

Draft - Not for citation

*POLICY PAPER*

# THE HUMAN RIGHTS IMPLICATIONS OF THE MINIMUM WAGE DIRECTIVE

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*June 2023*

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## **Introduction**

It might be surprising that an EU directive on ‘adequate minimum wages’ in the European Union’ (the ‘Minimum Wage Directive’) would be contested or would be an important site for struggles over the vision of human rights that should animate European law and policy, but that is the case. In this paper, we explore the theoretical and political contestations that informed the important developments in language and substance between the directive proposed by the European Commission in October, 2020,<sup>1</sup> and the final Directive (EU) 2022/2041 of 19 October 2022 on adequate minimum wages.<sup>2</sup> We argue that the normative imperatives of the directive’s relationship to human rights, specifically social and economic rights and the ‘solidarity rights’ related to trade unions, along with the competing interests and the variation between member state labour systems that characterise European labour politics on this issue, led to the particular form contestation took in this case and the prospects the agreement opens up for future labour politics in the European space. We further argue that the tensions between the alleged absence of EU competence in this area show the need for a robust statement of human rights that emphasises workers’ agency and collective action and not just the passive entitlement to a decent standard of living.

## **The Draft and Adopted Minimum Wage Directives**

The directive was developed in response to a clear problem. In the words of President von der Leyen, ‘The truth is that for too many people, work no longer pays.’<sup>3</sup> After years of austerity and various crises, combined with ongoing trends like ‘globalisation’ and ‘digitalisation’ the Commission notes that there has been a ‘polarisation’ of wages, with many people, especially women, finding themselves in low wage jobs. This, in turn, has led to both ‘in work poverty’ and inequality.

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<sup>1</sup> ‘Commission proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on adequate minimum wages in the European Union’ COM(2020) 682 final Brussels 28.10.20. (‘Proposed Directive’)

<sup>2</sup> Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union (‘Adopted Directive’).

<sup>3</sup> Proposed Directive, p. 1.

Although these developments themselves may be the result of previous EU economic governance interventions that see minimum wages and robust collective bargaining as hindrances to a competitive European economy,<sup>4</sup> the Proposed Directive claims to be a way of promoting a sustainable, fair and inclusive European economy, particularly as it recovers from the COVID-19 crisis.<sup>5</sup>

One challenge for addressing this problem is the variation between Member States regarding both a minimum wage and collective bargaining. Some states have a statutory minimum wage, others do not and establish minimum wages through collective bargaining. Although those latter states tend to have higher minimum wages relative to median and mean salaries, coverage of workers by collective bargaining varies tremendously. In Austria, almost all workers are covered by collective bargaining agreements<sup>6</sup>; in some of the countries of Central Eastern Europe coverage is lower than 20 per cent.<sup>7</sup> Because of the downward pressures on low wage workers, Germany adopted a statutory minimum wage in 2015, although after considerable debate. This uneven coverage and low minimum wages in some member states inform the proposals made in the directive.

## **Draft Directive**

The Proposed Directive attempted to tackle this problem with some concrete proposals and some vaguer recommendations. The clear goal in the directive is that minimum wages in member states should meet the ‘double decency’ standard: 60%

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<sup>4</sup> Jordan, J., Maccarrone, V. and Erne, R. (2021) 'Towards a Socialisation of the EU's New Economic Governance Regime? EU labour policy interventions in Germany, Italy, Ireland and Romania (2009-2019)', *British Journal of Industrial Relations* 59(1): 191-213.

<sup>5</sup> Proposed Directive, p. 2 and, re competitiveness, see Torsten Müller and Thorsten Schulten, 'Minimum-wage directive: yes, but...', *Social Europe* 10 November 2020. See <https://socialeurope.eu/minimum-wage-directive-yes-but>

<sup>6</sup> Thorsten Schulten and Andrew Watt, 'European minimum wage policy – a concrete policy for a social Europe', European Economic and Employment Policy Brief no. 2, 2007, p. 3. Viewed at <https://www.etui.org/publications/policy-briefs/european-economic-employment-and-social-policy/european-minimum-wage-policy-a-concrete-project-for-a-social-europe>

<sup>7</sup> Müller and Schulten, 'Minimum-wage directive: yes, but...'

of the median wage and 50% of the average wage.<sup>8</sup> (As Müller and Schulten note, ‘The median is lower than the average because the half of the wage distribution above it is skewed upwards by a tail of top earners whereas the half below has a zero lower bound.’<sup>9</sup>) The Proposed Directive, however, does not make this the sole determining criterion, but leaves the criteria for an adequate minimum wage to member states, including purchasing power parity and ‘productivity trends’.<sup>10</sup> Once purchasing power parity is taken into consideration, the gap between countries with the highest minimum wage and the lowest narrows considerably, but there is still tremendous inequality between the income of low paid workers in countries with a low minimum wage and level of collective bargaining coverage and countries with a high minimum wage and/or a high level of collective bargaining coverage.<sup>11</sup> The disparity can undermine the European project in a number of ways, from increasing pressures for a ‘race to the bottom’ through the free movement of workers or through the depression of the minimum wage below productivity increases to allow for a ‘real currency depreciation’ in the absence of control over one’s own currency.<sup>12</sup> On the other hand, a robust Minimum Wage Directive could protect low paid workers across the EU from these declines in their income and ensure for these workers ‘a decent standard of living and their societies a minimum of social cohesion.’<sup>13</sup> Müller and Schulten also note that this could be the basis for ‘an alliance of trade unions, political parties and NGOs and social movements that would have more in common, and more to fight for, than mere rejection of a neoliberal Europe.’<sup>14</sup>

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<sup>8</sup> Müller and Schulten, ‘Minimum-wage directive: yes, but...’.

