A review of the Directive on adequate minimum wages in the European Union

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Erik Sjödin has been given the following assignment by Faglig Faelles forbund (3F).

- A review of the legal analysis and the arguments made by Dr Jur. Jens Kristiansen, supplemented with the legal opinion of Erik Sjödin on the preliminary political agreement of the 12th of June 2022.
- An analysis of the legal basis of the political agreement of the 12th of July 2022, including an examination of the political agreement with reference to the Treaty of the European Union, including, but not solely art. 153. 5 and art. 153, 1f TFEU.
- An analysis of the legal risk connected to filing an annulment action, as well as not filing an annulment action of the Directive at the European Court of Justice.

In this report, Sjödin carries out the requested analysis. The analysis is based on documents provided by 3F, primarily 'Dossier interinstitutional: 2020/0310 (COD)' and Jens Kristiansen's 'Notat til CO-industri'.

Summary

Several arguments can be used to question the choice of legal basis. Three arguments relate to the exception for pay and the right of association in article 153.5 TFEU and one relates to the notion that article 153.1 f is a more appropriate legal basis.

The ECJ has stated that 'in the present state of EU law', it was considered appropriate to exclude determination of the level of pay from harmonization' (author's emphasis). It can be argued that the state of EU law has not changed.

The Directive entails direct involvement in the setting of wages by EU law and is thus covered by the exception for pay in article 153.5 TFEU. For that reason, it can be argued that the EU does not have the competence to adopt the directive.

According to article 153.5 TFEU, the right of association is excluded from the EU's competences on social policy. The Directive contains articles that concern protection of the essential parts of the freedom of association and thus the right of association. Therefore, it can be argued that the Directive is outside the competences transferred to the EU by the Member States.

The Directive's legal basis concerning working conditions is not correct. Only one of the articles in the Directive concerns working conditions. The Directive has a dual aim and the aim of promoting collective bargaining is not merely incidental to the aim of promoting adequate minimum wages. Article 153.1 f on representation and collective defence of the interests of workers and employers appears to be closer to the Directive's centre of gravity.

Kristiansen's note contains many well-reasoned arguments. Regarding some points, the arguments need to be developed to serve the purpose of convincing also the judges in the ECJ.

There are several risks with bringing an action for annulment. There is a substantial risk that the ECJ will dismiss the action for annulment. None of these risks disappears by not bringing an action for annulment. Not bringing an action for annulment will not put an end to the discussion. By bringing such an action the parties will have more control over the first judgment concerning the Directive. By bringing such an action it will also be noted in the rolls that there was no consensus among the Member States on the issue of a minimum wage.

The Directive is the first of its kind and legal predictions concerning the issues are complex and fraught with uncertainty.

1 Introduction

1. This report concerns the Directive on adequate minimum wages in the European Union (hereafter, 'the Directive'). A political agreement has been reached between the Council, the Parliament and the Commission. The Parliament, as well as the Council have now voted in favour of the Directive. A final directive will thus be published. I will here provide my analysis of the three themes asked for by 3F.

2. The report is structured as follows. I will start with an analysis of the legal basis of the political agreement. After that, the review of Kristiansen's arguments in his "Notat" will be presented. Finally, the report will address the risks connected with bringing, as well as not bringing an action of annulment against the Directive before the European Court of Justice (ECJ).

3. The ECJ is the final interpreter of EU law and the Court is known to be innovative and to some extent also sensitive to the current political situation. The Directive has no antecedent and content has been added to it in the legislative process. Predictions of the outcome of a procedure are therefore associated with uncertainty. It is the ECJ that has to be convinced, however, and therefore it is necessary to attempt to show how the arguments relate to previous judgments of the Court. The analyses will focus primarily on types of arguments that can be used concerning the choice of legal basis rather than certain conclusions of the outcome of the action of annulment. Regardless of the strength of legal arguments, the outcome will be uncertain, given that it is such a sensitive issue with high political stakes.

4. The Directive is the first of its kind. This adds to the necessary caution needed when drawing conclusions from existing ECJ case law.

