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

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Abstract
The question of whether there can, may, and should be a lowest price for work performed by a human can be discussed from different perspectives. The President of the European Commission, Ursula von der Leyen, has unambiguously made it clear that the EU must take measures with regard to minimum wages. On October 28 2020, the Commission presented a proposal for a Directive on adequate minimum wages in the European Union.

The article is structured as follows. It begins with a brief description of the history of the proposal and a short presentation of its material content. This is followed by a discussion of the chosen legal basis in the Treaty and of whether the EU has the competence to adopt the proposal. I shall then analyse how it can be determined whether Sweden has transferred competence to the EU to adopt legislation regarding minimum wages. The article concludes with some comments on future developments as a result of the proposal for a Directive on adequate minimum wage in the European Union.

Keywords
Minimum wage, EU labour law, Article 153(5) TFEU, adequate wages, COM (2020) 682, principal of conferred competence
Introduction

The question of whether there can, may, or should be a lowest price for work performed by a human can be discussed from different perspectives, including\(^1\) the *theological*: whether reasons for a minimum wage can be extracted from the holy books;\(^2\) the *philosophical*: how perceptions of human dignity relate to the lowest price for work;\(^3\) the *economical*: what effects the introduction of, and the level of, a minimum wage would have for unemployment and the functioning of the labour market;\(^4\) and the *legal*: what a reasonable price should be and how it could be determined, as well as how the protection of minimum wage could be designed.\(^5\) Of course, there is some overlap between these different perspectives, and whether a scholar wishes to take on an interdisciplinary perspective is a choice for him/her to make. It also evident that without some kind of protection for minimum wage work will no longer perceived as decent.\(^6\)

From the perspective of the labour market, the price of labour (wage level) is the most pronounced conflict of interest between labour and capital.\(^7\) In Sweden, as well as other countries, the wage structure is governed through complex procedures involving different actors. Wages and the size of recurring wage increases can be determined by social partners on the labour market through deals in collective agreements.\(^8\) These agreements are concluded on the basis of each of the parties’ assessments regarding how, e.g., the world economy will develop over the coming year(s) and other considerations.\(^9\) Who should set the lowest price for work, and how this should be decided, is another question for which there are differing opinions and perspectives.

The President of the European Commission, Ursula von der Leyen, has made it unambiguously clear that the EU must take measures with regard to minimum wages. Since 2009 and the Treaty of Lisbon, the EU has been a social market economy (Article 3(3) TEU). After the Euro crisis, it is evident that the EU has taken a sharp turn and has gone more on the offensive on the subject of social policy.\(^10\) The European Pillar of Social Rights (Social Pillar), adopted in 2017, can be

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1. Cf. also with the work of Polanyi, K. *Den stora omdaningen*, (Arkiv 1989) p. 82 ff.; Sinzheimer, H. *Grundzüge des Arbeitsrechts* (Verlag von Gustav Fischer 1927) p. 7 ff.; and Adams, Z. *Labour and the Wage*, (Oxford University Press 2020). Additionally, there is much work that is not remunerated in a manner determined by the labour market and is thus in that sense unpaid.
2. See, e.g., Levine, A. *The Living Wage and Jewish Law*. *Tradition: A Journal of Orthodox Jewish Thought* (2008) 41(4): 8–32. and Pope Leo XIII Rerum Novarum from 1892.
3. Gilabert, P., Dignity at Work in Collins, H., Lester, G. and Mantouvalou, V. (ed.) *Philosophical Foundations of Labour law*, (Oxford University Press 2018).
4. See, e.g. Rubery, J et al, Minimum wages and the multiple functions of wages in Dingeldey, I. et al (ed.), *Minimum Wage Regimes: Statutory regulation, collective bargaining and adequate levels* (Routledge 2021), Belman, D. and Wolfson, P. J., *What does the minimum wage do?* (W.E. Upjohn Institute 2014) and also Calmfors, L. et al. *Hur ska fler komma in på arbetsmarknaden?*, (Dialogs 2018).
5. See, e.g., Davidov, G. *A Purposive Approach to Labour Law* (Oxford University Press 2016) p. 73 ff.
6. Compare SDG 8 on economic growth and decent work for all.
7. Swedish labour law makes a distinction between disputes of interest and legal disputes. Disputes of interest are matters that are negotiated collectively and agreed upon in collective agreements. Legal disputes are matters that can be settled in court; see, e.g., Chapter 2 of Källström, K. et al., *Den kollektiva arbetsrätten: en lärobok*, (Iustus 2019).
8. See, e.g., Jacobs, A. Collective Labour Relations in Hepple, B. and Veneziani, B. (ed.) *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945–2004* (Hart 2009).
9. See also annual reports from the Swedish National Mediation Office, where the Swedish pay structure is described. www.mi.se.
10. Barnard, C. EU Employment Law and the European Social Model: The Past, the Present and the Future, *Current Legal Problems* (2014) 67: 199–237.
considered a symbol of this turnaround. In her guidelines for the European Commission for the years 2019–2024, von der Leyen stated: ‘The dignity of work is sacred. Within the first 100 days of my mandate, I will propose a legal instrument to ensure that every worker in our Union has a fair minimum wage.’

A little over 100 days after von der Leyen took office, on October 28 2020 the Commission presented a proposal for a Directive on adequate minimum wages in the European Union. There is no predecessor at EU level. The proposal was put forward after it had been established that the European social partners would not be able to reach a solution through negotiations within the scope of the European social dialogue. The European Trade Union Confederation (ETUC) welcomed the proposal, whilst its counterpart on the employer’s side called it a legal monster. The proposal is undoubtedly controversial, especially in the Nordic countries, and the Swedish social partners are outspoken opponents of it.

The proposal for a Directive is being processed by the EU at the time of writing (autumn 2021), and this article does not contain any detailed analysis of the material content of the proposal. Instead, I will focus on the questions of whether the proposed Directive is comprised by the legal basis chosen and whether Sweden has transferred competence to the EU to adopt legislation regarding minimum wages. The effects of a minimum wage will be visible at national level and therefore I will use some examples from Sweden.

The article is structured as follows. It begins with a brief description of the history of the proposal and a short presentation of its material content. This is followed by a discussion of the chosen legal basis in the Treaty and of whether the EU has the competence to adopt the proposal. I shall then analyse how it can be determined whether Sweden has transferred competence to the EU to adopt legislation regarding minimum wages. The article concludes with some comments on future developments as a result of the proposal for a Directive on adequate minimum wages in the European Union.

History of the proposal on adequate minimum wages

One of the conclusions of the so-called Ohlin Report that preceded the founding of the EU was that, for the creation of a common market, it was not necessary to harmonise social policy, including minimum wages. The EU originally lacked clear competence on social policy.

