

**Investigating the idea of a European Union minimum wage policy:
a socio-legal perspective**

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The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

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For Mum and Dad

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Abstract

This thesis investigates the idea of a European Union (EU) minimum wage policy, exploring what it might look like given the significant obstacles that stand in the way of its realisation. The idea of a minimum wage policy for the EU has a long and varied history and can be traced to the inception of the Single Market. Over the course of European integration, suggestions have been made for the Union to coordinate wages in Member States, against both absolute and relative values. Justifications for intervention have varied but predominately focus on the prevalence of low wage work in Europe. However, the limited competence of the Union to act in the area of pay, coupled with the heterogeneity of industrial relations systems in Member States, makes the realisation of an EU minimum wage at the hands of the Union highly unlikely.

In light of these impediments, this thesis articulates an alternative policy. This policy would be instituted by the European social partners and implemented by an 'autonomous' European social partner agreement. Given the scope of social partner agreements, this approach would lead to a more 'transnational' wage policy akin to collective agreements signed between European industry federations and employers' associations organised across national borders. In outlining the contours of this policy, valuable insights are gained into the operation of the European social dialogue and its potential to serve as an alternative space for societal governance. Furthermore, a potential 'hybrid' regulatory form for such a policy is suggested – between an autonomous agreement and 'new' governance processes – that would improve the effectiveness of its implementation.

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1. Introduction

Few policies divide opinion, across the political spectrum, like minimum wages. Depending on how they are set, whether by legislation or collective agreement, both trade unions and employers' associations raise economic and social concerns. Trade unions in countries with strong collective industrial relations systems have viewed those that are implemented by way of statutory legislation as an infringement of their autonomy to regulate wages and thus as a threat to their position in society. At the same time, fears are often raised that statutory minimum wages place downwards pressure on collectively agreed pay, hurting not helping those in need. Conversely, employers' associations resist minimum wages of both forms, arguing that increasing wages leads to price inflation and to higher levels of unemployment (resulting from, for example, businesses passing on higher costs to customers or reducing wage bills by making redundancies).

However, successful experiences with statutory minimum wages has led to a softening of this once universal opposition (although variants had been adopted as far back as the turn of the 19th century, it was not until the 1980s that they were used to protect workers from the changes wrought to economies by globalisation, including the deregulation of labour markets in the name of economic liberalisation). A prominent example is the introduction of a statutory minimum wage in the UK. Although initially opposing its introduction, the Trades Union Congress has been a leading supporter of the national minimum wage; viewing it as a complement to, rather than a replacement for, a strong collective industrial relations system. Moreover, the introduction of a statutory minimum wage in Germany in 2015, with significant support from trade unions, is perhaps further evidence of acceptance (especially in countries that have traditionally supported collective regulation).

On the other side of industry, campaigns such as 'Fight for \$15' in the US and the Living Wage Foundation's living wage in the UK, have proven remarkably successful in placing pressure on businesses to voluntarily pay their staff higher wages. Interestingly, the idea of 'socially just' wages has begun to catch

the attention of those on the right of the political spectrum. In 2016, a 'national living wage' was introduced in the UK by a Conservative government (although set as a wage floor and not to ensure that workers earn enough to maintain a decent standard of living).¹ Furthermore, in the US, a recent report by ThinkProgress suggests that increasing the federal minimum wage is a 'political goldmine', with significant levels of support amongst senior conservative, specifically Republican and Independent politicians.²

Importantly, this thesis departs from state-centric analyses of minimum wages, interrogating the idea of a transnational policy. Of those that have been suggested, arguably the most controversial is that of a European Union minimum wage policy. Responses to this proposal are often negative, usually questioning its practicality. Common issues raised include the Union's lack of competence in the area of pay;³ differences between Member States, in terms of their industrial relations systems (whether favouring state intervention or abstention); and of prevailing wage rates. Conversely, proponents argue that such a policy would provide a human face to the process of ongoing economic integration; alleviate the problem of 'social dumping'; and encourage transnational mobility across the Union (specifically of workers).

With increasing frequency over the last decade, these suggestions have been raised in debates concerning the future of the Union. There has long been a perception amongst proponents of 'social Europe', that Europe's social model

¹ The introduction of the national living wage by a Conservative government was viewed by some as an attempt to appeal to working class voters and to promote so-called 'Blue-collar Conservatism'. See George Wilson, 'What Now for the National Minimum Wage?' (*Huffington Post*, 13 May 2015) <http://www.huffingtonpost.co.uk/george-wilson/minimum-wage_b_7272708.html> accessed 5 November 2017.

² ThinkProgress, 'Raising the Minimum Wage is a Political Goldmine' (August 2013) <<https://thinkprogress.org/raising-the-minimum-wage-is-a-political-goldmine-7ac7826042c2/>> accessed 5 November 2017.

³ Article 154(4) of the Treaty on the Functioning of the European Union (TFEU).

has been neglected at the expense of economic integration.⁴ The onset of the financial crisis brought this reality home for many citizens, who were faced with austerity measures that could be traced directly to the Union,⁵ with anti-EU sentiment visible in the streets of major capitol cities across Europe.⁶ In the aftermath of the financial crisis, there has been a concerted effort by the Union to address some of these concerns. In his 2015 State of the Union address, President of the European Commission, Jean-Claude Juncker, emphasised the need to develop Europe's social model and restated his commitment to introduce a European Pillar of Social Rights.⁷ Importantly, the Pillar provides rights to fair wages and adequate minimum wages. This thesis does not suggest that an EU minimum wage would solve these problems, rather that it would form a valuable part of a concerted attempt at their resolution (e.g. an attempt to re-launch social Europe through a new programme of legislation).

Importantly, the idea of regulating pay at EU-level asks deeper questions than whether there should be a more social Europe versus further economic integration. Any call for competence to be transfer to the Union in order to harmonise an area, whether by setting strict standards in Member States or allowing for diversity, inevitably leads to the proponent(s) political motivations being called into question.

At first blush, the idea of an EU minimum wage policy appears to be very similar to those common in many Member States e.g. set at a certain nominal value but applying across the whole of the Union. However, there are a number

⁴ For an overview of debates, see Philip P. Whyman, Mark Baimbridge and Andrew Mullen, *The Political Economy of the European Social Mode* (Routledge 2012).

⁵ As was the case for the 'structural adjustment programmes' extended to indebted states e.g. Greece, Ireland, Portugal and Spain (which are discussed in detail in chapter 4).

⁶ For example, in Greece, the anti-austerity movement spawned SYRZIA, the political party that later went on to win the 2015 legislative election (headed by Alexis Tsipras).

⁷ European Commission, 'State of the Union 2015: Time for honest, unity and solidarity' <http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm> accessed 1 July 2017.

of proposals that are more sophisticated than this model. One example is those that are based upon coordinating wages around a target value set against mean or median wages, either for all Member States or certain groups e.g. northern/central/eastern Europe, to be achieved by way of a Directive (ignoring the Union's restricted competence). Alternative methods of implementation include non-binding guidelines set by an Open Method of Coordination process e.g. the European Employment Strategy.

However, strong responses to such proposals are, in reality, deeper seated than support either for or against minimum wages. As tools that are almost exclusively employed in pursuit of social objectives, such as to prevent in-work poverty, questioning whether there should be an EU-level policy implies that a problem exists. For this thesis, that problem is of low wage work and increasing levels of inequality. The number of low wage workers in the EU has been rising for a number of years and according to recent figures stands at 17.2% (roughly 1 in every 6 workers).⁸ Similarly, measures of inequality in general, and wage inequality, in particular, have been steadily rising since the end of 2008 (with the onset of the financial crisis). These problems manifest themselves not only in terms of how they affect individuals (whether they have enough money to provide for themselves and for their families), but also at a higher level of abstraction, in terms of how they affect society.

The Union has often shied away from this issue, arguing that due to its limited competence to act in the area of pay (due to its exclusion under Article 153 TFEU), the adoption of measures like an EU minima would not be possible without either a change to the Treaties or Member States, independently, instituting their own policy. Debates on the idea of an EU policy often take this binary choice as a starting point; either suggesting a change to the Treaties or, on the other hand, Member States developing their own minimum wage policy outside the auspices of the Union. However, the Union's insistence that it cannot act in the area of pay is misleading. From the inception of the internal

⁸ Eurostat, 'Earnings statistics' <http://ec.europa.eu/eurostat/statistics-explained/index.php/Earnings_statistics> accessed 4 November 2017.

market to more recent controversies over public procurement rules and the posting of workers, the Union has indirectly interfered in how wages are set and how wage-setting mechanisms function in Member States. For example, famous Court of Justice cases such as *Enderby* and *Cadman* illustrate that in the pursuit of policy objectives related to pay (here equality between sexes), the Union has interfered in how wages are set.⁹

More recently, however, this tiptoeing around the edges of its competence, has exploded into all out intervention, with serious negative consequences for workers. The origins of this more direct intervention can be traced to the early development of Economic and Monetary Union (EMU), seeing full fruition with the launch of so-called 'New' European economic governance around the time of the financial crisis of 2008. Whether through the Broad Economic Policy Guidelines or recommendations under the European Semester of policy coordination, the Union has developed a more direct method for influencing wages and wage-setting mechanism in Member States. For example, policy tools – like 'Country-Specific Recommendations' – are issued under the European Semester system 'advising' Member State to reduce wage rates and decentralise collective bargaining in certain sectors to improve competitiveness. In comparison to old(er) forms of wage governance, this approach is premised not on 'traditional' sanctions – like Court infringement proceedings – but 'softer' methods such as 'peer review' and 'naming-and-shaming'.

With the exceptional events of the financial crisis, however, these methods have taken on an altogether more sinister hue. The 'structural adjustment programmes' signed between 'the Troika' of the European Commission, ECB and IMF which extended financial aid to indebted Member States e.g. Greece, Ireland and Portugal, made receipt dependent upon wide-ranging economic and labour market reforms. This included reducing prevailing wage rates

⁹ Case C-127/92 *Enderby v Frenchay Health Authority* [1993] ECR I-5535; and Case C-17/05 *Cadman v Health & Safety Executive* [2006] ECR I-9585.

(usually by cutting statutory minima) and decentralising collective bargaining to sectoral and enterprise levels.

This form of intervention is anything but 'indirect', presenting a false choice between either default and domestic financial crisis and the dismantling of centuries old industrial relations systems or the reduction of protections for the most vulnerable. Indeed, as this thesis argues, these measures have had a visible impact on collective bargaining coverage, trade union density and prevailing wage rates. Collectively, these measures illustrate the fallacy of the Union's non-intervention concerning pay in Member States, indeed, such has been its impact that commentators have suggested new economic governance methods could be repurposed and used as a basis for the adoption of a more progressive wage policy (in particular, that of an EU minimum wage).

Contrary to common suggestions that the Union or the Member States should be placed at the helm of an EU minima, this thesis argues that greater attention should be paid to the capacity of the social partners, including both representatives of management and labour at EU and national level, to establish an equivalent. Importantly, this choice is influenced by current conceptual and practical limitations in the commentary and literature that surrounds discussions regarding the introduction of an EU minimum wage. This research is, with very few exceptions, wedded to the centrality of the Union and Member States in the development and implementation of such a policy. Moreover, it fails to appreciate the political reality of regulating matters relating to pay at EU-level. Although intervention may be possible through methods such as economic governance, the political desire for a policy that resembles a statutory or collectively agreed minimum wage in Member States is not present at either the national or EU-level.

Consequently, for any proposal to be of real value, it must be achievable in practice. This thesis seeks to develop a proposal that could be adopted by lawmakers (understood to include the social partners). This involves finding a workable basis and outlining how such a policy would operate. These points are two of the most significant gaps in current knowledge which, in the author's

view, are preventing suggestions for the adoption of an EU minima from developing from merely an idea to a serious proposal for regulatory intervention. There is little utility in suggesting a proposal for change if its realisation is hamstrung by its poor articulation.

In the pursuit of a workable proposal, this thesis turns to literature from a variety of different fields in order to flesh out its contours. Current research is undertaken almost exclusively by political scientists, to the neglect of other important disciplines. Indeed, a comprehensive (legal) analysis of this topic has not yet been undertaken, specifically of the potential bases for action and how such a policy would function. This thesis explores these points through the lens of multiple academic disciplines: including legal sociology, the study of regulation, legal theory, governance theory, reflexive law, hybridity, law and new governance, and post-colonial cultural theory. This thesis does not research the empirics of minimum wages or the attitudes of trade unions, employers' associations or the Member States towards the adoption of a European minimum wage policy. Although these are very important endeavours, and are drawn upon in this work, they have been undertaken elsewhere.¹⁰

This thesis, therefore, adds to current knowledge by developing a proposal that could potentially form the basis of an EU wage policy. In doing so, it covers areas in current debates that have not been fully explored.

On the potential basis for an EU minima, in light of the limited competence of the Union to act in the area of pay, attention is turned to the Member States and the methods they could utilise if, amongst themselves, they wished to proceed alone (namely away from the European Commission). Of the legal bases considered, because of the Article 153 TFEU exemption on pay, none

¹⁰ For example, see, respectively, Line Eldring and Kristin Alsos, *European Minimum Wage: A Nordic Outlook* (Fafo 2012); and Bengt Furåker and Mattias Bengtsson, 'On the road to transnational cooperation? Results from a survey of European trade unions' (2013) 19(2) *European Journal of Industrial Relations* 161.

could, realistically, serve as a foundation for an EU minima. This turns focus to potential normative bases; those that are not premised on public power (or the state's law-making monopoly). Subsequently, the centrality of the Union and Member States in formulating and implementing such a policy is challenged. The success of the social partners with the autonomous route of the European Social Dialogue, whereby they can give effect to their own agreements across the EU, directs attention towards the possibility that an EU minima could be based on a societal process; one that is focussed on actors such as trade unions acting independently of public power.

This suggestion has important consequences; not only does it remove the centrality of the Union in the development of such a policy but it has implications for its scope. For example, social partner agreements are commonly reached at cross-industry or sectoral levels, they do not ever, and they cannot, cover an entire national economy. Any policy based on the social dialogue would be less of an EU-wide minima and, more realistically, a 'transnational' wage policy, restricted to the national affiliates of European signatory associations.

This determination, which is a consequence of practical considerations, changes the complexion of current debates on an EU minima. Often the social dialogue is cited as a potential foundation for a minima but the scope of autonomous agreements is either not fully considered or ignored. Importantly, utilising the social dialogue does not rule out future action by the Union, indeed, regulation via the social dialogue has led to legislation being initiated by the European Commission in a number of areas (for example, the autonomous Agreement on Crystalline Silica has had an important influence on the levels at which occupational exposure limits will be set for silica dust – and indeed its eventual inclusion – in discussions on the Carcinogens Directive).¹¹ Moreover, autonomous agreements have been reached by the social partners

¹¹ See European Council, 'Carcinogens or mutagens at work: Council sets new exposure limits' (July 2017) <<http://www.consilium.europa.eu/en/press/press-releases/2017/07/11/carcinogens-mutations-at-work/>> accessed 3 January 2018.

that cover constituent elements of pay (including the Work in Fishing Agreement).¹²

Looking in closer detail at the operation of European social dialogue in the search for a basis for an EU minima, however, reveals a complex system of governance which requires further investigation if the most is to be made of the opportunities it provides as an alternative space for the social partners to give effect to their own agreements. By way of example, the autonomous route is dependent for its success on the national procedures and practices of management and labour for implementation, and the ability of the social partners to organise at EU-level and reach agreements.

Explained in another way, it appears less 'autonomous' of public forms of power and more contingent on the existence of institutional structures and support for success. Furthermore, the development of 'new' governance-style instruments and their adoption by the social partners raises questions about the impact they are having on the uptake of autonomous agreements, for example, are they interchangeable and, as a consequence, in competition, or is it possible they could be used together (alongside each other or in an arrangement designed to facilitate their interaction)?

It is of imperative importance that these 'hidden dynamics' are fully understood if an EU minimum wage policy is to be designed that could realistically stand a chance of being adopted by the social partners and of serving a solidarity enhancing function. Here, studying the autonomous route of the social dialogue through the lens of transnational legal pluralism sheds light upon the complexity involved in its operation. To-date, this approach has been overlooked by scholarship on European industrial relations and this thesis

¹² Europeche Cogeca and EFT, 'Agreement between the social partners in the European Union's sea-fisheries sector of 21 May 2012 concerning the implementation of the Work in Fishing Convention, 2007 of the International Labour Organization' (2012) <<http://ec.europa.eu/social/BlobServlet?mode=dsw&docId=9089&langId=en>> accessed 24 February 2018.

constitutes a first exploration of the utility of this theory for better understanding the social dialogue. The insights gain from this theoretical approach are utilised in the pursuit of creating a workable proposal for an EU minima and serve as an example of theory informing the development of policy.

Moreover, the insights gained from this approach present the social dialogue as an alternative space for societal governance; where labour law's main objectives of constraining market power/furthering concerns regarding economic/social justice can be achieved because of, not in spite of, the fragmentation of European law (especially with regard to the complexity of industrial relations at European level). This mode of governance is no longer viewed as occurring separately from the institutions of the Union and the Member States, rather its dependency is revealed. These insights have the potential to reach beyond the proposal under consideration and to contribute to the development of policy in other areas, for example, the use of the social dialogue to regulate 'hard' issues such as working hours.

Especially noteworthy for the development of transnational legal pluralism – as a theory – is how its application to the social dialogue illustrates its limitations, specifically, its underestimation of the continuing importance of the state. This point is not recognised in current literature and serves to illustrate the methodological value of using empirical evidence – by way of the case study of the social dialogue – to inform the development of (legal) theory.

Insights from transnational legal pluralism also reveal the full range of instruments available to the social partners – whether legal or not – and encourage experimentation with their combination in furtherance of labour law's objectives.¹³ For the autonomous route of the social dialogue, this involves exploring the possibility of combining autonomous agreements and so-called new generation texts (new governance-style instruments developed

¹³ For example, see Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar 2015).

by the social partners in response to the uptake of similar institutionalised policy tools around the turn of the millennium).

This approach is said to improve the effectiveness of social partner agreements, which is especially important in light of the limited support they receive from the national affiliates of social partners and Member States after their implementation. This combination is informed by research on hybridity, law and new governance, which is used as a basis to develop a 'transformative' understanding of the combination of different policy instruments. This framework is unique and contributes a new perspective to the design of regulation, in particular, for European social partner agreements, that has not previously been explored. Here, autonomous agreements are seen as providing a framework – for setting a target minimum wage – which is supported by new governance instruments – such as reporting exercises – for ensuring progress is made towards the realisation of a target wage by covered national affiliates.

As such, it is possible to articulate a *form* of EU minimum wage policy which takes into account the difficulties of regulating in Europe, however, its success will still be dependent on a wide range of structural and institutional factors.

Moreover, this unique approach to the design of regulation has potential implications beyond suggestions for the design of an EU minima, as a strategy that could be adopted for improving the effectiveness of other agreements (including national level collective agreements). However, this approach to the design of an EU minima is not without its limitations. As highlighted in literature on transnational law, institutional help and support must be forthcoming in order for it to stand a realistic chance of success in practice. Alternative regulatory strategies such as hybridity may be capable of improving the implementation of autonomous social partners agreements but they are still dependent in large part on the European Commission, the social partners and the national procedures and practices of their affiliates for their effective implementation.

In methodological terms, the combination of these different theories and their insights – from legal sociology, the study of regulation and governance theory (to name a few) – results in an approach that has not previously been applied in the area of European labour law. Research on hybridity, law and new governance, and, in particular, transnational legal pluralism, is especially instructive for developing an understanding of law-making in Europe that takes full account of the panoply of instruments available to regulators (whether through formal modes of governance e.g. Council Directive or informal e.g. the autonomous route of the European social dialogue).

As alluded to above, the added value of this approach is that by better understanding the reality of regulating social Europe, targeted and thus more effective proposals can be made (which need not be limited to the idea of an EU minima). In effect, this thesis employs insights from multiple academic disciplines – on the nature and purpose of law – as a basis against which a more accurate description of regulating in Europe is articulated. This understanding is subsequently operationalised in pursuit of developing a proposal for an EU minima that is workable and furthers debates over its potential form.

Given the positivistic and/or descriptive nature of the theories this thesis utilises – such as the systems theoretical underpinnings of transnational legal pluralism – their employment in pursuit of a particular normative outcome (that of providing a workable proposal for an EU minima) is possible. For this thesis, the normative orientation for such action is to address the problem of increasing wage inequality in Europe. As such, the idea of an EU minima is viewed as a contribution towards reversing rising wage inequality in Member States and, at the same time and on a more human level, ensuring workers receive fair remuneration for their labour.

In what follows, this thesis proceeds through 6 substantive chapters.

In chapter 2, a preliminary investigation of minimum wages is undertaken, both at a general level of abstraction and, where possible, against the specific

situations in Member States. A working definition of minimum wages is provided, along with a brief discussion of how minimum wages are commonly used. This is followed by a discussion of the effects of minimum wages on employment, competitiveness, and industrial relations. Next the demographics of minimum wages are outlined, in terms of the personal and employment characteristics of minimum wage workers. The history of minimum wages and their relationship with national industrial relations systems are then explored (which is restricted to four Member States whose national industrial relations systems have influenced the development of others). Finally, the regimes and levels at which minimum wages are set in Member States are compared against one another using various statistical measures. This chapter provides a background for the third chapter that investigates proposals for the coordination of minimum wages across Member States.

In chapter 3, debates on the idea of an EU minimum wage policy are explored. The chapter begins by investigating references to wages and minimum wages in international and European agreements and conventions. This is followed by a study of one of the earliest attempts to explore the possibility of establishing an EU minimum wage policy, the Commission *Opinion on an Equitable Wage*.¹⁴ Here, the lack of support from Member States is cited as the main reason for its failure. The positions and views of the European Parliament and trade unions on the adoption of an EU minimum are discussed, suggesting that although support exists (especially in the European Parliament), division along national lines has prevented the adoption of a uniform position in favour of its further investigation. Next more contemporary debates are considered. These include how and to what extent minimum wages in Member States could be coordinated and the levels at which they could be set. Finally, the features of minimum wage systems in Member States that are underdeveloped or ignored in debates on the idea of an EU minimum wage policy are outlined.

¹⁴ European Commission, *Commission opinion on an equitable wage* COM(93) 388 final.

In chapter 4 charts the impact of EU law and policy on wages and wage-setting mechanisms in Member States and explores how Union intervention in this area has developed over the course of European integration. Initially old(er) methods of EU wage governance are assessed – focussing on legislation and the jurisprudence of the Court of Justice – before Economic and Monetary Union and the beginnings of economic governance are explored. This is followed by a review of what has been referred to as ‘new’ European economic governance and its effects upon wages and wage-setting mechanisms in Member States (with specific focus on the European Semester). Finally, the financial assistance programmes administered at the hands the IMF-led ‘Troika’ to indebted Member States after the financial crisis are discussed. This chapter highlights the fallacy of the Union’s assertion that it cannot act in the area of pay and reveals the regressive wage policies it pursues. Furthermore, it serves as a basis for the articulation of an alternative, solidarity enhancing, wage policy.

