In-depth analysis

Joint in-depth analysis of the European Commission's proposed directive on adequate minimum wages, taking into account the opinion of the Council Legal Service

April 2021

Hedvig Forsselius, Council for Negotiation and Cooperation (PTK)

Hanna Björknäs, Swedish Trade Union Confederation (LO)

Karolina Löf, Confederation of Swedish Enterprise (Svenskt Näringsliv)

Register

Summary **3**

Introduction **4**

The Legal Service's analysis is a deliberately benevolent interpretation **6**

The Treaty does not allow an EU to ensure all workers the right to a minimum wage **7**

Circular reasoning in the Legal Service's analysis of Article 4 ..... **9**

The Legal Service does not analyse the effects for all countries **10**

Key issues on wage formation will be subject to review by the European Court of Justice **11**

Closing comment **13**

Summary

After an in-depth analysis of the Commission's proposed directive on minimum wages, taking into account the opinion from the Council Legal Service, we can note that significant legal barriers exist for EU legislators to adopt a directive with the content proposed by the Commission. The Legal Service's analysis and conclusions strengthen our assessment that the proposal is contrary to Article 153(5) of the Treaty on the Functioning of the European Union (TFEU), which explicitly excludes "pay, the right of association, the right to strike or the right to impose lockouts" from EU legislative competence. Based on the Legal Service's analysis and the consequences of the proposal for models such as the Swedish model, we can state:

- Firstly: An EU legal obligation for a Member State to ensure all workers a right to a minimum wage is not compatible with the limits of the Treaty.
  With regard to the limits of the Treaty, the Legal Service clearly states that the EU legislators do not have the power to stipulate that all workers are entitled to a minimum wage or to regulate the level of or conditions for setting a minimum wage. According to the Legal Service, a directive cannot simply confer the right to a minimum wage for "every worker", which was the Commission's explicit ambition.

  The Legal Service's finding concerning the limits of the Treaty also applies to Member States that do not have statutory regulation of wages or universal applicability of collective agreements. Even in Member States where the social partners, entirely without government interference, regulate wages in collective agreements, the proposal will have an impact on wage setting which is "direct interference by Community law in the determination of pay within the Community" and is therefore, according to the case law of the European Court of Justice, explicitly exempt from EU legislative competence.

- Secondly: The proposals on collective agreement coverage and the promotion of collective agreements must have its legal basis in Article 153(1)(f) of the TFEU, at any rate for Member States that do not have a statutory minimum wage.
  Taking into account the conclusion of the Legal Service that the directive cannot entail the right to a minimum wage for all workers, Article 4 is *the only* material provision of the proposed directive that entails an *obligation* for countries without a statutory minimum wage. The only possible legal basis in Article 153 TFEU is thus Article 153(1)(f) TFEU on "representation and collective defence of the interests of workers and employers, including co-determination". Such provisions can only be adopted by unanimous decision.

- Thirdly: The Legal Service must deepen its analysis to enable the Council to participate in the negotiations while protecting the Treaty's limits and respecting the fundamental principles, including on conferral of competences.
  It deserves to be pointed out that the Legal Service has not analysed the question of the right legal basis for the proposal in relation to Member States without statutory minimum wages. In addition, several key questions, including whether the proposal is compatible with the principle of subsidiarity and proportionality, have not been analysed, which the Legal Service itself emphasises.

Introduction

This memorandum presents an in-depth joint analysis of the Commission proposal for a directive on adequate minimum wages from the Confederation of Swedish Enterprise, the Swedish Trade Union Confederation (LO) and the Council for Negotiation and Cooperation (PTK) within the framework of the Labour Market Council for EU Affairs. The analysis develops our previous analysis of the proposed directive from November 2020, now taking into account the legal conclusions of the opinion of the Council Legal Service on the legal basis of the proposal and on the Treaty's limits on EU legislation on pay.[1]

The opinion of the Council Legal Service does not give us any reason to change the previous legal assessment by the Labour Market Council for EU Affairs that the proposal and the proposed legal basis are incompatible with the Treaty, not least on the basis of the proposal's content and impact on wage formation models such as the Swedish model, with far-reaching self-regulation between contracting parties in the labour market. As we stated previously, an EU directive on minimum wages in accordance with the Commission's proposal will undermine the well-functioning wage formation system established by the social partners in Sweden and, at worst, risk putting this entirely out of action without achieving any of the objectives of the directive.

