Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 14 January 2025 [1]

Case C-19/23

Kingdom of Denmark
v
European Parliament

Council of the European Union

(Action for annulment – Directive (EU) 2022/2041 – Adequate minimum wages in the European Union – Annulment in full of the directive – Legal basis – Article 153(1)(b) TFEU – Concept of 'working conditions' – Article 153(2)(b) TFEU – Competence of the European Parliament and the Council to adopt minimum requirements –Article 153(5) TFEU – Exclusions – 'Pay' and 'right of association' – Direct interference – Article 5 of the directive – Procedure for setting adequate statutory minimum wages – List of minimum criteria which Member States must include – Article 4 – Promotion of collective bargaining on wage-setting – Article 12 – Right to redress – Article 153(1)(f) TFEU – Concept of 'representation and collective defence of the interests of workers and employers' – Special legislative procedure requiring unanimity in the Council – Impossibility to adopt the directive on the basis of Article 153(1)(b) and (f) TFEU jointly – Partial annulment of the directive – Severability of Article 4(1)(d) and Article 4(2) of the directive)

I. Introduction

1. In accordance with the principle of conferral set out in Article 5(2) TEU and which is essential in a European Union founded on the rule of law,[2] the European Union is to act only within the limits of the competences conferred upon it by the Member States in the Treaties. Although in appearance simple, the Court's task of ensuring compliance with that principle is rendered more complex by the fact that certain Treaty provisions concerning the division of competences between the European Union and the Member States seem to either lack clarity or overlap.

2. That is particularly evident in the area of EU social policy, where the authors of the Treaties have aimed, on the one hand, to promote cohesion and convergence and, on the other hand, to build a Union which has regard of the diversity of national systems and the key role of social partners, two objectives which are not always easy to reconcile. Indeed, while pursuing the first objective implies giving more power to the European Union, pursuing the second objective favours the view that certain social policy decisions are for Member States alone.

[1] Original language: English.

[2] See Article 2 TEU.

3. By the present action, lodged in application of Article 263 TFEU, the Kingdom of Denmark, supported by the Kingdom of Sweden, asks the Court, principally, to annul Directive (EU) 2022/2041 on adequate minimum wages in the European Union ('the AMW Directive') [3] in full. Both Member States argue that the European Parliament and the Council lacked the competence to adopt the AMW Directive on the basis of Article 153(2)(b) TFEU, read in conjunction with Article 153(1)(b) TFEU. Those provisions empower the European Parliament and the Council to set, by means of directives, minimum requirements in the field of 'working conditions'. However, Article 153(5) TFEU makes clear that this competence does not extend to, inter alia, 'pay'.

4. Against that background, the most intricate issue raised by the present case concerns whether, in adopting the AMW Directive, the Parliament and the Council acted in breach of Article 153(5) TFEU by legislating in an area ('pay') which is excluded from the EU's competence. As I will explain in this Opinion, that question should, in my view, be answered affirmatively.

II. Legal framework

A. The FEU Treaty

5. Pursuant to Article 153 TFEU:

'1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

…

(b) working conditions;

…

(f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;

…

2. To this end, the European Parliament and the Council:

…

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

[3] Directive of the European Parliament and of the Council of 19 October 2022 (OJ 2022 L 275, p. 33).

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

…

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

B. The AMW Directive

6. Article 1 of the AMW Directive states:

'1. With a view to improving living and working conditions in the Union, in particular the adequacy of minimum wages for workers in order to contribute to upward social convergence and reduce wage inequality, this Directive establishes a framework for:

(a) adequacy of statutory minimum wages with the aim of achieving decent living and working conditions;

(b) promoting collective bargaining on wage-setting;

(c) enhancing effective access of workers to rights to minimum wage protection where provided for in national law and/or collective agreements.

2. This Directive shall be without prejudice to the full respect for the autonomy of the social partners, as well as their right to negotiate and conclude collective agreements.

3. In accordance with Article 153(5) TFEU, this Directive shall be without prejudice to the competence of Member States in setting the level of minimum wages, as well as to the choice of the Member States to set statutory minimum wages, to promote access to minimum wage protection provided for in collective agreements, or both.

4. The application of this Directive shall be in full compliance with the right to collective bargaining. Nothing in this Directive shall be construed as imposing an obligation on any Member State:

(a) where wage formation is ensured exclusively via collective agreements, to introduce a statutory minimum wage; or

(b) to declare any collective agreement universally applicable.

…'

7. Article 4 of that directive, entitled 'Promotion of collective bargaining on wage-setting', provides:

'1. With the aim of increasing the collective bargaining coverage and of facilitating the exercise of the right to collective bargaining on wage-setting, Member States, with the involvement of the social partners, in accordance with national law and practice, shall:

…

(d) for the purpose of promoting collective bargaining on wage-setting, take measures, as appropriate, to protect trade unions and employers' organisations participating or wishing to participate in collective bargaining against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

2. In addition, each Member State in which the collective bargaining coverage rate is less than a threshold of 80% shall provide for a framework of enabling conditions for collective bargaining, either by law after consulting the social partners or by agreement with them. Such a Member State shall also establish an action plan to promote collective bargaining. The Member State shall establish such an action plan after consulting the social partners or by agreement with the social partners, or, following a joint request by the social partners, as agreed between the social partners. The action plan shall set out a clear timeline and concrete measures to progressively increase the rate of collective bargaining coverage, in full respect for the autonomy of the social partners. The Member State shall review its action plan regularly, and shall update it if needed. Where a Member State updates its action plan, it shall do so after consulting the social partners or by agreement with them, or, following a joint request by the social partners, as agreed between the social partners. In any event, such an action plan shall be reviewed at least every five years. The action plan and any update thereof shall be made public and notified to the Commission.'

8. Article 5 of the AMW Directive, entitled 'Procedure for setting adequate statutory minimum wages', provides:

'1. Member States with statutory minimum wages shall establish the necessary procedures for the setting and updating of statutory minimum wages. Such setting and updating shall be guided by criteria set to contribute to their adequacy, with the aim of achieving a decent standard of living, reducing in-work poverty, as well as promoting social cohesion and upward social convergence, and reducing the gender pay gap. Member States shall define those criteria in accordance with their national practices in relevant national law, in decisions of their competent bodies or in tripartite agreements. The criteria shall be defined in a clear way. Member States may decide on the relative weight of those criteria, including the elements referred to in paragraph 2, taking into account their national socioeconomic conditions.

2. The national criteria referred to in paragraph 1 shall include at least the following elements:

(a) the purchasing power of statutory minimum wages, taking into account the cost of living;

(b) the general level of wages and their distribution;

(c) the growth rate of wages;

(d) long-term national productivity levels and developments.

3. Without prejudice to the obligations set out in this Article, Member States may additionally use an automatic mechanism for indexation adjustments of statutory minimum wages, based on any appropriate criteria and in accordance with national laws and practices, provided that the application of that mechanism does not lead to a decrease of the statutory minimum wage.

4. Member States shall use indicative reference values to guide their assessment of adequacy of statutory minimum wages. To that end, they may use indicative reference values commonly used at international level such as 60% of the gross median wage and 50% of the gross average wage, and/or indicative reference values used at national level.

5. Member States shall ensure that regular and timely updates of statutory minimum wages take place at least every two years or, for Member States which use an automatic indexation mechanism as referred to in paragraph 3, at least every four years.

6. Each Member State shall designate or establish one or more consultative bodies to advise the competent authorities on issues related to statutory minimum wages, and shall enable the operational functioning of those bodies.'

9. Article 12 of the AMW Directive, which is entitled 'Right to redress and protection against adverse treatment or consequences', provides that:

'1. Member States shall ensure that, without prejudice to specific forms of redress and dispute resolution provided for, where applicable, in collective agreements, workers, including those whose employment relationship has ended, have access to effective, timely and impartial dispute resolution and a right to redress, in the case of infringements of rights relating to statutory minimum wages or relating to minimum wage protection, where such rights are provided for in national law or collective agreements.'

III. Facts giving rise to the present action

A. The proposal for the AMW directive

10. The European Commission adopted its proposal for the AMW directive in October 2020.[4] That proposal was made after Ursula von der Leyen, President of the Commission, had stated that 'the dignity of work is sacred. Within the first 100 days of my mandate, I will propose a legal instrument to ensure that every worker in our Union has a fair minimum wage.'[5]

11. In the proposal for the AMW directive, the Commission noted that 'many workers are currently not protected by adequate minimum wages in the [European Union]' and that, in 2018, 'the statutory minimum wage did not provide sufficient income for a single minimum-wage earner to reach the at-risk-of-poverty threshold in nine Member States'. It also indicated that, following the COVID-19 crisis, ensuring that workers in the European Union had access to employment opportunities and to adequate minimum wages was 'essential to support a sustainable and

[4] See 'Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union' of 28 October 2020, COM(2020) 682 final ('the proposal for the AMW directive').

[5] Von der Leyen, U., *Political guidelines for the Next European Commission 2019-2024*; *Opening Statement in the European Parliament Plenary Session – 16 July 2019; Speech in the European Parliament Plenary Session – 27 November 2019*, Publications Office of the European Union, Luxembourg, 2020, p. 10.

inclusive economic recovery'.[6] Those statements have been regarded by some authors as reflecting a broad shift in how adequate minimum salaries are perceived at EU level, as they are no longer viewed as an obstacle to competitiveness between Member States and economic growth, but as a precondition to economic development.[7]

12. Within that context, the Commission explained that its proposal established a framework to 'improve the adequacy of minimum wages and to increase the access of workers to minimum wage protection'. It also noted that the proposed directive aimed at 'promoting collective bargaining on wages in all Member States', while 'taking into account and fully respecting the specificities of national systems, national competencies, social partners' autonomy and contractual freedom'.[8]

13. The AWM Directive was adopted at first reading on 19 October 2022. All Member States in the Council voted in favour of that instrument, except for the Kingdom of Denmark and the Kingdom of Sweden, which voted against it, and Hungary, which abstained.[9]

14. In its reasoned opinion on the proposal for the AMW directive, dated 15 December 2020, the Danish Parliament had already indicated that, in its view, wage conditions were best regulated at national level.[10] During the legislative procedure leading to the adoption of the directive, the Danish Government explained, in a statement to the Council, that it was 'as a matter of principle opposed to introducing any binding regulation at EU-level regarding minimum wage'. It also emphasised that 'it is essential to preserve the autonomy of … social partners' and that 'wage-setting is a national competence'.[11]

B. Key aspects of the AMW Directive for the purposes of the present case

15. According to Eurostat, as of 1 January 2022, statutory monthly minimum wages varied widely across Member States, from EUR 332 in Bulgaria to EUR 2 257 in Luxembourg.[12] In its 'Executive summary of the Impact Assessment' which accompanied the proposal for the AMW directive,[13] the Commission identified 'the lack of clear and stable criteria to set and update minimum wages' and 'the insufficient involvement of social partners' as being among the factors causing an insufficient protection of workers by adequate minimum wages across the European Union.

16. In response to those concerns, Article 1(1) of the AMW Directive states that that instrument establishes a framework for (a) the adequacy of statutory minimum wages; (b) promoting collective bargaining on wage-setting; and (c) enhancing effective access of workers to rights to minimum wage protection where provided for in national law and/or collective agreements. As I

6 Proposal for the AMW directive, p. 2.

7 See Schulten, T. and Müller, T., 'A paradigm shift towards Social Europe? The proposed Directive on adequate minimum wages in the European Union', *Italian Labour Law e-Journal*, Vol. 14, No 1, 2021, p. 7.

8 Proposal for the AMW directive, p. 2.

9 See 'Voting result – Directive of the European Parliament and of the Council on adequate minimum wages in the European Union (first reading)', Document ST_13171_2022_INIT, p. 2, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil%3AST_13171_2022_INIT.

10 See 'Reasoned opinion on the application of the Principles of Subsidiarity and Proportionality', Document ST_14106_2020_INIT, p. 4, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil%3AST_14106_2020_INIT.

