

Adequate minimum wages in the European Union – proposal for a directive of the European Parliament and of the Council*

Adekwatne wynagrodzenia minimalne w Unii Europejskiej
– projekt dyrektywy Parlamentu Europejskiego i Rady

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Summary: The European Union has no competencies in the field of directly setting wages, but it can propose common criteria to be taken into consideration when wages are set on a Member State level. The European Commission is therefore proposing a directive on adequate minimum wages in the European Union. Its twin objectives would be to establish a framework at Union level to ensure fair minimum wages, their adequacy and an increase in their accessibility by workers, and to strengthen collective bargaining in Europe, as high collective bargaining coverage tends to lead to lower share of low-wage workers. The minimum wage will not be uniform across the EU, nor there are any plans to harmonise the systems of setting it. In addition, any possible measures would be applied in a differentiated manner, depending on the systems applicable in particular Member States as well as traditions followed therein, in full respect of the competencies of the Member States, in order to achieve minimum standards through gradual implementation. Nevertheless the proposal is already facing criticism of certain Member States for intrusion into their competencies, as well as of some members of the European Parliament for not being 'ambitious' enough.

Key words: European Union law, labour law, minimum wage

Streszczenie: Unia Europejska nie posiada kompetencji do ustalania wynagrodzeń, ale może zaproponować wspólne kryteria, które można wziąć pod uwagę przy ich ustalaniu w poszczególnych państwach członkowskich. Komisja Europejska przedłożyła zatem projekt dyrektywy w sprawie adekwatnych wynagrodzeń minimalnych w Unii Europejskiej. Jej równorzędnymi celami są ustanowienie ram prawnych na poziomie Unii w celu zapewnienia godziwych płac minimalnych oraz wzmocnienie procesów prowadzenia negocjacji zbiorowych w UE. Płaca minimalna nie ma być jednolita w całej Unii, nie ma też planów harmonizacji systemów jej ustalania. Ponadto wszelkie środki przewidziane przez dyrektywę byłyby stosowane w sposób zróżnicowany, w zależności od rozwiązań i tradycji obowiązujących w poszczególnych państwach członkowskich, z pełnym poszanowaniem ich kompetencji, drogą stopniowego wdrażania w celu osiągnięcia pewnych minimalnych standardów. Mimo to projekt już obecnie spotyka się z krytyką niektórych państw członkowskich ze względu na ingerencję w ich kompetencje, a także niektórych posłów do Parlamentu Europejskiego ze względu na swój niedostatecznie „ambitny” charakter.

Słowa kluczowe: prawo Unii Europejskiej, prawo pracy, wynagrodzenia minimalne

Introduction

The European Union has no competencies in the field of directly setting wages, or pay (Article 153 (5) of the Treaty on the Functioning of the European Union)¹. This

remains the competence, or even a duty, of each state, as the existence of minimum wage is in particular to ensure a decent living for workers, strengthen incentives to work, and reduce in-work poverty and inequality at the lower end of the wage distribu-

* This text represents personal views of its author.

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¹ Consolidated text: Official Journal of the European Union, C 202, 7.6.2016, p. 47 ff.; hereinafter: TFEU.

tion². EU Member States undertake this through legislation (statutory minimum wage) and the subsequent collective bargaining (minimum wage being provided for in the resulting collective agreements of employers and workers), or exclusively through collective bargaining³.

One has to take into consideration, however, the more general empowerment of the EU to intervene in order to improve working conditions (Article 153 (1)(b) of the TFEU), the provisions of Article 31 of the Charter of Fundamental Rights of the EU⁴ in relation to the right of workers to fair and just working conditions, as well the principles of the European Pillar of Social Rights⁵, notably principle 6, which calls for adequate minimum wages as well as for transparent and predictable wage setting to be put in place.

The EU Council, composed of representatives of the Member States, has also called on them to ensure fair, upwardly-convergent wages, set with involvement of social partners⁶. The EU could therefore propose common criteria to be taken into consideration when wages are set on a Member State level, and the European Commission is now doing exactly that, fulfilling the pledge of its President to ‘propose a legal instrument to ensure that every worker in our Union has a fair minimum wage’, as ‘this should allow for a decent living wherever they work’⁷. It is worth noting in this context, that minimum wages in the EU differ highly in amount, and the way they are set. In July 2020, minimum wages in the EU Member States ranged from €312 per month in Bulgaria to €2142 per month in

Luxembourg (in Poland, it has been €584 per month)⁸.