<sup>9</sup> Müller and Schulten, ‘Minimum-wage directive: yes, but...’.

<sup>10</sup> Müller and Schulten, ‘Minimum-wage directive: yes, but...’.

<sup>11</sup> Thorsten Schulten and Andrew Watt, ‘European minimum wage policy – a concrete policy for a social Europe’, p. 2.

<sup>12</sup> Thorsten Schulten and Andrew Watt, ‘European minimum wage policy – a concrete policy for a social Europe’, p. 5.

<sup>13</sup> Thorsten Schulten and Andrew Watt, ‘European minimum wage policy – a concrete policy for a social Europe’, p. 8.

<sup>14</sup> Thorsten Schulten and Andrew Watt, ‘European minimum wage policy – a concrete policy for a social Europe’, p. 8.

A European adequate minimum wage, then, can be conceived either as a good to be delivered in a way that fulfils a right or it can be seen as a site of contestation that allows coalitions to claim the right as a social human right and as a basis for a European social dialogue. The difference between the two is highlighted by the even vaguer approach to collective bargaining coverage in the Proposed Directive. There, the draft notes:

‘In a context of declining collective bargaining coverage, it is essential that the Member States promote collective bargaining to enhance workers’ access to minimum wage protection provided by collective agreements. Member States with a high collective bargaining coverage tend to have a low share of low-wage workers and high minimum wages. Member States with a small share of low wage earners have a collective bargaining coverage rate above 70%.’<sup>15</sup>

Nevertheless, the remedy for low levels of collective bargaining is left largely to the member states:

‘While all Member States should be encouraged to promote collective bargaining, those who do not reach this level of coverage should, in consultation and/or agreement with the social partners, provide for or, where it already exists, strengthen a framework of facilitative procedures and institutional arrangements enabling the conditions for collective bargaining. Such framework should be established by law or by tripartite agreement.’<sup>16</sup>

As Müller and Schulten note, this would require 18 out of the 27 member states at the time of the Proposed Directive to develop a ‘national action plan’ to achieve the 70% level.<sup>17</sup> They also note, however, that the mechanisms to achieve this coverage are vague in the Proposed Directive and would need to be made more specifically union-friendly for the member state action plans to succeed.<sup>18</sup> Central to the theoretical and political dynamics surrounding the Proposed Directive is its focus on

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<sup>15</sup> Proposed Directive, p. 19.

<sup>16</sup> Proposed Directive, p. 19.

<sup>17</sup> Müller and Schulten, ‘Minimum-wage directive: yes, but...’.

<sup>18</sup> Müller and Schulten, ‘Minimum-wage directive: yes, but...’.

creating a ‘positive dynamic’ for greater convergence on both wages and collective bargaining coverage rather than simply setting a European minimum wage or mandating a particular minimum level of coverage in contravention of the Treaties.<sup>19</sup> Shaping this dynamic itself becomes the basis for both theoretical and political contestation.

## Reception

Perhaps given the diverse approaches to minimum wages in the EU, it is not surprising that the Proposed Directive was controversial. While the European-wide trade union umbrella organisation, the European Trade Union Confederation (ETUC), welcomed the move as a chance to make progress to ‘combat injustice’,<sup>20</sup> the Swedish Trade Union Confederation and the Danish employment minister both resisted the proposal because of the dangers of interference by the Swedish parliament in collective bargaining and the interference of the EU in the Danish collective bargaining system respectively. Both were concerned that the Proposed Directive posed a threat to the ‘Nordic System’ where minimum wages were set by collective bargaining and there is no statutory law in the area.<sup>21</sup> The European Commissioner for Jobs and Social Rights, Nicholas Schmit, attempted to allay these concerns by arguing that ‘Promoting higher standards on wages could support the kind of upward economic and social convergence—the race to the top—that helps to

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<sup>19</sup> Cédric Vallet, ‘European Commission pushes for higher minimum wages’, *Le Monde*, October 29, 2020. Found at [https://www.lemonde.fr/economie/article/2020/10/29/la-commission-europeenne-pousse-en-faveur-d-une-hausse-des-salaires-minimums\\_6057763\\_3234.html](https://www.lemonde.fr/economie/article/2020/10/29/la-commission-europeenne-pousse-en-faveur-d-une-hausse-des-salaires-minimums_6057763_3234.html)

