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**OPINION OF THE LEGAL SERVICE**[1]

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| From: | Legal Service |
| Subject: | Commission proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union - Legal basis |

## I. INTRODUCTION

1. On 28 October 2020, the Commission submitted a proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union ("Proposal" or "proposed Directive").[2] The legal basis for the Proposal is Article 153(2) TFEU, in conjunction with Article 153(1)(b) TFEU.

2. Following a first discussion at the level of the Working Party on Social Questions, and several requests for a legal opinion, the Coreper chair concluded by inviting the Council Legal Service to present an opinion on the legal basis of the Proposal. This opinion has been drawn up in response to that request.

1 This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

2 COM/2020/682 final.

3. This opinion focuses on the question of the legal basis and should not be read as an exhaustive assessment of all legal aspects of the Proposal. The Council Legal Service is aware that its views may also be requested on other aspects of the Proposal, and it stands ready to address such other questions if and when requested.

4. The following analysis takes as a basis the text as proposed by the Commission. Future developments of the text of the Proposal that could depart substantially from the Proposal may merit further assessment by the Council Legal Service.

## II. RELEVANT TREATY PROVISIONS

5. Article 153 TFEU, the legal basis of the Proposal, is contained in Title X of Part III of the TFEU on Social Policy.

6. The introductory provision of this Title, Article 151 TFEU, reads in part:

*"The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.*

*To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy (...)."*

7. Article 153 TFEU reads in part:

"*1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (...)*

*(b) working conditions; (...)*

*(f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5; (...)*

*2. To this end, the European Parliament and the Council: (...)*

*(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.*

*The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.*

*In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees. (...)*

*5. 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.*"

8. Article 157(2) TFEU, which concerns the principle of equal pay for male and female workers, defines 'pay' as follows:

"*2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.(...)*"

## III. LEGAL ANALYSIS

9. According to the case law of the Court, the choice of the legal basis for a Union act must be based on objective factors which are amenable to judicial review and which include, in particular, its aim and content.[3]

10. It is furthermore settled case law that the choice of the correct legal basis requires identification of the main or predominant aim or component of a measure. If a measure pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant aim or component. By contrast, if a measure simultaneously pursues a number of objectives, or has several components, which are inseparably linked without one being incidental to the other, such a measure will have to be founded, exceptionally, on the various corresponding legal bases. The Court has held also that recourse to dual or multiple legal bases is not possible where the procedures laid down for each legal basis are incompatible with each other.[4]

## A. AIM AND CONTENT OF THE PROPOSAL

### a) Aim of the Proposal

11. The Proposal, which is entitled "*Directive* (…) *on adequate minimum wages in the European Union*", does not contain a specific article setting out its aim or objectives. However, Article 1 of the Proposal sets out its "*subject matter*", which is "*to establish a framework*" with a view to *"improving working and living conditions in the Union.*"

12. The preamble contains further indications regarding the aim of the proposed directive.

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3 Judgment of 6 May 2014, *Commission v Parliament and Council,* C-43/12, EU:C:2014:298, paragraph 29, and judgment of 14 June 2016, *Parliament v Council*, C- 263/14, EU:C:2016:435, paragraph 43, and case law referred to therein.

4 See, for example, judgment of 19 July 2012, *Parliament v Council*, C-130/10, EU:C:2012:472, paragraphs 43-45 and judgment of 8 September 2009, *Commission v Parliament and Council*, C-411/06, EU:C:2009:518, paragraphs 45 to 47, and the case law referred to therein.

13. Recitals 1 to 5 refer to provisions of primary law, the Charter of Fundamental Rights of the European Union, the European Social Charter, the European Pillar of Social Rights and the European Semester process, notably regarding workers' rights to just conditions of work, fair wages and a decent standard of living.

14. Recital 6 states that *"[b]etter working and living conditions, including through adequate minimum wages, benefit both workers and businesses in the Union and are a prerequisite for achieving inclusive and sustainable growth. Addressing large differences in the coverage and adequacy of minimum wage protection contributes to improving the fairness of the EU labour market and promote economic, social progress and upward convergence".* It recalls that *"[c]ompetition in the Single Market should be based on high social standards, innovation and productivity improvements ensuring a level playing field."*[5] Recital 7 notes that *"[w]hen set at adequate levels, minimum wages protect the income of disadvantaged workers, help ensure a decent living, and limit the fall in income during bad times (...). Minimum wages contribute to sustaining domestic demand, strengthen incentives to work, reduce wage inequalities and in-work poverty"*. Recitals 8 and 9 point to the important role of minimum wages in protecting certain groups of workers, including in the context of the Covid-19 pandemic.

15. According to recital 14, it is *"important to take action at Union level to ensure that workers in the Union are protected by adequate minimum wages."*[6] Recital 15 indicates that the proposed Directive *"establishes minimum requirements at Union level to ensure both that minimum wages are set at adequate level and that workers have access to minimum wage protection"*.

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[5] See also the explanatory memorandum accompanying the Proposal, page 6, which refers to "*the large differences in standards for accessing an adequate minimum wage*" which "*create important discrepancies in the Single Market, which can best be addressed at Union level.*"

[6] See also the explanatory memorandum accompanying the Proposal, page 2: "(…) *the proposed Directive aims to ensure that the workers in the Union are protected by adequate minimum wages allowing for a decent living wherever they work. In order to reach this general objective, the Proposal establishes a framework to improve the adequacy of minimum wages and to increase the access of workers to minimum wage protection. These objectives are relevant both for statutory minimum wage systems and for those relying on collective bargaining.*"

16. Recital 18 sets out that *"[w]ell-functioning collective bargaining on wage setting is an important means to ensure that workers are protected by adequate minimum wages"* and that *"[s]trong and well-functioning collective bargaining together with a high coverage of sectorial or cross-industry collective agreements strengthen the adequacy and the coverage of minimum wages."* Recital 19 states that *"it is essential that the Member States promote collective bargaining to enhance workers' access to minimum wage protection provided by collective agreements."*

17. According to recital 20, *"[s]ound rules, procedures and practices for setting and updating statutory minimum wages are necessary to deliver adequate minimum wages"*. Recital 22 affirms that *"[t]o promote adequacy of minimum wages* (…) *variations and deductions from statutory minimum wages should be limited to a minimum."*

18. In explaining why *"the objectives of this Directive cannot be sufficiently achieved by the Member States"*, recital 28 refers to the shortcomings of the Member States' efforts *"to promote adequate minimum wage protection of workers"* and points out that *"individual countries may be little inclined to improve the adequacy and coverage of minimum wages."*

19. In addition, Article 10 on monitoring and data collection requires Member States to monitor "*the coverage and adequacy of minimum wages*". Pursuant to recital 25, reliable "*monitoring and data collection are key to ensure the effective protection of minimum wages.*"

20. The preamble also explains what the Proposal does not aim to do: According to recital 16, *"(...) this Directive neither aims to harmonise the level of minimum wages across the Union nor to establish an uniform mechanism for setting minimum wages. It does not interfere with the freedom of Member States to set statutory minimum wages or promote access to minimum wage protection provided by collective agreements, according to the traditions and specificities of each country and in full respect of national competences and social partners' contractual freedom. (...) [T]his Directive does not establish the level of pay, which falls within the contractual freedom of the social partners at national level and within the relevant competence of Member States".* This is also clarified in the second subparagraph of Article 1(1) and in paragraphs 2 and 3 of Article 1 (see paragraph 23 below).