The proposal

The proposal in question, for a directive (legal instrument chosen in accordance with conditions set out in Article 153(2)(b) of the TFEU) on adequate minimum wages in the European Union, has been put forward by the European Commission on 28th October 2020, in its Communication COM (2020) 628 (hereinafter: Commission communication). This proposal is divided into four chapters, encompassing general provisions, statutory minimum wages, horizontal provisions and final provisions in turn, and its description below will follow that order.

The proposal appears during the crisis induced by the COVID-19 pandemic, when the lowest-earning workers have suffered the most. This crisis, though, has only exacerbated the already pre-existing situation, when in the majority among the 21 Member States with national statutory minimum wages, these wages were too low compared to other wages (lower than 60% of the gross median wage and/or 50% of the gross average wage in almost all Member States) or to provide a decent living (in 2018, the statutory minimum wage did not provide sufficient income for a single minimum-wage earner to reach the at-risk-of-poverty threshold in nine Member States). In addition, specific groups of workers are excluded from the protection of national statutory minimum wages. Member States with a high collective bargaining coverage tend to have a low share of low-wage

² In reference to Poland cf. e.g. Jerzy Wrątny, „Prawo do godziwego wynagrodzenia jako zasada prawa pracy”, *Praca i Zabezpieczenie Społeczne* 9 (2020): 3–9.

³ Cf. e.g. Desmond Dinan, *Ever Closer Union. An Introduction to European Integration* (Houndmills: Palgrave Macmillan, 2010), 431; Wrątny, „Prawo do godziwego wynagrodzenia”, 3–6.

⁴ Consolidated text: OJ C 202, 7.6.2016, p. 389 ff.

⁵ Jointly proclaimed by the European Parliament, EU Council and the European Commission on 17 November 2017 – OJ C 428, 13.12.2017, pp. 10–15.

⁶ See Council Decision (EU) 2020/1512/EU of 13 October 2020 on guidelines for the employment policies of the Member States – OJ L 344, 19.10.2020, p. 22–28 – guideline 5.

⁷ Ursula von der Leyen, *A Union that strives for more. My agenda for Europe*. Political guidelines for the next European Commission 2019–2024, 2019, p. 9. accessed 26.11.2020. https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.

⁸ All data from Eurostat, *Minimum wage statistics*, accessed 26.11.2020, https://ec.europa.eu/eurostat/statistics-explained/index.php/Minimum_wage_statistics.

workers and high minimum wages. However, also in Member States relying exclusively on collective bargaining, some workers do not have access to minimum wage protection. The share of workers not covered is between 10% and 20% in four of these six states, and 55% in one⁹.

General provisions

The objective of the directive would therefore be (according to Article 1 of the proposal) to establish a framework at Union level to ensure not only fair minimum wages, their adequacy and an increase in their accessibility by workers (including in particular by setting statutory minimum wages on the basis of clear and stable criteria, strengthened involvement of social partners, and limited use of variations and deductions), but also to strengthen collective bargaining in Europe, as high collective bargaining coverage (which seems to be eroding in the EU) tends to lead to lower share of low-wage workers, higher minimum wages relative to the median wage, lower wage inequality and higher wages than the others¹⁰. When this provision is read together with recitals 15–16 of the Commission proposal, it further becomes clear, that the minimum wage will not be uniform across the EU, nor there are any plans to harmonise the systems of setting it. In addition, any possible measures would be applied in a differentiated manner, depending on the systems applicable in particular Member States as well as traditions followed therein, in full respect of the competencies of the Member States, in order to achieve minimum standards through gradual implementation¹¹. In Article 1(3) of the proposal it is specified, 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”.

The personal scope of the directive proposal (which may be considered quite broad – cf. its Article 2 and recital 17) includes workers who have an employment contract or an employment relationship as defined by the law, collective agreements or practice in each Member State, with consideration to the case-law of Court of Justice the European Union.

Article 3 of the proposal establishes a limited number of definitions under it, starting with the ‘minimum wage’ itself (“minimum remuneration that an employer is required to pay to workers for the work performed during a given period, calculated on the basis of time or output”) as well as ‘statutory minimum wage’ (set by law, or other binding legal provisions). The remaining three of them concern ‘collective bargaining’ (which itself means ‘all negotiations which take place between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more workers’ organisations, on the other, for determining working conditions and terms of employment; and/or regulating relations between employers and workers; and/or regulating relations between employers or their organisations and a worker organisation or worker organisations”), and the connected terms of “collective agreement” (concluded in writing by the social partners as an outcome of collective bargaining regarding working conditions and terms of employment) and “collective bargaining coverage” (the share of workers at national level to whom a collective agreement applies).

