ETUC Counter-Opinion

to the Opinion of Advocate General Emiliou

delivered on 14 January 2025 in the case

Denmark v EP and Council

Case C-19/23

(24.02.2025)

Overview

INTRODUCTION

1 This Counter-Opinion sets out the views of the European Trade Union Confederation (ETUC) in response to the Opinion of Advocate General Emiliou in Case C-19/23 *Kingdom of Denmark v European Parliament and Council of the European Union* regarding an action for annulment of Directive (EU) 2022/2041 on adequate minimum wages in the European Union (AMWD).

2 On 18 January 2023, Denmark, supported by Sweden, lodged a direct action under Article 263 TFEU to annul the AMWD in full, claiming the contested directive interferes directly with the determination of the level of 'pay' in the Member States and the 'right of association', both elements being excluded from the competences of the EU legislature pursuant to Article 153(5) TFEU.

3 In support of this principal claim, both Governments also argue that AMWD could not validly be adopted on the basis of Article 153(1)(b) TFEU, because it pursues both objectives set out in Article 153(1)(b) and (f) TFEU, whereby the latter legal base requires unanimity pursuant to Article 153(2) TFEU. In the alternative, it is submitted that in adopting Article 4(1)(d) and Article 4(2) AMWD, the EU legislature acted in breach of Article 153(5) TFEU, and therefore, as a secondary plea in law, these two Articles should be annulled and be no longer be part of the AMWD.

4 The ETUC contests and rejects all of these claims, defending the lawfulness of the AMWD as a whole.

5 On 14 January 2025, Advocate General Emiliou delivered his Opinion on the case, recommending the Court annul the AMWD in full. Should the Court nevertheless decide that the AMWD must not be annulled in its entirety, the AG suggested it should uphold the alternative head of claim and annul Article 4(1)(d) and Article 4(2) AMWD.

6 The ETUC respectfully considers that this Opinion is in fundamental error of law and invites the Court not to follow the proposals of the AG, but to uphold the AMWD in its entirety. The ETUC submission is that, correctly interpreted, EU law should lead the Court to conclude that the EU legislature fully acted within its conferred competences in accordance with Article 5(2) TEU when adopting the AMWD.

7 This Counter-Opinion of the ETUC offers a critical assessment and response to the conclusion of AG Emiliou in his Opinion in the present case C-19/23 and the reasoning which led to it. In a nutshell he ETUC submits that the AMWD does not amount to a direct interference with pay or collective bargaining, and that consequently the EU legislature acted within the remits of its lawful competences when adopting the AMWD. The ETUC's Counter Opinion may be briefly summarised as follows:

a. The ETUC begins by setting out the relevant legal framework, and outlines the breadth of sources of international and European law which explain the relevant objectives of the EU architecture and the context in which the relevant provisions must be construed. In the opinion of the ETUC, the AG has not given sufficient attention to this material and its significance to the case in hand.

b. Secondly, the ETUC presents a critical legal assessment of the reasoning of the AG. In the respectful opinion of the ETUC, the interpretative methodology applied by the AG demonstrates several shortcomings, together with certain inconsistencies and a lack of contextualisation.

c. Thirdly, the ETUC tackles the first plea in law by dissecting the three 'fallacies' alleged by the AG. In doing so, the ETUC seeks to demonstrate that the AG is relying on a literal and technical interpretation of the 'pay' exclusion which is not consistent with the Treaties, EU secondary law and, in particular, the caselaw of the CJEU. Linked to this, the ETUC also challenges the AG's concept of social partner autonomy.

d. Fourthly, the ETUC tackles the second plea in law, by demonstrating that the AG is, respectfully, wrong in his interpretation of the respective exclusions of 'pay' in Article 153(5) TFEU.

e. Finally, the ETUC deals with the potential illegitimacy of the AMWD's provisions on collective bargaining as follow:

– Firstly, by respectfully agreeing with the AG's distinction between collective bargaining and the right of association so that the collective bargaining provisions did not intrude on the area of impermissible legislation in respect of the right of association.
– Secondly, by agreeing that the collective bargaining provisions of the AMWD do not constitute a direct interference in freedom of association (or collective bargaining).
– Thirdly, by agreeing that the collective bargaining provisions of the AMWD were properly adopted on a subsidiary basis and not on the basis of a measure involving 'representation and collective defence of the interests of workers and employers' requiring unanimity in Council.
– Fourthly, the ETUC argue that, in any event, the AMWD had no direct effect on 'representation and collective defence of the interests of workers and employers'.
– Finally, the ETUC argue that in any event the relevant provisions of the TFEU must be read with a purposive construction so as to further the object of collective bargaining which has a central place in the legal architecture of the EU.

8 In conclusion, the ETUC invites the Court to uphold the AMWD in its entirety, thereby fully rejecting both the first and the second pleas in law.

LEGAL FRAMEWORK

9 The following compilation of the relevant legal provisions of international (UN/ILO) and European (Council of Europe (CoE) and EU) (human rights) instruments, is intended to be a complete exposition of the relevant international and European legal framework. It is the ETUC's view that the AG has not sufficiently taken into account these provisions.

I. International law

10 The following references to international law will deal with the following elements in the following order: principles of general application, principles relating to pay; principles relating to collective bargaining. Emphasis has been added.

A. United Nations

1. *Universal Declaration of Human Rights (UDHR)*

11 The principal relevant provisions of the Universal Declaration of Human Rights (UDHR) relate to just working conditions (including just and favourable remuneration) freedom of association, and collective bargaining:

> **Article 23**
>
> (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (…)
>
> (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
>
> (4) Everyone has the right to form and to join trade unions for the protection of his interests.

2. *International Covenant on Economic, Social and Cultural Rights*

a. General

12 Although the International Covenant on Civil and Political Rights (ICCPR) notably contains Article 22 protecting freedom of association, the principal UN instrument here is the International Covenant on Economic, Social and Cultural Rights (ICESCR). Its implementation is monitored by the Committee on Economic, Social and Cultural Rights (CESCR).

13 Having been ratified by all EU Member States this instrument forms a double legal base in EU constitutional law (Article 6(3) Treaty on the European Union (TEU) and Article 53 of the Charter of Fundamental Rights of the European Union (CFREU) of 7 December 2000, and adapted at Strasbourg, on 12 December 2007, - see below:

b. In relation to 'pay'

14 Article 7 ICESR provides:

> **Article 7**
>
> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) ***Remuneration*** which provides all workers, as a ***minimum***, with:[1]
>
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
>
> (ii) A ***decent living*** for themselves and their families in accordance with the provisions of the present Covenant; (…).

15 The CESCR has elaborated a General Comment No. 23 which contains a number of detailed requirements in relation to minimum pay.[2]

16 Article 11(1) of this Covenant obliges State parties to "*recognize the right of everyone to an adequate standard of living for himself and his family (…)",* and that the right to work, as stipulated in Article 6

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[1] Emphasis added. In all further quotes any ***emphases*** (in bold and italics) are also added unless clearly stated otherwise.

2 General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights).

of the Covenant, refers to 'decent work', which implies the provision of "an income allowing workers to support themselves and their families as highlighted in article 7 of the Covenant."[3]

17 There are several specific UN Conventions which also touch upon elements of pay/remuneration such as: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (Article 5)[4], the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) (Article 25)[5] and the International Convention on the Rights of Persons with Disabilities (ICRPD) (Article 27)[6]. The latter is explicitly referred to in Recital 15 of the AMWD as follows:

> (15) The United Nations' Convention on the Rights of Persons with Disabilities requires that workers with disabilities, including those in sheltered employment, receive equal remuneration for work of equal value. That principle is also relevant with regard to minimum wage protection.

c. In relation to 'collective bargaining'

18 Article 8(1)(c) ICESR states:

> **Article 8**
>
> 1. The States Parties to the present Covenant undertake to ensure: (…)
> (c) The right of ***trade unions to function freely*** subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (…).

19 Although there is no General Comment on this provision yet, the CESCR has nevertheless interpreted Article 8 as including the right to collective bargaining.

3. Vienna Convention on the Law of Treaties

20 The EU Treaties, like all other international treaties must be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) which read as follows:

> SECTION 3. INTERPRETATION OF TREATIES
>
> **Article 31** *General rule of interpretation*
>
> 1. **A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose**.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

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[3] CECSR, General Comment n° 18 on Article 6 the Right to Work, adopted on 24 November 2005.
[4] International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 19
[5][5] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of 18 December 1990.
[6] International Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly on 13 December 2006.

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

B. International Labour Organisation

1. General

21 The International Labour Organisation (ILO) has elaborated nearly 200 Conventions, including those on minimum wage and collective bargaining.

22 The foundational *Declaration of Philadelphia (1944)*[7], annexed to the ILO Constitution[8], contains the following:

> The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that: (…) (b) ***freedom of (…)association*** [is] ***essential to sustained progress***; (…)
> The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve: … (d) ***policies in regard to wages and earnings***, hours and other conditions of work ***calculated to ensure a just share of the fruits of progress to all***, and a ***minimum living wage to all employed and in need of such protection***; (e) the ***effective recognition of the right of collective bargaining***, the cooperation of management and labour in the continuous improvement of productive efficiency, and ***the collaboration of workers and employers in the preparation and application of social and economic measures***; (…)

23 The Community Charter on Fundamental Social Rights of Workers (Community Charter) adopted by the European Community in 1989 refers in its Recital 10 both to ILO and European Social Charter standards.

> Whereas inspiration should be drawn from the ***Conventions of the International Labour Organization*** and from the ***European Social Charter*** of the Council of Europe;

24 The AMWD refers in three recitals of its Preamble (8, 20 and 24) to the more specifically relevant Conventions.

2. In relation to 'pay'

25 Recital 8 of the Preamble of the AMWD states:

> ***When set at adequate levels, minimum wages***, as provided for in national law or collective agreements, protect the income of workers, in particular of disadvantaged workers, help ensure a decent living, as

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[7] Declaration concerning the Aims and Purposes of the International Labour Organisation, adopted at the 26th session of the ILO, Philadelphia, 10 May 1944.

[8] The ILO Constitution (1919) provides in its Preamble that:
And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by **(…) the provision of an adequate living wage,** (…), **recognition of the principle of equal remuneration for work of equal value**, **recognition of the principle of freedom of association**, (…).

pursued by ***International Labour Organization (ILO) Minimum Wage Fixing Convention No. 131 (1970) (***…)[9]

26 The ILO Minimum Wage Fixing Convention No 131 (1970)[10] provides for specific requirements in relation to minimum wage.

27 The Preamble of that Convention of 1970 states in its Recitals 3-5:

> Noting the terms of the Minimum Wage-Fixing Machinery Convention, 1928, and the Equal Remuneration Convention, 1951, which have been widely ratified, as well as of the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, and
> Considering that these Convention have played a valuable part in ***protecting disadvantaged groups of wage earners***, and
> Considering that the time has come to adopt a further instrument complementing these Conventions and ***providing protection for wage earners against unduly low wages***, which, while of general application, pays special regard to the needs of developing countries, and (…).

28 The Convention's substantive requirements are contained in Articles 2 and 3 providing:

> **Article 2**
>
> 1. ***Minimum wages*** shall have the ***force of law*** and shall not be subject to abatement, and failure to apply them shall make the person or persons concerned liable to appropriate penal or other sanctions.
> 2. Subject to the provisions of paragraph 1 of this Article, the ***freedom of collective bargaining shall be fully respected***.
>
> **Article 3**
>
> The ***elements to be taken into consideration*** in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include--
>
> (a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;
> (b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

29 Convention No. 131 was accompanied by the Minimum Wage Fixing Recommendation, 1970 (No. 135)[11] which provides the following:

> **Preamble**
>
> Considering that minimum wage fixing should in no way operate to the prejudice of the exercise and growth of free collective bargaining as a means of fixing wages higher than the minimum, (…)
>
> I. Purpose of Minimum Wage Fixing
>
> 1. Minimum wage fixing should constitute one element in a policy designed to overcome poverty and to ensure the satisfaction of the needs of all workers and their families
> 2. The fundamental purpose of minimum wage fixing should be to give wage earners necessary social protection as regards minimum permissible levels of wages.
>
> II. Criteria for Determining the Level of Minimum Wages

[9] Recital 20 the Preamble to AMWD states: 'This Directive takes into account that, in accordance with ILO Maritime Labour Convention (2006) (6), as amended, Member States who ratified that Convention are, after consulting representative ship-owners' and seafarers' organisations, ***to establish procedures for determining minimum wages*** for seafarers….')

[10] C131 - Minimum Wage Fixing Convention, 1970 (No. 131).

[11] Recommendation concerning Minimum Wage Fixing, with Special Reference to Developing Countries, adoption: Geneva, 54th ILC session (22 Jun 1970).

3. In determining the level of minimum wages, account should be taken of the following criteria, amongst others:
   a) The needs of workers and their families;
   b) The general level of wages in the country;
   c) The cost of living and changes therein;
   d) Social security benefits;
   e) The relative living standards of other social groups;
   f) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

30 In 2014 the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) published its latest *General Survey* concerning Convention No. 131 containing a summary of its case law.[12]

3. In relation to 'collective bargaining'

31 The AMWD specifically refers to the two key ILO Conventions at Recital 24 (and 31) of its Preamble.

> (24) In a context of declining collective bargaining coverage, it is essential that the Member States ***promote collective bargaining***, facilitate the ***exercise of the right of collective bargaining*** on wage-setting and thereby enhance the wage-setting provided for in collective agreements to improve workers' minimum wage protection. Member States have ratified ***ILO Freedom of Association and Protection of the Right to Organise Convention No 87 (1948) and ILO Right to Organise and Collective Bargaining Convention No 98 (1949)***. The right to bargain collectively is recognised under those ILO conventions, under ILO Labour Relations (Public Services) Convention No 151 (1978) and ILO Collective Bargaining Convention No 154 (1981), as well as under the Convention for the Protection of Human Rights and Fundamental Freedoms and the ESC (…).

32 The two principal Conventions of the International Labour Organisation (ILO) are part of the ten 'core Conventions'. Convention No. 87 is the *Freedom of Association and Protection of the Right to Organise Convention* of 1948. It protects freedom of association and the right to form and join trade unions (and employers' associations) free from state interference. Convention No. 98 is the *Right to Organise and Collective Bargaining Convention* of 1949. Apart from giving further protection against discrimination against trade union members and protecting trade unions and employers' associations from interfering with each other, Article 4 is devoted to collective bargaining, and states:

> ***Measures appropriate to national conditions shall be taken***, where necessary, ***to encourage and promote the full development and utilisation of machinery for voluntary negotiation*** between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

33 As the AMWD preamble notes at Recital 24, the ILO has adopted various other Conventions relevant to collective bargaining which it is not necessary to rehearse here. The ILO has also reiterated the fundamental nature of the a right to an adequate minimum wage (statutory or negotiated) and the right to bargain collectively in its *Declaration on Fundamental Principles and Rights at Work and its Follow-up*, 1998[13], its *Declaration on Social Justice for a Fair Globalization*, 2008[14] and its 2019 *Centenary Declaration on Future of Work*[15].

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[12] 2014 - Minimum wage fixing instruments (General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135))

[13] Declaration on Fundamental Principles and Rights at Work and its Follow-up, 1998.

[14] Declaration on Social Justice for a Fair Globalization, 2008.

[15] ILO CENTENARY DECLARATION FOR THE FUTURE OF WORK ADOPTED BY THE CONFERENCE AT ITS ONE HUNDRED AND EIGHTH SESSION, GENEVA, 21 JUNE 2019.

34 Moreover, the CEACR has elaborated a *General Survey* on the (then) eight 'core Conventions' summarising its case law also on those two Conventions.[16]

C. Council of Europe

35 The Council of Europe (CoE) protects human rights as one of its three main objectives. All EU Member States and EU candidate countries are members of the CoE. The two main instruments protecting human rights are, of course, the *European Convention on Human Rights and Fundamental Freedoms* (ECHR[17]) and the *European Social Charter* (ESC. The ECHR is referred to in Recital 24 of the Preamble of the AMWD and the ESC in Recital 2 (by cross referencing Article 151 TFEU which explicitly mentions it).

