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OPINION OF THE LEGAL SERVICE¹

From: Legal Service

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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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”).² 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.

¹ 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.

² 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.³
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.⁴

A. AIM AND CONTENT OF THE PROPOSAL

a) **Aim of the Proposal**

11. The Proposal, which is entitled “*Directive (...) on adequate minimum wages in the European Union*”, does not contain a specific article setting out its aim or objectives. However, Article 1 of the Proposal sets out its “*subject matter*”, which is “*to establish a framework*” with a view to “*improving working and living conditions in the Union.*”
12. The preamble contains further indications regarding the aim of the proposed directive.

³ 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.

⁴ 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.

13. Recitals 1 to 5 refer to provisions of primary law, the Charter of Fundamental Rights of the European Union, the European Social Charter, the European Pillar of Social Rights and the European Semester process, notably regarding workers' rights to just conditions of work, fair wages and a decent standard of living.
14. Recital 6 states that “[b]etter working and living conditions, including through adequate minimum wages, benefit both workers and businesses in the Union and are a prerequisite for achieving inclusive and sustainable growth. Addressing large differences in the coverage and adequacy of minimum wage protection contributes to improving the fairness of the EU labour market and promote economic, social progress and upward convergence”. It recalls that “[c]ompetition in the Single Market should be based on high social standards, innovation and productivity improvements ensuring a level playing field.”⁵ Recital 7 notes that “[w]hen set at adequate levels, minimum wages protect the income of disadvantaged workers, help ensure a decent living, and limit the fall in income during bad times (...). Minimum wages contribute to sustaining domestic demand, strengthen incentives to work, reduce wage inequalities and in-work poverty”. Recitals 8 and 9 point to the important role of minimum wages in protecting certain groups of workers, including in the context of the Covid-19 pandemic.
15. According to recital 14, it is “important to take action at Union level to ensure that workers in the Union are protected by adequate minimum wages.”⁶ Recital 15 indicates that the proposed Directive “establishes minimum requirements at Union level to ensure both that minimum wages are set at adequate level and that workers have access to minimum wage protection”.

⁵ See also the explanatory memorandum accompanying the Proposal, page 6, which refers to “the large differences in standards for accessing an adequate minimum wage” which “create important discrepancies in the Single Market, which can best be addressed at Union level.”

⁶ See also the explanatory memorandum accompanying the Proposal, page 2: “(...) the proposed Directive aims to ensure that the workers in the Union are protected by adequate minimum wages allowing for a decent living wherever they work. In order to reach this general objective, the Proposal establishes a framework to improve the adequacy of minimum wages and to increase the access of workers to minimum wage protection. These objectives are relevant both for statutory minimum wage systems and for those relying on collective bargaining.”

16. Recital 18 sets out that “[w]ell-functioning collective bargaining on wage setting is an important means to ensure that workers are protected by adequate minimum wages” and that “[s]trong and well-functioning collective bargaining together with a high coverage of sectorial or cross-industry collective agreements strengthen the adequacy and the coverage of minimum wages.” Recital 19 states that “it is essential that the Member States promote collective bargaining to enhance workers’ access to minimum wage protection provided by collective agreements.”
17. According to recital 20, “[s]ound rules, procedures and practices for setting and updating statutory minimum wages are necessary to deliver adequate minimum wages”. Recital 22 affirms that “[t]o promote adequacy of minimum wages (...) variations and deductions from statutory minimum wages should be limited to a minimum.”
18. In explaining why “the objectives of this Directive cannot be sufficiently achieved by the Member States”, recital 28 refers to the shortcomings of the Member States’ efforts “to promote adequate minimum wage protection of workers” and points out that “individual countries may be little inclined to improve the adequacy and coverage of minimum wages.”
19. In addition, Article 10 on monitoring and data collection requires Member States to monitor “the coverage and adequacy of minimum wages”. Pursuant to recital 25, reliable “monitoring and data collection are key to ensure the effective protection of minimum wages.”

20. The preamble also explains what the Proposal does not aim to do: According to recital 16, “(...) *this Directive neither aims to harmonise the level of minimum wages across the Union nor to establish an uniform mechanism for setting minimum wages. It does not interfere with the freedom of Member States to set statutory minimum wages or promote access to minimum wage protection provided by collective agreements, according to the traditions and specificities of each country and in full respect of national competences and social partners’ contractual freedom. (...) [T]his Directive does not establish the level of pay, which falls within the contractual freedom of the social partners at national level and within the relevant competence of Member States*”. This is also clarified in the second subparagraph of Article 1(1) and in paragraphs 2 and 3 of Article 1 (see paragraph 23 below).

21. **DELETED**

a) Content of the Proposal

22. As to the content of the Proposal, Article 1 indicates that “*this Directive establishes a framework for: (a) setting adequate levels of minimum wages; (b) access of workers to minimum wage protection, in the form of wages set out by collective agreements or in the form of a statutory minimum wage where it exists.*”

23. Article 1 also states that the proposed Directive “(..) *shall be without prejudice to the full respect of the autonomy of social partners, as well as their right to negotiate and conclude collective agreements.*” (second subparagraph of paragraph 1). It states also that it “(..) *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*” (paragraph 2). Moreover, Article 1(3) states that the proposed Directive does not impose any 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.*”
24. ‘Minimum wage’ is defined in point (1) of Article 3 of the Proposal as the “*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.*”
25. ‘Collective bargaining’ is defined in point (3) of Article 3 of the Proposal as covering all negotiations between the social partners “*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.*”
26. The Proposal distinguishes between Member States that rely on a statutory system of minimum wage setting⁷ and Member States relying on a system exclusively governed by collective agreements.⁸
27. Article 4(1) of the Proposal obliges all Member States to take certain measures to promote collective bargaining and encourage constructive negotiations on wage setting. The Member States are to take these measures “[w]ith the aim to increase the collective bargaining coverage”. The obligations in this paragraph relate to wage setting in general and are not limited to minimum wages.