11. See https://ec.europa.eu/info/strategy/priorities-2019–2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles/ last visited 29 March 2021. See also for example Garben, S. The European Pillar of Social Rights: Effectively Addressing Displacement? European Constitutional Law Review (2018) 14: 210–230 and Hendrickx F. The European Social Pillar: A first evaluation. European Labour Law Journal (2018) 9(1):3–6. doi:10.1177/2031952518759987.
12. A Union that strives for more, My agenda for Europe: political guidelines for the next European Commission 2019–2024, https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf , last visited September 2 2021.
13. COM(2020) 682 final.
14. See Article 155 TFEU.
15. Cf. op-ed by representatives of LO, PTK and the Confederation of Swedish Enterprise, ‘Regeringen måste stoppa EU-förslaget om minimilön’ (‘The government must stop the EU proposal for a minimum wage’) published in DN Debatt, November 11 2019.
16. (1956) Social Aspects of European Economic Co-operation (the Ohlin Report). It should also be mentioned that minimum wages have also been discussed within the ILO since the organisation was formed. See, e.g., Konrad, G. (2018) Mindestlöhne im Internationalen Arbeitsrecht. Europäische Zeitschrift für Arbeitsrecht. (2) pp. 143–154.
The Member States thereafter gradually transferred additional competence in this area to the EU.\textsuperscript{17} There has been a debate regarding the regulation of minimum wages at EU level, and even Jacques Delors – who was President of the Commission from 1985 to 1995 – discussed the issue.\textsuperscript{18} The issue of minimum wages gained renewed momentum with the accession of countries from Eastern and Central Europe and the European debt crisis, which brought about dramatic consequences for many of the EU Member States, especially those in the south of Europe.\textsuperscript{19}

Von der Leyen’s predecessor as President of the Commission, Jean-Claude Juncker, stated that a European minimum wage was a way to re-establish the European social market economy.\textsuperscript{20} With von der Leyen’s Commission the issue has been given a renewed and more concrete focus. The European Parliament has also urged the Commission to put forward a proposal on minimum wages.\textsuperscript{21}

The proposal for a Directive that was presented on October 28 2020 was preceded by a consultation within the social dialogue between the European social partners.\textsuperscript{22} The first step of the consultation was initiated on January 14 2020, and the Commission primarily wanted to obtain the parties’ views on whether they considered the EU initiative necessary and whether they were willing to enter into negotiations.\textsuperscript{23} The consultation document contains several references to the Social Pillar and is somewhat contradictory. It states that adequate wages are the key for ensuring proper living conditions, and that von der Leyen has advised that she will present a proposal that ensures that all workers receive a minimum wage. At the same time, it is stated in the consultation document that the proposal from the Commission does not seek to directly harmonise the minimum wage levels in the EU or to introduce uniform procedures for determining minimum wages and wage levels that will interfere with contractual freedom of the social partners. It also states that no minimum wages will be introduced in countries that have a high coverage of collective agreements.

The European social partners replied to the proposal. In short, the employers opposed entering into negotiations, whilst the ETUC was willing to do so. It should be mentioned that the Commission’s consultation led to disagreements within the ETUC. The Swedish, Danish,
Norwegian and Icelandic unions submitted a response deviating from that of the ETUC, in which they objected to the opening of negotiations. On July 3, 2020, the Commission initiated the second phase of the consultation process. The Commission was, at the time, considerably more specific with regard to what was intended to be achieved and how. In the consultation document, the policy objectives of an EU instrument for minimum wages are described. Firstly, the objective is for all workers in the EU to be protected by an adequate minimum wage that ensures a decent life, regardless of where the work is performed. An adequate minimum wage is an important part of fair terms of employment, and it protects those in low-paying jobs in particular. Additionally, the EU initiative can help to level the playing field for entrepreneurs in the internal market. These objectives were not considered to be achievable by the Member States. The EU initiative ensures that minimum wages are determined on adequate levels by the legislator and/or the social partners, and that the minimum wages protect all workers, especially those who are disadvantaged.

In the second consultation document, the Commission specified two choices for the initiative: either a Directive or a Recommendation.

The material content of the proposed Directive

On October 28, 2020, the Commission presented a proposal for a Directive on adequate minimum wages in the EU. The proposed Directive contains four chapters, and the material regulation is different for countries that have statutory minimum wages and those where wages are determined by collective agreements. The proposal is more extensive and contains more far-reaching obligations for countries that have a statutory minimum wage. The following description aims to provide an overview of the material content of the proposal. It should be noted that the proposed Directive does not contain figures in euros and cents with regards to how high the minimum wage should be.

The proposal makes reference to Charter of Fundamental Rights in the European Union, and specifically Article 31 on fair and just working conditions. It also makes reference to the aforementioned Social Pillar and the European Social Charter.

Chapter I (Articles 1-4) contains general provisions and states that, in order to improve living and working conditions in the EU, the proposed Directive sets out a framework for setting minimum wages and for giving workers the protection of a minimum wage, regardless of whether their wages are set by law or collective agreements (Article 1). The same Article also lists what the Directive should not do. It should not affect the full independence of social partners, and it should not affect the choice of Member States to determine whether protection for a minimum wage shall be regulated by law or collective agreements. Nothing in the proposal should be

24. There has been an unusual debate in the Swedish newspaper Dagens nyheter; see Karl-Petter Torvaldsson, ‘Regeringen måste stappa EU-förslaget om minimilön’ (‘The government must stop the EU proposal for a minimum wage’), November 11, 2019; Luca Visentini, secretary-general of ETUC, ‘Fel information om EU-förslaget om minimilöner’ (‘Incorrect information regarding the EU proposal on minimum wages’), DN debatt, November 14, 2019; and Ursula von der Leyen, ‘EU kommer inte att tvinga Sverige att införa minimilöner’ (‘The EU will not force Sweden to introduce a minimum wage’), September 14, 2020.

25. The letter is available on the Labour Law Portal, see http://arbetsratt.juridicum.su.se/euarb/20–01/Art.%204%20200225%20Trade%20union%20Letter%20to%20COM%20on%20diverging%20views%20on%20minimum%20wages%20from%20Sweden%20Denmark%20Norway%20Iceland.pdf last visited 2 September 2021.

26. See later for the following, C(2020) 3570 final. Second phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges related to fair minimum wages.
interpreted as an obligation to introduce a statutory minimum wage. Article 2 states that the proposed Directive is applicable to workers. Article 3 contains a number of definitions and Article 4 deals with the promotion of collective bargaining on wage setting.

Chapter II (Articles 5-8) concern Member States that have a statutory minimum wage.

