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Why the Directive on Adequate Minimum Wages does fit within EU competence

A response to the Advocate General's opinion

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Key points

- The decision of the Court of Justice of the European Union (CJEU) on the case for the annulment of Directive (EU) 2022/2041 on Adequate Minimum Wages, filed by Denmark and later joined by Sweden, is expected during May 2025. In the meantime, the Advocate General has issued an opinion concluding that the Directive should be annulled due to its incompatibility with Article 153(5) of the Treaty on the Functioning of the European Union (TFEU), specifically regarding the exclusion of competence over 'pay'.
- The Advocate General's opinion is primarily based on a rather literal reading of the Directive's text and Article 153 TFEU: such a restrictive reading does not align with the objectives pursued by the Directive within the framework of the Union's social policy goals. Had these objectives been properly considered, the Advocate General would have recognised that the Directive does not interfere with the scope of the pay exclusion. This is even more so in the light of the CJEU's own case law.
- The additional arguments put forward in the Danish case – claiming incompatibility with the further exclusion of competence regarding the right of association and arguing that the Directive should not have been adopted on the basis of Article 153(1)(b) – are also deemed unfounded. This has been acknowledged by the Advocate General.
- Should the Court uphold Denmark's case and the Advocate General's opinion, this decision would not only mark a break from the Court's previous stance but could also have repercussions on the future of the EU social policy agenda.

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Introduction

Directive (EU) 2022/2041 on Adequate Minimum Wages in the European Union (AMWD) has been fiercely criticised by a minority of Member States, especially Nordic countries, since the Commission's proposal was first made. Not surprisingly, on 18 January 2023, the Danish government brought an action for annulment (Case C-19/23), later supported by the Swedish government.

The case is mainly based on the argument that the Directive interferes directly with the determination of pay levels in Member States and that it concerns the right of association. The latter is excluded from the EU's competence under Article 153(5) TFEU and thus the argument is that it infringes the principle of the conferral of powers (as established in Article 5(2) TEU). The case also argues that the Directive could not validly have been adopted on the basis of Article 153(1)(b) TFEU which recognises the Union's competence in matters of working conditions. That is because, according to the Danish government, the Directive simultaneously pursues the important objective set out in Article 153(1)(f) TFEU concerning the 'representation and collective defence of the interests of workers and employers'; this requires the use of a special legislative procedure where the Council acts unanimously. Alternatively, Article 4(1)(d) and Article 4(2) AMWD, both provisions dealing with support for collective bargaining on wage-setting, should be annulled as they interfere with wage levels and, in any case, address the right of association.

Pending the Court's decision, on 14 January 2025 Advocate General Emiliou (AG) delivered his opinion, concluding for the annulment of the entire Directive because it constitutes direct interference with the exclusion of 'pay' under Article 153(5) TFEU – or, at least, of Article 4(1)(d) and Article 4(2) AMWD. While non-binding, the opinion remains authoritative.

The aim of this Policy Brief is to analyse the AG's opinion critically, focusing first and foremost on the interpretation of the meaning given to the 'pay' exclusion (which, in the writer's view, is incorrect); second, on the reasoning on social partner autonomy and collective bargaining support; and third, on the objections regarding the allegedly different legal basis that should have underpinned the Directive's adoption.

The compatibility of the Directive with the exclusion of competence related to 'pay'

AG v. CJEU case law

The reasoning that led the AG to identify an incompatibility between the Directive and the exclusion of competence in the area of 'pay' can be summarised in the following statement: a Directive that, from its very title, declares itself to be concerned with wages (para. 74) and whose subject matter is their adequacy (para. 75) undoubtedly aims to regulate 'pay', thereby conflicting with Article 153(5) TFEU. To support this conclusion, the opinion presents arguments

that essentially revolve around a broad interpretation of the 'pay' exclusion, allegedly derived from the case law of the CJEU.

The Court has scrutinised the exclusion of competence on several occasions, most notably as follows. First, *Del Cerro Alonso* (Case C-307/05) and *Impact* (Case C-268/06) both of which had regard to the obligation on Member States to guarantee the application of the principle of non-discrimination, including remuneration, in favour of fixed-term workers under the Framework Agreement on Fixed-Term Work. Second, *Bruno et al.* (joined cases C-395/08 and C-396/08) which concerns the similar principle of non-discrimination provided for by the Framework Agreement on Part-Time Work. And, third, *Specht et al.* (joined cases C-501/12 to C-506/12, C-540/12 and C-541/12) which deals with the general framework for equal treatment in employment and working conditions, including remuneration established by Directive 2000/78/EC.

