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# The Minimum Wages Directive Proposal and the External Limits of Art. 153 TFEU

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1. Preliminary remarks. 2. The principle of conferral and the risk of *fuites en avant*. 3. Setting the yardsticks: the aim and content of the Proposal. 4. Assessing the external limits of Art. 153 in relation to pay: the case law of the Court of Justice. 5. Final remarks.

## Abstract

The contribution aims at assessing the Commission's recent Proposal on minimum wages in light of the treaties. In particular, it focuses on the choice of the legal basis and most notably the exclusion of pay resulting from Art. 153(5) TFEU.

**Keyword:** Minimum wages; EU social policy; Court of Justice; Principle of conferral; Pay

## 1. Preliminary remarks.

From the perspective of an EU lawyer, the Commission's recent Proposal on minimum wages raises a number of topical issues.<sup>1</sup> This brief contribution focuses on one in particular: the choice of the legal basis and most notably the exclusion of pay resulting from Art. 153(5) TFEU, which in the words of Robert Schütze, “represents an external limit to all Union legislation adopted on the basis of Art. 153 TFEU”.<sup>2</sup>

## 2. The principle of conferral and the risk of *fuites en avant*.

As is well-known, pursuant to the principle of conferral the EU can act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain

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<sup>1</sup> Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, of 28 October 2020, COM(2020) 682 final.

<sup>2</sup> Schütze R., *European Union Law*, Cambridge University Press, Cambridge, 2018, 798.

the objectives set out therein. When deciding, directly or indirectly, on the validity of EU measures, the ECJ can be asked to ascertain the correctness of the legal basis chosen for the adoption thereof.

Unsurprisingly, when assessing the scope of a given provision enabling the EU legislator to act, the ECJ has followed a substantive and functional approach. On the one side, it has looked at the actual goal of the pertinent measures; on the other hand, it has consistently recognized that the EU political institutions enjoy a wide discretion in order to attain the general and specific objectives set in the treaties. In this sense, suffice it here to mention the *Tobacco* cases<sup>3</sup> concerning the use of Art. 114 TFEU to promote the Internal Market, which effectively illustrate the risk of “unpredictable and uncontrollable competence creep”.<sup>4</sup>

In relation to social policy, the danger of legislative *fuites en avant* is obviously more limited. Nonetheless, it is also true that – as the Court, in plenary formation, reminds us in *Wightman*<sup>5</sup> – “the interpretation of a provision of EU law requires that account be taken not only of its wording and the objectives it pursues, but also of its context and the provisions of EU law as a whole”.<sup>6</sup> In this regard, if it is true that the proposed Directive is firmly based on Articles 153(1) (b) and 153(2) TFEU – supporting and complementing competences, no harmonization possible – it is also a fact that, as stated by the President of the Commission Ursula Von der Leyen in her State of the Union speech,<sup>7</sup> the current context calls for immediate action: pursuant to Principle No 6 of the European Pillar of Social Rights, adequate minimum wages are a priority; Covid-19 has hit hard on low-wage workers such as retail and tourism and on the disadvantaged groups of the population; the rate of persons at risk of poverty is alarming and shows no sign of diminishing.

### 3. Setting the yardsticks: the aim and content of the Proposal.

The proposed Directive essentially aims to ensure that the workers in the Union are protected by adequate minimum wages allowing for a decent living wherever they work. It is also capable of contributing to a number of other relevant fields of EU action: promotion of the well-being of its peoples, development of a highly competitive social market economy (Art. 3 TFEU) and improvement of living and working conditions (Art. 151 TFEU), but also

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<sup>3</sup> See Judgment of the Court of 4 May 2016, Case 547/14, *Philip Morris Brands S.A.R.L. and Others v. Secretary of State for Health*, ECLI:EU:C:2016:325; Judgment of the Court of 4 May 2016, Case C-477/14, *Pillbox 38 v. Secretary of State for Health*, ECLI:EU:C:2016:324; Judgment of the Court of 12 December 2006, Case C-380/03, *Germany v. Parliament and Council (Tobacco Advertising II)*, ECLI:EU:C:2006:772; Judgment of the Court of 14 December 2004, Case C-210/03, *Swedish Match*, ECLI:EU:C:2004:802; Judgment of the Court of 10 December 2002, Case 491/01, *British American Tobacco*, ECLI:EU:C:2002:74; Judgment of the Court of 5 October 2000, Case C-376/98, *Germany v. Parliament and Council (Tobacco Advertising)*, ECLI:EU:C:2000:544.