11 See 'Draft Directive of the European Parliament and of the Council on adequate minimum wages in the European Union (first reading) – Adoption of the legislative act – Statements', Document ST_12616_2022_ADD_1_REV_2, p. 2, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil%3AST_12616_2022_ADD_1_REV_2.

12 See 'Out now: First 2022 data on minimum wages in the EU', available at https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/ddn-20220128-2.

13 Commission Staff Working Document, 'Executive Summary of the Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union' (SWD(2020) 246 final).

understand it, the AMW Directive thus pursues three distinct objectives – listed, respectively, in points (a), (b), and (c) of Article 1(1) – all of which are designed to contribute to the overarching aim of 'contribut[ing] to upward social convergence and reduc[ing] wage inequality'. [14]

17. Although the AMW Directive contains 19 articles in total, organised in four different chapters, 3 of these, namely Articles 4, 5 and 12 thereof, are of particular importance to the present case. They each relate to one of the three objectives listed in Article 1(1) of that directive.

18. First, Article 4 concerns the promotion of collective bargaining on wage-setting (Article 1(1)(b), the second objective). It forms part of Chapter I of the AMW Directive, which is entitled 'General provisions'. Article 4(1) imposes on all Member States a number of obligations 'with the aim of increasing the collective bargaining coverage and of facilitating the exercise of the right to collective bargaining on wage-setting'. Those obligations include '[taking] measures, as appropriate, to protect trade unions and employers' organisations participating or wishing to participate in collective bargaining against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration' (Article 4(1)(d)). By contrast, the obligations detailed in Article 4(2) apply only to Member States in which the collective bargaining coverage rate is less than a threshold of 80%. Those Member States are required to 'provide for a framework of enabling conditions for collective bargaining' and to 'establish an action plan to promote collective bargaining', which they are to regularly review and update.

19. Second, Article 5 relates to the 'adequacy of statutory minimum wages' (Article 1(1)(a), the first objective). It is the most important article in the AMW Directive and is contained in Chapter II thereof, which is entitled 'Statutory minimum wages' and whose provisions apply to Member States with statutory minimum wages only. Most notably, Article 5(2) details four minimum criteria, which are set to contribute to [the] adequacy of minimum wages and must be taken into account during the '[p]rocedure for setting adequate statutory minimum wages'.

20. Third, Article 12 of the AMW Directive, which is part of Chapter III, entitled 'Horizontal provisions', relates to workers' effective access to minimum wage protection (Article 1(1)(c), the third objective). The purpose of that provision is to ensure workers' access to effective, timely and impartial dispute resolution and a right to redress, in situations where their rights relating to statutory minimum wages or minimum wage protection under national law and/or collective agreements have been infringed.

IV. Procedure before the Court and forms of order sought

21. By application lodged at the Registry of the Court of Justice on 18 January 2023, the Kingdom of Denmark brought the present action.

22. The Kingdom of Denmark claims that the Court should:

– annul the AMW Directive in its entirety;

– in the alternative, annul Article 4(1)(d) and Article 4(2) of the AMW Directive;

[14] See Article 1(1) of the AMW Directive. See, also, Article 5(1) thereof, which refers to the aim of 'achieving a decent standard of living, reducing in-work poverty, as well as promoting social cohesion and upward social convergence, and reducing the gender pay gap'.

– order the Parliament and the Council to pay the costs.

23. The Parliament contends that the Court should dismiss the action as unfounded and order the Kingdom of Denmark to pay the costs.

24. The Council claims that the Court should:

– reject the principal claims as inadmissible;

– in the alternative, dismiss the action as unfounded in its entirety;

– order the Kingdom of Denmark to pay the costs.

25. By decisions of the President of the Court of 26 April and 25 May 2023, the Kingdom of Belgium and the Republic of Portugal were granted leave to intervene in support of the form of order sought by the Council.

26. By decisions of the President of the Court of 8 and 26 May 2023 and 5 and 7 June 2023, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg and the Commission were granted leave to intervene in support of the forms of order sought by the Parliament and the Council.

27. By decision of the President of the Court of 26 May 2023, the Kingdom of Sweden was granted leave to intervene in support of the form of order sought by the Kingdom of Denmark.

V. Analysis

28. For many years, EU social policy developed on the sidelines of the Treaties; the driving force behind EU integration being the establishment of a common market.[15] The adoption of the Protocol on Social Policy and the Agreement on Social Policy ('the Social Chapter'), annexed to the Maastricht Treaty, was the first attempt at 'constitutionalising' EU social policy, and it was only with the Treaty of Amsterdam in 1997 that the contents of the Social Chapter were formally enshrined in the EC Treaty.[16]

29. Since then, it is clear that the '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 is to promote, inter alia, social protection'.[17] Several instruments have been adopted by the EU legislature on the basis of Article 153 TFEU (or previous versions of that provision), with a view to achieving those objectives – for example, the Temporary Agency Work Directive,[18] the

[15] There were, of course, some exceptions such as the principle of equal pay, enshrined in Article 119 TEEC (see judgment of 25 May 1971, *Defrenne*, 80/70, EU:C:1971:55).

[16] Some instruments of secondary law furthering social policy objectives had already been adopted even before the Treaty of Amsterdam, for example, Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), which was adopted on the basis of Article 118a TEC (see judgment of 12 November 1996, *United Kingdom* v *Council*, C-84/94, EU:C:1996:431).

[17] See judgment of 21 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972, paragraph 76).

[18] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

Working Time Directive[19] or, more recently, Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union,[20] which, like the AMW Directive, was adopted on the basis of Article 153(2)(b) TFEU, read in conjunction with Article 153(1)(b) TFEU.

30. To my knowledge, the AMW Directive is, however, the first legal instrument at EU level in the field of minimum wages. Indeed, although Principle 6 of the European Pillar of Social Rights[21] already states that 'workers have the right to fair wages that provide for a decent standard of living' and that 'adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his/her family', with a view to preventing 'in-work poverty', that text has no legal binding force and rather serves as a guide towards efficient employment and social outcomes.[22]

31. In support of its principal head of claim, seeking full annulment of the AMW Directive, the Kingdom of Denmark puts forward two pleas in law. First, it alleges that the Parliament and the Council acted in breach of Article 153(5) TFEU and, thus, of the principle of conferral of powers which, as I have recalled in the Introduction, is enshrined in Article 5(2) TEU. In that regard, the Danish Government claims that that directive is incompatible with two of the exclusions contained in Article 153(5) TFEU, namely those relating to pay and to the right of association. It considers that the AMW Directive 'directly interferes' with both exclusions and, therefore, could not have been adopted by the EU legislature without the latter exceeding its competences. Indeed, whereas the Parliament and the Council are competent to adopt directives setting minimum requirements as regards 'working conditions' (in application of Article 153(2)(b) TFEU, read in conjunction with Article 153(1)(b) TFEU), they cannot legislate in the areas of pay or the right of association.

32. Second, the Danish Government argues that, even assuming that the AMW Directive does not fall into the scope of the exclusions concerning pay and the right of association laid down in Article 153(5) TFEU, the Parliament and the Council could not validly adopt it on the basis of Article 153(1)(b) TFEU. In that regard, the Danish Government notes that the AMW Directive pursues two objectives of equal importance, as it seeks not only to regulate 'working conditions' (Article 153(1)(b) TFEU), but also the 'representation and collective defence of the interests of workers …' (Article 153(1)(f) TFEU). It adds that each of those two legal bases requires a different legislative procedure, since Article 153(1)(f) TFEU requires unanimity in the Council, whereas Article 153(1)(b) TFEU does not. Given that those procedures are incompatible, the Danish Government submits that the AMW Directive must be annulled in full.

33. Should the Court decide that the AMW Directive must not be annulled in full, the Kingdom of Denmark seeks, in the alternative, the annulment of Article 4(1)(d) and Article 4(2) of that instrument. In that regard, that Member State raises a single plea in law, alleging, once more, that, when adopting those provisions, the Parliament and the Council acted in breach of Article 153(5) TFEU and, thus, of the principle of conferral of powers. The key issue which arises in connection therewith is that of the severability of Article 4(1)(d) and Article 4(2) of the directive from the other provisions contained therein.

[19] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

[20] Directive of the European Parliament and of the Council of 20 June 2019 (OJ 2019 L 186, p. 105).

[21] OJ 2017 C 428, p. 10.

[22] See recital 12 of the European Pillar of Social Rights.

34. Before I turn to examining those various claims, I wish to make one preliminary observation. The present action does *not* arise in a vacuum, as it is intrinsically linked to Denmark's and other Nordic Member States' constant opposition to European Union actions which they regard as interfering with their labour law and industrial relations systems. The reactions in those Member States to the Court's judgment in *Laval un Partneri*[23] which concerned the posting of Latvian workers by a Latvian company (Laval) to building sites in Sweden and the subsequent blockade of those sites by a Swedish trade union, are, to date, the most salient examples of that opposition. Both Denmark's and Sweden's labour law models are characterised by a 'laissez-faire' approach, that is to say, a high degree of autonomy of social partners, with wages and working conditions being negotiated by the social partners instead of being regulated by statutory act. The Court's conclusion in that judgment that industrial action can, in essence, amount to an unjustified restriction on free movement and its emphasis on the importance of transparency as regards the terms and conditions of employment, including pay, have been perceived by some as a threat to the autonomous character of Denmark's and Sweden's collective bargaining systems and to the absence of state intervention in the actions undertaken by trade unions which characterises those Member States.[24]

35. Against that background, one may regard the arguments presented by the Danish and Swedish Governments in the present case as the product of a mere principled opposition, that is to say, of those Member States' stiff opposition against any form of interference with the contractual autonomy of social partners,[25] rather than as being rooted in the substance of the obligations contained in that directive itself. In that regard, I note that the Swedish Government has recognised, for example, that the obligation contained in Article 4(2) of the AMW Directive does not apply to it, since that provision only applies to Member States whose collective bargaining coverage rate is below 80%. Both governments also agree that most of the obligations contained in that instrument replicate those that already derive from the International Labour Organization (ILO) Minimum Wage Fixing Convention, 1970, by which they are bound.[26] They therefore concede that, from a practical point of view, the AMW Directive will not affect their national systems to a significant extent.

36. In my view, however, those considerations must not affect the outcome of the present case. How competences are distributed between the Member States and the European Union is a question of a constitutional nature, which, as I have already stated in the Introduction, is essential to a European Union based on the rule of law. If the EU legislature adopts a directive in a field in which it is not competent to legislate, that directive cannot be saved on grounds of a mere practical nature, such as the fact that its adoption will only carry 'mild' consequences for the few (*in casu*, two) Member States that have voted against it. Considerations of that kind should, in my view, have no bearing on the Court's assessment. In that regard, I would add that the motivations or interests of a Member State to bring an action for the annulment of an EU legislative act are irrelevant within the context of proceedings based on Article 263 TFEU, since Member States are privileged applicants under that provision and, as a result, do not need to demonstrate that they have an interest in bringing proceedings.

[23] See judgment of 18 December 2007 (C-341/05, EU:C:2007:809).

[24] See, inter alia, Rönnmar, M., 'Free movement of services versus national labour law and industrial relations systems: Understanding the *Laval* case from a Swedish and Nordic perspective', *Cambridge Yearbook of European Legal Studies – 2007-2008, Volume 10*, Hart Publishing, 2008, pp. 493 to 524.

[25] As illustrated by the Danish Government's reactions during the legislative procedure having led to the adoption of the AMW Directive which I have recalled in point 14 above.

[26] See https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C131.

A. The principal head of claim: must the AMW Directive be annulled in full?

37. It follows from points 31 and 32 above that the principal head of claim of the Kingdom of Denmark relates, in essence, to the choice made by the EU legislature to use Article 153(2)(b) TFEU, read in conjunction with Article 153(1)(b) TFEU, as the legal basis for the AMW Directive – a choice which has been described by some authors as 'the most contentious' issue arising in connection with the AMW Directive.[27] In that regard, the Court is called upon to clarify the relationship of those provisions with, on the one hand, Article 153(5) TFEU (the first plea in law) and, on the other hand, Article 153(1)(f) TFEU (the second plea in law).