In all these cases, the Court has maintained a consistent approach, stating that:

- in order not unduly to affect the social policy objectives that fall within the Union's competence, exclusion must be interpreted restrictively and, therefore, it cannot be extended to any question involving any sort of link with pay;
- direct interference in the establishment of pay levels in the Member States is not permitted, as it would conflict with the exclusion. This encompasses the equivalence (uniformisation) of all or some constituent parts of pay, as well as the setting of a minimum guaranteed EU wage;
- however, indirect interference with the determination of pay is possible, since remuneration is nevertheless an essential aspect of working conditions.

Having briefly clarified the Court's interpretative approach, the fallacy in the AG's reasoning becomes evident. While the AG formally acknowledges the principle of a strict interpretation of the competence exclusion on 'pay' established by the Court, he ultimately nullifies it by introducing a counter-principle, asserting that the interpretation of exclusion from competences must not be so strict as to deprive them of their effectiveness (paras. 55 and 65).

To substantiate the exclusion, the AG then proceeds to offer his own interpretation of the Treaty's provision. More specifically, from the observation that Article 153(5) TFEU, even in its original formulation – namely, Article 137(6) TEC – has always expressly referred to 'pay' rather than 'pay levels', the AG infers that 'the drafters of the Union Treaties intended to exclude from the scope of Union action measures that include the harmonisation of wage levels, but which are not limited to that' (para. 51). Instead, they allegedly 'intended to cover all aspects of the Member States' wage-setting systems (including the modalities or procedures for fixing the level of pay)' (para. 54). This is an interpretation which, according to a scholarly reconstruction of the *travaux préparatoires* of the Maastricht Treaty (Kilpatrick and Steiert 2025), does not find any confirmation.

The AG supports this assumption with a parallel (and rather literal) interpretation of the Court's rulings, emphasising what, in reality, the Court has not stated. More precisely, in considering the *Impact case*, the AG claims that the Court's use of the preposition 'such as', preceding the list of actions that

EU legislators cannot undertake due to the competence exclusion ('such as the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States […]'), supposedly demonstrates that the Court 'did not rule out the possibility of direct interference with pay even when the contested measure does not, in itself, aim to harmonise the "level of pay"' (para. 53). With this conclusion the AG is endorsing the very interpretation of the exclusion on pay that the Court had expressly rejected: he is extending its scope to any question involving any sort of link with 'pay' (thus depriving Article 153(1) TFEU of much of its substance). The contradiction between the AG's opinion and CJEU case law becomes even more evident when the former states that 'it is clear that, by adopting Article 153(5) TFEU, the drafters of the Treaties have essentially sought to carve out an exclusion ('pay') from a field ('working conditions'), covered in Article 153(1)(b) TFEU' and that therefore 'there is no EU competence whatsoever for the matters covered by Article 153(5) TFEU' (para. 65).

If this interpretation were correct, then even the instruments considered in the aforementioned Court decisions – confirming the application of the principle of non-discrimination to pay, among others – would be incompatible with the competence exclusion in Article 153(5) TFEU. In this respect, the distinction proposed by the AG between instruments that (supposedly) directly regulate wages, such as the AMWD, and instruments that – while affecting wages, actually pursue another objective (para. 61) – appears entirely artificial. The reasoning followed by the Court in its precedents on the 'pay' exclusion is evidently different: the CJEU gives relevance only to the effect of the legal provisions in terms of direct (not permitted) or indirect (permitted) interference in the level of pay.

The 'pay' exclusion and procedures for setting adequate minimum wages

Keeping in mind the distinction made by the CJEU between direct and indirect interference with the level of 'pay', no provision of the AMWD appears to constitute direct interference. In more detail, Article 5(1) AMWD merely requires Member States to establish the necessary procedures for setting and updating minimum wages based on stable and clear criteria. These must include at least the four criteria indicated in Article 5(2): (a) the purchasing power of statutory minimum wages, considering the cost of living; (b) the general level of wages and their distribution; (c) the rate of wage growth; and (d) national long-term levels and trends in productivity. Not only the relative weight of these criteria is freely decided by Member States, as suggested by Article 5(1) AMWD, but so also is their 'internal composition'; that is, the composition of the basket of goods determining the cost of living and the period to consider in respect of the rate of wage growth (Sagan and Schmidt 2024). Moreover, Member States could lawfully decide to add other criteria to the mandatory ones listed in Article 5(2) AMWD that typically lead to wage moderation, such as the effect of minimum wages on employment and enterprises' costs and competitiveness.

The opinion of the AG is therefore not convincing when it identifies in the provisions of the AMWD a target of adequacy imposed on Member States (paras.

