



**Maynooth
University**
National University
of Ireland Maynooth

Professor Tobias Lock
Jean Monnet Chair in EU Law
Maynooth University Department of Law
Roinn Dlí Ollscoil Mhá Nuad

Houses of the Oireachtas
Joint Committee on Enterprise, Trade and Employment
Leinster House
Dublin 2
D02 XR20

Maynooth, 7 December 2020

Ref: ETE-i-054

Dear Mr Sheridan,

Please find enclosed my submission concerning the European Commission's proposal for a Directive on adequate minimum wages in the European Union.

Please note that the submission reflects solely my personal view and not that of my employer. Equally, the European Commission's support for the production of this publication does not constitute an endorsement of the contents, which reflect the views only of the author, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Kind regards,

Prof. Tobias Lock



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Submission to the Joint Committee on Enterprise, Trade and Employment¹

concerning the European Commission's Proposal for a Directive on adequate minimum wages in the European Union COM (2020) 682 and its compliance with the subsidiarity principle, including the legal basis and choice of instrument as outlined by the proposal and on a minimum wage framework falling under "working conditions" as set out in Article 153 TFEU.

Appropriateness of the legal basis as outlined by the proposal

1. The Commission cites Article 153 (1) (b) TFEU as the legal basis for the proposed Directive. That provision gives the EU a competence to 'support and complement' the Member States' activities in the field of 'working conditions'. This **competence is limited** by Article 153 (5) TFEU, which expressly states that this shall not apply to 'pay'. This limitation is to be interpreted strictly (Case C-507/13 *UK v Parliament and Council*, Opinion of AG Wahl, para 112).
2. It is obvious that EU legislation adopted on the basis of Article 153 TFEU cannot mandate the actual minimum pay levels. This would be a clear violation of Article 153 (5) TFEU. However, this is not what the proposed Directives does. It would not set minimum wage levels in the Member States, but it instead stipulates certain criteria for the process by which minimum wages are set, which factors should influence their calculation, and how minimum wages could be better enforced.
3. There is little case law by the Court of Justice of the European Union that deals with the competence limit relating to 'pay' laid down in Article 153 (5) TFEU. In particular there is no direct legal authority on minimum wages and minimum wage setting. As far as ancillary measures – such as those proposed – are concerned, **the proposal is thus in a grey area of EU competence.**
4. The Court of Justice's pronouncements shed some light on the meaning of 'pay' in Article 153 (5) TFEU, but they are not conclusive as far as the proposed Directive is concerned. In Case C-518/15 *Matzak*, para 49, the Court of Justice used the term 'questions of workers' remuneration' as a shorthand for the competence limit contained in Article 153 (5) TFEU, whereas in Joined Cases C-501-506/12 and 541-2/12 *Specht* the Court defined it as relating 'directly to the setting of a level of pay'.

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5. The Court of Justice in the past accepted as compatible with Article 153 (5) TFEU the right of workers to paid holidays contained in the Working Time Directive 2003/88/EC as it dealt the protection of workers' health and safety and not the remuneration of workers (Case C-175/16 *Hälvä*, para 25). Hence if the primary objective of a measure is not 'pay', but one of the competence bases mentioned in Article 153 (1) TFEU – such as 'working conditions' or 'workers' health and safety' – then it does not invalidate the measure if it has a connection with pay. In Case C-307/05 *Alonso*, para 41 the Court noted that "the 'pay' exception cannot, however, be extended to any question involving any sort of link with pay".
6. Recalling that the Commission considers the proposed Directive to be dealing with 'working conditions', a short assessment of whether the key provisions of the Directive violate the competence limit in Article 153 (5) TFEU follows. It should first be noted that **the Commission's own justification contained in COM(2020) 682 is very brief**. It simply states that since the proposal 'does not contain measures directly affecting the level of pay, it fully respects the limits imposed to Union action by Article 153(5) TFEU'.
7. The proposed Directive contains two types of measures: those relating to the setting of adequate minimum pay levels (Articles 5-7) and those relating to ensuring that workers actually receive minimum pay (Articles 8-12).
8. There is little doubt that **Articles 8-12 of the proposed Directive do not directly affect the level of pay and are thus within the competence of the EU** as they relate to 'working conditions'.
9. **The same cannot easily be said of Articles 5-7** of the proposal, which is clearly concerned with modalities affecting the setting of minimum pay levels. Article 5 stipulates a catalogue of minimum criteria that Member States must take into consideration when setting minimum wages. Article 6 limits the Member States' scope in differentiation rates of minimum pay, which would be subject to the principles of non-discrimination and proportionality. Finally, Article 7 provides that in the process of minimum wage setting, Member States must involve social partners.
10. Because the Court of Justice has not yet defined precisely when the threshold of relating 'directly to the setting of a level of pay' is crossed, **it is not clear whether the EU has competence to adopt these measures**. On a strict reading of the criterion, one could argue that it does given that the Directive only formulates minimum criteria and thus leaves the Member States a large degree of discretion when setting or updating minimum wage levels. At the same time, since the competence limit of 'pay' contained in Article 153 (5) TFEU has not been defined fully doubts remain.





