ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 107, 2024

https://doi.org/10.18778/0208-6069.107.05

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THE DIRECTIVE ON ADEQUATE MINIMUM WAGES IN THE EUROPEAN UNION AND ITS POTENTIAL IMPACT ON NATIONAL LAW

Abstract. The objective of this paper is to analyse the mechanisms established by the Directive 2022/2041 for the purpose of determining adequate and fair minimum wages and promoting collective bargaining. The authors present the objectives, scope of application, and legal nature of the provisions of the Directive, and subsequently undertake the clarification of the doubts that have emerged in the preparatory stages of the process of its transposition. Furthermore, the paper offers a preliminary reflection on the potential directions of the Directive's impact on national laws.

Keywords: minimum wages, European Union, Directive, labour law, employee

DYREKTYWA W SPRAWIE ADEKWATNEJ PŁACY MINIMALNEJ I JEJ POTENCJALNY WPŁYW NA PRAWO KRAJOWE

Streszczenie. Celem artykułu jest analiza ustanowionych w Dyrektywie 2022/2041 mechanizmów kształtowania adekwatnych i sprawiedliwych wynagrodzeń minimalnych oraz promocji rokowań zbiorowych. Autorzy przedstawiają cele, zakres stosowania oraz charakter prawny postanowień Dyrektywy, a także podejmują się wyjaśnienia części wątpliwości, które ujawniły w związku z pracami nad transpozycją tego aktu. Prowadzi to do realizacji drugiego celu tekstu, którym jest wstępna refleksja na temat potencjalnych kierunków oddziaływania Dyrektywy na prawo krajowe.

Słowa kluczowe: minimalne wynagrodzenie, Unia Europejska, Dyrektywa, prawo pracy, pracownik

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Received: 8.02.2024. Verified: 9.02.2024. Revised: 15.02.2024. Accepted: 23.02.2024.

1. OPENING COMMENTS

In 2017, the European Pillar of Social Rights[1] was adopted. The decision provided an impetus for a strategy shift regarding the social area in general, and in the area of employment in particular. The European Union is moving away from a policy, initiated during the global economic crisis, that focused on promoting flexibility of employment conditions and the decentralisation of how those conditions were determined. This shift and the resulting new direction are reflected in the Directive (EU) 2022/2041 of the European Parliament and of the Council of 19th October, 2022, on adequate minimum wages in the European Union (referred to as "the Directive" further on). The objective of the Directive is to contribute to the emergence of adequate and fair minimum wages that would ensure decent working and living conditions for workers. Implementing the Directive may require significant changes in the legal systems of the Member States, and may possibly encourage the convergence of national socioeconomic models (including their collective bargaining systems) that are currently very diverse both in their design (Liukkunen 2019, 1 et seq.) and in their scope of application.[2] For this reason, this European Commission's initiative has been controversial from the outset, both politically and legally. The initial proposal, and subsequently the Directive itself, have been accused of exceeding the European Union's powers under the Treaty, since the Union does not have legislative power with regard to the right of association and to pay (Article 153(1) TFEU)[3] (on the admissibility of the EU action see, e.g., Visentini 2021, 36). The Directive is also controversial from the economic perspective (Skedinger 2022).

When several Member States, including Poland, began preparing to transpose the Directive, significant doubts emerged in connection with its interpretation. These doubts have impact on the implementation process (Report 2023).[4] The objective of this paper is to outline the content and nature of the standards established by the Directive with regard to statutory minimum wage-setting and to promoting collective bargaining on wage-setting, as well as to offer a preliminary reflection on their potential impact on the law and bargaining

[1] European Union document jointly signed by the European Parliament, the Council of the European Union and the European Commission on 17 November 2017, Interinstitucional Proclamation on the European Pillar of Social Rights (O.J. C 428, 13.12.2017).

