THE DIRECTIVE ON ADEQUATE MINIMUM WAGES IN THE EU: A NEW STAGE IN DEVELOPING EU SOCIAL POLICY

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1. Introduction

Among the many publications by Herwig Verschueren there are several on minimum benefits.[1] Herwig also encouraged some of his PhD students to undertake studies on combatting poverty policies.[2] It is clear that Herwig has a special interest in protecting the most vulnerable in our society. Therefore, we can expect that the adoption of the Directive 2022/2041 on adequate minimum wages in the European Union has his special attention.[3]
Its adoption can be seen as a new development. Whereas binding EU law on wages and minimum benefits so far did not extend equal treatment and co-ordination, the new directive contains provisions promoting fair and adequate wages. It thus focuses on the contents of wages and does not only have procedural, but also substantive relevance.
The directive fits in the programme started by the European Pillar of Social Rights,[4][5] that aims to ensure, inter alia, that an effective social protection system is in place to protect the most vulnerable groups in society, including a minimum level of social protection. It is not the only product of the Pillar, other instruments that were elaborated to implement the Pillar and to introduce substantive rules in labour law are Directive 2019/1152 on transparent and predictable working conditions and the draft Directive on improving working conditions in platform work.[6]
The Directive on minimum wages was adopted in order to give a follow-up to Principle 6 of the European Pillar of Social Rights that reads: 'Workers have the right to fair wages that provide for a decent standard of living. Adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his/her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented. All wages shall be set in a transparent and predictable way according to national practices and respecting the autonomy of the social partners.'
As the document accompanying the proposal for the directive made clear, 'The truth is that for too many people, work no longer pays. Dumping wages destroys the dignity of work, penalises the entrepreneur who pays decent wages and distorts fair competition in the Single Market.

1 Just the most recent ones: H. Verschueren, 'The right to social assistance for economically inactive migrating Union Citizens: the Court disregards the principle of proportionality and lets the Charter appease the consequences', Vol. 29(4) (2022) *Maastricht journal of European and comparative law*, pp. 483-498; H. Verschueren, 'The right to social assistance for migrating union citizens: a step forward in the case law of the Court of Justice this time, Jobcenter Krefeld', Vol 23(2) (2021) *European journal of migration and law*, pp. 202-217; A. Aranguiz & H. Verschueren, 'De rol van het EU-recht in de strijd tegen armoede : op weg naar een betere Europese sociale bescherming?'in J. Coene (ed.), *Armoede en sociale uitsluiting: jaarboek 2020,* (Leuven: Acco, 2020), p. 99-113; A. Van Lancker, A. Aranguiz & H. Verschueren, *Expert study on a binding EU framework on adequate national minimum income schemes: making the case for an EU framework directive on minimum income* (Brussels: European Anti-Poverty Network, 2020).

2 Inter alia, A. Aranguiz, *Combating poverty and social exclusion in European Union law.* (Routledge: Abingdon, 2022); B. Bednarowicz, *Platform-mediated work in the gig economy through the lens of the EU social acquis,* (Antwerp: University of Antwerpen, 2020); P. Ploscar, 'The Principle of Solidarity in EU Internal Market Law' (Antwerp University, 2013); and still supervisor of m. quene with a PhD study on the topic 'The meaning of the sufficient resources condition in European migration law'.

3 Directive 2022/2041/EU of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, OJ 2022 L 275, p. 33-47; preceded by the Proposal, COM(2020) 682 final.

4 COM(2017) 251.

5 COM(2017) 250, p. 5.

6 COM(2021) 762 final.

This is why the Commission will put forward a legal proposal to support Member States to set up a framework for minimum wages. Everyone must have access to minimum wages either through collective agreements or through statutory minimum wages.'[7]
Poverty is indeed a large problem in Europe; according to recent statistical data around 20% of the population is at risk of social exclusion or poverty.[8] Certainly, this does not concern solely employees, but they form a substantial part of the poor; adequate minimum wages are an important step forward to address this problem.