36 The ECHR was signed in 1950 and came into effect in 1953. It makes no provision in relation to pay. However, it does protect the right to collective bargaining as an inherent right contained within the right to freedom of association and, in particular 'the right [of everyone] to form and to join a trade union for the protection of his interests'. The ECtHR held, particularly in the light of the jurisprudence of the ILO and the ESC, that the right to bargain collectively was an 'essential element' of Article 11 together with a number of other discrete rights inherent in freedom of association[18] (*Demir &Baykara v Turkey* [2008] ECHR 1345 at [145], [154]).

37 The ESC was adopted in 1961 and revised in 1996 (though the provisions relevant here remained unchanged). It is monitored in its implementation by the European Committee on Social Rights which summarises its case law in the 'Digest'.[19]

38 In EU law the ESC plays an important role. It is mentioned in Recital 5 of the TUE Preamble and Article 151(1) TFEU, and is also referred to in Recital 5 of the CFREU's Preamble:

> This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, **the Social Charters adopted by the Union and by the Council of Europe**

39 As mentioned above (para. 23) the Community Charter in its Recital 10 also refers to the ESC.

1. In relation to 'pay'

40 In substance, Recital 2 of the AWMD by quoting Article 151(1) TFEU refers to the ESC in the following terms:

> Article 151 TFEU provides that the Union and the Member States, having in mind fundamental social rights such as those set out in the ***European Social Charter (ESC)***, have as their objectives, inter alia, the promotion of employment, ***improved living and working conditions***, so as to make possible their

[16] 2012 - Fundamental Conventions (Giving globalization a human face (General Survey on the fundamental Conventions)).
[17] Council of Europe European Convention on Human Rights (ECHR), Rome, 4.11.1950.
[18] Including, the ECtHR held, the right to form and join a trade union, the prohibition of closed-shop agreements and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members. Other discrete rights are also inherent in freedom of association to join a trade union in Article 11, as the ECtHR has held on other occasions, e.g. the right of a trade union to regulate its conditions of admission to membership so as to exclude those inimical to its objectives: *ASLEF v UK* [2007] ECHR 184, at [39].
[19] The latest version dates from June 2022: Digest of Decisions and Conclusions of the European Committee of Social Rights.

harmonisation while the improvement is being maintained, ***proper social protection*** and ***dialogue between management and labour***.

41 More concretely, Recital 4 states that:

> The ***ESC*** establishes that all workers have the right to just conditions of work. It recognises ***the right of all workers to a fair remuneration sufficient for a decent standard of living*** for themselves and their families. (…)

2. In relation to 'collective bargaining'

42 The AMWD, notes in Recital 4 that the ESC:

> 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 and international organisations for the protection of their economic and social interests and the right to bargain collectively.

43 The ***ESC*** provides in Article 5 for freedom of association and the right of employers and workers 'to form local, national and international organisations for the protection of their economic and social interests and to join those organisations'.

44 Article 6(2) ESC materially provides:

> With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake: (…)
> 2 to ***promote***, where necessary and appropriate, machinery for ***voluntary negotiations between employers or employers' organisations and workers' organisations***, with a view to the regulation of terms and conditions of employment by means of collective agreements; (…).

II. EU law

A. Primary law

1. The provision at issue: Article 153 TFEU

45 As the provision at the heart of this case, Article 153 TFEU should be set out in full. It states:

> 1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:
>
> (a) improvement in particular of the working environment to protect workers' health and safety;
> (b) working conditions***;***
> (c) social security and social protection of workers;
> (d) protection of workers where their employment contract is terminated;
> (e) the information and consultation of workers;
> (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
> (g) conditions of employment for third-country nationals legally residing in Union territory;
> (h) the integration of persons excluded from the labour market, without prejudice to Article 166;
> (i) equality between men and women with regard to labour market opportunities and treatment at work;
> (j) the combating of social exclusion;
> (k) the modernisation of social protection systems without prejudice to point (c).
>
> 2. To this end, the European Parliament and the Council:

(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;
(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.
In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.
The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155.
In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision.

4. The provisions adopted pursuant to this Article:
— shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,
--shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

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

2. The EU fundamental rights framework

a. Charter of Fundamental Rights of the European Union (CFREU)

(1) General

46 The CFREU plays an important role in the constitutional framework of the EU. Article 6(1) TEU (first sentence) provides that:

> The Union recognises the rights, freedoms and principles set out in the *Charter of Fundamental Rights of the European Union* of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the ***same legal value as the Treaties.***

47 Recital 5 of the Preamble to the CFREU states:

> This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and ***international obligations common to the Member States***, the ***European Convention*** for the Protection of Human Rights and Fundamental Freedoms, the ***Social Charters adopted by the Union and by the Council of Europe*** and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

48 Two provisions of Title VII of the CFREU, 'General provisions governing the interpretation and application of the Charter', are of particular relevance here.

49 First, Article 52(3) CFREU provides:

> In so far as this Charter contains rights which correspond to rights guaranteed by the ***Convention for the Protection of Human Rights and Fundamental Freedoms***, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

50 Second, Article 53 CFREU provide:

> **Article 53 - Level of protection**
>
> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by ***international agreements to which the Union or all the Member States are party***, including the ***European Convention*** for the Protection of Human Rights and Fundamental Freedoms**,** and by the Member States'' constitutions.

(2) In relation to 'pay'

51 In its Article 31(1) the CFREU provides:

> 1. Every worker has the ***right to*** working conditions which respect his or her health, safety and ***dignity***.

52 The AMWD in its Recital 3 cites Article 31(1) CFREU:

> ***Article 31*** of the Charter of Fundamental Rights of the European Union (4) (the 'Charter') provides for the right of every worker to working conditions which respect his or her health, safety and dignity. (…)

53 Article 23 of the CFREU (on equality between men and women) stipulates that "equality between men and women must be ensured in all areas, including employment, work and pay"; Article 23 CFREU is also cited in Recital 3 of the AMWD Preamble.

54 The AMWD in its Recital 3 cites Article 31(1) CFREU. Although Article 31(1 CFREU) does not explicitly refer to "pay, remuneration, or (minimum) wages", many authors interpret "fair and just working conditions" in Article 31(1)[20]as including the right to decent remuneration, founded on the proposition that dignity at the workplace cannot be respected without decent remuneration.[21]

(3) In relation to 'collective bargaining'

55 Two provisions deal with collective rights: Article 12 more generally and Article 28 more specifically:

56 Article 12 CFREU materially provides:

> **Freedom of assembly and of association**

[20] Article 31 Fair and just working conditions

"1**. Every worker has the right to working conditions which respect his or her** health, safety and **dignity**. (…)"

[21] Lörcher, K., "Article 31 Fair and just Working Conditions", in Lörcher, K., Dorssemont, F., Schmitt, M. and Clauwaert, S. (eds.) *The Charter of Fundamental Rights of the European Union and the Employment Relation*, Hart Publishing: Oxford (2019). Lörcher refers to other scholars: A Koukiadaki, I Katsaroumpas, Precarious Employment (n 97), p. 29 f, PHKW/Bogg, Article 31, par. 31.48 (referring in particular to Article 23(1) and (3) ('Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.', emphasis added) UDHR); G Nassibi, *Schutz vor Lohndumping in Deutschland*, Nomos Verlag 2012, p. 251 ff; similarly, Blanke, Article 31, in: B Bercusson, , Nomos Verlag Baden-Baden, 2006, p. 365, referring to Article 4(1) ESC: Jeammaud, Art. II-91, in: L Burgorgue-Larsen, A Levade and F Picod (eds.), *Tratité établissant une Constitution pour l'Europe*, Partie II, vol. 2, Bruylant, 2005, p. 423.

> 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. (…)

57 Article 28 CFREU provides:

> **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.

58 Articles 12 and 28 are explicitly referred to in Recital 3 (and 28) of the AMWD Preamble.

b. General principles of EU law (Article 6(3) TEU)

59 Fundamental rights are also protected by the 'general principles of the Union's law' in Article 6(3) TEU:

> 3. Fundamental rights, as guaranteed by the ***European Convention*** for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

60 Accordingly, fundamental rights deriving from 'constitutional traditions common to the Member States' are imported into EU Treaty by Article 6(3) TEU., in particular if all Members have ratified them (such as ILO Conventions 87 and 98).

c. Community Charter (Preamble of the TEU and Article 151 TFEU)

(1) General

61 As briefly mentioned above, the Community Charter is relevant in several respects. It forms, in any event, part of the EU (constitutional) law in the following terms:

62 First, in its 5th Recital the TEU Preamble states:

> CONFIRMING their attachment to fundamental social rights as defined in the ***European Social Charter*** signed at Turin on 18 October 1961 and in the 1989 ***Community Charter*** of the Fundamental Social Rights of Workers[22] (…)

63 Second, as noted above, Article 151(1) TFEU begins:

> The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 ***Community Charter*** of the Fundamental Social Rights of Workers, shall have as their objectives ….[23]

64 Recital 10 the Community Charter refers to ILO and ESC standards in the following terms:

> Whereas inspiration should be drawn from the Conventions of the ***International Labour Organization*** and from the ***European Social Charter*** of the Council of Europe; (...).

65 In substantive terms, two provisions are of particular relevance:

[22] The reference to the European Social Charter will be dealt with below.
[23] For ease of reference the provision continues: "*the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion*".

(2) In relation to 'pay'

66 Article 5 CCFSR provides that:

> 5. All employment shall be ***fairly remunerated***.
> To this effect, in accordance with arrangements applying in each country:
> (i) workers shall be assured of an equitable wage, i.e. a wage sufficient to enable them to have a **decent *standard of living***; (…).

(3) In relation to 'collective bargaining'

67 The Community Charter includes separate provisions on freedom of association and collective bargaining at Articles 11 and 12.[24] Article 12 reads as follows:

> 12. Employers or employers' organizations, on the one hand, and workers' organizations, on the other, shall have the ***right to negotiate and conclude collective agreements*** under the conditions laid down by national legislation and practice.
> The dialogue between the two sides of industry at European level which must be developed, may, if the parties deem it desirable, result in contractual relations in particular at inter-occupational and sectoral level.

d. European Pillar of Social Rights

68 Chapter II of the European Pillar of Social Rights (the 'Pillar'), proclaimed at Gothenburg on 17 November 2017, though of limited legal effect, establishes a set of principles to serve as a guide towards ensuring fair working conditions.

69 In relation to pay, Principle 6 (right to fair wages that provide a decent standard of living) is particularly relevant and states:

> **Wages**
> a. Workers have the right to fair wages that provide for a decent standard of living.
> b. Adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his / her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented.
> c. All wages shall be set in a transparent and predictable way according to national practices and respecting the autonomy of the social partners.

70 In relation to collective bargaining, Principle No 8 provides that the "*social partners are (amongst other things) to be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action*".

71 Both Principles 6 and 8 are explicitly referred to in Recital 5 of the preamble to the AMWD.

72 Furthermore, Paragraph 16 of the preamble of the Pillar states that:

> The European Pillar of Social Rights shall not prevent Member States or their social partners from establishing more ambitious social standards. In particular, nothing in the European Pillar of Social Rights shall be interpreted as restricting or adversely affecting rights and principles as recognised, in their respective fields of application, by Union law or international law and by international agreements to which the Union or all the Member States are party, including the **European Social Charter signed at**

[24] Article 11 provides: "11. Employers and workers of the European Community shall have the right of association in order to constitute professional organizations or trade unions of their choice for the defence of their economic and social interests.
Every employer and every worker shall have the freedom to join or not to join such organizations without any personal or occupational damage being thereby suffered by him".

Turin on 18 October 1961 and the relevant Conventions and Recommendations of the International Labour Organisation.

73 In the Commission Communication on 'Establishing a European Pillar of Social Rights'[25], the following is relevant:

> 3. The political and legal nature of the Pillar
>
> The Pillar takes direct inspiration from the existing wealth of good practices across Europe, and ***builds on the strong body of law which exists at EU and international level***. Many of these values were already enshrined in the Rome Treaties in 1957 and have gained further global recognition due to the work of international bodies such as the ***United Nations, the International Labour Organisation and the Council of Europe***. ***In particular, the Pillar draws on both the European Social Charter*** signed at Turin on 18 October 1961 and the ***1989 Community Charter of the Fundamental Social Rights of Workers***, which set out essential social rights. At the same time, the EU "social acquis" has also developed over the last 30 years as a result of new provisions in the Treaties, the adoption of the ***European Charter of Fundamental Rights***, new legislation and the case law of the Court of Justice of the European Union. (…).

74 In an explanatory Staff Working Document to this Communication, the Commission provides further explanations of content and scope of each principle as well as suggestion with regard to their implementation:[26]

> Nothing in the European Pillar of Social Rights shall be interpreted as restricting or adversely affecting principles and rights as recognised, in their respective fields of application, by Union law or international law and by international agreements to which the Union or all the Member States are party, **including the European Social Charter of 1961 and the relevant ILO Conventions and Recommendations. The implementation of the Pillar can be reinforced by the ratification of relevant ILO conventions, the Revised European Social Charter of 1996 and its Additional Protocol Providing for a System of Collective Complaints.**
>
> 2. Scope and changes introduced by the European Pillar of Social Rights
>
> The Pillar sets out the right to fair wages providing for a decent standard of living for all workers. Comparable rights are already included in the 1989 Community Charter of the Fundamental Social Rights of Workers, one of the sources of Title X on Social Policy of the TFEU as well as in the (revised) European Social Charter.
>
> The Pillar foresees a level of the minimum wage which takes into consideration both the needs of workers and their families and social factors such as the evolution of the standards of living and economic factors, which can include the level of productivity. The Pillar recognises the role of minimum wages in combatting poverty, while avoiding employment traps. This is with a view to boosting the incomes of poor families and providing a fair compensation from work for those at the bottom end of the wage distribution, thus also increasing their incentives to work. (…).
>
> The Pillar requires that all wages are set in a transparent and predictable way, in full respect of national practice, notably as concerns the right to collective bargaining of social partners and their autonomy. As concerns minimum wages, most Member States have a national statutory minimum wage. This is a regulatory instrument making a single wage floor legally binding for all employees. A few Member States do not have a statutory minimum wage and different wage floors are set by the social partners through collective agreements, often at sector level. The Pillar does not challenge in any way this diversity of

[25] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on "Establishing a European Pillar of Social Rights", COM(2017) 0250 final, Brussels, 26.4.2017.

[26] Commission Staff Working Document Accompanying the document Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions on "Establishing a European Pillar of Social Rights", SWD (2017) 201 final, Brussels, 26.4.2017.

practices and recognises the autonomy of the social partners. Within this context, transparency means that well-established consultation procedures should be followed when setting the minimum wage, leading to consensus between relevant national authorities and the social partners, and possibly building on input from other stakeholders and independent experts. In addition, the Pillar calls for ensuring the predictability of wage decisions, for example through the definition of rules such as adjustment to the cost of living for minimum wages.

3. Implementation

a) What Member States and Social Partners can do

Member States and the social partners are responsible for the definition of wage and minimum wage developments in accordance with their national practices, as set in their collective bargaining and minimum wage-setting systems. They are invited to give effect to the provisions of the Pillar through transparent minimum wage setting mechanisms and effective collective bargaining at national, sector and firm level, and by taking complementary measures to avoid in-work poverty. (…)

Furthermore, Member States may ratify, if not yet done so, and apply ILO N° 131 convention on minimum wage fixing and the Convention N° 154 on the promotion of collective bargaining.

(…) At national level, social partners may support the implementation of the Pillar through collective bargaining and through their involvement in the design and implementation of relevant policies.

e. The social objectives and other relevant provisions in the Treaties

75 Relevant to both the objectives and context mandated by Article 31 for the purpose of interpretation, the social objectives of the Treaties after enhancement by the Lisbon Treaty, are of particular importance.

