

Position on the proposal for a Directive on adequate minimum wages in the EU

Key messages:

- SMEs, as employers, agree with the aim to ensure that workers in the European Union are granted adequate minimum wages, allowing for a decent living wherever they work. Making work pay is an important objective for SMEs;
- SMEUnited advocates for a recommendation which would fully respect the autonomy of national social partners and their freedom of collective bargaining in Member States where social partners are responsible for minimum wage setting, which is not the case with the current proposal;
- SMEUnited disagrees with the decision of the European Commission to propose a Directive. In our view the choice of the legal basis does not respect the subsidiarity principle. Moreover, the unclarity of the form and content of the text will give rise to court cases. As a consequence, it would be logical not to move forward with this proposal for a Directive;
- SMEUnited supports a stronger involvement of social partners in Member States with statutory minimum wage systems and the reinforcement of their capacity in order to encourage them to initiate collective bargaining on minimum wage;
- We ask to dedicate more attention to the impact of the proposal for a Directive on employment, productivity and competitiveness of SMEs when defining the adequacy of minimum wage. It is essential to avoid a strong increase of labour costs for SMEs in the current difficult economic situation;
- SMEUnited recalls the need to take better into account the current macro-economic situation.

1. General comments

On 28 October 2020 the European Commission published its proposal for a Directive on adequate minimum wages in the European Union.

During the two phases of consultation of social partners, SMEUnited expressed in a very clear manner that a Directive was not the right instrument to tackle such a core topic for social partners. Therefore, SMEUnited declared its readiness to start negotiations on a recommendation.

Negotiations among European social partners were not feasible although this would have been the best approach. Negotiations would have allowed to combine the European and national competences in accordance with the Treaty, the subsidiarity principle and the respect of autonomy of national social partners to enter in collective bargaining on minimum wages.

SMEUnited disagrees with the decision by the European Commission to propose a Directive. The choice of a legally binding instrument will impose new obligations on national social partners and Member States and will inevitably, in one way or another, need to interfere in the collective bargaining systems at national level.

It will also open the door to interpretation by the Court of Justice of the European Union going against the social partners' autonomy, their contractual freedom and their freedom of association.

On the legal aspects

The choice of the European Commission for a binding instrument on adequate minimum wages does not respect the subsidiarity principle nor the national competence on wage-setting. This goes against Article 153(5) TFEU, which explicitly excludes pay from the European competences.

Furthermore, contrary to what the Commission argues to respect the full autonomy of social partners, the proposal for a Directive creates a lot of concerns on the respect of social partners' autonomy, their contractual freedom and their freedom of association. The legally binding nature of the Directive creates a risk of interference by the Court of Justice of the European Union.

However, according to SMEUnited, the proposal touches on matters under Article 153(2)b which states that EU actions regarding the "representation and collective defence of the interests of workers and employers" requires unanimity at the Council, after consulting the European Parliament, the European Economic and Social Committee and the Committee of the Regions.

Even if the form and content of the proposal for a Directive seem to be closer to a recommendation, its impact will be binding. Therefore, in many ways, it is not compatible with the respect of national competences on wages. This ambiguity between the form and the legal nature of the instrument with vague and general formulation of articles and concepts creates legal uncertainty and leaves too much room for interpretation. Several examples are highlighted in our specific comments on the proposal. Consequently the Court of Justice of the European Union (CJEU) will play a significant role with its own interpretation with the real risk of interfering in national competences, industrial relations and autonomy of social partners in the field of wage setting. The Directive should therefore provide a better guarantee that in Member States where wage setting is exclusively ensured by social partners, the system will not be affected.

On the economic aspects

As employers, SMEs agree with the aim "to ensure that the workers in the Union are protected by adequate minimum wages allowing for a decent living wherever they work". Making work pay has always been an important objective for SMEs.

Against this background, it is essential to recall that wages, including minimum wages, represent what an employer is paying to a worker for the work done, taking into account the level of qualification and productivity. The minimum wage has nothing to do with a social transfer.