<sup>20</sup> Cédric Vallet, ‘European Commission pushes for higher minimum wages’, *Le Monde*, October 29, 2020. Found at [https://www.lemonde.fr/economie/article/2020/10/29/la-commission-europeenne-pousse-en-faveur-d-une-hausse-des-salaires-minimums\\_6057763\\_3234.html](https://www.lemonde.fr/economie/article/2020/10/29/la-commission-europeenne-pousse-en-faveur-d-une-hausse-des-salaires-minimums_6057763_3234.html)

<sup>21</sup> Sam Fleming, ‘Brussels faces fight over minimum wage pledge for EU’, *Financial Times*, January 2, 2020. Found at <https://www.ft.com/content/48a97ab4-231b-11ea-b8a1-584213ee7b2b>

boost the EU's social market economy.<sup>22</sup> On the employers' side, Business Europe was even more strongly opposed. They decried the Proposed Directive as a binding instrument that the majority of member states did not want and that was strongly opposed by European business. They noted the opposition of the Scandinavian trade unions and described it as 'against the word and spirit of the EU Treaty which protects national competences on pay and collective bargaining.'<sup>23</sup> Its Director General, Markus J. Beyrer went further, describing it as a 'legal monster' that would lead to 'dangerous experiments' and saying: 'We want fair wages set by national social partners, not politically manipulated minimum wages. We want a truly autonomous social dialogue, not quasi-compulsory collective bargaining imposed by public authorities.'<sup>24</sup> Thus, the spectre of politics entering into the allegedly apolitical world of collective bargaining—and particularly an EU-wide politics of political contention—looms large over the resistance both of business and of the trade unions of some member states. We argue that this particular site of contestation for issues involving social rights and collective bargaining is a rich one for the politics of human rights and collective action. In what follows, we show how this led to the changes we see in the Adopted Directive, changes with a much greater and more political role for human rights and a much greater scope for political action by trade unions and coalitions of union-friendly actors. It is possible that the theoretical space freed up by the introduction of human rights norms into the Adopted Directive also frees up space for an enhanced European Social Dialogue.

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<sup>22</sup> Sam Fleming, 'Brussels faces fight over minimum wage pledge for EU', *Financial Times*, January 2, 2020.

<sup>23</sup> 'Proposed EU directive on minimum wages is a recipe for disaster', *Business Europe*, October 29, 2020. Found at <https://www.businesseurope.eu/publications/proposed-eu-directive-minimum-wages-recipe-disaster>

<sup>24</sup> 'Proposed EU directive on minimum wages is a recipe for disaster', *Business Europe*, October 29, 2020.



## Adopted Directive

The Adopted Directive has some changes in terms of the proposals for ensuring an adequate minimum wage and greater collective bargaining in some EU countries. Regarding the minimum wage to be established, the Adopted Directive reiterates the commitment to the widely used ‘double decency test’ of 60% of gross median wage and 50% of gross average wage but adds another potential test: the net minimum wage could be 50% or 60% of net average wage.<sup>25</sup> More important, the suggestion regarding the relation to labour productivity has been removed and the relationship between the minimum wage and the poverty threshold introduced, along with purchasing power being retained. In the area of collective bargaining, the level of collective bargaining coverage that member states need to develop action plans to achieve is raised to 80%.<sup>26</sup> Although measures protecting trade union activity are not explicitly mentioned regarding the action plans—except ‘measures easing the access of trade union representatives to workers’—the stronger language surrounding the right to freedom of association and collective action in the Adopted Directive may encourage greater protections for collective action.<sup>27</sup>

Human rights language has been a key part of EU discussions of an adequate minimum wage and workers’ collective bargaining since the Community Charter of Fundamental Social Rights for Workers in 1989, which emphasised the social rights of workers (freedom of association and collective bargaining, the right to information, consultation and participation for workers) but also the right to ‘an equitable wage, ie a wage sufficient to enable them to have a decent standard of living’.<sup>28</sup> The Community Charter is a declaration, but was supposed to provide

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<sup>25</sup> Adopted Directive, Recital 21.

<sup>26</sup> Adopted Directive, Recital 2.

<sup>27</sup> Adopted Directive, Recital 19.

<sup>28</sup> Community Charter on the Fundamental Social Rights of Workers, Title I.5, See [https://web.archive.org/web/20170321082348/http://www.aedh.eu/plugins/fckeditor/userfiles/file/Conventions%20internationales/Community\\_Charter\\_of\\_the\\_Fundamental\\_Social\\_Rights\\_of\\_Workers.pdf](https://web.archive.org/web/20170321082348/http://www.aedh.eu/plugins/fckeditor/userfiles/file/Conventions%20internationales/Community_Charter_of_the_Fundamental_Social_Rights_of_Workers.pdf) Discussed in Brian Bercusson et al., ‘Legal prospects and legal effects of the EU Charter’, in Bercusson, ed., *European Labour Law and the EU Charter of Fundamental Rights*, ETUI, Brussels, 2002, p. 13.

guidance to developing policy and to European judges. Further, Article 4 of the Social Charter of the Council of Europe—that has been found to be protected through the law of the EU—contains the right to a ‘remuneration such as will give them and their families a decent standard of living’. This right should be exercised ‘by freely concluded collective agreements, by statutory wage fixing machinery, or by other means appropriate to national conditions.’<sup>29</sup> The right to freedom of association and collective bargaining appear in two places in the Charter of Fundamental Rights of the European Union: in Article 12 (Freedom of Assembly and Association)