3. Objectives

a. General objectives

76 Article 3 TEU defines the overall objectives of the Union. It states i.a.:

> **Article 3**
> 1. The Union's aim is to promote peace, its values and the ***well-being of its peoples***. (…)
> 3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, ***a highly competitive social market economy, aiming at full employment and social progress***, and a high level of protection and improvement of the quality of the environment. (…)

77 While requiring in its Article 7 'consistency between its policies and activities', the TFEU in its Article 9 provides in relation to social policy as follows:

> In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, ***the guarantee of adequate social protection***, the fight against social exclusion, and a high level of education, training and protection of human health.

78 Both Article 3 TEU and 9 TFEU are referred to in Recital 1 of the AMWD Preamble.

b. Specific social objectives

79 As already referred to above (paras. 40 and 63), Article 151(1) and (2) TFEU provide that the EU "shall implement measures" "having in mind fundamental social rights such as those set out in the European Social Charter (…) and in the 1989 Community Charter" and setting "as their objectives (…) improved

living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, (…).

c. Other provisions in the Social Policy Title (Title X) of the TFEU

80 Article 152 TFEU provides:

> The Union ***recognises and promotes the role of the social partners*** at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their ***autonomy***.
> The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue.

81 Article 157 TFEU is relevant in relation to at least one of its elements, i.e. the definition of 'pay' contained therein. In its paras. 1-3 it provides:

> **Article 157**
> 1. Each Member State shall ensure that the principle of ***equal pay*** for male and female workers for equal work or work of equal value is applied.
> 2. **For the purpose of this Article, *'pay' means* the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind**, which the worker receives directly or indirectly, in respect of his employment, from his employer.
> Equal pay without discrimination based on sex means:
> (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
> (b) that pay for work at time rates shall be the same for the same job.
> 3. The European Parliament and the Council, acting in accordance with the ***ordinary legislative procedure***, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. (…)

B. Secondary law

1. The AMWD

82 The AMWD is, of course, central to the present case. The relevant parts are quoted in full here:

a. The Preamble

83 For interpretation purposes, the Preamble contains important elements, some of which have already been cited above (see for Recitals 2 (para 40), 3 (para. 52), 4 (para. 41), 10 (para. 25), 24 (para. 31)); further recitals provide as follows:

(1) In relation to 'pay'

84 Unsurprisingly, most recitals refer to 'pay' either directly or indirectly. The following are submitted to be particularly relevant:

> (7) Better living and working conditions, including through ***adequate minimum wages***, benefit workers and businesses in the Union as well as society and the economy in general and are a ***prerequisite for achieving fair, inclusive and sustainable growth***. Addressing large differences in the coverage and adequacy of minimum wage protection contributes to improving the fairness of the Union's labour market, to ***preventing and reducing wage and social inequalities***, and to ***promoting economic and social progress and upward convergence***. ***Competition in the internal market should be based on high social standards***, including a high level of worker protection and the creation of quality jobs, as well as on innovation and improvements in productivity, while ***ensuring a level playing field***.

(2) In relation to 'collective bargaining'

85 The following recitals refer to 'collective bargaining':

> 18.With a view to improving living and working conditions as well as ***upward social convergence*** in the Union, this Directive establishes ***minimum requirements at Union level*** and sets out procedural obligations for the adequacy of statutory minimum wages, and enhances ***effective access of workers to minimum wage protection***, in the form of a statutory minimum wage where it exists, or provided for in ***collective agreements*** as defined for the purposes of this Directive. This Directive also ***promotes collective bargaining*** on wage-setting. (…)
>
> 22.***Well-functioning collective bargaining*** on wage-setting is an important means by which to ensure that workers are protected by adequate minimum wages that therefore provide for a decent standard of living. In the Member States with statutory minimum wages, ***collective bargaining supports general wage developments*** and therefore contributes to improving the adequacy of minimum wages as well as the living and working conditions of workers. (…)
>
> 24. In a context of declining collective bargaining coverage, it is essential that the Member States ***promote collective bargaining***, facilitate the ***exercise of the right of collective bargaining*** on wage-setting and thereby enhance the wage-setting provided for in ***collective agreements to improve workers' minimum wage protection***. (…)[27]
>
> 25. Member States with a high collective bargaining coverage tend to have a small 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 80 %. Similarly, the majority of the Member States with high levels of minimum wages relative to the average wage have a collective bargaining coverage above 80 %. Therefore, each Member State with a ***collective bargaining coverage rate below 80 % should adopt measures with a view to enhancing such collective bargaining***. (…)

b. The operative provisions

86 Article 1 of the AMWD provides:

> 1. With a view to ***improving living and working conditions*** in the Union, in particular the adequacy of minimum wages for workers ***in order to contribute to upward social convergence*** and reduce wage inequality, this Directive establishes a framework for:
>   a. adequacy of statutory ***minimum wages with the aim of achieving decent living and working conditions***
>   b. ***promoting collective bargaining*** on wage-setting;
>   c. enhancing ***effective access of workers to rights to minimum wage*** protection where provided for in national law and/or collective agreements.
> 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.

87 Article 3 contains the following material definitions:

> (3) '***collective bargaining***' means all negotiations which take place according to national law and practice in each Member State between an employer, a group of employers or one or more employers' organisations on the one hand, and one or more trade unions on the other, for determining working conditions and terms of employment;
>
> (4) '***collective agreement***' means a written agreement regarding provisions on working conditions and terms of employment concluded by the social partners that have the capacity to bargain on behalf of workers and employers respectively according to national law and practice, including collective agreements that have been declared universally applicable;

[27] See also para. 31.

88 Article 4 materially provides:

> 1. With the aim of ***increasing the collective bargaining coverage*** and of ***facilitating the exercise of the right to collective bargaining on wage-setting***, Member States, with the involvement of the social partners, in accordance with national law and practice, shall:
>
> (a) promote the building and strengthening of the capacity of the ***social partners to engage in collective bargaining*** on wage-setting, in particular at sector or cross-industry level;
> (b) encourage constructive, meaningful and informed ***negotiations on wages between the social partners, on an equal footing***, where both parties have access to appropriate information in order to carry out their functions in respect of collective bargaining on wage-setting;
> (c) 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;
> (d) for the purpose of ***promoting collective bargaining on wage-setting***, take measures, as appropriate, to protect trade unions and employers' organisations participating or wishing to participate in collective bargaining against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
>
> 2. In addition, each Member State in which the collective bargaining coverage rate is less than a threshold of 80 % shall ***provide for a framework of enabling conditions for collective bargaining***, either by law after consulting the social partners or by agreement with them. Such a Member State shall also establish an action plan to promote collective bargaining. The Member State shall establish such an action plan after consulting the social partners or by agreement with the social partners, or, following a joint request by the social partners, as agreed between the social partners. The action plan shall set out a clear timeline and concrete measures to progressively increase the rate of collective bargaining coverage, in full respect for the autonomy of the social partners. The Member State shall review its action plan regularly, and shall update it if needed. Where a Member State updates its action plan, it shall do so after consulting the social partners or by agreement with them, or, following a joint request by the social partners, as agreed between the social partners. In any event, such an action plan shall be reviewed at least every five years. The action plan and any update thereof shall be made public and notified to the Commission.

2. Other Directives

89 In his Opinion, the AG refers at different points to other EU secondary law instruments in the social policy field which touch on the issue of 'pay' or the promotion of collective bargaining (e.g. [29] AG Opinion). The ETUC considers that yet others are relevant as well.

90 As for the 'pay' issue, there exists a comprehensive set of EU secondary law that regulates either directly or indirectly aspects of 'pay' It is to be noted that some of them provide for an indication or threshold of the level of pay.

- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (Article 1);
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Article 3 (1)c);
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) ('equal pay for equal work');
- Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer ((*Article 4(3); 'ceilings on payments must* ***not fall below a level which is socially compatible with the social objective of this Directive')***

- Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (Recitals 30, 31 and Articles 8 and 20(7); "payment or allowance at least equivalent to the national sick pay, payment or allowance equal to payment or allowance for maternity leave; payment or allowance for parental leave at an adequate level, ensure a payment or an allowance of at least 65% of the workers' net wage, (…))

91 Also, in relation to promoting collective bargaining (and social dialogue), reference can be made to a vast range of EU secondary acquis such as:

- Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time – Articles 15, 18 (derogations);
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (Article 21 on Social Dialogue);
- Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (Preamble, Articles 5 and 11);
- Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Preamble, Article 1 and 3);
- Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (Preamble, Article 1(2), 5 and 8(3) and 11(3));
- Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (Preamble, Article 14);
- Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (Preamble , Article 8(1) and 20(8)).

ETUC's LEGAL ASSESSMENT

I. Critical assessment of the method of interpretation and lack of "contextualisation" in the AG Opinion

A. On the method of interpretation used by AG Emiliou

92 The ETUC, like other authors[28], is critical of a number of aspects of the reasoning which led the AG to his conclusion.

[28] Kilpatrick, C. and Steiert, M.(2025) *A little learning is a dangerous thing: AG Emiliou on the Adequate Minimum Wages Directive (C-19/23, Opinion of 14 January 2025)*, European University Institute, Department of Law, LAW Working Paper 2025/2, January 2025, p. 13; Barrio Fernández, A. (2025) *La Opinión del Abogado General Emiliou sobre la Directiva de Salarios Mínimos: Una Visión Crítica*, BRIEFS DE LA AEDTSS, 7 February 2025; Brameshuber, E. (2025), Op-Ed "*EU Competence in the Field of Social Policy: why the AG's Opinion on the Adequate Minimum Wages Directive in C-19/23 (does not) matter(s),* EU LAW Live, Employment & Immigration – Institutional law, 31 January 2025; Schulten, T. and Müller T. (2025) "*EU Minimum Wage Directive Before the European Court of Justice: It's Not All Over Now…*", Social Europe, 22 January 2025; Tran, N. (2025) *CJEU Advocate General calls for annulment of European directive on minimum wages*, RH Mind, 15 January 2025; Sinander, E. (2025), *Quite common for the CJEU to rule against the Advocate General*, Lag&Avtal, 15 January 2025; Selberg, N. and Sjödin E. (2025*) Sweden could put a spanner in the works for Ursula von der Leyen's crown jewel*, Lag&Avtal, 20 January 2025; Höpner, M. (2025) *Steht die Mindestlohnrichtlinie vor dem Aus? Zu den Schlussanträgen von Generalanwalt Emiliou zur dänischen Nichtigkeitsklage gegen die Richtlinie (EU) 2022/2041 über angemessene Mindestlöhne in*

93 First, the ETUC notes that no general description of the interpretation principles is included in the Opinion which is directed towards the principles governing the interpretation of the exclusions provided in Article 153(5) TFEU and the interpretation of certain specific provisions of the AMWD, even if these were not invoked by the complainant in this case.

94 Secondly, the ETUC takes the view that the AG's approach is oriented towards an unjustifiably formal and literal interpretation of the EU legal framework, the CJEU case law in general, and the AMWD in particular (see e.g. [51], [54], [60], [80], [83] AG Opinion). The ETUC submits that on the other hand, the AG failed sufficiently to take into account relevant and important historical, contextual and theological elements.

95 The ETUC respectfully considers that the AG failed to take, or take sufficiently, into account Articles 31 32 of the Vienna Convention (see above), in particular the duty to interpret the relevant EU Treaty provisions *"in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose"*[29]*.* The AG does not appear to consider the EU Treaties, the Social Policy title and Article 153(5) as a "living instrument"*.*

96 This interpretative duty is part of the Court's settled case-law, according to which, in interpreting a provision of EU law, it is necessary to consider not only its **wording** but also the **context** in which it occurs and the **objectives** pursued by the rules of which it forms part.[30] This settled case law was taken into account by the Court in its judgement on the Joined Cases C-395/08 and C-396/08 (B*runo e.a. v. INPS*) (see para. 131 below) when considering whether the term working/employment conditions referred to in Article 137(1)(b) (now Article 153(1)(b)) and in Clause 4 of the Fixed-term work Directive/Agreement encompassed conditions relating to factors as remuneration and pensions. The court held that:

> In order to interpret those provisions, it is therefore necessary, in accordance with settled case-law, to taken into consideration the context and the objectives pursued by the rules of which that clause is part (see, by analogy, Case C-268/08 *Impact* [2008] ECR-I-2483, para. 110).

In that case, the Court considered the term working/employment conditions did cover "financial conditions, such as those relating to remuneration and pensions; and if not interpreted this way it would effectively reduce the objectives attributed to this particular Clause 4. (Para. 33 -34 of the judgement)

B. On the lack of "contextualisation"

97 Below, the ETUC submits that the AG failed sufficiently to consider the issue before him in a "constitutional", an "international and European law ", a "historical" and a "social policy (objectives)" context.

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der EU, Verfassungsblog, 16 January 2025; Contouris, N. 2025), 'Avoiding another ‚Viking and Laval' moment – a critical analysis of the AG Opinion in the Adequate Minimum Wage Directive, Case C-19/23', forthcoming in European Laobur Law Journal and Rivista Giuridica del Lavoro.

[29] Although acknowledging that the EU has not acceded (yet) to the Vienna Convention, the following EU Member States and candidate countries did accede/succeed/ratify: Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, North Macedonia, Poland, Portugal, Serbia, Slovakia, Slovenia, Spain, Sweden and Ukraine.

[30] See, inter alia, CJEU 10 September 2014, *Ben Alaya*, C-491/13, EU:C:2014:2187, paragraph 22 and the case-law cited, CJEU (GC) 4 April 2017, C-544/15, *Fahimian*, para. 30, as a recent example; all emphases in quotations are added.

1. The "constitutional nature" and the real constitutional framework

a. The AG's Opinion

98 The AG's starting point is that this case is of a "constitutional nature" ([36]) and "essential to an EU based on the Rule of Law" (see also [1] AG Opinion). In this context, the AG however solely refers to "principle of conferral" of powers, as set out in Article 5(2) TEU .

b. The criticisms

99 The ETUC agrees that this case is indeed of 'constitutional nature', but the AG overlooks some fundamental constitutional features.

100 The AG appears to reduce the "constitutional" question to the issue of competences. Yet there are other relevant constitutional elements enshrined in the TEU and TFEU. In particular, there is the protection of human rights in general and of fundamental social rights in particular. It is submitted that the AG failed to take into account or sufficiently to take into account the following particular matters:

(1) The fundamental rights protection according to Article 6(1) TEU: The EU Charter

101 According to Article 6(1) 1st sentence TEU, the Charter of Fundamental Rights of the European Union (CFREU) plays an important role in defining the constitutional framework in general and the AMWD in particular.[31] Indeed, the AMWD in its Recital 3 explicitly quotes Article 31(1) CFREU (see above para. 83).

102 Although the Opinion refers to Article 31(1) CFREU (see [81], [82] and [94] AG Opinion), these references are deployed to assert that the more a right under this provision is recognised, the more it would run against the exclusion in Article 153(5) TFEU. The AG's approach thus affectively denies that the exclusion has to be interpreted restrictively thus widening the elements of 'pay' which would excluded by this exclusion.

(2) The fundamental rights protection according to the Preamble of the TEU and Article 151 TFEU: The Community Charter

103 The Community Charter forms part of the EU (constitutional) as demonstrated above (see paras. 61 et seq.). However, the Opinion only refers to the Community Charter in relation to the 'right of association' (See [97] AG Opinion). It fails to give any consideration whatsoever to the protection of fair remuneration in Article 5 CCFSR (see above para. 66). Yet the proper interpretation of Article 153(5) TFEU must necessarily take into account Article 5.

(3) The protection of the "social objectives" according to Treaty provisions

104 The short and limited "legal framework" in the AG Opinion (At[5]-[9] AG Opinion), shows that the AG did not take into account other EU Treaty articles which focus in particular on the "social objectives" of the EU Treaties. Whereas there are some indirect references to the social policy objectives set out in Article 151 TFEU, the AG made no mention and must be presumed not to have taken into account the social Treaty objectives enumerated in Article 3 TEU and Article 9 TFEU (above), notwithstanding that these articles are explicitly referred to in Recital (1) of the AMWD Preamble.