SMEUnited recognises the importance of having fair minimum wages in the European Union, as long as it fully takes into account the economic conditions, the productivity level and the labour market situation in each Member State, in order to contribute to employment and SME competitiveness. Ensuring the competitiveness of small businesses should remain a constant priority since it is the basis to maintain and create jobs.

An adequate minimum wage for workers provides fair competition for enterprises through a guaranteed level-playing field.

SMEs have serious reservations on the economic and employment consequences of the proposal for a Directive. The impact will be more pronounced than what is presented in the impact assessment.

Depending on the Member States' labour market situation, increasing the minimum wage will have a higher impact than 0.5 to 1% on employment. With the current COVID-19 crisis, such an increase of labour costs will have massive adverse effects on the economy as a whole and especially on small enterprises.

SMEUnited considers that the impact assessment does not take the consequences of the current crisis sufficiently into consideration. An increase in labour costs for SMEs, especially for small enterprises is currently not realistic given that SMEs are strongly hit by the COVID-19 pandemic and its severe economic repercussions.

Furthermore, labour costs are directly linked to employers' possibilities to create new jobs. An increase in labour costs due to a substantial increase of the minimum wage would entail the risk of further reducing the level of employment in sectors severely affected by the crisis, or for certain groups of workers, especially young people or low-skilled workers. With the COVID-19 crisis, a large percentage of SMEs are now facing serious risks of insolvency. The current situation has already led to a significant increase in partial and/or full unemployment and this trend will continue for an unforeseen duration.

Moreover, an increase in prices within the new crisis context where consumption is in sharp decline, might have a further negative impact on consumption. Stating that the impact on businesses would be mitigated by the increase in consumption by low-wage workers, in turn supporting domestic demand, appears risky.

SMEUnited recalls that it is more than ever essential to balance the needs and interests of enterprises and workers for setting the best adequate level of minimum wage and safeguarding jobs.

As a basic rule, social partners negotiate with due regard to the performance of the economy and, in particular, the situation of individual sectors and regional development. In this way, social partners secure the competitiveness of the economy while at the same time ensuring a positive development of incomes and employment. As a result, the social

partners, mainly at sectoral level, agree on the minimum wage and ensure a high level of coverage rate.

In addition, negotiations of minimum wage do not take place in isolation. It is strongly coordinated with the whole wage setting system. Insofar, the German law on minimum wages could serve as best practice. It explicitly prescribes that increases of the statutory minimum wage are to be in line with the average increases of collective wage agreements. Therefore, a strong increase in minimum wage could have a direct impact on the full wage scale and this might be problematic at a time of economic crisis.

SMEUnited also recalls that a too high minimum wage can push businesses and workers to move fully or partially towards undeclared work creating unfair competition, and to use more atypical forms of work. It can also lead to a reduction in the number of hours worked for employees or even the replacement of low-paid workers by automation.

On the challenges put forward by the Commission

The Commission justifies the need for a EU action on the following challenges: the deterioration of the situation of low-wage workers, including in-work poverty over the last decade, the fact that nearly 60% of minimum wage earners are women and that young workers have a higher likelihood to earn the minimum wage than other age groups.

The link between minimum wage and the fight against poverty is complex. The first reference concerning in-work poverty should be the amount earned by a person working full-time.

At the same time, in work-poverty very much depends on the household composition and the total household income. In many Member States, minimum wage earners benefit from various welfare measures, additional in-work benefits, tax allowances or credits which contribute to a decent standard of living. Lastly, one should not forget the difference between gross and net minimum wage which can largely differ among Member States.

SMEUnited agrees with the objective of the Commission to ensure a level playing field in the Single Market and foster fair competition. Collective bargaining is the best tool for ensuring a correct upward convergence in this field.

Speaking about upward convergence, the full labour costs related to minimum wages should be taken into account, including the contribution of employers to social protection systems (e.g. sickness protection, healthcare, occupational health and safety, pensions) and also holidays, bonuses, working time, etc. without forgetting the level of taxation.

