UNIVERSIDADE CATÓLICA PORTUGUESA

EU's competence in Social Policy and the impact of the Directive (EU) 2022/2041 of the European Parliament and of the Council on adequate minimum wages in the European Union

Jacqueline Juhrs Flaire

Master of Law

Porto Faculty of Law

2023

UNIVERSIDADE CATÓLICA PORTUGUESA

EU's competence in Social Policy and the impact of the Directive (EU) 2022/2041 of the European Parliament and of the Council on adequate minimum wages in the European Union

Jacqueline Juhrs Flaire

Supervisor: Prof. Dr. Sofia Oliveira Pais

Master of Law

Porto Faculty of Law

2023

To my parents.

To my sister.

To my friends.

To my professors.

To everyone who supported me.

ACKNOWLEDGEMENTS

I express my immense gratitude to my family, particularly my father and my sister, for their constant belief in me. I am grateful to my mother, who has been a source of strength and a driving force behind my perseverance, and my nephew for the love he has always shown me.

Furthermore, I extend my deepest appreciation to Prof. Dr Sofia Oliveira Pais for her patience, understanding, inspiration, and guidance. I am honoured and privileged to have been her student and have the highest respect for her as a professional. It is beyond words how grateful I am for her acceptance as my supervisor.

I would also like to express my gratitude to my friends, particularly Paula Lekić, Carla Christens, Kris Debruyne, David Debruyne, João Fachada, Lucas Debruyne, Pieter Debruyne and Tim Debruyne, for their invaluable support in various ways.

Additionally, I am grateful to Prof. Dr Raquel Carvalho for introducing me to this Master in Law programme and to those who have supported me throughout my studies at the Porto Faculty of Law, especially on the Incentive to International Mobility in Law (EMID) and other technical and administrative details of my course. My thanks go to Ms Rosa Lina Rocha for her invaluable support.

Finally, I extend my acknowledgements to the professors at the Universidade Católica Portuguesa Porto Faculty of Law and KU Leuven for their inspiring debates and assistance in defining my master's thesis topic, especially Prof. Dr Frank Hendrickx.

RESUMO

Em outubro de 2022 foi adotada a Diretiva (UE) 2022/2041 relativa a salários mínimos adequados na União Europeia. A presente dissertação analisará a legalidade desta Diretiva incluindo suas principais disposições e o impacto que poderá causar em determinados Estados-Membros como Portugal. Embora a Diretiva não estabeleça um nível de salário mínimo específico, este ato legislativo traz medidas a serem implementadas pelos Estados-Membros para fortalecer as negociações coletivas, garantir um salário mínimo adequado e proteger os direitos dos trabalhadores nestes contextos. A dissertação destaca a importância de salários mínimos adequados para proteger a dignidade dos trabalhadores em conformidade com o Pilar Europeu dos Direitos Sociais e a Carta dos Direitos Fundamentais da União Europeia e conclui que esta Diretiva é fundamental para enfrentar a crise e os novos desafios do mercado de trabalho, embora possa encontrar dificuldades em ser implementada devido a falta de alinhamento político e as circunstâncias económicas e políticas de alguns Estados-Membros.

Palavras-chave: Direito Europeu do Trabalho; Pilar Europeu dos Direitos Sociais; Carta dos Direitos Fundamentais da União Europeia; Diretiva; Salário Mínimo Adequado; Competência da UE; Política Social; Artigo 153.º, n.º 5, do Tratado sobre o Funcionamento da União Europeia; Mecanismos de fixação dos salários; Salário Mínimo Statutário; Convenções Coletivas; Negociação Coletiva; Proteção Social; Mercado Interno.

ABSTRACT

In October 2022, Directive (EU) 2022/2041 on adequate minimum wages in the European Union was adopted. This dissertation will analyse the legality of this Directive including its main provisions and the impact on certain Member States such as Portugal. Although the Directive does not set a specific minimum wage level, this legislative act provides measures to be implemented by Member States to strengthen collective bargaining, guarantee an adequate minimum wage, and protect workers' rights in these contexts. The dissertation highlights the importance of adequate minimum wages to protect the dignity of workers in accordance with the European Pillar of Social Rights and the Charter of Fundamental Rights of the European Union and concludes that this Directive is fundamental to address the crisis and the new labour market challenges, although it may

experience difficulties to be implemented due to the lack of political alignment and the economic and political circumstances of some Member States.

Keywords: European Labour Law; European Pillar of Social Rights; Charter of Fundamental Rights of the European Union; Directive; Adequate Minimum Wage; EU Competence; Social Policy; Article 153 (5) of the Treaty on the Functioning of the European Union; Wage-setting mechanisms; Statutory Minimum Wage; Collective Agreements; Collective bargaining; Social protection; Internal Market.

LIST OF ACRONYMS AND ABBREVIATIONS

ART. (s). – Article (s)

CFREU – Charter of Fundamental Rights of the European Union

CJEU - Court of Justice

CPR - Constitution of the Portuguese Republic (Constituição da República Portuguesa) - Decree of 10 April 1976.

EC - European Commission

EEC Treaty - Treaty establishing the European Economic Community (EEC Treaty)

EP – European Parliament

EPSR - European Pillar of Social Rights

ESC - European Social Charter

ETUC - European Trade Union Confederation

EU – European Union

GDELR - General Directorate of Employment and Labour Relations (Direção Geral do Emprego e das Relações de Trabalho)

GLLPF - General Labour Law in Public Functions (Lei Geral do Trabalho em Funções Públicas - LGTFP)

ILO - International Labour Organization

LC - Portuguese Labour Code (Código do Trabalho) - Law No. 07/2009 of 12/02/2009

MSs – Member States

SMEs - Small and Medium-Sized Enterprises

SMEunited - European Association of Craft, Small and Medium-Sized Enterprises

SMW(s) - Statutory minimum wage(s)

TEU - Treaty on European Union

TFEU - Treaty on the Functioning of the European Union

UK – United Kingdom

DISCLAIMER

The rule of citation adopted followed the author-date model. In situations where there are two references of the same author, dated the same year, an alphabetical letter was added to each one, with identical correspondence in the final bibliography. When a reference is made to an entire publication, only the author's name and the date of publication are included. Furthermore, it is worth mentioning that the translations of the transcriptions of sources that were not originally in English are our responsibility.

TABLE OF CONTENTS

1. INTRODUCTION

In her publication 'Political Guidelines for the next European Commission 2019-2024,' Ursula von der Leyen - the esteemed President of the European Commission (EC) - has articulated that "[...] it is high time that we reconcile the *social* and the *market*[1] in today's modern economy"[2]. Drawing particular attention to an action plan for realising the European Pillar of Social Rights (EPSR), she stated that would be proposed a legal instrument to guarantee fair minimum wages in the European Union (EU), which should correspond to national traditions and be established by collective agreements or national laws at a level that ensures a decent life.[3]

The 'Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union'[4] ('Directive') was proposed by EC in October 2020 and approved by the European Parliament (EP) in September 2022. The Council of the European Union formally adopted the Directive on 4 October 2022. Member States (MSs) now have two years to implement national measures to conform to the Directive's requirements.[5] The Directive aims to improve collective bargaining for setting minimum wages in MSs and launched the least criteria to be observed when setting the statutory minimum wage (SMW). Considering socio-economic circumstances and regional and sectoral variances, the purpose of the Directive is to achieve an adequate minimum wage in MSs in order to ensure decent working and living conditions, growth productivity and promote social and economic development, while reducing wage inequality and poverty at work.

Before the adoption of the Directive, the EC consulted the social partners in two phases in 2020[6], and their reactions were diverse: trade unions were largely in favour of the EU initiative, while employers' organisations were critical and favoured a non-binding recommendation. Apart from Central Europe Energy Partners, the employers' organisation argued the EU lacked the competence to propose a legislative act on minimum wages since Art. 153 (5) of the Treaty on the Functioning of the European

[1] Emphasised by the Author.
[2] See **https://data.europa.eu/doi/10.2775/101756**, p. 10.
[3] See **https://data.europa.eu/doi/10.2775/101756**, p. 10.
[4] See http://data.europa.eu/eli/dir/2022/2041/oj.
[5] See https://eur-lex.europa.eu/legal-content/EN/PIN/?uri=CELEX:52020PC0682.
[6] See First-stage consultation of social partners on Fair Minimum (europa.eu) and https://op.europa.eu/s/yBVc.

Union (TFEU) excepts the field of 'pay' from the EU's social policy competences listed in Art. 153 (1) TFEU.[7]

Given a history marked by a debate between contradictory opinions around the MSs' interest in conferring the EU powers to coordinate wage policy[8], the legal basis of the Directive and its impact on MSs' labour systems are essential for the future of the European Labour Law. Therefore, the rationale of this thesis is to analyse the first legally binding act (secondary legislation) adopted by the EU on fair minimum wages.[9] It is divided into two key debates: The first regards the limits of EU social competence, considering the interpretation of the Court of Justice (CJEU).[10] The second debate focuses on the influence of the Directive on MSs' labour law and the certain consequences for the labour market in the EU. The provisions of the Directive are also presented and explained to understand how the implementation of the Directive can be perceived by the MSs. However, we do not intend to expand at length on the substantive content of the Directive but to offer valuable reflections on its weaknesses and concerns about its effectiveness.

2. LEGAL ASSESSMENT OF THE DIRECTIVE

2.1. CONTEXT OF THE ANALYSIS

Since we are about to analyse an EU measure in the field of social policy, it is pertinent to remind certain aspects concerning the evolution of legal backgrounds that have facilitated the implementation of EU initiatives in this field. Initially, a fundamental aspect of the European treaties was to prevent the distortion of competition (indicating its economic origins), and, accordingly, the responsibility for the development of social policy rested with the MSs (through collaboration and coordination), while it was expected to be achieved as a result of the common market of goods, services, capital and people provided for in the Treaty establishing the European Economic Community ('EEC Treaty') signed in 1957.[11] Hence, the title 'Social Policy' of the European treaties provided a minimalist scope in its early stages[12], mainly because of the contrasting views

[7] See https://op.europa.eu/s/yCTO, p. 4.
[8] (Menegatti, 2021, p. 21)
[9] (Schwertner, 2022, p. 31)
[10] In this thesis we will not analyse the decisions of the General Court.
[11] (Schlachter, 2015, pp. 4–5) The Treaty establishing the European Economic Community between six European States (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) already provided for a Title III on Social Policy.
[12] (Schütze, 2021, p. 800)

of MSs on the role of the EU in social policy.[13] In 1973, confronted with discrepancies in economic progress and the life's quality among the MSs and after the Heads of State and Government concluded in Paris that the EU should provide a 'human face' (Paris Summit)[14], the EC introduced a Social Action Programme in 1973 that preceded the implementation of numerous social measures.[15] However, it is important to note that this Programme did not confer legislative powers to the EU, implying that legally binding measures in the social field at the EU level could solely be adopted based on the Arts. 100 and 235 of the EEC Treaty [now Arts. 115 and 352 TFEU], which were general provisions regarding the EU powers in law-making that required unanimous voting of the Council of the European Union. [16]

Discussions on social policy intensified in the 1980s, largely due to the enthusiasm of Jacques Delors, the President of the European Commission at that point, who strengthened the notion of a 'European Social Dimension' (*L'Espace Social de L'Europe*)[17] and obtained assistance from trade unions.[18] The fundamental innovation for European labour law was the adoption of the Single European Act in 1986, which introduced Art. 118a [now Art. 153 TFEU] into the EEC Treaty, extending **qualified majority voting** to the fields regarding the health and safety of workers, implying that countries reluctant to social policy, such as the United Kingdom (UK), could no longer block an EU initiative in these areas, leading to the adoption of numerous directives based on this article, such as the Working Time Directive.[19] Subsequently, the Treaty of Amsterdam, signed in 1997, clarified the powers of the MSs and EU in terms of social policy development[20], but the turning point came with the Treaty of Lisbon (signed in 2007), which placed not only economic and monetary integration at the centre of EU legislation but also the well-being of European people and their values.[21]

Simultaneously, the EU's attempts to develop a minimum wage policy have been characterised by the EU's desire to address most of the problems faced by workers in