1. First plea in law: the AMW Directive was adopted in breach of Article 153(5) TFEU and, thus, of the principle of conferral of powers

38. As I have already explained, the AMW Directive was adopted by the EU legislature on the basis of Article 153(2)(b) TFEU, read in conjunction with Article 153(1)(b) TFEU, on the ground that it seeks to regulate working conditions. However, by the first plea in law, the Danish Government claims that that instrument is incompatible with two of the exclusions contained in Article 153(5) TFEU, namely 'pay' and 'the right of association', for which there is no EU competence.

39. In that regard, the Court has held that, as paragraph 5 of Article 153 TFEU derogates from paragraphs 1 to 4 of that article, the matters reserved by it must be interpreted *strictly* so as not to unduly affect the scope of those other paragraphs, nor to call into question the aims pursued by Article 151 TFEU.[28]

40. Furthermore, the Court has already provided indications as to how the exclusion relating to pay must be understood. Indeed, in the judgments in *Del Cerro Alonso*,[29] in *Impact*,[30] in *Bruno and Others*[31] and in *Specht and Others*,[32] the Court has consistently held that that exclusion must be construed 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 wage – that amount to a *direct interference* by EU law in the determination of pay within the European Union. In that regard, the Court has made clear that the 'pay' exclusion cannot be extended to any question involving any sort of link with pay; otherwise, some areas referred to in Article 153(1) TFEU would be deprived of much of their substance. By contrast, the exclusion relating to the right of association has not yet been interpreted by the Court.

[27] See Garben, S. 'Choosing a tightrope instead of a rope bridge – The choice of legal basis for the AMW Directive', in Ratti, L., Brameshuber, E. and Pietrogiovanni, V. (eds), *The EU Directive on Adequate Minimum Wages – Context, Commentary and Trajectories*, Hart Publishing, 2024, p. 25.

[28] See judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223; 'the judgment in *Impact*'), paragraph 122. I recall that Article 151 TFEU provides that: 'the Union and the Member States … shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.'

[29] Judgment of 13 September 2007 (C-307/05, EU:C:2007:509, 'the judgment in *Del Cerro Alonso*', paragraph 41).

[30] Paragraphs 124 and 125.

[31] Judgment of 10 June 2010 (C-395/08 and C-396/08, EU:C:2010:329; 'the judgment in *Bruno and Others*, paragraph 37).

[32] Judgment of 19 June 2014 (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005; 'the judgment in *Specht and Others*', paragraph 33).

41. In the sections that follow, I will examine, in the light of that case-law, whether the AMW Directive breaches the exclusion relating to pay in Article 153(5) TFEU (Section (a)). I will then analyse whether that directive is compatible with the exclusion relating to the right of association contained in that provision (Section (b)).

(a) Whether the AMW Directive is compatible with the 'pay' exclusion in Article 153(5) TFEU

(1) Arguments of the parties

42. Two lines of arguments have been presented before the Court as regards the compatibility of the AMW Directive with the 'pay' exclusion in Article 153(5) TFEU. The Danish and Swedish Governments argue that that directive directly interferes with pay and is, as a result, incompatible with that provision, whereas the Parliament, the Council, the Commission and the other Member States having intervened in the present case are of the opposite view.

43. More specifically, the Danish and Swedish Governments consider that, even though the AMW Directive does not establish a general minimum wage across the European Union, nor explicitly determines the level of pay, a finding that the EU legislature was competent to adopt that directive would amount to depriving Article 153(5) TFEU of its substance. In their view, pay is to be established by the social partners at national level in the exercise of their contractual autonomy. That is why pay is expressly excluded from the sphere of EU competences.

44. Those governments further claim that the AMW Directive has as its express object the adequacy of minimum wages. Indeed, the purpose of the AMW Directive is to influence (increase) pay levels within the Union by imposing requirements on the Member States in a manner that directly interferes with their wage-setting mechanisms. As the Commission's Impact Assessment accompanying the proposal for the AMW directive[33] indicates, that instrument should result in an increase in minimum wages in approximately half of the Member States and engender an actual rise in terms of their level. In particular, Article 5 of that directive requires the Member States with statutory minimum wages to apply minimum criteria and rely on indicative reference values. That provision not only places legally binding obligations on those Member States, it also aims to have a direct, upward effect on the level of pay and seeks to introduce harmonisation through a framework which Member States must apply when they set minimum wages.

45. The Parliament and the Council, supported by the Commission and the other interveners, argue, for their part, that, as is clear from the case-law of the Court in, inter alia, the judgment in *Impact*, the appropriate test is one of direct interference and is not connected to whether the instrument in question has effects on the level of wages, otherwise, the competences of the European Union under Article 153(1)(b) TFEU would be unduly restricted. The German Government posits that the purpose of the 'pay' exclusion is not to exclude pay-related matters

[33] Commission Staff Working Document 'Impact Assessment accompanying the document Proposal for a Directive of the European Union and of the Council on adequate minimum wages in the European Union', COM(2020) 682 final, p. 71. In that document, the Commission indicated that it follows from Article 153(5) TFEU and the case-law of the Court as regards the interpretation of that provision (in, inter alia, the judgments in Del Cerro Alonso and in *Impact*) that whereas EU action shall *not* seek to harmonise the level of minimum wages across the European Union nor establish a uniform mechanism for setting minimum wages, it may consist of setting up a framework which does not 'interfere with Member States' and social partners' competence to determine the detailed modalities of their minimum wage-setting frameworks, and in particular the level of their minimum wages …' (see p. 72).

from the scope of EU action entirely. The Council adds that compliance with the 'pay' exclusion cannot solely be assessed with regard to the number of provisions relating to pay in a given instrument, but requires a substantive examination of the nature of those provisions.

46. Those institutions and interveners further note that the AMW Directive does not seek to introduce an EU-wide minimum wage or harmonise wage-setting mechanisms. They point out that the AMW Directive only establishes a procedural framework and does not directly interfere with the wage-setting mechanisms of the Member States. The Commission adds that several acts of EU law relating to working conditions have previously been adopted by the EU legislature. Those acts did not breach Article 153(5) TFEU, as, much like the AMW Directive, they related only indirectly to wages and did not harmonise the level of wages across the European Union.

47. The Parliament further submits that, given that one of the objectives of the Union's social policy is to improve living and working conditions, and that pay is an integral part of those conditions, it is not surprising that the AMW Directive may positively influence wage levels. The Council, supported by the Belgian and Portuguese Governments, also points out that the term 'adequacy' in Article 5 of the AMW Directive does not imply that minimum wages will be harmonised across the European Union. Indeed, that provision does *not* prevent Member States from deciding the level of statutory minimum wages, nor does it define a threshold below which the minimum wages are considered inadequate. Furthermore, the criteria established therein merely consist of qualitative elements to be used in the national wage-setting process. In that regard, the German Government adds that Member States remain free to establish, and make use of, other criteria and to rely on their own national practices and, thus, have sufficient leeway. The French Government notes that the procedure set out in Article 5 of the AMW Directive relies on broadly and imprecisely worded criteria which are part of a non-exhaustive list that Member States may supplement.

(2) Assessment

48. I gather from the arguments outlined above, first, that all the parties and interveners in the present case, except the Kingdom of Denmark and the Kingdom of Sweden, understand the 'pay' exclusion in Article 153(5) TFEU as being limited, essentially, to measures that harmonise the *level of wages*,[34] not those which concern the procedure for setting wages. Second, it seems to me that those parties and interveners perceive the judicial test of direct interference developed by the Court in relation to that exclusion as being, essentially, a test relating to the degree or intensity of the interference. In essence, the European Union is competent to provide *general and loosely worded requirements* as regards the organisation of the Member States' wage-setting frameworks and may even set up a framework to ensure workers' access to an adequate minimum wage, but it must stop short of interfering with the detailed modalities of the national frameworks, so as to preserve national specificities.[35] Third, those parties and interveners appear to me to understand the purpose of the 'pay' exclusion in Article 153(5) TFEU as being to safeguard the social partners' autonomy in concluding collective agreements. On that basis, they consider that, provided the AMW Directive does not intrude on that autonomy, it is compatible with that exclusion.

[34] See also the proposal for the AMW directive, in which the Commission stated that since the proposed directive 'does not contain measures directly affecting the level of pay, it fully respects the limits imposed to Union action by Article 153(5) TFEU'.

[35] See, also, inter alia, the 'Opinion of the European Committee of the Regions – Adequate minimum wages in the European Union' (OJ 2021 C 175, p. 89), pursuant to which 'the legal basis of Article 153 TFEU … does not allow for a direct role in setting remuneration within the European Union'; however, it would allow to provide 'for objectives' and 'a process that fully recognises existing national minimum wage legislation and the role of the social partners'.

49. The AMW Directive contains various statements illustrating that, when adopting that directive, the EU legislature also interpreted the 'pay' exclusion as described in point 48 above. Indeed, recital 19 provides that, in accordance with Article 153(5) TFEU, the AMW Directive 'neither aims to harmonise the *level* of minimum wages across the Union nor does it aim to establish a uniform mechanism for setting minimum wages'. It also explains that that instrument fully respects 'national competences and the social partners' right to conclude agreements' and 'does not establish the *level* of pay …'.[36] Moreover, Article 1(2) of the AMW Directive states that that directive is 'without prejudice to the *full respect for the autonomy of the social partners*',[37] whilst Article 1(3) thereof specifically refers to Article 153(5) TFEU and states that, in the light of that provision, the AMW Directive 'shall be without prejudice to the competence of Member States in setting the *level* of minimum wages'.[38] That directive also contains various references to the specificities of national practices.[39]

50. In my view, it is obvious from the wording and number of those provisions that the EU legislature did not ignore that, when adopting the AMW Directive, it was walking on thin ice in respect of the 'pay' exclusion contained in Article 153(5) TFEU (or, as some authors have said, walking on a 'tightrope').[40] In the next section, I will explain why the EU legislature's interpretation of that exclusion – an interpretation which is, as I have explained, shared by all the parties and interveners in the present case, except for the Kingdom of Denmark and the Kingdom of Sweden – is based on what I consider to be three fallacies. I will also outline how that very exclusion ought, in my view, to be understood in the light of the Court's case-law.

(i) The scope of the 'pay' exclusion in Article 153(5) TFEU

– The first fallacy: the 'pay' exclusion is limited to measures that harmonise the level of wages

51. Article 153(5) TFEU uses the broad term of 'pay'. All previous versions of Article 153(5) TFEU, namely, Article 137(6) TEC and Article 2(6) of the Social Chapter, were, to my knowledge, worded in the same way: they referred to 'pay', not to the 'level of pay'. The use of the term 'pay' suggests that other aspects of the Member States' wage-setting systems, aside from the level of pay, come within the scope of the exclusion contained in Article 153(5) TFEU. Consequently, I consider that the drafters of the EU Treaties have sought to exclude from the scope of EU action measures that include, but are *not* limited to, the harmonisation of the level of wages.

52. In support of the opposite view, some of the parties to the present case (such as the Portuguese Government) recall that, in her Opinion in *Impact*,[41] Advocate General Kokott stated that '*only the level of pay* …is removed from the [EU] legislature's competence by [that provision]'.[42] In that regard, I note that the judgment in that case contains statements that could appear to suggest that the Court also places the emphasis on the level of wages (as opposed to pay, in general). Indeed, the Court mentioned that the authors of the Treaties had considered it

36 Emphasis added.

37 Ibid..

38 Ibid..

39 See, for example, Article 4(1) and Article 5(1) of the AMW Directive.

40 See Garben, S., footnote 27, op. cit., p. 25.

41 Opinion of Advocate General Kokott (C-268/06, EU:C:2008:2, points 173 to 176).

42 Point 176, emphasis added.

appropriate 'to exclude determination of the *level of wages* from harmonisation', since 'fixing *the level of pay*' falls within the contractual freedom of the social partners at national level and within the competence of the Member States. [43]

53. However, it is clear to me that, in the judgment in *Impact*, the Court did not go as far as to indicate that the 'pay' exclusion applied to the level of wages (that is to say, their precise figure or amount) exclusively. In fact, it stated that that 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'. [44] In my view, the terms 'such as' and 'and/or the level of pay' 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.

