



Report

Expert Group

Transposition of Directive (EU) 2022/2041 on
adequate minimum wages in the European Union

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Introduction

Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, hereinafter “the Directive”, establishes an EU framework for setting adequate statutory minimum wages, promoting collective bargaining on wages, and enhancing the effective access of workers to minimum wage protection. The Directive aims at improving the living and working conditions in the Union, in particular the adequacy of minimum wages for workers, in order to contribute to upward social convergence and reduce wage inequality. It is one of the key deliverables of the European Pillar of Social Rights Action Plan adopted in March 2021 since Principle 6 of the Pillar on ‘Wages’ calls for adequate minimum wages as well as for transparent and predictable wage setting to be put in place, according to national practices and respecting the autonomy of the social partners.

As for other Directives in the field of labour law, the Commission set up an Expert Group to advise and support DG EMPL in monitoring the correct and timely transposition of the Directive by Member States. The group discussed all the provisions of this Directive. Moreover, it gave national experts, social partners and the Commission services the opportunity to exchange views on the progress in the transposition of the Directive at national level. The Expert Group was composed of national experts representing the Governments of the twenty-seven Member States and European Social Partners.⁽¹⁾ The group was chaired by a representative of the Commission’s Directorate-General for Employment, Social Affairs and Inclusion (‘DG EMPL’).

DG EMPL provided secretarial support for the group. While aiming at supporting the exchange of views and favouring a better common understanding of the provisions of the Directive, the Commission services have not sought to interfere with the transposition process at national level in any way, nor to intervene in the right of interpretation of the Court of Justice, or other courts concerned. The same applies to the experts in the Expert Group who, in their countries, are responsible for producing draft legislation and/or monitoring discussions between the social partners as part of agreement-based transposition.

The Expert Group worked on the basis of working documents presented by the Commission services. A total of XX meetings were held between March and November 2023, during which the main issues arising from the implementation of the Directive were extensively discussed. This report is the result of these discussions.

The report aims at supporting the legislative work leading to the transposition of the Directive in Member States. It is by no means binding and is not to be considered as representing the official position of any government participating in the Expert Group nor that of the Commission or the European Social Partners⁽²⁾. The report does not in any way exonerate Member States from the responsibility of ensuring the correct transposition and application of the Directive, and it does not exempt the Commission from its obligation to monitor that work.

⁽¹⁾ The EEA/EFTA Member States were invited to take part in the discussions of the group but declined to participate as they had not yet reached a joint conclusion on the possible incorporation of the Directive into the EEA Agreement.

⁽²⁾ Where a position has been formally adopted by the Commission as an institution, the text refers to ‘the Commission’ and where the text contains the view of DG EMPL officials, the text refers to ‘the Commission services’. The view of ‘the Commission services’ are not binding on the institution.

1. Chapter I on General provisions

1.1. Subject matter (Article 1)

Article 1:

1. With a view to improving living and working conditions in the Union, in particular the adequacy of minimum wages for workers in order to contribute to upward social convergence and reduce wage inequality, this Directive establishes a framework for:

(a) adequacy of statutory minimum wages with the aim of achieving decent living and working conditions;

(b) promoting collective bargaining on wage-setting;

(c) enhancing effective access of workers to rights to minimum wage protection where provided for in national law and/or collective agreements.

2. This Directive shall be without prejudice to the full respect for the autonomy of the social partners, as well as their right to negotiate and conclude collective agreements.

3. In accordance with Article 153(5) TFEU, this Directive shall be without prejudice to the competence of Member States in setting the level of minimum wages, as well as to the choice of the Member States to set statutory minimum wages, to promote access to minimum wage protection provided for in collective agreements, or both.

4. The application of this Directive shall be in full compliance with the right to collective bargaining. Nothing in this Directive shall be construed as imposing an obligation on any Member State:

(a) where wage formation is ensured exclusively via collective agreements, to introduce a statutory minimum wage; or

(b) to declare any collective agreement universally applicable.

5. The acts by which a Member State implements the measures concerning minimum wages of seafarers periodically set by the Joint Maritime Commission or another body authorised by the Governing Body of the International Labour Office shall not be subject to Chapter II of this Directive. Such acts shall be without prejudice to the right to collective bargaining and to the possibility to adopt higher minimum wage levels.

Recital (18): *With a view to improving living and working conditions as well as upward social convergence in the Union, this Directive establishes minimum requirements at Union level and sets out procedural obligations for the adequacy of statutory minimum wages, and enhances effective access of workers to minimum wage protection, in the form of a statutory minimum wage where it exists, or provided for in collective agreements as defined for the purposes of this Directive. This Directive also promotes collective bargaining on wage-setting.*

Recital (19): *In accordance with Article 153(5) TFEU, this Directive neither aims to harmonise the level of minimum wages across the Union nor does it aim to establish a uniform mechanism for setting minimum wages. It does not interfere with the freedom of Member States to set statutory minimum wages or to promote access to minimum wage protection provided for in collective agreements, in accordance with national law and practice and the specificities of each Member State and in full respect for national*

competences and the social partners' right to conclude agreements. This Directive does not impose and should not be construed as imposing an obligation on the Member States where wage formation is ensured exclusively via collective agreements to introduce a statutory minimum wage or to declare collective agreements universally applicable. Moreover, this Directive does not establish the level of pay, which falls within the right of the social partners to conclude agreements at national level and within the relevant competence of Member States.

Recital (20): *This Directive takes into account that, in accordance with ILO Maritime Labour Convention (2006), as amended, Member States who ratified that Convention are, after consulting representative ship-owners' and seafarers' organisations, to establish procedures for determining minimum wages for seafarers. Representative ship-owners' and seafarers' organisations are to participate in such procedures. In light of their specific nature, the acts of Member States resulting from such procedures should not be subject to the rules on statutory minimum wages set out in Chapter II of this Directive. Such acts should not interfere with free collective bargaining between ship-owners or their organisations and seafarers' organisations.*

1.1.1. Main elements of the provision

Article 1 sets the aim of the Directive, which is to improve the living and working conditions in the Union, in particular the adequacy of minimum wages. This objective is reflected in the legal basis of the Directive, i.e., Articles 153(1)(b) and 153(2) TFEU.

There is minimum wage protection in all Member States. In some cases, it derives from legislative provisions (statutory minimum wages), while in others it is only provided by means of collective bargaining. These two systems may coexist in the same country. The Directive applies to all Member States and covers both systems. The different national traditions in Member States should be respected.

The modalities for reaching the objectives of the Directive will depend on the minimum wage setting systems in place in each Member State.

Article 1(1) indicates that the Directive establishes a framework for (i) the adequacy of minimum wages, (ii) the promotion of collective bargaining on wage setting, and (iii) effective access of workers to minimum wage protection where it exists. The three indents in Article 1(1) reflect the structure of the Directive.

The Directive requires Member States to create the conditions for adequate minimum wage protection in accordance with national law and practice. It sets out procedural obligations for Member States to comply with. The Directive does not contain any provision creating individual rights to a minimum wage.

Article 1(2) to 1(4) specifies what the Directive does not do in line with the Treaty limitations, notably Article 153(5) as interpreted by the Court of Justice of the European Union.

- Article 1(2) states that nothing in the Directive interferes with the autonomy of the social partners, as well as their right to negotiate and conclude collective agreements.
- Article 1(3) clarifies that the Directive does not interfere with the competence of Member States in setting the level of minimum wages, as well as with their freedom to set statutory minimum wages, promote access to minimum wage protection provided for in collective agreements, or both.

- Article 1(4) stresses that the Directive does not impose any obligation to introduce a statutory minimum wage in Member States where it does not exist, nor to make collective agreements universally applicable. This concerns all minimum wage setting systems.

Article 1(5) allows for an ad-hoc exemption from Chapter 2 (statutory minimum wages) of the Directive for seafarers who are covered by minimum wage arrangements adopted under the ILO Maritime Labour Convention (MLC). Since the procedures set by the MLC involve bipartite negotiations between social partners in the maritime sector, the implementing decisions of Member States resulting from such procedures will be treated as if they were the outcome of collective bargaining for the purposes of the Directive. At the same time, seafarers remain within the scope of the Directive and therefore, even when they would be excluded from the application of Chapter 2, all the other provisions of the Directive apply to them. Moreover, social partners in the maritime sector remain free to negotiate the working conditions in the sector and set higher standards at national level.

1.2. Personal scope of the Directive (Article 2)

Article 2: *This Directive applies to workers in the Union who have an employment contract or employment relationship as defined by law, collective agreements or practice in force in each Member State, with consideration to the case-law of the Court of Justice of the European Union.*

Recital (21): *While complying with Regulation (EC) No 593/2008 of the European Parliament and of the Council⁽³⁾, this Directive should apply to workers who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, with consideration to the criteria established by the Court of Justice of the European Union for determining the status of a worker. Provided that they fulfil those criteria, workers in both the private and the public sectors, as well as domestic workers, on-demand workers, intermittent workers, voucher-based workers, platform workers, trainees, apprentices and other non-standard workers, as well as bogus self-employed and undeclared workers could fall within the scope of this Directive. Genuinely self-employed persons do not fall within the scope of this Directive since they do not fulfil those criteria. The abuse of the status of self-employed persons, as defined in national law, either at national level or in cross-border situations, is a form of falsely declared work that is frequently associated with undeclared work. Bogus self-employment occurs when a person is declared to be self-employed while fulfilling the conditions characteristic of an employment relationship, in order to avoid certain legal or fiscal obligations. Such persons should fall within the scope of this Directive. The determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and not by the parties' description of the relationship.*

1.2.1. Main elements of the provision

Article 2 defines the personal scope of the application of the Directive. It states that the Directive applies to workers as defined in national law, collective agreements or practice, taking into account the case-law of the Court of Justice of the European Union (CJEU).

This provision needs to be read together with Recital (21), which stipulates that, with a view to determining the status of a worker for the purposes of the Directive, the 'criteria' established by the CJEU have to be taken into account.

Furthermore, Recital (21) lists a series of cases of persons engaged in non-standard forms of employment (e.g., domestic workers, on-demand workers, intermittent workers, voucher-based workers, platform workers, trainees and apprentices and other non-standard workers), as well as bogus self-employed and undeclared workers, that would fall within the scope of the Directive should they fulfil the criteria established by the Court.

The Directive uses the same definition of a worker as that of Directive (EU) 2019/1152 on Transparent and Predictable Working Conditions in the EU (TPWC). The final report of the expert group on the transposition of this Directive provides an exhaustive discussion on the notion of worker in light of the case-law of the CJEU. The report was released in 2021 and is publicly available⁽⁴⁾.

⁽³⁾ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

⁽⁴⁾ <https://op.europa.eu/fr/publication-detail/-/publication/1d0f3b44-0b96-11ec-adb1-01aa75ed71a1/language-en/format-PDF/source-231250556>

This approach preserves the freedom of Member States to use their own definition of worker, as established in national law, collective agreements or practice, while avoiding a situation where Member States exclude at their discretion certain categories of persons who fulfil the criteria established by the CJEU from the benefit of the protection intended by the Directive, even though the relationship between those persons and their contractual partners is not substantially different from the relationship between persons having the status of worker under national law and their employer.

The terms 'personal scope' and 'coverage' should not be confused.

In the case of systems where minimum wage protection is provided for by collective agreements, referring to 'workers' in relation to the personal scope of the Directive does not mean that all workers must be covered by a collective agreement. Neither does it mean that a statutory minimum wage should be put in place for those workers who are not covered by a collective agreement. As specified in Article 1(4), the Directive does not impose any obligation to introduce a statutory minimum wage in Member States where this does not exist, or to make collective agreements universally applicable. The Directive fully respects the autonomy and collective bargaining freedom of the social partners.

As concerns statutory minimum wages, all those that can be defined as workers taking into account the criteria set by the CJEU, in both the private and public sectors, should be covered by the Directive, and therefore by relevant national provisions on statutory minimum wages. Therefore, civil servants are covered by the Directive. The Directive does not contain any exemptions or derogation for civil servants.

Finally, seafarers are not excluded from the scope of the Directive. Their specific situation is acknowledged in Article 1(5), which foresees that Chapter 2 of the Directive on 'statutory minimum wages' does not apply to the seafarers covered by the minimum wage setting arrangements adopted in accordance with the ILO Maritime Labour Convention. All the other provisions of the Directive apply to them.

1.2.2. Discussion

The main issues discussed were the following:

- The case-law of the CJEU on the concept of worker to be taken into consideration for defining the personal scope; and
- The qualification as workers of certain categories of working persons (e.g., civil servants, owners of a company without employees).

The Commission services explained that the CJEU has in some instances ⁽⁵⁾ considered that three elements (i) provision of labour, (ii) remuneration and (iii) subordination are characteristic of any employment relationship. This concerns workers in both the private and public sectors. Expert group participants were invited to **refer to the discussions held in the context of the expert group on the transposition of Directive (EU) 2019/1152** on transparent and predictable working conditions in the European Union (TPWC Directive) ⁽⁶⁾.

ETUC stressed the importance of the case-law of the CJEU for the definition of the personal scope of the Directive. In particular, it considered the **subordination criterion to be a key**

⁽⁵⁾ Judgment of 3 July 1982, Lawrie-Blum, C-66/85, EU:C:1986:284, paragraph 17.

⁽⁶⁾ See section '1.2. Personal scope of the Directive (Article 1(2))' of the final report of the expert group (<https://ec.europa.eu/social/BlobServlet?docId=24459&langId=en>).

element in determining the existence of an employment relationship. The Commission services agreed and emphasised again that the rulings of the CJEU have to be considered when defining the personal scope of the Directive and that the determination of the existence of an employment relationship should be guided by the actual performance of work and not by what has been declared by the parties, as explicitly stated in Recital (21).

A Member State expert indicated his/her adherence to the views set out in the Statement by Germany, supported by Hungary, in the Council of the European Union on 14 June 2019 concerning the definition of a worker used in the TPWC Directive, which would also be applicable to the Directive on adequate minimum wages in the EU. This protocol declaration states the following: *'Germany understands the reference in Article 1(2) [of the TPWC Directive] to the case-law of the Court of Justice of the European Union (CJEU) as relating to that court's case-law on ensuring the effectiveness of directives. According to that case-law, it is first and foremost Member States that define the employment relationship, if the directive in question refers to national law. That discretion is limited by the fact that Member States may not arbitrarily exclude certain categories of personnel.'*

A Member State expert stressed that it should be up to national law to set the definition of worker. The Commission services emphasised that the Directive respects the autonomy of Member States in defining the concept of 'worker'. However, Member States will have to establish, taking into consideration the case-law of the CJEU, whether certain persons are to be considered as workers for the purposes of the Directive and would therefore fall within its scope. This is something that Member States are already doing in the framework of the transposition of the TPWC Directive. All those who can be qualified as workers should be covered by the Directive. There is no distinction between employees and workers in EU law.

A Member State expert mentioned that in their country some **civil servants** are employed under private law contracts, while others are employed under public law contracts. He/she asked whether the latter would be exempted from the Directive. The Commission services explained that the Directive does not contain exemptions for civil servants. All those who can be classified as workers in both the private and public sector fall under the personal scope of the Directive. This includes civil servants, whether appointed by law or employed with a standard labour contract. The principle of 'organisational and procedural autonomy of Member States' is a general principle of EU law. However, this principle cannot be used as a basis for excluding certain categories of workers, such as civil servants, from the personal scope of the Directive.

Another Member State expert wondered why the criteria set by CJEU for determining the status of a worker were not included in Article 2 or Recital 21. The Commission services replied that the same approach was followed as for the TPWC Directive. For both Directives, the intention of the co-legislators was **not to pre-empt the continuously evolving case-law of the CJEU**.

Another Member State expert inquired whether an **owner of a company** who is also that company's only employee would be considered as a worker and thus fall under the scope of the Directive. The Commission services explained that this would have to be analysed against the criteria set in the case-law of the CJEU, but the criterion of 'subordination' may not apply in this case, and hence this category might not fall under the scope of the Directive.

A Member State expert inquired about whether they could adopt the same approach as the TPWC Directive in setting the scope of the minimum wage Directive. The Commission services replied that, as concerns the scope, Member States can use the same approach as in the case of the TPWC Directive, but the specificities of the minimum wage Directive must be taken into account. In this regard, Member States should pay attention to the

exemptions from statutory minimum wages that may exist at national level in order to ensure that workers are not excluded from the scope of the Directive. By contrast, in the systems relying on collective bargaining only, it might be the case that not all workers are covered by collective agreements, in light of the fact that the Directive does not contain any obligation to make them universally applicable, nor to introduce statutory minimum wages where they do not exist.

A Member State expert asked how the Directive would apply to countries with a hybrid minimum wage setting system. They also asked whether a Member State could have more than one national minimum wage. The Commission services explained that Member States would need to identify which parts of the economy and/or occupations were covered by a statutory minimum wage, and which were covered by minimum wage protection stemming from collective agreements. A country could have different statutory minimum wages per occupation, but all of them should comply with the provisions of the Directive.

Finally, a Member State expert explained that they have recently amended their system so that a minimum wage set in a collective agreement can also be considered as a statutory minimum wage if the collective agreement is extended. The Commission services replied that the fact that a collective agreement is made universally applicable does not necessarily transform the collectively agreed wage into a statutory minimum wage. The critical element to consider is the discretionary power of the declaring authority on the content of the applicable provisions of the collective agreement. This issue is addressed under Article 3(2) on the definition of statutory minimum wage.