[13] (Watson, 2014, p. 40)
[14] (Kenner, 2003, p. 24)
[15] (Watson, 2014, pp. 41–42)
[16] (Watson, 2014, p. 39) HANTRAIS (2019, p. 34) adds that "the compromise solution adopted by the signatories to the EEC Treaty was to incorporate a section on social policy but without stipulating how most of the provisions should be implemented. The Commission's role was not to elaborate a European social policy, but to facilitate collaboration and mobility between member states".
[17] See Jacques Delors.
[18] (Schlachter, 2015, p. 6)
[19] (Watson, 2014, p. 43)
[20] (Watson, 2014, p. 46)
[21] (Costa et al., 2020, p. 55)

labour markets. Discussions on this policy began after the 1989 Community Charter of Fundamental Social Rights, which, although not legally binding, became significant in the development of social legislation as it guaranteed the right to an 'equitable wage'.[22] Thereafter, in the early 1990s, a significant wave of opposition from MSs deemed minimum wages should only be regulated at the national level, as there were considerable differences between minimum wage systems, the cost of living, productivity rates and the economic performance of MSs and, against the background of this resistance, an 'equitable wage' was not included in the Charter of Fundamental Rights of the European Union (CFREU), which was signed in 2000 and became a legally binding instrument after the Treaty of Lisbon came into force (Art. 6 (1) Treaty on European Union - TEU).[23] For similar reasons, a reluctance has always been present in employers' organisations, while European trade unions have never been able to reach a consensus on this policy (which is why the European Trade Union Confederation – 'ETUC' does not have much of a policy direction in this area).[24]

More recently, however, the EPSR proclaimed in 2017[25] established 20 principles to reinforce the social aspect of the EU. As Prof. HENDRICKX[26] clarifies, while EU acts must be adopted following the current EU competences, the EPSR was an impetus for EU initiatives in labour law and spread an encouraging message insofar as "it re-establishes the idea that social progress must also serve the purpose of fairness and that European economic integration is subject to the respect of fundamental social rights".

As is evident from the above, the EU has taken measures to ensure the right to an adequate minimum wage and significant advancements have been achieved, including the application of protective measures outlined in the CFREU and the EPSR[27], as acknowledged in the Directive's preamble. However, it is important to understand that the EU cannot solely rely on the recognition of the worker's right to fair remuneration as the basis for binding legal acts on wages.[28] For a while now, there has been a lack of clarity regarding the proper scope of the EU's competences in social policy, mainly because there are contradictory opinions on whether to allow a broad or strict interpretation in this

[22] (Riesenhuber, 2012, pp. 19–20)
[23] (Schulten, 2008, pp. 429–431)
[24] (Schulten, 2008, pp. 434–435)
[25] See European Pillar of Social Rights – booklet.
[26] (Hendrickx, 2018, p. 6)
[27] While the CFREU can be applied by the CJEU, the EPSR has more relevance in the political field.
[28] (Aranguiz & Garben, 2021, p. 160)

regard, which may have implications for the legality of EU actions. Specifically, the question is whether the Directive could have been adopted based on the EU competence in 'working conditions' (Art. 153 (1) (b) TFEU) since Art. 153 (5) TFEU kept out 'pay' from the application of this article. As we will see below, the CJEU has (rightly) adopted a strict interpretation, showing that the exclusion of 'pay' does not encompass all aspects of this field, as specific conditions of workers' remuneration are considered part of 'working conditions'.

2.2. EU'S COMPETENCE IN SOCIAL POLICY

The subsequent sections will focus on the EU's legislative competences in social policy and the debates surrounding the legal basis of the Directive. However, before analysing these points, the following section is introduced to summarise the impact of the CJEU's interpretation on the delimitation of the scope of the TFEU articles.

2.2.1. PRINCIPLE OF CONFERRAL AND THE ROLE OF CJEU IN LIMITING THE COMPETENCES OF THE EU

"So, what is a legislative competence? The best definition is this: legislative competence is the *material field*[29] within which an authority is entitled to legislate".[30] Under the principle of conferral prescribed in Art. 5 (2) TEU, MSs confer some of their powers on the EU by means of the European Treaties ('Treaties') in order to realise the objectives of these Treaties, meaning that it reflects the MSs' interest in achieving certain aims commonly, while simultaneously safeguarding their concerns since it ensures that areas not addressed by the Treaties stay under the exclusive competence of the MSs.[31] Moreover, this principle triggers two distinct consequences: first, the EU cannot confer on itself additional powers beyond those explicitly foreseen in the Treaties (any extension of its powers can only be accomplished through the amendment of the Treaties by the MSs), and second, the EU is prohibited from adopting an act that addresses a matter which is outside its powers ('*ultra vires'* act).[32] AMTENBRINK & VEDDER[33] completes that, as an ultimate and practical outcome, every action undertaken by the EU must be based on specific articles of the Treaties.

[29] Emphasised by the Author.
[30] (Schütze, 2021, p. 229)
[31] (Dadomo & Quénivet, 2020, p. 33)
[32] (Dadomo & Quénivet, 2020, p. 34)
[33] (Amtenbrink & Vedder, 2021, p. 33)

However, according to SCHÜTZE[34], there is a more flexible approach to interpreting the principle of conferral, that sets aside the original intentions of the Treaties founders and instead employs a "[…] teleological interpretation [which] asks what is the purpose – or *telos*[35] – of a rule. Thus, it looks behind the legal text in search of a legal solution to a social problem that may not have been anticipated when the text was drafted". This interpretation is particularly significant when the terminology employed in the TFEU lacks precise definitions, giving rise to, for example, 'vertical disputes' regarding whether the EU or the MSs hold the power to legislate within a specific domain.[36] In these cases, it is possible to contest the legality of an EU legal act before the CJEU through an action provided for in Art. 263 TFEU, arguing that the EU has insufficiently or incorrectly selected the legal basis for its legal acts (such as secondary legislation) or has exceeded the limits of its powers[37]. In response, the CJEU may apply the 'teleological interpretation' approach and, consequently, the determination of the EU competence may be shaped through the CJEU's interpretation of the EU Law rather than resulting from a purely political process.[38]

This situation has led to the phenomenon called 'competence creep', which refers to the EU's practice of extending its powers beyond what the TEU or the TFEU explicitly allow (e.g. by proposing new secondary legislation), based on, for instance, the CJEU's interpretation when employing the 'teleological approach'.[39] Therefore, we conclude that due to the imprecision of certain terms of the TEU and the TFEU, the CJEU is ultimately competent to delimit the scope of the legal basis of the EU legal acts on the grounds of principles of EU Law,[40] which is why, as stated in *Parliament v Council of the European Union (C-363/14[41])*, the CJEU analyses the legality of EU legal acts based on their objectives and content (§ 41).

[34] (2021, p. 231-232)
[35] Emphasised by the Author.
[36] (Morano-Foadi et al., 2018, p. 156)
[37] (Dadomo & Quénivet, 2020, p. 34) One example of a CJEU judgement in annulling a directive on the basis of Article 263 of TFEU is Judgment of the Court of 5 October 2000, *Federal Republic of Germany v European Parliament and Council of the European Union*, C-376/98, (*Official Journal*, C 335, 21-22) CELEX: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:C2000/335/39 (§107 and §108).
[38] (Amtenbrink & Vedder, 2021, p. 35)
[39] (Redmond, 2019, p. 196)
[40] (Morano-Foadi et al., 2018, p. 165)
[41] See **https://e-justice.europa.eu/ecli/ECLI:EU:C:2015:579**.

2.2.2. THE LEGAL BASIS OF THE DIRECTIVE AND THE LIMITED SCOPE OF ART. 153 TFEU

The Directive's legal basis is Art. 153 (1) (b) TFEU, which stipulates the EU may take action in relation to **'working conditions'**, in conjunction with Art. 153 (2) (b) TFEU, which allows the EU to adopt directives in the mentioned field. The problem is, as hitherto mentioned, that Art. 153(5) TFEU excepts the area of 'pay' from the application of this article. Therefore, the main accusation against the adoption of the Directive has been the lack of EU competence to legislate minimum wages founded on Art. 153 (5) TFEU. This debate is recurrent since the exact scope of the competences conferred on the EU as regards social policy and the exceptions to Art. 153 TFEU remain uncertain.[42]Hence, it cannot be precisely deduced from the wording of the TFEU whether or not the term 'working conditions' in Art. 153 (1) (b) TFEU includes conditions related to the remuneration of workers. Then, the questions to be answered in the following sections are: What does the term 'pay' encompass? How has the CJEU been interpreting this exception? Does the term 'working conditions' comprise conditions relating to workers' wages? Is the Directive in line with the CJEU's ruling? Should the EU have chosen other articles to serve as the Directive's legal basis?

2.2.2.1. What is the CJEU's interpretation of the 'pay' exception in Art. 153 (5) TFEU?

In *Del Cerro Alonso (C-307/05 [43])*, *Impact (C-268/06)*[44]and *Bruno (Joined cases C-395/08 and C-396/08*[45]*),* the CJEU held the 'pay' exception is to be interpreted restrictively since the Art. 153 TFEU provides that measures adopted by the EU in the social policy field must aim to accomplish the objectives of Art 151 TFEU, which in turn,

[42] (Nielsen, 2000, p. 47)
[43] See https://op.europa.eu/s/yCUE. Paragraphs: 39. […] as Article 137(5) EC [now Art. 153 (5) TFEU] derogates from paragraphs 1 to 4 of that article, the matters reserved by that paragraph must be interpreted strictly so as not to unduly affect the scope of paragraphs 1 to 4, nor to call into question the aims pursued by Article 136 EC [now Art. 151 TFEU]. 40. More particularly, the exception relating to 'pay' set out in Article 137(5) EC [now Art. 153 (5) TFEU] is explained by the fact that fixing the level of wages falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States. In those circumstances, in the present state of Community law, it was considered appropriate to exclude determination of the level of wages from harmonisation under Article 136 EC et seq [now Art. 151 TFEU]. 41. The 'pay' exception cannot, however, be extended to any question involving any sort of link with pay; otherwise some of the areas referred to in Article 137(1) EC [now Art. 153 (1) TFEU] would be deprived of much of their substance".
[44] See https://op.europa.eu/s/yCUF. Paragraphs 113 and 122-125.
[45] See EUR-Lex - 62008CJ0395 - EN - EUR-Lex (europa.eu). Paragraphs 36-40.

provides that the EU must respect fundamental social rights when intervening in this area, as the right to a fair remuneration stipulated in Art 4 of the European Social Charter (ESC)[46]. Consequently, there would only be a breach of this exception if the EU act establishes "the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed Community wage — which **amount to direct interference by Community law in the determination of pay** […]"[47], since these measures fall within the exclusive competence of MSs and the collective bargaining autonomy of social partners. The CJEU concluded that a different (i.e., extensive) interpretation of Art. 153(5) TFEU would lead to a significant limitation of the scope of the other areas under the EU competence listed in Art. 153 (1) TFEU, which is why the 'pay' exception cannot cover all aspects of this field.

This interpretation is also supported by Advocate General MENGOZZI, who stated in his Opinion of 23 May 2007 (*Laval - C-341/05*[48]) that from the terms of Art. 153 (5) TFEU and the part of the TFEU in which the referred article is found, it "hardly lends itself to an extensive interpretation of that paragraph whereby it would determine the scope of all provisions of the Treaty" (§55), but also the position of some authors, such as that of Prof. HENDRICKX[49]:

> *In legal terms […]* ***the exclusion of pay is relative and does not hinder the coverage of pay in legislation of subjects for which the EU has explicit competences****.*[50] *This, for example, has allowed EU legislation providing equality clauses concerning pay in equality law, temporary work, part-time work or fixed term work (as well, beyond social policy, in the posting of workers area).*

Supporters of the opinion that the EU lacks competence to regulate minimum wages justify their position based on the sensitivity of this matter to the autonomy of the MSs, as it has significant implications for their economic policies and labour markets.[51] Another explanation is that the European social partners involved in wage-setting processes prefer to avoid interference from the EU in their affairs.[52] They consider that issues such as wage coverage and mechanisms or wage-setting policies are the exclusive competence of MSs and are part of the social partners' autonomy, which is the reason why, for example, the employers' organisations have proposed alternative ways of

[46] See CETS 163 - European Social Charter (Revised).
[47] *Impact (C-268/06),* §124. Emphasised by us.
[48] See https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=CELEX:62005CC0341.
[49] (Hendrickx, 2019, p. 6)
[50] Emphasised by us.
[51] (Menegatti, 2017, p. 197)
[52] (Schlachter, 2015, p. 7)

achieving the EU's objectives, such as through the European Semester.[53] Nevertheless, it seems that the restrictive interpretation of the term 'pay' of Art. 153 (5) TFEU aligns with the fundamental social rights safeguarded, for instance, by Art. 4 of the ESC, which establishes the right to **'fair remuneration'** to guarantee workers and their families a decent living, and by the 1989 Community Charter of the Fundamental Social Rights of Workers, which also protected the right to **'equitable wage'**. In light of these provisions, it is understandable that the derogation of 'pay' should not inhibit the indirect impact on workers' pay resulting from an EU act in social policy.

