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### OPINION OF THE LEGAL SERVICE<sup>1</sup>

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From: Legal Service

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Subject: Commission proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union - Legal basis

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**DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (16.03.2021)**

#### I. INTRODUCTION

1. On 28 October 2020, the Commission submitted a proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union (“Proposal” or “proposed Directive”).<sup>2</sup> The legal basis for the Proposal is Article 153(2) TFEU, in conjunction with Article 153(1)(b) TFEU.
2. Following a first discussion at the level of the Working Party on Social Questions, and several requests for a legal opinion, the Coreper chair concluded by inviting the Council Legal Service to present an opinion on the legal basis of the Proposal. This opinion has been drawn up in response to that request.

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<sup>1</sup> This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

<sup>2</sup> COM/2020/682 final.

3. This opinion focuses on the question of the legal basis and should not be read as an exhaustive assessment of all legal aspects of the Proposal. The Council Legal Service is aware that its views may also be requested on other aspects of the Proposal, and it stands ready to address such other questions if and when requested.
4. The following analysis takes as a basis the text as proposed by the Commission. Future developments of the text of the Proposal that could depart substantially from the Proposal may merit further assessment by the Council Legal Service.

## **II. RELEVANT TREATY PROVISIONS**

5. Article 153 TFEU, the legal basis of the Proposal, is contained in Title X of Part III of the TFEU on Social Policy.
6. The introductory provision of this Title, Article 151 TFEU, reads in part:

*“The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.*

*To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy (...).”*

7. Article 153 TFEU reads in part:

*“1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (...)*

*(b) working conditions; (...)*

*(f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5; (...)*

*2. To this end, the European Parliament and the Council: (...)*

*(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.*

*The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.*

*In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees. (...)*

*5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.”*

8. Article 157(2) TFEU, which concerns the principle of equal pay for male and female workers, defines ‘pay’ as follows:

*“2. For the purpose of this Article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.(...)”*

### III. LEGAL ANALYSIS

9. According to the case law of the Court, the choice of the legal basis for a Union act must be based on objective factors which are amenable to judicial review and which include, in particular, its aim and content.<sup>3</sup>
10. It is furthermore settled case law that the choice of the correct legal basis requires identification of the main or predominant aim or component of a measure. If a measure pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant aim or component. By contrast, if a measure simultaneously pursues a number of objectives, or has several components, which are inseparably linked without one being incidental to the other, such a measure will have to be founded, exceptionally, on the various corresponding legal bases. The Court has held also that recourse to dual or multiple legal bases is not possible where the procedures laid down for each legal basis are incompatible with each other.<sup>4</sup>

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<sup>3</sup> Judgment of 6 May 2014, *Commission v Parliament and Council*, C-43/12, EU:C:2014:298, paragraph 29, and judgment of 14 June 2016, *Parliament v Council*, C- 263/14, EU:C:2016:435, paragraph 43, and case law referred to therein.

<sup>4</sup> See, for example, judgment of 19 July 2012, *Parliament v Council*, C-130/10, EU:C:2012:472, paragraphs 43-45 and judgment of 8 September 2009, *Commission v Parliament and Council*, C-411/06, EU:C:2009:518, paragraphs 45 to 47, and the case law referred to therein.