54. In the light of that judgment, I do not see any reason for inserting into Article 153(5) TFEU a limitation (namely, that the 'pay' exclusion actually covers only the level of pay) which is not included *expressis verbis* in that provision. In my view, the term 'pay' is intended to cover all aspects of the Member States' wage-setting systems (including the modalities or procedures for fixing the level of pay), and not merely the level of pay.

55. In that regard, I recall that, while exclusions generally need to be interpreted strictly, they must not be interpreted so strictly as to be deprived of their effectiveness. As I have already stated in point 39above, the Court has indicated that the matters reserved by paragraph 5 of Article 153 TFEU, including pay, 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. [45] However, it does not follow from that statement, in my view, that 'pay' must be limited to the 'level of pay'. If that were the case, the EU legislature could harmonise all other aspects of the Member States' wage-setting systems, provided it stopped short of harmonising the amount of wages, by prescribing a specific formula or amount. The 'pay' exclusion would, as the Danish and Swedish Governments argue, be deprived of its effectiveness, as the EU legislature could, for example, adopt directives harmonising the frequency with which pay negotiations shall be carried out by social partners or prescribing how such negotiations shall be conducted – in contradiction with the stated purpose of that exclusion, which, according to the Court and as I have recalled in point 52 above, is to preserve the contractual autonomy of social partners. [46]

56. I wish to make two further remarks. First, the Court has clarified (and all the parties and interveners in the present case agree) that pay is an integral part of working conditions. [47] It is thus ineluctable that the 'pay' exclusion, however broadly or narrowly interpreted, affects the scope of Article 153(1)(b) TFEU (which concerns the EU legislature's competence as regards working conditions), since there is a clear overlap between that provision and Article 153(5) TFEU. Such an overlap is bound to exist even if the scope of that exclusion is reduced to its bare minimum.

[43] See judgment in Impact, paragraph 123 (emphasis added).

[44] Ibid., paragraph 124.

[45] See point 39 above.

[46] See, also, judgments in *Del Cerro Alonso* (paragraph 40), in Impact (paragraph 123) and in Bruno and Others (paragraph 36). I will return to this issue in points 67 to 69 below.

[47] See, in that regard, judgment of 11 November 2004, *Delahaye* (C-425/02, EU:C:2004:706, paragraph 33). See, also, judgment of 22 December 2010, *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 58).

57. Second, the finding of the Court that the exclusions listed in Article 153(5) TFEU, including that relating to pay, must be understood strictly was formulated in a specific context. The judgments in *Del Cerro Alonso*, in Impact, in *Bruno and Others* and in Specht and Others all concerned instruments that, unlike the AMW Directive, had as their object to regulate a matter other than pay. More specifically, the judgments in *Del Cerro Alonso* and in *Impact* concerned clause 4 of the framework agreement on fixed-term work,[48] which seeks to ensure the application of the principle of non-discrimination to fixed-term workers, rather than to regulate 'pay'. Likewise, the judgment in *Bruno and Others* concerned the interpretation of Council Directive 97/81/EC on part-time workers,[49] whose purpose is, inter alia, to provide for the removal of discrimination against part-time workers (and, again, not to regulate 'pay'). Finally, the judgment in *Specht and Others* concerned Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.[50] In that judgment, the Court clarified that that pay conditions for civil servants fell within the scope of that directive, since the object of that instrument was 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment', rather than to regulate 'pay' per se.

58. It follows from that case-law that, when stating that the 'pay' exclusion listed in Article 153(5) TFEU must be interpreted strictly, the Court was merely seeking to ensure that that provision did not make the adoption of instruments which do not have as their object to regulate pay impossible merely because they had repercussions on pay. Understood in its proper context, that statement was thus not designed to limit the scope of the matters that constitute pay (by limiting it to the level of pay), but to ensure that instruments that only indirectly interfere with those matters can be adopted.

59. The above considerations lead me to conclude 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). Understanding the 'pay' exclusion as being limited to measures that harmonise the level of wages is, therefore, a fallacy.

– The second fallacy: the EU legislature may set general and loosely worded requirements as regards the Member States' wage-setting frameworks

60. As I have explained in point 40 above, the Court has already clarified that the 'pay' exclusion in Article 153(5) TFEU does not extend to any question involving any sort of link with pay. Moreover, it follows from the previous section that the test of direct interference was developed in a context where the Court was seeking to differentiate instruments whose object is to regulate/harmonise pay from those whose object is to regulate a matter other than pay (for example, non-discrimination as is the case of the directives at the heart of the judgments in Bruno and Others and in *Specht and Others*), while only indirectly interfering with pay (by having mere repercussions on the level of wages).

[48] Concluded on 18 March 1999 and set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

[49] Directive of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9).

[50] Directive of 27 November 2000 (OJ 2000 L 303, p. 16).

61. In the light of those considerations, it is clear to me that certain other directives which employ the term 'pay' – such as Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation,[51] Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,[52] the Temporary Agency Work Directive,[53] the Posted Workers Directive,[54] the Working Time Directive[55] or even Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer[56] – also do not directly interfere with pay, within the meaning of Article 153(5) TFEU. Indeed, those directives fall into the category of instruments that, like the directives giving rise to the judgments in Bruno and Others and in *Specht and* Others, merely indirectly interfere with pay. They contain provisions that, in practice, affect or have repercussions on the level of pay. However, their object does not consist in regulating pay, but merely in entitling certain categories of workers to the same conditions of employment as others[57] or in establishing whether an employee is entitled to his or her pay (regardless of the level of that pay and how it was set) in certain specific contexts, such as when he or she is on annual leave or in the event that his or her employer becomes insolvent.

62. By contrast, an instrument directly interferes with pay and is, thus, incompatible with the 'pay' exclusion in Article 153(5) TFEU if its object is to regulate pay, no matter how strictly or flexibly.

63. In that regard, it is important to stress that, precisely because the test of direct interference was formulated by the Court to enable the adoption of certain instruments with an object other than regulating pay, that test was not established with the intention of allowing the adoption of a directive whose object is to regulate an aspect of the Member States' wage-setting systems (for example, the level of minimum salaries or how those minimum salaries are to be set) on the mere ground that the requirements which it sets in that respect are general and loosely worded. Nor does it seek to enable the adoption of such a directive on the ground that it aims for partial

51 Directive of the European Parliament and of the Council of 5 July 2006 (OJ 2006 L 204, p. 23). See, in particular, subparagraph (b) of the second paragraph of Article 1 of that directive, which states that 'it contains provisions to implement the principle of equal treatment' in relation to, inter alia, 'working conditions, including pay'.

52 Directive of 29 June 2000 (OJ 2000 L 180, p. 22). See Article 3(1)(c) thereof, which provides that it 'shall apply to all persons, as regards both the public and private sectors, including public bodies' in relation to, inter alia, 'employment and working conditions, including dismissals and pay'.

53 That directive, much like Council Directive 97/81/EC on part-time workers, seeks to ensure the respect of the principle of equal treatment, including as regards wages, as regards a particular category of workers (here, temporary agents).

54 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1). See, in that regard, judgment of 8 December 2020, *Hungary* v *Parliament and Council* (C-620/18, EU:C:2020:1001, paragraphs 71 to 85), concerning Hungary's request that the Court annul Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending the Posted Workers Directive, on the ground that it infringed Article 153(5) TFEU. The Court rejected that plea, finding that the amending directive did no more than coordinate the legislation of the Member States in the event of posting of workers to ensure that those workers enjoy some of, or almost all of, the terms and conditions of employment prescribed by the host Member State, including as regards their remuneration.

55 See, in particular, Article 7 of the General Working Time Directive, entitled 'Annual leave', whose paragraph 1 provides: 'Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.'

56 Directive of the European Parliament and of the Council of 22 October 2008 (OJ 2008 L 283, p. 36). That directive seeks to ensure the payment of employees' outstanding claims (including wages) in the event of their employer's insolvency, but does not have as its object to regulate 'wages'.

57 For an additional example in that regard, see Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (OJ 2019 L 188, p. 79), whose recital 31 provides that 'Member States should set the payment or allowance for the minimum non-transferable period of parental leave … at an adequate level'. However, the term 'adequate' only appears in the preamble of that directive and not in any of its provisions. Furthermore, Article 1 thereof makes clear that the purpose of that instrument is not to determine the level of that payment or how it shall be fixed, but to lay down 'minimum requirements designed to achieve equality between men and women with regard to labour market opportunities and treatment at work, by facilitating the reconciliation of work and family life' for parents or carers.

harmonisation only.[58] The opposite conclusion would amount to replacing the test of direct interference with a test relating to the extent of the interference, not to its direct or indirect nature.

64. In the light of those elements, it is clear to me that interpreting the test of direct interference developed by the Court in relation to the 'pay' exclusion in Article 153(5) TFEU as meaning that general and loosely worded requirements may be set by the EU legislature or that partial harmonisation may be operated as regards pay is a fallacy. Interference may be light or limited and, yet, it will still be direct if the object of the instrument is to regulate pay.

65. I wish to make one further observation. In my view, the test of direct interference also does not allow the EU legislature to set *minimum requirements* in the area of pay, leaving Member States the option of introducing more favourable provisions. In that regard, one must bear in mind, first, that there is no EU competence whatsoever for the matters covered by Article 153(5) TFEU. Second, as I have already explained, it is clear that, by adopting Article 153(5) TFEU, the drafters of the Treaties have essentially sought to carve out an exclusion ('pay') from a field ('working conditions'), covered in Article 153(1)(b) TFEU. Consequently, the tests applied by the Court to determine whether the EU legislature is exceeding its competences cannot be the same in both cases, otherwise the 'pay' exclusion would serve no purpose.

66. It follows that, whereas, for working conditions other than pay, the test is one of minimum requirements (meaning that, although EU competence exists in this field, it only allows the setting of minimum requirements, that is to say, a floor of obligations), in the area of pay, no form of harmonisation is allowed, as there is no EU competence in this area. If the EU legislature were to provide for minimum requirements as regards pay, it would already be exceeding its competences and be encroaching upon those of the Member States. Furthermore, as I stated above, the 'pay' exclusion in Article 153(5) TFEU would be deprived of its substance, as pay would be treated just as any other working condition coming within the scope of Article 153(1)(b) TFEU.

– The third fallacy: if a measure does not encroach upon the contractual autonomy of social partners, it complies with the 'pay' exclusion

67. As I have already explained, the Court has stated that the purpose of the 'pay' exclusion is to protect the contractual freedom of social partners.[59] That purpose is not expressly mentioned in Article 153(5) TFEU and the Court has not indicated which source it has based its statement on. However, I consider that that purpose can indeed be inferred, first, from the fact that the other exclusions contained in that provision (namely, the right of association, the right to strike or the right to impose lock-outs) all relate to the prerogatives of social partners (more specifically, trade unions) and, second, from the reference made in Article 152 TFEU to 'the role of the social partners' which the European Union is to recognise and promote.

68. That said, I cannot rule out that the 'pay' exclusion also serves other purposes. In spite of my best efforts, I have not been able to find any statement in the *travaux préparatoires* of the Treaties available to me confirming that there was a clear and unique reason or motive (namely, to protect the contractual autonomy of social partners) behind the drafters of the EU Treaties' decision to exclude 'pay' from the scope of EU competences. In fact, it is certainly the case that, by

[58] As would be the case, for example, of a directive concerning only the lowest range of salaries, rather than all salaries.