[2] The rate of coverage ranges from single digits up to 20% (particularly in Eastern Europe) to nearly 90%+ in Northern and Western Europe (Austria, Belgium, Finland, France, Italy, Spain, Sweden), https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/collective-bargaining-coverage

[3] Action brought before the CJEU on 18th January, 2023, by the Kingdom of Denmark (C-19/23). The applicant seeks the annulment of the Directive or at least of its Article 4(1)(a) and 4(2) thereof (2023/C 104/22).

[4] Report Expert Group Transposition of Directive (EU) 2022/2041 on adequate minimum wages in the European Union.

systems in the Member States, in particular in Poland. Due to the framework of the study, the focus of the analysis is on systemic issues. The assessment of specific legal solutions from the perspective of the implementation of the Directive requires separate, extended research. In relation to the Polish law, the areas where the need for legal changes has most clearly emerged are noted. The paper discusses the objectives, scope of application, and legal character of the norms enshrined in the Directive, the standards for the statutory minimum wages and wage protection established therein, as well as the principles guiding the promotion of collective bargaining on wage-setting. This forms the basis for offering several preliminary conclusions as to the potential impact of the Directive on national laws.

2. THE OBJECTIVES AND SCOPE OF THE DIRECTIVE

The Directive has been adopted in response to socioeconomic changes that affect workers and their families, such as the rise in the cost of living, unsatisfactory employment conditions, and the resulting increase in poverty levels (Visentini 2021), including among the working people (Ratti, Garcia-Muñoz 2022, 735). The problem is felt most acutely among those receiving the lowest wages. The primary objective of the Directive is to ensure adequate working and living conditions for workers in the European Union. This objective is to be achieved, *inter alia*, through the establishment of mechanisms to set adequate and fair minimum wages (where 'adequate' is used in the broad sense) and through an increase in the scope of collective bargaining on wage-setting, which can be regarded as an indirect, auxiliary objective (e.g. Ratti 2023).

In the strict sense of the term, an "adequate" minimum wage is a wage which, when the general level of wages and the cost of living in a given society is taken into account, allows workers to have decent living conditions. In this sense, an adequate minimum wage contributes to positive social convergence and to the reduction of wage inequalities, and is a factor in narrowing gender pay gap. Minimum wages should also be fair in relation to the distribution of wages in a given Member State, contributing to a fairer, more equal distribution of wealth across the society.[5] These objectives are served by transparency and predictability of minimum wages, which, in turn, can be achieved by establishing appropriate procedures. In any case, Member States should strive to increase the coverage of collective bargaining on wage-setting, the development of which is recognised as the most effective way of protecting the interests of workers (levels of pay are higher if the general systems are based on collective bargaining). As a benchmark and target for national action, the Directive aims for a rate of 80% coverage of collective bargaining on wage-setting in the Member States.

[5] https://www.consilium.europa.eu/pl/policies/adequate-minimum-wages/

In assessing the nature of the Directive and in determining how it is to be implemented, it is first of all necessary to form a proper understanding of the nature of the obligations it imposes on the Member States. These obligations are essentially procedural in nature. In implementing them, Member States are to be guided by the overarching objective of improving the conditions of work and life of workers. However, this is an obligation to *act* towards this objective rather than an obligation to *achieve* a specific result (Report 2023). The obligation to strive to increase the rate of collective bargaining coverage to 80% is similar in nature. Failure to achieve the ultimate objective – i.e. failure to reach a certain threshold when it comes to living conditions, or failure to meet that target rate of coverage – will not constitute a breach of obligations under the Directive as far as Member States have adopted measures required by the Directive. Due to the limitation of powers under the Treaty, no European minimum wage is introduced in the Directive, nor is a uniform mechanism created for setting national minimum wages. In particular, the Directive stops short of obliging the Member States with autonomous minimum wage mechanisms to either introduce statutory minimum wages or to make collective wage agreements universally applicable. Trade unions, for example in Nordic countries, were afraid of the imposition of such a mechanism, seeing it as a danger of state interference (Lillie 2022).

