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SPECIAL ISSUE

IN-WORK POVERTY IN THE EU

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The Proposal for a Directive on Adequate Minimum Wages in the EU

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Introduction

Since the very inception of the current EU Commission's mandate, a clear commitment was formulated towards the introduction of a European framework on fair minimum wages, on the premise that 'the dignity of work is sacred' (1). In January 2020, the Commission promoted a first consultation pursuant to Article 154 TFEU (2), followed by a second one in July 2020 (3), which brought the co-legislator to finally advocating its normative role and introducing a specific regulatory instrument in the field.

In October 2020, the Commission transmitted its proposal for a directive on adequate minimum wages in the European Union to the European Parliament and the Council (4). Since then, the legal services of both institutions have substantially validated the proposed text (5), albeit with some minor revisions (6). Last 18 November 2021, the European Parliament's Committee on Employment and Social affairs tabled a revised text (7) which was adopted by the Plenary as a basis for next negotiations with the Council (8). It will then be mainly for the Council, i.e., the Member States, to agree on the viability of the directive, against a background of political (9) and social controversy (10). In the hope of many observers, on the basis of the discussions last exchanged in November 2021 (11), an agreement might be reached during the French presidency of the EU, which will run from January to June 2022 (12). Still, the systemic impact of the proposed directive raises concerns, particularly among Nordic countries (13).

i. Associate Professor in European and Comparative Labour Law at the University of Luxembourg.

1. Von de Leyen, [State of the Union Address](#) by President von der Leyen at the European Parliament Plenary (September 2020).

2. [C\(2020\) 83 final](#).

3. [C\(2020\) 3570 final](#).

4. [COM\(2020\) 682 final](#).

5. Council of the European Union, [Opinion of the legal service on the Commission proposal for a Directive on adequate minimum wages](#) (March 2021).

6. European Parliament, Committee on Legal Affairs, [Opinion on the legal basis of the proposal for a Directive on adequate minimum wages](#) (October 2021).

7. European Parliament, [Draft legislative resolution on the proposal for a directive on adequate minimum wages in the European Union](#) (November 2021).

8. European Parliament, [Press release 25 November 2021](#).

9. [EU Observer](#) (January 2020).

10. [Euractiv](#) (March 2021).

11. [Agence Europe](#) (November 2021).

12. [Euractiv](#) (May 2021).

13. Furåker, [The issue of statutory minimum wages: Views among Nordic trade unions](#), *Economic and Industrial Democracy* 2020, Vol. 41 (2) 419–435.

Within or beyond EU competence?

As legal basis of the directive, the Commission chose to rely on Article 153(1)(b) TFEU, referred to the shared competence of the Union and the Member states in the field of ‘working conditions’.

The choice is grounded on two concurrent arguments, mentioned in the Explanatory memorandum to the proposed directive (14). On the one hand, ‘ensuring that workers in the Union earn adequate wages is essential to guarantee adequate working and living conditions’, since ‘having access to a minimum wage guaranteeing a decent standard of living is a pivotal element of adequate working conditions’. On the other hand, the introduction of a minimum wage directive would not trespass the limits established by Article 153(5) TFEU which expressly mentions ‘pay’ as one of the three subjects excluded from EU competence. In fact, given the narrow interpretation of such exclusion, indirect interferences by the EU in the field of wages have already been exercised by European institutions. Denying such indirect competences would deprive the areas referred to in Article 153(1) of ‘much of their substance’ (15).

Scholars have generally expressed their support to Article 153(1)(b) TFEU as valid legal basis (16), recalling the progress of ‘Social Europe’ from Amsterdam to Lisbon (17), although some suggested to provide the directive with a concurrent legal basis (18), found in Article 175 TFEU on economic, social and territorial cohesion. This would not only allow to reinforce the ‘slim and slack rope’ of Article 153(1)(b), but also to make the EU’s intervention on minimum wages functional to a more harmonious economic and social development across the EU.



14. Proposal for a Directive on adequate minimum wages in the European Union, [Explanatory Memorandum](#) (October 2020).