1.3. Definitions (Article 3)

Article 3: *For the purposes of this Directive, the following definitions apply:*

(1) *'minimum wage' means the minimum remuneration set by law or collective agreements that an employer, including in the public sector, is required to pay to workers for the work performed during a given period;*

(2) *'statutory minimum wage' means a minimum wage set by law or other binding legal provisions, with the exclusion of minimum wages set by collective agreements that have been declared universally applicable without any discretion of the declaring authority as to the content of the applicable provisions;*

(3) *'collective bargaining' means all negotiations which take place according to national law and practice in each Member State between an employer, a group of employers or one or more employers' organisations on the one hand, and one or more trade unions on the other, for determining working conditions and terms of employment;*

(4) *'collective agreement' means a written agreement regarding provisions on working conditions and terms of employment concluded by the social partners that have the capacity to bargain on behalf of workers and employers respectively according to national law and practice, including collective agreements that have been declared universally applicable;*

(5) *'collective bargaining coverage' means the share of workers at national level to whom a collective agreement applies, calculated as the ratio of the number of workers covered by collective agreements to the number of workers whose working conditions may be regulated by collective agreements in accordance with national law and practice.*

1.3.1. Main elements of the provision

Article 3 of the Directive provides definitions to ensure a consistent interpretation of the provisions across Member States. These definitions are set for the purposes of the Directive only and do not replace the definitions set at national level for other purposes.

Article 3(1) 'minimum wage'

'Minimum wage' is defined as the minimum remuneration set by law or collective agreement that employers in both private and public sectors are required to pay their workers in exchange for work performed during a given period. The Directive provides full freedom to Member States in defining the specific elements that constitute minimum remuneration, taking into account national legislation.

Article 3(2) 'statutory minimum wage'

'Statutory minimum wage' is defined as the minimum wage set by law or other binding legal provisions. Minimum wages set by collective agreements declared universally applicable without any discretion of the declaring authority are not considered statutory minimum wages.

Article 3(3) 'collective bargaining'

'Collective bargaining' encompasses all negotiations held between an employer, a group of employers or one or more employers' organisations on the one hand, and one or more trade unions on the other hand, concerning working conditions and terms of employment and not solely wage-related clauses. Such negotiations do not necessarily lead to the conclusion of

collective agreements. This definition follows the ILO definition set in Convention 154 on collective bargaining. The Directive does not provide a specific definition of trade unions, leaving it up to the discretion of Member States.

Article 3(4) 'collective agreements'

The definition of 'collective agreements' covers all applicable collective agreements, including those declared universally applicable and those not including wage clauses. It follows the ILO Recommendation 91 on collective agreements.

Article 3(5) 'collective bargaining coverage'

The 'collective bargaining coverage' is defined as the ratio of the number of workers covered by collective agreements to the number of workers whose working conditions may be regulated by collective agreements in accordance with national law and practice. The numerator should take into account all relevant collective agreements, including those extended and those still in force from previous years, even if they do not contain wage clauses.

Workers covered by the extensions of collective agreements fall under Article 3 (5) and are considered both in the numerator and denominator. This applies regardless of whether they are unionised.

Member States are free to choose the data source for calculating the collective bargaining coverage. The Commission services would favour the use of the OECD/AIAS ICTWSS database to report on this indicator for reasons of data comparability and reliability ⁽⁷⁾.

1.3.2. Discussion

The main issues discussed were the following:

- The definition of minimum wage, in particular its components and the equivalent measure in collective agreements;
- The definition of statutory minimum wage, in particular the discretionary power of the declaring authority; and
- The definition of collective bargaining coverage and whether it should include collective agreements signed by non-trade union workers' organisations.

Article 3(1) 'minimum wage' and Article 3(2) 'statutory minimum wage'

A Member State expert inquired about the flexibility given to Member States on the definition of the **components of minimum wage** while another Member State expert asked whether allowances in kind could be considered as part of the minimum wage in light of the reference to them in recital (29). The Commission services indicated that it is up to Member States to define the elements to be taken into account, as long as they include the minimum elements provided in the definition in Article 3(1). They clarified that allowances in kind are one of the elements that a Member State can decide to include. At the same time, they noted that recital (29) concerns Article 6 on variations and deductions and, in this context, allowances

⁽⁷⁾ <https://www.oecd.org/employment/ictwss-database.htm>

in kind are mentioned as an example of a possible deduction that may not be justified and proportionate.

A Member State expert explained that in their collective agreement for the construction sector, different pay rates exist for workers with different experience levels and asked whether only the lowest rate should be considered as the minimum wage. The Commission services confirmed that this is the case. They also explained that where minimum wage protection is provided exclusively by **collective agreements**, a measure comparable to the statutory minimum wage will be the **lowest pay rates** provided for in collective agreements for the lowest paid occupations. A Member State expert added that there is no obligation stemming from the Directive to compare the minimum wage protection stemming from collective agreements with statutory minimum wages.

A Member State expert explained that in some sectors different pay scales exist in law for workers with different skill levels and asked whether the Directive should apply to all the levels within the scale or only the lowest one. The Commission services explained that the Directive concerns minimum wage protection and therefore it applies to the lowest wages or wage floors, not the entire pay scale.

ETUC objected to the use of the expression '*lowest pay rates*' as equivalent to the minimum wage provided for in collective agreements. In their view, the term '*remuneration*', used in Article 3(1) of the Directive, is broader and should include any other remuneration which is not contained in the pay scale. It explained that, as a result of negotiations between the social partners, collective agreements can sometimes provide additional remuneration for workers through other elements that are not reflected in the pay scale, and that this should not exclude them from minimum wage protection. The Commission services replied that the definition of minimum wage in Article 3(1) refers to the minimum (lowest) remuneration that an employer is required to pay to (any of its) workers, without taking into account the occupational group or personal circumstances of each worker. This usually corresponds, in the case of collective agreements, to the lowest pay rate. This is also how minimum wage protection provided in collective agreements is measured according to Article 10(2)(c) of the Directive and the Impact Assessment accompanying the Commission proposal. Nevertheless, if a specific collective agreement does contain an additional minimum remuneration that is not included in the pay scale and that an employer is required to pay to all workers, regardless of their personal circumstances, for the work performed during a given period, it would also have to be considered as part of the minimum wage in the sense of Article 3(1).

One Member State expert asked whether the wage formation system for civil servants, who are generally exempt from the right to collective bargaining for wage determination, should be considered as a statutory minimum wage under the Directive. Another Member State expert inquired about the situation in their country where negotiations between trade unions and government representatives in the public sector result in an agreement similar to a **collective agreement, which is then passed as law**. The Commission services confirmed that civil servants are covered by the scope of the Directive, and if their wages are not set through collective agreements, they would be subject to the statutory minimum wage system and therefore to the provisions of Chapter 2. To the question raised by the second Member State expert, the Commission services explained that each case will need to be analysed on a case-by-case basis. The situation in a country could be considered as that of a collective bargaining system only if the legislator sets in law the minimum wage negotiated by social partners without any discretionary power.

Two Member State experts asked how the term '*minimum wage*' should be interpreted in case different pay scales exist for different groups of civil servants. They asked if, in such a situation, there is one minimum wage which is the lowest wage of all pay scales or whether multiple minimum wages would exist, namely the lowest wages in each pay scale. The

Commission services replied that Member States can have different minimum wages for different occupations and that in such a case, the minimum wage corresponds to the lowest wage in the pay scale applicable to each specific occupation. It added that in case that multiple pay scales apply to the same occupation, the lowest pay scale should be considered as the minimum wage.

A Member State expert raised a question about the meaning of the term 'declaring authority' and whether it refers only to the administration. The Commission services clarified that the term refers to the authority who decides on the extension of the collective agreement or declares a collective agreement universally applicable. It is meant in a general sense to avoid getting into the specificities of national systems.

A Member State expert inquired about the articles of the Directive that would be applicable to minimum pay rates set in regulations for specific sectors, in a country where there is also a statutory minimum wage applicable to all workers. It explained that sectoral regulations were approved by the government on the basis of a proposal from joint labour committees or a labour court. The Commission services replied that, on the basis of the information provided, the minimum wage set in each of these sectoral regulations can be considered a '*minimum wage*' in the sense of Article 3(1) of the Directive, but not a '*statutory minimum wage*' in the sense of Article 3(2), since it appears that the declaring authority does not have discretion as to its content. Consequently, it would be subject to Articles 12 and 13, but not to Article 5 or the reporting obligations under Article 10(2)(b). In addition, Article 10(2)(c) would not be applicable to it, since this provision applies to cases where minimum wage protection is provided for *only* in collective agreements and, in any event, a sectoral regulation is not a collective agreement in the sense of Article 3(4).

Article 3(3) 'collective bargaining'

ETUC inquired whether Member States need to review and amend their definition of collective bargaining in case they use a different one at national level and whether a Member State providing the right to collective bargaining to authorized employee representatives would need to change their approach. The Commission services clarified that the definitions in the Directive are meant to ensure a consistent interpretation across Member States, and national definitions can be used for purposes other than the implementation of the Directive. In case non-trade-union organizations have the right to collective bargaining, only collective agreements concluded by trade unions would have to be considered for the purposes of the Directive.

A Member State expert asked whether the definition of collective bargaining (Article 3(3)) could also refer to negotiations that take place in the framework of tripartite bodies or bodies in which government parties participate. The Commission services clarified that the definition only includes negotiations between employers or employers' organizations and trade unions, but not tripartite negotiations.

Article 3(4) 'collective agreements'

A Member State expert asked whether pension agreements, which are the result of collective bargaining between social partners, fall within the scope of the definition of collective agreement. Another Member State expert asked whether collective agreements covering public sector employees that do not concern wage setting should be included in the definition. The Commission services confirmed that collective agreements on working conditions in general, not specifically on wages, have to be taken into consideration.

Article 3(5) 'collective bargaining coverage'

A Member State expert asked whether only **collective agreements** concluded by trade unions should be considered for the calculation of the collective bargaining coverage rate,

pointing out that in his country there are many company level agreements **not concluded by trade unions**, but by Works Councils. Another Member State expert pointed out that the definition of collective agreements set in Article 3(4) refers to agreements 'concluded by the social partners that have the capacity to bargain on behalf of workers' and not to those concluded by 'trade unions'. Hence, collective agreements concluded by workers' organizations other than trade unions that have the capacity to bargain on behalf of workers in accordance with national law should also be taken into account for the calculation of the collective bargaining coverage rate. By contrast, ETUC stressed that the requirement set by the Directive is clear and only collective agreements concluded by trade unions should be taken into account. While acknowledging the existing data constraints, ETUC argued that this could not justify deviating from the intentions of co-legislators and that the relevant databases need to be improved. It pointed out that agreements concluded by non-trade union organisations do not contribute to quality collective bargaining.

The Commission services indicated that, in their view, **only collective agreements concluded by trade unions should be taken into consideration**. When the definitions of collective bargaining (Article 3(3)) and collective agreement (Article 3(4)) are read jointly, it is clear that, in the intention of the co-legislators, only collective agreements signed by trade unions should be taken into account.

ETUC inquired how the Commission services would handle cases of divergence between the OECD database and Member States' calculations on collective bargaining coverage. The Commission services replied that, in case of substantial differences between the rate reported by Member States and the OECD database, the Commission would investigate the source of the difference with the Member State and decide on the way forward on a case-by-case basis.

A Member State expert asked whether different coverage rates should be calculated for different groups of workers, to which the Commission services replied that one single coverage rate should be calculated per Member State. Another Member State expert pointed out that the same worker may have multiple employment relationships at the same time, only some of which are covered by a collective agreement, and asked what this would mean for the calculation of the collective bargaining coverage rate. The Commission services replied that in this case the worker would be considered to be covered by one agreement.

A Member State expert sought clarification on whether civil servants who negotiate but do not sign a collective agreement should be counted in the denominator of the collective bargaining coverage ratio. Civil servants in their country have the right to negotiate but not to bargain, as working conditions are ultimately set by law. The Commission services replied that if their working conditions cannot be regulated by a collective agreement, they should not be included in either the numerator or the denominator.

Several Member State experts inquired whether civil servants, who in their systems have the right to bargain but not to conclude collective agreements, should be included in the coverage rate. The Commission services replied that the specific situation of each Member State will be assessed at the time of the transposition deadline but noted that in principle the right to bargain goes together with the right to conclude collective agreements.

A Member State expert inquired about the availability of the OECD/AIAS ICTWSS database on collective bargaining coverage. The Commission services confirmed that it is publicly available and the data is validated by Member States.

A Member State expert inquired about the implications of Article 3(5) for the scope of Article 4, more specifically whether Article 4 aims at promoting collective bargaining on wage setting or the conclusion of collective agreements. The Commission services explained that

Article 4 is about promoting collective bargaining on wage setting, not just promoting the conclusion of collective agreements.

1.4. Promotion of collective bargaining on wage-setting (Article 4)

Article 4:

1. With the aim of increasing the collective bargaining coverage and of facilitating the exercise of the right to collective bargaining on wage-setting, Member States, with the involvement of the social partners, in accordance with national law and practice, shall:

(a) promote the building and strengthening of the capacity of the social partners to engage in collective bargaining on wage-setting, in particular at sector or cross-industry level;

(b) encourage constructive, meaningful and informed negotiations on wages between the social partners, on an equal footing, where both parties have access to appropriate information in order to carry out their functions in respect of collective bargaining on wage-setting;

(c) take measures, as appropriate, to protect the exercise of the right to collective bargaining on wage-setting and to protect workers and trade union representatives from acts that discriminate against them in respect of their employment on the grounds that they participate or wish to participate in collective bargaining on wage-setting;

(d) for the purpose of promoting collective bargaining on wage-setting, take measures, as appropriate, to protect trade unions and employers' organisations participating or wishing to participate in collective bargaining against any acts of interference by each other or each other's agents or members in the establishment, functioning or administration of trade unions or employers' organisations.

2. In addition, each Member State in which the collective bargaining coverage rate is less than a threshold of 80 % shall provide for a framework of enabling conditions for collective bargaining, either by law after consulting the social partners or by agreement with them. Such a Member State shall also establish an action plan to promote collective bargaining. The Member State shall establish such an action plan after consulting the social partners or by agreement with the social partners, or, following a joint request by the social partners, as agreed between the social partners. The action plan shall set out a clear timeline and concrete measures to progressively increase the rate of collective bargaining coverage, in full respect for the autonomy of the social partners. The Member State shall review its action plan regularly, and shall update it if needed. Where a Member State updates its action plan, it shall do so after consulting the social partners or by agreement with them, or, following a joint request by the social partners, as agreed between the social partners. In any event, such an action plan shall be reviewed at least every five years. The action plan and any update thereof shall be made public and notified to the Commission.

Recital (16): While strong collective bargaining, in particular at sector or cross-industry level, contributes to ensuring adequate minimum wage protection, traditional collective bargaining structures have been eroding during recent decades, due, inter alia, to structural shifts in the economy towards less unionised sectors and to the decline in trade union membership, in particular as a consequence of union-busting practices and the increase of precarious and non-standard forms of work. In addition, sectoral and cross-industry level collective bargaining came under pressure in some Member States in the aftermath of the 2008 financial crisis. However, sectoral and cross-industry level collective bargaining is an essential factor for achieving adequate minimum wage protection and therefore needs to be promoted and strengthened.

Recital (24): In a context of declining collective bargaining coverage, it is essential that the Member States promote collective bargaining, facilitate the exercise of the right of collective

bargaining on wage-setting and thereby enhance the wage-setting provided for in collective agreements to improve workers' minimum wage protection. Member States have ratified the ILO Freedom of Association and Protection of the Right to Organise Convention No 87 (1948) and Right to Organise and Collective Bargaining Convention No 98 (1949). The right to bargain collectively is recognised under those ILO Conventions, under the ILO Labour Relations (Public Services) Convention No 151 (1978) and the Collective Bargaining Convention No 154 (1981), as well as under the Convention for the Protection of Human Rights and Fundamental Freedoms and the ESC. Articles 12 and 28 of the Charter guarantee, respectively, the freedom of assembly and association and the right of collective bargaining and action. According to its preamble, the Charter reaffirms those rights as they result, in particular, from the Convention on the Protection of Human Rights and Fundamental Freedoms and the Social Charters adopted by the Union and by the Council of Europe. Member States should take, as appropriate and in accordance with national law and practice, measures promoting collective bargaining on wage-setting. Such measures might include, among others, measures easing the access of trade union representatives to workers.

Recital (25): *Member States with a high collective bargaining coverage tend to have a small share of low-wage workers and high minimum wages. Member States with a small share of low-wage earners have a collective bargaining coverage rate above 80 %. Similarly, the majority of the Member States with high levels of minimum wages relative to the average wage have a collective bargaining coverage above 80 %. Therefore, each Member State with a collective bargaining coverage rate below 80 % should adopt measures with a view to enhancing such collective bargaining. Each Member State with a collective bargaining coverage below a threshold of 80 % should provide a framework of enabling conditions for collective bargaining, and establish an action plan to promote collective bargaining to progressively increase the collective bargaining coverage rate. In order to respect the autonomy of the social partners, which includes their right to collective bargaining and excludes any obligation to conclude collective agreements, the threshold of 80 % of collective bargaining coverage should only be construed as an indicator triggering the obligation to establish an action plan.*

The action plan should be reviewed on a regular basis, at least every five years, and, if needed, revised. The action plan and any update thereof should be notified to the Commission and be made public. Each Member State should be able to decide on the appropriate form of its action plan. An action plan that a Member State has adopted before the entry into force of this Directive may be considered to be an action plan under this Directive provided that it contains actions to effectively promote collective bargaining and fulfils the obligations under this Directive. Each Member State should establish such an action plan after consulting the social partners or by agreement with them, or, following a joint request by the social partners, as agreed between them. Member States' collective bargaining coverage rates vary significantly owing to a number of factors, including national tradition and practice as well as historic context. This should be taken into account when analysing progress towards a higher collective bargaining coverage, particularly with regard to the action plan provided for in this Directive.