21. Based on these elements, it can be concluded that the aim of the Proposal is to improve the adequacy and the coverage of minimum wages for workers, thereby contributing to their decent standard of living and improving living and working conditions. More specifically, the Proposal aims to ensure that Member States have in place a framework that allows minimum wages to be set at an adequate level and that enhance access to minimum wage protection.

**b) Content of the Proposal**

22. As to the content of the Proposal, Article 1 indicates that *"this Directive establishes a framework for: (a) setting adequate levels of minimum wages; (b) access of workers to minimum wage protection, in the form of wages set out by collective agreements or in the form of a statutory minimum wage where it exists."*

23. Article 1 also states that the proposed Directive *"(..) shall be without prejudice to the full respect of the autonomy of social partners, as well as their right to negotiate and conclude collective agreements."* (second subparagraph of paragraph 1). It states also that it *"(...) shall be without prejudice to the choice of the Member States to set statutory minimum wages or promote access to minimum wage protection provided by collective agreements"* (paragraph 2). Moreover, Article 1(3) states that the proposed Directive does not impose any obligation *"on the Member States where wage setting is ensured exclusively via collective agreements to introduce a statutory minimum wage nor to make the collective agreements universally applicable."*

24. 'Minimum wage' is defined in point (1) of Article 3 of the Proposal as *the "minimum remuneration that an employer is required to pay to workers for the work performed during a given period, calculated on the basis of time or output."*

25. 'Collective bargaining' is defined in point (3) of Article 3 of the Proposal as covering all negotiations between the social partners "*for determining working conditions and terms of employment; and/or regulating relations between employers and workers; and/or regulating relations between employers or their organisations and a worker organisation or worker organisations*."

26. The Proposal distinguishes between Member States that rely on a statutory system of minimum wage setting[7] and Member States relying on a system exclusively governed by collective agreements.[8]

27. Article 4(1) of the Proposal obliges all Member States to take certain measures to promote collective bargaining and encourage constructive negotiations on wage setting. The Member States are to take these measures *"[w]ith the aim to increase the collective bargaining coverage"*. The obligations in this paragraph relate to wage setting in general and are not limited to minimum wages.

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7 Article 3, point (2), defines statutory minimum wage as "*a minimum wage set by law, or other binding legal provisions.*"

8 Article 3, point (4), defines collective agreements as "*all agreements in writing regarding working conditions and terms of employment concluded by the social partners as an outcome of collective bargaining.*"

28. In addition, Article 4(2) requires Member States with less than 70% collective bargaining coverage to "*provide for a framework of enabling conditions for collective bargaining*" and to establish an Action Plan to promote it. In spite of what the title of Article 4 suggests ("*Promotion of collective bargaining on wage setting"*),[9] the obligation in paragraph 2 of this provision is general and not limited to promoting collective bargaining in respect of minimum wages or wage setting in general.

29. The wording of paragraph 2 of Article 4, therefore, goes beyond actions to enhance the adequacy of wages and rather concerns the promotion of collective bargaining regarding working conditions in general. Likewise, the criterion for identifying the Member States which are subject to the obligation in Article 4(2) of the Proposal, i.e. those with a collective bargaining coverage of less than 70%, is not linked to the extent to which wages are determined by collective bargaining in the Member State concerned.

30. However, the recitals corresponding to Article 4, i.e. recitals 18 and 19, refer to *"collective bargaining on wage setting"* and to *"collective bargaining to enhance workers' access to minimum wage protection provided by collective agreements*", thereby clarifying the general aim of that provision.

31. The above however illustrates the discrepancies and lack of consistency that exist in several instances between, on the one hand, the very title of the proposed Directive, the titles of certain provisions, and the recitals related to specific provisions in the operative part of the Proposal, and, on the other hand, the substance and the scope of the obligations in such provisions. These discrepancies should, in the course of the discussions, be corrected.

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[9] Emphasis added, here and in all the various quotations of the Treaty provisions, provisions of the Proposal and case law.

32. In addition to the above general obligations on collective bargaining set out in Article 4, the Proposal sets out additional obligations for those Member States with a system of statutory minimum wages. They must in particular:

i) "*ensure that the setting and updating of statutory minimum wages are guided by criteria set to promote adequacy with the aim to achieve decent working and living conditions, social cohesion and upward convergence*" (Article 5(1)).

The Proposal does not define the concept of "adequacy". However, Article 5(2) provides for a minimum list of criteria which must be applied by Member States to this end, i.e. at least the "*purchasing power of statutory minimum wages (...)*", the "*general level of gross wages and their distribution*", the "*growth rate of gross wages*" and "*labour productivity developments.*"

Article 5(3) obliges Member States to "*use indicative reference values to guide their assessment of adequacy of statutory minimum wages in relation to the general level of gross wages, such as those commonly used at international level*" but does not set out what those values are. On this subject, recital 21 indicates under what circumstances *"[m]inimum wages are considered adequate"* notably when *"they are fair in relation to the wage distribution in the country and if they provide a decent standard of living"* which is determined *"in view of the national socio-economic conditions"* and points out that *"[t]he 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.*"

ii) ensure regular and timely updates of statutory minimum wages *"in order to preserve their adequacy"* (Article 5(4));

iii) *"establish consultative bodies to advise the competent authorities on issues related to statutory minimum wages"* (Article 5(5));

iv) limit the use of variations and deductions of statutory minimum wages both in time and in substance, including by justifying them by legitimate aims (Article 6);

v) ensure the timely and effective involvement of social partners in statutory minimum wage setting and updating (Article 7);

vi) take certain measures "*to enhance the access of workers to statutory minimum wage protection as appropriate*" (Article 8). These measures include the strengthening of controls and inspections, the development of guidance for enforcement authorities and the duty to ensure the availability of information on statutory minimum wages.

33. Finally, Chapter III of the Proposal contains a set of horizontal provisions addressed to all Member States concerning public procurement, monitoring and data collection obligations, and redress procedures.