The objective of the directive is to improve living and working conditions in the EU, in particular the adequacy of minimum wages for workers in order to contribute to upward social convergence and reduce wage inequality. It is based on Articles 153(2)b and 153(1)b TFEU, which enable the Union to lay down minimum standard provisions in the field of working conditions. The directive refers also to Article 31 of the Charter of Fundamental Rights in the EU, which states that every worker has the right to working conditions which respect his or her health, safety, and dignity (Preamble, recital 3).
Since Member States have different systems to regulate minimum wages, it is essential that the directive respects these differences and acknowledges that minimum wages can be laid down in statutory law or in collective labour agreements. Member States retain the powers to decide which form is chosen (Article 1(2)).

In order to reach its objectives, the directive establishes a framework for:
(a) adequacy of statutory minimum wages;
(b) promoting collective bargaining on wage-setting;
(c) enhancing effective access of workers to rights to minimum wage protection where provided for in national law and/or collective agreements (recital 18 of the Preamble and Article 1).
The Preamble also makes clear what is not its purpose: the directive does not affect the independence of the social partners; it does not affect the choice of Member States to lay down minimum wages in law or collective agreements and nothing in the directive must be construed as an obligation to introduce statutory minimum wages or collective agreements.

As required by article 154 TFEU, before submitting proposals in the social policy field, the European Commission has to consult 'management and labour', i.e., the social partners, on the possible direction of Union action. If, after such consultation, the Commission considers Union action advisable, it has to consult the social partners on the content of the envisaged proposal, and they have to give an opinion or, where appropriate, a recommendation on the topic to the Commission. They may also inform the Commission of their wish to initiate the process provided for in Article 155 TFEU, which is starting negotiations to reach an agreement, that can subsequently be implemented by a Council decision on a proposal by the Commission.
An initiative concerning minimum wages obviously lies 'in the social policy field', and therefore the social partners were asked about their view on such an initiative. It appeared that the European Trade Union Confederation (ETUC) fully acknowledged the need to combat poverty and was in favour of an EU instrument on minimum wages and prepared to negotiate on this.[9] The Danish, Norwegian, Icelandic and Swedish trade unions, members of the ETUC, however, distanced themselves openly from this position and were also opposed to the later published proposal for a directive.[10] They fear that the directive will infringe their national system of autonomous collective bargaining. Secondly, these unions were of the view that there was no

7 COM(2020) 682 final, p. 2.
8 https://ec.europa.eu/eurostat/web/products-eurostat-news/-/edn-20211015-1 (last accessed on 3 February 2023).
9 *ETUC reply to the Second stage consultation on a possible action addressing the challenges related to fair minimum wages.*
10 *Reply of the Danish, Norwegian, Icelandic and Swedish trade union federation on the second phase consultation of social partners under Article 154 TFEU on a possible action addressing the challenges related to fair minimum wages.*

competence to make EU law on wages in view of article 153(5) TFEU, which excludes EU action on the field of pay. Also the employers' organisation BUSINESSEUROPE argued that there was no such power. As a result, negotiations on an agreement on minimum wages were not started and subsequently the European Commission took the initiative to make a proposal for a directive. This proposal was adopted after lengthy discussions in Parliament and the Council.[11] This history shows that several thresholds have to be crossed before progress can be made in developing social policy measure at EU level. In this contribution I will address these thresholds and discuss how these can be approached.

2. The Main Obstacles that were Raised during the Discussions on the Directive

2.1. Is the directive compatible with the subsidiarity principle?

Some Member States raised the formal question whether the proposal was compatible with the principle of subsidiarity. Recital 37 of the Preamble addresses this question and argues that the reforms and measures adopted by the Member States to promote adequate minimum wage protection of workers, while being steps in the right direction, have not been comprehensive and systematic. Moreover, individual countries may be little inclined to improve the adequacy and coverage of minimum wages because of the perception that this could negatively affect their external cost competitiveness.
On the basis of this argument the conclusion was drawn that the objectives of the directive cannot be sufficiently achieved by the Member States, but can rather, by reason of their scale and effects, be better achieved at Union level.[12] According to this argument the subsidiarity principle does not prevent the adoption of the directive.

2.2. Is there a competence to adopt a directive related to pay?

One of the crucial issues in the discussion was, as was already mentioned in the introductory section, whether there is a legal basis for regulating minimum wages, given the text of Article 153(5) TFEU. This paragraph explicitly states that Article 153 TFEU is not applicable to 'pay'.