From a Swedish labour market perspective, minimum wages cannot be regarded as a working condition among others. The determination of pay, including minimum wages, has a significant impact on the system of collective bargaining that the social partners have established and manage in accordance with a tradition that goes back more than a hundred years. The directive as it is now drafted will have effects that go far beyond the purposes and objectives set by the European Commission.

> *"No special analysis and review of the content of the proposal for Member States without a statutory minimum wage has been carried out by the Legal Service. Thus, this means specifically that the proposed directive is a completely different one for countries with a statutory minimum wage than for countries with no statutory minimum wage."*

It should be pointed out early and clearly that the Legal Service's analysis of the proposed legal basis covers the proposed directive as a whole and thus all provisions that are to apply to Member States with a statutory minimum wage. No special analysis and review of the content of the proposal for Member States without a statutory minimum wage has been carried out by the Legal Service. Under the design of the proposed directive, these Member States are not covered by the proposal's detailed provisions on adequacy, variations, deductions and access to statutory minimum wages, but only by the general provisions, the horizontal provisions and final provisions. Thus, this means specifically that the proposed directive is a completely different one

[1] Regrettably, the opinion of the Legal Service has not yet (at the time of writing this report) been published by the Council despite this being requested by several Member States. We have read the EU Council Legal Service opinion, which has been disseminated in certain media and refer to certain parts and conclusions drawn by the Legal Service.

for countries with a statutory minimum wage than for countries with no statutory minimum wage.

However, what the Legal Service establishes on the legal basis and on the limits of the Treaty for the possible contents of an EU minimum wage directive provides several clear answers and guidance, also for the analysis of the proposal's content for countries without a statutory minimum wage. In the following, we present our joint analysis of the proposal and the conclusion that the legal basis for countries without a statutory minimum wage cannot be Article 153(1)(b) TFEU.

When reading the opinion of the Legal Service, the Commission's obvious problem of achieving a coherent and legally-founded proposal for a directive can be seen and it becomes clear that the legal basis is shaky. The Commission is simply trying to squeeze in more than Member States intended to accommodate in Article 153(1)(b) of the TFEU, which is the legal basis on which directives on working conditions can be adopted. This in turn leads to an extensive watering-down "through the back door" of Article 153(1)(f) TFEU, which is the basis for adopting rules on the representation and collective defence of the interests of workers and employers and the decision-making process for such rules. And, worse, it leads to obvious eroding of the explicit exemptions in Article 153(5) TFEU under which the EU cannot adopt legislation on pay, the right of association, the right to strike or the right to impose lockouts. It is our firm belief that EU legislators are thus assuming far greater powers in this area than the Member States intended in the Treaty. The consequence of this will also be that the questions will end up at the European Court of Justice for interpretation in future disputes, not only about access to minimum wages but also on fundamental issues such as what is a collective agreement, the scope of a collective agreement and on the subject of collective bargaining.

> *"It is our firm belief that EU legislators are thus assuming far greater powers in this area than the Member States intended in the Treaty."*

We take it for granted that the opinion of the Legal Service and these fundamental questions on the legal basis and the competence of the EU will be taken very seriously in the ongoing negotiations. It is a matter of ensuring that EU institutions respect fundamental principles of EU competence and powers. These matters should not be dealt with at a stressful pace of negotiation and in a political tug of war within the framework of the negotiations on an individual directive.

Hedvig Forsselius
Council for Negotiation and Cooperation (PTK)

Hanna Björknäs
Swedish Trade Union Confederation (LO)

Karolina Löf
Confederation of Swedish Enterprise (Svenskt Näringsliv)

The Legal Service's analysis is a deliberately benevolent interpretation

We perceive the Legal Service's analysis of the legal basis to be a deliberately benevolent interpretation in order to establish that it holds. The EU Council Legal Service has conducted a comprehensive analysis of whether the Commission has used a correct legal basis for the proposed directive. The analysis is based on its application in cases where all provisions are applicable, that is for systems with statutory minimum wages and with a particular focus in the analysis on the provisions of Chapter II on statutory minimum wages.