34. In particular, Article 9 refers to obligations of Member States to ensure, in the context of public procurement, compliance with applicable wages *"[i]n accordance with"* three relevant directives in the field of public procurement. The wording suggests that the provision does not intend to create new obligations beyond the scope of those contained in those existing Union acts. This reading is confirmed by recital 24, which refers to the obligations of economic operators under the existing public procurement legislation. Therefore, Article 9 does not add any operative value, its insertion in the Proposal being merely declaratory.[10] This provision thus does not to have an impact on the choice of the appropriate legal basis for the Proposal.

[10] As a matter of legal drafting, the inclusion of such declaratory provisions in the operative part of a Union legal act must be avoided. Point 12 of the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ C 73, 17.3.1999, p. 1) provides that: "*The enacting terms of a binding act shall not include provisions of a non-normative nature, such as wishes or political declarations, or those which repeat or paraphrase passages or articles from the Treaties or those which restate legal provisions already in force*".

35. Article 10 obliges Member States to develop effective data collection tools to monitor "*the coverage and adequacy of minimum wages*." Member States also have to report data to the Commission which can request further information *"where it considers such information necessary for monitoring the effective implementation of this Directive"*. Therefore, the reporting obligations are in principle accessory to the main obligations to which they relate in the context of this Proposal. However, pursuant to recital 25, *"[r]eliable monitoring and data collection are key to ensure the effective protection of minimum wages"*. While the recital does not further explain this stated link between monitoring and data collection and the protection of minimum wages, it suggests that the reporting obligations in Article 10 are also a substantial obligation aimed at enhancing effective protection of minimum wages. It will therefore be taken into consideration for the assessment of the legal basis.

36. Article 11 provides for a right to redress and protection against adverse treatment. All Member States have to ensure that effective dispute resolution mechanisms are put in place "*in the case of infringements of their rights relating to statutory minimum wages or minimum wage protection provided by collective agreements*". According to recital 26, the aim of this provision is "*to prevent that workers are deprived from their rights*" relating to established minimum wage protection. This is a substantive obligation on access to minimum wage protection which is relevant for the determination of the legal basis.

37. It follows from the above that, in terms of content**,** the Proposal imposes on Member States that have a system of statutory minimum wages a number of obligations regarding the process for setting such minimum wages (criteria, regular updates, establishment of consultative bodies, limitation of variations, involvement of social partners, controls, etc.) and obligations to enhance access to adequate statutory minimum wages. All Member States are to promote collective bargaining and to improve workers' access to minimum wage protection by ensuring a right to redress in case of infringements of their rights. All Member States also have to monitor and report on the coverage and adequacy of minimum wages.

**c) Aim and content of the Proposal**

38. On the basis of the above analysis, it can be concluded that the Proposal aims to improve the adequacy and the coverage of minimum wages in the Member States by establishing a framework for such improvement, and to enhance access to adequate minimum wages.

39. With regard to those Member States which have a system of statutory minimum wages, the Proposal does so by providing for a number of obligations regarding the process towards the setting of such minimum wages (criteria, regular updates, establishment of consultative bodies, limitation of variations, involvement of social partners, controls, etc.), as well as by strengthening controls and inspections.

40. With regard to all Member States, the aim of increasing coverage of and enhancing access to adequate minimum wages is to be achieved by promoting collective bargaining and by ensuring redress and protection in case of infringements of rights related to existing minimum wages.

41. As noted above in paragraph 31, a certain discrepancy exists between the aim and declared ambition of this Proposal as it follows from, notably, its title and its preamble, on the one hand, and the actual content of the measures envisaged in the operative part of the Proposal, on the other hand. While the declared aim of the Proposal is to ensure that workers in the Union are protected by adequate minimum wages, the majority of the measures proposed in the operative part have only an incidental and indirect effect on the level and coverage of minimum wages in the Member States. This discrepancy has implications for the analysis of the appropriate legal basis of this proposal and will therefore be taken into consideration below.[11]

[11] As noted above, for reasons of consistency, it is advisable, in the course of further work on the Proposal, to ensure greater consistency between the preamble and the operative provisions of the Proposal.

## B. ON ARTICLE 153 TFEU AS LEGAL BASIS

42. In the light of the above findings on the aim and content of the Proposal, it is necessary to assess whether the conditions are met for recourse to the legal basis proposed by the Commission, i.e. Article 153(2) TFEU, in conjunction with Article 153(1)(b) TFEU.

### a) Origin of Article 153 TFEU

43. The predecessor provision of Article 153 TFEU was first introduced in 1993 as Article 2 of the Agreement on Social Policy concluded among 11 Member States[12] which was annexed to the Protocol on Social Policy that was added to the EC Treaty by the Treaty of Maastricht. In 1999, the Treaty of Amsterdam integrated the substance of Article 2 of the Agreement on Social Policy into the EC Treaty, where it became Article 137 TEC, which corresponds to the current Article 153 TFEU.

44. Competence was conferred on the Community to support and complement Member States' action in several fields, notably by adopting harmonised minimum requirements by means of directives in a number of those fields, including working conditions. Article 2(6) of the 1993 Agreement on Social Policy, which later became Article 137(5) TEC and is now Article 153(5) TFEU, also provided that "*the provisions of this Article* [now paragraphs 1 to 4 of Article 153] *shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.*"

### b) Conditions for the use of Article 153 TFEU and the relevant case law of the Court

45. An act can be based on Article 153(2) TFEU, in conjunction with Article 153(1)(b) TFEU, where four conditions are met.

[12] Excluding the UK, which had an opt-out.

46. Firstly, according to Article 153(2)(b) TFEU, the Union is competent, in certain fields listed in paragraph 1, to adopt, by means of directives, minimum requirements for gradual implementation. The Proposal remains within these limits, since it takes the form of a directive and establishes minimum requirements, allowing Member States to apply or introduce measures which are more favourable to workers.[13]

47. Secondly, Article 153(1) TFEU confers on the Union the competence to act in certain fields, exhaustively listed in points (a) to (k), "*[w]ith a view to achieving the objectives of Article 151 [TFEU]*". Among the objectives of Article 151 TFEU is that of *"improved living and working conditions, (...) proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion*". In light of the findings in paragraph 21 above on the aim of the Proposal, it can be concluded that the Proposal intends to achieve some of the objectives contained in Article 151 TFEU, notably that of "*improving living and working conditions*", as set out in the introductory paragraph of Article 1(1) of the Proposal.

48. Thirdly, under point (b) of Article 153(1) TFEU, with a view to achieving the above objectives, the measures envisaged by a Union legal act adopted on the basis of this provision must support and complement the activities of the Member States in the field of "*working conditions.*"

[13] See recitals 15 and 29, as well as Article 16(2) of the Proposal.

