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Competition and Wage Regulation in the EU

Abstract: The following article analyses the complex relationship between competition and wage regulation within the European framework, examining how the CJEU, the European Council and the European Parliament have intervened in the field of pay. Taking into consideration the lack of EU competence on wage matters, as established by Article 153, para. 5, TFEU, it is possible to identify significant changes, especially with the 2022 Directive on Adequate Minimum Wages. The article examines both how the European Commission has addressed issues related to pay during economic crises and CJEU judgments such as *RegioPost* and *Bundesdruckerei*, illustrating how wages are seen as a competitive element in public procurement or, as in the *Werhof* and *Alemo-Herron* cases, how competition rules often prevail over wage protection. For these reasons, the Directive on minimum wages aims to solve the problematic balance between competition and social security. To achieve this goal, it is necessary to ensure the concrete, practical implementation of the Directive or a reform of the Treaty or the Charter of Fundamental Rights to recognise the right to a fair wage.

Keywords: minimum wage, competition, European Union, labour law

Introduction

This paper examines interactions between competition and pay, a key issue in European Union labour law. The focus is on how the different European institutions, particularly the Court of Justice of the European Union (CJEU) and also the legislature, intervene in the field of pay. The EU has never had formal competencies in this area since the Treaty of Rome entered into force in 1958. Moreover, this issue provides insight into changes since the origins of the European Economic Community, highlighting whether and how wages remain at the intersection of workers' protection and the functioning of the single market.

The fact that the EU cannot regulate wage profiles, at least not directly, has been clear for years, considering that Article 153(5) TFEU seems expressly to exclude that area from EU competences, which is linked to the discourse of competition. As the CJEU's Advocate General Kokott stated in her Opinion in the *Impact* case delivered in 2008 (Judgment of the CJEU, 15 April 2008, point 173), by preventing the harmonisation of wage levels applicable in each of the Member States, the exclusion of pay contributes to maintaining competition between undertakings operating in the internal market. As many in Europe are aware, significant changes occurred in 2022 with the passage of the EU's Directive on Adequate Minimum Wages (2022/2041), which will be analysed further below.

This does not mean that, for political and economic reasons, the EU before the 2022 Directive sidestepped the (apparent) lack of competence in some cases and intervened decisively on pay in others. Furthermore, as evidenced by the CJEU's case law, the issue of pay, particularly minimum wages, is connected to freedoms and fundamental rights with an EU dimension. Regarding this sidestepping of EU competences on pay, the requirements outlined in the instructions issued by the Bank of Italy on 30 March 2011 for implementing Directive 2010/76 (European Council, 2010) are particularly noteworthy. This regulatory intervention primarily concerns the relationship between fixed and variable components of pay and the criteria for the structure of variable wages (Nogler, 2013, p. 36). This Directive, confirmed with some amendments by Directive 2013/36 (European Council, 2013, pp. 338–436)[1] along with the instructions of the Bank of Italy, while it covered only some banking sector workers, lends itself to interesting considerations regarding the allocation profile of EU competences. Reading the 2013 Directive, one realises that most of its requirements concern variable pay.[2] It is possible to find general provisions on remuneration policy, as well as other, more meaningful provisions concerning the principles to be applied to variable pay components.[3]

1 This Directive amended Directive 2002/87/EC and repealed Directives 2006/48/EC and 2006/49/EC.

2 To be exact, 'categories of staff including senior management, risk takers, staff engaged in control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile' (Directive 2013/36, Article 92(2)).

3 Among those principles are that: 1) 'variable remuneration is strictly limited as a percentage of net revenue where it is inconsistent with the maintenance of a sound capital base and timely exit from government support'; 2) 'the relevant competent authorities require institutions to restructure remuneration in a manner aligned with sound risk management and long-term growth, including, where appropriate, establishing limits to the remuneration of the members of the management body of the institution'; and 3) there are provisions limiting variable remuneration. See Directive 2013/36, Article 94(2)(g), according to which 'institutions shall set the appropriate ratios between the fixed and the variable component of the total remuneration, whereby the following principles shall apply:

It has been challenging to reconcile the more detailed provisions, which are limited to specific categories of workers in a particular sector, with the exclusion of EU competences in the field of pay. Indeed, the accompanying documents to the 2010 and 2013 directives (European Commission, 2009) declared that wage policies in the financial services sector have played a crucial role in exacerbating the global economic crisis. It is undeniable that the situation may change the EU's priorities. Nevertheless, this would not be sufficient to increase EU competences.[4] Article 153(5) TFEU states that 'the provisions of this article shall not apply to pay', so according to this, and more generally within Title X of the Treaty, where this article is located, no provision could be passed by the EU in that area until at least 2022 (Santagata, 2011, pp. 1015–1017). On the contrary, EU intervention in the field of pay would be possible based on different provisions and/or within other Titles of the same Treaty. However, such an interpretation would make the distribution of competences between the EU and Member States useless, since the EU could regulate a single subject matter (such as pay), Member States or both, under the principles of proportionality and subsidiarity, depending on whether the legislation in question is enacted as part of a particular EU policy. In this way, there would have been a differentiated distribution of competences, which would have created legal disorder and prevented the operation of the EU system. Each subject matter would be 'chopped up' under the Part or Title of the Treaty based on which action is taken, rather than based on the relevant provision, thus making the boundaries of the matter itself fluid and uncertain. In short, such an interpretation would lead to the paradoxical result of allowing wage regulation in the financial services sector, which was affected by the crisis, while excluding it in the social policy field. Moreover, the same aspect is often linked to both the economic crisis and social policy, as is the case with variable pay.