In chapter 5, the concept of a solidaristic wage policy as the normative justification for an EU minimum wage policy is explored. First, the foundations of the policy are traced to the work of Gosta Rehn and Rudolf Meidner and their work on creating a redistributive wage policy. Second, the evolution of wages and wage dispersion in Europe is analysed, illustrating how with the development of European economies from the 1980s onwards, positive wage gains and reductions in wage dispersion have been lost (this is especially clear in Member States that followed and departed from solidaristic wage policies). Third, critiques of solidaristic wages – from the right of the political spectrum – are discussed. These are subsequently set against early suggestions by European Trade Union Congress for the adoption of solidaristic wages in Europe.

Chapter 6 questions on which legal or normative basis an EU minimum wage policy could be established. It explores a wide range of bases in detail, exposing areas that are neglected by current scholarship. It suggest literature on this topic has tended to focus on action the Union can undertake, at the expense of investigating the potential of alternative modes of governance;

specifically those that involve actors such as trade unions and employers' associations. Consequently, trade union initiatives for the transnational coordination of collective bargaining are explored, followed by those for the negotiation of transnational collective agreements and, finally, the European social dialogue.

In light of the Union's limited ability to regulate in the area of pay, it is perhaps not surprising that chapter 6 suggests the only way forward for an EU minima is at the hands of trade unions and employers' associations, whether through the social dialogue or initiatives aimed at wage coordination, however, it is argued this would not necessarily lead to the side-lining of the Union and its institutions. Rather the Union and its institutional and policy framework would retain a vital role in ensuring its success.

In chapter 7, the autonomous route of the social dialogue is studied through the lens of transnational legal pluralism in order to shed light upon the complexity evident in its operation. Initially, the origins of transnational legal pluralism are discussed, including how the theory views the relationship between the state and law and the consequences this has for rulemaking. These points are then explored against the operation of the European social dialogue, highlighting the importance of utilising all instruments available to the social partners – namely autonomous agreements and new generation texts – in order to ensure the effectiveness of their actions.

This point is picked up in the final chapter on the design of an EU minimum wage policy. Here, literature on hybridity is appraised and used as a basis against which to outline how an autonomous social partner agreement detailing an EU minima could be combined with new generation texts in order to improve the effectiveness of its operation. This model is informed by the governance architecture of the autonomous social partner agreement on Crystalline Silica, which is explored as a case study.¹⁵

¹⁵ Agreement on Workers Health Protection through the Good Handling and Use of Crystalline Silica and Products containing it (OJ [2006] C279/2).

2. Investigating minimum wages

2.1 Introduction

Before discussing the idea of an EU minimum wage policy and assessing the strengths and weakness of current debates, a preliminary investigation of minimum wages is necessary. This chapter provides background information on the history of minimum wages, how they have been used by policymakers and, importantly, how they are set in Member States. It serves as a foundation for the rest of the thesis; setting down the details necessary for the discussions and arguments that are developed in the following chapters. From a policy perspective, it highlights the difficulty of coordinating minimum wages amongst a group of 28 Member States with very different industrial relations systems.

Minimum wages have a rich and varied history, crossing disciplinary and policy boundaries. As much controversy is generated today when an academic or politician suggests their introduction, or as is more often the case, increasing their level, as faced Winston Churchill when he sponsored the Trades Boards Act of 1909. There are signs that after years of debate dominated by concerns about the negative effects of minimum wages on employment, broader considerations are gaining traction. Nowhere is this more evident than in the U.S., where the 'Fight for \$15' campaign organised by fast food workers has gained broad support centred around reducing poverty and inequality. Activists see Fight for \$15 as a means of helping workers achieve 'living wages', although as is often the case in the EU, such demands lack finer details.

Current proposals for an EU minimum wage policy suffer from similar problems, which are further complicated by suggesting transnational or EU-wide operation. Proposals often have well formed ideas regarding institutional operation but fail to articulate a clear vision of what type of minimum wage an EU policy would advocate. Would it be directed towards reducing poverty and inequality like the Flight for \$15, or would it be aimed at protecting vulnerable workers as envisaged by Churchill? Answers to these questions are bound to broader considerations, such as what are the effects of minimum wages on

employment, who are the most frequent recipients, and how have they developed over time? The success of any EU minimum wage policy is dependent not only upon its articulation but also its relationship with national industrial relations systems, in terms of the different regimes and levels at which minimum wages are set in Member States.

These issues are considered in further detail in this chapter, in general and where possible, against the specific situation in Member States. First, a working definition of minimum wages is provided, along with a brief discussion of how minimum wages are commonly used. Second, the effects of minimum wages on employment, competitiveness, and industrial relations is briefly considered. Third, the demographics of minimum wages are outlined, in terms of the personal and employment characteristics of minimum wage workers. Fourth, the history of minimum wages and their relationship with national industrial relations systems are explored. This is restricted to four Member States whose national industrial relations systems have influenced the development of others. Finally, the regimes and levels at which minimum wages are set in Member States are compared against one another using various statistical measures.

2.2 Background

It is important to have a clear understanding of what is meant by the term 'minimum wage' and of how minimum wages are used.

2.2.1 Definition

In simple terms, a minimum wage is a legally mandated lower boundary for wages. Some definitions restrict the meaning of minimum wages to those set by the state (and implemented by statute),¹ whereas others include those set by employers associations and trade unions (and implemented by collective

¹ Gerald Starr, *Minimum Wage Fixing: An International Review of Practices and Problems* (ILO 1981) viii.

agreement).² Definitional differences therefore turn on a distinction between *public* and *private* law. This work considers minimum wages to be lower wage boundaries set by statute or by collective agreement, including those extended by the state, that cover large numbers of workers across multiple industries. According to this definition, all Member States have a form of minimum wage.

2.2.2 Purpose

Minimum wages have traditionally served one of two purposes: either (1) as social justice tools; or (2) as macroeconomic policy tools. Each can be subdivided depending upon the broader policy objectives they are considered as instruments of.

Social Justice

The oldest justification for the introduction of minimum wages is as a means of protecting vulnerable workers. Minimum wages are seen as a last resort and should only be used when specific groups of workers, because of certain characteristics e.g. gender, are in a weak bargaining position in the labour market. This notion of vulnerability is associated with the absence of effective collective bargaining in specific trades or industries. The role of the state is to provide a substitute method for collective bargaining, and is based upon the belief that any subsequent agreement will be more acceptable to employers associations, trade unions and the community, than when imposed by the state unilaterally or with limited consultation. Additionally, those involved are argued to gain valuable experience as part of the process, reducing the need for similar interventions by the state in the future. However, the objective of protecting vulnerable workers is closely linked to the idea of providing a morally acceptable wage below which employment is considered unacceptable. This

² Wendy Cunningham, *Minimum Wages and Social Policy: Lessons from Developing Countries* (The World Bank 2007) 19.

approach is often criticised for not going far enough to reduce poverty, as minimum wages are artificially low and are not universal or coordinated.³

Minimum wages may be used to ensure the payment of 'fair wages', with the state intervening to determine what a fair or equitable wage is in a certain industry or occupation, as opposed to improving the relative position of the lowest paid. Greater concern is had for ensuring equal pay for equal work and for establishing minimum wages close to prevailing wage rates. Isolating wages from excessive competitive pressures is also important, and is justified against the principle, expressed in the Preamble to the Declaration of Philadelphia, that labour is not a commodity. In similarity with protecting vulnerable workers, this may be achieved by providing a substitute method for collective bargaining or by introducing statutory minimum wages for specific occupations. In the case of collective bargaining, unlike when protecting vulnerable workers, focus is directed towards reducing industrial conflict and providing a stable basis for negotiation. Minimum wages are thus used as an instrument of industrial relations policy, rather than as a means of achieving predetermined goals for the modification of wage structures. It is worth noting that fair wages are not to be confused with 'living wages'. Although having a history that dates back to the turn of the 20th century, living wages have courted recent attention in the wake of the financial crisis; living wages are informal benchmarks based upon the minimum income necessary for a worker to meet their basic needs and are different to subsistence based measurements.⁴

The adoption of ILO Convention No. 131 and Recommendation No. 135 of 1970 envisage minimum wages covering all workers. According to these instruments, rather than protecting only vulnerable workers or providing fair wages, minimum wages should be set as 'basic floors', protecting all workers from low wages. This is the case in a large number of Member States, and

³ Starr (n 1) 21.

⁴ In the U.K., see The Living Wage Foundation, 'What is the Living Wage?' <<http://www.livingwage.org.uk/what-living-wage>> accessed 20 April 2017.

although universally applicable (with some exceptions), the number of workers receiving minimum wages is relatively small, as they are often set at 'safety net' levels, instead of at levels that have a major influence on prevailing wage rates. This role for minimum wages rests on the belief that labour market imperfections justify establishing a wage floor, but that economic constraints restrict the level at which they can be set e.g. because of employment considerations.⁵ Minimum wages are also regarded as having a narrow effective scope and therefore should be directed towards the lowest paid (with collective agreements covering remaining workers).⁶ Understood in this way, minimum wages 'follow' rather than 'lead' wage developments, and exert only minimal upward pressure at the lower end of wage structures. In light of the increasing incidence of low pay and the normalisation of minimum wage work in Member States, the idea of basic floors as social policy instruments effecting only a limited number of workers can be questioned.

Macroeconomic policy

The broadest role envisaged for minimum wages is as macroeconomic policy tools; as a means of changing the level and structure of wages inline with national economic objectives, including growth, income redistribution, and price stabilisation. Although having broad coverage, unlike wage floor arguments, minimum wages are set at comparatively high levels, and are intended to determine the wages received by large numbers of workers. This implies an understanding of labour markets that is the direct opposite of that forwarded by the basic floor concept; that if left unregulated, labour markets are likely to maintain wages at low levels, having negative economic and social consequences.⁷

⁵ Starr (n 1) 40.

⁶ *ibid.*

⁷ Starr (n 1) 48.

2.3 The effects of minimum wages

The effects of minimum wages are hotly debated, both academically and politically. Below literature on the effects of minimum wages on employment, competitiveness, and industrial relations is briefly considered.

2.3.1 Employment

Standard economic models argue that if the minimum wage is set below the competitive wage, employment is unaffected, if it is set above the competitive wage, employment is reduced. In a competitive labour market, the extent of this reduction is dependent upon by how much the minimum wage exceeds the competitive wage and the elasticity of demand for labour. Increasing the minimum wage makes low paid, often low skilled, workers too expensive for employers to hire at a profit and, at the same time, intensifies competition for jobs (those previously unwilling to work for the minimum wage are attracted by higher pay). As a consequence, the minimum wage hurts those it is intended to help. Importantly, standard models make two assumptions: (1) that all workers are covered by the minimum wage; and (2) that all employers comply with the minimum wage.⁸ With regard to the former, any adverse employment effects of the minimum wage are tempered by less than universal coverage, with workers displaced from covered sectors having the option to migrate to uncovered sectors when searching for work. With regard to the latter, non-compliance can be understood as the *de facto* equivalent of an uncovered sector (where workers are employed below the minimum wage). Furthermore, some standard models assume heterogeneous labour, neglecting that workers are not perfect substitutes for one another.⁹ When analysing the employment effects of the minimum wage, focus should be directed towards low paid groups in particular, rather than the labour market in its entirety.

⁸ See David Metcalf, 'On the Impact of the British National Minimum Wage on Pay and Employment' <<http://cep.lse.ac.uk/research/labour/minimumwage/WP1481c.pdf>> accessed 20 April 2017.

⁹ *ibid.*

The possibility that the minimum wage may increase employment is also acknowledged by standard economic models. In the case of monopsony, where a single buyer of labour exists, if the minimum wage is set above the monopsonic equilibrium, employment increases.¹⁰ By how much the minimum wage can be increased without a fall in employment is dependent upon the elasticity of labour supply (the more inelastic the labour supply, the greater the scope for increasing the minimum wage). In oligopsonistic labour markets, where multiple employers compete with one another for workers, employment may rise if the minimum wage is set moderately above the competitive wage. In practice, this occurs where all employers offer higher pay (e.g. to comply with an increase in the minimum wage), leading to greater labour market participation. In contrast to standard models, Keynesian approaches suggest that a higher minimum wage may increase employment by changing the supply and demand structure of affected industries (at the macroeconomic level).¹¹ As low paid workers have a high propensity to consume, increasing the minimum wages is argued to encourage employment by lifting or 'stimulating' aggregate demand and output.

For both standard economic models and Keynesian approaches, the effects of minimum wages on employment are thus far from clear. Whereas for standard models, negative employment effects are based upon purely competitive labour markets, for Keynesian approaches, positive employment effects are based upon uncertain supply and demand structures. This theoretical divide is replicated in empirical analysis. Until the early 1980s, the consensus amongst labour economists was that minimum wages had a negative impact upon employment, especially for the low skilled. However, from the early 1990s onwards, a new wave of studies found minimum wages had little negative and,

¹⁰ See Alan Manning, 'How do we know that real wages are too high?' (1995) 110(4) *The Quarterly Journal of Economics* 1111.

¹¹ See Hansjörg Herr and Milka Kazandziska, 'Principles of Minimum Wage Policy – Economics, Institutions and Recommendations' (2011) Global Labour University Working Paper No.11.

in one landmark study, even a positive impact upon employment (for young workers).¹² Recent studies based upon standard models have stressed the importance of accounting for ‘adjustment channels’ or ‘offsets’ when assessing the impact of minimum wages on employment.¹³ Rather than making workers redundant, employers may reduce non-wage elements of work as a response to higher minimum wages, in order to maintain levels of profitability. This may include working hours, training or other fringe benefits such as health insurance, the wages of higher earners, or price increases (which is seen as a way of fighting deflation).¹⁴ The occurrence of ‘double-job holding’ amongst low paid workers has also been linked to reduced working hours resulting from increases in the minimum wage. When taking these factors into account, studies have shown that appropriately set minimum wages need not have large negative effects on job prospects if wage floors are properly differentiated for specific groups of workers and non-wage labour costs are kept in check.¹⁵

2.3.2 Competitiveness

If unit labour costs – calculated as the ratio of labour costs per hour (wages) to output per hour (productivity) – increase, competitiveness may be harmed. An increase in the minimum wage without a corresponding increase in productivity could damage the competitiveness of national companies, as they face additional costs in comparison to international competitors. This is considered especially problematic in labour intensive industries, where labour costs represent a higher proportion of total costs. A number of objections can be raised against these arguments. First, increases in the minimum wage have

¹² See David Card and Alan Krueger, ‘Minimum Wages and Employment: A Case Study of the Fast-food Industry in New Jersey and Pennsylvania’ (1994) 84(4) *The American Economic Review* 772.

¹³ See John Schmitt, ‘Why Does the Minimum Wage Have No Discernible Effect on Employment?’, Center for Economic and Policy Research <<http://www.cepr.net/documents/publications/min-wage-2013-02.pdf>> accessed 20 April 2017.

¹⁴ See Herr and Kazandziska (n 11).

¹⁵ Eurofound, *Pay in Europe in the 21st Century* (Eurofound 2014) 86.

been shown to foster improvements in productivity (known as ‘beneficial constraints’),¹⁶ having a positive effect upon unit labour costs and therefore competitiveness.¹⁷ Modern variants of the ‘economy of high wages’ argument suggest that workers feel more valued when paid more and are more motivated to work harder.¹⁸ Furthermore, increased unit labour costs can act as a spur for companies to find ways of improving efficiency and to be innovative. Second, trade focussed industries often employ very few low wage workers, unlike non-trade focussed industries (compare manufacturing and services). Increases in the minimum wage only have a limited impact upon internationally competitive industries, as low wages are very rarely a factor in their success. Third, unit labour costs are not the sole determinates of competitiveness. In addition to wages and productivity, exchange rates, inflation, and non-wage factors – such as product quality and design – are also important.

2.3.3 *Industrial Relations*

Modern institutionalist and heterodox approaches consider the effects that interaction between minimum wages and collective bargaining has upon employment, competitiveness, and social objectives. Although minimum wages have a direct effect upon those that earn below the threshold, they also have an indirect effect upon those that earn above the threshold.¹⁹ So called ‘ripple’ or ‘spillover’ effects have been shown to extend to a sizable proportion of the lower half of the wage distribution. This is as minimum wages are often used as ‘reference’ or ‘starting points’ for individual and collective wage negotiations

¹⁶ See Peter Brosnan and Frank Wilkinson, ‘A National Statutory Minimum Wage and Economic Efficiency’ (1988) 7(1) *Contributions to Political Economy* 1.

¹⁷ See Colm McLaughlin, ‘The Productivity-enhancing Impacts of the Minimum Wage: Lessons from Denmark, New Zealand and Ireland’ (2007) Centre for Business Research, University of Cambridge Working Paper No. 342.

¹⁸ See David Card and Alan Krueger, *Myth and Measurement: The New Economics of the Minimum Wage* (Princeton University Press 1995).

¹⁹ See Richard Freeman, ‘The Minimum Wage as a Redistributive Tool’ (1996) 106(436) *The Economic Journal* 639.

at the bottom of the wage distribution. When increased, workers seek to retain the distance between their own pay and the minimum wage. The strength of collective bargaining determines the impact of ripple or spillover effects.²⁰ When collective bargaining is strong, an increase in the minimum wage can effect more workers in the lower half of the wage distribution than the (low paid) workers that are its usual target. When collective bargaining is weak, trade unions may not be able to make the most of increases. Consequences include 'wage compression' from below, flat earning trajectories and, under certain circumstances, 'low wage traps'. Conversely, the strength of collective bargaining may be effected by the level at which minimum wages are set. High minimum wages have been shown to have a 'crowding out' effect on collective bargaining in low wage sectors.²¹ There is little need or incentive for employers and workers to engage in collective bargaining when minimum wages are set considerably above prevailing collectively agreed pay. To the extent that this is reflected in empirical analysis, the idea that minimum wages are a substitute for weak collective bargaining can be reversed.

2.4 Demographics of minimum wage earners

Workers earning minimum wages often share certain demographic characteristics. These can be divided between those that are personal (e.g. gender) and those that are related to employment (e.g. occupation).

2.4.1 Personal Characteristics

Gender

The most widely repeated claim regarding minimum wage workers is that a higher proportion are female, than male. In the EU, this is apparent from EU-SILC data; based upon a fictitious 'harmonised minimum wage' set at 60% of

²⁰ See Damien Grimshaw (ed), *Minimum Wages, Pay Equity, and Comparative Industrial Relations* (Routledge 2013).

²¹ Eurofound (n 15) 89.

the national median wage in Member States, Eurofound estimate that roughly 22% of recipients would be female in comparison to 11% male.²² Amongst OECD states, on average, the proportion of female to male minimum wage workers is roughly double. Based upon the estimates of Eurofound, there are exceptions. In Cyprus, the gap between men and women earning Eurofound's harmonised minimum wage would be roughly 20% (5% male versus 20% female), in Denmark, there would be no significant statistical difference.²³ A reason suggested for the difference between female and male minimum wage workers is contractual: a higher proportion of women are employed on a part-time basis than men.²⁴ To the extent that this is true, gender appears as a substitute for differences between part-time and full-time employment.

Age

As alluded to when reviewing literature on the employment effects of minimum wages, recent studies have focussed upon younger workers. Teenagers are considered to be the group most affected by minimum wages, followed by those aged 20 – 24.²⁵ Over the age of 25, the incidence of minimum wage workers steadily decreases, only to increase again above the age of 50.²⁶ The number of workers at either end of the age distribution represents a relatively small proportion of the total workforce in Member States. However, each group is not of equivalent size; in Sweden, teenagers outnumber those over 50, whereas in the UK, the reverse is true.

²² Eurofound (n 15) 130.

²³ *ibid* 131.

²⁴ *ibid* 132.

²⁵ See Jerold Waltman, *The Politics of the Minimum Wage* (University of Illinois Press 2000).

²⁶ *ibid*.

Race

Race is often neglected in the study of minimum wage demographics. Statistics are not compiled by Eurostat or by the majority of Member States. In the U.K., research based upon Labour Force Survey data shows that 6% of minimum wage earners are White, 3% Black Caribbean, 5% Black African, 9% Black Other, 12% Bangladeshi, and 14% Pakistani.²⁷ Higher rates amongst first generation migrants are also evident in Member States. The proportion of migrants in the tenth percentile of the wage distribution (where low wage workers are generally situated), as a fraction of the total population, is generally higher than that of natives: 16% versus 9% in Spain; 14% versus 9% in Belgium; 13% versus 10% in France; and 10% versus 9% in Portugal.²⁸

Education

It is perhaps not surprising that less educated workers are more likely to earn minimum wages than more educated workers. Workers with only a secondary level qualification (school) are more likely to earn minimum wages than those with a tertiary level (university) qualification. Based upon Eurofound's estimates, this is especially true of Southern European Member States, but less so of those in the North (with collectively agreed minimum wages).²⁹

²⁷ Simon Peters, 'Ethnic Inequality in Low Pay', Manchester Policy Blogs <<http://blog.policy.manchester.ac.uk/posts/2015/03/ethnic-inequality-in-low-pay/>> accessed 20 April 2017.

²⁸ Madeline Zavodny, 'Who benefits from the minimum wage – natives or migrants?' IZA World of Labor <<http://wol.iza.org/articles/who-benefits-from-minimum-wage-natives-or-migrants.pdf>> accessed 20 April 2017.

²⁹ Eurofound (n 15) 132.

2.4.2 *Employment characteristics*

Occupation

Less educated workers are often employed in elementary, skilled agricultural, forestry and fishery, and service and sales occupations.³⁰ These occupations also have a high concentration of minimum wage workers, across multiple sectors, including hotels and restaurants (horeca), agriculture, arts and entertainment, and retail. A high proportion of minimum wage workers are employed in small companies, with less than 50 employees, particularly in horeca, agriculture, and arts and entertainment.³¹ Importantly, recent research has shown that in the wake of the financial crisis, mid-skilled jobs are being replaced by low-skilled jobs,³² having the potential to change the composition of minimum wage workers by occupation. In the U.K., this has been highlighted with regard to administrative professionals and workers in the construction and building sector.³³

Employment contract type

A division can be made between those minimum wage workers employed on full-time contracts and those on part-time contracts. As groups, the latter are considerably larger than the former and, as discussed above, are, on average, comprised of twice as many women than men. It is worth noting that part-time employment represents only 20% of total employment in the EU,³⁴ but there are substantial differences between Member States; Belgium, the Netherlands, and the U.K. have sizable numbers of part-time workers. A high proportion of

³⁰ *ibid* 123.

³¹ *ibid* 125.

³² See Laura Gardiner and Adam Corlett, Resolution Foundation 'Looking through the hourglass: hollowing out of the UK jobs market pre- and post-crisis' <<http://www.resolutionfoundation.org/publications/looking-through-the-hourglass-hollowing-out-of-the-uk-jobs-market-pre-and-post-crisis/>> accessed 20 April 2017.

³³ *ibid*.

³⁴ Eurofound (n 15) 129.

minimum wage workers are also employed on temporary (atypical), rather than permanent contracts.

