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The EU Minimum Wage Directive: A Missed Opportunity? – by Zoe Adams

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In the coming months, member states will be making important decisions about how to recover from the social and economic harms brought about by the coronavirus pandemic. It is hoped that, in so doing, they will be keen not to reproduce the mistakes of the past. Decreasing wages, decentralising collective bargaining, and prioritising profits over living standards and working conditions – the strategy followed in response to the 2008 financial

crisis – cannot be repeated. For the last six months or more, most workers throughout the EU have been receiving from their employers a guaranteed income of sorts – irrespective of the amount of work performed – with most states subsidising employers with a view to encouraging them to retain staff and continue to pay their wages. This experience should act as a reminder to member states, and citizens, that prioritising living conditions and social needs *over* profitability is a political decision that it is well within member states' power to make, one which they can continue to make, in the difficult times to come.

It will be all too easy to forget this experience, however, and this is why the EU need to take decisive action now to demonstrate that, this time, it is not going to be a driver of social regression, to signal to member states a socially progressive route out of what will inevitably be a social and economic crisis. In this respect, the EU's Draft Minimum Wage Directive – representing, potentially, the first EU-level action on the question of wage-setting – represents an important opportunity for the EU to signal to member states the potential role that comprehensive systems of minimum wage regulation and collective bargaining, can make to their recovery from the pandemic.

The EU's Minimum Wage Directive, currently in draft form, was already on the agenda before the pandemic hit. It follows the commitment by President of the Commission, Ursula von der Leyen to "propose a legal instrument to ensure that every worker in our Union has a fair minimum wage" within the first 100 days of her mandate, and forms part of a much wider attempt by the EU to facilitate an upward convergence in living and working conditions across the Union more generally. Imposing on member states an obligation to provide minimum wage setting mechanisms capable of securing adequate wages to all workers – whether by statutory minimum wages and/or collective bargaining – the draft Directive seeks to ensure that workers enjoy a decent standard of living irrespective of where they work, while, at the same time, promoting fair competition, avoiding social dumping, ending in-work poverty, and potentially, facilitating action to narrow the gender wage gap.

As other commentators have rightly noted (see e.g. here) the draft Directive indicates a serious commitment by the EU to promoting competition based on quality and productivity, rather than on the basis of costs, and to creating an internal market in which everyone is able to benefit from the fruits of economic progress and further integration. Importantly, and taking into account concerns expressed during the consultations, the draft Directive is also sensitive to national industrial relations traditions, and is not prescriptive when it comes to the way – collective bargaining and/or statute – in which "adequate" wages are achieved. This is important for taking into account the quite different systems of labour market regulation that operate in different countries, and the different mechanisms by which similar outcomes are achieved in different states. At the same time, however, and importantly, by requiring Member States to promote collective bargaining on wage-setting (article 4), the draft Directive clearly recognises the benefits of having wage-

agreements tailored to the needs, and conditions, of particular sectors and occupations – and the role of trade unions and the social partners in levelling up working conditions across the Union today.

After more than a decade of austerity and cuts affecting wages in the EU, it is certainly welcome to see an attempt by the Commission to ensure that all workers receive decent wages. So too is it reassuring to see the renewed emphasis placed on collective bargaining. While the draft Directive is clearly intended to target certain serious, practical problems that have emerged throughout the course of integration, particularly since the admission of the "new" member states – namely unfair competition and social dumping – the draft Directive is explicit that its overriding objective is to ensure that workers actually receive an "adequate wage", a wage sufficient to secure themselves a decent standard of living. In this way, it seems to go some way towards recognising and reinforcing the implicit commitment made by member states during the pandemic to ensure that the living costs and needs of the working population are made a priority, *irrespective* of the short-term challenges facing workers and employers in terms of employment prospects and profitability.

