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Confronting the Competence Conundrum of an EU Directive on Minimum Wages: In Search of a Legal Basis

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Executive Summary

- The new European Commission has boldly announced its plans to deliver an EU minimum wage legal measure within the first 100 days in office.
- This commendable ambition raises the much-contested question of competence in this field.
- Under Article 153 TFEU, the EU's main social legal basis, the issue of 'pay' is excluded from the provisions of this Article (para. 5). This seems to prevent the adoption, on this legal basis, of a binding EU measure that directly fixes the level of minimum wages in the Member States.
- Another, and oft-overlooked social legal basis can be found in Article 175 TFEU on economic, social and territorial cohesion. Article 175 TFEU may offer an alternative route to adopt a fully-fledged minimum wage directive to diminish the social and economic disparities that are hampering a harmonious development of the Union in both economic and societal terms.
- The main advantage offered by Article 175 TFEU, as compared to the other contending alternative legal basis found in the flexibility clause of Article 352 TFEU, is that it allows the EU to act through the ordinary legislative procedure rather than requiring unanimity while maintaining a social focus.
- Furthermore, the objective of cohesion policy seems the most credible alternative, compared to the general harmonisation clause for the internal market under 115 TFEU or the free movement of workers under Article 46 TFEU.

In a bold and remarkable move, the new President of the European Commission, Ursula von der Leyen, has tasked her Commissioner for Jobs and Social Rights, Nicolas Schmit, with the mission to develop a proposal for a legal instrument ensuring that every worker in the EU has a fair minimum wage, to be delivered within the first 100 days of this new Commission's mandate.

On the one hand, this could be seen as a natural continuation of the legacy of the Juncker Commission in strengthening Europe's social dimension. Indeed, the centre-piece of the outgoing Commission's social achievements, the European Pillar of Social Rights (EPSR), is the political anchor point for the delivery of these new ambitions concerning a minimum wage. With a commitment to prevent in-work poverty, Principle 6 EPSR enshrines the right to fair wages to provide a decent standard of living in a way that it satisfies the need of the worker and her/his family in the light of national economic and social conditions, whilst enabling access to employment and incentives to seek work. It further demands that all wages are set in a transparent and predictable way.

On the other hand, the obstacles for adopting a minimum wage at EU level are manifold and appear formidable. For one, not all Member States have minimum wages. Second, the role of social partners in wage setting is a sensitive question, and it is not entirely clear how an EU measure would be able to accommodate this. From a legal point of view, the most important obstacle is the thorny question of competence. The EU's social legal basis, Article 153 TFEU, excludes the issue of "pay". The EPSR, for all its solemnity, is not legally binding and does not expand the EU's competence to act. However, as this policy brief argues, the overlooked Article 175 TFEU on cohesion policy could provide suitable legal anchor point to successfully launch this important initiative.

Article 153 TFEU on social policy: a slim and slack rope

Article 153 TFEU is the EU's standard social legal basis. It gives the EU competence to adopt a range of measures in various fields of social policy. Wages are part of "working conditions", which is one of the areas in which Article 153 TFEU allows the EU to adopt directives setting minimum requirements in accordance with the ordinary legislative procedure. However, as an explicit exception to the EU's social competence under Article 153 TFEU, its 5th paragraph states that "the provisions of this Article shall not apply to pay".

The Treaty itself does not define 'pay'. The Court of Justice of the European Union (CJEU), however, has consistently held in its case law that the limitation under Article 153(5) TFEU stands for 'the establishment of the level 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 wage' (*C-395/08 - Bruno and Others, EU:C:2010:329, §37; C-268/06 – Impact, EU:C:2008:223, §125*). This, quite clearly, does not bode well for a fully-fledged EU minimum wage directive based on Article 153 TFEU.

