Position state-ment

Position Statement of the German Trade Union Confederation on the Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union (COM (2020) 682 final)

European Directive on Adequate Minimum Wages in the European Union

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Preliminary remark

Between 2010 and 2018, the number of **working poor** increased in twelve Member States of the European Union - including Germany. In 2018, it was already at an alarming 9 %. According to the German Federal Statistical Office, in **Germany,** the country with the strongest economy in the EU, the low-wage sector amounts to 21%, meaning that in 2018 **around 8 million workers** were paid below the low-wage threshold. Among these people are many from professions that were identified as **so-called system relevant** during the Corona pandemic and were thus crucial for the maintenance of basic services for all citizens. This is one of the reasons why the fight against the low-wage sector must finally be tackled and the way paved for poverty-proof wages in the EU.

The growing low-wage sector is also the result of a **dwindling collective bargaining coverage in** Europe, which is on the decline in 22 of the 27 Member States. While collective bargaining coverage was still 76% in West Germany and 63% in East Germany in 1998, it fell continuously to 56% in West Germany and 45% in East Germany by 2018. Since workers covered by collective agreements receive higher wages and enjoy better working conditions than those not covered by a collective agreement, there is urgent need for action.

The DGB and its member unions hope that the Draft Directive presented by the European Commission will lead to effective steps towards fair working and living conditions through the widest possible collective bargaining coverage and poverty-proof statutory minimum wages - where these are desired. The DGB welcomes the fact that the European Commission is pursuing several approaches. For example,

collective bargaining is to be **promoted in the** European member states, and measures are to be taken to establish **statutory minimum wages in** Europe more strongly in the Member States and to focus on wage levels in terms of poverty resistance. Article 9 of the proposed Directive also emphasises the important role of regulations requiring **compliance with collective agreements** in achieving better pay and working conditions in Europe. Collective agreements as well as collectively agreed and statutory minimum wages must be promoted in order to foster a social Europe. In the case of regulations on statutory minimum wages, those Member States should be exempted which see no need for the introduction of statutory minimum wages because of their well-functioning collective bargaining systems. In the view of the DGB, collective agreements are *the preferred method* in order to guarantee poverty-proof wages and fair jobs in general. Poverty-proof collectively agreed wages and statutory minimum wages provide support at the lower end of the wage scale. They...

- contribute to the protection of the individual's dignity,
- prevent a downward wage spiral,
- protect fair employers from wage dumping,
- strengthen the European economy sustainably because they help increase demand - especially with regard to overcoming the Corona crisis - and
- lead to an upward convergence of wages across Europe, which will ensure Europe's cohesion in the future.

Incidentally, the three institutions (Parliament, Council and Commission) have also committed to wage convergence at EU level on the occasion of the solemn proclamation of the **European Pillar of Social Rights** with the 6th principle contained therein. **More than 25 million workers in Europe** would benefit if statutory minimum wages were raised to 60% of the median wage or 50% of the average wage, according to calculations by the Wirtschafts- und Sozialwissenschaftliches Institut (WSI/Economic and Social Research Institute) in the current WSI Minimum Wage Report 2021 "Is Europe on the Way to Adequate Minimum Wages?" (February 2021). This would be of paramount political importance in combating in-work poverty and an enormous step towards a social Europe.

The Directive must therefore **only** set **minimum standards** and no wording may be interpreted to mean that collective bargaining parties and/or legislators may not set and enforce higher minimum wages and collectively agreed wages.

The DGB expressly welcomes the fact that the EU Commission has chosen the **legal instrument of the Directive for the** implementation of its plans. This is the right way to achieve a binding and thus most effective implementation of the desired political goal. The legal basis chosen in **Article 153 (1)(1)(b) TFEU** ("working conditions") also does justice to this. In the opinion of the DGB, the regulations on the adequacy of statutory minimum wages do not violate Article 153 (5) TFEU, because they do not directly relate to the level of pay, but only have indirect effects on pay, which is permissible. The European Court of Justice has repeatedly ruled that the block on regulatory competence with regard to pay must be interpreted narrowly. There are already a number of regulations in European secondary law that have this indirect reference to pay, such as in the case of temporary agency work, continued payment of maternity allowance and payment for annual leave, to name but a few.