81 and 82). Such a target can be inferred neither from Article 5 AMWD nor from reference to the concept of 'dignity' provided for by Article 31 of the Charter of Fundamental Rights of the European Union (CFREU), recalled by Recital 3 of the AMWD. On the contrary, the concepts of 'adequacy' and 'dignity' do not materialise into binding indicators for Member States. This certainly does not happen in the aforementioned paragraphs 1 and 2 of Article 5 AMWD, nor in the obligation for Member States to adopt, under Article 5(4) AMWD, indicative reference values to guide their assessment of the adequacy of statutory minimum wages. First, Member States freely choose which values to use, as the provision allows for the exclusive use of 'indicative reference values used at national level'. Second, and more importantly, the assessment is carried out and managed by Member States themselves, retaining full discretion in determining the significance of these values.

As for Article 5(3) AMWD, it is certainly true, as the AG claims (para. 85), that if an indexation mechanism led to a decrease in statutory minimum wages, this would constitute an infringement of the Directive. But, again, no direct interference with the level of wages is provided by this provision. Rather, the provision confirms that statutory minimum wages may decrease as a result of the wage-setting mechanisms introduced by Member States, provided that the decrease does not result from the application of indexation. Moreover, Member States may decide not to introduce an indexation mechanism and thus free themselves from any constraint.

The 'pay' exclusion and the promotion of collective bargaining on wage-setting

Even less relevant to the alleged intent of the EU legislator to regulate wages is Article 4 AMWD which aims to promote collective bargaining on wage-setting. The AG argues (para. 91) that, by pursuing this objective, the legislator is limiting 'the choice, by Member States, of the method of wage determination they may use'. If this were true, then – considering that wages are typically a matter for collective bargaining – it would mean that the EU is precluded from supporting the right to collective bargaining.

It should not be forgotten that respecting the role of the social partners in regulating working conditions, including wages, through collective bargaining has both a negative and a positive meaning (ETUC 2025): first, non-interference with their freedom to negotiate, as explicitly stated in Article 1(2) AMWD and not contradicted by any other provision of the Directive; and, second, promoting social partners' autonomy and their bargaining activity by setting up a favourable environment, which is precisely the purpose of the measures in Article 4(1) AMWD. Positive promotion of social partner autonomy, which is widely referenced in the Union's primary law (i.e. Articles 151-156 TFEU; Article 28 CFREU) and in international labour law instruments, contributes to and is instrumental in achieving the EU's social policy objectives, primarily the improvement of working conditions.

It follows that the AG's objection to Article 4(2) AMWD (para. 93) is even more incomprehensible. The provision mandates that Member States with a collective

bargaining coverage rate below 80% establish a framework to promote collective bargaining on wage setting. According to the AG, this imposes state intervention in the organisation of wages. Far from constituting any direct interference with 'pay', however, this provision merely promotes collective bargaining to the purpose of improving working conditions. Respect for the autonomy of the social partners is reinforced by Article 17(3) AMWD which allows them, upon their joint request, to develop a national action plan for supporting collective bargaining (Müller and Schulten 2025).

It thus appears clear that an action plan, as well as the promotional framework to be established according to Article 4(1) AMWD, does not regulate wage-setting mechanisms. Instead, it aims to strengthen social partner autonomy by promoting collective wage bargaining in line with the social objectives of the EU. Moreover, the 80% threshold does not constitute an obligation but, as clarified by recital 28, is merely an indicator that triggers the obligation to establish an action plan. This confirms that the Directive seeks to support the expansion of the coverage of collective wage bargaining, but does not impose it (Lo Faro 2024) and, therefore, does not directly affect the method of wage determination.

For this same reason – namely, the absence of interference on national practices of wage setting and in particular on the autonomy of national social partners – the request for partial annulment of the AMWD, namely of Article 4(1)(d) and Article 4(2) AMWD, does not appear well-founded, contrary to the AG's claim (paras. 126-129).

Finally, no conflict is considered to arise with the exclusion of competence on 'pay' even in Article 12 AMWD which guarantees the right to redress. The AG suggests (para. 94) that this provision attempts to give, in connection with Article 47 CFREU, concrete expression to a supposed right to a decent minimum wage derived from Article 31(1) CFREU. Instead, the right to redress arises under Article 12(1) AMWD only 'in the case of infringements of rights relating to statutory minimum wages or relating to minimum wage protection, where such rights are provided for in national law or collective agreements'. Therefore, the right to redress cannot, first of all, be directed at the alleged 'adequacy' of a minimum wage derived from the EU legal framework. Moreover, if a statutory minimum wage or applicable collective agreement is absent in a Member State, workers may not have the right to a minimum wage at all, and Article 12 AMWD cannot resolve this situation (Laulom 2024). Neither can the link with Article 47 CFREU give rise to a right that the Directive simply does not recognise: namely, a right to an adequate minimum wage.

