Avoiding another '*Viking and Laval*' moment – a critical analysis of the AG Opinion in the Adequate Minimum Wage Directive, Case C-19/23.

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Nicola Countouris*

1. Introduction

Early in 2025, AG Emiliou delivered his Opinion[1] on the legality of the Adequate Minimum Wage Directive 2022/2041 (AMWD)[2] and, no doubt to the surprise of some, concluded that the instrument should be annulled, in whole or in part, on the ground that it was adopted ultra vires and in breach of Article 153(5) TFEU, the Treaty provision excluding 'pay' from the regulatory competence of the EU.

This short note argues that the Court should not follow AG Emiliou's Opinion. In essence, while the Opinion rightly acknowledges that exclusions from Treaty competencies 'must be interpreted strictly so as not to unduly affect the scope' (para 55) of the EU regulatory powers, the AG has failed to draw the correct conclusions from this important principle. AG Emiliou has interpreted *broadly*, much more broadly than the CJEU had ever done on previous occasions, the 'pay' exclusion, in a way that unnecessarily encroaches on EU lawmaking competences in the social policy field and risks precipitating Social Europe into an existential crisis unseen since the infamous CJEU decisions in *Viking and Laval*.[3]

More specifically, the AG has opined that 'pay' ought to refer both to the 'level of pay' (as already established by the Court in earlier cases such as C-268/06, *Impact*, see para 124 of that judgment), *and also* to the 'modalities or procedures for fixing the level of pay' (para 59 of the AG's Opinion). While Advocate Generals are of course at liberty to encourage the Court to develop further a particular jurisprudential line, it should be clear that this is exactly what AG Emilou is asking for: an expansion of the Article 137(5) exclusion as hitherto understood.

There is no principled or practical reason why the Court should accept to do so. Such an expansion is not necessary to ensure that the pay exclusion is not 'deprived of its effectiveness', another important interpretative principle that the Court will need to follow (as acknowledged by the AG at para 55). On the contrary, expanding the exclusion as advocated by the AG would jeopardise the attainment of a number of social regulatory objectives pursued by the EU Treaty (and, in this case, by the Directive). The Court should restate its orthodoxy.

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* Professor of Labour Law and European Law, University College London. I am grateful to Silvia Borelli, Antonio Lo Faro, Keith Ewing for comments and suggestions on earlier drafts. The usual disclaimer applies. An earlier version of this note was published, in Italian, in N. 1/25 of *RGL Giurisprudenza online* (https://www.futura-editrice.it/archivio-rgl-giurisprudenza-online/numero-1-25/).

[1] Opinion of AG Emiliou in Case C-19/23, Kingdom of Denmark v European Parliament, Council of the European Union, of 14 January 2025, ECLI:EU:C:2025:11. Hereinafter the 'Opinion'.
[2] Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, [2022] OJ L275/33.
[3] C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line* [2007] ECR I-10779; C-341/05, *Laval un Partneri Ltd* [2007] ECR I-11767.

2. The AMWD challenge before the Court.

The AMWD was adopted under the 'working conditions' competence provided by Article 153(2)(b) TFEU (read in conjunction with Article 153(1)(b) TFEU), and has three main purposes, all stated in its opening Article 1, namely establishing a framework for: i) the 'adequacy of statutory minimum wages with the aim of achieving decent living and working conditions'; ii) 'promoting collective bargaining on wage-setting'; and iii) 'enhancing effective access of workers to rights to minimum wage protection where provided for in national law and/or collective agreements'. The key provisions through which the AMWD seeks to achieve these objectives are Article 4 and Article 5. Article 4 requires Member States to promote 'collective bargaining on wage setting' (with a carefully drafted requirement for MSs whose collective bargaining coverage falls below 80% to 'establish an action plan to promote collective bargaining'). Article 5 requires them to set up a 'procedure for setting adequate statutory minimum wages', setting out various criteria and suggesting as an indicative reference '60 % of the gross median wage and 50 % of the gross average wage, and/or indicative reference values used at national level'.

This is an important, potentially transformative, directive in the social policy field, seeking to make good of the hitherto unfulfilled social progress aspirations set out in Article 3 TEU. Its adoption also sent an important political message from the EU and its Member States to the people of Europe: the 'Age of Austerity' when the EU was actively promoting wage setting and collective bargaining decentralisation was firmly behind us.

Denmark, with the support of Sweden, brought an action for annulment under Article 263 TFEU against Directive 2022/2041, the Adequate Minimum Wages Directive (AMWD). The challenge was essentially premised on the argument that Article 153(5) excludes 'pay, the right of association, the right to strike or the right to impose lock-outs' from the scope of EU regulatory competences in the social field, and that the AMWD as a whole, and its Article 4 in particular, were adopted in breach of this competence exclusions, requesting its annulment in whole or in part (i.e. limitedly to Article 4(1)-(2)).

