SYNDICAT EUROPEÆN TRADE UNION CONFEDERATION

ETUCLEX

Executive Summary of the ETUC Counter-Opinion

in relation to the Opinion of Advocate General Emiliou
delivered on 14 January 2025
in the Case C-19/23 *Denmark v EP and Council*
before the Court of Justice of the European Union
regarding an action for annulment
of Directive (EU) 2022/2041 on Adequate Minimum Wages

Introduction: The Advocate General's Opinion should be rejected in full as wrong in law

In its Counter-Opinion, the European Trade Union Confederation (ETUC) spells out its views in reaction to the Opinion presented by Advocate General (AG) Emiliou in the Case C-19/23 *Denmark v. EP and Council* before the Court of Justice of the European Union. On 14 January 2025, AG Emiliou delivered his (non-binding) Opinion which recommended that the Court of Justice of the European Union (CJEU) should annul the Adequate Minimum Wages Directive (2022/2041) (AMWD) in full on the basis that the AMWD is incompatible with Article 153(5) TFEU, the provision which excludes 'pay' from the regulatory competence conferred upon the EU under the Treaties.

The ETUC respectfully considers that the AG erred in law in reaching this conclusion and calls on the Court to reject the Opinion in its entirety.

The ETUC analysis of the Opinion is that the conclusion of the AG and the arguments which led him there are simply wrong in law. It appears that the AG founded his Opinion on a historically mistaken and reductionist understanding of the constitutional framework within which the AMWD, EU social policies and the social partners operate.

The AG's Opinion that the EU legislature acted in breach of its competences when adopting the AMWD would have profound consequences for millions of European workers should they perceive that the widely celebrated benefits of the AMWD are to be denied to them, resulting in a loss of trust in the whole European project. Though this is not evidence of an error of law, it does suggest that the logic which led to the AG's conclusion is counterintuitive and the alternative case proposed by the ETUC (and others) is more likely to be consistent with the legal architecture of the EU.

The ETUC considers that the AG reached his conclusions by failing to attach sufficient weight or even to recognise important aspects of the rich international and European legal framework and case law, including the profound value of decent work and pay, collective bargaining and joint decision making by the social partners. These guarantees are all important drivers for human dignity and social progress, which can be found among the fundamental values and objectives to be protected and promoted also by the European Union. However, the ETUC respectfully submits that the argument of the AG does not do justice to these sources of law and is, on occasion, inconsistent and contradictory.

European Trade Union Confederation | Esther Lynch, General Secretary |
Bld du Jardin Botanique 20 - 1000 Brussels | +32 (0)475 601 501 | etuc@etuc.org | www.etuc.org

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Context: The need for a holistic and social understanding of the EU legal landscape

In the words of AG Emiliou, '[t]he present action does *not* arise in a vacuum'. That is agreed, of course, although for a very different reason than that suggested by the AG when making reference to the infamous case of *Laval* (C-341/05). The issue in the AMWD case at hand is fundamentally different from that in *Laval*, which weighed a fundamental trade union right against an economic freedom rather than a social objective, and with very different considerations. The ruling set aside a social objective, the right to collective action, notwithstanding that Article 153(5) TFEU protected that right from interference. The trade union arguments in defence of social rights and equal pay were dismissed in favour of a legal reasoning based on competition and market integration. In contrast, the AMWD establishes a framework for protecting and promoting decent wage levels and collective bargaining which aligns with the social objectives of the Treaties and is not in tension with their economic objectives. It is unsurprising that the *Laval* judgement resulted in far-reaching concrete negative impacts on pay and collective bargaining across all of Europe. The AMWD will have the contrary effect, however.

The ETUC points out that adverse the social consequences of the *Laval* judgment offers important lessons for the Union, together with other negative experiences from the European Semester, the European Financial Stabilisation Mechanism and the sovereign debt crisis Memoranda of Understanding. *Laval* raises serious questions about the limits of EU economic policy and its legitimacy to directly interfere with wage levels and collective bargaining.