1.4.1. Main elements of the provision

Article 4 on the promotion of collective bargaining on wage setting applies to all Member States and reflects the fact that well-functioning collective bargaining together with a high coverage is an important means to strengthen the adequacy and coverage of minimum wages. This provision needs to be read together with recital (16), which stipulates that strong collective bargaining, in particular at sector or cross-industry level, contributes significantly to ensuring adequate minimum wage protection.

Article 4(1)

Article 4(1) contains a series of provisions requiring Member States to make sure that the conditions are in place for collective bargaining on wages to be effective. The aim is to increase collective bargaining coverage and facilitate the exercise of the right to collective bargaining on wage-setting. Measures within the meaning of Art. 4(1) shall be taken with the involvement of the social partners in accordance with national law and practice, with full respect for the autonomy of the social partners, as well as their right to negotiate and conclude collective agreements.

Most provisions in Article 4(1) were inspired by existing ILO Conventions. They do not interfere with the limitations set by Article 153(5) of the Treaty on the Functioning of the European Union in relation to the right of association, the right to strike or the right to impose lock-outs. Article 4(1) requires all Member States, with the involvement of social partners, to:

- a) promote the building and strengthening the capacity of social partners, in particular at sector or cross-industry level;
- b) encourage constructive, meaningful and informed negotiations on wages between the social partners 'on an equal footing' where both parties have access to the information necessary to carry out their functions;
- c) take measures, as appropriate, to protect the exercise of the right to collective bargaining on wage-setting and to protect workers and trade union representatives from acts that discriminate against them on grounds related to their participation or wish to participate in collective bargaining on wage setting, and
- d) take measures, as appropriate, to protect trade unions and employers' organisations participating or wishing to participate in collective bargaining against any acts of interference by one of the social partners or its agents or members in their establishment, functioning or administration.

As regards Article 4(1)(a), measures aimed at strengthening the capacity of social partners may take various forms, including financial or non-financial means, and do not necessarily have to be set by law.

As regards Article 4(1)(b), the reference to social partner being able to negotiate on an equal footing is intended to prevent the undermining of one side of the social partners in conducting collective bargaining and is in line with the spirit of the ILO Conventions mentioned in recital (24), in particular Convention 98 on the Right to Organize and Collective Bargaining.

Furthermore, Member States can play a role in ensuring that social partners are in possession of relevant information on macroeconomic developments, such as sector-level productivity, which is relevant for bargaining on wages. The Directive does not prescribe a specific list of information to be provided in respect of Article 4(1)(b). However, the Council Recommendation on strengthening the social dialogue in the EU of 12 June 2023, as well as ILO conventions, recommendations and reports, and Eurofound publications could be used as inspiration and guidance.

As regards Article 4(1)(c) and (d), Member States may need to adopt measures prohibiting acts of discrimination or interference and putting in place effective instruments to prevent such acts, wherever these measures are not yet in place. These requirements were inspired by ILO Convention 98.

Article 4(2)

Article 4(2) requires Member States with a collective bargaining coverage below 80% to provide for a framework of enabling conditions and establish an action plan to promote collective bargaining. The 80% threshold is an indicator triggering the obligations set in Article 4(2), and not a mandatory target to be reached. The Directive imposes an obligation of effort, not of result.

The design of the framework of enabling conditions is entirely up to Member States. Regarding the process for designing the framework of enabling conditions, Member States can provide for this framework: (i) by law after consulting the social partners; or (ii) by agreement with them.

As regards the action plan, the Directive does not prescribe its specific content, leaving it to the discretion of Member States in line with national traditions and practices, and respecting social partners' autonomy. However, the action plan should meet certain minimum requirements, namely to include a clear timeline and concrete measures to ensure the effectiveness of the provision. The action plan should be reviewed at least every five years and updated if needed. Irrespective of the form of the action plan and its updates, Member States are required to make them public and to notify it to the European Commission.

Finally, three options are available to Member States for the establishment of an action plan: (i) the action plan can be established by the Member State after consultation of the social partners; (ii) it can also be established together by the Member State and the social partners ("by agreement with them"); or (iii) it can be agreed by the social partners themselves, following their joint request, and then established by the Member State on the basis of the social partners' agreement. The option chosen is subject to the discretion of the Member State, which in any event remains responsible for establishing the action plan.

Although the Directive does not set a specific deadline for the adoption of the action plan, Member States with a collective bargaining coverage below 80% are expected to establish them by end 2025 at the latest. This is in line with the obligation for the Commission to report on their content as required by Article 10(3).

1.4.2. Discussion

The main issues discussed were the following:

- The types of measures to promote collective bargaining on wage-setting; and
- The process to establish an action plan, in particular the type of measures it should include and the deadline to adopt it.

Article 4(1)

One Member State expert noted that the assessment that the provisions of Article 4(1) do not interfere with Article 153(5) is not the opinion of all Member States and, in this regard, he/she referred to the action for annulment brought before the European Court of Justice by Denmark and supported by Sweden.

On Article 4(1)(a) on the building and strengthening of the capacity of social partners, ETUC wondered whether ESF+ financing could be used to implement this provision. The Commission services indicated that there are different instruments at the EU level providing Member States with financial support to promote the capacity of the social partners, but the Directive does not specify which (if any) financial instruments should be used for this purpose, leaving it to the discretion of Member States. ETUC pointed out that Recital 40

stipulates that, in accordance with Regulation (EU) 2021/1057, Member States are to allocate an appropriate amount to the capacity building of the social partners.

On Article 4(1)(b) on encouraging constructive, meaningful, and informed negotiations on wages between social partners, two Member State experts inquired about the type of information that Member States could provide to social partners. The Commission services explained that Member States can play a role in ensuring that social partners are in possession of relevant information on macroeconomic developments, such as sector-level productivity, which is relevant for bargaining on wages.

On Article 4(1)(c) and 4(1)(d) on the protection of the exercise of the right to collective bargaining, ETUC stressed the **importance of access for trade unions to workers** for promoting collective bargaining coverage. The Commission services clarified that, although Article 4(1) does not explicitly mention a right of access, facilitating the access for trade unions to workers can be a measure a Member State may take to protect and promote collective bargaining on wage-setting.

A Member State expert inquired about how national authorities could facilitate such access in accordance with the fundamental right of association. The Commission services replied that it is **up to Member States to decide on specific measures** in line with national practice and traditions, and fully respecting social partners' autonomy and collective bargaining freedom.

ETUC asked whether legislative **measures to curb precarious and non-standard forms of work** could be part of promoting collective bargaining, given their negative impact on trade union membership. The Commission services replied that such measures could indeed be appropriate, but this would need to be examined on a case-by-case basis.

A Member State expert stressed that the autonomy of trade unions and employer organisations, as well as the decision to enter into collective bargaining, have to be taken into account when setting measures according to Article 4(1). ETUC pointed out that Article 1(2) provides that the Directive shall be without prejudice to the full respect for the autonomy of the social partners, as well as their right to negotiate and conclude collective agreements.

Two Member State experts sought clarification on the **formal process for complying** with the Directive, asking whether a specific document with measures needed to be adopted or if it was sufficient to prove that certain measures had been taken to promote collective bargaining. The Commission services clarified that Member States will need to **present a package of measures** showing how they comply with Article 4(1) by the transposition deadline, with the involvement of social partners being a key aspect of the process.

A Member State expert asked whether Article 4(1) should apply to **civil servants** appointed by law, such as military personnel, who are excluded from the right to collective bargaining. The Commission services confirmed that Article 4(1) does not apply in cases where the right to collective bargaining does not exist. Another Member State expert explained that, in their country, workers are not allowed to participate directly in collective bargaining and asked whether this would be in conflict with the Directive. The Commission services explained that the intention of the legislator was to protect workers and trade union representatives that participate or wish to participate in collective bargaining from any kind of discrimination or interference.

A Member State expert inquired about the difference between 'sector' and 'cross-industry' as both terms are used in Article 4(1)(a) on the building and strengthening of the capacity of social partners. The Commission services explained that 'cross-industry' refers to the agreements applying to more than one sector.

The same Member State expert asked whether establishing and supporting tripartite bodies could qualify as building and strengthening the capacity of social partners. Another Member State expert stressed that, in his/her view, tripartite negotiations and social dialogue could also qualify as capacity building for the social partners and could strengthen collective bargaining on wage setting indirectly. The Commission services replied that the objective of Article 4(1) is to promote collective bargaining on wage-setting, and not tripartite negotiations or social dialogue.

Another Member State expert inquired about the term 'as appropriate' in Articles 4(1)(c) and 4(1)(d) on the protection of the exercise of the right to collective bargaining, asking whether it implies that Member States are not always obliged to take such measures. The Commission services explained that the expression 'as appropriate' was introduced to acknowledge that some Member States already have functioning protection measures in place. If this is the case, those Member States do not need to adopt such measures again.

ETUC stressed that the Directive aims at creating an enabling environment for fostering collective bargaining and increasing coverage of collective agreements. Any measure discouraging social partners to engage in collective bargaining on wage-setting, including the renewal of collective bargaining agreements, shall be reviewed – in consultation with the social partners – in order to abide by the provisions of the Directive. The Commission services mentioned that the wording of Article 4(1) obliges Member States to promote collective bargaining, but not to review existing legislation, so the focus when evaluating the transposition of the Directive should be on the positive measures taken to promote collective bargaining. A Member State expert stressed that the Directive does not establish such an obligation for Member States. ETUC stated that, in their view, measures to be taken under Article 4(1) may inevitably have an impact on existing legislation.

Article 4(2)

A Member State expert inquired about the **process for establishing an action plan** under Article 4(2) and whether it depends on national law and practice. The Commission services confirmed that it is up to Member States to choose among the **three options** listed in the Directive (consulting social partners, reaching an agreement with them, or between the social partners following their joint request), respecting national traditions and practices.

The same expert asked how the Commission would handle a situation where an action plan with clear timelines and concrete measures fails to increase collective bargaining coverage. The Commission services explained that Article 4(2) provides for an **obligation of effort, not of result**, and the Directive does not foresee sanctions if these efforts do not lead to an increase in collective bargaining coverage. In this regard, Member States are required to regularly review action plans, at least every five years, and update them if they are found to be ineffective.

Another Member State expert asked about additional measures that could be included in the framework of enabling conditions and the action plan, beyond those already required by Article 4(1). The Commission services explained that the **framework of enabling conditions and the action plan should be seen as complementary**, with the former establishing an overall regulatory framework (more in line with the elements included in Article 4(1)), and the latter including more concrete measures with a specific timeline. The Directive does not suggest particular measures, leaving it to the discretion of Member States in line with national traditions and practices, and respecting social partners' autonomy.

A Member State expert inquired if the scope of Article 4(2) is limited to bargaining on wage-setting only or if it also includes collective bargaining on working conditions and terms of employment. The Commission services clarified that Article 4 is **limited to collective**

bargaining on wage-setting, in line with the legal basis of the Directive, while acknowledging that it would also benefit collective bargaining in general.

2. Chapter II on Statutory minimum wages

2.1. Procedure for setting adequate minimum wages (Article 5)

Article 5:

1. Member States with statutory minimum wages shall establish the necessary procedures for the setting and updating of statutory minimum wages. Such setting and updating shall be guided by criteria set to contribute to their adequacy, with the aim of achieving a decent standard of living, reducing in-work poverty, as well as promoting social cohesion and upward social convergence, and reducing the gender pay gap. Member States shall define those criteria in accordance with their national practices in relevant national law, in decisions of their competent bodies or in tripartite agreements. The criteria shall be defined in a clear way. Member States may decide on the relative weight of those criteria, including the elements referred to in paragraph 2, taking into account their national socioeconomic conditions.

2. The national criteria referred to in paragraph 1 shall include at least the following elements:

(a) the purchasing power of statutory minimum wages, taking into account the cost of living;

(b) the general level of wages and their distribution;

(c) the growth rate of wages;

(d) long-term national productivity levels and developments.

3. Without prejudice to the obligations set out in this Article, Member States may additionally use an automatic mechanism for indexation adjustments of statutory minimum wages, based on any appropriate criteria and in accordance with national laws and practices, provided that the application of that mechanism does not lead to a decrease of the statutory minimum wage.

4. Member States shall use indicative reference values to guide their assessment of adequacy of statutory minimum wages. To that end, they may use indicative reference values commonly used at international level such as 60 % of the gross median wage and 50 % of the gross average wage, and/or indicative reference values used at national level.

5. Member States shall ensure that regular and timely updates of statutory minimum wages take place at least every two years or, for Member States which use an automatic indexation mechanism as referred to in paragraph 3, at least every four years.

6. Each Member State shall designate or establish one or more consultative bodies to advise the competent authorities on issues related to statutory minimum wages, and shall enable the operational functioning of those bodies.

Recital (26): Sound rules, procedures and effective practices for setting and updating statutory minimum wages are necessary to deliver adequate minimum wages, while safeguarding existing and creating new employment opportunities, a level playing field and the competitiveness of firms including microenterprises, small enterprises and medium-sized enterprises (SMEs). Those rules, procedures and practices include a number of components to contribute to the adequacy of statutory minimum wages, including criteria to guide Member States in setting and updating statutory minimum wages and indicators to assess their adequacy, regular and timely updates, the existence of consultative bodies and the involvement of the social partners. A timely and effective involvement of the latter in the

setting and updating of statutory minimum wages as well as in the establishment or modification of automatic indexation mechanisms, where they exist, is another element of good governance that allows for an informed and inclusive decision-making process. Member States should provide the social partners with relevant information on statutory minimum wage-setting and updating. Giving the social partners the possibility to provide opinions, and to receive a reasoned response to opinions expressed prior to the presentation of proposals, on statutory minimum wage-setting and updating and before any decisions are taken could contribute to the proper involvement of the social partners in that process.

Recital (27): Member States which use an automatic indexation mechanism, including semi-automatic mechanisms in which a minimal obligatory increase of statutory minimum wage is at least guaranteed, should also carry out the procedures for updating the statutory minimum wages, at least every four years. Those regular updates should consist of an evaluation of the minimum wage taking into account the guiding criteria, followed, if necessary, by a modification of the amount. The frequency of the automatic indexation adjustments on the one hand, and the updates of the statutory minimum wages on the other might differ. Member States where automatic or semi-automatic indexation mechanisms do not exist should update their statutory minimum wage at least every two years.

Recital (28): Minimum wages are considered to be adequate if they are fair in relation to the wage distribution in the relevant Member State and if they provide a decent standard of living for workers based on a full-time employment relationship. The adequacy of statutory minimum wages is determined and assessed by each Member State in view of its national socioeconomic conditions, including employment growth, competitiveness and regional and sectoral developments. For the purpose of that determination, Member States should take into account purchasing power, long-term national productivity levels and developments, as well as wage levels wage distribution and wage growth.

Among other instruments, a basket of goods and services at real prices established at national level can be instrumental to determining the cost of living with the aim of achieving a decent standard of living. In addition to material necessities such as food, clothing and housing, the need to participate in cultural, educational and social activities could also be taken into consideration. It is appropriate to consider the setting and updating of statutory minimum wages separately from income support mechanisms. Member States should use indicators and associated reference values to guide their assessment of statutory minimum wage adequacy. The Member States might choose among indicators commonly used at international level and/or indicators used at national level. The assessment might be based on reference values commonly used at international level such as the ratio of the gross minimum wage to 60 % of the gross median wage and the ratio of the gross minimum wage to 50 % of the gross average wage, which are currently not met by all Member States, or the ratio of the net minimum wage to 50 % or 60 % of the net average wage. The assessment might also be based on reference values associated to indicators used at national level, such as the comparison of the net minimum wage with the poverty threshold and the purchasing power of minimum wages.

2.1.1. Main elements of the provision

Article 5 sets minimum procedural requirements for setting adequate statutory minimum wages. It creates an obligation of effort, but not of result, in line with the limits set by Article 153(5) TFEU. Recital (28) explains the concept of “adequacy” used in the Directive. It has two main dimensions: first, it refers to the fairness of minimum wages with respect to the wages of other workers in the same country (relative dimension of ‘adequacy’); second, it refers to the capacity of minimum wages to provide workers with a decent standard of living (absolute dimension of ‘adequacy’).

Article 5(1)

Article 5(1) outlines the main requirements set by Article 5, namely establishing procedures for the setting and updating of statutory minimum wages, including the use of criteria to guide it. This provision needs to be read together with Recital (26) that underlines the importance of sound procedures, in particular: criteria to guide the setting and updating of statutory minimum wages (Article 5(2) and (3)), indicative reference values to assess their adequacy (Article 5(4)), regular and timely updates (Article 5(5)), and consultative bodies (Article 5(6)).

In line with Article 5(1), the criteria to set and update statutory minimum wages should be defined in accordance with national practices and in a clear way (i.e., set by law) to ensure transparency and predictability. The relative weight of the criteria can be chosen taking into account national socioeconomic conditions but should not be zero. The guiding criteria to set and update the statutory minimum wages should be set to contribute to their adequacy, with the aim of achieving a decent standard of living, reducing in-work poverty, as well as promoting social cohesion and upward social convergence, and reducing the gender pay gap.

