time, etc) and the model remains that collective employment relations between worker and employer representatives is generally not subject to legislative intervention, but rather left to the parties themselves. In terms of collective employment rights, Ireland provides notably weak legal protection for collective bargaining and for collective worker representation in general. The Irish Constitution, in Article 40.6.1iii⁰, protects the right of freedom of association but trade unions in Ireland enjoy no rights to be recognised for bargaining purposes by an employer. Thus, while employees are free to join a trade union, they cannot insist that their employer negotiate with any union regarding their pay and conditions. Collective bargaining in Ireland, therefore, is seen as normative and collective agreements are usually not legally enforceable as they do not generally intend to create legal relations. The law does intervene in collective employment relations in some, limited, circumstances (relating to sectoral collective bargaining mechanisms; which we will discuss below).

Worker representatives, then, as is typical in the single-channel Anglo model, must rely on industrial relations 'muscle' (not any legal or state-mandated rights) to achieve their aims. In Ewing's terms, the Irish trade union movement leans heavily towards the 'representational' function of trade unions, which sees collective bargaining as a private market activity conducted by unions, usually at the level of the enterprise, as agents of a

[8] Kahn-Freund O., *Labour and the Law*, Stevens, London, 1977, 77.
[9] Doherty M., *When You Ain't got Nothin', You Got Nothin' to Lose.... Union Recognition laws, Voluntarism and the Anglo Model*, in *Industrial Law Journal*, 42, 4, 2013, 369-397.
[10] From 1990 to 2020, 43 major labour law acts were passed; a huge volume for an area of law unused to statutory regulation. Approximately half of these were required, or heavily influenced, by EU law.

tightly circumscribed bargaining unit.[11] Trade unions rely, for power and influence, on membership and density levels. While this model differs from some other models in Europe, where unions benefit from the *erga omnes* extension of collective agreements, and where workers and trade unions can have an influence via Works Councils, the trade union movement does retain significant political, social and economic influence. There has never been a 'Thatcherite' attack on union rights, as in the UK, and, to date, there has never been a major anti-union public policy in Ireland. Neither has union legitimacy been challenged by any political party. Between 1987 and 2010, indeed, a series of social pacts was concluded between the social partners; the State; the unions (represented by the only trade union confederation, the Irish Congress of Trade Unions- ICTU); and the employers (represented primarily by the main employers' association, the Irish Business and Employers Confederation- Ibec). The social pacts each ran for three years, focusing on issues of pay (for the public, and unionised private, sector), tax reform and a range of other socio-economic issues.[12] Thus, the Irish trade union movement (and the main employers' representative groups) had a strongly institutionalised, and State-sanctioned, role in national socio-economic governance. Although the "social partnership" era ended in the aftermath of the financial crash of after 2007, institutionalised social dialogue was restored to some extent with the establishment of the Labour Employer Economic Forum (LEEF), where the State continues to meet and regularly consult with the social partners on areas of shared concern affecting the economy, employment and labour relations.[13] We can see, therefore, that although legal mechanisms to support collective bargaining are relatively weak in Ireland, social dialogue has been, and continues to be, a feature of the industrial relations system.

Social dialogue, as with so many aspects of the industrial relations system, came under significant strain during the years after the financial crash. In November 2010, the Irish government accepted the terms of an IMF-EU rescue package, totalling approximately €85 billion. The government agreed, as a precondition for receiving bail-out funds, to the adoption of an austerity programme, the exact terms of which were provided for in the December 1 2010 Memorandum of Understanding (MoU) signed with the 'Troika' of the European Central Bank, the European Commission and the IMF.[14] A significant requirement of the MOU was for the government to commission an independent review of two mechanisms (Registered Employment Agreement – REAs, and Joint Labour Committees – JLCs) in order to ensure there were no distortions of wage conditions across sectors associated with the presence of sectoral minimum wages in addition to the *national* minimum wage. The REA and JLC systems represented a significant departure from the Irish (indeed, Anglo-American) norm,[15] in that terms and conditions of employment were not

