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Directive (EU) 2022/2041 of the European Parliament and of the Council of 19th October 2022 on adequate minimum wages in the European Union – an attempt at a critical analysis

Dyrektywa Parlamentu Europejskiego i Rady (UE) 2022/2041
z dnia 19 października 2022 r.
w sprawie adekwatnych wynagrodzeń minimalnych w Unii Europejskiej
– próba analizy krytycznej

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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 has therefore proposed a directive on adequate minimum wages in the European Union, subsequently adopted by the European Parliament and the Council. Its twin objectives were 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 will 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 directive has faced consistent criticism of certain Member States for intrusion into their competencies, and in consequence it remains an open question whether its objectives would only be fulfilled due to their ultimately limited nature.

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 jej poszczególnych państwach członkowskich. Komisja Europejska przedłożyła zatem projekt dyrektywy w sprawie adekwatnych wynagrodzeń minimalnych w Unii Europejskiej, przyjęty następnie przez Parlament Europejski i Radę. Równorzędnymi celami dyrektywy 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 mają być 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 dyrektywa spotkała się z konsekwentną krytyką niektórych państw członkowskich ze względu na ingerencję w ich kompetencje, co czyni otwartą odpowiedź na pytanie, czy stawiane jej cele nie będą rzeczywiście realizowane tylko ze względu na swój w sumie dość ograniczony charakter.

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

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Introduction

The Treaty on the Functioning of the European Union¹ (hereinafter: TFEU) makes it clear (in its Article 153 (5)), that the European Union has no competencies in the field of directly setting wages, or pay. This remains the competence, or even a duty, of each of its Member States, 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 distribution².

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.

On the other hand, however, one has to take into consideration 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 in 2020 did exactly

that, fulfilling an earlier 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 consistently and highly differ in amount and the way they are set.

In July 2022, minimum wages in the EU Member States ranged from €363 per month in Bulgaria to €2313 per month in Luxembourg (in Poland, it has been €642 per month – all data from Eurostat 2022). In addition, according to the European Trade Union Confederation, real statutory minimum wages in the EU have fallen on average by 4.8% between 2021 and 2022 (in Poland by 6.7%⁸).

This text is therefore devoted to an analysis, in a critical manner, of the most important provisions of the resulting directive of the European Parliament and of the Council on adequate minimum wages in the European Union. To this end, a dogmatic legal analysis method has been applied, in a dynamic approach, attempting to compare the various stages of adoption of the directive in question, from the Commission proposal, through legislative proceedings, to the final text, with the structure of the latter being mirrored by the text below. The numbering of provisions of the directive reflects the final text as published in the Official Journal of the EU.

The directive

The proposal 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

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

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 Desmond Dinan, *Ever Closer Union. An Introduction to European Integration*, 4th ed. (Houndmills: Palgrave Macmillan, 2010), 431; Jerzy Wrątny, “Prawo do godziwego wynagrodzenia jako zasada prawa pracy”, 3–9.

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 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, pp. 22–28, guideline 5.

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

⁸ ETUC, *Record fall in value of statutory minimum wages*, accessed 13.09.2022, <https://www.etuc.org/en/pressrelease/record-fall-value-statutory-minimum-wages>.

has been put forward by the European Commission on 28th October 2020, in its Communication COM (2020) 682 (hereinafter: Commission communication). This proposal has been divided into four chapters, encompassing general provisions, statutory minimum wages, horizontal provisions and final provisions in turn. The description of the directive below will follow that order, as the general structure of this act has not been changed during the approximately two-year-long proceedings leading to the adoption of the common legislative text by the European Parliament (on 14th September 2022) and the Council (on 4th October 2022). The directive (EU) 2022/2041 on adequate minimum wages in the European Union, signed on and dated 19th October 2022, has been published in the Official Journal of the EU on 25th October (L 275, p. 33 ff.).

The initial proposal for the directive in question was put forward amidst 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, where 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 too low 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 have been excluded from the protection of national statutory minimum wages. Member States with a high collective bargaining coverage tended to have a low share of low-wage workers and high minimum wages.

However, also in Member States relying exclusively on collective bargaining, some workers did not have access to minimum wage protection. The share of workers not covered has been 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 its Article 1) 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.

In particular, Article 1(4) expressly specifies, that ‘nothing in this Directive shall be construed as imposing an obligation on any Member State:

- (a) where wage formation is ensured exclusively via collective agreements, to introduce a statutory minimum wage; or
- (b) to declare any collective agreement universally applicable.’

