

## Legal arguments in favour of the ETUC proposal for a Directive on Fair Minimum Wages and Collective Bargaining

### Legal Aspects Briefing

Stefan Clauwaert, ETUC Legal and Human Rights Advisor

A major argument expressed against the ETUC proposal for an EU Framework Directive has been that the EU has no competence on this matter and this primarily on (a textual reading of) Article 153(5) which reads that *“the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.”*

This briefing sets out the arguments underpinning the ETUC demands for an EU Framework Directive to establish a threshold below which statutory minimum wages cannot fall along with ensuring that Member States require employers to recognize the right to collective bargaining and provide genuine protection so that workers can unionsise without fear of retribution.

#### Key messages

- Article 153 TFEU (in conjunction in 151 TFEU) is the only **appropriate legal basis** for the Framework Directive, in particular Article 153(1)(b) which is aimed at **improving working conditions** - unfairly low minimum wages can be considered as an unfair condition of employment as can a refusal by employers to recognize the union or other anti-union activities;
- It is not true that the **EU** has no **competence whatsoever in the matter of pay and in particular minimum wage**. CJEU case law confirms that the exclusion in Article 153(5) TFEU must be interpreted restrictively and cannot be read as a full exclusion of competence for the EU to act on the issue of wages/pay. Article 153(5) TFEU only limits the EU from setting levels of pay (or parts of it), since this comes under the contractual freedom of unions and employers at national level and the competence of Member States.
- It is also clear from EU secondary law that the **EU is competent to deal with pay/wage related aspects** and that **pay, wages, remuneration** as well as other financial components **fall under the EU definition of “working/employment conditions”** as enshrined in Article 153(1)(b).
- Although fixing the levels of pay/wages/payments, according to the CJEU, is a primarily national competence (public authorities and/or social partners), **several EU Directives do provide for direct and/or indirect indicators or thresholds in relation to the level of pay/payments**.
- It is **possible via this Directive to also, as ETUC demands, to promote the role of social partners and collective bargaining/agreements in particular**. There are numerous examples of EU secondary legislation which set minimum requirements in relation to working conditions (including aspects of pay) but and at the same time indeed confer an important role to the social partners in the Member States to implement these requirements, or to reach the objectives defined in the legislation via collective bargaining/agreements.
- **Protecting workers right to unionize and ensuring respect for the right to collective bargaining** is a requirement of the EU, explicitly included in the EU Treaties by the EU Charter of Fundamental Rights.

## Introduction

In both its first and second consultation documents for the dedicated European social partners consultation process under Article 154 TFEU on an EU initiative on a possible action addressing the challenges related to fair minimum wages, the Commission identified Article 153 (1)(b) TFEU (read in conjunction with Article 151 TFEU) as the possible legal basis for this initiative although recognizing the limits put by Article 153(5) TFEU as well as the constant case law of the CJEU.

In its replies to the 1st and 2nd phase consultation, the ETUC has also stated that it considers that the EU has competence in the matter of pay and in particular minimum wage and that the most logical and appropriate legal basis for this EU initiative is indeed Article 153 TFEU (in conjunction with Article 151) and in particular Article 153(1)(b) aimed at improving working conditions. ETUC is also aware - like the Commission- of the limits put by article 153(5) and the related case law of the CJEU.

Indeed, a major argument expressed against this EU initiative has been that the EU has no competence on this matter and this primarily on (a textual reading of) Article 153(5) which reads that *“the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.”*

This note aims to provide arguments why according to the ETUC there is indeed sufficient legal base and competence for the EU to move ahead with a legislative initiative in the form of a Directive on this matter (section I).

Furthermore, it also looks more in particular at the following (legal) questions/issues as they are reflected in the ETUC replies to the Commission consultation:

- why Article 153 TFEU forms the most logical/appropriate legal base (section II.A),
- whether pay/wages are covered by the concept of “working/employment conditions” as defined in Article 153(1)(b) and EU secondary law (section II.B.1 and 2 ),
- how EU secondary law defines indirectly or directly levels or thresholds of pay/payments (section II.B.3);
- how EU primary and secondary law promotes and respects collective bargaining/agreements (section II.B.4)
- some other key demands with legal aspects in the ETUC replies to the Commission consultation (section III)

### **I. Article 153 (5) TFEU – exceptional rule to be interpreted restrictively**

In order to support the argument that the EU has no competence to act on the issue of minimum wages, reference is almost exclusively made to Article 153(5) TFEU which stipulates that:

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Whereas this article could indeed read as excluding the issue of pay/(minimum) wage from EU competence to act on (minimum) wages, the ETUC (and Commission) consider that this entails no complete exclusion of that EU competence. This view is supported by the CJEU case law.

