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SPECIAL ISSUE

# IN-WORK POVERTY IN THE EU

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# Weekend Contents

## Editorial

Luca Ratti and Antonio García-Muñoz Alhambra

### **In-Work Poverty in the EU**

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Luca Ratti

### **The Proposal for a Directive on Adequate Minimum Wages in the EU**

Ane Aranguiz, Eleni De Becker and Paul Schoukens

### **Minimum Income Protection at EU level: What Role to Play for the EU?**

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Highlights

**Week 29 Nov - 3 Dec 2021**

Insights, Analyses  
& Op-Eds

# Editorial

## In-Work Poverty in the EU<sup>1</sup>

Luca Ratti<sup>i</sup> and Antonio García-Muñoz Alhambra<sup>ii</sup>

### *The European debate on in-work poverty*

In-work poverty is currently a topical issue at EU level, featuring high in the EU agenda. This is the result, firstly, of the increased visibility of the problem in European statistics since the adoption, in 2003, of Regulation (EC) No.1177/2003 on Community Statistics on Income and Living Conditions (EU-SILC) (2), and, secondly, of the relatively high and increasing number of people working but yet falling below the poverty line.

Statistical data show that, in 2019, 9% of all employed persons aged 18-64 in the EU-27 were in-work at risk-of-poverty (3). This means that almost one in ten European workers lived that year in a household with an equivalent disposable income below 60% of the median of the national equivalised household income. Since the *in-work at risk-of-poverty* indicator is a relative measure, the differences across Europe are not based on direct comparisons of salaries between countries. Similarly, in some Member States, certain level of in-work poverty is compatible with very low material deprivation (which is an indicator of absolute poverty) whereas material deprivation may be relatively high in countries with lower in-work poverty rates.

Some problems that a high level of in-work poverty may cause to European societies are almost self-evident: in-work poverty affects negatively social justice, may fuel political instability (in times of increasing populism), causes social distress and, no less importantly, it affects the content and concept of EU citizenship and the trust of EU citizens in the Union. Some other consequences are less obvious. In-work poverty is a threat to the narrative of the social pact that insists on the idea that work is the best shield against poverty, thus challenging any policy aimed at work creation as the main formula against poverty.

High expectations are placed on regulation at EU level to tackle in-work poverty in a coordinated way in Europe, but a number of questions remain unresolved: what is the role of regulation in the social domain in relation to in-work poverty? What can the EU legislator do?



1. This Special Issue reflects only the authors' views. The Research Executive Agency is not responsible for any use that may be made of the information it contains. The WorkYP project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870619.

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2. [Regulation \(EC\) No 1177/2003](#) of the European Parliament and of the Council of 16 June 2003 OJL 165, 3.7.2003, p. 1.

3. Eurostat. [In-work at-risk-of-poverty rate by age and sex - EU-SILC survey](#).

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A debate on in-work poverty is, therefore, very timely. EU Law live will contribute with two Special Issues on the topic. In both Special Issues, the editors propose to explore some key topics from the perspective of labour law and social security.

In this first Special Issue, the reader finds two contributions: Ane Aranguiz, Eleni De Becker and Paul Schoukens explore the possibilities of an EU instrument on minimum income and its role to fight in-work poverty. In the second contribution, Luca Ratti deals with the proposal for a Directive on Adequate Minimum Wages in the EU and the many legal questions it poses. The second Special Issue on in-work poverty, to be published in spring 2022, will address, on the one hand, the much-debated regulation of platform work at EU level and, on the other hand, the thorny issue of collective bargaining for the self-employed in the EU.

### ***‘Working, Yet Poor’, a Horizon 2020 Project focused on in-work poverty***

All contributors in both Special Issues are part of the Project Working, Yet Poor (WorkYP) (4), coordinated by the University of Luxembourg. The contributions build on the work already done in the Project, which is entering its third and final year.

The WorkYP Project gathers together twelve partners, including 9 European Universities (University of Luxembourg; University of Bologna; Goethe University Frankfurt; KU Leuven; Tilburg University; Erasmus University Rotterdam, University of Lund; University of Gdansk and Utrecht University) and three Institutions working in the field of social rights and poverty (Observatoire Social Européen; Fondazione Giacomo Brodolini and European Anti-Poverty Network).

The WorkYP Project’s aim is to gain a better understanding of the role of regulation in setting the conditions that produce (and reproduce) in-work poverty, in order to propose regulatory strategies that may help to tackle it. In this sense, the Project will contribute to achieve the goals proclaimed in the European Pillar of Social Rights (EPSR), namely to grant all workers ‘fair and adequate wages’ and to have an ‘adequate protection for all kinds of employment’.

In-work poverty is a complex societal issue, which cannot be easily explained using clear cause-effect patterns. While regulation certainly plays a role, other determinants must be considered. Even if we restrict the analysis to the role of regulation, several branches of law may have an impact on in-work poverty, from tax law and social security law, to labour law and competition law. More in general, the existence of adequate and affordable social services, social conditions and gender are also relevant factors. A challenging aspect of the WorkYP Project relates to the fact that existing statistics about in-work poverty do not focus on individuals, but are rather based on the household dimension. The situation of a particular individual concerned, in terms of in-work poverty impact, depends not only on her individual position in the labour market, but also on the composition of the household where she lives and on the position in the labour market of the other household’s members. Labour law (and to a lesser extent social security law), on the contrary, is built largely on the premise of the individual worker.

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4. The website of the Project can be consulted [here](#).



The WorkYP project applies an innovative and interdisciplinary methodology which includes a comparative analysis of the regulation at national level in seven European countries (Belgium, Germany, Italy, Luxembourg, Netherlands, Poland and Sweden) and a vertical focus on particular groups of workers who, because of their position in the labour market, are more at risk of experiencing in-work poverty. The project has labelled these groups as VUPs (Vulnerable and Underrepresented Persons). The four VUP groups identified by the project include: full-time workers working in low-wage sectors (VUP 1); solo self-employed (VUP 2); atypical workers (fixed-term, part-time and agency workers) (VUP 3); and casual workers, including those persons working under casual contractual arrangements, platform workers and workers in the gig economy (VUP 4).

The focus on these VUP groups allows for a targeted approach, more sensible to the particular needs of such groups in the labour market. Therefore, tailor-made proposals to tackle their problems are possible. Given the differences among different groups of workers in their exposure to in-work poverty, focusing on VUP groups is a more effective strategy in fighting the loopholes of the existing regulatory framework at both EU and national level than addressing the whole working population to find general solutions.

### *The topics addressed in the Special Issue*

In this Special Issue, the current debates at EU level concerning two of the most widely known instruments to tackle in-work poverty – the minimum income and the minimum wage – are presented. Both instruments aim at securing minimum income levels, which, while may not be the only factor to take into account, plays nevertheless an important role regarding in-work poverty.

