

<https://doi.org/10.22364/jull.15.09>

Minimum Wage Fixing Mechanisms in the EU Member States: A Comparative Overview in the Light of the Draft Directive on Adequate Minimum Wages¹

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This paper focuses on a comparative legal overview of the minimum wage in Austria, France, Germany, Italy, Poland, Portugal, Romania and Spain. The author uses this context to discuss the significance of constitutions, statutes and collective bargaining agreements. Attention is drawn to the amount of detail in relevant constitutional provisions, the reasons for the discrepancies, as well as to the correlation between the way in which the minimum wage is regulated in the constitution and the way it is regulated by way of statute or collective bargaining agreement. The influence of international and European legal acts on the norms adopted in particular states is also assessed. Next, the structure of various national minimum wage fixing mechanisms is analysed in an attempt to indicate regularities in their formation. The paper refers to the draft Directive on adequate minimum wages in the European Union and provides an assessment of its potential impact on domestic legal systems. Further, the article evaluates national minimum wage fixing mechanisms from the perspective of their compatibility with the requirements introduced by the draft Directive.

Keywords: minimum wage, draft Directive on adequate minimum wages in the European Union, minimum wage fixing mechanism, collective bargaining agreements, European Pillar of Social Rights.

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¹ The current paper has been prepared in the framework of the research project No. 2017/26/D/HS5/01050, financed by the National Science Centre, Poland.

Introduction

The minimum wage is an expression of state interference in the operation of the market in pursuit of specific social and economic objectives. This instrument is firmly rooted in both international and European systems of social human rights and the values that underpin them². This refers in particular to Article 23(3) of the UN Universal Declaration of Human Rights³ and Article 7(a)(ii) of the UN International Covenant on Economic, Social and Cultural Rights⁴. The conventions of the International Labour Organisation explicitly refer to the minimum wage⁵, including Convention No. 131 concerning Minimum Wage Fixing, with Special Reference to Developing Countries⁶. In turn, as far as European law is concerned, Article 4(1) of the European Social Charter needs to be invoked⁷. The legal instrument in question has also been the subject of the draft Directive on adequate minimum wages in the European Union⁸. It must be emphasized that on 7 June 2022 the Council and the European Parliament reached a provisional political agreement on the abovementioned draft Directive. The agreement in point increases the chances of the Directive being adopted.

The main objective of this study is to conduct a comparative overview of national minimum wage regulations adopted in Austria, France, Germany, Italy, Poland, Portugal, Romania and Spain. The above-mentioned countries are considered to be representative as they employ different legal solutions at the constitutional level and in secondary legislation. The minimum wage in these countries is determined by way of statute or collective agreement. Those states have ratified legal acts of international law and European law that directly or indirectly refer to minimum wage with varying degrees. All of them are the European Union Member States. Thus, their legal systems should be based on similar assumptions. This background

² Cf. *Shelton, D. L.* Advanced Introduction to International Human Rights Law. Cheltenham-Northampton: Edward Elgar Publishing, 2014, p. 170 ff.

³ United Nations Universal Declaration of Human Rights (10.12.1948). Available: https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf [last viewed 30.06.2022].

⁴ United Nations International Covenant on Economic, Social and Cultural Rights (19.12.1966). Available: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> [last viewed 30.06.2022].

⁵ *Bomba, K.* Minimalne wynagrodzenie za pracę w działalności Międzynarodowej Organizacji Pracy [Minimum wage for work in the activities of the International Labor Organization]. *Praca i Zabezpieczenie Społeczne*, No. 10, 2021, pp. 15–16. DOI:10.33226/0032-6186.2021.10.2. Available: <https://www.pwe.com.pl/czasopisma/praca-i-zabezpieczenie-spoleczne/minimalne-wynagrodzenie-za-prace-w-dzialalnosci-miedzynarodowej-organizacji-pracy,a1446148109> [last viewed 30.06.2022]. See also *Bomba, K.* Instrumenty prawa międzynarodowego kształtujące standard minimalnego wynagrodzenia za pracę [Instruments of international law shaping the standard of minimum remuneration for work]. In: *Roczniki Administracji i Prawa. Rok XXI. Zeszyt specjalny: In labore virtus et vita. Księga jubileuszowa Prof. Marka Pliszkiwicza, Borski, M. Ćwiertniak, B. M. Lekston, M.* (eds). Sosnowiec: Oficyna Wydawnicza Humanitas, 2021, p. 269 ff. DOI:10.5604/01.3001.0015.6389. Available: <https://rocznikiadministracjiiprawa.publisherspanel.com/resources/html/article/details?id=226463> [last viewed 30.06.2022].

⁶ International Labour Organization. Minimum Wage Fixing Convention No. 131 concerning Minimum Wage Fixing, with Special Reference to Developing Countries (3.06.1970). Available: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C131 [last viewed 30.06.2022].

⁷ Council of Europe. European Social Charter (18.10.1961). Available: <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatyenum=035> [last viewed 30.06.2022]

⁸ Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union. COM(2020) 682 final, Brussels (28.10.2020). Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0682> [last viewed 30.06.2022].

is used in an attempt to formulate regularities and indicate differences in particular legal orders with regard to the method of regulation and the type of mechanisms for fixing the minimum wage. Furthermore, this paper refers to the draft Directive on adequate minimum wages in the European Union and discusses its possible impact on the legal systems in the analysed countries. Against the background of the draft Directive, this study analyses the margin of discretion of the Member States to shape their national mechanisms of minimum wage fixing. It also takes into account the minimum conditions that should be met by Member States. Moreover, the article evaluates national minimum wage fixing mechanisms from the perspective of their compatibility with the requirements introduced by the draft Directive.