49. The notion of "*working conditions*" is not defined in the Treaty. However, the remuneration paid by the employer to the worker for the work performed is an important element in an employment relationship. The Court has taken the view that "*a reduction in the remuneration* (…) *must, if it is substantial, be regarded as a substantial change in working conditions"*.[14] This interpretation of the notion of "*working conditions*" is confirmed by the Court's case law, which has interpreted acts adopted in the field covered by Article 137(1)(b) TEC, the predecessor provision of Article 153(1)(b) TFEU, as validly applying to elements of remuneration.[15] Against this background, measures on minimum wages fall within the notion of "*working conditions*."

50. However, and this is the fourth condition, according to Article 153(5) TFEU, "*the provisions of* [Article 153 TFEU] *shall not apply to pay* (…)". This provision therefore provides for exceptions[16] to the scope of what can be done under Article 153 TFEU.[17]

51. It is thus necessary to interpret the scope of this exception. The Court has done so on several occasions and in a consistent way since its judgment of 2007 in Case *Del Cerro Alonso*.[18]

52. According to the Court, *"as 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 paragraphs 1 to 4, nor to call into question the aims pursued by Article [153 TFEU]."*[19]

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14 Judgment of 11 November 2004, *Delahaye*, C-425/02, EU:C:2004:706, paragraph 33. See also Opinion of AG Y. Bot of 28 November 2013, *Specht*, C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2013:779, paragraph 48 who stated that *"pay constitutes an essential element of employment conditions"*.

15 In its judgment of 13 September 2007, *Del Cerro Alonso,* C-307/05, EU:C:2007:509 and in its judgment of 22 December 2010, *Torres,* joined Cases C-444/09 and C-456/09, EU:C:2010:819, the Court ruled that the length-of-service allowance is included among the employment conditions mentioned in Clause 4 of the framework.

16 The Court uses the terms *"carve-outs, derogations and exceptions"* as synonyms. No substantive conclusion can be derived from the alternative use of these terms. For the purpose of the present opinion, we will use the term *"exception",* as in the case law relating to Article 153(5) TFEU.

17 In the judgment of 8 December 2020, *Hungary v Parliament and Council*, C-620/18, EU:C:2020:1001, the Court clarified that the exceptions to the Union competence provided for in Article 153(5) TFEU only apply to measures adopted on basis of Article 153 TFEU, and do not extend to other Treaty legal bases, see paragraph 80.

18 *Del Cerro Alonso,* cited above.

19 *Del Cerro Alonso,* cited above, paragraph 39; *Impact*, cited above, paragraph 122; judgment of 10 June 2010, *Bruno,* joined Cases C-395/08 and C-396/08, EU:C:2010:329, paragraph 35.

53. The Court continued that *"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. In those circumstances, in the present state of Community law, it was considered appropriate to exclude determination of the level of wages from harmonisation under Article [153 TFEU] et seq."*[20]

54. More specifically, the Court clarified that this *"exception must therefore be interpreted as covering measures – such as the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed Community wage – which amount to direct interference by Community law in the determination of pay within the Community."*[21]

55. The Court held that the exception in Article 153(5) TFEU *"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."*[22]

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**20** *Del Cerro Alonso*, cited above, paragraph 40; *Impact*, cited above, paragraph 123; *Bruno,* cited above, paragraph 36.

**21** *Impact*, cited above, paragraph 124; *Bruno,* cited above, paragraph 37; judgment of 19 June 2014, *Specht,* joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 33; Opinion of AG V. Trstenjak of 16 June 2011, *Williams,* C-155/10, EU:C:2011:403, paragraph 61; Opinion of AG N. Jaaskinen of 20 November 2014, *UK v Parliament and Council,* C-507/13, EU:C:2014:2394, paragraphs 112 and 117; Opinion of AG M. Campos Sanchez-Bordonain of 28 May 2020, *Hungary v Parliament and Council*, C-620/18, EU:C:2020:392, paragraph 92.

**22** *Del Cerro Alonso,* cited above, paragraph 41; *Impact*, cited above, paragraph 125; *Bruno*, cited above, paragraph 37; *Specht,* cited above, paragraph 33.

56. The interpretation given by the Court in these cases did not constitute a departure from its previous case law, notably in the *Dellas* case, according to which the minimum requirements which can be adopted on the basis of the predecessor provision to Article 153 TFEU cannot apply to pay.[23] The Court recalled that in the *Dellas* case, the issue which arose concerned the 'level' of pay. Therefore, the Court's ruling ensured that *"the national authorities retain sole competence to establish the level of wages and salaries"*. Similarly, in this subsequent line of case law, the Court recalls that "*the establishment of the level of the various constituent parts of the pay of a worker falls outside the competence of the Community legislature and is unquestionably still a matter for the competent bodies in the various Member States*".[24]

57. This line of case law concerned Union legislation aimed at protecting workers against discrimination in matters of employment and occupation, which also affected certain elements of pay.[25] However, the rulings contain no indication that the Court's findings on the purpose and interpretation of the exclusion in Article 153(5) TFEU apply only in that context. On the contrary, the texts quoted above examine this provision and its predecessor generally and do not suggest that these parts of the rulings are relevant only with regard to Union acts aimed at applying the principle of non-discrimination.

58. The above is confirmed by the opinion of the Advocate-General in the so-called "bonuses Directive"[26] case, which concerned the setting of ratios between the fixed and variable components of the remuneration payable to employees of credit institutions and investment firms, a directive that was not based on Article 153 TFEU.

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23 Judgment of 1 December 2005, *Dellas*, C-14/04, EU:C:2005:728, paragraph 39.

24 *Del Cerro Alonso,* cited above, paragraphs 45 and 46; *Impact*, cited above, paragraph 129; *Bruno,* cited above, paragraph 39.

25 The Court was asked to assess the legality of measures on discrimination against certain groups of workers. In particular: in *Specht*, cited above, the Court interpreted Directive 2000/78/EC in relation to national measures fixing the level of pay on the basis of criteria discriminating on the ground of age; in *Impact*, in *Del Cerro Alonso* and in *Torres*, all cited above, the Court interpreted Council Directive 1999/70/EC, regarding the discriminatory allocation of certain elements of pay vis-à-vis workers with fixed term contracts; in *Bruno*, cited above, the Court interpreted Council Directive 1997/81/EC, regarding the discriminatory allocation of certain elements of pay vis-à-vis workers with part-time contracts.

26 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

59. In that case, the Advocate-General, referring also to what the Advocate-General had stated in the *Impact* case, noted that *"[i]ndisputably the prohibition in Article 153(5) TFEU applies only to the determination of the 'level' of pay. (...) [T]he EU would not have any competence, for example to 'introduce an upper limit for annual pay increases or regulate the amount of pay for overtime or for shift-work, public holiday overtime or night work.' (...) Article 153(5) TFEU aims to prevent EU wide standardization by the EU legislature of the wage levels applicable in each of the Member States (...)".* The Advocate-General stated that *"a ratio in itself is simply not enough to set anything"* and that *"the limit on variable remuneration that* [the bonuses Directive] *contains does not impact directly on the level of pay of persons falling within its scope*."[27]

60. On the basis of the analysis of this case law, it must be concluded that being an exception, Article 153(5) TFEU must be interpreted strictly so as not to unduly affect the scope of paragraphs (1) to (4) of Article 153. That exception precludes the Union legislator's taking measures based on Article 153 TFEU determining the level of wages or establishing the level of the various constituent parts of the pay of a worker or directly interfering in the determination of pay.

