The Adequate Minimum Wage Directive 2022/2041 before the Court of Justice

The AMWD 2022 outlines a framework for minimum wages, promoting collective bargaining, and access to minimum wage protection – it was a transformative moment for Social Europe, signalling a clear turn away from neo-liberalism

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The adoption of the Adequate Minimum Waged Directive - A watershed moment for Social Europe

The adoption of the Adequate Minimum Wages Directive (AMWD) in 2022 was a watershed moment for the European Union. It signalled that the EU had firmly and consciously turned the page on the 'Austerity' era, and on the litany of Employment Guidelines, Memoranda of Understanding, and CJEU judgements that, between 2007 and 2016 had crushed entire national systems of industrial relations, collective bargaining, and wage setting mechanisms across Europe, and especially in the 'bailed-out' Member States (Ewing, 2015). Announcing the political agreement on the directive, President Ursula Von der Leyen officially commented, "The EU has delivered on its promise. The new rules on minimum wages will protect the dignity of work and make sure that work pays. All of this will be done in full respect of national traditions and social partners' autonomy" (EC, 2022).

There was reason to celebrate. The Directive set out to pursue three ambitious policy objectives that had been off the European integration lexicon for at least a generation. Article 1 set out that the directive sought to establish a framework for: i) the 'adequacy of statutory minimum wages with the aim of achieving decent living and working conditions'; ii) 'promoting collective bargaining on wage-setting'; and iii) 'enhancing effective access of workers to rights to minimum wage protection where provided for in national law and/or collective agreements'. Articles 4 and 5 of the Directive are central to achieving these goals.

Article 4 is entirely dedicated to the 'promotion of collective bargaining on wage setting'. Its first paragraph offers four examples of 'promotional' activities that Member States 'shall' take. Essentially, these are social partners' capacity building for collective bargaining (esp. at sector and cross-sector level); a public role in 'encouraging' negotiations and bargaining; a duty to protect the exercise of collective bargaining including by protecting workers and unions from acts of discrimination; and protecting unions and employers from 'acts of interference'. Article 4(2) provides, 'in addition' to the aforementioned activities and responsibilities, an administrative obligation for MS 'in which the collective bargaining coverage rate is less than a threshold of 80 percent', consisting of providing 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'. It contains additional procedural obligations on how to produce these action plans (with the involvement of social partners), how to communicate them to the Commission, reviewing them (at least every 5 years). This is a potential game-changer for European workers and to restore the national frameworks dismantled during the austerity decade.

Article 5 is no less important, and is arguably the core provision of the directive, dealing as it does with the procedures for setting adequate statutory minimum wages. It provides that Member States with statutory minimum wages must put in place procedures for the setting and updating of statutory minimum wages, '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'. It leaves Member State free to define the criteria for doing so, but asks those criteria to take into account elements such as 'the purchasing power of statutory minimum wages', 'the general level of wages and their distribution', wage growth and long-term productivity levels. No less importantly, paragraph 4 of the article provides that '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 percent of the gross average wage, and/or indicative reference values used at national level'.

The AMWD and the 'Nordics'

This was undoubtedly a transformative moment for Social Europe. Amidst the fanfare and celebrations it might have been easy to ignore that a Damocles sword was hanging over the future of the Directive. Denmark and Sweden, who had voted against its adoption, had long threatened to challenge the legality of the AMWD before the Court of Justice of the EU, seeking its annulment. They were ostensibly concerned that a number of the directive's provisions, and its Articles 4 and 5 in particular, were exceeding the regulatory competences of the European Union, that are established by its Treaties. In particular they argued that the Directive had been adopted in breach of Article 153(5) of the Treaty on the Function of the EU (TFEU), that expressly provides that the EU competence in the social policy domain 'shall not

apply to pay, the right of association, the right to strike or the right to impose lock-outs'.

Denmark and Sweden are of course high wage, high union density, and high coverage countries, with finely tuned and well-functioning systems of industrial relations and universalistic welfare state regimes. They had nothing to fear from the adoption of the AMWD. Certainly, their prevailing wages are already (more than) adequate and collective bargaining coverage has historically been above 80 percent. No less importantly, the core provisions of the Directive had been designed so as not to apply to their wage setting mechanisms, that are entirely based on voluntary collective agreements with no statutory extension mechanisms. The Directive is explicit on this point, Article 1(4) expressly saying that 'Nothing in this Directive shall be construed as imposing an obligation on any Member State […] where wage formation is ensured exclusively via collective agreements, to introduce a statutory minimum wage', or 'to declare any collective agreement universally applicable'. But the two countries had been adamant that this 'get out of jail card' was not enough to reassure them, and that their 'Nordic Model' was threatened by it (Lillie, 2023). The ghost of *Viking and Laval* – the two CJEU judgements that rocked Scandinavian industrial relations in 2007, also signalling a deeper crisis of Social Europe – was no doubt looming large on their decision to take the AMWD before the Luxembourg court.

Challenging the legality of the AMWD – the Opinion of the Advocate General

The challenge was essentially premised on the argument that Article 153(5) excludes 'pay, the right of association, the right to strike or the right to impose lock-outs' from the scope of EU regulatory competences in the social field, and that the AMWD as a whole, and its Article 4 in particular, were adopted in breach of these competence exclusions, requesting its annulment in whole or in part (i.e. limitedly to Article 4(1)-(2)). Early in 2025, Advocate General Emiliou delivered his Opinion on the legality of AMWD (Case C-19/23) and, no doubt to the surprise of some, concluded that the instrument should be annulled, in whole or in part, on the ground that it was adopted ultra vires and in breach of Article 153(5) TFEU.

