Challenging the EU Downward Pressure on National Wage Policy*

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In-work poverty has increasingly become a problem of major concern for many EU Member States. In the opinion of many, a common European wage standard could represent a desirable and effective solution. However, Article 153(5) TFEU excludes the EU from competence on “pay,” preventing EU institutions from taking any binding action to that end, while attempts to address the issue by soft law or by coordinated wage bargaining have proven to be weak and ineffective. Even so, the exclusion of EU institutions from exercising competence in the area of “pay” has not prevented them from acting within the present framework of European economic governance so as to issue recommendations aimed at cutting or freezing national minimum wages and public-sector wages or keeping their growth in check (wage moderation). The article thus considers whether there is room for challenging the EU encroachment on national wage policies as a way to restore to national governments and social partners the freedom to address the question of wages according to their own best judgment.

1. INTRODUCTION

For a long time now a discussion has been taking place on a proposal for a common European minimum-wage policy aimed at guaranteeing a fair wage for every worker in Europe. The topic received a lot of attention when the effects of the eastward enlargement of the EU overlapped with the effects brought about by neoliberal globalization, setting off a race to the bottom in wage levels. As the Laval and Rüffert cases clearly testify, this matter bears importantly on competition within the EU. The debate has been revitalized because in many EU countries the in-work at risk

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of poverty rate spiked in the aftermath of the financial and economic crisis of 2008. Recently, some economists and industrial-relations experts have revived the idea of a common European wage standard, that is, a minimum wage expressed as a percentage of national median or average wages. In their opinion, such a policy could be the instrument by which to tackle poverty while increasing the purchasing power of workers, thus stimulating internal demand. This seems to be the direction taken by the British government, which has recently increased the minimum wage for workers over twenty-five (calling it a “living wage”) and has set out the goal of raising that wage to 60% of median earnings by 2020. The debate on the minimum wage is also strong in the U.S., since the federal minimum wage is still stuck at the same level as in 2009, whereas it has been increasing in some states, like California and New York where in a few years it is expected to grow to twice the current federal minimum wage. Developments both inside and outside the EU suggest that it is high time wages grew in Member States, especially in those countries where workers at the lower end of the wage scale have fallen below the poverty line. And yet EU institutions, acting within the framework of the system of economic coordination, have not relented in their policy of putting on wages the downward pressure they began to exert in the wake of the financial and economic crisis of 2008.

This article investigates the influence that EU institutions exert over national wage policies: It does so from the perspective of a labour lawyer. My arguments proceed from the well-known exclusion of EU competence on pay, looking to draw its exact contours in light of the recent evolution of the complex European legal system (Part 2). I will then show that while the EU’s lack of competence precluded almost all common EU wage policies aimed at sustaining national wage levels—the only exception being some interventions linked to overlapping competences (Part 3)—this has not prevented European Economic Governance from moving in the opposite direction (Part 4). In fact, in coordinating national economic policies, EU institutions have been issuing recommendations aimed at cutting or freezing national minimum wages and public-sector wages or curbing their growth (wage moderation). I will thus consider whether there is room for challenging the EU encroachment on national wage policies as a way to restore to national governments and social partners the freedom to chart their own course in addressing the question of wages (Part 5).

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3 According to Eurostat figures, the rate of working people at risk of poverty has grown in most part of the EU countries. The most affected countries (over 10% of in-work at-risk-of poverty) are Romania, Greece, Spain, Italy, Poland, Portugal, Estonia and Luxembourg. See Eurostat, People at risk of poverty or social exclusion (2015), in http://ec.europa.eu/eurostat/statistics-explained/index.php/People_at_risk_of_poverty_or_social_exclusion.


2. THE EU’S LACK OF COMPETENCE ON PAY

Under Article 153 of the Treaty on the Functioning of the European Union (TFUE), the Union enjoys very broad competence on labour law, but with some exceptions. One of these exceptions (Art. 153(5) TFEU) concerns precisely the topic we are dealing with, namely, pay. So under the principle of conferral contained in Article 5(2) TEU, there can be no doubt that the EU cannot legislate in this area. Neither does it look possible for social partners to engage in a European social dialogue under Articles 154 and 155 TFEU so as to work toward a framework agreement implemented by the Council, since this option is open only in “matters covered by Article 153” (and pay is not).

The exclusion of competence on wage rests on two main arguments. For one thing, wage policy is a sensitive area: It may unduly undermine the autonomy of Member States, since it represents an important tool for domestic economic policy and for the functioning of the national labour market. Moreover, the exclusion of Union intervention is also aimed at preserving collective bargaining autonomy at the national level.

And, for another thing, the exclusion of EU competence on “pay” has disappointed many commentators, some of them underscoring how inappropriate it has been to preclude a common wage policy despite the monetary union and the creation of the European Central Bank, others stressing that among the main objectives of EU social policy is that of working toward “improved living and working conditions so as to make possible proper social protection [...] and the combating of exclusion” (Art. 151(1) TFEU), and there is no doubt that one of the most effective tools by which to reach that goal would lie in a common wage policy.

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8 See the conclusion that Advocate General Kokott delivered in Case C-268/06, *Impact* [2008], *ECR I*–02483173, pointing out that the protection of collective bargaining autonomy is “evidenced not least by the close association between pay and the other matters excluded from the Community’s powers: the right of association, the right to strike and the right to impose lockouts, which are particularly important in relation to fixing pay and, accordingly, are referred to ‘in the same breath’ as pay in Article 137(5) EC.”


The EU competence on pay could not be invoked by reference to Article 4(1) of the European Social Charter of 1961 (ESC), providing for “the right to a remuneration such as will give [workers] and their families a decent standard of living,” or to Article 5 of the 1989 Community Charter of the Fundamental Social Rights of Workers, providing that “all employment shall be fairly remunerated” and that “workers shall be assured of an equitable wage, i.e. a wage sufficient to enable them to have a decent standard of living.” The EU Treaties are rather clear that these acts merely carry symbolic value for the EU: The preamble to the TEU only confines itself to “confirming [the Member States’] attachment to fundamental social rights as defined in [...] the 1989 Community Charter of the Fundamental Social Rights of Workers,” and Article 151 TFEU merely invites the Union and Member States to have “in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers” in pursuing social objectives.12

Neither can the EU competence on pay be inferred from the Charter of Fundamental Rights of the European Union (CFREU), which after the Lisbon amendments gained the same legal force as the Treaties (Art. 6(1) TFEU). Even if the right to an equitable wage can be deduced from article 31 (1) (see part 5.2 below), it cannot be used to infer a EU legislative competence on wage matters, since under Article 6(1) TFEU and Article 51(2) of the Charter of Fundamental Rights itself, the latter does not in any way extend the powers of the Union. As things stand, the only way the Union can decide a legally binding wage policy prevailing over national wage policies is by repealing or amending article 153(5) TFEU or signing a brand-new treaty. For example, Eurozone countries may decide to agree to a specific intergovernmental treaty on the model of the Treaty Establishing the European Stability Mechanism of 2012. A common wage policy could make it possible to achieve the aim of ensuring the proper functioning of the economic and monetary union as specified in Article 136 TFEU. However, the political consensus needed for Member States to move toward that goal is simply not there, and they are unlikely to find it anytime soon.