Chapter III is labelled General Provisions, and Articles 9-12 deal with a number of different subjects, among other things an obligation for the Member States to submit data on wages to the Commission. Article 11 provides that Member States must ensure that, regardless of whether wages are set by law or collective agreement, workers have access to impartial dispute settlement and a right to redress, including adequate compensation, if the minimum wage protection is infringed upon. Chapter IV contains final provisions primarily relating to the implementation of the proposed Directive. It follows from Article 13 that Member States may delegate responsibility for implementing the Directive to the social partners.

From this brief review, it is clear that a number of different questions are brought to the fore regarding how a Directive with the aforementioned content could be implemented throughout the Member States. Furthermore, the proposed Directive does not specify what is to be done with the data that are to be submitted and the consequences if such data are not submitted. It is evident that many issues central to the Nordic system for setting wages could be put under scrutiny by the European Court of Justice, since the proposal contains, amongst other things, a definition of the collective agreement. It is also clear that there are connections with other primary law, in particular the EU Charter of Fundamental Rights, especially Article 31(2) on fair and just working conditions.

The legal basis and the motivation of the Commission’s choice

The legal basis for the Commission’s proposal is Articles 153(1)(b) and 151(1) TFEU. From the aforementioned provisions in the Treaty on the Function of the European Union, it is clear that the EU can adopt minimum harmonisation Directives regarding working conditions. Such Directives must be adopted according to the ordinary legislative procedure. The ordinary legislative procedure is based on the involvement of the European Parliament through a first and second reading, and the Council makes a decision by qualified majority (Article 294 TFEU).

The Commission comments on the legal basis of the proposal and considers that it is in agreement with the limitations stated in Article 153(5) TFEU, since it ‘does not contain measures directly affecting the level of pay.’

Under the heading ‘Subsidiarity’, the Commission first states that wages at the national level fall unequivocally under the competence of Member States. Large differences in access to adequate minimum wages between Member States create discrepancies on the common market, and this is best addressed at the EU level. Workers in the majority of Member States are affected by inadequate minimum wage protection. The proportion of workers who lack protection is expected to rise as the extent of collective bargaining declines, and it will therefore become more difficult to achieve a level playing field between Member States. Within the scope of the European Semester, the issue has been monitored, but national measures have been
insufficient. Measures at the EU level will be more effective in strengthening systems for setting minimum wages. They will additionally set clearer expectations in respect of adequate minimum wages. The measures will contribute to ensuring equal opportunities on the internal market. The proposal specifies a framework of minimum standards, and Member States may set higher ones.

Under the heading ‘Proportionality’, the Commission repeats the fact that it is a question of a minimum Directive and that Member States that have more favourable provisions do not have to change them. Additionally, Member States can choose to implement the Directive through collective agreements. According to the Commission, then, the proposal thus leaves considerable leeway for Member States, since it contributes to the objective of improving working conditions by introducing a framework within which workers in the EU have minimum wage protection available to them.

Can the proposed Directive be adopted with Article 153 TFEU as its legal basis?

Introduction

Directives and other legislative acts must have a legal basis in the treaties. This is an expression of the fact that the EU may only legislate on matters that Member States have transferred competence over to the EU (Article 5.2 TEU). The legal basis defines the procedure by which a legislative act may be adopted, the type of legislative act that can be adopted, and the majority by which the Council shall make decisions. The boundaries between the area of each legal basis are not completely clear, and these areas can overlap. Since certain articles in the Treaty contain relatively open phraseology (Articles 115 and 352 TFEU), the outer limits of the EU’s competence are not clearly defined. EU measures may be taken only if the objectives cannot be achieved at the Member State level (subsidiarity), and such measures must be in proportion to the Union’s objectives (Articles 5.3 and 5.4 TFEU). The issues of subsidiarity and proportionality will not be discussed further here.

It can be seen from the case law of the CJEU that the choice of legal basis must be made according to objective factors, and that it is possible to test the choice before the Court. The Court determines whether a certain measure has been adopted using the correct legal basis. In such a proceeding, the Court normally applies a test to determine what the main centre of gravity of the legislative act is.

28. See also, e.g., Craig, P. and Búrca, G.d. EU Law: Text, Cases and Materials. (Oxford University Press 2020) p. 102 ff. 29. The Swedish parliamentary labour market committee’s (Arbetsmarkandsutskottet) opinion is that the proposal is in conflict with the principle of subsidiarity; see the committee’s opinion, Arbetsmarkandsutskottets utlåtande 2020/21:AU6. The opinion can be accessed through the Swedish parliaments home page, see https://data.riksdagen.se/fil/80227DE5–0AA0–4F77-A0F4–26DA00D8F802 last visited January 14, 2022.
30. See, e.g., 45/86, Commission of the European Communities v Council of the European Communities, EU:C 1987:163 p. 11; C-300/89, Commission of the European Communities v Council of the European Communities (Directive on waste from the titanium dioxide industry), EU:C:1991:244; C-620/18, Hungary v Parliament and Council EU:C:2020:1001; and C-626/18 Republic of Poland v European Parliament and Council of the European Union EU:C:2020:1000.
31. Engel, A. The Choice of Legal Basis for Acts of the European Union (Springer 2018) p. 13 ff.
Article 153 TFEU and exception for pay

The legal basis for the proposal is Article 153(1)(b) regarding working conditions. Article 153 contains a number of different points, and the general legislative procedure applies for some, whilst the special legislative procedure applies for others. As far as subsection (b) relates to working conditions, the ordinary legislative procedure applies, and the Council decide with qualified majority. It is self-evident that pay is in itself a working condition, and a crucial one at that. The 1991 Directive on the employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship states that employers must provide information regarding initial wages and other forms of remuneration. A similar provision can also be found in the revised Directive from 2018 on transparent and predictable working conditions. It is clear that pay is covered by working conditions in Article 153(1)(b).

The decisive factor in assessing whether the proposal can be adopted with the stated legal basis is how the exception in Article 153(5) is to be interpreted. The wording of the exception is:

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.

Collaboration on social policy first took place in intergovernmental forms with the support of the Social Agreement and the exception was included also in that agreement. This agreement was, through the Treaty of Amsterdam, inserted into treaties. EU cooperation on social policy has thus always included an exception for pay which was justified mainly for reasons of subsidiarity, i.e., that it was more appropriate to settle issues of pay at the Member State level. Pay was also something determined by social partners.

There are judgments from the Court of Justice of the European Union (CJEU) that concern Article 153(5). This proposed Directive is the first of its kind, and in existing case law, the connection to the exception in the Article has been of a more indirect nature.