Speaking of the primary sources of EU law, the Charter of Fundamental Rights (CFREU) does not expressly address wages, unlike other subjects where the EU

(i) the variable component shall not exceed 100% of the fixed component of the total remuneration for each individual. Member States may set a lower maximum percentage; (ii) Members States may allow shareholders or owners or members of the institution to approve a higher maximum level of the ratio between the fixed and variable components of remuneration provided the overall level of the variable component shall not exceed 200% of the fixed component of the total remuneration for each individual. Member States may set a lower maximum percentage.'

4 Moreover, on the participation of employees in profits and enterprise results, as well as on shareholding, EU bodies and institutions have always refrained from interfering with binding acts, instead preferring soft law instruments which essentially contain guidelines and non-coercive provisions addressed to single states. This has been because the EU has consistently recognised both the diversity of national experiences and the legislative sovereignty of states in some fields, such as pay and tax policies. An example of such an approach is the EU Recommendation of 27 July 1992 (European Council, 1992) and other soft law provisions enacted to date, such as the European Parliament Resolution of June 2003.

has no competence, as the right of association is included in its Article 12.[5] In contrast, the right to strike and the right to impose lockouts are enshrined in Article 28 CFREU. As far as pay is concerned, however, the only provision that can be considered is Article 31(1) CFREU, which provides that 'every worker has the right to working conditions which respect his or her health, safety and dignity' (Ricci, 2012, p. 10). It is certainly possible that this provision could be interpreted to include pay. Nevertheless, the wording of Article 31(1) refers to working conditions thoroughly considered, rather than to the right to fair and equitable pay (Bogg, 2014, p. 856; Hunt, 2003, p. 44), and the heading of the Article ('Fair and just working conditions') puts the two adjectives in connection with working conditions without any qualification. As I have mentioned, this was true until the approval of the Directive on minimum wages in 2022, which enabled the EU to address its lack of competence in pay.

1. Indexation mechanisms, reductions of wage bills and the role of the European Commission

Some years ago, the European Commission also played a role in addressing the issue of pay to combat the economic crisis by enacting recommendations within the integrated coordination of employment policies and memoranda of understanding, addressed to some Member States (Dorssemont, 2014, pp. 153–170). Moreover, these sources operated in a field such as pay, which is traditionally an elective area of regulation for social partners across Europe.

As far as the recommendations are concerned, in many cases they were rather vague, asking for moderation in wage increases in general (Bulgaria, Finland and Italy) or in minimum wages in particular (France and Slovenia) (Leonardi, 2014, pp. 85 – 195.; Schulten & Müller, 2013, p. 7). More precise recommendations were addressed to other countries (Belgium, Italy and Spain) regarding reforms to their wage-setting systems. Intense criticism was directed at countries that employed automatic indexation mechanisms (Belgium, Luxembourg, Malta and Cyprus), which had to be repealed or at least severely amended. With specific reference to minimum wages, the European institutions intervened against Ireland, which, under pressure from the Troika, reduced minimum wages in 2011 and then brought them back to their previous value, only because 'the Irish Government, as an exchange, decided to reduce the social security contributions of employers' (Schulten & Müller, 2013, p. 8). In contrast, Lithuania, Portugal and, albeit in a more informal way, Spain were in-

5 According to Article 12 CFREU, 'everyone has the right to […] freedom of association at all levels […], which implies the right of everyone to form and to join trade unions for the protection of his or her interests'. Article 28 establishes that 'workers and employers, or their respective organisations, have […] the right […], in cases of conflicts of interest, to take collective action to defend their interests, including strike action'.

duced to freeze minimum wages. At the same time, in 2012 the Troika imposed a 22% cut on Greece's minimum wage.

Similar considerations apply to the Memorandum of Understanding, as provided for in Article 3(bis) of Regulation 2002/332 (European Council, 2002), which was concluded for Romania in 2009 under Article 143 TFEU (applicable to non-Euro states) following the Council's adoption of two decisions: Decision 2009/458, granting mutual assistance to that country, and Decision 2009/459, making a medium-term loan available to it (Judgment of the CJEU, 13 June 2017). These decisions authorised the conclusion of the Memorandum, which was regarded as mandatory by the CJEU in its June 2017 judgment. The problem is that the Memorandum provided for a reduction of the public sector wage bill (European Commission & Romania, 2009), thus directly impinging on the field of pay. Since the Memorandum is a mandatory source of EU law, Romania was required to reduce its wage bill in the public sector, according to the conditions attached to the financial assistance given by the EU set out in the Memorandum (Judgment of the CJEU, 13 June 2017).

