Case no. 19-2878
Our ref. HERO
26 November 2020

Memorandum on the legal basis for the EU directive on minimum wages

The memorandum is prepared by Attorney-at-Law (entitled to appear before the Danish Supreme Court), PhD, Jørgen Rønnow Bruun, on behalf of the Danish Trade Union Confederation (FH).

- The memorandum shows that:

  The legal basis stated in article 153(1)(b) TFEU on working conditions *cannot* include pay, since a distinction is made between pay and working conditions in both the 1989 Community Charter of the Fundamental Social Rights of Workers, a number of EU directives and in ILO conventions. In the Community Charter, ensuring fair remuneration for workers is described in articles 4-6 under "Employment and remuneration", and working conditions are mentioned in articles 7-9 under "Improvement of living and working conditions".

- Articles 151 and 152 TFEU establish that the union and the member states, *"shall take account of the diverse forms of national practices, in particular in the field of contractual relations"* and "*the union recognises and promotes...the diversity of national systems"*. The proposals in the proposed directive are directly contrary to these two articles in the Treaty. This is further substantiated by the fact that the right to form trade unions and to bargain collectively follow from the European Social Charter (art. 6), the Charter on Fundamental Rights of the European Union (art. 28) and a number of ILO conventions (especially no. 87 and no. 98). Hence, this is not a right which is provided by the governments.

- Finally, it is emphasised that, based on the Lisbon Treaty's protocol on the application of the principles of subsidiarity and the annex to the conclusions of the Presidency from the European Council meeting in Edinburgh on 12 December 1992, the proposed directive is not in accordance with the principle of subsidiarity.

The conclusion is therefore that the treaties do not provide for the proposed directive as:

1. The legal basis stated in article 153(1)(b) on *working conditions* cannot include *pay*.
2. The first paragraph of article 151 and the provision in article 152 on taking into account the diversity of national systems have not been observed.
3. The principle of subsidiarity has not been complied with based on the grounds listed.

The memorandum does not deal with the issues touched on in the memorandum of Doctor of Laws, Jens Kristiansen, prepared on behalf of CO-Industri (*the Central Organisation of Industrial Employees*). This memorandum deals with the issues that are not discussed in Jens Kristiansen's memorandum.

Jens Kristiansen reaches the same conclusion regarding the legal basis and the principle of subsidiarity and sets out, among other things, that "*the rules of the proposal interfere with wage setting by aligning wages and wage levels in the member states. The proposal thus applies to "pay" and therefore falls outside the jurisdiction of the EU in accordance with article 153(5) TFEU ".*

Memorandum on the legal basis for the EU directive on minimum wages

Introduction

On 28 October 2020, the European Commission presented its proposal for a directive on adequate minimum wages in the European Union (COM(2020) 628 final.

As can be seen from TEU art. 5, such a proposal must be based on the provisions of the treaties. This basis must be stated in the proposal.

Section 2 of the explanatory memorandum of the proposal states the legal basis relied on. According to this section:

"2. Legal basis, subsidiarity and proportionality

- *Legal basis"*

  The proposed directive is based on article 153(1) (b) of the Treaty on the Functioning of the European Union (TFEU), which prescribes the union to support and complement the activities of member states in the field of working conditions, within the boundaries of the principles of subsidiarity and proportionality (Article 5(3) and 5(4) TEU)*. Since it does not contain measures directly affecting the level of pay, it fully respects the limits imposed to union action by article 153(5) TFEU.*

  Under article 153(2), member states may adopt minimum requirements by the means of directives, while avoiding to impose administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

  It is stated on page 7, paragraph 1 of the proposed directive that:

  "While pay at national level falls unequivocally under the competence of the Member States...".

  Similarly, it is stated in explanatory note no. 16 (page 19) of the proposed directive that:

  "Also, this Directive does not establish the level of pay, which falls within the contractual freedom of the social partners at national level and within the relevant competence of Member States".

I. Pay- and working conditions

1. The legal basis relied on can be seen in art. 153, Title X on Social Policy. This provision must be seen in connection with articles 151 and 152. The provisions state:

*"**Title X. SOCIAL POLICY***

Article 151

(ex Article 136 TEC)

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

Article 152

The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.

Article 153

(ex Article 137 TEC)

1) With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

a) improvement in particular of the working environment to protect workers' health and safety:

b) Working conditions:

…

2) To this end, the European Parliament and the Council:

…

b) in the fields referred to in paragraph 1(a)(i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

5) The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs".

Initially, it is stated that it is article 153(1)(b) on "working conditions" in particular which is considered to be used as legal basis for the proposed directive on pay or wage conditions which are stated as exempt from this article in paragraph 5.