On the other hand, the CJEU has confirmed that the exclusion of Article 153(5) TFEU cannot hollow out and unduly restrict the EU's competence in relation to the other areas of social policy under Article 153(1) TFEU. As an exception to a rule, Article 153(5) TFEU has to be interpreted narrowly and it should not completely undermine the effectiveness of EU social law and policy. Hence, as the CJEU has held, the exception of 'pay' cannot be extended to every issue related to 'pay', as many areas of social policy would otherwise be deprived of much of their substance. Thus, pay has been legitimately included in the 'working conditions' regarding various types of workers' right to equal treatment under EU directives adopted on the basis of Article 153 TFEU.

The conclusion is that 'only' provisions directly interfering in the way pay is determined, and the setting of the levels thereof, are excluded from EU competence under Article 153(5) TFEU. It might perhaps not be impossible to conceive of an instrument that avoids the setting of wages or the components of pay directly, but that instead prescribes certain procedural requirements such as transparency and predictability. It would, however, be a very slim and slack rope to balance on. Any such measure on the social policy legal basis that would manage to avoid the 'lethal' exception of paragraph 5 would inherently and necessarily lack the very substance and thus legal and political punch that the promised initiative should carry.

Article 175 TFEU on social, economic and territorial cohesion: the road less travelled

An important part of the rationale of introducing an EU minimum wage is to decrease the social and economic inequalities between different parts of the EU, to promote upward social and economic convergence and a more harmonious development of the Union. Article 4(2) TFEU qualifies economic, social and territorial cohesion as one of the principal areas of shared competence. In accordance with Article 2(2) TFEU, "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union … may legislate and adopt legally binding acts in that area".

More specifically, Article 174 TFEU states that "in order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion". Article 175 TFEU continues that "if specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted … in accordance with the ordinary legislative procedure". Thus, if Article 175 TFEU would be used, it would entail QMV and, importantly for the European Parliament, co-decision.

Interpreting Article 175 TFEU as a possible legal basis for a minimum wage directive

A textual interpretation of Article 175 TFEU, in conjunction with Article 174 TFEU, does not in principle seem to oppose the adoption of a minimum wage directive, if it would be designed so as to significantly strengthen the Union's economic and social cohesion and thus genuinely diminish disparities between Member States. It would be imperative that a rigorous and systematic impact assessment accompany the proposal. This assessment should, through data and reasoned projection, provide sufficient ground and reason for the CJEU to accept, if the Directive were to be challenged afterwards, that the way in which the Directive sets minimum wages for the EU genuinely (and not incidentally or purely indirectly) contributes to social and/or economic cohesion and the Union's harmonious development. The assessment should perhaps not just focus on the measure's by reduction of disparities but also on taking the sharp edges of wage-competition that has distorted the internal market as can be seen from the Posting-saga, as well as producing upward socio- economic convergence). The fact that such a measure would protect workers in all Member States does not necessarily seem to be a problem, as long as it can clearly be shown that in doing so, the measure significantly contributes to social and/or economic cohesion.

While this would entail a somewhat creative legal reading of the provision, the CJEU has explicitly acknowledged that EU cohesion policy gives extensive discretion to the Union as to the actions that might be taken in the field of economic, social and territorial cohesion (*C-420/16 P, Izsák and Dabis v Commission, ECLI:EU:C:2019:177, §68*). The Court in another judgment (*C-166/07, Parliament v Council, ECLI:EU:C:2009: 499*) furthermore considered that "economic and social progress" correspond to the objectives pursued by the EU policy on economic and social cohesion.

The case to further explore the under-used potential of Article 175 TFEU has already been made in the context of economic policy (Flynn, 2019), to avoid the lack of legislative competence in Article 121 TFEU on economic policy. It seems pertinent to cite here, and apply mutatis mutandis, what has been said in this respect: "when they wish to institute measures that will affect the economic performance of the Member States the Union institutions can take another route, to overcome the limitations associated with Article 121 TFEU. It is perfectly proper for them to adopt such measures on another legal base if the measures in question come with the ambit of the Treaty provision used" (ibid.: 48). Indeed, as Flynn notes, "In recent years, the Union legislator has turned repeatedly to the cohesion policy chapter of the Treaty (Articles 175 to 178 TFEU) when considering such measures" (ibid.: 49). Particularly relevant to counter the argument that

