

EU Commission minimum wage initiative must not be used to reimpose a declining collective bargaining model

By Tom Hayes

How collective relationships between employers and employees are best structured is a complex and contested issue. It is not something that can be dealt with in a 145-word article on collective bargaining in an EU Directive primarily concerned with the minimum wage.

On Wednesday, October 28, the European Commission published proposals for a *Directive of the European Parliament and of the Council on adequate minimum wages in the European Union*. ([here](#))

If adopted, the Directive would establish a framework which the governments of Member States would be obliged to take into consideration in setting minimum wage levels. What the Commission is proposing is reference percentages of median and average wages in each country that should act as the metrics against which minimum wage levels are judged.

Minimum wage levels act as a “floor” for general wage levels throughout the economy, so any ratcheting up could push up wage levels in general. These are matters we will return to in further comments at a later date.

The promotion of collective bargaining?

What we want to focus on in this paper is the other main objective in the Commission’s proposal, the promotion of collective bargaining as the main mechanism for the setting of wages.

The intention is made clear in Article 4:

Article 4 Promotion of collective bargaining on wage setting

1. With the aim to increase the collective bargaining coverage Member States shall take, in consultation with the social partners, at least the following measures:
 - a) promote the building and strengthening of the capacity of the social partners to engage in collective bargaining on wage setting at sector or cross-industry level;
 - b) encourage constructive, meaningful and informed negotiations on wages among social partners
2. Member States where collective bargaining coverage is less than 70% of the workers defined within the meaning of Article 2 shall in addition provide for a framework of enabling conditions for collective bargaining, either by law after consultation of the social partners or by agreement with them, and shall establish an action plan to promote collective bargaining. The action plan shall be made public and shall be notified to the European Commission

In an accompanying document, *Questions and Answers: Adequate Minimum Wages 2020, (Q+A)* the Commission makes it clear that the promotion of collective bargaining is a key objective of the proposals:

Collective bargaining plays a key role for adequate minimum wage protection both in Member States where minimum wage protection is ensured exclusively by collective agreements and in those with statutory minimum wages. The proposal therefore aims to promote collective bargaining on wages in all Member States, in particular those where collective bargaining coverage is less than 70% of the workers.

In the Q+A, the Commission asks itself the question: *Why do you want to increase collective bargaining in all Member States?* It offers the following answer:

Well-functioning collective bargaining is important to ensure that workers are protected by adequate minimum wages.

Member States with high collective bargaining coverage tend to have a low share of low-wage workers, low wage inequality and high minimum wages.

- *In Member States with statutory minimum wages, collective bargaining supports general wage developments and thus contributes to more adequate minimum wages.*
- *In Member States where wages are set exclusively in collective agreements, the level of minimum wages as well as the share of protected workers are directly determined by the collective bargaining system.*

In a context of declining collective bargaining coverage, it is therefore important that Member States promote collective bargaining on wages.

Note the words “... In a context of declining collective bargaining coverage...”. Which obviously begs the question: why is collective bargaining coverage declining? To which an obvious answer is: because trade union membership is declining. (OECD trade union statistics [here](#)).

In order to promote collective bargaining the Directive would require all Member States to:

- *Take measures to (further) increase the coverage of collective bargaining, notably by supporting the capacity of social partners and encouraging negotiations on wages among social partners. If collective bargaining coverage is below 70%, Member States will also have to provide for a framework of enabling conditions for collective bargaining, either by law or through an agreement with the social partners, and establish an action plan to promote collective bargaining.*
- *Enhance enforcement and monitoring, by:*
 - *taking measures to ensure that in public procurement or concession contracts, economic operators comply with the wages set by relevant collective agreements or with statutory minimum wages where they exist;*
 - *developing effective data collection tools on minimum wage coverage and adequacy, with annual reporting to the Commission.*
 - *ensuring access for workers to effective and impartial dispute resolution and a right to redress, including to adequate compensation, without prejudice to specific forms of redress and dispute resolution provided for in collective agreements.*
 - *providing for effective, proportionate and dissuasive penalties, for breaches of national provisions on minimum wage protection.*

While all Member States will be encouraged to take action to promote collective bargaining, those that do not reach a collective bargaining coverage of at least 70%, will be required to make extra efforts, in consultation with the social partners.