The first statements from the CJEU were made in Del Cerro Alonso from 2007, in which the Court answered a number of questions regarding Directive 1999/70/EC concerning the framework agreement on fixed-term work. The Spanish court requested a preliminary ruling on, amongst other things, whether the Directive’s requirement that fixed-term employees should not be treated less favourably than the permanent staff also applied to economic benefits. After announcing that the principle of non-discrimination in the Directive may not be interpreted strictly, the European Court of Justice commented at length on Article 153(5). Firstly, the exception shall be

32. See regarding the history of Article 153 TFEU, Ales, E. et al. International and European Labour Law: Article-by-Article-Commentary (Nomos 2018) p. 155 ff.
33. Article 2(1)(h) of Directive 91/533/EEC of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ. Official Journal of the European Communities, issue. L 288, 18/10/1991 pp. 0032–0035.
34. Article 4(2)(k) of Directive 2019/1152 of 20 June 2019 on transparent and predictable working conditions in the European Union.
35. In other language versions: Swedish: ‘löneförhållanden’; German: ‘das Arbeitsentgelt’; and French: ‘rémunérations’.
36. See, e.g., Bercusson, B. European Labour Law (Cambridge University Press 2009) p. 141 ff.
37. See also Ryan, B. (1997) Pay, Trade Unions Rights and European Community Law. International Journal of Comparative Labour Law and Industrial Relation 13(4): 305–325.
38. C-307/05 Del Cerro Alonso, EU:C:2007:509.
interpreted strictly such that the area of application for the Article is not inappropriately restricted so as to undermine the social policy objectives of Article 153.\(^{39}\) The exception for pay is, according to the Court, justified by the fact that the determination of pay is covered by the contractual freedom of unions and employers, as well as the competence of Member States.\(^{40}\) However, the exception for pay cannot be extended to exclude every measure connected with pay, since that would deprive Article 153(1) of too much of its substance.\(^{41}\) The answer provided to the Spanish court was that the concept of ‘employment conditions’ must be interpreted as meaning that it can act as a basis for a claim such as that at issue in the main proceedings, which seeks the grant to a fixed-term worker of a length-of-service allowance which is reserved under national law solely to permanent staff.

In the subsequent judgment of the Grand Chamber in Impact, which also concerned Directive 1999/70/EC concerning the framework agreement on fixed-term work, the Court assessed the exception again.\(^{42}\) The issue relevant for this discussion involved whether clause 4 in the Directive regarding non-discrimination of fixed-term workers should also be considered to apply to working conditions involving pay. In the judgment the Grand Chamber repeated what had been established in Del Cerro Alonso and added regarding the exception in Article 153(5) that it applies to 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 Community law in the determination of pay within the Community’ (emphasis added).\(^{43}\) The answer given to the national court was that clause 4 on non-discrimination of fixed-term employees applied to pay.

The CJEU has repeated these conclusions in judgments regarding other issues, such as age discrimination of public employees in Berlin in the Specht judgment.\(^{44}\) In the Matzak judgment regarding working time, the European Court of Justice stated that pay is outside the competence of the EU.\(^{45}\)

From existing case law of the ECJ, which partially applies to other issues, it can be seen that the exception in Article 153(5) must be interpreted strictly. This does not prevent all measures connected with wages. However, it is clear that the exception in Article 153(5) applies to the equivalence of all or some of the constituent parts of pay and/or the level of pay, or the introduction of a minimum wage at Community level. It therefore involves measures that comprise direct involvement in determining wages. The decisive factor is therefore whether the proposed Directive in question can be considered to constitute direct involvement of that sort.

**An alternative (Swedish?) interpretation of Article 153(5) TFEU**

Many, including, for example, the ETUC, are in favour of the proposed Directive. Several are also of the opinion that the proposed Directive is within the competence of the EU, primarily since they

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39. Point 39 of the Judgment.
40. Point 40 of the Judgment.
41. Point 41 of the Judgment.
42. C-286/06 Impact, EU:C:2008:223.
43. Point 124 of the Judgment.
44. C-501/12, C-506/12, C-540/12 and C-541/12 Specht EU:C:2014:2005, p. 32–34; and C-395/08 and C-396/08 Bruno EU:C:2010:329.
45. C-518/15 Matzak EU:C:2018:82, p. 49.
do not see that the provisions in the Directive constitute a direct involvement of the setting of wages in the Member States.\textsuperscript{46} The Council’s Legal Service has analysed the proposal on the basis of the question of whether it is consistent with the chosen legal basis. The Legal Service found that the majority of the proposal could be adopted using the chosen legal basis.\textsuperscript{47} The overall assessment of the Legal Service was that the proposal is within the transferred competences.\textsuperscript{48}

Regardless of these - in many cases - well-argued contributions, there is room for some alternative perspectives on whether the proposed Directive should be adopted with Article 153 TFEU as the legal basis.

According to the existing case law of the CJEU, the decisive factor for determining if the proposal is covered by the exception in Article 153(5) is whether it can be viewed as constituting a direct involvement in the setting of wages. It is usually advisable to exercise a certain degree of caution when making an \textit{argumentum a contrario} of grounds for judgment, but according to the reasoning in the mentioned case law of the ECJ, it seems that indirect involvement is not covered by the exception in Article 153(5). This means that such legislation can be adopted on the basis of Article 153. No other guidance regarding what can be considered direct and indirect involvement in stipulating wages, respectively, can be found in the case law of the European Court of Justice.

‘Direct’ is usually set apart from ‘indirect’. The pair of concepts – ‘direct’ and ‘indirect’ – are also found elsewhere in EU law. EU law usually distinguishes between direct and indirect effect.\textsuperscript{49} In non-discrimination law, direct discrimination is separate from indirect discrimination.\textsuperscript{50}

Even taking into account the fact that the exception must be interpreted strictly, it appears difficult to determine what should be considered as constituting direct or indirect involvement in a Member State’s determining of wages. Various kinds of measures can indirectly affect wages, since they affect costs. The understanding of what constitutes direct involvement in stipulating wages can vary depending on the perspective from which the legislation is viewed. The statement from the Legal Service appears to be written from a top-down or outside perspective of the labour market and the relationship between employer and employee. If the issue is thus viewed from above, it is possible to come to the same conclusion as the Legal Service – that the proposal does not constitute a direct involvement.

Article 5 contains provisions relating to the adequacy of the minimum wage. The Article sets forth that Member States with a statutory minimum wage must introduce criteria that are to be

\textsuperscript{46} See, for example, Menegatti, E. Much Ado about Little: The Commission Proposal for a Directive on Adequate Wages, \textit{Italian Labour Law E-Journal}, vol. 14, no. 1, Jan. 2021, pp. 21–32, doi:10.6092/issn.1561–8048/13369, Di Federico, G. The Minimum Wages Directive Proposal and the External Limits of Art. 153 TFEU, \textit{Italian Labour Law E-Journal}, vol. 13, no. 2, Jan. 2020, pp. 107–11, doi:10.6092/issn.1561–8048/11879, Wixforth, S. and Hochscheidt, L, Minimum-wages directive: it’s. legal, Social Europe, Politics, economy and employment & labour, published April 8 2021.