Assessments on individual provisions of the Draft Directive

Article 2 Scope

The Article defines the group of persons covered by the provisions of the Directive. This Directive applies to "workers who have an employment contract or an employment relationship as defined by the law, collective agreements or practice in each Member State, with consideration to the case-law of Court of Justice the European Union." It is therefore a combination of national and Union law elements.
The scope of application of the Directive thus covers all persons who have concluded a contract of employment or have de facto established an employment relationship, as both are defined in national law. Under German law, all employees who have concluded a contract of employment within the meaning of section 611 of the German Civil Code (BGB) are already covered by this first of the two regulatory alternatives. This includes all holders of contracts of employment in the public sector. Persons whose employment contract has been void from the outset or become ineffective because it has been contested, but who have established a de facto employment relationship by taking up work, are also covered.
The German legislator must also take into account the ECJ's case law on the concept of worker when implementing the Directive. This concept is more far-reaching than the respective provision of German law (section 611a BGB). It covers persons who, for a certain period of time, perform services under instructions for which they receive remuneration in return. According to the case law of the European Court of Justice, this includes, for example, civil servants, managing directors of limited liability companies, trainees, disabled persons in workshops and German Red Cross nurses, insofar as they are not already considered workers under national law on

the basis of a separately concluded employment contract. According to the understanding of Union law, the decisive factor is whether the respective legal relationship is, by its nature, significantly different from the one existing between employers and those considered workers under national law. The national concept of worker must therefore be expanded to include groups of employees that were not previously covered.

Genuinely self-employed persons, however, would not fall under the scope of application. This is regrettable insofar as economically dependent **solo self-employed workers are** to be classified as in comparable need of protection and must be covered. It is to be welcomed that the Directive explicitly confirms that **platform workers** fall within the scope (recital 17) and are thus covered by the minimum protection.

Article 3 Definitions

The definition of the minimum wage under (1) also includes the calculation based on "**output**(s)". It must be ensured that the statutory minimum wage is paid for the hours worked in order to prevent circumvention.

In the definition of "collective bargaining" under (3), reference must be made on the workers' side to those actors who are responsible under national law for concluding collective agreements. The term "workers' organisations" must therefore be replaced by "**trade unions**". According to section 2(1) of the German Collective Bargaining Act ("Tarifvertragsgesetz") only trade unions (as the only possible representation of the workers' side) with collective bargaining capacity are allowed to conclude collective agreements. We therefore request a consistent choice of words in the Directive. It must be prevented that alleged workers' organisations that do not represent workers' rights replace trade unions. Also, works councils must not be allowed to replace trade unions, since under German law works councils cannot use industrial action to enforce their demands as trade unions can. The term "collective agreement" in (4) must be defined such that only trade unions may conclude collective agreements and that national requirements for collective agreements, such as the written form requirement in Germany, are respected.

Article 4 Promotion of collective bargaining on wage setting

Paragraph 1:

The DGB welcomes the fact that action plans are being proposed to promote collective bargaining coverage. Not only in Germany, but in 22 of the total of 27 EU member states, the number of workers covered by collective agreements is falling. This development must be counteracted in order to guarantee fair wages and good working conditions in the future. The European Commission itself notes that workers covered by collective agreements have better pay and better working conditions than those who are not. In the context of the action plan proposed in Art. 4 of the Draft Directive, however, it must be ensured that the collective bargaining autonomy of the social partners under Art. 9 (3) of the German Constitution (Grundgesetz) and the current national possibilities are preserved and national circumstances are taken into account.