A person reading only the summary of the Legal Service's analysis may be led to believe that the Legal Service is largely and without reservation giving the green light to the Commission's proposed directive. However, this is not the case. The Legal Service has in fact a number of different reservations and objections to the proposal, but interprets them benevolently in order to squeeze the proposal, as far as possible, into the framework of EU competence under the Treaty. The Legal Service starts from a number of assumptions that the proposal has a particular implication, which mean that the proposal's stated legal basis, working conditions in Article 153(1)(b) TFEU, works and that the proposal is largely not contrary to Article 153(5) TFEU. It is thus on the basis of this benevolent interpretation that in turn assumes a number of adjustments and deletions, that the Legal Service assesses that the legal basis in Article 153(1)(b) TFEU on working conditions can be used.

> *"A person reading only the summary of the Legal Service's analysis may be led to believe that the Legal Service is largely and without reservation giving the green light to the Commission's proposed directive. However, this is not the case."*

The Legal Service also notes that the Commission's proposal contains a number of conflicts with regard to the content of the individual articles in relation to the title of the directive. The Legal Service also notes that the content and wording of the preamble are far more binding and detailed than the articles themselves. This creates a lack of clarity about the specific scope of the articles in several cases.

In point 31 the Legal Service states: *"The above however illustrates the discrepancies and lack of consistency that exist in several instances between, on the one hand, the very title of the proposed Directive, the titles of certain provisions, and the recitals related to specific provisions in the operative part of the Proposal, and, on the other hand, the substance and the scope of the obligations in such provisions. These discrepancies should, in the course of the discussions, be corrected."*

The Treaty does not allow an EU to ensure all workers the right to a minimum wage

The Legal Service's analysis of the limits of the Treaty notes that the exception in Article 153(5) TFEU does not allow EU rules imposing an obligation for Member States to ensure all workers the right to a minimum wage. The Legal Service's obviously cautious interpretation of the proposal has left several traces. For example, it has contented itself with remarking that it would be contrary to the exception in Article 153(5) TFEU that wage conditions may not be regulated by EU law if the directive is to be understood as an obligation for Member States to introduce a minimum wage for *all* workers. The Legal Service therefore believes that the proposal cannot entail such an obligation. The Legal Service's understanding of the limits of the Treaty and of what is covered by Article 153(5) TFEU is expressed as follows in footnote 30:

"*Furthermore, the analysis in this opinion is based on the understanding that the Proposal does not oblige Member States to grant access to minimum wage protection to all workers. Article 1(1)(b) clearly states that the proposed directive "establishes a framework for (…) access of workers to minimum wage protection, in the form of wages set out by collective agreements or in the form of a statutory minimum wage where it exists". If, however, this provision was taken to mean that the Proposal would oblige Member States to grant access to minimum wage protection to all workers, the Proposal would thus directly interfere with the minimum wage coverage in the Member States, and such a provision would therefore fall under the exception of Article 153(5) TFEU.*"

As is known, we make the same assessment as the Legal Service on this matter. Instead of proposing an amended wording of Article 1, the Legal Service slips this statement about the clearly limited scope of the Treaty into a footnote, which is revealing in itself. The Council Legal Service thus takes the view in this fundamental question concerning the EU's competence in this area, that *it would be contrary to Article 153(5) TFEU to legislate on an obligation for Member States to ensure that all workers have a minimum wage*. It is worth pointing out clearly that the consequence of these assumptions is in practice that such directive content as the Commission has promised – with the right to a fair minimum wage for all workers promised by von der Leyen when running for the Presidency – simply does not fit within the limits of the Treaty and the competence of the Union.