15. [Judgment of the Court of Justice of 19 June 2014, Specht](#) (C-501/12, EU:C:2014:2005, para 33); [judgment of the Court of Justice of 15 April 2007, Bruno and others](#) (C-268/06, EU:C:2008:223, paras. 123-124).

16. Menegatti, [‘Much ado about little: The Commission proposal for a Directive on adequate wages’](#), *Italian Labour Law e-Journal*, Issue 1, Vol. 14(2021), 21-32.

17. Di Federico, [‘The Minimum Wages Directive Proposal and the External Limits of Art. 153 TFEU’](#), *Italian Labour Law e-Journal*, Issue 2, Vol. 13(2020), 107-111.

18. Aranguiz – Garben, [‘Confronting the Competence Conundrum of an EU Directive on Minimum Wages: In Search of a Legal Basis’](#), *CEPOB Policy Brief* (2019).

The two cases concerning the legal basis of Directive 2018/957 on the posting of workers – challenged by Poland and Hungary for alleged lack of a correct legal basis (19) – clearly illustrate how advanced is the CJEU case law in the field, particularly read in the light of the horizontal social clause contained in Article 9 TFEU, which not by chance has been put by the EU Parliament as an important reference in Recital 1 of the revised text of the directive proposed in November 2021 (20).

Dissenting opinions raised in principle the lack of competence of the EU (21), also based on the accession acts of some countries (in particular, Denmark) (22), which supposedly did not entrust the EU with the exercise of legislative direct effect concerning the wage setting system, typically in the realm of social partners at national level (23). Furthermore, the same functioning of the proposed directive is seen as potentially harmful for the ability of collective bargaining agreements to establish wages at all levels, since the Charter of Fundamental Rights (referred to in Recital 2 of the directive) entitles ‘every worker’ with the right to working conditions which respect their dignity.

Some national Parliaments already actioned the ‘yellow card procedure’ against the Directive, to stop or at least slow down its roadmap (24).

It remains that the sole authority in the field, which will very likely be sued in case the Directive finally sees the light, is the CJEU. In assessing the directive’s validity, the Court will have to consider its previous jurisprudence, typically constructed on the idea that the legal basis must reflect the aim and content of the regulatory measure (25).

The two pillars of the proposed directive: adequacy and coverage

An important element in the assessment of the proposed directive’s validity will be the concrete functioning of its implementation at domestic level. The proposed text relies heavily on Member states’ discretion, on the one hand, to facilitate social partners’ intervention in the elaboration of effective minimum wage policies or, on the other hand, to ensure the adequacy of statutory minimum wages.

Adequacy and coverage are in fact the two pillars around which the whole directive is structured and result in its very objectives (see Recitals 15 and 18).

19. [Judgment of the Court of Justice of 8 December 2020, Commission v Poland \(C-626/18, EU:C:2020:1000\)](#) and [judgment of the Court of Justice of 8 December 2020, Commission v Hungary \(C-620/18, EU:C:2020:1001\)](#).

20. European Parliament, Committee on Legal Affairs, [Opinion on the legal basis of the proposal for a Directive on adequate minimum wages](#) (October 2021).

21. Gill-Pedro, [‘The Commission’s proposal for a European Minimum Wage – another ultra vires challenge for the EU?’](#), *European Law Blog* (June 2020).

22. Kristiansen, [Expert Opinion](#) (November 2020).

23. Grenfors – Gentile, [‘The minimum wage Directive proposal and the promotion of collective bargaining: the voice of SGI-Europe’](#), *Italian Labour Law e-Journal*, Issue 1, Vol. 14 (2021), 41-48.

24. Rolfer and Wallinm, [‘Yellow card from Sweden and Denmark to proposed minimum wages in the EU’](#), *Nordic Labor Journal*, Jan 22, 2021.

25. [Judgment of the Court of Justice of 8 September 2009, Commission v Parliament and Council \(C-411/06, EU:C:2009:518, para 45\)](#).



