



**Proposal for a Directive on adequate minimum
wages in the European Union**

**Ibec Submission to the Department of
Enterprise Trade and Employment**

19 February 2021

Executive summary

1. Ibec shares the objectives of ensuring adequate wages across the EU, making work pay, addressing poverty and strengthening the role of social dialogue in line with national industrial relations systems. However, we do not believe that the draft Directive proposed by the EU Commission is an appropriate mechanism for achieving these policy objectives.
2. The EU Treaty provides that matters of pay and collective bargaining remain the competence of Member States and social partners. The proposed Directive fails to respect this fundamental principle of subsidiarity.
3. The proposal fails to comply with the well-recognised freedom of association enshrined in ILO Convention 98 which ensures the voluntary nature of collective bargaining and poses a potential conflict with the Constitutional protection of freedom of association in Ireland.
4. Businesses in Ireland and across the EU are facing unprecedented financial challenges posed by the Covid-19 crisis. Rather than helping Europe's economies to overcome this crisis, the proposed EU Directive on minimum wages will undermine businesses' capacity to remain in operation and maintain productive employment. In the current challenging circumstances, the EU must avoid additional regulation which risks leading to a reduction in employment.
5. EU guidance in a non-legally binding tool would be a more appropriate mechanism for achieving the Commission's stated policy objectives. Such a non-binding approach would better respect national competences and industrial relations systems, as well as ensuring the autonomy of the social partners. This approach would allow Member States and social partners to work together at EU level whilst leaving decisions as to specific actions and approach to the national level.

Introduction

Ibec welcomes the opportunity afforded by the Department of Enterprise, Trade and Employment to comment on the European Commission's proposal for a Directive on adequate minimum wages in the European Union.

Ibec shares the objectives of ensuring adequate wages across the EU, making work pay, addressing poverty and strengthening the role of social dialogue in line with national industrial relations systems. However, we do not believe that the draft Directive proposed by the EU Commission is an appropriate mechanism for achieving these policy objectives.

In circumstances where we do not believe that a binding legislative initiative is an appropriate mechanism for addressing the issue at hand, we do not propose to set out in our submission an article-by-article analysis of the Directive. However, Ibec will be happy to provide specific comments on the provisions of the draft Directive should the Department wish.

Principle of subsidiarity

The principle of subsidiarity is fundamental to the proper functioning of the EU and requires that the EU must be competent to legislate where it proposes to do so. The principle ensures that matters should be decided as close as possible to the citizens of the EU. Ibec submits that matters such as wages and collective bargaining are key issues for businesses and workers alike and so respecting the principle of subsidiarity is particularly crucial when dealing with such matters.

Both the letter and spirit of the EU Treaty provide that matters of pay and collective bargaining remain the competence of Member States and social partners. In proposing a Directive on adequate minimum wages and collective bargaining, the EU Commission is failing to adhere to the principle of subsidiarity and the strict division of competences between the EU and Member States.

Articles 153(5) and 153(1f) of the EU Treaty, together with related rulings of the Court of Justice of the European Union (CJEU), provide that the EU has no competence to introduce a binding legal instrument on the level of minimum wages or on collective bargaining and the representation of workers' and employers' interest.

In explaining this division of competence, the CJEU has noted that the exclusion on "pay":

*"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 ... the exclusion on pay cannot ... 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."*¹

¹ Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud (C-307/05)

Furthermore, the CJEU has made clear that the exclusion on “pay” must be construed 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”².

While the draft Directive does not directly regulate the level of wages, it does however set *binding* criteria for adequacy. Recitals 7 and 21 define adequate as “ensuring decent living and fairness compared to the wage distribution in the country” and state that “indicators commonly used at international level, such as 60% of the gross median wage and 50% of the gross average wage, can help the assessment of minimum wage adequacy”. These provisions quite clearly go beyond the very limited space that the Treaty gives, if any, for EU intervention in the area of pay. In doing so, it entirely disrespects the autonomy of social partners and national competences regarding wage setting and collective bargaining.