The issue of the competence to make legislation on pay was already an older one. It arose, for instance, when the social partners investigated the possibility to make an agreement on temporary agency work. Ahlberg, who made a study of the failure of these negotiations, concluded that this failure was to a large extent due to the fact that during the negotiations the chairperson of the negotiations referred to an oral advice of the Legal Service of the European Commission, in which it advised that a provision requiring the same wages of temporary agency workers and the workers of the beneficiary company would be contrary to Article 137(6) EC (now Article 153(5) TFEU).[13] Employers organisations thus had the expectation that the Commission would not make a proposal requiring such equal treatment and were less willing to negotiate.[14]

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11 For discussions in the Council, see also Council of the European Union, *Interinstitutional file 2020/0310(COD)*. For the preceding text, see Council, https://data.consilium.europa.eu/doc/document/ST-14366-2021-INIT/en/pdf, Parliament https://data.consilium.europa.eu/doc/document/ST-14366-2021-INIT/en/pdf.

12 See also European Commission, *Commission Staff Working Document, Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union*, Brussels, 28 October 2020 SWD(2020) 245 final.

13 K. AHLBERG, 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in K. AHLBERG et al. (eds), *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. (Brussels: Peter Lang, 2008), pp. 199-262, at p. 209.

14 *Ibid*., p. 217.

After all, for the success of negotiations at this level, the 'shadow of the law',[15] that could be evaded by the social partners by making an agreement themselves, is very important.
In a later stage of the discussion of the proposal, when it was debated in the Council, the Legal Service had a more nuanced view: the Treaty provision concerned does not allow to define the level and method of calculation of wages. However, it does not exclude measures to improve the working conditions, even if these *relate to* remuneration.[16]
This view was followed: Temporary agency work directive 2008/104 that was subsequently adopted mentions wages as essential working conditions for which the equal treatment rule applies (Article 3(1)f(ii)).

As we saw, in the discussion on the proposal on the Directive on adequate minimum wages the competence to make law on wages was raised again. The *Commission Staff working document* that discussed the possibilities of interference in this area did not address this important topic; it merely mentioned that the directive respects the limitations imposed by Article 153(5) TFEU, which forbids the EU to intervene directly on the level of pay, so as not to interfere with the competence of Member States and autonomy of social partners in this field.[17] Although this text is certainly correct, it is very short, and in any case it did not convince all participants of the debate.
In a later stage, the Legal Service of the Commission presented a document advising that particular forms of regulation in order to promote minimum wage were allowed. The advice as such is, however, not made public since the parts with the view of the Service were deleted from the published document.[18] That is regrettable, since this may mean that also during future occasions a dispute could arise on the same matter again. In the voting stage on the directive, several Member States were still opposed to the Commission proposal, considering that it lacks a valid legal basis in view of Article 153(5) TFEU.

To answer the question whether there is competence to adopt the directive on minimum wage, the case law of the Court of Justice has to provide for an answer. The core judgment is *Del Cerro Alonso* of 2007.[19] The dispute in this case concerned clause 4(1) of the Framework Agreement on fixed-term work, that is implemented by Directive 1999/70. This provision provides that 'In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.' In *Del Cerro* a request for a particular payment was refused on the ground that for this payment one must be classified as a member of 'permanent regulated staff', while Mrs Del Cerro Alonso was not classified as such.
For answering the question whether this is consistent with the Agreement, the national court wished to know whether the concept of 'employment conditions' includes pay in view of the provision of Article 137(5) EC, now 153(5) TFEU.
The same provision of Article 153(1)(b) —on working conditions—was used as the legal basis for the Directive on adequate minimum wages, so this case law is very relevant to our discussion as well.
The Court argued that the Framework Agreement aims to apply the principle of non-discrimination to fixed-term workers in order to prevent an employer using such an employment relationship to deny those workers' rights that are recognised for permanent workers. This principle of Community social law cannot be interpreted restrictively, the Court continued. As

15 B. Bercusson, 'Maastricht: A fundamental change in European labour law', in N. Bruun et al. (eds.), *Labour Law and Social Europe - Selected writings of Brian Bercusson*, (Brussels: ETUI, 2009), pp. 89-114 at pp. 107ff.
16 K. Ahlberg, 2008, p. 232.
17 European Commission, *Second stage consultation on a possible action addressing the challenges related to fair minimum wages*, SWD(2020)105, p. 55.
18 European Council, Interinstitutional file 2020/0310, 6817/21.
19 CJEU 13 September 2007, Case C307/05, *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud*, ECLI:EU:C:2007:509.