1. Comparative overview of constitutional regulations

The minimum wage is not addressed in all national constitutions *expressis verbis*. Those that do refer to it explicitly, however, do so with varying degrees of comprehensiveness. The broadest treatment of the minimum wage is found in the Constitution of Portugal⁹. Article 59(2)(a) thereof provides that the state is charged with ensuring that workers are provided with proper conditions of work, remuneration and leisure to which they are entitled. In particular, the state is obliged to establish and update a national minimum wage which, among other factors, shall have regard to workers' needs, increases in the cost of living, the level of development of the forces of production. Consequently, the above provision is not limited to the mere formulation of legal guarantees of minimum wage and its adjustment but also regulates the criteria for fixing its amount. When compared to other states, this regulation is exceptionally detailed.

Although some constitutions formulate minimum wage guarantees, it is the subordinate legislation's responsibility to provide further details. This type of arrangement is found in the Constitution of Romania¹⁰, whose Article 41(2) explicitly formulates the employees' right to social protection, including the minimum wage. Similarly, in Poland, Article 65(4) of the Constitution¹¹ stipulates that the minimum level of remuneration for work, or the manner of setting its levels, shall be specified by statute. In this way, the Constitution imposes the obligation on the legislator to fix the amount of the minimum wage but does not specify clear guidelines in this respect¹².

One can also point to states where the constitutions do not refer to minimum wages directly but allude to the concept of fair remuneration. Such solutions can be found in Article 36 of the Italian Constitution¹³ and Article 35 of the Spanish

⁹ Constitution of the Portuguese Republic (25.04.1974). Available: <https://mobile.dre.pt/constitution-of-the-portuguese-republic> [last viewed 30.06.2022].

¹⁰ The Constitution of Romania (21.11.1991). Available: <https://www.presidency.ro/en/the-constitution-of-romania> [last viewed 30.06.2022].

¹¹ The Constitution of the Republic of Poland (02.04.1997). Available: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> [last viewed 30.06.2022].

¹² Cf. Czerniak-Swędziół, J. The Principle of Fair Remuneration. In: Principles of Polish Labour Law, Baran, K.W. (ed.). Warsaw: C. H. Beck, 2019, p.60 ff.

¹³ Article 36 of the Italian Constitution: "Workers have the right to wages in proportion to the quantity and quality of their work and in all cases sufficient to ensure them and their families a free and dignified existence." Cf. Constitution of the Italian Republic (22.12.1947). Available: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf [last viewed 30.06.2022].

Constitution¹⁴. Finally, there are also states that do not explicitly refer to the minimum wage. In these cases, its justification may be sought indirectly in the ideas underlying the respective domestic legal orders¹⁵. Austria, Germany and France fall into this group.

The discrepancies in the constitutional regulations governing social rights can be viewed from a historical perspective in connection with the development of both the international and the European systems of social rights. Constitutions adopted during the interwar period (Austria¹⁶), as well as the constitutions passed immediately after the end of World War II (Germany¹⁷ and France¹⁸), in principle do not address social issues, leaving their regulation to lower-ranking legal acts. One exception is the Constitution of Italy of 1947, which formulated the right to a decent remuneration in response to the pressure generated by left-wing parties and the social teachings of the Church¹⁹. The signing of the European Social Charter in 1961, together with the International Covenant on Economic, Social and Cultural Rights of 1966, contributed to the popularization of the idea of social rights, including the guarantee of a decent remuneration. This was reflected in the national constitutions adopted in the 1970s (in Portugal and Spain). It should be noted that the constitutions of Central and Eastern European countries adopted after 1989 take into account the need for the state to intervene in the operation of the market to ensure a minimum amount of remuneration. However, under the circumstances of political and economic transformation, no decision was made to lay down detailed rules in the constitutions. The legislators limited themselves to establishing guarantees of minimum wages, further specifying them in statutes²⁰.

It is important to note that all the states under review have ratified the UN International Covenant on Economic, Social and Cultural Rights. In addition, most of them have ratified at least one of the ILO conventions relating to the minimum wage directly (No. 26, No. 99 or No. 131). Each of the countries mentioned herein has ratified the European Social Charter, although not all of them are bound by Article 4(1) of the ESC, which aims to ensure that workers are paid a remuneration

¹⁴ Article 35 of the Spanish Constitution: 1. "All Spaniards have the duty to work and the right to employment, to free choice of profession or trade, to advancement through their work, and to sufficient remuneration for the satisfaction of their needs and those of their families; moreover, under no circumstances may they be discriminated against on account of their gender. 2. The law shall establish a Workers' Statute." Cf. The Spanish Constitution (31.10.1978). Available: <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf> [last viewed 30.06.2022].

¹⁵ Cf. e.g. *Mertens, T.* A Philosophical Introduction to Human Rights. Cambridge: Cambridge University Press, 2020, p. 25; *Collins, H., Lester, G., Mantouvalou, V.* Introduction: Does Labour Law Need Philosophical Foundations? In: *Philosophical Foundations of Labour Law*, *Collins, H., Lester, G., Mantouvalou, V.* (eds). Oxford: Oxford University Press, 2018, p. 13.

¹⁶ Federal Constitutional Law in Austria (1920, as amended). Available: https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.html [last viewed 30.06.2022].

¹⁷ Basic Law for the Federal Republic of Germany (8.05.1949). Available: https://www.gesetze-im-internet.de/englisch_gg/ [last viewed 30.06.2022].

¹⁸ Constitution of France (4.10.1958). Available: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf [last viewed 30.06.2022].

