

Reply of the Danish, Norwegian, Icelandic and Swedish trade union federations on the Second Phase Consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges related to fair minimum wages

Introduction

Labour market traditions vary widely between Member States in the European Union. Whereas many countries are characterised by a high degree of government intervention in wage regulation, others give social partners the primary responsibility to regulate employment and working conditions.

Overall, self-regulatory labour market models, such as in the Nordic countries, have proved to be among the most successful and effective in the long term. These models also tend to result in higher actual wage floors than other labour market models. In countries using self-regulatory models, the role of the state is limited essentially to creating conditions for trade unions and employers to regulate wages and conditions of employment. We believe that initiatives taken by the European Commission in the area of wage policy should have the same starting-point.

A strong social Europe should contribute to strengthening the framework for the social partners to regulate conditions on the labour market. A social Europe cannot – and should not – replace national rules and institutions. Instead, EU policies and initiatives must support the creation of a regulatory framework which, on the basis of national traditions and practices, strengthens the interests of workers in Europe.

The fundamental problem with the Commission's consultation document is that it takes labour market models with statutory wages as the starting-point. The rules outlined in the document are adapted to those systems. The consultation document is not representative for the situation in all Member States, as it does not pay enough attention to the autonomy of the self-regulatory wage-setting systems and their institutional foundations. This is a problematic starting-point, which puts self-regulatory collective bargaining models at severe risk, especially if an EU initiative on minimum wages would be legally binding.

We cannot emphasise enough the need for any EU initiative on wages to respect the autonomy of social partners and the different labour market systems in Europe. The motto of the European Union - United in diversity – must have a real meaning, and is crucial for the functioning of the national labour markets.

We, the Danish, Norwegian, Icelandic and Swedish Trade Unions, representing approximately 6 million of all employees in the Nordic countries, wish to express our views concerning the Commission's second consultation to in this separate letter. We do not share the views expressed by the ETUC in its response. We believe that it is important and necessary to provide the Commission with a holistic point of view and a thorough understanding of the Nordic perspective.

The need for better wages and working conditions in Europe

Several EU Member States have problems with dysfunctional labour markets. Resource utilisation is low. The wage share is often falling, wages are low and opportunities for full-time work are too limited. The greatest problems are in central and eastern Europe, where functioning self-regulatory collective agreement models have rarely been put in place. There are similar problems in southern Europe, where in many cases collective agreement systems no longer play a key role, as a result of austerity measures undertaken after the financial crisis. But also Western Europe, with its changing labour markets, face difficult challenges: zero-hour contracts and false self-employment without the right to a social safety net are some examples.

Low wages, combined with difficulties in earning a living wage, have consequences on several levels in some of the Member States. First and foremost for individuals, but also national economies suffer from a lack of demand and lower growth. The promise of a better future turned into stagnation in many places.

A strong social Europe is needed more than ever. Remedying this situation requires measures that can make a real difference to the labour markets in Member States. However, measures at EU level must also safeguard the autonomy of the social partners as laid down in the Treaties. An EU initiative must promote and protect sectorial, nationwide collective bargaining, not undermine it.

We, the Danish, Norwegian, Icelandic and Swedish trade unions, wish to underline the fundamental importance of respecting different national collective bargaining traditions. Theoretical one-size-fits-all solutions at EU level, which may damage well-functioning national models, do not work on the ground and must absolutely be avoided.

No legal base in the Treaty

We want to reiterate that pay, as well as the right of association, the right to strike or the right to impose lock-outs, is explicitly exempted from EU legislation, according to Article 153(5) TFEU and also by case law of the Court of Justice (for example C-268/06 Impact). This exemption includes rules implying that all Member States need to have a minimum wage even if the levels and the forms of wage floors can be decided by the Member States themselves.

We, the Danish, Norwegian, Icelandic and Swedish trade unions find it deeply problematic that the Commission in its consultation document has so easily disregarded the lack of EU competence in the area of wages. The Commission refers to the fact that wage conditions have already been regulated in EU secondary legislation, for example on issues of discrimination. However, according to our analysis, the current initiative is not comparable with any previous initiatives, since a possible legal initiative on wages would constitute a pure wage policy initiative which interferes directly with national competence on wage-setting, thus being in conflict with article 153.5. It is important to point out that such an initiative will not only lead to an indirect intrusion of the social partners' autonomy. It will also interfere directly with the social partners' autonomous wage-setting.

The Member States have not transferred any competence to the EU to legislate wages. Wages are and must continue to be national competence. No legal initiative can be presented without a Treaty change. The diversity of labour market systems in Europe must be preserved and self-regulatory systems that are especially vulnerable for state intervention must be protected.