[11] Ewing K. D., *The Function of Trade Unions*, in *Industrial Law Journal*, 34, 1, 2005, 1-14.
[12] Doherty, M., *It Must Have Been Love...But It's Over Now. The Crisis and Collapse of Social Partnership in Ireland*, in *Transfer: European Review of Labour and Research*, 17, 3, 371-391.
[13] *See* Merrion Street, *Taoiseach chairs first meeting of Labour Employer Economic Forum*, 5th October 2016, available at https://merrionstreet.ie/en/news-room/news/taoiseach_chairs_first_meeting_of_labour_employer_economic_forum.html (accessed May 15 2024).
[14] Doherty M., nt. (12).
[15] Bogg A., *The Democratic Aspects of Trade Union Recognition*, Hart, Oxford, 2009.

settled through direct contractual negotiations between the employer and its workers. Instead, employment standards were set, and applied, not only for employers that recognised trade unions and union members, but also for employers which did not engage in collective bargaining. REAs at the sectoral level, made between the main employer body representing employers, and the trade unions representing workers, in the relevant sector, were traditionally the most significant (particularly in the construction sector) and had *erga omnes* effect.[16] In addition, Joint Labour Committees (JLCs) provided for the fixing of minimum rates of pay and the regulation of employment in certain sectors where there was little or no collective bargaining and where significant numbers of vulnerable workers were employed (e.g. retail, catering, and hotels).[17] JLCs comprised of an independent chairperson, appointed by the Minister, and representative members of workers and employers. They proposed "Employment Regulation Orders" (EROs), which, when confirmed by the Labour Court, set legally binding minimum wages and conditions of employment for workers in the sectors covered.[18] It was these two mechanisms (which set sectoral wage standards, following sectoral social partner negotiations) that were targeted by the 'Troika' for their "market distorting" effects.

At this time also, the (limited) legal structures for sectoral standard-setting came under critical scrutiny from the Irish courts. In 2011, the High Court declared that the legislation allowing the imposition of terms and conditions of employment by means of an ERO was unconstitutional, as it allowed an impermissible delegation of legislative powers (the setting of the rate of remuneration and conditions of employment for the sector) to a body other than the Oireachtas (Irish Parliament) without dealing with how, or on what basis, such powers should be exercised.[19] Two years later, in *McGowan v. The Labour Court*,[20] the Irish Supreme Court similarly declared Part III of the Industrial Relations Act 1946, which established the REA system to be unconstitutional. The tone of the judgment and the language used by the Supreme Court are noteworthy.[21] The Court notes (at paragraph 8) that the provisions of Part III (and its *erga omnes* effect) appear "somewhat anomalous" today and give rise to the "prospect of burdensome restraints on competition for prospective employers and intrusive paternalism for prospective employees".

The focus of the EU institutional members of the Troika and the Irish judiciary seemed to overlap; moving away from prioritising the role of the (sectoral) social partners in negotiating terms and conditions of employment, and moving towards the establishment of statutory minimum standards (which increasingly seem to operate as a 'ceiling' rather than a 'floor') and away from bargained terms and conditions of employment. It was noted by some

[16] Part III of the *Industrial Relations Act 1946* (as amended).
[17] Part IV of the *Industrial Relations Act 1946* (as amended).
[18] Doherty M., *Battered and Fried? Regulation of Working Conditions and Wage-Setting after the John Grace Decision*, in *Dublin University Law Journal*, 35, 2013, 97-120.
[19] *John Grace Fried Chicken Ltd v. Catering Joint Labour Committee* [2011] IEHC 277. The body to which the power was delegated, the Irish Labour Court, is not part of the regular court system, but is a statutory industrial tribunal, comprised of representatives of unions and employers, and chaired by a government nominee.
[20] [2013] IESC 21.
[21] *See* Doherty M., nt. (9).

commentators that this, in fact, was very much the approach taken by the Court of Justice in the infamous '*Laval*' line of caselaw.[22]

What a difference a decade (or so) makes. In November 2013, as Ireland exited its austerity programme, then Commission Vice-President, Olli Rehn, proclaimed it "a good day for Ireland and the Irish people" and "clear evidence that determined implementation of a comprehensive reform agenda can decisively turn around a country's economic fortunes…".[23] Less than five years later, Commission President Ursula von der Leyen was part of the proclamation of the European Pillar of Social Rights (EPSR).[24] As Schulten and Müller put it:

Not so long ago, the dominant view among EU policy makers was that strong institutions of collective wage regulation hinder the functioning of free markets, limit employers' flexibility and therefore have a largely negative effect on growth and employment. But today, statutory minimum wages and collective bargaining are recognised as institutional preconditions for a more sustainable and inclusive economic development.[25]