3. OVERLAPPING COMPETENCES: IMPLEMENTING EQUAL PAY RIGHTS

Even though it is practically undisputed that the Union has no competence on “pay,” this has not prevented it from issuing binding interventions in this area. This has happened because competences under EU law frequently overlap. Basically, in dealing with other matters, EU institutions, and even the Court of Justice of the European Union (CJEU), have often had to address the question of wages.

A first set of EU interventions were made in connection with the four freedoms

12 See U. Khaliq, “The EU and the European Social Charter: Never the Twain Shall Meet?” Cambridge Yearbook of European Legal Studies 15 (2014): 169–96, at 176, pointing out that the CJEU has never based its decisions on any ESC provision but has merely made occasional reference to the ESC.
governing the single market and were meant to address the impact of these freedoms on the Member States’ ability to regulate wages. More to the point, Article 45 TFEU states that with the free circulation of workers comes equal treatment, pay included, between nationals and EU workers. Similar consequences stem from the freedom to provide services, as this includes the right to use posted workers: A firm established in one Member State provides a service to an entity (a client or host company) in another Member State by sending its own workforce to the client or host company. According to Directive 96/71/EC, the employer should ensure to posted workers the benefits they would enjoy under the host state’s norms in a series of matters (the so-called hard nucleus of protections) that also cover “minimum rates of pay.” However, as the CJEU has made clear in its highly controversial Laval quartet, the benchmark by which to set equal pay between national and posted workers is exclusively the statutory minimum wage (and not any higher pay that may be available under a collective agreement). Setting aside the matter of the questionable differential treatment between workers posted in a Member State and migrant workers, what seems relevant here is that the equal-treatment rights at issue seem to partly make up for the EU’s lack of competence.

The CJEU has found itself playing the protagonist in another (apparent) significant collision in connection with the large body of EU legislation dealing with the principle of equal treatment against discrimination on any ground whatsoever. On many occasions the Court has found that the exclusion under Article 153(5) TFEU is consistent with the guarantee of equal “employment and working conditions, including dismissals and pay” contained in several directives (and in particular Directives 2000/78/EC and 2000/43/EC of 29 June 2000). The Court’s argument is that the “pay” exception cannot be extended to any question involving any sort of link to pay, for “otherwise some of the areas referred to in Article 137 EC [now 153 TFEU] would be deprived of much of their substance.” The exception must therefore be interpreted restrictively as applying only to provisions of EU law directly interfering in the way pay is determined within the Union. Specifically, the exception covers measures establishing “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.”

13 Article 45 TFEU: “Freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.”
15 It is worth considering that in March 2016, the European Commission proposed that the Posted Workers Directive be revised so that posted workers are entitled to the same pay and working conditions as local workers.
18 Case C-268/06 Impact [2008] ECR I-0248.
As matter of fact, as far as equal pay rights are concerned, the “collision” between EU interventions in matters relating to pay and the EU lack of competence is more apparent than real. As clarified by the CJEU, the rationale behind the exclusion is such that its scope should be narrowed to measures designed to set wage structure and levels (including minimum levels of pay). The guarantee of equal pay rights (between nationals and migrants, men and women, older and younger workers, and so on) does not interfere with the task reserved to organisations entrusted with regulating national wages.

4. THE IMPACT OF EUROPEAN ECONOMIC GOVERNANCE ON NATIONAL WAGE POLICIES

A completely upturned situation has come to pass in what concerns the system of economic governance. This is another example, probably the most significant, of EU action overlapping with the lack of competence on “pay”. I am going to go into some detail here in showing how, in this context, restrictions on national wage policies have turned out to be among the main tools for reducing public debts and driving processes of “internal devaluation.”

In the broad context of EU economic coordination, we have witnessed two main channels of Union intervention.

The first, and more dramatic, channel of intervention concerned countries that received financial assistance in exchange for reforms (under the so-called bailout plans). The financial assistance programmes concerned both Eurozone countries (Ireland, Portugal, Greece, and Cyprus) and non-Eurozone countries (Hungary, Latvia, and Romania). Apart from the programme for Hungary, the others all contained measures with a huge impact on public sector wages and the minimum wage.

All these programmes share two characteristics.

The first is that the reforms were formally agreed to by Member States under (binding) memoranda of understanding (MoUs). As can be appreciated, however, it is only euphemistically that these agreements can be described as voluntary. Indeed, states enjoyed little discretion, since financial assistance was submitted to bailout conditionality.

Second, there has always been a tight link between financial-assistance programmes and the EU: Even if some of these programmes (like those for Cyprus and Greece) were not formally part of the EU institutional framework, they all required an active commitment by EU institutions. However, when Portuguese and Romanian trade unions, for example, sought to challenge the austerity

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19 For example, since at the time the programmes were put in place, Greece and Cyprus were under the excessive deficit procedure, the Council intervened with a number of decisions, often copy-pasting the MoUs. In this way, the measures contained in the MoUs carried the same effect as Union law. Moreover, the European Central Bank and the European Commission have been entrusted with closely monitoring compliance with these conditions.
measures contained in MoUs, the CJEU declined to hear their complaints on the ground that they were not related to EU sources.

Much scrutiny has already been devoted to the effects of the austerity measures imposed on bailed-out countries and the possibility of challenging those measures before the CJEU. It is therefore not my intention to dwell on this topic. Instead, I will focus on the second channel of interventions on wage policy, where recourse is had to “ordinary” economic governance in hopes of forestalling the “extraordinary” situations that led to the bailouts.

Even within the “ordinary” framework of economic governance, EU institutions have exercised systematic pressure on minimum wages and the public-sector wage bill. Just to give an idea of the breadth of the Union action, in 2015 eleven countries (Belgium, Bulgaria, Croatia, Finland, France, Germany, Luxemburg, Portugal, Romania, Slovenia, and Spain) received specific recommendations on their own wage trends and policies.