2. The international and European law framework

105 The AG fails to make any mention of, and hence appears not to have taken into account, the international and European human rights standards set out in this Counter-Opinion. This is despite the

[31] The references to Article 28 CFREU will be dealt with below of this ETUC counter-opinion.

fact that these are expressly referred to in EU Treaty provisions and the AMWD, and despite the fact that the Vienna Convention compels consideration of such material

(1) European Social Charter (ESC)

106 As mentioned above, Recital 5 of the TUE Preamble as well as Article 151(1) TFEU refer both to the ESC (see above para. 38). Moreover, Recital 5 of the CFREU as well as Recital 10 of the Community Charter also include a reference to the ESC (see above paras. 47 and 64, respectively):

107 As noted above, the AWMD Preamble cites Article 151(1) TFEU thus referring (indirectly) to the ESC. It also refers to Articles 2 and 4(1) ESC and to the ESC generally (in Recital 2 of (see above para. 40) and Recital 4 (see above para. 41)).

108 None of those provisions have been taken into account in the AG's Opinion.

(2) International Labour Organisation (ILO)

109 In general terms Recital 10 of the Community Charter Preamble (see above para. 64) refers to ILO standards. More specifically, Recital 8 of the AMWD Preamble (see above para. 25) refers explicitly to the ILO Minimum Wage Fixing Convention, 1970 (No. 131) containing important elements (see above paras. 27 and 28). Yet the AG appears to disregard this.

(3) UN: Covenant on Economic, Social and Cultural Rights (ICESCR)

110 Having been ratified by all EU Member States this ICESCR forms a double legal base in EU constitutional law. First, Article 6(3) TEU refers to the common constitutional traditions of the Member States. Second, Article 53 CFREU provides a minimum level of protection:

111 As noted above, fair remuneration is provided for in Article 7(a)(ii):

> **Article 7**
>
> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
> (a) **Remuneration** which provides all workers, as a minimum, with:
> (i) **Fair wages** and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
> (ii) **A decent living for themselves** and **their families** in accordance with the provisions of the present Covenant;

112 Yet the AG makes no mention of the fact that that the provisions under consideration must be interpreted in such a way as to require a minimum level of pay guaranteeing a 'decent living' to which an adequate minimum wage must surely give effect.

(4) The European Pillar of Social Rights

113 The AMWD could be considered as an important EU measure to implement the 'Pillar' of which the Principles 6 and 8 are explicitly referred to in the Recital 5 of the AMWD Preamble. However, the AG only refers once to the 'Pillar' ([30] AG Opinion) in relation to Principle 6. He ignores Principle 8 altogether.

3. Historical material

114 At several occasions in his Opinion, the AG seeks support for his interpretation of (amongst others) the scope of term "pay" in Article 153(5) TFEU, the rationale of the 'pay' exclusion, and the scope of the term 'working conditions' in Article 153(1)b TFEU, from the "drafters of the EU Treaties" and *the travaux préparatoires*. (see e.g. [51], [65] and [68] AG Opinion). This, however, is impermissible under

the Vienna Convention unless to confirm the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose or where the meaning is left ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. In any event, 'historical research' by other authors of amongst others the Maastricht preparatory works show that the AG errs in his interpretation of *the travaux préparatoires*.[32]

115 Furthermore, the AG concluded that for many years EU social policy developed "on the sidelines of the Treaties". ([28] AG Opinion) and that true 'constitutionalisation' only started with the adoption of the Protocol on Social Policy and the Agreement on Social Policy as they were annexed to the Maastricht Treaty (1991). No evidence is cited for this and it does not appear to accord with the reality of the adoption of key social Directives in the areas of equal pay (e.g. 1975 Directive), health and safety (1989 Framework Directive on Health and Safety), information and consultation (the initial Collective Redundancies Directive (1975), transfer of undertakings (1977 Acquired Rights Directive), and the initial Insolvency Directive (1980). These were Directives adopted in accordance with the Treaties and not "on the sidelines of the Treaties"?

4. The "social objectives" of the Social Policy Title and the AMWD itself

116 this view of social policy measures as "on the sidelines" leads to a misunderstanding of the "raison d'être" of both the Social Policy Title in the Treaty and the AMWD. For the Social Policy Title, it is clear that this chapter is part and parcel of the Treaty architecture designed to counterbalance the primary economic internal market objectives of the EU. In consequence The Union of today is much more than a market. It is a social market economy which seeks the constant improvement of working and living conditions, sustainable development and social progress, as stipulated by the Treaties. The AMWD reflects this ambition of the EU, serving a much broader purpose than regulating pay (which it does not seek to do). The AMWD is based upon the consolidation of and embodies the paradigm shift over the last two decades or more in the way EU economic and social policies interact, so that the internal market is no longer the supreme consideration. (See also the Court in *AGET Iraklis* (C-201/15) on this.)

117 The AMWD was a much needed reaction against the stance of the EU institutions during and in the aftermath of the economic crisis, in "regulating" via the European Semester (and its predecessors like the Troika) extensive 'soft law' measures in many key social policy areas including on minimum wages and collective bargaining. The EU law, politics and policy background leading to the AMWD is missing in the AG Opinion.

II. The principal head of claim: must the AMW Directive be annulled in full?

A. First plea in law: the AMW Directive was adopted in breach of Article 153(5) TFEU and, thus, of the principle of conferral of powers

[32] See Kilpatrick and Steiert, also cited in footnote 29.

1. Whether the AMW Directive is compatible with the 'pay' exclusion in Article 153(5) TFEU

a. The scope of the 'pay' exclusion in Article 153(5) TFEU

118 The AG considered that the EU legislature's interpretation of the exclusion of pay in Article 153(5) TFEU is based on what he called three fallacies. ([50] AG Opinion)

(1) The first fallacy: the 'pay' exclusion is limited to measures that harmonise the level of wages

119 As for the first fallacy, the AG considered that the 'pay' exclusion should not be construed restrictively. His reasoning was that the word 'pay' was used in a broad sense in Article 153(5) TFEU and because the AG considered that the established case law of the Court in particular of Article 153(5) TFEU in relation to 'pay' erred in imposing a too restrictive interpretation of 'pay'.

120 In deploying this rationale, the AG contradicts a general proposition of law which is considered a general principle in the interpretation of EU. The proposition is that provisions derogating from a permissive power should be interpreted restrictively. AG Emiliou recognises this principle In [55] of his Opinion, stating that "exclusions generally need to be interpreted strictly". He seeks to mitigate the principle by adding that exclusions must not be interpreted so strictly as to be deprived of their effectiveness' Yet in the instant case it is quite possible to interpret the 'pay' exclusion restrictively while still giving effect to it – as will be seen. Ironically, at [103]-[105] of his Opinion, the AG does interpret the exclusion of the right of freedom of association narrowly, holding that the right to bargain collectively , though an aspect of freedom of association, is a permissible subject for EU legislation.

121 The correct approach was set out by the Court in its judgment in Case C-349/03 C*ommission v. United Kingdom* (para. 43):[33]

> ***As an exception*** to the application of Community law in the territory of the Community, ***that provision must be given an interpretation which limits its scope to that which is strictly necessary*** to safeguard the interests which it allows Gibraltar to protect. ***It must also be read in the light of*** the second sentence of the first paragraph of Article 10 EC, pursuant to which the Member States are required to facilitate the achievement of the Community's tasks (see, to that effect, Joined Cases 194/85 and 241/85 *Commission v Greece* [1988] ECR 1037, paragraph 20).

122 In the cited cases, joined Cases C-194/85 and 241/85 *'Commission v Greece'*, the Court held at paragraph 20 that:

> It follows that the provisions of the Act of Accession must be interpreted with reference to the foundations of the Community, as established by the Treaty, and that the ***derogations permitted*** by the Act of Accession ***from the rules laid down by the Treaty must be interpreted in such a way as to facilitate the achievement of the objectives of the Treaty and the application of all its rules.***

123 The AG thus failed to apply the approach authorised by the Court, namely that the pay exclusion: 1) should be indeed interpreted to what is strictly necessary, 2) must also be read in the light of other Articles of primary law (in this particular case Articles 151, the whole of Article 153, Article 156 and Article 157 TFEU).

124 In support of a broader interpretation of the pay exclusion the AG cites AG Kokott's Opinion and the Courts' judgement in *Impact* (see AG Opinion, [52]-[53]). Examination, below, of that Opinion and judgment do not justify the AG's conclusion in the instant case.

[33] As referred to in para. 171 and footnote 110 of the AG Kokott's Opinion in the Case 268/06 *'Impact.*

125 The established case law on interpreting Article 153(5) TFEU developed from the Court's judgment in *Del Cerro Alonso* (C-307/50). The AG refers to *Del Cerro Alonso* but on a different point [34]

Case C-307/05 – Del Cerro Alonso

126 In *Del Cerro Alonso* the Court confirmed that:

> 39 (…) as Article 137(5) EC [now Article 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 Article 151 TFEU]***.
>
> 40 More particularly, the exception relating to 'pay' set out in Article 137(5) EC 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.
>
> 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 would be deprived of much of their substance***.
>
> 46 For the same reasons, the ***establishment of the level of the various constituent parts*** of the pay of a worker such as the applicant in the main proceedings is ***still unquestionably a matter for the competent bodies in the various Member States***. That is not, however, the subject of the dispute before the referring court.

It is also to be noted that in that case the Court overruled the opinion of AG Poiares Maduro who considered that *"it is clear from Article 137(5) EC that the Council is not authorised to adopt on that basis measures relating to pay"* (para. 22 of that Opinion). Not only the CJEU rejected this view. In addition the Commission also disputed this view on the basis that such a restricted interpretation of Article 153(5) TFEU would deprive this article from its effectiveness (see para. 23 of that Opinion):[35]

> 23. However, the Commission disputes that interpretation. In its view, ***the Treaty should be interpreted as meaning that acts based on Article 137 EC cannot directly fix the level or nature of pay*****.** On the other hand, it is **quite permissible for the legislature to adopt legislation, such as that at issue, which has only indirect or incidental effects on pay.** Only on that condition can the ***effectiveness of Article 137 EC be maintained*****.** It follows that ***Member States are completely free to choose the procedures*** for determining ***and the level of pay*****,** but they cannot allow fixed-term workers to be discriminated against as regards that pay.

Case C-268/06- Impact

127 In the AG Opinion and the CJEU Judgement in C-286/06 '*Impact*', the need to read the exclusions in Article 153(5) TFEU restrictively was further confirmed. In the Opinion of 9 January 2008, Advocate General Kokott stated the following:

> **Interpretation in conformity with primary law in the light of Article 137(5) EC**

[34] That the object and objectives of the Directives at stake in that case (and others cited below) were different than the object and objectives of the AMWD. (i.e. not to directly regulate pay).

[35] It is to be noted that the Advocate General came to this conclusion on an almost textual interpretation of the wording in Article 153(5) by stating that *"That interpretation [of the European Commission] is certainly attractive. However, it receives no serious support from the text interpreted. Moreover, if it were accepted, it would be liable to render Article 137(5) EC meaningless. On that interpretation, it would be possible, in laying down rules on employment conditions, to determine pay conditions. However, it is quite obvious that the harmonisation of pay conditions is capable of having a direct effect on the level and nature of that pay. Such a consequence would be manifestly contrary to the intentions expressed by the framers of the Treaty in Article 137(5) EC."*

170. Interpreting that term alone, however, does not provide any insight into what is meant by the fact that, according to Article 137(5) EC, that article 'shall not apply' to pay. ***Therefore, account must be taken also of the positioning of Article 137(5) EC***, in addition to the meaning and purpose of that provision.

171. As a ***derogation, Article 137(5) EC is to be interpreted strictly***, as the Court recently held in *Del Cerro Alonso*. (110) The provision cannot, therefore, be interpreted as excluding from the scope of Article 137 EC anything that has any sort of link with pay, as ***otherwise many of the fields listed in Article 137(1) EC would – in practical terms – be meaningless***. (111)

172. Instead, the ***meaning and purpose of Article 137(5) EC is primarily to protect the social partners'*** **autonomy** ***in collective bargaining from being restricted***, as evidenced not least by the close association between pay and the other matters excluded from the Community's powers: the right of association, the right to strike and the right to impose lock-outs, which are particularly important in relation to fixing pay and, accordingly, are referred to 'in the same breath' as pay in Article 137(5) EC.

173. In addition, ***Article 137(5) EC aims to prevent Community-wide standardisation by the Community legislature of the*** **wage levels** ***applicable in each of the Member States***, since such a levelling out – albeit possibly only partial – of national, regional and occupational differences in wage levels by the Community legislature would represent significant interference in competition between undertakings operating in the internal market. It would also go well beyond the measures intended under Article 137(1) EC to enable the Community to support and complement the activities of the Member States in the field of social policy.

174. Against that background, ***Article 137(5) EC prevents the Community legislature, for example***, from exerting any influence on wage levels in the Member States ***by fixing a minimum wage***. Nor can the Community legislature provide, for example, for annual inflationary compensation, introduce an upper limit for annual pay increases or regulate the amount of pay for overtime or for shift work, public holiday overtime or night work.

175. ***By contrast, Article 137(5) EC does not prevent the Community legislature from adopting legislation with financial consequences, such as in relation to working conditions (Article 137(1)(b) EC)*** or the improvement of the working environment to protect workers' health and safety (Article 137(1)(a) EC). Thus, the Community may, for example, lay down requirements for national employment law, resulting in a worker's right to be paid for his annual leave. (112)

176. In the same vein, the Court recently also clarified in *Del Cerro Alonso* that ***it is only the*** **level of pay** ***that is removed from the Community legislature's competence by Article 137(5) EC***. (113) The Court added that fixing the level of the various constituent parts of a worker's pay continues to be a matter that is entirely for the competent bodies in the Member States concerned. (114)

180. (…) ***While Article 137(5) EC leaves it to the competent national authorities and to unions and management to set the level of individual remuneration components***, it cannot serve as a pretext for discriminating between particular groups of workers. Rather, the competent national authorities and unions and management must comply with Community law when exercising the competence reserved to them by Article 137(5) EC, (117) not least with the general legal principles such as the principle of equal treatment and non-discrimination. (…).

128 Not only did Advocate General Kokott confirm the restrictive interpretation as defined in *Del Cerro Alonso*, but also he also made reference to the order in which on the one hand Article 153(1) [and Article 151] TFEU and on the other hand Article 153(5) TFEU appear in the Treaty. A too expansive interpretation of a derogative provision like Article 153(5) TFEU might deprive Articles 153(1) and 151 TFEU of their meaning and thus not allow the EU and Member States to achieve the social objectives expressed in both articles of improving living and working conditions.

129 This interpretation was subsequently confirmed by the CJEU in its judgment of 15 April 2008 in which the Court stated[36]:

> 122 As the Court has already held, ***as Article 137(5) EC 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** (*Del Cerro Alonso*, paragraph 39).
>
> 123 More particularly, the exception relating to 'pay' set out in Article 137(5) EC is explained by the fact that ***fixing the level of pay 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. (*Del Cerro Alonso*, paragraphs 40 and 46).
>
> 124 As the ***Commission contended, that exception must therefore be interpreted as covering measures*** – ***such as*** 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 within the Community.
>
> 125 ***It 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 would be deprived of much of their substance*** (see, to that effect, *Del Cerro Alonso*, paragraph 41; see also, to the same effect, Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, concerning the Council's competence to adopt, on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty were replaced by Articles 136 EC to 143 EC), Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), in particular Article 7 of that directive, relating to the grant of four weeks' paid annual leave).