2.5 A brief History of minimum wages

The history of minimum wages is complex and for clarity can be divided between pre-industrial and industrial society. It is difficult to trace the emergence of minimum wages to any one specific period in time, but a necessary prerequisite is the idea of 'wage labour' (or for Marx and modern economists 'labour power'). Wage labour is dependent upon two abstractions: first, labour must be separated from the person and the product of work; second, for the purposes of payment, a method of measuring labour is required ('labour time').³⁵ In modern European states, minimum wages developed with industrial relations systems, contributing towards the heterogeneity of regimes present in the EU. Those Member States investigated in this section exemplify these different systems, and have influenced the development of industrial relations in other Member States (for example, Denmark and the Northern European Member States). Importantly, the adherence to pluralism common to these Member States stands in marked contrast to the totalitarian and centrally planned systems that developed during the second half of the 20th century.

2.5.1 Pre-industrial society

The first recorded example of a minimum wage can be found in ancient Mesopotamia.³⁶ Dating to circa 1750 BC, the Code of Hammurabi, named after the sixth Babylonian king, consisted of 282 laws. Almost half of the Code was dedicated to issues of contract, amongst which provisions on the amounts to be paid for various forms of work were detailed. These ranged from field labours: "if anyone hire a field labourer, he shall pay him eight gur of corn per year", to veterinary surgeons: "if a veterinary surgeon perform a serious operation on an ass or on an ox, and cure it, the owner shall pay the surgeon

³⁵ See Moses Finlay, *The Ancient Economy* (University of California Press 1973).

³⁶ Starr (n 1) 1.

one-sixth of a shekel as a fee” (the Code is considered a primitive, or early, constitution).³⁷

Moving from the Bronze Age to the Middle Ages, wage control can be found in various forms across Europe. In Britain, in order to prevent workers from overcharging for their labour, given its scarcity after the Hundred Year' War and the Black Death, the Statute of Labourers of 1351 enforced customary wages, in effect, creating 'maximum wages' in certain traders. Later powers were given to Justices of the Peace to set wages, which from the Statute of Artificers of 1562 onwards were used protectively. The Act of Apprentices of 1563 provided that wages in each district were to be assessed by Justices of the Peace, who should meet to find ways of “[yielding] unto the hired person both in time of scarcity and in time of plenty a convenient proportion of wages”.³⁸ Along with statutory laws, the guilds also regulated wages and working conditions.

Across Europe, from the 14th century, craftsmen began to form associations based upon trades in order to protect their common interests. The guilds reflected the medieval ideal of harmonious collaboration between masters, journeymen, and apprentices. Wages, working conditions, pensions, sickness and unemployment assistance were controlled and administered by guilds. However, the guild system of collective self-regulation began to fail towards the 16th century as masters usurped all powers and journeymen abandoned the idea of becoming masters themselves; growing tired of having wages and working conditions unilaterally imposed upon them. The decline of the guilds and the development of combinations signalled the birth of pre-industrial trade unionism. No longer did employers and workers organise together (if, indeed, workers ever had the choice to refuse), rather they began to organise separately. Combinations of journeymen, as journeymen's clubs in Britain,

³⁷ See Leonard King, 'Hammurabi's Code of Laws'

<<http://eawc.evansville.edu/anthology/hammurabi.htm>> accessed 21 April 2017.

³⁸ See Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (OUP 2005).

compagnonnages in France, *gezellenbroederschappen* in the Netherlands, and *gesellenverbände* in Germany, defended wages when cuts were threatened and negotiated for increases when living costs rose.³⁹ The first collective agreements were reached between masters and combinations of journeymen in the 18th century, but were prevented from developing as complements to statutory laws on wages. In Britain, there were over 40 statutes forbidding combinations in specific trades and numerous examples of judges declaring their actions to increase wages unlawful at common law. On the continent, in France, the *ordonnances* of King Charles VI (1382), Villers-Cotterets (1539), the *décret* of 2nd January 1749, and the Edict of Turgot (1776) banned combinations. In the Netherlands, combinations were outlawed by policed regulations, which were also used in Germany until the *Reichszunftordnung* (Reich Guild Act) of 1731.⁴⁰

2.5.2 Industrial society

The industrial revolution in Britain from the middle of the 18th to the beginning of the 19th century saw the repeal of combinations bans and the legal recognition of trade unions (and employers associations). Although trade unions were no longer subject to the criminal law, they were the civil law. They were tolerated, not repressed, but not recognised. The Combination Act of 1825 provided that all combinations concerned with wages, prices, and hours of work were to be free from criminal sanction under statute and common law, but the Act outlawed violence, threats, intimidation, molestation, and obstruction. Thus, in theory, the piecemeal state regulation of wages that had occurred from the Middle Ages onwards was set to be complemented by a nascent body of collective labour law, independent of the state. Its development, specifically concerning minimum wages, was far from straightforward. This was also the case on the continent, where industrial

³⁹ Antoine Jacobs, 'Collective Self-Regulation' in Bob Hepple (ed), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (Hart 2010) 193, 196.

⁴⁰ *ibid* 197.

revolution occurred later than in Britain and different social and political situations prevailed. Britain is examined in more detail next, followed by France, Germany and Denmark.

Britain

The term 'collective *laissez-faire*' was coined by Kahn-Freund to describe industrial relations in Britain before the middle of the 20th century. From the 19th century onwards, the economic liberalism of thinkers such as J.S. Mill was used to justify the abstention of the state in the provision of welfare and the limited oversight of collective bargaining between employers associations and trade unions. Where protective legislation did exist, this was to regulate employment relations that could not be effectively reached by collective bargaining, in Kahn-Freund's words protective legislation was "in a sense, a gloss or a footnote to collective bargaining".⁴¹ It was not until the development of 'new model' trade unions – as labelled by Sidney and Beatrice Webb⁴² – that collective agreements covering wages became a part of the industrial relations landscape in Britain. By 1888, 10% of adult male workers were members of trade unions, which were increasingly organised across industries and cities, and in the public sector.⁴³ Whereas trade unions were successful in securing minimum standards for their members without the need for legislation, it became clear that those who were excluded, including women, children, and young workers, were in desperate need of protection.

Towards the turn of the 19th century, the problem of 'sweating' – the exploitation of vulnerable workers – caught the attention of social reformers

⁴¹ Otto Kahn-Freund, 'Legal Framework' in Allan Flanders and Hugh Clegg (eds), *The System of Industrial Relations in Great Britain: Its History, Law and Institutions* (Blackwell 1954) 42, 66.

⁴² Sidney and Beatrice Webb, *The History of Trade Unionism: 1666 – 1920* (Nabu Press 2011).

⁴³ Jacobs (n 39) 221.

and political liberals.⁴⁴ Although not restricted to ‘homework’, sweating was described by a House of Lords select committee in 1890 as a combination of:

a rate of wages inadequate to the necessities of the workers or disproportionate to the work done, excessive hours of labour, and the insanitary state of houses in which the work is carried on.⁴⁵

As a consequence of the dominance of collective *laissez-faire*, a national minimum wage was considered unthinkable, rather limited state regulation of wages in the ‘sweated’ trades was favoured. The result was the Trades Boards Act of 1909, which established machinery for setting minimum wages in trades or industries where prevailing wages were exceptionally low and collective bargaining was ineffective. Introduced by Winston Churchill, the Act was based upon the wage boards of Australia and New Zealand (the first states in the modern world to introduce minimum wages). Each trade board was comprised of an equal number of employers’ and workers’ representatives, with an uneven number of independent members (including academics and retired civil servants). Once a minimum wage had been set, the state ensured it was enforced.

By the time of the second Trade Boards Act in 1918, roughly 3 million workers were protected from exceptionally low pay in more than 40 industries.⁴⁶ Over 70% of these workers were women and only one-fifth of the total workforce were covered.⁴⁷ Unlike in other states, minimum wages in Britain, as an example of protective legislation, were not gradually extended to all workers, rather they remained confined to specific groups. The Edwardian hangover of

⁴⁴ See Sheila Blackburn, *A Fair Day’s Wage for a Fair Day’s Work?: Sweated Labour and the Origins of Minimum Wage Legislation in Britain* (Ashgate 2007).

⁴⁵ Cited in Jerold Waltman, *Minimum Wage Policy in Great Britain and the United States* (Algora 2008) 42.

⁴⁶ Thilo Ramm, ‘*Laissez-faire* and the State Protection of Workers’ in Hepple (n 39) 73, 88.

⁴⁷ *ibid.*

using trade boards as a proxy and start-up mechanism for collective bargaining, as opposed to for setting minimum wages in their own right, remained until the abolition of wage councils in 1993 (which replaced trade boards with slight alteration after the Second World War). The first national, or universal, minimum wage was not introduced in Britain until 1998.

France

On the continent, protective legislation had a far more prominent role in regulating working life than in Britain, even when collective bargaining had reached a stage of maturity. In France, before the enactment of the Waldeck-Rousseau Act in 1884,⁴⁸ trade unions were severely limited in their ability to organise and engage in collective bargaining (due to the hostility of French revolutionary ideology to sectional organisations between the state and society and the political fears of the ruling classes). Consequently, minimum wages were initially the result of statutory regulation, rather than collective agreements.

In similarity with Fair Wage Resolutions in Britain,⁴⁹ *Décrets Millerand* obliged government contractors to observe terms and conditions of employment no less favourable than those held in collective agreements between representative employers associations and trade unions in concerned trades or industries.⁵⁰ At the turn of the 19th century, strikes in Decazeville and Longwy drew attention to the problem of *economats* ('Tommy Shops'),⁵¹ as factories which forced workers into almost total dependence. Unlike the response to sweating in Britain, the first steps towards statutory regulation of minimum wages in France were motivated by war concerns. An Act of 10 July 1915 fixed

⁴⁸ Jacobs (n 39) 209.

⁴⁹ See Brain Bercusson, *Fair Wage Resolutions* (Mansell 1978).

⁵⁰ Jacobs (n 39) 237.

⁵¹ Ramm (n 46) 102.

wages for women homeworkers who produce military kit (based upon living costs and skills).⁵²

The recognition of positive legal rights for trade unions was a watershed moment for industrial relations in France. In less than a year, trade union membership increased from 1 million to 5 million.⁵³ The Matignon Agreement of May 1936 provided a procedure for the extension of collective agreements and for compulsory arbitration should employers associations and trade unions fail to reach agreement or disputes arise. Under the 'Popular Front' government that introduced the agreement, only 4% of cases referred for arbitration were decided by the state,⁵⁴ which heavily favoured trade unions; conditions were therefore advantageous for high collectively agreed pay. However, collective agreement coverage was considerably lower in the private sector than in the public sector. This was addressed with the introduction of the *Salaires Minimum National Interprofessionnel Garanti* (the 'SMIG') in 1950, which can be seen as a complement to the established system of industrial relations in France.

Germany

The 'social question' was approached differently in Germany, by 1850 'socialism of the throne' or the 'welfare monarchy' was favoured as a way of securing the loyalty of workers by providing a state system of social protection.⁵⁵ The reforms of Otto von Bismarck evidence this form of paternalism; legislation against social risk was passed, specifically, as social insurance schemes. The ideological influence of the Bismarckian reforms are evident in the Weimar Constitution of 1919, which invested trade union rights with constitutional status; including that of association (Article 159) and to bargain collectively (Article 165). These were reinforced by the German

⁵² *ibid* 98.

⁵³ Jacobs (n 39) 227.

⁵⁴ *ibid*.

⁵⁵ Bob Hepple, 'Welfare Legislation and Wage-Labour' in Hepple (n 39) 114, 134.

Collective Agreements Decree of 1918, which gave collective agreements automatic and compulsory effect. The work of Hugo Sinzheimer was no doubt influential, theorising collective agreements as private law contracts between employers associations and trade unions, serving social and normative or legislative functions.⁵⁶

Despite the recognition of positive legal rights for trade unions and one of the most advanced systems of industrial relations in Europe, calls were made for the introduction of British style trade boards in Germany.⁵⁷ As in Britain, these calls were at the behest of protecting specific groups of workers; the German Home Work Act of 1911 had provided for the establishment of 'branch committees' that could promote 'wage or collective agreements'. The response from State Secretary von Bethmann-Hollweg left proponents in little doubt about the possibility of a statutory minimum wage, he considered it the "first step [towards a] socialist state".⁵⁸ That having been said, the German Home Workers Act of 1929 authorised branch committees to declare collective agreements generally binding, to establish minimum wages, and to decide settlements when necessary. Having been dismantled under National Socialism, industrial relations recovered after the Second World War. It was only with declining collective agreement coverage that calls for a statutory minimum wage resurfaced at the end of the century.

Denmark

The voluntary system of industrial relations in Denmark was similar to that in Britain, but with a stronger orientation towards partnership. A strong tradition of private societies, an aversion to compulsion, and the widespread acceptance of individual responsibility for protection against social risks, laid the foundations for the signing of the celebrated September Agreement of 1899.⁵⁹

⁵⁶ Jacobs (n 39) 234.

⁵⁷ Ramm (n 46) 98.

⁵⁸ *ibid.*

⁵⁹ Hepple (n 55) 141.

After the hardest and longest industrial conflict in Danish history, employers associations and trade unions agreed to acknowledge each others rights to exist and function. The September Agreement was immediately recognised by the Danish government and later supported by legislation.⁶⁰ However, in comparison to France and Germany, negative immunities were favoured over positive legal rights. This gave collective bargaining in Demark a dynamic character, and avoided court oversight. The September Agreement remains the basis of Danish industrial relations today, with the continued partnership it promotes (partially) explaining the opposition of trade unions and employers associations to statutory minimum wages.

2.6 Comparing Member States

All Member States of the EU have a minimum wage, whether set by statute or by collective or tripartite agreement. The use of these regulatory instruments corresponds to whether Member States have sectoral or universal minimum wage regimes, and roughly to the levels at which they are set (in nominal and real terms).

2.6.1 Regimes

Of the 28 Member States of the EU, 22 have universal minimum wage regimes, whereas 8 have sectoral minimum wage regimes. Universal regimes set a wage floor for all workers, whereas sectoral regimes set a wage floor for specific groups of workers. With the entry into force of the *Mindestlohngesetz* in January 2015 ('the Germany Act on the regulation of a minimum wage'), Austria, Cyprus, Demark, Finland, Italy, and Sweden are the only Member States with sectoral regimes. With Germany, these Member States constituted a visual 'belt' of sectoral regimes across the EU, without Germany, they form a 'pincer'.

⁶⁰ Jacobs (n 39) 224.

Figure 1: Map of Minimum Wage Regimes in the EU (*light grey indicates universal regimes, dark grey indicates sectoral regimes*)



The most common way of distinguishing between minimum wage regimes is by regulatory instrument; whether minimum wages are set by law (statute), by collective agreement (by representatives of management and labour), or by tripartite agreement (by representative of management, labour, and the state). The distinction between law and collective or tripartite agreement is not antithetical to that between different types of minimum regime, rather it can be seen as complementary. In Member States with universal regimes, minimum

wages are set by statute (e.g. France, Greece, and Croatia), whereas in Member States with sectoral regimes, minimum wages are set by collective agreement (e.g. Denmark, Austria, and Italy). There are caveats to this rule; in some Western and Central and Eastern European Member States (e.g. Bulgaria and Poland), minimum wages are initially negotiated by a tripartite body, after which any subsequent agreement is given statutory effect. Belgium is a special case, as the minimum wage is set by a national collective agreement for the private sector as a whole.

The means by which minimum wages are set in universal regimes are linked to the methods used for their adjustment. Member States that set minimum wages directly by statute usually consult representatives of management and labour before adjustments are made (e.g. Croatia, Latvia, and Lithuania). Increasingly, methods of adjustment are combined, for example, in Belgium, the negotiation of a national collective agreement for the private sector is supplemented with indexation to price developments. Since the financial crisis of 2008, unilateral decision-making or direct adjustment by the state has become more popular. Those Member States that make use of negotiation based methods of adjustment often have strong collective labour law traditions (prior to regulation by the state).

Table 1: Methods of Adjustment

1. Indexation (automatic adjustment to price and/or wage developments)	2. Negotiation (bipartite and tripartite negotiations between employers associations, trade unions, and the state)	3. Consultation (institutionalised consultations between employers associations and trade unions)	4. Unilateral Decision-making (unilateral decision-making by the state)
Belgium, France, Luxembourg, Malta, Netherlands, Slovenia	Bulgaria, Estonia, Germany, Hungary, Poland, Slovakia (<i>Belgium supplementing 1</i>)	Croatia, Latvia, Lithuania, Portugal, Spain, United Kingdom (<i>France, Luxembourg, Netherlands, Slovenia supplementing 1</i>)	Czech Republic, Greece, Ireland, Romania

Source: Amended from Schulten (2016)

In Member States with sectoral regimes, minimum wages that are set by collective agreement are dependent for their effectiveness upon the strength of national industrial relations systems. In Northern European Member States, collective agreement coverage is particularly high: 91% in Sweden, 90% in Finland, and 85% in Denmark. In Austria, collective agreement coverage of 97% has been achieved by a national framework agreement between employers associations and trade unions. This agreement establishes the functional equivalent of a national minimum wage of €1,000 per month, below which other collective agreements cannot derogate. High collective agreement coverage in Northern European Member States is the result of *erga omnes* extension; the process by which collective agreements are declared universally applicable by the state. This is suggested as a reason for the aversion of

Scandinavian trade unions to statutory minimum wages; they are seen as superfluous. Conversely, low collective agreement coverage of 58% was used as a justification for the adoption of a statutory minimum wage in Germany. Of those Member States with sectoral regimes, Cyprus is the only Member State with a statutory minimum wage (for certain occupations); which somewhat mitigates against its low collective agreement coverage of 52%.

Table 2: Minimum Wage Regimes in the EU

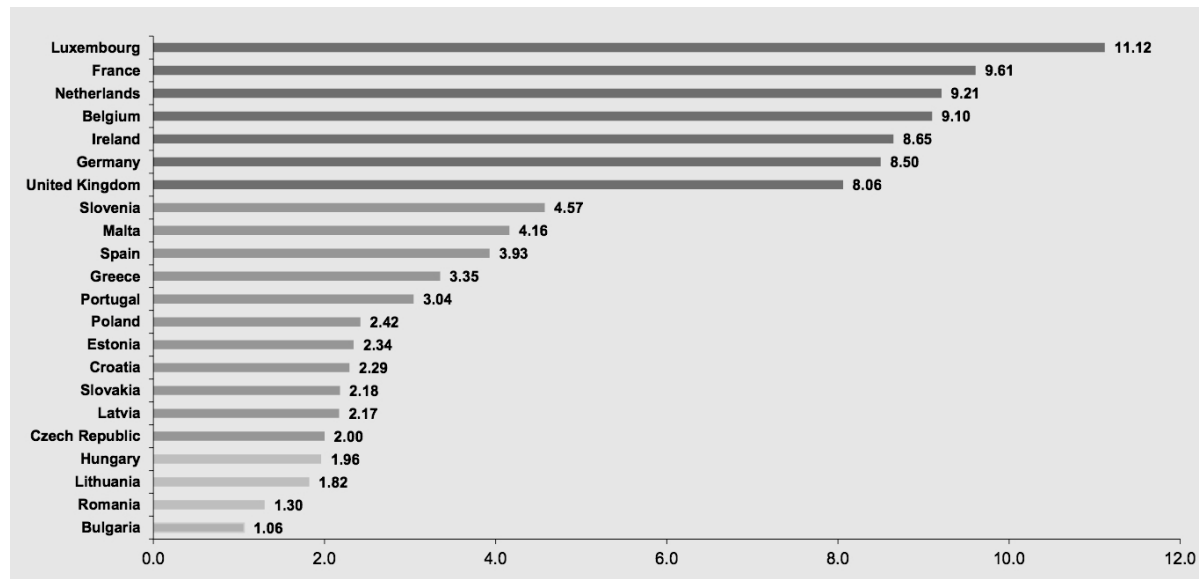
Regulatory Instrument / Scope	Law	Collective or Tripartite Agreement
Universal Regimes (with a national minimum wage, covering all workers)	<p>Western Europe France, Ireland, Luxembourg, Netherlands, United Kingdom</p> <p>Southern Europe Greece, Malta, Portugal, Spain</p> <p>Central and Eastern Europe Croatia, Czech Republic, Hungary, Latvia, Lithuania, Romania, Slovenia</p>	<p>Western Europe Belgium, Germany</p> <p>Central and Eastern Europe Bulgaria, Estonia, Poland, Slovakia</p>
Sectoral Regimes (without a national minimum wage, but with minimum wages covering specific groups of workers e.g. for certain occupation)	Cyprus	<p>Northern Europe Denmark, Finland, Sweden</p> <p>Western Europe Austria</p> <p>Southern Europe Italy</p>

Source: Amended from Schulten (2016)

2.6.2 Levels

There are large differences between Member States in terms of the absolute levels at which minimum wages are set. Luxembourg has the highest minimum wage in the EU at €11.12 per hour, whereas Bulgaria has the lowest at €1.06 per hour. Of the 22 Member States with universal regimes, three groups can be identified: those with minimum wages below €3 per hour; those with minimum wages between €3 and €7 per hour; and those with minimum wages above €7 per hour. The first group is populated by Central and Eastern European Member States, the second by Central and Eastern European Member States at the lower end and Southern European Member States at the higher end (with the exception of Slovenia), and the third by Western European Member States. Of particular interest is the relationship between the third and second group, where the minimum wages of the former are considerably higher than those of the latter.

Figure 2: National Minimum Wages per Hour (*in Euros as of 1st January 2017*)



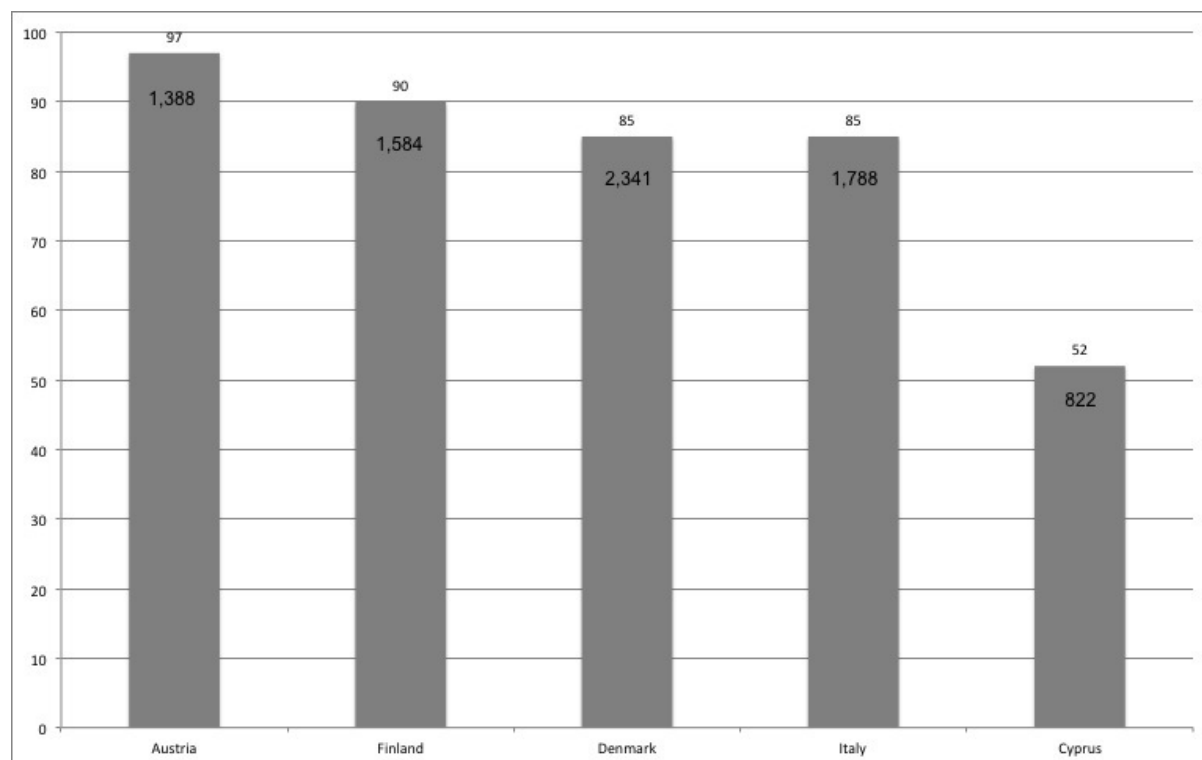
Source: WSI Minimum Wage Database (2017)

Of the 6 Member States with sectoral regimes, only limited data is available on collective agreement coverage and average collectively agreed pay (Figure 3 has been produced using data from two different sources). Accurate data was not available for Sweden; collective agreement coverage is estimated at 91%

according to the ICTWSS Database and average collectively agreed pay between €2,300 and €2,700 per month by various sources. Average collectively agreed pay has been calculated on a monthly basis due to differences in the length of the agreed working week in those collective agreements sampled.