Moreover, the EU intervention in Greece was quite intrusive, and not only in terms of the required percentage cut to the minimum wage (Ricci, 2015, pp. 205–217.).[6] As highlighted in the Recommendations of the Expert Group for the Review of Greek Labour Market Institutions of 27 September 2016 (European Parliament Committees, 2016), the need to comply with the requirements to reduce real and nominal wages to bring about an internal devaluation of the Eurozone led to a change in the procedures for determining minimum wages in Greece. In fact, before the crisis, the minimum wage in that country was determined through intersectoral collective bargaining via the National General Collective Labour Agreement; the Greek state did not intervene in minimum wages, except to ensure the universal application of collective agreements and the minimum wages set therein.

2. The CJEU and the issue of minimum wages in public contracts: *RegioPost and Bundesdruckerei*

The CJEU has issued various judgments that directly or indirectly address pay; however, it is helpful to focus on those that are most relevant to the relationship between wages on the one hand and the market economy or competition on the other. It is better to start by examining decisions that demonstrate that wages and minimum wages are integral to the competitive landscape and can be considered a competitive

6 Deakin (2013, pp. 549–559.) believes that the EU was interested in remuneration during the crisis because 'while monetary policy was unified, economic policy was not, and the absence of a common approach to wage determination magnified the resulting divergences'. For this reason, 'the issue of wage determination has acquired a new, EU-level dimension' (Deakin, 2013, p. 559). On those profiles, see Guarriello, 2017, pp. 107–118.

variable within the market. The issue of minimum wages in that respect has become prominent at the EU level in the field of public procurement, especially as a result of two CJEU judgments delivered just a few years after the famous *Rüffert* case (Judgment of the CJEU, 3 April 2008): *RegioPost* (Judgment of the CJEU, November 2015) and *Bundesdruckerei* (Judgment of the CJEU, 2014).

> In *RegioPost* (Brino, 2016, pp. 35–45.), the CJEU ruled that:
> 'Article 26 of Directive 2004/18 (European Council, 2014, pp. 114–120) must be interpreted as not precluding legislation of a regional entity of a Member State […] which requires tenderers and their subcontractors to undertake […] to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation'. (Judgment of the CJEU, November 2015, para. 77)[7]

Consequently, neither tenderers nor their subcontractors 'who refuse to undertake […] to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation' can be excluded 'from participation in a procedure for the award' (Judgment of the CJEU, November 2015, para. 77). This provided that the workers assigned to the execution of a public contract (or subcontract) must perform their duties in the Member State that introduced the legislation concerned, regardless of the country of the contracting authority.

Conversely, in *Bundesdruckerei* (Judgment of the CJEU, 2014; Guadagno, 2015, pp. 33–44.), a contractor based in Germany applied to obtain the award of a public contract but declared that it would carry out that contract by having recourse exclusively to workers employed by a subcontractor established in a Member State other than that to which the contracting authority belonged. The CJEU ruled that:

> the imposition, under national legislation, of a minimum wage on subcontractors of a tenderer which are established in a Member State other than that to which the contracting authority belongs and in which minimum rates of pay are lower constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Consequently, a measure such as that at issue […] is capable of constituting a restriction within the meaning of Article 56 TFEU. (Judgment of the CJEU, 2014, para. 30)[8]

7 The text of Article 26 reads: '[C]ontracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

8 This case recalls the Judgment of the CJEU, 2008, para. 37. On the latter, see, *ex multis*, Ales, 2008. This paper not only deals with the *Rüffert* case but also with the *ITWF* and *Laval* cases, since in

Therefore,

> by imposing, in such a situation, a fixed minimum wage corresponding to that required to ensure reasonable remuneration for employees in the Member State of the contracting authority in the light of the cost of living in that Member State, but which bears no relation to the cost of living in the Member State in which the services relating to the public contract at issue are performed and for that reason prevents subcontractors established in that Member State from deriving a competitive advantage from the differences between the respective rates of pay, that national legislation goes beyond what is necessary to ensure that the objective of employee protection is attained. (Judgment of the CJEU, 2014, para. 34)

In other words, the provision of a minimum wage may not be out of context, and in the CJEU's view, legislation on minimum wages is only applicable to employees of a contractor established in an EU country who carry out their activity in the same Member State as that of the contracting authority. Only in this event should the minimum wage be identical to that of the workers working for the contracting authority, as the wage bill must be adapted to the cost of living existing in that state. If such a minimum wage were also to apply to workers employed by contractors or subcontractors who carry out their work in another Member State where the cost of living is lower, the freedom to provide services under Article 56 TFEU would be breached, because competition is achieved precisely by exploiting the differences in minimum wages in the various national contexts (Guarriello, 2017, p. 108). Therefore the sovereignty of a Member State cannot extend to requiring contractors or subcontractors established in other states to comply with the minimum wage fixed by the legislation of the first country.