⁷ Article 3, point (2), defines statutory minimum wage as “*a minimum wage set by law, or other binding legal provisions.*”

⁸ Article 3, point (4), defines collective agreements as “*all agreements in writing regarding working conditions and terms of employment concluded by the social partners as an outcome of collective bargaining.*”

28. In addition, Article 4(2) requires Member States with less than 70% collective bargaining coverage to “*provide for a framework of enabling conditions for collective bargaining*” and to establish an Action Plan to promote it. In spite of what the title of Article 4 suggests (“*Promotion of collective bargaining on wage setting*”),⁹ the obligation in paragraph 2 of this provision is general and not limited to promoting collective bargaining in respect of minimum wages or wage setting in general.

29. **DELETED**

30. **DELETED**

31. **DELETED**

⁹ Emphasis added, here and in all the various quotations of the Treaty provisions, provisions of the Proposal and case law.

32. In addition to the above general obligations on collective bargaining set out in Article 4, the Proposal sets out additional obligations for those Member States with a system of statutory minimum wages. They must in particular:

- i) *“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(1)).*

The Proposal does not define the concept of “adequacy”. However, Article 5(2) provides for a minimum list of criteria which must be applied by Member States to this end, i.e. at least the “*purchasing power of statutory minimum wages (...)*”, the “*general level of gross wages and their distribution*”, the “*growth rate of gross wages*” and “*labour productivity developments.*”

Article 5(3) obliges Member States to “*use indicative reference values to guide their assessment of adequacy of statutory minimum wages in relation to the general level of gross wages, such as those commonly used at international level*” but does not set out what those values are. On this subject, recital 21 indicates under what circumstances “*[m]inimum wages are considered adequate*” notably when “*they are fair in relation to the wage distribution in the country and if they provide a decent standard of living*” which is determined “*in view of the national socio-economic conditions*” and points out that “*[t]he 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.*”

- ii) ensure regular and timely updates of statutory minimum wages “*in order to preserve their adequacy*” (Article 5(4));
- iii) “*establish consultative bodies to advise the competent authorities on issues related to statutory minimum wages*” (Article 5(5));

- iv) limit the use of variations and deductions of statutory minimum wages both in time and in substance, including by justifying them by legitimate aims (Article 6);
- v) ensure the timely and effective involvement of social partners in statutory minimum wage setting and updating (Article 7);
- vi) take certain measures “*to enhance the access of workers to statutory minimum wage protection as appropriate*” (Article 8). These measures include the strengthening of controls and inspections, the development of guidance for enforcement authorities and the duty to ensure the availability of information on statutory minimum wages.

33. Finally, Chapter III of the Proposal contains a set of horizontal provisions addressed to all Member States concerning public procurement, monitoring and data collection obligations, and redress procedures.

34. In particular, Article 9 refers to obligations of Member States to ensure, in the context of public procurement, compliance with applicable wages “*[i]n accordance with*” three relevant directives in the field of public procurement. **DELETED**¹⁰ **DELETED**

¹⁰ **DELETED**

35. **DELETED**

36. Article 11 provides for a right to redress and protection against adverse treatment. All Member States have to ensure that effective dispute resolution mechanisms are put in place “*in the case of infringements of their rights relating to statutory minimum wages or minimum wage protection provided by collective agreements*”. According to recital 26, the aim of this provision is “*to prevent that workers are deprived from their rights*” relating to established minimum wage protection. **DELETED**

37. **DELETED**

c) **DELETED**

38. **DELETED**

39. **DELETED**

40. **DELETED**

41. **DELETED**¹¹

¹¹ **DELETED**

B. **DELETED**

42. **DELETED**

a) **Origin of Article 153 TFEU**

43. The predecessor provision of Article 153 TFEU was first introduced in 1993 as Article 2 of the Agreement on Social Policy concluded among 11 Member States¹² which was annexed to the Protocol on Social Policy that was added to the EC Treaty by the [Treaty](#) of Maastricht. In 1999, the Treaty of Amsterdam integrated the substance of Article 2 of the [Agreement on Social Policy](#) into the EC Treaty, where it became Article 137 TEC, which corresponds to the current Article 153 TFEU.
44. Competence was conferred on the Community to support and complement Member States' action in several fields, notably by adopting harmonised minimum requirements by means of directives in a number of those fields, including working conditions. Article 2(6) of the 1993 Agreement on Social Policy, which later became Article 137(5) TEC and is now Article 153(5) TFEU, also provided that "*the provisions of this Article [now paragraphs 1 to 4 of Article 153] shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.*"

DELETED FROM THIS POINT UNTIL THE END OF THE DOCUMENT (page 35)

¹² Excluding the UK, which had an opt-out.