61. However, measures involving some link with pay can be laid down in Union acts since otherwise, the scope of the powers conferred upon the Union by Article 153 paragraphs (1) to (4) TFEU would be unduly deprived of much of their substance.

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[27] See Opinion of AG N. Jaaskinen, *UK v Parliament and Council*, cited above, paragraphs 117, 118 and 120, referring also to opinion of AG J. Kokott of 9 January 2008, *Impact*, C-268/06, EU:C:2008:2.

**c) Application of the case law to the proposed Directive**

62. As seen above in the analysis of its aim and content, the Proposal establishes minimum requirements regarding the setting of a framework for improving the adequacy and coverage of minimum wages for workers. It results from the definition of 'minimum wage', set out in point (1) of Article 3 of the Proposal cited above in paragraph 24, that minimum wages are to be considered as *"a constituent part of pay"* within the meaning of the case law of the Court (see paragraph 54 above). Accordingly, it must be assessed whether the exclusion of pay in Article 153(5) TFEU must be interpreted as precluding Union measures such as those set out in the Proposal.

63. It is noted that the Proposal is unprecedented in Union social law in that it establishes minimum requirements relating to a constituent part of pay. While the Union has in the past adopted measures affecting pay, these constituted elements amongst other rules on working conditions more generally. It should therefore be examined whether the exception contained in Article 153(5) TFEU does not *per se* preclude an act, like the Proposal, in that it relates to minimum wages, which are a constituent part of pay.

64. However, this is not what the above analysis of the case law suggests. While that case law deals with Union acts which affect pay only *inter alia*, the Court's findings regarding the purpose and scope of the exclusion in Article 153(5) TFEU are general and contain no indication of any relevance of the specific context in which they are given.

65. Therefore, the same standard of analysis should also be applied when assessing the Union's competence for an act such as the Proposal, which centres on setting out a framework for improving the adequacy and coverage of minimum wages for workers, which are a constituent part of pay, itself part of working conditions.

66. It follows that this Proposal must be examined as to whether it establishes the level of the various constituent parts of the pay of a worker or directly interferes in the determination of pay. In doing so, regard must be had to the reasoning which led the Court to identifying these criteria. As seen in the analysis above, the Court interpreted the exception in Article 153(5) TFEU as a provision protecting the contractual freedom of the social partners and the competence of Member States as regards the fixing of the level of wages.

67. Regarding the second criterion above, it is noted that the examples of precluded measures which the Court evokes, to illustrate measures "*which amount to direct interference by Community law in the determination of pay within the Community"*, are also linked to the level of pay: "*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"*. Therefore, measures concerning wage setting do not automatically amount to an interference with the determination of pay.

68. Pursuant to the Court's case law, only measures which directly interfere with that determination are excluded from Union competence under Article 153 TFEU. This suggests that the Court would not consider that any interference with the determination of pay by the Union legislator was precluded but would examine the impact of that interference on the outcome of the determination.

69. Against this background, the Council Legal Service sees good reasons to consider that the Union has competence under Article 153 TFEU to establish minimum requirements which concern the framework for setting and improving coverage of minimum wages where these requirements neither establish the level of that element of pay nor impose conditions for the setting of these wages which are likely to have a direct impact on the outcome of their determination.

70. The analysis below will therefore also take account of the level of prescriptiveness of the provisions and the leeway they allow for Member States and social partners.

71. In this context, recital 16 states that the Proposal is *"[i]n full respect of Article 153(5) of the Treaty on the Functioning of the European Union"* since it *"neither aims to harmonise the level of minimum wages across the Union nor to establish an uniform mechanism for setting minimum wages."*

72. This statement does not fully reflect the relevant case law. The above analysis has shown that while the harmonisation of the level of wages across the Union is indeed clearly excluded from the Union's competence by virtue of Article 153(5) TFEU, the Court has also found the Union legislator not to have competence to take measures "*which amount to direct interference by Community law in the determination of pay within the Community.*"[28]

73. An assessment of the individual measures contained in the Proposal is therefore necessary. In case of discrepancies between the aims as identified in the preamble and the content of the operative part, the present assessment will focus primarily on the provisions in the operative part, as they contain the actual measures and obligations proposed. Where necessary, appropriate adaptation of the text of the preamble will be suggested.

74. As has been shown above, the Proposal contains essentially measures on the coverage of minimum wages, on the adequacy of statutory minimum wages and on access to minimum wage protection.

[28] *Impact*, cited above, paragraph 124; *Bruno,* cited above, paragraph 37; *Specht,* cited above, paragraph 33; Opinion of AG V. Trstenjak, *Williams,* cited above, paragraph 61; Opinion of AG N. Jaaskinen, *UK v Parliament and Council,* cited above, paragraphs 112 and 117; Opinion of AG M. Campos Sanchez-Bordonain, *Hungary v Parliament and Council*, cited above, paragraph. 92.

*i) Measures aimed at increasing the coverage of minimum wage protection (Article 4)*

75. A first set of provisions concerns the promotion of collective bargaining, including on wages, by which the Proposal aims to increase the coverage of minimum wages in the Member States. The aim of increasing the coverage of minimum wages is to widen the personal scope of the protection of minimum wages.[29] The rules on coverage are contained in Article 4 of the Proposal.[30]

76. Article 4(1) establishes an obligation for all Member States to promote the capacity of social partners to engage in collective bargaining on wage setting and to encourage constructive, meaningful and informed negotiations on wages among social partners. This provision makes no reference to the level of wages but concerns the procedure for wage setting and negotiations on wages in Member States.

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29 It is noted that the preamble does not use this term consistently in this sense. Recitals 16 and 19 for instance make reference to the promotion of *"access to minimum wage protection provided by collective agreements"* and to the need to *"promote collective bargaining to enhance workers' access to minimum wage protection provided by collective agreements"*, whereas the corresponding Article 4 on the promotion of collective bargaining refers to *"the aim to increase coverage"*. This opinion uses these terms as they are used in the operative part of the Proposal.