\textsuperscript{47} However, the Legal Service rejected Article 6 of the proposal regarding the possibility of making deductions from the minimum wage. The Legal Service was of the opinion that, as Article 6 has come to be worded, it gives the impression that the EU has the right to determine wage levels. Nevertheless, this discrepancy can, according to the Legal Service, be solved by rewording the Article. The Legal Service made some additional criticisms regarding the proposal, in particular, with relation to the fact that it is unclear how the stated objectives are expected to be achieved by means of the proposed measures.

\textsuperscript{48} See Interinstitutional File: 2020/0310 (COD) of March 9 2021.

\textsuperscript{49} See, e.g., Bergström, C. F. and Hettne, J. \textit{Introduktion till EU-rätten} (Studentlitteratur 2014), p. 399 ff.

\textsuperscript{50} See, for instance, Article 2 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJL 303, 02/12/2000 P. 0016–0022 on the different kinds of discrimination.
defined in a ‘stable and clear way’. The second paragraph of Article 5 states what the criteria should at least involve: the purchasing power of minimum wages, the general level of gross wages and their distribution and growth, and labour productivity developments. Additionally, according to Article 5(3), Member States are obligated to use indicative reference values (such as those commonly used on the international level) to guide the assessment of the level of minimum wages. Additional clarifications appear in paragraph 21 of the preamble, where it stated that a minimum wage can be considered adequate if it is ‘fair in relation to the wage distribution in the country’, and that the adequacy of a minimum wage should be determined:

...at least in relation to their purchasing power, to the productivity developments and to their relation to the gross wage levels, distribution and growth. The 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.

It is clear that the Directive imposes a number of criteria for Member States that have a statutory minimum wage to adhere to. The possibility to deviate from this and to make another interpretation appears to be limited. This appears to mean that the proposed Directive, by setting criteria for the minimum wage, will actually affect the determination of the minimum wage for Member States that have a statutory minimum wage. It is difficult to see how it could otherwise have the effect that the Commission intends with the Directive, i.e., that minimum wages are raised in half of the Member States. What will apply for countries in which minimum wages are determined via collective agreements remains unclear.

When considered from the perspective of the relationship between an individual worker and his or her employer, a number of other questions arise. According to Article 11, Member States must ensure that workers have access to effective and impartial dispute resolution and a right to have their case examined, including adequate compensation, in the event that their legal or agreed entitlement to a minimum wage is disregarded. In Sweden, for example, minimum wages are determined by collective agreements. However, Sweden lacks a system for making collective agreements generally applicable. A primary prerequisite for an entitlement to a minimum wage is thus that the employer is bound by a collective agreement. Another prerequisite for an individual worker to be able to invoke a collective agreement and what is stipulated therein is usually that the individual is a member of the trade union that has concluded the agreement. Those who are not members essentially lack this entitlement. Furthermore, there is no automatic entitlement to receiving wages in accordance with collective agreements for workers employed by employers not bound by collective agreements. In order to implement the Article in its proposed form, therefore, Swedish law will have to change. The Directive will thus affect individual entitlement to wages in accordance with collective agreements. In my opinion, this constitutes a ‘direct’ involvement in the stipulation of wages, even though it does not set figures in euros and cents.

One objection to such reasoning could be the fact that we have already been given such rules as a result of the implementation of other EU Directives. This includes, for example, Directives on

51. For the following, cf. Franzen, M. (2021) Europäischer Regelungsrahmen für Mindestlöhne? Europäische Zeitschrift für Arbeitsrecht. (1): 1–2.
52. SWD (2020) 246 final, p. 2.
posted workers and those lacking required work/residence permits.\textsuperscript{53} However, none of these Directives were adopted on the basis of Article 153 on social policy. There are also provisions stemming from EU Directives concerning different kinds of employee who are in precarious employment and must be treated on equal terms with other employees.\textsuperscript{54}

The EU Treaties can be interpreted in different ways; a distinction can be made between interpretations that are based on wording, or that are systematic, teleological or historical in nature.\textsuperscript{55} The interpretation of Article 153(5) that the CJEU has thus far made appears to be a form of systematic interpretation. The Court could have made a different choice here, and it is not clear that the outcome in that case would have been the same. Using a historical interpretation, the reason for the exception can be taken into account, i.e., the fact that pay is a matter for social partners to determine.

Collective bargaining to conclude a collective agreement is done various ways in different places, and the situations vary between Member States. The reason for excepting minimum wages is that regulation can disrupt the balance between social partners and thus affect their negotiations. Such an interpretation would also much better connect with the objective of the provision. The historical interpretation would have just as much merit as the systematic one, and going by the former rather than the latter style of interpretation could easily be justified by the fact that the issue at hand now is a Directive specifically about wages rather than a follow-up question of discrimination, as was the case previously.

My opinion is that, against the aforementioned background, the Directive constitutes a direct involvement in the stipulation of pay and is therefore covered by the exception in Article 153(5).

\textit{Other possible options in the Treaty}

The fact that the Commission has decided to put forward this proposal on the basis of Article 153 may be a result of experiences from the so-called Monti II regulation, which was proposed after the \textit{Laval} quartet and was stopped before it could be adopted.\textsuperscript{56} Additionally, the opposition of the Nordic countries towards the here discussed proposal was - and still is - apparent, and this rules out the use of a legal basis that require unanimity in the Council.\textsuperscript{57} In view of these circumstances, I assume that the Commission considered that the prospect of establishing the desired Directive was most feasible if Article 153 was invoked as the legal basis.

My view is thus that the proposal for a Directive concerns a subject that is covered by the exception in Article 153(5) regarding the transferred competence on social policy, and the proposal

\textsuperscript{53} See Section 21 of the Swedish Posting of Workers Act and Section 5 of lagen (2013:644) om rätt till lön och annan ersättning för arbete utfört av en utlänning som inte har rätt att vistas i Sverige (‘the Entitlement to Payment or Other Compensation for Work Performed by a Foreigner Who Does Not Have the Right to Stay in Sweden Act’).

\textsuperscript{54} See Article 5 of Directive 2008/104/EC on temporary agency work, OJ L 327, 5.12.2008, p. 9–14.

\textsuperscript{55} See, e.g., Streinz, R., Interpretation and development of EU primary law, in Riesenhuber, K. (ed.) \textit{European Legal Methodology} (Intersentia 2017).