2.2.2.2. Does the Directive characterise a direct interference in the determination of pay?

Recital 19 of the preamble makes it clear that the intention of the Directive is not to establish a uniform level or mechanism for establishing minimum wages, nor does it impose any requirement to implement a SMW or to make existing collective agreements universally applicable, even ensuring in Recital 38 that the Directive leaves open the possibility for MSs to apply or maintain more favourable provisions. The European Economic and Social Committee complemented this reasoning by stating that the Directive does not lay down a specific way of setting wages, but only broad rules on the adequacy of the minimum wage.[54] In contrast, DELFINO[55] highlights, for instance, that Art. 7 of the Directive states that MSs must take actions to include the social partners in their process of deciding the SMW, which means that MSs will need to modify their national laws to comply with this requirement and, in his opinion, these could be interpreted as a key element in setting wage levels. However, it is doubtful whether this is the interpretation of the case-law of the CJEU.

Nevertheless, it will become apparent in the subsequent section of this thesis that the Directive does not explicitly establish a minimum wage level but, rather, limits itself to outlining certain procedures that should be followed to raise the coverage rate of collective bargaining when relevant, and to define criteria that MSs must ensure when establishing the SMW. In our view, this does not hinder MSs from setting the actual wage level. Choosing a directive in this case also indicates that the EU aims to achieve the least

[53] See https://op.europa.eu/s/yBVc, p. 5.
[54] See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020AE5731, p. 107.
[55] (Delfino, 2021, p. 55)

amount of harmonisation on this matter[56], thereby enabling MSs to choose how to implement the requirements of the Directive in their national legal systems.[57] Although the discussion relates to different legislation, namely Directive (EU) 2018/957 on the posting of workers in the framework of the provision of services, we consider that the position of Advocate General CAMPOS SÁNCHEZ-BORDONA in *Hungary* (*C-620/18*[58]) can be applied to the Directive in the sense that the legislation does not contain a substantive description of the minimum wage (§ 97).

2.2.2.3. Does Art. 153 (1) (b) TFEU include pay-related conditions under the definition of 'working conditions'?

If the exception for 'pay' in Art. 153(5) TFEU should be interpreted strictly, does this mean that the EU can set minimum wages on the basis of its competence for 'working conditions'? In the proposal for the Directive, the EC states that "having access to a minimum wage guaranteeing a decent standard of living is a pivotal element of adequate working conditions. […] the large differences in standards for accessing an adequate minimum wage are part of working conditions"[59], and the preamble of the Directive reinforces this understanding based on provisions protecting fair working conditions, such as Art. 31 (1) of the CFREU and Principles 6 and 8 of the EPSR.

While Art. 31 of the **CFREU** (formally proclaimed in December 2000[60]) does not contain an explicit reference to workers' pay or similar wording, it establishes the right of workers to **'fair and just working conditions'**, i.e., those that respect their health, safety and dignity. There is a debate whether the dignified conditions of work protected by this article include conditions relating to workers' remuneration. Those who do not agree with this inclusion argue that remuneration is not specified in the CFREU Explanatory Notes[61] as 'working conditions', which should be interpreted in the sense of Art. 156 TFEU, to be read with Art. 153 TFEU through a restricted interpretation.[62]

It seems more reasonable that working conditions can only be respectful of workers' dignity if they enable them to attain a decent standard of living, and this imposes adequate remuneration. This suggests that workers' wages represent how the aim of

[56] (Jacobs, 2022, p. 14)
[57] (Amtenbrink & Vedder, 2021, p. 43)
[58] See **https://e-justice.europa.eu/ecli/ECLI:EU:C:2020:392**.
[59] See https://op.europa.eu/s/yCUL. p. 6.
[60] See http://data.europa.eu/eli/treaty/char_2016/oj.
[61] See 32007X1214(01) - EN - EUR-Lex.
[62] (Zimmer, 2019, p. 291)

ensuring their dignity is accomplished, as postulated by certain authors.[63] To corroborate this viewpoint, ZIMMER[64] argue that, in conjunction with Art. 45(2) TFEU, which refers to 'remuneration and other conditions of work and employment', the material scope of Art. 31 (1) CFREU should be founded on EU secondary legislation, including the Temporary Agency Work Directive 2008/104/EC and the Posted Workers Directive 96/71/EC since these directives recognize remuneration as part of working conditions (Art. 3(1)(f)(ii) and Art. 3(1)(c), respectively).

The preamble of the Directive also cites the principles of the EPSR, promoting that they may serve as a guide to ensure fair working conditions, especially Principle 6, which provides that an adequate minimum wage should be guaranteed and established in a transparent and predictable manner, to prevent in-work poverty and safeguard access to employment, consistent with national practices and economic and social circumstances, while upholding the social partners' autonomy (Recital 5). Despite its significance, as indicated in section 2.1, the EPSR does not possess legally binding status and is unable to extend the EU social policy competences.[65]

Finally, as highlighted by Advocate General BOT in Thomas Specht and Others v Land Berlin and Bundesrepublik Deutschland (Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12[66]), "it is clear that the term 'pay' as used in Article 153(5) TFEU does not encompass pay conditions, which form part of employment conditions. They do not relate directly to the fixing of the level of pay […]"(§45). Hence, it is understandable to consider that working conditions could include standards related to wage-setting.[67]

2.2.2.4. Could any other article of TFEU be more appropriate to the legal basis of this Directive?

Certain authors suggest the EU could have used Art. 175 TFEU as the Directive's legal basis to avoid the discussion on the 'pay' exception (Art. 153 (5) TFEU), since this provision requires MSs to take measures to achieve the objectives of Art. 174 TFEU,

[63] (Menegatti, 2021, p. 22)
[64] (2019, pp. 289–290)
[65] (Schwertner, 2022, p. 31)
[66] See https://e-justice.europa.eu. Paragraph 45: "Accordingly, it is clear that the term 'pay' as used in Article 153(5) TFEU does not encompass pay conditions, which form part of employment conditions. They do not relate directly to the fixing of the level of pay, but to the conditions in which an employee is awarded a certain level of pay, determined in advance by the parties concerned, whether by agreement between parties in the private sector or between the social partners and the State".
[67] See also (Sjödin, 2022, p. 281)

which includes actions to consolidate economic, social, and territorial convergence.[68] Nevertheless, the CJEU exhibits a greater inclination towards the implementation of Art. 153 TFEU in relation to social measures. In *UK v Council (C-84/94[69])* on the Working Time Directive (Directive 2003/88/ EC), the claimant argued that the EU should have used other articles as the legal basis for that directive, instead of Art. 118a EC Treaty (now Art. 153 (1)(a) TFEU). The CJEU held that the choice was appropriate as Art. 153 TFEU is a specific provision (related to social policy) and there is nothing in its wording to suggest it should be interpreted restrictively (§12 - §15), emphasizing that there is no other provision of the TFEU that restricts the area of workers' health and safety (§15). Moreover, although Art. 153 of the TFEU does not confer on the EU a general competence in labour law[70], in *Almudena Baldonedo Martín v Ayuntamiento de Madrid* (*C-177/18*) the CJEU concluded that Arts. 151 and 153 establish general objectives to be pursued by the EU in the social domain (§55). Thus, we support the understanding that Art. 153 TFEU is the specific legal basis for EU legal acts in the field of social policy, as it establishes EU competences in areas that generally concern the protection of workers[71], which is the purpose of minimum wages.

3. IMPACT ASSESSMENT OF THE DIRECTIVE

3.1. MAIN PROVISIONS OF THE DIRECTIVE AND RELEVANT CONCERNS

Our aim in this section is to provide an overview of the articles of the Directive[72], not only to contextualise the discussions that will follow in section 4 of this thesis but also to present some discussions on possible weaknesses of the directive's provisions.[73]

3.1.1. SUBJECT MATTER AND SCOPE

For achieving the aims of the Directive, Art. 1 establishes a framework for the appropriateness of SMWs (defined as minimum wages set by a legally binding provision, except for universally applicable collective agreements), for the promotion of collective bargaining (as the preamble indicates a preference for this mechanism of minimum wage setting) and finally for the improvement of workers' access to national protection

[68] See (Schwertner, 2022, pp. 32–33) and (Aranguiz & Garben, 2021, pp. 167–172)
[69] See https://e-justice.europa.eu/ecli/ECLI:EU:C:1996:431.
[70] (Jaspers et al., 2019, p. 20)
[71](Schütze, 2021, p. 802)
[72] In this section, articles without reference to any legislation should be presumed to be from the Directive.
[73] The mechanisms of establishing the level of minimum wage, however, will not be discussed.

measures. We can already note that the Directive only indicates two general ways of setting minimum wages: by statute and/or collective agreements, while other instruments such as International Labour Organization (ILO) Recommendation 135 (Chapter IV, No. 6) provide that minimum wages can be set, for example, by decisions of specialised courts or wage committees and councils.[74][75] On the other hand, according to SCHWERTNER[76], even though neither extension mechanisms of minimum wage agreements[77] nor other hybrid instruments were explicitly mentioned in the Directive, they can be considered included in the definition of SMWs (Art. 3 (2)) as any other legal provision. The ETUC, however, proposed in its response to the social partners' consultation (first phase) to introduce extension mechanisms only if recommended by the social partners at the national level.[78]

Art. 1 (2) and (3) are clearly intended to support the position that the Directive is not in breach of Art. 153 (5) TFEU, as discussed in the previous section of this thesis, since it is emphasised that the provisions of the Directive respect the social partners' autonomy and their right to bargain collective agreements, the MSs' competence to set the level of minimum wages and their choice between setting the SMW or adopting a system of wage setting through collective bargaining (or both).

As regards the scope of application, Art. 2 stipulates that it will be subjected to the Directive workers who have a contract of employment or an employment relationship not only under national law or collective agreements or in accordance with the MSs' practices but equally considering the case-law of the CJEU. Recital 21 of the Directive explains that "bogus self-employed and undeclared workers could fall within the scope of this Directive [but not] genuinely self-employed persons" since the latter does not satisfy the CJEU criteria for worker's status. The concern about the scope of the Directive is thus related to the discussion about the protection of self-employment in Labour Law. Prof. HENDRICKX[79] noted that the number of so-called 'dependent self-employed' is increasing, i.e., those who are economically dependent on another party but are not

[74] See R135 - Minimum Wage Fixing Recommendation, 1970 (No. 135).
[75] (Bomba, 2022a, p. 122)
[76] (Schwertner, 2022, p. 40)
[77] For better understanding: "statutory bargaining extensions […] make sectoral agreements binding for all firms within the sector. In most cases, national or regional labor ministries declare agreements binding after formal applications from sectoral trade unions, employers' associations, or both" (Günther & Höpner, 2023, p. 89).
[78] See p. 16 available at: ETUC reply to the First Phase Consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges related to fair minimum wages.
[79] (Hendrickx, 2019, pp. 8–9)

considered to be in a relationship of subordination and most cases are not covered by labour law, adding that working conditions for self-employed workers is analysed in the disputes concerning labour law and EU competition law (Art. 101 (1) TFEU).