30 It is noted that the Council Legal Service has not assessed, in the context of this opinion, whether it is sufficiently demonstrated that the promotion of collective bargaining is likely to increase the coverage of minimum wages in the Member States. The assumptions contained to that effect in recitals 14 and 15 of the Proposal are neither questioned nor confirmed. Furthermore, the analysis in this opinion is based on the understanding that the Proposal does not oblige Member States to grant access to minimum wage protection to all workers. Article 1(1)(b) clearly states that the proposed directive *"establishes a framework for* (…) *access of workers to minimum wage protection, in the form of wages set out by collective agreements or in the form of a statutory minimum wage where it exists"*. If, however, this provision was taken to mean that the Proposal would oblige Member States to grant access to minimum wage protection to all workers, the Proposal would thus directly interfere with the minimum wage coverage in the Member States, and such a provision would therefore fall under the exception of Article 153(5) TFEU.

77. These obligations must be read together with Article 1(2) of the Proposal, according to which the directive *"shall be without prejudice to the choice of the Member States to set statutory minimum wages or promote access to minimum wage protection provided by collective agreements"*. While the stated aim of Article 4(1) is to increase collective bargaining coverage, the obligation it imposes on Member States can therefore not be read as affecting their choice, as is confirmed by Article 1(2) of the Proposal. This is also confirmed by recital 18, which explains the advantages of well-functioning collective bargaining on wage setting in both Member States with statutory minimum wages and in Member States where minimum wage protection is provided exclusively by collective bargaining.

78. Furthermore, Article 4(1) leaves Member States wide discretion as to the nature of the measures they will adopt to *"promote"* the collective bargaining capacity of the social partners and *"encourage"* constructive negotiations on wages among social partners. The requirements set by this provision are therefore not likely to have a direct impact on the outcome of the wage setting in the Member States and do not constitute direct interference in the determination of pay in the Member States.

79. Article 4(2) requires Member States with a collective bargaining coverage of less than 70% to *"provide for a framework of enabling conditions for collective bargaining"* and *"to establish an action plan to promote collective bargaining"*. The Member States in question have the choice between establishing this framework by law after consultation of the social partners or doing so by agreement with them. The Proposal contains no further indications of the required content of either the framework or the action plan. Therefore, this provision does not amount to direct interference with the determination of pay, which would be excluded under Article 153(5) TFEU.

80. However, as noted in paragraph 28 above, this provision does not expressly mention wage setting. The wording of this article refers instead to collective bargaining in general. It should therefore be examined whether, considered in isolation, this operative provision could be considered as relating not mainly to the field of working conditions under Article 153(1)(b) TFEU but more specifically to the field of representation and collective defence of interests of workers and employers provided for in Article 153(1)(f) TFEU.

81. It is recalled though that, in accordance with the settled case law of the Court, the interpretation of a provision of Union law requires account to be taken not only of its wording, but also of the context in which it occurs, and the objectives pursued by the rules of which it is part.[31] The normative context in which a provision of Union law is placed and the purposes it pursues are relevant, particularly where there are ambiguities in the way in which that provision is drafted.

82. Article 4(2) of the Proposal must therefore be read within the context of the proposed legal act in which it is contained. In that respect, the corresponding recital 19 explains that the promotion of collective bargaining in general is expected "*to enhance workers' access to minimum wage protection provided by collective agreements*" and that "*Member States with a high collective bargaining coverage tend to have a low share of low-wage workers and high minimum wages*". The preamble therefore seeks to establish that a causal link exists between promoting collective bargaining and wider coverage of adequate minimum wages. It suggests that the ultimate objective of the strengthening of the social partners' role as provided for in Article 4(2) is to improve working conditions. Hence, in the context of the Proposal, the promotion of collective bargaining is not an end in itself but a tool to achieve the overall objective of this Proposal. Therefore, within the framework of the Proposal as it stands, even though Article 4(2) itself does not explicitly refer to wage setting, it imposes measures aimed at reaching the objectives of the Proposal regarding wider coverage of minimum wages. Article 153(1)(b) TFEU is thus the appropriate legal basis for this provision as well.

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**31** See, most recently, judgment of 27 January 2021, *De Ruiter*, C-361/19, EU:C:2021:71, paragraph 39.

83. The same conclusion should be drawn even apart from the link established by the preamble between the aim of achieving wider minimum wage coverage and the actual content of Article 4(2). Even if the content of Article 4(2), which relates to the representation and collective defence of the interests of workers and employers, were seen as a component separate from the rest of the provisions of the proposed Directive, which provide a framework relating to minimum wages, in line with the case law cited in paragraph 10 above on the main and incidental components of a measure, that component would have to be qualified as incidental, the centre of gravity of this Proposal clearly lying with the rules regarding minimum wages. This predominance is confirmed by the analysis made above of the aim and content of the Proposal. Accordingly, in line with that case law , the proposed Directive should be founded on the single legal basis that is required by its main component, namely Article 153(1)(b) TFEU.

84. It follows from the foregoing that the rules contained in Article 4 regarding the promotion of collective bargaining do not constitute direct interference with the determination of pay in the Member States and can be adopted on the basis of Article 153(1)(b) TFEU.

***ii) Measures aimed at promoting the adequacy of minimum wages (Articles 5 to 7)***

85. As is apparent from the title of the proposed Directive and the multiple references to the adequacy of minimum wages identified in section III.A. above, by establishing a framework for improving the adequacy of minimum wages, the Proposal pursues the objective of *"ensur[ing]* (…) *that wages are set at adequate level"* (recital 15). This objective is pursued mainly by Article 5 of the Proposal, entitled *"Adequacy"*, but also by Articles 6 and 7. These provisions concern statutory minimum wages and apply only to those Member States with a system of statutory minimum wages.

86. It could be argued that the provisions concerning adequacy fall *per se* outside the Union's competence, since according to the relevant case law, Article 153(5) TFEU precludes the Union legislator's establishing the level of a constituent part of pay. That conclusion would have to be drawn if (a) requiring adequacy were to be interpreted as establishing the level of pay and (b) the Proposal were indeed obliging Member States to set the statutory minimum wages at an adequate level. The assessment of the relevant provisions below will show whether this is the case.

87. While adequacy undoubtedly concerns the level of pay, it is a relative concept rather than an absolute reference. Requiring wages to be adequate does not replace the setting of wages, but rather establishes a qualitative criterion to be applied in the process of wage setting. Moreover, adequacy as such is a vague and flexible term which leaves ample room for subjective assessments and variations according to the economic and other circumstances. Therefore, to the extent that the concept of adequacy is not narrowed down by specific criteria which would directly affect the outcome and remains characterised by obligations of effort rather than of result, it appears to leave untouched the essence of the competence of social partners and Member States to fix the level of pay.

88. The relevant provisions of the Proposal will therefore be analysed to assess whether they narrow down the concept so as to unduly interfere with the determination of the level of pay. That analysis will also make it possible to reach a conclusion as to whether the Proposal obliges Member States to set statutory minimum wages at an adequate level and whether the provisions interfere directly with the determination of pay.