Before considering some examples of this type of Union interference on wage policy and discussing its legitimacy, it is worth briefly describing the functioning of the system of economic coordination.

European economic governance has been widely reformed in response to the financial and economic crisis of 2008. The present system is a stronger revamped version of the weak and ineffective “multilateral surveillance” that was set up under Article 121 TFEU and was implemented in the late 1990s through the original Stability and Growth Pact (SGP). The most significant amendments to

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21 In Cases C-128/12 and C-264/12 the CJEU made it clear that the questions referred by the Portuguese court did not contain any specific evidence supporting the view that the law at issue was intended to implement EU law. In the opinion of A. Koukiadaki, “Can the Austerity Measures be Challenged in Supranational Courts? The Cases of Greece and Portugal” ETUC 24 (2014), and C. Barnard, “The Charter in Time of Crisis: A Case Study of Dismissal,” in Resocialising Europe in a Time of Crisis, ed. N. Countouris and M. Freedland (Cambridge: Cambridge University Press, 2013), this conclusion was only an excuse to not hear the cases, since they involved a very sensitive issue like the future of the monetary union. C. Kilpatrick, “On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts,” Oxford Journal of Legal Studies 35, no. 2 (2015): 325–53, at 349, points out that the CJEU treated these references differently from comparable ones where it creatively reformulated the questions referred in order to make them admissible.


23 Under the former (pre-2008) SGP, Member States could not be compelled to implement responsible fiscal policies, so much so that departures from such policies were never subject to penalty: A certain leeway was allowed, as happened in 2003 for France and Germany (decisions
the original system came from the so-called Six-Pack (five regulations and one directive), providing (i) stricter oversight over annual stability and convergence programmes; (ii) semi-automatic sanctions for Eurozone countries in excessive deficit position, not following the direction provided by the Council;24 (iii) a brand-new procedure aimed at correcting and preventing excessive macroeconomic imbalances;25 and (iv) a single process, the so-called European semester, merging together the surveillance over budgetary positions, coordination of economic policies, prevention of excessive macroeconomic imbalances and integrated guidelines for growth and employment coming from the Europe 2020 strategy in just one process.26

Despite its name, the European semester basically consists in a yearly cycle where each Member State receives country-specific recommendations (CSRs) drawn up by the Commission on the on the basis of a detailed analysis of national budgetary and structural policies and macroeconomic imbalances. Once endorsed by the heads of state and governments within the European Council and formally adopted by the Council of the EU, these recommendations are to be transformed into national “reform programs” whose effectiveness will again be assessed by the Commission.

As far as wages are concerned, the new procedure for macroeconomic surveillance is probably the most relevant part of the system of economic governance. The procedure starts with the alert mechanism report (AMR), through which the Commission analyses the economic situation of every country using a scoreboard with ten indicators covering the major sources of macroeconomic imbalance.

The indicators are designed to make it possible to reliably detect early on any potential for harmful imbalances and loss of competitiveness. The current scoreboard includes, besides the standard macroeconomic indicators—like GDP, national debt, and the unemployment rate—the reference to the unit labour cost (UCL), tracking percentage changes in the average nominal cost of labour per unit of output over three years, where the threshold is a 9% increase for euro-area countries and a 12% increase for non-euro-area ones. As the European Commission has stressed, the increase in nominal ULC corresponds to a rise in

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24 According to Article 6 of Regulation (EU) No. 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, a fine amounting to 0.2 % of the Member State’s GDP in the preceding year can be imposed by the Council on the basis of a Commission recommendation, unless a qualified majority of Member States should vote against such a fine (under the so-called “reverse qualified majority” voting procedure).


labour costs exceeding the increase in labour productivity, and if this indicator rises to any significant degree, the outcome may therefore be to erode competitiveness.\textsuperscript{27} This has become a problem of major concern after the creation of the monetary union. The increasing differences in competitiveness between EU countries (between so-called surplus and deficit countries) are mainly owed to the divergent trends in wages and unit labour costs. Many countries in the past have been able to circumvent this problem by devaluing their national currencies, but this is obviously no longer possible under the single currency.\textsuperscript{28}

An economic reading of the scoreboard indicators does not lead to any automatic conclusions.\textsuperscript{29} They are just symptoms of probable macroeconomic imbalances subject to a further in-depth Commission review that is not strictly connected to the scoreboard indicators but covers all topics under the broad economic policies within the European semester.\textsuperscript{30}

If on the basis of the in-depth review the situation cannot be considered dramatic, it will be dealt with under the preventive arm of the procedure, leading to recommendations and requiring countries to take actions to correct the identified imbalances, which become part of the country-specific

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\item \textsuperscript{29} As literally expressed in Article 3(2) of Regulation No. 1176/2011: The Commission’s “conclusions shall not be drawn from a mechanical reading of the scoreboard indicators.”
\item \textsuperscript{30} Under Article 5(2) of Regulation No. 1176/2011, the purpose of the in-depth review is to analyse relevant developments related to the Union strategy for growth and jobs. In particular, the review shall take into account (a) the recommendations or invitations the Council addresses to the Member States under review in accordance with Articles 121 (economic policy coordination), 126 (budgetary policies), and 148 (employment strategy) TFEU and (b) the policy intentions of the Member State under review as reflected in its national reform programmes and, where appropriate, in its stability or convergence programme. The review shall also (c) “build on a detailed analysis of country-specific circumstances, including the different starting positions across Member States”; (d) use “analytical tools and qualitative information of country-specific nature”; and (d) “acknowledge the national specificities regarding industrial relations and social dialogue.”
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recommendations (CSRs) that each year in July the Council addresses to each Member State as part of the European semester. Otherwise, when macroeconomic imbalances are deemed excessive and in need of corrective actions, the Commission may ask the Council to place the country in question under the corrective arm (the excessive imbalance procedure, or EIP). Here the Council issues a set of policy recommendations to be followed within a deadline. Noncompliant Eurozone Member States will face financial sanctions designed with a high level of automatism.

Sanctions against Eurozone Member States are provided not only for macroeconomic imbalances but also for failure to meet the deficit target set in the Stability and Growth Pact (SGP) under the excessive deficit procedure (EDP) set forth in Article 126 TFEU.\(^{31}\) Deficit targets obviously have a direct impact on public sector wages, which have often become an object of Council recommendations (and not only in connection with bailouts).