2 The legal basis of the Directive

2.1 Introduction

5. Directives and other legislative acts must have a legal basis in the treaties. This is an expression of the fact that the EU may legislate only on matters concerning which the Member States have transferred competence over to the EU (see article 5.2 Treaty of the European Union, TEU). The legal basis defines the procedure by which a legislative act may be adopted, the type of legislative act that can be adopted, and the majority by which the Council shall make decisions. The boundaries between legal bases are not completely clear, and can overlap. Because certain articles in the Treaty are relatively open to interpretation (see articles 115 and 352 Treaty of the Functioning of the European Union, TFEU), the outer limits of the EU's competences are not clearly defined. EU measures may be taken only if the objectives cannot be achieved at the Member State level (*subsidiarity*), and such measures must be in *proportion* to the Union's objectives (articles 5.3 and 5.4 TEU).
6. The legal basis of the Directive is article 153.2 point b in conjunction with article 153.1 point b. According to the mentioned articles, the EU may adopt *minimum directives* for the gradual implementation of *working conditions*. Such directives concerning working conditions may, according to article 153.2, be adopted via ordinary legislative procedure. That procedure is regulated in article 294 TFEU, according to which the Council can adopt such acts by a qualified majority.
7. The fifth paragraph in article 153 contains special exceptions for, among other things, *pay* and the *right of association*.
8. To my knowledge, only Directive (2019/1152) on transparent and predictable working conditions in the European Union has been adopted with the same legal basis.[1]
9. In what follows, I will present arguments that question the choice of legal basis. These are arguments that can be used in an action for annulment of the Directive by a Member State.

[1] 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, OJ L 186, 11.7.2019, pp. 105–121

10. Such analysis is dependent on the content of the Directive, which is presented in the table below:

Overview of the directive

Article 1 Subject matter	*Article 6 Variations and deductions*	*Article 11 Information on minimum wages*
Article 2 Scope	*Article 7 Involvement of social partners in the setting of statutory minimum wages*	*Article 12 Right to redress and protection against adverse treatment or consequences*
Article 3 Definitions	*Article 8 Effective access of workers to statutory minimum wages*	*Article 13 Penalties*
Article 4 Promotion of collective agreement coverage	*Article 9 Public procurement*	*Articles 14–18 Final provisions*
Article 5 Procedure for setting adequate statutory minimum wages	*Article 10 Monitoring and data collection*	

2.2 Is the Directive covered by the exception in article 153.5 TFEU

2.2.1 Introduction

11. The first line of arguments concerns the exception in article 153.5 TFEU. The decisive factor in assessing whether the proposal can be adopted with the stated legal basis is how the exception in Article 153.5 is to be interpreted. The wording of the exception is (italics added):

> 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.[2]

12. Collaboration on social policy first took place in intergovernmental form with the support for the Social Agreement. The exception was also included in that agreement. This agreement was, through the Treaty of Amsterdam, inserted in the treaties in the 1990s.[3] EU cooperation on social policy has thus always included an exception for pay and also the right of association. This was justified mainly for reasons of subsidiarity; that is, that it was more appropriate to settle issues of pay at the Member State level. Pay was also something determined by the social partners.[4]

13. In my view, three lines of argument in particular can be made regarding the exception in article 153.5 TFEU. The first concerns the state of EU law; the second is that the Directive is covered by the exception for pay; and the third is that the Directive concerns the exception for the 'right of association'.

14. The fact that article 1.3 states, in accordance with article 153.5, that the Directive shall be without prejudice to the competence of Member States in setting the level of minimum wages, and so on, does not mean that the material content cannot be contested.

2.2.2 The state of EU law has not changed

15. A first remark based on the present case law on the exception found in article 153.5 concerns the state of EU law. In the judgment *Impact*, delivered on 18 April 2008, the Court's Grand Chamber made the following statement (*emphasis added*):

[2] In other language versions: Swedish, '*löneförhållanden*', German, '*das Arbeitsentgelt*', and French, '*rémunérations*'.