2. It is common, to distinguish between working conditions and wage conditions in the employment relationship context. In other words, these are to different types of conditions in the employment relationship.

   a) The distinction in art. 153(1) and 153(5) between working conditions and pay seem to reflect this distinction.

   b) This is supported by the introductory provision in art. 151, first paragraph on "Objectives for improved living and working conditions". The provision refers to the "*1989 Community Charter of the Fundamental Social Rights of Workers*".

   This refers to a Community Charter which was adopted by the Heads of State or Government in Strasbourg on 9 December 1989. In articles 4-6 on "employment and remuneration" and articles 7-9 on "Improvement of living and working conditions" of the charter, it is stated that:

"II. Employment and remuneration

4. Every individual shall be free to choose and engage in an occupation according to the regulations governing each occupation.

5. All employment shall be fairly remunerated.

To this effect, in accordance with arrangements applying in each country:

- *workers shall be assured of an equitable wage, i.e. a wage sufficient to enable them to have a decent standard of living."*

…

"Improvement of living and working conditions

7) The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions while the improvement is being maintained, as regards in particular the duration and organisation of working time and forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work.

The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies.

8) Every worker of the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be harmonised in accordance with national practices while the improvement is being maintained.

9) The conditions of employment of every worker of the European Community shall be stipulated in laws, in a collective agreement or in a contract of employment, according to arrangements applying in each country."

c) The distinction between pay and working conditions is also known from EU directives. The Council Directive (75/117/EEC) on equal pay for men and women only concerns pay. This directive is supplemented by Directive (76/207/EEC) on equal treatment which concerns working conditions, cf. art. 5.

Reference is also made to Directive (2001/23/EC) on transfer of undertakings which, in article 3(3), distinguishes between pay- and working conditions.

It can also be observed that a distinction between pay conditions and working conditions is made. Working conditions under art. 153(1)(b) can therefore not provide a legal basis for provisions on pay conditions. This is a natural extension of the fact that the EU does not have jurisdiction when it comes to pay conditions, cf. also page 7, paragraph 1 of the proposed directive and explanatory note no. 16 of the directive cited above.

d) In this connection, it should be emphasised that article 31 of the Charter on Fundamental Rights of the European Union also contains provisions on working conditions which do not include provisions on pay conditions. This article is inspired by the Community Charter.

e) According to article 151, first paragraph, reference is also made to the European Social Charter of 18 October 1961. This is not a union act but was adopted by the Council of Europe. Here, working conditions are considered in article 2, but remuneration is considered in 4.

f) Furthermore, a number of ILO conventions also distinguish between pay- and working conditions. For example, in ILO Convention no. 94 on labour clauses in public contacts, art. 2(1).

It can therefore be concluded that working conditions are not pay conditions.

II. Other introductory provisions in Title X. SOCIAL POLICY

According to article 151, second paragraph and art. 152, there are to substantial provisions that inevitably provide the norm for acts that can be executed under art. 153.

As appears from the above, under:

a) art. 151, second paragraph, the EU must "*take account of the diverse forms of national practices, in particular in the field of contractual relations*".

b) In accordance with art. 152, the EU "*recognises and promotes...the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy*".

III. Danish industrial relations law compared to the provisions in section II

In addition to what the contents of these two provisions under II provide, it is necessary to review the fundamental rules of Danish industrial relations law.

Under the Danish model, the social partners agree on pay- and working conditions. The legislature must therefore refrain from interfering herein. This system dates back more than 120 years in Denmark. On 5 September 1899, the so-called September Compromise was concluded between the central organisations on the Danish labour market. This has been referred to as the constitution of the labour market. According to section 1 of the current general agreement between LO and the Danish Employers' Confederation:

"Recognising the desirability of settling questions relating to pay and employment conditions by concluding collective agreements..."

Notice the distinction between pay and employment conditions.

It is important to keep in mind that, in Denmark, there is complete agreement on the Danish labour market model among unions, employers' association and all political parties in the Danish Parliament.

On this basis, it is hardly surprising that an EU directive on pay conditions is considered as a serious attack on the Danish model by all the listed parties.

Experience clearly shows that in countries with high wages - such as the Nordic countries - the introduction of a minimum wage will lead to lower wages. The minimum wage will simply become "the wage". This is, evidently, the reason why the resistance against minimum wages is so widespread in the North, among other places.

The following is a review of some of the directive's proposals compared to current Danish industrial relations law.

a) **Article 3 of the proposal** is, in as many as three areas, in violation of fundamental Danish industrial relations law.