¹⁹ *Nowak, M.* Prawo do godziwego wynagrodzenia w konstytucjach państw europejskich. *Praca i Zabezpieczenie Społeczne*, No. 5, 2002, p. 12.

²⁰ The impact of political and economic reforms in Central and Eastern European countries on the minimum wage system is discussed by *Kohl, H., Platzer, H.-W.* Minimum wages in Central and Eastern Europe. In: *Minimum wages in Europe*, *Schulten, T., Bispinck, T., Schäfer, C.* (eds). Brussels: ETUI-REHS, 2006, p. 177 ff.

that allows them and their families to have a decent standard of living (e.g. Poland). Hence, it may be observed that there is no direct link between regulating minimum wages in national constitutions and ratification of individual acts of international and European law²¹.

2. Comparative overview of sub-constitutional regulations

The basis for the minimum wage established by the constitution may be substantiated by way of statute or by collective agreement. Under the statutory model, the constitutional provisions are made more specific in a statute, which may also contain a delegation to set the amount of the minimum wage in lower-order government regulations. As regards the states under study, such a method has been applied in Germany, France, Portugal, Spain, Romania and Poland.

In Germany, the minimum wage is governed by the Minimum Wage Act of 11.08.2014 (MiLoG)²². Its amount is set by the Government based on the proposal made by the Minimum Wage Commission (in German – *Mindestlohnkommission*). In France, the minimum wage is regulated primarily by the Labour Code²³, particularly in Articles L.3231-2 to L.3231-11, while its amount is fixed by decree. Likewise, in Portugal, the constitutional obligation to establish and update the minimum wage is further detailed in Articles 273 and 274 of Labour Code Law No. 7/2009 of 12.02.2009²⁴, with the amount of the minimum wage set by decree²⁵. In Spain, Article 27 of the Workers' Statute²⁶ plays an important role in formulating, among other things, the criteria for fixing the minimum wage. The amount thereof is determined by way of a decree. In Romania, the minimum wage is regulated by the Labour Code²⁷. Pursuant to Article 164(1) of the Labour Code, its amount is fixed through a decision of the Romanian government. Similarly, the obligation arising from Article 65(4) of the Polish Constitution to regulate the minimum wage was effected in Poland by the Act of 10.10.2002²⁸, whereas the amount of this remuneration is determined by the government ordinance²⁹.

Under the collective bargaining model, the issue of minimum wages is subject to collective labour agreements. This model is in place in Austria and Italy. Under Austrian law, the minimum wage is determined by social partners through collective

²¹ Cf. Bomba, K. Minimalne wynagrodzenie, p. 180 ff.

²² Gesetz zur Regelung eines allgemeinen Mindestlohns, Federal Law Gazette I, p. 1348 (as amended). Available: <https://www.gesetze-im-internet.de/milog/> [last viewed 30.06.2022].

²³ Code du travail. Available: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072050/ [last viewed 30.06.2022].

²⁴ Lei n.º 7/2009, Código do Trabalho, Diário da República n.º 30/2009, Série I de 2009-02-12, consolidated text. Available: <https://dre.pt/dre/legislacao-consolidada/lei/2009-34546475> [last viewed 30.06.2022].

²⁵ Direção-Geral do Emprego e das Relações de Trabalho (DGERT), Ministério do Trabalho, Solidariedade e Segurança Social (MTSSS), Evolução da Remuneração Mínima Mensal Garantida (RMMG). Available: <https://www.dgert.gov.pt/evolucao-da-remuneracao-minima-mensal-garantida-rmmg> [last viewed 30.06.2022].

²⁶ Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, Boletín Oficial del Estado n.º 255, 24.10.2015. Available: <https://www.boe.es/buscar/act.php?id=BOE-A-2015-11430> [last viewed 30.06.2022].

²⁷ Codul Muncii, 24.01.2003, Legea nr. 53/2003, Monitorul Oficial nr. 345/18.05.2011. Available: <https://legislatie.just.ro/Public/DetaliiDocument/41627> [last viewed 30.06.2022].

²⁸ Act of 10.10.2002 on the minimum wage, consolidated text, Journal of Laws of 2018, item 2177 as amended.

²⁹ Cf. Hajn, Z. In: Labour Law in Poland, Hajn, Z., Mitrus, L. Warsaw: Wolters Kluwer, 2019, pp. 130–131.

bargaining³⁰. Statutory instruments provide a supplementary method for fixing minimum wages for groups of workers not subject to minimum rates established through collective bargaining. It is worth mentioning in this context the Austrian Collective Labour Relations Act of 14.12.1973³¹ and the Anti-Wage and Social Dumping Act of 28.04.2011³². Similarly, in Italy, there is no statute explicitly addressing the issue. Minimum wages are fixed through collective bargaining, the legal framework for which is provided by the state. However, it should be noted that there is an ongoing discussion regarding the introduction of statutory minimum wage regulation³³. In this respect, E. Menegatti concludes that it would be best to fix a minimum level of remuneration based on a sectoral collective bargaining agreement concluded by the most representative trade unions, combined with a solution involving the adoption of a statutory minimum wage for workers outside an employment relationship³⁴. It is important to note that the government approved the text of the Update Note to the Economic and Financial Document on 5.10.2020³⁵. This document addresses the recovery of the Italian economy in the period 2021–2023, and one of the methods is expected to be the statutory regulation of the minimum wage.