[59] See point 52 above.

preventing the harmonisation of the wage levels applicable in each of the Member States, the 'pay' exclusion contributes to maintaining competition between undertakings operating in the internal market, as Advocate General Kokott stated in her Opinion in *Impact*.[60] Some authors have also pointed out that there is no competence for pay because wage policy is, simply, a sensitive area, which represents an important tool for domestic economic policy and for the functioning of the national labour market, and because the manner in which collective bargaining systems and industrial relations are traditionally organised differs across Member States.[61]

69. Against that background, one thing is, however, clear: an EU instrument or measure that is compatible with the 'pay' exclusion in Article 153(5) TFEU contributes to safeguarding the contractual autonomy of the social partners; but the fact that an EU instrument or measure does not encroach upon the contractual autonomy of social partners does not necessarily mean that it complies with that exclusion. Such a reverse reasoning, endorsed, in particular, by the German Government in the present case, simply cannot be accepted. That is all the more so, in my view, because the importance of preserving 'the diverse forms of national practices, in particular in the field of contractual relations' and of '[maintaining] the competitiveness of the Union economy' is *not* specific to 'pay' but as Article 151 TFEU makes clear, is also relevant – although perhaps to a lesser degree – to all social policy issues where the EU legislature is competent to complement the activities of the Member States.

70. Accordingly, replacing the test of direct interference with one aiming to establish whether or not the instrument sufficiently safeguards the contractual autonomy of social partners is a fallacy. Not only does it amount to confusing the test itself with its purpose, it also focuses, in my view, on only part of the purpose served by that exclusion.

(ii) The AMW Directive is incompatible with the 'pay' exclusion

71. It results from the previous sections that many of the provisions and recitals of the AMW Directive relied upon by the parties and interveners to the present case in support of the view that that instrument complies with the 'pay' exclusion in Article 153(5) TFEU are, in fact, not relevant to that question. Such is the case, in particular, of Article 1(2) to (4) of the AMW Directive, which states that the AMW Directive does not oblige Member States to introduce statutory minimum wages (Article 1(4)), leaves the definition of 'adequacy' as well as the setting of the exact amounts or figures of minimum wages to the Member States (recitals 19 and 28 and Article 1(3)) and protects national specificities and the prerogatives of Member States in setting the *level* of 'wages' (Article 1(2) and (3), which I have mentioned in point 49 above). In my view, those provisions cannot be relied upon to argue that the AMW Directive is compatible with the 'pay' exclusion in Article 153(5) TFEU. They could only serve to determine the degree and form of harmonisation established by that instrument – an issue which would only need clarification if it were not in doubt that the EU legislature was competent to adopt the AMW Directive. However, they are not directly relevant to the preliminary question of whether that directive breaches the 'pay' exclusion in Article 153(5) TFEU and, thus, the principle of conferral laid down in Article 5(2) TEU. Indeed, as I have explained, what matters in that regard is not to what extent that directive interferes with national specificities, but whether it has as its object to regulate pay, since, if that is the case, then that instrument directly interferes with the exclusion included to that effect in Article 153(5) TFEU.

[60] Opinion of Advocate General Kokott (C-268/06, EU:C:2008:2, point 173).

[61] See Menegatti, E. 'Much ado about little: the Commission proposal for a Directive on adequate wages', *Italian Labour Law e-journal* (1) Vol. 14, 2021, p. 29.

72. Furthermore, as I have explained in points 67 to 70 above, the fact that an EU instrument or measure does not encroach upon the contractual autonomy of social partners does not necessarily mean that it complies with the 'pay' exclusion. Accordingly, the mere fact that the AMW Directive seeks, on the whole, to encourage or promote collective bargaining, as is shown by provisions such as recitals 13, 19 and 24, as well as Article 1(2) and (3) and Article 7 thereof, which requires Member States to take the necessary measures to involve social partners in the setting and updating of statutory minimum wages, [62] does not suffice to make that instrument compatible with Article 153(5) TFEU.

73. In that regard, I wish to make one additional preliminary remark as regards, specifically, Article 1(3) of the AMW Directive, which provides that 'in accordance with Article 153(5) TFEU, this Directive shall be without prejudice to the competence of Member States in setting the level of minimum wages, as well as to the choice of the Member States to set statutory minimum wages, to promote access to minimum wage protection provided for in collective agreements, or both.' In my view, if other provisions of the AMW Directive make clear that the object of that directive is to regulate pay, then a statement of that kind cannot suffice to change that object. The same is true, I believe, for recital 19 of the AMW Directive, which replicates much of the wording of that article. Indeed, the test of direct interference requires, as the Council has stated, that the substance of the instrument in question be analysed as a whole, without the Court being able to limit its assessment in that regard to provisions – such as, *in casu*, Article 1(3) of the AMW Directive – that expressly mention Article 153(5) TFEU.

74. Turning now to defining the object of the AMW Directive, I shall begin by stating the obvious. Unlike other directives such as the ones having led to the judgments in *Bruno and Others* and in *Specht and Others*, namely Council Directive 97/81/EC on part-time workers and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, whose titles do not refer to 'wages' or 'pay', or other directives which I have mentioned in point 61 above, the directive at issue in the present case is 'on adequate minimum wages in the European Union'. It contains, in its very title, the word 'wages'. That constitutes, in my view, a clear and even obvious sign that the object of the AMW Directive is to regulate 'pay'.

75. That first impression is then confirmed by Article 1 thereof, which is entitled 'Subject matter' and whose paragraph 1(a) and (b) states, in unambiguous terms, that, 'with a view to improving … in particular the adequacy of minimum wages for workers in order to contribute to upward social convergence and reduce wage inequality', that directive establishes a framework for '[the] adequacy of *statutory minimum wages*' and the promotion of 'collective bargaining on *wage-setting*'. [63] In my view, and since I have clarified in point 54 above that 'pay', within the meaning of Article 153(5) TFEU, is not limited to the level of pay, but includes also the modalities and procedures for setting that level, that provision leaves little room for doubt as to the fact that 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. Furthermore, it shows that the EU legislature never envisaged the EU-wide increase of the level of minimum wages (convergence) as an incidental or indirect consequence of the adoption of that directive; but rather as the end goal or overarching aim of that instrument. I add that Article 3 of the AMW

[62] One could also mention Article 4(2) of the AMW Directive, which provides that 'the action plan shall set out a clear timeline and concrete measures to progressively increase the rate of collective bargaining coverage, in full respect for the autonomy of the social partners'.

[63] Emphasis added.

Directive, which provides a list of relevant definitions, begins by defining the terms 'minimum wage' and 'statutory minimum wage' – thereby demonstrating that those concepts are central to that instrument.

76. In the light of those provisions, it is already clear to me that the difference between the AMW Directive and the directives giving rise to the judgments in *Bruno and Others* and in *Specht and Others* or the other directives which I have mentioned in point 61 above lies not only in their title, but also in their object itself. As I have explained, all those directives contain provisions that affect the level of pay. However, unlike the AMW Directive, their object does not consist in regulating how pay should be set (*in casu*, through collective bargaining) or in increasing the level of pay (by establishing a 'framework for…[the] adequacy of statutory minimum wages', with a view to contributing to 'upward social convergence and [reducing] wage inequality').

77. Having made those remarks, I shall now explain why Article 5 of that instrument – whose content I have briefly described in section III. B. above and which is the most important provision of the AMW Directive – confirms, in my view, that the object of that directive is to regulate pay, thereby infringing the exclusion contained to that effect in Article 153(5) TFEU. I will then analyse other provisions of that instrument.

– *Article 5 of the AMW Directive*

78. Article 5(1) of the AMW Directive provides that Member States with statutory minimum wages must define in a clear way the criteria that guide the setting and updating of those wages. They may do so in accordance with their national practices and are free to decide on the relative weight of those criteria. However, they must also ensure that the criteria that they provide contribute to the adequacy of statutory minimum wages, with the aim of 'achieving a decent standard of living, reducing in-work poverty, as well as promoting social cohesion and upward social convergence, and reducing the gender pay gap'. Moreover, Article 5(2) of that directive provides a list of four minimum criteria that Member States must take into account as part of the [p]rocedure for setting statutory minimum wages.[64] It is true that, in principle, that obligation could be regarded as being fulfilled even if those criteria were only given low weighting by the Member States. Nevertheless, such an approach would completely undermine the objectives listed in Article 5(1) of that directive. Furthermore, the clear enumeration of four minimum criteria in Article 5(2) of the AMW Directive indicates that those criteria actually ought to be given particular importance.[65]

79. In the light of those elements, it is clear to me 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.

80. In support of the view that the AMW Directive is valid, several of the parties to the present case put forward, first, the fact that Article 5(1) and (2) of that directive stops short of creating an obligation for Member States to put in place adequate minimum salaries and, second, that the

[64] Those criteria are (a) the purchasing power of statutory minimum wages, taking into account the cost of living; (b) the general level of wages and their distribution; (c) the growth rate of wages; and (d) long-term national productivity levels and developments.

[65] See, also, in that regard recital 26 of the AMW Directive.

concept of adequacy used in that provision has no autonomous meaning in EU law. [66] I agree with those parties that no obligation to put in place adequate minimum salaries is contained *expressis verbis* in the first two paragraphs of Article 5 of the AMW Directive. However, Member States are expressly subject, under those provisions, to the obligation to ensure that the criteria that they rely on for the setting and updating of minimum wages contribute to their adequacy. In my view, the difference between those two obligations is, in practice, inexistent.

81. Moreover, I find the argument that the concept of 'adequacy' in Article 5(1) of the AMW Directive has no autonomous meaning in EU law and never could have one rather unconvincing. I recall that recital 3 of that directive refers to Article 31(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), which provides for the right of every worker to 'working conditions which respect his or her health, safety and dignity'. Recital 28 of the AMW Directive further indicates that, although the 'adequacy of statutory minimum wages is determined and assessed by each Member State in view of its national socioeconomic conditions', 'minimum wages are considered to be adequate if they are fair in relation to the wage distribution in the relevant Member State and if they provide a decent standard of living for workers …'.

82. In the light of those recitals, I agree with the observation put forward by the Danish Government at the hearing that Article 5(1) and (2) of the AMW Directive could be regarded as seeking to give concrete expression to the right to a decent minimum wage, which some commentators regard as deriving from Article 31(1) of the Charter on the ground that the reference to 'dignity' in that provision forms the basis for a right to decent pay, ensuring a satisfactory standard of living for workers and their families. [67] Overall, Article 5(1) and (2) of the AMW Directive could, thus, be interpreted as requiring Member States to ensure that the criteria which they rely on to determine the level of pay are compatible with Article 31(1) of the Charter. That interpretation would carry two consequences: first, the concept of 'adequacy' in Article 5(1) of the AMW Directive would have to be understood by Member States as aligned with that of 'dignity' in Article 31(1) of the Charter (and, thus, as an autonomous concept of EU law). Second, if Member States were to breach their obligation to ensure that the national criteria which they apply for the setting and updating of statutory minimum wages contribute to the 'adequacy' of such wages, workers would be able to invoke their right to an effective remedy under Article 47(1) of the Charter. That confirms that Article 5(1) and (2) of the AMW Directive could have important implications for the wage-setting systems of Member States.

83. I further observe that several (if not all) of the parties to the present case which argue that the AMW Directive is valid, state that Article 5 of that instrument only imposes *procedural* obligations on the Member States, since it is concerned, as its title indicates, with the '*Procedure* for setting adequate statutory minimum wages'. [68] In particular, the Portuguese Government claims that the AMW Directive only details the means to achieving a certain result in terms of the level of minimum salaries, but does not harmonise that level in any way. I do not agree.

[66] See Sagan, A. and Schmidt, A., 'The procedure for setting adequate statutory minimum wages (Article 5)', in Ratti, L., Brameshuber, E. and Pietrogiovanni, V. (eds.), *The EU Directive on Adequate Minimum Wages, Context, Commentary and Trajectories*, Hart Publishing, 2024, p. 202.