Furthermore, the AG argues that the redress provision could be 'problematic' for Member States such as those requiring the annulment because it seems to privilege individual action 'where stipulations in collective agreements are traditionally and systematically enforced by the social partners (not by individual employees)' (para. 94). Nonetheless, it is to be noted that, following questions at the hearing of 7 September 2024, both Denmark and Sweden confirmed that Article 12 AMWD – in its current text formulation – no longer posed any problem to them. This observation, too, therefore appears to be unfounded.

In conclusion, contrary to the opinion of the AG and the applicant states, the AMWD preserves the full autonomy of Member States freely to determine wage levels. Its objective is not to regulate wages but to support their adequacy by prescribing a certain procedure for setting statutory minimum wages (Brameshuber 2025). Statutory minimum wages are deemed to be 'adequate' under the Directive's obligations if they are set in accordance with the procedural requirements of Article 5 AMWD (Sagan and Schmidt 2024).

The compatibility of the Directive with the competence exclusion relating to the 'right of association'

The AG correctly disagrees (paras. 103-106) with the broad interpretation of the right of association proposed by the Danish and Swedish governments which refers not only to the right of every worker and employer to join an organisation but also to the inseparable right to participate freely in collective bargaining. Bearing in mind that, according to the CJEU, competence exclusions must be interpreted strictly, the reference to the right of association included within Article 153(5) TFEU seems to be related to the right of association in a strict sense and thus excludes any reference to the right to collective bargaining.

To find a definition, we must refer to Article 11 of the 1989 Community Charter of Fundamental Social Rights of Workers (CCFSRW), before the right of association was ultimately removed from the EU's competences by the Agreement on Social Policy annexed to the Maastricht Treaty. Association is defined as the right 'of workers and employers to establish and freely join an organisation for the collective defence of their interests' and must be kept distinct from the right to collective bargaining which is instead recognised by Article 12 CCFSRW. A distinction between the two rights is also confirmed by CFREU (the right of association provided for by Article 12; the right to collective bargaining by Article 28). Whereas the regulation of the right of association is excluded from EU competence, the advance of collective bargaining falls within its full competence (ETUC 2025).

With this essential premise established, the potential points of contact between the Directive and the right of association lie in Article 4 AMWD. However, nothing in this provision touches upon the right of workers and employers freely to establish and join an organisation, as correctly noted by the AG (para. 109). This is certainly not what Article 4(1) aims to do, notwithstanding that letter (d) introduces an obligation for Member States to adopt measures to protect trade union and employer organisations from any act of interference by the opposing party in their establishment, operation or administration. Rather than interfering with that right, it only aims to safeguard it. This is even less the case in respect of Article 4(2), which simply seeks to increase the number of workers protected by collective agreements.

The correct legal basis of the Directive

The AG's conclusions again diverge from the Danish action regarding the allegedly incorrect legal basis on which it was adopted. According to the applicant, the Directive pursues the objective set out in Article 153(1)(f) TFEU

on the 'representation and collective defence of the interests of workers and employers' which requires a special legislative procedure different from that under Article 153(1)(b) TFEU on which the Directive was adopted.

It must first be pointed out that no provision of the Directive seems to regulate forms of collective defence or the representation of interests, including those dedicated to collective bargaining support. Instead, as per the AG's opinion (para. 109), it merely aims to promote them by asking Member States to implement measures, freely identified by them, where these are not already in place. In any case, the CJEU has already clarified that, if an examination of an act shows that it pursues a dual purpose or has two components, and one of them can be identified as a principal or predominant one, the act must be based on a single legal basis, namely the one required by that principal or predominant purpose or component (see for instance Case C-411/06). Regarding AMWD, a predominant legal basis appears to be identifiable as the act pursues a primary and final objective – wage adequacy – alongside one instrumental to this objective and, therefore, accessory to it – the expansion of collective bargaining coverage. The numerous references to collective bargaining included by AMWD should not mislead. The adequacy of minimum wages, and thus 'working conditions', appears to be the centre of gravity of the Directive, with support for representation and collective defence being merely instrumental (Ratti 2024). The chosen legal basis thus seems to be consistent with the Union's objectives.

Conclusions

Based on the overall exposition, it is believed that it will be sufficient for the CJEU to confirm the restrictive approach in interpreting the competence gap under Article 153(5) TFEU in order to overrule the AG's opinion and reject all the claims made in the Danish case. A different conclusion would mark a definitive break with the approach previously expressed by the CJEU itself, which would also have a significantly negative impact on the Union's social policy objectives extending beyond AMWD. In fact, if the Court were to endorse a broader interpretation of the competence exclusion, it would result in a parallel erosion of the Union's competences. This should be kept in mind by the Union's institutions in their future legislative activities whenever they might, even indirectly, collide with the topic of workers' pay. In other words: should the Court uphold Denmark's action and the Advocate General's opinion, this decision would not only mark a breach with the Court's previous stance but could have major repercussions on the development of the future EU social policy agenda.

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