Paragraph 2:

The DGB supports the provisions whereby member states with collective bargaining coverage below 70 per cent must, on the one hand, establish a regulatory framework via national law or social partner agreement to enable "conditions for collective bargaining" and, on the other hand, establish an "action plan to promote collective bargaining". In this way, national social partners are required to continuously address measures to strengthen collective bargaining coverage and to find sustainable ways to work towards increasing collective bargaining coverage. This means that the issue can no longer be neglected on either side. Since the percentage of employees working in companies covered by collective agreements is currently 52% in **Germany**, the **70% threshold** has not **been reached at present, so** that there would be a fundamental need for an action plan. In the context of the proposed measures, however, it must also be ensured that the collective bargaining autonomy of the social partners under Article 9 (3) of the German Constitution (Grundgesetz) and the current national possibilities are respected and national circumstances are taken into account.

The regulatory framework must be such that national action plans lead to concrete improvements, namely an increase in collective bargaining coverage. This goal must be explicitly stated. It requires the protection of workers, effective law enforcement, including a right of actio popularis for trade unions, access rights (also digital) for trade unions and effective steps against union busting. With regard to the framework regulations, it must be clear that, for example, no compulsory arbitration may be introduced.

From a trade union perspective, possible items for a national action plan could include:

- flanking measures by the legislator to increase the attractiveness of collective agreements, for example by making collectively agreed fringe benefits and top-ups tax-exempt and providing incentives for companies and employees to join associations or trade unions.
- the abolition of so-called "no-tariff" memberships in employers' associations as an instrument to circumvent collective bargaining protection.
- the continued binding validity of collective agreements in outsourced company units.
- facilitating the procedure for declaring collective agreements in force generally binding, and extending
- regional, generally binding wage rates on posting companies.
- a Federal Collective Bargaining Compliance Act to make collective bargaining compliance by companies, along with other social criteria such as training quotas, a prerequisite for the awarding of public contracts and the granting of state subsidies.
- the promotion of collective bargaining in the skilled crafts sector through the recognition of guilds as institutions under public law. In this way, guilds are made responsible for fulfilling their role as a collective bargaining association.
- the possibility for trade union members to deduct their trade union dues from tax in addition to the tax-deductible blanket allowance. Members whose income is so low that they pay no wage tax should also be relieved.

Preliminary remark on Chapter II: Statutory minimum wages

The legal definition of statutory minimum wage under Article 3 (2) of the Draft Directive also includes "a minimum wage set by law or other binding legal provisions." For Germany, this would include **collective agreement-based statutory minimum wages**, i.e. the minimum wages/wage floors set by legal ordinances under sections 7, 7a, 11 of the Posted Workers Act and section 3a of the Temporary Employment Act as well as by declarations of general applicability under section 5 of the Collective Agreements Act. Collective agreement-based statutory minimum wages are characterised by the fact that the collectively agreed wages agreed

by the social partners represent the wage levels. The regulations provided for in Articles 5-8 of the Draft Directive do not always match these minimum wages/wage floors, however. The adequacy of the minimum threshold provided for in Article 5(1-3) of the Draft Directive must also apply to this type of minimum wage. However, there is no need for Article 5(4) of the Draft Directive on the regular updating of the minimum wage level. The social partners amend the underlying collective agreements on their own initiative in Germany in a timely manner.

Article 7, which regulates the setting and updating of the statutory minimum wage, only fits the national statutory minimum wage, which is not based on collective agreements. The provision states that the social partners shall be "involved" in a timely and effective manner. However, the collective agreements underlying these collective agreement-based minimum wages are concluded and updated by the parties to the collective agreement within the framework of the collective bargaining autonomy conferred on them precisely without state involvement. The parties to the collective agreements do not have to be "involved" by the state in this exercise.

There would need to be counter-exceptions therefore for **Article 5(4) and Article 7 of the Draft Directive** saying that these provisions do not apply to collective agreement-based minimum wages.

Article 5 Adequacy

Paragraphs 1 - 3:

The DGB shares the view of the EU Commission that the goal of the Directive must be poverty-proof minimum wages. This goal is illustrated by the target provisions mentioned in the first sentence: adequate working and living conditions, social cohesion and the achievement of upward convergence. Unfortunately, adequacy is **not** defined **by a uniform formula that would** allow each Member State to calculate a fixed lower limit, so that the respective national statutory minimum wage may not be undercut. Paragraphs 2 and 3 merely mention criteria which must be used to define adequacy at national level. However, the exact formulation of these criteria is left to the Member States.