### **C-307/50 – Del Cerro Alonso**

Reference can there be main in first instance to the CJEU judgement of 13 September 2007 in [C-307/50 Del Cerro Alonso](#) where the Court confirms that:

39 Secondly, as Article 137(5) EC [now Article 153(5) TFEU] derogates from paragraphs 1 to 4 of that article, the matters reserved by that paragraph **must be interpreted strictly so as not to unduly affect the scope of paragraphs 1 to 4, nor to call into question the aims pursued by Article 136 EC [now Article 151 TFEU].**

40 More particularly, the exception relating to ‘pay’ set out in Article 137(5) EC is explained by the fact **that fixing the level of wages falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States.** In those circumstances, in the present state of Community law, it was considered appropriate to exclude determination of the level of wages from harmonisation under Article 136 EC et seq.

41 The ‘pay’ exception cannot, however, **be extended to any question involving any sort of link with pay; otherwise some of the areas referred to in Article 137(1) EC would be deprived of much of their substance.**

46 For the same reasons, the **establishment of the level of the various constituent parts of the pay of a worker such as the applicant in the main proceedings is still unquestionably a matter for the competent bodies in the various Member States.** That is not, however, the subject of the dispute before the referring court.

It has thereby also to be noted that by its judgement the Court overruled – which is very rare – the [opinion of Advocate General POIARES MADURO](#) who considered that *“it is clear from Article 137(5) EC that the Council is not authorised to adopt on that basis measures relating to pay”*. (para 22 of the Opinion)

Not only the CJEU did thus not share this view, also the Commission disputed this view as such a restricted interpretation of Article 153(5) TFEU would deprive this article from its effectiveness (para. 23 of the AG Opinion)<sup>1</sup>:

23. However, the Commission disputes that interpretation. In its view, **the Treaty should be interpreted as meaning that acts based on Article 137 EC cannot directly fix the level or nature of pay. On the other hand, it is quite permissible for the legislature to adopt legislation, such as that at issue, which has only indirect or incidental effects on pay. Only on that condition can the effectiveness of Article 137 EC be maintained. It follows that Member States are completely free to choose the procedures for determining and the level of pay,** but they cannot allow fixed-term workers to be discriminated against as regards that pay.

### **C-286/06 – ‘Impact’**

In the [Advocate General opinion and the CJEU Judgement C-286/06 ‘Impact’](#), the need to read Article 153(5) restrictively was further confirmed. In its [Opinion of 9 January 2008 Advocate General Kokott](#) stated amongst others the following:

Interpretation in conformity with primary law in the light of Article 137(5) EC

---

<sup>1</sup> It is to be noted that the Advocate General come to this conclusion on an almost textual interpretation of the wording in Article 153(5) by stating that *“That interpretation [of the European Commission] is certainly attractive. However, it receives no serious support from the text interpreted. Moreover, if it were accepted, it would be liable to render Article 137(5) EC meaningless. On that interpretation, it would be possible, in laying down rules on employment conditions, to determine pay conditions. However, it is quite obvious that the harmonisation of pay conditions is capable of having a direct effect on the level and nature of that pay. Such a consequence would be manifestly contrary to the intentions expressed by the framers of the Treaty in Article 137(5) EC.”*

170. Interpreting that term alone, however, does not provide any insight into what is meant by the fact that, according to Article 137(5) EC, that article ‘shall not apply’ to pay. **Therefore, account must be taken also of the positioning of Article 137(5) EC**, in addition to the meaning and purpose of that provision.

171. As a **derogation, Article 137(5) EC is to be interpreted strictly**, as the Court recently held in *Del Cerro Alonso*. <sup>(110)</sup> The provision **cannot, therefore, be interpreted as excluding from the scope of Article 137 EC anything that has any sort of link with pay, as otherwise many of the fields listed in Article 137(1) EC would – in practical terms – be meaningless.** <sup>(111)</sup>

172. Instead, the **meaning and purpose of Article 137(5) EC is primarily to protect the social partners’ autonomy in collective bargaining from being restricted**, as evidenced not least by the close association between pay and the other matters excluded from the Community’s powers: the right of association, the right to strike and the right to impose lock-outs, which are particularly important in relation to fixing pay and, accordingly, are referred to ‘in the same breath’ as pay in Article 137(5) EC.

173. In addition, **Article 137(5) EC aims to prevent Community-wide standardisation by the Community legislature of the wage levels applicable in each of the Member States**, since such a levelling out – albeit possibly only partial – of national, regional and occupational differences in wage levels by the Community legislature would represent significant interference in competition between undertakings operating in the internal market. It would also go well beyond the measures intended under Article 137(1) EC to enable the Community to support and complement the activities of the Member States in the field of social policy.

174. Against that background, **Article 137(5) EC prevents the Community legislature, for example, from exerting any influence on wage levels in the Member States by fixing a minimum wage**. Nor can the Community legislature provide, for example, for annual inflationary compensation, introduce an upper limit for annual pay increases or regulate the amount of pay for overtime or for shift work, public holiday overtime or night work.