\textsuperscript{56} For further information, see, e.g., ‘The adoptive Parents’ The Life of a Death Foretold: The Proposal for a Monti II Regulation, in Freedland, M. R. and Adams-Prassl, J. (ed.) \textit{Viking, Laval and Beyond}. (Hart 2016). See also Malmberg, J. and Johansson, C. (2012) \textit{The Commissions Posting Package (2012:8epa)}. SIEPS.

\textsuperscript{57} It is worth recalling, at this point, that the reason social policy was not initially included in the Treaty was due to the objection of the United Kingdom. At the time, there was talk of a parallel development, where some Member States would take the lead on the social policy front.
should therefore not be adopted on the basis of Article 153. Indeed, in 2000, Lena Maier wrote that the exception in Article 153 did not apply to other legal bases.58

Possible alternative legal grounds may be, for example, Article 46 on the free movement of workers, Articles 114 and 115 TFEU on approximation of the internal market, Article 175 of the TFEU on economic and social cohesion and Article 352 of the TFEU with its so-called flexibility clause.59 The choice of legal basis will, of course, affect the procedure according to which the Directive can be adopted. Some of the mentioned legal bases presuppose unanimity in the Council. The legal basis may also affect the material content of a Directive. The legal basis will be one factor that is of importance when interpreting a Directive, and the bases will particularly affect what can be seen as the purpose of the Directive. The choice of legal basis will thus not only be of procedural importance but will also affect the material content of a future Directive.60

Has Sweden transferred competence to the EU for regulating minimum wages?

The question of whether a Member State has transferred competence to the EU, and in that case what the prerequisites are for the EU to exercise this competence, can generate questions of law that are brought to the highest courts of Member States. The Federal Constitutional Court of Germany has repeatedly examined such cases.61 Nordic countries, such as Denmark, have also had such cases.62 The discussion here cannot, of course, solve this problem definitively; instead, I wish to emphasise the fact that this discussion of the transfer of competence to the EU also has a national (Swedish) dimension. It should be highlighted, and follows from the case law of the CJEU, that national courts are not able to annul legal acts of the EU – only the Court of Justice of the European Union can do that.63

Sweden became a member of the EU in 1995, following a referendum in 1994. In connection with this forthcoming membership, it was discussed how accession to the EU might affect the Swedish model for labour market regulation.64 The competence of the EU on the social policy has been clarified and expanded, and the EU of 1995 was in many ways a different Union to the 2022 version. Now, after 25 years, the consequences of membership have become clear, and it is evident that EU law has had a significant impact on the regulation of the Swedish labour market.65

References:
58. Maier, L. EU, arbetsrätten och normgivningsmakten: en rättslig studie av gemenskapsrättens inverkan på medlemsstaternas arbetsrättsliga normgivningsutrymmen (Jure 2000) p. 276. Compare the statements in Laval, in which the CJEU stated that Article 153(5) does not in itself prevent testing whether industrial action can constitute a restriction to free movement, see C-341/05 Laval EU:C:2007:809, p. 86–88. See also C-438/05, Viking Line, EU:C:2007:772, p. 39–41.
59. Cf. Aranguiz, A. and Garben, S. (2019) Confronting the Competence Conundrum of an EU Directive on Minimum Wage: In Search of a Legal Basis, CEPOB Collage of Europe Policy Brief (9).
60. Rebhahn, R., European Labour law in Risenhuber, K., European Legal Methodology (Intersentia 2017).
61. Solange I (BVerfGE 70, 11), Solange II (BVerfGE 73, 339), Maastrichturteil (BVerfGE 89, 155) and Lissabonurteil (BVerfGE 123, 267).
62. See case 15/2014, Judgment of 6 December 2016, Danska Højesteret in the Ajos case.
63. See 314/85, Foto-Fost EU:C:1987:452.
64. See, e.g., Bergh, L., Arbetsrätten i det nya Europa (Tiden 1995).
65. See Ahlberg, K. Tio år med EU: effekter på arbetsrätt, partsrelationer, arbetsmarknad och social trygghet. (Arbetslivsinstitutet 2005); Malmberg, J. (2011) Arbetsrätten efter EU-inträdet SvJT, 430–439, Rönnmar, M. (2015) Det svenska arbetsrätts- och arbetsmarknadssystemet i EU – samspel och konflikt under 20 år, Europarättslig tidskrift
The Swedish membership was preceded by an exchange of letters between the Swedish Government and the Commission regarding social policy and the Swedish labour market model. The fact that preservation of the Swedish model for regulating labour law was an important prerequisite for the Swedish Parliament in connection with the decision regarding membership of the EU is evident from the fact that Flynn’s letters (the so-called Flynn letters) were incorporated in extenso into the Government Bill that the Swedish Parliament decided and voted on.\(^\text{66}\) It is clear that these letters were understood by many to be guarantees of protection of the Swedish model for labour market regulation, and even in the 2020s, trade union representatives and others refer back to the ‘guarantees’ given to Sweden on the part of the EU.\(^\text{67}\) In summary, the Swedish Parliament appears to have been of the opinion that, in relation to accession, it had been guaranteed that EU membership would not affect the foundations of the Swedish model for labour market regulation. In retrospect, the accuracy of this understanding can be called into question on formal grounds, but it cannot be disregarded that the Swedish Parliament attached decisive importance to these guarantees and assurances, and that these, together with other factors, constituted prerequisites for the Swedish membership in the EU.\(^\text{68}\)

Since Sweden’s accession, the EU has undergone extensive expansion, including a large number of new Member States. The treaties have been amended a number of times, and Brexit means that, for the first time, a Member State has left the Union. In connection with these various treaty amendments, the Swedish Parliament has made new decisions regarding the transferral of competence to the EU, and no letters or guarantees from the EU relating to labour market regulation have formed the basis for the decisions of Parliament.\(^\text{69}\) The subsequent preparatory work thus does not contain any documents that correspond to the Flynn letters.

It is clear that the domestic importance that may have once been ascribed the above ‘guarantees’ can no longer be upheld, since they have not been followed up in subsequent decisions regarding the transferral of competence to the EU. Whenever competence is transferred from the national level to the EU, the meaning of EU law at that point in time can be said to have been accepted. It is in the decisions to transfer competence that have been made following accession that the EU has been given competence relating to social policy.\(^\text{70}\)

\(^{\text{286}}\)European Labour Law Journal 13(2)

\(^{\text{66}}\) Government Bill 1994/95:19, Annex 12. Page 9 shows the following conclusion in the letter from Commissionaire Flynn: ‘...provide you with full assurances that the Maastricht Protocol would in no way require a change of existing practice in the labour market.’

\(^{\text{67}}\) See Sjödin, E. and Wadensjö, E. 25 år med utstationering av arbetstagare till och från Sverige – Reglering, omfattning och arbetsmarknadseffekter (SIEPS 2020) p. 30 and op-ed by Johan Lindholm (Chairman of the Swedish construction workers union) in the magazine Arbetet, published April 1 2021, entitled ‘Sitt inte på läktaren Löfven’ (‘Don’t stand by the wayside, Löfven’).