[3] See, eg, Bercusson, B (2009) *European Labour Law,* Cambridge University Press, pp 141 ff.

[4] See also Ryan, B (1997) Pay, Trade Unions Rights and European Community Law. *International Journal of Comparative Labour Law and Industrial Relation* 13(4): 305–325.

> 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.[5]

16. This statement was repeated after the political agreement on the Directive in June 2022 in a preliminary ruling delivered on 7 July 2022 in cases C-257/21 and C-258/21 *Coca-Cola European Partners Deutschland GmbH* (*emphasis added*):

> Furthermore, pursuant to paragraph 5 thereof, Article 153 TFEU does not apply to pay, the right of association, the right to strike or the right to impose lock-outs. That exception is explained by the fact that fixing the level of pay falls within the contractual freedom of the social partners at national level and within the relevant competence of Member States. In those circumstances, *in the present state of EU law*, it was considered appropriate to exclude determination of the level of pay from harmonization under Article 136 EC et seq (now Article 151 TFEU et seq).[6]

17. The first question in relation to the statement made in the judgments is *whether the state of EU law has changed.*

18. The exception is found in the Treaties and has been there since the Member States transferred competence to adopt legislative acts on issues of social policy. The statement concerning the 'state of EU law' has been repeated by the ECJ after the latest revision of the Treaties (Treaty of Lisbon).

19. The ECJ opinion in the summer of 2022 appears to be that in the present state of EU law it is appropriate to exclude the determination of pay from harmonisation. In the next chapter, I will show how the Directive contains provisions that determine wages.

20. The state of EU law has not changed since the exception concerning pay, as well as the right of association was introduced into the Treaties. It can be argued that to change the state of EU law it is necessary to reform the provisions on social policy in the TFEU.

[5] C-268/06 Impact, EU:C:2008:223, p. 123.
[6] C-257/21 and C-258/21 *Coca-Cola European Partners Deutschland GmbH*, EU:C:2022:529, p. 47.

2.2.3 The exception for pay: direct involvement in the setting of wages

21. From the existing case law of the ECJ, which partially applies to other issues, the following conclusions concerning the exception in article 153.5 can be drawn:[7]

- Article 153.5 must be interpreted strictly. The exception does not prevent all measures connected with wages.[8]
- The exception in Article 153.5 applies to the equivalence of all or some of the constituent parts of pay and/or the level of pay, or the introduction of a minimum wage at the Community level. It therefore involves measures that comprise direct involvement in determining wages.

22. For the Directive to be covered by the exception it must be established that it constitutes a direct involvement in the setting of wages.

23. In my opinion, article 5 is one article that may be considered to entail direct involvement in the setting of wages. Article 5 concerns a procedure for setting adequate statutory minimum wages. The procedures for setting and updating statutory minimum wages shall be guided by the criteria that contribute to the adequacy of minimum wages with regard to achieving a decent standard of living, reducing in-work poverty, as well as promoting social cohesion and upward social convergence. The second paragraph concerns elements that the national criteria must include: (a) the purchasing power of statutory minimum wages, taking into account the cost of living; (b) the general level of wages and their distribution; (c) the growth rate of wages; and (d) long-term national productivity levels and developments.

24. According to article 5.4, Member States may use indicative references when determining the adequacy of minimum wages, such as 60 per cent of the gross median wage or 50 per cent of the gross average wage.

25. The detailed demands laid down in article 5 mean that the provisions constitute direct involvement in the setting of wages.

26. Article 6 concerns variations and deductions. According to the article, variations and deductions shall respect the principles of non-discrimination and proportionality. Also, regulation of possible variations and deductions

[7] See Judgements C-307/05 Del Cerro Alonso, EU:C:2007:509, C-268/06 Impact, EU:C:2008:223. See also C-501/12, C-506/12, C-540/12 and C-541/12 Specht EU:C:2014:2005, p. 32-34, C-395/08 and C-396/08 Bruno EU:C:2010:329, C-518/15 Matzak EU:C:2018:82, p. 49.