175. **By contrast, Article 137(5) EC does not prevent the Community legislature from adopting legislation with financial consequences, such as in relation to working conditions (Article 137(1)(b) EC) or the improvement of the working environment to protect workers’ health and safety (Article 137(1)(a) EC).** Thus, the Community may, for example, lay down requirements for national employment law, resulting in a worker’s right to be paid for his annual leave. <sup>(112)</sup>

176. In the same vein, the Court recently also clarified in *Del Cerro Alonso* that **it is only the level of pay that is removed from the Community legislature’s competence by Article 137(5) EC.** <sup>(113)</sup> The Court added that fixing the level of the various constituent parts of a worker’s pay continues to be a matter that is entirely for the competent bodies in the Member States concerned. <sup>(114)</sup>

180. (...) **While Article 137(5) EC leaves it to the competent national authorities and to unions and management to set the level of individual remuneration components**, it cannot serve as a pretext for discriminating between particular groups of workers. Rather, the competent national authorities and unions and management must comply with Community law when exercising the competence reserved to them by Article 137(5) EC, <sup>(117)</sup> not least with the general legal principles such as the principle of equal treatment and non-discrimination. (...).

Not only Advocate General Kokott thus confirms the restrictive interpretation as defined in *Del Cerro Alonso*, but also refers amongst others to the order in which on the one hand Article 153(1) [and Article 151] TFEU and on the other hand Article 153(5) TFEU appear in the Treaty. A too expensive

---

<sup>2</sup> In this footnote 110 the following is stated “*Del Cerro Alonso (cited in footnote 3), paragraph 39; see also, in relation to a restrictive interpretation of derogating provisions in primary law, Case C-349/03 Commission v United Kingdom [2005] ECR I-7321, paragraph 43.*” Indeed in this case the Court stated that derogating provisions in primary law must be interpreted restrictively and in light/context of other primary law provisions; for Article 153(5) this implies that it has to be read in light of Articles 151 and 153(1).

interpretation of a derogative provision like Article 153(5) or even concluding that there would be no EU competence at all, would deprive the earlier and more general Articles 153(1) and 151 TFEU from all their meaning and thus not allow the EU and Member States to reach the social objectives expresses in both articles of improving living and working conditions.

This interpretation was then confirmed by the CJEU in its Judgement of 15 April 2008 whereby the Court states<sup>3</sup>:

**122** As the Court has already held, **as Article 137(5) EC derogates from paragraphs 1 to 4 of that article, the matters reserved by that paragraph must be interpreted strictly so as not to unduly affect the scope of paragraphs 1 to 4, nor to call into question the aims pursued by Article 136 EC** (*Del Cerro Alonso*, paragraph 39).

**123** More particularly, the exception relating to 'pay' set out in Article 137(5) EC is explained by the fact that **fixing the level of pay falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States**. In those circumstances, in the present state of Community law, it was considered appropriate to **exclude determination of the level of wages** from harmonisation under Article 136 EC et seq. (*Del Cerro Alonso*, paragraphs 40 and 46).

**124** As the **Commission contended, that exception must therefore be interpreted as covering measures – such as** the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, **or the setting of a minimum guaranteed Community wage** – which amount to direct interference by Community law in the determination of pay within the Community.

**125** **It cannot, however, be extended to any question involving any sort of link with pay; otherwise some of the areas referred to in Article 137(1) EC would be deprived of much of their substance** (see, to that effect, *Del Cerro Alonso*, paragraph 41; see also, to the same effect, Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, concerning the Council's competence to adopt, on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty were replaced by Articles 136 EC to 143 EC), Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), in particular Article 7 of that directive, relating to the grant of four weeks' paid annual leave).

### In Conclusion:

- The CJEU case law confirms that Article 153(5) must be interpreted restrictively and it can not be read as a full exclusion of competence for the EU to act on the issue of wages/pay.
- Such an extensive interpretation would not only deprive Article 153(1)(b) (to improve working conditions) of its meaning and effectiveness but also Article 151 TFEU which enshrines the social policy objectives including to improve living and working conditions.
- The only limitations put by Article 153(5) for the EU to act lies thus primarily in fixing a minimum guaranteed Community wage as setting the levels of pay (or constituent parts of it) falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States.

---

<sup>3</sup> It should be noted that also the referring court in this case took the restrictive view; “**35** Furthermore it [the referring court] takes the view that, having regard to Article 136 EC and the Community Charter of the Fundamental Social Rights of Workers adopted at the European Council's meeting in Strasbourg on 9 December 1989 (in particular Article 7 of the Charter) – in conjunction with which Article 137 EC must be read –, **Article 137(5) EC, which excludes pay from the scope of Article 137 EC, must be interpreted as being intended solely to preclude the European Community from having legislative competence to fix a Community minimum wage and that it does not therefore prevent the term 'working conditions' within the meaning of Article 137(1) EC from encompassing pay and pension matters.** (paragraph 35 of the Judgement)

## **II. Article 153 TFEU - most logical/appropriate legal base to improve working conditions**

Before entering into the question whether, given the exclusion of Article 153(5) TFEU, other paragraphs of Article 153 and in particular Article 153(1)(b) on working conditions do cover pay, wage or other financial components (section II.B), section II.A looks into the question of why ETUC (and the European Commission) considers Article 153 (in conjunction with Article 151) TFEU as the most appropriate and logical legal base for this EU legislative action on fair minimum wages in Europe.