89. Article 5(1) establishes an obligation for Member States with statutory minimum wages to ensure that the setting and updating of minimum wages are *"guided by criteria set to promote the adequacy"* of minimum wages. These criteria must be set *"with the aim to achieve decent working and living conditions, social cohesion and upward convergence*". According to recital 20, criteria to assess adequacy are amongst the rules, procedures and practices for the setting and updating of statutory minimum wages which are *"necessary to deliver adequate minimum wages."*

90. Despite this ambitious preamble language, the actual provision in the operative part stops short of obliging Member States to set statutory minimum wages which ensure adequacy. Instead, the setting and updating of this element of pay is to be *"guided by criteria set to promote adequacy"*. This formulation suggests that while the criteria aim at enhancing the adequacy of statutory minimum wages, the operative obligation remains one of effort rather than of result.

91. Accordingly, Article 5(1) does not allow the conclusion that the Member States are required to set statutory minimum wages at an adequate level. The measures proposed in that regard rather set out a framework or a process towards improving the setting of statutory minimum wages. This interpretation is confirmed by Article 1, according to which the proposed Directive establishes a framework for setting adequate levels of minimum wages.

92. Furthermore, the obligation in Article 5(1) explicitly leaves scope for defining the criteria *"in accordance with national practices"* and makes no provision as to the format in which these criteria are to be adopted.

93. In the light of the standard of assessment set by the Court in its case law, it can therefore be concluded that, as proposed, the obligation in this paragraph neither establishes the level of statutory minimum wages nor imposes conditions for the setting of these wages which could be considered to directly interfere with their determination. This is the case notably because of the considerable leeway left to Member States as to the definition of the criteria to be used for assessing adequacy.

94. Points (a) to (d) of Article 5(2) identify four elements that the Member States "*shall include at least*" - i. e. as a minimum - in their national criteria that guide the setting and updating of statutory minimum wages. Article 5(2) thus restricts the choice of Member States as regards elements on which such guiding criteria are founded. The question is therefore whether by imposing the use of "*at least*" those four elements to be included in the national criteria used for the setting and updating of statutory minimum wages, the Proposal directly interferes in the Member States' competence to determine pay.

95. The Council Legal Service considers that, on the basis of a contextual reading of the Proposal, this is not the case. First, as determined by Article 5(1), to which paragraph 2 refers, these elements are part of the criteria that are conceived as mere *"guidance"* to *"promote"* adequacy, Member States remaining free to use other criteria or elements thereof, in addition to the mandatory elements to be included in such criteria. Second, Article 5(1) itself provides that the definition of criteria are to be made in accordance with the national practices of Member States. Third, the list of elements set out in Article 5(2) must be interpreted as leaving Member States discretion to consider both the relevance and the relative weight of each of those elements, bearing in mind the prevailing economic and social conditions.

96. The above interpretation is underpinned by recital 21 of the Proposal according to which the adequacy of statutory minimum wages is determined "*in view of the national socio-economic conditions, including employment growth, competitiveness as well as regional and sectoral developments*". Therefore, the list of elements in Article 5(2) cannot constitute the basis for a formula of calculation that Member States will have to follow in an automatic manner, but is a framework of elements to be taken into account in a predictable, transparent and objective manner, for which the Member States remain ultimately free to decide on both their relevance and relative weight.[32] Therefore, the obligatory use of the four elements as part of the criteria to be used by Member States does not amount in substance to significantly impacting the outcome of the wage setting process, but remains instead an obligation related to the process. It therefore does not directly interfere in the determination of pay.

[32] For instance Member States remain free to base minimum wage levels on productivity, in years where competitiveness has to be improved, or inflation, in years of growth, and adapt to cyclical elements.

97. Given that the "chapeau", or introductory sentence, of Article 5(2) lacks clarity in that respect and may create doubt as to the level of discretion enjoyed by Member States, the Council Legal Service advises to adapt the drafting of the introductory sentence in order to better clarify the discretion of Member States in the sense explained above. This can be achieved by adding the following wording to the introductory sentence of Article 5(2): "(…) *at least the following elements, whose relevance and relative weight may be decided by Member States in accordance with their prevailing national socio-economic conditions:* (…)".

98. In relation to one of these elements (i. e. the *"general level of gross wages"*), Article 5(3) establishes an obligation for Member States to use *"indicative reference values"* to evaluate the adequacy of minimum wages. It is noted that the reference values are not binding but indicative, that the value and relative weight of the element of the criterion to which it applies is not prescribed by either paragraph 2 or 3 of Article 5, and that Member States are in principle free to decide which reference value to take into consideration. Therefore, this provision does not result in direct interference with the determination of pay either.

99. Article 5(4) establishes an obligation for Member States with statutory minimum wages to take the necessary measures to ensure their regular and timely updating *"in order to preserve adequacy"*. As in the case of Article 5(1), analysed in paragraphs 89 to 93 above, while this provision relates to the setting of pay and has the general objective of ensuring the adequacy of statutory minimum wages, its prescriptive content is limited. The need for regular and timely updates leaves Member States wide leeway and therefore does not directly interfere in the determination of pay.

100. However, it is noted that the formulation *"in order to preserve their adequacy"* presupposes the existence of an obligation to ensure an adequate level of statutory minimum wages, whereas Article 5(1) merely obliges Member States to ensure that the setting of these minimum wages is *"guided by criteria set to promote adequacy."* Therefore, with a view to avoiding ambiguity in the drafting, the Council Legal Service advises that such words in Article 5(4) are deleted or replaced by *"in order to continue promoting their adequacy"*.

101. Article 5(5) establishes an obligation for Member States to set up consultative bodies to advise the competent authorities on issues related to statutory minimum wages. The format of these bodies is not specified but, pursuant to Article 7, it is mandatory that the social partners be part of them and perform certain functions with regard to the setting and updating of statutory minimum wages, as well as in the establishment of variations and deductions.

102. According to recital 20, these procedural requirements and the involvement of social partners in consultative bodies are amongst the rules *"necessary to deliver adequate minimum wages"* and are an *"element of good governance that allows for an informed and inclusive decision-making process."*

103. Given the consultative role of the bodies in question, the impact of these procedural requirements on the outcome of the setting and updating of statutory minimum wages cannot be said to directly interfere with the determination of pay. Therefore, Article 5(5) and Article 7 fall within the Union's competence under Article 153(1)(b) TFEU.