Unfortunately, when attention is shifted to the conceptual structure and substantive content of the draft Directive, however, there are reasons for concern. The Directive, as drafted, is hampered by inconsistencies, conceptual confusion, and a lack of ambition. In this entry, I will focus on two specific issues: first, the definition and implicit conception of minimum wages that the draft Directive adopts, and its resulting failure to decouple the wage from the amount of work performed; and second, its failure to link the concept of adequacy to an analysis of worker need and costs of living.

The Draft Directive in Depth

The central component of the draft Directive is the duty it imposes on member states to secure adequate wages to all workers working in the member state, whether by collective agreement or statutory minimum wages. In order to ensure "adequacy", it requires states to produce national criteria for minimum wage setting and updating that includes at least the purchasing power of minimum wages, the general level of gross wages and their distribution, the growth rate of gross wages, and labour productivity developments, defined in accordance with national practices. In turn, member states are to use indicative reference values (such as the internationally recognised Kaitz index) to guide the assessment of adequacy, and to ensure regular and timely updates (Article 5). In practice, this is likely to involve linking adequacy to a given percentage of median or average wages.

On the surface, there seems little particularly problematic about the above. Minimum wage mechanisms, of some form, exist in all states, and the above approach to adequacy – tying the minimum wage to a given percentage of

median wages – is a common strategy employed by many. There are, however, two particular reasons for concern: first, despite aspiring to a notion of adequacy that ensures that workers enjoy decent living standards, the mechanisms the draft Directive proposes for ensuring adequacy make adequacy a function of the relationship between the lowest wage and the wages of others, rather than costs of living. Second, and again, despite aspiring to a system of minimum wage regulation that ensures decent living standards, the draft Directive at Article 3(1) defines the minimum wage as "the minimum remuneration that an employer is required to pay to workers for the work performed during a given period, calculated on the basis of time or output". In so doing, it makes the minimum wage, and thus, potentially, "decency", a function of the amount of work performed, and therefore, the amount of work to which the individual has access. In effect, it transposes what aspired to be a mechanism for guaranteeing workers an adequate minimum income from their employers, into a mechanism which, in practice, simply seeks to regulate the price at which a particular commodity is sold.

Thinking about the function of Minimum Wages

As I have argued elsewhere (in this book and this article), English law has long drawn a distinction between the concepts of "remuneration" and that of the "wage", distinguishing the latter, as a payment *for work*, from the former, as that which the employee is entitled to receive in connection with his / her employment. This effectively allowed for a distinction to be drawn between payments made for a commodity, and thus, a price which is paid in proportion with the amount of work provided, and payments made in exchange for the benefit, to the employer, of employing a worker – where employment was seen as a legal institution that was profoundly shaped by the wider legal, and social, framework through which work is provided. The concept of remuneration thus decoupled the right to, and scope of, payment, from the amount of work performed, regulating the exchange of a commodity, – work for "wages" – but doing so by partially de-commodifying it in the process.

It was this concept of remuneration that was central to the Wages Councils system introduced after the second world war. While, today, in the context of England's National Minimum Wage framework, the scope of the worker's minimum wage entitlements depends on the amount of work performed, with wages defined in terms of what employer must pay for a given quantum of work, the Wages Councils Act regulated the workers' remuneration, and focused more on what the worker actually received from his employer in practice. To this end, it allowed for the setting up of Wages Councils with a view to providing for "reasonable remuneration," where remuneration was defined as "the amount obtained or to be obtained in cash by the worker from his employer … in connection with his employment" (section 13).

In contrast with the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015 (as amended), which focus on what the employer must pay for work, then, the earlier concept of remuneration focused on what workers must *receive* in connection with their employment. The choice of the concept of remuneration was, moreover, a deliberate policy decision that sought to legally guarantee a "reasonable" income to all workers, regardless of fluctuations in the amount of work available for them to perform. This formed part of a broader commitment, by the UK Government, to ensure that a right to be paid "wages" for work actually translated into a right to be provided with an income sufficient to sustain a decent standard of living in practice.

