

Minimum-wages directive: it's legal

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Susanne Wixforth and Lukas Hochscheidt

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Last October, the European Commission proposed a framework directive on minimum wages. Whether one likes it or not, the EU is competent to do so.

From the beginning of her mandate, the president of the European Commission, Ursula von der Leyen, promised to 'put forward a framework to ensure that every worker in our Union has a fair minimum wage'. Proposing in October 2020 a directive 'on adequate minimum wages in the European Union', the commission kept this promise.



Susanne Wixforth

By no means does the commission envisage a uniform statutory minimum wage for the EU. Rather, the directive would establish prerequisites for *national* minimum wages. To avoid interference with collective bargaining and wage-setting by social partners, the directive would also protect and promote collectively-agreed minimum wages. This is indeed crucial: for many years the share of workers covered by collective agreements in Europe has been declining.

The heated debate the proposal has occasioned has little however to do with the protection of collective agreements —what led to controversy are the proposed minimum thresholds for *statutory* minimum wages in the member states. Critics argue that the EU is simply not competent to legislate on a binding framework for national minimum wages. Referring to article 153(5) of the Treaty on the Functioning of the EU (TFEU), which excludes 'pay' from EU competences, they claim that the framework falls outwith the treaties.



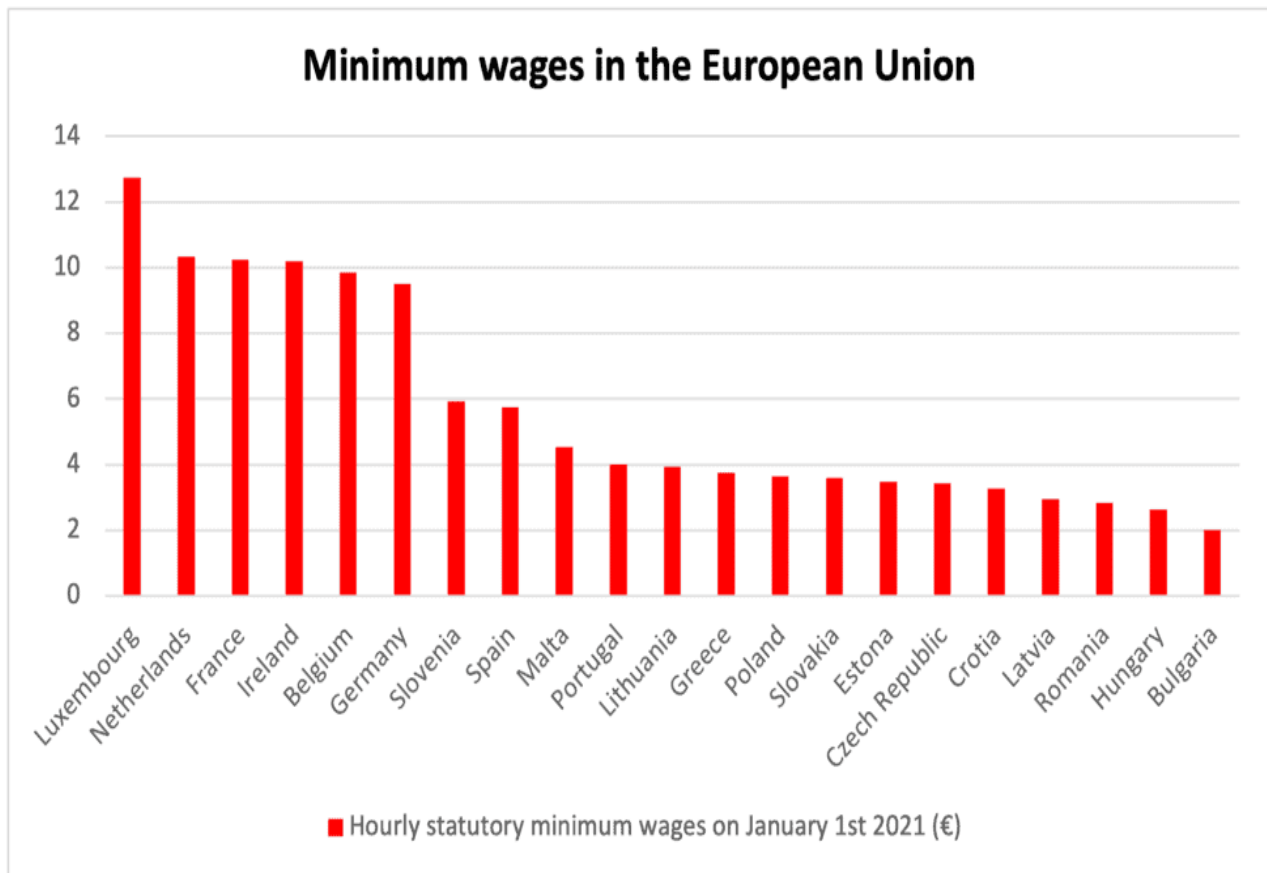
Lukas Hochscheidt

Subsidiary and proportionate

The legal basis of the commission's proposal is article 153(1)b TFEU, which grants the EU a supporting and complementing role in the shaping of working conditions in the member states. EU measures in this domain have to meet two conditions: they must be *subsidiary*, not intervening in issues member states would be able to deal with themselves, and *proportionate*, intervening only as much as necessary and as little as possible.

The framework for minimum wages complies with both: it is subsidiary because member states remain fully responsible for setting and shaping their own minimum wages and it is proportionate because not all minimum wages in Europe protect workers from in-work

poverty (see chart). Moreover, the single market dearly needs a level playing-field for wages. Hence, European action is necessary and appropriate to fulfil the overarching goals of the EU.



Source: M Lübker and T Schulten, *WSI-Mindestlohnbericht 2021*, Wirtschafts- und Sozialwissenschaftliches Institut der Hans-Böckler-Stiftung, Düsseldorf

Critics point to tension between articles 153(1)b and 153(5). But this is no obstacle to the commission's proposal. There are a number of reasons why lack of competence for direct wage determination (article 153(5)) does not obstruct a framework directive on adequate minimum wages.

Indirect action

First, the fact that the EU must not directly set wages does not prevent *indirect* action: article 153(5) only excludes from EU competence measures that immediately affect wages. The commission aims to create a framework which brings national minimum wages to an adequate level as measured by the respective median or average wages in the member states.