104. Pursuant to Article 6, *"Member States may allow different rates*" of statutory minimum wage and "*may allow deductions*" that reduce the remuneration. In doing so, Member States must respect certain criteria in relation to such variations and deductions, keeping these measures to a minimum and only applying them when they are objectively justified and proportionate. In particular, Article 6(1) refers to the possibility of Member States allowing different rates of statutory minimum wage for specific groups of workers, obliging Member States "*to keep these variations to a minimum*", while ensuring that they are "*non-discriminatory, proportionate, limited in time if relevant, and objectively and reasonably justified by a legitimate aim*". Article 6(2) refers to the possibility of Member States allowing deductions by law that reduce the remuneration paid to a level below the minimum wage, while ensuring that such deductions are "*necessary, objectively justified and proportionate.*"

105. The wording used - "*Member States may allow*" - suggests that it is the Union legislature which, through the proposed Directive, authorises Member States to apply different rates of statutory minimum wage. This is at odds with the nature of the obligations in the other provisions of the Proposal which are obligations of effort or process rather than of result. This formulation, by enabling Member States to allow different rates or deductions, seems to presuppose that the Union legislature has, in the first place, the competence to set such rates or remuneration and could then authorise Member States to derogate therefrom. As seen above in paragraphs 50 to 61, given the exception provided for in Article 153(5) TFEU, the Union legislature does not have such a competence. This formulation is therefore not appropriate and should either be deleted or amended in order to be in conformity with the legal basis and the limits of the Union competence in this matter.

106. As regards the substance, some of the limitations in Article 6 reflect general principles of law - non-discrimination and proportionality - and hence add little in terms of operative content. However, other limitations can be considered as interfering directly with the determination of minimum wages, such as the obligation to keep different rates to a minimum, the need for variations to be limited in time and objectively and reasonably justified by a legitimate aim, as well as the Member States' obligation to ensure that deductions are necessary and objectively justified. These elements exclude choices which the Member States would otherwise have and be able to exercise under national law.

107. Therefore, to the extent that the above obligations directly limit the leeway of Member States when setting rates of statutory minimum wages and defining variations and deductions, these obligations directly interfere with the determination of minimum wages as an element of pay in a way that falls within the exception in Article 153(5) TFEU. The limitations going beyond those reflecting such general principles of law as non-discrimination and proportionality should therefore be deleted.

108. Should Article 6 be kept in the Proposal, it would need to be redrafted in order to remain within the scope of Union competence. This could be done by adjusting the wording of Article 6 as follows: *"Where Member States allow for different rates of statutory minimum wage for specific groups of workers or for deductions by law that reduce the remuneration paid to a level below that of the statutory minimum wage, they shall ensure that these variations and deductions are non-discriminatory and proportionate."*

109. It is therefore concluded that most of the measures regarding adequacy contained in the Proposal can validly be adopted on the basis of Article 153(1)(b) TFEU, given that their nature is not such as to establish the level of statutory minimum wages or to interfere directly with the determination of that element of pay.

110. However, in Article 5(2) and (4), it is advised that the wording be adjusted to avoid uncertainties as to the procedural nature of the obligations and the corresponding leeway left to Member States as regards the outcome of the wage setting process. Moreover, a number of the elements of Article 6 of the Proposal as they stand impose obligations on Member States which can be considered to constitute direct interference in the determination of minimum wages and, consequently, fall within the exception provided for in Article 153(5) TFEU. Should this Article be kept in the Proposal, it should be redrafted as suggested above.

111. Furthermore, it is advised that the preamble be reformulated so as to clarify that the Proposal does not oblige Member States to ensure that statutory minimum wages are set at adequate levels, but that the proposed Directive creates a framework supporting the setting of such adequate levels.

***iii) Measures aimed at enhancing access to existing minimum wage protection (Articles 8, 10 and 11)***

112. The Proposal contains, finally, provisions on effective access to minimum wage protection. The objective of these provisions is to enable workers to exercise their rights in relation to existing minimum wage protection more effectively.

113. Article 8 applies to Member States relying on a system of statutory minimum wages and provides for a series of measures to be taken, *"as appropriate"*, to enhance the access of workers to statutory minimum wages. These measures include the strengthening of controls and inspections, the development of guidance for enforcement authorities and the duty to ensure the availability of information on statutory minimum wages.

114. The monitoring and data collection obligations in Article 10 apply to all Member States and aim at ensuring *"the effective protection of minimum wages"*. Member States are required to task their competent authorities with developing effective data collection tools on the coverage and adequacy of minimum wages and to report specified data, or any other information necessary for monitoring the effective implementation of the directive, to the Commission on an annual basis. Member States also have transparency obligations in this regard. The Commission will assess this data and report annually to the European Parliament and the Council.[33]

115. Article 11 applies to all Member States and obliges them to ensure that effective dispute resolution mechanisms and protection measures are put in place for workers "*in the case of infringements of their rights relating to statutory minimum wages or minimum wage protection provided by collective agreements*".

116. None of these provisions relate to the setting of minimum wages. Instead, they enhance the effective respect or enforcement of existing minimum wage protection without interfering with the way in which the level or coverage of this protection is determined. Accordingly, these provisions do not directly interfere with the determination of pay. In the light of the case law cited above, these provisions therefore fall within the competence of the Union to support and supplement the activities of the Member States by improving working conditions and can be validly adopted on the basis of Article 153(1)(b) TFEU.

[33] This opinion does not address the issue of proportionality. It is noted, however, that the monitoring and data collection obligations under Article 10 are very detailed. It is furthermore noted that in the preamble it is neither explained how the obligations will *"ensure the effective protection of minimum wages"* nor how the data reported under Article 10(2) serves to monitor "*the effective implementation of this Directive*", given that the Proposal sets a framework for improving the adequacy and coverage of minimum wages but does not impose results in that respect.

## IV. CONCLUSION

117. The Council Legal Service is of the opinion that:

a) As it neither establishes the level of the various constituent parts of pay nor directly interferes in the determination of pay, the Proposal can appropriately be based on Article 153(1)(b) TFEU in conjunction with Article 153(2) TFEU (except for a number of elements in Article 6, see below).

b) In order to avoid uncertainties as to the procedural nature of the obligations and the corresponding leeway left to Member States as regards the outcome of the wage setting process, it is advised that in the introductory sentence of Article 5(2), the words *", whose relevance and relative weight may be decided by Member States in accordance with their prevailing national socio-economic conditions"* be added and that in Article 5(4) the words *"to preserve their adequacy"* be deleted or replaced by *"to continue promoting their adequacy"* (see paragraphs 97 and 100).

c) A number of elements in Article 6 amount to direct interference with the determination of pay, for which the Union's competence is excluded pursuant to Article 153(5) TFEU. This is the case of those limits regarding variations and deductions on statutory minimum wages which go beyond restating general principles of law and which therefore fall outside the competence of the Union under Article 153 TFEU, as well as the way the provision is formulated (i.e. allowing Member States to operate such variations and deductions). Therefore, Article 6 should either be deleted or adjusted (see paragraph 108 above).

d) More generally, it is advised that the language used in the title of the proposed Directive, in the title of certain articles and in the preamble be reviewed and adapted with a view to making it consistent with the actual scope of the obligations provided for in the operative part of the Proposal.