Article 153(5) TFEU derogates from paragraphs 1 to 4 of that article, the matters reserved by that paragraph must be interpreted strictly so as not to unduly affect the scope of the mentioned paragraphs.
More particularly, the exception relating to 'pay' set out in Article 153(5) TFEU is explained by the fact that *fixing the level of wages* falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States. Therefore, it was considered appropriate to exclude determination of the level of wages from harmonisation under Article 152 TFEU et seq. The 'pay' exception cannot, however, be extended to any question involving any sort of link with pay; otherwise, some of the areas referred to in Article 153(1) TFEU would be deprived of much of their substance, the Court ruled.
It follows that the derogation in Article 153(5) TFEU does not prevent a fixed-term worker from requiring equal treatment in respect of a condition of employment reserved only for permanent workers, even though the application of that principle leads to the payment of a pay differential.
The Court further explained that this relation with wages is different from that in the earlier *Dellas and Others* judgment, in which it decided that a particular interpretation of the working time directive would not be consistent with the pay exemption of Article 153(5).[20] In that judgment it was decided that methods of payment for periods of on-call duty are not capable of being harmonised, since the national authorities retain sole competence to establish *the level of wages and salaries*. Therefore, Member States are exclusively competent to lay down different rules for pay for periods during which work is actually done and during rest periods. In contrast, the question whether one of the constituent parts of the pay should, as an employment condition, be granted to fixed-term workers in the same way as it is to permanent workers comes within the scope of Article 153(1)(b) TFEU and therefore of Directive 1999/70 and the Framework Agreement adopted on that basis.
From this judgment, confirmed in later case law,[21] it can be concluded that the exception of Article 153(5) TFEU has to be interpreted strictly. It applies only to the direct determination of the level of pay, or when the level is established of the parts that constitute wages of workers. However, if a measure has solely a link with pay, but does not directly regulate it, it is not excluded.

If we compare the contents of the Directive with the criteria of the Court's case law, the following elements are relevant. The Directive does not define a specific level of a minimum wage. However, for Member States having a *statutory minimum wage*, it mentions criteria for the *adequacy* of those statutory minimum wages (Article 5). These Member States have to establish the necessary procedures for the setting and updating of statutory minimum wages. Such setting and updating has to be guided by criteria mentioned in this article; however, Member States have to define those criteria in accordance with their national practices in relevant national law, in decisions of their competent bodies or in tripartite agreements. This article gives considerable room to the Member States: they may decide on the relative weight of those criteria, including the elements referred to in paragraph 2, taking into account their national socio-economic conditions.
The national criteria referred to in Article 5(2) have to include at least the following elements: (1) the purchasing power of statutory minimum wages; (2) the general level of wages and their distribution; (3) the growth rate of gross wages; and (4) long-term productivity levels and developments (Article 5(2)).
Article 5(4) also states that for the assessment of adequacy of statutory minimum wages, Member States may use indicative reference values commonly used at international level such as 60% of

20 CJEU 1 December 2005, Case C14/04, *Dellas*, ECLI:EU:C:2005:728. See also CJEU 11 January 2007, Case C437/05, *Vorel*, ECLI:EU:C:2007:23.
21 CJEU 10 June 2010, Cases C-395/08 and 396/08, *Bruno*, ECLI: EU:C: 2010:329; CJEU 19 June 2019, Cases C-501/12-C-506/12, *Specht*, ECLI:EU:C:2014:2005.

the gross median wage and 50% of the gross average wage, and/or indicative reference values used at national level.
Member States have to ensure regular and timely updates of statutory minimum wages (Article 5(5)).
Article 5(6) provides that each Member State has to designate or establish one or more consultative bodies to advise the competent authorities on issues related to statutory minimum wages.
Article 6 limits the use of different rates of statutory minimum wage for specific groups of workers and of deductions that reduce the remuneration paid to a level below that of the relevant statutory minimum wage: Member States have to ensure that those variations and deductions respect the principles of non-discrimination and proportionality, the latter including the pursuit of a legitimate aim.
Article 7 requires Member States to take the necessary measures to involve the social partners in the setting and updating of statutory minimum wages in a timely and effective manner that provides for their voluntary participation in the discussions throughout the decision-making process.