Article 5(2)

Article 5(2) lists the minimum elements that Member States shall include in their national criteria for setting or updating their statutory minimum wages:

- The purchasing power (Article 5(2)(a)) aims at ensuring that minimum wages provide a decent standard of living for workers (based on a full-time employment relationship). The Directive leaves flexibility to Member States to decide on the methods to assess the purchasing power of minimum wage earners. This could include the use of a basket of goods and services, as mentioned in Recital (28). Other tools could also be used.
- The general level of wages and their distribution (Article 5(2)(b)) and the growth rate of wages (Article 5(2)(c)) are linked to the “fairness” dimension of adequacy.
- The long-term national productivity levels and developments (Article 5(2)(b)(d)) establishes a link between minimum wages and economic fundamentals that ensures the sustainability of wage growth and employment levels over time. In particular, this formulation (with “national”) aims at avoiding that the Directive is interpreted as giving grounds to lower minimum wages for some workers based on productivity measured at an individual level. In addition, the reference to “long-term” productivity aims at avoiding that the Directive is interpreted as giving grounds to lower minimum wages in crisis times. The aim is to ensure that minimum wage earners benefit from national productivity gains.

Article 5(3)

Article 5(3) clarifies that that automatic indexation mechanisms are compatible with the Directive. It indicates that Member States with such mechanisms can continue to use their existing formulas, provided that the use of an automatic indexation mechanism does not lead to a decrease of the statutory minimum wage. At the same time, these countries remain subject to the obligations set in Article 5. Recital (28) clarifies that this provision also applies to ‘semi-automatic mechanisms’ in which a minimum obligatory increase of statutory minimum wages is at least guaranteed.

Article 5(4)

Under Article 5(4), Member States are required to use indicative reference values to guide their assessment of adequacy of statutory minimum wages, but not to reach them. These reference values may be commonly used at international level, and/or used at national level. For those commonly used at international level, two examples are underlined: 60% of the gross median wage and 50% of the gross average wage. Recital (28) highlights some (other) examples. However, Member States are also free to select reference values other than those mentioned in Article 5(4), or in Recital 28. They can also use more than one reference value.

Article 5(5)

Article 5(5) aims at ensuring that the frequency of the updates of statutory minimum wages safeguard their adequacy over time. Member States are required to update the statutory minimum wages at least every 2 years or, for those with automatic indexation systems, at least every 4 years. Article 5(5) and Recital 27 make the distinction between, on the one hand, automatic and semi-automatic indexation, which usually takes place annually in the concerned Member States and does not need to be based on the elements set in Article 5(2), and, on the other hand, the updates of statutory minimum wages referred to in Article 5(5), which have to take place at least every 4 years and have to take into consideration the four elements set in Article 5(2).

Article 5(6)

Article 5(6) requires Member States to designate or establish one or more consultative bodies to advise the competent authorities on issues related to statutory minimum wages. As underlined in Recital (26), the existence of consultative bodies is one component of sound rules, procedures and effective practices that contribute to the adequacy of statutory minimum wages. In addition, Article 5(6) requires Member States to enable the operational functioning of these bodies.

2.1.2. Discussion

The main issues discussed were the following:

- The nature of the obligation to achieve the overarching objective of improving working and living conditions;
- The elements to be included in the criteria for setting and updating statutory minimum wages; and
- The use and choice of indicative reference values, and whether they are binding.

Article 5(1)

On Article 5(1), ETUC stated that Article 5 should be read in conjunction with international standards, notably the European Social Charter, and therefore, while the Directive sets procedural requirements, Member States would have an indirect **obligation of reaching the overarching objective** of improving working and living conditions referred to in Article 5(1) (in particular achieving a decent standard of living, promoting social cohesion and upward convergence, reducing in-work poverty and the gender pay gap) as well as the indicative reference values referred to in Article 5(4). The Commission services agreed that the implementation of Article 5 should foster the achievement of the overarching objectives spelled out in Article 5(1), but it also underlined that under the Directive there is **no**

obligation of result and explained that the immediate objective was the adequacy of minimum wage protection which will contribute to the overarching objectives, but that the overarching objectives themselves will not be assessed in light of the Directive.

BusinessEurope encouraged Member States to consider national realities when looking at Article 5. It emphasised that in several Member States, appropriate consultations of social partners do not take place in the setting of statutory minimum wages. It stated that the transposition of the Directive should lead to progress in this regard.

ETUC and a Member State expert wondered about the meaning of the requirement that criteria should be 'defined in a clear way'. The Commission services clarified that this means that the criteria should be set by law, but the details on their application (e.g., statistical definition and exact indicator to be used) do not need to be specified in law.

A Member State expert referred to the situation in which a Member State has two minimum wage setting systems in place, one through which wages are set via collective bargaining and one via which minimum wages are set by law. It asked whether a Member State would still need to comply with the provisions in Article 5. The Commission services replied that, in cases where a Member State has two different systems, Chapter 2 of the Directive, including Article 5, applies to the statutory minimum wage setting system. The Directive does not provide for an exemption, for civil servants or other groups of workers, on the ground that their wages are considered as already adequate.

Article 5(2)

ETUC stressed that the elements listed in Article 5(2) should all serve to achieve the overarching aims mentioned in Article 5(1) and asked how Member States would be required or guided to help ensure this. The Commission services replied that the Directive sets minimum procedural requirements and does not detail how Member States should apply the elements, although some guidance is provided in the recitals. It pointed out that Article 7 requires the involvement of social partners in the selection and implementation of the elements in Article 5(2).

A Member State expert also inquired whether Member States are free to decide about the **period to which the data used for implementing these elements refer** to and whether Member States are obliged to include a **detailed enumeration of all the elements** in a legal act when transposing the Directive. The Commission services replied that while Member States have **flexibility** in how to implement the elements, they should do so **in a manner that promotes the adequacy** of statutory minimum wages. In this regard, using annual data referring to the previous year (or more frequent data) is recommended. The Commission services also indicated that Member States **should define in a clear manner by law** the national criteria for setting and updating statutory minimum wages in line with Article 5(2) but they do not need to specify the indicators they plan to use.

On **purchasing power** (Article 5(2)(a)), ETUC asked about the methods that could be used to implement it. The Commission services explained that the Directive provides flexibility to Member States and recalled the examples mentioned in the Directive, in particular the use of a basket of goods and services, as well as a survey specifically designed for this purpose. Regarding the use of a basket of goods and services, a Member State expert inquired whether the choice of a type of basket of goods and services is at the Member State's discretion. The Commission services replied that using a basket of goods and services is one of the tools to implement this element, but that Member States could use other indicators as well. If a Member State decides to use a basket of goods and services, it is free to choose the specific basket.

A Member State expert also inquired whether the **cost of living** referred to a single worker or to a household, the Commission services recalled that Recital (28) refers to the decent standard of living for 'workers' and not households.

A Member State expert asked whether the Commission would refer to Eurostat data in assessing its implementation, or to other data sources. The Commission services replied that it encouraged Member States to use the harmonised data from Eurostat, but that the choice of data would be for Member States.

A Member State expert also asked whether the Commission had any recommendations on defining purchasing power indicators. The Commission services answered that there is a variety of methods, but that the method chosen should allow for a genuine assessment of the purchasing power of minimum wage earners.

In relation to the '**general level of wages**' (Article 5(2)(b)), a Member State expert asked about the meaning of this expression and whether it should consider the median wage for example. The Commission services replied that the Directive provides flexibility to Member States to choose the specific indicator to apply this first component of Article 5(2)(b) and pointed out that the general level of wages could be captured by indicators such as the average or the median wage. At the same time, the Commission services stressed that Article 5(2)(b) also requires to take into account the '**distribution of wages**'. In this regard, ETUC underlined that the latter term should be well explained, as this would affect the data to be collected, possibly including breakdowns by gender, age, or employer size. The Commission services clarified that the concept of wage distribution primarily refers to the share of workers at different levels of pay or pay range in a Member State. This can provide insights on how statutory minimum wages compare to other wages, which captures the 'fairness' dimension of adequacy. Since minimum wages are applicable to all workers, the primary aim of considering the wage distribution is to compare minimum wages to the wage levels of workers across the national economy, and not to assess wage disparities between workers of specific occupations, sectors, age, gender or types of employer. Therefore, Member States are not required to use data that includes such breakdowns when implementing Article 5(2) (b). In the context of Article 5(2), 'wage distribution' could be operationalised, for instance, by using indicators such as the ratio of the minimum wage to the average or median wage, the Gini coefficient ⁽⁸⁾ of wages, or the ratio of the first to the fifth decile of the wage distribution. While the Directive provides flexibility to Member States on how to consider the distribution of wages, the indicator should be sufficiently up to date.

A Member State expert also asked how it should interpret the concept of 'wage' used in Article 5(2)(b) and (c) and whether there would be an obligation to use a specific definition. The Commission services replied that the Directive leaves a lot of flexibility to Member States as regards the application of the criteria in Article 5 and that it is up to Member States to use the definition of 'wage' that they consider most appropriate, in consultation with the social partners as required by Article 7.

In relation to **productivity** (Article 5(2)(d)), a Member State expert asked whether labour productivity or total factor productivity should be used. The Commission services stated that Member States have the flexibility to choose their preferred indicator, while recalling that the original Commission proposal referred to labour productivity since it is more fit for purpose. Business Europe also suggested unit labour cost (ULC) as another indicator that takes into account productivity and highlighted that the national productivity boards can provide relevant insights on different methods to implement this element.

A Member State expert also asked specifically about the meaning of the words '**long-term**' and '**developments**'. The Commission services replied that Member States need to decide

⁽⁸⁾ The Gini coefficient is an index of inequality in a distribution.

on how to operationalise this element in consultation with the social partners, considering economic conditions, and pointed out that Eurostat provides a harmonised concept of productivity based on value added. The Commission services also explained that 'long-term' is not defined, but that Member States should look at productivity developments over a long period of time with a view to both ensuring that minimum wage earners can benefit from productivity gains and avoiding that statutory minimum wages are lowered in times of crisis.

Article 5(3)

Concerning the systems relying on automatic indexation mechanisms (Article 5(3)), a Member State expert asked whether a country with **automatic indexation** could disregard the elements set out in Article 5(2). The Commission services clarified that, while the formula used for the automatic indexation does not necessarily have to take into account all the elements under 5(2), countries with indexation mechanisms are obliged to consider these elements in the updates that need to be conducted at least every 4 years (as set out by Article 5(5)). A Member State expert also wondered about the exact indicators to be used by Member States for the updates every four years (i.e., whether the latest data should be used, or the entire period of the past 4 years should be considered). The Commission services answered that the Directive leaves flexibility to Member States.

Article 5(4)

On reference values (Article 5(4)), several Member State experts asked for clarification about the **use and choice of indicative reference values**, namely: whether reference values could be amended over time; how many reference values needed to be used; whether one reference value should be defined for each element listed in Article 5(2); and whether they could choose reference values at national level instead of those commonly used at international level. Moreover, ETUC, and two Member State experts sought clarifications regarding the freedom for Member States to choose their reference values.

The Commission services underlined that the Directive gives **flexibility** to Member States to choose the reference values they consider most appropriate, while encouraging the choice of those **commonly used at international level**. It further explained that Member States have the obligation to choose **at least one reference value**, and that the reference values selected could be later amended.

ETUC and a Member State expert asked whether Member States have an obligation to reach their indicative reference values. The Commission services clarified that there was **no obligation to reach them**, but that Member States should undertake efforts to do so.

A Member State expert asked whether the indicative reference values would have to be reconsidered every two or four years, in line with the provision on regular and timely updates in Article 5(5). The Commission services replied that the reference values should apply at all times and guide the assessment of adequacy, including when the minimum wage is updated, but not exclusively. The aim is to preserve the adequacy of statutory minimum wages to make sure that they do not lag behind other wages and allow for a decent standard of living.

Article 5(5)

Regarding the frequency of the updates (Article 5(5)), a Member State expert asked whether the frequency of the updates should be set by law, or whether it would be sufficient if social partners ask for the updates in the context of wage negotiations, for instance for civil servants. The Commission services replied that the frequency should be established in law and not be left to social partners to decide. Moreover, it added that while Article 5(5) stipulates the minimum frequency for the updates, that frequency can also be higher.

A Member State expert also asked whether the updates could be based on data released with a 3 to 4 years' lag. The Commission services replied that it is up to Member States to decide which data to take into account, also considering data constraints, but stressed that Member States should make efforts to improve the timeliness of wage statistics to guarantee that updates preserve the adequacy, including the purchasing power, of minimum wages.

Article 5(6)

ETUC and a Member State expert asked by when these bodies should be put in place or designated. The Commission services answered that it should be done by the transposition deadline. A Member State expert also asked about the composition and structure the consultative bodies are expected to have. The Commission services recalled that the body should include social partners and its purpose should be to advise the national authorities on matters related to the statutory minimum wage setting and updating. The Commission services finally emphasized that Member States should ensure that these bodies have sufficient financial capacity and human resources so that they are in a position to carry out their role.

2.2. Variations and deductions (Article 6)

Article 6:

1. Where Member States allow for different rates of statutory minimum wage for specific groups of workers or for deductions that reduce the remuneration paid to a level below that of the relevant statutory minimum wage, they shall ensure that those variations and deductions respect the principles of non-discrimination and proportionality, the latter including the pursuit of a legitimate aim.

2. Nothing in this Directive shall be construed as imposing an obligation on Member States to introduce variations of and deductions from statutory minimum wages.:

Recital (29): *Without prejudice to the competence of Member States to set the statutory minimum wage and to allow for variations and deductions, it is important to avoid variations and deductions being used widely, as they risk negatively impacting the adequacy of minimum wages. It should be ensured that variations and deductions respect the principles of non-discrimination and proportionality. Variations and deductions should therefore pursue a legitimate aim. Examples of such deductions might be the recovery of overstated amounts paid or deductions ordered by a judicial or administrative authority. Other deductions, such as those related to the equipment necessary to perform a job or deductions of allowances in kind, such as accommodation, present a high risk of being disproportionate. Moreover, nothing in this Directive should be construed as imposing an obligation on Member States to introduce any variations of or deductions from minimum wages.*

2.2.1. Main elements of the provision

While the decision to establish variations and deductions is entirely up to Member States, the purpose of Article 6 is to limit their use by setting a few clear conditions as they directly affect the adequacy of statutory minimum wages, as indicated in Recital (29).

Article 6 defines variations as ‘different rates of statutory minimum wage for specific groups of workers’ and deductions as reductions that diminish the value of the ‘remuneration paid to a level below that of the relevant statutory minimum wage’.

Article 6(1) requires that variations and deductions respect the principles of non-discrimination and proportionality, with the latter encompassing the pursuit of a legitimate aim. In this regard, the principle of proportionality requires that the measures are appropriate and necessary in order to attain the objectives legitimately pursued by the legislation. The principle of non-discrimination requires that individuals or groups of individuals that are in comparable situations should not be treated less favourably on grounds such as religion or belief, disability, age, sexual orientation, racial or ethnic origin. These two principles are general principles of EU law.

Article 6(2) clarifies that nothing in this Directive imposes any obligation on Member States to introduce variations and deductions.

2.2.2. Discussion

The main issues discussed were the following:

- Variations for young workers, for imprisoned persons, regional variations; and
- Deductions of taxes and social contributions, and alimony payments.

ETUC asked what constitutes a '**legitimate aim**', notably for variations applying to **young workers**. The Commission services replied that a legitimate aim could be an objective related to employment policy. For instance, as regards variations applying to young workers, they could be justified to facilitate the labour market integration of young workers, especially for apprentices, but this must be assessed on a case-by-case basis. ETUC further asked whether the Commission assessment of the transposition of Article 6 would include an adequacy test (besides assessing proportionality and non-discrimination). The Commission services replied that assessing proportionality inherently involves considering adequacy.

ETUC called for ensuring the consistency of Article 6 with international law. The Commission services clarified that Article 6 was inspired by ILO Convention 131 and Recommendation 135.

ETUC also asked how to assess whether variations applying to **imprisoned persons** working in prison were in line with the provisions of Article 6. The Commission services replied that, as far as imprisoned persons are considered to be workers in accordance with Article 2 of the Directive, variations would have to be proportionate and non-discriminatory.

Finally, ETUC asked whether the Commission services would assess if all variations existing by the transposition deadline fulfil the requirements of Article 6. The Commission services replied that Member States need to carry out this assessment and then inform the Commission about the results. Under Article 10, these assessments are expected to focus on current variations and deductions, as well as the reasons behind them. While the evaluations are not expected to be exhaustive, the Commission services confirmed that any disproportionate aspects would be flagged. If disputes arise, Member States could be taken to Court for further deliberation.

A Member State expert asked whether variations applying to **workers in certain regions** are acceptable. The Commission services replied that it is not in a position to indicate if a particular variation is compliant or not and recalled that it is not the purpose of the expert group. It is the responsibility of Member States to review their variations by the transposition deadline against the requirements set by Article 6 and to eliminate those that are discriminatory and/or not proportionate.

One Member State expert asked whether Member States are free to determine the components constituting the minimum wage and if **deductions of taxes and social contributions** are by nature considered as justified. The Commission services replied that it is up to Member States to decide which components they include in the concept of the minimum wage. It explained that taxes and social contributions are provided by law, and by nature, they are expected to be necessary, non-discriminatory, objectively justified, and proportionate. Hence, Member States are not expected to assess all the existing regulations in the area of social security and taxation against the criteria set out in Article 6.

A Member State expert asked whether certain deductions provided by law apart from taxes and contributions, such as **alimony**, would be allowed by the Directive. The Commission services replied that such deductions should be assessed for compliance with Article 6 but should not be problematic if they are set by law and respect the principles of non-discrimination and proportionality, including the pursuit of a legitimate aim. The Commission services also stated that deductions required by judicial or administrative authorities could be considered as justified.