This finding must be analysed from a twofold perspective. On the one hand, a state with a high minimum wage is unable to impose such a minimum in tendering if the performance is carried out by contractors or subcontractors established in another Member State with lower wage levels, thereby undermining the protection

all these judgments, 'at stake was the request of (maintaining) working conditions which differ from those ones afforded by the employer to the workers' (Ales, 2008, p. 8). The other element that is common to all the three cases is avoiding 'that the exercise of a fundamental freedom by the relevant employer will have as a direct or indirect effect the worsening of wage standards and, consequently, of living conditions' (Ales, 2008, p. 9). On the *Laval* and *Rüffert* cases, see also Lo Faro, according to whom 'in both cases, the legality of the practices of wage dumping carried out by foreign "low-cost" companies has been based on an arbitrarily reductive interpretation of the Posted Workers Directive 96/71/EC, pp. 1–6 and of Article 49 of the EC Treaty on freedom to provide services. According to this highly contestable interpretation, Directive 96/71 does not allow the host Member State to oblige a foreign service provider to observe terms and conditions of employment settled in its own national system, to the extent that those terms and conditions go beyond the mandatory rule for minimum protection' (2008, p. 14).

of workers in that country. On the other hand, it can also happen that a Member State with a lower minimum wage cannot impose it on contractors or subcontractors established in a Member State with higher wage levels, so the issue of higher or lower worker protection turns out to be more complex than expected. Moreover, the CJEU's findings suggest again that the EU regards wage trends as a factor that influences the free market rather than as a fundamental aspect of workers' protection (Kenner, 2017).[9]

The two judgments above reflected the CJEU's case law on the posting of workers. In particular, the *Portugaia Construções* ruling of 2002 concerned the pay treatment of employees of a Portuguese company who had been posted to Germany (Judgment of the CJEU, 2002). That judgment concerned the application of minimum wages to posted workers, and according to the CJEU, 'Community law does not preclude a Member State from requiring an undertaking established in another Member State which provides services in the territory of the first State to pay its workers the minimum remuneration laid down by the national rules of that State' (Judgment of the CJEU, 2002, para. 21). The CJEU added that 'the application by the host Member State of its minimum-wage legislation to providers of services established in another Member State pursues an objective of public interest, namely the protection of employees' (Judgment of the CJEU, 2002, para. 23). Of course, it is for national courts to determine whether the wage legislation in question is suitable to ensure the protection of posted workers; still, the EU judges were leaning in that direction. The evaluation of national authorities in this case is then a given, as minimum wages in Germany in the relevant sector were higher than the corresponding wages in Portugal. Otherwise, the CJEU's opinion would probably have been different.

For these reasons, the *Portugaia Construções* ruling is particularly welcome, as the CJEU underlined that the protection of workers is a general objective to be pursued in the context of the posting of workers. In sum, the judgment in question, albeit reaching conclusions substantially similar to the case law on public contracts, has the merit of focusing on the protection of workers rather than on the functioning of the internal market (Bavaro, 2012, p. 88).[10]

9 Kenner agrees with this opinion, although he makes a distinction between the two decisions mentioned. As a matter of fact, he believes that '*Bundesdruckerei* is a case of posting in reverse with consequences that are in many respects even more negative for labour law than *Rüffert*' (2017, p. 237). On the contrary, *RegioPost* 'is an antidote to *Rüffert* and *Bundesdruckerei*, and represents a significant shift in the Court's jurisprudence' (Kenner, 2017, p. 238).

10 In Bavaro's opinion an undertaking that derives competitive advantage from the application of economic and regulatory measures to the lowest level would be socially harmful, simply because such an undertaking would be established in a Member State with lower levels of social protection.

3. Pay, collective bargaining and the freedom to conduct business: *Werhof and Alemo-Herron*

It is now necessary to address CJEU judgments that involve an indirect and unbalanced interaction between wages and competition, as the rules governing competition are considered as prevailing over those protecting wages. A couple of rulings regarding the transfer of undertakings must be examined: *Werhof* and *Alemo-Herron* (Judgments of the CJEU, 2006 and 2013). In both cases, reference was made to wages recognised by collective agreements based on Article 3(3) of Directive 2001/23 (European Council, 2001, pp. 16–20), according to which, 'following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement'. The collective agreement is not immediately applicable, but it is valid because it is referenced in the contracts of employment signed by the transferor and the workers. Therefore, on closer inspection, it is Article 3(1) of the Directive that applies, under which 'the transferor's rights and obligations arising from a contract of employment or an employment relationship existing on the date of a transfer shall, because of such transfer, be transferred to the transferee'. After the transfer, collective bargaining establishes a wage increase that the transferee refuses to extend to the workers. In short, it is necessary to clarify whether the reference to the collective agreement is static or dynamic.

In both cases, the CJEU classified it as a static reference, as a different interpretation would have prevented the transferee from making the necessary adjustments and changes to carry on its business (Judgment of the CJEU, 2006, para. 31; Judgment of the CJEU, 2013, para. 27). The similarities between the two judgments end here, so they need to be examined *seriatim*. In *Werhof*, the CJEU's ruling centred on the negative freedom of association. The EU judges ruled that 'if the "dynamic" interpretation of the contractual reference clause were applied, that would mean that future collective agreements would apply to a transferee who is not a party to a collective agreement and that their fundamental right not to join an association could be affected' (Judgment of the CJEU, 2006, para. 34). In *Alemo-Herron* on the contrary, the CJEU's reasoning centred on the freedom to conduct a business under Article 16 CFREU. Such a freedom covers 'inter alia, freedom of contract' (Judgment of the CJEU, 2013, para. 32), so that 'the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity' (Judgment of the CJEU, 2013, para. 33). In such a situation, 'the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business' (Judgment of the CJEU, 2013, para. 35). In short, the freedom of contract was conceived as a function of the undertaking's activity. In contrast, the negative freedom of association was set aside because in this case, the employee's wage was determined periodically by a third party, namely, the National Joint Council for Local Government Services, of which neither the transferor nor the transferee was a member or represented.