The employer organisations and the governments in our countries share our view. The EU has no legal competence to adopt rules on wages. We will continue to argue for this jointly in order to protect our wage-setting systems and, if needed, challenge the legality of a legislative initiative.

Wage floors

Wage floors are regulated in completely different ways across the EU. In most Member States, it is the State that bears the primary responsibility for wage floors, by setting statutory minimum wages. In some countries, including the Nordic countries, wages, including wage floors, are regulated in nationwide collective agreements.

As mentioned above, the second consultation document does not distinguish between systems where wage floors are negotiated in collective agreements and statutory wage systems. The document seems to indicate that a possible future initiative, as far as possible, should regulate these very different systems in the same way.

We, the Danish, Norwegian, Icelandic and Swedish trade unions, wish to stress how problematic this starting point is. It constitutes a serious threat to our Nordic labour market models as such and to our industrial relations systems in particular.

Collective self-regulatory bargaining between the social partners has been a successful way of ensuring the priorities and security of both employers and workers, and contribute to a flexible labour market and fair wages. The EU treaties protect this bargaining system by explicitly exempting wages and the role of the social partners from a legally binding instrument and instead encourages social dialogue.

Collective self-regulation gives employees and employers power to negotiate and regulate important issues between them. Regulations have a strong legitimacy through collective agreements. Its rules might not reach each and every worker in a self-regulatory system – some will be unorganised. However, the practical consequence is strong enforcement of the rules on the labour market. Flexibility and adaptability are also important effects of self-regulation. In practice, wages set through collective agreements also have a strong normative effect on the whole labour market.

The data presented by the Commission in its consultation document show that countries with strong social partners, who are able to negotiate freely, to a large extent already have fair wages. The consequence of the Commission's argument is that the best way to achieve fair wages is to strengthen collective bargaining. In other words: EU regulation on statutory minimum wages is not the way forward. Instead, we believe that the Commission should use guidelines, benchmarks and financing tools to promote social dialogue and an increased use of collective bargaining. A fair minimum wage in each Member State – a long-term but sustainable solution – should be promoted by other means than via legislation at EU level. One size does not fit all.

Effects of binding rules on wages on the Nordic labour markets

Legally binding EU rules on wage setting would have detrimental effects on the Nordic self-regulatory models.

A directive or a regulation would be binding for all Member States, and it would be a duty for the state to implement the rules and guarantee that “all” workers are entitled to a minimum wage. This means that the state will have to interfere through binding legislation, which would lead to the end of the self-regulatory labour market models in our countries.

In a country using a self-regulated collective agreement model, it is crucial that the legislator has trust in the social partners and refrains from intervening in wage setting. The Commission’s consultation document however, implicitly seems to contain a desire to change the balance of power between government and social partners. The focus in the consultation document is on workers who are not covered by collective agreements. If the collectively agreed wage floors agreed between the social partners are subject to binding EU rules, our collective agreements on wages will be subject to direct review by the European Court of Justice. This entails an unacceptable restriction to the right of collective bargaining, the right of association, the autonomy of the social partners and national competence on wage formation, which is contrary to the Treaty provisions.

A lack of protection of the social partners’ autonomous regulation of wages may also force countries like Denmark, Norway, Iceland and Sweden to change their wage-setting models in a comprehensive way by possible requirements on collective bargaining coverage. Who knows what level of coverage the EU institutions would deem adequate in the negotiations on a possible directive? Is it to be calculated for the entire labour market, for industrial sectors or for particularly vulnerable workers? Do all workers have to be covered, as suggested by the Commission? What will the legal consequence be if such limits are exceeded? In order to cope with coverage requirements, a statutory minimum wage *or erga omnes* extension of collective agreements may have to be introduced in all the Nordic countries. This would in turn require fundamental changes to how the entire labour market systems work.

If Denmark, Norway, Iceland and Sweden have to change the foundations of its wage formation models, it will ultimately have an adverse effect on employees in our countries. Strong and representative social partners, who enter into robust nationwide collective agreements, have been developed in an environment where national legislators have supported the social partners, without intervening in matters that the social partners are able to solve themselves.

A directive which necessitates rules to guarantee all workers a degree of specific protection will create a dual command of our national labour markets. If the national legislator guarantees wage conditions by law in the often temporary gaps that arise in the social partners’ self-regulation, a greater number of employers and employees will dodge out of self-regulation through collective agreements. The incentives to organise, both among workers and employers will be weakened. The price of avoiding responsibility for organising and concluding collective agreements will fall. To this should be added that the level of protection the State is to guarantee through EU rules is likely to push down the collectively agreed wage

levels. EU legislation on wages runs the risk of undermining a Social Europe through a less organized labour market, instead of strengthening it.