The above overview shows that the statutory method is used both in states that have thoroughly regulated the minimum wage in their constitution (e.g. Portugal) and in those countries where the Constitutions do not explicitly refer to the minimum wage (e.g. Germany, France). In the Austrian Constitution, where the collective bargaining mechanism applies, there are no references to social rights. Meanwhile, in Italy, where a collective bargaining mechanism has also been adopted, the constitution formulates the right to fair remuneration. As a result, it must be assumed that the way in which the minimum wage is regulated at the constitutional level does not, in principle, exert a direct influence on the design of the minimum wage mechanism in the country concerned³⁶.

3. Structure of domestic minimum wage fixing mechanisms

3.1. Statutory mechanisms

In those states where statutory mechanisms are in place, it is generally accepted that the minimum wage is regulated through statutes and lower-order government regulations. These mechanisms are not identical and differ, in particular, in the form of involvement of the social partners. In my view, two alternatives can be distinguished in this respect. The first option means the involvement of the social partners in this

³⁰ Cf. *Hermann, Ch.* Minimum wage in Austria. In: *Minimum wages in Europe. Schulten, T., Bispinck, R., Schäfer, C.* (eds). Brussels: ETUI-REHS, 2006, p. 304 ff.

³¹ Bundesgesetz vom 14. Dezember 1973 betreffend die Arbeitsverfassung (Arbeitsverfassungsgesetz – ArbVG), BGBl. Nr. 22/1974. Available: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008329> [last viewed 30.06.2022].

³² Lohn- und Sozialdumping-Bekämpfungsgesetz, BGBl. I Nr. 44/2016. Available: <https://www.ris.bka.gv.at/eli/bgbl/I/2016/44> [last viewed 30.06.2022].

³³ Cf. *Bellavista, A.* Il salario minimo legale. *Diritto delle Relazioni Industriali*, No. 3, XXIV-2014, p. 743 ff.

³⁴ *Menegatti, E.* Wage-setting in Italy: The Central Role Played by Case Law. *Italian Labour Law e-Journal*, Vol. 12, Issue 2, 2019, p. 66. Available: <https://doi.org/10.6092/issn.1561-8048/10017> [last viewed 30.06.2022].

³⁵ Documento di Economia e Finanza 2020 Nota di Aggiornamento, Deliberata dal Consiglio dei Ministri il 5 ottobre 2020. Available: https://www.dt.mef.gov.it/export/sites/sitodt/modules/documenti_it/analisi_progammazione/documenti_programmatici/nadef_2020/NADEF_2020_Pub.pdf [last viewed 30.06.2022].

³⁶ Cf. *Bomba, K.* Minimalne wynagrodzenie, p. 190 ff.

mechanism and takes the form of consultation. In the second option, the social partners co-decide together with the public authorities on the minimum wage rate³⁷.

The first variant of the statutory mechanism – based on consultations – assumes that the minimum wage is set by the public authority after consulting the social partners. Despite the prevalence of this formula, the solutions adopted in states are not consistent as regards the body with which the public authority has to fulfil its consultation obligation. To this extent, an interesting solution has been adopted in Spain, where the consultation of employers' and workers' organisations is carried out with the assistance of a body established *ad hoc*³⁸. Pursuant to Article 27(1) of the Workers' Statute, the government shall fix the interprofessional minimum wage each year after consultation with the most representative trade unions and employers' organizations³⁹. D. Pérez del Pedro points out that disregarding the consultation process would prejudice the invalidity of the decree fixing the minimum wage. Consultation is therefore mandatory but non-binding. In this context, the author states that the government is free to decide, regardless of the results of the consultation⁴⁰. In turn, M. Llompart Bennàssar remarks that the consultation may turn into a negotiation based on indicators presented by the government if the social partners and the government wish to do so⁴¹.

In general, however, the consultations between the public authorities and employers' organisations and trade unions are carried out through permanently operating tripartite bodies. These are usually Economic and Social Councils, and their mandate is not limited to wage-related issues. Such a mechanism exists, for instance, in Portugal⁴². According to Article 273(1) of the Labour Code, the amount of the minimum wage shall be determined after consultation with the Standing Committee for Social Dialogue (Pt. *Comissão Permanente de Concertação Social*). Pursuant to Articles 2 and 6 of Law No. 108/91⁴³, it constitutes a body of the Economic and Social Council (Pt. *Conselho Económico e Social*). Similarly, in Romania, according to Article 164(1) of the Labour Code, the minimum wage is fixed through a government decision (Rom. *hotărâre a Guvernului*) following consultations with trade unions and employers, which, as per Article 78(a) of Law No. 62/2011 on social dialogue⁴⁴ take place within the framework of the Tripartite National Council (Rom. *Consiliulul Național Tripartit*).

Similarly, the minimum wage in France is fixed following consultation within a permanent body of a tripartite nature⁴⁵. According to Article R.3231-1 of the Labour

³⁷ Cf. Bomba, K. Minimalne wynagrodzenie, p. 287 ff.

³⁸ Cf. Recio, A. The statutory minimum wage in Spain. In: Minimum wages in Europe, Schulten, T., Bispinck, R., Schäfer, C. (eds). Brussels: ETUI-REHS, 2006, p. 151 ff.

³⁹ Pérez del Prado, D. El Salario Mínimo Interprofesional en el debate jurídico y económico. Revista de Información Laboural, issue 1, 2017, part II.2; Paillisser, J.-B. Le droit social en Espagne. Paris: Lamy, 1998, p. 65.

⁴⁰ Pérez del Prado, D. El Salario Mínimo Interprofesional, part II.2.

⁴¹ Llompart Bennàssar, M. La subida del salario mínimo interprofesional: repercusiones en la esfera Laboral y de seguridad social. Trabajo y Derecho, issue 57, 2019, part II.2.

⁴² Schulten, T., Müller, T. Between Poverty Wages And Living Wages, p. 108 ff.