All these requirements give criteria for developing adequate minimum wages, while leaving it to the Member States to actually decide on the criteria they use. The provisions therefore do not directly define the level of wages, as that competence is left to the Member States.
Still, it is understandable that the dispute on the nature of the provisions continued during the negotiations. After all, the criteria are not merely procedural, for instance by requiring equal treatment, but they also mention the direction in which the level of the wages has to develop. Reference is made, inter alia, to international criteria for assessing adequacy. Therefore, it can also be argued that the criteria mentioned in the directive have a substantial value. However, Member States have retained the power to choose the criteria they use for defining the minimum wage and it cannot be said that the directive *directly* determines the level of pay. Since the exclusion of pay in Article 153(5) TFEU has to be interpreted strictly, as the Court ruled, the directive seems to fit with the criteria developed in *Del Cerro*.[22] Still, the directive can be said to interfere more with pay than under the instruments used so far, such as the directives on atypical work,[23] ~~as~~ its adoption ~~thus is~~ a step forward in developing a social Europe.

These requirements are relevant to statutory minimum wages. For minimum wages established by collective labour agreements there are no criteria. Instead, the directive has provisions on collective bargaining on wage setting. These concern collective bargaining in general, thus also for wages higher than the minimum ones and these are also relevant to countries having statutory minimum wages. The provisions on collective bargaining and the fear that the directive interferes with the autonomy of the social partners is discussed in the following section.

2.3. Collective bargaining

The directive has no provisions on the adequacy of (minimum) wages in collective labour agreements; of course, deciding whether wages are adequate is exactly the responsibility of the contracting partners. However, the Preamble notes that if there is a system of collective bargaining without statutory minimum wages, it is important that it is a well-functioning system and has a high degree of coverage. In a context of declining collective bargaining coverage, it

22 See also.G. Di Federico, 'The Minimum Wages Directive Proposal and the External Limits of Art. 153 TFEU', (2020) Vol. 13(2) *Italian Labour Law E-Journal*, pp. 107-111.

23 Also Aranguiz and Garben are of the view that there is more tension with the exclusion of the competence on pay than in previous instruments, see their 'Combating income inequality in the EU: a legal assessment of a potential EU minimum wage directive', (2021) Vol. 46(2) *E.L. Rev.*, pp. 156-174: 'Even as it currently stands, with only a weak provision on adequacy, the proposal still straddles the borders of art. 153(5) in a precarious way, it not at all being certain that the proposed Directive, when adopted on the basis of art.153 TFEU, would be upheld in Court if challenged.'

is essential that the Member States promote collective bargaining to enhance workers' access to minimum wage protection provided by collective agreements. Therefore, the directive has several provisions that intend to promote collective bargaining. Article 4 provides that Member States have to undertake some activities, with the aim of increasing the collective bargaining coverage and of facilitating the exercise of the right to collective bargaining on wage-setting. This has to be done with the involvement of the social partners:
(a) They have to promote the building and strengthening of the capacity of the social partners to engage in collective bargaining on wage-setting, in particular at sector or cross-industry level;
(b) They have to encourage constructive, meaningful and informed negotiations on wages between the social partners, on an equal footing, where both parties have access to appropriate information in order to carry out their functions in respect of collective bargaining on wage-setting;
(c) They have to take measures, as appropriate, to protect the exercise of the right to collective bargaining on wage-setting and to protect workers and trade union representatives from acts that discriminate against them in respect of their employment on the grounds that they participate or wish to participate in collective bargaining on wage-setting;
(d) They have, for the purpose of promoting collective bargaining on wage-setting, to take measures, as appropriate, to protect trade unions and employers' organisations participating or wishing to participate in collective bargaining against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
Each Member State in which the collective bargaining coverage rate is less than a threshold of 80% has to provide for a framework of enabling conditions for collective bargaining. This applies to all Member States, thus not only those that do not have statutory minimum wages. All Member States also have to establish an action plan to promote collective bargaining.
The directive excludes a potential very important enforcement measure for collective labour agreements: Article 1(4) provides that if the minimum wage is regulated by collective agreements, there is no obligation to make it universally applicable.