[67] See, also, Blanke, T., 'Fair and just working conditions (Article 31)', *European Labour Law and the EU Charter of Fundamental Rights*, Bercusson, B (ed.), Nomos, Baden Baden, 2002), p. 537; and Bogg, A., 'Article 31 – Fair and just working conditions', in Peers, S., Hervey, T., Kenner, J. and Ward, A. (eds), *The EU Charter of Fundamental Rights – A commentary*, Hart Publishing, London, 2014, pp. 855 and 856. Whether Article 31(1) of the Charter extends to working conditions such as 'pay' has been debated in the doctrine, since it appears that that provision was initially included with a view to ensuring the health and safety of workers, as protected under Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

[68] Emphasis added.

84. Indeed, I do not see how, for example, the obligation contained in Article 5(2)(c) of that directive that the procedure for the setting and updating of statutory minimum wages is to be guided by the growth rate of wages could mean anything other than that the *level* (amount) of minimum wages must be based on and reflect that growth rate. What is presented as a procedural obligation is, in fact, a substantive obligation in disguise. In those conditions, it seems to me that Article 5(1) and (2) of the AMW Directive actually has as its very object to interfere with the *level* of minimum wages, even though 'it does not set figures in euros and cents'.[69] That interpretation is confirmed by recital 18 of the AMW Directive, which presents that instrument as a directive laying down procedural obligations, but also states that it 'establishes minimum requirements at Union level … for the adequacy of statutory minimum wages …'. In my view, that indicates that the obligations contained in Article 5 of the AMW Directive as regards the 'adequacy of statutory minimum wages' are not of a procedural, but substantive, nature.

85. Leaving Article 5(1) and (2) aside, I note that Article 5(3) of the AMW Directive states that Member States cannot rely on an indexation mechanism if that leads to a decrease of the statutory minimum wage. It is clear to me that that obligation is also more than merely procedural. In fact, both the Commission and the Parliament and Council recognised, at the hearing, that the Commission could initiate infringement proceedings under that provision if a Member State introduced an indexation mechanism that actually led to a decrease of its statutory minimum wage.

86. At any rate, the mere fact that an obligation is of a procedural nature does not mean, in my view, that it is necessarily compatible with the 'pay' exclusion in Article 153(5) TFEU. Indeed, as I have explained in points 51 to 59 above, that exclusion covers not only the level of pay, but also how wages are to be determined and the method (or procedure) relied on by Member States in that regard. Thus, even a merely procedural obligation relating to 'pay' already goes too far and is incompatible with that exclusion.

87. For that reason, I consider that provisions such as Article 5(4), (5) and (6) of that directive, which require, inter alia, Member States to use indicative reference values 'to guide their assessment of adequacy of statutory minimum wages' (that is to say, when determining the level of such wages) also directly interfere with pay, as they have as their object to regulate how wages are to be determined and the method relied on by Member States in that regard.

– *Other provisions of the AMW Directive*

88. None of the other provisions of the AMW Directive contradicts the finding that that directive directly interferes with the 'pay' exclusion in Article 153(5) TFEU. In particular, Article 2 of the AMW Directive merely provides that that directive applies to 'workers'. Article 6 of that directive aims to ensure that the setting of lower rates for specific groups of workers (variations) and the application of reductions based on the value of equipment or other costs (deductions) by Member States that have statutory minimum wages comply with the principles of non-discrimination and proportionality. Article 7 of the AMW Directive requires Member States to take the necessary measures to involve the social partners in the setting and updating of statutory minimum wages and Article 8 of that instrument concerns the '[e]ffective access of

[69] See Sjödin, E., 'European minimum wage: A Swedish perspective on EU's competence in social policy in the wake of the proposed directive on adequate minimum wages in the EU', *European Labour Law Journal*, Vol. 13(2), 2022, p. 283.

workers to statutory minimum wages'. All those provisions (save for Article 2) refer to 'minimum wages' and nothing in their wording contradicts the finding that the AMW Directive has as its object to regulate pay.[70]

89. Furthermore, two provisions of that instrument, namely Article 4 and 12 thereof, have, in my view, as their object to harmonise the method for wage determination relied upon by the Member States and, thus, to regulate pay.

90. First, Article 4 is entitled 'Promotion of collective bargaining on *wage-setting*'.[71] Paragraph 1 thereof requires Member States to 'promote the building and strengthening of the capacity of the social partners to engage in collective bargaining on *wage-setting*', to 'encourage constructive, meaningful and informed negotiations on *wages* between the social partners' and to take measures both to safeguard 'the exercise of the right to collective bargaining on *wage-setting*'[72] and to protect trade unions and employers' organisations participating or wishing to participate in collective bargaining from interference in their establishment, functioning or administration (Article 4(1)(a) to (d)).

91. It is true that that paragraph does not seek to regulate the contents of collective agreements on wage-setting per se and merely aims to *promote* such agreements through rather vague prescriptions, which some consider to be respectful of the specificities of national systems.[73] However, I agree with the Danish Government, first, that Article 4(1) nevertheless imposes on the Member States a number of positive obligations designed to promote collective bargaining on wage-setting and, second, that in so doing, it clearly restricts the Member States' choice as to the method of wage determination that they may resort to. Furthermore, I recall that even if a provision only operates 'limited' harmonisation (for example, because much room is left for national specificities or because it merely provides for a framework, in rather loose terms), it still operates harmonisation – something that the EU legislature is not competent to do for the matters covered by Article 153(5) TFEU.

92. A similar conclusion applies, in my view, in so far as Article 4(2) of the AMW Directive is concerned. That provision only applies, as I have already explained in point 18 above, to Member States in which the collective bargaining coverage rate is less than a threshold of 80%. Those Member States are required to 'provide for a framework of enabling conditions for collective bargaining' and to 'establish an action plan to promote collective bargaining', which they are to regularly review and update. The Danish Government itself recognises that the obligations flowing from that provision are neither very 'concrete' nor very 'constraining', since Member States are not required to reach a specific collective bargaining coverage rate, but merely, if their collective bargaining coverage rate is below 80%, to adopt an action plan.[74] Yet, the fact that that provision remains rather vague about, for example, how collective bargaining coverage is to be measured by the Member States[75] cannot be taken as an indication, in my view, that that

[70] The same conclusion can be reached as regards the horizontal provisions (in Chapter III) and final provisions (in Chapter IV) of the AMW Directive.

[71] Emphasis added.

[72] Ibid..

[73] See Menegatti, E. 'Much ado about little: the Commission proposal for a Directive on adequate wages', *Italian Labour Law e-Journal*, Vol. 14, No 1, 2021, p. 25.

[74] According to the OECD, only 8 out of 27 Member States currently meet the threshold of 80% laid down in Article 4(2) of the AMW Directive (both Denmark and Sweden appear to be above that threshold) (see https://www.oecd.org/en/data/datasets/oecdaias-ictwss-database.html).

[75] Indeed, there does not appear to be either a generally recognised method of measuring collective bargaining coverage or a generally accepted database of respective coverage in various Member States.

provision is compatible with Article 153(5) TFEU. Vague obligations imposed on the Member States as to the organisation of their wage-setting systems are still obligations. They still amount to regulating pay, even if they do so in vague or uncertain terms.

93. Furthermore, I have much sympathy for the Danish Government's argument that, to the extent that Article 4(2) of the AMW Directive requires Member States whose collective bargaining rate is below 80% to put in place a framework to promote collective bargaining on wage-setting, it does impose some form of State intervention into how wages are to be organised. It is true that Article 17(3) of that directive provides that the implementation of Article 4(2), including the establishment of the action plan to increase collective bargaining coverage, can be entrusted to the social partners, if they jointly request to do so. However, the Danish Government correctly points out that the combined effect of those two provisions is that the obligation relating to that action plan may be transferred from the State to the social partners. Introducing such an obligation at the level of the social partners could actually interfere with their autonomy as regards 'wage-setting' – in contradiction with (part of) the purpose of the 'pay' exclusion in Article 153(5) TFEU.[76]

94. Second, Article 12(1) of the AMW Directive entitles individual workers whose rights relating to statutory minimum wages or minimum wage protection have been infringed, to have access to 'effective, timely and impartial dispute resolution and a right to redress'. That provision seems rather '*bancale*' to me. Indeed, it introduces 'a right to redress' in situations where rights relating to statutory minimum wages or relating to minimum wage protection are infringed, but only 'where such rights are provided for in national law or collective agreements'. That sits uneasily, in my view, with the rationale underpinning Article 47 of the Charter, which is that a right to an effective remedy is, in principle, only recognised where a right or freedom guaranteed under EU law (and not merely under national law or in collective agreements) has been breached. In my view, Article 12 of the AMW Directive could, therefore, be understood as providing additional support in favour of the conclusion which I have drawn in relation to Article 5 of the AMW Directive, which is that that provision could be regarded as seeking to give concrete expression to the right to a decent minimum wage, which may be deriving from Article 31(1) of the Charter. At any rate, Article 12 of the AMW Directive is problematic for Member States such as Denmark and Sweden, where stipulations in collective agreements are traditionally and systematically enforced by the social partners (not by individual employees). Indeed, that provision makes clear that the EU legislature privileges individual action and by doing so, in my view, interferes with the Member States' organisation of their wage-setting systems.

(iii) Conclusion on the compatibility of the AMW Directive with the 'pay' exclusion

95. In the light of the above considerations, I am of the view that, as is shown, in particular, by its Articles 1, 3, 4, 5 and 12, the AMW Directive has as its object to regulate 'pay'. Consequently, it directly interferes with the 'pay' exclusion in Article 153(5) TFEU. It follows that the EU legislature was not competent to adopt that instrument and, thus, acted in breach of the principle of conferral laid down in Article 5(2) TEU.

96. In my view, those considerations should lead the Court to conclude that the AMW Directive must be annulled in full, without it being necessary for it to analyse the second part of the first plea (namely, whether the AMW Directive is compatible with the 'right of association' exclusion laid down in Article 153(5) TFEU), nor the second plea in law or the alternative head of claim put

[76] See points 67 to 69 above.

forward by the Kingdom of Denmark. However, were the Court to disagree with the solution which I propose it adopt, I shall nevertheless proceed, in the following sections, to examining the arguments presented by the parties and interveners on those other issues.

(b) Whether the AMW Directive is compatible with the 'right of association' exclusion in Article 153(5) TFEU

(1) Arguments of the parties

97. The Danish and Swedish Governments argue that the 'right of association', mentioned in Article 153(5) TFEU, must be understood (as is the case under several legal instruments, including the Community Charter of Fundamental Social Rights of Workers) as referring to the right of every worker and every employer to join an organisation or trade union and participate freely in collective bargaining.

98. In that light, those governments consider that, since Article 4(1)(d) of the AMW Directive requires Member States to take measures to protect trade unions and employers' organisations participating in collective bargaining against any interference in their establishment, functioning or administration, that provision directly interferes with the 'right of association' and is, thus, incompatible with Article 153(5) TFEU. Furthermore, since Article 4(2) of the AMW Directive requires Member States whose collective bargaining coverage rate is below 80% to establish a framework to promote collective bargaining and to create an action plan with the social partners to increase collective bargaining coverage, that provision also affects the legal framework for membership of a trade union or organisation and, consequently, the very core of the right of association.

99. In support of the opposite view, the Council, the Parliament and the Commission, as well as all the other interveners argue, first, that the 'right of association' referred to in Article 153(5) TFEU pertains to an individual's freedom to join, leave, or establish an association without interference. It is, therefore, a prerequisite for collective bargaining – that is to say, the possibility for associations of workers to act collectively to determine terms/conditions of employment, which is covered by Article 153(1)(f) TFEU) – but the two concepts do not overlap. In that regard, they also observe that the 'right of association' and the 'right to collective bargaining and action' are each safeguarded by separate provisions of the Charter. Second, they claim that the 'right of association' exclusion in Article 153(5) TFEU must be interpreted narrowly and as being limited, in essence, to measures which directly interfere with the ability for workers to associate.