⁴³ Lei n.º 108/91, *Conselho Económico e Social*, Diário da República n.º 188/1991, Série I-A de 1991-08-17. Available: <https://dre.pt/dre/legislacao-consolidada/lei/1991-58928557> [last viewed 30.06.2022].

⁴⁴ Lege nr. 62 din 10 mai 2011, dialogului social (republicată), Monitorul Oficial nr. 625 din 31 august 2012. Available: <https://legislatie.just.ro/Public/DetaliiDocument/128345> [last viewed 30.06.2022].

⁴⁵ Aftalion, F. Le salaire minimum. Nice: Libréchange, 2017, p. 21 ff.; Schmid, B., Schulten, T. The French minimum wage (SMIC). In: Minimum wages in Europe, Schulten, T., Bispinck, R., Schäfer, C. (eds). Brussels: ETUI-REHS, 2006, pp. 126–131.

Code, the Council of Ministers is competent to issue a decree on the minimum wage, after consulting the National Commission for Collective Bargaining, Employment and Vocational Training (Fr. *Commission nationale de la négociation collective de l'emploi et de la formation professionnelle*). The National Commission submits to the Minister of Labour a reasoned position on the level of the minimum wage. It does so after reviewing the annual report on the increase in the minimum wage prepared by the Group of Experts (Article L.2271-1(5) of the Labour Code)⁴⁶. Before submitting its report, the Group of Experts hears the representatives of employers' organizations and trade unions that are part of the National Commission for Collective Bargaining and attaches their opinions to its report (Article 2 of Decree No. 2013-123 of 7.02.2013 on the conditions for the valorisation of the minimum wage⁴⁷).

Against the background of the above-mentioned regulations, an exceptional solution has been implemented in Germany, where the procedure for fixing the minimum wage is based on cooperation between the federal government and the special commission⁴⁸. The federal government has set up a permanent Minimum Wage Commission which prepares proposals to change the minimum wage (§ 4 (1) MiLoG). The commission presents its position on the minimum wage to the federal government with proper justification every two years (§9 (1) and (4) MiLoG). The federal government can adjust the minimum wage based on the Commission's proposal by issuing a regulation. However, it cannot introduce amendments to the Commission's proposals (§ 11 MiLoG)⁴⁹. Therefore, the Commission's recommendation is not binding, but rejecting it and fixing a different remuneration rate is not left to the arbitrary discretion of the government⁵⁰.

The second variant of the statutory mechanism – based on co-decision involving both the public authority and the social partners – involves fixing the minimum wage either by tripartite bodies or by special committees⁵¹. The model in question differs from the previous one in that the government is bound by the decision of such an entity and fixes the minimum wage following its conclusions. Thus, the burden of the decision regarding the minimum wage is transferred to the entity which remains structurally outside the public authority. Only if no agreement is reached by such an entity is the minimum wage fixed by the government. In my opinion, Poland should qualify under this model.

⁴⁶ Cf. Rapport du Groupe d'Experts, *Salaire Minimum Interprofessionnel de Croissance* (26.11.2021), p. 5 ff. Available: <https://www.tresor.economie.gouv.fr/Articles/284b121f-b187-4280-b327-05f18064c3fa/files/36296c31-5b87-4e8c-a4ac-62a9c63d5ae1> [last viewed 30.06.2022].

⁴⁷ Décret n° 2013-123 du 7 février 2013 relatif aux modalités de revalorisation du salaire minimum de croissance, NOR: ETSX1301417D, JORF n°0033 du 8 février 2013. Texte n° 17. Available: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000027041943> [last viewed 30.06.2022].

⁴⁸ Nyklewicz, K. Minimum wage and its impact on the job market in Germany. *Olsztyn Economic Journal*, Vol. 11, issue 2, 2016, p. 153 ff. Available: <https://doi.org/10.31648/oj.2917> [last viewed 30.06.2022].

⁴⁹ Cf. *Deinert, O.* Wage-setting in a System of Self-Regulation through Collective Private Autonomy. *Italian Labour Law e-Journal*, Vol. 12, issue 2, 2019, p. 8. Available: <https://doi.org/10.6092/issn.1561-8048/10138> [last viewed 30.06.2022].

⁵⁰ See also *Hu, Q.* An incomplete breakthrough: Questioning the momentum and efficiency of Germany's minimum wage law. In: *European Labour Law Journal*, Vol 9, issue 1, 2018, p. 96. Available: <https://doi.org/10.1177/2031952517752168> [last viewed 30.06.2022].

⁵¹ The ILO Committee of Experts has classified such procedures in the category of tripartite minimum wage fixing machinery. For more details, see: International Labour Organization, Committee of Experts on the Application of Convention and Recommendation, General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), Report III (Part 1B). Geneva 2014, p. 54.

In Poland, pursuant to Article 2 of the Act on Minimum Wage, its amount is negotiated annually within the Council for Social Dialogue, which is a tripartite body bringing together representatives of public authorities, employers and workers⁵². Negotiations are conducted following the proposal put forward by the government⁵³. Should the Council for Social Dialogue fail to agree on the amount of the monthly minimum wage or the minimum hourly rate, the government shall determine them by way of ordinance no later than 15 September each year. The values fixed by the government may not be lower than the rates previously proposed to the Council of Social Dialogue⁵⁴. It needs to be recognized that the difficulties in reaching an agreement through the tripartite dialogue result in the fact that, in practice, it has become a rule in Polish law that the minimum remuneration for work is set by the government and not by the Council for Social Dialogue. Therefore, in my opinion, social partners in Poland, in practice, primarily play an opinion-making role in shaping the level of the minimum remuneration for work⁵⁵.