With the exception of Austria and Cyprus (as special cases), two groups of Member States can be identified: Finland and Italy have similar average collectively agreed pay levels, as do Denmark and Sweden. Although considerably lower than Denmark and Sweden, average collectively agreed pay in Finland and Italy is comparable to those Member States with universal regimes and minimum wages above €7 per hour. With the second highest minimum wage after Luxembourg, the *Salaire Minimum Interprofessionnel de Croissance* (the 'SMIC') in France is set at a basic rate of €1,458 per month. However, statutory minimum wages often serve as a 'safety net' for those workers who are not covered by higher, collectively agreed pay.

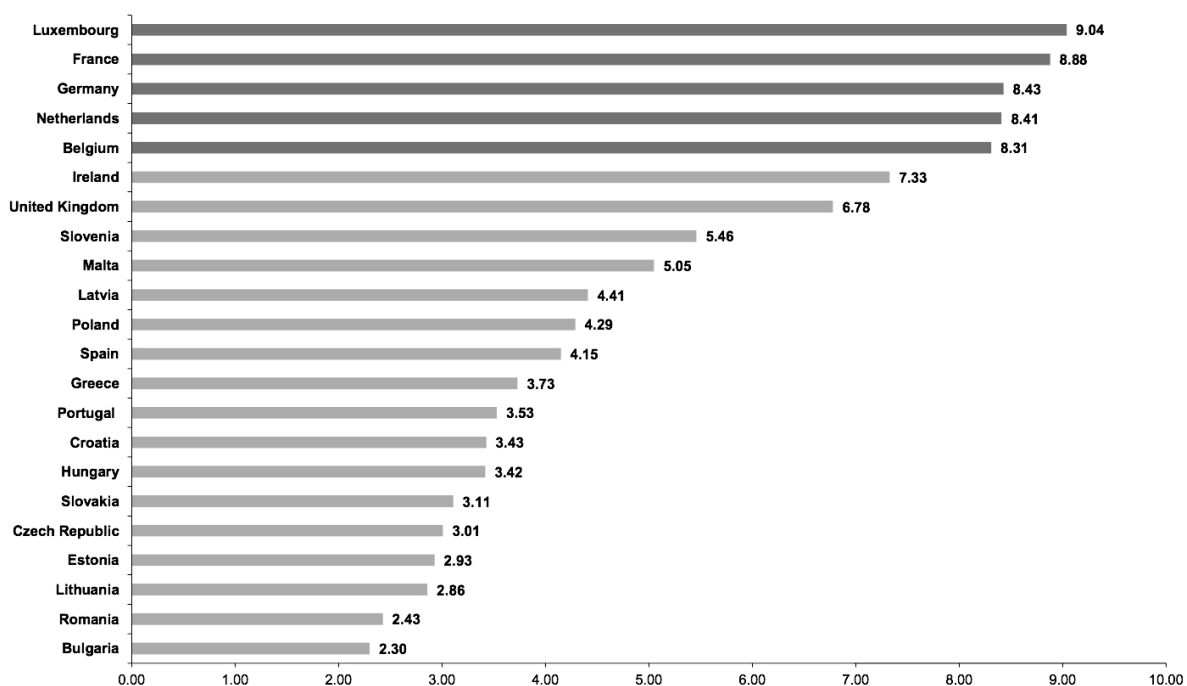
Figure 3: Collective Agreement Coverage and Average Collectively Agreed Pay per Month (*in Euros as of 2009 from EU-SILC*)



Source: ICTWSS Database (2013), EU-SILC (2010)

A more accurate comparison between Member States can be made by converting the nominal levels of minimum wages to 'Purchasing Power Standards' (PPS). PPS take account of differences in living costs. In contrast to the nominal levels of minimum wages, the differences between Member States in PPS are considerably smaller (the distribution of minimum wages in PPS is more consistent than in Euros per hour). Whereas the nominal minimum wage of the United Kingdom is just under double that of Slovenia, in PPS, it is less than 1. The ratio between the Member States with the highest (Luxembourg) and lowest (Bulgaria) nominal minimum wage is reduced from just over 11:1 to just over 4:1.

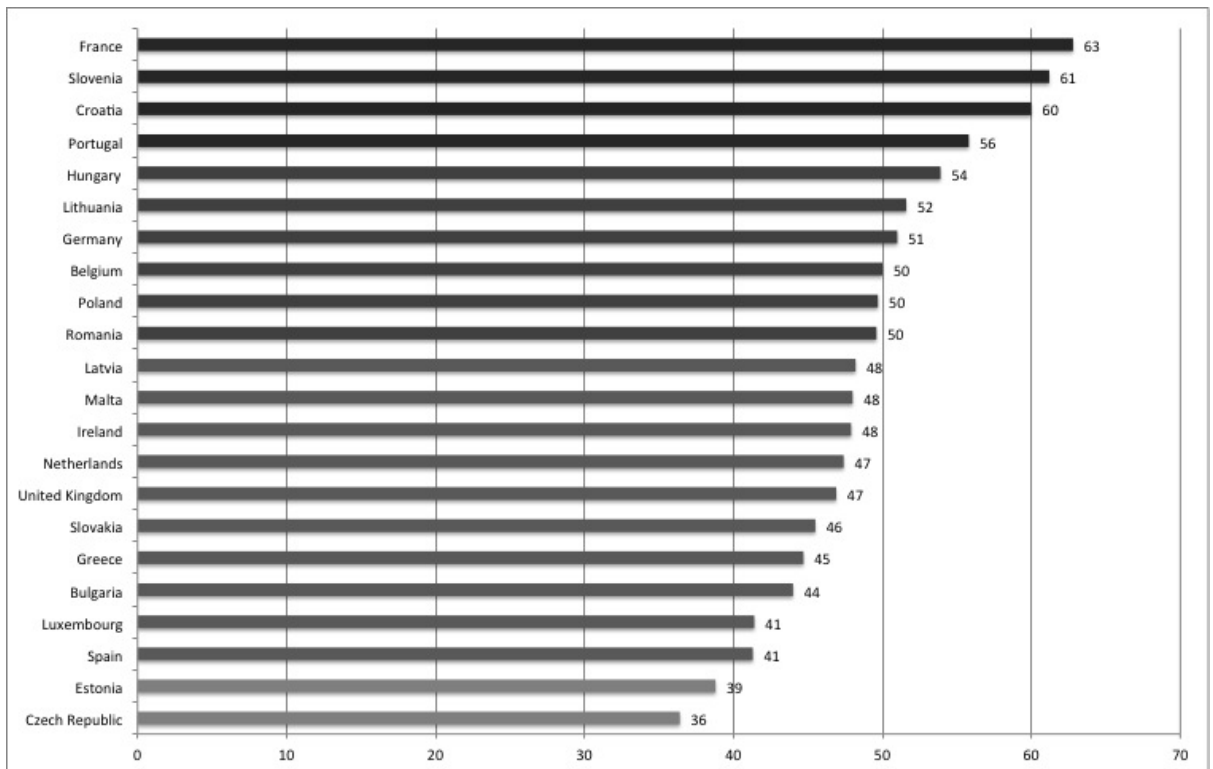
Figure 4: National Minimum Wages per Hour (*in PPS as of 1st January 2017*)



Source: WSI Minimum Wage Database (2017)

The relative level of minimum wages in relation to national wage structures can be measured using the 'Kaitz index', which sets the national minimum wage as a percentage of the national median wage. Comparing Kaitz indices provides a clearer picture of the real levels of minimum wages between Member States, as opposed to measurements based upon absolute levels.

Figure 5: National Minimum Wages as a Percentage of National Median Wages



Source: OECD 2013, Croatian Bureau of Statistics (2014), EU-SILC (2010), German Ministry of Labour and Social Affairs (2015)

When compared with minimum wages in PPS, the order of minimum wages in Kaitz indices is considerably different. Luxembourg falls from its position as the Member State with the highest minimum wage in PPS to the Member State with the fourth lowest minimum wage in Kaitz indices. Trends in the opposite direction can be identified; whereas Croatia and Portugal have minimum wages in the middle of the PPS distribution, in Kaitz indices they belong to the first group of Member States with national minimum wages above 55% of the national median wage. A difference of 27 percentage points exists between the Member States with the highest (France) and lowest (Czech Republic) minimum wage in Kaitz indices. Context is given to these figures when they are set against international benchmarks; low wages are those below 60% of the national median wage, whereas poverty wages are those below 50% of the national media wage. Therefore, almost all Member States with universal regimes have minimum wages below low wage levels and over half have

minimum wages below poverty wage levels (which surprisingly includes all Western European Member States, bar France and Germany).

2.7 Conclusion

A workable EU minimum wage policy must accommodate the differences that exist between national minimum wage setting systems. The heterogeneity of these systems creates a substantial hurdle to the articulation of a more comprehensive policy; in terms of institutional coordination and the willingness of Member States and social partners to alter the operation of their regimes which are often of significant historical importance.

As the discussion in the next chapter illustrates, because of these differences, very few proposals forward a policy instituted by the Union, imposed in a top-down fashion and based around the same nominal value for all Member States. Indeed, considerable differences in the levels of minimum wages in Member States rules out coordination around a base value, for example, of €8 per hour, in favour of measurements centred around relative values. As outlined in the next chapter, when commentators speak about the idea of an EU minimum wage policy, they often describe a policy based around a form of wage coordination between Member States.

Furthermore, the means by which minimum wages are set and adjusted in Member States raises the question of who would be responsible for an EU minimum wage policy. Would it be the European Commission, trade unions and employers associations or Member States themselves? Moreover, what would the aim of an EU minimum wage policy be? Would it seek to address gender disparities between minimum wage workers or, more generally, the problem of low wage work? Would such an initiative be viewed as a social justice or macroeconomic policy tool?

These questions are explored in the next chapter which provides a comprehensive overview of current debates on the idea of an EU minimum wage policy.

3. Debates on the idea of an EU minimum wage policy

3.1 Introduction

This chapter provides a in-depth background to past and present debates on the idea of an EU minimum wage policy. It discusses the obstacles that have stood in the way of the development of a more comprehensive policy and identifies areas that require further investigation if the objective of a workable proposal is to be realised. In doing so, it serves as a foundation for the following chapters of this thesis, against which ideas surrounding why such a policy is needed, how it could be implemented and who should be responsible for its operation, are articulated.

After close to half a decade of austerity measures in Member States, the idea of an EU minimum wage policy is currently receiving more attention than at any other time during its relatively short history. When the current President of the European Commission, Jean-Claude Juncker, addressed the European Parliament before the vote to confirm his appointment on 15th July 2014, he called for the introduction of a minimum wage in all Member States.¹ In his campaign for the Presidency, Juncker had developed this idea further, suggesting that an EU minimum wage policy could be introduced and “adjusted to national collective bargaining traditions and economic conditions [in Member

¹ Euractiv, ‘Juncker calls for minimum wage in all EU countries’
<<http://www.euractiv.com/sections/%20social-europe-jobs/juncker-calls-minimum-wage-all-eu-%20countries-303484>> accessed 2 November 2017.

States]”.² Juncker justified this proposal as a contribution to the “rehabilitation of the social market economy”.³

Whereas Juncker appears to favour a policy instituted by Member States (in cooperation with the institutions of the Union), much earlier, Jacques Delors suggested an EU minimum wage policy could be achieved through the collaboration of trade unions and employers’ associations organised at European level. Delors called on European trade unions to negotiate an EU minimum wage policy within the framework of the European Social Dialogue.⁴ Although the Member States are still very much viewed as key players in current debates, suggestions similar to that of Delors are still being discussed. Indeed, the European trade union movement has worked for decades on the transnational coordination of wages.⁵

If the idea of an EU minimum wage policy is to develop into a serious proposal, imagination is required in order to overcome the many hurdles that stand in the way of its realisation. For the Union-led proposal of Juncker, significant political and institutional differences between Member States must be accommodated (notwithstanding the Union’s limited competence to regulate in the area of pay). For the social partner-led proposal of Delors, the asymmetry in bargaining power that exists between trade unions and employers’ associations organised at European level is a serious impediment to progress. In order to push debate

² Jean-Claude Juncker, ‘Kernbotschaften von Jean-Claude Juncker, Spitzenkandidat der Europäischen Volkspartei (EVP) für das Amt des Präsidenten der EU-Kommission bei der Europawahl am 25. Mai 2014’ <<http://juncker.epp.eu/news/kernbotschaften-von-jean-claude-juncker-spitzenkandidat-der-europaischen-volkspartei-evp-fur>> accessed 1 October 2017.

³ RP Online, ‘Jean-Claude Juncker im Interview: Ich bin überzeugt, dass Europa Mindestlöhne braucht’ <<http://www.rp-online.de/politik/ich-bin-ueberzeugt-dass-europa-mindestloehne-braucht-aid-1.4080596>> accessed 2 November 2017.

⁴ Jacques Delors, ‘Speech at the Forum on the European Dimension’ in PES (ed), *Social Europe: Second Contributions to the Debate* (PES 2006) 8, 18.

⁵ The transnational coordination of wages is discussed below and in more detail in chapter 6.

forward and develop a workable proposal, policymakers, social partners and academics must think within the confines of what is possible, not what is desirable; there is little value in focusing efforts on the idea of a Union-led EU minimum wage policy if Member States are opposed or, conversely, on a social partner-led proposal if both sides of industry cannot be brought to the bargaining table.

On both fronts, recent events are encouraging. As arguably the most powerful member of the Union, the introduction of a statutory minimum wage in Germany from 1st January 2015 has reignited debate at EU-level. Whereas at one time most were fiercely opposed to the idea of an EU minimum wage policy, all major political parties in Germany are now in favour.⁶ Der Linke (the 'Left Party') is the most ambitious, calling for "a binding European minimum wage regulation [of] the amount of 60 per cent of the relevant national average wage".⁷ With regard to the idea of a social partner-led policy, the European Trade Union Confederation (ETUC) declared 2017 'the year of the pay rise' and recommitted itself to supporting efforts to establish a transnational level to collective bargaining.⁸

In what follows, first, references to wages and minimum wages in international and European agreements and conventions are investigated. Second, one of the earliest attempts to explore the possibility of establishing an EU minimum wage policy, the Commission *Opinion on an Equitable Wage*,⁹ is discussed and the lack of support from Member States cited as the main reason for its failure. Third, the positions and views of the European Parliament and trade

⁶ Thorsten Schulten, 'Contours of a European Minimum Wage Policy' (2014) Friedrich Ebert Stiftung 1, 3.

⁷ Die Linke, 'Europa geht anders. Sozial, friedlich, demokratisch' <<http://www.die-linke.de/partei/organe/parteitage/europaparteitag-2014/europa-geht-anders-sozial-friedlich-demokratisch/>> accessed 21 December 2017.

⁸ See ETUC, '2017 – the year of the pay rise' <<https://www.etuc.org/press/2017-year-pay-rise#.WffVgK10dR0>> accessed 1 October 2017.

⁹ European Commission, *Commission opinion on an equitable wage* COM(93) 388 final.

unions are discussed, suggesting that although support exists (especially in the European Parliament), division along national lines has prevented the adoption of a uniform position in favour of its further investigation. Fourth, more contemporary debates are considered. These include how and to what extent minimum wages in Member States should be coordinated and the levels at which they should be set. Finally, the features of minimum wage systems in Member States that are underdeveloped or ignored in debates on the idea of an EU minimum wage policy are outlined.

3.2 International and European agreements and conventions

Potential normative foundations for an EU minimum wage policy can be found in various international and European agreements and conventions. These documents are not generally considered to be legally binding,¹⁰ rather they serve to illustrate the political commitment of a state to their values.

Internationally, Article 23(3) of the 1948 United Nations Universal Declaration of Human Rights (UDHR) states that “everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity”. Similarly, the Preamble of the 1919 Constitution of the International Labour Organization (ILO) calls for an “adequate living wage” for all workers. This is developed further with regard to minimum wages by ILO Conventions No. 26 of 1928 and No. 131 of 1970. According to Article 3(a) of the latter, considerations to be made when determining minimum wage levels include:

The needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups.

In Europe, Article 4(1) of the 1961 Council of Europe European Social Charter (ESC) states that “all workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families”. In contrast to the

¹⁰ See Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 3 – 4.

focus of the ESC on 'fair' wages, Article 5 of the 1989 EU Community Charter of Fundamental Social Rights of Workers (CFSRW) refers to the concept of 'equitable' wages. It reads "workers shall be assured of an equitable wage i.e. a wage sufficient to ensure them a decent standard of living". Furthermore, the CFRW breaks the link between remuneration and family provision (as expressed in the UDHR, ILO Conventions, and the ESC). The Charter of Fundamental Rights of the European Union does not contain any provisions on fair or equitable wages. It has been argued wages were left out of the Charter because Member States sought to retain and develop low wage labour.¹¹ As a result, establishing a right to a fair or equitable wage was dismissed. Indeed, in its communication on the Charter, the Commission considered the idea of an equitable wage not as a fundamental right but "simply... [as a] policy objective".¹²

In all international and European agreements and conventions, fair and equitable wages are related to a decent standard of living. In general, they aim to guarantee not only a minimum level of sustenance but also allow for adequate participation in society. The most advanced attempt to operationalise the concept of a fair wage was made by the Council of Europe (CoE) in the 1970s, as a means to test compliance with the ESC. The CoE's European Committee of Social Rights (ECSR) adopted a definition of a fair wage as being 68% of the *gross* national average wage. However, this threshold was abandoned in the 1990s in favour of 60% of the *net* national average wage, with difficulties in calculating the weight of tax and welfare benefits cited as reasons for the change. The ECSR was subsequently criticised, as moving from a gross to a net calculation shifted responsibility for providing fair wages

¹¹ Thorsten Schulten and Andrew Watt, 'European minimum wage policy – a concrete project for social Europe' (2007) European Economic and Employment Policy Brief No. 2 (ETUI-REHS) 6.

¹² European Commission, *Commission Communication on the Charter of Fundamental Rights of the European Union* COM(2000) 559 final 7.

from employers to the state.¹³ The ECSR evaluates the conformity of Member States with the 'right to fair remuneration' once every four years.

3.3 Early attempts to develop an EU minimum wage policy

As a response to the adoption of the CFSRW and in recognition the significant number of low wage workers in the EU, in 1993 the Commission published its *Opinion on an Equitable Wage*.¹⁴ Together with the input of the European Parliament, the Commission Opinion was the first and, so far, only institutional initiative exploring the possibility of establishing an EU minimum wage policy. The Commission Opinion called on Member States to "take appropriate measures to ensure that the right to an equitable wage is protected",¹⁵ given that "the problem of low pay is an issue in all countries of the European Community".¹⁶ Moreover, the Commission argued "very low income levels at both individual state and Community level... [cause] problems concerning social justice and social cohesion that could have a detrimental effect on economic performance in the long term".¹⁷

In order to address some of these problems, the Commission recommended Member States consider "legislation on discrimination, in particular on grounds of gender, race, ethnic origin or religion",¹⁸ along with "mechanisms for the establishment of negotiated minima and the strengthening of collective bargaining arrangements".¹⁹ It also committed itself to monitor wage developments and the implementation of equitable wages in Member States,²⁰

¹³ See Carol Murray, 'The Definition of Adequate Remuneration' (2004) 85 *Radical Statistics* 30.

¹⁴ European Commission (n 9).

¹⁵ *ibid* 9.

¹⁶ *ibid* 7.

¹⁷ *ibid* 7.

¹⁸ *ibid* 9.

¹⁹ *ibid* 9.

²⁰ *ibid* 10.

and invited the social partners to address these issues at “Community, national, regional and local level”.²¹

In reaction to the Commission Opinion, the European Parliament initially argued for binding guidelines, with the Social Affairs Committee later encouraging Member States “to establish a minimum wage which amounts to a certain proportion of the national average wage”.²² Although criticised for being vague,²³ the Commission Opinion began a debate which conceptualised the idea of an EU minimum wage policy as involving the coordination of national minimum wages around a particular reference value or ‘norm’.

Any further action by the Commission was ruled out in the second half of the 1990s, due to political resistance from Member States. In 1997 the Commission published *Equitable Wages – a Progress Report*,²⁴ which presented research on the areas highlighted for investigation in the Commission Opinion. Of the then 15 Member States, only 7 provided data on their national wage structure. The Commission believed “there were few signs that the Member States had viewed the Opinion as a catalyst for action” rather “the majority of Member States felt that the intervention on wage setting was not desirable and should be avoided if possible”.²⁵ In similarity with the preliminary findings of the Commission Opinion, the Progress Report revealed growing wage inequality and suggested “the decline of traditional forms of collective bargaining in some Member States has reduced control over monitoring and maintaining an equitable wage”.²⁶ At a time when EU competences in the social policy field were being extended, it was clear Member States did not want to transfer powers in the area of pay. However,

²¹ *ibid* 6.

²² Thorsten Schulten, ‘Towards a European Minimum Wage Policy? Fair Wages and Social Europe’ (2008) 14(4) *European Journal of Industrial Relations* 421, 430.

²³ *ibid*.

²⁴ European Commission, *Equitable Wages – a Progress Report* COM(96) 698 final.

²⁵ *ibid* 1.

²⁶ *ibid* 1.

the Commission continued to discuss equitable wages, specifically with regard to financial participation schemes and in terms of its 'quality of work' agenda.²⁷

3.4 Positions and views of the European Parliament and trade unions

Along with the Commission Opinion, the idea of an EU minimum wage policy has also been discussed by the European Parliament and trade unions. Whereas the Parliament has tended to consider the idea in terms of how it could be implemented through the Union's institutional and policy framework, trade unions have focussed on national and transnational collective bargaining.