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

And under ‘Solidarity Rights’ in Articles 27 (Workers' right to information and consultation within the undertaking) and 28 (Right of collective bargaining and action)

Article 27 Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

Article 28 Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.<sup>30</sup>

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<sup>29</sup> European Social Charter 1961, articles 4.1 and 4.5. See <https://rm.coe.int/168006b642>

<sup>30</sup> Charter of Fundamental Rights of the European Union. See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>

The Charter of Fundamental Rights is, of course, binding fundamental law of the EU. That is why it is perhaps surprising that the Proposed Directive contains so little reference to it as a source of rights. The Proposed Directive refers to Article 31 of the Charter ('the right to fair and just working conditions')<sup>31</sup> Other references to the Charter of Fundamental Rights are largely to gender equality.<sup>32</sup> All other references to human rights instruments are to the European Social Charter where while the right to 'just conditions of work' and 'fair remuneration' are mentioned, collective agreements are not framed in terms of rights<sup>33</sup>. The other main references to the rights we are concerned with in the Proposed Directive are to the European Pillar of Social Rights which does indeed contain references to 'adequate minimum wages' but collective action and membership of a trade union are not foregrounded as rights.<sup>34</sup> Although 'the right to collective action' appears in the Preamble and in Principle 8 of the European Pillar of Social Rights, the emphasis is on the flexibility of employers: 'In accordance with legislation and collective agreements, the necessary flexibility for employers to adapt swiftly to changes in the economic context shall be ensured.'<sup>35</sup>

The Proposed Directive, then, is notable both for ignoring of the binding Charter of Fundamental Rights in favour of the more aspirational and non-binding European Social Charter and European Pillar of Social Rights and for its framing of the issues at hand in terms of a passive and attenuated understanding of rights. In contrast, the Adopted Directive contains a much more robust set of human rights protections and a more dynamic and participatory vision of rights. The Adopted

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<sup>31</sup> Proposed Directive, Preamble, p. 5.

<sup>32</sup> E.g. Charter of Fundamental Rights, p. 11  
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>

<sup>33</sup> Proposed Directive, p. 16.

<sup>34</sup> European Pillar of Social Rights  
[https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en)

<sup>35</sup> European Pillar of Social Rights, Principle 5, p. 14. See  
[https://ec.europa.eu/info/sites/default/files/social-summit-european-pillar-social-rights-booklet\\_en.pdf](https://ec.europa.eu/info/sites/default/files/social-summit-european-pillar-social-rights-booklet_en.pdf)

Directive more strongly links the European Social Charter to EU law.<sup>36</sup> It foregrounds, at the very beginning of the Adopted Directive, the role of the Charter of Fundamental Rights:

(3) Article 31 of the Charter of Fundamental Rights of the European Union (the "Charter") provides for the right of every worker to working conditions, which respect his or her health, safety and dignity. Article 27 of the Charter provides for the right of workers to information and consultation. Article 28 of the Charter provides for a right of workers and employers, or their respective organisations, in accordance with Union law and national laws and practices, to negotiate and conclude collective agreements at the appropriate levels. Article 23 of the Charter provides for the right to equality between women and men in all areas, including employment, work and pay.<sup>37</sup>

It refers to the European Social Charter in a much more participatory way, highlighting the importance of collective action to securing the right to an adequate minimum wage: the adopted Directive also recognises the role of freely concluded collective agreements as well as of statutory minimum wage setting mechanisms, to ensure the effective exercise of this right, the right of all workers and employers to organise in local, national or international organisations for the protection of their economic and social interests and the right to bargain collectively.<sup>38</sup>

The 'right to collective action' and collective bargaining is highlighted in the European Social Pillar,<sup>39</sup> in a much longer discussion of the relevant ILO

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<sup>36</sup> Adopted Directive, Recital 3.

<sup>37</sup> Adopted Directive, Recital 3.

<sup>38</sup> See: Adopted Directive, Article 2 "This Directive shall be without prejudice to the full respect for the autonomy of the social partners, as well as their right to negotiate and conclude collective agreements." Article 3: 'In accordance with Article 153(5) TFEU, this Directive shall be without prejudice to the competence of Member States in setting the level of minimum wages, as well as to the choice of the Member States to set statutory minimum wages, to promote access to minimum wage protection provided for in collective agreements, or both.'