Appropriateness of the choice of instrument as outlined by the proposal

11. There is little doubt that a **Directive would be the appropriate choice of instrument** to achieve the ends pursued by the proposal. Article 153 (2) (b) TFEU restricts the choice of instruments for the EU to Directives. Directives tend to be the least intrusive from the perspective of the Member States and can thus be regarded as a reflection of the principle of subsidiarity.

Compliance with the subsidiarity principle

12. The principle of subsidiarity applies where the EU does not have an exclusive competence to legislate. In order for EU legislation to comply with subsidiarity **two tests must be met**: First, the objectives of the proposed action cannot be sufficiently achieved by the Member States; and second, the objectives, by reason of scale or effects, be better achieved at EU level.
13. The Court of Justice tends to accord the EU legislature a **broad discretion** when it comes to assessing compliance with the subsidiarity principle. It is generally enough if the EU legislature ‘could legitimately take the view’ that the objectives of a measure could be better achieved at EU level (Case C-58/08 *Vodafone*, para 68).
14. Until this day, the Court of Justice has not found a single EU law measure to be incompatible with the principle of subsidiarity. At the same time, it should be noted that following a so-called ‘yellow card’ issued by national parliaments in accordance with Protocol No 2 to the Treaty of Lisbon, the European Commission has in the past abandoned legislation (the so-called ‘Monti II Regulation’) on subsidiarity grounds.
15. The European Commission in COM (2020) 682 argues that differences in standards for accessing minimum pay between Member States “create important discrepancies in the Single Market, which can be best addressed at Union level.” According to the Commission this creates challenges for building a level playing field between Member States.
16. It is important to note two aspects of this justification: first, the discrepancies to be addressed relate to standards in *accessing* minimum wages as they already exist in the Member States. It does not relate to discrepancies in the level of minimum wages. Secondly, the Commission argues that this difference in the ability of workers in accessing the minimum wage hinders the creation of a level playing field. The reason for this – according to the Commission – is that Member States are reluctant to act on their own in order not to threaten their own competitiveness.





17. **So far as ensuring access to a minimum wage is concerned (Articles 8-12 of the draft Directive), the Commission’s justification appears logical and would most probably meet the standard set by the Court of Justice**, which is that the Commission can legitimately take the view that the objectives cannot be achieved at Member State level and can be better achieved at EU level.
18. Whether the subsidiarity requirements are met regarding the framework for setting minimum wage levels (Articles 5-7 of the draft Directive) is less clearly justified in COM(2020) 682.
19. While the Commission provides a coherent justification for closing any differences in coverage (**Article 6** of the draft Directive), there is very little in terms of the duty to adopt a set of minimum criteria for the setting and updating of minimum wage levels contained in **Article 5** of the draft Directive. The Commission claims that this was necessary to ensure a level playing field amongst Member States, but it is difficult to see why that would be the case, unless it was also the aim of the proposal to eliminate minimum wage differentials between Member States. Yet this would be outside the EU’s competence because of the competence limit relating to ‘pay’ contained in Article 153 (5) TFEU.
20. **It is therefore doubtful whether Article 5 of the draft Directive is compliant with the principle of subsidiarity.**

Maynooth, 7 December 2020