The objective of improving the conditions of work and life applies to the general group of workers, understood in its totality, and, therefore, should not be restricted to selected areas of life (for instance, merely to the economy) or selected economic sectors. The Directive applies to all workers, meaning both to the private and the public sectors, technically including, in principle, civil servants (Report 2023). While the Directive makes a reference to national definitions of who qualifies as a 'worker,' it also invokes the necessity to take into account the jurisprudence of the CJEU – a definition that, in turn, contains certain elements that prompt the emergence of an autonomous European definition. The CJEU considers the provision of work for remuneration and under conditions of subordination to the recipient of the work to be the most important features of the employment relationship (judgment of the European Court of Justice 1986–07–03, C 66/85 *Deborah Lawrie-Blum vs. Land Baden-Württemberg*, LEX No. 130250 and subsequent related judgments; Menegatti 2019). While Member States are not required to modify their definitions of a worker, they should also not withhold the protection of the Directive from persons who would be eligible for that protected status under the CJEU jurisprudence. This is particularly relevant for the legal systems that generally rely on a narrow definition of a worker, or where (like, for example, in Poland) the potential for hiring workers outside of that protected status tends to be significantly abused. When assessing national laws, the totality of the situation of workers situated outside the protected employment relationship must be taken into account. In particular, the inclusion of non-workers within the minimum wage guarantees may be relevant for determining

compliance. To use the example of Poland again, the statutory minimum hourly rate (combined with the statutory minimum wage) applies to those working under Polsh Civil Code[6] contracts (such as the contract of mandate and contracts for the provision of services, which are not employment contracts). However, it may prove to be difficult to ensure that workers without the protected employee status have a level of protection that meets the requirements of the Directive, e.g. because the scope of protection of those employed under the Polish Civil Code contracts is narrower than that of employees.

For the purposes of the Directive, "minimum wages" means the minimum remuneration set by law or collective agreements that an employer, including in the public sector, is required to pay to workers for the work performed during a given period. Member States are free to determine what components count towards that minimum remuneration, but all the component parts present in the Directive's definition must be included (Report 2023). The essence of the protection is that the entirety of minimum wages must be subject to the procedural standards established by the Directive. Certain components of remuneration (such as seniority bonuses or bonuses for working under special conditions) are not obligatorily included in the calculation of the amount to which a worker is entitled. As a result, the amount of what is purely the remuneration for performing work does not necessarily have to include those component parts that reflect the particularities of the work rendered, which may potentially raise the level of remuneration.

3. FACTORS INVOLVED IN STATUTORY MINIMUM-WAGE-SETTING

The Directive introduces standards for minimum wage-setting that should help to ensure the adequacy and fairness of those wages. These mechanisms apply to statutory minimum wages. In contrast, they do not apply to minimum wages negotiated by collective agreements. This represents both an attitude of respect for collective autonomy and the belief in the high standard of wages negotiated by the social partners. By recognising the importance of collective bargaining in terms of the effectiveness of minimum wage systems, and by acknowledging the positive impact it has on wages, the Directive also promotes the participation of the social partners in adequate statutory minimum wage-setting, which may require changes in some national systems where such participation is not guaranteed at the moment (Report 2023).

The basis for the setting and updating of statutory minimum wages is formed by criteria intended to encourage the adequacy of those wages with the aim of ensuring that workers achieve a decent standard of living. These criteria must

[6] Act of 23 April 1964, Civil Code, Journal of Laws of 2023, item 1610 as amended. Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny tj. Dz. U. 2023 r., poz 1610 z późn. zm.

include at least the following elements: a) the purchasing power of statutory minimum wages, taking into account the cost of living; b) the general level of wages and their distribution; c) the growth rate of wages; and d) long-term national productivity levels and developments. Among other instruments, a basket of goods and services at real prices established at the national level can be instrumental to determining the cost of living with the aim of achieving a decent standard of living. In addition to material necessities such as food, clothing, and housing, the need to participate in cultural, educational, and social activities may also be taken into consideration. This lays the foundation for a broader understanding of adequacy, one rooted in a broader spectrum of perception of workers, similar to that enshrined in Article 4 of the European Social Charter.[7]