The huge and complicated system of economic governance just described has given birth to two mainstream policies impacting on wages: fiscal austerity and cost competitiveness. The first policy has influenced public sector wages by lowering or freezing them or keeping them in check (wage moderation). The second can be summarized in this aptly expressed statement found in the 2013 Council conclusions on the Annual Growth Survey:\(^{32}\) “wage-setting frameworks need to be monitored and where appropriate reformed to ensure that they reflect productivity developments and contribute to safeguarding competitiveness.” As I will show below in greater detail, the outcome has been again to cut or freeze national minimum wages or keep them in check (wage moderation).

According to some economists, this approach is inadequate in addressing the problem of macroeconomic imbalances, so much so that it has even impaired the ability of deficit countries to grow their economies.\(^{33}\) In their view the EU’s mainstream approach is neglecting to consider the important role of wages in creating or stabilizing domestic demand—especially in those countries that cannot rely on an export-driven economy.\(^{34}\) They propose an alternative macroeconomic policy under which wage coordination may have the function of

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\(^{31}\) The excessive deficit procedure has been revised by Regulation No. 1175/2011 and Council Regulation (EU) No. 1177/2011 of 8 November 2011 amending Regulation (EC) No. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure; it was subsequently reinforced by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the so-called Fiscal Compact), providing the golden rule on balanced budgets; and most recently it was amended by the so-called Two-Pack (Regulation Nos. 472/2013 and 473/2013).


avoiding downward wage competition and modelling a demand-led model of economic development.\textsuperscript{35} A labour lawyer is obviously unable to contribute to this debate. Therefore, from here on out, I would rather focus on assessing the legitimacy of Union interventions on wages and, in case they turn out not to be lawful, on whether and how they can be challenged.

4.1. THE EFFECTS OF ECONOMIC GOVERNANCE ON NATIONAL WAGE POLICIES

I will start by discussing some examples of country-specific recommendations (CSRs) on national wage policies. The first example concerns France, which among the countries most affected by minimum-wage recommendations. The French minimum wage, so-called \textit{salaire minimum interprofessionnel de croissance} (SMIC), has been increasing very fast over time (much faster than the consumer price index), driving the minimum hourly rate of pay to the second highest in Europe. It is therefore not surprising that since the beginning of the EU semester, the Commission and the Council have repeatedly stressed that the cost of labour at the minimum wage was too high compared with other Member States. In particular, automatic wage indexing in France, and more in general the country’s wage-setting mechanism, has been held responsible for “distortions of the wage structure,” limiting “the ability of firms to adjust wages in economic downturns”\textsuperscript{36} and, in a context of low inflation, leading “to wage increases beyond what is necessary to preserve purchasing power.”\textsuperscript{37} The recommendation the Council has repeatedly made since 2011 in its CSRs has therefore been to “ensure that developments in the minimum wage are supportive of competitiveness and job creation.”\textsuperscript{38} Which translates to putting the brakes on minimum-wage growth (wage moderation).

These recommendations were made in the context of macroeconomic imbalances that, starting from 2013, have become “excessive,” thus requiring “decisive policy action and specific monitoring.”\textsuperscript{39} As noted, excessive imbalances may trigger the corrective arm of macroeconomic surveillance, with the ensuing sanctions. This may have been taken into consideration by the French government, since it has moved in the direction indicated by the Council. The 2015 French national reform

\textsuperscript{36} See Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of France and delivering a Council opinion on the Stability Programme of France, whereas no. 12.
\textsuperscript{39} This comment has been consistently reiterated starting from Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of France and delivering a Council opinion on the Stability Programme of France, 2012-2017 (2013/C 217/08) C 217/31.
programme reported significant moderation in the increase of the minimum wage.\textsuperscript{40} However, that was not enough from the Union’s point of view, considering that the Commission’s last country report on France (2016) noted that “limited progress has been made in ensuring that minimum wage developments are consistent with the objectives of promoting employment and competitiveness,” especially because, “while no increase of the minimum wage was granted in 2014, its automatic annual indexation process was not modified.”\textsuperscript{41} Essentially, what EU institutions are demanding of France is not wage \textit{moderation}, but a \textit{freeze} on minimum wages. That has been made clear by the country report just mentioned, where the Commission opined that nominal wage growth in 2015, having decreased from 4.5\% to nearly 1\%, was still insufficient.\textsuperscript{42}

Whereas, as noted, it was expected that recommendations aimed at wage moderation would issue for France, the same cannot be said of the similar advisory guidelines issued for Bulgaria in 2014 and again 2015. Bulgaria is the country with the lowest minimum wage in the Union, both in nominal terms and in terms of purchasing power, not to mention that it also has the highest percentage of people at risk of poverty (close to 50%).\textsuperscript{43} The minimum wage in Bulgaria has seen a constant increase since 2011, and even though that is the lowest rate of increase recorded in any EU country over the same period, EU institutions have faulted the Bulgarian government for deciding to significantly hike the minimum wage for 2016. Taking the usual narrow focus on wages as the main factor working against competitiveness, the Council commented that “such sharp discretionary shifts in the Government’s wage setting policy could be distorting for the labour market,” even as it conceded, just a few lines below, that “poverty and social exclusion remain a concern, as Bulgaria has one of the highest rates of material deprivation in the Union.”\textsuperscript{44} The

\textsuperscript{40} On page 41 of the French national reform programme of 2015, it is explicitly stated that in January 2014 and January 2015, the rules for increasing the minimum wage were strictly applied, meaning that in the ongoing effort to contain the growth of minimum wages, the gain in the purchasing power of the minimum wage was half that of employees and workers, and from the first quarter of 2007 to the first quarter of 2014, the gross minimum wage lagged behind the average wage level of employees and workers. The French original: “En janvier 2014 et en janvier 2015, les règles de revalorisation du Smic ont été strictement appliquées (c’est-à-dire que le gain de pouvoir d’achat du Smic a été deux fois plus faible que le gain de pouvoir d’achat moyen des employés et ouvriers), dans la continuité des efforts de modération déjà à l’œuvre. Le Smic brut a ainsi progressé moins vite que le niveau moyen des salaires des employés et des ouvriers entre le 1er trimestre 2007 et le 1er trimestre 2014.”


\textsuperscript{42} Country Report France 2016, quoted above, p. 23.