<sup>4</sup> Prechal S., De Vries S., Van Eijken H., *The Principle of Attributed Powers and the 'Scope of EU Law'*, in Besselink L., Pennings F., Prechal S. (eds.), *The Eclipse of Legality*, Wolters Kluwer International, Alphen aan den Rijn, 2011, 213 ff.

<sup>5</sup> Judgment of the Court of 10 December 2018, Case C-621/18, *Wightman*, ECLI:EU:C:2018:999.

<sup>6</sup> *Ibidem.*, para. 47.

<sup>7</sup> See State of the Union Address by President von der Leyen at the European Parliament Plenary, Brussels, 16 September 2020, SPEECH/20/1655:

[https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH\\_20\\_1655](https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_20_1655).

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the creation of a level playing field in the Single Market; enhancement of gender equality and workers' right to fair and just working conditions (Art. 31 of the Charter). As already mentioned, moreover, the proposed Directive contributes to implementing the European Pillar of Social Rights.

The Proposal is also coherent with the European Semester priorities and the adoption of the Directive would in principle contribute to appease concerns expressed in relation to the fact that country specific recommendations are not reviewable under the EU Charter of Fundamental Rights. While the latter are not binding, they can still impact on social dialogue and pay, thereby potentially circumventing the limitations included in Art. 153 TFEU.<sup>8</sup>

The Proposal does not aim to harmonize national legislation on minimum wages, nor does it attempt to impose a one-size-fits-all solution. Rather, it establishes, a governance framework to improve the adequacy of minimum wages and to increase the access of workers to minimum wage protection regardless of whether the national system has opted for statutory minimum wage or collective bargaining, as well as it fosters compliance and effective enforcement. Nothing in the text indicates that Member States will lose control over matters (directly) related to pay.

#### **4. Assessing the external limits of Art. 153 in relation to pay: the case law of the Court of Justice.**

Albeit not fully satisfactory, the developments following the controversial *Laval quartet*<sup>9</sup> are obviously a good term of comparison when assessing the compatibility of the proposal with the treaties. Indeed, had the Proposal for a Regulation on the exercise of the right to take collective action,<sup>10</sup> advanced by the Commission in 2012, passed the national parliaments' scrutiny (although the latter is formally limited to subsidiarity and proportionality concerns), it remains to be seen whether it would have passed a possible judicial review of the kind recently solicited by Hungary *vis à vis* the Posted Workers' Directive.

In the view of the Hungarian government, Art. 153 TFEU represents the correct legal basis for the adoption of Directive 2018/957.<sup>11</sup> However, insofar as it prescribes that the remuneration of workers must conform to the legislation in force in the host Member State, that directive infringes Art. 153(5) TFEU, which would explain why the EU Legislator turned to Articles 53(1) and 62 TFEU, allowing for the approximation of laws in relation to the

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<sup>8</sup> See Dawson M., de Witte F., *Constitutional balance in the EU after the Euro-Crisis*, in *Modern Law Review*, 2013, 817 ff.

<sup>9</sup> Judgment of the Court of 19 June 2008, Case C-319/06, *Commission v. Luxembourg*, ECLI:EU:C:2008:350; Judgment of the Court of 3 April 2008, Case C-346/06, *Rijffert*, ECLI:EU:C:2008:189; Judgment of the Court of 18 December 2007, Case C-341/05, *Laval un Partneri*, ECLI:EU:C:2007:809; Judgment of the Court of 11 December 2007, Case C-438/05, *Viking*, ECLI:EU:C:2007:772.

<sup>10</sup> Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services of 21 March 2012, COM(2012) 130 final.