130 Having cited these cases, it is respectfully submitted that AG Emiliou disregarded the principles they established.

Joined Cases C-395/08 and C-396/08 (Bruno e.a. v. INPS)

131 In his Opinion at [40] the AG refers to the case of Joined Cases C-395/08 and C-396/08 (*Bruno e.a. v. INPS*) but again appears to disregard its *ratio*. In her Opinion in *Bruno*, AG Sharpston reiterated the established case law on the exclusion of pay:

> **70.** ***In Impact, (35) a case concerning Directive 1999/70, (36) the Court was asked whether 'employment conditions'*** within the meaning of Clause 4 of the framework agreement on fixed-term work, annexed to that directive, ***included conditions of an employment contract relating to remuneration*** and pensions.
>
> **71.** ***The Court referred to its settled case-law according*** to which the term 'pay' within the meaning of the second subparagraph of Article 141(2) EC covers pensions which depend on the employment relationship between worker and employer, (37) excluding those deriving from a statutory scheme, to the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship than by considerations of social policy. (…)

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[36] It should be noted that also the referring court in this case took the restrictive view; "*35 Furthermore it [the referring court] takes the view that, having regard to Article 136 EC and the Community Charter of the Fundamental Social Rights of Workers adopted at the European Council's meeting in Strasbourg on 9 December 1989 (in particular Article 7 of the Charter) – in conjunction with which Article 137 EC must be read –, **Article 137(5) EC, which excludes pay from the scope of Article 137 EC, must be interpreted as being intended solely to preclude the European Community from having legislative competence to fix a Community minimum wage** and that it does not therefore prevent the term 'working conditions' within the meaning of Article 137(1) EC from encompassing pay and pension matters. (paragraph 35 of the Judgement)*

The Judgement of the Court of 10 June 2010, agreed and set the point out in more detail:

> 28 **The matters thus covered include, in the second indent of Article 2(1) of the agreement on social policy, 'working conditions', a provision which is reproduced in Article 137(1)(b) EC, as amended by the Treaty of Nice. Clearly, it is not possible on the basis of the wording of that provision of the agreement on social policy or that of Clause 4 of the Framework Agreement alone to determine whether the working conditions or employment conditions, referred to in those two provisions respectively, encompass conditions relating to factors such as the remuneration and pensions** at issue in the main proceedings. **In order to interpret those provisions, it is therefore necessary, in accordance with settled case-law, to take into consideration the context and the objectives pursued by the rules of which that clause is part (see, by analogy, Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 110).**
>
> 29 It is apparent from the wording of Clause 1(a) of the Framework Agreement that one of the objectives of the agreement is 'to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work'. Similarly, the second paragraph of the preamble to the Framework Agreement states that the agreement 'illustrates the willingness of the social partners to establish a general framework for the elimination of discrimination against part-time workers and to assist the development of opportunities for part-time working on a basis acceptable to employers and workers'. That objective is also stated in recital 11 in the preamble to Directive 97/81.
>
> 30 The Framework Agreement, in particular Clause 4, thus pursues an aim which is in line with fundamental objectives enshrined in Article 1 of the agreement on social policy, which are set out in the first paragraph of Article 136 EC, the third recital in the preamble to the TFEU and paragraph 7 and the first subparagraph of paragraph 10 of the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council in Strasbourg on 9 December 1989, to which the abovementioned provision of the EC Treaty refers. **Those fundamental objectives are associated with the improvement in living and working conditions and with the existence of proper social protection for workers. In particular, they are directed at improving working conditions** for part-time workers and ensuring that they are protected from discrimination, as evidenced by recitals 3 and 23 in the preamble to Directive 97/81.
>
> 31 Moreover, the first paragraph of Article 136 EC, which defines the objectives with a view to which the Council may, in respect of the matters covered by Article 137 EC, implement, in accordance with Article 139(2) EC, agreements concluded between social partners at European Union level, refers to the European Social Charter signed in Turin on 18 October 1961, which includes at point 4 of Part I the right for all workers to a 'fair remuneration sufficient for a decent standard of living for themselves and their families' among the objectives which the contracting parties have undertaken to achieve, in accordance with Article 20 in Part III of the Charter (*Impact*, paragraph 113).
>
> 32 In the light of those objectives, Clause 4 of the Framework Agreement must be interpreted as articulating a principle of European Union social law which cannot be interpreted restrictively (see, by analogy, Case C-307/05 *Del Cerro Alonso* [2007] ECR I-7109, paragraph 38, and *Impact*, paragraph 114).
>
> 33 To interpret Clause 4 of the Framework Agreement as excluding from the term 'employment conditions', within the meaning of that clause, financial conditions, such as those relating to remuneration and pensions, would effectively reduce – contrary to the objective attributed to that clause – the scope of the protection against discrimination for the workers concerned by introducing a distinction based on the nature of their employment conditions, which is not in any way implicit in the wording of that clause.
>
> 34 Moreover, such an interpretation would deprive the reference in Clause 4(2) of the framework agreement to the principle of pro rata temporis of all useful effect, that principle being intended by definition only to apply to divisible performance, such as that deriving from financial employment conditions linked, for example, to remuneration and pensions (see, by analogy, *Impact*, paragraph 116).
>
> 35 According to Article 2(6) of the agreement on social policy, which is reproduced in Article 137(5) EC, as amended by the Treaty of Nice, the provisions of that article 'shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'. However, as the Court has already held in relation to Article 137(5) EC, since that provision derogates from paragraphs 1 to 4 of that article, the matters reserved by paragraph 5 must be interpreted strictly so as not to affect unduly

the scope of paragraphs 1 to 4, nor to call into question the aims pursued by Article 136 EC (see *Del Cerro Alonso*, paragraph 39, and *Impact*, paragraph 122).

36 More particularly, it has already been held that the exception relating to 'pay' set out in Article 137(5) EC is explained by the fact that fixing the level of pay falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States. In those circumstances, as European Union law stood, it was decided to exclude determination of the level of wages from harmonisation under Article 136 EC et seq. (see *Del Cerro Alonso*, paragraphs 40 and 46, and *Impact*, paragraph 123).

37 That exception must therefore be interpreted as covering measures – such as 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 wage – which amount to direct interference by European Union law in the determination of pay within the Union. It 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 would be deprived of much of their substance (see, by analogy, *Impact*, paragraph 125).

39 While it is true that the establishment of the level of the various constituent parts of the pay of a worker falls outside the competence of the European Union legislature and is unquestionably still a matter for the competent bodies in the various Member States, those bodies must nevertheless exercise their competence consistently with European Union law – particularly Clause 4 of the framework agreement – in the areas in which the European Union does not have competence (see, to that effect, *Impact*, paragraph 129).

40 It follows that, in establishing both the constituent parts of pay and the level of those constituent parts, the competent national bodies must apply to part-time workers the principle of non-discrimination as laid down in Clause 4 of the Framework Agreement.

Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12 (Specht and others)

132 The AG in the instant case also mentioned at [40] the case of Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12 (Specht and others) though without following it. In that case AG Bot stated in his Opinion that:

41. Article 153 TFEU, which comes under Title X on social policy and which authorises the EU legislature to enact legislation relating to working conditions, expressly excludes pay from its scope.

42. Is the Court nevertheless required to refrain from exercising any review whatsoever where the national legislation in question is connected with pay? Is Article 3(1)(c) of Directive 2004/78 invalid by reason of the exception laid down in Article 153(5) TFEU? I do not think so.

43. ***There is a difference — which admittedly might seem artificial at first sight but is nevertheless essential — between the term 'pay' as used in that provision and the expression 'conditions, including … pay'*** **in** Article 3(1)(c) of Directive 2000/78.

44. In its judgment of 13 September 2007 in *Del Cerro Alonso*, (5) after pointing out that the principle of non-discrimination cannot be interpreted restrictively, the Court stated that, as paragraph 5 of Article 153 TFEU derogates from paragraphs 1 to 4 of Article 153, the matters reserved by ***paragraph 5 must be narrowly construed so as not to affect unduly the scope of paragraphs 1 to 4, nor to call into question the aims pursued by Article 151 TFEU*****.*** **(6)** The Court also held that, more specifically, ***the exception relating to 'pay' set out in Article 153(5) TFEU is explained by the fact that fixing the level of wages falls within the contractual freedom of the social partners at national level and within the relevant competence of Member States. In those circumstances, it was considered appropriate, as EU law currently stood, to exclude determination of the level of wages from harmonisation under Article 151 TFEU et seq.*** **(7)**

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*****.***

> 46. In my view, the system of remuneration for German civil servants at issue in the main proceedings serves as a good illustration of this difference between pay and pay conditions. The level of wages of German civil servants is determined by grades then by steps. ***The amounts corresponding to each grade and each step are freely determined by the competent bodies, and the EU legislature certainly could not, on the basis of Article 153(5) TFEU, intervene in determining those amounts, by imposing a minimum threshold for example.*** In this latter case, competence is vested exclusively in the Member States. (8) Wage disparities within the European Union cannot, as the law stands at present, be subject to EU rules.
>
> 47. On the other hand, the effect of national rules governing the arrangements for allocation to those grades and steps cannot be to discriminate against civil servants by reason, inter alia, of their age.
>
> 48. As the Council of the European Union stated in its written observations, ***pay constitutes an essential element of employment conditions, (9) perhaps even the most important and the most open to discrimination. (10) Consequently, if pay conditions were to be included in the exception under Article 153(5) TFEU, that would render Article 19 TFEU — which, it should be borne in mind, seeks to combat discrimination — largely meaningless***.

133 The relevant parts of the Judgement of the Court of 19 June 2014 seem to be:

> 33 The Court has held, however, ***that that exception must be construed as covering measures — such as 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 wage — that amount to direct interference by EU law in the determination of pay within the European Union.*** On the other hand, it cannot be extended to any question involving any sort of link with pay; otherwise some of the areas referred to in Article 153(1) TFEU would be deprived of much of their substance (*Impact*, C-268/06, EU:C:2008:223, paragraphs 124 and 125, and *Bruno and Others*, C-395/08 and C-396/08, EU:C:2010:329, paragraph 37).
>
> 34 ***Consequently, it is necessary to draw a distinction between the term 'pay' as used in Article 153(5) TFEU and the same term 'conditions, including … pay' as used in Article 3(1)(c) of Directive 2000/78. The latter term forms part of the employment conditions and, as noted by the Advocate General in point 45 of his Opinion, it does not relate directly to the setting of a level of pay.***

Joined Cases C-257/21 and C-258/21 *Coca-Cola*

134 And finally, there is also the Court's judgement in Joined Cases C-257/21 and C-258/21 *Coca-Cola* of 7 Juli 2022. This case was not referred to by AG Emiliou in the instant case though it is equally relevant. In that case the Court held:

> 47. Furthermore, pursuant to paragraph 5 thereof, Article 153 TFEU does not apply to pay, the right of association, the right to strike or the right to impose lock-outs. ***That exception is explained by the fact that fixing the level of pay falls within the contractual freedom of the social partners at national level and within the relevant competence of Member States. In those circumstances, in the present state of EU law, it was considered appropriate to exclude determination of the level of pay from harmonisation under Article 136 EC et seq***. (now Article 151 TFEU et seq.) (judgment of 15 April 2008, Impact, C-268/06, EU:C:2008:223, paragraph 123 and the case-law cited).

135 It will be seen therefore that the conclusion on 'pay' of the AG in the instant case appears to fly in the face of the established case law.

136 The AG also seems to **find support for his broad interpretation of the pay exclusion from "the drafters of the EU Treaties"** (see e.g. [51], [65] and [68] of the AG Opinion). However, from the 'historical research' of amongst others the Maastricht preparatory works by other authors[37] seem to indicate otherwise as throughout the Treaty drafting process several options were put forward between 1) excluding 'pay' in full, 2) the 'level of pay' only, 3) 'explicitly giving competence to regulate pay to the exception of its level and 4) even not excluding pay at all. That historical research furthermore found no proof that, as the Opinion might imply, that the pay competence exclusion was motivated by the

[37] See in particular Kilpatrick and Steiert, p. 3 ff.

promotion of competitiveness through internal wage competition (see [68]-[69] AG Opinion). But this is quite wrong, the whole Social Policy Title and the extension of social policy competences was principally driven by the intentions: to make internal competition on working conditions (i.e. social dumping) impossible; to deploy social policies to promote social cohesion; and to ensure the autonomy of the social partners in an EU industrial relations space. These objects must be respected, it is submitted, in the interpretation of the pay exclusion. (see also below under the 'Third fallacy').

137 Disregarding the jurisprudence above, the AG favours a broad interpretation of the term 'pay' which covers "*all aspects of Member States' wage-setting systems (including the modalities or procedures for fixing the level of pay) and not merely the level of pay" (*[*54*] AG Opinion*).* However, in the view of the ETUC, such a construction is disproportionate and unjustified; the strict interpretation of the pay exclusion (by limiting it to levels/amounts mainly) has not and will not deprive the pay exclusion of effectiveness. This is indeed exemplified in the cited CJEU case law and also by the manifold EU Directives which do regulate directly or indirectly aspects of pay including even the level of it. As noted above, the ETUC refers to:

- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (**'equal pay for equal work'**);
- Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer ((*Article 4(3); 'ceilings on payments must* ***not fall below a level which is socially compatible with the social objective of this Directive');***
- Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (Recitals 30, 31 and Articles 8 and 20(7); "payment or allowance at least equivalent to the national sick pay, payment or allowance equal to payment or allowance for maternity leave; payment or allowance for parental leave at an adequate level, ensure a payment or an allowance of at least 65% of the workers' net wage, (…)).

138 The ETUC considers that the breadth of the extended interpretation of 'pay' favoured by the AG here, would fundamentally undermine the effectiveness and scope of the objectives of Article 151 as well as those of Article 153(1)(b) TFEU. Indeed, extending the scope of the pay exclusion to any question involving any sort of link with 'pay' would deprive Article 153(1) TFEU of much of its substance and call into question the aims pursued by Article 151 TFEU contrary to the case law cited above. The broad interpretation favoured by the AG would entail a considerable restriction of the EU's legislative competence leading to a situation where it could become impossible to protect the wages of workers in the EU within the framework of the Social Policy title and Articles 151 and 153(1) TFEU in particular. Considering past experiences on how the Troika and European Semester system "recommended" Member States to intervene in wage setting systems (and collective bargaining systems in general) and to cut drastically (minimum) wages (as well as pensions), this would defeat the objectives of the Treaties, as amended and could lead to dissatisfaction with the EU and even to social unrest.

139 The ETUC adds **four further observations.**

140 Firstly, the ETUC observes that the translations of the pay exclusion in the Danish and Swedish version of Article 153(5) TFEU translate the term 'pay' as '*lønforhold*' and *'löneförhållanden*' which means 'pay *relations*' respectively, whereas all other official language versions of this Article base their translations of the term on various concepts more strictly limited to pay, wages or remuneration. Clearly, the Danish and Swedish translations suggest a significantly wider reading of the term 'pay' which cannot be deduced from the vast majority of other official language versions of the Treaties. The ETUC speculates that this may explain part of the disquiet of the Danish and Swedish government in urging a broad rather than a narrow interpretation of 'pay'.

141 Secondly, the ETUC notes that in [102] of his Opinion, and in order to justify a restrictive interpretation of the 'freedom of association'-exclusion in Article 153(5) TFEU (so as not to include the right to collective bargaining), the AG considered the relevant articles of the CFREU and the CCFSR, and Article 156 TFEU where indeed 'right of association' and 'right to collective bargaining' are regarded as distinct[38]. But he did not look more widely in his interpretation of 'pay'.

142 It would have been appropriate to consider Article 157 TFEU (on the 'principle of equal pay for equal work or work of equal value') which contains a definition of pay which states *"For the purpose of this Article, '**pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind**, which the worker receives directly or indirectly, in respect of his employment, from his employer*." The ETUC, of course, notes the limitation of this definition to Article 157 TFEU specifically, however it also observes that a similar limitation is mentioned in Article 153(5) TFEU ("This article will not apply"), and that the definition refers to elements of pay but does not entail any references to levels of pay let alone "**to all aspects of Member States' wage settings (including the modalities or procedures for fixing the level of pay**" as the AG seem to reads into the pay exclusion of Article 153(5) TFEU. It would be somewhat strange if Member States were required by EU primary and secondary law to ensure "equal pay (incl. minimum wages") for equal work" whereas on the other hand they could not be required by EU law to establish a framework to ensure that minimum wages in Member States are "adequate".