\(^{\text{68}}\) Government Bill 1994/95:19, p 218, where it is explicitly stated that Sweden has received guarantees for the Swedish labour market system, and in particular, employment terms determined in collective agreements.

\(^{\text{69}}\) See Government Bill 1997/98:58 on the Treaty of Amsterdam, and also the committee deliberations UU 1997/98:UU13; Government Bill 2001/02:8 on the Treaty of Nice, processed by the parliamentary committee in 2001/02:KUU1; and Government Bill 2007/08:168 regarding the Treaty of Lisbon, and the committee deliberations 2008/09:UU8. The committee discussed the issue of a special social protocol for balancing freedom of movement and social rights.

\(^{\text{70}}\) Cf. the dissenting opinion in Case 15/2014, Judgments of 6 December 2016, the Danish Højesteret’s decision regarding the Ajos case, which was the subsequent judgment to the C-441/14 DI EU:C:2016:278.
However, one phrasing that can be found in the preparatory work takes aim at the way things that lie beyond the transferred competence should be classified in Sweden (my translation and emphasis added). In 1994, the Swedish Committee on the Constitution made the following statement (emphasis added).\footnote{See also Gustafsson, S. (2011) Unionsmedlemsskapet som grundlagsproblem. \textit{Statsvetenskaplig Tidkrift} 113(3): 351–374.}

If a rule in a regulation or directive appears to be constitutionally unacceptable from a Swedish standpoint, the committee’s view is that Sweden’s approach should not be to be concerned with whether there is a conflict between European Community Law and national law. The issue should instead concern whether the EC body is entitled to represent Sweden in making such a decision. In other words, does the legal act in question lie within the competence that has been transferred? If the answer is that it lies outside of that area, it is not a valid European Community Law in Sweden.\footnote{The Swedish Constitutional Committee, KU 1993/94:21, p. 29.}

The statement has also been repeated in connection with parliamentary decisions regarding the transferral of competence with regard to the Treaty of Lisbon.\footnote{See Annex 3 to 2008/09:UU8, p. 122 f., in which the opinion cited above is confirmed. It is also mentioned in the legal commentary by Isberg and Eliason regarding the provision. Isberg, M. and Eliason, M. Grundlagarna, (Nordstedts juridik 2019), see comments on Chapter 10, Section 6 of the Instrument of Government.} In my opinion, two things can be seen from the statement. It can be examined at the national level whether a certain adopted legislative measure lies within the competence that Sweden has transferred to the EU. If this examination results in the finding that Sweden has not transferred the competence, the legislative act in question is not a valid EU law in Sweden.

What is not stated, however, is who it is that should make this examination and on the basis of what sources of law the issue should be decided. The fact that the statement in the preparatory work does not further clarify how and in what way objections to the EU enacting legislations beyond its transferred authority should be handled entails significant uncertainties regarding the legal situation. If, during the future implementation of a Directive similar to the proposed one about minimum wage, someone were to assert that the Directive lies beyond the transferred competence, it is clear that the issue must be handled judicially, but it is not clear by whom and on what basis. If a certain measure is not considered to be valid EU law in Sweden, it follows that Sweden is not obligated to take any national implementation measures.

The competence that Sweden has transferred to the EU is stated in the Act concerning the accession of Sweden to the European Union (1994:1500). According to Section 3 of the Act, the EU may make decisions to the extent and with the effect derived from the treaties. The Swedish Constitution sets a limit for the competence that can be transferred. According to Chapter 10, Section 6 of the Instrument of Government (\textit{regeringsformen}), competence can be transferred to the EU as long as it does not involve the principles of the form of government, and as long as the protection of freedoms and human rights corresponds to what is provided in the Instrument of Government and the European Convention of Human Rights.\footnote{See, e.g., Lebeck, C. \textit{De konstitutionella gränserna för tillämpning av överstatlig rätt: en komparativ studie}. (Jure 2019) p. 258 ff., and contributions by Mats Melin, Ulf Bernitz and Nils Wahl in tehspecial issue of Europarättslig tidskrift, 2004 issue 1.}

A tentative answer to the question posed in this section heading is as follows. Whether Sweden has transferred competence to the EU must be determined according to an interpretation of the
treaties. The CJEU is the ultimate authority when it comes to interpreting the treaties, and if it considers that a certain measure lies within the transferred competence according to the treaties, then it must be considered to be so. The limit set by Sweden for the transferral of competence relates to matters that involve the foundations of the form of government, which can be seen in the first chapter of the Instrument of Government – in short, mainly the principles of democracy, representative government, parliamentarianism, municipal autonomy and the conformity to law of any exercise of power.75 The regulation of a minimum wage cannot be said to involve the principles of the form of government, and there is thus no national protection in Sweden that can be invoked if anyone were to be of the opinion that a certain legislative measure from the EU lies beyond the transferred competences.

The 1994 law on Sweden’s membership and the EU paragraph in the Instrument of Government do not allow for any domestic examination as to whether a legislative act lies beyond the transferred competence in the manner implied in the above citation from the Constitutional Committee. The model for calling a matter into question given in Chapter 10, Section 6 of the Instrument of Government involves examining a matter in relation to the foundations of the form of government. There are no other national guarantees. On the contrary, the meaning of the 1994 EU law is that it is the European Court of Justice that is qualified to determine what competence Sweden has transferred. The wording used in the 1994 law is that the EU is entitled to make decisions to the extent and with the effect derived from the treaties, and it can be seen from the treaties themselves that the European Court of Justice is the ultimate authority for interpreting the treaties.

A Member State that believes that the treaty has been disregarded when a legislative act is adopted can bring an action for annulment to the European Court of Justice in accordance with Article 263 TFEU.76 Such examples also exist with regard to Directives on concerning social policy. In 1994, the United Kingdom brought an action for annulment against the Working Time Directive on the grounds that, amongst other things, it had been adopted on the wrong legal basis. The action was rejected by the European Court of Justice.77 Hungary and Poland recently brought an action for annulment against the 2018 Directive amending the Posting of Workers Directive, arguing that it should rightly have been adopted on the basis of Article 153 rather than the Articles on free movement of services, as was the case. The European Court of Justice rejected the action and held that the Directive could not be adopted on the basis of Article 153 of the TFEU because it was primarily intended to promote freedom of movement.78

If the Directive on minimum wages were to be adopted on the basis of Article 153, there would be reason to examine how the exception in Article 153(5) should be interpreted. Of course, the outcome of such an examination would depend on the exact content that the Directive eventually has. As has been mentioned, in such an examination, there may be grounds to deviate from earlier case law, and the outcome does not appear to be self-evident.