<sup>11</sup> Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

freedom to provide services. The case is still pending but in his Opinion of 28 May 2020, AG Campos Sánchez-Bordona,<sup>12</sup> discarded any misuse of power. The Member States' exclusive competence in relation to pay, which is openly recognized in recital 17 of that directive – as it is in the Proposal –, cannot serve to stop the competent institutions from carrying out their tasks under the treaties. There are plenty of good reasons to believe that the ECJ will follow the Advocate General in this instance. Indeed, the EU judges have consistently held that Art. 153(5) TFEU must be interpreted strictly so as not to affect unduly the scope of paragraphs 1 to 4, nor to call into question the aims pursued by Art. 152 TFEU. This is why it cannot be construed in such a way as to include any question involving “*any sort of link with pay*”.<sup>13</sup>

It follows from *Impact*<sup>14</sup> and *Del Cerro Alonso*,<sup>15</sup> that Art. 153(5) TFEU must be interpreted as covering measures – such as the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed Community wage – which amount to direct interference by EU law in the determination of pay within the Union. Hence, the exception relating to “pay” set out in Art. 153(5) TFEU cannot preclude the interpretation of the framework agreement on fixed-term work as imposing on the Member States the obligation to ensure that fixed-term workers are also guaranteed the application of the principle of non-discrimination in relation to pay.<sup>16</sup>

Similarly, in *Specht & others*,<sup>17</sup> where the referring court wondered about the compatibility of Directive 2000/78<sup>18</sup> with Art. 153(5) TFEU insofar as the expression “employment and working conditions” covers, *inter alia*, dismissals and pay, the ECJ reached the conclusion that “[I]n the case of the German civil service, the amount of pay for each grade and step is determined by the competent national courts and the European Union has no competence in that regard. On the other hand, the national rules governing the methods of allocating those grades and steps cannot be severed from the material scope of Directive 2000/78”.<sup>19</sup>

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<sup>12</sup> Opinion of Advocate General Campos Sánchez-Bordona delivered on 28 May 2020, Case C-620/18, *Hungary v. European Parliament and Council of European Union*, ECLI:EU:C:2020:392, paras. 52, 58, 80-82, 89-100.

<sup>13</sup> *Ibidem*, para. 93.

<sup>14</sup> Judgment of the Court of 15 April 2008, Case C-268/06, *Impact*, ECLI:EU:C:2008:223, paras. 128-130.

<sup>15</sup> Judgment of the Court of 13 September 2007, Case C-307/05, *Del Cerro Alonso*, ECLI:EU:C:2007:509, paras. 31-48.

<sup>16</sup> See Opinion of Advocate General Jääskinen delivered on 20 November 2014, Case C-507-13, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, ECLI:EU:C:2014:2394, paras. 109-124; Opinion of Advocate General Trstenjak delivered on 16 June 2011, Case C-155/10, *Williams and Others v. British Airways plc*, ECLI:EU:C:2011:403, paras. 58-67; Judgment of the Court of 10 June 2010, Joined Cases C-395/08 and C-396/08, *Istituto nazionale della previdenza sociale (INPS) contro Tiziana Bruno e Massimo Pettini*, ECLI:EU:C:2010:329, paras. 35-36.

<sup>17</sup> Judgment of the Court of 19 June 2014, Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12, *Specht and Others*, ECLI:EU:C:2014:2005, paras. 32-37.

<sup>18</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>19</sup> See nt. (17), para. 35.

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## 5. Final remarks.

On the basis of these brief considerations on the Proposal and the case law of the Court of Justice on the adoption of social policy measures it would seem that the Legislator is actually competent to adopt the Directive. Looking back at the progress made in the social realm since the introduction of Art. 118A by the Single European Act, considering, in particular, the important amendments included in the Maastricht and Amsterdam Treaties and the new framework resulting from the Lisbon Treaty, and keeping in mind the legal, social and economic context, it is believed that a new systematic interpretation of the provisions on social policy, read jointly with Articles 2, 3, 6 TEU and Art. 9 TFEU, should now prevail. A reading which can accommodate proposals such the one the Commission advances on minimum wages. This of course, does not detract from the fact that a more exhaustive, comprehensive (and far reaching) assessment on the actual impact that the Directive could have on pay would be more than advisable, perhaps not only in strictly legal terms.

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