A guaranteed minimum income exists, in different forms, in most EU Member States, yet not always in an adequate form. There is an ongoing debate on the convenience and opportunity to regulate minimum income at EU level, with an active involvement of the Parliament (5) and the Council (6). Although it has yet not produced regulative proposals, such debate demonstrates how important is the current reflection about the goals and future of social Europe. While minimum income policies are directed mostly to people who are not at work, they have an indirect impact on people at work, functioning as a minimum that prevents the existence of (very) low salaries. Minimum income schemes may also support households where work intensity is particularly low. Ane Aranguiz, Eleni De Becker and Paul Schoukens provide an insightful contribution on this topic by presenting the current state of the debate, the main issues that an EU instrument on minimum income raises, and potential alternatives and complementary pathways to provide adequate minimum income protection for EU citizens.

When it comes to minimum wages and their role in combating in-work poverty, many questions remain open. Minimum wages exist in most European Member States, although in different forms. While a majority of EU Members States has statutory minimum wages, some legal systems have minimum wages set through collective agreements, typically at sector level. Another issue concerns the adequacy of minimum wages, whatever form

5. [European Parliament Briefing](#) 'Strengthening minimum income protection in the EU' March 2021.

6. Council of the European Union. 'Strengthening Minimum Income Protection to Combat Poverty and Social Exclusion in the COVID-19 Pandemic and Beyond' [Council Conclusions 11721/2/20](#), 9th October 2020.

they have, to protect effectively workers against in-work poverty. There are no simple answers to the question of what is the role of minimum wages in the fight against in-work poverty, although studies demonstrate that minimum wages contribute to protect workers' income, particularly in low-wage sectors.

These debates became even more relevant since October 2020, when the European Commission presented a proposal for a Directive on Adequate Minimum Wages in the European Union (7). This interesting document raises, nevertheless, numerous legal questions. Luca Ratti describes in its contribution the main contents of the proposal against a background of the on-going developments of the EPSR and the EU's fight against in-work poverty.

**Luxembourg, 19.11.2021,**  
*The editors*



7. European Commission, [Proposal for a Directive on Adequate Minimum Wages](#). COM(2020) 682 final, 28 October 2020.

# The Proposal for a Directive on Adequate Minimum Wages in the EU

Luca Ratti<sup>i</sup>

## Introduction

Since the very inception of the current EU Commission's mandate, a clear commitment was formulated towards the introduction of a European framework on fair minimum wages, on the premise that 'the dignity of work is sacred' (1). In January 2020, the Commission promoted a first consultation pursuant to Article 154 TFEU (2), followed by a second one in July 2020 (3), which brought the co-legislator to finally advocating its normative role and introducing a specific regulatory instrument in the field.

In October 2020, the Commission transmitted its proposal for a directive on adequate minimum wages in the European Union to the European Parliament and the Council (4). Since then, the legal services of both institutions have substantially validated the proposed text (5), albeit with some minor revisions (6). Last 18 November 2021, the European Parliament's Committee on Employment and Social affairs tabled a revised text (7) which was adopted by the Plenary as a basis for next negotiations with the Council (8). It will then be mainly for the Council, i.e., the Member States, to agree on the viability of the directive, against a background of political (9) and social controversy (10). In the hope of many observers, on the basis of the discussions last exchanged in November 2021 (11), an agreement might be reached during the French presidency of the EU, which will run from January to June 2022 (12). Still, the systemic impact of the proposed directive raises concerns, particularly among Nordic countries (13).

i. Associate Professor in European and Comparative Labour Law at the University of Luxembourg.

1. Von de Leyen, [State of the Union Address](#) by President von der Leyen at the European Parliament Plenary (September 2020).

2. [C\(2020\) 83 final](#).

3. [C\(2020\) 3570 final](#).

4. [COM\(2020\) 682 final](#).

5. Council of the European Union, [Opinion of the legal service on the Commission proposal for a Directive on adequate minimum wages](#) (March 2021).

6. European Parliament, Committee on Legal Affairs, [Opinion on the legal basis of the proposal for a Directive on adequate minimum wages](#) (October 2021).

7. European Parliament, [Draft legislative resolution on the proposal for a directive on adequate minimum wages in the European Union](#) (November 2021).

8. European Parliament, [Press release 25 November 2021](#).

9. [EU Observer](#) (January 2020).

10. [Euractiv](#) (March 2021).

11. [Agence Europe](#) (November 2021).

12. [Euractiv](#) (May 2021).

13. Furåker, [The issue of statutory minimum wages: Views among Nordic trade unions](#), *Economic and Industrial Democracy* 2020, Vol. 41 (2) 419–435.

## Within or beyond EU competence?

As legal basis of the directive, the Commission chose to rely on Article 153(1)(b) TFEU, referred to the shared competence of the Union and the Member states in the field of ‘working conditions’.

The choice is grounded on two concurrent arguments, mentioned in the Explanatory memorandum to the proposed directive (14). On the one hand, ‘ensuring that workers in the Union earn adequate wages is essential to guarantee adequate working and living conditions’, since ‘having access to a minimum wage guaranteeing a decent standard of living is a pivotal element of adequate working conditions’. On the other hand, the introduction of a minimum wage directive would not trespass the limits established by Article 153(5) TFEU which expressly mentions ‘pay’ as one of the three subjects excluded from EU competence. In fact, given the narrow interpretation of such exclusion, indirect interferences by the EU in the field of wages have already been exercised by European institutions. Denying such indirect competences would deprive the areas referred to in Article 153(1) of ‘much of their substance’ (15).

Scholars have generally expressed their support to Article 153(1)(b) TFEU as valid legal basis (16), recalling the progress of ‘Social Europe’ from Amsterdam to Lisbon (17), although some suggested to provide the directive with a concurrent legal basis (18), found in Article 175 TFEU on economic, social and territorial cohesion. This would not only allow to reinforce the ‘slim and slack rope’ of Article 153(1)(b), but also to make the EU’s intervention on minimum wages functional to a more harmonious economic and social development across the EU.



14. Proposal for a Directive on adequate minimum wages in the European Union, [Explanatory Memorandum](#) (October 2020).

15. [Judgment of the Court of Justice of 19 June 2014, Specht](#) (C-501/12, EU:C:2014:2005, para 33); [judgment of the Court of Justice of 15 April 2007, Bruno and others](#) (C-268/06, EU:C:2008:223, paras. 123-124).

16. Menegatti, [‘Much ado about little: The Commission proposal for a Directive on adequate wages’](#), *Italian Labour Law e-Journal*, Issue 1, Vol. 14(2021), 21-32.

17. Di Federico, [‘The Minimum Wages Directive Proposal and the External Limits of Art. 153 TFEU’](#), *Italian Labour Law e-Journal*, Issue 2, Vol. 13(2020), 107-111.

18. Aranguiz – Garben, [‘Confronting the Competence Conundrum of an EU Directive on Minimum Wages: In Search of a Legal Basis’](#), *CEPOB Policy Brief* (2019).



The two cases concerning the legal basis of Directive 2018/957 on the posting of workers – challenged by Poland and Hungary for alleged lack of a correct legal basis (19) – clearly illustrate how advanced is the CJEU case law in the field, particularly read in the light of the horizontal social clause contained in Article 9 TFEU, which not by chance has been put by the EU Parliament as an important reference in Recital 1 of the revised text of the directive proposed in November 2021 (20).