It is not our intention to further the discussion in the context of competition law, but it is important to complete this idea with the analysis of what is considered 'false self-employed', as called by the CJEU in the case *FNV Kunsten (C-413/13[80])*. According to Prof. PAIS[81], service providers are not undertakings if they lack the autonomy to decide how to operate in the market and do not assume financial and commercial risks.[82] This definition is crucial, as pointed out by Prof. PAIS[83], because it distinguishes dependent workers from independent workers and determines the application of relevant articles of the TFEU since the former are covered by Arts. 145 to 161 TFEU on employment and social policy titles, whereas the latter fall under Art. 173 TFEU, which pertains to industry policy and is therefore subject to competition rules.[84] When the Directive defines 'bogus self-employment' in Recital 21 as a person recognized as self-employed while fulfilling the elements that typify an employment relationship, this means, in our opinion, that the 'dependent self-employed' or 'false self-employed' are included in the scope of the Directive.[85]

3.1.2. PROMOTION OF COLLECTIVE BARGAINING ON WAGE-SETTING

This matter is addressed by Art. 4, which aims to increase MSs' coverage of collective bargaining by facilitating this mechanism for setting wages. To this end, the Directive provides that MSs with a collective bargaining coverage of less than 80% must establish a framework and an action plan for the formulation of favourable conditions for collective bargaining, either by law after the opinion of the social partners, or by agreement with them. As regards the action plan, this may also be established at the joint

[80] See https://e-justice.europa.eu/ecli/ECLI:EU:C:2014:2411. Paragraph 39.
[81] (Pais, 2021a, p. 52)
[82] Translated by us. Original text in Portuguese.
[83] (Pais, 2021a, p. 58)
[84] Translated by us. Original text in Portuguese.
[85] In addition to this discussion, there is also a debate on whether self-employment should also be included in social protection measures, as, for example, the EP argued in the Resolution of 19 January 2017 on an EPSR, when it states that, in view of "socio-economic uncertainty and the deterioration of working conditions for many workers" (Point 22), all forms of employment should be guaranteed with adequate social protection, including self-employment. However, in the case *FNV Kunsten (C-413/13),* the Advocate General WAHL pointed to a problem of covering the self-employed in the minimum wage measures: "Without the possibility of competing on price, some self-employed would have far fewer opportunities to win a contract and would risk being marginalised from the job-market entirely" (§56).

request of the social partners who have agreed on it. After the periodic review, they must carry out (obligatory at least every 5 years), the plan can be updated if MSs find the need for it, using the same procedures (law, agreement or request of the social partners). The action plan and its updates should be available to the public and communicated to EC.

Art. 4 also highlights that MSs should, in line with national practices and with the involvement of the social partners, strengthen the capacity of the social partners (preferably at sectoral and cross-sectoral levels) through access to appropriate information, safeguard workers and trade union representatives from acts of discrimination (considering their participation in collective bargaining) and protect of trade unions and employers' organisations from any external or internal interference. Some critics point out that the Directive imposes certain obligations on MSs that have a collective bargaining system, which cannot be fulfilled by a collective source, meaning that these MSs will have to adopt a regulation on their system and this may not only jeopardise their national traditions and the autonomy and powers of the social partners but also their national industrial relations.[86]

3.1.3. PROVISIONS REGARDING STATUTORY MINIMUM WAGES

The Directive states that taking into account the objectives of the preamble, MSs with SMWs should establish their procedures for setting and updating their minimum wages on the basis of clearly defined and explicit criteria, with Art. 5(2) stating that at least the following elements should be included: "(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; (d) long-term national productivity levels and developments". These criteria must be established in accordance with national practice, enshrined in national laws or defined by the decision of the competent bodies or by tripartite agreements (Art. 5(1)). The updating of minimum wages should be regular and timely: at least every two years, or four years in the case of MSs applying an automatic indexation mechanism (Art. 5(5)). It is worth noting that these provisions apply to MSs implementing the SMWs, i.e., the Directive does not set criteria for MSs that regulate minimum wages exclusively through collective bargaining and gives full

[86] (Grenfors & Gentile, 2021, p. 44)

autonomy to the social partners in setting these criteria (situation that arises primarily from the EU's restricted competence in the field of 'pay' (Article 153(5) TFEU).[87]

Art. 5 (4) indicates that MSs shall apply "indicative reference values commonly used at international level such as 60 % of the gross median wage and 50 % of the gross average wage, and/or indicative reference values used at a national level" and Art. 5 (6) provides that MSs must designate or establish at least one consultative body to guide those responsible for setting the SMW. The voluntary involvement of the social partners in these consultative bodies should be ensured by MSs so that they can be fully and timely involved in the decision-making process regarding the SMWs (Art. 7). The MSs will also have to consider the principles of non-discrimination and proportionality (including a legitimate aim) when applying variations from the SMW for certain groups of workers or deductions that result in a wage level below the SMW (Art. 6). Finally, Art. 8 provides some examples of measures that should be applied to protect workers and maintain compliance with the SMW. These include not only effective and non-discriminatory on-site controls and inspections but also training of enforcement officers to improve their skills.

3.1.4. HORIZONTALS PROVISIONS

First, Art. 9 provides that MSs must take actions to safeguard that economic operators and their subcontractors observe the current social and labour law conditions concerning wages and collective bargaining to set wages when they perform public procurement or concession contracts. As regards data collection for monitoring conformity with minimum wage protections, the Directive is extremely detailed and requires MSs to report information every two years to the EC regarding the level of the SMW, collective bargaining coverage, applicable variations and deductions, etc., as well as statistical data divided in categories covering, for example, gender, disability and size of companies (Art. 10). Moreover, MSs should also ensure that information on the SMW, universally applicable collective agreements and redness mechanisms is made available to the public in a clear and easily accessible manner, including for persons with disabilities (Art. 11). In the event of breaches of the provisions regarding the SMW and the protection of the minimum wage, MSs must establish a right to redness and provide workers with efficient, prompt, and unbiased methods for resolving disputes, including

[87] (Bomba, 2022a, p. 123)

for those whose employment relationship has already been terminated (Art. 12), as well as effective, proportional and discouraging sanctions (Art. 13).

3.1.5. FINAL PROVISIONS

Art. 16 provides that the Directive cannot be applied to weaken the general minimum wage protection already in place (e.g. by reducing or eliminating the minimum wage), or to prevent MSs from establishing more beneficial provisions to workers (whether by introducing them into law or by applying collective agreements), e.g. from raising the SMW, or to result in diminishing rights already granted by other EU acts. These statements are in line with Art. 153 (4) TFEU, which states that even if the EU adopts minimum requirements in the social legislation, the MSs may maintain or introduce more rigorous protective measures in relation to the subject matter of the EU measure, but only if the MSs exercise this power without jeopardising the coherence of the corresponding EU measure, as clarified by the CJEU in *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry* and *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry (Joined Cases C-609/17 and C-610/17*[88]*)*.

It is worth remembering that the EU may adopt directives setting minimum requirements within permitted topics,[89] but must consider the technical conditions and standards of MSs and avoid obstructing the establishment or development of small and medium-sized enterprises (which is why certain directives are specifically employed for enterprises that have a minimum threshold of workers[90]). Art. 153 (4) TFEU also stipulates that EU initiatives cannot impact MSs' prerogative of determining fundamental rights regarding their social security systems or substantially affect the financial balance of these systems. It is unclear whether the Directive will affect the financial balance of national social security systems, but ARANGUIZ[91] indicates this is unlikely to be the case with the gradual implementation of the Directive.

[88] See 62017CA0609 - EN - EUR-Lex. Paragraph 48.
[89] Except in two fields: the combating of social exclusion and the modernisation of social protection systems.
[90] (Jaspers et al., 2019, p. 22)
[91] (Aranguiz, 2020, pp. 474–475)

3.2. POTENTIAL CONSEQUENCES OF IMPLEMENTING THE DIRECTIVE

By 2023, twenty-two MSs have implemented the SMW mechanism (the latest being Cyprus in January 2023), with varying levels and updating regimes, meaning that in the EU only Austria, Denmark, Finland, Italy and Sweden allow minimum wages to be set exclusively through collective agreements.[92] Minimum wage levels vary widely between MSs due to factors such as differences in the cost of living[93] (ranging from €339 in Bulgaria to €2,387 in Luxembourg in 2023[94]).

The preamble of the Directive states that "in several Member States, statutory minimum wages are usually low compared to other wages in the economy" (Recital 13), while points out that "Member States with a high collective bargaining coverage tend to have a small share of low-wage workers and high minimum wages." (Recital 25). However, SCHULTEN & MÜLLER[95] explain that "currently, collective bargaining coverage is below the 70% threshold in 17 out of 27 EU countries […] in seven Central and Eastern European EU Member States, less than a quarter of the workforce is covered by a collective agreement". This section will therefore examine the potential influence of the directive on the labour market systems of certain MSs, which were included in this analysis because of their diverse systems for minimum wage regulation. This will be accomplished by analysing the viewpoints of various authors and our own observations with regard to Portugal. Additionally, we will assess the Directive's effectiveness and its interplay with national law.

3.2.1. EXAMPLES OF THE EXPECTED IMPACT OF THE DIRECTIVE IN SELECTED MEMBER STATES WITH MINIMUM WAGES SET BY STATUTORY REGULATION

In **PORTUGAL**[96], the right to an SMW is foreseen in Art. 59 (2)(a) of the Constitution of the Portuguese Republic – 'CPR', but the minimum wage can also be determined by collective agreements. Art. 56 of CPR establishes the right of trade union associations to engage in collective bargaining, which is an original and guaranteed right, not granted or delegated by the State, meaning that the role of the legislator, in principle, is limited to regulating the legitimacy and effectiveness of these agreements (Art. 56 (4)

[92] See https://www.eurofound.europa.eu/topic/minimum-wage.
[93] (Schulten, 2008, p. 424)
[94] See https://www.eurofound.europa.eu/data/statutory-minimum-wages-2023.
[95] (Schulten & Müller, 2021, pp. 12–13)
[96] This analysis from Portugal was mostly based on resources originally in Portuguese, hence it should be considered that the **translation was provided by us.**

CPR).[97] Historically, sectoral collective bargaining has been predominant in Portugal's practices (as required by Art. 4 (1) (a) of the Directive), however, current public policies in this field aim to promote negotiations also at the company level[98], for instance, introducing incentives for companies to engage in this practice, such as access to public support (including funding from European funds), public procurement procedures, and tax incentives (Art. 485 of the Portuguese Labour Code - 'LC'). Art. 496 LC stipulates that collective agreements have effect only between the parties, but Art. 497 LC allows non-affiliated workers to join existing collective agreements individually if they belong to the sector of activity and meet the other professional and geographical requirements.[99] On this topic, Prof. RIBEIRO[100] highlights that collective bargaining is not normally undertaken by Small and Medium-Sized Enterprises (SMEs) and, in general, smaller enterprises "[…] often lack representative institutions for the personnel and employers' affiliation is also reduced. And despite having legitimacy to celebrate agreements by themselves with trade unions, these employers show a tendency to direct negotiation with their employees […]".[101] This situation is relevant when considering that in 2022 a report conducted by the EC identified that in Portugal 76% of people employed work in SMEs.[102]

Regarding Art. 4(1)(c) of the Directive (protection of workers and representatives of trade unions associations against discrimination), Art. 444 LC emphasises the freedom of workers to join trade unions without discrimination and Art. 406 considers it a severe offence to make employment conditional on membership or non-membership of a trade union or to transfer or dismiss a worker for the aforementioned reasons or for carrying out trade union activities. Moreover, workers' representatives are protected by the presumption of unfair dismissal (within 3 years of assuming their position).[103] With regard to Art. 4 (1) (d) of the Directive (protection of trade unions and employers' organisations against interference), it should be noted that trade unions' autonomy is a constitutional right (Art. 55 (4) CPR) regulated by Art. 405 of the LC and Art. 407 provides that violation of this autonomy or any discriminatory act are a criminal offence.

