

Position of the Union of Entrepreneurs and Employers on the Directive of the European Parliament and of the Council on adequate minimum wages in the European Union

The Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, proposed on 28th October 2020, constitutes the next stage in the implementation of the European minimum wage. The Union of Entrepreneurs and Employers consistently opposes the introduction of such a solution due to: the European Union's lack of competence to act in the field of wages; the non-binding nature of the political declaration known as the European Pillar of Social Rights; and the negative social and economic effects that this regulation will cause. Furthermore, the Union of Entrepreneurs and Employers is critical of the way how the European Commission used the opinions collected during consultations with the European Economic and Social Committee and of the solutions presented in the draft Directive, in particular the definition of the adequacy of the minimum wage and the aggressive formula for extending collective bargaining.

The first aspect of the Directive on adequate minimum wages in the European Union that **raises serious doubts is the choice of the legal basis**. In the explanatory memorandum we read that “the basis of the proposed directive is Art. 153(1) (b) of the Treaty on the Functioning of the European Union (TFEU), which states that the Union supports and complements the activities of the Member States in the field of working conditions, within the boundaries of the principles of subsidiarity and proportionality (Article 5(3) and 5(4) of the Treaty on European Union TEU). Since it does not contain measures directly affecting the level of pay, it fully respects the limits imposed to Union action by Article 153(5) TFEU”. In the opinion of Union of Entrepreneurs and Employers, the above claims are false. Article 153 TFEU is the standard legal basis for EU actions in the field of social policy. Art. 153 sec. 1 lists a number of areas in which the EU can support and complement the action of member states. One of them is listed in Art. 153 par. 1 b as “working conditions”. However, as a clear exception to the EU's social competences under Art. 153 par. 5 TFEU states that “the provisions of this Article shall not apply to pay”. It is evident that Art. 153 par. 5 TFEU does not mention the direct impact on the level of remuneration, but explicitly states that the EU institutions have no competence in this area, whether directly or indirectly. **This means that the Treaties in a clear and literal way**

exclude EU action in the field of wages, and the proposed Directive is an example of exceeding the competences and ignoring EU law by the European Commission.

The second debatable issue is the justification of the need to introduce the Directive on the European minimum wage by referring to the European Pillar of Social Rights (“EFPS”) established in November 2017. The EFPS assumptions include adequate minimum wages. **It is worth noting, however, that the EFPS is not a legal act, but merely a non-binding political declaration that some believe is intended to stimulate the development of EU legislative initiatives on social rights. Nevertheless, the EFPS provisions themselves exclude this possibility.** Recital 18 of the ESPS makes it clear that “at Union level, the European Pillar of Social Rights does not entail an extension of the Union’s powers and tasks as conferred by the Treaties. It should be implemented within the limits of those powers”, while recital 19 states that “the establishment of the European Pillar of Social Rights does not affect the right of Member States to define the fundamental principles of their social security systems and manage their public finances, and must not significantly affect the financial equilibrium thereof”. **Therefore, the Union of Entrepreneurs and Employers is of the opinion that the regulation of the minimum wage remains the exclusive competence of member states,** and although the EU may take measures to support them in improving working conditions, such instruments should not possess the binding nature of a directive.

Thirdly, it should be noted that **the Commission did not consider to a sufficient extent the results of its consultations.** The Union of Entrepreneurs and Employers participated in the consultations of the European Commission, and its representatives sit on the European Economic and Social Committee (“EESC”). The explanatory memorandum to the Directive states that “the European Economic and Social Committee also adopted opinions of relevance for an EU initiative on adequate minimum wages”. **However, the applicants ignored the fact that the EESC’s Opinion failed to reach consensus on a number of contentious issues, including the EU’s competence to act on minimum wages.** In fact, the Opinion issued by the EESC reflects the gap between the positions of the European Workers and Diversity Group and the Employers Group.

With regard to the impact assessment of the Directive, it should be noted that **the applicants underestimate its social and economic impact.** The explanatory memorandum states that the Directive will significantly improve the remuneration of employees and reduce workers’ poverty. The applicants note that “the expected economic impacts include increased labour costs for firms, increased prices and, to a lesser extent, lower profits”, but argue that the impact on enterprises would

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be mitigated by an increase in consumption among low-wage earners supporting domestic demand. **Apart from the fact that this concept was not supported by any calculations, the applicants forgot that the rising labour costs would lead to an increase in arbitration on the European labour market.** According to the research by The Netherlands Economic Review, the average employment on a non-employment basis in the OECD is 11.5%. On the other hand, in Poland, France, Italy, Portugal, Spain and the Netherlands, as many as 21% to 27% of employees are employed on the basis of civil law contracts, and this number is constantly growing. The European minimum wage may make an employment contract an even greater deficit commodity on the labour market. Furthermore, as a result of the introduction of the European minimum wage, employers may force employees to switch to part-time work, which would effectively reduce their remuneration.

In terms of the provisions of the Directive themselves, the Union of Entrepreneurs and Employers has the following reservations.

First of all, **the Union of Entrepreneurs and Employers criticizes the provisions of Art. 5 of the proposed Directive, a definition of the adequacy of minimum wages.** Article 5 obliges Member States to introduce the necessary measures to guarantee the adequacy of minimum wages based on stable and clear criteria. Interestingly, the requirement to establish a minimum wage at 60% of the gross median wage and 50% of the gross average wage are mentioned in recital 21 and not in the text of the directive itself. The preamble, contrary to the provisions of the directive, is not binding, although it has the so-called indirect authority and is often used to provide a purposeful interpretation of regulations. Consequently, despite the lack of a literal provision, it can be expected that the Directive will be interpreted in a way that obliges member states to ensure a minimum wage at 60% of the gross median wage. **The Union of Entrepreneurs and Employers is of the opinion that such a postulate is unacceptable due to the lack of EU competence in this area and the negative economic effects that such an obligation will have for enterprises and employees.**

And secondly, **the Directive introduces an aggressive formula for expanding collective bargaining, which does not respect the traditions of the member states where the minimum wage is regulated by law.** Art. 4 sec. 2 of the proposed Directive states that “Member States where collective bargaining coverage is less than 70% of the workers defined within the meaning of Article 2 shall in addition provide for a framework of enabling conditions for collective bargaining, either by law after consultation of the social partners or by agreement with them, and shall establish an action plan to promote collective bargaining”. Poland, despite being a country with a low level of

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unionisation, meets the demands of the Commission in terms of updating the minimum wage, involvement of social partners, and the minimum wage monitoring and enforcement system basing on the provisions currently in force in Poland of the Act on the minimum wage for work. Consequently, EU action in this area is unjustified.

Institutions of the European Union are bound by the rule of granting, which means that the Union acts only within the boundaries of powers conferred on it by the member states in Treaties, and by the principle of subsidiarity, i.e. taking the least intrusive, yet effective means to achieve a given goal. The directive on adequate minimum wages in the European Union violates both of these fundamental principles of EU law, and therefore should be assessed negatively.