When this provision is read together with recitals 18–19 of the directive, it further becomes clear, that the minimum wage will not be uniform across the EU, nor that 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. One important general exception to the application of the directive, excluding seafarers from its provisions on statutory minimum wages (and not any other ones), has been contained in a new general provision (Article 1(5)), introduced into the text during legislative proceedings due to a position the Council has taken, apparently under the influence of Member States

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.

where shipping constitutes a major sector of the economy).

The personal scope of the directive (which may be considered quite broad cf. its Article 2, kept unchanged in the legislative proceedings, and recital 21) 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 directive establishes a limited number of definitions under it, starting with the ‘minimum wage’ itself (‘minimum remuneration set by law or collective agreements that an employer, including in the public sector, is required to pay to workers for the work performed during a given period’) as well as ‘statutory minimum wage’ (set by law, or other binding legal provisions, with an important exception of ‘collective agreements that have been declared universally applicable without any discretion of the declaring authority as to the content of the applicable provisions’).

The remaining three of them concern ‘collective bargaining’ (which means ‘all negotiations which take place according to national law and practice in each Member State between an employer, a group of employers or one or more employers’ organisations on the one hand, and one or more trade unions on the other, for determining working conditions and terms of employment’), as well as 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, whose working conditions may be regulated by collective agreements, to whom a collective agreement in fact applies).

Against the background (pointed to earlier on) of the decline of thus defined coverage of collective bargaining, the directive provides for

a minimum target for adequate level of such coverage, contained in Article 4 (and mirrored in recital 25), 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 collective bargaining on wage setting, and to encourage constructive, meaningful, non-discriminatory and informed negotiations on wages.

Moreover, this requires that the Member States where collective bargaining coverage does not reach at least 80% of the workers (raised from the 70% foreseen in the Commission proposal at the insistence of the European Parliament), 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%, and none other of less than 80%. In total, 18 out of the 27 EU Member States (including Poland) currently stand at below 70%, and 20 below 80%¹².

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

In consequence, as the legislative proceedings brought no change significant enough from their point of view in that part of the text, the representatives of these two Member States in both the European Parliament and the

¹² The data quoted after: Regina Anna Konle-Seidl, *The proposed Minimum Wage Directive at a glance* (Brussels: European Parliament, 2020), 1; OECD, Collective bargaining coverage, accessed 10.10.2022, <https://stats.oecd.org/index.aspx?DataSetCode=CBC>.

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

Council eventually opposed the adoption of the directive (with those representing another one, Hungary, equally consistently abstaining in relevant votes).

Statutory minimum wages

For the 21 EU Member States with a statutory minimum wage, the directive makes a number of further suggestions. It points out, that when setting or updating (at least every two to four years, as decided in the legislative proceedings) 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, gross wage growth or long-term increases in labour productivity (Article 5).

At the same time, while limiting any variations of the wage (by time, extent and differences between various groups of workers) or deductions from it, the directive also attempts at preventing Member States from actually using its text as promoting an introduction of such variations or deductions (Article 6, changed during the legislative proceedings against the proposal's permissiveness towards the Member States in this last aspect).

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 it 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 28.

In the legislative proceedings, again at the insistence of the Parliament, this reference has been made more verbose, and another mir-

roring reference added in the provisions (Article 5(4)), but in the end still without binding the Member States. 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 recent years, 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, i.a. through reliable monitoring, controls and field inspections by labour inspectorates of the Member States, 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 procurement (see e.g. p. 5 of the Commission communication), the directive requires them to take appropriate measures to ensure that in 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 in the directive by the obligation of the Member States to collect the relevant data in an effective and reliable manner, to ensure that information regarding collective

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 Cf. OECD, *Minimum to average wages of full-time workers*, accessed 10.10.2021, <https://stats.oecd.org/index.aspx?DataSetCode=RMW>; Regina Anna Konle-Seidl, *The proposed Minimum Wage Directive at a glance*, 1–2.

agreements and their wage provisions is transparent and publicly available, and to provide bi-annual (annual in the proposal) reports to the Commission on the level and variations of their minimum wages as well as on the collective bargaining coverage.

The reports in question would then be used for reporting by the Commission to the European Parliament and the Council on these issues (Article 10). In the legislative proceedings, new Article 11 ('Information on minimum wage protection') has been added to the text of the directive, stating that 'Member States shall ensure that information regarding statutory minimum wages as well as minimum wage protection provided for in universally applicable collective agreements, including information on redress mechanisms, is publicly available, where necessary in the most relevant language, as determined by the Member State, in a comprehensive and easily accessible way, including to persons with disabilities'.