2.3. Involvement of the social partners in the setting and updating of statutory minimum wages (Article 7)

Article 7: *Member States shall take the necessary measures to involve the social partners in the setting and updating of statutory minimum wages in a timely and effective manner that provides for their voluntary participation in the discussions throughout the decision-making process, including through participation in the consultative bodies referred to in Article 5(6) and in particular as concerns:*

(a) the selection and application of criteria for the determination of the level of the statutory minimum wage, and the establishment of an automatic indexation formula and its modification where such formula exists, referred to in Article 5(1), (2) and (3);

(b) the selection and application of indicative reference values referred to in Article 5(4) for the assessment of the adequacy of statutory minimum wages;

(c) the updates of statutory minimum wages referred to in Article 5(5);

(d) the establishment of variations and deductions in statutory minimum wages referred to in Article 6;

(e) the decisions both on the collection of data and the carrying out of studies and analyses to provide information to authorities and other relevant parties involved in statutory minimum wage-setting.

Recital (26): *Sound rules, procedures and effective practices for setting and updating statutory minimum wages are necessary to deliver adequate minimum wages, while safeguarding existing and creating new employment opportunities, a level playing field and the competitiveness of firms including microenterprises, small enterprises and medium-sized enterprises (SMEs). Those rules, procedures and practices include a number of components to contribute to the adequacy of statutory minimum wages, including criteria to guide Member States in setting and updating statutory minimum wages and indicators to assess their adequacy, regular and timely updates, the existence of consultative bodies and the involvement of the social partners. A timely and effective involvement of the latter in the setting and updating of statutory minimum wages as well as in the establishment or modification of automatic indexation mechanisms, where they exist, is another element of good governance that allows for an informed and inclusive decision-making process. Member States should provide the social partners with relevant information on statutory minimum wage-setting and updating. Giving the social partners the possibility to provide opinions, and to receive a reasoned response to opinions expressed prior to the presentation of proposals, on statutory minimum wage-setting and updating and before any decisions are taken could contribute to the proper involvement of the social partners in that process.*

2.3.1. Main elements of the provision

The purpose of Article 7 is to strengthen the involvement of social partners in statutory minimum wage setting and updating in a timely and effective manner. This involvement should always be ‘voluntary’. The Directive imposes an obligation of effort, not of result, and does not foresee sanctions in case the objective of the Article is not reached due to a lack of cooperation of social partners. Thus, it fully respects social partners’ autonomy.

Article 7 requires Member States to include social partners in consultative bodies, referred to in Article 5(6), that guide national authorities on statutory minimum wages. However, it

does not mean that this Article should be implemented only based on the work of such bodies as these bodies may not be involved in some of the activities listed under Article 7.

Apart from the requirement of social partners' participation in consultative bodies, Article 7 does not specify which form should take the involvement of social partners so that it is done in accordance with national law and practice, and in full respect of social partners' autonomy.

Recital (26) states that Member States should provide social partners with 'relevant information on statutory minimum wage setting and updating'. Moreover, it indicates that in order to contribute to the meaningful engagement of social partners in the process, Member States could give 'the social partners the possibility to provide opinions and to receive reasoned responses to (their) opinions' before any decisions are made.

Article 7(a) requires Member States to involve social partners in 'the selection and application of the criteria used for the determination of the level of the statutory minimum wage' referred to in Article 5(1) and 5(2), and 'the establishment of an automatic indexation formula and its modification where such formula exists', referred to in Article 5(3).

Article 7(b) requires that Member States involve social partners on the 'selection and application of the reference values referred to in Article 5(4) for the assessment of the adequacy of statutory minimum wages'.

Article 7(c) requires Member States to involve social partners in 'the updates of statutory minimum wages referred to in Article 5(5)'.

Article 7(d) requires Member States to involve social partners in 'the establishment of variations and deductions in statutory minimum wages referred to in Article 6'. This paragraph does not imply that social partners would have to propose or to 'validate' new variations and deductions. However, this involvement should be effective for all new variations and deductions potentially decided upon by the Member State.

Article 7(e) requires Member States to involve social partners in 'the decisions on both the collection of data and the carrying out of studies and analyses to provide information to authorities and other relevant parties involved in statutory minimum wage-setting'. This paragraph does not place any obligations on the social partners regarding data collection or the carrying out of studies, in full respect of their autonomy. Instead, it implies that they should be consulted when such activities are carried out by Member States.

2.3.2. Discussion

The main issues discussed were the following:

- Ways to ensure a meaningful involvement of social partners and the role they should play as regards monitoring and data collection; and
- Formal mechanisms to consult social partners and the provision of reasoned responses to their opinions.

ETUC asked how the Commission would assess that social partners are involved in the setting and updating of statutory minimum wages in a meaningful way. It argued that a **meaningful involvement** would include the sharing of full information, being given sufficient reaction time and proof of feedback having been taken into account. The Commission services replied that Recital (26) precisely states that Member States '*should provide the social partners with relevant information on statutory minimum wage setting and*

updating'. Moreover, it indicates that '*giving the social partners the possibility (...) to receive a reasoned response to opinions expressed (...) before any decisions are taken could contribute to the proper involvement of the social partners*'. It emphasised that social partners have a role to play in monitoring compliance with the Directive and should inform the Commission in case of perceived non-compliance.

ETUC raised concerns about the fact that Article 10 on **monitoring and data collection** does not make reference to the involvement of social partners as laid down in Article 7. It asked what role the Commission sees for European social partners in monitoring the involvement of social partners as required by Article 7. The Commission services acknowledged that Article 10 does not provide for reporting obligations in relation to Article 7 but noted that Recital (33) indicates that EMCO and SPC should involve the European social partners in the examination of the development of collective bargaining coverage and the adequacy of statutory minimum wages (when such an examination is requested by the Council or the Commission).

Business Europe emphasized the importance of discussing Article 7 and **improving the involvement of social partners** in the minimum wage-setting process.

A Member State expert asked whether **the requirements set in Article 7 should be spelled out in a legal act**, or whether it would be enough to require the involvement of social partners in general. It also requested clarification on **practical aspects of involving social partners in data collection and carrying out studies and analysis** as per Article 7(e). The Commission services replied that the provisions of Article 7 should be explicitly mentioned in the law. As regards the practical involvement of social partners in data collection and carrying out studies and analysis, it stated that Member States could for instance consult social partners directly or via consultative bodies before carrying out studies, as well as on which data should be reported to the Commission in line with Article 10. It stated that in the end it is up to Member States to decide how to organise this.

One Member State expert asked whether the involvement of social partners could also be informal and asked about the obligation of providing reasoned responses to opinions of social partners. The Commission services replied that social partner consultation should be formal in the sense that the consultation is provided for in national law. Moreover, it argued that Member States should design a **procedure or mechanism that will ensure that social partners will be involved**, not only through their participation in consultative bodies, but through additional mechanisms or procedures listed in Article 7. As regards the provision of **reasoned responses** to opinions from social partners, the Commission services indicated that such a practice is encouraged, as stated in Recital (26).

One Member State expert asked whether Member States are obliged to consult social partners on the data to be reported to the Commission as per Article 10. The Commission services replied that the Directive does not set such an obligation while pointing out that such a measure could serve to implement Article 7.

2.4. Effective access of workers to statutory minimum wages (Article 8)

Article 8: Member States shall, with the involvement of the social partners, take the following measures to enhance the effective access of workers to statutory minimum wage protection as appropriate, including, where appropriate, strengthening its enforcement:

(a) provide for effective, proportionate and non-discriminatory controls and field inspections conducted by labour inspectorates or the bodies responsible for the enforcement of statutory minimum wages;

(b) develop the capability of enforcement authorities, in particular through training and guidance, to proactively target and pursue non-compliant employers.

Recital (14): Not all workers in the Union are effectively protected by minimum wages, as in some Member States some workers, even though they are covered, receive a lower remuneration than the statutory minimum wage in practice, due to non-compliance with existing rules. Such non-compliance has been found to affect, in particular, women, young workers, low-skilled workers, migrant workers, single parents, persons with disabilities, workers in non-standard forms of employment such as temporary workers and part-time workers, and agricultural and hospitality workers, which as a consequence drives down wages. In Member States where minimum wage protection is provided for in collective agreements alone, the share of workers not covered is estimated to vary from 2 % to 55 % of all workers.

Recital (30): An effective enforcement system, including reliable monitoring, controls and field inspections, is necessary to ensure the functioning of and compliance with national statutory minimum wage frameworks. To strengthen the effectiveness of enforcement authorities, a close cooperation with the social partners is also needed, including to address critical challenges such as those related to abusive sub-contracting, bogus self-employment, non-recorded overtime or health and safety risks linked to an increased work intensity. The capabilities of enforcement authorities should also be developed, in particular through training and guidance. Routine and unannounced visits, judicial and administrative proceedings and penalties in the case of infringements are important means by which to dissuade employers from effecting infringements.

2.4.1. Main elements of the provision

The purpose of Article 8 is to ensure the effective access of workers to statutory minimum wage protection. Ensuring effective enforcement is essential for workers to benefit from adequate minimum wage protection and for businesses to be protected from unfair competition. In several Member States, some workers, receive in practice a remuneration below the statutory minimum wage due to the non-respect of existing rules even though they are covered by it.

Article 8 requires Member States to take the necessary action, with the involvement of social partners, to ensure effective access of workers to statutory minimum wage protection.

In the chapeau paragraph, the expressions ‘as appropriate’ and ‘where appropriate’ acknowledge that certain Member States may already have well-functioning enforcement systems in operation. It will be up to Member States to review and assess whether they need to change their legislation to comply with Article 8.

Article 8(a)

Article 8(a) requires Member States to provide for ‘effective, proportionate and non-discriminatory controls and field inspections conducted by labour inspectorates or the bodies responsible for the enforcement of statutory minimum wages’.

The term ‘effective’ alongside ‘proportionate and non-discriminatory controls and field inspections’ underscores the importance of efficient tools for fighting non-compliance. Recital (30) also highlights that ‘routine and unannounced visits, judicial and administrative proceedings, and penalties in the event of infractions, are key deterrents to discourage employers from committing violations’.

With a view to implementing Article 8(a), Member States should review or establish legal frameworks that empower labour inspectorates or designated bodies to conduct controls and field inspections. These controls and field inspections should be ‘effective and proportionate’, ensuring that they are neither disproportionate nor insufficient to verify compliance with statutory minimum wage laws. The controls should avoid disproportionate burdens on businesses while ensuring adequate protection for workers.

Besides, controls should be ‘non-discriminatory’, meaning that they should not target or avoid targeting a company solely based on the nationality of its owner or registration in a specific Member State. However, this does not prohibit Member States from applying a risk-based approach that entails more frequent or intense controls in sectors or companies where non-compliance with minimum rules is more likely.

Article 8(a) refers to both labour inspectorates and other bodies to respect differences that may exist across Member States as concerns the enforcement of statutory minimum wages.

Article 8(b)

Article 8(b) requires Member States to “develop the capability of enforcement authorities, in particular through training and guidance, to proactively target and pursue non-compliant employers”.

Member States could take inspiration from ILO and Eurofound as well as best practices among Member States to develop the capability of enforcement authorities. For example, to assess the capacity of labour inspection systems in ensuring enforcement, the financial resources allocated to enforcement activities, the number of inspectors and inspectors’ training are criteria that could be considered.

Strengthening training and guidance are minimum requirements that should enable enforcement authorities to proactively target and pursue employers who violate statutory minimum wage regulations. It should equip them with the necessary skills to identify non-compliant employers and take appropriate enforcement actions.

2.4.2. Discussion

The main issues discussed were the following:

- The notion of effectiveness of controls; and
- Measures to develop the capability of enforcement authorities.

Article 8(a)

In relation to Article 8(a), one Member State expert asked how Member States should determine whether controls are 'proportionate' and 'non-discriminatory', as well as **how the effectiveness of control could be measured**. The Commission services clarified that 'effective control' referred to controls that pursue the enforcement of the statutory minimum wage. It added that Member States could assess if their system is already compliant and if it would need to reinforce its controls. On the 'non-discriminatory' requirement, it explained that non-discrimination is a well-established EU principle, which means that Member States should not target companies based on the nationality of the owner or on the fact that the company is based in another Member State. It added that at the same time, risk-based approaches, such as targeting sectors more likely to be non-compliant with the minimum wage, can be followed.

A Member State expert sought further explanation on the **'effectiveness of control'**, whether it meant that consistent reactions from labour inspectors to reported non-compliance cases could be a measure of effectiveness. The Commission services replied that the aim is to decrease non-compliance with statutory minimum wages and that this should be the focus when considering the effectiveness of control. It explained that 'proportionate' means that measures should not impose an undue burden on companies.

Article 8(b)

A Member State expert asked **how to implement** Article 8(b) on the **development of the capability of enforcement authorities**. The Commission services also stated that Member States should adapt the provision under Article 8(b) to their national framework and involve social partners in this. It suggested Member States could review the **training** provided to its labour inspectorates, provide guidance to enforcement authorities, **monitor and identify sectors affected by non-compliance** to help improve enforcement capabilities. It also suggested looking into the **number of inspectors and controls**, as well as **risk assessments** as options to ensure the effective implementation of Article 8.

ETUC stated that capacity-building for enforcement – including a sufficient number of qualified labour inspectors –, proactive anticipation of potential violations, and effective controls and field inspections are crucial for guaranteeing the enforcement of statutory minimum wages. It asked whether Article 8(b) could be interpreted as requesting Member States to **ensure that there are enough qualified labour inspectors** to provide effective controls. The Commission services replied that while the number of inspectors is not explicitly specified in the Article, good resources and trained inspectors are relevant for ensuring the enforcement of statutory minimum wages rules. It pointed out that Member States have the freedom to decide on their enforcement strategies.

3. Chapter III on Horizontal provisions

3.1. Public procurement (Article 9)

Article 9: *In accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, Member States shall take appropriate measures to ensure that, in the awarding and performance of public procurement or concession contracts, economic operators and their subcontractors comply with the applicable obligations regarding wages, the right to organise and collective bargaining on wage-setting, in the field of social and labour law established by Union law, national law, collective agreements or international social and labour law provisions, including ILO Freedom of Association and the Protection of the Right to Organise Convention No 87 (1948) and the ILO Right to Organise and Collective Bargaining Convention No 98 (1949).*

Recital (31): *The effective implementation of minimum wage protection set out by legal provisions or provided for in collective agreements is essential in the awarding and the performance of public procurement and concession contracts. Non-respect for collective agreements providing for minimum wage protection may indeed occur in the execution of such contracts or in the sub-contracting chain thereafter, resulting in workers being paid less than the wage level agreed in the sectoral collective agreements. To prevent such situations, in accordance with Articles 30(3) and 42(1) of Directive 2014/23/EU, Articles 18(2) and 71(1) of Directive 2014/24/EU and Articles 36(2) and 88(1) of Directive 2014/25/EU, of the European Parliament and the Council, public procurement contracting authorities and contracting entities are to take appropriate measures, including the possibility to introduce contract performance conditions, and ensure that economic operators apply to their workers the wages provided for in collective agreements for the relevant sector and geographical area and respect the rights of workers and trade unions arising from the ILO Freedom of Association and the Protection of the Right to Organise Convention No 87 (1948) and Right to Organise and Collective Bargaining Convention No 98 (1949), as referred to in those Directives, in order to abide by applicable obligations in the field of labour law. However, this Directive does not create any additional obligation in relation to those Directives.*

3.1.1. Main elements of the provision

The aim of Article 9 is to ensure compliance with statutory minimum wages and wages set by collective agreements in the awarding and performance of public procurement or concession contracts.

The EU legal framework for public procurement is set by three EU Directives adopted in 2014, namely: Directive 2014/24/EU on public procurement; Directive 2014/25/EU on utilities (water, energy, transport, postal services); and Directive 2014/23/EU on concessions. The obligation set by Article 9 of the Directive on adequate minimum wages already exists in these public procurement Directives (the so-called ‘social clause’) ⁽⁹⁾.

Article 9 does not call into question nor amends these Directives. Non-compliance with the social clause appears to be a significant phenomenon in many countries, notably as testified by the feedback received from social partners during the preparation of the minimum wage Directive.

⁽⁹⁾ See Article 30.3 of Directive 2014/23/EU on concession contracts, Article 18.2 of Directive 2014/24/EU on public procurement, and Article 36.2 of Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>.

Article 9 asks Member States and in particular public procurement contracting authorities to ensure that economic operators and sub-contractors comply with the applicable legal provisions and collective agreements. However, Article 9 does not specify how Member States should ensure compliance with this obligation. The modalities for this are left to Member States' discretion, in line with national practices and traditions, and fully respecting social partners' autonomy.

Member States can take inspiration from ILO instruments that provide guidance on responsible labour practices to companies, namely:

- the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), and
- the Declaration of Fundamental Principles and Rights at Work.

Moreover, some examples of measures that could be taken by Member States include:

- Providing for contracting authorities and entities to apply as a condition for the performance of contracts, in the procurement or concession documents, that the economic operator shall respect the right to organise and collective bargaining.
- Introducing a law that establishes as a legally binding condition for the performance of the contract that the collective agreement, which applies to the specific performance, is respected. This is in line with Article 70 of Directive 2014/24/EU and Article 87 of Directive 2014/25/EU, as well as Recitals 64-66 of Directive 2014/23/EU.
- Providing that any economic operator that breached workers social and labour rights will be excluded from receiving public procurement and concession contracts for a certain period of time. This is in line with Article 57(4) of Directive 2014/24/EU ⁽¹⁰⁾.

Finally, and in accordance with Article 4, Member States with less than 80% collective bargaining coverage could consider including measures on public procurement in the national action plans to promote collective bargaining.

3.1.2. Discussion

The main issues discussed were the following:

- Monitoring of the implementation of the public procurement directives; and
- The possible use of the conclusion of a collective agreement as an award criterion for public procurement contracts.

ETUC indicated that, in light of the lack of compliance with the social clause of the public procurement Directives, the Commission should effectively monitor the implementation of

⁽¹⁰⁾ Specifically, this Article states that '4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations: (a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2)'.