3.4.1 European Parliament

In the last decade, the idea of an EU minimum wage has been raised in the European Parliament more frequently than at any other time. During the 2014 parliamentary elections, all major political groupings discussed its introduction. The Party of European Socialists made the introduction of an EU minimum wage its flagship policy, whilst the European People's Party added its support towards the end of campaigning.²⁸ Although the Alliance for Liberals and Democrats for Europe rejected the idea, some of their constituent parties were in favour.²⁹ In the last Parliament, there was reportedly a consensus for its introduction, with a majority favouring regulation.³⁰ In spite of this, no request was made for the Commission to investigate the possibility of legislation. To

²⁷ Daniel Vaughan-Whitehead 'Towards an EU Minimum Wage Policy?' in Daniel Vaughn-Whitehead (ed), *The Minimum Wage Revisited in the Enlarged EU* (Edward Elgar 2010) 513; and see European Commission, *Employment and Social Policies: a Framework for Investing in Quality* COM(2001) 313 final.

²⁸ Le Monde, 'Salaire minimum en Europe: comment se positionnent les partis?' <http://www.lemonde.fr/europeennes-2014/article/2014/05/21/salaire-minimum-en-europe-comment-se-positionnent-les-partis_4422374_4350146.html> accessed 18 October 2017.

²⁹ *ibid.*

³⁰ Line Eldring and Kristin Alsos, *European Minimum Wage: A Nordic Outlook* (Fafo 2012) 15.

date, debates have paid little attention to the idea of an EU minimum wage as a policy in its own right rather it has been almost exclusively discussed as part of wider efforts at alleviating poverty.

A resolution adopted by the European Parliament on 15th November 2011 discusses minimum wages in terms of an EU minimum income policy.³¹ As a concept, minimum incomes are broader than minimum wages; they include social security transfers and seek to ensure that all citizens have an income sufficient to live on, irrespective of whether they are working, unemployed or retired.³² Given the heterogeneity of national industrial relations systems, the idea of an EU minimum income policy is considered to be more accommodating of difference than that of an EU minimum wage policy.³³ This is may be as the latter is often discussed in terms of statutory implementation in Member States (not by processes of national or transnational collective bargaining). The summary of the resolution states:

Parliament wishes the Commission to launch a consultation on the possibility of a legislative initiative concerning a sensible minimum income which will allow economic growth, prevent poverty and serve as a basis for people to live in dignity. It wants the Commission to help Member States to share best practice in relation to minimum income levels, and encourages Member States to develop minimum income schemes based on at least 60% of the median income in each Member State.³⁴

In section 46, Parliament says it:

³¹ European Parliament, 'Resolution on the European Platform against poverty and social exclusion', adopted on 15 November 2011 (2011/2052/(NI)).

³² Eldring and Alsos (n 30) 15; See Ramón Peña-Casas and Denis Bouget, 'Towards a European minimum income: Discussions, issues and prospects' in David Natali (ed), *Social developments in the European Union* (ETUI 2014).

³³ Eldring and Alsos (n 30) 16.

³⁴ European Parliament (n 31).

[B]elives that in-work poverty reflects inequitable working conditions, and calls for efforts to change this state of affairs, through pay levels in general and minimum wage levels in particular, which – whether regulated by legislation or collective bargaining – must ensure a decent standard of living.³⁵

Read against a similar resolution adopted on 15th November 2007,³⁶ there appears to be considerable support within Parliament for an EU minimum income policy. Given the similarities between both policies, it can reasonably be assumed that the idea of an EU minimum wage has some of this support. However, it remains highly unlikely the Commission will consider investigating its feasibility, especially without a standalone resolution. On 7th April 2014, the Commission was asked by GUE/NGL MEP Patrick Le Hyaric if it was “prepared to fight for a European minimum wage”.³⁷ The Commission responded “that wage-setting is a competence of Member States, and in many cases social partners”,³⁸ in effect, ruling out the possibility of any action in the near future.

3.4.2 Trade unions

The largest trade union at EU-level is the European Trade Union Confederation (ETUC). The ETUC is one of four European social partners, and represents the interests of workers and their national affiliates during consultations with the institutions of the Union and in negotiations with the representatives of industry organised at EU-level.

³⁵ *ibid.*

³⁶ European Parliament, ‘Resolution on social reality stocktaking’, adopted on 15 November 2007 (2007/2104(INI)).

³⁷ See European Parliament, ‘Parliamentary questions: European social model and response to the crisis’

<<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2014-004317&format=XML&language=EN>> accessed 18 October 2017.

³⁸ *ibid.*

Published in 2005 by a group of German, Swiss, and French academics, the *Theses for a European minimum wage policy* affords a key role to European trade unions,³⁹ such as the ETUC, in designing and implementing an EU minimum wage policy. In contrast to institutional initiatives (e.g. the Commission Opinion) and debates in institutional fora (e.g. those on an EU minimum income policy in the European Parliament), it attributes a key role to process of national and transnational collective bargaining. This approach shifts reliance upon the institutions of the Union to establish an EU minimum wage policy to the trade unions themselves. The Theses argues that:

The European trade unions have a key role in implementing a European minimum wage policy. They first need to develop their own concept for a European minimum wage policy. Such a concept would be linked, on the one hand, to the existing initiatives aiming at a European coordination of collective bargaining policy. On the other hand, the concept would serve as a basis for formulating ambitious objectives at European level and driving forward their implementation at national level.⁴⁰

The ETUC has never explicitly endorsed the idea of an EU minimum wage policy. Indeed, in contrast to the European Metalworkers Federation, the ETUC was slow in promoting 'wage norm' rules for national-level collective bargaining (according to which wages are to increase inline with inflation and productivity). That having been said, in 2007 the ETUC's Executive Committee issued a statement on minimum wages, equality, and collective bargaining.⁴¹ It proposed that in pursuing fair wages, the ETUC should:

³⁹ Thorsten Schulten et. al., 'Theses for a European minimum wage policy' in Thorsten Schulten, Claus Schäfer and Reinhard Bispinck (eds), *Minimum Wages in Europe* (ETUI 2006).

⁴⁰ *ibid* 357.

⁴¹ ETUC, 'On the Offensive on Pay: Towards Equality. Congress Statement on minimum wages, equality and collective bargaining'

Explore continually the scope for united campaigns at European level... for common standards on minimum pay and income, and for collective bargaining strategies.⁴²

Further into its statement, the Executive Committee recognises that differences between national industrial relations systems may be too great to undertake a united campaign for an EU minimum wage policy.⁴³ The idea of an EU minimum wage policy was reportedly discussed at the ETUC congresses in Seville in 2007 and in Athens in 2011 but is not mentioned in either manifestos.⁴⁴ Whilst in the former, the ETUC said it would “seek to ensure higher minimum wages and real wage growth for European workers” and to “assess more intensively how to develop and coordinate collective bargaining at the European level”,⁴⁵ in the latter, it pledged to uphold the principle of “the autonomy of social partners in collective bargaining and wage negotiations” and to “better coordinate collective bargaining” in light of EU crisis measures.⁴⁶

As a response to EU economic governance, in 2013 the ETUC outlined its new method of coordination for collective bargaining and wages,⁴⁷ which seeks to strengthen its transnational processes as a response to unwelcome EU interventions. Although greater support for wage coordination can be seen as a positive in the campaign for an EU minimum wage policy, divisions between affiliates from different countries makes agreement highly unlikely. In a recent

<http://www.etuc.org/sites/www.etuc.org/files/On_the_Offensive_on_Pay.pdf> accessed 18 November 2017.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ Eldring and Alsos (n 30) 19.

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ ETUC, ‘The ETUC Coordination of Collective Bargaining and Wages in the EU Economic Governance’ <<http://www.etuc.org/documents/etuc-coordination-collective-bargaining-and-wages-eu-economic-governance#.VJNVScAg0>> accessed 18 November 2017.

study of national affiliate attitudes, trade unions from Germany and Spain were in favour, whilst those from Denmark, Norway and Sweden were opposed.⁴⁸ Of course, in light of the decisions in *Viking* and *Laval*,⁴⁹ and the adoption of the Posting of Workers Enforcement Directive,⁵⁰ the attitudes of Nordic affiliates may change.

3.5 Contemporary suggestions for an EU minimum wage policy

The clearest articulation of an EU minimum wage policy can be found in the *Theses for an EU Minimum Wage Policy* (briefly discussed above). The Theses addresses some of the most commonly asked questions regarding ideas for an EU minimum wage policy, including: the extent to which minimum wages in Member States should be coordinated; the level at which minimum wages should be set; and the method of implementation that should be followed. Suggestions with regard to each tend to follow developments in the EU's political and legal history.

3.5.1 Extent of Coordination

Perhaps the most controversial aspect of ideas for an EU minimum wage policy is the extent to which minimum wages in Member States should be coordinated. Public debates show how polarising the idea of an EU minimum wage policy is: people are either fiercely in favour or fiercely opposed, very few sit on the fence.⁵¹ This is arguably a result of the way in which the debate is

⁴⁸ Bengt Furåker and Mattias Bengtsson, 'On the road to transnational cooperation? Results from a survey of European trade unions' (2013) 19(2) *European Journal of Industrial Relations* 161, 172 – 173.

⁴⁹ Case C-438/05 *Viking* [2007] ECR I-10779; Case C341/05 *Laval* [2007] ECR I-11767.

⁵⁰ See European Commission, *Posting of workers: EU safeguards against social dumping* MEMO/14/344.

⁵¹ See Debating Europe, 'Should the EU set a European Minimum Wage' <<http://www.debatingeurope.eu/2014/02/13/should-the-eu-set-a-minimum-wage/#.VJQFhsAg1>> accessed 19 November 2017.

often framed. Often the nuances are missed, with people given a choice between a universal EU minimum wage (with connotations of each Member State having a minimum wage of the same nominal value e.g. €8 per hour) or extending their own national minimum wage to other states (which for the Western Europeans usually polled is considerably higher than that of their Eastern European neighbours). As was outlined in the previous chapter, considerable differences between nominal minimum wage rates in Member States make both of these suggestions unworkable.

Of course, this is a false choice, but it serves as a useful starting point when discussing suggestions for coordinating minimum wages in Member States. In its programme for the 2004 European Parliamentary elections, the French Parti Socialiste proposed the introduction of a universal EU minimum wage of €1000 per month.⁵² This suggestion for harmonising minimum wages in Member States around a nominal value was widely criticised,⁵³ given the significant economic differences between the (then) 25 Member States.

A variation of this approach is for minimum wages in Member States to be harmonised by group or 'cluster'. During the late 1990s, 'cluster coordination' was seen as a way of harmonising the nominal value of minimum wages in Member States with comparable economic performance.⁵⁴ In terms of Member States with similar minimum wage levels, a distinction can be made between Northern, Western, and Central and Eastern European states. Moreover, this approach can also be applied to Member States which are characterised as functioning according to different types or varieties of welfare capitalism (e.g. liberal, corporatist-statist, or social democratic).⁵⁵ However, the relative value

⁵² Parti Socialiste, 'Une ambition socialiste pour l'Europe' <http://www.elections-europeennes.org/2004/tes/pdf/text_euro_cn.pdf> accessed 19 November 2017.

⁵³ Schulten (n 22) 432.

⁵⁴ See Pierre Bourdieu, 'Die fortschrittlichen Kräfte' in Pierre Bourdieu et. al., *Perspektiven des Protests. Initiativen für einen europäischen Wohlfahrtsstaat* (VSA 1997) 11, 25.

⁵⁵ See Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1st edn, Polity Press 1999).

of minimum wage levels varies significantly within such groups, challenging the desirability of nominal coordination.

The idea of cluster coordination was resurrected by Jean-Claude Juncker in January 2013. As the outgoing president of the Eurogroup (the group of Member States belonging to the Eurozone), Juncker told the European Parliament that the EU needed “a basis of social rights for workers, including of course one essential thing, a minimum wage – a legally compulsory minimum wage in the Eurozone Member States”.⁵⁶ Although Juncker was short on details in his speech, it seems he was advocating harmonising the relative, not the nominal value of minimum wages in Eurozone Member States. In doing so, Juncker appears to have been experimenting with ideas for how to developing the so called ‘social dimension’ of Economic and Monetary Union.⁵⁷

Harmonising the relative value of minimum wages in Member States is not, like nominal approaches to harmonisation, about a universal EU minimum wage, rather it is about what the Party of European Socialists (PES) called in 2010 a ‘European Pact on Wages’.⁵⁸ According to the PES, such a pact should:

[E]nsure that all workers and employees receive a wage above the poverty threshold, either through collective bargaining or by law, while ensuring compatibility with, and respect for, national traditions and the autonomy of social partners.⁵⁹

This would require trade unions and employers’ associations or the Union to define a reference value or norm around which minimum wages in Member

⁵⁶ Bloomberg, ‘Juncker Says Euro-Area Countries Need Common Minimum Wage’ <<http://www.bloomberg.com/news/2013-01-10/juncker-says-euro-area-countries-need-common-minimum-wage.html>> accessed 18 November 2017.

⁵⁷ Juncker later suggested a variation on this during his campaign for the Presidency of the European Commission (see the introduction to this chapter).

⁵⁸ PES, ‘A European Employment and Social Progress Pact for fair growth’ (2010) PES Council Policy Paper 1.

⁵⁹ *ibid* 8.

States were coordinated. Depending upon the criteria chosen, minimum wages in Member States would be set as a factor of national economic performance.

3.5.2 *Defining minimum wage levels*

Many different ways for defining minimum wage levels in Member States have been suggested, of which the most common is as a proportion of the national median or average (mean) wage. Recommendations usually range from a target value of 50% to 60% of the median or average wage, with each chosen to give effect to specific policy objectives. By way of example, 60% of the median wage was suggested in the Commission Opinion to combat the problem of low wage work in the EU (a low wage is defined as a wage falling below two thirds of the national median wage),⁶⁰ whereas an initial value of 50% of the average wage was suggested in the *Theses for an EU minimum wage policy* to avoid the threshold for 'poverty wages' (a poverty wage is defined as a wage falling below 50% of the national average wage).⁶¹ Choosing between the median or average wage has important distribution consequences, implying a different understanding of what a fair or equitable distribution of income would be in the EU.⁶²

Linking an EU minimum wage policy to a percentage of the median wage in Member States would make it unresponsive to developments at the top of the wage distribution; the point where recent growth in wage inequality has occurred. As a measure of the middle position, the median would not account for this increase, however large. In contrast, the average would, although as average wages in Member States are higher than median wages, any value for an EU minimum wage policy would have to be considerably lower.

A more sophisticated approach has been suggested by the French Parti Socialiste, whereby minimum wages in Member States would be defined on

⁶⁰ European Commission (n 9) 2.

⁶¹ Schulten et. al. (n 39) 374.

⁶² Eurofound, *Pay in Europe in the 21st Century* (Eurofound 2014) 94.

the basis of national purchasing power standards, according to which after a certain convergence period all minimum wages in Member States would have the same purchasing power.⁶³ Similar groups have called for an “EU target for minimum wages in terms of GDP per capita”.⁶⁴ In line with such proposals, minimum wages would be defined as a proportion of overall national average income. Using GDP per capita would link minimum wages to productivity, although as has been recognised, this would be difficult to defend in the context of flat economic growth and high unemployment.⁶⁵ Rather than GDP per capita, GDP per employee could also be used. Another approach would be for an EU-level body to set minimum wages in Member States. As with the UK Low Pay Commission, this could be performed on a yearly basis, after a general evaluation of the prevailing economic and social conditions in Member States, and/or with reference to specific goals, such as for convergence towards a predetermined target (e.g. 60% of the average wage within a 10 year period).

3.5.3 Method of implementation

Whereas the extent of coordination and ways for defining minimum wage levels in Member States have been investigated at some length, the question of how an EU minimum wage policy would be implemented has been somewhat neglected. Although there have been a number of suggestions, placing responsibility for implementation with either the institutions of the Union or trade unions, each is often examined only briefly.

Given that Article 153 TFEU excludes pay from the areas in which the Union has competence, one popular suggestion is for a change to the Treaties. In

⁶³ Gerard Filoche, ‘L’Europe et le Smic Unique Européen’ (2004) *Democratie & Socialisme* <<http://www.democratie-socialisme.org/spip.php?article415>> accessed 19 November 2017.

⁶⁴ Poul Nyrup Rasmussen and Jacques Delors, *The New Social Europe* (PES 2007) 86.

⁶⁵ Eurofound (n 62) 94.

July 2014 the French Ministry of the Economy published a paper on the introduction of a 'European minimum wage standard', which argues an EU minimum wage policy could be introduced after such a change, through a Directive adopted by the Council and European Parliament.⁶⁶ The obvious difficulty with this suggestion is that the approval of all 28 Member States would be required, at a time notoriously unfavourable for the adoption of legislation in the social policy field.

The use of Enhanced Cooperation under Articles 326 – 334 TFEU and Article 20 TEU could allow those Member States that are in favour to move forward. The Commission could issue opinions, as it did with that on an equitable wage. Complementary systems for reporting and incentivisation could also be created, in a similar way to the former Commission initiative to promote worker participation in profit and enterprise results.⁶⁷

A potential 'soft' law method currently receiving attention is the European Semester. As a part of the EU framework for the coordination of economic policy, the European Semester has already been used to issue recommendations on minimum wages in Member States, however these have so far been regressive. Proposals for using the European Semester for implementing an EU minimum wage policy have suggested the gradual introduction of hard law measures.⁶⁸ This process of 'crystallisation' is intended to build consensus before the introduction of binding recommendations, although, again, hard law measures would require Treaty amendment.

The launch of the Lisbon Strategy in 2000 and the subsequent institutionalisation of the 'open method of coordination' (OMC) had a significant

⁶⁶ Maxence Brischoux et. al., 'Pistes pour l'instauration d'une norme de salaire minimum européenne' (2014) 133 *Trésor-Eco* 1, 8.

⁶⁷ Vaughn-Whitehead (n 27) 526.

⁶⁸ Thorsten Schulten and Torsten Müller, 'Back on the agenda: a European minimum wage standard' (2014) *European Economic, Employment and Social Policy Brief No.2* (ETUI) 5; Schulten (n 6) 12.

impact upon suggestions for how to implement an EU minimum wage policy. In the context of the European Employment Strategy (EES), the OMC was initially seen by commentators as a way for the Commission to set targets for minimum wages in Member States.⁶⁹ These were to be reached in accordance with national procedures and practices, ensuring respect for different industrial relations systems in Member States.⁷⁰

At the same time as debates regarding the development of a transnational dimension to collective bargaining,⁷¹ the OMC was increasingly discussed away from the Union's institutions, as a collection of discrete governance instruments. Target-setting processes were viewed as complements to efforts to coordinate national and transnational collective bargaining.⁷² In 2006, the European Federation of Public Service Unions suggested setting targets for the lowest collectively agreed wages as a part of a campaign to improve the coordination of transnational collective bargaining.⁷³ More recently, it has been argued this approach could be used alongside an EU minimum wage policy agreed between the social partners within the framework of the European Social Dialogue.⁷⁴ A European social partner agreement could detail the aims of an EU minimum wage policy and refer to procedures for implementation, monitoring, and adjustment. However, the popularity of these proposals appears to have been affected by the current bias towards the introduction of statutory minimum wages in Member States (of which Germany was the latest in 2015). As such, methods that prioritise collective bargaining and its coordination, and promote social partner involvement are being ignored.

⁶⁹ Schulten et. al. (n 39) 374; Schulten and Watt (n 11) 8.

⁷⁰ Schulten (n 22) 435.

⁷¹ See Eduardo Ales et. al., 'An EU framework for transnational collective bargaining: An opportunity for European trade unions?' (2006) 12(4) *Transfer: European Review of Labour and Research* 637, 641.

⁷² Schulten and Watt (n 11) 8.

⁷³ EPSU, 'Tackling Low Pay'

<http://www.epsu.org/IMG/pdf/EN_LOW_pay_conclusions_integrated-2.pdf>
accessed 20 November 2017.

⁷⁴ Delors (n 4); Schulten (n 22) 435; and Vaughn-Whitehead (n 27) 514.

Recent movements by the Juncker presidency towards the introduction of the European Pillar of Social Rights also raise important questions for the idea of an EU minimum wage policy, which have not yet been explored in any significant detail. The Pillar is a response to criticism that European integration has often progressed to the detriment of social considerations (in favour of closer economic cooperation).⁷⁵ The Pillar has been conceived as a reference point, against which to measure the employment and social performance of Member States, to encourage convergence towards better living and working conditions (and is said to be aimed specifically at members of the Eurozone, although other states are invited to participate).⁷⁶

In terms of substance, it sets out 20 rights and principles based around 3 categories:

1. Equal opportunities and access to the labour market;
2. Fair working conditions; and
3. Social protection and inclusion.

The Pillar reaffirms a number of rights found in European and international documents in an attempt to make them more visible, explicit, and easier to understand for citizens. As such, it does not create any new rights rather it codifies those that exist elsewhere.⁷⁷ Given the limited competence the Union

⁷⁵ This is reinforced by Jean-Claude Juncker's 'State of the Union' speech in September 2015, where alongside introducing the Pillar, Juncker spoke of the need for a 'more social' Europe. See European Commission, 'State of the Union 2015: Time for honest, unity and solidarity' <http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm> accessed 1 July 2017.

⁷⁶ European Commission, 'The European Pillar of Social Rights – Questions and Answers' <http://europa.eu/rapid/press-release_MEMO-17-1004_en.htm> accessed 12 July 2017.

⁷⁷ Comparison can be drawn with the Charter of Fundamental Rights of the European Union, which was said not to create any new rights *per se* but codify those that existed elsewhere.

enjoys, in the majority of the areas covered, the Pillar is targeted at national governments (along with local and regional bodies). For similar reasons, it is also expected that Member States will develop domestic policies to support implementation and enforcement efforts.⁷⁸

The Pillar is best understood as a declaration; drawing together in a single document current legislation underpinning the ‘social’ *aquis*.⁷⁹ It has two distinct legal bases:

1. A Commission Recommendation; and
2. A proposal for an inter-institutional proclamation.⁸⁰

Interestingly, the use of an inter-institutional proclamation is modelled upon the approach adopted during the introduction of the Charter of Fundamental Rights (which was used to garner political support amongst heads of state and government and between the main institutions of the Union before work on its drafting began). However, the Pillar, unlike the eventual form of the Charter, is not intended to confer directly enforceable rights upon individuals.⁸¹

In similarity with other high-profile social policy initiatives lunched in the last decade, the Pillar is aimed squarely at the Member States; they are encouraged to act in areas where they retain competence and the Union considers joint action desirable (in pursuit of centrally set aims and objectives). This method of governance can be traced to the Lisbon Strategy and early variants of the OMC. Importantly, this approach allows the Union to exert

⁷⁸ European Commission (n 76).

⁷⁹ Which is said to include primary law, secondary law, the judgments of the Court of Justice, and guidelines found in the various, soft law, Open Method of Coordination processes.

⁸⁰ On behalf of the European Parliament, the Council and the Commission.

⁸¹ This is made explicit in the Commission Staff Working document that accompanied the recommendation and inter-institutional proclamation, with Member States being encouraged to legislate in order to give effect to rights that do not find expression in domestic law.

influence over issues that can only usually be dealt with by the Member States, without a requirement for the transfer of further decision-making power.