The only conclusion you can draw from reading this is that EU Member States will come under pressure from the European Commission to take measures to promote collective bargaining. However, nowhere in any of the documentation is there any discussion of how “collective bargaining” is to be defined, still less, as noted above, why it is in decline. The presumption is that everyone “knows” what collective bargaining is and that collective bargaining is a “good thing”.

Questions on “collective bargaining” in the context of a Directive

It is not the purpose of this *BEERG Perspective* to get involved in discussions on whether, or not, the European Union has the Treaty competency to legislate on pay or to require Member States to take steps to promote collective bargaining. Others, on both sides of the debate, can make their arguments on that.

The European Commission’s decision to oblige Member States to promote collective bargaining as the preferred way of determining pay is a **political choice**, a public policy choice, irrespective of any legal considerations. Which raises the question as to whether or not the governments of EU Member States have a mandate to support EU legislation on the mandatory imposition of collective bargaining as the preferred method of regulating labour relations.

As already noted, there is no description in the Commission’s proposal for a Directive of how collective bargaining is to be understood, much less is it defined. How can you require Member States to promote something that is not legally defined? It may be argued that there are libraries of literature on collective bargaining and/or that collective bargaining should be understood by reference to ILO [Convention 87](#) and [Convention 98](#).

But neither the literature nor the Conventions impose the type of legal obligations on Member States that an EU Directive does, enforceable through the Court of Justice of the European Union (CJEU). The ILO Conventions require signatory States to put mechanisms in place that facilitate employers and employees’ representatives to engage in collective bargaining if they so wish. But there is no obligation on States to actively require employers and employees’ representatives to engage in collective bargaining, which appears to be the Direction of travel of the proposed Directive.

Questions that come to mind about “collective bargaining” in the context of the proposed Directive include:

- Is collective bargaining to be understood as “sectoral” bargaining or bargaining at individual enterprise level?
- If “sectoral”, how are sectors to be defined?
- Would sectoral definitions have to be consistent across the EU or could they differ from country to country?
- What is to be the scope of bargaining? Just pay or all aspects of terms and conditions of employment?
- What would be the length of agreements? Would negotiations have to be conducted annually or could agreements run for two or three years?
- Would agreements across Europe/sectors have to run for the same length of time?
- Collective bargaining is an economic process designed to settle differences between the parties. What happens if they fail to agree? Is the right to strike or lock-out assumed to be an inherent part of the process? Or, in the absence of agreement, is arbitration to settle matters?

Of equal importance, if not more importance, are such issues on the **employer side** as:

- If collective bargaining is to be at individual enterprise level, then it is the management of that enterprise who will be responsible for the conduct of such negotiations.
- What happens in companies with multiple sites? Would negotiations be conducted site-by-site or at enterprise level? Who decides?
- If collective bargaining is to be conducted at sectoral level, then who defines the sector and which companies are to be included in which sectors? In some Member States there may be traditionally defined sectors, but in many Member States there are no sectoral definitions and/or many newer businesses that cannot be allocated to traditional sectors.
- How are decisions to be taken on the management side in sectoral negotiations? Would every company, irrespective of size, have one vote?

Even more complex issues arise on the **employee side**.

- Who has the right to represent employees in negotiations, either at sectoral-level or in individual enterprises?
- If trade unions, how are trade unions to be defined and established? Can new unions be created? Why should existing unions have a monopoly on representation?
- How is the representative nature of trade unions to be determined? What membership threshold would a union have to reach to be considered representative?
- What about non-union bodies, such as staff committees or works councils? Would they be entitled to represent employees in negotiations?
- What happens if employees decide they do not want to be represented by either a union or a works council?
- What happens in multi-site companies if some sites want to be represented and others do not?
- How would proposed agreements be ratified?

The above are just some of the initial questions that come to mind. No doubt, there are others. How are these questions to be dealt with in both European and national legislation if controversy and legal disputes are to be avoided?

More importantly, how collective relationships between employers and employees are best structured is a complex and contested issue. It is not something that can be dealt with in 145 words in Article 4, as quoted above. This needs to be impressed on national legislators as they consider the Commission's proposals.

European Commission initiatives on minimum wages should not be used to reimpose a declining collective bargaining model on businesses.

How labour relations are best conducted should be a matter for employers and employees to decide, in line with the principle of subsidiarity.

Nov 2020