[8] Also, wage discrimination can be covered by the EU directives.

from the minimum wage is a regulation of 'pay'. The Member States with statutory minimum wages need to take measures to implement article 6. Such provisions will directly affect the regulation of pay in the Member States.

27. Article 12 concerns the right of redress and the protection against adverse treatment or consequences, and article 13 concern penalties. The Member States shall ensure, among other things, the 'right of redress' in the case of infringements of the minimum wage, regardless of whether it is set by law or collective agreement.

28. According to article 13, the penalties must be effective, proportionate and dissuasive. In the Member States without statutory minimum wages, this 'may contain or be limited to a reference to compensation and/or contractual penalties provided for, where applicable, in rules on enforcement of collective agreements'. A right of redress read together with demands on effective sanctions can be interpreted in the following way. If the right to a minimum wage has been infringed, the worker shall be entitled to redress and this means an ability to claim the minimum wage not received.

29. In Sweden, the right to claim a minimum wage is dependent on membership of the trade union that has concluded the collective agreement that contains provisions on minimum wages. A worker not organized in a trade union with a collective agreement cannot make claims based on the collective agreement and will not be entitled to compensation when provisions in the collective agreement are infringed. In Sweden, implementation of the Directive will – probably – result in statutory regulation of the right to claim minimum wages according to a collective agreement regardless of trade union membership. This is because otherwise the sanctions will not be effective, proportionate and dissuasive. The Directive will thus result in regulations that give workers the right to Claim minimum wages who previously did not have that right. This can be seen as direct involvement in the setting of wages.

30. It can be argued that several articles of the Directive entail direct involvement in the setting of wages by EU law. Therefore, it is excluded from the competence transferred to the EU from the Member States according to article 153.5 TFEU.

2.2.4 Does the directive contain provisions on the 'right of association'?

31. The exception in article 153.5 TFEU also concerns the 'right of association'.[9] International conventions on human rights generally speak of 'freedom of association'. See, for example, article 11 of the European Convention of Human Rights, as well as article 12 of the Charter of Fundamental Rights of the European Union. It is thus necessary to make a remark on the difference between the 'freedom' and the 'right' of association. If the conclusion is to be drawn that the Directive concerns the 'right' of association it must be explained how this relates to 'freedom'. In order for the argument not to be disregarded because it is the only right that is excluded from the EU's competence. The exception must also be related to the competence provided for in article 153.1 p f on representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5.

32. There are several possible interpretations of what 'the right of association' means. Barnard in her textbook on EU Employment Law seems to disregard the distinction and concludes that the exception concerns 'freedom of association'.[10] Risenhuber claims that the right of association 'denotes regulation on the formation, dissolution and activity and membership of, employee associations (trade unions) and employers'.[11] An even more narrow interpretation is found in a commentary on European labour law, according to which the right of association comprises rules concerning the constitution and internal organisation of a trade union and employer federation.[12]

33. An interpretation inspired by Swedish law is that freedom consists of protection from the state, whereas the right concerns mutual protection in the horizontal relationship between employer and employee. The right of association is regulated in sections 7–9 of the Swedish Co-determination act and contains protection from violations of the right of association within the employment relationship.

34. Another possible interpretation is inspired by the case law of the European Court of Human Rights. According to this interpretation 'the right of association' concerns the essential parts of the freedom of association

[9] Das koaliationsrecht (de.), föreningsrätt (sv.), ni au droit des associations (fr.)
[10] Barnard C (2012) EU Employment Law (4th ed.), Oxford University Press, pp. 705f.
11 Risenhuber K (2021) European Employment Law (2nd ed.), Intersentia, p. 181.
12 Franzen M, Gallner I, and Oetker H (2022) Kommentar zum europäischen Arbeitsrecht (4 Aufgabe), CH Beck, p. 49.

insofar as they relate to trade unions. The European Court of Human Rights has made a non-exhaustive list of the essential parts of the 'right to the freedom of association':