\textsuperscript{44} Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Bulgaria and delivering a Council opinion on the 2015 Convergence Programme of Bulgaria (2015/C 272/08), whereas no. 12.
EU institutions’ disappointment mainly concerns the fact that the minimum wage is discretionarily decided by the government following nonbinding consultations with social partners. The recommended measure is therefore to establish “a transparent mechanism for setting the minimum wage and minimum social security contributions in the light of their impact on in-work poverty, job creation and competitiveness.”\(^{45}\)

Like France, Bulgaria is experiencing macroeconomic imbalances carrying “risks that deserve close attention.” If Bulgaria will not be able to correct macroeconomic imbalances by reducing wage growth (the country is routinely failing to meet the scoreboard threshold for nominal ULC), it will seriously run the risk of falling into the corrective arm of the procedure (even if fines do not apply to Bulgaria since it does not belong to Eurozone). However, as the Commission’s 2016 country report observed, the Bulgarian government seems headed in the right direction.\(^{46}\) It has announced criteria for a mechanism to be put in place in late 2016 as the basis for setting minimum wages, and it has also stated that in 2017 it may introduce sector-specific minimum wages to be negotiated with social partners.

Another significant example is Slovenia. In 2012, the Council in its CSRs found that “the minimum wage as a percentage of the average wage was the highest in the EU in 2011, although the minimum wage is just below the poverty threshold,” adding that the continuing increase in the minimum wage would “reduce the competitiveness of labour-intensive industries and exacerbate structural unemployment.”\(^{47}\) In 2012, and then again in 2013 and 2014, this assessment led to recommendations similar to those addressed to France: “Ensure that wage developments, including the minimum wage, support competitiveness and job creation,”\(^{48}\) which according to the Commission’s country reports clearly means ensuring moderation in minimum-wage growth.

The Slovenian government has made several efforts in that direction. Most notably, substantial reductions have been made to the public-sector wage bill,\(^{49}\) and minimum-wage growth has been limited. However, in the Commission’s

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45 Council Recommendation 2015 quoted above, whereas no. 3
47 Council Recommendation on the National Reform Programme 2012 of Slovenia and delivering a Council Opinion on the Stability Programme of Slovenia, 2012–2015 Brussels, 6 July 2012 (11272/12), whereas no. 16.
49 The main measures the Slovenian Government has enacted since 2012 are (a) in 2012, a permanent 3% net cut in wages; (b) in 2013, an additional reduction; and (c) in 2014 and 2015, wage freezes along with other “austerity” measures that have still not been completely removed (the indexation of public sector wages was cancelled, the third and fourth instalments of the public sector wage increase was permanently cancelled, public sector holiday allowance was cut). See Commission Staff Working Document, Country Report Slovenia 2016, Including an In-Depth Review on the prevention and correction of macroeconomic imbalances the 2016 Country Report, Brussels, 26.2.2016 (SWD(2016) 92 final).
opinion expressed in the 2015 country report, those measures were still insufficient. Apart from expressing an overall disappointment that minimum wages are still too high relative to average gross monthly income, the Commission entered into detail on the mechanism for setting the minimum wage, complaining that packaged into the minimum wage are various allowances or entitlements (as for working night shifts and overtime), and that this is factored into the indexing of minimum wages. Hence, the Council recommended a “review, in consultation with the social partners and in accordance with national practices, [of] the mechanism for setting the minimum wage, and in particular the role of allowances.”

In November 2015, the recommendation was transposed into a Parliament proposal for excluding existing bonuses from the minimum wage. In light of the examples just considered, it can be concluded that as far as wage policies are concerned the system of economic governance is working. Countries are following Union recommendations: France and Slovenia have kept minimum-wage increases moderate; Bulgaria and Slovenia have been redesigning their system for setting the minimum wage. As mentioned, Member States know that if they fail to comply with Council prescriptions, they may fall subject to the corrective arm, which means possible fines for Eurozone countries.

A second consideration concerns the margin of discretion in implementing CSRs. This margin may look significant if we consider, for example, the quite general tone of the recommendations addressed to France and the similar ones addressed to Slovenia: “Ensure that minimum wage developments are consistent with the objectives of promoting employment and competitiveness.” But in fact these kinds of recommendations are only apparently broad: Once read in conjunction with the Commission’s country reports, making up their analytic basis, they become quite specific and detailed. Going back to the French CSRs, the underlying 2016 country report provides analyses, data, statistics, and graphs from which a specific intention of EU institutions can easily be inferred, namely, to abolish automatic indexing of the minimum wage and peg its increases to inflation.

I am not suggesting that the highlighted EU recommendations are wrong. I am merely stressing that, in the examples just considered, national wage policies

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51 This is expressly provided by Article 2-bis, par. 3 of Regulation No. 1466/97, as amended by Regulation No. 1175/2011: “In the course of the European Semester, in order to provide timely and integrated policy advice on macrofiscal and macrostructural policy intentions, the Council shall, as a rule, following the assessment of these programmes on the basis of recommendations from the Commission, address guidance to the Member States.”

52 See Country Report France 2016 (note 45 above), p. 85. In drawing final conclusions on the implementation of the 2015 CSRs, the Commission stated that “limited progress has been made in ensuring that minimum wage developments are consistent with the objectives of promoting employment and competitiveness. While no increase of the minimum wage was granted in 2014, its automatic annual indexation process was not modified. In 2015 the minimum wage increased by 0.6 percentage points more than inflation while unemployment continued rising.” If a 0.6% increase above inflation is too much, the next step will obviously be to set the difference at zero.
have been set, not by national governments acting in consultation with social partners, but by the Commission and the Council making those decisions for them.

The emerging scenario involving the Union’s lack of competence on pay looks contradictory: On the one hand, there is no room for a binding Union intervention aimed at providing everyone with a fair wage, thus pursuing the general EU objectives of securing adequate social protection, fighting social exclusion (Art. 9 TFEU), and improving living and working conditions (Art. 151 TFEU); on the other hand, EU institutions are behaving as if they had full competence on pay, de facto imposing their opinions on the development of minimum wages and the public-sector wage bill. If we are to restore a rational legal framework, we need to assume one or the other: Either the EU’s lack of competence no longer has any relevance, since it has almost completely been eroded by overlapping competences, or—if we want to preserve the meaning of Article 153 TFEU, as I feel it to be necessary—we have to deem unlawful the EU recommendations affecting national wage policies, for they cannot be reconciled with the EU’s lack of competence on pay.

A second argument that can be raised against the validity of EU recommendations impacting on wages concerns the *substance* of those recommendations, in that they may come into conflict with fundamental rights whenever the same recommendations require implementing measures that wind up driving wages below the threshold of poverty. As previously outlined, similar issues have already emerged for bailout countries.