As made clear by the Impact assessment accompanying the proposed directive (26), adequacy is imposed as a target for those Member states which regulate minimum wages by statutory legislation. By contrast, for the six countries without such a legal system (Sweden, Denmark, Finland, Austria, Italy, and Cyprus), the directive infers adequacy from collective bargaining coverage rates of more than 70%.

According to Article 5, Member states of the first group (which have already in place statutory minimum wages) are required to ‘take the necessary measures to ensure that the setting and updating of statutory minimum wages are guided by criteria set to promote adequacy with the aim to achieve decent working and living conditions, social cohesion and upward convergence’.

Article 5(2) offers some guidance as to which criteria are to be considered to deduce adequacy, including ‘(a) the purchasing power of statutory minimum wages, taking into account the cost of living and the contribution of taxes and social benefits; (b) the general level of gross wages and their distribution; (c) the growth rate of gross wages; (d) labour productivity developments’.

From the outset, all such criteria may seem too generic to effectively guarantee that adequacy of statutory minimum wages is complied with. At interpretative level, however, they must be read in the light of the directive’s preambles, which state in particular that adequacy must be appreciated with reference to the wage distribution in the country (‘national socio-economic conditions, including employment growth, competitiveness as well as regional and sectoral developments’) and to the fact that minimum wages must provide a decent standard of living (‘purchasing power, productivity developments and to their relation to the gross wage levels, distribution and growth’). Recitals also make clear that ‘the use of indicators commonly used at international level, such as 60% of the gross median wage and 50% of the gross average wage, can help guide the assessment of minimum wage adequacy in relation to the gross level of wages’ (Recital 21). Commentators observed that the reference to

26. [Impact Assessment](#) accompanying the proposal for a Directive on adequate minimum wages in the European Union (October 2020).

‘commonly used indicators (27)’ certainly include the Kaitz index, which measures the value of the minimum wage in comparison with the median and the average wage. The real issue, however, is that the vast majority of EU Member states already have minimum wages below the threshold of 60% of the median wage (28), which increase will therefore result the most challenging endeavour for domestic implementation in case the proposed directive is adopted in its current version.

Even more complex is the way the proposed directive deduces adequacy from a certain level of collective bargaining coverage. Article 4, referring to those Member states where no statutory minimum wage is in place, provides for two default obligations and two optional measures which should grant an increased collective bargaining coverage. The two main obligations are to (a) promote the building and strengthening of the capacity of the social partners to engage in collective bargaining on wage setting at sector or cross-industry level; and (b) encourage constructive, meaningful and informed negotiations on wages among social partners. Only where collective bargaining coverage is less than 70%, Member States are further required to (a) ‘provide for a framework of enabling conditions for collective bargaining, either by law after consultation of the social partners or by agreement with them’; and (b) ‘establish an action plan to promote collective bargaining’, which ‘shall be made public and shall be notified to the European Commission’. So far collective bargaining coverage is well above 70% for five of the six countries not having statutory minimum wages. In case the adopted text remains in line with the current version, Cyprus will have to put in place all the mentioned instruments with a view to increase their coverage well above the current 44% (29). The November 2021 amendments proposed by the EU Parliament increase the coverage threshold to 80% (proposed amendment 59 to Article 4(2)) (30).

The vague drafting of obligations referred to collective bargaining coverage may also in this case be enlightened by the directive’s preambles. In particular, Recital 19 inextricably associates minimum wage adequacy to coverage rates above a certain threshold. Such inference, however, may be problematic, as it simplistically considers the fact that Member States with high minimum wages compared to the median wage are characterised by collective bargaining coverage above 70% as the only condition to ensure an adequate minimum wage.

As I have observed elsewhere (31), this is particularly challenging in industrial relations systems (like the Italian one) where no *erga omnes* effect is recognised to collective agreements, which aspect leaves large shares of workers (typically in the private sector) uncovered by collective agreements or, alternatively, affected by downward competition amongst trade unions.

27. Schulten – Müller, ‘[A paradigm shift towards Social Europe? The proposed Directive on adequate minimum wages in the European Union](#)’, *Italian Labour Law e-Journal*, Issue 1, Vol. 14(2021), 1-19.