> the right to form and join a trade union; the prohibition of closed-shop agreements; the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members, and, in principle, the right to bargain collectively with the employer.[13]

35. Article 4.1 c and b were not included in the Commission's original proposal and seem to have been inserted on the initiative of the European Parliament. They were inserted into the Directive late in the process and have thus not been discussed to the same extent. The provisions were inserted after the Danish parliament made a "subsidiaritetsindvending" in February 2021. They have the following wording:

> (c) Take measures, as appropriate, to protect the exercise of the right to collective bargaining on wage setting and to protect workers and trade union representatives from acts that discriminate against them in respect of their employment because they participate or wish to participate in collective bargaining on wage setting.
>
> (d) For the purpose of promoting collective bargaining on wage-setting, take measures, as appropriate, to protect trade unions and employers' organisations participating or wishing to participate in collective bargaining against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

36. These articles resemble classic protection of the most essential parts of the freedom of association. One situation that appears to be covered by article 4.1 c concerns when a worker wants to join a trade union and claim minimum wage and that as a result of this action the worker is 'discriminated against' in some way.

37. From the wording of article 4.1 c, it is clear that only workers and trade union representatives receive protection from discrimination. Article 4.1 d concerns measures to protect trade unions and employers' federations.

[13] See case *Association of Civil Servants and Union for Collective Bargaining and others v Germany* (Applications nos 815/18 and 4 others – see appended list), 5 July 2022, p 67 with reference to previous case law.

Individual employers are not awarded any protection according to the Directive.

38. One guarantee found in article 1 is that the Directive shall be without prejudice to the full respect for the autonomy of social partners, as well as their right to negotiate and conclude collective agreements. According to article 28 EU Charter, both workers and employers have the right to engage in collective bargaining.

39. A first remark concerning the provision is that it does not respect the autonomy of the social partners because the protection affects only one side and therefore tilts the balance between the parties. According to the Directive's definition of collective bargaining it is something that also individual employers may take part in. Also, compatibility with article 28 Charter could be called into question because the Charter concerns both sides.

40. As stated above there are different understandings of the 'right of association'. In relation to the judgments of the European Court of Human Rights it is evident that provisions in articles 4.1 c and d will protect essential parts of the freedom of association. Potentially, these provisions cover many disputes related to the exercise of freedom of association in the labour market and disputes concerning these rights can be transformed into questions to the ECJ.

41. There is no ECJ case law on the meaning of the 'right of association'. If reasoning is applied similar to the reasoning the ECJ has used concerning 'pay' it is likely that the ECJ will take the view that the exception for the 'right of association' should be interpreted strictly in order that it does not prevent EU action in the areas in which the EU has competence. From that starting point, the most extensive interpretation is ruled out, namely that the right of association is the same as freedom of association.

42. The strictest interpretation of the 'right of association' is that it concerns only internal questions, that is, who can become a member and a member's relationship with the organisation. If such an interpretation is accepted, then the mentioned provisions are not covered by the exception in article 153.5 TFEU.

43. It would at least be possible to argue that because the provisions in articles 4.1 c and d concern the most essential parts of freedom of association and thus the right of association, this could also cast light on the interpretation of article 153.1 f TFEU and add to what the EU can regulate and what is excepted from such regulation. Based on such an argument it can be claimed that article 4 concerns the right of association and that it is therefore excluded from EU competence.

2.3 Is article 153.1 b on working conditions the correct legal basis?

44. Article 153 contains a list of several points. The EU may, with the application of different legal procedures, adopt minimum directives. For the article to have the foreseen effect it must be possible to separate the points from each other. If the different points in article 153.1 are interpreted extensively it will not be possible to uphold the distinction between the different points.[14]

45. The point that is used concerns 'working conditions'. Working conditions occur also in article 31.1 EU Charter of Fundamental Rights, according to which every worker has the right to working conditions that respect their health, safety and dignity. Previously, a directive was adopted concerning the same article 153.1 b, namely Directive 2019/1152 on transparent and predictable working conditions in the European Union.