3. The Opinion of the AG

In addressing the request for annulment, the AG engaged with four questions. Firstly, should the Directive be annulled in full because of its incompatibility with the Article 153(5) 'pay' exclusion. Secondly, should it be annulled due to its incompatibility with the Article 153(5) 'right of association' exclusion. Thirdly, was the Directive invalidly adopted by majority vote under Article153(1)(f), whereas it should have been adopted unanimously as it also pertains to the 'representation and collective defence' of workers, falling under 153(1)(f) and requiring unanimity. Fourthly, and finally, if the Court did not find in favour of the applicant on the previous three please, could at least 4(1)(d) and Article 4(2) of the Directive be annulled?

The AG concluded that the two pleas worth of merit were the first and the last one and advised the Court to 'to conclude that the AMW Directive must be annulled in full' (para 96), but also that 'should the Court decide that the AMW Directive must not be annulled in its entirety, I would suggest it [...] annul Article 4(1)(d) and Article 4(2) of that directive' (para 129). This note only addresses these two conclusions, that share a single, unduly and unnecessarily expansive interpretative approach of the 'pay' exclusion under Article 153(5).

The AG took three steps to reach these conclusion. The first step was to deny 'that the 'pay' exclusion actually covers only the level of pay [...] which is not included *expressis verbis* in that provision' (para 54 of the Opinion). He did so by reinterpreting the CJEU pronouncements in a

previous case, Case C-268/06, *Impact*[4] (i.e. that the exclusion must be interpreted as 'covering measures – such as the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed [EU] wage – which amount to a direct interference … in the determination of pay withing the [EU]', para 124 of *Impact*) as suggesting that 'the 'pay' exclusion contained in Article 153(5) TFEU covers, *but is not limited to*, measures that harmonise the level of pay; it also covers measures that harmonise other aspects of the Member States' wage-setting systems (including the *modalities or procedures for fixing the level of pay*)' (para 59 of the Opinion). This would be so, according to the AG, because 'the terms 'such as' and 'and/or the level of pay' [in *Impact*] show that the Court did not exclude that a direct interference with pay may occur even where the measure in dispute does not seek to harmonise the 'level of pay' in and of itself' (para 53 of the Opinion). It is clear that this renewed focus on procedures and modalities also played a great part in concluding that Article 4 of the AMWD in particular could not pass the 'pay exclusion' scrutiny as it introduces 'a number of positive obligations designed to promote collective bargaining on wage-setting and that, in so doing, they restrict the Member States' choice as to the method of wage determination that they may resort to' (para 122 of the Opinion).

The second step was to expand the exclusion even further by introducing a broad 'direct interference' test (that the AG extrapolated from the *Impact* quote above) and by suggesting that this test is met by an instrument, such as the AMWD, 'if its object is to regulate pay, no matter how strictly or flexibly' (para 62 of the Opinion). So other EU directives 'whose object is to regulate a matter other than pay (for example, non-discrimination …), while only indirectly interfering with pay (by having mere repercussions on the level of wages)' can pass the test but the AMWD cannot because, as noted by the AG 'the object of the AMW Directive is to regulate an aspect of pay, more specifically, the adequacy of minimum wages and how those wages are to be set' (para 75). This would be particularly true, the Opinion concludes, of Article 5 of the Directive, because 'it is clear … that Article 5(2) of the AMW Directive requires, in practice, Member States with statutory minimum wages to ensure that the level of minimum wages is calculated on the basis of at least the four criteria listed in that provision. Thus, it has as its object to regulate the level of statutory minimum wages' (para 79). To this, the Opinion added that 'two provisions of that instrument, namely Article 4 and 12 thereof, have […] as their object to harmonise the method for wage determination relied upon by the Member States and, thus, to regulate pay' (para 89), a point that could also be made, said the AG, in respect of Articles 1 and 3 (para 96).

Thirdly, the AG opined that the protection of the 'contractual freedom of social partners' is not the only rationale for the pay exclusion. To this rationale (the only accepted in other CJEU precedents) he added three more, namely 'maintaining competition between undertakings operating in the internal market', the fact that wage policy is a 'sensitive area', and the diversity of national collective bargaining and industrial relations systems (para 68).