[97] (Fernandes, 2020, pp. 808–809)
[98] (Martins, 2023, p. 146)
[99] (Dray, 2020, pp. 1071;1075) They are also subject to some limitations regarding the term for this choice and the duration of its application, which, however, it is not useful to extend the explanation in this paper.
[100] (Ribeiro, 2015, p. 276)
[101] (Ribeiro, 2015, p. 276)
[102] See https://ec.europa.eu/docsroom/documents/50700.
[103] (Fernandes, 2020, p. 823)

Employers' associations are governed by the principle of self-regulation (Art. 445 LC) and their autonomy and independence are protected by Art. 446 LC in the same way as trade union associations.[104]

Our findings show that the rate of coverage of existing and published collective agreements is already above 80%[105], suggesting that Portugal should not need any further framework or action plan for the implementation of the Directive. However, as explained by Prof. RIBEIRO[106], this achievement has been largely facilitated by the so-called 'extension orders'[107], which allow the extension of collective agreements in force to workers and employers not initially covered by them, based on social and economic reasons. While these extension orders have been debated as to their consequences on the social partners' autonomy (which, however, we shall refrain from detailing in this thesis), it is irrefutable that they have undeniably increased coverage rates of collective bargaining in Portugal.

In relation to the requirements on SMWs, Art. 59 (2) (a) CPR determines that the Portuguese State is the guarantor of the working conditions to which workers are entitled, including remuneration, and is responsible for setting and updating the national SMW considering factors such as the needs of workers, the increase in the cost of living, the productivity trends, and the economic and financial requirements for stability and development.[108] Art. 273 LC stipulates that the level of the SMW will be set annually by specific legislation, after consulting the Permanent Committee for Social Dialogue[109], considering the above-mentioned elements and in accordance with the income and pricing policy. The level of SMW is set by decree and in 2023 the SMW was fixed at 760€ through the Decree-Law No. 85-A/2022,[110] whereby it is stated that a tripartite agreement[111] was concluded aiming to increase wages in general. This agreement

[104] (Dray, 2020, pp. 951–953)
[105] See https://www.crlaborais.pt/outros, p. 52.
[106] (Ribeiro, 2019, p. 321)
[107] This expression is indicated in Art. 505 of the English translation of the Portuguese Labour Code which is available on the website of the Official Portuguese Electronic Gazette: https://dre.pt/dre/en/consolidated-legislation/act/7-2009-123169278 and https://files.dre.pt/diplomastraduzidos/7_2009_CodigoTrabalho_EN_publ.pdf?lang=EN. Original term in Portuguese: Portarias de extensão.
[108] According to Bomba (2022b, p. 139), this article is extraordinarily complete in comparison with the articles of constitution of other MSs.
[109] Translated by us. Original in Portuguese: Comissão Permanente de Concertação Social.
[110] See Decreto-Lei n.º 85-A/2022, de 22 de dezembro.
[111] These agreements are political in nature and are concluded to define the conditions to be considered in the decision-making process of the subscribing entities, such as legislative decisions by the government and collective bargaining by the social partners (Fernandes, 2020, pp. 818–820).

stipulates that the objective is to reach the SMW of 900€ by 2026.[112] If we compare the criteria of the quoted Art. 273 LC with those of the Directive, it can be noted that LC does not include explicitly the factor of the general level and distribution or the growth rate of wages, but, according to a Eurofound publication, the aforementioned level of SMW would be reached by following the criteria set out in Art. 5 (2) of the Directive.[113] On the other hand, the above overview shows that the regular updates of the SMW and the consultation of a consultative body with the participation of the social partners are already foreseen in the LC, which means that Portugal satisfies or aims to satisfy the requirements of Art. 7 of the Directive. Finally, according to the Eurostat database, the minimum wage in Portugal represents 55.1% of the average monthly earnings in 2023.[114]

As made clear by Prof. CARVALHO[115], the SMW applies to all workers without any distinctions based on factors such as economic sector or profession and is paid monthly, considering the standard of 40 hours per week (with part-time workers receiving proportional payment). Thus, regardless of whether the remuneration is variable or a combination of different elements, the worker is entitled to receive the SMW,[116] which cannot be diminished through collective bargaining or individual contracts.[117] Nonetheless, Art. 275 of the LC allows for a reduction of the SMW but based solely on the worker's situation, for example, if the worker is a trainee (limited to a 20% reduction for only one year or less in the case of a worker qualified with a technical-professional course, for instance) or has a reduced work capacity (which will be subject to a reduction proportional to the effective capacity, but never exceeding 50%). Moreover, minimum wage earners must pay merely 11% into social security and are excluded from personal income tax.[118]

Additionally, in the view of Art. 8 of the Directive, regarding measures aimed at ensuring compliance with the protection of workers, the Authority for Working

[112] See Acordo de médio prazo para a melhoria dos rendimentos, dos salários e da competitividade - XXIII Governo - República Portuguesa.
[113] See https://www.eurofound.europa.eu/publications/article/2023/minimum-wage-hikes-struggle-to-offset-inflation.
[114] See https://ec.europa.eu/eurostat/databrowser/view/earn_mw_avgr2/default/table?lang=en.
[115] (Carvalho, 2018, p. 26)
[116] (Martinez et al., 2013, p. 611)
[117] (Fernandes, 2020, p. 376) This author criticizes the Portuguese model of minimum wage, stating that despite its appearance, it cannot be considered an authentic minimum wage, since it is only fixed at the limit of what is sufficient, without considering a minimum subsistence for a family, being insufficient to meet this demand.
[118] (Martins, 2023, p. 145)

Conditions[119] assumed the role of safeguarding compliance with labour legislation. This Authority is part of the direct administration of the State and with autonomy carries out its inspection duties by exercising public authority powers[120] (the labour inspections are regulated by Decree-Law No. 102/2000[121]). Concerning Art. 9 (public procurement) of the Directive, we do not forecast it will result in significant changes in the national law since the primary legislation governing this matter, the General Labour Law in Public Functions (GLLPF[122]), already guarantees in Art. 347 collective bargaining rights to workers regardless of the type of public employment relationship they have (including nomination-based ones) and the GLLPF provides for two types of collective bargaining, including those that have immediate normative efficacy and cover affiliated workers and public employers who have subscribed to them.[123] Regarding Art. 10 of the Directive (about monitoring the protection of minimum wages), the General Directorate of Employment and Labour Relations (GDELR[124]) publishes an annual report on collective bargaining instruments,[125] and other information is made available by statistical institutes.[126] In addition, the aforementioned tripartite agreement provides for annual monitoring and follow-up of collective bargaining and the measures envisaged in that agreement. As regards Art. 11 of the Directive, in order to ensure access to information for workers, the GDELR provides an internet search page for collective agreements,[127] and there is a publication ('Boletim do Trabalho e Emprego'[128] in Portuguese) in which are published, for example, the projects of extension orders. In these cases, therefore, it does not seem that many adaptations will be necessary.

Regarding dispute resolution foreseen in Art. 12 of the Directive, Art. 492 LC provides that the collective agreement must regulate the processes for resolving disputes, especially through conciliation, mediation, or arbitration (procedures regulated by Arts. 523 and following of the LC). By Decree No. 40/2012 of April 12, the GDELR is responsible for monitoring and intervening (dependent on the request of one of the

[119] Translated by us. Original in Portuguese: Autoridade Para as Condições do Trabalho.
[120] See https://portal.act.gov.pt/Pages/QuemSomos/QuemSomos.aspx.
[121] See https://dre.pt/dre/legislacao-consolidada/decreto-lei/2000-107689199.
[122] Translated by us. Original in Portuguese: Lei Geral do Trabalho em Funções Públicas.
[123] (Fernandes, 2020, pp. 885–887)
[124] Translated by us. Original in Portuguese: Direção Geral do Emprego e das Relações de Trabalho.
[125] See Instrumentos de Regulamentação Coletiva de Trabalho Publicados – DGERT.
[126] Such as: https://www.ine.pt/xportal/xmain?xpgid=ine_main&xpid=INE and https://www.ccdr-n.pt/pagina/regiao-norte/norte-conjuntura;
[127] See https://www.dgert.gov.pt/ferramenta-para-pesquisa-de-convencoes-coletivas and
[128] See http://bte.gep.mtsss.gov.pt/historia.php.

parties) in labour relations to prevent and overcome collective labour disputes between workers and employers (usually represented by their organisations).[129] Furthermore, still with regard to the protection of workers, Art. 129 LC stipulates the guarantee that the worker's remuneration will not be reduced (apart from exceptions under the LC or collective labour regulation instruments) and Arts 387 and 388 of the LC establish that the worker may request a judicial review of the dismissal, that if considered unlawful, the worker is entitled to compensation for all damages incurred, whether financial or non-financial (Art. 389 of the LC). Penalties (Art. 13 of the Directive) are provided for in, for example, Art. 273 (3) and (4) LC that classifies the violation of the guarantee of a monthly minimum wage as a severe offence punishable by the payment of a fine and an order to pay the wage owed to the worker. In addition, Art. 521 LC stipulates that the breach of a provision within a collective labour regulation instrument, encompassing both collective agreements and extension orders, constitutes a severe offense if it detrimentally affects the entire workforce, and a minor offense per employee affected.[130]Thus, our examination demonstrates that the Portuguese labour system conforms to the Directive in this regard.

In conclusion, even though there may be minimal adjustments required for national legislation towards better alignment with the Directive's requirements, we emphasise that the government of Portugal has declared support for its realisation, since, for instance, signed the 'Porto Social Commitment' at the Porto Social Summit to reinforce the commitment made with the EPSR and taking into consideration the post-pandemic scenario, to support fair and sustainable competition in the Internal Market (e.g. through decent wages).[131]

In **FRANCE**, the SMW is established after the opinions of the National Commission for Collective Agreements, the government, and a group of experts, but minimum wages can also be set through collective agreements at the company or branch level.[132] The minimum wage in France is one of the highest in the EU at €1,709[133] and it is based on the economic scenario and the growth of national wages and is assessed annually in line with the consumer price index or when the inflation increases by more

[129] See https://www.dgert.gov.pt/wp-content/uploads/2020/05/Relatorio-anual-Conflitos-coletivos-2012-2021.pdf.
[130] The classification of the offense as severe or minor is employed to determine the applicable fines.
[131] See https://www.2021portugal.eu/en/porto-social-summit/.
[132] (Pasquier, 2021, pp. 84–87)
[133] See Statutory minimum wages, 2023 | Eurofound.

than 2% of this index.[134] According to PASQUIER,[135] the current French system of establishing minimum wages is already largely aligned with the requirements outlined in the Directive and is not expected to undergo significant changes, however, he poses two questions for consideration in the future: whether the concept of a decent minimum wage will influence the expectations of social partners or extend the coverage of minimum wage to unsalaried workers, and whether the opinion of social partners should carry equal weight as that of the expert group during the assessment of the SMW, considering the importance that the Directive gives to the social partners' involvement.

In **GERMANY**, where the SMW was only introduced in January 2015[136], Prof. FUCHS[137] explains that it will not be difficult for German law to meet most of the Directive's requirements, but Germany needs to take action to encourage collective bargaining (as the coverage rate is around 44%) and improve measures to adequately inform workers about minimum wage protection mechanisms. In **SPAIN,** in the opinion of ALONSO[138], the Directive would not cause a significant change to the system of setting the minimum wage and its implementation would not require a particularly challenging effort, since it can be supposed that the current regulation already exceeds the requirements of the Directive, but considering few points of nonconformity, it would be required to constitute a consultative body for advising competent authorities when setting the SMW (or assign this function to another existing body, such as the Economic and Social Council), formalise a standard for reference values to evaluate the adequacy of the SMW, overcome the current lack of transparency and reliability of the information on wage issues and collective agreements and introduce a framework and action plan to promote collective bargaining (since despite the lack of official data, it is estimated that the coverage rate of collective bargaining is below 70%).