Finally, let us also mention that the role and functions of trade unions and employers' organisations in the Nordic countries must not be interpreted too narrowly. Unions are crucial as protection of democracy. It is through freedom of association and freedom of speech, the practical "nitty gritty" work of negotiation and compromise, that civil society keeps democracy alive. The social partners are the most important part of civil society. Any legislative initiative will also run the risk of weakening civil society - and democracy in the Member States. Is the Commission really willing to damage these well-functioning democratic structures?

1. What are your views on the specific objectives of a possible EU action set out in section 5?

The Danish, Norwegian, Icelandic and Swedish trade unions will only comment on issues related to our collective self-regulatory labour market models. Thus, our comments do not encompass all issues in the consultation paper.

The issue of "all workers": The long-term goal of the possible action on minimum wage is to support and put pressure on Member States in order for employees to live a decent life wherever they may work. Wage floors is an important tool to prevent too low wages on the labour market. However, in wage systems where wages solely or mainly are based on collective agreements there will never be a 100 percent coverage of minimum wages. Even so, our nation-wide sectoral collective agreements, serve as a benchmark for wage setting and thus, in practise, becomes a norm for wages for all workers.¹ In countries with strong collective self-regulation, such as in the Nordic countries, in practice almost everyone earns wages and conditions that correspond to the levels in the collective agreements. In fact, the level of coverage may be the same as in a system with *erga omnes* extension of collective agreements. In practice, self-regulation systems generally provide a higher level of protection for workers. Therefore, the starting point in the consultation document that all workers need to be covered by rules on minimum wages in order to ensure fair working conditions, is a fallacy.

The issue of "exceptions" from minimum wage: When it comes to the question of elimination or limitations of minimum wage variations and exemptions from wage floors, we wish to stress that such exceptions from wage floors in collective agreements are carefully designed to achieve a specific objective. Collectively agreed and determined exceptions from provisions on minimum wages take both the needs of employers and employees into consideration and are there for a reason. They are negotiated on national level between trade unions and the employer organisations, two equally strong parties. Thus, if such exceptions are made in collective agreements, they are well-balanced and need to be safeguarded from any EU initiative on minimum wages. In that respect we fully agree with the ETUC answer on the consultation. Just to give one example, there can be justified lower wages for young people or

¹ For the normative effect of the collectively agreed wage floor in Sweden see https://www.mi.se/app/uploads/Minimum_wages_eng.pdf

students, which makes it possible for them to work during school holidays and get work experience, to be able to start their working life.

Civil law and/or public law? - the issue of “enforcement and control”: It is important that workers’ wages are ensured and protected. But how that is executed should be left to the Member States to decide and should not be regulated at EU level. In the Nordic countries, compliance with collective agreements belong to civil law, entrusting the trade unions to go to court to safeguard the interests of their members. It is not public law where the state or state agencies have a role. In Member States with high trade union density, union membership and union control is more effective than state control when it comes to dealing with non-compliance of wage provisions in collective agreements. A possible EU initiative must therefore leave room for trade unions to perform this task and not oblige Member States to introduce follow up-processes where the social partners do not want or need them.

2. What are your views on the possible avenues for EU action set out in section 6.1 of this document?

There is no legal basis for putting forward initiatives on minimum wages, as clearly laid down in Article 153(5) TFEU. Any EU initiative should aim at workers who are considered to be workers according to national law. The EU should not introduce measures deciding on the concept of a worker, as this will be inflexible and can mean that some workers fall outside of the scope and therefore end up in a much more difficult position than today.

An EU initiative that interferes with the autonomy of the social partners or aims at regulating collectively agreed wages will limit our ability to regulate wages in collective agreements. As already mentioned, in the Nordic countries, the negotiation process works very well and does so explicitly because our governments have secured a legal environment where social partners are responsible for regulating working conditions and wages in collective agreements, and because governments have refrained from interfering.

The Commission has repeatedly stated that collective bargaining is the best way to ensure decent wages, and the Nordic labour market models have been highlighted as good examples. We sincerely do not believe that the Commission has any intentions to damage our labour market systems. Nevertheless, there is a contradiction between the Commission’s wish to promote collective bargaining on the one hand, and the introduction of EU legislation on wage setting on the other. We don’t want neither our national parliaments nor the EU institutions to interfere in wage setting, and legally binding initiatives will introduce a legal basis for both the national and EU level to intervene in wage setting systems in all Member States. A legal basis to interfere in wage setting will also reduce the social partners’ autonomy at national level. We cannot stress enough that legally binding initiatives on wage setting will not only be detrimental to our labour markets, but also risk to harm social dialogue in other EU Member States.