28. Lübker – Schulten, ‘[WSI Minimum Wage Report 2021](#) – Is Europe en route to adequate minimum wages?’ (February 2021).

29. Ibid.

30. European Parliament, [Draft legislative resolution on the proposal for a directive on adequate minimum wages in the European Union](#) (November 2021).

31. Ratti, ‘[La proposta di direttiva sui salari minimi adeguati nella prospettiva di contrasto all’in-work poverty](#)’, *Diritto delle Relazioni Industriali*, XXXI(1)(2021), 59-76.

The proclamation of the European Pillar of Social Rights served as an amplifier of social policy initiatives and constitutes the main policy driver for the years to come

An underlying objective: the reduction of in-work poverty through minimum wages

The proclamation of the European Pillar of Social Rights (EPSR) served as an amplifier of social policy initiatives and constitutes the main policy driver for the years to come. Recitals 4 and 5 of the proposed Directive refer, albeit in a merely descriptive way, to principle 6 of the European Pillar of Social Rights (EPSR) on fair working conditions and to Council Decision (EU) 2020/1512 on guidelines for the employment policies of the Member States (32).

Of particular interest is Principle 6 of the EPSR, which consists of three distinct but consequential parts. It first recognises every European worker's 'right to a fair wage that provides a decent standard of living' (point a), according to an adequacy criterion focused on 'the needs of the worker and his or her family according to national economic and social conditions' (point b, first part), in order to make it possible to prevent in-work poverty (point b, second part).

Recital 7 of the proposed Directive lists the reduction of in-work poverty among the different functions of the minimum wage, together with the support of domestic demand, work incentives and the reduction of wage inequalities. Recital 8 further identifies minimum wage as one of the factors that would enable the pursuit of gender equality and lift women out of poverty. Even more significantly, Recital 11 records that in one third of European countries with a legal minimum wage, this latter does not guarantee that the individual worker will emerge from the relative poverty line.

The repeated and explicit reference to in-work poverty throughout the text and the preambles, appears to be one of the key messages featured by the proposed directive on adequate minimum wages.

The very concept of an 'adequate' minimum wage derived from the combined provisions of Article 5 and Recital 21, is defined in negative terms as a minimum wage aimed at ensuring 'decent living and working conditions', i.e., sufficient to enable workers not to fall below the at-risk-of-poverty threshold. By referring to a relative poverty indicator, the concept of adequacy is based on a consideration not only of the conditions of the individual worker, but of the worker in relation to their surrounding social context, and in particular the average and median levels of household disposable income. The idea of fairness, intertwined with the reduction of wage inequalities, is thus expressed as the main feature of the legislative initiative.

32. [OJ 2020 L 344, p. 22.](#)

33. [Regulation \(EC\) No. 1177/2003.](#)

The interest towards in-work poverty in the European discourse is a relatively recent acquisition.

The shift from combating poverty in general to tackling in-work poverty took place especially since 2003 with the adoption of Regulation (EC) No. 1177/2003 on Community Statistics on Income and Living Conditions (EU-SILC) (33). The Regulation established the index called At-Risk-Of-Poverty (AROP), measured as ‘the share of individuals whose most frequent activity status is ‘employed’ and who are at risk of poverty, i.e. who live in a household whose equivalised income (including social benefits) is below [...] 60% of the median equivalised income of the whole population (i.e. the poverty line)’, i.e. the relative poverty threshold (34). In the subsequent years, EU institutions paid attention to combatting in-work poverty mainly by establishing benchmarks and targets, included in the Europe 2020 strategy for smart, sustainable and inclusive growth (35), as well as in other more recent policy documents, including the EPSR Action Plan (36), and important initiatives such as the creation of a European Platform Against Poverty and Social Exclusion (37).

The main question arising from such renewed consideration of in-work poverty as strategic priority of the EU for the next years, relates to the ability of an EU Directive on adequate minimum wages to effectively reduce the levels of in-work poverty across Europe.