recourse to Article 175 TFEU would illegally circumvent the constraints of Article 153 TFEU, Flynn considered that: "the fact that the effects of the measure will have an impact on economic policy does not mean that the use of that other legal base constitutes a circumvention of the limitations associated with Article 121 TFEU. The Court accepted in Gauweiler and Weiss that monetary policy measures taken by the European Central Bank ('ECB') do not fall into the sphere of economic policy for the sole reason that they may have indirect effects that can also be sought in the context of economic policy. By the same logic, measures adopted by the other Union institutions under other policies are not equivalent to economic policy measures due to such indirect effects. Moreover, the fact that such effects are definitely foreseeable by the measure's author(s) and are knowingly accepted does not rob them of the status of 'indirect' effects" (ibid.: 48).

The main legal uncertainties concerning Article 175 TFEU as a legal basis for a minimum wage directive

While Article 175 TFEU therefore deserves serious consideration, a number of uncertainties related to using this provision as the legal basis for a directive on minimum wages remains.

First, it is ambiguous what 'specific action' under Article 175 TFEU may entail. As the CJEU held, the "provision does not set out the form which such specific actions can take" (Case C-166/07, op cit, § 46). The Court then considered that "the Community, through all of its actions, implements an independent Community policy, with the result that Title XVII of the EC Treaty provides adequate legal bases allowing for the adoption of means of action which are specific to the Community, administered in accordance with the Community regulatory framework and the content of which does not extend beyond the scope of the Community's policy on economic and social cohesion". This does not give much guidance on the question whether 'specific actions' could comprise the adoption of (minimum) harmonising legislation.

However, in principle, it does not seem impossible to defend that the introduction of an EU minimum wage is an 'EU action', as this term could be considered to comprise both legal and non-legal measures. There are areas where the EU is given the competence to adopt 'incentive measures' or 'measures to complement actions of the Member States' but which exclude the harmonisation of Member States' laws, notably in the areas of complementary competence such as education (Article 165 TFEU), culture (Article 167 TFEU) and tourism (Article 195 TFEU). In these cases, the provision itself explicitly excludes such harmonisation. Article 175 TFEU, in a marked difference, does not feature such a prohibition. Social and economic cohesion is, instead, a shared competence, where according to Article 2 TFEU the Union may legislate. To derive a prohibition of harmonisation, or of substantive legislation, from the word 'actions' or 'specific actions' would seem overly restrictive: it would go against the principle of effectiveness and does not seem to be supported by the case law of the CJEU.

Similarly, the fact that the provision enshrines the role of coordination and funding in cohesion policy does not necessarily confine all EU actions in this field to measures of coordination or funding. In fact, a step-by-step reading of the Article clearly suggests that different forms of EU action are possible for attaining the overall objective in Article 174 TFEU, which include, but are not necessarily limited to, measures of coordination and action through the Structural Funds. This is supported by the explicit wording of the provision where Article 175 TFEU foresees also actions 'outside the Funds'.

Another ambiguity can be found in Article 175 TFEU where it says 'without prejudice to the measures decided upon within the framework of the other Union policies'. Could it be argued that this lays down a subordination of Article 175 TFEU to other provisions in the Treaty, in a way that would hamper the adoption of a minimum wage directive on this legal basis? There is no ground to interpret this phrase to such a limiting extent. First, the wording of the caveat itself is weak. If the provision had read 'to be decided upon' or 'other provisions of the Treaties', it might have been different, but even then, the Treaty is riddled with such references (see, for example Article 18 TFEU on nationality discrimination or Article 22 TFEU on citizenship) which have not been given a restrictive reading. Furthermore, while it may be taken to mean that measures adopted under this provision need to respect existing measures adopted on the basis of other provisions, this does not cause any problems: at present there seems to be no such measure that would stand in the way of a minimum wage directive.