In order to maintain the adequacy of minimum wages, they must be regularly updated so that the minimum wages can be adjusted to the changing cost of living. Member States may additionally use an automatic mechanism for the indexation of statutory minimum wages in order to supplement the existing system of minimum wage-setting. This indexation may be carried out on the basis of criteria deemed relevant by the Member State; these criteria may differ from those used to set the minimum wages (specified in Article 5(2) of the Directive). However, the criteria for setting minimum wages will be used for periodic reviews of minimum wages, and these reviews will apply to automatically indexed wages (Report 2023). The updates of minimum wages required by the Directive must take place at least every two years or, for Member States which use the automatic indexation mechanism, at least every four years. The frequency of updates should be determined by law, and the objective of the updates should be to preserve the purchasing power of wages (Report 2023).

The fairness of the minimum wages, in turn, means that the share of minimum wages in the totality of wages in general must be appropriate. Fairness is to be assessed taking into account selected reference values (Report 2023). These can include reference values in common use on the international arena, such as, for instance, the ratio of the gross minimum wage to 60% of the median gross wage, the ratio of the gross minimum wage to 50% of the average gross wage, and the ratio of the net minimum wage to 50% or to 60% of the average net wage. Reference values may also include indicators used at the national level, such as a comparison of the net minimum wage with the poverty threshold, or the purchasing power of minimum wages. The universal nature of the minimum wages means that, in principle, they should be compared to wages in general, in their totality across all sectors, without narrowing the comparisons down to specific industries or groups of workers selected by, e.g., age or gender (Report 2023). The ultimate objective of minimum wages is to contribute to eradicating differences

[7] European Social Charter, Coulcil of Europe. Europejska Karta Społeczna, Rada Europy, https://rm.coe.int/en/web/european-social-charter/charter-text

and, in particular, narrowing the wage gap between women and men. Therefore, the benchmarks (reference values) may also include the average national wage, the median national wage, and the ratio of the first to the fifth decile of the distribution of remunerations (Report 2023).

Procedurally, the Directive obliges the Member States to establish a consultative body to advise the relevant authorities on issues related to minimum wages (Article 5(6) of the Directive); the consultative body should have adequate expert and material resources (Report 2023).

Standards for setting adequate and fair statutory minimum wages will need revisions. Moreover, in some Member States, they will require changes to the existing national minimum wage setting mechanisms. Member States enjoy a lot of freedom in terms of the criteria, and their relative importance, that are to be used to determine the increases in the minimum wage, taking into account national socioeconomic conditions. Nonetheless, the criteria must be defined transparently and precisely (Report 2023). The mode of their selection, be it by law, by the decision of the relevant authorities, or by tripartite agreements, depends on national practice. To ensure the genuine adequacy of minimum wages, up-to-date data must be used, either from the preceding year or, if possible, even more recent (Report 2023). In the light of this requirement, a review of Polish legislation is necessary – even though the core of the relevant Polish legislation meets the standards of the Directive. Notably, the automatic indexation mechanism is optional. Whether or not to apply it has been left for the Member States to decide, with the caveat that its application may not result in a decrease of statutory minimum wages. In any case, a continuous update mechanism (in whatever form adopted in national law) must be in place.

In view of the ultimate objective – i.e. of the social and economic model being fostered by the Directive – the crucial aspect is the selection of the benchmark (the indicator to be used in the fair wages calculation formula), because of its impact on the distribution of wealth in society. This is why the decision is not so much legal but, rather, economic and political in nature. Preliminary signals from the Polish government – before the parliamentary elections in 2023 – had suggested a preference for the indicator being the 60% of the median gross wage,[8] which could translate into an impact on minimum wages as well as into a potential increase of their share in the general income distribution. Member States should strive to achieve the reference values, but are not formally obliged to bring about this result (Report 2023).