Since social partners, in particular in the Nordic countries, were concerned that the directive would affect their autonomy to collective bargain, the directive has several provisions in order to reassure them. Article 1(2) provides that this directive shall be without prejudice to the full respect for the autonomy of the social partners, as well as their right to negotiate and conclude collective agreements. And the just mentioned Article 1(4) reads that Member States are not obliged to introduce a statutory minimum wage or a system of declaring collective labour agreements generally binding. These are both meant to take concerns about threats to the autonomy of social partners away.

The concerns of the Nordic trade unions and countries were explained by BENDER and KJELLBERG.[24] They argue that in Sweden one in ten employees do not fall under a collective labour agreement. Moreover, around 400 of the approximately 690 collective agreements on wages do not contain specified minimum wages. As a result, only 53 per cent of all employees in Sweden are covered by minimum wage provisions. The authors argue that the system still gives adequate protection since collectively agreed wages act as benchmarks for wages in companies without collective labour agreements, and thus have an indirect effect. For that reason, they are opposed to the introduction of statutory minimum wages, since these would serve as the benchmark instead, and probably they would be much lower than the collective labour agreement minimum wages. There is also a risk, they fear, that if there is a statutory minimum wage (yellow) unions will make agreements that are close to these. If, as a response, a system is introduced of declaring collective labour agreements universally binding, this might jeopardise the union density of Sweden. As we have seen, the introduction of statutory wages is not required, and the same is true for a system of declaring agreements universally binding;

24 G. BENDER & A. KJELLBERG, 'A minimum-wage directive could undermine the Nordic model', *Social Europe*, 2021.

however, the authors seem to fear further interference since at first sight a system of solely collective labour agreements does not give a general protection to all workers.

SJÖDIN also analysed the proposal for the directive from the dimension of the risks for the autonomy of the social partners.[25] The core question is to what extent Member States are responsible for adequate minimum wages in the collective labour agreement system. Since they are, according to the directive, responsible for the implementation of the directive and if coverage is insufficient, are they then required to take measures, and thus interfere with the autonomy of the social partners?

Article 12 of the directive states that 'Member States shall ensure that, without prejudice to specific forms of redress and dispute resolution provided for, where applicable, in collective agreements, workers, including those whose employment relationship has ended, have access to effective, timely and impartial dispute resolution and a right to redress, in the case of infringements of rights relating to statutory minimum wages or relating to minimum wage protection, where such rights are provided for in national law or collective agreements.'

Even though this provision respects the enforcement provisions of the collective labour agreements, and requires ensuring access to enforcement rights only if laid down in national legislation or collective agreements, Nordic unions fear that if workers are not actually ensured an adequate minimum wage, the Court of Justice might give an interpretation of the directive imposing more obligations on Member States, and thus on the contracting partners, than cannot be foreseen on the basis of the text of the directive.

In this context it is relevant to note that the Nordic unions have become quite suspicious as regards how the Court of Justice might interpret the directive since the *Laval* judgment,[26] in which the Court restricted the possibilities to strike. They fear that the directive could lead to case-law interfering with the right to collective bargaining and with collective labour agreements. Consequently, the problem is not so much the actual text of the directive, since that gives several very clear safeguards, but it is more the fear of a particular interpretation of the directive, even though it is not possible to predict what this will be. This fear could not be taken away by all the provisions of the directive guaranteeing the autonomy of the social partners, not even when also labour law experts in the Nordic countries declared that the directive does not interfere with their autonomy.[27]

It is hard to solve this problem. SJÖDIN[28] discusses some possibilities to reconcile the directive with the Nordic model for labour market regulation. He proposes that the directive does not apply to certain countries, such as Sweden and Denmark, or countries whose coverage of collective agreements exceeds a certain proportion. Another option would be to state that the directive applies only to countries that already have a statutory minimum wage or to connect the directive to the euro.[29] These proposals are not convincing. The purpose of the Directive is to provide a framework for an adequate minimum wage, having in mind that currently there are many systems without such minimum wage. To convince countries to give a follow up to the directive, it is not a good idea to exempt some countries.