As for the **CENTRAL AND EASTERN EUROPEAN COUNTRIES**, they have long regulated their labour markets through a statutory system (whose importance has increased due to the decline of collective bargaining in these countries), and the current challenge is to transfer the economic success they have achieved to working conditions,

[134] (Pasquier, 2021, pp. 85–86)
[135] (Pasquier, 2021, pp. 88–89)
[136] (Bruckmeier & Bruttel, 2021, p. 249)
[137] (Fuchs, 2021, pp. 70–73)
[138] (Alonso, 2021, pp. 52–54)

as this success was achieved on the basis of standards with minimal labour costs.[139] Technically, unlike in the past, where wages were mainly set by the state, the countries in the post-socialist scenario currently have a dispersed wage-setting system, with few collective agreements and prevalent individual wage negotiations.[140]

In **HUNGARY**, for example, according to their Labour Code, the government establishes the level and the scope of the SMW by decree, after consulting the National Economic and Social Council, and the level is reviewed every calendar year, but it is set based on the occupations, the economic scenario and sectors, statistics of the labour market, etc., which means the Directive may noticeably influence the improvement of the method and criteria for setting the SMW.[141] Consultation of the social partners is informal, not timely and heavily influenced by government dominance.[142] As for the promotion of collective bargaining, the current coverage is only 20% since the Hungarian system does not allow collective agreements in the public sector and the private sector is characterised by being disintegrated, with current collective agreements limited in their scope and the new collective agreements being concluded in a demotivated environment, often only at a company level and without most often having provisions related to wages or sanctions, implying that there are many measures to be adopted for the implementation of the Directive (to the extent that the 80% reference threshold of Art. 4 (2) of the Directive may be considered unreal), which is why it requires an extreme modification in its government policy, while it is possible to predict that the Directive may increase wages in the medium term and promote a long-term assessment of the inefficient collective bargaining system.[143]

Regarding **POLAND,** besides the fact that this country has one of the largest labour markets along with one of the lowest unemployment rates in the EU, it faces different problems in comparison to the Western European countries, as a consequence of its historical past and current social, economic and political scenario and mainly related to

[139] (Muszyński, 2020, p. 5)"Since workers' bargaining power is low, employers can simply exploit their position and impose poorer working conditions than those formally prescribed in law. Thus, the most important question is how to improve bargaining power".
[140] (Kun & Szabó, 2023, p. 217)
[141] (Kun & Szabó, 2023, p. 217)
[142] (Kun & Szabó, 2023, p. 218)
[143] (Kun and Szabó, 2023, pp.219–223) These Authors (2023, p. 222) also emphasise that "the Directive's enhanced emphasis on enforcement is thus full of promise from a Hungarian perspective, however one can't be naïve to expect prompt and radical changes in this regard. Still, the principle of effective enforcement is a real novelty of the Directive, and it will certainly become a cardinal issue during the implementation by Member States (and it would be a compelling issue for Hungary)".

the weakness and low percentage of collective agreements (only 15% and mainly concluded at the company level), and the slow increase of the level of wages (established largely by legislation and individual employment contracts), a situation contrary to the Polish's economy and productivity growth.[144] In view of the Directive, SURDYKOWSKA & PISARCZYK[145] clarifies that the Polish SMW setting mechanism will have to be adjusted since the referred Act does not include any of the criteria provided for in Art. 5 (2) of the Directive, but only gives attention to the actual and forecasted levels of inflation and the real gross domestic product growth, and to comply with the mandatory establishment of consultative bodies (Art. 5(6) of the Directive), as Polish legislation does not require the establishment of such a body and the Social Dialogue Council is not a consultative but a decision-making body.[146]

3.2.2. EXAMPLES OF THE EXPECTED IMPACT OF THE DIRECTIVE IN SELECTED MEMBER STATES WITH MINIMUM WAGES SET EXCLUSIVELY BY COLLECTIVE AGREEMENTS

Foremost, it should be noted that in countries such as Italy, where there is no universal applicability of the collective agreements required to implement the EU law, the objectives and requirements of the Directive can only be achieved through legal instruments adopted by the MSs, i.e. the transposition of the Directive cannot be delegated to the social partners (as is the case with Art. 17(3) of the Directive), and therefore the involvement of the national (statutory) legislator will be presumably required.[147]

Within this context, in **ITALY,** there is a principle of equivalent and fair remuneration provided for in Art. 36 of the Constitution, which must be observed by the legislator responsible for ensuring that the wages set by the social partners are enough to provide workers and their families with a dignified life.[148] One of the implications of the Directive would serve as the impetus for the definition of a previous discussion that had been fading for at least 30 years and has recently returned to the forefront regarding the adoption of an SMW in the national system.[149] The Corte di Cassazione n° 4951 of 20 February 2019 already concluded that a system of collective bargaining implementing

[144] (Surdykowska & Pisarczyk, 2021, pp. 92–94)
[145] (Surdykowska & Pisarczyk, 2021, pp. 92–94)
[146] (Surdykowska & Pisarczyk, 2021, p. 95;98)
[147] (Delfino, 2021, pp. 55–57)
[148] (Bomba, 2022b, p. 145)
[149] (Menegatti, 2019, pp. 63–65)

Art. 36 of the Italian Constitution does not inhibit the legislator from setting measures to ensure a fair wage as suggested by ILO, meaning that if Italy introduces an SMW it would be required to comply with the Directives' requirements concerning this mechanism.[150]

In **AUSTRIA,** collective agreements "[…] are mainly concluded by affiliated trade unions of the Austrian Trade Union Federation (Österreichischer Gewerkschaftsbund) on the employees' side and by the Economic Chambers, respectively its sectoral and regional organizations, on the employers' side".[151] Their collective bargaining coverage rate stands at approximately 98% (meaning that exceeds the minimum percentage required by the Directive) and the existing legislation grants access to not only an impartial and effective mechanism for resolving disputes but also offers a range of remedies in the event of workers' rights violations, as a legal action to recover unpaid wages or address instances of retaliatory dismissal by employers or seek compensation in the event of precipitate termination of their employment contract.[152] A possible discussion in Austria's labour law would be the 2% of workers who are not included in any collective agreement or substitute instrument, resulting in limited protection based on the criterion of a significant disparity between remuneration and their level of performance, which may raise concerns regarding compliance with the Directive, as these workers could potentially fall within the scope of the Directive, meaning that Austria's system would have to safeguard their rights accordingly.[153] Nevertheless, SCHWERTNER[154] concludes in a preliminary assessment that the Directive will have minimal impact on the Austrian collective bargaining system and will most likely not entail any relevant legislative changes.

In the case of the **NORDIC COUNTRIES**, LILLIE[155] made an outline stating that even considering that collective bargaining is universal in the Nordic countries, they are hesitant about the Directive as it may undermine their collective bargaining mechanism and jeopardise their well-structured system because of state intervention (as will be explained later). However, according to this author, although Nordic trade unions may not need this Directive, legal extension regulations for groups that have difficulty organising have been helpful in Finland and Norway, besides the fact that safeguarding

[150] (Delfino, 2021, pp. 62–63)
[151] (Schwertner, 2022, p.34)
[152] (Schwertner, 2022, p. 37)
[153] (Schwertner, 2022, pp. 37–39)
[154] (Schwertner, 2022, p. 44)
[155] (Lillie, 2023, p. 5)

collective agreements and wages in sectors with significant levels of mobility within Europe, means that Nordic trade unions also benefit from it.[156]

3.3. AN OVERVIEW OF THE EFFECTIVENESS AND PRACTICAL CONSEQUENCES OF THE DIRECTIVE'S IMPLEMENTATION

Regarding the effectiveness of the Directive, it is clear that the limitation of EU competences was made for certain reasons, and one of them is clarity about what falls within the competence of the MSs or the EU. This is important for trust among them and for the maintenance of the principle of supremacy, which allows EU law to take priority over national law when there is a conflict between them. It is essential for the effectiveness of EU law (MSs must amend or repeal national provisions that are incompatible with EU law) and its application (to ensure that all MSs are subject to the same benefits and obligations).[157]

It is logical to conclude that due to the limited competence of the EU in social policy and with respect for national laws and social practices, the Directive has adopted a simpler approach with basic principles and requirements to which MSs must adhere. The main responsibility for ensuring the practical effectiveness of the Directive, therefore, lies with the MSs, relying on their willingness and commitment to achieve the objectives set out in the Directive.[158]

Effectiveness also refers to the potential of the measures to achieve its objectives. According to some authors[159], the fact that the Directive does not require the implementation of an SMW or the universal application of collective agreements shows its weakness in effectively addressing the problems listed in the preamble, as many other measures should be taken within the framework of EU social policy for this purpose. Nonetheless, some studies show the opposite, such as an economic study by SÁNCHEZ VELLVÉ[160] which concludes that the increase in relative minimum wages seems to be effective in reducing income inequality between households in the MSs between 2005 and 2014 (even though the effectiveness diminishes after the onset of the economic crisis)

[156] For further information: (Dølvik & Marginson, 2018).
[157] (Morano-Foadi et al., 2018, p. 154;165)
[158] These conclusions were shared by: (Menegatti, 2021, p. 30) and (Alonso, 2021, p. 151) and the European Committee of the Regions in Opinion of the European Committee of the Regions – Adequate minimum wages in the European Union. (2021). *Official Journal*, C 175, p.94. CELEX: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020AR5859
[159] See (Delfino, 2021, p.55) and (Schwertner, 2022, p.44).
[160] (Sánchez Vellvé, 2017, p. 99)

and that economic, social, welfare and labour market differences between the MSs should not be a serious obstacle to minimum wage measures resulting from EU action. [161]

Concerning the **negative effects**, as already mentioned, most of the employers' organisation were against a binding legal act from the EU to regulate the field of minimum wages and, for instance, BusinessEurope were concerned about the possible fading of the social partners in long-term and enlargement of the workers not declared,[162] while the European Association of Craft, Small and Medium-Sized Enterprises (SMEunited) pointed out the intensification of the labour costs for the SMEs but agreed that "minimum wages can help prevent unfair competition and social dumping on the labour market, which is a key concern for SMEs".[163]

Although most European trade unions are in favour of the EU proposal on minimum wages, the Swedish and Nordic trade unions are against it, both because of the alleged lack of EU competence in the area of 'pay' (based on Art. 153(5) TFEU), and because they argue that: (i) the minimum wage could be used as a ceiling instead of a base reference; (ii) self-regulated collective bargaining models could be replaced by state-regulated models and generally weakened; (iii) employers' efforts to maintain a high level of organisation could be reduced and consequently the social partners would be weakened; (iv) the balance between the EU, MSs and the social partners could change, leaving collective bargaining systems vulnerable due to the involvement of policy makers; and finally (v) this could open space for the CJEU's interpretation to interfere with national systems, which could be detrimental to workers. In summary, the Nordic trade unions believe that an EU minimum wage act threatens their labour market models.[164] Still, we endorse the statement that it is paradoxical that MSs with exemplary social and employment performance, as evidenced by high trade union density and widespread collective bargaining, have spoken unitedly against the Directive intended to enhance Europe's social features.[165] However, as outlined above, the Central and Eastern European MSs seem to be most affected by the Directive.

---

[161] Translated by us. Original in Spanish: "[…] de este estudio se infiere la bondad de los salarios mínimos relativos como medida de referencia para combatir la desigualdad de los ingresos. […] son medidas que, al tener un carácter relativo, podrían resultar de aplicación para el conjunto de los Estados de la Unión, sin que las diferencias económicas, sociales, culturales, del mercado de trabajo y del estado de bienestar supusieran un serio inconveniente para su adopción comunitaria".

[162] See https://www.businesseurope.eu/sites/buseur/files/media/position_papers/social/2020-12-04_pp_minimum_wages.pdf pp.2–3.

[163] See https://op.europa.eu/s/yBVc, p. 3.

[164] (Lovén Seldén, 2020, pp. 336–337)

[165] (Haapanala et al., 2022, p. 3)

SGI Europe also expressed concerns about the Directive and questioned its impact on future proposals, in particular in relation to the right to strike and the right of association, which are also included in Art. 153(5) TFEU as an exception to the application of this Article. In particular, if these areas could also be considered as 'working conditions' and thus fall under EU competence.[166] Furthermore, in light of previous cases such as *Laval (C-341/05)*[167] and *Viking (C-438/05)*, the Northern European countries shared concerns about the potential impact of the Directive on their industrial relations system.[168] To better understand this context, DEAKIN[169] briefly explains that "the common idea underpinning *Viking, Laval*[170] […] is that national-level labour law rules are capable of constituting a distortion of competition within the internal market and, as such, must be justified by reference to a strict test of proportionality".