[8] https://biz.legalis.pl/2024-r-wdrozenie-dyrektywy-w-sprawie-adekwatnych-wynagrodzen-minimalnych-w-ue/

4. THE EFFECTIVENESS OF MINIMUM WAGES

The two factors that contribute to the existence of adequate and fair minimum wages include: the uniformity of the wages (which contributes to social convergence and helps eliminate wage gaps) and the security of the wages (understood as a guarantee of the payment of remuneration at the set level; appropriate oversight to ensure that employers' obligations are met; and options of seeking effective redress in the event of a breach of workers' rights).

The Directive sets standards for a variation of minimum wages, which means setting different rates for certain groups of workers, and for deductions that reduce the remuneration below the relevant statutory minimum wages. The objective is to limit these variations and deductions to situations where they are necessary in order to achieve a legitimate aim (the principle of proportionality). The legitimate aim should be objectively linked to the employment policy. Variations and deductions may not be in contravention of the principle of equal treatment, meaning that they cannot consist in differentiating between workers, or groups of workers, on the basis of criteria recognised as discriminatory under the EU law (religion, belief, disability, gender, sexual orientation, and racial or ethnic origin). Variations and deductions must also pass the adequacy test (Report 2023).

Member States should ensure that, without prejudice to the specific forms of seeking redress and resolving disputes provided for in collective agreements where applicable, workers (including workers whose employment relationship has ended) have access to effective, timely, and impartial dispute resolution mechanisms, and that they have the right to seek redress in the event of a breach of rights relating to statutory minimum wages or the protection of such wages. Workers and their representatives (including trade union representatives) should also be protected from any reprisals for lodging a complaint with the employer or initiating proceedings to pursue claims resulting from the right to earn minimum wages.

When transposing the Directive, Member States should review and assess national laws that pertain to variations and deductions of minimum wages, that ensure compliance with the relevant legislation, and that lay down effective avenues for workers seeking redress of violations. However, the Directive itself is not to be used to legitimise such variations and deductions. An example of a legitimate aim that justifies a departure from standard regulations on minimum wages is, for instance, facilitating labour market access for young workers, including those in apprenticeship positions (Report 2023). As for deductions, in some Member States they cause the wages to drop below the minimum level; this is particularly the case for vulnerable groups of workers (women, workers with disabilities, young workers, migrant workers) and those in precarious work (Report 2023). Deductions generally tend to measure up to the proportionality

test when they are caused by the collection of amounts due on the basis of a final court judgment or administrative decision – this includes, for instance, child maintenance claims. In contrast, there is a risk of disproportionality in the case of deductions made to cover the costs of equipment (e.g. special clothing) that is necessary to carry out work, and to cover employer-provided benefits such as food and accommodation (Report 2023). Varying the minimum wages by region is another example of a practice that may be challenged and should be examined in view of proportionality. On the other hand, deductions of taxes and social security contributions are generally considered to be objective (Report 2023).

As far as protective measures are concerned, they should primarily be assessed in terms of their effectiveness. Elements that serve to increase the effectiveness of protection include effective, proportionate, and non-discriminatory checks and inspections by authorised bodies, including in particular labour inspectors, as well as encouraging good functioning of the inspection authorities by providing them with training and guidelines on how to approach non-compliant employers.[9] When assessing effectiveness, factors such as the number of inspectors carrying out inspections or the extent of resources allocated to carrying out the inspections should be taken into account. A balance needs to be found so that the processes are, on the one hand, effective but, on the other hand, not excessive compared to the existing needs. Inspections should not cause undue hardship for the businesses where they are carried out (Report 2023). Where necessary, Member States should enact appropriate new laws, e.g. to allow workers effective access to legal protection (Report 2023).