Now, the distinction between a system that provides a guaranteed weekly or monthly income, independently from the amount of work performed, and one which simply provides for a minimum rate to be paid for work, may be relatively insignificant in a context of full employment, where full-time, regular work for a single employer is the norm. In this context, setting a minimum rate for the amount of work provided is not much different from providing a right to a guaranteed weekly income, or remuneration. But in a context in which workers routinely work on zero hours or fixed term contracts; have working schedules that are so variable and unpredictable that they are unable to take on multiple jobs and/or balance their work with caring obligations; move from job to job at regular intervals with no guarantee of stable employment, a right to 'adequate' wages for work actually provided is simply not sufficient – particularly in current circumstances. Either the right to be paid must be decoupled from the quantum of work actually performed and tied instead to the existence of ongoing employment; and/or parallel mechanisms must be introduced alongside the minimum wage, such as a restriction on the use of zero hours and/or temporary contracts, so as to ensure that workers are not only paid an adequate rate in exchange for work, but are *also* guaranteed access to sufficient work from which to earn an adequate income in practice.

To return to the draft Minimum Wage Directive, then, the issue is that, while it promotes a conception of minimum wages as something that can help ensure that living costs are met and decent living standards upheld – guaranteeing all workers a "*fair remuneration sufficient for a decent standard of living for themselves and their families*" (Recital 21) – its substantive provisions give form to a model of minimum wage regulation which, instead, is about regulating competition – setting the minimum price of a commodity.

But minimum wage regulation cannot concern itself exclusively with regulating competition – however desirable it may be to promote "fair" competition on the basis of quality rather than price. Minimum wage regulation, as with all forms of labour market regulation, are market constituting, and so, express a political decision to determine the terms or conditions on which firms and organisations are allowed to access labour power in the market. The "problem" to which minimum wage mechanisms respond is not simply the problem that firms often exploit market

imperfections with a view to paying below the "natural" wage rate, distorting competition; rather, the problem is that "free competition" itself tends to encourage firms to pay insufficient wages because there is simply no way to ensure that the actual needs of workers are taken into consideration when decisions in the labour market are made.

The pressures of competition force firms, and workers, to make decisions about work, and wages, based on short term considerations about immediate financial need, rather than long-term considerations about sustainability and living standards. Firms will naturally offer to pay the lowest wage they can get away with given prevailing conditions in order to avoid financial death; and workers will naturally accept whatever wage is on offer, when the alternative is no income at all. The only way to ensure the receipt by workers of wages that are sustainable, and which actually provide for decent living standards in practice, then, is to make the receipt of those wages by workers a condition precedent for allowing workers, *and* firms, to compete in the labour market. Making it, in other words, a policy-priority from which all other policy decisions must stem. While there is no "right" or "optimum" way to achieve this end – whether through a combination of minimum wages for work combined with full employment and guaranteed weekly hours; or through a right to be paid a minimum income by employers that is decoupled from an assessment of the quantum of work performed – securing this end is not only a matter of political *preference*, but a social and economic *necessity.* It is exactly this *necessity* which member states were forced to recognise and embrace throughout the past six months or so of "lockdown".

Of course, the social function of any minimum wage setting mechanism depends not only on the conceptual structure and architecture of those mechanisms, or even on the "rate" that is set; it depends, crucially, on the wider policy – and thus labour law – environment in which it operates. That is, on the social and legal framework through which the national and EU wide labour market is itself constructed. What this means is that, if the EU is really committed to ensuring the payment of adequate wages that *actually* guarantees a decent standard of living to workers in practice, minimum wage mechanisms must either decouple the right to be paid from the amount of work provided, linked instead, for example, to the existence of an employment relationship, *or* this mechanism *must* be expressly embedded in a framework in which providing *adequate work* to all is *also* made a priority. But the draft Directive fails to signal to Member States that such a choice must be made. Other EU policies, such as the new Directive concerning the rights of gig-workers, The Transparent and Predictable Working Conditions Directive, go *some* way towards this end, in the sense that they seek to provide greater regularity and predictability to some of those whose working arrangements have proven most contingent and variable. However, all these mechanisms stop far short of providing all workers with a legal right to be provided with a guaranteed minimum amount of work per week, or month, as a mechanism of securing them a guaranteed minimum income. Given that member states all have different rules concerning the legal permissibility of zero hours contracts, moreover, the extent to which "adequate" minimum wages can actually

translate into "decent living standards" today, given the definition of minimum wages adopted, will not only be highly uncertain, it will be highly variable across Member States as well.