Here, it is worth noting again that EU primary sources fail to recognise the fundamental right to an equal, fair, or decent wage, at least to the same extent as they recognise the right of association and the freedom to conduct a business. You can agree with the failure to grant wage adjustments to transferred workers after the transfer of an undertaking, because the guarantees in the case of a transfer may not be applicable for an indefinite period. However, wage increases must be implemented in other ways, namely through a collective agreement applicable to the transferee or through different instruments, including statutory regulation. Any freeze on wage increases (for example, because there is no relevant collective agreement applicable to the transferee) would be disadvantageous for workers, who may not be protected by EU law and whose dignity would be at risk if such a freeze were to last for a considerable time.

Moreover, by emphasising the freedom of contract as functional to the freedom to conduct a business while at the same time downplaying the negative freedom of association, the CJEU seems to suggest that employers may disregard collective agreements concluded by third parties. On the one hand, this contention may enable an individual employer to refuse to comply with collective agreements concluded by bodies to which the employer is not affiliated, as in the case before the CJEU. On the other hand, it can give rise to the claim that the organisation to which an employer belongs must also be regarded as a third party relative to that employer, bound only to collective agreements to which it is a party, thus paving the way for firm-level collective bargaining. If the CJEU consolidates this interpretation, it could be argued that a transferee, who may already have decided not to apply the collective agreement after the transfer as it concerns only the transferor, could freeze the treatment of transferred workers for a specific period. The transferee may use the working conditions agreed in any collective agreement applicable to the transferor until the date of termination or expiry of that agreement or the entry into force or application of another collective agreement. Then it may be that, as regards wages, the transferee renewed the economic part of the collective agreement shortly before the transfer of the undertaking. In such a case, the risk is that the treatment of the transferred employees is blocked, since the renewal of the agreement signed by the transferor does not apply while the collective agreement of the transferee has not been renewed. In addition, if the freedom to conduct a business has to be protected in the way understood by the CJEU, pay treatment, even a minimum wage, that fully ensures the freedom of contract, might be the only treatment provided by a firm-level collective agreement, which could be concluded much later than a national sectoral agreement.

Fortunately, another CJEU ruling seems to point in a different direction. The *Asklepios* judgment of 27 April 2017 concerns the transfer of undertakings and the application of the same article of the Directive as that in *Alemo-Herron*, as well as in Article 16 CFREU. In such a case, 'the national legislation […] provides for the possibility, after the transfer, for the transferee to adjust the working conditions existing at the date of the transfer, either consensually or unilaterally' (Judgment of the CJEU, April 2017, para. 24). Thanks to that legislation, the continued observance of the rights and obligations of the transferor arising from a contract of employment extended to a 'dynamic' clause according to which their employment relationship was governed not only by the collective agreement in force on the date of the transfer, but also by amending agreements after the transfer. Therefore this decision appears to mitigate the problem highlighted above, namely the freezing of the wage increase for the transferred worker; however, this was mainly due to the domestic law applicable in the present case rather than EU law. Nevertheless, it is essential, in the CJEU's view, that domestic legislation does not infringe on EU law.

More generally, the judgments mentioned above raise questions about the relationship between contractual and statutory sources on the one hand and the freedom of contract protected by EU law on the other. In fact, except for the *Asklepios* case, it appears that the CJEU's attitude has changed in this regard. A decision of 30 years ago is very eloquent, although it does not concern the transfer of an undertaking. The *Meyers* case of 1995 is about the equal treatment of men and women in matters of employment and concerns the application of 'an income-related benefit (s.c. *family credit*) which is awarded to supplement the income of low-paid workers who are responsible for a child' (Judgment of the CJEU, 1995, para. 3), under a British statutory provision. According to the CJEU,

> compliance with the fundamental principle of equal treatment presupposes that a benefit such as family credit, which is necessarily linked to an employment relationship, constitutes a working condition within the meaning of Article 5 of the directive (European Council, 1976, pp. 40–42). To confine the latter concept solely to those working conditions which are set out in the contract of employment or applied by the employer in respect of a worker's employment would remove situations directly covered by an employment relationship from the scope of the directive. (Judgment of the CJEU, 1995, para. 24)

Therefore, based on this decision, it is legitimate, at least within the scope of the Directive in question, for national legislation to incorporate the contents of the employment contract, providing for benefits that have not been negotiated between the parties involved. In short, for the CJEU, not all working conditions can be agreed upon in the contract of employment, but they can also be established by law and by collective agreements.