Under the Polish law, there is no variation of minimum wage rates. The Court's single source case law (judgement of the Court of Justice of the European Union 2021–06–03, C 624/19, K and Others vs. Tesco Stores Ltd, ECLI:EU:C:2021:429) and the Directive itself are rather arguments against adopting such a mechanism, in particular against the regionalisation of minimum wage. Minimum wages are protected against deductions, with exceptions justified by the interests of third parties, including persons towards whom the affected workers have maintenance obligations, and towards creditors. However, the standard of the protection of minimum wage-related rights varies between workers, depending on the legal basis on which they carry out work. For workers with no employment relationship that protection is less effective due to the scope of powers of the State Labour Inspectorate and differences in rules for court proceedings. It may lead to incomplete implementation of the Directive. This is a good example of the consequences of limited access to full employment status.

[9] Measures potentially include inspections (both with and without prior notification), administrative and judicial procedures, as well as penalties to deter employers from violations.

5. THE PARTICIPATION OF THE SOCIAL PARTNERS IN SETTING AND PROTECTING MINIMUM WAGES

An important part of ensuring that statutory minimum wages are adequate, fair, and certain is involving the social partners in the relevant processes to an appropriate degree. This is something to take into account in parallel to the promotion of collective bargaining on wage-setting. Member States should ensure that the social partners are involved in setting and updating the minimum wage, in selecting the applicable reference values, and in deciding on the acceptable scope of variations and deductions. This, however, does not imply a requirement to obtain formal authorisation or acceptance of the social partners for the proposed variation or deduction schemes (Report 2023). The participation of the social partners should be meaningful, which requires providing them with complete information and offering them prompt and substantiated answers when they come forward with questions or suggestions. The social partners should also be represented in the consultative body that advises the competent authorities on minimum wages, as well as in the process of collection and review of data related to minimum wages; yet, this imposes on obligation on the social partners to collect such data or to take part in the conceptual work on the matter. The participation of the social partners should be ensured with full respect for collective autonomy (Report 2023). Member States are not to be held accountable for the results of whatever actions they take to promote collective bargaining on wage-setting, including in particular for any absence of the involvement of the social partners which occurs as a result of social partners' own decisions to act or not to act (Report 2023).

As matters stand currently, the Polish law already ensures significant participation of the social partners, represented by the Social Dialogue Council, in setting and updating minimum wages. The absence of an agreement – which, after many years of unsuccessful negotiations, was only reached in 2023 – can be seen as an example of a situation in which the social partners themselves chose not make use of the legal mechanism created for them. However, there is a need to ensure that the social partners are included in the potential new consultative body, if established.

6. THE PROMOTION OF COLLECTIVE BARGAINING ON WAGE-SETTING

The decrease in the coverage of workers by collective bargaining agreements, which have traditionally served to unify and improve terms and conditions of employment, is considered to be one of the reasons for the overall situation getting worse. The decline in collective bargaining coverage is a consequence of both the long-term tendency towards decentralisation that emerged in the late

1970s and early 1980s, and of the measures taken by international institutions and the European Union in response to the global economic crisis, with a view to increasing the competitiveness of businesses. In some cases, this has served to weaken or undercut the collective bargaining model (e.g. Laulom 2018). The adverse impact of decentralisation on the situation of workers is now being recognised (Visentini 2021), and efforts are made to return to collective bargaining, which is viewed as an effective instrument for improving the working and living conditions of workers created by autonomous and legitimate partners (e.g. ILO 2022, 33–34).

While the Directive itself only references collective bargaining on wage-setting, its impacts will indirectly echo across the entire system of collective relations. Primary significance is given in the Directive to sector and cross-industry bargaining, the development of which offers the greatest potential for increasing the scope of social dialogue (Article 4(1) of the Directive) while at the same time contributing to wage progression and convergence. This effort to promote sector and cross-industry bargaining can be viewed as breaking off (in legal but also symbolic terms) with the strategy of decentralisation, and as an attempt to return to the traditional and somehow unique European social model (Vaughan-Whitehead 2015, 9) – and possibly to extend it to the countries that have only joined the European Union in recent decades. The institution of collective bargaining is to be promoted while respecting the autonomy of the social partners; the Directive is also careful not to interfere with the design of national collective bargaining models. In particular, there is no requirement for Member States to recognise collective agreements as universally applicable (in the sense of being effective *erga omnes* for either workers or employers).