Dissenting opinions raised in principle the lack of competence of the EU (21), also based on the accession acts of some countries (in particular, Denmark) (22), which supposedly did not entrust the EU with the exercise of legislative direct effect concerning the wage setting system, typically in the realm of social partners at national level (23). Furthermore, the same functioning of the proposed directive is seen as potentially harmful for the ability of collective bargaining agreements to establish wages at all levels, since the Charter of Fundamental Rights (referred to in Recital 2 of the directive) entitles ‘every worker’ with the right to working conditions which respect their dignity.

Some national Parliaments already actioned the ‘yellow card procedure’ against the Directive, to stop or at least slow down its roadmap (24).

It remains that the sole authority in the field, which will very likely be sued in case the Directive finally sees the light, is the CJEU. In assessing the directive’s validity, the Court will have to consider its previous jurisprudence, typically constructed on the idea that the legal basis must reflect the aim and content of the regulatory measure (25).

## The two pillars of the proposed directive: adequacy and coverage

An important element in the assessment of the proposed directive’s validity will be the concrete functioning of its implementation at domestic level. The proposed text relies heavily on Member states’ discretion, on the one hand, to facilitate social partners’ intervention in the elaboration of effective minimum wage policies or, on the other hand, to ensure the adequacy of statutory minimum wages.

Adequacy and coverage are in fact the two pillars around which the whole directive is structured and result in its very objectives (see Recitals 15 and 18).

19. [Judgment of the Court of Justice of 8 December 2020, Commission v Poland \(C-626/18, EU:C:2020:1000\)](#) and [judgment of the Court of Justice of 8 December 2020, Commission v Hungary \(C-620/18, EU:C:2020:1001\)](#).

20. European Parliament, Committee on Legal Affairs, [Opinion on the legal basis of the proposal for a Directive on adequate minimum wages](#) (October 2021).

21. Gill-Pedro, [‘The Commission’s proposal for a European Minimum Wage – another ultra vires challenge for the EU?’](#), *European Law Blog* (June 2020).

22. Kristiansen, [Expert Opinion](#) (November 2020).

23. Grenfors – Gentile, [‘The minimum wage Directive proposal and the promotion of collective bargaining: the voice of SGI-Europe’](#), *Italian Labour Law e-Journal*, Issue 1, Vol. 14 (2021), 41-48.

24. Rolfer and Wallinm, [‘Yellow card from Sweden and Denmark to proposed minimum wages in the EU’](#), *Nordic Labor Journal*, Jan 22, 2021.

25. [Judgment of the Court of Justice of 8 September 2009, Commission v Parliament and Council \(C-411/06, EU:C:2009:518, para 45\)](#).



As made clear by the Impact assessment accompanying the proposed directive (26), adequacy is imposed as a target for those Member states which regulate minimum wages by statutory legislation. By contrast, for the six countries without such a legal system (Sweden, Denmark, Finland, Austria, Italy, and Cyprus), the directive infers adequacy from collective bargaining coverage rates of more than 70%.

According to Article 5, Member states of the first group (which have already in place statutory minimum wages) are required to ‘take the necessary measures to ensure that the setting and updating of statutory minimum wages are guided by criteria set to promote adequacy with the aim to achieve decent working and living conditions, social cohesion and upward convergence’.

Article 5(2) offers some guidance as to which criteria are to be considered to deduce adequacy, including ‘(a) the purchasing power of statutory minimum wages, taking into account the cost of living and the contribution of taxes and social benefits; (b) the general level of gross wages and their distribution; (c) the growth rate of gross wages; (d) labour productivity developments’.

From the outset, all such criteria may seem too generic to effectively guarantee that adequacy of statutory minimum wages is complied with. At interpretative level, however, they must be read in the light of the directive’s preambles, which state in particular that adequacy must be appreciated with reference to the wage distribution in the country (‘national socio-economic conditions, including employment growth, competitiveness as well as regional and sectoral developments’) and to the fact that minimum wages must provide a decent standard of living (‘purchasing power, productivity developments and to their relation to the gross wage levels, distribution and growth’). Recitals also make clear that ‘the use of indicators commonly used at international level, such as 60% of the gross median wage and 50% of the gross average wage, can help guide the assessment of minimum wage adequacy in relation to the gross level of wages’ (Recital 21). Commentators observed that the reference to

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26. [Impact Assessment](#) accompanying the proposal for a Directive on adequate minimum wages in the European Union (October 2020).

‘commonly used indicators (27)’ certainly include the Kaitz index, which measures the value of the minimum wage in comparison with the median and the average wage. The real issue, however, is that the vast majority of EU Member states already have minimum wages below the threshold of 60% of the median wage (28), which increase will therefore result the most challenging endeavour for domestic implementation in case the proposed directive is adopted in its current version.

Even more complex is the way the proposed directive deduces adequacy from a certain level of collective bargaining coverage. Article 4, referring to those Member states where no statutory minimum wage is in place, provides for two default obligations and two optional measures which should grant an increased collective bargaining coverage. The two main obligations are to (a) promote the building and strengthening of the capacity of the social partners to engage in collective bargaining on wage setting at sector or cross-industry level; and (b) encourage constructive, meaningful and informed negotiations on wages among social partners. Only where collective bargaining coverage is less than 70%, Member States are further required to (a) ‘provide for a framework of enabling conditions for collective bargaining, either by law after consultation of the social partners or by agreement with them’; and (b) ‘establish an action plan to promote collective bargaining’, which ‘shall be made public and shall be notified to the European Commission’. So far collective bargaining coverage is well above 70% for five of the six countries not having statutory minimum wages. In case the adopted text remains in line with the current version, Cyprus will have to put in place all the mentioned instruments with a view to increase their coverage well above the current 44% (29). The November 2021 amendments proposed by the EU Parliament increase the coverage threshold to 80% (proposed amendment 59 to Article 4(2)) (30).

The vague drafting of obligations referred to collective bargaining coverage may also in this case be enlightened by the directive’s preambles. In particular, Recital 19 inextricably associates minimum wage adequacy to coverage rates above a certain threshold. Such inference, however, may be problematic, as it simplistically considers the fact that Member States with high minimum wages compared to the median wage are characterised by collective bargaining coverage above 70% as the only condition to ensure an adequate minimum wage.

As I have observed elsewhere (31), this is particularly challenging in industrial relations systems (like the Italian one) where no *erga omnes* effect is recognised to collective agreements, which aspect leaves large shares of workers (typically in the private sector) uncovered by collective agreements or, alternatively, affected by downward competition amongst trade unions.

27. Schulten – Müller, ‘[A paradigm shift towards Social Europe? The proposed Directive on adequate minimum wages in the European Union](#)’, *Italian Labour Law e-Journal*, Issue 1, Vol. 14(2021), 1-19.

28. Lübker – Schulten, ‘[WSI Minimum Wage Report 2021](#) – Is Europe en route to adequate minimum wages?’ (February 2021).

29. Ibid.

30. European Parliament, [Draft legislative resolution on the proposal for a directive on adequate minimum wages in the European Union](#) (November 2021).

31. Ratti, ‘[La proposta di direttiva sui salari minimi adeguati nella prospettiva di contrasto all’in-work poverty](#)’, *Diritto delle Relazioni Industriali*, XXXI(1)(2021), 59-76.