<sup>39</sup> Adopted Directive, Recital 5.

conventions,<sup>40</sup> the Convention on the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) and the European Social Charter,<sup>41</sup> and, especially, the Charter of Fundamental Rights.<sup>42</sup> It frames the concession—to the Proposed Directive’s Scandinavian critics—that there is no obligation on member states to introduce a statutory minimum wage where they do not exist.<sup>43</sup> It emphasises workers’ ‘right to redress’.<sup>44</sup> The Adopted Directive is clear that it cannot be the basis of regression: ‘The implementation of this Directive cannot be used to reduce existing rights for workers, nor can it constitute valid grounds for reducing the general level of protection afforded to workers in the field covered by this Directive, including, in particular, with regard to the lowering or abolition of minimum wages.’<sup>45</sup> Finally, it places obligations on the member states to protect the right to collective bargaining to ‘take measures, as appropriate, to protect the exercise of the right to collective bargaining on wage-setting and to protect workers and trade union representatives from acts that discriminate against them in respect of their employment on the grounds that they participate or wish to participate in collective bargaining on wage-setting’.<sup>46</sup>

This is a remarkable transformation from a passive employers’ document to an active workers’ document focused on the right to participation and the vision of a meaningful social dialogue. What produced this change? In what follows, we argue that both human rights norms, appropriately construed, and the potential dynamics in human rights policy coherence and political contention at the national level spilling over to the European level can account for this change. Given that the changes entrench and reinforce active worker participation in securing an adequate

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<sup>40</sup> Adopted Directive, Recital 20 and 24.

<sup>41</sup> Adopted Directive, Recital 2 and 24.

<sup>42</sup> Adopted Directive, Recital 3.

<sup>43</sup> Adopted Directive, Article 4a.

<sup>44</sup> Adopted Directive, Article 12.

<sup>45</sup> Adopted Directive, Recital 38.

<sup>46</sup> Adopted Directive, Article 4 (1c).

minimum wage and collective action, the changes present in the Adopted Directive are potential first steps to a participatory European Social Dialogue.

## **Human Rights Pressures to Revise the Directive**

### Coherence in Human Rights Policies

As a directive expressly concerned with human rights—specifically economic and social rights—and intended to inform policy, both the Proposed and Agreed Minimum Wage Directive can be evaluated in terms of human rights policy coherence. In previous work, Graham Finlay helped develop a definition of human rights policy coherence for FP7 FRAME (Fostering Human Rights Among European Policies).<sup>47</sup> Policy coherence appears in a number of forms in EU instruments, including as ‘coherence’, ‘transparency’ and ‘consistency’. The orthodox view of policy coherence is that it equals the absence of incoherence. Incoherence is seen as bad by definition: all policies and institutions should be pulling in the same direction. Given the complexity of the EU, there are many potential sources of coherence and incoherence: internal, external, vertical and horizontal. As a result, incoherence in the actions and institutions of the EU is natural, but regrettable according to the orthodox view.

The orthodox view identified three potential sources of incoherence: structural, framework or policy and interest-based. Structural incoherence is produced when institutions lack coordination or clash. Framework or policy incoherence involves competing visions or overlapping responsibilities. Finally, interest-based incoherence is where the interests of different actors diverge or conflict regarding policy goals. Overriding all of these considerations in human rights policy is the centrality of normative coherence: policies are incoherent if they fail to live up to human rights standards. Human rights are ‘universal, indivisible,

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<sup>47</sup> A definition principally developed by Tamara Lewis. Please see Tamara Lewis et al., *Coherence of human rights policymaking in EU institutions and other EU agencies and bodies* (2014) FRAME Deliverable 8.1 Available at <https://repository.gchumanrights.org/items/b40a498c-660c-495c-a813-d79f8a416e36>

interdependent and inter-related', but merely delivering on the substances of these human rights is increasingly seen as insufficient. But beyond human rights outcomes, the process by which they are realised is also important. Human rights are claimed and this process requires further values and principles if people are to effectively make such claims. Some of these norms are explicitly mentioned in the Adopted Directive, including non-discrimination.<sup>48</sup> Increasingly, however, human rights policy coherence is seen to also involve process norms: transparency, accountability and participation to and of those right holders in their realisation of their own human rights. We argue that it is these process norms that provide the theoretical impetus to strengthen human rights in the adopted form of the Minimum Wage Directive. These process norms are particularly suited to the area of decent wages and collective bargaining governed by the Directive and are part of a potential vision for economic and social rights in a Social Europe. An emphasis on process is also central to the Minimum Wage Directive's role in legitimising the EU's economic model: both 'output' and 'throughput' legitimacy are required for it to succeed.

But this emphasis on process challenges the orthodox view of human rights policy coherence. Could structural, framework or interest-based incoherence be productive in terms of promoting human rights? In subsequent work with a co-author.<sup>49</sup> Finlay explored how incoherence in the various forms of policy coherence could advance the coherence that we are actually seeking: normative coherence involving human rights. Previously we have applied this conception of incoherence for coherence to the external policies of the EU, where the idea of human rights is most at home. In this article, we apply it to the internal policies of the EU. Applying a more participatory approach to internal EU policies both helps to conceive of the European Union as a human or fundamental rights-based project from the point of view of its citizens, but also helps identify the key actors that

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<sup>48</sup> For non-discrimination, see Adopted Directive Article 22.

<sup>49</sup> Finlay and Ginsborg, 'Coherence Versus Coherence: Normative Versus Structural and Interest-based Coherence', in Benedek, W., Kettelman, M.C., Klaushofer, R., Lukas, K. and Nowak, M. eds., *European Yearbook on Human Rights 2017*, Vienna-Graz, NWV, 2017.

promote this project. In the case of the Minimum Wage Directive, as with the external policies of the EU, a crucial participatory agent is the European Parliament. We see this in the political process that led to the changes in the Adopted Directive.