143 Thirdly, and when looking at the possible overlap on 'right to collective bargaining' between Article 153(1)(f) TFEU (on "representation and collective defence of the interests of workers and employers, including co-determination") and the 'freedom of association' exclusion in Article 153(5) TFEU, the AG notes in para. 105 of his Opinion that Article 153(1)(f) TFEU expressly mentions that this article "is subject to paragraph [of Article 153]. This leads the AG to conclude that the latter provision "makes clear that the matters covered by that provision do not wholly overlap with those covered by Article 153(5) TFEU". The ETUC notes on the other hand that the AG seems to overlook that this "subject to paragraph 5" does not figure in Article 153(1)(b) TFEU. If so, this would not be compatible with the statement of the AG in [66] of his Opinion that the "drafters of the Treaties have essentially sought to carve out and exclusion ('pay') from a field ('working conditions')".

144 Finally, the AG also seems to overlook the CJEU's established case law on interpreting secondary law in conformity with primary law (e.g. (C-518/16, para 29) ZPT, i.e. if a provision of secondary law "is open to more than one interpretation preference should be given to the interpretation which renders it consistent with the Treaty rather than the interpretation which leads to its being incompatible with the Treaty" (references to cases Commission vs. Council (C-218/82, paras. 13ff and Commission vs. Germany (C-2025/84, para 62). In the instant case the inconsistency in the two interpretations of the AMWD that it "regulates pay" vs. "it does not regulate pay" the latter is the more consistent with the Treaty.

[38] Article 156 TFEU, first paragraph, reads:
With a view to achieving the objectives of Article 151 and without prejudice to the other provisions of the Treaties, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Chapter, particularly in matters relating to:

- *employment,*
- *labour law and working conditions,*
- *basic and advanced vocational training,*
- *social security,*
- *prevention of occupational accidents and diseases,*
- *occupational hygiene,*
- ***The right of association and collective bargaining between employers and workers. (…)***

(2) The second fallacy: the EU legislature may set general and loosely worded requirements as regards the Member States' wage-setting frameworks

145 The AG considers that

> interpreting the text of direct interference developed by the Court in relation to the 'pay' exclusion in Article 153(5) TFEU as meaning that general and loosely requirements may be set by the EU legislature or the partial harminisation may be operated as regards pay is [also] a fallacy".

For him any interference even light or limited can will still be direct if the object of the instrument (and/or several of its provisions) is to regulate pay ([64] AG Opinion) and that thus "an instrument directly interferes with pay and is, thus, incompatable with the 'pay' exclusion in Article 153(5) TFEU if its object is to regulate pay, no matter how strictly or flexibly" ([62] AG Opinion). This bold argumentation stands or falls, of course, on whether the AMWD is intended to regulate pay. Unlike the AG, the ETUC, the EU legislators and other authors consider the AMWD doesnot have the object of regulating pay.

146 The AG's interpretation that the AMWD regulates pay appears largely based on a textual interpretation dependent on the use of the word "wages" in the title of the Directive but also and wording used in other articles of the Directive such as Article 1, 3, 5 and 12(1) AMWD (see [74]-[94] AG Opinion).[39]

147 In *ADEDY* (Case T-541/10), the Court held in para. 84 that EU Decisions to reduce Excessive Deficits in Greece and therein recommended measures that would impact wages and pensions of Greek workerst, he national authorities had a wide discretion to achieve the objective of reducing the excessive deficit. Correspondingly, the AMWD, far from regulating wages, bestows likewise on Member States (and social partners) very wide discretion as to the implemenation of its provisions.

148 Under this same alleged fallacy, the AG opines that the test of direct interference does not allow the EU legislature to set "minimum requirements" in the area of pay, leaving Member States the option of introducing more favorable provisons ([65] AG Opinion). The AG continues in a broader sense than in relation to the first alleged fallacy "that there is no competence whatsoever for the matters covered by Article 153(5) TFEU (ibidem)" and that "in the area of pay, no form of harmonisation Is allowed, as there is no EU competence in this area". He asserts that even "if the EU legislature were to provide minimum requirements as regards pay it would already exceed its competence". ([66] AG opinion)

149 This appears to be based on the argument that, by adopting Article 153(5) TFEU, the drafters of the Treaties essentially sought to carve out an exclusion ('pay') from a field ('working conditions') covered in 153(1)(b) TFEU. Apart from the historical research refered to above rejecting this suggestion, it is also clear from the text of Article 153(1)(b) that, unlike Article 153(1)(f) TFEU, this Article is "not subject to paragraph 5" and that pay is thus not carved out by from "working conditions". This is also confirmed by the Court's settled case law which considers that pay is an essential aspect of "working/employment conditions".[40]

150 The ETUC considers that this approach can also be applied to those concepts as they are used in Article 153(1)(b) TFEU in particular by reason of the Vienna cinvention and because the Court considers that if:

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[39] As to the strong statement in relation to Article 12(1) AMWD that "at any rate, Article 12 of the AMWD is problematic for Member States such as Denmark and Sweden,…", the ETUC considers this not true because when being asked at the hearing about the problematic nature of this Article, both Denmark and Sweden confirmed orally that "the problem of Article 12 has been resolved by its current wording".

[40] See e.g. [17], [21], [23] and [25] of the AG Opinion and paras. 39-41 and 46-47 of the judgment in C-307/50 *Del Cerro Alonso*; (and see also [152], [155]-[158], [166], [169], [175] and [182] of the AG Opinion and paras. 110 and 113 of the judgment in C-268/06 *Impact*).

> a question of interpretation raised cannot be resolved by the wording of a provision, it is necessary, in accordance with settled case law, to take into consideration the context and the objectives pursued by the rules of which that provision is part

and that

> the first paragraph of Article 136 EC, which defines the objectives, (…) refers to the European Social Charter … which includes in Article 4 the right for all workers to a 'fair remuneration sufficient for a decent standard of living for themselves and their families' among the objectives which the contracting parties have undertaken to achieve (…)"

(See paras. 30-31, 110 and 113 of the Judgment in *Impact*).

151 Furthermore completely "carving" out 'pay' from 'working conditions' would not only – as already mentioned – defeat the aims and objectives of Article 151 TFEU and the substance of Article 153(1)(b) TFEU. It would also put serious restrictions (to say the least) on the substance and effectiveness of Article 153(2)(b) TFEU which allows the EU legislature to adopt, by means of Directives, minimum requirements in the fields referred to in Article 153(1)(a) to (i) TFEU, as well as on the possibility offered by Article 153(4) TFEU to allow any Member State to maintain or introduce more stringent protective measures compatible with the Treaties. [41]

152 Finally, the AG's bold conlcusion that the "EU has no competence whatsoever when it comes to the matters of 153(5) TFEU" implies disregard of the court's settled case law which amongst other things states that the 'pay' exclusion can not be extended to any question involving any sort of link with pay and that Article 153(5) TFEU does not prevent the EU legislature from adopting legislation with financial consequences such as in relation to working conditions.

(3) The third fallacy: if a measure does not encroach upon the contractual autonomy of social partners, it complies with the 'pay' exclusion

153 When it comes to the third alleged fallacy, the ETUC considers that the AG errs in his interpretation of social partner autonomy, bearing in mind the European and international legal framework which safeguards the contractual freedom of management and labour. A comprehensive reading of the legal and institutional context in which the social partners operate is crucial to ensure a correct understanding of how their autonomy interacts with Union law. Respecting the autonomy of the social partners not only comes with a negative obligation on the EU to refrain from interfering in their contractual freedom, but also contains a positive obligation on the EU to protect and promote this autonomy.

154 The ETUC concludes that AG's reading of Article 153(5) TFEU results in a reductionist understanding of the pay exclusion and the purposes it serves, not only in relation to the autonomy of the social partners but also beyond. As demonstrated throughout this Counter-Opinion, promoting adequate minimum wages does not amount to a direct interference in the autonomy of the social partners or their collective bargaining. Similarly, the promotion of collective bargaining does not amount to a direct interference in the autonomy of the social partners or the determination of wages – nor indeed a direct interference in the conduct of collective bargaining, its content, its participants, its modalities or any other features of collective bargaining. All these things are left to the autonomy of the partners. In fact, a lack of purposive interpretation of the social policy chapter in general and the pay exclusion in particular risks undermining this very autonomy of the social partners.

[41] See also para. 48 of the AG Opinion in Joined Cases C-501/12 to C-50612, C-540/12 and C-541/12 'Specht and others') that "if pay conditions were to be included in the exception under Article 153(5) TFEU, **that would render Article 19 TFEU largely meaningless**".

155 The AG introduces his third alleged fallacy by developing two-fold reasoning. First, the AG says an EU instrument compatible with the pay exclusion in Article 153(5) TFEU presumably also contributes to safeguarding the contractual autonomy of the social partners. However, the fact that an EU instrument or measure does not encroach upon the contractual autonomy of the social partners does not necessarily mean that it complies with the pay exclusion. He justifies this reversed reasoning as follows [69 AG Opinion]:

> That is all the more so, in my view, because the importance of preserving 'the diverse forms of national practices, in particular in the field of contractual relations' and of '[maintaining] the competitiveness of the Union economy' is not specific to 'pay' but as Article 151 TFEU makes clear, is also relevant – although perhaps to a lesser degree – to all social policy issues where the EU legislature is competent to complement the activities of the Member States.

156 Indeed, Article 151 TFEU pays respect to the diversity of national industrial relation systems as one of the prerequisites when advancing the social policy objectives of the EU. In doing so, this Article not only identifies the relevant levels and actors sharing the competences in EU social policy, but also recognises the importance of collective bargaining as a means of setting labour and working conditions. As previously outlined above, other sources of EU primary law also contribute respecting social partner prerogatives, such as Article 12 CFREU on freedom of association and Article 28 CFREU on collective bargaining.

157 The importance of social partner autonomy under EU law is also illustrated by Article 152 TFEU:

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

158 Also the autonomy of national social partners takes concrete expressions in EU primary law such as Article 153(3) TFEU, whereby a Member State may entrust the social partners with the implementation of directives. This is clearly reflected also in Article 17(3) AMWD and a wide range of other EU Directives in the social policy field. Another concrete expression of the importance of the contractual freedom of management and labour can be found in a number of EU secondary law instruments, including Article 1(2) AMWD. This provision inter alia states that the Directive '*shall be without prejudice to the full respect for the autonomy of the social partners*'.

159 However, respecting the autonomy of the social partners not only entails a negative obligation on the Union *not* to interfere with their contractual freedom in the labour market. Even in the case of labour law models such as the Danish and Swedish ones, described by the AG as '*characterised by a 'laissez-faire' approach, that is to say, a high degree of autonomy of social partners*' ([34] AG Opinion), the national legislator has obligations to promote and protect the industrial relations, amongst other things providing management and labour with the necessary regulatory space to exercise their autonomy.

160 As will be elaborated later in this Counter-Opinion, the relevant European and international legal framework provides for clear obligations to actively promote e.g. collective bargaining. In other words, providing the social partners with an enabling framework in law to cater for and create incentives for voluntary negotiations between management and labour is not inconsistent with their autonomy. On the contrary, it provides them with the necessary space to stimulate well-functioning industrial relations. This holds true also for the purposes of EU law. Beyond Articles 151, 152 and 153 TFEU, this approach is supported also by Article 156 TFEU, whereby cooperation and coordination between Member States should be encouraged and facilitated, including when it comes to the right of association and collective bargaining. This positive approach to the promotion of social partner autonomy forms an integral part of EU secondary law, including but not limited to the possibility to negotiate more favourable conditions through collective agreements. By way of example, Article 18 of the Working Time Directive 2003/88/EC offers space for social partners to negotiate derogations from

certain provisions through collective agreements. Similarly, provisions such as Article 5(3) of the Temporary Agency Directive 2008/104/EC and Article 14 of the Transparent and Predictable Working Conditions Directive (EU) 2019/1152 empower social partners to maintain, negotiate, conclude and enforce collective agreements which may even differ from the working conditions established under these Directives, provided that the overall protection of workers is respected. It follows that this contractual freedom may also come with some limitations, such as Article 7(4) of the Free Movement of Workers Regulation (EU) No 492/2011, which prohibits clauses in collective agreements discriminating against workers on grounds of nationality as regards employment, remuneration, other conditions and dismissals.

161 Dedicated provisions of the AMWD as regards the promotion of collective bargaining are explored more thoroughly in the following section of this Counter-Opinion. Prior to that, however, the interrelation between social partner autonomy and the social policy chapter of the Treaties merits further attention.

162 As explained, EU social policy is characterised by a multi-governance architecture, recognising the diversity of legitimate actors at the various levels, ranging from EU institutions and Member States to social partners. The social policy chapter provides each of these regulators with the necessary space to advance the EU's social objectives within their respective competences. However, from the shared competences in this field it also follows that the question of relevant actors cannot be reduced to a pure dichotomy of either national or EU action, of either collective bargaining or legislation. And this is so even when it comes to the autonomy of the social partners. The questions of EU competence and social partner autonomy are not mutually exclusive.

163 Article 151 TFEU not only recognises the diversity of national industrial relation systems, but also identifies as one of the EU's social policy objectives the promotion of '*dialogue between management and labour*'. The very objectives of Article 151 TFEU would be deprived of their effectiveness, if on the one hand the autonomy of social partners rendered it impossible for the EU to promote social dialogue, or on the other hand, if the EU was not able to improve working conditions by means of promoting social dialogue, including when it comes to pay. For this reason, any restrictions of the EU institutions to promote and protect the contractual freedom of management and labour must be interpreted restrictively, precisely to ensure that the other EU social policy objectives pursued do not run the risk of being undermined or deprived of their effectiveness.

164 This somewhat ambiguous division of labour is also reflected in the wording of Article 153 TFEU. At the same time, however, it also allows for a certain degree of flexibility in terms of accommodating the different levels, actors and tools of labour regulation. Rather than leaving the co-legislators and the Court in legal uncertainty, the Treaties offer some leeway in striking an appropriate balance, promoting the EU's social objectives, on the one hand, while respecting the prerogatives of national legislators and social partners on the other. As illustrated in previous sections of this Counter-Opinion, 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' under Article 153(5) TFEU. In the same way, a number of legislative acts in EU secondary law also demonstrate the inherent link between decent working conditions and adequate wages, and how these two have been accommodated by the co-legislators while respecting the autonomy of the social partners.

165 Looking specifically at the AMWD, as demonstrated in the previous sections of this Counter-Opinion, its provisions cater for the necessary space to fully accommodate the diversity of levels, actors and tools when it comes to regulating labour. In this way, it also 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 have been among the key

considerations of the European Commission and the co-legislators when carefully crafting and adopting the AMWD.

166 Given the incremental importance of social partner autonomy in the development of EU social policy, this autonomy must of course be respected when interpreting Article 153(5) TFEU. Still, this obligation is not a justification for disproportionately extending the test of direct interference. In the words of the AG himself, '*confusing the test itself with its purpose*' ([70[AG Opinion) is a fallacy, because the exclusion of 'pay' also serves other purposes.