**The proclamation of the European Pillar of Social Rights served as an amplifier of social policy initiatives and constitutes the main policy driver for the years to come**

## **An underlying objective: the reduction of in-work poverty through minimum wages**

The proclamation of the European Pillar of Social Rights (EPSR) served as an amplifier of social policy initiatives and constitutes the main policy driver for the years to come. Recitals 4 and 5 of the proposed Directive refer, albeit in a merely descriptive way, to principle 6 of the European Pillar of Social Rights (EPSR) on fair working conditions and to Council Decision (EU) 2020/1512 on guidelines for the employment policies of the Member States (32).

Of particular interest is Principle 6 of the EPSR, which consists of three distinct but consequential parts. It first recognises every European worker's 'right to a fair wage that provides a decent standard of living' (point a), according to an adequacy criterion focused on 'the needs of the worker and his or her family according to national economic and social conditions' (point b, first part), in order to make it possible to prevent in-work poverty (point b, second part).

Recital 7 of the proposed Directive lists the reduction of in-work poverty among the different functions of the minimum wage, together with the support of domestic demand, work incentives and the reduction of wage inequalities. Recital 8 further identifies minimum wage as one of the factors that would enable the pursuit of gender equality and lift women out of poverty. Even more significantly, Recital 11 records that in one third of European countries with a legal minimum wage, this latter does not guarantee that the individual worker will emerge from the relative poverty line.

The repeated and explicit reference to in-work poverty throughout the text and the preambles, appears to be one of the key messages featured by the proposed directive on adequate minimum wages.

The very concept of an 'adequate' minimum wage derived from the combined provisions of Article 5 and Recital 21, is defined in negative terms as a minimum wage aimed at ensuring 'decent living and working conditions', i.e., sufficient to enable workers not to fall below the at-risk-of-poverty threshold. By referring to a relative poverty indicator, the concept of adequacy is based on a consideration not only of the conditions of the individual worker, but of the worker in relation to their surrounding social context, and in particular the average and median levels of household disposable income. The idea of fairness, intertwined with the reduction of wage inequalities, is thus expressed as the main feature of the legislative initiative.

32. [OJ 2020 L 344, p. 22.](#)

33. [Regulation \(EC\) No. 1177/2003.](#)



The interest towards in-work poverty in the European discourse is a relatively recent acquisition.

The shift from combating poverty in general to tackling in-work poverty took place especially since 2003 with the adoption of Regulation (EC) No. 1177/2003 on Community Statistics on Income and Living Conditions (EU-SILC) (33). The Regulation established the index called At-Risk-Of-Poverty (AROP), measured as ‘the share of individuals whose most frequent activity status is ‘employed’ and who are at risk of poverty, i.e. who live in a household whose equivalised income (including social benefits) is below [...] 60% of the median equivalised income of the whole population (i.e. the poverty line)’, i.e. the relative poverty threshold (34). In the subsequent years, EU institutions paid attention to combatting in-work poverty mainly by establishing benchmarks and targets, included in the Europe 2020 strategy for smart, sustainable and inclusive growth (35), as well as in other more recent policy documents, including the EPSR Action Plan (36), and important initiatives such as the creation of a European Platform Against Poverty and Social Exclusion (37).

**The main question arising from such renewed consideration of in-work poverty as strategic priority of the EU for the next years, relates to the ability of an EU Directive on adequate minimum wages to effectively reduce the levels of in-work poverty across Europe.**

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A study committed by the European Parliament's committee on Employment and Social Affairs recalls that empirical evaluations ‘currently suggest that increasing minimum wages can only have a limited impact on poverty levels, as poverty often results from low working hours rather than simply low hourly wages, amongst other factors’ (38).

According to a recent study, several reasons may reveal why minimum wages are not per se sufficient to adequately combat in-work poverty (39). Amongst them, we should recall that: a) in-work poverty largely depends on low work intensity rather than low hourly wages, b) children-oriented policies proved being more effective (40), and c) housing costs result crucial in helping low-income families escape relative (and absolute) poverty.

34. Atkinson – Guio – Marlier, [Monitoring social inclusion in Europe](#) (Eurostat, 2017).

35. Communication from the Commission - [Europe 2020. A strategy for smart, sustainable and inclusive growth](#) (March 2010).

36. European Commission, [European Pillar of Social Rights Action Plan](#) (March 2021).

37. [The European platform against poverty and social exclusion](#), A European framework for social and territorial cohesion (2011).

38. Raitano – Gallo – Jessoula – Pagnini [Fighting poverty and social exclusion. Including through minimum income schemes](#), Study requested by the EMPL committee (June 2021).

39. Bruckmeier – Bruttel, [‘Minimum Wage as a Social Policy Instrument: Evidence from Germany’](#), *Journal of Social Policy*, Vol. 50, Issue 2, April 2021, 247-266.

40. Marchal – Marx – Verbist, [‘Income Support Policies for the Working Poor’](#), *IZA Discussion Paper* No. 10665 (2017).

## Conclusion

The initiative undertaken by the EU Commission on a proposed directive on adequate minimum wages is a remarkable step in the relaunch of ‘Social Europe’. Not only does provide substance to Principle 6 of the EPSR, but it also marks a courageous move towards the implementation of minimum working standards across the EU pursuant to Article 153(1)(b). The proposed amendments which will be discussed at the EU Parliament in the coming months further strengthen the directive’s impact in reducing in-work poverty and wage inequalities.

From a technical point of view, the proposed directive may incur in three main critiques.

First, despite the positive reactions by the legal services of the other EU institutions, still controversial appears to be the issue of competence. The formal obstacle represented by the exclusion of ‘pay’ from the EU competences in the social policy domain raises important questions that still deserve attention and will eventually be clarified by the CJEU.

Second, the very pillars on which the entire edifice of the proposed directive is construed – namely the principles of ‘adequacy’ and ‘coverage’ – leaves unresolved many specific questions, mostly related to the concrete functioning of such principles at EU and domestic level. In particular, the mere equation between having or acquiring 70% coverage of collective agreements and the adequacy of minimum wages provided by such agreements, results particularly challenging.

Third, the systemic impact of the directive on the systems of industrial relations of some Member States is undoubtedly critical. The proposed text pretends from its first provisions to leave untouched ‘the full respect of the autonomy of social partners, as well as their right to negotiate and conclude collective agreements’ (Article 1(1)). It reiterates that the directive ‘shall be without prejudice to the choice of the Member States to set statutory minimum wages or promote access to minimum wage protection provided by collective agreements’ (Article 1(2)). And finally concludes that ‘Nothing in this Directive shall be construed as imposing an obligation on the Member States where wage setting is ensured exclusively via collective agreements to introduce a statutory minimum wage nor to make the collective agreements universally applicable’ (Article 1(3)). However, as a matter of fact, industrial relation systems based on social partners’ autonomy will certainly be impacted. The

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same mechanism of redress designed by Article 11 of the proposed directive may result to be at odds with the law and practice of those Member states where labour disputes are an exclusive prerogative of trade unions.

Conclusively, and from a more societal perspective, it remains to be seen how much an increase or better distribution of minimum wages will contribute to effectively meet the expectations to reduce in-work poverty. While sound minimum wage policies are pivotal for the functioning of any labour market – for legal, socio-economic, and even moral reasons -, minimum wage as a sole-standing policy does not seem to resolve the problem of in-work poverty.