Against the background (pointed to earlier on) of the decline of thus defined coverage of collective bargaining, the proposal provides a minimum target for adequate level of such coverage, contained in Article 4 (and mirrored in recital 19), which is promoting collective bargaining on wage setting. In accordance with this provision, Member States are required to take action to promote the capacity of social partners to engage in

⁹ The above background information is quoted after the Commission communication, pp. 1–2.

¹⁰ Commission communication, pp. 2–3.

¹¹ Commission communication, pp. 6–7.

collective bargaining on wage setting, and to encourage constructive, meaningful and informed negotiations on wages. Moreover, it requires that the Member States where collective bargaining coverage does not reach at least 70% of the workers, provide for a framework for collective bargaining and establish an action plan to promote collective bargaining. It is worth pointing out, that collective bargaining coverage varies widely across the EU, ranging from 80% to over 90% in Member States such as Austria, France or Belgium, to 10% to 20% in other, mainly Eastern European, countries. As it has been signaled above, among the six Member States without statutory minimum wages (Austria, Cyprus, Denmark, Finland, Italy and Sweden), only Cyprus has a coverage rate of less than 70%. In total, 18 out of the 27 EU Member States currently stand at below 70%¹².

The provisions contained in Article 4, even though aimed at all Member States irrespective of their system of minimum wage setting, are criticised notably by Denmark and Sweden, as infringing upon the autonomy of theirs (embodied by collective bargaining systems free of ‘political intervention’), which the directive is specifically supposed to respect¹³.

Statutory minimum wages

For the 21 EU Member States with a statutory minimum wage, the proposal makes a number of further suggestions. It points out, that when setting or updating the minimum wage, these Member States have to base their decisions on clear and stable criteria, including factors like the purchasing power, the general level of gross wages and their distribution, the purchasing power, gross wage growth or increases in labour productivity (Article 5), while limiting any variations of the wage (by time, extent and differences between various groups of workers) or deduc-

tions from it (Article 6). Although the adequacy of minimum wages is a key objective of the proposal, there is no binding criterion for the assessment of adequacy. Instead, the text would suggest that every Member State should basically find its own definition of adequacy. The category of labour productivity developments is especially problematic, as would not be immediately clear what productivity indicators should be used and at what level¹⁴. While long discussed as a possible pragmatic benchmark to assess adequacy, the so-called Kaitz index has not been included in the proposal, beyond the non-binding reference to its criteria in recital 21. The index in question is a measure of the relative value of the minimum wage in relation to the national wage structure. Accordingly, a minimum wage is considered adequate when it is at least 60% of the national median and 50% of the gross average wage. By analogy with poverty research, a minimum wage of 60% of the median wage is the wage that enables a single full-time worker to avoid a life in poverty without relying on state transfers. In 2019, the statutory minimum wage met the 60% standard in only four EU Member States: Bulgaria, France, Portugal and Slovenia¹⁵.

The Member States with a statutory minimum wage must also take into consideration the role of social partners, strengthening their involvement in statutory minimum wage setting (Article 7). Last but not least, the proposal aims at ensuring compliance and effective enforcement of statutory minimum wage, making the relevant provisions effectively accessible to workers (Article 8).

Horizontal provisions

In reference to all the EU Member States, and in accordance with EU law on public procurement¹⁶, the proposal requires them to take appropriate measures to ensure that in

¹² The data quoted after: Regina Anna Konle-Seidl, *The proposed Minimum Wage Directive at a glance* (Brussels: European Parliament, 2020), 1.

¹³ S. Fleming, D. Hindley, “Brussels faces unease among capitals over minimum wage initiative”, *Financial Times*, 28.10.2020.

¹⁴ Torsten Müller, Thorsten Schulten, “Minimum-wage directive: yes, but...”, *Social Europe*, accessed 26.11.2020, <https://www.socialeurope.eu/minimum-wage-directive-yes-but>.

¹⁵ Konle-Seidl, *The proposed*, 1–2.

¹⁶ See e.g. p. 5 of the Commission communication.

the performance of public or concession contracts economic operators comply with the wages set in relevant collective agreements or with the statutory minimum wages when they exist (Article 9).