## **Productive Incoherence and the Minimum Wage Directive**

In what follows, we examine some of the ways in which incoherence has been productive in the development of the Adopted Directive, in terms of the three types of incoherence we have identified.

### Normative Coherence

It is important to note that human rights principles were strengthened and made more concrete in the Adopted Directive. Although a reference the European Social Charter's emphasis on the right to a 'decent standard of living' is found in both versions of the directive, this right is much more strongly tied to other rights in the Adopted Directive and, in particular, to the right of 'every worker to working conditions, which respect his or her health, safety and dignity' of Article 31 of the binding Charter of Fundamental Rights.<sup>50</sup> The right to transparency is made more concrete by clearer indicators regarding an adequate minimum wage, including relating it to purchasing power parity and poverty levels.<sup>51</sup> Accountability and participation are enhanced by the more ambitious level of collective bargaining coverage. This normative coherence is a real achievement, but it is worth noting that many of the gains of the Adopted Directive were a result of structural and interest-based incoherence.

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<sup>50</sup> Adopted Directive, Recital 3 For the European Social Charter, see Recital 2.

<sup>51</sup> See Adopted Directive, Article 5(1): 'Member States with statutory minimum wages shall establish the necessary procedures for the setting and updating of statutory minimum wages. Such setting and updating shall be guided by criteria set to contribute to their adequacy, with the aim of *achieving a decent standard of living, reducing in-work poverty*, as well as promoting social cohesion and upward social convergence, and reducing the gender pay gap' emphasis added.



## Structural Incoherence

Given the difficulties of making progress on human rights and under the influence of the orthodox view, EU actors have frequently called for a single actor to be responsible for human rights.<sup>52</sup> This could be an enhanced Fundamental Rights Agency or a lead or separate department within the European Commission. A single or lead actor would then simplify the process of policy formation and act as a single point of contact for other units within the EU. We disagree. Other policy actors in the EU have already suggested that this streamlining would be at the cost of mainstreaming human rights across all the actors within the EU.<sup>53</sup> More important, with multiple actors, including the labour inspectors in Member States but also trade unions at local, sectoral and national levels, there is more potential for conflict, but this conflict is frequently productive because the rival actors can act as checks and balances on the domination of policymaking by one branch of EU governance.<sup>54</sup> Specifically, checks and balances help to secure transparency and accountability and in the lead check on the power of the Commission, the European Parliament, allows for EU citizens' participation in the protection of their human rights. This clearly happened in the case of the Minimum Wage Directive, but perhaps the most important form of participation occurred at Member State level. Multiple actors across diverse national contexts, all of which have different

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<sup>52</sup> This was the response of some of our interview subjects in FP7 FRAME report 8.3, Ginsborg et al., *Policymakers' Experiences Regarding Coherence in the European Union Human Rights Context*, 2016. Cited in Finlay and Ginsborg, p. 206.

<sup>53</sup> An extreme example is DG Trade's reliance on the International Labour Organization for human rights standards in trade policy. This has led to a loss of focus and a lack of expertise regarding human rights in DG Trade itself. See Finlay and Ginsborg, p. 207.

<sup>54</sup> Given the uneven power relationship between employers and employees, in the area of employment relations "having a right" and "getting a right" is not the same thing. Between the equal contractual rights of employers and employees, typically force decides. Workers' rights in the area of pay can be best enforced better through neo-corporatist regimes that give unions a strong collective voice in wage policy enforcement. By comparison to the universal, "liberal" enforcement regimes through courts and independent agencies is producing inferior results as shown, for example, by our comparative analysis of Switzerland's unequal equal pay policy by gender and by nationality in Switzerland across time. Erne, R. and Imboden, N. (2015) 'Equal pay by gender and by nationality: a comparative analysis of Switzerland's unequal equal pay policy regimes across time', *Cambridge Journal of Economics* 39(2): 655-674.

approaches to setting minimum wages allow the political independence of states and worker participation and self-protection. These human rights norms were central to the rights which received new emphasis in the Adopted Directive: the 'right to information' promotes transparency, the 'right to redress' allows for accountability. The fact that the Adopted Directive emphasises that the penalties for violating these rights must not only be 'effective' and 'proportionate' but also dissuasive shows the heightened effectiveness of these rights in the adopted version and the centrality of accountability to their protection. Even more importantly, its Art 13 stipulates that penalties can also be issued and enforced by the social partners themselves, namely through 'contractual penalties provided for, where applicable, in rules on enforcement of collective agreements'.<sup>55</sup> This accountability and these labour rights cannot be enforced in a top-down manner by a single agency, whether the Fundamental Rights Agency or, in the area of labour rights, the European Labour Authority in Bratislava. Rights need to be achieved on the ground, by the concerned social actors affected, namely the trade unions. Thus, we need a bottom up approach to human rights promotion and labour unions need to be involved in enforcement.