A wider palette of measures and policies is therefore needed. This includes not only sound minimum income instruments (discussed in the previous contribution), but also a more targeted approach towards the most vulnerable cluster of the labour market, including atypical workers (in particular, involuntary part-timers), platform workers, and the self-employed. An increase in households' work intensity and the stimulation of job transitions towards standard employment contracts will be pivotal to effectively contribute to reduce in-work poverty and inequalities, and should feature high in the EU's social policy agenda.

# Minimum Income Protection at EU Level: What Role to Play for the EU?

— Ane Aranguiz,<sup>i</sup> Eleni De Becker<sup>ii</sup> and Paul Schoukens<sup>iii</sup> —

In this contribution, we look at the role of the EU in combating poverty and strengthening the minimum protection at national level for EU citizens. This debate has been high on the EU political agenda for some years now. Though traditionally the anti-poverty debate has focused on targeting those excluded from the labour market, and in fact, labour integration has often been the strategy to reduce poverty, our contribution emphasizes the need to aim for a broader personal scope that also covers those who, while at work, struggle to make ends meet.

## Poverty and social exclusion: old debate, new trends

Although the EU competences in the domain of social protection are limited, the fight against poverty and social exclusion has been an important part of EU policymaking for decades. Examples are the Council Recommendation 92/441/EC (1) – also known as the minimum income recommendation – the Lisbon Strategy (2000-2010) (2) and the Europe 2020 Strategy (3) (2010-2020, closely linked to the European Semester) (4). The Lisbon and the Europe 2020 strategy were yearly monitoring cycles where member states' policies were reviewed in light of overall goals and indicators. Both strategies have been criticized for not going far enough, and ultimately not being effective enough in achieving its goals as many EU member states still struggled, and to a large extent failed, to reduce their poverty rates.

Meanwhile, new trends have also emerged in this domain, with more and more people at work facing a risk of in-work poverty. This is particularly true for workers in atypical employment relationships (e.g. solo self-employment and platform work). In 2018, almost one worker in ten in the EU was considered at risk of poverty; an increase of 1,4 % since 2006.

The European Pillar of Social Rights (2017) (the 'EPSR') (5), as an effort to strengthen the social dimension of the EU, now explicitly mentions the importance of adequate minimum income benefits by stating that everyone lacking sufficient resources has a right to adequate minimum benefits ensuring a right to human dignity at all

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1. [Council Recommendation 92/441/EC](#), OJ 1992 L 245, p. 46..

2. [Lisbon Strategy](#) (2000-2010).

3. [Europe 2020 Strategy](#).

4. [European Semester](#).

5. [European Pillar of Social Rights](#) (2017).



stages of life (principle 14). In doing so, the EPSR further develops the right to social assistance and the right to human dignity in the Charter of Fundamental Rights of the EU (CFREU) (6). Recently, the Council has also called for the strengthening of the minimum income protection and has urged the Commission to rethink the European Semester framework with a stronger focus on minimum income protection (7). More recently, the EU's action plan to implement the EPSR (2021) sets lifting 15 million people out of poverty among one of its three overarching headline targets to be achieved by 2030 (8). More specifically, the action plan also states that in 2022 a Council recommendation on minimum income will be launched.

In what follows, we discuss precisely the possibilities offered by this recommendation, emphasising the need to take the phenomenon of in-work poverty on board on the Commission's plans.

## Developing an EU instrument on minimum income: how to proceed?

### *On the question of competences*

The reasons for the EU to engage with the issue of minimum income are manifold; normative political and functional. An instrument on minimum income would, first and foremost, contribute to two key objectives of the EU: the combating of social exclusion and the promotion of social cohesion (Article 3 TEU). These efforts, moreover, would give a much needed legitimacy boost to the EU by guaranteeing citizen's right to an adequate standard of living. A much bigger question than the rationale behind such initiative, however, is to what extent the EU has the competences to act towards reaching these objectives.

It has been contended elsewhere (9) that Article 153(1)(h) TFEU on the integration of people excluded from the labour market could make a suitable legal basis for a solid legal instrument at the EU. This is precisely the legal basis that the Commission (10) recognizes as applicable in the context of principle 14 EPSR on minimum income. This legal basis, however, by applying to those 'excluded from the labour market' inevitably excludes from its scope those active in the labour market. As it is made abundantly clear in the project (WorkYP) (11), however, those at work are also often in need of a minimum income protection.

If the aim of a minimum income instrument at the EU level is in fact to combat poverty and social exclusion (Article 3 TEU) by providing adequate minimum benefits 'at all stages of life' (principle 14 EPSR), the personal scope of the instrument should include those that while at work, remain in need. In view of this, a robust legal alternative lies in a combination between Article 153(1)(h) TFEU and Article 175 TFEU regarding economic, social and territorial cohesion. Combining these bases is not only possible from a procedural point of view – since

6. [Charter of Fundamental Rights of the EU](#), OJ 2012 C 326, p. 391..

7. Council, [Strengthening Minimum Income Protection to combat Poverty and Social Exclusion in the COVID-19 Pandemic and Beyond](#) (2020).

8. [EU's action plan to implement the EPSR](#) (2021).

9. A. Aranguiz, [Securing decent incomes at a crossroads: on the legal feasibility of framework directive on minimum income](#), EJSS 2020.

10. Communication from the Commission, Monitoring the implementation of the European Pillar of Social Rights, [COM 2018 \(130\) final](#).

11. The website of the Project is available [here](#).

**If the aim of a minimum income instrument at the EU level is in fact to combat poverty and social exclusion by providing adequate minimum benefits ‘at all stages of life’, the personal scope of the instrument should include those that while at work, remain in need**

it complies with the prerequisites for dual bases established in *Titanium Dioxide* – (12), but also allows for extending the personal scope while maintaining the social objective of a minimum income instrument. All of it without undermining the decision-making procedure established in the Treaties, namely, co-legislation and qualified majority voting. This combination would go most in line with principle 14 EPSR that vows to provide an adequate minimum income ‘at all stages of life’.

Using these and no other alternatives may also be seen as a strategic move toward future developments in the medium to long run. Unlike other legal bases that could be used for a recommendation on minimum income, most clearly Article 153(1)(j) TFEU in the field of combating social exclusion, Articles 153(1)(h) and 175 TFEU do not exclude the possibility to adopt a directive. If by 2030 the poverty goals are (yet again) not achieved, on the initiative of the Commission, the recommendation could ultimately be transformed into a directive. This combination of legal bases would allow for such a transformation – provided of course that all other procedural aspects are complied with.


### *On the question of form and content*

Any instrument on minimum income would also have to comply with the principles of subsidiarity and proportionality. In this respect, it is important to note the status quo. On the one hand, all Member States already have some sort of minimum income scheme in place, albeit most are inadequate (13). On the other, previous EU efforts, such as the minimum income recommendation of 1992 (14), have thus far been insufficient in delivering a minimum income that guarantees a life in dignity and actually reducing poverty. This highlights that while stronger efforts are necessary to achieve the existing supranational goals, an EU intervention in this field would not create a completely out-of-the-blue system. Instead, efforts would be directed towards improving and strengthening existing national structures, therefore limiting EU intrusion. This is important regarding the limitation established in Article 153(4) TFEU that bans the EU from interfering with member state’s prerogative to define the fundamental principles of their social security systems.