The difference between this judgment and the more recent decisions concerning the transfer of an undertaking is that in the 1995 case, the law incorporates the contents of the contract of employment when providing for the family credit (Judgment of the CJEU, March 2015). In contrast, in the later cases there is a succession of collective agreements or an adjustment of pay provided for in some of these agreements. However, upon closer inspection, even in the assumptions concerning the transfer of undertakings, it is the statutory source that prevents the application of wage adjustments to the transferred employees. Therefore in both cases, it is essential to understand how the law can intervene on (and possibly compress) freedom of contract, a problem, as has been underlined, of fundamental importance in the wage issue. In addition, regarding the relationship between competition and wages, these judgments demonstrate that the freedom to conduct business is thoroughly regulated at the EU level and includes the freedom of contract. In contrast, the right to a decent wage is ancillary to such freedom. In other words, the latter right does not seem to keep pace with the right to conduct a business, the functioning of the market, and, ultimately, competition.

4. Wages and the notion of subordination in CJEU case law: *Fenoll and Balkaya*

As will become evident, pay is a necessary though not sufficient requirement for classifying an employee, according to EU law. This once again demonstrates that wages are helpful for the functioning of the market, albeit in a different sense in the context of public procurement, for instance. It is necessary to highlight this profile, however briefly, by recalling other case law of the CJEU. According to the *Fenoll* judgment of 6 May 2015, to define an employee under Directive 2003/88/EC on working time (European Council, 2003, pp. 9–19), it is necessary to pass a test based on four elements. First, it is crucial to consider 'both the nature of the activities concerned and the relationship of the parties involved', independently of the classification provided by national legislation (Judgment of the CJEU, March 2015, para. 29). Second, the activities entrusted to the interested person must be 'of some economic benefit to the body concerned', i.e. the employer (Judgment of the CJEU, March 2015, para. 32). Third, the activities entrusted by the person must be carried out 'in return for remuneration', regardless of the amount, as it may be lower than the minimum wage, and irrespective of the origin of the funds for remuneration (Judgment of the CJEU, March 2015, paras. 33–34). Finally, regarding the fourth element, the activities undertaken by the interested persons must be considered 'real and genuine'; they cannot be 'purely marginal and ancillary' (Judgment of the CJEU, March 2015, para. 35).

The case law concerning the scope of Directive 98/59 on collective redundancies (European Council, 1998, pp. 16–21) is also interesting. In particular, the *Balkaya* judgment of 9 July 2015 (Judgment of the CJEU, July 2015, para. 29) focuses once again on the concept of an employee, saying that 'the essential feature of an employment relationship is that, for a certain time, a person performs services for and under the direction of another person, in return for which he receives remuneration' (Judgment of the CJEU, July 2015, para. 34). Moreover, 'the nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for EU law', it being necessary 'to consider the circumstances in which […the person] was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the scope of the person's powers and the extent to which he or she was supervised within the company; and the circumstances under which the person could be removed' (Judgment of the CJEU, July 2015, paras. 35, 39). All that considered, the interested person in the *Balkaya* judgment, who was a member of the board of directors of a capital company, can be classified as an employee for EU law, since he, 'in return for remuneration, provides services to the company which has appointed him and of which he is an integral part', 'carries out his activities under the direction or supervision of another body of that company and […] can, at any time, be removed from his duties without such removal being subject to any restriction' (Judgment of the CJEU, July 2015, para. 39).

According to the same judgment, the notion of a 'worker' in EU law is even wider (Pallini, 2016, p. 77),[11] since it can also cover 'a person who serves a traineeship or periods of apprenticeship in an occupation […], provided that the periods are served under the conditions of genuine and effective activity as an employed person, for and under the direction of an employer' (Judgment of the CJEU, July 2015, para. 50). Such a person is an employee under legislation on collective redundancies, and 'while not receiving remuneration from his employer, performs real work within the undertaking […] with financial support from, and the recognition of, the public authority responsible for the promotion of employment' (Judgment of the CJEU, July 2015, para. 52).

Both the *Fenoll* and the *Balkaya* cases demonstrate that, according to EU law, the notion of an employed worker is not based on the existence of a contract of employment or an employment relationship characterised by the job or by wage exchange, since, as we have seen, in both decisions the origin of the resources used to pay the remuneration was irrelevant; it is possible to use public funds for this purpose, also outside the area of public employment. In other words, in the CJEU's view, remuneration shall be considered as one of the leading (although not necessary) indicators of the presence of an employee, defined as an economic operator within the single market. For these purposes, the amount is unrelated; it is only vital that it is not so low that the subordinate worker loses the characteristic of being an economic operator.

11 The CJEU has long extensively interpreted the concept of a subordinate worker by using, in a non-technical sense, the criterion of their being directed by another person and by valuing other criteria, such as the fact of being organised by another person or being in the weak position of the employee in the market. See also section 5 below.

Therefore, in this case, the purpose of EU law is not to recognise pay as a fundamental right of workers, but rather to identify employees as economic operators, thereby protecting their freedom of movement, which is necessary for the functioning of the market and competition.

5. The new era: The Directive on Adequate Minimum Wages

The EU Directive on Adequate Minimum Wages represents a significant intervention in the panorama of European social policies, aimed at promoting adequate minimum wages to combat the phenomenon of the working poor and to ensure sufficient pay for all workers, establishing general principles and leaving it to the Member States – through a 'variable geometry' structure – to adapt the implementation methods to their own regulatory and economic characteristics while respecting national traditions. Although the Directive does not impose the adoption of a uniform minimum wage, it identifies two main pillars to ensure wage adequacy: strengthening collective bargaining and, where necessary, introducing minimum statutory salaries based on objective and transparent criteria.