### **II.A. Article 153 TFEU compared to possible alternative legal bases**

Throughout the debate on the eventual legal base for this initiative, several alternatives have been put forward however mainly on the presumption that Article 153(5) TFEU provided no competence at all for the EU to act on minimum wage issues. It concerns in particular the following ones: Article 352 TFEU (so-called “flexibility” clause), Article 115 TFEU (harmonization of internal market), Article 46 TFEU (“freedom of movement of workers”) and Article 175 TFEU (“social, economic and territorial cohesion”). Each of them entail however serious in particular procedural drawbacks and obstacles.

- Article 352 TFEU: this article is subject to a Special Legislative Procedure (SLP) which would downgrade the role of the European Parliament, it necessitates also the consent of national governments/parliaments, it requires unanimity voting in Council and provides for no role of social partners.
- Article 46 TFEU: although an initiative under this article would be dealt with via the so-called Ordinary Legislative Procedure (OLP), including a co-decision role of the European Parliament, and is to be adopted with a Qualified Majority Vote (QMV) in Council, the main weaknesses lie in principle in the fact that there would be no direct role for social partners’ involvement neither in the legislative procedure nor in the implementation of the initiative (unlike the involvement foreseen in Articles 153 and 154-155 TFEU); furthermore it would need to necessitate to build/stretch an argumentation on how an initiative on minimum wages can enhance or have as an objective the free movement of workers.
- Article 115 TFEU: firstly this article relates to the ‘establishment or functioning of the internal market’ which would imply submitting a crucial social right on a fair minimum wage to internal market rules (thereby bearing in mind the earlier conflicts raised between social rights and economic freedoms in particular in CJEU case law); furthermore Article 115 TFEU is subject to a Special Legislative Procedure and unanimity voting in Council.
- Article 175 TFEU: although this Article is subject to the OLP (including thus co-decision role of the EP) and QMV, it does not provide for a role of social partners; furthermore this Article deals or is mainly used in relation to allocating (European) funds and it will require a very creative reading of the text of the Article (what does e.g. “specific actions outside the Funds” imply) and the CJEU case law gives no real guidance so far unlike the well-established CJEU guidance in relation to Article 153 TFEU (see above and below section I. and II.B).

Compared to the abovementioned alternative proposed legal bases, it is thus clear that Article 153 TFEU has the following arguments in favour to be the most appropriate and logical basis for this EU initiative on minimum wages:



- It is situated in Title X on Social Policy of the TFEU (Articles 151-161 TFEU) and which thus also includes Article 157 TFEU on “equal pay for equal work”;<sup>4</sup>
- Article 153 TFEU starts off with “1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields”. Article 151 sets out indeed the social objectives of the Union and Member States by stating “*The Union and the Member States, **having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers**, shall have as their **objectives** the promotion of employment, **improved living and working conditions**, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, **dialogue between management and labour**, the development of human resources with a view to lasting high employment and the combating of exclusion. To this end the Union and the Member States shall **implement measures which take account of the diverse forms of national practices**, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy (...)*”. Articles 151 and 153 TFEU have thus to be read in conjunction and with consideration of the Community Charter of Fundamental Social Rights of Workers and the Council of Europe European Social Charter (ESC) which provide respectively amongst other for the following:
  - CCFSRW: 5. *All employment shall be fairly remunerated. To this end, in accordance with arrangements applying in each country: o workers shall be assured of an equitable wage, i.e, a wage sufficient to enable them to have a decent standard of living; (...);*
  - ESC: Article 4 – *The right to a fair remuneration: With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake: 1. to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living; (...)*. This particular article is accompanied by a well-established and longstanding [case law of the European Committee of Social Rights](#) also in relation to the setting and level of minimum wages.
- It explicitly provides in Article 153(3) that Member States may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to Article 153.
- Article 153 TFEU is subject to the Ordinary Special Legislative Procedure (incl. a co-decision role for the EP) and, in relation to improving working conditions, to Qualified Majority Voting.

## **II.B Article 153(1)(b) – “pay being the most essential working condition”**

ETUC (and the Commission) consider Article 153(1)(b) aimed at improving “working conditions” as being the most appropriate concrete basis for this EU initiative as pay/wages form the most essential part of working conditions for workers across Europe and the world.

Whereas it is already clear from Section I. that even if Article 135(5) TFEU does not excludes all pay/wage related issues from EU competence, it is also clear from EU secondary law as well as CJEU case law that firstly the EU is competent to deal with pay/wage related aspects via its secondary law

---

<sup>4</sup> Furthermore Article 157(2) provides that for this Article “pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.”

and secondly, and more importantly, that pay, wages, remuneration as well as other financial components fall under the EU notions of “working/employment conditions”.