5. CHALLENGING THE EU’S ENCROACHMENT ON NATIONAL WAGE POLICIES

5.1. THE “LACK OF COMPETENCE” ARGUMENT

The challenge that Council recommendations on pay are illegitimate because the EU lacks the competence to issue them comes up against major counterargument that turns on the nature or status of recommendations issued within the European semester, meaning that these recommendations are just that—recommendations—and so are political and nonbinding. If that is correct, it should also at the same time be ruled out that they encroach on national autonomy under the terms of Article 153(5) TFEU, and so that a case can be brought to the CJEU for their annulment. In fact, soft-law acts, namely, “recommendations” and “opinions,” do not fall within the exclusion of competence on pay, and under Article 263(1) TFEU they also fall outside the

53 In fact, the Commission has often intervened under Article 156 TFEU (formerly 140 TEC), which entrusts it with the task of encouraging cooperation and facilitating coordination among Member States in all social policy areas, including wages. One example is the Commission’s 1993 opinion on an “equitable wage” (COM (93) 388), recommending that Member States “take appropriate measures to ensure that the right to an equitable wage is protected.” Another recent example is the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, “Towards a Job Recovery,” Strasbourg, 18.4.2012 (COM(2012) 173 final) issued in view of the Europe 2020 strategy.
scope of the CJEU’s jurisdiction. The argument is quite forceful, since acts issued in the Open Methods of Coordination context used to be considered nonbinding for Member States, on the ground that they do not come with any formal sanctions for noncompliance.\(^{54}\)

However, as discussed, the framework has radically changed, especially for the Euro Area countries. The system for coordinating national economic policies has deliberately been reinforced starting from the 2011 Six-Pack. The system now starts with Commission reports and recommendations that trigger quasi-automatic sanctions for Member States which have adopted the Euro if the Member State in question should depart from the course indicated by EU institutions. It is therefore difficult to make the case that Eurozone countries compliance with Council recommendations issued within the macro-imbalances procedure or the excessive deficit procedure is merely optional. Otherwise compliance has remained a question of political opportunity for non-Eurozone countries, since sanctions provided within EDP or EIP do not apply to them.

Today, therefore, Council recommendations dealing with wage policy definitely do contravene the lack of competence on pay, as far as Eurozone countries are concerned. This appreciation seems to emerge from Article 1(3) of Regulation No. 1176/2011 “on the prevention and correction of macroeconomic imbalances,” through which it appears that Union lawmakers are trying to deflect blame for future failures: “The application of this Regulation shall fully observe Article 152 TFEU, and the recommendations issued under this Regulation shall respect national practices and institutions for wage formation.” This sounds a lot like an *excusatio non petita* ... (an excuse that has not been sought is an obvious accusation).

Bearing a strict logical relation to the conclusion reached here on the binding nature of Council recommendations is the issue of whether recourse can be had to the CJEU.

In this last regard, we need to take into account the CJEU’s case law. In fact, even if Article 263(1) TFEU limits the Court’s scrutiny over acts “intended to produce legal effects vis-à-vis third parties” and expressly excludes recommendations and opinions from the scope of the CJEU’s jurisdiction, the Court has been very clear in applying a substance-over-form rule. According to the CJEU’s consistent case law, any measures that EU institutions adopt that are intended to have binding legal effects, whatever their form, are deemed actionable measures within the

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meaning of Article 263 TFEU.\textsuperscript{55}
In particular, in determining whether an act can give rise to third-party rights or obligations, the CJEU has usually taken three kinds of factors into account as follows.
The first of these lies in the act’s \textit{wording} and \textit{context}.\textsuperscript{56} This is the basis on which the addressee can reasonably be expected to construe the act as either (a) mere guidance \textit{proposing} a course of conduct or (b) a \textit{mandatory} act that must be complied with. According to the CJEU, whether an act is prescriptive in the mandatory sense may be determined by the use of \textit{imperative} rather than strictly indicative language.\textsuperscript{57} The obligation created by the act at issue should also be a \textit{new} one, since recommendations that merely make obligations “more explicit,” for example, are not subject to CJEU scrutiny.\textsuperscript{58}

As we have seen, CSRs concerning wages are always formulated in robustly prescriptive terms, recommending that this country or that “ensure that developments in the minimum wage are supportive of competitiveness and job creation” or “review […] the mechanism for setting the minimum wage.” The Council decisions within the excessive deficit procedure (EDP) are even more commandingly prescriptive in their wording. In addressing recommendations to Member States under this procedure, the Council usually states that “the national authority should” take such and such a measure.\textsuperscript{59} All the acts so far mentioned create brand-new obligations, since no other piece of EU legislation deals with the same topic in the same way. Moreover, their mandatory nature seems to be borne out in their addressees’ perception of them, since recommendations and decisions dealing with wage policies may now trigger with regard to Eurozone countries the corrective arm of the economic coordination processes.

Another factor bearing on the ability of an act to give rise to rights and obligations lies in its \textit{substance, or content}, and its \textit{author’s intention}.\textsuperscript{60} Measures


\textsuperscript{57} See, for example, Italy v Commission, paragraph 31, EU:C:2005:727, paragraphs 21 and 22. See Scott 2011, 340.

\textsuperscript{58} France v Commission, C-57/95, paragraph 23.

\textsuperscript{59} A typical example would be Council Recommendation to Romania No. 11402/09 of 07.07.2009: With a view to bringing an end to excessive government deficit, it specifies that “measures should concentrate on containing current expenditure, notably with respect to the public sector wage bill.”

\textsuperscript{60} See the judgment of 9 October 1990 in France v Commission, C-366/88, ECR, EU:C:1990:348, paragraph 23; the judgment of 26 January 2010 in Internationaler Hilfsfonds v Commission, C-362/08 P, ECR, EU:C:2010:40, paragraph 52; and the judgment in Athinaïki Techniki v Commission, paragraph 30 above, EU:C:2008:422, paragraph 42; see also, to this effect and by
definitively determining an author’s position on the conclusion of an administrative procedure, and which are intended to have binding legal effects capable of affecting the applicant’s interests, are open to challenge. Otherwise, intermediate measures taken in preparation for a final decision or measures merely confirming an earlier measure cannot be challenged.\footnote{See the judgments of 13 November 1991 in \textit{France v Commission}, C-303/90, ECR, EU:C:1991:424, paragraphs 18 to 24, and 16 June 1993 in \textit{France v Commission}, C-325/91, ECR, EU:C:1993:245, paragraphs 20–23.}

Clearly belonging to the first category of acts are Council CSRs issued at the end of the European semester, as well as the corrective Council recommendations within the excessive imbalance procedure (IEP) or the excessive deficit procedure (EDP). The Commission’s country reports, by contrast, are only intermediate measures not subject to voidance under Article 263 TFEU. However, the CJEU has clarified that, while intermediate measures “may not themselves be the subject of an application for a declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step.”\footnote{Case 60/81 \textit{IBM v Commission} [1981] ECR 2639, paragraph 12.} This seems to hold in particular for country reports, since they form the basis for recommendations and clarify their exact content.