Furthermore, when considering a fair minimum wage, one should not underestimate the impact of national tax/benefit systems and the level of tax wedge. Large differences appear among Member States with, in some cases, high or very high tax wedge level for employers and/or workers.

2. Specific comments on the proposal for a Directive

1. On recitals

SMEUnited disagrees with the reference to the international indicators such as 60% of the gross median wage and 50% of the gross average wage for assessing the minimum wage adequacy in relation to the gross level of wages.

SMEs are also concerned by the strict limitation of variations and deductions which are largely justified in order to facilitate the entry and integration of less qualified young workers into the labour market.

SMEUnited proposes the following amendment to recital 21 and recital 22

<p>(21) Minimum wages are considered adequate if they are fair in relation to the wage distribution in the country and if they provide a decent standard of living. The adequacy of statutory minimum wages is determined in view of the national socio-economic conditions, including employment growth, competitiveness as well as regional and sectoral developments. Their adequacy should be assessed at least in relation to their purchasing power, to the productivity developments and to their relation to the gross wage levels, distribution and growth. The use of indicators commonly used at international level, such as 60% of the gross median wage and 50% of the gross average wage, can help guide the assessment of minimum wage adequacy in relation to the gross level of wages.</p> <p>(22) To promote adequacy of minimum wages for all groups of workers, variations and deductions from statutory minimum wages should be limited to a minimum, while ensuring that social partners are duly consulted in their definition. Some deductions to statutory minimum wages may be justified by a legitimate aim, including overstated</p>	<p>21) Minimum wages are considered adequate if they are fair in relation to the wage distribution in the country and if they provide a decent standard of living. The adequacy of statutory minimum wages is determined in view of the national socio-economic conditions, including employment growth, competitiveness as well as regional and sectoral developments. Their adequacy should can be assessed at least if necessary in relation to their purchasing power, to the productivity developments and to their relation to the gross wage levels, distribution and growth. The use of indicators commonly used at international level, such as 60% of the gross median wage and 50% of the gross average wage, can help guide the assessment of minimum wage adequacy in relation to the gross level of wages.</p> <p>(22) To promote adequacy of minimum wages for all groups of workers, variations and deductions from statutory minimum wages should be limited to a minimum, while ensuring that social partners are duly consulted in their definition. Some deductions to statutory minimum wages may be justified by a legitimate aim, including overstated amounts paid or</p>
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<p>amounts paid or deductions ordered by a judicial authority. Others, such as deductions related to the equipment necessary to perform a job or deductions of allowances in kind, such as accommodation, may be unjustified or disproportionate.</p>	<p>deductions ordered by a judicial authority. Some variations concerning young workers can be justified. Others, as deductions related to the equipment necessary to perform a job or deductions of allowances in kind, such as accommodation, may be unjustified or disproportionate.</p>
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2. On Article 1: Subject matter

In Article 1(1), the European Commission requests to establish a framework for setting adequate levels of minimum wage at national level whatever the wage setting system in place.

The link between Article 1(1) and Article 5, which defines adequacy criteria to be respected at national level, bares the risk to interfere in social partners' autonomy to set the adequate level of minimum wage.

In addition, the adequacy of minimum wages is defined in Recital 21 as follows *“Minimum wages are considered adequate if they are fair in relation to the wage distribution in the country and if they provide a decent standard of living. The adequacy of statutory minimum wages is determined in view of the national socio-economic conditions, including employment growth, competitiveness as well as regional and sectoral developments. Their adequacy should be assessed at least in relation to their purchasing power, to the productivity developments and to their relation to the gross wage levels, distribution and growth”*.

At the same time, in Article 1(3) the Commission states that *“Nothing in this Directive shall be construed as imposing an obligation on the Member States where wage setting is ensured exclusively via collective agreements to introduce a statutory minimum wage nor to make the collective agreements universally applicable”*.