This seems to have the effect of practically superseding one of the final provisions of the text (Article 14), which is foreseeing somewhat more general awareness-raising concerning rights provided for in the directive as well as the already-existing legal provisions in the field.

The directive further aims 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 12). These provisions call 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, although in the legislative proceedings this has been qualified by statement that in Member States 'without statutory minimum wages, those rules may contain or be limited to a reference to compensation and/or contractual penalties provided for, where applicable, in rules on enforcement of collective agreements' (Article 13).

Final provisions

Since the directive has entered into force¹⁶, 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 transposition, the Commission would have five years to conduct an evaluation of the directive, to report to the Parliament and the Council on the reviewing of its implementation process (on the formal notions of implementation and related, see e.g. Mik 2000, pp. 651 ff.) and, if it considers this necessary, to make proposals to revise and update the text (Article 15). Notably, in accordance with Article 153(3) TFEU, Member States may entrust management and labour, at their joint request, with the implementation of the directive, provided that achieving the objectives sought by the directive can be ensured by the states in question (Article 17 (3)).

As has been indicated 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, or be construed as preventing them from raising statutory minimum wage ('the non-regression clause' – Article 16). This very last aspect of that provision has been introduced into the text during the legislative proceedings at the instigation of the Parliament, just like, more generally, it has been the case with various more specific references to consulting social partners and their inclusion in the relevant decision-making processes.

Conclusions

Already following the presentation of the Commission proposal, opinions have been expressed, that without a clear and common definition of wage adequacy at EU level, there was a danger that some member states would apply a very restrictive definition on their own, which would fail to foster real improvement of minimum-wage levels¹⁷.

¹⁶ On 14th November 2022, i.e. twenty days after its publication in the Official Journal – cf. Article 18.

¹⁷ Torsten Müller, Thorsten Schulten, *Minimum-wage directive: yes, but...*

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 showed 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 included 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 was expected to be limited, as it would remain below 0.5% of total employment in most cases. The benefits of an improved minimum wage protection for the concerned workers would greatly outweigh the possible negative employment impact on these workers¹⁸.

There had also been voices heard at the time, that the proposal for this directive would ‘never’ be adopted by the European Parliament and the Council, because of the aforementioned critical stance of certain Member States, as well as divisions in the Parliament, where roughly equally many members expressed their view of the proposal as not ‘ambitious’ enough, and too much intruding¹⁹.

Opinions sometimes even stated quite unequivocally, that with this proposal the Commission had simply wandered into a ‘minefield’²⁰. The range of possible amendments in the European Parliament has been considered quite broad then, including: a more precise definition of adequate minimum wages and more practical tools for the promotion of collective bargaining, supportive measures to be taken into consideration by Member States to ensure increasing collective bargaining coverage, improved protection against victimisation of workers who exercise their right to collective bargaining, or even 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 not²¹.

While some of these changes have been indeed introduced to an extent into the text during the legislative proceedings, it would still have to be concluded that the changes made at that stage have been mostly confined to ancillary issues, if not mere ‘window-dressing’. One exception would be the aforementioned raising of the threshold of collective bargaining coverage from 70 to 80%²², which however by itself would not invalidate the author’s personal conclusion, that the representatives of the Member States in various EU institutions have successfully prevented or precluded any more sweeping (or binding) changes at practically all stages of the proceedings, to the extent that the lack thereof seemed somewhat a foregone conclusion.

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¹⁸ The above analysis is quoted after the Commission communication, p. 10.

¹⁹ Marc Peepkorn, “Brussel wil een leefbaar minimumloon vastleggen in de EU”, *De Volkskrant*, 29.10.2020, 8.

²⁰ Eloie Lamer, “L’UE s’aventure sur le terrain miné du salaire minimum”, *Le Soir*, 29.10.2020, 18.

²¹ Regina Anna Konle-Seidl, *The proposed Minimum Wage Directive at a glance*, 2; Torsten Müller, Thorsten Schulten, *Minimum-wage directive: yes, but...*

²² Cf. e.g. Esther Lynch, “A major step forward for fair wages”, *Progressive Post*, accessed 28.06.2022, <https://progressivepost.eu/a-major-step-forward-for-fair-wages/>.

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