The third and final factor to be taken into account lies in the powers of the institution by which a measure is adopted.\footnote{See, inter alia, Case C-301/03 \textit{Italy v Commission} [2005] ECR I-10217, paragraph 28.} An act is not suitable for applications under Article 263 TFEU if in the procedure in question the issuing institution had a merely consultative role. As repeatedly stressed here, in the case of Council recommendations, the Council’s role is fully mandatory, since noncompliance may trigger the corrective arm.

From the foregoing analysis, we can conclude that Council recommendations on wages are binding and can be challenged before the CJEU on the ground of the Council’s lack of competence on pay. Eurozone Member states certainly have standing to bring such actions: They could appeal directly to the Court under Article 263(2) TFEU in virtue of their status as “preferential plaintiffs.” So far, however, they have not shown any interest in following this path.

In theory, even trade unions or workers could bring a direct action before the Court. But since they do not enjoy the “preferential plaintiff” status that Article 263(5) TFEU accords to Member States, they may not request annulment of a European act unless they can demonstrate an interest in doing so, in the sense that the contested act must be addressed to them or must concern them directly and individually (only directly, and not also individually, if the complaint concerns
a “regulatory act”). Obviously, in our case, Council recommendations, or even Council decisions, are never directly addressed to trade unions or to workers. In view of the broad scope that measures recommended for Member States usually have, even the condition that the measure be of “individual concern” to the contesting party is impossible to meet. Similarly, almost impossible to meet is the condition that the measure be of “direct concern” to the party in question—meaning that the implementation of a Union act is fully automatic, and hence no discretion is left to addressees in their implementation—at least on the narrow interpretation of that condition in the settled case law.

However, this does not mean that trade unions or workers are deprived of the right to effective judicial protection in the EU system. They cannot in practice rely on the direct access to the CJEU provided in Article 263 TFEU, but they can certainly apply before national courts, asking them to refer a question to the CJEU for a preliminary ruling on the validity of Council recommendations and on subsequent national acts.

64 As the General Court has clarified in Inuit Tapiriit Kanatami (C-583/11 P, EU:C:2013:625), encompassed by this term are “all acts of general application apart from legislative acts.”
65 The so-called “individual concern” condition is still assessed on the basis of the Plaumann test: “Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed” (judgment of 15 July 1963, Plaumann & Co. v Commission, C-25/62, EU:C:1963:17). As P. Craig and G. De Burca, “The evolution of EU Law” 494 (Oxford: Oxford University Press, 2011) have explained, it is very difficult to meet this condition, so much so that almost without exception the test has prevented private parties form challenging decisions addressed to others.
67 That has been made very clear by a significant case on which the General Court (First Chamber) recently ruled: judgment of 27 November 2012, ADEDY, Case T-541/10. The case was brought by a Greek trade union and two employees challenging the decision issued under the excessive deficit procedure giving Greece a deadline by which to pass a “reduction of the Easter, summer and Christmas bonuses and allowances paid to civil servants with the aim of saving EUR 1 500 million for a full year (EUR 1 100 million in 2010).” As can be appreciated, the decision was very specific, more so than any of the other examples previously considered. In the Court’s opinion, however, it was not so specific as to completely rule out Greece’s discretion in implementing it, since it did not specify “the details of the reduction provided for, the way in which it will be implemented or the categories of civil servants which will be affected,” and “it does not prevent the Hellenic Republic, in particular, from excluding certain categories of civil servants from the principle of the reduction of bonuses, provided that the objective of making savings is achieved.” It follows that the provision leaves it to the discretion of Greek authorities to specify how the bonuses will be reduced by way of national implementing measures, and it is those measures which may directly affect the applicants’ legal situation.
5.2. THE VIOLATION-OF-FUNDAMENTAL-RIGHTS ARGUMENT

A second, and more complicated, way to challenge the Union’s encroachment on national wage policies goes to the *substance* of the measures imposed on Eurozone Member States. Union acts imposing wage cuts, freezes, or moderation may come into conflict with the fundamental rights recognized by the Union. The conflict, more to the point, may concern Article 31(1) of the Charter of Fundamental Rights (CFR), which under the title “fair working conditions” recognizes that “every worker has the right to working conditions which respect his or her health, safety and dignity”. The right to an equitable wage can be grounded in a broad interpretation of the reference to “working conditions.” In particular, the connection thus established with “dignity” can form a basis for the right to a decent pay, ensuring a satisfactory standard of living for workers and their families, since pay is the principal means of subsistence for them. This conclusion, and especially the role played by the connection established with “dignity,” finds literal support in Article 23(3) of the Universal Declaration of Human Rights, providing “the right to just and favourable remuneration” for every worker in order to ensure “for himself and his family an existence worthy of human dignity.”

A similar argument was advanced in two requests for a preliminary ruling made by a Portuguese court. At issue was a provision in a 2012 Portuguese law under which holiday entitlements and year-end supplements (Christmas bonuses and any sums for a thirteenth or fourteenth month’s pay) were to be suspended while implementing the country’s economic and financial assistance programme. Unfortunately, the CJEU declined to hear the case, holding that the issue was not connected to EU law (see part 5.1 above). This outcome does not express any negative position of the CJEU on the issue. It only stresses on the need that the order for reference should highlight a clear link to EU sources of law.

In the case at stake, since a country is implementing recommendations issued within the EU Semester, this link cannot be disavowed. Therefore, under Article 51(1) CFREU the right to fair working conditions—including, as previously explained, the right to a fair wage—must be respected by all EU institutions, including the Council, and by Member States when implementing EU law (just as they do within the European semester).

At this point, a very important question arises: Is the right to a fair wage *absolute*, or is it subject to limitations on the conditions set forth in Article 52 (1) CFREU? The first option is reasonable on the assumption that the right to a fair wage is included within meaning of the right to human dignity recognized in Article 1 of the Charter. The right to human dignity—as well as other rights set forth in Title I

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70 See note 20 above.
71 See C. Barnard, n. 21 above.
CFREU—the rights to life (Article 2) and integrity of the person (Article 3) and the prohibitions on torture and other degrading punishment (Article 4) and forced labour (Article 5)—clearly belongs to the catalogue of those imperative human rights, inherent in all human beings, applicable everywhere and at all times (universal) and overriding any other policies or principles. They are non-derogable rights under the CFREU. Article 52(3) only confers on EU law the discretion to provide more extensive protection.