SMEUnited is very concerned that Article 1(1) combined with Article 5, covering all Member States with statutory minimum wages¹, will result in court cases to specify whether or not the minimum wage framework ensures an adequate level. This evaluation of “adequacy of minimum wage” will apply to all Member States without any distinction between those with statutory minimum wages and those with minimum wage defined by collective agreements. In addition, it is also likely that Article 1(1) combined with Article 4, may result in court rulings where the components of national collective bargaining systems or frameworks are judged against the requirements of Article 4.

¹ Statutory minimum wages are put in place by law or other binding legal provisions such as an erga-omnes effect after a decision by the government of a Member State.

Furthermore the definition in Article 3 of “statutory minimum wage” set by law, or other binding legal provisions, may lead to an erga-omnes effect to collective agreements for groups of workers where no collective bargaining takes place. Such erga-omnes effect does not alter a collective agreement but may requires to take into account the adequacy of the minimum wage, which will create a direct interference in social partners’ autonomy.

The proposal for a Directive should provide a better guarantee in the Member States where wage setting is ensured mainly via collective agreements, that these systems will remain untouched. The choice of wage setting system must strictly lie in the Member States. The Directive must not bring additional elements to the existing systems. Furthermore, amendments to existing collective agreement systems must also be possible by national decisions.

SMEUnited proposes the following amendment in order to reinforce Article 1(3):

<p>Nothing in the Directive shall be construed as imposing an obligation on the Member States where wage setting is ensured exclusively via collective agreements to introduce a statutory minimum wage nor to make the collective agreements universally applicable.</p>	<p>The application of this Directive shall be in full compliance with the freedom of association, as recognised in the Charter of fundamental rights of the European Union.</p> <p>Nothing in this Directive shall be construed as imposing an obligation on the Member States where wage setting is ensured exclusively mainly via collective agreements to introduce a statutory minimum wage nor to make the collective agreements universally applicable.</p>
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2. On Article 4: Promotion of collective bargaining on wage setting

SMEUnited welcomes the promotion of collective bargaining on wage setting and especially to strengthen the capacity of social partners. It is important that employers organisations representing Crafts and SMEs have sufficient know-how and resources to engage in constructive and meaningful negotiations on wages. It has been proven that well-functioning collective bargaining is the best tool for setting wages.

In this regard, it is essential that the Commission's proposal in no way interferes with the autonomy of social partners and must refrain from imposing rules on when and how minimum wage should be defined and adapted. Such measures could have been a good approach for a Council Recommendation but are problematic in a Directive.

SMEUnited is concerned about Article 4(1) which could be in contradiction with the freedom of collective bargaining. It creates an obligation for all Member States to promote collective bargaining even in countries where governments have no role in wage setting.

Collective bargaining among social partners is based on a voluntary approach and cannot become a legal obligation for public authorities.

Where social partners already take the responsibility to conduct meaningful negotiations, they are strong and respected. This approach of the Commission risks to interfere with the social partners' autonomy and willingness to act together.

SMEUnited proposes the following amendment to Article 4(1):

<p>With the aim to increase the collective bargaining coverage Member States shall take in consultation with the social partners, at least the following measures:</p> <ul style="list-style-type: none"> (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 wage among social partners; 	<p>With the aim to increase the collective bargaining on wage setting and capacity of the social partners, Member States shall can upon request of the national social partners propose appropriate measures to enable conditions for collective bargaining, provided that national industrial relations and traditions are respected. Such measures shall be in full compliance with the fundamental freedoms of workers and employers, as set in the Charter of Fundamental Rights of the EU.</p>
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On Article 4(2) in case collective bargaining coverage is less than 70% of the workers, Member States have to 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.

SMEUnited considers it as a direct interference in the national systems and social partners' autonomy especially in systems where social partners are the only ones responsible for defining the coverage of their collective agreements.

Furthermore, deciding on such a threshold will create endless discussions whether the 70% is reached and at the end might destabilise well-functioning industrial relations systems.