## Interest-based Incoherence

Social dialogue is the paradigmatic example of how a conflict of interests can lead to greater transparency, accountability and participation in the conditions of one's work. The conflict of interests between employers and trade unions brings home the importance of the right to collective bargaining itself. The interests of Member States can conflict with the interests of other Member States and EU institutions. Similarly, within Member States, the interests of the social partners can also conflict. This helps to explain the successful resistance to harmonisation by some Scandinavian countries. This manifested itself in the reiteration that the Directive does not require states to adopt a statutory minimum wage and fully respects national competences and social partners right to conclude agreements.<sup>56</sup>The higher level of collective bargaining coverage of 80% is also produced by this

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<sup>55</sup> For the workers' right to information and consultation see Recital 3 of the Adopted Directive, where it is strongly tied to the Article 27 of the Charter of Fundamental Rights. For the right to redress see Article 12. For penalties see Article 13.

<sup>56</sup> Adopted Directive, Article 2.

conflict of Member State interests. Indeed, following an argument by Lorenzo Zucca, it is an excellent example of the possibility of conflict between legal orders to lead to a higher level of human rights protection in ‘a multilevel world of actors with diverse, competing interests.’<sup>57</sup> In the case of the Minimum Wage Directive, the different legal provisions for setting minimum wages in different member states and the different forms of social dialogue led to a higher level of collective bargaining coverage. It should be noted that this was both to the benefit of states that had already reached the required level of coverage, since their competitors with less coverage will be obliged to increase their minimum wages and collective bargaining coverage, but it also prevents countries with high levels of coverage from challenging the directive’s approach. Since they have already attained the required level of coverage, they will not be affected by the requirement that Member States develop a plan to reach the target. This clash of legal orders can also be seen as a form of framework or policy incoherence because there are competing visions about how to promote human rights in this area. It is also important to note that the enhanced commitment in the Adopted Directive was, once again, based on the fundamental law of the Charter of Fundamental Rights, rather than being promoted through the Social Pillar.

## **Conclusion: a future European Social Dialogue?**

Convergence on a robust level of human rights protection in the area of minimum wages and collective bargaining is, potentially, a basis for hope in a European Social Dialogue suitable for such a multilevel world. The contestation around the Minimum Wage Directive shows the potential for a Social Dialogue that improves workers’ standard of living across the Union in ways that enhance worker participation and agency and through that a Social Europe that legitimises the EU itself. This contestation at European level, however, is very much in its infancy. Most

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<sup>57</sup> Finlay and Ginsborg, p. 207. See Lorenzo Zucca, ‘Monism and Fundamental Rights in Europe’ in Dickson, J. and Eleftheriadis, P. eds., *Philosophical Foundations of European Union Law*, Oxford: OUP, 2012. Zucca is thinking about the clash between the overlapping legal orders of the Charter of Fundamental Rights and the European Convention on Human Rights.

of the political contention surrounding the directive was at Member State level and, subsequently, in the European Parliament. Without political action, the Directive will not have these positive effects. As Brian Bercusson noted long ago, there is a clash between the ‘limited EU competences’ and the Charter’s fundamental rights.<sup>58</sup> Charter rights, including collective bargaining, cannot simply be imposed on states, as the Adopted Directive also notes. Not surprisingly, we have seen the limits of EU competences invoked by the directive’s opponents. As Bercusson further notes, Charter rights do not guarantee themselves and, during austerity, we have seen how the main actors of the European Union were content to ignore Charter rights, let alone the rights in the Social Charter, when they clashed with economic policies that weakened workers’ rights and reduced their wages. Convergence towards a fairer and more social Europe thus requires political action at EU level, which may be more effective than legal action. For the potential of the Minimum Wage Directive to be realised, it will require political action not just by the social partners of the Member States, but by coalitions of unions and other actors, including political parties, in and around the EU institutions. Although the success of this contestation is still uncertain, the rights acknowledged by the Minimum Wage Directive make it—and a future European Social Dialogue—possible.

## **Policy Recommendations:**

As noted above, any concrete policies at Member State or European Union level will require political action for their development, authorisation and implementation. Nevertheless, there are a number of concrete steps that Member States can take to encourage that they achieve the levels of minimum wage and collective bargaining coverage set by the directive. The minimum wage can, obviously, be set by statute if collective bargaining does not result in an adequate

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<sup>58</sup> In Bercusson, B., ed., *European labour law and the EU Charter of Fundamental Rights*, Brussels, ETUI, 2002.

minimum wage by the directive's standards. More interesting, perhaps, are policies designed to achieve the requisite levels of collective bargaining coverage. What unites all of these policy proposals is that they enhance the agency and active human rights of workers and their representatives, often using interest-based coherence to achieve this.