The elevation of the right to a fair wage to the status of a human right finds no support either on a literal interpretation of the CFREU (or other relevant acts), or in the academic literature. On the contrary, it has been authoritatively argued that labour rights, including the right to a decent wage, differ in several ways from human rights.\(^72\) They do not present the same urgent and weighty moral claim as human rights; they do not apply universally, but only to individuals in employment relations; and their content changes considerably from country to country.

Therefore, the right to a fair wage is potentially subject to the restrictions provided for in EU or national law, on the condition that such restrictions “are necessary and genuinely meet objectives of general interest recognized by the Union” (article 52 (1)). As elucidated by the explanatory note to Article 52, the norm refers to “objectives mentioned in Article 3 of Treaty on European Union”. The coordination of economic policies is here included. Article 119 TFEU is very clear on that point: “For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States’ economic policies”.

Therefore, the limitations (a) are subject to the “principle of proportionality,” which is to say that Union or Member State action must not go beyond what is necessary to attain their objectives of general interest and the measures are appropriate for attaining them,\(^73\) and (b) they also need to “respect the essence” of rights. It is very difficult to separate these two conditions in practice. In fact, the CJEU usually considers them together.\(^74\)

In point of fact, the “proportionality test” for Council recommendations aimed at reducing or freezing the national minimum wage involves a balance between the purposes of those measures (basically, austerity and cost competitiveness) and the social aims behind the right to a fair wage. The outcome of such a test would presumably depend on the content of EU recommendations: The “essence” of the right would be considered disproportionally affected if the Council were to

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\(^{73}\) See joined cases C-92/09 e C-93/09 Volker and Schecke [2010] ECR I-11063 paragraphs 72-86. The proportionality principle has been stated in the same terms also in well-known cases dealing with national measures hindering the worker’s exercise of the free movement right (See note 12 above and Case C-55/94, Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-04165; Case C-18/95 F.C. Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland [1999] ECR I-00345.

\(^{74}\) See T. Blanke, n. 63 above.
impose a sharp minimum wage cut below the poverty line. However, it should be borne in mind that, as the Viking-Laval doctrine has taught us, whenever social rights have to be balanced with the economic the needs underpinning the common market, the result can be very disappointing for social rights.75

A further problem is that of identifying violations of the right to a fair minimum wage: What is the line that EU institutions exerting downward pressure cannot cross? The answer is not difficult to find. We need only look at the standards expressed by the pertinent charters—an “existence worthy of human dignity” (Art. 23 of the Universal Declaration of Human Rights), a “decent standard of living” for workers and their families (Art. 4(1) of the European Social Charter)—and we will see that this line can be accurately drawn: It coincides with the threshold of poverty. Accordingly, the right to a fair minimum wage is violated whenever a wage reduction or moderation recommended by EU institutions forces Member States to set the minimum wage below the threshold of poverty. In putting an exact number to this threshold we might set it at 60% of the average wage (a rule widely shared among economists), but if we find that to be overgeneralizing, we can rely on country-specific analyses that take relevant statistical evidence into account. This is the approach already taken by the European Committee for Social Rights (ECSR), the body responsible for monitoring member-state compliance with the European Social Charter (ESC), in dealing with the Greek austerity measures that dramatically slashed the minimum wage for workers under twenty-five.76

An alternative path may be to apply to the ECSR itself on the ground of a violation of the right to a fair minimum wage set forth in Article 4(1) ESC. This path has been held up as an example of an emerging multilevel trade union pluralism,77 and has been successfully followed by Greek trade unions. Although ECSR decisions are in principle not legally binding, since this is not a judicial body, an argument has recently been made that some kind of biding effect on domestic


76 In Complaint 65/2011 General Federation of Employees of the National Electric Power Corporation & Confederation of Greek Civil Servants Trade Unions v Greece, Decision of May 23, 2012, and Complaint 66/2011 General Federation of Employees of the National Electric Power Corporation & Confederation of Greek Civil Servants Trade Unions v Greece, Decision of 23 June 2012, the committee found that the 32% minimum-wage reduction mandated for workers under twenty-five (a reduction enacted through the Board of Ministers Decision 6/28.2.2012) meant pushing those workers below the poverty level, considering that the reduction worked out to a minimum monthly gross wage of €510.95 and that the poverty level in Greece in 2011 was set at €580 per month.

law should be recognized.\textsuperscript{78} Be that as it may, they carry considerable moral and political weight and so cannot easily be ignored by national and European legal and judicial systems.

6. CONCLUSION

In view of the foregoing discussion, a common European wage policy aimed at solving the problem of in-work poverty would be highly desirable today, yet the lack of EU competence on pay still makes such a policy unfeasible. Even so, this lack of competence has been overcome in a variety of ways, sometimes by protecting workers through equal pay rights but more often, on a completely different approach, by working within the system of European economic governance. In this last connection, in the wake of the financial and economic crisis, EU institutions have influenced national wage policies by pushing wages down.

There are today many good reasons for reversing this downward pressure on wages, not only from an economic and social point of view, but also from a political one. The wage policy imposed by the Union is once again a diversion of Union action from its social role. And that, of course, contributes increasing its distance from citizens.

Today, as never before since the Brexit and the migrant crisis are undermining the “European Project,” it seems important to turn the tide, especially in a field as sensitive as wages. Following the example the Jacques Delors’s Commission set in the late 1980s, the Union needs to show its positive side. Economic efficiency and austerity policies should leave some room for social objectives, including a solution by which to fix the problem of unsustainably low wages.

I have shown that at this precise moment in time, the only legally feasible and realistic solution available to those interested in promoting a different wage policy is to act though the CJEU so as to force EU institutions to stick to their competences and stay away from wages. In Eurozone countries (non-Eurozone countries do not at this time face the same problem), this would at least restore the freedom of national wage-setting institutions to set wage policies, in keeping with Article 153(5) TFEU clearly says.

\textsuperscript{78} This view is advanced, for example, in Yannakourou “Challenging Austerity Measures Affecting Work Rights at Domestic and International Level: The case of Greece,” in Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges, ed. C. Kilpatrick and B. de Witte (EUI Working Paper, LAW 2014/05): 27, arguing that Greek courts can invoke the ECSR’s 2012 decision as grounds for not applying the provisions cutting the pay of workers under twenty-five. Indeed, as the argument goes, the ESC is an international convention that has been ratified by Greece: It is therefore part of the country’s domestic law and accordingly takes precedence over any contrary provision in that law.