Nonetheless, the discussion of the above cases falls within the scope of the analysis of the internal market chapter of the TFEU, which applies whenever other prerogatives of the TFEU cause an economic impact (such as distortion). In those cases, the CJEU clarified that it is not because the right to strike and the right of association are excluded from the application of Art. 153 of the Social Policy Title of the TFEU that they will not be examined for their compatibility with the internal market provisions of the TFEU, which can be applied in the analysis of any social activity.[171] It is not our intention to enter into the discussion on internal market provisions, but in our view, this means that these cases may not have an impact on the EU's competence in social policy, but they are certainly a warning in the sense that whenever a social right is compared to an economic necessity, it seems that the former would not prevail.[172] Thus, what happens in practice is that both *hard law* and *soft law* adopted by the EU can have an impact in fields of exceptions, and this is the case of the right to strike, which was interpreted by the CJEU based on the freedom of establishment and freedom to provide services or the case of some employment policies measures.[173] There are, however, some concerns about the counterproductive effect of the Directive resulting in the reverse effect, i.e. instead of

[166] See Response to the open consultation on the Minimum Wage Directive Proposal (sgieurope.org).
[167] See EUR-Lex - 62005CJ0341 - EN - EUR-Lex (europa.eu).
[168] (Menegatti, 2021, p.23)
[169] (Deakin, 2012, p. 24)
[170] Emphasised by the Author.
[171] (Aranguiz & Garben, 2021, p. 6)
[172] (Menegatti, 2017, p.217)
[173] (Jaspers et al., 2019, p. 22)

ensuring the minimum and aiming for improvement, actually being interpreted so that efforts are limited to this minimum.[174]

As far as **positive effects** are concerned, considering that the preamble of the Directive identifies that workers in the EU are not sufficiently protected by minimum wages due to various factors, including new forms of work and non-compliance with existing collective agreements and national legislation (recital 14), although the Directive only provides a framework and the final decisions are taken at a national level, we can expect the Directive to guide MSs to improve social protection,[175] by stimulating and reviving old debates on the definition and formalisation of minimum wages in line with the standards and requirements of the Directive (as indicated by most of the authors cited in section 3.2) and supporting those fighting for adequate minimum wages and solid collective bargaining. [176] It is necessary to bear in mind that EP has been issuing resolutions since 2017 stressing the need for an EU framework that ensures a fair and adequate minimum wage that respects the autonomy of social partners and collective bargaining models[177], and the Council of the European Union has already defended in its Decision (EU) 2020/1512 of 13 October 2020[178] that the involvement of social partners in wage-setting mechanisms is crucial to ensure that wages respond adequately to productivity developments[179]. As the Directive was adopted through the ordinary legislative procedure, the European Parliament has also played a crucial role in this process, which has increased the democratic relevance and credibility of the Directive. [180]

For all these reasons, we may conclude that the adoption of this Directive is necessary for the progress of European Labour Law, in line with the CFREU, which, as Prof. PAIS[181] clarifies, while it cannot extend the competences conferred on the EU by the Treaties (TEU or TFEU), broadly formulates several social rights (without establishing a hierarchy between them) and represents the consolidation of the EU's

[174] (Aranguiz & Garben, 2021, p. 6)
[175] (Kun & Szabó, 2023, p. 216)
[176] (Schulten & Müller, 2021, p. 16)
[177] See TA (europa.eu), Texts adopted - Employment and social policies of the euro area - Thursday, 10 October 2019, Texts adopted - Employment and social policies of the euro area 2020 - Thursday, 22 October 2020, Texts adopted - A strong social Europe for Just Transitions - Thursday, 17 December 2020, Texts adopted - Reducing inequalities with a special focus on in-work poverty - Wednesday, 10 February 2021.
[178] See 32020D1512 - EN - EUR-Lex.
[179] Regarding the connection between minimum wages and productivity, see for example: (Ku, 2022).
[180] (Aranguiz, 2020, p. 473)
[181] (Pais, 2021b, pp. 159–160)

legitimacy in the protection of fundamental rights.[182][183] And Prof. HENDRICKX[184] complements in the sense that "[…] within an EU context, labour law needs more than just labour rights". In practice, each new treaty amendment has increased the competences of the EU, which means that over time the MSs have agreed to reduce their sovereignty in this area, since, above all, it cannot be claimed that the EU is an immutable entity, i.e., the EU will constantly evolve and, understandably, its competences will grow with its increasing complexity.[185]

[182] Translated by us.
[183] For this reason, the CJEU has been using the CFREU to test EU law (including legislation of MSs implementing EU law) and as an additional basis for its judgments (Jacobs, 2019, p. 40).
[184] (Hendrickx, 2018, p. 5)
[185] (Foster, 2021, p. 78)

4. CONCLUSION

Why would we not have a directive on minimum wages? Although Article 153(5) TFEU foresees a 'pay' exception to the EU's competence in social policy, the CJEU has interpreted this exception strictly and clearly defined the actions that would violate it. It appears, however, that the directive does not represent either of these actions. Nevertheless, while it is unclear how the CJEU will interpret the Directive, based on previous cases it seems that the CJEU is not hesitant to recognize the EU's competence to address requirements that indirectly affect the establishment of wages. Despite MSs employing differing mechanisms for establishing minimum wages, the Directive does not seek to standardise such mechanisms or impose how to involve the social partners, nor does it set a predetermined minimum wage throughout the EU. Our perspective is that the Directive is crucial in directing MSs towards necessary measures for establishing an effective minimum wage labour system. Research demonstrates that the involvement of social partners is important to consider the needs of the most vulnerable ones in relation to wage policies. Providing adequate wages can also increase purchase power while reducing workforce emigration to countries with better wage conditions.

International and EU legal frameworks already offer comparable guidelines in terms of fair remuneration, as exemplified by the ESC, that has been ratified by the MSs, indicating their adherence to similar principles outlined in the Directive. The CFREU is a legally binding instrument that focuses on working conditions that respect the dignity of workers. In our view, an adequate minimum wage ensures financial conditions essential to the workers' health and safety, for instance, and consequently to their dignity. The truth is that if workers are not supported with proper remuneration (in this case, specifically minimum wage), they are more likely to subject themselves to degrading working conditions. Some argue that labour rights are human rights, a both fragile and reasonable position. Although the EPSR is not legally binding, it stipulates rights recognized as necessary by the leaders of the 27 MSs and its Principle 6 asserts that adequate minimum wages must be guaranteed. The TFEU itself sets strong social aims, demonstrating that the common market should also strive for the well-being of citizens. The fact that the EU cannot implement any legislative act to enforce the right to fair and adequate wages is at odds with the fact that all these other instruments, whether directly or indirectly, guarantee this right. We believe that fundamental rights should not be set in stone, but rather should be adaptable to changing and pressing needs. However, we also

recognise that solely focusing on amending legal instruments is not enough and it should be prioritised political harmony, as the latter appears to be the most significant obstacle to implementing the Directive. Regrettably, if we remain unable to address this issue, the progress of social integration will continue to fall behind economic integration, and the conflict between the dominance of capital and the strength of social and civil organizations will endure.

With regard to the implementation of the directive, the countries of Central and Eastern Europe are expected to face more difficulties in meeting its requirements, bearing in mind, for example, that in most cases their competitiveness is based on low wages and that they continue to suffer the repercussions of socialist governments. However, it is reasonable to conclude that the Directive could motivate them to address certain shortcomings in wage conditions. In the interim, Nordic countries are apprehensive about state intervention in their already well-established systems, but some experts contend that ensuring protections for minimum wages in a European context could serve as an additional safeguard for these countries in the event of system failures.

The effectiveness of the procedures and principles established to achieve the objectives and overcome key problems indicated in the Directive remains a subject of debate and is reliant on MSs' commitment. Despite this, it is worth taking the risk of potential negative consequences, such as increased labour costs, substantially given the deterioration in the living standards of workers due to economic crises after the COVID-19 pandemic. The Directive encourages MSs to focus on a minimum wage that guarantees workers and their families the minimum necessary for a dignified life, supporting adequate minimum wages as a fundamental right. Therefore, it should be perceived as a welcome instrument. To conclude, even if it is not highly effective, the Directive has prompted MSs to reconsider their labour and minimum wage setting models, providing it, at least, an important symbolic function for the advancement of 'Social Europe'. It may be essential for the recovery of the EU and a path to be followed to define certain debates such as the 'dependent self-employed'. Despite facing resistance and uncertainties, it seems plausible to assume that this Directive is a courageous step forward for European Labour Law.

BIBLIOGRAPHY

Alonso, D. Á. (2021). Salarios mínimos en la Unión Europea: propuesta de Directiva e implicaciones para España. *Revista Del Ministerio de Trabajo y Economía Social, ISSN 2660-4647, Nº. 151, 2021, Págs. 33-55*, *151*, 33–55. https://dialnet.unirioja.es/servlet/articulo?codigo=8313188

Amtenbrink, F., & Vedder, H. (2021). *European Union law : a textbook*. Eleven International Publishing.

Aranguiz, A. (2020). Securing decent incomes at a crossroads: On the legal feasibility of a Framework Directive on Minimum Income. *European Journal of Social Security*, *22*(4), 467–485. https://doi.org/10.1177/1388262720968175/FORMAT/EPUB

Aranguiz, A., & Garben, S. (2021). Combating income inequality in the EU: A legal assessment of a potential EU Minimum Wage Directive - KU Leuven. *European Law Review* , *2*, 156–174.

Bomba, K. (2022a). Collective voice in fixing minimum wages: social partners' participation from the ILO and EU perspectives. *Italian Labour Law E-Journal*, *15*(1), 117–132. https://doi.org/10.6092/ISSN.1561-8048/14899

Bomba, K. (2022b). Minimum Wage Fixing Mechanisms in the EU Member States: A Comparative Overview in the Light of the Draft Directive on Adequate Minimum Wages. *Journal of the University of Latvia. Law*, *15*(15), 137–153. https://doi.org/10.22364/JULL.15.09

Bruckmeier, K., & Bruttel, O. (2021). Minimum Wage as a Social Policy Instrument: Evidence from Germany. *Journal of Social Policy*, *50*(2), 247–266. https://doi.org/10.1017/S0047279420000033

Carvalho, C. de O. (2018). Salary and inequalities in Portugal. *IUS Labor – Revista Electrònica de Dret Del Treball i de La Seguretat Social, Comparative Labor Law Dossier (Wage and Inequalities)*, *3*, 24–37. https://repositorio.ucp.pt/handle/10400.14/26786

Costa, M., Peers, S., Steiner, J., & Woods, L. (2020). *Steiner & Woods EU law* (14th edition). Oxford, United Kingdom: Oxford University Press.

Dadomo, C., & Quénivet, N. N. R. (2020). *European Union law* (Third edition.). Hall & Stott Publishing.

Deakin, S. (2012). The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe's 'Social Market Economy.' In N. Bruun, K. Lörcher, & I. Schömann (Eds.), *The Lisbon Treaty and Social Europe* (pp. 19–44). Hart Publishing.

Delfino, M. (2021). The Proposal for an EU Directive on adequate Minimum Wages and its impact on Italy. *Italian Labour Law E-Journal*, *14*(1), 49–65. https://doi.org/10.6092/ISSN.1561-8048/13370

Dray, G. (2020). Código do trabalho : anotado. In *Código do Trabalho - Anotado*. Almedina.

Fernandes, A. M. (2020). *Direito do trabalho* (20th ed.). Almedina.

Foster, N. G. (2021). *Foster on EU law* (8th ed.). Oxford University Press.