Schulten and Müller pose the question as to whether this is a paradigm shift towards a more social Europe, noting that the loss of legitimacy of the European integration project,[26] has created a political momentum for a more social orientation of EU policy, reinforced by the Covid-19 pandemic which has fostered a kind of "emergency pragmatism" in the EU. The paper will go to consider whether such a paradigm shift can be seen in a Member State such as Ireland, traditionally hostile to legal supports for collective bargaining, but where the regulation of (especially sectoral) bargaining has been hugely influenced by developments at EU level over the past two decades, and what pointers this might provide for other Member States as the AMWD is transposed.

3. Save us from ourselves…

On the 28th October 2020, the European Commission published its proposal for the AMWD.[27] As noted above, the Directive has not been universally welcomed by trade unions across the EU.[28] Ozols et al., have researched trade union attitudes to the Directive in 13

[22] Achtsioglou E., Doherty M., *There Must Be Some Way Out of Here…The Crisis, Labour Rights and Member States in the Eye of the Storm*, in *European Law Journal*, 20, 2, 219-240.
[23] European Commission, *Statement by Vice-President Rehn on Ireland's decision regarding programme exit*, 14th November 2013, available at http://europa.eu/rapid/press-release_MEMO-13-997_en.htm (accessed 15th May 2024).
[24] *See* https://ec.europa.eu/social/main.jsp?catId=1226&langId=en (accessed 15th May 2024).
[25] Schulten T., Müller T., nt. (7).
[26] A loss, incidentally, predicted by commentators on the austerity measures at the time – *see*, for example, Achtsioglou E., Doherty M., nt. (22).
[27] European Commission, *Advancing the EU social market economy: adequate minimum wages for workers across Member States*, 28th October 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1968 (accessed 15th May 2024).
[28] The response from employer representatives has been less nuanced; BusinessEurope labelled the proposal a "disaster" and a "legal monster" (https://www.businesseurope.eu/publications/proposed-eu-directive-minimum-wages-recipe-disaster; accessed May 15 2024).

Member States and have categorized the positions as consisting of three types: domestically-oriented opposition (e.g. Denmark, Sweden), domestically-oriented support (e.g. Hungary, Germany), and externally-oriented support (e.g. Finland, Spain).[29] The authors find that two key variables influence union attitudes; differences in levels of bargaining coverage, and state support for collective bargaining. The latter, for example, can take the form of "statutory extension of collective agreements, compulsory membership by firms in employers' associations, or labour law regulations requiring all firms to pay bargained wages".[30] Where levels of coverage are high, but state support (as defined) weak or absent, unions are likely to oppose the Directive for fear it will undermine their national model (as in Denmark and Sweden). Where levels of coverage are high and state support for collective bargaining is strong, unions are not particularly concerned about the Directive's domestic impact, but may support it in the expectation that it will raise bargaining levels/wages in other countries (the position the authors found in Finland and Spain). The third position, domestically-oriented support, can be found in countries where levels of bargaining coverage are low and state support for collective bargaining weak; here unions are likely to support the Directive as a mechanism to increase bargaining coverage, as the Directive requires Member States to take action to build and strengthen the capacity of social partners to engage in collective bargaining on wage setting, and to provide a framework for enabling conditions for collective bargaining, including an action plan to promote collective bargaining (under Article 4).

The ICTU position was very much that of domestically-orientated supporter of the Directive. Indeed, given the traditional judicial hostility to collective bargaining in Ireland,[31] ICTU had actively endorsed the idea of an EU law measure in this space, which would give legal protection for a more robust domestic framework for collective bargaining; as Thomas puts it, there was support among the Irish union leadership for a possible "European solution to an Irish problem".[32] This perspective, if anything, was bolstered by the judgment of the Irish Supreme Court in what is known as the '*NECI*' case.[33] This case involved yet another legal challenge by an association of small employers (this time in the Electrical Contracting sector) to the system of setting sectoral terms and conditions of employment (involving the sectoral social partners) set up in 2015 to respond to the declaration of unconstitutionality in the *McGowan* case (discussed above). In a surprise to many observers of the Irish Superior Courts' jurisprudence in this area, the Supreme Court appeal in the *NECI* case not only