The Pillar makes explicit reference to minimum wages and prevailing wage rates in Member States. Under the category of fair working conditions, key principle 6 on wages provides for:

1. Fair wages that allow for a decent standard of living;
2. Adequate minimum wages in a way that provide for the satisfaction of the needs of the worker and his/her family; and
3. A commitment to prevent in-work poverty.⁸²

These points are interesting as they present a different view of minimum wages in comparison to that usually forwarded by the Union. Although copied verbatim from the European Social Charter and Community Charter of Fundamental Social Rights, there is great deal to be said about the Commission endorsing minimum wages as a way of achieving goals like ending in-work poverty.

At EU-level, a supply-side view of wages as cost factors has dominated discourse and has served as the basis of calls for Member States to reduce minimum wages in order to improve their competitiveness (with high rates considered impediments).⁸³ The Pillar mentions two distinct types of wage:

1. A fair wage linked to living standards; and
2. An adequate wage linked to the needs of a worker and his/her family.

⁸² European Commission, 'The European Pillar of Social Rights in 20 principles' <https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en> accessed 2 November 2017.

⁸³ This logic is visible in Country Specific Recommendations issued in 2015, 16 and 17 by the Commission under the European Semester (which are discussed in detail in chapter 4).

Not since the original Commission Opinion on an equitable wages in 1993 has there has been such explicit consideration, although perhaps only cursory in this instance, of the different roles that can be, and should be, performed by minimum wages. Indeed, the idea of a fair wage in Member States appears particularly ambitious and no doubt draws inspiration from the success of recent national campaigns.⁸⁴ Whereas the idea of a sustenance based minima is a far more expansive concept, taking into account the needs not only of workers but also of their families.

Is, therefore, the Pillar evidence the Union has changed its view of minimum wages and now believe that intervention is desirable? Certainly their employment in pursuit of social objectives is a welcome development but the proof of the pudding is often in the eating, and it will be interesting to see whether recommendations for the adoption of fair and/or adequate minimum wages find their way into the coming year's European Semester for policy coordination. Here, the Pillar could be viewed as providing a basis for closer wage coordination, with implementation achieved through existing methods for policy coordination like the European Semester.

3.6 Towards a more comprehensive EU minimum wage policy

Contemporary suggestions for an EU minimum wage policy are incomplete. In comparison to systems for setting minimum wages in Member States, analysis of features including the method used for adjustment, form, coverage, and enforcement is often performed only partially or not undertaken at all. With regard to those features considered above, questions still remain. In outlining the contours of a more comprehensive EU minimum wage policy, each is briefly considered below.

⁸⁴ The ETUC also made similar calls in a 2017 resolution on low pay and minimum wages. See ETUC (n 8).

There appears to be broad agreement on the extent to which minimum wages should be coordinated in Member States. During the 2014 European Parliamentary elections, the main parties focussed almost exclusively on proposals for relative rather than nominal coordination.⁸⁵ What remains unclear is the reference value or norm around which an EU minimum wage policy would coordinate minimum wages in Member States. A proportion of the median or average wage is a common suggestion, whereas other measures of national economic performance, such as GDP per capita, are becoming increasingly popular. When choosing a reference value, close attention should be paid to the objectives that an EU minimum wage policy seeks to give effect to. As discussed above, if attempting to reduce inequality, it would be advisable to choose a measure of the average, not the media wage.

Of fundamental importance for any EU minimum wage policy would be method chosen for its implementation. Placing responsibility with the institutions of the EU or with trade unions, implies a specific understanding of what is considered possible and desirable at European level; whether that be uniform regulation for all Member States or agreements between representative of management and labour. A thorough analysis of all feasible methods of implementation should be undertaken. This should be conducted from perspectives other than political science, with attention being paid to the possibility of different instruments being used together. Methods of implementation should respect national industrial relations systems, allowing for statutory legislation and collective bargaining to be used in Member States.

The method of how an EU minimum wage policy would be implemented also determines those responsible for its adjustment. Whether implemented by the institutions of the EU or by trade unions, a choice must be made between whether an EU minimum wage policy is adjusted via indexation, bipartite or tripartite negotiation, consultation, or unilaterally. Of course, different methods appeal to different actors. The Commission may favour a tripartite body similar to the UK Low Pay Commission (given its history of co-regulation with the

⁸⁵ Le Monde (n 28).

social partners), whereas the ETUC may favour a combination of indexation and negotiation (given its use of wage norm rules and negotiation committees in transnational collective bargaining). In each instance, adjustment criteria should be set in advance (e.g. a target value). By way of example, in Hungary, unplanned, extreme increases in the minimum wage were found to have no lasting effects on wage inequality, unlike planned, moderate increases in Lithuania.⁸⁶ Not only the frequency and amount but also the sequence of minimum wage adjustments should be taken into account. For an EU minimum wage policy implemented by the institutions of the EU, adjustment should take place before wage bargaining rounds in Member States, in order to multiply any potential spillover effects.

Minimum wages in Member States take different forms, being fixed on an hourly, weekly or monthly basis. In many Member States, a combination of all three is used. Conversion between each is achieved by multiplying or dividing rates by the maximum working hours defined by Member States or in collective agreements. Since the most common way of paying wages below the minimum wage is the non-payment of overtime, an hourly and a monthly minimum wage should be set (with the latter fixed as a multiple of the former). To maximise the impact of an EU minimum wage policy, 'reference compensation' should be defined. In France, reference compensation includes only the basic wage, whereas in the Netherlands, all regular payments, such as bonuses and premia of different kinds, are included.⁸⁷ The taxation of minimum wages varies significantly between Member States and is a related factor that should also be borne in mind when determining minimum wage rates.

Whether an EU minimum wage policy is extended to all workers without exception, or whether certain categories of worker are excluded or subject to different minimum wage rates, should also be investigated. As trade unions traditionally represent the collective interests of their members, the use of sub-minima is a issue more relevant to the idea of policy introduced by the Union.

⁸⁶ Vaughn-Whitehead (n 27) 523.

⁸⁷ *ibid* 522.

In Belgium, public sector workers are not entitled to the minimum wage,⁸⁸ whereas in the UK, all categories of worker qualify, with different rates applying to apprentices, those aged under 18, 18 to 20, and 21 to 24, and 25 and over. Criteria other than education and age are also used as bases for sub-minima. In the Czech Republic, France and Portugal, different minimum wage rates for disabled people are justified as helping a marginal group into employment.⁸⁹ The growing problem of contingent work in the EU means many are not covered by minimum wages, for example, those who are forced into bogus self-employment. As such, inclusivity should be prioritised, with sub-minima used only when absolutely necessary. Whether an EU minimum wage policy should apply at cross-industry or sectoral level is a question that has so far not been asked. The experiences of European Industry Federations and the ETUC with sectoral and cross-industry transnational collective bargaining, respectively, should be used to explore the positives and negatives of an EU minimum wage policy established at each level.

The effective coverage of minimum wages differs from their legal coverage (if compliance is required by law, which it is not in the Netherlands).⁹⁰ Making an EU minimum wage policy legal binding would be a first step towards tackling non-compliance. In Germany, employers found not paying the minimum wage are liable for fines of up to €500,000.⁹¹ As with similar systems in other Member States, enforcement is a major problem, with monitoring often hindered by understaffed labour inspectorates (as is the case in France).⁹² Information should be collected on the number and types of workers paid below the minimum wage. Of particular relevance to the idea of an EU minimum wage policy implemented by trade unions is how such information

⁸⁸ *ibid* 521.

⁸⁹ *ibid*.

⁹⁰ Vaughn-Whitehead (n 27) 525.

⁹¹ Marc Spielberger and Angela Schilling, 'Minimum Wages in Germany – You Might be Affected, Too: An Overview of the New German Minimum Wage Act (Mindestlohngesetz, MiLoG) (2014) Fall Labor Law Journal 163, 169.

⁹² Vaughn-Whitehead (n 27) 525.

could be used to improve enforcement, given that any agreement with employers' associations would not be legally binding. The use of governance instruments, in particular, peer-review and naming and shaming, should be considered. In the context of the EES, similar instruments have been shown to be as effective at eliciting positive behaviour as more punitive measures such as fines.

3.7 Conclusion

Over the last two decades, the idea of an EU minimum wage policy has been debated widely. During this time, broad agreement has been reached between those involved in its development, on the key elements that would form the basis of any future initiative. First, minimum wages in Member States should be coordinated around a relative value of national economic performance, so as to avoid distortions resulting from significant economic differences between Member States. Second, any method chosen for implementation should consider statutory and collectively agreed minimum wages in Member States as functional equivalents. Third, and as a consequence, measures to improve collective bargaining coverage in Member States may be necessary to ensure adequate coverage.

These insights will be taken forwards in the following chapters and used as the basis for the articulation of a workable proposal. In other words, the form of policy suggested should allow for the coordination of wages, should not undermine statutory wage setting mechanisms i.e. it should act as a complement to wages set or extended by the state and should be grounded in the current reality of collective industrial relations in Member States (that of the necessity of state support to ensure the effectiveness of its outputs).

Beyond these issues, a choice has to be made about who should be responsible for developing an EU minimum wage policy. Should it be the institutions of the Union or the social partners? This choice has important consequences for what type of method could be used for its implementation and how it would be adjusted and monitored. From the preceding debate, it is

clear there is little evidence of support amongst the Member States for the introduction of such a policy. Indeed, as is evident from a recent response from the European Commission to a question posed in the European Parliament (discussed above),⁹³ the Union is keen to emphasize that it does not have competence to act in the area of pay and that the introduction of an EU minimum wage policy is a question for the Member States.

However, discussion of recent EU-level governance developments suggests the Union already intervenes in the area of pay, irrespective of its limited competence. Recommendations on minimum wages were previously made under the Broad Economic Policy Guidelines and have been made since 2011 under the European Semester. Moreover, the adoption of the European Pillar of Social Rights, with its focus on ensuring fair and adequate wages, suggests more direct intervention could be justified in the future. These developments are somewhat underplayed in current debates and, as such, the next chapter considers the extent to which the Union intervenes in the area of pay, what impact this has had upon wages and minimum wages in Member States and whether methods of policy coordination like the European Semester could be used to set targets for national minimum wages.

⁹³ European Parliament (n 36).

4. European economic governance

4.1 Introduction

This chapter outlines the impact of EU law and policy on wages and wage-setting mechanisms in Member States and charts how Union-led intervention in this area has developed over the course of European integration. This is undertaken with a view to providing a more comprehensive understanding of how wages are regulated by the Union (versus that assumed by current debates on the idea of an EU minimum wage policy). It is only against this more complete picture that a workable alternative can be presented in the second part of this thesis.

As briefly discussed in the last chapter, the new models of economic governance developed by the Union over the last two decades – often characterised as ‘soft’ modes of governance – are increasingly being used to issue recommendations to Member States concerning prevailing wage rates and how they are set. This chapter places these developments within the context of the history of EU-level wage governance and suggests that, contrary to some proposals, such methods would not be an appropriate basis for setting an EU minima. Rather, as discussed in this chapter and developed in the next, there is a need for an alternative method – which is not under the sole control of the Commission – to address the negative consequence such initiatives are having on wages in Member States.

The main challenge for the introduction of an EU minimum wage policy is the lack of competence for the EU to act in the area of pay (as per Article 153(5) TFEU). However, this exemption has not prevented the Union from indirectly regulating wages and wage-setting mechanisms in Member States, both in the past and at the present. Current debates on the idea of an EU minimum wage policy understate the influence of the Union on wages. Indeed, given this history, suggestions for the formalisation of a process for wage coordination are not that revolutionary. For example, indirect pressure was exerted during the run-up to monetary union for the convergence of wages across Member

States in order to prevent the development of macroeconomic imbalances. Here, it appears Member States may be more comfortable with the illusion of wage sovereignty than agreeing to a formal process that delivers similar results.

Economic and social policies have effected wages and wage-setting mechanisms in Member States since the inception of the Union, however, the methods adopted during the financial crisis have proven to be exceptional; not only have they been far more interventionist, for example, stipulating the moderation of statutory minimum wages but they have also made innovative use of non-binding recommendations backed by the threat of financial sanctions in order to foster compliance. The focus of this 'new' mode of European economic governance on the pursuit of austerity and the damaging effect it is having on real wages and industrial relations systems highlights the need for an alternative policy. Such a policy could involve coordinating wages in Member States around the aims of fighting falling real wages and promoting solidarity between workers. Moreover, the possibility of its foundation on a process initiated by the social partners themselves – like the European social dialogue – would serve as a counterpoint to the predominance of Union-led interventions.

In what follows, first, old(er) methods of EU wage governance are assessed, initially focussing on legislation and the jurisprudence of the Court of Justice, before turning to consider Economic and Monetary Union and the beginnings of economic governance. Second, what has been referred to as 'new' European economic governance and its effects upon wages and wage-setting mechanisms in Member States are discussed (with specific focus on the European Semester). Finally, the financial assistance programmes administered at the hands the IMF-led 'Troika' to indebted Member States after the financial crisis are explored.

4.2 Old(er) methods of EU wage governance

Since the inception of the internal market, the institutions of the Union have passed legislation and the Court of Justice has decided cases that have had wide-ranging implications for wages and wage-setting mechanisms in Member States. Examples of this ‘older’ form of governance – through ‘hard’ law measures and court adjudication – and its implications for wages in the areas of equal pay, atypical work, the posting of workers and public procurement are explored below.

4.2.1 Legislation

Equal pay

The principle of equal pay has been a fundamental value of the Union since the Rome Treaty of 1957. The Treaty prohibited unequal pay for men and women, and has given rise to legislation intended to eliminate the gender pay gap. The Recast Equal Treatment Directive establishes two important reference points with regard to wages and collective bargaining: (1) it refers to the prohibition of direct and indirect discrimination based upon gender; and (2) calls on Member States to promote social dialogue between social partners in order to foster equal treatment.¹ The Court of Justice has developed the first point further, both in the past and more recently.

In *Enderby*,² the Court held that differences in pay, in seemingly equivalent jobs, undertaken by groups comprised almost entirely of the opposite sex, were justified on the basis that each group had signed different collective agreements. In *Cadman*,³ the Court argued that in the context of length of

¹ Council 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 (recast) (OJ [2006] L204/23).

² Case C-127/92 *Enderby v Frenchay Health Authority* [1993] ECR I-5535, [20] – [23].

³ Case C-17/05 *Cadman v Health & Safety Executive* [2006] ECR I-9585.

service, criteria used to determine pay must genuinely reward greater experience and better job performance, in order to prevent, as is often the case, indirect discrimination against women based upon prolonged absences from the labour market. Here, an interesting justification for a legally binding EU minima is that it would help tackle the gender pay gap (as with statutory minimum wages in Member States). Such a minima could be based upon Article 157 TFEU and would go part way to ensuring respect for the principle of equal pay for work of equal value.

Atypical work

The atypical work directives – the Part-Time Work Directive, the Fixed-Term Work Directive and the Temporary Work Directive – regulate certain aspects of wages.⁴ The Part-Time Work Directive provides that “in respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers” but “different treatment [may be] justified on objective grounds”.⁵ Thus employers may pay part-time and full-time workers differently but this must be in line with the proportionality test established in *Cadman*.⁶

Unlike the Part-Time Work Directive, the Fixed-Term Work Directive excludes the possibility for derogation from its aim of ensuring equal treatment for fixed-term workers. In *Gavieiro Gavieiro*,⁷ the Court of Justice held that precluding fixed-term workers from pay rises for length of service, that were extended to permanent workers, was not permissible.

⁴ Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ [1998] L14/9); Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ [1999] L175/43) and Directive 2008/104/EC on temporary agency work (OJ [2008] L327/9).

⁵ Clause 4(1) of the Part-Time Work Directive.

⁶ *ibid* (n 3).

⁷ Case C-444/09 *Gavieiro Gavieiro v Consellería de Educación e Ordenación Universitaria de la Xunta de Galicia* [2010] ECR I-0000.

The Temporary Agency Workers Directive refers to equal pay when outlining the working and employment conditions it covers. Article 5 of the Directive allows for derogation in two situations. First, Article 5(3) provides Member States with the option of implementing its provisions by collective bargaining. National social partners are permitted to “establish arrangements concerning the working and employment conditions of temporary agency workers...”. Such arrangements can be different to those of permanent workers. Second, Article 5(4) allows for Member States who do not provide for the extension of collective agreements the ability to regulate temporary agency work based upon an agreement between national social partners. This practice has been used by Member States to restrict equal pay for temporary agency workers until they have worked for a pre-determined ‘qualifying period’ e.g. the twelve week period stipulated in the UK Agency Workers Regulations.

Posting of workers

Posting occurs when a company established in one Member State provides services in another Member State, sending its own workers. The Posting of Workers Directive covers the substantive terms and conditions of employment for such contracts.⁸ Article 3(1) of the Directive requires that ‘host’ Member States ensure that posted workers benefit from its own “minimum rates of pay”. Article 3(1) further stipulates that minimum rates of pay can be drawn from the “law[s], regulation[s] and provision[s]” of the host Member State. As stipulated in the Annex to the Directive, when a posted worker is employed in the building industry, minimum rates of pay held in collective agreements may be used. However, collective agreements must have been extended by the state to the sector in question or be “generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned” with the employers association and trade union concluding the agreement being representative.

⁸ Council Directive 96/71/EC concerning the posting of workers in the context in the framework of the provision of services (OJ [1996] L18/1).

In the now infamous string of cases beginning with *Laval*,⁹ the Court of Justice further developed EU law on the posting of workers. It held that minimum wages must be set by legislation or extended collective agreements in order to be relied upon for the purpose of the Directive. In *Rüffert* and *Commission v Luxembourg*,¹⁰ the Court found that less favourable wages cannot be set for posted workers based upon expansive interpretations of Articles 3(7) and 3(10) of the Directive, respectively. These cases have stirred much controversy, the fallout from which has led to calls in Member States without statutory minimum wages for their introduction (in order to prevent the undercutting of 'home' workers wages when mechanisms for the extension of collective agreements are not generally binding on an industry).

Public procurement

More recently, controversy has surrounded the Union's approach towards wages in the context of its public procurement rules.

Whilst the Procurement Directive aims to foster market integration and to prevent discrimination between domestic and non-domestic contractors and subcontractors when public authorities procure good, works or services, it also acknowledges that procurement can serve a number of other objectives.¹¹

Article 70 of the Directive provides that:

⁹ Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767, [71].

¹⁰ Case C-346/06 *Rüffert v Land Niedersachsen* [2008] ECR I-1167; and Case 319/06 *Commission v Luxembourg* [2008] ECR I-4323.

¹¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Text with EEA relevance) (OJ [2014] L94).

Contracting authorities may lay down special conditions relating to the performance of a contract... which may include economic, innovation-related, environmental, social or employment-related considerations.

As the preamble to the Directive suggests, such conditions can be drawn widely, including in order to give effect to the Europe 2020 Strategy and in support of SMEs. However, as the cross-border dimension of procurement continues to develop, its interface with the Union's rules on the posting of workers must also be considered.

As discussed above, the Posted Workers Directive defines a series of mandatory rules concerning the terms and conditions of employment for employees who are sent by their employer to undertake work in another Member State. These include minimum rates of pay. As such, when posting occurs, the Directive governs the conditions regulating pay that public authorities can impose during procurement; acting to restrict the scope of Article 70 of the Procurement Directive, specifically, as a basis for minimum wages. The tension between both Directives has been the subject of string of recent cases.

The first test of this conflict was heard in *Rüffert* (briefly discussed above). Within, the Court of Justice considered whether a 'first generation' German 'Tariftreuegesetze', setting a regional procurement wage stipulating that posted workers be paid in line with the local collectively agreed wage, was valid under the Posted Workers Directive. The Court decided that as the wage had not been declared universally applicable, it did not fall within the ambit of any of the models envisaged by the Directive and, consequently, could not be relied upon. In response, the Tariftreuegesetze was amended to include collective agreements declared universally applicable by regulation i.e. by state extension mechanisms.¹²

¹² In *Bundesdruckerei*, the legality of the amended Tariftreuegesetze, requiring procurement wages based upon collective agreements to be declared universally applicable, was considered in detail. However, it was decided that posting had not

More recently, in the case of *RegioPost*,¹³ a cross-border procurement contract stipulating that a *Tariftreuegesetz* should be paid to contractors and subcontractors, that referred to a sectoral minimum wage set by state legislation, was challenged. With reference to the Procurement Directive, the Court decided that the wage in question amounted to a performance condition, and providing that it conformed with certain procedural conditions, including that of transparency,¹⁴ was valid.

Importantly, as performance conditions must be compatible with Union law, the wage was also scrutinised in light of the Posted Workers Directive and Article 56 TFEU. With regard to the former, *RegioPost* can be interpreted as endorsing the view that under the Procurement Directive, differentiated minimum wages are permissible. As the Court emphasised both in *Laval* and *Rüffert*:

Member States cannot require the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection.¹⁵

In the context of procurement, performance conditions that set wage floors specific to certain industries or sectors must be applied equally to home and

occurred and, separately, that the minimum wage in question was an unjustifiable restriction of Article 56 TFEU, as it proscribed a higher rate than in the Member State where the work was to be undertaken. See Case C-549/13 *Bundesdruckerei* ECLI:EU:C:2014:2235.

¹³ Case C-115/14 *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz* ECLI:EU:C:2015:760.

¹⁴ For example, Article 26 requires conditions be “indicated in the contract notice or in the specifications”.

¹⁵ (n 9).

posted workers (and conform to one of the models detailed under the Posted Workers Directive).¹⁶

However, it remains unclear where the dividing line sits in terms of differentiation. For example, could minimum wages specific to certain professions be justified?¹⁷

Interestingly, *RegioPost* can be distinguished from *Rüffert* in terms of the so-called 'selective applicability' of procurement law; in that it does not, by its nature, apply to the general workforce, only to those employed to fulfil public contracts. Although acknowledged in *Rüffert*, in *RegioPost* the Court clarified this point with reference to the Posted Workers Directive, namely, the interpretation of Article 3(8); that if Member States do not have systems for declaring collective agreements universally applicable by regulation, for the purposes of procurement, they cannot rely upon either of the listed exemptions (generally applicable collective agreements and those agreed by national representative organisations at cross-industry level).

With regard to the latter, as originally held in *Rüffert*, procurement contracts stipulating that minimum wages should be paid to contractors and subcontractors, are a restriction of the freedom to provide services (if workers are established in a Member States where a lower rate applies). In *RegioPost*, such measures were considered legitimate in light of the regulatory objective of protecting workers. Furthermore, in supporting this finding, the Court affirmed what was described above as the selective applicability of procurement law,

¹⁶ It remains unclear whether this extends to setting the nominal level or rate of minimum wages. However, it has been suggested that justifications for high (or low) minima are not required, providing that they are applied equally to home and posted workers.