Promotion of compliance and enforcement monitoring of minimum wage provisions is extended by the obligation of the Member States to collect the relevant data in an effective and reliable manner, to ensure that information regarding collective agreements and their wage provisions is transparent and publicly available, and to provide annual reports to the Commission on the level and variations of their minimum wages as well as the collective bargaining coverage. The reports in question would then be used for annual reporting by the Commission to the European Parliament and the Council on these issues (Article 10).

Further provisions aim to enforce, in reference to the minimum wage setting process, a right of workers to redress (dispute resolution, adequate compensation) and protection against adverse treatment or consequences at the hands of their employers (Article 11), as well for appropriate penalties for breaches of Member State laws establishing minimum wage protection to be established and enforced by the Member States themselves (Article 12).

Final provisions

In accordance with Article 153(3) TFEU, Member States may entrust management and labour, at their request, with the implementation of the directive, provided that the results sought by this act can be guaranteed (Article 13). There is to be awareness-raising concerning rights foreseen in the directive as well as the already-existing legal provisions in the field (Article 14). When the directive enters into force (twenty days after its publication in the Official Journal – Article 18), Member States, to all of which it is formally addressed (Article 19) have two years to transpose it (Article 17). Following the end date of transposi-

tion, the Commission would have five years to conduct an evaluation of the directive and report to the Parliament and the Council reviewing its implementation process¹⁷ and, if it considers necessary, make proposals to revise and update it (Article 15). As has been signaled above, since the directive is to achieve certain minimum standards, the Member States are not to use it in order to lower those already existing in the field, while nothing in the directive is to prevent them from providing an even higher level of protection than foreseen therein (“the non-regression clause” – Article 16).

Conclusions

Opinions are already being expressed, that without a clear and common definition of wage adequacy at EU level, there is a clear danger that some member states will apply a very restrictive definition, which will fail to foster real improvement of minimum-wage levels¹⁸. In fact, the quantitative analysis carried out by the European Commission on a scenario based on a hypothetical increase of minimum wages to 60% of the gross median wage shows that it would improve the adequacy of minimum wages in about half of the Member States. Between 10 and 20 million workers would benefit from these improvements. In several countries, improvements in minimum wage protection would result in a reduction of in-work poverty and wage inequality by over 10%. However, the expected economic impacts include increased labour costs for enterprises, increased prices and, to a lesser extent, lower profits. The impact on the enterprises would be mitigated by increases in the consumption of low-wage earners, which would support domestic demand. Enterprises would also benefit from more gradual and predictable minimum wage increases, which would improve the business environment. The possible negative impact on employment is expected to be limited, as it would remain below 0.5% of total employment in

¹⁷ On the formal notions of implementation and related, see e.g. Cezary Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki*, vol. 1 (Warsaw: C.H. Beck, 2000), 651 ff.

¹⁸ Müller, Schulten, *Minimum-wage*.

most cases. The benefits of an improved minimum wage protection for the concerned workers would greatly outweigh the possible negative employment impact on these workers¹⁹.

There are also voices already being heard, that this proposal for a directive shall ‘never’ be adopted by the European Parliament and the EU Council, because of the aforementioned critical stance of certain Member States, as well as divisions in the Parliament, where roughly equally many members express their view of the proposal as not “ambitious” enough, and too much intruding²⁰. Opinions sometimes even state quite unequivocally, that with this proposal the Commission simply wandered into a “minefield”²¹. Possible amendments in the European Parliament might include a more precise definition of ade-

quate minimum wages and more practical tools for the promotion of collective bargaining. To ensure that the action plans fulfil their purpose of increasing collective bargaining coverage to at least 70%, the directive might need to specify supportive measures to be taken into consideration by Member States. Other proposals could include e.g. improved protection against victimisation of workers who exercise their right to collective bargaining. Amendments might also be put forward for a recognition of the extension mechanisms which in some European countries have proved an effective (although controversial) instrument to ensure high bargaining coverage, by making collective agreements binding on all employers in the sector, whether they are members of the employers’ association or not²².

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¹⁹ The above analysis is quoted after the Commission communication, p. 10.

²⁰ Marc Peeperkorn, “Brussel wil een leefbaar minimumloon vastleggen in de EU”, *De Volkskrant*, 29.10.2020, 8.

²¹ Elodie Lamer, “L’UE s’aventure sur le terrain miné du salaire minimum”, *Le Soir*, 29.10.2020, 18.

²² Konle-Seidl, *The proposed*, 2; Müller, Schulten, *Minimum-wage*.