Paragraph 2 (a)-(d) lists several criteria that must be used at the national level to determine adequacy. The criterion **"labour productivity developments"** under (d) must be **deleted,** as it is an unclear and vague concept, which is not even further defined in its relation to the other criteria mentioned.

Paragraph 3 requires Member States to set **indicative reference values** "commonly used at international level" for assessing the adequacy of statutory minimum wages in relation to the general level of gross wages. In **recital 21,** the Commission does mention 60% of the gross median wage and 50% of the gross average wage. The Commission states it "**can help guide**" the assessment of minimum wage adequacy, but a binding regulation is missing. Paragraph 3 therefore lacks sufficient concretisation, which in turn leaves it up to the Member States to decide which concrete reference values they use.

The DGB therefore continues to advocate a definition of adequacy in the form of the **double threshold of 60 per cent of the gross median wage and 50 per cent of the gross average wage - in each case related to full-time employees -** below which national statutory minimum wages must not fall. This determination is based on internationally recognised criteria and would effectively achieve poverty-proof statutory minimum wages throughout Europe.

In addition, the DGB is in favour of an additional phrase in Article 5 which clarifies that the formulations on the adequacy of minimum wages within the meaning of the Directive are **only to be understood as a minimum standard.** The parties to collective agreements and the legislator must always have the competence to set and enforce higher collectively agreed and/or statutory minimum wages that exceed the required minimum level.

Article 6 Variations and deductions

The DGB rejects **different minimum wage rates for specific groups of workers,** as contained in Article 6(1) of the Draft Directive. A prohibition of deviating rates which does no longer allow for the current possibilities for deviation must be stipulated in the Directive.

In Article 6(2), the Draft Directive also provides for the possibility of allowing certain deductions from the statutory minimum wage. The DGB rejects such possible deductions **from the statutory minimum wage** (for example, for the use of uniforms by workers).

The statutory minimum wage must be the wage that represents the lower end of the wage scale. Any permissible undercutting entails the risk of ambiguity and, among other things, makes controls and thus the effectiveness and enforcement of this instrument, which is highly necessary in terms of social policy, more difficult. The fixed minimum wage would otherwise no longer set an actual wage floor.

Article 8 Effective access of workers to statutory minimum wages

The control and intensity of on-site inspections should be reinforced. To this end, inspection authorities must be provided with sufficient financial and human resources. Only comprehensive controls can guarantee a general minimum wage.

Article 9 Public procurement

The regulation on tariff compliance covers not only public procurement law but also the area of concession contracts, which is to be welcomed. However, the regulation must also apply to **public funding**, such as expenditure by the EU institutions. The proposed article should be amended accordingly.

In addition, the provision must be worded in such a way that the Member States are obliged to take appropriate measures to ensure that the awarding of public contracts, the granting of concessions and the granting of public subsidies is exclusively **awarded to** companies that **apply collective agreements**. In concrete terms, this means that in addition to pay, the other items covered by collective agreements, such as holiday allowance, days of leave, working time, etc., must also be covered in order to prevent that Member States help undermine collectively agreed provisions also in these areas. The current wording does not provide for that.

Article 10 Monitoring and data collection

Member States must not be given the right to demand the **publication of collective agreements within** the framework of the monitoring process provided for, unless they are generally binding, such as in Germany under the Collective Agreements Act or the Posted Workers Act. The involvement of the social partners in the monitoring process is essential. The entire monitoring process must be driven by the objectives of the Directive, namely the promotion of collective agreements and respect for existing national rights of association, collective bargaining and the right to strike, as well as the adequacy of statutory minimum wages. Under no circumstances must monitoring be used to undermine collective agreements or lower wages.

Additional demands

It must be ensured that the Directive recognises the **different European systems of wage setting**: it must be possible also in future to have systems with collective

bargaining and a statutory minimum wage alongside systems with collective bargaining only. With regard to the Scandinavian systems, safeguards must be introduced to guarantee their protection.