Furthermore, in Article 3, the Commission attempts to define terms such as collective agreement, collective bargaining and collective bargaining coverage. These matters fall squarely within the competence of Member States and should, therefore, remain defined at national level.

Ibec notes with disappointment the Commission’s cursory attempt to address the principle of subsidiarity wherein it argues that the initiative respects the principle of subsidiarity as:

“National action has not been enough to address the problem of insufficient adequacy and/or coverage of minimum wage protection. Without policy action at EU level, individual countries may be little inclined to improve their minimum wage settings because of the perception that this could negatively affect their external cost competitiveness.”

However, the Commission fails to substantiate the claim that “national action has not been enough to address the problem of insufficient adequacy and/or coverage of minimum wage protection”. Indeed, even the Commission’s own impact assessment demonstrates difficulties with this position in showing that some of the biggest increases in minimum wages have been in Member States with lower levels of wealth³.

Notwithstanding our difficulties with specific provisions such as those mentioned above, the mere existence of such a legally binding text means that Member States will need to transpose it. The CJEU would, therefore, acquire jurisdiction on purely national collective agreements and wage setting; on issues that are of national competence. This constitutes an unacceptable encroachment on the principle of subsidiarity.

Freedom of association

² IMPACT V Minister for Agriculture and Food (C-268/06)

³ See pages 149 to 151 in the Commission Impact Assessment including graph A8.9 and A8.10 where it is concluded that: The statutory minimum wage has increased faster in low-wage countries, even as compared to other wages or compared to productivity growth.

The proposal fails to comply with the well-recognised freedom of association enshrined in ILO Convention 98 which ensures the voluntary nature of collective bargaining. Of particular concern to Ireland is the manner in which the proposal may conflict with the Constitutional protection of freedom of association.

Article 4 introduces binding legal obligations on the coverage of collective bargaining. While the proposed Directive does not directly determine the collective bargaining systems that should exist at national level, it attempts to regulate a vital aspect of them. Ibec is particularly concerned by the proposed requirement for Member States, where collective bargaining coverage does not reach 70% of the workforce, to provide for a framework for collective bargaining and establish an action plan to promote collective bargaining. Quite apart from the fact that this provision lacks any sort of clarity to enable Member States to determine whether they meet the 70% target, this provision quite clearly disrespects national competence with respect to the organisation of collective bargaining and the industrial relations framework in each Member State.

Ibec is very concerned about the impact this proposal might have on Ireland's voluntarist industrial relations system. Freedom of association is a constitutional right in Ireland. As such, Ireland has a robust legal framework to facilitate collective bargaining but equally allows employers who choose not to engage in collective bargaining to do so. It has served Ireland well both in times of recession and in strong economic growth and it is crucial that the EU Commission's proposed Directive, does not undermine our industrial relations systems or the autonomy of the social partners.

Covid-19 crisis

Businesses in Ireland and across the EU are facing unprecedented financial challenges posed by the Covid-19 crisis. For many, their very survival is by no means certain. Rather than helping Europe's economies to overcome this crisis, the proposed EU Directive on minimum wages will undermine their capacity to survive the consequences of the Covid-19 pandemic and could jeopardise some businesses' ability to remain in operation and maintain productive employment. It is also important to note that, in a European context, Ireland currently has the second highest minimum wage, which even when adjusted according to Purchasing Power Standards, sees Ireland rank 6th in the European rankings.⁴

Even the Commission appears to accept the risk that its proposal could further reduce employment in the majority of EU Member States⁵. Of particular concern to Ibec are the Commission's estimates which suggest that the proposal could lead to a reduction of around 20,000 jobs in Ireland – equivalent to a 1 percentage point reduction in employment.

The Commission further notes in its impact assessment that the proposal is expected to lead to *“increased labour costs for firms, increased prices and, to a lesser extent, lower profits.”* According to the Commission's impact assessment, setting the minimum wage at 60% of the median wage and 60% of the average wage (as set out in recital 21 and article 5.3 of the

⁴ Eurostat: minimum wage

⁵ Based on Graph A12.9, page 197 of the Commission Impact Assessment

proposal) would lead to an overall increase in the EU wage bill of up to €53 billion of total economic cost⁶.