Among the most relevant requirements, the Directive provides for Member States taking measures to achieve a contractual bargaining coverage of at least 80% of workers; if this threshold is not reached, Member States are invited to set up action plans to promote the development and strengthening of social partners' capacity to participate in collective bargaining on wage determination at the sectoral or inter-sectoral level or to introduce a statutory minimum wage that guarantees a proportionate and sufficient wage following local socio-economic conditions. Furthermore, the Directive provides objective criteria for assessing the adequacy of minimum wages, including the cost of living, the general wage level and economic productivity. It suggests quantitative thresholds (60% of the median salary or 50% of the average wage) to ensure minimum protection standards. Regarding transparency and monitoring, the Directive requires Member States to collect and provide periodic reports on wage levels, contractual coverage and the effectiveness of the measures taken.

A comparison between the experiences of some EU Member States highlights differentiated but effective approaches to ensure wage adequacy: for example, in Germany, the introduction of a statutory minimum wage in 2015 helped to reduce poorly paid work and strengthen collective bargaining, acting as a safety net for workers not covered by trade union agreements; in France, on the other hand, the minimum wage is flanked by a system of automatic adjustments based on inflation and economic growth, which ensures greater wage stability over time.

As is well known, in 2023 Denmark, supported by Sweden, claimed an action before the Court of Justice (Case C-19/23; Judgment of the CJEU, 2025) regarding the alleged lack of competence of the Union to issue a directive on adequate minimum wages and the need to annul the Directive itself. According to the Danish government, the adoption of the Directive exceeded the competence of the European Union, as it infringed Article 153(5) TFEU. Indeed, the Parliament and the Council are competent to adopt directives laying down minimum requirements only in respect of 'working conditions' (under Article 153(2)(b) TFEU, read in conjunction with Article 153(1)(b) TFEU). In contrast, they may not legislate in areas such as pay or the right to association (Article 153(5) TFEU). Moreover, even if the Directive did not fall within the scope of the exclusions regarding pay and the right of association in Article 153(5) TFEU, Denmark argued that the Parliament and the Council did not follow a valid procedure for adopting the Directive.

The appeal, while motivated by highly technical aspects, appeared to be partly justified by political reasons. It is no coincidence that it was introduced by Denmark, a country where the collective and participatory dimensions have always been significant. From a reading of the appeal, the challenge was motivated by the fear that the Directive could threaten the role of social partners in determining minimum wages and that the Union could engage in excessive interference in matters such as pay, which are at the heart of domestic collective bargaining.

On 14 January 2025, Advocate General Nicholas Emiliou delivered his Opinion, in which he invited the Court to uphold the Danish appeal and declare the Directive in question null and void. It is not possible to review the Advocate General's arguments in detail here; suffice to say that they shared the Danish government's concerns about the risk of excessive interference by the European legislature in fields entrusted to collective bargaining. This is even more striking when reading that part of the Opinion which emphasises that the purpose of the exclusion of competence in matters of pay would be to protect the contractual freedom of the social partners.

On 11 November 2025, the Court of Justice delivered its decision (Brameshuber, 2026; Lo Faro, 2026; Menegatti, 2025; Müller, 2025; Ratti, 2025). The Court reiterated that the exception relating to pay provided for in Article 153(5) TFEU is based on the principle that the determination of wages falls within the contractual autonomy of social partners at the national level and within the competence of the Member States. For this reason, it was considered appropriate, under current EU law, to exclude the determination of wage levels from any harmonisation under Article 151–157TFEU (Judgment of the CJEU, 2025, para. 67).[12]

This exclusion of competence must be interpreted as covering all measures that would involve direct interference by EU law in the determination of remuneration, such as the total or partial standardisation of wage components and/or their levels across Member States or the establishment of a minimum wage at the European level.

12 This referred to the judgments in *Del Cerro Alonso* of 13 September 2007, C-307/05, paras. 40 and 46, and *Coca-Cola European Partners Deutschland* of 7 July 2022, C-257/21 and C-258/21, para. 47.

However, according to the Court of Justice, that exclusion cannot be extended to any matter with even the slightest connection to pay; otherwise, many of the issues covered by Article 153(1) TFEU would be rendered meaningless (Judgment of the CJEU, 2025, para. 68).[13] In short, since 'pay is an integral part of working conditions', the legal basis for the Directive is Article 153(1)(b) (Judgment of the CJEU, 2025, para. 72). The legal basis for an act must be determined by its specific purpose and content, not by the legal basis used for other EU acts with similar characteristics.