The Commission has declared that safeguards for our labour market systems can be established in the framework of binding rules. But our understanding of the legal situation is that no “waterproof firewalls” can be guaranteed by the Commission. The EU legislative process as well as the interpretation of the ECJ present obstacles in this regard.

Therefore, the given option for the Commission should be to propose an instrument that provides incentives and promote well-functioning nationwide collective bargaining on wage issues in Member States where it is less developed and support collective bargaining on wage-setting.

Much more could be done both by the member states and the EU to promote collective bargaining. For example, at EU level, capacity building of social dialogue should be promoted through a new EU fund. The role of the social partners and the collective bargaining system can be strengthened by (to a greater extent) leaving it to the social partners themselves to agree on the content of possible actions (social dialogue) or by allowing the social partners to derogate from EU law through collective agreements. These are just a few examples of alternative possible actions to promote collective bargaining. We are also aware of recent proposal from the Danish and Swedish governments, which includes viable proposals in order to strengthen social dialogue and collective bargaining. We would very much like to engage in a constructive dialogue with the Commission on these issues.

The Laval case and its aftermath shows that the European Court of Justice has contributed to social dumping by putting free movement of services before the interests of decent working conditions for workers. For this we need a social protocol to the EU treaties, striking a better balance between those interests. We also stand behind the ETUC's call for revised EU rules on public procurement which would allow the state to create incentives to conclude and observe collective agreements. A new EU initiative on minimum income schemes, safeguarding the need for all to a decent life and to combat poverty, can also be considered, if it respects national competences and social partners' autonomy. At national level, measures should be taken to promote collective bargaining.

3. What are your views on the possible legal instruments presented in section 6.2?

The choice of legal form for an initiative on wage policy is crucial. The same applies to proposals which could strengthen the self-regulation of the social partners. Pay along with the right to strike and the right of association are excluded from the scope of Article 153. In order to develop a social Europe based on nationwide collective agreements, Article 153.5 must be interpreted broadly. The ultimate purpose of this Article is to protect the autonomy of the national social partners and these intentions must not be circumvented. Safeguarding the autonomy of social partners is a necessary prerequisite for creating and maintaining robust collective bargaining systems.

Article 153.5 is and has been important for all countries with collective self-regulatory labour market systems and has been an essential precondition for our countries' membership or affiliation in and with the EU. For example: In Sweden, the issue of EU legislative competence in the wage policy area was a crucial issue in the context of the 1994 EU membership referendum. Back then, the Commission promised that the Swedish collective agreement model would not be affected by membership, referring to legal grounds (today's article 153.5). Ever since then, these exemptions have constituted a crucial protection of the Nordic collective agreement models.

Developing a more social Europe by building and strengthening nationwide collective agreements at industry level requires a differentiated approach, taking into account national traditions and conditions. Universal solutions to be applied to all Member States would be directly counterproductive. Organically developed and strong collective bargaining models will be seriously harmed if European policy measures in this area are too interfering and one-dimensional.

It is crucial that an EU initiative does not alter the balance between the national legislator and the social partners as that would be devastating for the possibility to enter into collective agreements, the possibility to uphold a high coverage of collective agreements and trade union membership in our countries. The EU could instead play a role by supporting collective bargaining structures as well as systems for wage statistics and benchmarking, without disturbing the autonomy of the social partners. Benchmarking of statistics concerning wages and collective bargaining can also be a useful tool to put pressure on member states to promote collective bargaining.

4. Negotiations with a view to conclude an agreement under Article 155 TFEU

Social dialogue on core labour market issues should always be supported by the Commission. A strong social dialogue is a precondition for a strong social Europe. However social dialogue on European level initiated by the Commission must respect the limits of EU competence as set out in the Treaty.

Conclusion

We, Danish, Norwegian, Icelandic and Swedish Trade Unions, have always advocated a stronger social Europe with decent working conditions and fair wages. However, we cannot accept the introduction of EU legislation on wages. Any proposed EU instrument must of course be in compliance with the Treaty, and respect collective self-regulation and the autonomy of the social partners.

Our Nordic labour market models are among the most competitive models in the world, both in terms of economic efficiency and fairness, but also in terms of innovation and wage equality. Workers in our countries can live off their wages and make ends meet.

However, our labour market systems are sensitive to disruptions through legislative initiatives disturbing the autonomy of the social partners and their negotiations. A legally binding initiative on minimum wage runs a risk of becoming such a disruption and can seriously harm labour market systems.

Commissioner Nicolas Schmit has declared that “what is not broken should not be fixed”. It is time to fulfil that promise and abstain from proposing EU rules that would undermine our collective bargaining models.