[29] Ozols E., Hristov S. I., Paster T., *Unions divided? Trade Union Attitudes Towards the European Union's Directive on Adequate Minimum Wages*, in *Economic and Industrial Democracy*, 2024 (https://doi-org.may.idm.oclc.org/10.1177/0143831X241245007).
[30] Ozols E., Hristov S. I., Paster T., *ibid*, 6.
[31] We have seen some judicial *dicta* relating to *erga omnes* sectoral collective bargaining above; the Irish judiciary has also been clear that the Constitutional right to dissociate means that there is no Constitutional obligation on any employer to bargain with a trade union. A controversial judgment by Geoghegan J. in the case of *Ryanair v Labour Court* [2007] 4 IR 199, went so far as to suggest (*obiter dicta*) that "[i]t is not in dispute that as a matter of law Ryanair is perfectly entitled not to deal with trade unions *nor can a law be passed compelling it to do so*" (214; emphasis added).
[32] Thomas D., *An Opportunity to Review and Reframe Collective Bargaining and the Industrial Relations Regime*, NESC, Dublin, 2022, 42.
[33] *Naisiúnta Léictreach Contraitheoir Éireann Coideachta Faoi Theorainn Ráthaoichta (NECI) v The Labour Court, The Minister for Business, Enterprise and Innovation, Ireland and the Attorney General* [2021] IESC 36.

overturned the High Court finding that the relevant sections of the legislation were unconstitutional, but seemed to indicate a welcome departure in judicial thinking on the sectoral bargaining question. In an exceptionally clear and erudite leading judgment, MacMenamin J. focused in detail on the recent evolution of *EU* Law in a number of spheres. The judge accepted that a key objective of *erga omnes* sectoral agreements is to prevent "social dumping", and made reference to: the enactment of the amended Posted Workers Directive,[34] and the "social market principles" expressed therein; the Directive's *travaux préparatoires*, which expressed recognition of the need for facilitating dialogue between social partners; and the rights to information and consultation (Article 27) and collective bargaining (Article 28) under the EU Charter of Fundamental Rights. In another decision in 2024, also involving sectoral employment orders (this time in the engineering sector), but primarily considering the law on granting injunctions restraining industrial action, Hogan J. in the Supreme Court made some observations about the freedom of association provisions in the Irish Constitution.[35] The Judge noted (at para 7) that it was arguably implicit that the Constitutional right to form trade unions implied at least "some- perhaps as yet undefined- zone of freedom for those unions to organise and campaign. The *effet utile* of this constitutional provision would otherwise be compromised."

The argument here should not be overstated, but these decisions could be read in parallel, or as being consistent, with the "paradigm shift" in EU policy and law-making since the proclamation of the EPSR. The direction of travel, if clearly signalled by the EU institutions, *can* have an impact on the national legal and policy environment. This is very much the case in Ireland in respect of the publication of the proposed AMWD. Shortly after the proposed Directive was published, the Tánaiste (Deputy Prime Minister) and Minister for Enterprise, Trade and Employment, Leo Varadkar established a tripartite High-level Working Group (under the auspices of the LEEF) to review collective bargaining and the industrial relations landscape in Ireland; the Group was composed of senior employer and trade union representatives (including the CEO of Ibec and the General Secretary of ICTU), civil servants and academics, and published its final report in October 2022.[36] The report makes a number of recommendations for reform of collective bargaining structures in Ireland. In respect of sectoral standard setting, the report addresses the JLC system, re-established in 2012 following the declaration of unconstitutionality in the *John Grace* case (discussed above).[37] Currently, JLCs in many sectors in which they are established (notably, retail, catering, and hotels) do not operate, as employer representatives do not attend the Committees, and so sectoral orders cannot be formulated. The HLG report proposes a mechanism whereby, in the event employer representatives do not attend at JLCs, orders may be formulated, and enforced, in any case with the approval of the Labour Court. The

[34] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ/ L173, 16).
[35] *H.A. O'Neil Ltd v Unite* [2024] IESC 8.
[36] Department of Enterprise, Trade and Employment, *Reports of the LEEF High Level Group on Collective Bargaining*, 5th October 2022, available at https://enterprise.gov.ie/en/publications/leef-high-level-group-on-collective-bargaining.html (accessed May 15 2024). The Group was Chaired by the author of this paper.
[37] *See* the *Industrial Relations (Amendment) Act 2012*.