100. Third, those parties and interveners argue the AMW Directive does not impose rules on the right of association, since it only establishes a framework to facilitate the exercise of the right to collective bargaining without laying down any obligations concerning the joining, leaving or dissolution of associations or trade unions. In particular, Article 4(1)(d) of that directive does not establish, nor harmonise, rules regarding the formation of trade union organisations, nor does it define the rights and obligations of such organisations or impose specific rules on participation or require workers/employers to actively engage in trade union organisations. Instead, it focuses on ensuring the proper functioning of collective bargaining. At any rate, even if Article 4 of the AMW Directive were considered to be laying down rules regarding the right of association, it would not amount to direct interference with that right. Article 4(2) of the AMW Directive does not directly interfere with the right of association, as it merely uses the 80% threshold as an indicator, rather than a binding or strict target.

(2) Assessment

101. As regards the compatibility of the AMW Directive with the 'right of association' exclusion contained in Article 153(5) TFEU, two central issues arise. First, the parties and interveners disagree as to the meaning and scope of that exclusion and as regards, in particular, its relationship (and potential overlap) with the EU competence in the field of 'representation and collective defence of the interests of workers and employers' (Article 153(1)(f) TFEU). In that respect, they engage in a debate as to the relationship between the 'right of association' and the 'right to collective bargaining'. Second, since, as I have noted in point 40 above, the Court has not yet had the opportunity to elaborate on the 'right of association' exclusion in Article 153(5) TFEU, it is necessary to clarify whether the test of direct interference, developed by the Court in relation to the 'pay' exclusion laid down in that provision, also applies in that context.

102. As far as the first issue is concerned, I recall that the right of association is protected by Article 12 of the Charter,[77] whilst the right to collective bargaining is covered by Article 28 thereof.[78] The Danish Government, in support of its argument that the right of association includes the right to collective bargaining, correctly points out that Article 137(6) TEC (whose wording is identical to Article 153(5) TFEU) was adopted before the Charter itself. Thus, that government considers that the fact that the right of association and the right to collective bargaining are treated as distinct rights in the Charter must not dictate how they are to be understood under Article 153 TFEU. However, I note that, in the 1989 Community Charter of the Fundamental Rights of Workers,[79] whose contents were expressly referred to in Article 136 TEC (now Article 151 TFEU) and have been reflected in the Charter,[80] the right of association and the right to collective bargaining were already regarded as distinct.[81] I further observe that, in Article 156 TFEU (whose wording is identical to that of Article 140 TEC), the 'right of association' and 'collective bargaining between employers and workers' are mentioned alongside each other, which would not have been necessary, in my view, were those rights not regarded as autonomous, distinct rights.

103. Based on those considerations, it is clear to me that the right of association does not include the right to collective bargaining. Rather, those rights are distinct: the first relates to the right of workers or employers to constitute and join organisations (including trade unions) to defend their economic and social interests, whereas the second relates to a specific part of the mandate of those organisations, namely that of negotiating and concluding collective agreements.

77 Article 12(1) of the Charter provides that 'everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies *the right of everyone to form and to join trade unions for the protection of his or her interests*.' (Emphasis added).

78 Article 28 of the Charter, which is entitled 'Right of collective bargaining and action', provides that 'workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.'

79 The Community Charter of Fundamental Social Rights of Workers was adopted at the European Council meeting held on 9 December 1989 in Strasbourg and is set out in Commission document COM(89) 471 of 2 October 1989. It establishes the major principles on which the European labour law model is based.

80 See the Preamble of the Charter: 'this Charter reaffirms, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from … the Social Charters adopted by the Union and by the Council of Europe'.

81 Indeed, on the one hand, Article 11 of the Community Charter of Fundamental Social Rights of Workers sought to protect the right of association of employers and workers 'in order to constitute professional organisations or trade unions of their choice for the defence of their economic and social interests'. On the other hand, Article 12 thereof concerned 'the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice'.

104. Against that background, I find it difficult to be persuaded by the arguments presented by the Danish and Swedish Governments. Those governments take the view, in essence, that because the exercise of the right of association is a prerequisite to the exercise of the right to collective bargaining, the matters covered by 'right of association' exclusion in Article 153(5) TFEU somehow encompass, and overlap with, those covered by the 'collective defence of the interests of workers' (Article 153(1)(f) TFEU). I agree with them that the protection of the right of association is indispensable to the protection of the right to collective bargaining, since the collective defence of the interests of workers presupposes the creation of organisations designed to collectively defend the economic and social rights of workers and/or employers. Nevertheless, I share the Parliament and the Council's view that that link does not mean that the matters covered by the first provision include those that come within the scope of the second.

105. In that regard, I recall that, as I have indicated in point 39 above, the Court has held that, as paragraph 5 of Article 153 TFEU derogates from paragraphs 1 to 4 of that article, the matters reserved by it 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.[82] Two conclusions follow, in my view, from that statement. First, as the Council notes, if the right of association was understood as including the right to collective bargaining, then the competence laid down in Article 153(1)(f) TFEU in the field of the 'representation and collective defence of the interests of workers and employers' would essentially be deprived of its substance. Indeed, any measure adopted in application of that provision would conflict with the exclusion in respect of the right of association laid down in Article 153(5) TFEU. Second, the Court's statement that the exclusions laid down in that provision must be understood strictly (as is generally the case for most exclusions) undermines the Danish and Swedish Governments' argument that the drafters of the EU Treaties have carved out, under Article 153(1)(f) TFEU, a limited competence (for matters relating to the collective defence of workers' interests) from a field in which there is, generally, no EU competence (the right of association).[83] In that regard, I would add that Article 153(1)(f) TFEU expressly mentions the 'representation and collective defence of the interests of workers and employers, including co-determination, *subject to paragraph 5*' – thus, making clear that the matters covered by that provision do not wholly overlap with those covered by Article 153(5) TFEU.[84]

106. It follows, in my view, that a provision or measure adopted by the EU legislature cannot be found to be incompatible with the 'right of association' exclusion in Article 153(5) TFEU, simply because it concerns the right to collective bargaining. In the present case, that means, for example, that the mere fact that Article 4(1)(d) and Article 4(2) of the AMW Directive seek to promote collective bargaining is not sufficient to support a finding that that directive is, as a whole, incompatible with the 'right of association' exclusion contained in Article 153(5) TFEU.

107. Turning now to the second issue, I recall that the Court has developed the test of direct interference in relation to the 'pay' exclusion laid down in Article 153(5) TFEU, without expressly indicating whether it also applies in the context of the 'right of association' exclusion also contained in that provision. In my view, however, that test can be applied to that exclusion

[82] See judgment in *Impact*, paragraph 122. I recall that Article 151 TFEU provides that: 'the Union and the Member States … shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.'

[83] As I understand it, those governments view the relationship between Article 153(1)(f) TFEU ('collective defence of the interests of workers and employers') and the 'right of association' exclusion in Article 153(5) TFEU as being the opposite of that between the 'pay' exclusion contained in that provision and Article 153(1)(b) TFEU ('working conditions'). (see, in that regard, point 65 above).

[84] Emphasis added.

without much difficulty. Indeed, the rationale is the same: as with the 'pay' exclusion, the 'right of association' exclusion does not aim to exclude from the sphere of EU competences any question involving 'any sort of link' with the right of association, but merely those instruments or provisions which have as their object to regulate that right.

108. In the light of those considerations, I find it difficult to conclude that the AMW Directive has as its object to regulate the right of association. Indeed, as the French Government noted at the hearing, the provisions of that directive do not impose conditions for creating or joining an organisation (such as a trade union). A few of its provisions have as their object to promote collective bargaining (Article 4) and to involve the social partners in the setting and updating of statutory minimum wages (Article 7). However, as I have just explained, the right to collective bargaining is distinct from the right of association and the EU legislature is competent, under Article 153(1)(f) TFEU to adopt instruments concerning the 'representation and collective defence of the interests of workers and employers'.

109. It is true, as the Council itself concedes, that Article 4(1)(d) of the AMW Directive refers to aspects of the right of association, namely, the establishment, functioning or administration of trade unions or employers' organisations.[85] However, that provision clearly does not seek to interfere with that right, but only aims to safeguard it by protecting trade unions and employers' organisations from interference. Furthermore, while Article 4(2) of that directive requires Member States whose collective bargaining coverage rate is less than 80% to set up an action plan with a view to increasing that coverage, that obligation does not require Member States to encourage workers to join a trade union but only to increase the number of workers protected by collective agreements.

110. Finally, I note that the Danish and Swedish Governments' views are centred around Article 4(1)(d) and Article 4(2) of the AMW Directive. They do not delve into the content of other provisions of that directive or even claim that those provisions are the most important ones in the AMW Directive and reflect its 'object' – which makes it difficult to support their claim that the AMW Directive must be annulled in full on the ground that it is incompatible with the 'right of association' exclusion in Article 153(5) TFEU.

111. In the light of the above considerations, I am of the view that the second part of the first plea in law must be rejected.

2. Second plea in law: the AMW Directive could not be validly adopted on the basis of Article 153(1)(b) TFEU, because it also relates to matters covered by Article 153(1)(f) TFEU

112. As I have already indicated in point 32 above, by the second plea in law, the Danish Government argues that, even assuming that the AMW Directive does not fall into the scope of the 'pay' and 'right of association' exclusions laid down in Article 153(5) TFEU, the Parliament and the Council could not validly adopt that instrument on the basis of Article 153(1)(b) TFEU. More specifically, that government considers that that directive pursues two objectives of equal importance, as it seeks not only to regulate 'working conditions' (Article 153(1)(b) TFEU), but also the 'representation and collective defence of the interests of workers …' (Article 153(1)(f) TFEU). It notes that each of those legal bases requires a different legislative procedure. Indeed,

[85] That provision requires Member States to take measures 'to protect trade unions and employers' organisations participating or wishing to participate in collective bargaining against any acts of interference by each other or each other' agents or members in their *establishment, functioning or administration*' (emphasis added).

Article 153(1)(f) TFEU requires unanimity in the Council, whereas Article 153(1)(b) TFEU does not. Given that those procedures are incompatible, the Danish Government claims that the AMW Directive must be annulled in its entirety.

(1) Arguments of the parties

113. The Danish and Swedish Governments consider that the AMW Directive relates not only to 'working conditions' (Article 153(1)(b) TFEU) but also to the collective defence of workers' interests (Article 153(1)(f) TFEU) because many of the provisions of that instrument, including Article 4 thereof, concern the protection of such interests. According to those governments, those provisions could only have been adopted following a unanimous vote in the Council. In that regard, they note that Article 4 of the AMW Directive is not ancillary to other provisions of that directive, as it establishes general obligations for all the Member States and is, therefore, likely to have a broader impact than provisions which are directed only to a certain number of Member States, such as Articles 5 to 8 thereof.

114. The Council, the Parliament, the Commission and the other interveners contend that the AMW Directive was adopted on the correct legal basis. That directive's overarching objective relates to 'working conditions', within the meaning of Article 153(1)(b) TFEU, and not to the collective defence of workers' interests as referred to in Article 153(1)(f) TFEU. Indeed, that instrument aims at enhancing the adequacy of statutory minimum wages for workers by, inter alia, promoting collective bargaining coverage on wage-setting. Article 4 of the AMW Directive focuses on collective bargaining merely as a means to attain that overarching objective.