## National Level

Anke Hassel's recommendations for promoting collective bargaining in Germany are also helpful elsewhere,<sup>59</sup> even if the level at which collective bargaining occurs differs to some extent among European countries, as Hassel acknowledges, from individual firms to sectoral level to an economy-wide social dialogue. Tellingly, she notes that if we simply accept the wider industrial relations system in a particular Member State and see collective bargaining coverage merely as an 'outcome' of those systems 'it becomes clear that the role of the government is limited.'<sup>60</sup> But if we focus on the agency of workers and trade unions and see industrial relations systems in terms of the rights to participation of workers organised into collective actors, then the normative basis for a more consolidated sectoral or national level dialogue is clearer and the conditions under which those negotiations take place need to be rebalanced to enhance union participation. This human rights basis justifies government action to encourage sectoral agreements and a national social dialogue so that workers' rights are more effective. It is not always noted that the need for workers' freedom of association to be effective is reflected in the jurisprudence of the European Court of Human Rights. Article 11.1 of the European Convention on Human Rights explicitly mentions, under 'freedom of association: 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.'<sup>61</sup> The European Court of Human Rights has found

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<sup>59</sup> Hassel, A. 'Round Table. Mission impossible? How to increase collective bargaining coverage in Germany and the EU', *Transfer: European Review of Labour and Research* Volume 28, Issue 4, Nov 2022.

<sup>60</sup> Hassel, p. 491.

<sup>61</sup> See European Convention on Human Rights, Article 11.1, found at [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf).

that states have positive obligations to grant ‘the legal entity status and afford necessary legal protection during its life-cycle.’<sup>62</sup> Although the court has not found that trade unions have the right to the signing of collective agreements, consultations etc. ‘provided a state has secured other corresponding measures to protect their rights’ it has noted that ‘compulsion to join a particular trade union may not always be contrary to the Convention.’<sup>63</sup> This construction of the right to freedom of association creates the space for both the varying forms of minimum wage setting found in the European Union and for government action to protect and promote the agency of workers.

The form that government action takes could vary, but at least potentially includes, following Hassel, reform of any employer vetoes in sectoral bargaining, especially on extension decisions, appealing to employers’ interests by requiring collective agreements to tender for government contracts and reforming the social dialogue by putting pressure on employers to join employers’ associations, to facilitate cooperation between unions and other labour organisations and to support smaller unions’ participation in collective bargaining.<sup>64</sup> Politically, there is much for unions to do in this space, including ‘joint initiatives’ and broader coalitions.

## European Level

If Member State governments’ influence on collective bargaining is indirect, especially in the absence of a participatory conception of human and fundamental rights, the European Union’s potential role is even more so. Nevertheless, the European Union’s commitment to fundamental rights in the Charter and Treaties, allows it to go beyond the minimalist conception of the human right to freedom of association of the ECHR. And even beyond the machinery envisaged by the Minimum

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<sup>62</sup> Golubovic, D 2013. ‘Freedom of Association in the Case Law of the European Court of Human Rights’, *International Journal of Human Rights* 17, p. 5.

<sup>63</sup> Golubovic, p. 6 and 8, citing *Cesnieks v. Latvia*, Application no. 56400/00, judgment of 12 December 2002.

<sup>64</sup> Hassel, p. 495-6.

Wage Directive itself as well as by other directives, there are also important opportunities to promote collective bargaining through the distribution of European funds. In a recent communication, the European Commission has identified the Minimum Wage Directive's requirement to put in place enabling frameworks and national action plans to promote collective bargaining as central to improving the social dialogue within Member States.<sup>65</sup> But it also emphasises the 'comprehensive framework of Directives on the information and consultation of workers' and the public procurement directives' requirement that 'Member States to respect the right to organise and collective bargaining following the ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise and ILO Convention 98 on the Right to Organise and Collective Bargaining.'<sup>66</sup> Most interestingly, the Commission notes that the European Social Fund Plus requires Member States 'to whom a country specific recommendation on social dialogue has been addressed to spend at least 0.25% of the funds on supporting the capacity-building of social partners, while all other Member States must allocate an appropriate amount of ESF+ resources to this area.'<sup>67</sup> Confirming the discursive shift between the two texts of the Minimum Wage Directive, the Commission proposes a Council recommendation that includes a social dialogue 'that respects the fundamental rights of freedom of association and collective bargaining' and that 'promotes strong, independent workers' and employers' organisations, includes measures to strengthen their capacity ; ensures access to the relevant information needed in order to participate in social dialogue; promotes engagement in social dialogue on the part of all parties'.<sup>68</sup> Using the interests of Member States in receiving European Social Fund Plus funds to promote enhanced participation in national social dialogues in the name of fundamental rights, shows the concrete policy measures and opportunities a participatory vision of human rights enables, even at European

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<sup>65</sup> 'Strengthening social dialogue in the European Union: harnessing its full potential for managing fair transitions', COM(2023) 40 final, Brussels, 25.1.2023, p. 4-5, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023DC0040>.

<sup>66</sup> COM(2023) 40 final, p. 5.

<sup>67</sup> COM(2023) 40 final, p. 6.

<sup>68</sup> COM(2023) 40 final, p. 6.

level. It is important, however, that capacity building enhances participants' agency and does not restrict it. Thus, any funds for capacity building should be without obligations that would reduce social partners'—and especially trade unions'—scope for action.



With the support of the **Erasmus+ Programme of the European Union** under the **Jean Monnet Network “Transnational Political Contention in Europe”** (TraPoCo) (GA 620881).

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