HLG report also proposes a mechanism of "Good Faith Engagement" at enterprise level, whereby employers that do not negotiate with, or recognise, trade unions (who count employees of the enterprise amongst their members) will be legally mandated to at least engage with a trade union, which makes representations on its members' behalf.[38]

It is argued here that, while the recommendations themselves may have an important domestic impact if and when implemented,[39] it is the process that is of note for the purposes of this paper, and for assessing the wider implications of the Directive.[40] The HLG report explicitly acknowledges the impact of the Directive on its establishment, and its work, throughout:

The EU context (particularly proposed EU legislation) was of paramount importance to the Group's work (p. 5)

A central theme of the proposed Directive is the emphasis on the key institutional role that collective bargaining plays in ensuring adequate minimum wage protection for workers (p. 5)

The focus of the Group's work has been to propose means by which plans and frameworks, developed by the social partners in conjunction with the State, can be put in place so that Ireland is well-positioned to meet its obligations under EU law (p. 6)

There are some aspects of the proposed EU Directive, which the Group did not address (for example, measures on the awarding of public procurement and concession contracts, and easing the access of trade union representatives to workers). The Group recommends that any remaining issues of transposition should be addressed in a similar tripartite manner to those examined in this report (p. 8)

The current wording of the Draft EU Directive on the Minimum Wage includes a requirement for Member States, where collective bargaining coverage is less than 80%, to provide for a framework of enabling conditions for collective bargaining and the establishment of an action plan to promote collective bargaining (p. 18)

The recommendations will also ensure Ireland is well placed to fulfil upcoming EU law obligations, in a meaningful way, and in the context of a genuine tripartite approach, which respects the autonomy of the social partners (p. 27).

The HLG report, which was finalised before the Directive even entered into force (indeed when the work of the HLG started, the proposed Directive had a "trigger" of only 70% collective bargaining coverage), was very much completed in the "shadow of EU law". The social partners, and the State, framed the review and reform of the Irish industrial relations system in the context of developments at EU level (the "paradigm shift"). Throughout the report the emphasis is very much on the role of the social partners in strengthening collective bargaining (the report includes proposals to fund strengthening social partner capacity through training, for example). Although, as noted above, tripartism had remained an

[38] Department of Enterprise, Trade and Employment, nt. (36), 10-12; 20-22.
[39] *See*, further, below.
[40] It is undoubtedly the case, for example, that seeking to strengthen the JLC system will not, strictly speaking, increase collective bargaining coverage, as any proposals that emerge from social partner negotiations in JLCs must be promulgated by the Labour Court and signed into law by the Minister. This does not accord with the definitions of "collective bargaining" set out in the Directive; *see* Bell, M. and Eustace, E., n 5, 479.

important feature of Irish labour relations in recent years, the establishment of the HLG (and the publication of its report) was in the context of the existence of "a set of environing conditions that are constraining and incentivising the [social partners and State] towards a more meaningful, open and constructive engagement".[41] These environing conditions included, of course, issues such as the Covid-19 pandemic, and the growing importance to business internationally of the Environmental, Social and Governance (ESG) agenda,[42] but the (then proposed) AMWD was undoubtedly crucial. Thoughts, however, now turn to how to turn proposals into actions, and how to transpose the Directive.

4. Challenges for transposition: Run, Toto, Run…

In June 2023, the Ibec leader, Danny McCoy (referencing the classic film, the Wizard of Oz), declared that "we're not in Kansas anymore" regarding how collective bargaining is practised in Ireland.[43] However, the question for labour lawyers and industrial relations practitioners in Ireland, in terms of the implementation of the AMWD, is: "so, where are we??". As in many Member States without traditionally strong legal support for collective bargaining, there are many contradictions at play when assessing the context for achieving the aim of strengthening collective bargaining. At the conference from which the quote above was taken, research was cited showing that 44% of workers in Ireland not in a trade union said that they would vote to establish one if they could (a significant "representation gap").[44] At the same conference, however, survey research showed that around 75% of non-union companies remained unwilling to consider collective bargaining with trade unions, and amongst companies that were already unionised, 26% said they would consider "non-union" collective bargaining.[45] It is also the case that the recommendations in the HLG report for increasing sectoral coverage of JLCs is not "collective bargaining" in the strict sense of that under the Directive, as the JLC process involves tripartite action (with the Labour Court as a key actor) which produces proposals that must, ultimately, be approved by the Minister.[46] Nonetheless, it could be argued that these are measures which are one element of "a framework of enabling conditions for collective bargaining" (Article 4(2)), by promoting, at the very least, engagement by the sectoral social partners.