4. The legal construction of the Article 153(5) pay exclusion according to precedent

It is important to stress that the AG's Opinion pushes the boundaries of the pay exclusion well beyond earlier court decisions that examined it. As a reminder, and as acknowledged by the AG, there have been four CJEU judgments that have dealt with the issue: C-307/05, *Del Cerro Alonso*[5];

[4] Case C-268/06, *Impact v Minister for Agriculture and Food and Others* [2008] ECR I-02483
[5] Case C-307/05, Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud [2007] ECR I-07109

C-268/06, *Impact*[6]; C-395/08, *Bruno*[7]; and Case C-501/12, *Specht*[8]. These cases dealt with the alleged interference with the exclusion by provisions contained in the Fixed-term Work Directive 99/70 (*Del Cerro* and *Impact*), the Part-time Work Directive 97/81 (*Bruno*), and the Equal Treatment Framework Directive 2000/78 (*Specht*). Ob iter, in *Del Cerro* (paras 43-45), the Court also elaborated on how the exclusion applies to the Working Time Directive 2003/88/EC jurisprudence on 'on call' work. From these judgments the following established principles can be ascertained.

Firstly, the A 153(5) pay exclusion must be 'interpreted strictly'. This is because since it 'derogates from paragraphs 1 to 4 of that article, the matters reserved by that paragraph must be interpreted strictly so as not to unduly affect the scope of paragraphs 1 to 4, nor to call into question the aims pursued by Article [151 TFEU]' (*Del Cerro*, para 39; *Impact* para 122; *Bruno* para 35).

Secondly, the Court has also explained what the rationale of that exclusion is, namely 'the exception relating to 'pay' set out in Article [153(5) TFEU] is explained by the fact that fixing the level of wages falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States' (*Del Cerro*, para 40; *Impact*, para 123; *Bruno* para 36).

Thirdly, the Court has stated what are the type of measures that the exception applies to. It applies to, and therefore prohibits, 'measures – such as the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed Community wage – which amount to direct interference by Community law in the determination of pay within the Community' (*Impact*, para 124; *Bruno* para 37; *Specht*, para 33). The word 'equivalence' here is important. Crucially, it appears in the French version as '*une uniformisation'*, and in the Italian one as '*uniformizzazione*' and it aims at prohibiting uniformity in the levels of pay, and not just some simple procedural coordination. The idea of uniformity should inform the general proposition that , more generally, the exclusion is designed to 'to exclude determination of the level of wages from harmonisation under Article [151] et seq.' (*Del Cerro*, 40; *Bruno* 36; *Impact* 123).

The Court has also spelled out the type of measures that the exclusion does not apply to. Namely 'The 'pay' exception cannot, however, be extended to any question involving any sort of link with pay, otherwise some of the areas referred to in Article [153(1) TFEU] would be deprived of much of their substance' (*Del Cerro*, 41; *Impact* 125; *Bruno* 37; *Specht*, 33).

So, to sum up, the Court's precedent have established that the pay exclusion must be interpreted *strictly*, must not interfere with the social policy competencies and 'aims pursued' by the EU, prohibits the harmonisation of the determination of the '*level* of wages', as well as measures – such as the *equivalence of all or some of the constituent parts* of pay and/or *the level of pay* in the Member States, or the *setting of a minimum guaranteed Community wage* – which, the Court has stated, would amount to *direct interference* by EU law in the determination of pay within the EU.

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[6] Cf above ftn 4.

[7] Case C395/08, *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini* [2010] ECR I-05119.

[8] Case C-501/12, *Specht Others v Land Berlin and Bundesrepublik Deutschland* ECLI:EU:C:2014:2005.

5. Expanding the pay exclusion – interference with EU law competence and policy objectives

From the two previous sections it should already be apparent that there is a legally significant chasm between the established precedents of the Court on the 'pay exclusion' and the visible interpretative expansion advocated by the Opinion of AG Emiliou. To state the obvious, if the Court is to be consistent with the key principle that the exception should be 'interpreted strictly', such an expansion should not be endorsed lightly. The expansion occurs on three different levels.

Firstly, the AG has expanded the rationale of the exclusion from the established 'contractual freedom of the social partners' to at least three new rationales, including 'maintaining competition between undertakings operating in the internal market', a 'policy sensitivity' rationale, and a 'national diversity' rationale (para 68). The expansive intentions of these rationales aside, there is a noticeable lack of merit to them as well. Plenty of EU measures deal with policy sensitive areas and harmonise nationally diverse industrial relations systems, and the Court has long accepted that 'European Union thus has not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 151 TFEU, the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion', see para 77 of Case C-201/15, *AGET Iraklis*.[9]