12. [Judgment of the Court of Justice of 11 June 1991, Commission v. Council \(C-300/89, EU:C:1991:244\)](#).

13. Sarah Marchal and Ive Marx, ‘[Europe’s social safety nets were not ready for the corona shock](#)’, Socialeurope.eu.

14. [Council Recommendation 92/441/EC](#).



**Previous EU efforts, such as the minimum income recommendation of 1992, have thus far been insufficient in delivering a minimum income that guarantees a life in dignity and actually reducing poverty**

Essential to respecting the principles of proportionality and subsidiarity is also the form in which the EU could exercise these powers and the content of such instrument. Elsewhere it has been argued in favour of a framework *directive* on minimum income (15). Given that the Commission has already unveiled its plans to present a recommendation instead, however, we would like to highlight a number of important traits to include in a future recommendation that could make this different, more effective, than previous soft-law attempts.

In terms of form, the recommendation should establish a *framework*, even if it is through a non-binding instrument. This form emphasizes the idea that a ‘one-size-fits-all’ approach does not exist and that minimum income schemes should be country-specific. Accordingly, a minimum income recommendation would set a number of core standards that member states may pursue by different means.

The country-specificity should also be reflected in the content of the instrument by, for example setting standards on adequacy. In this vein, indicators such as the at-risk-of-poverty (AROP) threshold can serve as guidance on how a decent minimum income should be interpreted. Despite its merits, however, the AROP threshold is not a perfect tool to measure the adequacy of national policies on poverty and often fails to portray an accurate representation (16) of the poverty levels in some Member States. This is certainly true for atypical work forms such as self-employment. Research shows, however, that when contextualised with reference budgets, the AROP threshold provides a more accurate representation. Reference budgets are illustrative priced baskets of goods and services that represent a certain standard of living and they can be important tools to enhance substantive comparability by representing a context-specific benchmark that illustrates what adequate income means in each member state. An indicator like the AROP threshold, which can be contextualised with reference budgets, may thus serve as an opportunity to frame the current EU approach towards the fight against poverty and social exclusion in terms of *adequacy* of Member States’ income protection systems. Member States, would

15. A. Van Lancker, A. Aranguiz and H. Verschuere, [Expert study on a binding EU framework on adequate national minimum income schemes: making the case for an EU framework directive on minimum income](#), EAPN, 2020.

16. B. Cantillon, T. Goedemé and J. Hills (eds.), [Decent incomes for all: improving policies in Europe](#) (2019).

**It is essential to conceive the efforts towards an EU framework on minimum income in relation to the broader picture of decent incomes for all. Only this way can it be guaranteed that minimum income benefits remain enabling while being adequate and accessible as well**

in any case retain some leeway in justifying their performance vis-à-vis- these indicators. A recommendation on minimum income should also be seen as a catalyst to develop a poverty measure that is cross-country comparable, more precise and reflective of different realities.

In addition to setting core standards for adequacy, the recommendation should also strive for *accessible* minimum income schemes. On the one hand, this requires a broad and as universal as possible coverage (both formal and effective) and, on the other, that access is provided for in a non-discriminatory and non-stigmatizing manner.

Another essential content feature would be a link to EU funding, which would finance part of the costs of minimum income schemes, particularly on poorer Member States. In this vein, a recommendation on minimum income could mirror the proposal on minimum wages (17) (discussed on the following contribution in this Special Issue) and include links to the European Social Fund Plus (ESF+) or the

more recent Recovery and Resilience Facility. These links could assist Member States in reducing costs and tackle a potential burden of a minimum income scheme with such broad coverage (18). By doing so, the EU would ensure that it does not significantly alter the financial equilibrium of the social security systems of the Member States (Article 153(4) TFEU).

Lastly, for a recommendation to truly trigger a change at the national level, it should be accompanied by a monitoring framework to supervise Member State's performance. A monitoring framework would allow to follow-up on national changes while leaving room for Member States to gradually work towards the core standards set by the recommendation. It would, moreover, facilitate a flow of communication between the EU and the Member States, exchange of good practices and the collection of relevant data over the years. This framework could benefit from the more matured monitoring of the European Committee of Social Rights for the European Social Charter (19) of the Council of Europe that has, for years now, provided detailed monitoring on Member States' minimum income schemes. The Commission and the Member States could thus take these 'case-law' into consideration also within the EU monitoring process.

Much like the proposal on minimum wages or the recommendation on access to social protection (20), this monitoring could be embedded in the European Semester, which would limit the administrative burden and align

17. Proposal for a directive of the European Parliament and of the Council on adequate minimum wages in the European Union, [COM\(2020\)682](#).

18. Francine Mestrum, '[Social commons: the social protection we want](#)', Socialeurope.eu.

19. [European Social Charter](#) (1961).



different protection fronts (minimum wages, social protection and minimum income). In this line, previous research has shown that low minimum wages act as a glass ceiling for benefits such a minimum income or social security (21). Equally, there should be a clear positive hierarchy between the level of minimum wages and of minimum income, so integration to the labour market for those who can work is encouraged. As such, it is essential to conceive the efforts towards an EU framework on minimum income in relation to the broader picture of decent incomes for all. Only this way can it be guaranteed that minimum income benefits remain *enabling* while being adequate and accessible as well.

The above elements are essential for an EU minimum income instrument that delivers on all important fronts: accessibility, adequacy and enabling benefits. There are alternatives, or even complementary ways, in which the EU can strengthen minimum income protection for its population.



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## Complementary pathways for the EU to provide minimum protection?

An EU instrument on minimum income is not the only way in which the EU can act to strengthen minimum protection for EU citizens. We discuss below two other options.

### *A stronger focus on fundamental social rights in the European Semester*

We have stressed that the recommendation on minimum income, like other recent EU initiatives, could (and even should) be embedded in the European Semester. Currently, social protection schemes are already closely monitored within the EU Semester. These schemes, however, have often been evaluated in light of the sustainability of member states' public finances, or their link with employment (activation) policies. The latter was in particular the case for national social assistance schemes, encompassing also minimum protection schemes.

Adding additional blocs to the European Semester framework to strengthen the social dimension is, however, not enough and could lead to a plethora of measures in which it is difficult to gain a clear overview of the social dimension of the EU and the relationship with the economic coordination in the European Semester.

Both the European Parliament (22) and the Council (23) have recently urged to reform the governance framework of the European Semester. Providing more clarity in the European Semester with a strong and clear-cut social dimension focusing strongly on fundamental social rights could be a possible route to be taken by the European Commission. Even if the recommendation on minimum income would not finally be adopted, reforming the European Semester in such a way remains a much-needed task to do.