Article 9 and asked about the measures foreseen in this regard. The Commission services clarified that, while the responsibility for **monitoring the implementation of the public procurement Directives** lies primarily with Member States, the Commission is taking action to facilitate this monitoring through better data collection and data transparency. It recalled that precise and thorough information from Member States on how they transpose the Directive will help the Commission assess whether it is effectively transposed, which contributes to the Directive's effective enforcement. A Member State expert pointed out that this information should not be collected by the contracting authorities since this is a matter concerning labour rights' regulations, while noting that it is essential that the collection of data at EU level is carried out in the most automated and standardised possible manner. Therefore, this should be channelled through the standard forms of Commission Implementing Regulation (EU) 2019/1780 on eForms, for example, through the BT-775 field, which includes social considerations in the field of strategic public procurement.

ETUC suggested that Member States could take measures related to public procurement inspired by ILO Convention 94 on labour clauses (public contracts). It also called on Member States to promote collective bargaining in line with Article 4 and to consider **measures to ensure the compliance with collective agreements and the respect of the right to collective bargaining, such as exclusion, termination and penalties in cases of violations of labour rights and the obligation to document suppliers and subcontractors**. BusinessEurope called for caution, arguing that the implementation of the Directive has to take into account national specificities and that ultimately the enforcement of public procurement rules is a national competence. It pointed out that the participation in collective bargaining is not an award criterion and that freedom of association is essential. One Member State expert stated that the early termination of a public contract could be considered by Member States as a measure that contracting authorities could apply in case of non-payment of wages by the contractor. It further added that this is allowed by Article 73 of Directive 2014/24/EU, given the non-exhaustive nature of the list of reasons for early termination of public contracts that contracting authorities should be empowered to apply. ETUC noted that the early termination of a contract could also be considered when paid wages are below the statutory minimum wages or the minimum pay rates specified by the applicable collective agreement. The Commission services recognised that, in case companies were to breach certain rights, contracts could be terminated, and companies could be excluded from public procurement procedures, but that taking such measures would be the responsibility of Member States.

In Business Europe's view, the opinion that Member States can create regulations so that companies can be excluded from public procurement procedures if they violate certain rights should be viewed critically. Exclusion from public procurement procedures should not be the first means of sanctioning violations. Rather, Member States should consider concrete sanction regulations that are taken with a sense of proportion. A materiality threshold of culpable violation is also important so that severe sanctions do not take effect even if the company only culpably violates its obligations to a minor degree. Moreover, regulations on collective bargaining represent a further encroachment on the autonomy of collective bargaining and are counterproductive to the declared aim of the Directive to increase collective bargaining coverage in Member States. The Commission services replied that this was not a measure suggested by the Commission, but only an example suggested by one of the experts, and that in any event it is for Member States to decide on the measures they consider most appropriate.

ETUC asked if Member States could introduce a law according to which the **coverage by a collective agreement would be a criterion for awarding a public procurement contract**. The Commission services agreed that such a measure could be considered by Member States, while emphasising that the equal treatment of economic operators, including SMEs, would need to be ensured. A Member State expert added that any award criterion must comply with the requirements under the public procurement Directives or, at

least, it must be linked to the subject-matter of the public contract and be formulated in an objective and non-discriminatory manner.

3.2. Monitoring and data collection (Article 10)

Article 10:

1. Member States shall take the appropriate measures to ensure that effective data collection tools are in place to monitor minimum wage protection.

2. Member States shall report the following data and information to the Commission every second year, before 1 October of the reporting year:

(a) the rate and development of collective bargaining coverage;

(b) for statutory minimum wages:

(i) the level of the statutory minimum wage and the share of workers covered by it;

(ii) a description of the existing variations and deductions and the reasons for their introduction and the share of workers covered by variations, as far as data is available;

(c) for minimum wage protection provided for only in collective agreements:

(i) the lowest pay rates provided for in collective agreements covering low-wage earners or an estimate thereof, if accurate data is not available to the responsible national authorities, and the share of workers covered by them or an estimate thereof, if accurate data is not available to the responsible national authorities;

(ii) the level of wages paid to workers not covered by collective agreements and its relation to the level of wages paid to workers covered by collective agreements.

The Member States that are subject to the reporting obligations referred to in first subparagraph, point (c) shall be required to report the data referred to in point (i) thereof at least with regard to sectoral, geographical and other multi-employer collective agreements, including collective agreements that have been declared universally applicable.

Member States shall provide the statistics and information referred to in this paragraph disaggregated by gender, age, disability, company size and sector as far as available.

The first report shall cover 2021, 2022 and 2023 and shall be delivered by 1 October 2025. The Member States may omit statistics and information which are not available before 15 November 2024.

3. The Commission shall analyse the data and information transmitted by the Member States in the reports referred to in paragraph 2 and in the action plans referred to in Article 4(2). It shall report in this regard every second year to the European Parliament and to the Council and shall simultaneously publish the data and information transmitted by Member States.

Recital (33): Reliable monitoring and data collection are essential for effective minimum wage protection. For the purposes of data collection, Member States may rely on sufficiently representative sample surveys, national databases, harmonised data from Eurostat and other publicly accessible sources such as the Organisation for Economic Co-operation and Development. In exceptional cases where accurate data is not available, Member States might use estimates. Employers, in particular microenterprises and other SMEs, should not bear an unnecessary administrative burden with regard to the implementation of data collection requirements. The Commission should report every second year to the European Parliament and to the Council its analysis of levels and developments in the adequacy and

coverage of statutory minimum wages as well as the collective bargaining coverage on the basis of data and information to be provided by Member States.

In addition, progress should be monitored in the framework of the process of economic and employment policy coordination at Union level. In that context, the Council or the Commission can request the Employment Committee and the Social Protection Committee, in accordance with Articles 150 and 160 TFEU respectively, to examine, in their respective area of competence, the development of the collective bargaining coverage and the adequacy of statutory minimum wages in the Member States on the basis of the report produced by the Commission and other multilateral surveillance tools such as benchmarking. During such an examination, the Committees are to involve the social partners at Union level, including cross-sectoral social partners, in accordance with Articles 150 and 160 TFEU respectively.

3.2.1. Main elements of the provision

Article 10 sets out the obligations concerning monitoring and data collection on minimum wage protection. Reliable monitoring and data collection are key to monitor progress towards achieving the objectives of the Directive.

The obligations to submit data every second year and make them public apply to both systems, although the specific requirements for each system differ, in particular:

- All Member States are requested to report the rate and development of collective bargaining coverage, as defined in Article 3(5).
- Member States with a statutory minimum wage are requested to report also:
 - the level of this statutory minimum wage as well as the share of workers covered by it.
 - a list of all the existing variations and deductions and the reasons for their introduction as well as the share of workers covered by variations as far as data is available.
- Member States where minimum wage protection is provided for only in collective agreements also need to report:
 - the lowest pay rates provided for in collective agreements covering low-wage earners ⁽¹¹⁾ or an estimate thereof, if accurate data is not available to the responsible national authorities, and the share of workers covered by them, or an estimate thereof if no accurate data is available to the responsible national authorities.
 - the level of wages paid to workers not covered by collective agreements and its relation to the level of wages paid to workers covered by collective agreements.

Moreover, the Directive asks all Member States to ‘*provide the statistics and information disaggregated by gender, age, disability, company size and sector as far as available*’.

While Member States are free to select the data sources they want to use for these data reporting requirements, the Commission encourages them to use Eurostat or OECD data

⁽¹¹⁾ Eurostat defines low-wage earners as those employees earning two thirds or less of the national median gross hourly earnings.

sources as they provide harmonised, comparable and reliable data across all Member States (see Recital (33)). The Technical Annex in Section 3.2.3 provides details on harmonised data available at EU level to comply with reporting requirements of Article 10(2).

Member States shall deliver their reports by 1 October of the reporting year and the coverage period of each report shall cover the 2 preceding years for which data were not submitted. Only the first report (to be delivered by 1 October 2025) shall cover three years, namely 2021, 2022 and 2023 provided that data are available. Member States may omit in this first report data and information not available before 15 November 2024.

The Directive requires the Commission to analyse the data and information transmitted by Member States and to report in this regard every second year to the European Parliament and to the Council. The Commission will report also on the progress and effectiveness of national action plans, as this would contribute to the effective monitoring of the implementation of Article 4.

3.2.2. Discussion

The main issues discussed were the following:

- The aim and contents of the Commission's report and possible follow-up actions;
- The availability of data for the required breakdowns;
- Timing of the reporting; and
- The circumstances under which estimates can be provided.

BusinessEurope inquired about the aim of the Commission's report and what would be the follow-up actions. The Commission services replied that the **purpose of its report** will be to analyse the levels and developments in the adequacy and coverage of minimum wage protection as well as the collective bargaining coverage on the basis of data and information provided by Member States. The Commission services added that the Commission or the Council **could then request the Employment Committee and the Social Protection Committee** to examine the development of the collective bargaining coverage and the adequacy of statutory minimum wages in Member States.

BusinessEurope pointed out that it would be burdensome for Member States to report on the **breakdowns**, in particular by age. The Commission services replied that some information is already available at EU level and stressed that Member States are required to report these breakdowns as far as data is available.

ETUC asked for clarification on the **timing of the reporting** by Member States of both the indicators set in Article 10 and the action plans required in Article 4(2). The Commission explained that Member States will have to report on the required indicators by 1 October 2025 and then every two years. As concerns the action plans, the Commission services explained that, although the Directive does not set a specific deadline for the adoption of the action plan, Member States with a collective bargaining coverage below 80% are expected to establish them by end 2025 in line with the obligation for the Commission to report on their content as required by Article 10(3). ETUC further inquired why the transposition deadline is not applicable to the establishment of the action plans required in Article 4(2). The Commission services clarified that the establishment of actions plans is

part of the implementation, and not of the transposition of the Directive, as reflected in Article 17(3).

ETUC inquired about the role of social partners in the context of Article 10. The Commission services replied that the Directive foresees a significant role for social partners in monitoring and data collection not only in the case of statutory minimum wages, as provided for by Article 7, but also in the case of collective bargaining systems as social partners hold a large part of the data to be reported.

ETUC further inquired on how to assess the minimum wage of workers with multiple jobs. The Commission services replied that Member States should follow the Eurostat definition of minimum wage earners which refers to the main job of workers (and not second jobs).

A Member State expert asked about how the numerator and denominator should be determined for the purposes of calculating the share of workers covered by a statutory minimum wage under Article 10(2)(b)(i). The Commission services clarified that the numerator should be the number of workers covered by the statutory minimum wage and the denominator the whole workforce. It also asked how this share should be calculated in the case of multiple minimum wages applying to different occupational groups. The Commission services replied that, in case of multiple statutory minimum wages, they would need to report on the share covered by each statutory minimum wage and pointed out that the denominator to calculate the share should always be the total workforce.

Following the previous question another Member State expert asked how the denominator should be calculated in Member States where the statutory minimum wage only covers a small part of the workforce (for instance, only a part of the civil servants). The Commission services recalled that, according to the Directive, Member States have to report on the share of workers covered by a statutory minimum wage with respect to the total workforce, but that Member States are in any event free to add additional information which might be useful such as the share that workers covered by a statutory minimum wage represent with respect to the workforce in the public sector, for instance.

ETUC asked **under which circumstances Member States can provide estimates**. The Commission services clarified that estimates can be provided when accurate data is not available at European or national level. This would thus have to be decided on a case-by-case basis. For instance, for the breakdown of disability, there is currently no information in the SES survey. Thus, in the absence of national data Member States can provide the breakdown by disability for indicator 2c(ii) based on estimates. However, if there is no data or the samples are too small it will not be possible to calculate such estimates.

With respect to the calculation of the collective bargaining coverage, the Commission services pointed out that, **in light of data constraints, a collective bargaining coverage rate also including collective agreements signed by non-trade unions** could be used as an estimate in exceptional cases where a collective bargaining coverage rate taking into account only collective agreements signed by trade unions is not available. Based on available information, including collective agreements signed by non-trade unions would have a significant impact on the collective bargaining coverage rate in a few Member States. The use of such estimates would be without prejudice to the need to continue making efforts to improve data collection.

While acknowledging the existing data constraints, ETUC argued that a deviation from the intentions of the co-legislators cannot be justified. It pointed out that agreements concluded by non-trade union organisations do not contribute to quality collective bargaining and therefore should not be included in the calculation. ETUC added that, when data constraints are the issue, improved data collection has to become the solution.

ETUC inquired how the Commission will ensure the comparability of the reported data. The Commission services replied that the Directive sets minimum requirements, giving flexibility to Member States. In the case of collective bargaining systems, using a common definition of minimum wage, i.e., basic adult full time pay rate for an adult worker (without bonuses or top ups), will already ensure comparability.

A Member State expert asked whether the Commission would provide Member States with a template for data reporting. The Commission services replied that the Directive gives flexibility to Member States but that it could propose a template next year if Member States find it useful.

With regards to the requirement to provide disaggregated data by sectors as far as available, the Commission services encouraged Member States to use the Eurostat main standardized classification for company size and sector, according to which company size is classified according to the number of employees while sector is defined based on the NACE REV 2 classification.

3.2.3. Technical annex on Article 10(2)

This technical annex provides guidance to Member States on harmonised data available at EU level that could be used by Member States to comply with reporting requirements set in Article 10(2). Member States remain free to use other data sources, including national databases and sufficiently representative sample surveys.

All Member States – Article 10(2)(a)

All Member States are requested to report the rate and development of collective bargaining coverage. In line with Article 3(5), this indicator should be calculated as follows:

- On the numerator: the number of workers whose pay and/or employment terms are determined by one or more collective agreements. This includes all relevant collective agreements, including those extended and those still in force from previous years, even if they do not contain wage clauses.
- On the denominator: the number of workers whose working conditions may be regulated by collective agreements.

The OECD/AIAS ICTWSS database provides an update of this indicator in a harmonised, comparable and reliable manner across all Member States every two years (in line with the reporting requirements). This database has the advantage that it builds on information validated by Member States, and the OECD work provides reassurance about data comparability and reliability. Still, Member States are free to select the appropriate data source.

Member States with a statutory minimum wage – Article 10(2)(b)

Member States with a statutory minimum wage are also requested to provide the following additional data and information:

- i. The level of the statutory minimum wage and the share of workers covered by it

As concerns the level of statutory minimum wages, data is released by Eurostat twice a year ⁽¹²⁾. Minimum wages are defined as monthly wage rates for gross earnings, that is, before deduction of income tax and social security contributions.

As concerns the share of workers covered by minimum wages, Eurostat does not currently publish data on this. Still, Member States could calculate an estimate of this share by linking microdata from the EU Labour Force Survey (LFS) on the gross monthly pay from the main job (INCGROSS variable) to the level of minimum wages ⁽¹³⁾. Alternatively, Member States could use the Structure of Earnings Survey (SES) to report this indicator, as it contains information on the share of workers earning the minimum wage. However, the SES is only conducted every 4 years and currently does not include enterprises with less than 10 employees. Under the approved review of the LMB legislation, the SES will be extended to cover all firms (micro-firms included) on a mandatory basis. But this will apply only to the next wave (SES 2026) for which data will not be available before end 2028. The frequency of every 4 years will not change. Furthermore, it does not contain information on disability, which is one of the required breakdowns. In any case, as stated in Recital (33), Member States could also use national databases or sufficiently representative sample surveys, if available, to report this data.

- ii. A description of existing variations and deductions and the reasons for their introduction and the share of workers covered by variations, as far as data is available

Data on existing variations and the share of workers covered by them does not exist at EU level. However, Member States can find a description of all their current variations in their national legislation. The share of workers covered by variations could be calculated based on the LFS and the INCGROSS variable. For instance, the breakdown by age would allow estimating the share of workers covered by a youth variation, which are one of the most widely used. For calculating the share of workers covered by a variation when the LFS does not provide a breakdown for a specific group, Member States would have to rely on national administrative data.

Member States with minimum wage protection provided for only in collective agreements – Article 10(2)(c)

Member States with *minimum wage protection provided for only in collective agreements* are also required to provide the following additional data and information:

- i. The lowest pay rates provided for in collective agreements covering low-wage earners or an estimate thereof, if accurate data is not available to the responsible national authorities, and the share of workers covered by them or an estimate thereof, if accurate data is not available to the responsible national authorities

This indicator concerns the lowest full adult pay rates set by collective agreements covering low wage earners. This refers to regular pay and does not take into account pay rates bonuses on the basis of seniority, skills, compensation during leave, Christmas bonuses etc.

Eurofound is currently developing a Collective Bargaining Agreements (CBA) Database i.e., an EU-wide database on collectively agreed minimum pay rates applicable to a selection of low paid occupations. It covers all Member States and it will be released by early 2024. The database is expected to produce reliable and comparable data across Member States on

⁽¹²⁾ In mid-February, for the reference date of 1 January, and in mid-August for the reference date of 1 July each year.

⁽¹³⁾ The LFS provides data on an annual basis and is released in April, thus in time for a reporting by 1 October.

the lowest pay rates in low-paid sectors, although the availability of data on the share of workers covered may be limited.

The agreed text allows Member States to provide estimates in case this data is not available to national authorities. In this regard, several registers of collective agreements at national level do not contain precise estimates of the number of workers covered by an agreement in the low-paid sectors (instead, estimates represent all covered workers).

- ii. The level of wages paid to workers not covered by collective agreements and its relation to the level of wages paid to workers covered by collective agreements

A good estimate of this indicator can be calculated on the basis of the data on individual earnings included in the Structure of Earnings Survey (SES). This survey contains information on the coverage by collective agreements and therefore is suitable for the calculation of the level of wages and shares of covered and non-covered workers.