167 Indeed, the 'pay' exclusion under Article 153(5) TFEU certainly serves other purposes than safeguarding the contractual freedom of the social partners. However, the AG errs in his interpretation when he suggests that ([68] AG Opinion]:

> by preventing the harmonisation of the wage levels applicable in each of the Member States, the 'pay' exclusion contributes to maintaining competition between undertakings operating in the internal market, as Advocate General Kokott stated in her Opinion in *Impact*. Some authors have also pointed out that there is no competence for pay because wage policy is, simply, a sensitive area, which represents an important tool for domestic economic policy and for the functioning of the national labour market/

168 From a historical interpretation as regards the *raison d'être* of the 'pay' exclusion under Article 153(5) TFEU not only policy objectives such as social partner autonomy emerge but also that of social cohesion and the need to tackle social dumping. Contrary to the suggestion of AG Emiliou, wage competition was not one of these objectives when drafting the social policy chapter, however. On the contrary, wage competition would directly interfere with these other enlisted policy objectives, depriving them of their effectiveness. Similarly, the reasoning put forward by AG Kokott was never confirmed by the Court in its *Impact* (C-268/06) judgment. This historical interpretation can even be traced back to the Treaty of Rome in 1957, which introduced the principle of equal pay for men and women in Article 119 EEC, precisely as a means to prevent distortions of competition based on cheaper female labour. Clearly, an extensive interpretation of Article 153(5) TFEU would undermine the purpose and policy objectives of the whole Article 151 TFEU.

169 As pointed out by the AG, Article 151 TFEU indeed contains a reference to the '*need to maintain the competitiveness of the Union economy*' [69 AG Opinion]. Nevertheless, price and labour costs cannot be understood as the sole nor the primary parameter of competition, as illustrated by the historical and purposive interpretation outlined just above. When it comes to social policies, investments in human capital cannot be underestimated. Labour is not a commodity that can be negotiated for the lowest price or the highest profit as other factors of production, even in a common market founded on economic freedoms. To recall the fundamental objectives of the EU as set out in Article 3 TEU, the internal market is not an end in itself. Instead, it shall serve '*a highly competitive social market economy, aiming at full employment and social progress*'. The importance of reading the social policy chapter in the light of the Treaties as a whole has also been confirmed and further elaborated by the Court in *AGET Iraklis* (C-201/15) (see also [77] AG Opinion]:

> Since the European Union thus has not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 151 TFEU, the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

170 The Court has also confirmed the central role that the social partners and their autonomy play in advancing the social objectives of Union. In *Albany* (C-67/96), the Court by reading the EU Treaties as a whole, held that the inherent conflict between the social policy objective of encouraging collective

bargaining (in what is now Articles 151-153 TFEU), on the one hand, and the prohibition of anti-competitive behaviour (in what is now Article 101 TFEU), on the other, was to be resolved by the supremacy of the former:

> [59] It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.
>
> [60] It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.

171 Finally, a few words need to be said also about the Court's ruling in *Laval un Partneri* (C-431/05). In his Opinion, the AG uses this ruling to contextualise the case at hand [34 AG Opinion]:

> The present action does not arise in a vacuum, as it is intrinsically linked to Denmark's and other Nordic Member States' constant opposition to European Union actions which they regard as interfering with their labour law and industrial relations systems. The reactions in those Member States to the Court's judgment in *Laval un Partneri* which concerned the posting of Latvian workers by a Latvian company (Laval) to building sites in Sweden and the subsequent blockade of those sites by a Swedish trade union, are, to date, the most salient examples of that opposition. […] The Court's conclusion in that judgment that industrial action can, in essence, amount to an unjustified restriction on free movement and its emphasis on the importance of transparency as regards the terms and conditions of employment, including pay, have been perceived by some as a threat to the autonomous character of Denmark's and Sweden's collective bargaining systems and to the absence of state intervention in the actions undertaken by trade unions which characterises those Member States.

172 Although this infamous ruling indeed constituted an encroachment upon the autonomy of the social partners, their specific collective bargaining system and national wage levels, its relevance to the instant case must be dismissed as being quite marginal, or in fact even demonstrating the opposite of what the AG seeks to draw from it. The legal basis examined in *Laval un Partneri* was of an economic rather than of a social nature. The dispute concerned the fundamental right to collective action, which ultimately was set aside, despite the right to strike being safeguarded under Article 153(5) TFEU as well as by Article 28 CFREU. The trade unions argued their case based on a logic of social rights and equal pay, but the case was decided on the logic of competition law. The interference was of a direct rather than indirect nature, with far-reaching and long-lasting concrete negative impacts on pay and industrial relations in the Member State and beyond.

173 This striking interference with the autonomy of social partners illustrates the dangerous consequences of a '*laissez-faire*' approach which did not safeguard the contractual freedom of management and labour under EU law and without any rebalancing obligations to actively promote and protect their autonomy. The European Committee of Social Rights, in a subsequent collective complaint (No. 85/2012)[42] by Swedish trade unions in the aftermath of the Court's ruling, held:

> [120] national legislation which prevents a priori the exercise of the right to collective action, or permits the exercise of this right only in so far as it is necessary to obtain given minimum working standards would not be in conformity with Article 6§4 of the Charter, as it would infringe the fundamental right of workers and trade unions to engage in collective action for the protection of economic and social interests of the workers. In this context, within the system of values, principles and fundamental rights embodied in the Charter, the right to collective bargaining and collective action is essential in ensuring

[42] European Committee of Social Rights: Decision on admissibility and the merits in Complaint No. 85/2012 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, 3 July 2013.

> the autonomy of trade unions and protecting the employment conditions of workers: if the substance of this right is to be respected, trade unions must be allowed to strive for the improvement of existing living and working conditions of workers, and its scope should not be limited by legislation to the attainment of minimum conditions.

174 Whereas *Laval un Partneri* amounted to a direct interference with the industrial relations at national level, in contrast the AMWD aims to promote and protect the autonomy of social partners and collective bargaining without direct interference, simply providing management and labour with an enabling framework and the necessary space to exercise their contractual freedom.

b. Whether the AMW Directive is compatible with the 'right of association' exclusion in Article 153(5) TFEU

(1) The collective bargaining issues

175 Having concluded that the AMWD should be annulled on the ground that its provisions on pay fall foul of Article 153(5) TFEU, as noted above, the second part of the AG's Opinion is devoted to issues in relation to collective bargaining. This part of the Counter-Opinion deals with two principal issues.

176 The first issue (hereinafter the 'right of association issue') is whether Article 153(5) TFEU in excluding from the competence of the EU legislature to adopt Directives not only 'pay' but also the 'right of association' thereby renders the AMWD illegitimate because it contains provisions directed to collective bargaining.

177 The second issue (hereinafter the 'representation and collective defence issue') is whether those collective bargaining provisions fall within the permissible objective set out in Article 153(1)(f) of 'representation and collective defence of the interests of workers and employers, including co-determination, subject to [Article 153(5)]'. If so, those provisions are a nullity since such a Directive requires a unanimous vote of the Council whereas the AMWD was passed by a majority.

178 In relation to the second issue, a subsidiary issue arises. This (hereinafter the 'severance issue') is whether, if the CJEU concluded that the AG was wrong and that the nature of the pay provisions of the AMWD rendered it *within* the competence of the co-legislators to adopt, the provisions relating to collective bargaining were nonetheless a nullity and therefore could and should be severed from the rest of the Directive (because, unlike the rest of the AMWD), the collective bargaining provisions constitute 'representation and collective defence of the interests of workers and employers' and hence require unanimity.

179 Before considering these arguments, however, it is useful to set out again the principal material relevant to collective bargaining (hereinafter the 'collective bargaining provisions'). Starting with the AWMD, not all relevant provisions are recited by the AG at the outset of his Opinion, most are referred to later in it. As outlined earlier in this counter-opinion, Articles 1, 3 and 4 AMDW are of particular relevance.

180 The 'collective bargaining provisions' of the AMWD referred throughout this counter-opinion is a shorthand for the following summary of measures Member States must take:

a. promoting and strengthening the social partners' capacity to engage bargain collectively on wage-setting;
b. encouraging constructive, meaningful and informed negotiations on wages between the social partners;
c. taking measures to protect against discrimination against participants in collective bargaining;
d. taking measures to protect against interference by one side against the other;

e. in Member States with less than 80% coverage of collective agreements, encourage constructive, meaningful and informed negotiations on wages between the social partners and with their agreement, produce an action plan to achieve that level of coverage.

181 Turning to the Treaties, relevant collective bargaining provisions can be found notably in the social policy chapter. Article 151 TFEU sets out the social policy objectives of the Union, including the '*promotion of dialogue between management and labour*' and the obligation on '*the Union and the Member States to implement*' such measures, while taking '*account of the diverse forms of national practices*'. Article 152 TFEU places an obligation on the Union to '*facilitate dialogue between the social partners, respecting their autonomy*'. At the heart of this case is Article 153 TFEU, which provides the legal bases and ways for the Union to '*support and complement the activities of the Member States*' with a view to '*achieving the objectives of Article 151*'. Likewise, Article 156 requires the Commission, '*with a view to achieving the objectives of Article 151 and without prejudice to the other provisions of the Treaties*', to encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Chapter, including in matters relating to '*the right of association and collective bargaining between employers and workers*'.

182 In this context, also the Community Charter of the Fundamental Social Rights of Workers must be mentioned again. Though without the legal status of the Charter of Fundamental Rights, the Community Charter (unsurprisingly) included provisions on freedom of association and collective bargaining at Articles 11 and 12 (and the right to strike in Article 13).

183 Similarly, Chapter II of the European Pillar of Social Rights (the 'Pillar'), proclaimed at Gothenburg on 17 November 2017, though of limited legal effect, establishes a set of principles to serve as a guide towards ensuring fair working conditions. Principle No 8 provides that the social partners are (amongst other things) to be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. It will be recalled that the AG refers (at [30] AG Opinion) to the Pillar and to Principle 6 (right to fair wages that provide a decent standard of living) but not to Principle 8.

184 As described in earlier sections of this Counter-Opinion, these Treaty provisions and the historical context in which they have developed, make it obvious that collective bargaining is a central feature of the constitutional arrangements and objectives of the EU. As noted above, this constitutionalisation of the EU's social dimension has been confirmed by the Court, notably in cases such as *AGET Iraklis (*C-201/15 at [76-77]) and *Albany* (C-67/96 at [59]-[60]), underscoring the fundamental importance of collective bargaining as a social objective within the EU legal order.

185 But there is more. Article 6 TEU makes the Charter of Fundamental Rights of the EU legally binding and of equal status to the Treaties. As noted by the AG (at [102] AG Opinion), freedom of association is guaranteed in Article 12 CFREU and collective bargaining in Article 28 CFREU. Accordingly, those Charter rights now have 'equal value' to Article 153 TFEU though it is not evident that the AG appreciated this or at least accorded proper significance to it.

186 Importantly, Article 52(3) CFREU also provides that the Charter guarantees at least the same level of protection as the ECHR. Freedom of association is protected by Article 11 ECHR, and also the right to collective bargaining has been held by the ECtHR, particularly in the light of the jurisprudence of the ILO and the European Social Charter, to be an 'essential element' of Article 11 together with a number of other discrete rights inherent in freedom of association[43] (*Demir &Baykara v Turkey* [2008] ECHR 1345 at [145], [154 AG Opinion]).

[43] Including, the ECtHR held, the right to form and join a trade union, the prohibition of closed-shop agreements and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its

187 Not only do EU Charter rights have equal value to provisions of the Treaties, but the EU Court has deferentially given direct horizontal effect between worker and employer to Charter rights (though the right to collective bargaining has not yet come before the Court in a context in which it might be horizontally applied). Examples are *Egenburger* (Case C-414/16) (discrimination on grounds of religion) and *Bauer* (joined Cases C-569/16 and C-570/16) (right to paid annual leave), but there appears no principled reason why the right to bargain collectively should be accorded any less effect in the hierarchy of rights protected by the EU Treaties.

188 Before leaving the sources of freedom of association and collective bargaining obligations reference should be made to the other Council of Europe instrument, the European Social Charter 1961 (revised 1996). It provides in Article 5 for freedom of association and the right of employers and workers to organise. More specifically, Article 6(2) ESC safeguards the right to collective bargaining.

189 These provisions reflect, of course, the two principal Conventions of the International Labour Organisation (ILO). Convention No 87 on the Freedom of Association and Protection of the Right to Organise Convention of 1948 protects freedom of association and the right to form and join trade unions (and employers' associations) free from state interference. Convention No 98 is on the Right to Organise and Collective Bargaining Convention of 1949. Apart from giving further protection against discrimination against trade union members and protecting trade unions and employers' associations from interfering with each other, Article 4 is devoted to collective bargaining.

190 The AMWD specifically refers to these two Conventions at paragraph 24 of the preamble. The ILO has adopted various other Conventions relevant to collective bargaining which it is not necessary to rehearse here, though they are cited at paragraph 24 of the preamble to the AMWD. It has also reiterated the fundamental nature of the right to bargain collectively (and other rights) in its *Declaration on Fundamental Principles and Rights at Work and its Follow-up*, 1998, and its *Declaration on Social Justice for a Fair Globalization*, 2008.

191 Convention No 87 and Convention No 98 are amongst the fundamental rights of the ILO. All Member States have ratified the fundamental rights and the EU recognises them as such. Thus, for example, the EU-UK Trade and Cooperation Agreement of 2021 reiterates them at Article 399, including specifically at Article 399(2)(a), 'freedom of association and the effective recognition of the right to collective bargaining' (and see Art.386(1)(a)).

192 Finally, in relation to the ILO the foundational *Declaration of Philadelphia*, 1944, annexed to the ILO Constitution, cannot be overlooked. Cited earlier, it reaffirms the fundamental principles on which the ILO is based, in particular recognising freedom of association and the effective recognition of the right of collective bargaining.

193 It is not surprising that in case C-271/08 *Commission v Germany (occupational pensions)* the CJEU held that the right to bargain collectively is a fundamental right recognised in EU law.

194 In the light of this wealth of material illustrating the eminence and role of collective bargaining in the architecture of the EU, any asserted restriction on the power of the EU institutions to advance collective bargaining in the pursuit of EU objectives must be subject to intense scrutiny to be sure of the legal justification for so doing – and, unless the contrary is indicated, the presumption must be that any such basis must be strictly and narrowly construed.

members. Other discrete rights are also inherent in freedom of association to join a trade union in Article 11, as the ECtHR has held on other occasions, e.g. the right of a trade union to regulate its conditions of admission to membership so as to exclude those inimical to its objectives: *ASLEF v UK* [2007] ECHR 184, at [39].

(2) The right of association issue

195 It will be recalled that the first issue here is whether Article 153(5) TFEU in excluding from the competence of the EU the adoption of directives on the 'right of association', thereby renders the collective bargaining provisions of the AMWD illegitimate.

196 Here the AG concludes that the reference to right of association in Article 153(5) TFEU does not preclude measures relating to collective bargaining. At [106] of the AG Opinion he holds:

> a provision or measure adopted by the EU legislature cannot be found to be incompatible with the 'right of association' exclusion in Article 153(5) TFEU, simply because it concerns the right to collective bargaining. In the present case, that means, for example, that the mere fact that Article 4(1)(d) and Article 4(2) of the AMW Directive seek to promote collective bargaining is not sufficient to support a finding that that directive is, as a whole, incompatible with the 'right of association' exclusion contained in Article 153(5) TFEU.

197 This conclusion is reached principally because (at [103] AG Opinion) the AG distinguishes between the right of association and the right to collective bargaining, holding that:

> those rights are distinct: the first relates to the right of workers or employers to constitute and join organisations (including trade unions) to defend their economic and social interests, whereas the second relates to a specific part of the mandate of those organisations, namely that of negotiating and concluding collective agreements.

198 He points out (at [105] AG Opinion) that much of (but not all) the wealth of material cited above treated those rights as distinct. He agrees (at 104] AG Opinion), however, that (as is self-evidently the case):

> the protection of the right of association is indispensable to the protection of the right to collective bargaining, since the collective defence of the interests of workers presupposes the creation of organisations designed to collectively defend the economic and social rights of workers and/or employers.

and continues:

> … I share the Parliament and the Council's view that that link does not mean that the matters covered by the first provision include those that come within the scope of the second.

199 In distinguishing between the rights of collective bargaining and of association the AG is evidently, and in accordance with the Vienna Convention, utilising the ordinary meaning to be given to the relevant terms in the TFEU in their context and in the light of the object and purpose of the Treaty as a whole and this (and surrounding) Article(s) in particular.