## **1. EU secondary law**

There exists a comprehensive set of EU secondary law that regulates either directly or indirectly the issue of pay. As for EU secondary law directly and explicitly dealing with pay issues, reference can of course be made to the longstanding EU legislation on “equal pay for equal work” (now embedded in Directive 200/55/EC recast – see further). As for more indirect regulatory interventions, reference can be made to Directives where the issue of pay remuneration is included in concept of “working/employment conditions” (e.g. [Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation \(recast\)](#), Article 1 “working conditions including pay”; [Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin](#), Article 3 (1)c “(c) employment and working conditions, including dismissals and pay) or which ensure the protection of wages (e.g. [Directive 2008/94 on the protection of employees in the event of the insolvency of their employer](#)).

But even in for instance Directives which have as their objective to protect the working/employment conditions of workers without clearly defining what these conditions exactly entail and/or where the issue of remuneration/wage/pay is not explicitly mentioned as being one of those conditions, the CJEU has established standing case law that pay (but also elements of pay, pensions, benefits or other financial compensations) have to be considered as an essential working condition. (E.g. [Directive 1999/70 EC on fixed-term work](#), Clause 4(1) on prohibition of less favourable treatment for fixed-term workers in respect of employment conditions; see also below section “CJEU case law on “pay as working conditions”)

## **2. CJEU case law on “pay as working condition”**

Although there exists a vast CJEU case law on pay related issues, particular reference is made here to the already abovementioned CJEU cases ‘Del Cerro Alonso’ (C-307/50) and ‘Impact’ (C-268/06) as they relate the most closely to the main questions at stake here.

### **C-307/50 – Del Cerro Alonso**

In its [Opinion in the Del Cerro Alonso case](#), the Advocate General POIARES MADURO had - like on the interpretation Article 153(5) – also a quite diverging view on the question whether pay has to be considered falling under the notion of employment conditions (as mentioned in the Clause 4 of the Directive 1999/70 on Fixed-term work). Based on a literal/textual interpretation of that Clause 4 which indeed those not define the term employment conditions nor explicitly refers to pay as being part of them, the Advocate General concluded that pay (related issues) did not form part of the notion working conditions. However, the Advocate General did admit that *“it is true that pay represents, for any worker, an essential employment condition (...)”*. (Para. 25 of the Opinion)

In this case, the Commission defended on the other hand a completely different view than the Advocate General and considered ‘based on common sense’ that pay is to be ‘the first and most important of working conditions’; secondly the Commission also defends the argumentation that the mere fact that when pay is not mention it does not mean that it is excluded from the provisions of EU law:

C– The concept of employment conditions within the meaning of clause 4 of the framework agreement



17. **In the Commission's view, the answer is not in doubt. It relies, firstly, on common sense in order to gain acceptance for its view that pay is the first and most important of working conditions. (...)**

20. However, in the Commission's view, the mere fact that the directive in question makes no mention of pay cannot exclude pay from its scope. (...)

21. It is true that, in certain cases, in the absence of any indication to the contrary, the term 'working conditions' may encompass pay. (...) In that regard, it must be recalled that, according to settled case-law, when it is necessary to interpret a provision of secondary Community law, preference must be given to the interpretation which renders the provision consistent with the Treaty. (14).

23. However, the Commission disputes that interpretation. In its view, the Treaty should be interpreted as meaning that acts based on Article 137 EC cannot directly fix the level or nature of pay. **On the other hand, it is quite permissible for the legislature to adopt legislation, such as that at issue, which has only indirect or incidental effects on pay. Only on that condition can the effectiveness of Article 137 EC be maintained.** It follows that Member States are completely free to choose the procedures for determining and the level of pay, but they cannot allow fixed-term workers to be discriminated against as regards that pay.

In its Judgement, the CJEU also overruled this interpretation of the Advocate General, and concluded that pay, even if not explicitly mentioned, does fall under the notion of "working/employment conditions".

47 In contrast, as has already been explained at paragraphs 44 and 45 of the present judgment [see above], the question whether in applying the principle of non-discrimination laid down in clause 4(1) of the framework agreement, **one of the constituent parts of the pay should, as an employment condition,** be granted to fixed-term workers in the same way as it is to permanent workers does come within the scope of Article 137(1)(b) EC and therefore of Directive 1999/70 and the framework agreement adopted on that basis.

#### C-268/06 'Impact'

This interpretation was confirmed again in both the Advocates' General opinion and CJEU judgement in the Impact-case.

In its [Opinion of 9 January 2008 Advocate General Kokott](#) stated amongst others the following:

*E – Question 5: Applicability of Clause 4 of the Framework Agreement to matters of remuneration and pensions*

150. By its fifth question, the referring court asks, in essence, whether the 'employment conditions' referred to in Clause 4 of the Framework Agreement include conditions of an employment contract that relate to remuneration and pensions. (...)