> *"The Council Legal Service thus takes the view that it would be contrary to Article 153(5) to legislate on an obligation for Member States to ensure that all workers have a minimum wage."*

However, the Legal Service assumes in its analysis and conclusion concerning the legal basis that the proposal should not be understood to constitute such an obligation. On this assumption, the Legal Service concludes that the proposal – on the whole – can be based on Article 153(1)(b) TFEU, provided that a number of adjustments are made in the preamble. However, these are assumptions that are hardly shared by the Commission and it should also be noted that there are strong advocates, including within the European Parliament, who are pulling in a completely opposite direction and who want a clear regulation stipulating that all workers should be covered by a minimum wage and stipulating its levels. What is absolutely certain is that the content of a directive – if ever adopted – will not be the same as the original proposal.

The Legal Service then concludes, taking into account the Court's case law, the following: "*Against this background, the Council Legal Service sees* ***good reasons*** *(our emphasis) to consider that the*

Union has competence under Article 153 TFEU to establish minimum requirements which concern the framework for setting and improving coverage of minimum wages where these requirements neither establish the level of that element of pay nor impose conditions for the setting of these wages which are likely to have a direct impact on the outcome of their determination."

The Legal Service does not want to express itself too confidently concerning the limits of EU competence. "Good reasons" is not the strongest of expressions in a legal analysis concerning precisely the issue of the legal basis. This manner of expression is most likely a way for the Legal Service to indicate that it is fully aware that it is moving on new ground in the area of social policy and that it is only the European Court of Justice that can judge upon the limits of EU competence. Thus, the opinion is based on the assumption that the Directive establishes obligations for Member States in terms of a framework and "procedures" for determining wages, rather than an obligation for the Member State in question in terms of a "result". It is also by making this distinction that the Council Legal Service gets round the limitations of the Treaty in Article 153(5) TFEU. This is a very important demarcation that also underpins the assumption that the directive cannot create any individual rights but only an obligation for Member States to ensure that there is a framework for how minimum wages can be set.

It should also be noted in this context that the Legal Service, with reference precisely to the exemption in Article 153(5) TFEU, completely rejects other parts of the proposal. This applies to Article 6, which prevents variations and deductions for countries with statutory minimum wages[2]. The Legal Service considers that these rules have such a direct impact on wage conditions (direct interference by Community law in the determination of pay within the Community)[3] that according to case law may not be regulated at EU level. It is also worth noting that the Legal Service considers that Article 5 should be seen as a procedural provision, while it can be noted that this is clearly not the Commission's intention, at least not according to the Commission's working documents and impact assessment. The latter states that the Commission expects the proposal to have a direct impact on wage formation.[4]

As pointed out already in our joint analysis of the proposed directive itself, it deserves to be recalled that the EU has only the competences which Member States have conferred to the Union in the Treaties (Article 5 of the Treaty on European Union, TEU) and the principle of conferral of competence). Article 153(5) TFEU expressly specifies a number of exemptions from the legislative competence of the EU in the area of social policy relating to fundamental issues of freedom of association, the right to strike or impose lockouts and pay. Given that these questions have been explicitly exempted from the competence of the EU legislator, there is no reason and no logic in which these exemptions should be interpreted narrowly in such manner as may otherwise apply, for example with regard to exemptions from different obligations and rights in areas where the EU has indisputable competence and based on the purpose of the provisions.

It is also important to note in particular that this proposed directive has no predecessors in the field of social policy. Here it is not a matter of regulating something that indirectly concerns or impacts wage conditions where the EU has a clear competence, but about creating minimum requirements directly related to pay. In the words of the Legal Service: "*the Proposal is unprecedented in Union social law in that it establishes minimum requirements relating to a constituent part of pay*".[5]

[2] Point 117, c.
[3] Point 72.
[4] The Commission's own impact assessment shows that the proposal will lead to a higher minimum wage in half or even two thirds of Member States, with an increase of up to 20 per cent in a few member States (COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT, SWD (2020) 245 final, page 71)
[5] Point 63.

Circular reasoning in the Legal Service's analysis of Article 4

With regard to the analysis of the legal basis of Article 4, by which Member States are subject to obligations concerning collective bargaining coverage and the promotion of collective bargaining, the Legal Service – following remarkable circular reasoning – concludes that Article 153(1)(b) TFEU on working conditions is the most appropriate basis in the Treaty, instead of the particular article 153(1)(f) TFEU which exists precisely for the regulation of collective bargaining. This conclusion, however, is based on erroneous assumptions and assertions at several stages.