In a Union founded on democracy, human rights and the rule of law, the protection and promotion of decent wages and collective bargaining is central. And precisely for this reason, the social policy chapter in the Treaties fulfils the purpose of balancing the economic powers of the EU. The Union has not only an economic but also a social purpose, as the CJEU has confirmed. The Treaties must be read accordingly as a whole; the social objectives cannot be eliminated or devalued by the economic objectives of the Union.

The Union of today is much more than a market. It is a social market economy that the Treaties dictate shall work for the constant improvement of working and living conditions, sustainable development and social progress. The AMWD reflects this ambition of the EU, serving a much broader purpose than regulating pay. As such, it consolidates and embodies in a vital way how EU economic and social policies interact, and the CJEU is invited to confirm this integration of social and economic objectives.

Legal certainty: The long-standing narrow interpretation of the 'pay' exclusion must remain

While the AG has chosen a reductionist analysis of the legal context in which the AMWD came about, he nevertheless advocates for an overly extensive interpretation of the 'pay' exclusion in Article 153(5) TFEU. Rather than a purposive interpretation, the AG primarily follows a literal interpretation of the Treaties and the AMWD. Interestingly, however, he

does not point to the fact that the Danish [*lønforhold*] and Swedish [*löneförhållanden*] translations of the text of the AMWD using 'pay *relations'* rather than 'pay' seem to suggest a significantly broader reading than the other official language versions of the Treaties, which all use translations more strictly corresponding to pay, wages or remuneration.

As a rule, any restriction in law should be interpreted narrowly and its purpose must be understood also in its wider context. For the purposes of Article 153(5) TFEU, it follows that the exclusion of 'pay' must be read in the light of Article 153 TFEU as a whole, which outlines the legislative competences of the EU in the social field, but also with regard to the social policy objectives of the EU set out in Article 151 TFEU, and in the context of the social policy chapter and the Treaties as a whole.

As already pointed out, the 'pay' exclusion under Article 153(5) TFEU has not prevented economic policies of the Union from directly interfering with wages. Thus, for example, as part of the social policy chapter in the Treaties, the adjacent Article 157 TFEU on equal pay for male and female workers contains an explicit definition on pay. Looking specifically at Article 153(1) TFEU, point (f) on 'representation and collective defence' makes an explicit reference to the exclusion grounds in paragraph (5) whereas point (b) on 'working conditions' contains no such reservation.

At this point, it should be recalled that the AMWD was specifically adopted based on Article 153(1)(b) TFEU ('working conditions'). The appropriateness of this choice of legal base is also confirmed by the long-standing caselaw of the CJEU, according to which pay constitutes an essential and integral element of working conditions.

However, in his narrow and literal interpretation, the AG largely overlooks this well-established caselaw of the Court, which confirms a restrictive application of Article 153(5) TFEU. The Court has consistently held that measures which do not set individual wage levels, harmonise a minimum level wage or the level of the various wage constituents do not amount to a direct interference with the exclusion of 'pay'. According to the Court, a more extensive interpretation of this exclusion would deprive the social objectives under Article 151 TFEU and the social policies under Article 153 TFEU of much of their substance.

While the ETUC is of the opinion that the AMWD as such does not regulate pay, the AG insists that even general and loosely worded requirements as regards the Member States' wage-setting frameworks represent a direct interference with this 'pay' exclusion. Even claiming 'that there is no competence whatsoever for the matters covered by Article 153(5) TFEU', the AG completely disregards the considerable amount of EU secondary law under Article 153 TFEU and beyond, which either indirectly or rather directly regulate pay. To name but a few, the Pregnant Workers Directive (92/85) guarantees adequate payment during maternity leave, the Working Time Directive (2003/88) stipulates a right to annual paid leave, the revised Posting of Workers Directive (2018/957) provides for allowances or reimbursement of expenditure to cover travel, board and lodging, the Work-Life Balance Directive (2019/1158) contains requirements

about pay during paternity leave, and the Pay Transparency Directive (2023/970) requires gender-neutral criteria for pay-setting.