152. Not only IMPACT and the **Commission**, but also the referring court **take the view that the employment conditions referred to in the Framework Agreement also cover pay** and pensions. (...)

The term 'employment conditions'

155. In a number of measures of recent employment and social legislation, **the Community legislature explicitly stated that the term 'employment conditions' used in those measures includes pay.** [\(95<sup>5</sup>\)](#)

---

<sup>5</sup> Footnote 95 refers to: Article 3(1)(c) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), Article 3(1)(c) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), and Article 3(1)(c) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), as amended by Directive 2002/73/EC (OJ 2002 L 269, p. 15).

**However, the fact that there is no such express provision in the present case does not necessarily mean that pay is completely excluded** from the scope of Clause 4 of the Framework Agreement.

157. The term 'employment conditions' within the meaning of Clause 4 of the framework agreement on fixed-term work requires interpretation. **According to settled case-law, it is necessary to consider not only the wording of that provision but also the context in which it occurs and the objects of the rules of which it is part.** (99)

158. According to Clause 1(a) of the Framework Agreement, the purpose of that Agreement is to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination. (100) **Fundamental social policy objectives of the Community are thereby expressed, such as are laid down in particular in the first paragraph of Article 136 EC, especially the improvement of living and working conditions and ensuring proper social protection. The same objectives are alluded to also in the preambles to the EU Treaty (101) and to the EC Treaty, (102) and in the Community Charter of Fundamental Social Rights for Workers (103) and the European Social Charter. (104)**

166. The scope of provisions of secondary legislation cannot validly exceed that of their legal basis. (108) **To ensure that that is so, secondary law must be interpreted and applied so as to render it consistent with primary law since, on that point, the Court has consistently held that, if the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the EC Treaty rather than to the interpretation which leads to its being incompatible with the Treaty. (109)**

169. The meaning of pay as such may, as can be seen from Article 141(2) EC, conceivably be given a broad interpretation and cover, in addition to the ordinary basic or minimum wage or salary, also any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

175. By contrast, Article 137(5) EC does not prevent the Community legislature from adopting legislation with financial consequences, such as in relation to working conditions (Article 137(1)(b) EC) or the improvement of the working environment to protect workers' health and safety (Article 137(1)(a) EC). Thus, the Community may, for example, lay down requirements for national employment law, resulting in a worker's right to be paid for his annual leave. (112)

182. To summarise, therefore:

**'Employment conditions'** within the meaning of Clause 4 of the framework agreement on fixed-term work include conditions of an employment contract that relate to remuneration. The same applies to conditions of an employment contract concerning pensions, provided that the latter are in the nature of a retirement or occupational pension awarded by the employer.

In the Judgement, the CJEU confirmed this view by stating that even when certain EU Directives expressly state that the term 'employment and working conditions' (to which those provisions refer) includes remuneration this **does not permit the conclusion to be drawn from the absence of a statement to that effect** (para. 47) because:

110 Since the question of interpretation raised cannot be resolved by the wording of Clause 4 of the framework agreement, **it is necessary, in accordance with settled case-law, to take into consideration the context and the objectives pursued by the rules of which that clause is part** (see, in particular, Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case 337/82 *St. Nikolaus Brennerei und Likörfabrik* [1984] ECR 1051, paragraph 10; Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 23; and Case C-76/06 P *Britannia Alloys & Chemicals v Commission* [2007] ECR I-4405, paragraph 21).

113 Moreover, the first paragraph of Article 136 EC, which defines the objectives with a view to which the Council may, in respect of the matters covered by Article 137 EC, implement in accordance with Article 139(2) EC agreements concluded between social partners at Community level, refers to the European Social Charter signed at Turin on 18 October 1961, which includes at point 4 of Part I the right for all workers to a 'fair remuneration sufficient for a decent standard of living for themselves and their families' among the objectives which the contracting parties have undertaken to achieve, in accordance with Article 20 in Part III of the Charter.

### 3. Defining the level of pay/wages

In the ETUC demands that Member States opting for a statutory minimum wage system should establish a minimum wage floor with a dual threshold of at least 60% of the national median wage and at least 50% of the national average wage.

Although based on CJEU case law (see above section 1) the fixing of the level of pay/(minimum)wages is left to the social partners and/or public authorities at national level, several EU Directives do provide for an **indication or even threshold on the level of the pay/wages or payments**. In this regard reference can be made to:

- Equal pay for equal work - [Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation \(recast\)](#)
- “Socially acceptable level” : [Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer](#) (OJ L 283, 28.10.2008, p. 36) - *Article 4(3): Member States may set ceilings on the payments made by the guarantee institution. These ceilings must **not fall below a level which is socially compatible with the social objective of this Directive***. This Directive and article is inspired by the ILO Conventions n° 95 on the Protection of Wages (Article 11) and n° 173 on the protection of workers’ claims in case of insolvency of the employer (Articles 7 and 13).
- [Directive \(EU\) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU](#) (OJ L 188, 12.7.2019, p. 79–93; legal basis Article 153(2))
  - (30) **Member States should therefore set a level for the payment or allowance with respect to the minimum period of paternity leave that is at least equivalent to the level of national sick pay**. Since granting rights to paternity and maternity leave pursue similar objectives, namely creating a bond between the parent and the child, **Member States are encouraged to provide for a payment or an allowance for paternity leave that is equal to the payment or allowance provided for maternity leave at national level.**
  - (31) **Member States should set the payment or allowance for the minimum non-transferable period of parental leave guaranteed under this Directive at an adequate level**. When setting the level of the payment or allowance provided for the minimum non-transferable period of parental leave, Member States should take into account that the take-up of parental leave often results in a loss of income for the family and that first earners in a family are able to make use of their right to parental leave **only if it is sufficiently well remunerated, with a view to allowing for a decent living standard**.
  - Article 8 - Payment or allowance - Para. 2. With regard to paternity leave as referred to in Article 4(1), **such payment or allowance shall guarantee an income at least equivalent to that which the worker concerned would receive in the event of a break in the worker's activities on grounds connected with the worker's state of health, subject to any ceiling laid down in national law**. Member States may make the right to a payment or an allowance subject to periods of previous employment, which shall not exceed six months immediately prior to the expected date of the birth of the child.
  - Article 20 – Transposition: Para 7. - **Where Member States ensure a payment or an allowance of at least 65 % of the worker's net wage**, which may be subject to a

ceiling, for at least six months of parental leave for each parent, they may decide to maintain such system rather than provide for the payment or allowance referred to in Article 8(2).

#### 4. The role of collective bargaining/agreements in EU secondary law

Given that in a majority of Member States minimum wages are either set solely or complementary to a statutory minimum wage via collective bargaining/agreements between the social partners on different levels (national, sectoral, regional), the ETUC demands that, next to establishing a threshold below which statutory minimum wages must not fall, the EU initiative in the form of a Directive would also promote collective bargaining as the main way to set wages.

Although aware that collective bargaining falls under Article 153 (1)(f) ('collective' defense') and requires unanimity voting and that thus tackling collective bargaining/agreements can only be done in an auxiliary way in this Directive on fair minimum wages, there are numerous examples of EU secondary legislation which have as a primary objective to set minimum requirements in relation to important working conditions but at the same time confer an important role to the social partners in the Member States to implement these requirements via collective bargaining/agreements. The latter can thus form a source of inspiration for the much needed provisions on collective bargaining/agreements in this Directive on fair minimum wages.

Reference can amongst others be made to:

- Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time – Articles 15<sup>6</sup>, 18 (derogations);
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) – Article 21 on Social Dialogue<sup>7</sup>;

---

<sup>6</sup> Article 15 More favourable provisions: **This Directive shall not affect Member States' right to** apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to **facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection** of the safety and health of workers.

<sup>7</sup> Article 21 Social dialogue

1. **Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to** fostering equal treatment, including, for example, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice.

2. **Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy,** to promote equality between men and women, and flexible working arrangements, with the aim of facilitating the reconciliation of work and private life, and **to conclude, at the appropriate level, agreements** laying down anti-discrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the provisions of this Directive and the relevant national implementing measures. (...).

- Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work – Preamble<sup>8</sup>, Articles 5 and 11;
- Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services – Preamble<sup>9</sup>, Article 1<sup>10</sup> and 3;
- Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ( ‘the IMI Regulation’ ) - Preamble<sup>11</sup>, Article 1(2)<sup>12</sup>, 5 and 8(3)<sup>13</sup> and 11(3)<sup>14</sup>;

---

<sup>8</sup> (16) In order to cope in a flexible way with the diversity of labour markets and industrial relations, Member States may allow the social partners to define working and employment conditions, provided that the overall level of protection for temporary agency workers is respected.

(17) Furthermore, in certain limited circumstances, Member States should, on the basis of an agreement concluded by the social partners at national level, be able to derogate within limits from the principle of equal treatment, so long as an adequate level of protection is provided.

<sup>9</sup> (17) It is within Member States' competence to set rules on remuneration in accordance with national law and/or practice. The setting of wages is a matter for the Member States and the social partners alone. Particular care should be taken not to undermine national systems of wage setting or the freedom of the parties involved.

<sup>10</sup> This Directive shall not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, to conclude and enforce collective agreements, or to take collective action in accordance with national law and/or practice.'

<sup>11</sup> (15) In many Member States, the social partners play an important role in the context of the posting of workers for the provision of services since they may, in accordance with national law and/or practice, determine the different levels, alternatively or simultaneously, of the applicable minimum rates of pay. The social partners should communicate and inform about those rates.

(31) In order to cope in a flexible way with the diversity of labour markets and industrial relations systems, by way of exception, the management and labour and/or other actors and/or bodies may monitor certain terms and conditions of employment of posted workers, provided they offer the persons concerned an equivalent degree of protection and exercise their monitoring in a non-discriminatory and objective manner.