The current EU treaties already provide some tools to rethink the European Semester framework in such a way: the EU has a set of (legally binding) fundamental social rights in the CFREU, social objectives in Article 3 TEU and a horizontal social clause in Article 9 TFEU. Anchoring those rights and objectives more clearly in the European Semester, means that both EU member states and EU institutions should actually observe them. This can be done by explicitly asking Member States to explain in their national reports current and future measures to achieve those rights. For the Commission and the Council, this would mean that – if necessary – they will explicitly call on EU Member States to (further) respect and implement the fundamental social rights and the social objectives in their national policies. That way the various indicators to measure social exclusion and poverty already existent at EU level can also be translated in more concrete principles to be taken into account under the European Semester. In rethinking the European Semester particular attention should also be paid to new (atypical) forms of work and new labour market trends. This also flows from the recommendation on access to social protection which includes the need to provide adequate social protection to all types of work, including atypical work.

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22. European Parliament, [A strong social Europe for Just Transitions](#) (2020).

23. Council Conclusions, [Strengthening Minimum Income Protection to combat Poverty and Social Exclusion in the COVID-19 Pandemic and Beyond](#) (2020).

The fundamental social rights in the CFREU have been criticized in the past for their rather vague character: very strict or detailed guidelines cannot be derived from them. They do however offer a touchstone for Member States to explain how they respect the fundamental social rights through their national law provisions. Also, these rights can provide an explanation on why member states do not or only gradually implement certain changes to their national policies, although they may have been asked to do so in light of their public finances or to increase the employment rate. Moreover, to further concretize the fundamental social rights of the CFREU it is possible to build on previous EU instruments (e.g. Council Recommendation 92/441/EC) (24), as well as international instruments such as the European Social Charter and the ILO instruments (e.g. ILO Recommendation on Social Protection Floors) (25). Those instruments were an important source of inspiration for the CFREU and the EPSR.

### *EU citizenship as a ground to provide social assistance standards?*

EU citizenship can also be seen as a possible route to formulate social (assistance) standards, allowing EU citizens to live a life in human dignity in the sense of Article 34 CFREU.

Article 21 TFEU states that the Council may adopt measures concerning social security or social protection in order to achieve the right to move and reside freely within the EU. This provision does not seem to be restricted to mere coordination of social assistance schemes. Such measures could include guidance or standards, as to the (minimum) contents of social assistance or minimum income protection for citizens moving across EU Member States. Merely coordinating Member States' social assistance schemes does not suffice if the protection varies too much across EU Member States. By setting minima that go further than a mere technical coordination of social assistance schemes, such an EU measure can have a broader personal scope of application, encompassing all EU citizens (mobile or not). One may question to what extent Article 21 TFEU allows for such an approach. However, it can be defended that such a reading is necessary to allow for a genuine EU citizenship. It can be argued that, as Article 21 TFEU does not only refer to the right to move (to another state) but also to the right to reside freely within the EU, a situation of impoverishment caused by insufficient access to social protection, could make this freedom meaningless. The WorkYP project will explore this possibility more in detail in the coming months, when it looks at the ties between EU citizenship and the fundamental social rights at EU level.

**It can be argued that, as Article 21 TFEU does not only refer to the right to move (to another state) but also to the right to reside freely within the EU, a situation of impoverishment caused by insufficient access to social protection, could make this freedom meaningless**

24. [Council Recommendation 92/441/EC](#).

25. [ILO Recommendation on Social Protection Floors](#) (2012).



## Concluding thoughts

The action plan of the Commission presents an ambitious proposal to keep delivering on the EPSR. This strategy offers the opportunity not only to strengthen the social dimension of the EU, but also to revisit previous defective approaches. Concretely, in this contribution, and overall in the entire project of WorkYP, is advocated to take working people on board in the poverty strategies. The long-standing idea that work suffices to have a decent standard of living no longer can be sustained, as the increasing numbers of in-work poverty prove. It follows that labour integration cannot be seen as the only, and not even the primary, strategy to fight poverty and social exclusion.

With the recommendation on minimum income, along with other initiatives that emanate from the EPSR, the Commission has now the opportunity not only to acknowledge the flaws of previous anti-poverty strategies, but also to adapt the EU's approach to changing realities and labour trends. These new initiatives open the door to fight new poverty trends, and provide answers for those that while in the labour market do not see their needs met.

This contribution suggests a course of action to have an inclusive minimum income framework at the EU by using the existing competences smartly and adapting the content of such an instrument in a way that is fit for purpose





# News Highlights

29 November to 3 December 2021

## Position for Legal Officer – Data Protection available at EUROJUST

Monday 29 November

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The European Union Agency for Criminal Justice Cooperation is seeking to recruit a Legal Officer in the Data Protection field at its headquarters in The Hague for a term of up to five years, with the possibility of renewal.

## EFTA Court: children derive rights of residence from stepparents who are EEA workers, even in the event of divorce

Monday 29 November

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The EFTA Court ruled in *Case Q and Others v the Norwegian Government* (E-16/20) that a stepchild of an EEA national worker and the child's third-country national mother derive rights of residence under Regulation 492/2011 on freedom of movement for workers within the Union.

## New action before General Court against Commission's refusal to grant access to documents related to purchase and delivery of COVID-19 vaccines

Tuesday 30 November

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Official publication was made of another action for annulment (T-651/21) brought before the General Court by a German journalist against a Commission decision requesting access to documents related to the purchase of COVID-19 vaccines.

## Appeal against General Court's judgment finding existence of tax advantage in Luxembourg's Engie group tax rulings published

Monday 29 November

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Official publication was made of the action for annulment (C-451/21 P) lodged by the Grand Duchy of Luxembourg against the General Court's judgment, which held that the Commission was right to determine that Luxembourg tax authorities conferred a selective advantage to the Engie group in connection with intra-group financing structures

## EPPO appoints Slovenian Delegated Prosecutors

Tuesday 30 November

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The European Public Prosecutor's Office appointed two Delegated Prosecutors from Slovenia, bringing to an end the process of appointing all required delegated prosecutors.

## Court of Justice clarifies how immunity from legal proceedings applies to governors of central banks of Member States

Tuesday 30 November

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The Court of Justice ruled in case *LR Ġeneralprokuratūra* (C-3/20) that governors of a central bank of a Member State do not enjoy immunity from legal proceedings for acts carried out outside their official capacity as members of the European Central Bank.

## ECtHR: right to life breached in procedural but not in substantive terms in case concerning death of a child following a school fight

Tuesday 30 November

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The European Court of Human Rights held in *Derenik Mkrtchyan and Gayane Mkrtchyan v. Armenia* that the Armenian authorities breached the procedural limb of the right to life, but not the substantive limb thereof, in a case concerning the death of a ten-year-old following a fight in the classroom in his school.

## Court of Auditors publishes overview of 2020 risk disclosures in relation to SRM legal proceedings

Wednesday 1 December

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The European Court of Auditors published an audit of financial risks arising from legal proceedings relating to the Single Resolution Mechanism in the 2020 financial year.

## General Court to hear action challenging refusal of access to preparatory document of the Regulatory Cooperation Forum about CETA

Wednesday 1 December

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The General Court will hear an action for annulment brought by consumer rights advocacy group, challenging a decision by the Commission refusing access to a preparatory document relating to a meeting of the Regulatory Cooperation Forum concerning the EU-Canada Comprehensive Economic and Trade Agreement.

## General Court President rejects interim suspension of COVID-19 certificate requirement to access European Parliament

Wednesday 1 December

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The President of the General Court rejected to suspend a decision of the European Parliament requiring to present an EU Digital COVID-19 certificate in order to access the premises of the Parliament (T-710/21 R Roos *e.a. v Parliament* and T-711/21 RID *e.a. v Parliament*).