In similar vein, it may be argued that Article 153 TFEU is the more specific provision (*lex specialis*) for what a minimum wage directive would try to achieve, and as such it should be used. However, the CJEU's case law does not seem to prohibit the use of a more general and indirect legal basis, provided that its conditions are fulfilled, if the more specific legal basis excludes the type of action to be taken. Examples are the Tobacco Advertisement legislation adopted based on Article 114 TFEU because the legal basis on public health excludes harmonisation, or the above-mentioned Gauweiler and Weiss cases. Arguably, it is thus precisely because Article 153(5) excludes the issue of pay that another legal basis, like Article 175 TFEU, can be used. Indeed, the most logical interpretation is that this limitation in paragraph 5 only applies to Article 153 TFEU itself and does not prevent the EU legislature to use another provision in the Treaties as a legal basis, provided there is one. This interpretation is supported by a textual interpretation of Article 153(5) which says that "the provisions of this Article shall not apply to pay" – meaning that other provisions potentially can.

It is true that in relation to this provision, the Court has consistently held that the "establishment of the level of the various parts of pay of a worker fall outside the competence of the EU legislature and rests with the Member States'"(*C-395/08 - Bruno and Others, EU:C:2010:329, §39; C-268/06 –*

Impact, EU:C:2008:223, §129). These words could be interpreted as a more general statement of the limits of EU powers. This seems to have been the approach taken by Advocate-General Jääskinen in Case *C-507/13* (*United Kingdom v Parliament and Council, ECLI:EU:C:2014:2394, §114*) where he opined (in relation to the CRD IV Directive) that in light of this above-mentioned statement by the Court, another legal basis (in this case Article 53(1) TFEU) could not be used "in order to circumvent the limitation imposed by Article 153(5) TFEU". This Opinion is not binding and does not seem to be in keeping with the approach of the Court to legal basis choice in general. The CJEU's stance instead appears to be that as long as the conditions for the use of a particular legal basis are fulfilled, it is irrelevant whether the matter is explicitly prohibited or excluded from another legal basis. Another interpretation could seriously harm the effectiveness of EU law. And again, textually, the argument for such a cross-cutting prohibition seems to fall flat in the face of the explicit phrasing that "the provisions of this Article shall not apply to pay".

Alternative legal bases

Beyond the realm of social and cohesion policy, there are a number of other options worth contemplating.

The flexibility clause

For attaining one of the objectives set in the Treaties where these do not provide the necessary powers, on the basis of Article 352 TFEU, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the Parliament, may adopt the appropriate measures. Following Article 3 TEU, a highly competitive social market economy aims at full employment and social protection and shall combat social exclusion and discrimination. Arguably, the so-called 'flexibility clause' could serve to implement such objectives through EU minimum wages.

Nevertheless, a proposal for a directive on minimum wages based on Article 352 TFEU would come up against a number of drawbacks. First, besides the obstacle of unanimity and the special legislative procedure that downgrades the role of the Parliament, national procedures might block the use of this provision. This is the case of Germany, for example, that requires a law for any measure that is adopted under this provision to be passed with a two-third majority both in the Bundestag and the Bundesrat. Second, an arguably even bigger obstacle relates to the explicit limitation to use this provision to adopt laws or regulations where the Treaties exclude such harmonisation. It is unclear whether the exclusion of 'pay' under Article 153(5) TFEU constitutes such a 'prohibition of harmonisation' in the sense of Article 352 TFEU. The European Commission previously did not think so, as it proposed the Monti II Regulation, an initiative on collective action which is another field excluded under Article 153(5) TFEU, on the basis of Article 352 TFEU. Then again, this proposal became the first victim of the 'yellow card' procedure, as national parliaments considered this an illegitimate way of circumventing Article 153(5) TFEU.