75. See Joachim, Å. Överlåtelse av beslutanderätt: En rättsvetenskaplig studie av den i 10 kap. regeringsformen reglerade möjligheten att överlåta beslutande rätt till icke svenskt organ. (Iustus 2015) p. 355 ff. and also Åhman, J. (2016) Beslutanderätt som inte får överlåtas inom EU-samarbetet. Europarättslig tidskrift (2): 179–193.
76. See e.g., Bergström, C. F. and Hettne, J. Introduktion till EU-rätten. (Studentlitteratur 2014) p. 343 ff.
77. C-84/94 United Kingdom of Great Britain and Northern Ireland v Council of the European Union EU:C:1996:431.
78. C-620/18 Hungary v European Parliament EU:C:2020:1001; and C-626/18 Republic of Poland v European Parliament and Council of the European Union, EU:C:2020:1000.
Can a Directive on minimum wages be designed in a way that respects the Nordic model?

In view of the strong and unambiguous statements on the part of the Commission, it is clear that some form of EU Act on minimum wages will be proposed, in spite of the fact that I, and many others with me, believe that the legal basis that has been invoked cannot be used as grounds for a Directive in this area.\(^{79}\) At the European level, a majority favour a Directive on adequate minimum wages in the EU.

In Article 1 of the proposal, a number of things are listed that the Directive is intended to achieve. It is evident that these assurances have failed to placate the critics, and from a Nordic perspective (or at least a Danish and Swedish one), it is of interest to analyse whether a Directive could be designed in such a way as not to interfere with the Nordic model, which is so cherished by many, although, as has been stated, I believe that an EU Directive on minimum wages with the proposed content cannot be adopted with the chosen legal basis in the Treaty. In that context I will here elaborate on whether it is possible to reconcile a future Directive with the Nordic model for labour market regulation.

One possible solution would be to state in the Directive that it does not apply to certain countries. This could be designed either so as to explicitly mention that, for example, Sweden and Denmark are excluded, or by stating that countries whose coverage of collective agreements exceeds a certain proportion are not covered by the Directive. In that case, it should be made clear how this is to be calculated, and an additional safety margin should be included against the current coverage.

Another option would be to state that the Directive applies only to countries that already have a statutory minimum wage. This would mean that countries that lack one, such as Sweden and Denmark, would not be covered by the Directive.

A third way would be to connect the Directive to the Euro. In that case, too, Sweden and Denmark would avoid being affected by a future Directive. An additional justification for this is that it is primarily in these countries that measures resulting from the Euro crisis have had the greatest repercussions.

These three possibilities show that it is possible to design even a Directive on adequate minimum wages in such a way that it does not have negative consequences on the Nordic model.

Concluding comments

Whether it was for theological or philosophical reasons that the Commission, in the autumn of 2020, chose to propose a Directive on adequate minimum wages is perhaps not necessary to answer. However, it does seem that the Commission is partly thinking along those lines when it points out, in its argument for the presented proposal, that ‘The dignity of work is sacred’\(^{80}\) and that ‘in our Union the dignity of work must be sacred.’\(^{81}\)

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79. Thüsing, G. and Hütter-Brungs, G. (2021) Soziale Gerechtigkeit ultra vires – Kritische Anmerkungen zum Entwurf einer Mindestlohnrichtline. NZA (3): 170–175, Krebber, S. (2021) Unionsrecht und Arbeitsentgelt, Recht der Arbeit, 215–222 and Gill-Pedro, E. (2020) The Commission’s proposal for a European Minimum Wage – another ultra vires challenge for the EU? In: European Law Blog News and Comments on EU Law.
80. https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf last visited on September 2 2021.
81. Von der Leyen in her speech on the state of the Union 2020, https://ec.europa.eu/info/sites/default/files/soteu-2020-brochure_sv.pdf, last visited September 2 2021.
It is clear that an EU Directive on minimum wages will have economic consequences. The Commission believes that the proposal will result in higher wages in half of Member States, and that, in some, the pay increase will exceed 20%. Even those with a limited understanding of economics are aware of the controversial issue of whether an increased minimum wage can affect unemployment. If the proposal is adopted, any effects it has had on employment within the EU Member States will, in all likelihood, be evaluated.

What measure is most appropriate for equalising income disparities and lifting people out of poverty is a question to which there are differing answers. Some argue that regulating the minimum wage fails to help those who are most in need, because the most disadvantaged are not employed at all. The effects foreseen by the Commission will primarily affect those who are suffering from in-work poverty.

The question of law that has been discussed in this article has involved the matter of whether the Directive can be adopted with the proposed legal basis in Article 153 TFEU. It is not inconceivable that the legal basis per se will change. The basis that ultimately comes to be used for the adoption will affect the purpose of the harmonisation. Is the Directive put forward in order to raise minimum wages, to level the playing field between Member States, or to improve pay equality between men and women? A minimum wage might have all of these aims, but EU law requires that one be prioritised over the others; there must be a legal basis that determines the procedure that will be followed when the formal decisions are made at the EU level.

It is self-evident that a Directive on minimum wages will have consequences for the wage-setting systems of the Member States. Exactly what these consequences will be depends on the final content of the Directive. Even with some familiarity with both EU and national law, there is a significant degree of uncertainty as to how such a Directive will affect the different labour markets of the Member States. This uncertainty is amplified by the fact that the minimum wage Directive links to the EU Charter and Article 31 thereof. Case law of the European Court of Justice has provided unexpected developments since the Charter became legally binding. These developments have included surprising elements, such as an obligation for employers to keep a record of working hours. According to the wording of the proposed Directive and definitions contained therein, the European Court of Justice will be the ultimate authority for interpreting what constitutes a collective agreement according to the Directive, and whether the degree of coverage for such collective agreements shall be considered to amount to 70%. Additionally, the proposal for a European minimum wage contains individual entitlements that, considered in the light of the EU Charter, open the way for uncertainty regarding how the legal situation will develop henceforth, not least of which in the interpretations of the European Court of Justice.

By means of the proposal in question, the EU is taking a new and far-reaching initiative in the field of social policy. It has been labelled as a symbol for the return of social Europe.
States are thereby challenged with regard to how far they are actually willing to go in the creation of a common social policy, and thus also a social market economy. It will be interesting to see what the next step will be, and to observe whether, as a result of the regulation of minimum wages, demands will be made regarding additional social reforms, such as for a common tax-funded social security system at the EU level.

Whether there is an ultimate compromise between self-regulation and intervention from legislators, authorities and courts is a complex issue. 87 With the proposal, it is clear that the EU is intervening in an area that was earlier preserved for the Member States.

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