In light of the above overview, one can assume that within the framework of the statutory mechanism, the preferred form of participation of social partners in the discussed mechanism in individual states is consultation (the first option).

3.2. Collective bargaining mechanisms

As already indicated, the collective bargaining mechanism has been adopted in Italy and Austria. In Italy, Article 36 of the Constitution formulates the principle of equivalent and fair remuneration. In order to implement it in line with the Constitution, the division of skills has been established between the social partners and the legislator. It is the responsibility of the former to ensure by way of a collective agreement that remuneration is adequate for the work performed, while it is the responsibility of the legislator to ensure that this remuneration is fixed at a level sufficient to provide the worker and his/her family with a decent living. The social partners are well equipped to define the value of work in relation to specific sectors and occupational groups. The role of the legislator, on the other hand, is limited to ensuring that wages are fixed at a fair level and that they guarantee that public interests of a social, political and economic nature are satisfied, even if this were to lead to interference in the freedom of collective bargaining, for example, by extending the scope of sectoral collective bargaining agreements. Consequently, this makes constitutional monitoring of the determination of fair wages possible⁵⁶. On the other hand, in Austria, the minimum wage is, in principle, determined by way of collective bargaining agreements, which are most often sectoral in nature. Their application

⁵² Cf. *Zieleniecki, M.* On a new Formula for Social Dialogue at the National Level. In: Trade unions and non-union employee representation in Europe – the current state of play and prospects for the future, *Carby-Hall, J., Rycak, M.* (eds). Warsaw: C. H. Beck, 2016, p. 187 ff.

⁵³ *Lekston, M.* Social dialogue. In: Polish Collective Employment Law, *Baran, K.W.* (ed.). Warszawa: C. H. Beck, 2019, p. 146 ff.; *Wujczyk, M.* Social Dialogue. In: Outline of Polish Labour Law System, *Baran, K. W.* (ed.). Warsaw: Wolters Kluwer, 2016, p. 416 ff.

⁵⁴ *Mróz, E.* Minimalne wynagrodzenie zatrudnionych w postindustrialnej Polsce i Niemczech. In: *Zatrudnienie w epoce postindustrialnej*, *Godlewska-Bujok, B., Walczak, K.* (eds). Warsaw: C. H. Beck, 2021, s. 244.

⁵⁵ Also *Wrątny, J.* Minimalne wynagrodzenie za pracę – nowe regulacje prawne. *Praca i Zabezpieczenie Społeczne*, No. 6, 2003, p. 5.

⁵⁶ *Menegatti, E.* Wage-setting in Italy: The Central Role Played by Case Law. *Italian Labour Law e-Journal*, Vol. 2, issue 2, 2019, p. 59 ff. Available: <https://doi.org/10.6092/issn.1561-8048/10017> [last viewed 30.06.2022]. At the same time, the author points out that Article 39 of the Constitution which allows the extension of the application of sectoral collective agreements has not yet been applied in practice.

can be extended by the Federal Conciliation Commission to workers not covered by the agreements.

The dichotomous divide between countries with a statutory mechanism and a collective bargaining mechanism is not separable in nature. In states where the minimum wage is fixed by statute, collective bargaining may result in a higher minimum wage for particular groups of workers. In such a situation, the statutory minimum wage rate is universal, while the collective bargaining rate applies to specific groups of workers on a preferential basis⁵⁷. As far as the countries where collective bargaining is the main mechanism for fixing the minimum wage are concerned, statutory regulations are of a subsidiary character. They can be applied to groups of workers not covered by a collective bargaining agreement, as, for example, in Austria⁵⁸.

4. Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages

Over the last few years, the European Union has seen a departure from the neoliberal narrative focused on increasing the competitiveness of national economies by making labour markets more flexible and lowering the cost of labour. T. Schulten and T. Müller note that the new direction in EU discourse is marked by the formula of Social Europe, where labour protection standards and social security systems play a major role in ensuring economic development and political stability⁵⁹. The above change was reflected in 2017 with the adoption of the European Pillar of Social Rights⁶⁰. In the context of the minimum wage, particular attention should be paid to section 6 of the Pillar, which states that an adequate minimum wage shall be ensured in a way that provides for the satisfaction of the needs of the worker and his / her family in the light of the national economic and social conditions while safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented. As a follow-up to this commitment, the European Commission presented a proposal for a Directive on adequate minimum wages in the European Union in 2020.

The draft Directive is concerned primarily with the mechanisms employed to fix minimum wages, seeking to ensure that workers are guaranteed minimum wages – in an adequate amount – by way of statutory instruments or collective agreements.⁶¹ Article 1 of the draft merely lays down a framework to improve the adequacy of minimum wages and increase workers' access to minimum wage protection, yet it does not aim at either harmonizing minimum wage rates across the Union or establish a uniform mechanism for fixing minimum wages, nor does it affect

⁵⁷ In Spain, for example, the applicability of the statutory minimum wage is limited due to the protection provided by collective agreement in this respect. See *Pérez del Prado, D.* El Salario Mínimo Interprofesional..., part II.1.

⁵⁸ International Labour Organization, Committee of Experts... *General Survey...* Geneva, 2014, p. 50 ff.

⁵⁹ Cf. *Schulten, T., Müller, T.* A paradigm shift towards Social Europe? The proposed Directive on adequate minimum wages in the European Union. *Italian Labour Law e-Journal*, Vol. 14, issue 1, 2021, p. 6. Available: <https://doi.org/10.6092/issn.1561-8048/13368> [last viewed 30.06.2022].