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A study committed by the European Parliament's committee on Employment and Social Affairs recalls that empirical evaluations ‘currently suggest that increasing minimum wages can only have a limited impact on poverty levels, as poverty often results from low working hours rather than simply low hourly wages, amongst other factors’ (38).

According to a recent study, several reasons may reveal why minimum wages are not per se sufficient to adequately combat in-work poverty (39). Amongst them, we should recall that: a) in-work poverty largely depends on low work intensity rather than low hourly wages, b) children-oriented policies proved being more effective (40), and c) housing costs result crucial in helping low-income families escape relative (and absolute) poverty.

34. Atkinson – Guio – Marlier, [Monitoring social inclusion in Europe](#) (Eurostat, 2017).

35. Communication from the Commission - [Europe 2020. A strategy for smart, sustainable and inclusive growth](#) (March 2010).

36. European Commission, [European Pillar of Social Rights Action Plan](#) (March 2021).

37. [The European platform against poverty and social exclusion](#), A European framework for social and territorial cohesion (2011).

38. Raitano – Gallo – Jessoula – Pagnini [Fighting poverty and social exclusion. Including through minimum income schemes](#), Study requested by the EMPL committee (June 2021).

39. Bruckmeier – Bruttel, [‘Minimum Wage as a Social Policy Instrument: Evidence from Germany’](#), *Journal of Social Policy*, Vol. 50, Issue 2, April 2021, 247-266.

40. Marchal – Marx – Verbist, [‘Income Support Policies for the Working Poor’](#), *IZA Discussion Paper* No. 10665 (2017).

Conclusion

The initiative undertaken by the EU Commission on a proposed directive on adequate minimum wages is a remarkable step in the relaunch of 'Social Europe'. Not only does it provide substance to Principle 6 of the EPSR, but it also marks a courageous move towards the implementation of minimum working standards across the EU pursuant to Article 153(1)(b). The proposed amendments which will be discussed at the EU Parliament in the coming months further strengthen the directive's impact in reducing in-work poverty and wage inequalities.

From a technical point of view, the proposed directive may incur in three main critiques.

First, despite the positive reactions by the legal services of the other EU institutions, still controversial appears to be the issue of competence. The formal obstacle represented by the exclusion of 'pay' from the EU competences in the social policy domain raises important questions that still deserve attention and will eventually be clarified by the CJEU.

Second, the very pillars on which the entire edifice of the proposed directive is construed – namely the principles of 'adequacy' and 'coverage' – leaves unresolved many specific questions, mostly related to the concrete functioning of such principles at EU and domestic level. In particular, the mere equation between having or acquiring 70% coverage of collective agreements and the adequacy of minimum wages provided by such agreements, results particularly challenging.

Third, the systemic impact of the directive on the systems of industrial relations of some Member States is undoubtedly critical. The proposed text pretends from its first provisions to leave untouched 'the full respect of the autonomy of social partners, as well as their right to negotiate and conclude collective agreements' (Article 1(1)). It reiterates that 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' (Article 1(2)). And finally concludes that '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 nor to make the collective agreements universally applicable' (Article 1(3)). However, as a matter of fact, industrial relation systems based on social partners' autonomy will certainly be impacted. The

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same mechanism of redress designed by Article 11 of the proposed directive may result to be at odds with the law and practice of those Member states where labour disputes are an exclusive prerogative of trade unions.

Conclusively, and from a more societal perspective, it remains to be seen how much an increase or better distribution of minimum wages will contribute to effectively meet the expectations to reduce in-work poverty. While sound minimum wage policies are pivotal for the functioning of any labour market – for legal, socio-economic, and even moral reasons -, minimum wage as a sole-standing policy does not seem to resolve the problem of in-work poverty.

A wider palette of measures and policies is therefore needed. This includes not only sound minimum income instruments (discussed in the previous contribution), but also a more targeted approach towards the most vulnerable cluster of the labour market, including atypical workers (in particular, involuntary part-timers), platform workers, and the self-employed. An increase in households' work intensity and the stimulation of job transitions towards standard employment contracts will be pivotal to effectively contribute to reduce in-work poverty and inequalities, and should feature high in the EU's social policy agenda.