If this should prove necessary at the national level, due to, e.g., insufficient collective bargaining coverage, appropriate measures should be taken, including: a) strengthening the capacity of the social partners to engage in collective bargaining on wage-setting at the sector or cross-industry level; b) encouraging the social partners to engage in constructive, substantive, and informed collective bargaining on wage-setting; c) ensuring effective protection against discrimination and interference among the social partners. Supporting the capacity of the social partners may be achieved by financial or non-financial means, and may not necessitate any regulatory changes (Report 2023). However, as far as the realm of regulation is concerned, eliminating obstacles to access to collective bargaining (e.g. unjustified restrictions on bargaining capacity) may be a relevant factor. Similarly, regulations can facilitate social partners' access to the information and data needed to engage in bargaining; this should include the International Labour Organisations's standards (hereafter: ILO), Eurostat publications, and Council recommendations.[10] Regulations may also create an obligation to engage

[10] A good example is data on productivity by sector, which is important for wage-setting.

in bargaining at certain levels and in certain areas, and offer avenues for extending the effectiveness of the collective agreements that are already in place, for instance by means of generalisation mechanisms. Public procurement procedures may also potentially serve to promote collective bargaining on wage-setting, where factors in awarding the contracts may include compliance with obligations related to wage-setting and to the exercise of collective freedoms (Article 9 of the Directive) while respecting the principle of equal treatment of all actors, including small and medium-sized enterprises (Report 2023). The Directive may be interpreted to the effect that it is discriminatory to create unjustified exclusions from the scope of the coverage of collective bargaining on wage-setting, e.g. in the public sector (Report 2023). The restriction of the right to collective bargaining of all civil servants, regardless of the nature of the tasks they perform, can be classified in this way, especially in the context of international standards (Article 4 of the ILO's Convention No. 98). The fact that members of the Polish civil service corps have no right to take part in collective bargaining is an example of this issue (Article 239 of the Polish Labour Code).

7. NATIONAL ACTION PLANS AS A RESPONSE TO INSUFFICIENT COVERAGE OF COLLECTIVE BARGAINING

The Directive articulates additional requirements for the Member States where the collective bargaining coverage rate is below the 80% threshold, calculated as the ratio between the number of workers covered by collective agreements and the number of workers who, in accordance with national law and practice, might potentially be covered by such agreements (Article 4 of the Directive). Member States that do not meet the 80% threshold – which, at present, is the majority (Eurofound 2022) – should adopt collective bargaining action plans. The plans should set out clear timetables and specific measures to be taken in order to progressively increase the rate of collective bargaining coverage. The plans should be implemented after consulting the social partners, or by agreement with them, or, following a joint request by the social partners, as agreed between them. The plan and the measures outlined therein should be articulated with full respect for the autonomy of the social partners. The plans should be reviewed regularly (every five years at a minimum), and updated as needed. In the many Member States where coverage is at present much below the threshold set out in the Directive, it will be difficult – if not outright impossible in the short term – to achieve this near-universal rate of collective agreement coverage. This is very much the case in Poland, where the collective bargaining coverage rates rank among the lowest in the European Union, standing at no more than 20%. In addition, the current scope of coverage results almost exclusively from agreements made at the workplace or enterprise level. The sector and cross-industry collective

agreements that are referenced by the Directive (and that have the greatest potential to perceptibly boost the rate of coverage) are almost non-existent.[11]