Having established these premises, the Court examined whether the contested provisions of the Directive (Articles 4 and 5) involve direct interference by Union law in the determination of remuneration (Judgment of the CJEU, 2025, para. 75). Article 4 of the Directive is compatible with the exclusion of competence provided for in Article 153(5) TFEU, because although it introduces state intervention in the methods of collective bargaining on wages, it does not give rise to direct interference by Union law in the determination of wages (Judgment of the CJEU, 2025, para. 77). On the one hand, Article 4 does not affect Member States' choice of model for determining wages: legislative, collective bargaining or mixed. On the other hand, the provision neither defines the content nor prescribes the outcome of collective bargaining. The measures provided for constitute obligations of means, not of result. Article 4(2) does not require that the collective bargaining coverage threshold provided therein be met; rather, it requires Member States to establish a favourable framework and to define a promotional action plan if that threshold is not met.

On the other hand, the Court of Justice's November 2025 ruling partially annulled Article 5. This provision regulates the procedure for determining and updating statutory minimum wages, requiring Member States to establish procedures based on criteria developed at the national level to ensure their adequacy and periodic updating, while leaving them free to determine their relative weight (Judgment of the CJEU, 2025, para. 91). According to the Court, there has been no direct interference so far. However, the same provision listed, in points (a) to (d), four binding elements that national criteria had to include: the purchasing power of statutory minimum wages in relation to the cost of living, the general level of wages and their distribution, the rate of wage growth, and the levels and long-term trends of national productivity (Judgment of the CJEU, 2025, para. 94). Article 5(2) therefore obliges Member States with statutory minimum wages to ensure that their criteria include at least these four elements. By imposing these parameters on the determination and updating procedures, the European legislation has established requirements that directly affect the constituent elements of wages (Judgment of the CJEU, 2025, para. 95). In the Court's view, Article 5(2) achieves partial harmonisation of the constituent elements of wages and thus is a direct interference by EU law in wage determination, which is incom-

13 With reference to the *Impact* ruling of 15 April 2008.

patible with the exclusion of competence provided for in the Treaty (Judgment of the CJEU, 2025, para. 96).

The same conclusion applies to Article 5(3). Although it merely allowed Member States to use automatic mechanisms for indexing minimum wages and refers to national law and practice for the applicable criteria, the provision subjects that option to the condition that the mechanism does not reduce the statutory minimum wage (Judgment of the CJEU, 2025, para. 97). Consequently, by imposing a non-regression clause on Member States that adopt automatic indexation, this provision constitutes, in the Court's view, a direct interference by EU law in the determination of wages (Judgment of the CJEU, 2025, para. 98).

Conclusions

On the one hand, most of the aforementioned judgments of the Court of Justice show, albeit in different ways, that the EU considers wage trends a factor that influences the internal market rather than a crucial aspect of workers' protection and ultimately a fundamental human right. On the other hand, such an attitude reveals the limitations of EU social policies and the prevalence of a market-oriented vision.[14] This approach reflects the lack of thorough EU competence in the field of pay and therefore also the lack of a uniform minimum wage applicable to Member States. All this demonstrates once again that the competition game is played at the level of wage differences among the various Member States, rather than between the EU as a whole and extra-EU countries. Therefore, regarding the prospects, the best approach should be twofold.

The first option is to amend the Treaty, or more specifically the Charter of Fundamental Rights, by recognising the right to an equal, fair and decent wage as a fundamental right of the EU. The second way is to implement the Directive on Adequate Minimum Wages in the Member States after it has been considered substantially valid by the Court of Justice. The Directive appears to be a beacon in the darkness of the EU's (apparent) lack of competence in pay matters. The existence of the Direc-

14 According to Blanpain, 'socially speaking, the EU is still an empty box. The EU is like a giant tanker with a very small social engine. There is not yet a European Social Model. We tried very hard to provide the EU with more social competences, but failed hopelessly. The EU is absent from one of the most important fields: social policy. As a result of the failure of appropriate social and employment policies, the Member States are competing with each other. Wage costs and taxes continue to be national competences. The EU has no jurisdiction over core issues like wages and social security. For remuneration, job security, collective bargaining, workers' participation or freedom of association and the right to strike, every Member State goes its own way. The EU has 27 Member States and 500 million inhabitants, including 215 million workers. But there is no European minimum wage, and no European social security. We should be able to say to foreign investors: we give you access to a market of 500 million consumers and these are our social conditions. But we cannot. […] So we compete with each other forever' (2009, pp. 167–168).

tive represents a change in the EU's attitude, as is well demonstrated by the seventh 'whereas' clause of the Directive itself: 'addressing large differences in the coverage and adequacy of minimum wage protection contributes to improving the fairness of the Union's labour market, to preventing and reducing wage and social inequalities, and to promoting economic and social progress and upward convergence'. This approach seems to be linked to a different notion of competition in the single market that, according to the same clause, 'should be based on high social standards, including a high level of worker protection and the creation of quality jobs, as well as on innovation and improvements in productivity, while ensuring a level playing field'. The Directive is not the perfect solution to the interaction between wages and competition, since it also has some defects. Nevertheless, it could be an opportunity for the EU to shift its direction towards a better balance between social protection and competition.

Ultimately, the Court of Justice's declaration that the EU has some competencies in the field of pay has consequences for the various issues I have addressed above. This results in a 'snowball effect' that would be positive in some cases (such as the 2022 Directive) but negative in others, particularly in areas like wage cut-offs and public contracts, as it would be entirely legitimate for the EU to intervene in such fields with numerous normative tools.

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