3.3. Information on minimum wage protection (Article 11)

Article 11: Member States shall ensure that information regarding statutory minimum wages as well as minimum wage protection provided for in universally applicable collective agreements, including information on redress mechanisms, is publicly available, where necessary in the most relevant language, as determined by the Member State, in a comprehensive and easily accessible way, including to persons with disabilities.

Recital (34): Workers should have easy access to comprehensive information on statutory minimum wages as well as on minimum wage protection provided for in universally applicable collective agreements to ensure transparency and predictability as regards their working conditions, including for persons with disabilities in accordance with Directive (EU) 2016/2102 of the European Parliament and of the Council ⁽¹⁴⁾.

3.3.1. Main elements of the provision

The aim of Article 11 is to ensure that workers have an easy access to information on minimum wage protection. This is key for ensuring an adequate minimum wage protection. Similar provisions are included in ILO Minimum Wage Fixing Recommendation 135 ⁽¹⁵⁾. Moreover, Directive 2014/67/EU on the Enforcement of the Posting of Workers Directive includes provisions related to easy access to information that can serve as inspiration for the transposition of Article 11; specifically, the latter Directive requires Member States to ensure that information on universally applicable collective agreements is made publicly available in a single official website.

The text limits the obligation to make the reported information public only to statutory minimum wages and universally applicable collective agreements. Therefore, it does not concern the minimum wage protection stemming from collective agreements that are not universally applicable.

Regarding the reference to '*the most relevant language*', this wording leaves flexibility to Member States to determine what are the most relevant languages, in addition to the official languages of each country.

The information should be made available '*in a comprehensive and easily accessible way, including to persons with disabilities*'.

- The term '*comprehensive*' means that the publicly available information should contain all aspects of minimum wage protection that can be relevant for workers to know and be able to exercise their rights.
- The term '*easily accessible*' means that a) it should be available through the most adapted communication channels to ensure it reaches those who need to know it (examples: webpage of the Ministry, brochures at employment

⁽¹⁴⁾ Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies (OJ L 327, 2.12.2016, p. 1).

⁽¹⁵⁾ Article 6 of ILO Recommendation 135 reads: '*Measures to ensure effective application of all provisions relating to minimum wages should include the following: Arrangements for giving publicity to minimum wage provisions in languages or dialects understood by workers who need protection, adapted where necessary to the needs of illiterate person*'.

agencies and workplaces, etc.) and b) that it should be in a clear and easily understandable language ⁽¹⁶⁾.

Article 11 does not include an obligation to publish collective agreements. Where statutory minimum wages are in place, only information about these wages needs to be made publicly available. Where universally applicable collective agreements are in place, Member States are asked to make publicly accessible only the information related to minimum wage protection including information on redress mechanisms, and not the whole collective agreement.

The requirement to publish information on minimum wage protection included in universally applicable collective agreements applies also to countries with statutory minimum wages. This is because these collective agreements may establish higher minimum wages than the statutory minimum wage in the country.

3.3.2. Discussion

The main issues discussed were the following:

- How to interpret the notion of '*relevant language*'; and
- The meaning of '*minimum wage protection*' in the context of this provision.

ETUC inquired **how to interpret the notion of '*relevant language*'**. The Commission services replied that it is for each Member State to determine, in view of the composition of its workforce and in particular of those that are likely to earn minimum wages, what is the language or languages that should be used for information purposes, but that Member States can find inspiration in Article 9(5) of Directive 2014/67 on the enforcement of the Directive concerning the posting of workers. These could include not only the official languages, but also other languages spoken by a significant part of the population or minimum wage earners in relevant sectors. The key element in Article 11 is 'where necessary', so when more than one language is deemed necessary for information purposes then it is reasonable for the information to be provided in more than one language.

Two Member States' experts asked whether the information should be published on a platform set up by national authorities. The Commission services replied that Member States are responsible to make this information public and it is up to them to choose the means and platforms.

One Member State expert inquired about the **meaning of '*minimum wage protection*'** in the context of Article 11 and pointed out that the same expression is used in Article 12. The Commission services clarified that as concerns Article 11, Member States are asked to report data on statutory minimum wage and universally applicable collective agreements only. However, this does not mean that these are the only instruments providing minimum wage protection because there are also other collective agreements which provide it.

One Member State expert inquired whether the Commission services plan to publish some technical description of transferring data- templates. The Commission services explained

⁽¹⁶⁾ Member States can get inspiration from the approach developed by the European Labour Authority to the presentation of universally applicable collective agreements on the single national websites on posting as required by the EU Directive 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers: <https://www.ela.europa.eu/sites/default/files/2021-01/ELA-Approach-to-presenting-collective-agreements.pdf>.

that there have been no plans to come forward with a specific template, apart from the one provided by ELA. However, if Member States would like to have it, the Commission services could come forward with a template in the course of 2024, keeping in mind that the Directive does give flexibility to Member States.

Two Member State experts inquired whether, to comply with the obligation to make the information on minimum wage protection from universally applicable collective agreements publicly available, it would be enough to provide the link to trade union websites or to the registry of collective agreements. The Commission services replied that, in Member States where there is a very high number of universally applicable collective agreements, the provision of this information through a link to existing websites may be justified provided that the information is comprehensive and easily accessible. Another Member States noted that the single website required by Directive 2014/67 on the enforcement of the Directive concerning the posting of workers could be a way for Member States to comply with the obligation provided that the information on minimum wage protection is made available in a clear and easily accessible manner.

One Member State expert asked whether it is sufficient for a Member State to provide information on the lowest pay rate in the case when a collective agreement provides for a minimum wage for both unskilled and skilled workers. The same question was raised in relation to statutory minimum wages when different salary scales for different skills and/or for different occupational groups within a sector are applied. The Commission services replied that Member States relying on collective bargaining should provide information on the lowest pay rates provided for in universally applicable collective agreements covering low-wage earners. The same obligation applies also to Member States with statutory minimum wage.

3.4. Right to redress and protection against adverse treatment or consequences (Article 12)

Article 12:

1. Member States shall ensure that, without prejudice to specific forms of redress and dispute resolution provided for, where applicable, in collective agreements, workers, including those whose employment relationship has ended, have access to effective, timely and impartial dispute resolution and a right to redress, in the case of infringements of rights relating to statutory minimum wages or relating to minimum wage protection, where such rights are provided for in national law or collective agreements.

2. Member States shall take the measures necessary to protect workers and workers' representatives, including those who are trade union members or representatives, from any adverse treatment by the employer and from any adverse consequences resulting from a complaint lodged with the employer or resulting from any proceedings initiated with the aim of enforcing compliance in the case of infringements of rights relating to minimum wage protection, where such rights are provided for in national law or collective agreements.

Recital (35): Workers and workers' representatives, including those who are trade union members or representatives, should be in a position to exercise their right of defence when their rights relating to minimum wage protection are provided for in national law or collective agreements and have been violated. In order to prevent workers from being deprived of their rights provided for in national law or collective agreements and without prejudice to specific forms of redress and dispute resolution provided for in collective agreements, including systems of collective dispute resolution, Member States should take the necessary measures to ensure that workers have access to effective, timely and impartial dispute resolution and a right to redress, as well as effective judicial and/or administrative protection from any form of detriment, if they decide to exercise their right of defence. Social partners' involvement in the further development of impartial dispute resolution mechanisms in Member States can be beneficial. Workers should be informed about the redress mechanisms for the purpose of exercising their right to redress.

3.4.1. Main elements of the provision

The purpose of Article 12 is to enhance the enforcement of minimum wage protection. It provides for a consistent set of procedural principles and obligations to put workers in a position to exercise their right of defence when their rights relating to minimum wage protection are violated, namely:

- The access to effective and impartial dispute resolution,
- a right to redress, and
- the effective protection from any form of detriment in case they decide to exercise their right of defence.

This is essential for workers to benefit from adequate minimum wage protection, and for businesses to be protected against unfair competition. In several Member States, some workers are poorly protected against adverse treatment resulting from a complaint, particularly in the case of non-unionised and/or foreign workers.

Article 12 applies to all Member States and addresses minimum wage rights that are 'provided for in national law or collective agreements'. Therefore, the rights concerned are

those established at national level either by the national normative acts on statutory minimum wages or by the minimum wage protection stemming from collective agreements.

Article 12(1)

Article 12(1) requires Member States to make sure that workers, including those whose employment relationship has ended, have access to '*effective, timely and impartial dispute resolution and a right to redress*'. The terms '*effective, timely and impartial*' are not defined in the Directive. Therefore, the responsibility lies with Member States to define the appropriate dispute resolution mechanisms to reach these goals.

Regarding the '*right to redress*' the Directive does not explicitly detail the content of this right. Member States are free to choose the remedies which will apply for the enforcement of minimum wage standards in the national legal order. In practice, a wide range of possible remedies exist, depending upon the field of the applicable law (e.g., civil, criminal, administrative remedies), but they usually have in common the possibility to seek restitution of unpaid wages and adequate compensation for the damage suffered by the workers.

The expression '*without prejudice to specific forms of redress and dispute resolution provided for, when applicable, in collective agreements*' reflects the fact that in some Member States collective agreements include specific forms of redress or specific dispute resolution mechanisms. These can include participation in negotiation, conciliation, or mediation as a mandatory or voluntary preliminary step before proceeding to administrative or judicial actions.

The scope of Article 12(1) covers also workers whose employment relationships have ended as they may refrain from seeking redress while still employed.

Article 12(1) applies in the case of infringements of the rights relating to statutory minimum wages or minimum wage protection where such rights are provided for in national law or collective agreements which means that the rights concerned are the rights that are conferred either by the national normative acts on statutory minimum wages or by the minimum wage protection stemming from collective agreements. Article 12 protects rights established at national level.

Article 12(2)

Article 12(2) requires Member States to protect workers and workers' representatives against any adverse treatment by the employer or other adverse consequences as a result of complaints about breaches of the rights relating to minimum wage protection provided for in national law or collective agreements.

The concept of protection against '*adverse treatment*' should be understood as protection from dismissal (including non-renewal of a temporary contract) or any other retaliatory measures taken by the employer as a reaction to the fact that the worker or workers' representative has lodged a complaint about breaches of the rights relating to minimum wage protection ⁽¹⁷⁾.

The protection should encompass both complaints lodged with the employer and proceedings, legal or administrative, initiated with the aim of enforcing compliance with the rights relating to minimum wage protection.

⁽¹⁷⁾ See in this regard, by analogy, judgment of 20 June 2019, *Hakelbracht and others*, C-404/18, EU:C:2019:523, paragraphs 23-37.

3.4.2. Discussion

The main issues discussed were the following:

- The concept of minimum wage protection for the application of this provision;
- The relationship with Article 4 of the Directive; and
- The applicability of Article 12 to the lowest pay scale in collective agreements in countries with statutory minimum wages.

The Commission services presented the aim and the main elements of this Article 12 and explained that its purpose is to enhance the enforcement of minimum wage protection. Member States should take the necessary measures to ensure access to effective, timely and impartial dispute resolution and a right to redress, as well as effective judicial and/or administrative protection from any form of detriment.

A Member State expert asked whether the implications of Article 12 depend on the type of minimum wage system. The Commission services replied that Article 12 does not differentiate between minimum wage systems. It sets the same obligations for all Member States, whether minimum wage protection is provided through collective agreements, statutory minimum wages or both.

A Member State expert then asked if having both a statutory minimum wage and wages covered by collective agreements constituted a 'mixed system' and whether minimum wage protection can stem from both a statutory minimum wage and collective agreements. The Commission services noted that the Directive does not use the term "mixed system" and confirmed that minimum wage protection can also be provided by collective agreement in countries with statutory minimum wages.

ETUC inquired whether the right to redress and protection against adverse treatment only applies **to the lowest pay scale set in collective agreements or to provisions in the collective agreement, such as on all other elements of remuneration, which contribute to minimum wage protection.** The Commission services replied that Article 12 only applies to the rights relating to minimum wage protection, taking into account the definition of minimum wage provided in Article 3(1).

ETUC asked **to what extent Article 12 also applies to the provisions of Article 4.** They consider that this is needed since the exercise of the right to collective bargaining is a prerequisite to reaching a collective agreement. The Commission services replied that Article 12 only comes into effect once the rights to minimum wage protection have been established. It cannot apply to the requirements set out in Article 4 which refer to creating the conditions for promoting collective bargaining on wage setting. ETUC pointed out that all EU Member States have established collective bargaining rights that contribute to minimum wage protection. It expressed concerns about the potential for separating the promotion and protection of such rights.

Article 12(1)

ETUC inquired **how the Commission would check** whether Member States have ensured that workers have access to effective, timely and impartial dispute resolution and a right to redress. They noted that although certain directives mandate the implementation of proportionate and dissuasive sanctions, the realization of these directives often falls short. ETUC questioned the efficacy of allowing Member States to review and assess their

systems which could be like "being party and judge" at the same time. The Commission services replied that it will be up to Member States to review and assess if they need to change their legislation to comply with Article 12. The Directive imposes a clear obligation of result: the dispute resolution mechanisms must be effective, timely and impartial. The Commission will then assess, after the transposition deadline, whether this is the case. The Commission services also called on Member States to provide detailed information in their transposition packages.

One Member State expert asked on whether an arbitration procedure was obligatory to comply with Article 12. The Commission services explained that Article 12 does not detail the procedures that should be implemented, leaving Member States with flexibility to decide on protective measures as long as they are effective, impartial, and timely. One Member State expert inquired about the worker whose employment relationship has ended, and questioned whether his or her right to seek redress is limited to a determined period after the termination of the employment contract. The Commission services clarified that the Directive does not give a precise definition for such circumstances, given its primary emphasis on achieving its overarching objectives and stressed that the discretion to address these situations appropriately resides with Member States.

Article 12(2)

A Member State expert asked **whether, in countries with statutory minimum wages, Article 12 (2) applies to the lowest pay scale set in collective agreements**. It also highlighted that collective agreements often offer wages that are at least equivalent but in practice often higher than the statutory minimum wage. The Commission services replied that Article 12(2) applies to both statutory minimum wages and the minimum wage protection provided by collective agreements. The wording of both paragraphs is clear in this regard and does not indicate that where workers are covered by both a statutory minimum wage and a collective agreement only the minimum wage rights resulting from one of them are to be protected.

One Member State expert observed that the wording in Article 12(2) seems different from the Directive on work-life balance, though the content appears similar. The Commission services agreed there might be similarities but confirmed the text was unique to this Directive and should not be confused.

3.5. Penalties (Article 13)

Article 13: *Member States shall lay down the rules on penalties applicable to infringements of rights and obligations falling within the scope of this Directive, where those rights and obligations are provided for in national law or collective agreements. In Member States without statutory minimum wages, those rules may contain or be limited to a reference to compensation and/or contractual penalties provided for, where applicable, in rules on enforcement of collective agreements. The penalties provided for shall be effective, proportionate and dissuasive.*

Recital (30): *(...) Routine and unannounced visits, judicial and administrative proceedings and penalties in the case of infringements are important means by which to dissuade employers from effecting infringements.*

3.5.1. Main elements of the provision

The purpose of Article 13 is to strengthen the enforcement of minimum wage protection by requiring all Member States to:

- have rules on penalties applicable to infringements of minimum wage rights, and
- ensure that such penalties are effective, dissuasive and proportionate.

Article 13, which applies to all Member States, establishes the principle that infringements of the rights and obligations falling within the scope of the Directive should be subject to penalties. This is also in line with Article 2(1) of ILO Convention No. 131, which states that failure to apply minimum wages shall make the person or persons concerned liable to appropriate penal or other sanctions.

The expression '*the rights and obligations falling within the scope of the Directive*' refers to the rights and obligations relating to minimum wage protection derived from national law or collective agreements. Therefore, all Member States must ensure that any infringement of statutory minimum wages and/or the minimum wage protection stemming from collective agreements is subject to penalties.

As concerns countries without statutory minimum wages, the rules on penalties may contain or be limited to a reference to the penalties provided for in their rules on enforcement of collective agreements. This serves to acknowledge the enforcement mechanism that exists in some of these countries, where there can be, on the one hand, a series of collective agreements applying to different territories, sectors or companies and, on the other, general rules on their enforcement.

The Directive does not prescribe specific sanctions. It is therefore left to each Member State to determine the type of penalties (e.g., criminal, administrative, civil), their form (e.g., fines or payment of compensation), as well as their amounts. However, the result must be that the penalties for infringements of minimum wage protection are '*effective, proportionate and dissuasive*'.

- Effectiveness points towards the ability of a sanction to achieve the desired goal, in this case the safeguarding of the right to minimum wage protection. According to the case-law ⁽¹⁸⁾, this requirement means that Member States are obliged to

⁽¹⁸⁾ Judgment of 10 April 1984, *Von Colson*, C-14/83, EU:C:1984:153, paragraph 18.

ensure that all persons who consider that their rights to minimum wage protection have been infringed may pursue the claims before the competent national instances by the persons concerned and that the remedies chosen guarantee real and effective protection.

- Dissuasiveness requires that the penalties are sufficiently high to have a genuine deterrent effect against a repetition of the infringement ⁽¹⁹⁾.
- Finally, proportionality refers to the fact that the penalties must be '*commensurate to the injury suffered*' ⁽²⁰⁾ and '*sufficiently adjustable according to the seriousness of the infringement*' ⁽²¹⁾.

Taking these definitions from the case-law as a starting point, the evaluation of whether a given penalty or system of penalties meets these three criteria has to be done on a case-by-case basis. The ECJ has held in the past, for instance, that purely nominal compensation ⁽²²⁾ or the setting of limits to the amount recoverable by way of reparation of the damage effectively caused ⁽²³⁾ did not comply with these criteria.