⁶⁰ Inter-institutional Proclamation on the European Pillar of Social Rights, Official Journal of the European Union. C 2017/428/10. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017C1213%2801%29> [last viewed 30.06.2022].

⁶¹ *Lübker, M., Schulten, T.* WSI Minimum Wage Report 2022. Towards a new Minimum Wage Policy in German and Europe. Report No. 71, March 2022. WSI Institute of Economics and Social Research 2022, p. 4.

the freedom of the Member States as they fix statutory minimum wages or support access to minimum wage protection provided for in collective agreements. Moreover, those Member States in which minimum wage protection is only provided for by collective agreements are not obligated to institute a statutory minimum wage or to apply collective agreements across the board. Furthermore, the draft does not define a hierarchy between statutory solutions and collective bargaining as methods to fix minimum wages, allowing the States to choose their preferred mechanism freely in line with the particular features of their national systems, national competencies, the autonomy of the social partners and freedom of contract.⁶² With regard to the above, A. Aranguiz and S. Garben state that the Member States will retain the competence to determine their minimum wages, by collective agreement or by statutory provisions, provided that the national regulations comply with the EU criteria for fixing adequate minimum wages⁶³.

At the same time, the draft formulates the requirements to which national mechanisms for fixing an adequate minimum wage should conform. Firstly, in the case of a statutory mechanism, states should ensure the actual participation of social partners in fixing and adjusting minimum wages. According to Article 7 of the draft, Member States shall take the necessary measures to ensure that the social partners are involved in a timely and effective manner in statutory minimum wage setting and updating, including through participation in consultative bodies referred to in Article 5(5). The provisions of the Directive do not set forth detailed rules for such cooperation but draw attention to the need to have social partners involved in the activities of advisory bodies. The operation of the latter is provided for in the abovementioned Article 5(5) of the Directive, pursuant to which the Member States shall establish consultative bodies to advise the competent authorities on issues related to statutory minimum wages.

Secondly, the draft seeks to strengthen the role of collective bargaining in all Member States of the Union⁶⁴. It underlines the importance of collective bargaining in ensuring wage adequacy and states the need to create the conditions in which it may take place. Therefore, regardless of the adopted type of mechanism, as per Article 4(1) of the proposal, Member States should create a favourable environment in which the wages can be agreed upon. To this end – in consultation with the social partners – the states must take steps to increase the scope of collective bargaining in that they, for example, support social partners to develop and strengthen their capacity to engage in collective bargaining over wage-fixing at the sectoral or cross-sectoral level and encourage social partners to engage in constructive, substantial and informed negotiations concerning pay. Meanwhile, Article 4(2) of the draft Directive provides that countries in which the scope of collective bargaining does not exceed 70% of the workforce should also establish a framework of favourable conditions for collective bargaining in consultation or agreement with the social partners and adopt an action plan to promote collective bargaining. According to Recital 19 of the preamble, this framework should be established by law or by way of a tripartite agreement.

⁶² COM(2020) 682 final, p. 3, substantiation.

⁶³ Aranguiz, A., Garben, S. Combating income equality in the EU: a legal assessment of a potential EU minimum wage directive. *European Law Review*, Vol. 2, 2021, p. 164.

⁶⁴ Visentini, L. Directive on Adequate Minimum Wages: European institutions must respect the promise made to workers! *Italian Labour Law e-Journal*, Vol. 14, issue 1, 2021, p. 35. Available: <https://doi.org/10.6092/issn.1561-8048/13371> [last viewed 30.06.2022].

When assessing the implications of the adoption of the Directive for domestic legal orders, attention should be paid to the fact that it is a legally binding instrument that provides for the introduction of a legal framework for minimum wage fixing mechanisms. The adoption of the Directive will therefore require Member States to fulfil their obligations stemming from it.

When it comes to the obligation to ensure that public authorities and social partners are consulted under the mechanism, it should be noted that most of the states under review provide for appropriate solutions in this regard⁶⁵. This way, the obligation under Article 7 of the Directive is fulfilled⁶⁶. The situation is different in Poland, where the adoption of the Directive will necessitate the introduction of a procedure of consultation of public authorities with social partners if the negotiations on fixing the minimum wage prove unsuccessful⁶⁷. The Spanish regulation, which has been subject to reservations regarding the actual nature of consultations with employers' representatives and workers' representatives, is also potentially in need of revision⁶⁸.

Moving on to the states' obligation to strengthen collective bargaining, it should be noted that in most EU Member States it will be necessary to take steps to implement this obligation. Collective bargaining coverage exceeds 70% in only 10 out of 27 states. This indicator has been achieved in Austria, France, Spain, Portugal and Italy, among others. Poland (where collective bargaining coverage is below 14%) faces a greater challenge in implementing the Directive than any of the analysed countries.⁶⁹ In connection with the proposal for a Directive, M. Fuchs draws attention to the necessity of introducing an action plan to strengthen collective bargaining in Germany, where the subjective coverage of such bargaining stands at 44%.⁷⁰ According to E. Menegatti, in particular states the strengthening of company collective bargaining on a sectoral level could be achieved through state intervention in two areas. The first area would involve the introduction of legislation favouring the development and spread of sectoral and intersectoral autonomous collective bargaining. To this end, states could adopt a range of measures to enhance the capacity of social partners to participate in collective bargaining through, *inter alia*, training, provisions to facilitate trade union access to workplaces, benefits for employers for their participation in intersectoral collective agreements or their membership in an employers' organisation. The second area of state intervention would include differentiated support for collective bargaining, such as the introduction of a mechanism for extending sectoral agreements. The cited

⁶⁵ Cf. *Pasquier, T.* Proposal for a Directive on adequate minimum wages in the European Union: A look at French law. *Italian Labour Law e-Journal*, Vol. 14, issue 1, 2021, p. 79. Available: <https://doi.org/10.6092/issn.1561-8048/13373> [last viewed 30.06.2022].