   A1) Art. 3(3) refers to "*working conditions and terms of employment*". This expression makes no sense in a Danish law context. There are pay conditions and then there are working conditions.

   This wording has probably been chosen by the Commission in order to avoid dealing with the explicit distinction under art. 153(1)(b) on working conditions and art. 153(5) on pay/pay conditions.

   A2) In art. 3(3), as part of the definition of collective bargaining, "*workers´ organisations*" are referred to on the workers side. This is entirely incompatible with Danish law.

   In Denmark, all that is required is a collective on the workers' side. For example, this can be a local union club at a workplace or it can be the worker-side in a works council.

   A3) In art. 3(4), a requirement for "*agreements in writing*" in collective agreements is listed. There are no formal requirements under Danish law. Verbal agreements are just as binding as written agreements. In addition, standard customs and practises, i.e. practises at a workplace or industry, play a significant role in Danish labour law.

b) Article 4 of the directive governs collective bargaining. Here, member states are to "*take measures*" and "*establish action plans*".

   In Denmark, the state has nothing whatsoever to do with collective bargaining. The social partners are fully independent in determining how collective bargaining is conducted. The parties have party autonomy and are fully independent from the state.

   This is further substantiated by the right to form trade unions and to bargain collectively under the European Social Charter (art. 6), the Charter on Fundamental Rights of the European Union (art. 28) and a number of ILO conventions (especially no. 87 and no. 98). It is thus not a right that is provided by the national governments.

   It seems that this state of law is ensured by article 151, paragraph 2 of the treaty according to which the union must "*take account of the diverse forms of national practices, in particular in the field of contractual relations*" and, in article 152, according to which the union "*recognises and promotes the role of the social partners*" while "*respecting their autonomy*".

c) Article 11 of the directive regulates the enforcement of the collective agreements. The proposal strongly interferes with national rules.

   In Denmark, a collective agreement covers all workers performing work in the area covered by the collective agreement. This applies regardless of whether they are unionised or not. Meanwhile, only the parties to the collective agreement may enforce the collective agreement, ultimately before the Danish Labour Court.

The proposals are in direct violation of articles 151 and 152 of the treaty.

IV. The principle of subsidiarity

The subsidiarity principle is closely connected with the requirements in article 151, paragraph 2 on "*taking account of the diverse forms of national practices, in particular in the field of contractual relations*" and art. 152, paragraph 1 where the union recognises "*the diversity of national systems*".

This principle can be seen from TEU article 5(1) and 5(3). A protocol on the application of the principles of subsidiarity (and proportionality) has been included in the Lisbon Treaty.

As early as at the time of the conclusions of the Presidency from the European Council meeting in Edinburgh on 12 December 1992, a number of interpretations were included in annex 1 and 2 (Bulletin of the EC, No. 12, 1992, p. 12).

In annex 1, under Basic Principles, it is stated that the principle "*aims at decisions within the European Union being taken as closely as possible to the citizen*".

According to II(2)(iii), the issue under consideration for regulation must have "*transnational aspects".* This does not seem to be the case as the only (extremely vague) reason stated in explanatory note no. 28 concerns the scale and effects.

According to v) of the same provision, "*the reasons for concluding that a Community objective cannot be sufficiently achieved by the Member States but can be better achieved by the community must be substantiated by qualitative or, wherever possible, quantitative*

indicators". These cannot be seen from page 6 of the proposed directive concerning the principle of subsidiarity.

According to paragraph 3(iii), "*care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems*". And in connection with enforcement, "*Community measures should provide Member States with alternative ways to achieve the objectives of the measures*". This is not observed in art. 11 of the proposed directive .

According to viii), *"Where difficulties are localised and only certain Member States are affected, any necessary Community action should not be extended to other Member states, etc.".*

It appears from the important instructions, that a number of member states, including the Nordic countries, should not be included in the directive. In this respect, article 4(2) does not constitute an adequate exemption.

V. Conclusion

The treaties thus do not provide for the proposed directive since:

4. The legal basis stated in article 153(1)(b) on *working conditions* cannot include *pay*.
5. The first paragraph of article 151 and the provisions of article 152 on taking into account the diversity of national systems have not been observed.
6. The principle of subsidiarity has not been complied with in a number of areas listed.

VI. The memorandum of Jens Kristiansen of 11 November 2020

The memorandum does not focus on the issues touched on in the memorandum of Doctor of Laws, Jens Kristiansen. This memorandum focuses on the issues that are not discussed in Jens Kristiansen's memorandum and can be seen as a supplement to Jens Kristiansen's memorandum.

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