Moving Forward

Fortunately, there are a number of things that the EU can, and ought to, do, to better shape member states' approaches to wage-regulation as they forge their paths to recovery.

First, the EU needs to signal to Member States a particular understanding of the nature and purpose of wage regulation that encourages them to look past a notion of the wage that links it with the quantum of work provided, encouraging them to see minimum wage mechanisms as being about ensuring that workers actually *receive* an "adequate income", an income sufficient to maintain themselves, and their families, in decent conditions, however uncertain employment conditions, and however irregular, and intermittent, their access to work. The European Pillar of Social rights already takes the lead on this point, defining adequate minimum wages as requiring "the satisfaction of workers and his/her family". To do this, definitions of wages, and minimum wages, need to be decoupled from assessments about the quantity of work performed, linked instead to the existence and continuation of a particular working relationship.

Second, and relatedly, the EU needs to actively support and promote a conception of the wage that is independent from "economic forces", a conception that recognises the inherently political, and constructed, nature of wages, and the capacity for the law, and society, to shape how those economic forces actually play out in practice. This means ensuring that the setting of minimum wages is presented as the starting point from which all other legal and economic decisions are made, rather than something that 'responds' to apparently 'inevitable' economic constraints.

Third, the EU needs to facilitate a political agreement about the meaning of decency that is acceptable to all. Rather than allowing national conditions to determine the limits of fairness, defining "adequacy" relative to a nation's wage structure, the EU needs to forge a political agreement, with the full participation of stakeholders, about the sort of basket of goods and services that a worker in the EU should be able to purchase with his / her weekly "wages", as well as appropriate mechanisms for updating and revising that agreement over time. Guaranteeing the receipt, by workers, of weekly income sufficient to purchase these goods and services would then become the task for each member state to secure, using whatever policy mechanisms are appropriate in the context of their national labour regulation and industrial relations systems.

Finally, and to assist member states in realising this goal, the EU needs to continue to facilitate awareness, among States, as to the different conceptions of the "wage" which national institutions and frameworks embody. At present, much work is already being done to provide information to member states about the wage-setting mechanisms in place in different systems: on the different ways in which the rate is set; and the different definitions of wages used. But what does not exist at present is an attempt to explore the underlying conceptions of the minimum wages' social *function,* and the different ways in which the scope of the right to be paid can be determined. Not all member states will be so receptive to the idea that minimum wages might be linked with time in employment, rather than with the quantity of work provided; and yet, in some States, this idea already holds strong. Raising awareness about competing understandings of the function of minimum ages will be important if attempts to implement "adequate minimum wages" in different states are actually to translate in practice into a situation in which workers throughout the EU actually receive an adequate income, conducive to decent living standards.

Conclusion

The pandemic could well be a turning point in the EU's approach to social and economic policy, providing an historical opportunity for changing the way in which the nature, and purpose, of the internal market and the Union more generally is conceived. It provides an unprecedented chance for increasing the power of trade unions and embracing their role in wage-setting, and for levelling up the living and working conditions of workers in all states. But taking advantage of this opportunity will require clearer, and more decisive, action, than is implied by the EU's proposed Directive on Minimum Wages as presently conceived. The EU thus needs now to build on the positive aspects of the draft Directive – its goals, it sensitivity to national conditions, its encouragement of collective bargaining, and its attempt to improve enforcement mechanisms. It should use this as a starting point from which to realise the important goals or purposes to which the draft Directive itself is committed: levelling up working and living conditions, and ensuring workers throughout the union actually enjoy a "wage" that provides them with decent standards of living in practice, and that they continue to do so in the difficult months, and years, to come.

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