Firstly, the Legal Service states that the purpose of promoting collective bargaining is to improve working conditions as regards minimum wages and to achieve the purpose of the directive regarding wider coverage of collectively agreed minimum wages.[6] This is despite the fact that the Legal Service previously stated that the article as worded has a wider meaning and is not limited to the coverage of collective agreements that contain wage provisions and that this implies a discrepancy in relation to the aim of the directive and what is stated in the preamble.[7]

The Legal Service then concludes that the promotion of collective bargaining is not an end in itself but a tool to achieve the overall objective of the proposal, and that Article 153(1)(b) TFEU is thus the appropriate legal basis for Article 4 as well.[8] This is an extraordinary conclusion, since collective bargaining rarely has any other purpose than to enter into collective agreements on working conditions. In addition, pay is the employer's main obligation in an employment relationship and thus the most central negotiation issue also in collective labour law. The Legal Service's argumentation thus becomes purely circular reasoning that, with a strong centrifugal effect, displaces all elements of "representation and collective defence of the interests of workers and employers" and retains a core where everything has become "working conditions". With the Legal Service's reasoning, it is difficult to see that any proposal could be assigned to the legal basis of Article 153(1)(f) TFEU.

> *"It is not reasonable that the Commission should be able to choose the basis on which a proposal can be adopted most easily."*

Our legal assessment is that the rules on collective rights require a separate legal basis. This is particularly true when it is taken into account that the directive also contains a wide range of definitions of fundamental collective concepts (in Article 3) that have no connection to wages, a fact which the Legal Service chooses to ignore. The Treaty sets boundaries between the competences of the EU and the Member States. It is not reasonable that the Commission should be able to choose the basis on which a proposal can be adopted most easily. Respecting the division of competences is a fundamental issue for confidence in the EU. The Legal Service's argument seems to be that the conditions the parties are negotiating and may take industrial action for can be classified as "working conditions" ultimately leads to both the exception, which means that the EU is not competent to legislate on pay, freedom of association and the right to strike or impose lockouts, and the special legal basis relating to collective rights, becoming completely without content.

[6] Point 82.
[7] Points 27-31.
[8] Point 82.

The Legal Service does not analyse the effects for all countries

The Legal Service does not analyse the legal basis in relation to effects for countries without statutory minimum wages. It deserves to be clearly pointed out that the Legal Service has thus not analysed the legal basis of the proposal for Member States only covered by Chapters I, III and IV. As the proposed directive is formulated, only certain parts of it apply to these countries, namely the general provisions of Chapter I (on the objective, scope of application, definitions and promotion of collective bargaining), the horizontal provisions of Chapter III (on monitoring and data collection, the right to redress and protection against adverse treatment or consequences, penalties and a specific provision on public procurement) and Chapter IV with final provisions (on implementation, dissemination of information, evaluation and review, a so-called ”non regression clause” with provisions on maintaining the level of protection and on transposition). For countries without statutory minimum wages, there are thus no actual minimum wage provisions corresponding to Chapter II of the proposed directive concerning the adequacy, variations and deductions of statutory minimum wages, the effective access to minimum wages of workers and the involvement of the social partners in statutory minimum wage setting.

The Legal Service argues that even if Article 153 (1)(f) TFEU were to be the most appropriate legal basis for Article 4(2) (on the promotion of collective bargaining), the obligation of this article is only an incidental component of the directive aimed at regulating the right to minimum wages. However, for those countries without a statutory minimum wage and which are not covered by Chapter II at all, Article 4 cannot only be considered to be an incidental component. For these Member States, the proposal cannot be interpreted in any other way than that the predominant obligation to achieve the purpose of the directive in Article 1 is regulated by Article 4 on promoting collective bargaining on wage setting. This is particularly in view of the interpretation by the Legal Service that Article 1 does not confer any independent right to a minimum wage for all workers.