Contradictions and complexities are also evident when we look at the position of the main actors. As noted, the Directive has been strongly welcomed by the union movement, as

[41] Thomas D., nt. (32), 54.
[42] *See*, for example, https://corpgov.law.harvard.edu/2020/09/14/the-stakeholder-model-and-esg/ (accessed 15th May 2024).
[43] Speaking at the annual *Industrial Relations News Conference*, reported in *Industrial Relations News,* 24, 2023.
[44] Geary J., Belizon M., *Employee voice in Ireland, First findings from the UCD Working in Ireland Survey, 2021*, College of Business, University College Dublin, 2022, 11.
[45] CIPD, *CIPD-IRN Private sector pay and employment report 2023*, available at https://www.cipd.org/ie/knowledge/reports/private-sector-pay-survey-2023/ (accessed 15th May 2024).
[46] *See* the *Report of the Expert Group on the Transposition of Directive (EU) 2022/2041 on adequate minimum wages in the European Union,* 2023, 26, available at: https://ec.europa.eu/social/main.jsp?catId=1539 (accessed May 15 2024); Bell, M. and Eustace, E., nt. (5), 484.

potentially transformative and groundbreaking.[47] The union movement has focused on a number of aspects of the Directive, including the need to protect workplace union representatives from unfair treatment, the need to better ensure access to time and facilities for workplace union representatives, and the possibility to use public procurement as a "lever" to promote collective bargaining.[48] Employers' representatives have taken a more limited view of the potential impact of the Directive. Speaking before the Joint Oireachtas Committee on Enterprise, Trade and Employment, in early 2024, Ibec was of the view that "little if any legislative change" is required for the transposition of the Directive, given that "a comprehensive suite of industrial relations legislation…already exists in Irish law". Ibec focused on the "non-legislative action [that] could be taken to further build and promote the strengthening of the capacity of the social partners to engage in collective bargaining", and noted that this was one of the recommendations of the HLG report. Ibec noted that work was "ongoing at LEEF to consider the recommendations" and that this work would be central to the development of Ireland's action plan to promote collective bargaining.[49]

However, it is the position of the State that is of most interest here, and which best illustrates why there is such a diversity of views (across the EU) on the potential impact of the Directive. Ireland was among the signatories of a letter sent to the German EU presidency in 2021, questioning the proposal for a Directive as a potential breach of the subsidiarity principle, and arguing that a Recommendation would be a "better legal instrument" than a legally-binding directive.[50] The letter was signed, on behalf of the Government, by Leo Varadkar; the Minister who would (weeks later) establish the High-Level Group (which, as we have seen, framed its work in light of the draft Directive's requirements). The publication of the report was widely welcomed by the Government, and the Taoiseach (Prime Minister): "[t]he publication of this Report is timely, given the renewed focus at a European and international level on collective bargaining. The recommendations in this report will ensure Ireland is *well placed to respond to EU developments in relation to collective bargaining*" (emphasis added).[51] Yet, by mid-2024, with the transposition deadline looming, nothing in the HLG Report had been progressed. In a comment, the substance of which will

[47] Walsh E., *New collective bargaining laws to radically transform Ireland's industrial landscape*, in *Irish Examiner*, 6th January 2024, available at https://www.irishexaminer.com/business/economy/arid-41302756.html (accessed May 15 2024).

[48] Irish Congress of Trade Unions, *Oireachtas Joint Committee on Enterprise, Trade and Employment on the Regulatory and Legislative Changes required for the Transposition of the Adequate and Minimum Wages*, 24 January 2024, available at https://www.ictu.ie/publications/opening-statement-regulatory-and-legislative-changes-required-transposition-adequate (accessed 15th May 2024).

[49] The parliamentary committee debate, and a transcript of it, is available at: https://www.oireachtas.ie/en/debates/debate/joint_committee_on_enterprise_trade_and_employment/2024-01-24/2/ (accessed 15th May 2024).

[50] Irish Legal News, *Ireland raises concerns about EU minimum wage directive*, 9th February 2021, available at https://www.irishlegal.com/articles/ireland-raises-concerns-about-eu-minimum-wage-directive (accessed 15th May 2024).