In addressing the request for annulment, the Advocate General engaged with four questions. Firstly, should the Directive be annulled in full because of its incompatibility with the Article 153(5) 'pay' exclusion. Secondly, should it be annulled due to its incompatibility with the Article 153(5) 'right of association' exclusion. Thirdly, was the Directive invalidly adopted by majority vote under Article153(1)(f), whereas it should have been adopted unanimously as it also pertains to the 'representation and collective defence' of workers, falling under 153(1)(f) and requiring unanimity. Fourthly, and finally, if the Court did not find in favour of the applicant on the previous three questions, could at least 4(1)(d) and Article 4(2) of the Directive be annulled? The AG concluded that the two pleas worth of merit were the first and the last one and advised the Court to 'to conclude that the AMW Directive must be annulled in full' (para 96), but also that 'should the Court decide that the AMW Directive must not be annulled in its entirety, I would suggest it […] annul Article 4(1)(d) and Article 4(2) of that directive' (para 129).

The opinions of Advocate Generals do not bind the Court, that can decide autonomously whether to agree, disagree, or – as it sometimes happens – take a different approach to the issue at stake altogether. It is fair to say that AG Emiliou's opinion has not been met with favour by academic commentators that have overwhelmingly criticised it for departing from precedent and misrepresenting the 'pay exclusion' contained in Article 153(5) TFEU (Countouris 2025, Kilpatrick and Steiert 2025, Menegatti 2025). The ETUC has also expressed concerns and has released its own counter-opinion (ETUC, 2025). The Court has yet to express itself on the matter, but a judgement is expected imminently, in the coming months. It is worth noting that, in the meantime, the deadline for Member States to transpose the AMWD in their national legal systems has come and gone (in November 2024), with most EU countries implementing it uneventfully (Müller, 2024). A decision by the Court to annul the Directive, even only in part, would have a significant impact on this, practically and symbolically, important measure for Social Europe.

Conclusions – Social Europe after the AMWD

Social Europe had an important period of revitalisation between 2017 and 2023, the EU institutions churning out a large number of new, updated, and 'recast' directives in the social policy field. But arguably no other instrument has the same symbolic value enjoyed by the AMWD. When adopted, the Directive both sought to put Europe on a high road of decent working conditions and upward social convergence and, no less importantly, it sought to signal to its citizens and workers that the EU has turned the page on the excesses of neo-liberalism that had characterised the previous decade. The EU was now at last fulfilling its Treaty based aspiration to 'work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress' (Article 3(3) of the Treaty on the European Union, TEU).

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But the Directive was challenged by Denmark and Sweden, two high wage, high union density countries, with strong welfare state regimes, which had nothing to fear from the adoption of the AMWD

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An annulment of the Directive, even only a partial one, would no doubt pose some rather unprecedented, but ultimately manageable, de-regulatory challenges to those Member States that had already implemented its provisions earnestly. But it would really be the political backlash that should be feared the most. The message that would resonate across the Union would be that the renewal of Social Europe was really a false start and was already faltering. That the policy pendulum of the current EU Commission, that installed itself in 2024 following the European Parliament elections that saw a growth of centre right and far right parties, was once again swinging away from redistributive politics and in the direction of deregulation and of spending cuts to welfare budgets, also justified by an increase in defence and military spending.

This may well be the new direction of travel of the EU, regardless of the fate of the AMWD. It is clear that the current Commission has lower social regulatory ambitions than it did during its previous mandates. And it is well accepted that any social advances will more likely come from the purposive implementation of existing instruments, rather than from the adoption of a new wave of transformative directives. But unless the integrity of the AMWD is preserved, and more generally unless Social Europe is once more brought to the centre of European policy making, a new spectre will soon be haunting Europe. The spectre of militarism (and militarism alone) as the highest stage of European capitalism. A striking contract with Article 3(1) TEU, providing that 'The Union's aim is to promote peace, its values and the well-being of its peoples'.

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recognised in earlier cases such as *Çerikçi v Tűrkiye* (2007), where a strike was called in support of May Day.

Conclusion

The judgements in these cases must necessarily temper the enthusiasm of those keen on 'strategic litigation' in the ECtHR on behalf of trade unions and workers. The revolving churn of Judges in the Court seems unlikely to improve matters since nominations emanate from national governments of the Contracting States of the Council of Europe, which have been increasingly less progressive.

1 Appn.53574/99.
2 Appn.6615/03.
3 Appns.74611/01, 26876/06 et 27628/02.
4 Appn.68959/01.
5 Appn.67336/01.
6 Appn. 48408/12.
7 Appn.44873/09.
8 Appn.36701/09.
9 Appn.34503/97.
10 Appn. 668/16.
11 See footnote 1, in Vogt *et al*., *The Right to Strike in International Law,* 2020, Hart.
12 Article 3 of C87 reads: '1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.'
13 Appn. 59477/18, 59481/18, and 59494/18.
14 Appn.51194/19 and Appn.55789/19.