Article 4 refers to the collective bargaining coverage, not any individual working condition. In addition – and important to note – the provision stands on its own and without a direct link to Articles 5-8 on statutory minimum wages. To the extent the directive is directed at Member States without a statutory minimum wage, the legal basis must therefore rightfully be Article 153(1)(f) TFEU. If a proposed directive contains rules aimed at different Member States depending on the labour market system, the Commission cannot freely chose the legal basis. The Commission must then take into account that there must be a valid legal basis for all Member States. As stated in our first joint analysis of the proposed directive, it would thus rightly also be based on Article 153(1)(f) TFEU unless it has such far-reaching content that it falls under Article 153(5) TFEU. In that case, the EU completely lacks the right to regulate this.

Finally, it can be noted that the Legal Service has not either analysed whether the directive is proportionate. Should the validity of the directive be reviewed by a court, a more comprehensive assessment could be made. In particular, the proportionality could be questioned, as the rules regarding the obligation to report wage levels to the Commission are very far-reaching, while the proposal itself – in light of the opinion – is very limited in content. The last applies in particular to systems that do not have a statutory minimum wage, where the proportionality of the reporting obligation could to an even greater extent be questioned.

Key issues on wage formation will be subject to review by the European Court of Justice

Fundamental issues concerning the Treaty's limits and exceptions will be up to the European Court of Justice to determine, with a directive characterised by a political tug of war. The Commission has repeatedly pointed out that Sweden's labour market model is protected by the guarantee contained in the proposal that Member States are not obliged to introduce a statutory minimum wage or to make the collective agreements universally applicable (Article 1(3)) and that this also prevents the issue of our national minimum wages ending up at the Court of Justice and beyond the control of the legislator.

> *"We repeat our message – the proposal creates completely unacceptable legal uncertainty for key elements of the collective agreement model."*

Unfortunately, in the light of the above, we fear that it can be the exact opposite. If the minimum wage directive is adopted, this becomes part of secondary law as "working conditions". The European Court of Justice, as the ultimate interpreter of Union law, has then been given the opportunity through its case law to express an opinion both on the exact scope and meaning and on what constitutes "working conditions" under the Treaty. The Court may interpret the contents of the directive in light of other objectives of the Treaty, for example in relation to the internal market, and with the application of the Charter.

It is obvious that a number of key issues relating to wage formation in the Nordic countries will be subject to the Court of Justice's review. This also applies to questions about what is a collective agreement, which measures are sufficient to support collective bargaining and – not least – workers' individual right to a minimum wage.[9]

We are well aware of the European Court of Justice's previous case law on Article 153(5) TFEU and what the Court has stated, that the exemption in Article 153(5) TFEU cannot be extended to all matters with any connection to pay, as this would in turn mean that some of the areas mentioned in Article 153(1) TFEU would be deprived of much of their content. But the same reasoning can of course also be applied inversely in relation to Article 153(1)(b) TFEU. This basis cannot be extended to all questions with any connection to working conditions, since such broader interpretation would make the provision in Article 153(1)(b) TFEU into a kind of social policy super competence basis (Superkompetenzgrundlage), as the German professor Franzen expressed it.[10]

This, in turn, would mean that the other legal bases in the catalogue of Article 153(1) TFEU would be superfluous and deprived of their "effet utile". Similarly, such an interpretation of "working conditions" would have a direct impact on the exceptions in Article 153(5) TFEU, which would be drained of much of their content through legislation by the back door, becoming almost an empty shell without real material content.

[9] Associate Professor Erik Sjödin has also noted that these key issues relating to wage formation in the Nordic countries would be subject to review by the European Court of Justice if the directive were to be adopted in its current form and that there is considerable uncertainty about the outcome of such a review, not least linked to the importance the European Court of Justice would then assign to the EU Charter, in particular Article 31 on safe and dignified working conditions. EU & arbetsrätt no 3-4 2020.

[10] Professor Dr Martin Franzen, Faculty of Law, Ludwig-Maximilian University, Munich

In its case law, the European Court of Justice has stated that the limit of EU competence under Article 153(5) TFEU shall be understood so that the concept of pay refers to measures – which may consist of 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.[11]

> *"Article 153(1)(b) cannot be extended to all questions with any connection to working conditions, since such broader interpretation would make the provision into a kind of social policy super competence basis."*

[11] Joined cases C-395/08 and C-396/08, Bruno and others, points 36-37 with references to further case law.