[51] Department of Enterprise, Trade and Employment, *Publication of the Final Report of the LEEF High-Level Working Group on Collective Bargaining*, 5th October 2022, available at https://enterprise.gov.ie/en/news-and-events/department-news/2022/october/publication-of-the-final-report-of-the-leef-high-level-working-group-on-collective-bargaining.html (accessed 15th May 2024).

no doubt be echoed in other Member State capitals, the then-Minister for Enterprise noted (in a parliamentary debate in February 2024):

Ireland's economy is different from many other economies around Europe. There is not the same demand for union membership and representation in some sectors of the Irish economy as there is in others. I think it is far too early for the Government to be setting a specific target (for collective bargaining coverage).[52]

5. Conclusions: somewhere over the rainbow…?

In a forthcoming paper,[53] Maccarrone analyses EU interventions on national wage policy since the crisis post-2007, and how these affect the power resources, and strategic responses, of employers and trade unions. He notes that these strategic choices, in turn, affect the outcome of processes of institutional change; the outcome of policy struggles depends, therefore, on the specific configuration of power resources that unions and employers possess.[54] Depending on whether or not the EU policy intervention is aimed at deregulation (e.g. the "austerity bail-outs") or re-regulation (e.g. the AMWD), and depending on whether or not actors wish to overhaul or defend "market-embedding" institutions and regulation, the labour relations actors will respond in different ways. Maccarrone sees the AMWD very much as a "de-commodifying" measure (in contrast to the austerity prescriptions following the crisis post-2007). He concludes that:

Irish trade unions have used the changed opportunity structure at EU level … to amend the Troika-driven weakening of Irish minimum wage regulation. They will now have to deploy their domestic power resources to ensure an expansive transposition of the directive into national law. As for employers, while they have failed in their attempts of completely insulating the Irish legislation of collective bargaining from decommodifying EU pressures, they have used their institutional power resources to pre-emptively shape the contours of the national legislation deriving from the new EU intervention. Moreover, the possibility of further domestic legal challenges remains open, especially from those smaller employers that have less access to lobbying at the national and European level.

In other words, power and strategic choice matter greatly in terms of how impactful the AMWD will be across the EU. The "paradigm shift' at EU level, to which this paper refers on multiple occasions, is itself fragile, and could easily be reversed. As Vanherecke et al. point out, there is no room for complacency; drawing attention (correctly as it turned out) to the spectre of a populist right coalition emerging in the European Parliament after the 2024 elections, and the stalling of the "Green Deal". they conclude that "the 'social' paradigm shift

[52] Houses of the Oireachtas, *Wage-setting Mechanisms*, 8th February 2024, available at https://www.oireachtas.ie/en/debates/question/2024-02-08/1/ (accessed 15th May 2004).
[53] Maccarrone, V., *The Europeanisation of Wage Policy and Its Consequences for Labor Politics: The Case of Ireland* in *ILR Review*, forthcoming, 2024.
[54] Ibid.

that has taken place since 2017 risks becoming overshadowed by an austerity and competitiveness reload as well as the possibility of a security transition".[55]

In the Irish context (with traditional judicial suspicion of, and hostility to, collective rights; relatively low collective bargaining coverage; relatively weak State support for collective bargaining institutions; declining trade union density – not at all dissimilar to the position in many Member States), there is a long-term resistance to measures that infringe on employers' right to manage, be they political, policy, or legal. For example, the dominance of a corporate governance model where the focus is shareholder (as opposed to stakeholder) primacy, and the huge influence on labour relations policy of US-based multinational corporations (not a cohort traditionally sympathetic to collective labour rights) at least partly explain the weak institutional support for collective bargaining and worker participation more generally in Ireland.[56]

However, power is never acquired, nor exercised, in a vacuum; we have seen above some key "environing conditions", in addition to the AMWD, that might incentivise better social dialogue (lessons learned from the Covid-19 era about what constitutes "essential work"; the corporate focus on ESG goals, etc). A fascinating example of when the wider policy context can have an unexpected impact on labour relations decision-making can also be see in Ireland in the context of gender equality. In 2020, the Citizens Assembly on Gender Equality met (online) for the first time.[57] The Assembly was established to consider gender equality and make recommendations to the Oireachtas to advance gender equality in Ireland. In its final report (published in June 2021) the Assembly, to the surprise of many observers, had much to say about collective bargaining, and was unequivocal in its views:[58]

The Assembly recommends supporting employment contract security through establishing a right to collective bargaining in the constitution (p. 35; emphasis added).