The Commission expects that these costs of the increased minimum wage will be borne by companies with lower margins, consumers through higher prices and workers through higher unemployment. This is particularly concerning given that, at present, because of the Covid-19 crisis, many small businesses have severely weakened balance sheets, making them less able to absorb increased costs than standard economic models (such as that used in the Commission's impact assessment) assume. In the present circumstances placing more costs on vulnerable businesses will ultimately lead to closures, and in turn job losses.

Given the impact which the Commission itself appears to recognise its proposals could have on businesses, Ibec cannot understand how the draft Directive fails to contain any recognition of broader economic aspects, such as the impact on creating and maintaining employment and competitiveness.

In the current challenging circumstances, the EU must avoid additional regulation which risks leading to a reduction in employment, particularly in circumstances where other measures would be more effective in reducing poverty without such negative impacts.

Ibec is further concerned that the proposed Directive's impact on employment could have wider unintended consequences, such as a growth in the number of undeclared workers across the EU. The EU has undertaken significant work to address the problem of undeclared work in recent years. Ibec is concerned that the Commission's current proposals could add to the issue of undeclared work at a time when there is such a focus on tackling it.

Ibec notes that the majority of EU Member States oppose the proposed Directive and favour a non-binding instrument. Ibec is, therefore, also concerned that, at a time when cohesion amongst EU Member States is crucial, the proposal will not only put social partners in opposition to each other but will also result in division between Member States.

Directive an inappropriate mechanism

As stated above, Ibec shares the policy objectives of achieving adequate wages and fighting poverty across the EU. We, therefore, believe that there is room for discussion on this topic at EU level. Specifically, we believe that EU guidance in a non-legally binding tool would be a more appropriate mechanism for achieving the stated policy objectives. Such a non-binding approach would better respect national competences and industrial relations systems, as well as ensuring the autonomy of the social partners. This approach would allow Member States and social partners to work together at EU level whilst leaving decisions as to specific actions and approach to the national level. This would also make it possible to take the broad approach necessary to at the same time promote employment and fight poverty.

The aim of any such non-legally binding tool (including, for example a Council Recommendation) should be to achieve well-functioning national minimum wage setting in all EU Member States in a way that fully respects national competences and national

⁶ Page 64 of the Commission Impact Assessment.

industrial relations systems. Regard must also be had to EU and national skills policies, schemes to encourage employment participation as well as national social protection systems.

In particular, we believe that any such non-legally binding tool should focus on the following matters:

- Encouraging well-functioning industrial relations systems
- Supporting and promoting capacity building of social partners and highlighting good practice in this regard
- Encouraging an approach where adequacy and economic factors are combined
- Supporting compliance with statutory minimum wage provisions and other existing provisions, whilst fully respecting the diversity of national wage setting systems

Furthermore, Ibec is concerned that the unclear derogations and vague language used in the draft Directive will create huge complexity for transposition and numerous court cases to clarify misinterpretations.

By way of just one example, Article 1.1. of the draft Directive provides for an EU obligation for the national legislator to establish a framework for adequate minimum wages. Adequate minimum wage is defined in recital 21 as follows:

“Minimum wages are considered adequate if they are fair in relation to the wage distribution in the country and if they provide a decent standard of living”.

Imprecise and unclear language such as this will only serve to create legal uncertainty for employers, workers and Member States and thereby invite litigation for many years to come.

Concluding remarks

Ibec is happy to continue to engage, through its partners in BusinessEurope, with the Department, the EU Commission and trade unions on the issue of minimum wages and collective bargaining at EU level.

However, we cannot support a proposal which wholly disregards the principle of subsidiarity and the constitutionally protected principle of freedom of association. We, therefore, urge the Department to work to reject the proposal and suggest the Commission to pursue its objectives through EU guidance in a non-legally binding tool.

We would welcome the opportunity to engage further with the Department as it considers the EU Commission proposal.

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