Social partners autonomy: The relevance of protection and promotion as opposed to interference

The ETUC finds that the AG's reading of Article 153(5) TFEU should be rejected also on grounds of its skewed understanding of the autonomy of social partners. While it is true that the 'pay' exclusion aims to safeguard the contractual freedom of labour and management, this safeguard also contributes to social cohesion and prevents social dumping. However, the AG errs in his interpretation when suggesting that wage competition would be one of the legitimate justifications for this exclusion. On the contrary, such an interpretation would deprive the overall objectives pursued by the EU's social policy chapter from their effectiveness, including the respect for the autonomy of the social partners itself.

A comprehensive reading of the EU legal framework is a precondition to understand the legal and institutional context in which the social policy chapter operates. The same holds true for ensuring a correct understanding of how the autonomy of social partners interacts with Union law. Respecting the autonomy of the social partners does not only come with a negative obligation on the EU to refrain from interfering in their contractual freedom but also contains a positive obligation on the Union to protect and promote this autonomy, as also affirmed by relevant international and European human rights standards.

As an area with shared competences under the Treaties, EU social policy is characterised by a multi-governance architecture, identifying a variety of actors and levels of labour regulation, ranging from EU institutions and Member States to social partners. However, none of these are mutually exclusive. By way of example, Article 151 TFEU on the one hand recognises the diversity of national industrial relation systems, but on the other also identifies the promotion of dialogue between management and labour as one of the policy objectives of the Union.

This somewhat overlapping division of labour is also reflected in the wording of Article 153 TFEU. This ambiguity, however, also allows for a certain degree of flexibility in terms of accommodating the different levels, actors and tools of labour regulation. Looking specifically at the AMWD, its provisions cater for the necessary space to fully accommodate this diversity in a way that safeguards the prerogatives of Member States and social partners to set wages nationally by law and/or collective bargaining. Clearly, not only the autonomy of the social partners but also the 'pay' exclusion were among the key considerations of the European Commission and the EU legislature when carefully crafting and adopting the AMWD.

Freedom of Association: The promotion of collective bargaining is instrumental to the social objectives

Finally, the inconsistencies of the AG's reasoning culminate in a narrow reading of the 'freedom of association' exclusion under Article 153(5) TFEU, after having consistently argued that the exclusion of 'pay' in that same Article should be given a broad interpretation. As a secondary claim, he goes on to conclude that even if the Court decided the Directive must not be annulled in full, its specific provisions on collective bargaining in Articles Article 4(1)(d) and Article 4(2) AMWD nevertheless call for a partial annulment of the Directive. According to the AG, these Articles are not indispensable for reaching the overall objectives of the AMWD. In the eyes of the AG, collective bargaining is simply a means and not an end in itself.

The ETUC considers that also this argument about a partial annulment of the AWMD must be rejected by the Court. As explained in relation to the autonomy of social partners, the Treaties in general and the social policy chapter in particular recognise collective bargaining as a legitimate means of labour regulation. In the same spirit, the AMWD caters for the necessary space for management and labour to exercise their prerogatives. Providing an enabling framework for collective bargaining under EU law does not encroach on national wage setting mechanisms, exactly because there is an inherent link between the two, which cannot be reduced to a simple question of either/or.

The CJEU has clearly recognised collective bargaining as a fundamental right, and its inherent link to pay. In the same way, also the European Court of Human Rights has found that collective bargaining constitutes an essential element of the right to freedom of association. In order not to undermine the effectiveness of the social policy objectives of the EU when it comes to both the protection and promotion of collective bargaining, it is therefore worth recalling once again the importance of interpreting any restrictions under the Treaties restrictively; whether it is about the legislative conditions linked to 'representation and collective defence' or exclusions grounds regarding 'freedom of association' or 'pay'.

Conclusion: The Directive must be upheld in full as a legal expression of a Social Europe

When it comes to pay and collective bargaining, the obligations and competences conferred upon the Union clearly cannot be reduced to a '*laissez-faire*' approach, as wrongly deducted by the AG. Instead, they come with important imperatives not only to refrain from any direct interference, but also to take positive action to protect and promote the collective rights and interests of workers.

For all the reasons, the ETUC therefore calls on the Court to uphold the validity of the AMWD in full, as a unique piece of EU legislation in its own right, thereby also confirming the richness and depth of the social dimension within the EU legal order.