¹⁷ In *Sähköalojen Ammattiliitto*, it was held that under the Posted Workers Directive, minimum wages structured on the basis of wage groups were valid when based upon 'the nature of work performed', along with other criteria including professional qualifications, training and relevant experience. See Case C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna* ECLI:EU:C:2015:86.

arguing that not doing so would strip Article 70 of the Procurement Directive of its intended protective function.¹⁸

The Court is likely to hear a number of other cases concerning minimum wages in 2018.¹⁹ The European Commission has recently initiated infringement proceedings against Germany, France and Austria based upon the application of their own systems. Investigations are centred around the issue of minimum wages being applied to international transport operations loading and unloading in the respective territories, who are not established in the Member State or do not have significant links there. The Commission argues that such measures have the potential to prevent the proper functioning of the internal market by constituting an unfair administrative barrier to the freedom to provide goods and services. The Commission has initially suggested that it is willing to compromise on this issue and that it will publish the details of a 'Mobility Package' for the transport sector in 2017, with the intention of addressing the concerns raised by Member States (against which they have justified the territorial application of minimum wages).²⁰ These include the issue of wage dumping, which is a considerable problem in the sector. If compromise cannot be reached and the Commission refers a case to the Court, it would likely turn

¹⁸ n (13).

¹⁹ Although courting media attention, the case of *Tyco* has not been discussed here as it did not directly relate to minimum wages but concerned what could be considered working time for the purposes of the Working Time Directive, specifically, whether for peripatetic or mobile workers this includes time spent travelling between home and the first scheduled appointment of a shift. Importantly, the Directive does not stipulate whether this time should be paid, rather was said to be a consideration for national employment law systems. See Case C-266/14 *Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA* ECLI:EU:C:2015:578.

²⁰ This point, concerning the territorial application of minimum wages, is unprecedented and there appears to be no known examples of the adoption of such a policy in any of the relevant literature. Given the context of posting, this is perhaps a development that could not have been expected in the absence of an internal market for goods and services.

on the priority given to the freedom to provide goods and services (and whether this is to be given primacy).

These older forms of governance, irrespective of Union's Article 153(5) TFEU exemption on regulating pay, have altered established practices relating to the determination of wages in Member States. Although the jurisprudence of the Court in the *Laval* quartet is perhaps best known, its decisions with regard to equal pay, atypical work, and public procurement must not be overlooked. These very specific interventions stand in contrast to more direct attempts to regulate wages and wage-setting mechanisms made under EMU and economic governance including, for example, calls to reduce real wages. Although, as will be discussed below, as the Union has become more interventionist, its newer methods of regulating wages and wage-setting mechanisms are not of the same legal form as these early forms of wage governance.

4.2.2 Economic and Monetary Union

The start of the 1990s saw the beginning of Economic and Monetary Union (EMU). Through three separate stages, participating Member States committed to the convergence of their economies. Member States that have complied with the third stage of EMU adopt the Euro as their currency and are commonly referred to as members of the 'Eurozone'. The legal framework of EMU combines a fully-centralised monetary policy with a model of economic policy-making that shares competence for fiscal policy between the EU and Member States. Whilst the main objective of the European Central Bank (ECB) has been the maintenance of price stability, Member States are free to set their own fiscal and wage policies with minimal intervention from the EU.

This institutional asymmetry at the heart of EMU – a unified monetary policy with fiscal policy distorted through an excessive emphasis on price stability alongside the limited coordination of economic and social policy – has placed pressure on wages and wage-setting mechanisms in Member States. At the

onset of the third stage of EMU, this was predicted to manifest itself in one of three ways.

First, the adoption of the Euro and the completion of the single market would increase competition between Member States.²¹ Without the possibility for Member States to devalue their national currencies, wage moderation would be pursued as a way of improving national competitiveness. Second, with the ability of monetary policy to discipline national wage developments limited by its transfer to EU-level, coordination of wage policies across the EU would be required in order to prevent the development of macroeconomic imbalances (this issue has played out during the crisis with regard to German wage restraint).²² Third, EMU was likened to globalisation in the effect that it would have upon collective bargaining and collectively agreed wages; specifically decentralisation towards company level and lower wages.²³

Over the course of the introduction of EMU, the adoption of a general policy of wage moderation across Member States was visible. This included a strong trend of declining nominal wage growth and average increases in real wages clearly below increases in labour productivity. Member States sought to limit wage increases to improve competitiveness and prevent inflationary pressures (often with a view to matching unit labour cost developments of trading partners). This was achieved by introducing new laws (e.g. the competitiveness law in Belgium) or concluding bipartite or tripartite agreements known as 'social pacts' (e.g. Finland and the Netherlands). However, these arrangements were dismantled in many Member States after the introduction of the Euro, at the behest of employers, who argued they were too centralised and ill-suited to the single market i.e. they were overly rigid and stifled competition.

²¹ Ronald Janssen and Emmanuel Mermet, 'Wage Policy under EMU' (2003) 9(4) *Transfer: European Review of Labour and Research* 666, 667

²² *ibid* 668.

²³ *ibid* 668.

The introduction of EMU signals the first real attempt by unions to coordinate wages across the EU (targeting the sum of inflation and labour productivity). These attempts will be discussed in detail in chapter 5 but serve to highlight two important issues: (1) specific economic justifications for the introduction of an EU minimum wage policy can be traced to the inception of EMU; and (2) whether these attempts at coordination, in and of themselves, contributed to the convergence of wages across Member States. With regard to the first issue, wage coordination was viewed by unions as a way of preventing wage competition and protecting wages from possible ECB retaliation against wage-push inflation. With regard to the second issue, wage convergence is almost exclusively attributable to the wage moderation policies described above. This has been described as a situation of 'competitive wage benchmarking',²⁴ whereby convergence is caused by wages in one Member State being copied in another (as played out with Germany at the helm).

The effect of EMU on wage-setting mechanisms in Member States, in particular collective bargaining, was somewhat mixed. Western and northern Member States pursued the recentralisation of collective bargaining in order to improve the effectiveness of wage moderation policies. Where decentralisation did occur, qualitative issues, such as working time, were discussed at company and plant level. This change in bargaining structure raised the ceiling imposed by wage moderation, allowing for productivity related increases, such as the more efficient use of working time. This stands in contrast to southern Member States who abandoned the central coordination of wages in favour of decentralisation with the adoption of the Euro.

Rather than directly intervening in wages and wage-setting mechanisms in Member States, EMU exerted indirect pressure for reform. With some exceptions, whether Member States chose to pursue wage moderation policies or the recentralisation of collective bargaining was ultimately their choice. Given the institutional asymmetry at the heart of the legal framework of EMU,

²⁴ Bob Hancké, *Unions, Central Banks and EMU: Labour Market Institutions and Monetary Integration in Europe* (OUP 2013) 41.

however, this choice was illusory, as Member States had no real alternative. Importantly, the Union has established a more direct system within the context of EMU – of setting recommendations, agreements and providing fora for discussion – that concern wages.

4.2.3 Broad Economic Policy Guidelines

In an effort to coordinate economic policies, the authors of the Maastricht Treaty included the Broad Economic Policy Guideline process (now held under Article 121 TFEU). Since 1994 (the start of the second stage of EMU), the Commission and the Council have adopted annual Broad Economic Policy Guidelines (BEPG) on macroeconomic, microeconomic (the ‘Cardiff Process’) and structural policies. The BEPGs are intended to serve as a common frame of reference for Member States when reviewing their national economic policies. As part of the Europe 2020 strategy, the BEPGs are accompanied by guidelines on employment, poverty and education (together forming the ‘integrated guidelines’). Although the BEPGs have never been used for the coordination of wages, with some change in focus, they have addressed wage developments for each period they have been adopted.

By way of example, the fourth BEPG adopted for the period 2005-2008, called on Member States to ensure that wage developments contributed towards growth and stability, complemented structural reforms, and that wage-setting mechanisms facilitated the development of nominal wages and unit labour costs in line with price stability and productivity developments. The non-binding nature of these recommendations mean they are dependent upon Member States for their effect. This situation, and the voluntary character of the BEPGs, should not be underplayed. The Commission can issue ‘warnings’ to Member States whose national economic policies do not take sufficient account of the BEPGs, which may lead to further recommendations being made public. Since 2011, reforms to the Stability and Growth Pact have meant that financial sanctions may be levied for macroeconomic imbalances as well as excessive deficits (which will be discussed in detail below).

The reform of the Stability and Growth Pact signalled the beginning of a change in direction for the EU with regard to wages; recommendations as to their level and the means by which they were set began to take on a less voluntary and more obligatory nature. Naming and shaming and fines make ignoring the BEPGs more difficult. What amounts to a trend towards more direct intervention developed further with the advent of new European economic governance. However, the EU has also retained more indirect or cooperative means of governance via the Macroeconomic Dialogue.

4.2.4 Macroeconomic Dialogue

Established by a resolution on the European Employment Pact of 3-4 June 1999 (also known as the 'Cologne Process'), the Macroeconomic Dialogue serves as a forum for the Council, the Commission, the ECB, the Member States and the social partners to meet to discuss the coordination of national economic policies. Specific focus is directed towards the:

[Improvement] of mutually supportive interaction between wage developments and monetary, budgetary and fiscal policy through macro-economic dialogue aimed at preserving a non-inflationary growth dynamic".²⁵

The Dialogue takes place twice a year before European Council meetings. In providing a forum where those responsible for wages and wage-setting can meet, the Dialogue aims to create a better understanding of each actor's priorities e.g. the ETUC has used the Dialogue to present its demand for a more expansive wage policy that would combat current deflationary trends by reversing decreases in real wages and stabilising aggregate demand.

A serious concern is that the Dialogue may be little more than window dressing; in that it gives the illusion of cooperation between EU institutions and

²⁵ European Council, 'Presidency Conclusions: Cologne European Council – 3 and 4 June 1999 (Brussels).

both sides of industry, whereas in reality agreements of any real consequence are rarely reached. Previous attempts by the ETUC to promote its 'framework formula' for collective bargaining (targeting the sum of inflation and labour productivity) have been met with little interest from the Commission, the ECB and the representatives of management.

The BEPGs and the Macroeconomic Dialogue have been retained as part of the Union's new system of European economic governance.

4.3 New European economic governance

In the wake of the financial crisis of 2008 and the economic crisis that followed, Member States, in particular those belonging to the Eurozone, were faced with levels of public debt unprecedented in modern times. The bailout programmes Member States extended to the financial industry have created huge budgetary deficits, placing pressure on Member States to find ways of refinancing their sovereign debt. With a view to the system of economic governance under EMU, these troubles were not foreseen (if, indeed, they could have been). As a response, the Union has put in place a new set of regulations, procedures and institutions commonly referred to as 'new' European economic governance.²⁶ This new system aims to stabilise the current situation in the Eurozone through updated coordination, monitoring and sanctions.

A common theme running through early appraisals of this system is how it is more interventionist with regard to wages and wage-setting mechanisms than under EMU.²⁷ This narrative portrays such intervention as being almost exclusively negative; minimum wages are reduced and wage-setting mechanisms reformed or dismantled. The exceptional nature of the financial

²⁶ Christophe Degryse, 'The New European Economic Governance' (2012) ETUI Working Paper 14.

²⁷ Thorsten Schulten and Torsten Müller, 'European Economic Governance and its intervention in national wage development and collective bargaining' in Steffen Lehndorff (ed), *Divisive integration. The triumph of failed ideas in Europe – revisited* (ETUI 2015).

crisis necessitated ad hoc measures to prevent contagion in the Eurozone, as such, new European economic governance has developed in a piecemeal fashion rather than through planned EU initiatives. Consequently, in what follows, this system is analysed chronologically, detailing its major features before its affect upon wages and wage-setting mechanisms in a select number of Member States are outlined.

4.3.1 The Stability and Growth Pact

On 29 September 2010, the Commission formally proposed the strengthening of the Stability and Growth Pact through the adoption of the 'Six Pack'. The Six Pack consists of one directive and five regulations, of which, four texts are focussed on the reform of the Stability and Growth Pact (SGP) and two the correction of macroeconomic imbalances. This new 'macroeconomic pillar' provides for the regular evaluation of potential imbalances through an alert mechanism based on a scoreboard of economic indicators. Members States with serious imbalances are issued recommendations by the Council, with sanctions for non-compliance.

The scoreboard of economic indicators includes the development of prices and costs, non-price competitiveness and various components of productivity. Thus wages are an implicit adjustment variable. Sanctions for excessive macroeconomic imbalances are automatic under the Six Pack for Member States who have persistently failed to comply with recommendations issued by the Council. Sanctions are deemed adopted by the Council unless rejected by a qualified majority vote. They include an interest bearing deposit of 0.1% of GDP if a Member State has not taken corrective measures as recommended by the Council and an additional annual fine of 0.1% of GDP if it persistently fails to comply with recommendations. This has been used as an example of the growing influence of new European economic governance on national wage policies, since recommendations have become more binding as Member States that ignore them face significant financial sanctions.²⁸ Moreover, this

²⁸ *ibid* 334.

approach presents itself as a development of the naming and shaming policy employed under the BEPGs.

On 23 November 2011, the Commission proposed to add two new regulations to the Six Pack. The 'Two Pack' complements the European Semester (discussed below) by requiring Member States to submit their draft budgetary plans for the following year to the Eurogroup and the Commission. If draft budgetary plans breach the obligations of the SGP, the Commission can publically demand their revision within two weeks. This new budgetary calendar is strengthened by the further intensification of monitoring processes. Depending upon the seriousness of a Member State's financial difficulties, the Commission and the ECB can increase surveillance by requesting reports, undertaking in-country evaluation missions and altering the terms, if in receipt, of macroeconomic adjustment programmes.

4.3.2 The Euro Plus Pact

After the reform of the SGP, German Chancellor Angela Merkel and French President Nicolas Sarkozy presented their own version of economic governance, based upon the idea of a 'competitiveness pact'. Reports from Berlin suggested that Angela Merkel was keen on institutionalising the assessment of Member States' wage policies, in particular, automatic wage indexation. However, Belgium and Luxembourg, along with the ETUC, were concerned that doing so would result in the German policy of wage restraint being exported to the rest of the Eurozone. Proposals for the comparison of unit labour costs were seen as placing further pressure on Member States to cut wages.

On 11 March 2011, heads of state and government approved the Euro Plus Pact. The Pact was eventually signed by the EU28 minus Croatia, the Czech Republic, Hungary, Sweden and the UK (hence 'Euro Plus'). Signatory Member States commit themselves to take enhanced measures in the areas of competitiveness, employment, the viability of public finances and financial stability. The general aim of the Pact is to reinforce the economic side of EMU.

Signatory commitments are reviewed each year by Member States on the basis of a report by the Commission. Whereas the reforms of the SGP reinforce fiscal discipline and macroeconomic surveillance, the Euro Plus Pact focuses upon competitiveness and convergence. Commitments in the areas of competitiveness and employment specifically effect wages and wage-setting mechanisms. Unit labour costs are to be kept low by limiting public sector wage increases and evaluating wage-setting mechanisms, whilst employment is to be promoted through labour market reforms that favour 'flexicurity'.

Although the Pact states that each member state is responsible for its own policies in pursuit of its goals, certain measures are given special attention, including those:

[T]hat... ensure cost developments in line with productivity, such as... review[ing] the wage setting arrangements, and, where necessary, the degree of centralisation in the bargaining process, and the indexation mechanisms, while maintain the autonomy of the social partners in the collective bargaining process, [and ensuring] that wage settlements in the public sector support the competitiveness efforts in the private sector (bearing in mind the important signalling effect of public sector wages).²⁹

Wages and wage-setting mechanism appear as the main adjustment variables for fostering competitiveness under the Pact.³⁰ The guidance given to Member States is far more specific than with regard to macroeconomic imbalances under the SGP. The scoreboard of economic indicators introduced under the reforms of the SGP is co-opted by the Pact for the purpose of monitoring unit labour cost developments. Eurozone Member States are currently permitted a maximum 9% increase in unit labour costs over a period of three years (or 12% for those outside of the Eurozone).³¹ Although the reform of the SGP has

²⁹ European Commission, *Towards a Job Rich Recovery* COM(2012) 173 final.

³⁰ Eurofound, *Pay in Europe in the 21st Century* (Eurofound 2014).

³¹ European Commission, 'Scoreboard for the surveillance of macroeconomic imbalances' (2012) Occasional Paper 12.

placed added pressure on wages and wage-setting mechanisms in Member States, the Euro Plus Pact is an exceptional development in their regulation, that for the first time, seeks to ensure a favourable microeconomic environment for business.

4.3.3 The European Semester

These new regulations, procedures and institutions are brought together by the 'European Semester' for policy coordination. The Semester was established in 2010 with the adoption of the 'Europe 2020' (EU2020) strategy and brings together economic and social policies with the aim of improving the consistency of their coordination. In addition to fiscal and macroeconomic surveillance, the Semester mainstreams the EU2020 growth strategy. The Semester is viewed as means of "ensur[ing] that collective discussion on key priorities takes place at EU-level, before and not after national decisions are taken".³² This is crucial if the reform of wages and wage-setting mechanisms is to be effective.

The Semester begins each year in November with the adoption of the Annual Growth Survey (AGS), which identifies priorities and objectives for the EU and Member States and ensures they align with the EU2020 strategy and the SGP. At the same time the Commission identifies Member States for 'In-Depth Reviews' under the 'Macroeconomic Imbalance Procedure' (as part of the SGP discussed above). These findings are published in March, when the Council outlines annual EU and Member State priorities, provides guidelines for action and reflects upon the previous cycle of the Semester. As part of the 'preventative arm' of the SGP, Member States draft 'Stability and Convergence Programmes'. These are presented alongside country-specific 'National Reform Programmes' that Member States draft taking into account the objectives of the EU2020 strategy, the AGS and the Euro Plus Pact. Both programmes are submitted to the Commission in April, with the Commission

³² European Commission, *Concluding the first European semester of economic policy coordination: Guidelines for national policies in 2011-2012* COM(2014) 400 final.

assessing each and presenting Member States with an integrated set of County-Specific Recommendations (CSRs). The CSRs are formally adopted by the Council and endorsed by the European Council in June.

The CSRs can be understood as the practical manifestation of the effect that new European economic governance is having on wages and wage-setting mechanisms. The CSRs distil the multiple recommendations made under the SGP and the Euro Plus Pact down to very specific calls for change. What is surprising is that such intervention, bearing in mind the contested nature of its voluntariness, can be pursued by the EU in spite of Article 153(5) TFEU. For all intents and purposes, new European economic governance acts to coordinate wages across Member States. This has led to suggestions that an EU minimum wage policy could be established within the auspices of the European Semester (of course a fundamental change of direction in terms of the objectives it pursues would be required).³³

4.3.4 Country-Specific Recommendations

Recommendations were first issued under the European Semester in 2011 and Member States have received CSRs on a yearly basis since.

The CSRs cover wages broadly, calling for Member States to moderate developments and ensure increase in line with real productivity (including Belgium, Bulgaria, Croatia, Finland, Italy, Slovenia and Spain). The CSRs have also called for the moderate development of minimum wages (including France, Portugal and Slovenia). With regard to France, in particular, requests have consistently been made for its minimum wage to support job creation and competitiveness. In a move unpopular with Sweden, a CSR for 2013/14 called for it to address the perceived problem of high wages at the bottom of its wage distribution (*de facto* asking it to increase its low pay sector). However,

³³ Torsten Müller, Stefan Clauwaert, Isabelle Schömann and Kurt Vandaele, 'More of the same: wages and collective bargaining still under pressure' in ETUI, *Benchmarking working Europe 2015* (ETUI 2015).

recommendations made under the Semester have not been entirely negative. The Commission has commented on weak wage growth in the UK and its effect upon private consumption and investment but has gone further with regard to Germany. Here, CSRs have called for wage developments in line with real productivity, which would cause a general increase in wages (the CSRs can thus be understood as supporting the introduction of Germany's national minimum wage in 2015).³⁴

The CSRs have made more specific calls with regard to wage-setting mechanisms (this is arguably a result of the important influence they have on unit labour costs). Recommendations have focussed upon the reform of wage indexation systems. Belgium, Cyprus, Malta and Luxembourg have faced criticism of their wage-setting practices as they remain the only Member States with automatic indexation systems (although recommendations have encouraged the adoption of more flexible forms of indexation as opposed to their abandonment). With regard to collective bargaining, CSRs have promoted decentralisation, in particular, to company and enterprise level. In the pursuit of competitiveness improvements, CSRs for Italy and Spain have called for the prioritisation of collective agreements at company level and the ability for companies to opt-out or derogate from higher level, multi-employer agreements.

It is difficult to distinguish the impact of the CSRs on national wage policies and thus whether changes in wages and wage-setting mechanisms in Member States are a result of pressure from the European Semester or domestic political considerations. However, since the introduction of the European Semester, the levels of wages and the strength of collective bargaining have continued to worsen in Member States.

³⁴ Schulten and Müller (n 27).

4.3.5 Trends in wages

Minimum wages in Member States have developed in a somewhat uneven fashion. In those Member States in receipt of IMF-led financial assistance programmes, minimum wages have faced significant cuts. Given their 'signalling' function for wages in the bottom half of the wage distribution, it is perhaps not surprising they have been singled out for closer attention. Aside from cuts in minimum wages imposed at the hands of the Troika (which will be discussed in the next section), decreases have been recorded in only 9 out of 21 Member States with universal systems. Tax reforms in Hungary and attempts to reduce poverty in Slovenia saw modest increase in minimum wages, respectively. Even during times of austerity, the flexibility of minimum wages, as public policy tools, appears to have prevented a general trend of devaluation from developing.

This stands in contrast to the picture with regard to public sector wage developments. Public sector wage reforms have been pursued in 18 Member States, including those left relatively unaffected by the crisis. This has led to suggestions that Member States have used the crisis as a pretext to introduce austerity measures. Pay cuts, freezes and the abolition of benefits have been commonplace. As an example, pay cuts of 5-10% were introduced in Italy in 2010, followed by pay freezes and the reduction of productivity bonuses and the suspension of automatic pay increases for certain groups of worker (armed forces, police, magistrates etc.). As with the signalling function of minimum wages, public sector pay plays an important role in the wage distribution. Higher wages in the public sector are often a result of higher skill levels and seniority. Public sector premia of up to 45% relative to the private sector have been inverted during the crisis e.g. to -15% in Romania, squeezing the wage distribution from above.

4.3.6 Trends in collective bargaining

Visible trends with regard to collective bargaining include: its continuing decentralisation; the spread of opt-out clauses from higher level agreements,

enabling companies to derogate from wage standards under specific circumstances; the inversion of the favourability principle, allowing company level agreements to take precedence over sectoral agreements, even if wage standards are less favourable; and changes restricting the use of government extension mechanisms.³⁵

The predominant tendency towards the decentralisation of collective bargaining, visible from the early 1980s, has continued. Member States have enacted legislation that favours wage negotiations at company level, however 'recentralisation' to cross-sectoral level has also occurred e.g. in Belgium (but the possibility for wage increases above those provided for by automatic indexation has been limited).

Coordination has thus become an issue, with trade unions reaching agreements with employers associations to ensure horizontal links remain between bargaining units. In terms of mechanisms for ensuring vertical coordination between bargaining levels, opt-out and opening clauses along with the inversion of the favourability principle, for example, the passing of the Fillion law in France, have become increasingly common. Whereas opt-out clauses have been regularly included in collective agreements, opening clauses still appear to be reserved for exceptional circumstances such as financial difficulties resulting from the crisis.