SMEUnited proposes the following amendment to Article 4(2):

<p>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 agreements with them and shall establish</p>	<p>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 upon request of social partners either by law or by agreements with them and shall establish an action plan to provide collective</p>
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<p>an action plan to provide collective bargaining. The action plan shall be made public and shall be notified to the European Commission.</p>	<p>bargaining. The action plan shall be made public and shall be notified to the European Commission. This article shall be without prejudice to Article 1(3).</p>
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3. On Article 5: Statutory minimum wages adequacy

While Article 5(1) and 5(2) define criteria to set-up the minimum wage in a stable and clear way, Article 5(3) creates an obligation for Member States to use indicative reference values to guide their assessment of adequacy of minimum wages. In recital 21, the Commission mentioned the commonly used international values indicators such as 60% of the gross median wage and 50% of the gross average wage to guide Member States.

Such a reference to international values can easily be considered as an indirect way to settle the level of minimum wage at European level and will give ample room to the CJEU to introduce such targets of minimum wages at EU level. This clearly goes against the Treaty Article 153(5) and interferes with the national competence to define the level of minimum wage as stated in Article 1(3).

More generally the adequacy of minimum wages cannot be assessed and set-up without taking into account the economic dimension and the labour market situation – especially competitiveness and employment growth - in order to best balance workers’ and employers’ needs as stated in Recital 21. Defining the adequate level of minimum wage is a complex issue which cannot be restricted to a percentage of the gross / net national median wage or average wage in a given country.

SMEUnited proposes the following amendment to Article 5(2) and 5(3):

<p>2. The national criteria referred to in paragraph 1 shall include at least the following elements:</p> <ul style="list-style-type: none"> (a) the purchasing power of statutory minimum wages, taking into account the cost of living and the contribution of taxes and social benefits; (b) the general level of gross wages and their distribution; (c) the growth rate of gross wages; (d) labour productivity developments. <p>3. Member States shall use indicative reference values to guide their assessment of adequacy of statutory minimum wages in relation to the general level of gross wages, such as those commonly used at international level.</p>	<p>The national criteria referred to in paragraph 1 shall can include at least the following elements:</p> <p>(a) the purchasing power of statutory minimum wages, taking into account the cost of living and the contribution of taxes and social benefits;</p> <ul style="list-style-type: none"> (a) the general level of gross wages and their distribution; (b) the growth rate of gross wages; (c) labour productivity developments. <p>3. Member States shall can use indicative reference values to guide their assessment of adequacy of statutory minimum wages in relation to the general level of gross wages, such as those commonly used at international level.</p>
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The involvement of social partners in statutory minimum wage is the pre-condition for establishing the right level for a fair minimum wage for workers and a good functioning of the economy and the labour market.

To avoid further rigidities, the minimum wage should be based on productivity level, competitiveness, employment situation and the overall economic and social situation. In particular, the availability of adequate skills, including through up-skilling and re-skilling, is fundamental to raise productivity.

4. On Article 6: Variations and deductions

Even though we completely agree that social partners must be effectively involved in the determination of a statutory minimum wage in order to support adequacy, it does not mean that exceptions and deviations for certain groups of workers are not justified.

SMEUnited insists that necessary variations and deviations from statutory minimum wage should remain.

SMEUnited proposes the following amendment to Article 6(1):

<ol style="list-style-type: none"> 1. Member States may allow different rates of statutory minimum wage for specific groups of workers. Member States shall keep these variations to a minimum, and ensure that any variation is non-discriminatory, proportionate, limited in time if relevant, and objectively and reasonably justified by a legitimate aim. 2. Member States may allow deductions by law that reduce the remuneration paid to workers to a level below that of the statutory minimum wage. Member States shall ensure that these deductions from statutory minimum wages are necessary, objectively justified and proportionate. 	<ol style="list-style-type: none"> 1. Member States may allow different rates of statutory minimum wage for specific groups of workers. Member States shall keep these variations to a minimum, and ensure that any variation is non-discriminatory. proportionate, limited in time if relevant, and objectively and reasonably justified by a legitimate aim. 2. Member States may allow deductions by law that reduce the remuneration paid to workers to a level below that of the statutory minimum wage. Member States shall ensure that these deductions from statutory minimum wages are necessary, objectively justified and proportionate.
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5. On Article 7: involvement of social partners in statutory minimum wage setting and updating

SMEUnited considers the timely and effective involvement of social partners as a key component of the setting of statutory minimum wage. The involvement of social partners for the definition of the appropriate level of minimum wage and its increase should be the rule all over Europe.