Thirdly, the AG expands on the three types of measures that have been hitherto understood as being prohibited by the exclusion (those that prescribe the 'equivalence of all or some of the constituent parts of pay', 'the level of pay in the Member States', or the 'setting of a minimum guaranteed Community wage') by introducing a novel and much broader test, a self-standing 'direct interference' test, that is then deployed to add to the pay exclusion '*procedures'* for fixing the level of pay. This cannot be inferred from the three types of measures expressly mentioned at para 124 of *Impact*, none of which can reasonably amount to 'machineries' or 'procedures' but appear to be substantive in nature. All three examples seek to prevent an 'equivalence' *across* Member States of a *quantum* of pay, be it by reference to a 'constituent part of pay', to a 'level of pay' in general, or 'a minimum guarantee Community wage'. They do not refer to '*modalities or procedures* for fixing the level of pay' (para 59 of the AG's Opinion). Hypothetically speaking they would refer to measures such as, say, a '10 Euro/hour pan-European minimum wage', or the quantitative harmonisation of a constituent part of pay, such as basic pay, overtime compensation, bonuses, or travel housing and food allowances, none of which are procedures or machineries. It is also worth pointing out that it is highly doubtful that the provisions contained in Article 4 (for which a partial annulment is envisaged) would meet the AG's new 'direct interference' test. To the extent that they may interfere with pay setting, they do so in an eminently indirect manner, by encouraging the coverage of collective agreements.

These are controversial expansions, that also run against the grain of existing EU law. For example, under the new Article 3(1)(i) of the Posted Worker Directive, as amended by Dir. 2018/957, there is now an express reference to 'allowances or reimbursement of expenditure to cover travel, board and lodging expenses' – all constituent parts of pay – that are however

[9] Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* ECLI:EU:C:2016:972.

eminently compatible with the 'pay exclusion' as currently understood (because while they interfere with the level of pay they only do so procedurally, without specifying a quantum). However, they would struggle to pass the expanded test established by Mr Emiliou, as indeed they do 'directly interfere' with the fixing of pay (so much so that they ask it to be equivalent to that prevailing in the 'host state', which the AMWD falls short of, and rightly so). In fact they would also be irreconcilable with the AG's new rationale that a ''pay' exclusion contributes to maintaining competition between undertakings operating in the internal market', since Dir. 2018/957 was adopted with the view that 'In a truly integrated and competitive internal market, undertakings compete on the basis of factors such as productivity, efficiency, and the education and skill level of the labour force, as well as the quality of their goods and services and the degree of innovation thereof' (para 16 of the Preamble), and not on the basis of the inadequate and poverty wages that the AMWD seeks to eliminate from the labour markets of the EU Member States. There are several other EU instruments that share the same 'upward convergence' rationale of the new Posted Workers Directive, such as for instance the public procurement directive 2014/24/EU requiring compliance with collective agreements also by reference to ILO Convention 98.

Finally, it is important to stress that none of the expansions advocated by the AG are necessary to ensure that the pay exclusion is not 'deprived of its effectiveness'. The exclusions as hitherto understood as only applying to measures equalising the quantum of the 'level of pay' are sufficient to the task, without requiring an expansion to 'modalities or procedures' that are best left out of the Article 153(5) concept of 'pay'.

6. Conclusions

The cumulative effect of these unnecessary expansions of the ' pay exclusion' is significant. Under the principles currently established by the Court (not the ones encouraged by AG Emiliou), the AMWD and its carefully worded individual provisions - eminently procedural in nature and not affecting the freedom of social partners to agree the levels of national minimum wages (as long as they meet a decency threshold that broadly reflects the obligations already applicable to EU Member States under Article 4 of the European Social Charter) – would certainly pass the scrutiny required under the Article 263 action for annulment and the 'pay exclusion' in Article 153(5). The expansive approach advocated by the AG, as well as jeopardising the validity of the AMWD, would run against the aims of several Treaty provisions (not least Articles 151 TFEU and Article 3 TEU) and against the grain of several other EU instruments, such as the Posted Workers Directive as amended in 2018, that envisage the EU as a highly competitive social market economy where competition between businesses takes place on the basis of investment in technology, productivity, and skills – not on the back of poverty wages and inadequate pay. There have been other instances where AG have suggested that 'he European Union is based on a free market economy, which implies that undertakings must have the freedom to conduct their business as they see fit' (see AG Wahl Opinion in Case C-201/15, *AGET Iraklis*, para 1), and where the Court had to intervene to set the record straight, pointing out 'that, as is apparent from Article 3(3) TEU, the European Union is not only to establish an internal market but is also to work for the sustainable development of Europe, which is based, in particular, on a highly competitive social market economy aiming at full employment and social progress, and it is to promote, inter alia, social protection' (para 76 of the *AGET Iraklis* judgment).

As well as being legally objectionable, the Opinion raises serious questions about the future trajectories of European social and economic integration, as the Court will no doubt appreciate when reaching its deliberations.