46. The ECJ has, when adjudicating whether the correct legal basis has been used, adopted the *centre of gravity* test.[15] In one of its latest judgments, this is expressed as follows (*italics added*):

> As a preliminary point, it must, first, be recalled that the choice of the legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include the aim and the content of the measure. *If examination of the measure concerned reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component.*[16]

47. A first review of whether the correct legal basis has been chosen thus includes a test of the Directive's 'centre of gravity' or, in the words of the Court, whether one purpose is the main or predominant purpose. As already mentioned, the Directive has eighteen articles. The aim is to improve working and living conditions, in particular the adequacy of minimum wages. To achieve this aim the Directive establishes a framework for:

- the adequacy of statutory minimum wages for achieving decent living and working conditions;
- promoting collective bargaining on wage setting;

[14] Franzen M, Gallner, I, and Oetker A (2022) *Kommentar zum europäischen Arbeitsrecht* (4 Auflage), CH Beck, p. 135 ff.
[15] Engel A (2018) *The Choice of Legal Basis for Acts of the European Union*, Springer, pp 13ff.
[16] C-620/18 *Hungary v European Parliament*, ECLI:EU:C:2020:1001, p 38.

- enhancing effective access of workers to rights to minimum wage protection where provided for by national law and/or collective agreements.

48. The adequacy of statutory minimum wages and the promotion of collective bargaining are separate purposes. The aim of enhancing access can be perceived as merely incidental to the other two.

49. Regarding choice of legal basis, a quick review of the material content shows that few articles concern working conditions.

50. Directives often contain a general provision that establishes their aim, scope and definition necessary for the Directive. Articles 1–3 are such provisions.

51. The material content of the Directive is found in articles 4–13.

52. Article 4 on the promotion of collective bargaining does not concern working conditions. The same applies to article 7 on the involvement of the social partners in the setting and updating of statutory minimum wages. Article 9 on public procurement and article 10 on monitoring and data collection, and article 11 on information on minimum wages also clearly do not concern working conditions. The mentioned articles concern only obligations for the Member States.

53. Article 5 concerns the procedure for setting an adequate statutory minimum wage. The article concerns obligations for the Member States concerning a procedure and certain criteria. All of the obligations in the article are directed towards the Member States and none of them necessarily affect an employer or employee. Article 7 concerns the involvement of the social partners in the setting of wages and thus, again, not working conditions.

54. Article 6 on variations and deductions concerns the employment relationship and working conditions.

55. Articles 8, 12 and 13 concern workers' access to statutory minimum wages and the right of redress and protection against adverse treatment or consequences. The articles mentioned only indirectly concern working conditions

56. In my opinion, the only article that concerns working conditions is article 6. Article 4, with its protection from discrimination of workers and trade union representatives, comes under article 153.1 f. The same can be said concerning article 7 on the involvement of the social partners in the setting of statutory wages.

57. One argument that may contest whether article 153.1 b is the correct legal basis is that *the centre of gravity of the Directive does not concern working conditions*. The Directive has several other purposes and therefore it is not the correct legal basis. There are other points in article 153.1 that are closer to the Directive's centre of gravity. They are, primarily, article 153.1 f on representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5; and point j, the latter concerning combating social exclusion. The adoption of directives with Article 153.1 f TFEU as their legal basis requires unanimity in the Council, in accordance with article 153 TFEU.

2.4 Subsidiarity and proportionality

58. Articles 5.3 and 5.4 TEU contain the general obligations of subsidiarity and proportionality of EU actions. These obligations are relevant in the context of the Directive. From the abovementioned case law, it is clear that the exception in article 153.5 TFEU is motivated by reasons of subsidiarity. EU shall act 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States'. Arguments concerning subsidiarity can be developed in relation to the Directive.
59. The same can be said regarding proportionality. EU action shall not exceed what is necessary to achieve the objectives of the Treaties.
60. The fact that it is stated in the Directive that subsidiarity, as well as proportionality are respected does not make that the case.
61. In an action of annulment, the arguments related to subsidiarity as well as proportionality need to be developed further. If an action annulment is filed the arguments concerning subsidiarity must be developed by the claimant. That is the Member State that make an action for annulment needs to present arguments as to why this is a question better handled at Member State level.