Secondly, there are several examples of such indirect effects of EU legislation on wage-setting: regulations on maternity protection, paid leave and the posting of workers also intervene indirectly in the wage-setting process. The European Court of Justice (ECJ) has already confirmed the legitimacy of these measures—for the EU to be able to harmonise social and labour-market policies (as provided for in the treaties), the exceptions laid down in article 153(5) must be interpreted narrowly. Otherwise, the EU could not exercise

its competences in the arena of working conditions (as provided for in article 153(1)b). Thus, the exemption made for direct wage-setting must not impede the effectiveness of other measures tackling discrimination or in-work poverty.

Thirdly, promotion of decent working conditions and living wages is an objective of the EU rooted in the treaties. Article 3 of the Treaty on European Union and article 8 of the TFEU oblige the union to combat social exclusion and inequalities. Article 151 TFEU meanwhile acknowledges, as binding EU commitments, the objectives of the European Social Charter of the Council of Europe and the Community Charter of the Fundamental Social Rights of Workers.

Finally, the framework for minimum wages is also relevant to the functioning of the single market. Regarding cross-border employment, the ECJ has already affirmed that prevention of competitive advantage through wage divergence is a legitimate objective of EU legislation. The EU must not however limit this approach to cross-border activities: wage divergence creates competitive advantages regardless of whether work is performed across borders or inside member states.

The directive on adequate minimum wages would make an important contribution in this regard as it would effectively level the playing-field for wages—thus protecting precarious workers from discrimination. The fight against discrimination on the labour market is one of the key motivations of social and labour-market harmonisation by the EU. The ECJ, too, has been very keen to enforce EU anti-discrimination law in its decisions.

No objection

The treaties, existing secondary legislation and the jurisprudence of the ECJ thus offer no objection to a framework for adequate minimum wages based on article 153(1)b TFEU. This legal assessment was confirmed by the Legal Service of the Council of the EU on March 9th.

The framework directive would contribute to the fight against social exclusion, promote living wages and tackle discrimination against precarious workers. It would moreover favour wage equality between men and women (article 157(1) TFEU), level the playing field for wages and make the single market fairer for both firms and workers.

This article is based on a legal opinion by Prof Eberhard Eichenhofer, commissioned by the German Confederation of Trade Unions

About Susanne Wixforth and Lukas Hochscheidt

Susanne Wixforth is head of unit in the Europe and International Department of the German Trade Union Confederation (DGB). Lukas Hochscheidt is a research assistant there.