3.5.2. Discussion

The main issues discussed were the following:

- How the Commission will check the compliance of penalties with the criteria of effectiveness, proportionality and dissuasiveness; and
- Clarifications on penalties already provided by national law.

ETUC asked about the **process to check the compliance** of national rules on penalties with Article 13 and what role the Commission will play in it. The Commission services replied that, as a first step, Member States will have to check the penalties they have in place and determine if they already comply with the Directive or need to be amended. They will then communicate their rules on penalties to the Commission as part of their transposition packages. The Commission will assess them and take the necessary measures in case of non-compliance. The Commission will also duly examine any complaints it may receive in this regard from citizens or social partners.

ETUC mentioned that, given the disparity of national systems, the Commission may not be able to effectively check whether the penalties established at national level comply with the three criteria. The Commission services replied by giving some examples of sanctions which could in principle be assessed as not meeting these criteria (e.g., purely nominal penalties, limits to the damage which can be recuperated by the worker or disproportionately high penalties for minor infringements).

SME United asked whether the Commission will issue guidance to Member States on penalties complying with the three criteria set in Article 13. The Commission services replied

⁽¹⁹⁾ Judgment of 24 March 2021, *Prefettura Ufficio territoriale del governo di Firenze*, Joined Cases C-870/19 and C-871/19, EU:C:2021:233, paragraph 45.

⁽²⁰⁾ Judgment of 29 October 2009, *Pontin*, C-63/08, EU:C:2009:666, paragraph 42.

⁽²¹⁾ *Prefettura Ufficio territoriale del governo di Firenze*, paragraph 47.

⁽²²⁾ *Von Colson*, paragraph 24.

⁽²³⁾ Judgment of 2 August 1993, *Marshall II*, C-271/91, EU:C:1993:335, paragraph 30.

that, because of the different nature of the existing sanctions in the national legal systems, it would be difficult to make a general recommendation on appropriate penalties. However, if Member States consider it useful, the Commission services could provide them with a list of examples extracted from the case-law.

A Member State expert asked whether **administrative penalties** can be sufficient, so that Member States are not obliged to foresee compensation or contractual penalties. The Commission services replied that it is for Member States to determine the most appropriate penalties for potential infringements, but bearing in mind that the penalties must provide effective protection to workers against the damage they may suffer as a result of an infringement of their minimum wage rights.

Another Member State expert explained that their legislation already foresees sanctions for late payment of wages and for payment of amounts below the minimum wage, and asked whether the Directive obliges them to introduce new sanctions for these or for other types of infringements. The Commission services replied that Member States have to ensure that penalties exist for any infringements to the rights and obligations to minimum wage protection under their national law and collective agreements. In this regard, payment of amounts below the minimum wage or late payment of wages are obvious examples of infringements, but there may be other potential infringements. It also recalled that, if the existing penalties already comply with the Directive, a Member State does not have to introduce new measures but should explain how the existing rules comply with the obligation set in Article 13 in their transposition package.

4. Chapter IV on Final provisions

4.1. Dissemination of information (Article 14)

Article 14: *Member States shall ensure that the national measures transposing this Directive, together with the relevant provisions already in force relating to the subject matter as set out in Article 1, are brought to the attention of workers and employers, including SMEs.*

4.1.1. Main elements of the provision

This provision aims at ensuring awareness-raising in Member States on the rights resulting from the transposition of the Directive, as well as from other already existing provisions related to the same subject-matter.

This provision requires all Member States to bring to the attention of workers and employers:

- any new measures adopted at national level as a result of the transposition of the Directive, and
- any relevant provisions already in force relating to the subject matter of the Directive as set out in Article 1.

Article 1 mentions as subject matter of the Directive:

- the adequacy of statutory minimum wages,
- the promotion of collective bargaining on wage-setting, and
- the enhancement of effective access of workers to minimum wage protection rights.

Therefore, the obligation to disseminate information contained in Article 14 refers, on the one hand, to any national measure adopted to transpose the Directive and, on the other hand, to any relevant provision already in force in each of these three fields.

The Directive leaves flexibility to Member States as to the means through which this information should be disseminated, provided that they achieve the intended result, which is that it is effectively brought to the attention of workers and employers, including SMEs.

4.1.2. Discussion

The main issues discussed were the following:

- Relationship with Article 11 of the Directive; and
- Modalities of implementation.

ETUC asked about how the Commission foresees that this provision should be implemented and what is the meaning of '*brought to the attention of workers and employers*'. The Commission services explained that the provision leaves flexibility to Member States as to the means of dissemination and that they may find some inspiration in this regard in how they have implemented Article 17 of the Work Life Balance Directive, which also contains an obligation of dissemination of information.

ETUC and a Member State expert inquired about the **relationship of Article 14 with Article 11** (information on minimum wage protection) and whether they refer to the same method of publishing information. The Commission services noted that the subject matter of these two Articles is different: the former refers to the substance of minimum wage protection (such as the specific amounts and the right to redress), while the latter covers the new and existing measures (such as laws or regulations) transposing the Directive or referring to its subject matter. Article 11 also emphasizes, unlike Article 14, that information on minimum wage protection should be provided in the most relevant language and in a comprehensive and easily accessible way. Therefore, the modalities of publication of the information required by each of these Articles do not need to be the same.

A Member State expert noted that the obligation of dissemination of the information in Article 14 did not refer to the action plan foreseen in Article 4(2), since the establishment of that plan forms part of the implementation of the Directive, not of its transposition.

A Member State expert mentioned that, in their country, the standard method to make legislative provisions publicly available is their **publication in their official journal**. The Commission services noted that publication in official gazettes is also the means chosen by some Member States to implement Article 17 of the Work Life Balance Directive.

4.2. Evaluation and review (Article 15)

Article 15: *By 15 November 2029, the Commission shall, after consulting the Member States and the social partners at Union level, conduct an evaluation of this Directive. The Commission shall submit thereafter a report to the European Parliament and the Council reviewing the implementation of this Directive and propose, where appropriate, legislative amendments.*

Recital (36): *The Commission should conduct an evaluation providing the basis for a review on the effective implementation of this Directive. The European Parliament and the Council should be informed of the results of that review.*

4.2.1. Main elements of the provision

This Article is a standard provision which states that the Commission, five years after the expiry of the transposition deadline, shall review the implementation of the Directive. As stipulated by the co-legislators, it shall do so after consulting Member States and the European social partners.

The outcome of this review will be a report from the Commission to the co-legislators on the implementation of the Directive. If it considers it necessary, the Commission will also make legislative proposals to revise and update it.

4.2.2. Discussion

The main issue discussed was the following:

- Subject matter of the evaluation report to be prepared by the Commission.

ETUC inquired about the subject of the evaluation report to be prepared by the Commission. The Commission services replied that it will mainly assess whether there has been progress towards the achievement of the three specific objectives of the Directive, namely the adequacy of statutory minimum wages, the promotion of collective bargaining on wage-setting and the enhancement of the effective access of workers to rights to minimum wage protection.

A Member State expert asked if it will also examine the issue of minimum wage convergence. The Commission services replied that while upward convergence is an overarching objective mentioned in the Directive, the evaluation will mainly focus on whether the Directive has achieved its three specific objectives.

4.3. Non-regression and more favourable provisions (Article 16)

Article 16:

1. *This Directive shall not constitute valid grounds for reducing the general level of protection already provided to workers within Member States, in particular with regard to the lowering or abolition of minimum wages.*

2. *This Directive shall not affect Member States' prerogative to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to encourage or permit the application of collective agreements which are more favourable to workers. It shall not be construed as preventing Member States from increasing statutory minimum wages.*

3. *This Directive is without prejudice to any rights conferred on workers by other legal acts of the Union.*

Recital (38): *This Directive lays down procedural obligations as minimum requirements, thus leaving untouched Member States' prerogative to introduce and maintain more favourable provisions. Rights acquired under the existing national legal framework should continue to apply, unless more favourable provisions are introduced by this Directive. The implementation of this Directive cannot be used to reduce existing rights for workers, nor can it constitute valid grounds for reducing the general level of protection afforded to workers in the field covered by this Directive, including, in particular, with regard to the lowering or abolition of minimum wages.*

4.3.1. Main elements of the provision

The purpose of Article 16 is to incorporate the non-regression and more favourable conditions principles, which are standard in EU labour law Directives.

Article 16(1)

Article 16(1) contains the non-regression principle, which essentially means that the implementation of the Directive shall not serve as grounds to reduce the general level of protection in place for workers. It further specifies that the implementation of the Directive should not lead to the lowering or abolition of minimum wages.

According to the case-law of the ECJ ⁽²⁴⁾, in order for a national provision '*to be caught by the prohibition laid down in this clause, it must, first, be connected to the implementation*' of the Directive and, second, relate to the '*general level of protection*' afforded to workers as regards minimum wages.

The term '*implementation*' does not refer only to the original transposition of the Directive but covers also all domestic measures intended to ensure that the objective pursued by the directive may be attained, including those, which, after transposition in the strict sense, add to or amend domestic rules previously adopted ⁽²⁵⁾.

⁽²⁴⁾ Judgment of 8 March 2012, *Huet*, C-251/11, EU:C:2012:133, paragraph 31 and the case-law cited.

⁽²⁵⁾ Judgment of 23 April 2009, *Angelidaki*, joined Cases C-378/07 to C-380/07, EU:C:2009:250, paragraph 131.

The condition of the reduction of the '*general level of protection*' implies that only a reduction on a scale likely to have an overall effect on the minimum wage protection afforded to workers in a Member State is liable to be prohibited by this clause ⁽²⁶⁾.

Article 16(2)

Article 16(2) recalls the principle that the Directive does not prevent Member States from providing workers with more favourable conditions, including through collective agreements. This is already clear from the legal basis of the Directive, which is Article 153(2)(b) in conjunction with Article 153(1)(b) TFEU, given that Article 153(4) TFEU states that the provisions adopted pursuant to the same Article shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

This provision further specifies that, in application of the principle of more favourable conditions, the Directive shall not be construed as preventing Member States from increasing statutory minimum wages.

Article 16(3)

Finally, Article 16(3) is a standard formulation providing that this Directive does not affect any other rights conferred on workers by other Union legal instruments (this includes the rights contained in other Directives).

4.3.2. Discussion

There was no substantive discussion on this Article.

⁽²⁶⁾ See, by analogy, *Angelidaki*, at paragraph 140.

4.4. Transposition and implementation (Article 17)

Article 17:

1. Member States shall adopt the measures necessary to comply with this Directive by 15 November 2024. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this Directive.

3. Member States shall take, in accordance with their national law and practice, adequate measures to ensure the effective involvement of the social partners with a view to the implementation of this Directive. To that end, they may entrust the social partners with that implementation, in all or in part, including with regard to the establishment of an action plan in accordance with Article 4(2), where the social partners jointly request to do so. In so doing, the Member States shall take all necessary steps to ensure that the obligations laid down in this Directive are complied with at all times.

4. The communication referred to in paragraph 2 shall include a description of the involvement of the social partners in the implementation of this Directive.

4.4.1. Main elements of the provision

This Article lays out the modalities to be followed by Member States for the transposition of the Directive.

Article 17(1)

The first paragraph of Article 17(1) fixes the transposition deadline. Member States have until 15 November 2024 to put in place the necessary measures to comply with the Directive. They should also immediately inform the Commission of those measures. Of course, Member States are free to submit their transposition packages before 15 November 2024 and should notify the Commission once this has been completed.

The second paragraph of Article 17(1) obliges Member States to include a reference to the Directive when transposing it, either within the measures they adopt or accompanying them. The methods of making the reference are left to the discretion of Member States.

According to the case-law of the ECJ ⁽²⁷⁾, ‘if a directive expressly requires Member States to ensure that the necessary measures transposing the directive include a reference to it or that such reference is made when those measures are officially published, it is, in any event, necessary for Member States to adopt a specific measure transposing the directive in question containing such a reference’. This means that Member States should not adopt measures intended to transpose the Directive without duly referring to it.

Article 17(2)

Article 17(2) restates the obligation of Member States to communicate to the Commission the measures of national law which they adopt in order to transpose the Directive. This

⁽²⁷⁾ Judgment of 13 January 2021, *Commission v. Slovenia*, C-628/18, EU:C:2021:1, paragraph 22 and the case-law cited.

obligation also derives from the principle of sincere cooperation laid down in Article 4(3) TEU.

In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents ⁽²⁸⁾, the information Member States supply to the Commission as regards the transposition of directives in national law ‘*must be clear and precise*’ and ‘*must indicate unequivocally the laws, regulations and administrative provisions*’, or any other provisions of national law, as well as, where relevant, the jurisprudence of national courts, by means of which Member States consider that they have satisfied the various requirements imposed on them by the Directive.

As regards this obligation to notify the transposition measures, the ECJ has held that, ‘*in order to satisfy the obligation of legal certainty and to ensure the transposition of the provisions of [a] directive in full throughout their territory, the Member States are required to state, for each provision of the directive, the national provision or provisions ensuring its transposition*’ ⁽²⁹⁾. ‘*Thus, notification, to which a correlation table may be added, must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State considers that it has satisfied the various requirements imposed on it by that directive. In the absence of such information, the Commission is not in a position to ascertain whether the Member State has genuinely implemented the directive in full*’ ⁽³⁰⁾.

It is therefore clear that, when notifying the transposition of the Directive, Member States may not simply send a copy of, or a link to, the national laws and then leave it for the Commission to find the pertinent provisions. Although providing a correlation table is not an obligation, each Member State is required to indicate, for each provision of the Directive, the national provision or provisions ensuring its transposition.

Article 17(3) and (4)

The first sentence of Article 17(3) obliges Member States to take, in accordance with their national law and practice, adequate measures to ensure the effective involvement of the social partners in the implementation of this Directive. It was introduced by the co-legislators to recognize that the social partners in several Member States play a strong role in determining the rights and obligations of workers and employers in the field covered by this Directive. Article 17(4) reinforces this provision by requiring each Member State to include a description of the involvement of the social partners in the implementation of the Directive when they notify it to the Commission.

The second sentence of Article 17(3) is in line with Article 153(3) TFEU and provides that Member States may entrust the social partners with the total or partial implementation of the Directive, where social partners jointly request to do so, and as long as the Member States take all the necessary steps to ensure that they can at all times guarantee the results sought under the Directive. This may also include the action plan to be established in accordance with Article 4(2).

4.4.2. Discussion

The main issues discussed were the following:

- Meaning of ‘effective involvement’ of the social partners;

⁽²⁸⁾ OJ C 369, 17.12.2011, p. 14.

⁽²⁹⁾ Judgment of 8 July 2019, *Commission v. Belgium*, C-543/17, EU:C:2019:573, paragraph 59. See also C-549/18, C-550/18 and C-628/18.

⁽³⁰⁾ *Commission v. Belgium*, paragraph 51.

- Involvement of other actors beside the social partners, and
- Existing measures that are considered compliant.

ETUC asked **how the Commission would evaluate whether the involvement** of social partners in the implementation of the Directive, foreseen in Article 17(3), **had really been effective**. The Commission services replied that they would expect the involvement of social partners to be timely, meaningful and with feedback on the social partners' contributions. ETUC further inquired about how the Commission would assess the nature of the feedback to social partners and the Commission services indicated that it is expected to be substantive and not purely formal.

ETUC stated that to ensure effective involvement of the social partners Member States should respect their role and avoid diluting social dialogue through the inclusion of other actors. The **involvement of other actors** would not be acceptable if it interfered with the representation of social partners. SGI Europe stated that in the text of the Directive, i.e., in Article 17(3), as well as in other provisions, the 'social partners' are mentioned. In these cases, the social partners should be involved and not be substituted by non-social partners. The Commission services replied that the Directive prescribes the effective involvement of social partners in the implementation but not their exclusive involvement, and always in accordance with the national law and practice, so that the participation of other actors is not excluded but should still allow for the effective involvement of the social partners.

ETUC asked if the involvement of the social partners in the transposition should follow the usual consultation mechanisms in each Member State or some enhanced consultation procedure. The Commission services replied that the involvement must in any event be effective, which means that in cases where the usual consultation mechanisms do not guarantee its effectiveness, they will have to be enhanced.

A Member State expert asked whether the obligation to insert a reference to the Directive in the measures adopted to comply with it also included **existing measures that were already compliant** and, if so, how should this reference be inserted. The Commission services clarified that this obligation referred to new measures adopted after the entry into force of the Directive to transpose it. Existing measures do not have to be republished with a reference but should be included in a clear manner in the correlation table or equivalent within the transposition package.

A Member State expert asked about the relationship between the implementation of the Directive and the Council Recommendation on strengthening social dialogue ⁽³¹⁾ and whether there could be an overlap between the measures. The Commission services mentioned that, while the Directive imposes an obligation Member States must comply with, the Council Recommendation only offers guidance on the interpretation or content of EU law, but that some measures can be linked to both the Directive and the Recommendation.

⁽³¹⁾ Council Recommendation on strengthening social dialogue in the European Union, adopted by the Council on 12 June 2023. Available at <https://data.consilium.europa.eu/doc/document/ST-10542-2023-INIT/en/pdf>.

4.5. Entry into force (Article 18)

Article 18: *This Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.*

4.5.1. Main elements of the provision

This is a standard formulation. The Directive was published in the Official Journal on 25 October 2022, and it entered into force on 14 November 2022.

4.5.2. Discussion

There was no substantive discussion on this Article.

4.6. Addresses (Article 19)

Article 19: *This Directive is addressed to the Member States.*

4.6.1. Main elements of the provision

This is a standard formulation. In accordance with Article 288 TFEU, a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

4.6.2. Discussion

There was no substantive discussion on this Article.

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