2.5 Conclusions

62. Several arguments can be made to call into question the choice of the legal basis of the Directive. Because it is the ECJ that has to be persuaded by such arguments it is therefore necessary, at least in my opinion, to find support – if possible – in ECJ case law.

63. First, it can be argued that the Directive is covered by the exception in article 153.5, in two ways. It would constitute direct involvement in the setting of wages by EU law. Also, article 4.1 c d of the Directive concerns the right of association. What is meant by 'right of association' has not, to my knowledge, previously been considered by the ECJ.

64. The second argument is that there are several purposes in the Directive, but the Directive's centre of gravity does not concern working conditions. A majority of the articles in the Directive instead concern article 153.1 f on representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5.

65. The Directive's aims can be achieved at the Member State level and therefore it is not in compliance with the principle of subsidiarity in article 5.3 TEU.

66. Several legal arguments can be presented against the chosen legal basis in the Treaty. Even if I consider that the arguments have weight, however, the outcome of an action of annulment, if brought, is far from certain.

3 Review of Kristiansen's Notat

67. I will here review the arguments presented by Kristiansen. The review will focus primarily on section 4 b) TEUF artikel 153, stk 5 om lønforhold and section 4 c) TEUF artikel 153 stk. 2 smh. med stk.1 litra b om kollektiv interessevaretagelse in his Notat.

68. I concur with many of the arguments made by Kristiansen. He also mentions that the Directive is the first of its kind and that there is great uncertainty regarding the relevance of previous case law.

4 b) TEUF artikel 153 stk 5 om lønforhold

69. As already mentioned, the body that must be convinced is the ECJ. The ECJ's legal methodology includes a linguistic interpretation of the meaning of 'pay'. A mere statement that it is evident from the meaning of the words that the Directive concerns pay and is therefore excluded from EU competence under article 153.5 TFEU will not by itself convince the ECJ. The Commission, the European Parliament as well as the Council support the Directive. Thus the very actions of EU institutions make it far from evident that the Directive will be excluded from the EU's competence.

70. An argument based on article 153.5 TFEU must show in detail how and why the Directive concerns pay within the meaning of ECJ case law.

71. This is something that needs to be based on the material content of the articles of the Directive; it cannot be established by reference to the Commission's opinion about what the effects of an earlier proposal could be.

72. The focus of such an argument should be on the points that Kristiansen makes on p. 11, second to last paragraph, where he argues why the Directive constitutes direct EU involvement in the setting of wages.

73. The argument as to why the directive constitutes direct involvement in the setting of wages is related primarily to the obligations of Member States that have statutory minimum wages.

74. It is not that I have a different opinion from Kristiansen, but rather that I believe the order of arguments should be structured differently. It is not stakeholders in the Nordic countries who have to be convinced, but the judges on the bench in Luxembourg. My guess, and I must emphasize that this is a guess, is that it is best to start with arguments based in the case law from the ECJ. And finish with those concerning the obvious meaning of the words. This in order to show knowledge of the Courts reasoning

and try to use it in order to convince the ECJ that the conclusions follow from the Courts own reasoning. The arguments about the meaning of the words should however also be included.

4 c) TEUF artikel 153 stk. 2 smh. med stk.1 litra b om kollektiv interessevaretagelse.

75. Kristiansen in this section presents convincing arguments as to why article 4 does not concern working conditions. He also points out that in article 4 but also articles 5–8 the Directive has several different objectives. I also agree that article 4 on the promotion of collective bargaining cannot be seen as 'merely incidental' to other aims of the Directive.

76. The promotion of collective bargaining concerns something other than the adequacy of minimum wages. The way in which Kristiansen shows this, namely by highlighting that they concern different fundamental rights in the EU Charter, is a good way of strengthening the argument.