The systematic involvement of social partners in statutory minimum wage setting will ensure the full acceptance of the outcomes by the representatives of employers and trade unions involved in this process.

The involvement of social partners is a necessity whatever the system in place. To set a predictable and transparent framework for minimum wage, governments should apply a full and genuine involvement of social partners and a systematic monitoring of potential impact on employment by independent bodies.

Moreover, it is not sufficient to involve social partners. They should also dispose of the capacity and expertise required and dispose of the data, analysis and outcomes of research on economic, social and/or sectoral trends to make a correct analysis for the right decisions.

Businesses demand legal certainty to anticipate on minimum wage and wage increases more generally. Increases of minimum wage, unilaterally taken by governments in a number of Member States, without consulting social partners, is not the right approach. Such political decisions on minimum wage do not create a favourable business environment for employers. The direct negative impact on labour costs also affects the general wage level due to a spill-over effect on wages above the minimum wage level.

Article 5(5) creates an obligation for Member States to establish consultative bodies to advise competent authorities. Such bodies can be useful in some Member States and work well, but this should not be an obligation to be applied in all Member States. Member States should be free to decide on their needs for setting-up the adequate level of minimum wages.

6. On Article 9: Public procurement

SMEUnited supports the respect of minimum wages in public procurement, set either by social partners through collective agreements or as statutory minimum wage in accordance with Article 18 of Directive 2014/24/EU which stipulates the compliance of economic operators with the applicable national labour law obligations also set out in collective agreements. SMEUnited also recalls the crucial importance to ensure a good functioning of the Internal Market with fair opportunities for all businesses, especially SMEs, participating in public procurement.

SMEUnited proposes the following amendment to Article 9:

In accordance with Directive 2014/24/EU, Directive 2014/25/EU and Directive 2014/23/EU, Member States shall take appropriate measures to ensure that in the performance of public procurement or concession contracts economic operators comply with the wages set out by collective agreements for the relevant sector and geographical area and with the statutory minimum wages where they exist.

In accordance with Directive 2014/24/EU, Directive 2014/25/EU and Directive 2014/23/EU, Member States shall take appropriate measures to ensure that in the performance of public procurement or concession contracts economic operators comply with the **applicable obligations in the fields of** wages set out by collective agreements for the relevant sector and geographical area and with the statutory minimum wages where they exist.

7. On Article 10: Monitoring and data collection

The provisions contained in this article must be re-evaluated because, especially in the case of collective bargaining, they are not limited to certifying the coverage situation and indicating the constituent elements of the wages. It also implies a possibility of evaluation by both the national and European legislators and a possible consequent request for modification of the content of collective agreements. The wording of this article is not acceptable and in sharp contrast with the Treaty provisions.

This article also foresees a lot of new obligations for Member States on data collection tools to monitor the coverage and adequacy of minimum wages in Member States where social partners are responsible for wage-setting systems. These new requirements imposed by the Commission will add on social partners' as well as employers' shoulders numerous administrative tasks on informing in a detailed manner on minimum wage levels, on number of collective agreements and on workers covered. This will require additional financial resources in order to be able to make an accurate report to the Commission on an annual basis.

8. On Article 11: Right to redress and protection against adverse treatment or consequences

Social partners can contribute to support compliance by informing their members on the minimum wage rules as well as rights and obligations on both sides. Depending on the national system, it is also in the joint interest of social partners to have full compliance with the application of minimum wage. Joint cooperation at sectoral level could contribute to a better compliance.

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