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Ceemet's views on the proposal on adequate minimum wages directive

On 28 October 2020, the European Commission published its proposal for a directive on adequate minimum wages. Ceemet considers that there is a lack of legal basis to issue a proposal for a directive on wages and believes this proposal to be a far-reaching intrusion on the autonomy of social partners.

Ceemet's key messages

- The European Treaties and the case-law of the European Court of Justice exclude pay and collective bargaining from the EU level. Wage setting and the manner to set wages are a purely national and social partner competence.
- The proposed directive is an interference in national competences and social partners' autonomy. It also conflicts with the principle of subsidiarity.
- Ceemet urges the European Parliament and the Council to reject the proposal for a directive and to request the European Commission to pursue the objectives via a non-legally binding tool such as a Council Recommendation or via the European Semester.

Ceemet's views

First and foremost, Ceemet is of the opinion that the EU has no competence to introduce any EU action regarding pay and collective bargaining as there is no legal basis to do so. 'Pay' is explicitly excluded from the EU level in article 153(5) TFEU. The Commission argues that it stays within the limits of Article 153(5) as the proposal "does not contain measures directly affecting the level of pay". Also the Council Legal Service is of the opinion that this proposal does not establish the level of the various constituent parts of pay nor directly interferes in the determination of pay.

Ceemet strongly disagrees with this reasoning. The analysis of the Council Legal Service is largely based on the fact that the concept of adequacy is not narrowed down by specific criteria which would directly affect the outcome and is characterised by obligations of effort rather than of result. However, the Commission proposal states that wages should be adequate and imposes the use of indicative reference values and pre-defined criteria on Member States in order to determine the adequacy of minimum wages. The text of the proposal clearly mentions the obligation of result in article 5.2 and 5.3 where it states that "*the national criteria shall include at least the following elements" and "Member States shall use indicative reference values to guide their assessment of adequacy".* In case the Commission would have wanted to suggest certain criteria it would have done so, for example by stating that "*the national criteria can take, amongst others, the following elements into account"*. When applying the wording chosen by the Commission, the Member States will be obliged to take into account the criteria in their established practices and procedures when assessing their national figures. This practice will inevitably result in a set level of minimum wage. Therefore, there is, contrary to what is stated in the opinion of the Council Legal Service, a direct interference in the determination of pay.

The opinion of the Council Legal service states that the compulsory use by Member States of the four criteria referred to in Article 5.2 does not have a significant impact on the outcome of the wage-setting process, as Member States remain free to use other criteria in addition to the mandatory criteria. Therefore, according to the opinion, this article does not interfere directly in the determination of wages.

In reality, however, the Member States will not be able to depart from this very restrictive framework. They will only be able to slightly mitigate the effects by using particularly complex calculation formulas, combining a multitude of criteria (including the four mandatory criteria). For information, some Member States currently have formulas based on less than 4 criteria for the calculation of the minimum statutory wage.

Contrary to what the opinion states, this article therefore has a significant impact on the procedure for setting remuneration, and consequently on its outcome.

Unavoidably, the proposal will thus interfere directly in a purely national competence and have an effect on the level of pay which goes far beyond the limits set in the European Treaties and case-law of the European Court of Justice (ECJ).

The adequacy of the level of minimum wages will be up for interpretation by the ECJ. The mere existence of this legally binding text means that Member States will need to transpose it and the Court will acquire jurisdiction on purely national collective agreements and wage setting. This interferes greatly with national and social partner competences.

Moreover, ‘the right to associate’ is also explicitly exempted from the EU level in Article 153(5) TFEU. The Commission (indirectly) puts pressure on social partners in some Member States, depending on their national social system, to “push” as many workers and companies as possible to affiliate to their organisation. By doing so, the Commission indirectly impacts the right to associate. We therefore consider that the Commission not only oversteps its competence in the matter of pay, but also as regards the right to associate. This has also been disregarded by the Council Legal Service in their assessment of the legal basis.

The lack of legal basis is not the only problem with the text. This proposal for a directive also breaches the autonomy of social partners. Collective bargaining and pay are at the heart of social partners competences. Wage setting is explicitly excluded from the EU level and a mere national competence. In many countries it is even a core responsibility of mandated social partners at the appropriate level. According to article 152 TFEU, the EU must recognise the role of social partners and respect their autonomy. Accordingly, any measures related to these topics should be taken at national level, in full respect of national regulations and practices. This position is also shared by several trade unions, national governments and national parliaments. Unfortunately however, the Council Legal Service fails to take this important issue into account in their assessment.

In addition, even if there had been a legal basis for EU action, the chosen legal basis, i.e. article 153(1)(b) would be incorrect in our opinion. The directive contains a provision which has little to do with the setting of wages but concerns collective bargaining in general, i.e. article 4. If transposed as it stands, this article would have very far-reaching consequences for social partners as regards their way of functioning, structure and modalities in general. Out of touch with the practical realities and the actual impacts of such provision, the opinion of the Council Legal Service regards it as “incidental”. Ceemet strongly disagrees with this view and considers that this provision falls under article 153(1)(f) ‘representation and collective defence of the interests of workers and employers’ but not under ‘working conditions’. Therefore the Commission would have to base itself on article 153(1)(f) as the only correct legal basis for such a provision. Article 153(2)b, states that EU actions concerning "the collective representation and defence of the interests of workers and employers" require unanimity in the EU Council, after consultation of the European Parliament, the European Economic and Social Committee and

the Committee of the Regions. However, this proposal for Directive is subject to an ordinary legislative procedure.

Furthermore, assuming again that there were a legal basis for EU action, the principle of subsidiarity requires action to be taken as closely as possible to the citizen. Member States have different models for dealing with wage setting. Indeed, often wages are set by, or in agreement with, the national (sectoral) social partners. The differences that exist between Member States make Ceemet strongly question that the objective of the Directive can be better achieved at EU-level rather than at national level. Also, there is no clear transnational dimension to the issue that are intended for regulation. Therefore, it seems hardly appropriate that this topic is regulated at EU level, which is extremely far from the citizens and goes against the intent of the Treaties.

As this is a sensitive topic which at least touches – but in practice interferes with – national and social partners competences, a binding legal tool, i.e. a directive as proposed by the Commission, is not appropriate. The only way in which the EU can deal with such a delicate topic is through non-binding measures, such as a Council recommendation, supported by enhancing existing monitoring in the European Semester process.

We therefore urge the European Parliament and the Council to reject the proposal for a directive and to request the European Commission to pursue the objectives via a non-legally binding tool.

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