## Stronger data sharing mechanisms: Council and Parliament reach provisional political agreement on Data Governance Act

Wednesday 1 December

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The Council and the European Parliament reached a provisional agreement on the Data Governance Act – regulation aimed to promote the availability of data and build a trustworthy environment to facilitate its use for research and the creation of innovative new services and products.

## New Motor Vehicles Insurance Directive published in the Official Journal

Thursday 2 December

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Official publication was made of the newly adopted Motor Vehicles Insurance Directive (Directive 2021/2118), which seeks to strengthen the protection of injured parties in motor vehicle accidents and improve the rights of policyholders.

## Council agrees to start negotiations with Parliament on transparency of crypto-assets transfers to prevent money laundering and terrorist financing

Thursday 2 December

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The Council adopted a mandate for negotiations on the proposal on information regarding the transfers of funds in order to strengthen rules in digital finance and further curb money laundering and terrorist financing related to certain crypto-assets.

## AG Campos Sánchez-Bordona advises Court of Justice to uphold rule of law conditionality mechanism

Thursday 2 December

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Advocate General Campos Sánchez-Bordona delivered his Opinions in cases *Hungary v Parliament and Council* (C-156/21) and *Poland v Parliament and Council* (C-157/21), advising the Court of Justice to dismiss the actions brought by Poland and Hungary against the Rule of Law Conditionality Regulation (2020/2092), thereby upholding its validity.

## AG Richard de la Tour: Banco Popular shareholders cannot seek annulment of their share subscription contract

Thursday 2 December

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Advocate General Richard de la Tour delivered his Opinion in *Banco Santander* (C-410/20) on the compatibility of the Spanish annulment procedure (for reimbursement of money invested in shares issued by a financial entity on the occasion of a public offer to subscribe) with the principle that shareholders must bear any losses governing the resolution of a financial institution under Directive 2014/59.

## AG Richard de la Tour: consumer protection associations may be allowed to bring representative actions against infringements of the protection of personal data

Thursday 2 December

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Advocate General Richard de la Tour in his Opinion in *Facebook Ireland* (C-319/20), advised the Court of Justice to rule that Member States may allow consumer protection associations to bring representative actions against infringements of the protection of personal data if those claims derive directly from the breaches of the GDPR.

## Commission's decision on records management and archives published

Thursday 2 December

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Official publication was made of Commission Decision 2021/2121, which updates the rules determining the conditions under which electronic, digitised and electronically transmitted documents are valid and stored for the Commission's purposes.

## Commission fines five banks for their participation in Forex spot trading cartel

Thursday 2 December

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The European Commission adopted a Decision imposing a total fine of 344 million euros on five banks for their participation in a Foreign Exchange spot trading cartel and finally completing the wider Commission's Forex investigation.

## Opinion of AG Campos Sánchez-Bordona on the subsidiary jurisdiction of courts in succession matters

Thursday 2 December

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Advocate General Campos Sánchez-Bordona concluded in *V A and Z A* (C-645/20), that a court of a Member State in which the deceased did not have his habitual residence but nevertheless had his nationality and held there assets, must declare of its own motion that it has subsidiary jurisdiction to rule on succession under the EU Succession Regulation.

## Commission issues reasoned opinions with regard to LGBTIQ rights and media freedom in Hungary

Friday 3 December

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As part of its December infringements package, the European Commission delivered three reasoned opinions concerning the respect of LGBTIQ rights and media freedom in Hungary.

## Commission amends list of projects or programmes of Union interest in FDI Screening Regulation

Friday 3 December

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Official publication was made of Commission Delegated Regulation 2021/2126, by which the European Commission has amended the list of programmes of Union interest contained in the Annex to the Foreign Direct Investment Screening Regulation (2019/452).

## European Supervisory Authorities renew their Board of Appeal

Friday 3 December

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The European Banking Authority, the European Markets and Securities Authority and the European Insurance and Occupational Pensions Authority have renewed the composition of their Board of Appeal.

## EU and WTO members reach deal to simplify trade in services

Friday 3 December

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67 World Trade Organization members, including the EU, concluded negotiations on a Joint Initiative on Services Domestic Regulation, which is intended to simplify trade in services worldwide.

## Initiatives for digitalisation of EU justice systems adopted by Commission

Friday 3 December

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The European Commission adopted several initiatives to digitalise EU justice systems, making digital communication channels as default in cross-border judicial cases and translating one of the priorities set out in the Communication on the Digitalisation of Justice.



# Insights, Analyses & Op-Eds

## Inbox advertising and the fundamental right to privacy in the European Union

by Laura Drechsler

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Analysis of the Court of Justice's judgment in *StWL Städtische Werke Lauf a.d. Pegnitz* (C-102/20) interpreting the compatibility of 'inbox advertising' with the right to privacy and unfair commercial practices Directive 2005/29 and declaring that online advertisers must obtain user consent for such practice.

## IS (*Illegality of the order for reference*) (C-564/19): A ground-breaking judgment but an uncertain outcome on the ground

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Op-Ed on the Court of Justice's judgment in *IS (Illegality of the order for reference)* (C-564/19), addressing two key holdings by the Court of Justice concerning judicial independence, followed by an assessment of the usefulness of the judgment for judges in Hungary.

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Op-Ed on the Court of Justice's judgment in *Council v. Hamas* (C-833/19 P), which upheld the Council legal acts of 2018 which maintained the EU's counter-terrorism restrictive measures against Hamas, thereby annulling the General Court's judgment in *Hamas v Council* (T-308/18).

## AG Szpunar's Opinion in *Commission v Council (IMO)*: EU Law, International Organisations and the Legal Value of Pragmatism

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Op-Ed on AG Szpunar's Opinion in *Commission v Council (IMO)* concerning an action for annulment against a Council decision endorsing a submission made by Croatia, acting on behalf of the Council, to the International Maritime Organization. The author focuses on the tension between what the Treaties and international law permit regarding the EU's external action.

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Op-Ed focusing on the Conference for the Future of Europe potential recommendations and opportunities to pave the road towards a substantial treaty change and an increased role for the EU in protecting its citizen's health building towards European Health Union.

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Op-Ed of the Opinion of Advocate General Campos Sánchez-Bordona in three cases concerning the conditions for the general and indiscriminate of traffic and location data, in which he concluded that indiscriminate storage of telecommunications data is only allowed for national defense and for internal security interests.

## Cross-border tax information exchanges and effective remedy against them

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Analysis of the Court of Justice's ruling in *État luxembourgeois (Informations sur un groupe de contribuables)* (C-437/19), a case concerning the conditions for, and the judicial review of, requests for exchange of cross-border tax information among the Member States.

## Can private enforcement mechanisms be used for conducts which occurred during the transitory regime of Articles 104 and 105 TFEU?

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Analysis of the Court of Justice's judgment in the so-called Air Cartel Dutch case (C-819/19), in which the Court affirmed the competence of national jurisdictions to apply Article 101 TFEU and Article 53 of the EEA Agreement, in the context of a private action for damages, to conducts which partly took place during the transitory regime of Articles 104 and 105 TFEU.



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