Approximation of laws

Could a directive on minimum wages be based on the general harmonisation of the internal market enshrined in Article 115 TFEU, which applies explicitly to fields excluded from its 'twin' Article 114 TFEU such as 'measures that affect the right and interests of employed persons'? First, it is not immediately clear that wage differences between the Member States directly affect the functioning of the internal market in more than a number of specific sectors. Moreover, the adoption of measures under Article 115 TFEU requires unanimity. Most importantly, the adoption of an instrument on the basis of the internal market is likely to backlash when the interests of the internal market conflict with the social objective. This was at the centre of the discussion in Viking and Laval (*C-438/05 - The International Transport Workers' Federation and The Finnish Seamen's Union, EU:C:2007:772* and *C-341/05 – Laval un Partneri, EU:C:2007:809*). In these cases, the fact that the Posting of Workers Directive was adopted on the services provisions in the Treaties pushed the CJEU to interpret the directive in light of its main objective and see the instrument as a maximum harmonisation of labour standards rather than a social minimum directive. This subordinated workers' fundamental social rights to the economic interests of the internal market.

If the objective of adopting a minimum wage directive is to fight in-work poverty and guarantee fair wages for workers in order to enhance social progress in Europe to further its more harmonious development, a directive on minimum wages should have a social focus. If follows, that the usage of Article 115 TFEU for the adoption of a directive on minimum wages should be avoided.

The free movement of workers

A final approach to consider would be to adopt a directive on minimum wages under Article 46 TFEU according to which 'the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure … issue directives or regulations setting out measures required to bring about freedom of workers'. Using free movement of workers as the legal basis for the adoption of a directive on minimum wages would entail QMV. However, it seems quite an overstretch to argue that a directive on minimum wages at the EU level has in fact the objective of enhancing the free movement of workers. It may, in contrast, be argued that it may have the opposite effect, as such a directive would, to some extent, eliminate the wage-incentive that induces many workers to move.

Conclusion

Given the content and the objective of a directive on minimum wages that guarantees fair wages for workers as to effectively tackle in-work poverty, this instrument should have a strong social focus so that in the case that conflict arises between social and other interests, the former always prevail. Moreover, because of the high sensitivity in the area of

wages, with some Member States arguing a possible downward pressure and others fearing that they will lose their competitive advantage in the internal market, a legal basis that allows for QMV would be necessary to avoid vetoes. Not subordinating the role of the Parliament to consultation, moreover, would increase the democratic value of a directive in minimum wages.

In light of these considerations, the most desirable and realistic options for the Commission can be narrowed down to two. Keeping on the beaten track of the social policy title, the Commission could try to propose an instrument on minimum wages under Article 153 TFEU that in no direct way interferes with fixing the level of minimum wages. Or it would take a road much less travelled, and propose a fully-fledged minimum wage directive based on Article 175 TFEU.

Because a directive on the basis of social policy would be substantially limited to regulating methods and rules of allocation of pay, therefore having minimal impact on the adequacy of wages, it is highly unlikely that such a directive would have the necessary drive to boost upward convergence on minimum wages and effectively tackle the issue of in-work poverty. Hence, any such measure that would manage to avoid being struck down by the exception of Article 153(5) TFEU would necessarily lack the very substance and thus legal and political punch that the promised initiative should carry to avoid disappointment and backlash.

The more innovative approach under the cohesion policy, by contrast, could indeed contain provisions on adequacy, including methodologies to establish adequate incomes so as to fight income poverty. The use of this legal basis, while somewhat creative, would thus allow for a directive on minimum wages that is rich in content, can be adopted through the ordinary legislative procedure and by QMV and has at its centre the social objective of diminishing economic and social disparities between Member States. It is uncharted territory and, as such, not an entirely risk-free approach (either), but if the Commission is serious about delivering legally on the political promises made, then this seems the most viable way.

Ultimately, the challenges that plague the successful adoption of legislation in matters of social policy, that translates clear objectives of the Union and basic fundamental social rights enshrined in primary law, seriously beg the question of whether the limitation on social policy competence should be revisited. This could be done either by amending the social policy title or by starting a discussion about a future Treaty revision that gives sufficient social competences to the EU so as to finally become a true social market economy.

Further Reading

Flynn, L., "Greater Convergence, More Resilience? Cohesion Policy and the Deepening of the Economic and Monetary Union", in D. Fromage and B. de Witte (eds.), *Recent Evolutions in the Economic and Monetary Union and the European Banking Union: A Reflection*, Faculty of Law Working Paper Series, 2019/03, Maastricht University, 2019, pp. 48-60.

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