(35) For the purpose of ensuring that a posted worker receives the correct pay and provided that allowances specific to posting can be considered part of minimum rates of pay, such allowances should only be deducted from wages if national law, collective agreements and/or practice of the host Member State provide for this.

<sup>12</sup> Article 1 Subject matter: (...) 2. This Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and/or practice.

<sup>13</sup> Article 8 Accompanying measures: (...) 3. While respecting the autonomy of social partners, the Commission and Member States may ensure adequate support for relevant initiatives of the social partners at the Union and national level that aim to inform undertakings and workers on the applicable terms and conditions of employment laid down in this Directive and in Directive 96/71/EC.

<sup>14</sup> Article 11 Defence of rights — facilitation of complaints — back-payments: (...) 3. Member States shall ensure that trade unions and other third parties, such as associations, organisations and other legal entities which have, in accordance with the criteria laid down under national law, a legitimate interest in ensuring that this Directive and Directive 96/71/EC are complied with, may engage, on behalf or in support of the posted workers or their employer, and with their approval, in any judicial or administrative proceedings

- Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union - Preamble<sup>15</sup>, Article 14<sup>16</sup>;
- Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU - Preamble<sup>17</sup>, Article 8(1) and 20(8)<sup>18</sup>.

Furthermore it should also be recalled that the Treaty, a primary EU law source, provides in particular in relation to Article 153 that *“a Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155”*. The latter principle should in any case clearly be prescribed in the “Implementation” section/provisions of the EU Directive on fair minimum wages.

### III. Other key demands on legal aspects in the ETUC reply

Next to all the above in relation to the legal base as well as on the competence of the EU to deal with pay issues and more in particularly also the promotion and respect of collective bargaining/agreements, the ETUC raises in its replies to the Commission consultation a couple of other demands with a legal connotation them.

The ETUC calls in particular for:

- **A revision of the Public Procurement Directive** as well as other relevant Directives in order to ensure that only companies which respect workers’ rights to bargain collectively and apply a collective agreement can be awarded public contracts, grants, funds, CAP, etc;

---

with the objective of implementing this Directive and Directive 96/71/EC and/or enforcing the obligations under this Directive and Directive 96/71/EC.

<sup>15</sup> (38) **The autonomy of the social partners and their capacity as representatives of workers and employers should be respected. It should therefore be possible for the social partners to consider that in specific sectors or situations different provisions are more appropriate, for the pursuit of the purpose of this Directive, than certain minimum standards set out in this Directive. Member States should therefore be able to allow the social partners to maintain, negotiate, conclude and enforce collective agreements which differ from certain provisions contained in this Directive, provided that the overall level of protection of workers is not lowered.**

<sup>16</sup> Article 14 Collective agreements: **Member States may allow the social partners to maintain, negotiate, conclude and enforce collective agreements, in conformity with the national law or practice, which, while respecting the overall protection of workers, establish arrangements concerning the working conditions of workers which differ from those referred to in Articles 8 to 13.**

<sup>17</sup> (50) **Member States are encouraged, in accordance with national practice, to promote a social dialogue with the social partners with a view to** fostering the reconciliation of work and private life, including by promoting work-life balance measures in the workplace, establishing voluntary certification systems, providing vocational training, raising awareness, and carrying out information campaigns. In addition, Member States are encouraged to engage in a dialogue with relevant stakeholders, such as non-governmental organisations, local and regional authorities and service providers, in order to promote work-life balance policies in accordance with national law and practice.

(51) **The social partners should be encouraged to promote** voluntary certification systems assessing work-life balance at the workplace.

<sup>18</sup> Article 20 Transposition: (...) 8. **Member States may entrust the social partners with the implementation of this Directive, where the social partners jointly request to do so, provided that Member States take all the necessary steps to ensure that the results sought by this Directive are guaranteed at all times.**



- **A clarification of the interpretation of (EU) competition law** so that collective agreements covering non-standard workers, including self-employed should be considered to fall outside the scope of Article 101 TFEU;
- **Several safeguards in relation to the application and implementation of the Directive on fair minimum wages:**
  - Full respect of social partners' autonomy and that collective bargaining remains the prerogative of social partners and trade union and is not opened to other (obscure and non-representative) actors;
  - No obligation to introduce a statutory minimum wage system, but where such system exists it should be maintained ;
  - A firm non-regression clause and a more favourable provision clause;
  - A clause ensuring the possibility to implement the Directive by social partners (cfr. Article 153(3));
  - And last but not least, a Social Progress clause which clarifies that neither economic freedoms nor competition rules have priority over and/or can infringe upon trade union and workers' rights (in particular the freedom of association, the right to organize, the right to bargain collectively and take collective actions and the right to fair remuneration) as they are recognized in the relevant ILO Conventions, the Council of Europe European Convention of Human Rights and European Social Charter, the Community Charter of Fundamental Social Rights of Workers and the EU Charter of Fundamental Rights.