200 Applying the Vienna Convention further, it can be pointed out that since the AMWD is contested, it is not possible to identify any relevant agreement made between or accepted by all the parties in connection with this part of the TFEU or regarding the interpretation of the treaty or the application of its provisions. However, 'relevant rules of international law applicable in the relations between the parties' are to be found here (including the two EU Charters, the ILO Philadelphia Convention and C87 and C98, and Article 6(2) of the European Social Charter) and the AG adverts to many of them. They show that the promotion and advancement of collective bargaining is a prominent part of the context in which the meaning of Article 153 TFEU must be ascertained and that the promotion and advancement of collective bargaining forms a primary object and purpose of the provision. (This proposition assumes a particular significance in relation to the representation and collective defence issue discussed below.) The ETUC also asserts that the case law of the Court in relation to the restrictive construction to be placed on the exclusions in Article 153 represents 'relevant rules of international law applicable in the relations between the parties' here.

201 Given that the ordinary meaning of the words make the distinction between the respective rights to collective bargaining and to freedom of association, it must be concluded that the AMWD is not barred by Article 153(5) TFEU from promoting collective bargaining, since it is neither ambiguous nor obscure, manifestly absurd nor unreasonable (Article 32 of the Vienna Convention). There was and is no justification for resort to supplementary means of interpretation including reference to the *travaux préparatoires*.

202 Though the principles of the Vienna Convention were not articulated by the AG as such, this part of his Opinion is consistent with them and it appears to the ETUC that it cannot be faulted.

(3) Direct interference

203 The Opinion then rejects a second argument on this right of association issue. At [107 AG Opinion] the AG recalls):

> that the Court has developed the test of direct interference in relation to the 'pay' exclusion laid down in Article 153(5) TFEU, without expressly indicating whether it also applies in the context of the 'right of association' exclusion also contained in that provision.

204 The formulation of the direct interference test by the AG is at [57]-[58] of the AG Opinion. In [57] the AG considers some of the CJEU jurisprudence and holds at [58] that:

> It follows from that case-law that, when stating that the 'pay' exclusion listed in Article 153(5) TFEU must be interpreted strictly, the Court was merely seeking to ensure that that provision did not make the adoption of instruments which do not have as their object to regulate pay impossible merely because they had repercussions on pay. Understood in its proper context, that statement was thus not designed to limit the scope of the matters that constitute pay (by limiting it to the level of pay), but to ensure that instruments that only indirectly interfere with those matters can be adopted.

205 In fact, as pointed out earlier in this Counter-Opinion, in relation to 'pay', a measure can only amount to direct interference if it sets individual wage levels, harmonises a minimum wage level or the level of the various wage constituents: see conjoined cases C-501/12, C-506/12, C-540/12, C-541/12, *Specht* at [33] (see also above para. 131 ff.). It is submitted that the same degree of intrusion and specificity in relation to the nature of the interference is required to conclude that provisions promoting collective bargaining amount to a direct interference with the representation or collective defence of workers' and employers' interest.

206 That the direct interference test only applies to instruments which have as their object the 'regulation' of pay is reiterated by the AG at [60] of the AG Opinion]:

> …the test of direct interference was developed in a context where the Court was seeking to differentiate instruments whose object is to regulate/harmonise pay from those whose object is to regulate a matter other than pay…

and at [63]:

> …the test of direct interference was formulated by the Court to enable the adoption of certain instruments with an object other than regulating pay…

and at [64]:

> Interference may be light or limited and, yet, it will still be direct if the object of the instrument is to regulate pay.

and at [71]:

> …what matters … is not to what extent that directive interferes with national specificities, but whether it has as its object to regulate pay,, since, if that is the case, then that instrument directly interferes with the exclusion included to that effect in Article 153(5) TFEU.

207 As discussed earlier the AG holds that the AMWD does have as its object the regulation of pay, a conclusion which the ETUC challenges above.

208 Turning, however, to the application of the direct interference test to the right of association, the AG concludes (at [107]):

> In my view, however, that test can be applied to that exclusion without much difficulty. Indeed, the rationale is the same: as with the 'pay' exclusion, the 'right of association' exclusion does not aim to exclude from the sphere of EU competences any question involving 'any sort of link' with the right of association, but merely those instruments or provisions which have as their object to regulate that right.

209 The AG notes (at [108] AG Opinion) that the AMWD does '*not impose conditions for creating or joining an organisation (such as a trade union).*' At [109] he notes that Article 4(1)(d) AMWD '*refers to aspects of the right of association, namely, the establishment, functioning or administration of trade unions or employers' organisations*' but holds:

> However, that provision clearly does not seek to interfere with that right, but only aims to safeguard it by protecting trade unions and employers' organisations from interference. Furthermore, while Article 4(2) of that directive requires Member States whose collective bargaining coverage rate is less than 80% to set up an action plan with a view to increasing that coverage, that obligation does not require Member States to encourage workers to join a trade union but only to increase the number of workers protected by collective agreements.

210 This conclusion on the application of the direct interference test to the AMWD and the right of association (respectfully) appears to the ETUC as manifestly correct. The test is of great significance, it is submitted, to the representation and collective defence issue examined next.

B. Second plea in law: the AMWD could not be validly adopted on the basis of Article 153(1)(b) TFEU because it also relates to matters covered by Article 153(1)(f) TFEU

211 It will be recalled that this issue turns on whether the collective bargaining provision of Articles 4(1)(d) and 4(2) AMWD offend the prohibition in Article 153(1)(f) and (2)(b) TFEU on introducing a measure involving 'representation and collective defence of the interests of workers and employers' without unanimity in Council.

212 The AG appears to assume that the promotion of collective bargaining in the AMWD necessarily falls within the scope of '*representation and collective defence of the interests of workers and employers*' in Article 153(1)(f) TFEU, though he does not articulate why. It appears to the ETUC that, though collective bargaining may perhaps be regarded as a species of representation and collective defence of the interests of both workers and employers, it is a particular and distinguishable species of the latter genus in the same way that collective bargaining is a particular and distinguishable derivative of freedom of association. The ETUC considers that it is significant that the drafters of Article 153(1)(f) TFEU felt it necessary expressly to include 'co-determination' which is similarly a species of the genus 'representation and collective defence' but is evidently distinct from the latter just as it is distinct from collective bargaining. The fact that co-determination is expressly included supports (but, of course, does not prove) the proposition that other species of representation and collective defence were not intended to be included.[44]

213 On that logic, and in accordance with the principles of the Vienna Convention, it is not evident that provisions to promote collective bargaining require unanimity.

[44] For example, Works Councils and safety committees are not mentioned.

214 This counter-opinion will proceed, however, on the footing that collective bargaining is held to fall within representation and collective defence. That hypothesis nevertheless does not lead to the conclusion that unanimity was required by Article 153(2) TFEU.

215 The AG approaches the matter thus. The AMWD was adopted on the basis that it is aimed at improving 'working conditions' under Article 153(1)(b) TFEU. The case put forward by Denmark was that notwithstanding that, the AMWD also advances the collective defence of workers' interests under Article 153(1)(f) TFEU. The AG follows CJEU precedent in holding that where an EU measure pursues a twofold purpose one of which is identifiable as the main one, whereas the other is merely incidental, the measure '*must be founded on a single legal basis, namely that required by the main or predominant purpose*' ([115] AG Opinion). This proposition is founded on the jurisprudence of the CJEU which, constitutionally, all Member States have necessarily accepted, thus fulfilling the requirements of Article 31 of the Vienna Convention.

216 The AG holds (at [119] AG Opinion) that '*the overarching objective' of the AMWD 'seems to be more appropriately described as establishing a framework for the adequacy of statutory minimum wages, than promoting collective bargaining*' and that the collective bargaining provisions '*must be regarded as a means of achieving that overarching goal*'. Accordingly, the adoption of the AMWD was properly on the basis of 'working conditions' under Article 153(1)(b) TFEU and was not, and did not need to be, adopted on the basis of representation and collective defence under Article 153(1)(f) TFEU. Unanimity was not therefore required.

217 The ETUC does not disagree with the AG on this point.

218 However, even if he was wrong on it, there are two arguments with which he does not deal with but which lead to the conclusion that even if the collective bargaining provisions had not been a subsidiary purpose of the AMWD but had been its primary objective, those provisions would still not offend the requirement of unanimity required in relation to measures concerning 'representation and collective defence of the interests of workers and employers, including co-determination'.

(1) No direct interference

219 The first submission is that, even on the assumption that collective bargaining is caught by Article 153(1)(f) TFEU, the test of direct interference must be surmounted. That is to say that the bar on adopting directives without unanimity on issues of '*representation and collective defence of the interests of workers and employers, including co-determination*' is only engaged if the directive directly interferes and is intended to regulate the representation and collective defence of the interests of workers and employers, including co-determination. Examination of the AMWD shows that it clearly does not directly interfere with those matters: it merely promotes collective bargaining (see the summary of the collective bargaining provisions above).

220 Applying precisely the argument deployed by the AG in holding that the collective bargaining provisions of the AMWD directly interfere with pay but do not directly interfere with the right of association, it can be said, with some force, that the collective bargaining provisions do not directly interfere with the representation and collective defence of workers and employers. Thus, using his language at [107] of the AG Opinion and substituting 'representation and collective defence' for 'right of association' he should have concluded that:

> the [non-unanimous representation and collective defence] exclusion does not aim to exclude from the sphere of EU [lawfulness] any question involving 'any sort of link' with the [representation and collective defence], but merely those instruments or provisions which have as their object to regulate that right.

221 The AG's formulation of the direct interference test in relation to pay in his paragraphs [58], [63], [64], and [71] of the AG Opinion cited above can be similarly read with the substitution of the word 'pay' by

the phrase 'representation and collective defence of the interests of workers and employers'. So for example, making the substitution in [71]: it would read:

> …what matters … is not to what extent that directive interferes with national specificities, but whether it has as its object to regulate [representation and collective defence of the interests of workers and employers], since, if that is the case, then that instrument directly interferes with the exclusion included to that effect in Article [153(2)] TFEU.

222 The consequence is that only if the object of Articles 4(1)(d) and (2) AMWD is to regulate representation and collective defence of workers' and employers' interests will the direct interference test be surpassed. Those Articles clearly do not have as their object that of regulating representation and collective defence of workers' and employers' interests; their object is no more than to promote and encourage collective bargaining.

223 Neither does the AMWD regulate collective bargaining. The Articles of the AMWD cited in the previous paragraph do not stipulate the form or nature of collective bargaining to be encouraged, do not propose limitations on or exclusions from collective bargaining, do not intrude on the autonomy of the parties to it, and do not regulate the circumstances in which it may take place. To adapt the AG's language at [109] of the AG Opinion: the collective bargaining provisions clearly do not seek to interfere with representation and collective defence of workers' and employers' interests. Instead, they seek to promote collective bargaining to enhance that representation and collective defence.

224 Accordingly, it is submitted that there is no direct interference.

225 The AG might also have prayed in aid the fact that the bar on representation and collective defence has not inhibited EU measures to promote, facilitate (or even regulate) collective bargaining. There are many examples but the most obvious is the thirty-one-year old Works Council Directive 94/45, now Directive 2009/38. The fifty-year-old Collective Redundancies Directive 75/129/EEC (as amended) and the slightly younger Acquired Rights Directive 77/187/EEC, now Directive 2001/23, together with the more recent Information and Consultation Directive 2002/14 all contain provisions mandating collective consultation which, though not as strong an obligation as mandatory collective bargaining, must equally fall under the rubric of measures aimed at 'representation and collective defence of the interests of workers'. The Working Time Directive 93/104/EEC mandates collective bargaining for certain aspects of some of the substantive obligations of the Directive. The 2019 Directive on Work-Life Balance for Parents and Carers 2019/1158 encourages Member States '*to promote a social dialogue with the social partners with a view to fostering the reconciliation of work and private life*'. The Equal Treatment Directive 2006/54/EC provides in Article 21(1) that Member States shall '*take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment*'.

226 It is true that not all these measures had Article 153 TFEU as their legal base so that the requirement for unanimity in Article 153(2) TFEU was not applicable. But they nonetheless demonstrate that unanimity is not a prerequisite in the EU legal order for measures encouraging collective bargaining. That must be particularly the case where the collective bargaining provisions are subsidiary to the principal objects of the various Directives and where those provisions did not directly interfere with pre-existing arrangements for the representation and collective defence of workers' and employers' interests but promoted what is now the Article 151(1) TFEU object of dialogue between management and labour.

(2) Purposive construction

227 The second additional argument which in the view of the ETUC supplements the AG's conclusion here is that the phrase '*representation and collective defence of the interests of workers and employers, including co-determination*' must be construed (in accordance with Article 31(1) Vienna Convention)

in the context of, and in the light of, the object and purpose of the TFEU. Put simply, the requirement of unanimity needs to be interpreted so as to give effect to the objective of '*dialogue between management and labour*' in Article 151 TFEU (referred to in Article 153(1) TFEU). It cannot be sensibly construed as restricting a measure the purpose and effect of which is to promote dialogue between management and labour. The point is yet more emphatic bearing in mind that the context also involves the '*rules of international law applicable in the relations between the parties*' which require State promotion and encouragement of collective bargaining, as recited above.

III. The alternative head of claim: must Article 4(1)(d) and Article 4(2) of the AMWD be annulled?

228 It will be recalled that the first of the two subsidiary issues arising was whether, if the CJEU concluded that the AG was wrong on the first issue and that the nature of the pay provisions of the AMWD rendered it *within* the competence of the EU legislature to adopt, the provisions relating to collective bargaining were rendered a nullity and therefore could and should be severed from the rest of the Directive on the ground that the collective bargaining provisions constituted '*representation and collective defence of the interests of workers and employers*' and hence required unanimity (i.e. the second issue).

229 On this issue the AG holds (at [128]) that, since the collective bargaining provisions were subsidiary to the objective of establishing a framework for the adequacy of a minimum wage they could be severed without annulling the main provisions of the AMWD (on the hypothesis on which the AG is proceeding, i.e. that the pay provisions are lawful and effective and do not offend the Article 153(5) TFEU bar on measures to do with 'pay').

230 This conclusion, however, appears to rest on the footing that the collective bargaining provisions are incompatible with Article 153(5) TFEU, presumably because they relate to '*representation and collective defence of the interests of workers and employers, including co-determination*' requiring unanimity of the Council which the AMWD did not have. This is not explained or justified by the AG but must be inferred from the summary of the argument in the alternate advanced by the German Government at [124].

231 For the reasons advanced above in this counter-opinion, even if promotion of the collective bargaining provisions cannot be distinguished from '*representation and collective defence of the interests of workers and employers, including co-determination*', those collective bargaining provisions do not directly interfere with representation and collective defence and therefore are not barred by lack of unanimity with respect to Article 153(1)(f) TFEU. On this point the ETUC respectfully considers the AG to have been in error.

231 The second of the subsidiary issues is the corelative to first subsidiary issue; namely whether, if the CJEU rejected the reasoning of the AG in relation to the 'pay' provisions and held that those provisions were beyond the competence of the EU, but found that the collective bargaining provisions were within competence and did not require unanimity, those latter provisions could be severed to stand alone as the lawful remnant of the AMWD.

232 In relation to this hypothetical point it is to be noted that the AG did not deal with it. It appears to the ETUC that the collective bargaining provisions, on the hypothesis postulated, could stand though they would need to be shorn of references to 'pay' and 'wage setting'. While it is true that the collective bargaining provisions are very much the subsidiary aspect of the AMWD they are nonetheless discrete and are indisputably capable of standing alone (though presumably the Directive would need to be retitled for clarity).

IV. CONCLUSIONS

232 In the light of the foregoing, the ETUC invites the Court of Justice to:

- Dismiss in its entirety (i.e. both the principle and alternative head of claim) the action for annulment brought by the Kingdom of Denmark, supported by the Kingdom of Sweden, and
- Uphold Directive (EU) 2022/2041 on Adequate Minimum Wages in the European Union in its entirety.

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