77. In addition to article 4, there are also other articles of the Directive that concern article 153.1 f on representation and collective defence of the interests of workers and employers. Also article 7 relates to the mentioned provision.

78. Kristiansen also concludes that article 4 concerns the right of association. If this argument is to be used it needs to be developed. Here it is relevant to make a distinction between the 'freedom' and the 'right' of association.

d) Naerheds- og proportionalitetsprincippet

79. These are important arguments and need to be developed further.

Concluding remarks concerning Kristiansen's note

80. Kristiansen raises several points of relevance if the aim is to question the chosen legal basis of the Directive. To convince the ECJ some parts of the arguments must be further elaborated. The fact that it appears to be clear will not be enough; it must also be shown in relation to the provisions contained in the articles of the Directive.

4 Risks of an action for annulment

81. Different kinds of risks are attached to an action for annulment of the Directive. People more qualified than me may assess the political risks of such a process.

82. I will here focus on the legal risks attached to bringing or not bringing an action for annulment. Another way of putting it is that I will focus on the pros and cons of such a procedure.

83. The outcome of an action for annulment can go either way. Even if there are clear and well-reasoned arguments for the proposition that the Directive is covered by the exception for pay and/or right of association, and that the legal basis concerning working conditions is not correct, it is not certain that the ECJ will attach such weight to these arguments that the Court will annul the Directive. History shows that actions for annulment are seldom successful and there is a risk that Denmark (and Sweden?) might lose such a case.

84. The Directive contains definitions of many central concepts, such as 'collective agreement' etcetera. If brought before the Court there is a risk that the Court's judgment may contain interpretations that could, in due course, raise different kinds of questions about the corresponding national interpretations and also the national legal sources on which the national understanding of these concepts is grounded. This is the most evident risk with the action for annulment. The ECJ judgment might further strengthen the problematic parts of the Directive.

85. If the action is successful the Directive will fully or partially be annulled. There are well reasoned legal arguments – see above primarily sections 15-21 concerning the state of EU law, sections 21-43 concerning the exception in article 153.5 and sections 44-57 concerning that the Directive does not primarily concern working conditions, as to why such an action could be successful.

86. Even if there is a substantial risk that an action for annulment will fail there are some advantages to initiating such a process. Proceedings for annulment should be instituted within two months of the publication of the Directive.

87. The action for annulment will be the first case before the ECJ concerning the Directive. Those taking such an initiative will, at least to some extent, be able to control the questions before the Court and also the kind of arguments that are presented.

88. These proceedings concerning annulment will probably be finished before the period for implementation runs out. The judgment, even if the action is not successful, may contain clarification on what measures need to be taken to implement the Directive. It is hard to estimate the time needed for such proceeding. In case C-620/18 the action for annulment was filed in October 2018 and the judgement from the ECJ came in December 2020.

89. There are several other proposals in the EU pipeline and a judgment can clarify the room for manoeuvre at the EU level. The proposals concern wage transparency and platform workers.

90. The choice of not bringing an action for annulment will not automatically put an end to the discussion on whether the EU has the competence to adopt the Directive. This discussion may reappear in the national implementation process and also in a question for a preliminary ruling. Not bringing an action for annulment will thus only postpone the relevant risks of such action. They can reappear in a dispute before a national court that asks for a preliminary ruling, and in that event someone else would be in control of the process. History shows that cases concerning disputes in the Nordic countries may be initiated also by courts in the other Member States.[17] The Directive concerns complex questions and there will be other judgments on the Directive in the future.

91. If a Member State in the Council votes against a directive for reasons of lack of competence, it is consistent then to bring an action for annulment. One consequence of such action for annulment of the Directive is that it will be noted in the rolls that there was no consensus among the Member States on the issues in the Directive.

[17] C-438/05 Viking Line EU:C:2007:772, C-18/02 DFDS Torline EU:C:2004:74, see also that a Court in Sicily refused to recognize a judgment from Arbejdsretten. The Danish case was AR2015.0254.