⁶⁶ Cf. *Fuchs, M.* Notes on the proposal for a directive on adequate minimum wages: A German perspective. *Italian Labour Law e-Journal*, Vol. 14, issue 1, 2021, p. 72. Available: <https://doi.org/10.6092/issn.1561-8048/13372> [last viewed 30.06.2022].

⁶⁷ *Surdykowska, B. Pisarczyk, Ł.* The Impact of the Directive on Adequate Minimum Wages in the European Union on Polish Labour Law. *Italian Labour Law e-Journal*, Vol. 14, issue 1, 2021, p. 97. Available: <https://doi.org/10.6092/issn.1561-8048/13374> [last viewed 30.06.2022].

⁶⁸ Unión General de Trabajadores de España. Consideraciones de la U.G.T. de España acerca de la aplicación del Convenio No 131 y la Recomendación No 135 sobre salarios mínimos, not published, 2013, p. 2.

⁶⁹ Organisation for Economic Cooperation and Development. How do collective bargaining systems and workers' voice arrangements compare across OECD and EU countries? Data from 2018 or more recent data available: <https://www.oecd.org/employment/ictwss-database.htm> [last viewed 30.06.2022].

⁷⁰ *Fuchs, M.* Notes on the proposal, p. 70.

author indicates that the Directive does not impose these solutions, but Member States are free to adopt them after consulting the social partners⁷¹.

The high requirements for strengthening collective bargaining may contribute to replacing the agreement-based mechanism for fixing the minimum wage with a statutory mechanism. The adoption of the Directive may produce this effect in Italy⁷². M. Delfino highlights the difficulties in reforming the Italian trade union organisational model and the fact that this model does not allow for the implementation of the EU Directive on adequate minimum wages. Therefore, the legislative intervention is required, the extent of which should be further clarified⁷³. Implementation of the Directive may require amending the rules on trade union representativeness, supporting collective bargaining, or introducing a statutory minimum wage⁷⁴.

However, the adoption of the Directive does not necessarily imply a departure from a statutory to an agreement-based mechanism. For instance, according to the social partners in Austria, the collective mechanism for fixing the minimum wage is characterised by stability and almost universal subjective coverage. For these reasons, they fail to recognise the need for statutory regulation. Trade unions, in particular, fear that statutory regulation will become a reference point for collective bargaining, making collective agreement solutions dependent on the political situation. Such a development will eventually lead the trade unions to lose their autonomy in determining the amount of the minimum wage. It should be noted that the introduction of a statutory mechanism also raises controversies within political parties⁷⁵.

Summary

This analysis leads to the conclusion that domestically used mechanisms for fixing minimum wages are not uniform. The minimum wage in the analysed states is more often fixed by statute and lower-order government regulations (Poland, Germany, France, Spain, Portugal, Romania). The collective bargaining mechanism is used less frequently (Austria, Italy). The type of employed mechanism varies depending on country-specific traditions and additional legal solutions.

Cooperation between government and social partners permits consideration of the needs and priorities of those most affected by minimum wage policies. It also fosters greater acceptance on the part of the social partners of minimum wage decisions. In general, national legislators recognise these regularities, providing for the participation of the social partners in statutory mechanisms. Yet they do not agree on the formula for their involvement. In the majority of states, tripartite bodies, comprising the government, employers' organisations and trade unions, take on the central role (Poland, France, Portugal). Sometimes, however, the national mechanism provides for the interaction of employers' and workers' representatives in bilateral bodies (Germany). Moreover, domestic legislators generally assume

⁷¹ *Menegatti, E.* Much ado about little: The Commission proposal for a Directive on adequate wages. *Italian Labour Law e-Journal*, Vol. 14, issue 1, 2021, p. 22. Available: <https://doi.org/10.6092/issn.1561-8048/13369> [last viewed 30.06.2022].

⁷² *Menegatti, E.* Wage-setting in Italy, p. 66.

⁷³ *Delfino, M.* The Proposal for the EU Directive on adequate Minimum Wages and its impact on Italy. *Italian Labour Law e-Journal*, Vol. 14, issue 1, 2021, p. 57. Available: <https://doi.org/10.6092/issn.1561-8048/13370> [last viewed 30.06.2022].

⁷⁴ *Delfino, M.* The Proposal for the EU Directive, pp. 62–63.

⁷⁵ *Schulten, T., Müller, T.* Between Poverty Wages, p. 23.

that the role of the social partners takes the form of consultation. In this context, the Polish legal regulation stands out, as it gives priority to cooperation between the representatives of the government, the employers' organizations and the trade unions within the Social Dialogue Council, and subsequently, it allows for unilateral fixing of the minimum wage by the government.

In view of the domestic mechanisms shaped in this way, the implementation of the proposal for a Directive on adequate minimum wages will not result in fundamental changes to the legal systems of individual states. The Directive will not lead to the harmonisation of domestic legal systems, which manifests itself, among other things, in leaving the states free to opt for either statutory or collective bargaining mechanisms. However, the new legal regulations will not remain indifferent to the way they are shaped as regards social partners' involvement. The fulfilment of the obligations arising from the Directive will require the Member States to introduce consultations between the public authorities and the social partners into their domestic mechanisms. In most cases, it will oblige them to take measures aimed at strengthening the role of collective bargaining.

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