Closing comment

The EU must act with respect for the limits and principles of the Treaties. The proposed directive on adequate minimum wages concerns legal issues that are of fundamental importance to the Swedish labour market model. These concern the exceptions to the EU's competence as regards pay, freedom of association and the right to strike or impose lockouts, as well as "representation and collective defence of the interests of workers and employers, including co-determination" in Article 153(1)(f) TFEU, where the EU can only adopt legislation unanimously. It is worth repeating that political promises from Commissioners that our model is protected have no legal value in a future review of the directive by the European Court of Justice.

We share the opinion of the Legal Service that a directive, within the limits of the Treaty, cannot have a content that entails an obligation for Member States to introduce a minimum wage for all workers or that regulates the adequacy of wages. But at the same time it is clear that several actors, including the Commission, will probably demand just that. This means that the issue of protection for Member States to themselves regulate pay, the right to strike and impose lockouts and freedom of association will land with the European Court of Justice and it will be up to the European Court of Justice to decide whether the directive is adopted.

The European Court of Justice is the ultimate interpreter of Union law and the body that has the right to review and determine whether a directive is contrary to the Treaties or the Charter. Thus, the Court of Justice owns the interpretation of the scope of the EU law's exception in Article 153(5) TFEU, of what can be regulated as "working conditions" under Article 153(1)(b) TFEU and the relation to Article 153(1)(f) TFEU. Given all the question marks arising from the Commission's proposal and the political tug of war which is currently underway concerning the contents of the directive, it can already be noted that there will be uncertainty and abundant issues if the proposal is adopted. In addition, it can be noted that there are keen proposals from several quarters that the directive should specify more clearly the levels for what should constitute an acceptable minimum wage, such as 60 per cent of the median wage and 50 per cent of the gross wage. However one wishes to describe the matter, the existence of an EU directive in this area – with ambiguities, contradictions and different existing legal views on the legal basis – is already in itself an intervention in the autonomy of social partners.

> *"In the worst case, the legislative process risks resulting in an unclear and conflicting legislative act with a material content that goes beyond the competence conferred on the EU in the area of social policy and with potentially major risks to our Swedish collective bargaining model."*

However, if the Commission is serious about its statements that it does not wish to harm well-functioning collective bargaining models, there is only one logical and obvious measure in light of the opinion of the Council Legal Service, and it is simply to withdraw the proposal for a directive on adequate minimum wages in the EU.

According to our information, the negotiations in the Council and the European Parliament now seem instead to be proceeding with an ambitious timetable for processing the proposal. Thus, there seems to be a great risk that the negotiation will be rushed by political interests and without due consideration being given to a closer analysis of the fundamental questions concerning the limits of what can be legislated within the framework of the Treaties with respect to its principles of conferral of competence and rule of law.

Through the opinion of the Council Legal Service, it is clear, even before any more detailed negotiations have begun in the Council, that the proposal is associated with extensive question marks and legal uncertainty that will require the European Court of Justice to interpret its detailed content and meaning. In the worst case, the legislative process risks resulting in an unclear and conflicting legislative act with a material content that goes beyond the competence conferred on the EU in the area of social policy and with potentially major risks to our Swedish collective bargaining model.

We have clearly pointed to this risk already in our analysis of the proposal itself and if anything the concern has now increased. The assurances which the Commission, led by Commissioner Schmit, considers to exist through Article 1(3), that the directive does not imply an obligation to regulate wages by law or declare collective agreements universally applicable, are of no legal significance. They will in no way be a guarantee or “waterproof firewall” for our model when the European Court of Justice reviews the purpose and content of the directive, which can also be interpreted in light of the Charter.

We understand that the Commission does not intentionally intend to harm our labour market model or our wage formation system. However, we do not agree with the Commission’s assessment that the proposal does not entail any interference with Member States‘ freedom to regulate wages themselves, nor the Commission’s claim that the proposal fully respects the parties’ bargaining autonomy. It is not the Commission but we Swedish social partners who know our model best and know how it works and we see an obvious risk of such harm.