Fuchs, M. (2021). Notes on the proposal for a directive on adequate minimum wages: a German perspective. *Italian Labour Law E-Journal*, *14*(1), 65–76. https://doi.org/10.6092/ISSN.1561-8048/13372

Grenfors, J., & Gentile, E. (2021). The minimum wage Directive proposal and the promotion of collective bargaining: the voice of SGI-Europe. *Italian Labour Law E-Journal*, *14*(1), 41–48. https://doi.org/10.6092/ISSN.1561-8048/13367

Günther, W., & Höpner, M. (2023). Why does Germany abstain from statutory bargaining extensions? Explaining the exceptional German erosion of collective wage bargaining. *Economic and Industrial Democracy*, *44*(1), 88–108. https://doi.org/10.1177/0143831X211065783/FORMAT/EPUB

Haapanala, H., Marx, I., & Parolin, Z. (2022). Decent Wage Floors in Europe: Does the Minimum Wage Directive Get it Right? *SSRN Electronic Journal*, 48. https://doi.org/10.2139/SSRN.4263242

Hantrais, L. (2019). *What Brexit means for EU and UK social policy*. Bristol : Policy Press.

Hendrickx, F. (2018). The European Social Pillar. *European Labour Law Journal*, *9*(1), 3–6. https://doi.org/10.1177/2031952518759987

Hendrickx, F. (2019, September). *Regulating working conditions through EU directives – EU employment law outlook and challenges*. https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/638430/IPOL_BRI(2019)638430_EN.pdf

Jacobs, A. (2019). The Future of the Charter on Fundamental Rights of the European Union. In F. Dorssemont, K. Lörcher, S. Clauwaert, & M. Schmitt (Eds.), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (1st ed., pp. 39–52). Hart Publishing. http://www.bloomsburycollections.com/book/the-charter-of-fundamental-rights-of-the-european-union-and-the-employment-relation/ch3-the-future-of-the-charter-on-fundamental-rights-of-the-european-union/

Jacobs, A. (2022). The Enforcement Structure for EU Labour Law. In Z. Rasnača, A. Koukiadaki, N. Bruun, & K. Lörcher (Eds.), *Effective Enforcement of EU Labour Law* (1st ed., pp. 13–34). Hart Publishing. http://www.bloomsburycollections.com/book/effective-enforcement-of-eu-labour-law/ch1-the-enforcement-structure-for-eu-labour-law/

Jaspers, T., Pennings, F., & Peters, S. S. M. (2019). *European labour law*. Intersentia.

Kenner, J. (2003). EU employment law: from Rome to Amsterdam and beyond. In *EU employment law : from Rome to Amsterdam and beyond* (1st ed.). Hart Publishing.

Ku, H. (2022). Does Minimum Wage Increase Labor Productivity? Evidence from Piece Rate Workers. *Https://Doi.Org/10.1086/716347*, *40*(2), 325–359. https://doi.org/10.1086/716347

Kun, A., & Szabó, I. S. (2023). The impact of the "Minimum Wage Directive" - Directive (EU) 2022/2041 - in Hungary. *Revue de Droit Du Travail 2023* , 216–223.

Lillie, N. (2023). Round Table. Nordic unions and the European Minimum Wage Directive. *Https://Doi.Org/10.1177/10242589221148474*, 6. https://doi.org/10.1177/10242589221148474

Lovén Seldén, K. (2020). Challenges posed by the EU minimum wage initiative to the ETUC and European trade union cooperation. *Https://Doi.Org/10.1177/1024258920945111*, *26*(3), 325–343. https://doi.org/10.1177/1024258920945111

Martinez, P. R., Monteiro, L. M., Vasconcelos, J., Brito, P. M. de, Dray, G., & Silva, L. G. da. (2013). *Código do Trabalho Anotado* (9ª). Almedina.

Martins, J. Z. (2023). EU Directive on adequate minimum wages: Review and Outlook from Portugal. *Revue de Droit Du Travail | Dalloz*, 144–148. https://www-dalloz-fr.kuleuven.e-

bronnen.be/documentation/Document?id=REVTRAV%2FCHRON%2F2023%2F0037

Menegatti, E. (2017). Challenging the EU Downward Pressure on National Wage Policy. *The International Journal of Comparative Labour Law and Industrial Relations*, *33*(2), 195–219.

Menegatti, E. (2019). Wage-setting in Italy: The Central Role Played by Case Law. *Italian Labour Law E-Journal*, *12*(2), 53–66. https://doi.org/10.6092/ISSN.1561-8048/10017

Menegatti, E. (2021). Much ado about little: The Commission proposal for a Directive on adequate wages. *Italian Labour Law E-Journal*, *14*(1), 21–32.

Morano-Foadi, S., Neller, J., & Fairhurst, John. (2018). *Fairhurst's law of the European Union* (12th ed.). Pearson Education Limited.

Muszyński, K. (2020). Reform and Oversight Mechanisms are not Enough Mechanisms Enough: Access to Justice for Workers and Employment Standards in Central Eastern European Countries. In *SSRN Electronic Journal* (ETUI Research Paper - Working Paper 2020.09). Elsevier BV. https://doi.org/10.2139/SSRN.3706721

Nielsen, R. (2000). *European labour law*. Copenhagen Djøf.

Pais, S. O. (2021a). A aplicação do direito da concorrência nos mercados laborais: participação de trabalhadores das plataformas digitais em convenções coletivas e acordos de não contratação. *Questões Laborais*, *58*, 45–72. https://ciencia.ucp.pt/pt/publications/a-aplica%C3%A7%C3%A3o-do-direito-da-concorr%C3%AAncia-nos-mercados-laborais-part

Pais, S. O. (2021b). *Estudos de direito da União Europeia* (4ª). Almedina.

Pasquier, T. (2021). Proposal for a Directive on adequate minimum wages in the European Union: a look at French law. *Italian Labour Law E-Journal*, *14*(1), 77–89. https://doi.org/10.6092/ISSN.1561-8048/13373

Redmond, T. (2019). Law of the European Union. In *Clarus Press*.

Ribeiro, A. T. (2015). Crisis and labour law recent developments in Portuguese labour law. *European Labour Law Journal*, *6*(3), 259–281. https://doi.org/10.1177/201395251500600305

Ribeiro, A. T. (2019). Recentes desenvolvimentos legislativos e jurisprudenciais no domínio das portarias de extensão. *Prontuário de Direito Do Trabalho*, *1*, 315–330. https://repositorio.ucp.pt/handle/10400.14/28752

Riesenhuber, K. (2012). *European employment law : a systematic exposition*. Intersentia.

Sánchez Vellvé, F. J. (2017). Política de salarios mínimos: influencia sobre la desigualdad económica en la Unión Europea. *Investigación Económica*, *76*(302), 77–101. https://doi.org/10.1016/J.INVECO.2018.01.003

Schlachter, M. (2015). *EU labour law : a commentary*. Wolters Kluwer. https://catalogo.bibliotecas.ucp.pt/cgi-bin/koha/opac-detail.pl?biblionumber=374923&q=eu%20labour%20law%20a%20commentary

Schulten, T. (2008). Towards a European Minimum Wage Policy? Fair Wages and Social Europe. *Http://Dx.Doi.Org/10.1177/0959680108097494*, *14*(4), 421–439. https://doi.org/10.1177/0959680108097494

Schulten, T., & Müller, T. (2021). A paradigm shift towards Social Europe? The proposed Directive on adequate minimum wages in the European Union. *Italian Labour Law E-Journal*, *14*(1), 1–19. https://doi.org/10.6092/ISSN.1561-8048/13368

Schütze, R. (2021). *European Union law* (3rd ed.). Cambridge University Press.

Schütze, R. (2021). European Union law. In *Cambridge University Press* (3rd ed.). Cambridge University Press.

Schwertner, S. (2022). The EU's new minimum wage Directive: Implications for Austria? *University of Vienna Law Review*, *6*(1), 30–48. https://doi.org/10.25365/VLR-2022-6-1-30

Sjödin, E. (2022). European minimum wage: A Swedish perspective on EU's competence in social policy in the wake of the proposed directive on adequate minimum wages in the EU. *Https://Doi.Org/10.1177/20319525221090547*, *13*(2), 273–291. https://doi.org/10.1177/20319525221090547

Surdykowska, B., & Pisarczyk, Ł. (2021). The Impact of the Directive on Adequate Minimum Wages in the European Union on Polish Labour Law. *Italian Labour Law E-Journal*, *14*(1), 91–103. https://doi.org/10.6092/ISSN.1561-8048/13374

Watson, P. (2014). *EU social and employment law* (2nd edition). Oxford University.

Zimmer, R. (2019). Living wages in international and European law. *Https://Doi.Org/10.1177/1024258919873831*, *25*(3), 285–299. https://doi.org/10.1177/1024258919873831.

EU LAW AND PUBLICATIONS

European Commission, Directorate-General for *standards*nication, Leyen, U. (2020). *Political guidelines for the next European Commission 2019-2024 : Opening statement in the European Parliament plenary session 16 July 2019 ; Speech in the European Parliament plenary session 27 November 2019*, Publications Office of the European Union. https://data.europa.eu/doi/10.2775/101756

Council Decision (EU) 2022/2296 of 21 November 2022 on guidelines for the employment policies of the Member States. (2022). Official Journal, L 304, 67-77. ELI: http://data.europa.eu/eli/dec/2022/2296/oj

European Union, *Consolidated version of the Treaty on the Functioning of the European Union* (Latest Edition: 01.02.2020). https://op.europa.eu/s/yBVa

European Commission, Directorate-General for Employment. Social Affairs and Inclusion, *Second phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges related to fair minimum wages*. (2020) https://op.europa.eu/s/yBVc.

European Commission, *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Adequate Minimum Wages in the European Union* (2020).

CASE-LAW

Judgment of the Court of Justice of 10 September 2015, *European Parliament v Council of the European Union*, C-363/14 (ECLI:EU:C:2015:579, **https://e-justice.europa.eu/ecli/ECLI:EU:C:2015:579**)

Joined Cases C-609/17 and C-610/17: Judgment of the Court (Grand Chamber) of 19 November 2019 (requests for a preliminary ruling from the Työtuomioistuin — Finland) — *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry* (C-609/17) and *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry* (C-610/17) (OJ C, C/27, 27.01.2020, p. 2, CELEX: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CA0609)

Judgment of the Court of Justice of 13 September 2007, *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud*, C-307/05 (ECLI:EU:C:2007:509, **https://e-justice.europa.eu/ecli/ECLI:EU:C:2007:509**)

Judgment of the Court of Justice of 15 April 2008, *Impact v Minister for Agriculture and Food and Others*, C-268/06 (ECLI:EU:C:2008:223, **https://e-justice.europa.eu/ecli/ECLI:EU:C:2008:223**)

Judgment of the Court of Justice of 10 June 2010, *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini* (C-395/08) and Daniela Lotti and Clara Matteucci (C-396/08), C-395/08 (ECLI:EU:C:2010:329, https://e-justice.europa.eu/ecli/ECLI:EU:C:2010:329)

Judgment of the Court of Justice of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05 (ECLI:EU:C:2007:772, **https://e-justice.europa.eu/ecli/ECLI:EU:C:2007:772**)

Judgment of the Court of Justice of 22 January 2020, *Almudena Baldonedo Martín v Ayuntamiento de Madrid*, C-177/18 (ECLI:EU:C:2020:26, **https://e-justice.europa.eu/ecli/ECLI:EU:C:2020:26**)

Judgment of the Court of Justice of 12 November 1996, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, C-84/94 (ECLI:EU:C:1996:431, https://e-justice.europa.eu/ecli/ECLI:EU:C:1996:431)

Judgment of the Court of Justice of 04 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, 413/13 (ECLI:EU:C:2014:2411, https://e-justice.europa.eu/ecli/ECLI:EU:C:2014:2411)

Opinion of the Advocate General of the Court of Justice of 28 May 2020, *Hungary v European Parliament and Council of the European Union*, C-620/18 (ECLI:EU:C:2020:392, **https://e-justice.europa.eu/ecli/ECLI:EU:C:2020:392**).

Opinion of the Advocate General of the Court of Justice of 28 November 2013, *Thomas Specht and Others v Land Berlin and Bundesrepublik Deutschland*, 501/12 (ECLI:EU:C:2013:779, https://e-justice.europa.eu

Opinion of the Advocate General of the Court of Justice of 23 May 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05 (ECLI:EU:C:2007:291, https://e-justice.europa.eu/ecli/ECLI:EU:C:2007:291)