Members were also extremely concerned about workplace conditions and employment security, having heard evidence from women who had been badly treated in work or were in precarious employment including in the care sector. They voted strongly (by over 96%) in favour of establishing a legal right to collective bargaining as a means of increasing wages and improving working conditions (p. 80; emphasis added).

This may seem rather parochial (an exercise in domestic Constitutional revision). However, the point here is that the allies that the trade union movement, and others who

[55] Vanhercke B., Sabato S. and Spasova S. (eds.) *Social policy in the European Union: state of play 2023, An ambitious implementation of the Social Pillar,* ETUI and OSE, Brussels, 2024, 152.
[56] Doherty, M., *BLER in Ireland: a long climb from here to there!*, in Lafuente, S (ed), *Revisiting worker representation on boards: the forgotten EU countries in codetermination studies*, ETUI, 2024 (forthcoming).
[57] The Citizens' Assembly is an exercise in deliberative democracy, which brings together 99 randomly selected members of the public to discuss and debate a specific issue. Members of the Assembly are asked to carefully consider a range of other views, examine reports and studies, consider experiences in other countries, and hear from experts in their fields. The discussions amongst the members of the Assembly culminate in a series of recommendations for the Government and the Oireachtas to consider; https://citizensassembly.ie/about/ (accessed 15th May 2024).
[58] The Citizens' Assembly, *Report of the Citizens' Assembly on Gender Equality*, June 2021, available at https://citizensassembly.ie/wp-content/uploads/2023/02/report-of-the-citizens-assembly-on-gender-equality.pdf (accessed 15th May 2024).

favour a robust transposition of the Directive, may have can be a much broader cohort than the "usual IR suspects". If collective bargaining is viewed as a fundamental aspect of (industrial) democracy, the goals of the Directive to strengthen collective bargaining must be taken very seriously by the wider legal and political community. Indeed, what the Citizens' Assembly latched onto (the role of collective bargaining as a crucial aid to achieving gender equality) is directly concomitant with the underlying ethos of the Directive itself; the explicit linkage of fair and adequate wages with strong and well-functioning collective bargaining systems.

In conclusion, however, we must return to the role of key actors. Unions and employers (to a greater or lesser degree of conflict) will fight their corners and defend the views of their respective constituents. What the Directive is very clear in emphasising, however, is that Member States are not in a position to equivocate. The obligations in Article 4 are clear: Member States shall promote collective bargaining. For Member States like Ireland (and others) where the State has traditionally been (at best) a passive observer, change must come. A failure by the State to promote collective bargaining through (to echo the words of the Irish Supreme Court in the *Unite* case) "some- perhaps as yet undefined- zone of freedom for unions and their members to organise and campaign" would arguably, perhaps fatally, compromise the *effet utile* of the Directive. Although at first glance, the obligations in Article 10 of the AMWD on data collection and monitoring of, *inter alia*, the rate and development of collective bargaining coverage do not seem particularly eye-catching, these could prove to be absolute fundamental. As Krause notes, there is a transparency benefit, and potentially "peer pressure" effect, as Member States gain greater awareness of their "performance" relative to that of other countries; however, also: "the report to the Commission and the report of the Commission to the European Parliament and the Council expose the Member States to the pressure mechanisms of economic and policy co-ordination and, in the case of undesirable developments, they may even have to reckon with country-specific recommendations".[59]

The idea that country-specific recommendations, so often in the past framed in terms of tackling the perceived negative effects of collective bargaining institutions,[60] could be deployed in this manner is, indeed, a paradigm shift. However, the success of the Directive in promoting collective bargaining coverage will depend significantly on the level of action (or inaction…) by legislators and regulators at both national and EU level. That will need to be closely monitored not only in the formal sense under the Directive, but by everyone with an interest in safeguarding and promoting the idea of a 'Social Europe'.

[59] R. Krause, *Monitoring and Data Collection and Information on Minimum Wage Protection (Articles 10 and 11)*, in Ratti L., Brameshuber E., Pietrogiovanni V. (eds), nt. (1), 283.
[60] Schulten, T., and Müller, T., nt. (7).

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