(2) Assessment

115. I recall that, according to the Court's settled case-law, the choice of the legal basis for an EU act must rest on objective factors amenable to judicial review. If an examination of an EU act demonstrates that it pursues a twofold purpose or that it comprises two components and if one of these is identifiable as the main one, whereas the other is merely incidental, the act must be founded on a single legal basis, namely that required by the main or predominant purpose or component. Exceptionally, if it is established that the act simultaneously pursues several objectives or has several components, which are inextricably linked, without one being incidental to the other, such that various provisions of the Treaties are applicable, such a measure will have to be founded on the corresponding different legal bases.[86] Nonetheless, recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other.[87]

116. In support of the view defended by the Danish and Swedish Governments, which is, in essence, that the AMW Directive pursues two objectives of equal importance (the first one being the provision of a framework to ensure the adequate character of statutory minimum salaries and the second the promotion of collective bargaining on wage-setting), one could point out, as those governments do, that Article 4 of that directive (which relates to the promotion of collective bargaining on wage-setting) is an important provision because it applies to all Member States, whereas Article 5 thereof (which concerns the procedure for setting adequate statutory minimum wages) applies only to Member States with statutory minimum wages. Unlike Article 5, Article 4

[86] See judgment of 4 September 2018, *Commission* v *Council (Agreement with Kazakhstan)* (C-244/17, EU:C:2018:662, paragraphs 36 and 37 and the case-law cited).

[87] See Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017 (EU:C:2017:592, paragraph 78).

is, thus, a provision of transversal application. That is confirmed by the fact that that provision is contained in Chapter I of the AMW Directive, which is entitled 'General Provisions', whilst Article 5 is part of Chapter II of that instrument, which is entitled 'Statutory minimum wages'.

117. One could also state that Article 1(1)(a) and (b) of the AMW Directive indicates that that directive establishes a framework for the adequacy of statutory minimum wages and the promotion of collective bargaining on wage-setting, and that nothing in the wording of that provision suggests that the second of those objectives is less important than, or instrumental to, the first. In a similar vein, recital 18 of that directive states that that instrument 'establishes minimum requirements … and sets out procedural obligations for the adequacy of statutory minimum wages'. That same recital further states that the AMW Directive 'also promotes collective bargaining on wage-setting'. Again, both objectives could be regarded as having been deemed to be of equal importance by the EU legislature.

118. Yet, in my view, those considerations are not sufficient to uphold the arguments put forward by the Danish and Swedish Governments. To begin with, as I have already noted in point 76 above, the title of the AMW Directive indicates that that directive concerns 'adequate minimum wages in the European Union', not the promotion of collective bargaining. Furthermore, as I have already stated on several occasions, Article 5 of that directive (not Article 4) is clearly its most important provision. In that regard, I note that recital 25 of the AMW Directive clarifies that the reason why that directive places a strong emphasis on the promotion of collective bargaining is that 'Member States with a high collective bargaining coverage tend to have a small share of low-wage workers and high minimum wages'. Recital 22 of that instrument indicates, in equally unambiguous terms, that 'well-functioning collective bargaining … is an important *means* by which to ensure that workers are protected by adequate minimum wages …'.[88]

119. It follows from those elements, first, that the overarching objective of the AMW Directive seems to be more appropriately described as establishing a framework for the adequacy of statutory minimum wages, than promoting collective bargaining and, second, that Article 4 of that instrument must be regarded as a means of achieving that overarching goal. Consequently, the objective of 'promoting collective bargaining on wage-setting', laid down in Article 1(1)(b) of that directive is instrumental to the objective laid down Article 1(1)(a) thereof, namely, that of establishing a framework for the adequacy of statutory minimum wages. The Commission's statement, in the proposal for the AMW directive, that '[*i*]*n order to reach [its] objectives*, the proposed Directive aims at promoting collective bargaining on wages in all Member States' also supports that view.[89] Finally, it should be noted that other pieces of EU secondary legislation exist which, alongside their principal objective, seek to promote the role of social partners and which, notwithstanding this fact, were not adopted on the basis of Article 153(1)(f) TFEU.[90]

120. In those circumstances, I am of the view that the AMW Directive did not need to be adopted on the basis of Article 153(1)(f) TFEU and that the second plea in law must therefore be rejected.

[88] Emphasis added.

[89] Proposal for the AMW directive, p. 2 (emphasis added).

[90] See, in particular, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23), whose Article 21(1) provides that 'Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including, for example, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice.'

B. The alternative head of claim: must Article 4(1)(d) and Article 4(2) of the AMW Directive be annulled?

121. Should the Court decide that the AMW Directive must not be annulled in full, the Kingdom of Denmark seeks, in the alternative, the annulment of Article 4(1)(d) and Article 4(2) of that instrument, on the ground of their incompatibility with Article 153(5) TFEU. In accordance with the Court's settled case-law, partial annulment of an EU act is possible only if the elements whose annulment is sought may be *severed* from the remainder of that act. That requirement is not satisfied where that partial annulment would have the effect of altering the substance of the act in question.[91]

122. As I have explained in points 90 to 93 above, I am of the view that Article 4(1)(d) and Article 4(2) of the AMW Directive impose on Member States 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, in a way which is incompatible with the 'pay' exclusion in Article 153(5) TFEU. The last issue which is left for me to examine is, thus, whether Article 4(1)(d) and Article 4(2) of the AMW Directive can be *severed* from the other provisions of that directive.

(1) Arguments of the parties

123. On the one hand, the Danish, Swedish and German Governments claim that the AMW Directive would not be deprived of its effectiveness if only Article 4(1)(d) and Article 4(2) of the AMW Directive were annulled. In that regard, the Danish and Swedish Governments note that Article 4(1)(d) was not included in the proposal for the AMW directive. That provision was only added at a subsequent stage of the legislative procedure. In their view, the other provisions of that directive can, thus, continue to be effective even without that provision. Furthermore, those governments submit that the Council and the Parliament offer contradictory views by, on the one hand, regarding Article 4(1)(d) and Article 4(2) of the AMW Directive as vague, while, on the other, claiming that their annulment would render the other provisions of that directive ineffective.

124. At the hearing, the German Government recalled, for its part, that it considers Article 4(1)(d) and Article 4(2) of the AMW Directive to be compatible with Article 153(5) TFEU. However, that government also believes that, should the Court conclude otherwise, those provisions could, in theory, be severed from the other provisions of that directive. Indeed, their annulment would leave the essential contents of that instrument intact. Article 4 of the AMW Directive could even be annulled in its entirety without jeopardising the effectiveness of the other provisions of that directive, as it merely provides a useful means of achieving the overarching objective of that directive.

125. On the other hand, the Parliament, the Council, the Commission and the other interveners consider that the annulment of Article 4(1)(d) and Article 4(2) of that directive would significantly alter the scope and essence of that instrument and that, as a result, those provisions cannot be severed from the rest of the AMW Directive. Indeed, the promotion of collective bargaining is an important means for workers to benefit from adequate minimum wages. Moreover, the annulment of Article 4(1)(d) and Article 4(2) of the AMW Directive would deprive certain

[91] See, inter alia, judgment of 8 December 2020, *Poland* v *Parliament and Council* (C-626/18, EU:C:2020:1000, paragraph 28 and the case-law cited). Emphasis added.

general provisions of that directive (in particular, Article 1 thereof) of their effectiveness. The Council and the French Government add that if Article 4 of the AMW Directive were to be annulled in its entirety, then that directive would no longer impose obligations on all Member States. Instead, it would only impose obligations on Member States that have statutory minimum wages.

(2) Assessment

126. As regards the question of whether Article 4(1)(d) and Article 4(2) of the AMW Directive can be severed from the other provisions of that directive, first, I agree with the Danish and Swedish Governments that the arguments of the Parliament and the Council on the second plea in law and the alternative head of claim are, to some extent, contradictory. Indeed, on the one hand, in the context of the second plea in law, those institutions claim (as I have noted in point 114 above) that Article 4 of the AMW Directive focuses on collective bargaining merely as a means of achieving that directive's overarching objective. On the other hand, as regards the alternative head of claim, they argue that one of the pillars of the AMW Directive is the promotion of collective bargaining on wage-setting and that if Article 4(1)(d) and Article 4(2) of the AMW Directive were annulled, the other provisions of that instrument would be deprived of their effectiveness.

127. Second, it results from the analysis in points 115 to 120 above that, whilst Article 4(1)(d) and Article 4(2) of the AMW Directive are key to fulfilling one of the objectives pursued by that directive, namely that of 'promoting collective bargaining on wage-setting', as stated in Article 1(1)(b) of that directive, that objective is actually instrumental to that of establishing a framework for the 'adequacy of statutory minimum wages' (Article 1(1)(a) of the AMW Directive), which is that instrument's overarching objective.

128. Indeed, as I have explained in point 119 above, Article 4(1)(d) and Article 4(2) merely provide a *means* of achieving that overarching objective and the latter can still be achieved even if one relies on the other provisions of that directive only. As the German Government rightfully argues, the close link which exists between Article 4(1)(d) and Article 4(2) of the AMW Directive and that instrument's other provisions does *not* mean that, were Article 4(1)(d) and Article 4(2) to be annulled, it would be impossible for that directive to establish a framework for the adequacy of statutory minimum wages. Establishing it may be harder, but not impossible.

129. It follows from those considerations that Article 4(1)(d) and Article 4(2) of the AMW Directive may, therefore, be *severed* from its other articles, which could wholly remain in force if they were annulled. Consequently, should the Court decide that the AMW Directive must *not* be annulled in its entirety, I would suggest it uphold the Kingdom of Denmark's alternative head of claim and annul Article 4(1)(d) and Article 4(2) of that directive.

C. Final remark

130. By way of final remark, I wish to say a few words on an issue which was discussed at the hearing, namely whether an alternative legal basis, *in casu* Article 175 TFEU, could have been used by the EU legislature when adopting the AMW Directive, instead of Article 153(2)(b) TFEU, read in conjunction with Article 153(1)(b) TFEU.

131. I recall that Article 175 TFEU gives competence to adopt measures to strengthen the economic, social and territorial cohesion of the EU.[92] However, I am not convinced that, simply because the AMW Directive would reduce socio-economic disparities across the EU, promote upward convergence and facilitate a more harmonious development of the EU, it could have been adopted on the basis of that provision.

132. Indeed, first, Article 175 TFEU is mainly concerned with allocating EU funds; hence, basing the AMW Directive on that provision would require a rather creative reading of it.

133. Second, the Court has made clear, in its case-law, that, whereas an express exclusion of harmonisation as regards certain matters in the FEU Treaty does not necessarily mean that harmonising measures cannot be adopted on the basis of other provisions of that Treaty, the EU legislature cannot rely on those other provisions if, in so doing, it 'circumvents' that express exclusion.[93] In the present case, I consider that, had the EU legislature adopted the AMW Directive on the basis of Article 175 TFEU, it would have circumvented the 'pay' exclusion in Article 153(5) TFEU. Indeed, it would have relied on a broader provision (Article 175 TFEU) in order to reclaim a competence (as regards pay) which Article 153(5) TFEU (the *lex specialis*) has expressly sought to exclude from the sphere of EU competences and adopt an instrument whose very object is to regulate the matters covered by that exclusion.

134. Therefore, I am of the view that the AMW Directive could not have been validly adopted by the EU legislature on the basis of Article 175 TFEU.

VI. Costs

135. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since, in my view, the action brought by the Kingdom of Denmark is founded and that party has applied for costs, the Parliament and the Council should be ordered to pay the costs. Nevertheless, the Kingdom of Sweden, the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Portuguese Republic and the Commission, which have intervened in the proceedings, should bear their own costs, in accordance with Article 140(1) of those Rules of Procedure.

VII. Conclusion

136. In the light of the foregoing, I propose that the Court of Justice:

– annul in full Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, on the ground that it is

[92] That provision states that 'Member States shall conduct their economic policies and shall coordinate them in such a way as, in addition, to attain the objectives set out in Article 174. The formulation and implementation of the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement. The union shall also support the achievement of these objectives by the action it takes through the Structural Funds …the European Investment Bank and the other existing Financial Instruments … If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.'

[93] See judgment of 5 October 2000, *Germany* v *Parliament and Council* (C-376/98, EU:C:2000:544, paragraph 79).

incompatible with Article 153(5) TFEU and, thus, with the principle of conferral laid down in Article 5(2) TEU;

– order the European Parliament and the Council of the European Union to pay the costs;

– order the Kingdom of Sweden, the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Portuguese Republic and the European Commission to bear their own costs.