Almost certainly, the first report on the scope of collective bargaining in Poland (to be submitted by the end of 2025) will serve as grounds to require the implementation of the action plan. The strategies and attitudes of the social partners to date suggest that a fundamental overhaul of the collective bargaining system – for instance one rooted in the idea of giving universal applicability to collective agreements made at any level above workplace level – is not a real possibility. Therefore, the legislator will be forced to seek out other ways to encourage, facilitate, and support collective bargaining. The primary objective will be to eliminate regulations that restrict or impede collective bargaining. A draft bill on collective bargaining and other collective agreements, submitted in May 2023 for pre-consultation with the social partners, includes the following proposals: time limits on collective agreements (making them last for a period of no more than five years); option to engage in bargaining above the workplace level with a group of employers; duty for larger employers currently not covered by the collective agreements to engage in workplace-level bargaining on an annual basis; and the elimination of the registration procedure (in favour of a notification requirement). This should include, additionally, the removal of legal barriers to collective bargaining in the public sector.

The action plans are to be updated by Member States after consulting the social partners, or by agreement with them, or, following a joint request by the social partners, as agreed between them. The action plans and any updates to these plans should be made public and notified to the European Commission. However, the obligation to put an action plan in place is not equivalent to an obligation to achieve a certain rate of coverage; Member States are required to strive to increase that rate, but are not obliged to achieve the 80% threshold specified in the Directive.

[11] The extent of coverage by workplace-level agreements can be estimated to be at around 12% (according to State Labour Inspectorate's data as of 23rd January, 2023, the number is 1,648,245 workers). Enterprise-level collective agreements cover about 1–2% of the workforce (according to data from the Ministry of Labour and Social Policy, the number of workers covered by these agreements was below 200,000 in 2022). The rate of coverage would increase somewhat if other collective agreements (both those based on the statutes and those made within the framework of the general freedom of association, i.e. the so-called unnamed agreements) were included. At the same time, it is important to bear in mind that there is a potential overlap between the scopes of the agreements due to the fact that the same groups of workers may be covered at the same time by workplace-level and enterprise-level agreements as well as other collective agreements. As a result, it would be difficult to argue that the total collective bargaining coverage could potentially be any greater than 20%.

8. FINAL COMMENTS

The Directive is one of the most important, but also most controversial, elements of the new European social policy. The potential impact of the Directive on national systems is much greater than merely the specific changes it sets out. A genuine pursuit of the aim laid out in the Directive, including adequate and fair statutory minimum wages and a significant increase in the coverage of collective bargaining on wage-setting, may imply a shift towards greater unification of the socioeconomic models in the Member States, as determined by the manner of income distribution triggered by the new approach to the calculation of minimum wages. Such far-reaching effects may fail to materialise (at least in the short term) due to the legal nature of the Directive, which focuses on procedural aspects and, at the same time, lays down only the obligation to take certain actions rather than to achieve certain results. However, Member States will undoubtedly need to carry out comprehensive reviews of their regulatory frameworks pertaining to minimum wages, adopt the necessary changes, and – in many cases – take measures to promote collective bargaining on wage-setting, including plans to improve the current situation.

As for Poland, in connection with the implementation of the Directive it will face at least three challenges of a systemic nature (alongside a host of smaller challenges). The first big challenge is the selection of reference values. It will set the course for the future trajectory of the growth rate of minimum wages, and, as a result, will directly impact the income distribution across the society. The second challenge pertains to the breakdown of social dialogue. Measures will have to be taken to promote collective bargaining, including a plan for wide-spread, systematic support for the relevant mechanisms. The actions of the authorities to date, and the attitudes and capacities of the social partners, suggest that the legislator is unlikely to propose profound reforms that would *de facto* change the systemic position of collective bargaining on wage-setting, making it the primary regulatory mechanism in that area. Rather, limited changes are to be expected, which may have the effect of strengthening collective relations somewhat, but without a major breakthrough. At the very minimum, change must include the elimination or modification of laws that restrict or impede collective bargaining. The third challenge, the scope of which goes beyond the framework of any single directive, is the nexus of problems around the determination of who is eligible for protection as a worker, how the abuse of the relevant provisions can be eliminated, and in what manner the adequate legal status should be assigned to different categories of workers.

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