Exempting countries from the directive is, as a matter of fact, not a form of *reconciling* the directive with the Nordic model. Instead, if the already given safeguards are not considered enough, we have to look for where further protection for the Nordic model can be made and still the objective of the directive can be realised. Therefore, if the vulnerable point of the collective labour agreements model is that it is difficult to ensure enforcement by the Member State concerned of the minimum wages and that therefore interference by Court's decisions is feared, the discussion could be focused on that particular issue. After all, this enforcement is also important for the individual worker. Article 17(3) of the directive gives already the basis for

25 E. SJÖDIN, 'European minimum wage: A Swedish perspective on EU's competence in social policy in the wake of the proposed directive on adequate minimum wages in the EU', (2022) Vol. 13(2) *European Labour Law Journal*, pp. 279ff, at 283.

26 CJEU 18 December 2007, Case C-341/05, *Laval*, ECLI:EU:C:2007:809.

27 See http://www.nordiclabourjournal.org.

28 E. SJÖDIN, 2022.

29 *Idem*, p. 289.

this reconciliation: it provides that 'Member States shall take, in accordance with their national law and practice, adequate measures to ensure the effective involvement of the social partners with a view to the implementation of this directive. To that end, they may entrust the social partners with that implementation, in all or in part, including with regard to the establishment of an action plan in accordance with Article 4(2), where the social partners jointly request to do so. In so doing, the Member States shall take all necessary steps to ensure that the obligations laid down in this directive are complied with at all times.'

This should be the way to reconcile the directive with the Nordic model; this reconciliation should not take place at the EU level, but at the national level. The quoted article gives social partners the room to develop enforcement methods for minimum wages and Member States have to involve them in the enforcement. Since having an adequate minimum wage is an objective supported by social partners as well, they should seek ways to make sure that the collective labour agreement protection stretches out to all workers. How this is done is the primary responsibility of the national social partners. Maybe it is disappointing that here not the ultimate solution is given, but it is exactly the required autonomy that means that we have to leave it to them.

3. Conclusions

The Directive on adequate minimum wages has an objective that as such has general support. It is remarkable that in the documents of the Commission, social partners and Council, the traditional argument —minimum wages lead to an increase of wage costs, and thus to a loss of jobs— does not play a role. Instead, the objections are from the Nordic countries, in particular, even though these have as such already more protection than required by the directive and they also have to win from a reduction of wage competition with other countries.

The file of the minimum wages shows that progress in social Europe can be complicated, although the adoption of the directive also shows that progress is possible and that the text even became stronger during the discussions.

We can conclude that interference by the EU in this area is now generally accepted, since competition on (minimum) wages and the failure of Member States to reduce poverty themselves are phenomena that require supranational measures. Although such supranational measures are supported as such, the main obstacles lie in the fear that national competences are not respected sufficiently. This paradox is essential for the development of EU social policy.

National values in social policy are, of course, very important and interference with part of a national system may have waterbed effects to other parts of that system. Therefore, the solution cannot be a simple one, by shifting competences on social policy to the EU level.

However, it is also problematic if a particular instrument with an objective that is generally supported and has a potential effect on many workers in precarious situations, would not be possible because of a conflict with national values. A solution to this can be found only if developing and implementing EU social law is a two-way process. On the one hand, that means that EU law is further developed at the EU level, with the input of national actors, to meet the social objectives as mentioned in the Treaties. On the other hand, at the national level it should also be investigated how national law can be drafted in such a way that the objective of the instrument is met, and that at the same time national values are adequately protected. This means that discussions, also at the national level, cannot stop when too much or undesired EU interference is feared, but have to continue to find solutions and safeguards to realise the objective of the social policy initiative concerned.

Herwig has consistently followed an EU approach to social policy and has contributed much, from several positions during his long career, to this development. His critical articles and his clear view to develop social Europe have been very important, not only for academia, but also for the actual development of EU law. He has also contributed to solutions I proposed in the previous paragraph. We must hope that he will be willing and able to do so also after retirement, since social Europe still requires considerable support, also from lawyers.