Changes to the government extension of collective agreements have been recorded in Member States with single and multi-employer systems of industrial relations. These changes have though cut both ways, whereas in Germany minimum wages have been extended to low pay sectors (under the old minimum wage system), the 'quasi-legal' extension of collective

³⁵ Paul Marginson and Christian Welz, 'Changes to wage-setting mechanisms in the context of the crisis and the EU's new economic governance regime' (Eurofound 2014) <<http://www.eurofound.europa.eu/observatories/eurwork/comparative-2015/information/changes-to-wage-setting-mechanisms-in-the-context-of-the-crisis-and-the-eus-new-economic-governance>> accessed 9 October 2017.

agreements in Italy has been called into question by recent court decisions that endorse new plant level agreements imposed by the government during 2011. In a similar vein, legislation has been altered or introduced in a number of Member States to limit the time for which collective agreements remain valid after their expiration e.g. Estonia and Slovakia. However, those Member States in receipt of IMF-led financial assistance programmes have feared significantly worse.

4.4 Financial assistance programmes

The most direct form of intervention in wages and wage-setting mechanisms in Member States has been made by the coalition of the Commission, ECB, and IMF. As the so-called 'Troika', during the financial crisis, they offered assistance to Member States upon the condition that wide-ranging social reforms were made; which were intended to secure fiscal stability and to increase competitiveness.

This form of intervention is unlike that under new European economic governance; Member States were given what can be characterised as a Hobsonian choice between default and exit from the Union and accepting a loan and continued membership.

Conditions for the receipt of financial assistance are contained in 'Memoranda of Understanding' (MoUs) or 'Stand-By Agreements'. Member States currently with MoUs include Cyprus, Greece, Ireland and Portugal, whereas Hungary, Latvia and Romania have signed Stand-By Agreements with the IMF independently of the Troika (Spain has a slightly different arrangement, which may be telling as to the future of EU intervention in the context of the crisis). International financial aid has been contingent upon the implementation of CSRs under the European Semester but, before this, the ECB practiced what has been referred to as 'unofficial' intervention, where the purchase of state bonds were made conditional upon policy reforms. This policy was made official with the launch of its bond buyback programme in 2012.

4.4.1 Memoranda of Understanding and Stand-By Agreements

Minimum wages were immediately singled out for cuts and reform by the Troika. Ireland was the first country affected, with its minimum wage being cut by €1 from €8.65 to €7.56 per hour in February 2001. However, this cut was later reversed when a new government agreed to cut social security contributions for employers instead.

More radical cuts have been seen in Greece, in 2010, the first of three bailouts were agreed. These were financed by the Greek Loan Facility (managed by the Commission and including a contribution from the IMF), the European Financial Stability Facility and later the European Stability Mechanism. To date, over €320 billion has been made available through these various funds, contingent upon reforms being undertaken. These have explicitly targeted minimum wages and collectively agreed pay.

Initially, the Troika suggested Greece adopt a policy of internal devaluation in order to boost competitiveness, versus their neighbours, and foster economic growth. Later, these proposals saw fruition as a lower minimum wage for those under 25 and legislation removing the favourability principle in the collectively regulation of pay. During 2012, a second Memoranda of Understanding was agreed containing more extensive changes to minimum wages in exchange for further financial assistance; these included a 22% reduction in the adult rate and a reduction in the under 25 rate. Furthermore, the automatic indexation of collectively agreed wages was suspended and the period for which they were valid limited (after which wages were paid in line with the basic terms of previous agreements).

The latest 'supplemental' Memoranda of Understanding takes a slightly different tact; suggesting the establishment of a guaranteed basic income for the most vulnerable. However, this is perhaps more a response to criticism than an act of benevolence; recent measures show poverty has increased significantly during the past 5 years. Overall, the Troika's approach has been adopted in other states in financial difficulty.

In late May 2011, Portugal was extended a total of €78 billion in financial assistance. The conditions of its Memoranda of Understanding required the adoption of policies pursuing wage moderation in the public sector and greater labour market flexibility. Between 2011-12, salaries in the public sector were reduced by almost 25%. Furthermore, entitlements such as holiday and Christmas bonus pay were removed. These changes were made by legislation without the involvement of social partners, in violation of in force collective agreements (contributing to a significant reduction in the number of workers covered in the economy). Figures from the ETUC show that a similar trend is also visible in the private sector, with collective bargaining coverage dropping from 1.5 million in 2010 to 300,000 in 2012.

However, as illustrated by Portugal, improvements in a states budgetary position does not holt further calls for reform. Indeed, whilst in 'post-programme surveillance', the Troika has criticised Portugal for not decentralising wage setting quickly enough and has expressed concern that company level bargaining is not being promoted.

At the same time, collective bargaining has not fared much better, with Troika reforms leading to the almost complete breakdown of multi-employer bargaining in Ireland and Romania. The de-collectivisation of industrial relations is especially worrying given that higher collective agreement coverage is positively associated with multi-employer systems. Greece, Italy, Portugal and Spain have made it easier for employers to derogate from higher level agreements, to the company level, at the request of the Troika. Hungary also presents an interesting case where its financial assistance programme appears to have been used as an excuse for limiting rights such as those to strike. The position of trade unions has been further undermined in these Member States by reforms making it easier for non-union employees to conclude collective agreements e.g. in small and non-unionised companies.

4.5 Conclusion

From the advent of EMU onwards the policies and legislation of the EU have regulated wages and wage-setting mechanisms in Member States more directly. EMU exerted indirect pressure for Member States to moderate wage developments, which became more direct with the introduction of non-binding recommendations under the BEPGs and later all but mandatory under the European Semester. The height of this trend was reached with the IMF-led financial assistance programmes, where receipt of help is conditional upon wide-ranging reforms.

With each of these developments, older methods of regulation are not replaced but continue to be used. This point is currently underappreciated; new European economic governance is but one part of what amounts to a system of multi-level governance of wages and wage-setting mechanisms in Europe. Although used for very specific purposes, the EU retains the ability to regulate aspects of wages via legislation as it has done in the past for issues such as equal pay.

Such actions draw attention to the current rationale for EU wage intervention. Instead of regulating for social considerations, as it has done using older methods of governance, new European economic governance has internalised austerity, with wage moderation and the decentralisation of collective bargaining being fiercely pursued. However, CSRs such as those for Germany to increase wages in line with real productivity illustrate how this system could be used for different ends, specifically, to increase real wages. An EU minimum wage policy could adopt this more expansive economic rationale in combination with a complementary social one, targeting the areas damaged by austerity policies in pursuit of their rehabilitation.

This approach would, of course, be dependent upon the Commission changing course and utilising economic governance tools in a different, more socially advantageous, way. To date, there is little evidence that the Commission would be willing to do this. Indeed, its calls for Germany to increase real wages were

driven by a desire to improve aggregate demand, not to alleviate the social hardship caused, in part, by austerity policies. From a policy perspective, for an EU minima, it appears that such methods of implementation are unrealistic, if for no reason other than the purposes for which they are currently employed. As a consequence, an alternative is required, that sits sufficiently far outside of the Commission's influence to allow a more socially-minded policy to be pursued but is close enough to benefit from the Union's institutional and policy framework. This endeavour is turned to in chapter 6 on the legal and normative foundations for an EU minimum wage policy.

On the other hand, there is a clear requirement for the creation of a counterbalance to address the negative social consequences that the Union's economic governance policies are having in Member States. Barring a change in direction by the Commission, it appears the only realistic way forwards for such a policy is at the hands of the social partners (as a group who can set their own agenda whilst at the same time having the capacity to effect change at EU-level). The goal of reversing the negative consequences of economic governance for wages in Member States fits well with the idea of an EU minima, in particular, as a uniform response from social society (or interest representation groups such as trade unions). Moreover, the guiding rationale for this intervention – to address falling wages in Europe – can be understood as a way of fostering solidarity between workers. The next chapter explores this idea further, charting the contours of what a solidarity enhancing EU minimum wage policy would look like.

5. Exploring the idea of a solidarity enhancing wage policy

5.1 Introduction

This chapter sets out the normative justification for an EU minimum wage policy. Building upon the discussion in the previous chapter – of the Union’s regressive approach towards wages – it argues that an EU minima could serve as a appropriate counterbalance and would, as a consequence, be similar in form to the solardistic wage policies promoted in Europe during the latter half of the twentieth century. However, such a solardistic policy would be more expansive than merely seeking to address the regression in prevailing wage rates caused by the Union’s policies, rather it would attempt to recoup part of the losses in wage share of labour to capital over the last half century. In more recent literature, this has been explored in terms of wage inequality and ensuring workers are paid fairly for their labour.

The phrase 'European social model' is commonly associated with the idea of a socially regulated form of capitalism, which is politically and institutionally structured to create a relatively high degree of social equality through redistributive policies.¹ Although Member States have pursued their own specific national development paths, in the period of Fordist post-war capitalism, most western European states created social models characterised by close links between economic prosperity and the continuous reduction of social inequality.

Supported by a world economy regulated within the Bretton Woods system, the institutions of the Keynesian welfare state developed based upon national class compromises, that enabled a broad redistribution of income and wealth. This included, in particular, the emergence of a highly progressive tax system, the appearance of comprehensive collective social insurance systems and the

¹ Colin Crouch, *Social Change in Western Europe* (OUP 1999) 3.

development of solidaristic wage policies in the context of multi-employer collective agreements at sectoral and national levels.²

The historical roots of the concept of a solidaristic wage policy, as a key element of the European social model, can be traced to the European labour movement of the 1920s and 1930s. The idea of a 'solidaristic wage policy' originated in Sweden, where in the 1950s it became the foundation for a comprehensive social and economic policy concept adopted by Swedish trade unions, which later became well-known as the Rehn-Meidner model.³

In what follows, first, the foundations of the policy are traced to the work of Gosta Rehn and Rudolf Meidner and their work on creating a redistributive wage policy. Second, the evolution of wages and wage dispersion in Europe is analysed, illustrating how with the development of European economies from the 1980s onwards, positive wage gains and reductions in wage dispersion have been lost (this is especially clear in Member States that followed and departed from solidaristic wage policies). Third, critiques of solidaristic wages – from the right of the political spectrum – are discussed. These are subsequently set against early suggestions by European Trade Union Congress for the adoption of solidaristic wages in Europe.

5.2 The idea of a solidaristic wage policy

According to Rudolf Meidner, the concept of a solidaristic wage policy essentially pursues two aims. The first is to achieve 'fair wages' in accordance with the principle equal pay for work of equal value. Consequently, wages should be set not as a function of either broader economic considerations or as the balance of power between management and labour in the companies but instead within the framework of multi-employer agreements based on a

² John Grahl and Paul Teague, 'Is the European Social Model Fragmenting?' *New Political Economy* 3 (2009) 405, 425.

³ See LO, *Trade Unions and Full Employment* (LO 1953).

"comprehensive system of job evaluation".⁴ To underpin a 'rational wage structure' negotiated in this way, periodic pay rises must, likewise, not be linked to the profitability of individual enterprises but instead be geared towards productivity gains in the economy as a whole. This approach should also simultaneously ensure that all workers participate in economic development on an equal footing and that the distribution of national income does not change to the disadvantage of workers' incomes.

Secondly, besides achieving 'fair wages', a solidaristic wage policy works to develop a 'balanced wage structure'.⁵ Whilst wage differentials in the case of different work requirements are accepted in principle, at the same time, individual pay scales should not drift too far apart and excessive wage differences should be curbed. Orientation towards the most egalitarian wage structure possible applies both within and between different wage levels. Consequently, besides the distributional conflict between capital and labour, a solidaristic wage policy also strives for redistribution within the workforce: a wage policy oriented towards the average productivity of the economy, as a whole, limits both upward wage trends in higher pay brackets and wage increases that outstrip productivity gains. At the same time, the leeway for added income distribution this creates for disproportionate wage hikes, in lower pay brackets, and in wage levels with below-average productivity, should also to be exploited.

Overall, the concept of a solidaristic wage policy is based on a form of wage regulation which "uses a deliberate, centrally controlled force to counteract the centrifugal force of the market i.e. its tendency towards wage differentiation".⁶

The realisation of this concept is tied to the existence of collective bargaining institutions which allow for the national, cross-sectoral coordination of wage

⁴ Bruno Amoroso and Jesper Jespersen, *Macroeconomic Theories and Policies for the 1990s: A Scandinavian Perspective* (1992 Palgrave MacMillan) 42.

⁵ *ibid.*

⁶ *ibid.*

policy. The most extensive form of wage policy coordination is found in countries with cross-industry wage bargaining at national level, as was customary in, for example, Sweden or Denmark into the 1980s and, indeed, still exists today in European countries such as Belgium, Norway and Finland.

In addition, however, countries with primarily sectoral wage bargaining structures also frequently have forms of cross-sectoral wage coordination which entail either wage policy recommendations made by the national peak organisations of trade unions and/or employers associations or as a result of wage leadership taken by a prominent sector.⁷ In Germany, for example, IG Metall has mostly assumed the role of the "single union secretly covering the economy as a whole",⁸ in that it has geared its own wage demands to the productivity of the overall economy – rather than merely that of the metal industry – and the pay settlements in the metal industry served as the benchmark for other wage levels.

Lastly, even in countries with fragmented wage bargaining structures, mechanisms for the coordination of wage policy – sometimes exercised via the government – can be identified. This is true, for example, in France, where minimum wage increases extended by the government constitute an important reference point for the development of the entire wage structure. In Europe, in the round, collective bargaining institutions are mostly based on multi-employer wage bargaining at sectoral or cross-sectoral level, with government mechanisms for the extension of collectively agreements (see chapter 2). Consequently, these institutional variations account for differences pay developments amongst trade unions in Member States who have pursued solidaristic wage policies.

⁷ Franz Traxler, 'National Pacts and Wage Regulation in Europe' in G. Fajertag and P. Pochet (eds), *Social Pacts in Europe - New Dynamics* (ETUI 2000) 415.

⁸ Wolfgang Streek, 'Competitive Solidarity: Rethinking the 'European Social Model'' MPIfG Working Paper No. 8/99.

Ultimately, the achievement of a solidaristic wage policy has far-reaching macroeconomic consequences, reflected most visibly in trade union economic policy based on the Rehn-Meidner model.⁹ The underlying hypothesis of this model is that a solidaristic wage policy exerts strong pressure for innovation in the economy. As wages are not subject to competition due to multi-employer agreements, rivalry between companies is focused exclusively on the productivity of the manufacturing process and on product quality. Individual companies are forced to constantly introduce innovations designed to boost productivity, since an externally predetermined wage structure has deprived them of the opportunity to offset possible competitive disadvantages by paying lower wages.

A solidaristic wage policy is said to:

[Reduce] the risk of 'wage-dumping' which tends to preserve non-rational production methods and concerns. Wage pressure exerted on low-wage enterprises may therefore speed up their rationalisation and/or the transfer of manpower from inefficient to efficient firms.¹⁰

Accordingly, the innovative function of a solidaristic wage policy also works at the level of the economy as a whole, in a similar way to how it works at the company level. By engineering wage trends to average productivity developments, a solidaristic wage policy speeds up the transition from less productive to more productive sectors, thereby promoting structural change throughout the economy.

Rehn and Meidner also hypothesised that the concept of a solidaristic wage policy would not only generate a special innovation model but could also – as part of a national coordinated economic strategy – be developed into a

⁹ L. Erixon, 'A Swedish Economic Policy -The Theory, Application and Validity of the Rehn- Meidner-Model' (2002) Working Paper of the Departments of Economics, Stockholm University.

¹⁰ LO (n 3) 55.

macroeconomic stability model with full employment and simultaneous price stability. Their economic concept of 'modified Keynesianism' was based on a flexible, cyclical combination of supply and demand policies.¹¹ Rehn and Meidner assumed that the classical Keynesian ideas of macroeconomic demand management were designed for cyclical depression phases but were not suitable for overheated cyclical trends.¹² They criticised the idea of an incomes policy subject to government control, since the corporatist integration of trade unions contradicts the idea of freedom of collective bargaining, and the wage restraint demanded by the government, especially in times of economic prosperity:

[Demands] too much of unions as representatives of their members' interests. A restrained, defensive wage policy in a situation of high profits and high demand for labour is hard to explain to the members and undermines confidence in union management.¹³

In contrast, the Rehn-Meidner model puts forward an alternative economic approach, based on a solidaristic wage policy which pursues the goal of guaranteeing full employment and inflation-free growth. Initially, Rehn and Meidner felt that a solidaristic wage policy would, itself, have an inflation-dampening effect, since its orientation towards average productivity levels places it in a position to prevent the most productive sectors from pushing each other upwards through inflationary wage leapfrogging. On the other hand, company-level wage drift, in which companies in high-productivity sectors use some of the 'excess profits' they have earned under the solidaristic wage policy for supplementary wage payments at company level, was identified as a possible problem liable to boost inflation. As a result, Rehn and Meidner called for limits to be placed on excessive rises in profits by implementing an appropriate tax policy.

¹¹ Amoroso Jespersen (n 4).

¹² Erixon (n 9).

¹³ Amoroso Jespersen (n 4) 70.

The guarantee of full employment results above all from the innovation function on which the concept of the solidaristic wage policy is based. Whilst it may be true that jobs in low productivity sectors can be lost as a result of wage pressure, at the same time, new jobs emerge in high-productivity sectors owing to the increased pace of structural change. However, since the transition from a low-productivity to a high-productivity sector does not normally run smoothly or without generating friction, an economic core concept of the Rehn-Meidner model entails linking a solidaristic wage policy with an active labour market policy. In the Swedish context, such a policy covers not just job promotion measures in the narrow sense of the term 'labour market policy', but also the full range of regional, structural and industrial policy issues.¹⁴ Accordingly, the responsibility for employment lies with the government, but through the added profits generated in high-productivity sectors as a result of the solidaristic wage policy, the government is in a favourable position to obtain the necessary resources for an active labour market policy by implementing appropriate fiscal measures.

Although the Swedish model is seen as the prototype when implementing a solidaristic wage policy, comparable arrangements emerged in other Member States in Northern and Western Europe in the 1950s and 1960s. Collective bargaining institutions with specific national features arose which helped the concept of a solidaristic wage policy become established (in a more or less developed way). At the same time, governments complemented solidaristic wage policies through economic and employment policies based on redistribution. The overall result was the development of a specific economic model whose strengths derived from advantages associated with productivity and innovation, not from labour costs, and formed the basis for a 'European social model' aimed at achieving economic dynamism and social equality.

¹⁴ *ibid.*

5.3 The crisis of solidaristic wage policies

With the post-war crisis of the Fordist economic and social model, the concept of the solidaristic wage policy took centre stage in debates on economic reform.¹⁵ On the one hand, questions were being asked of the concept's normative goal of achieving the highest possible level of social equality. On the other, it was argued that the structure of the economy had changed so much that the former functional prerequisites of economic concepts like the Rehn-Meidner model no longer applied.

5.3.1 The evolution of wages and wage dispersion in the EU

Whether and how far it was actually possible to implement the concept of a solidaristic wage policy in practice can be examined using two basic indicators. The first step is to look at the extent to which the real wage trend is consistent with the development of the economy as a whole. This focuses initially on the net distribution between capital and labour. In addition, a second step is to analyse the distance or 'spread' between individual wage brackets (this step analyses the net distribution of wages within the workforce).

For the Member States of the Union, long-term wage trends have been well documented. Both a comparison between the trends of real wages and productivity, and the development of 'wage share' (as a share of worker income versus total national income) can be used to analyse the net distribution between capital and labour. Taken together, these two indicators show that since the early 1980s there has been a fundamental U-turn in wage policy in Europe, which can be described as a transition from productivity-oriented wage policies to competition-oriented policies.

Until the late 1960s, the trend of real wages largely paralleled the rise in labour productivity in Member States. Consequently, the implementation of a

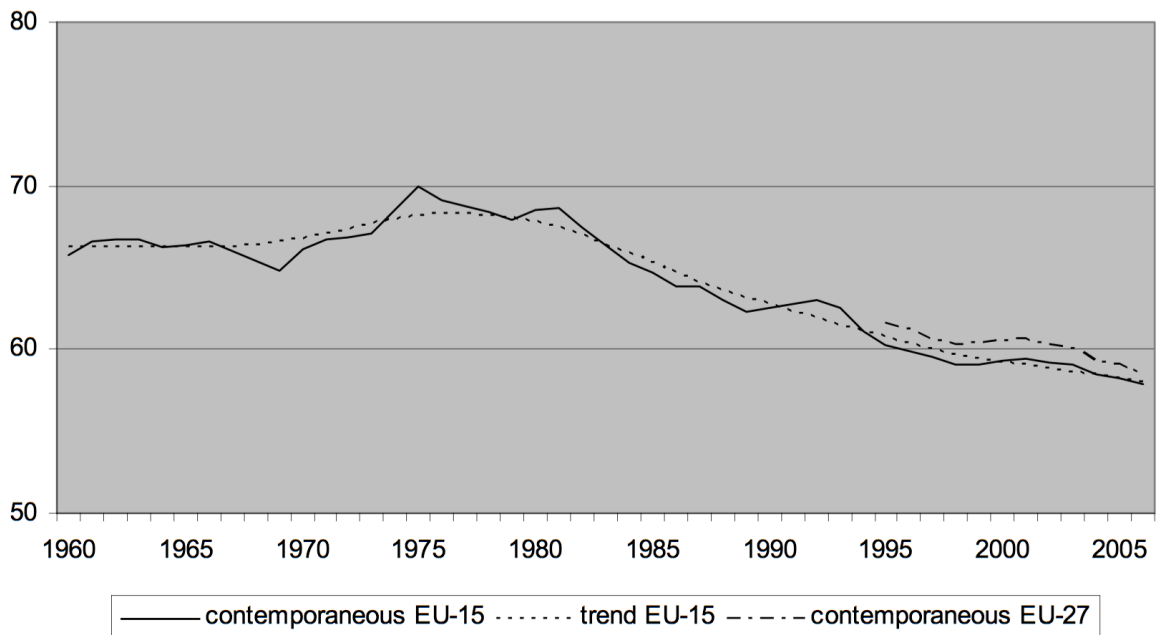
¹⁵ A. Lipietz, *Towards a New Economic Order: Postfordism, Ecology and Democracy* (Polity Press 1992).

productivity-oriented wage policy enabled trade unions in western European to ensure that workers participated equally in greater economic prosperity. Consequently, in a short period in the early 1970s, trade unions managed to gain acceptance of an expansive wage policy which resulted in pay settlements well above productivity trends. Since the mid-1970s, however, real wage increases have almost continually lagged behind productivity growth.

The move away from productivity-oriented wage policies initially reflected the weakened political power of unions in an environment of mass unemployment. However, this movement was also accompanied by a broader reassessment of wage policies, in which wage trends were considered to be the most important component of international competition between production sites and should, therefore, assume prime responsibility for growth and employment. As this view became more common, a policy of permanent wage restraint was promoted, whereby pay increases below productivity gains were said to improve the competitiveness of companies or even entire national economies. However, as competition-oriented wage policies became established, an important function of solidaristic wage policies, namely of removing wages from market competition, was gradually undermined.

In terms of the distribution of wages, the shift away from productivity-oriented wage policies also led to a massive redistribution of income from workers to capital. As competition-oriented wage policies became established, from the 1980s onwards, wage shares have more or less continuously declined in the EU (see Chart 1), thus setting in train a downward distributive spiral.

Chart 1: Labour income share in the EU-15 and EU-27



Source: European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities (2017)

ec.europa.eu/social/BlobServlet?docId=539&langId=en

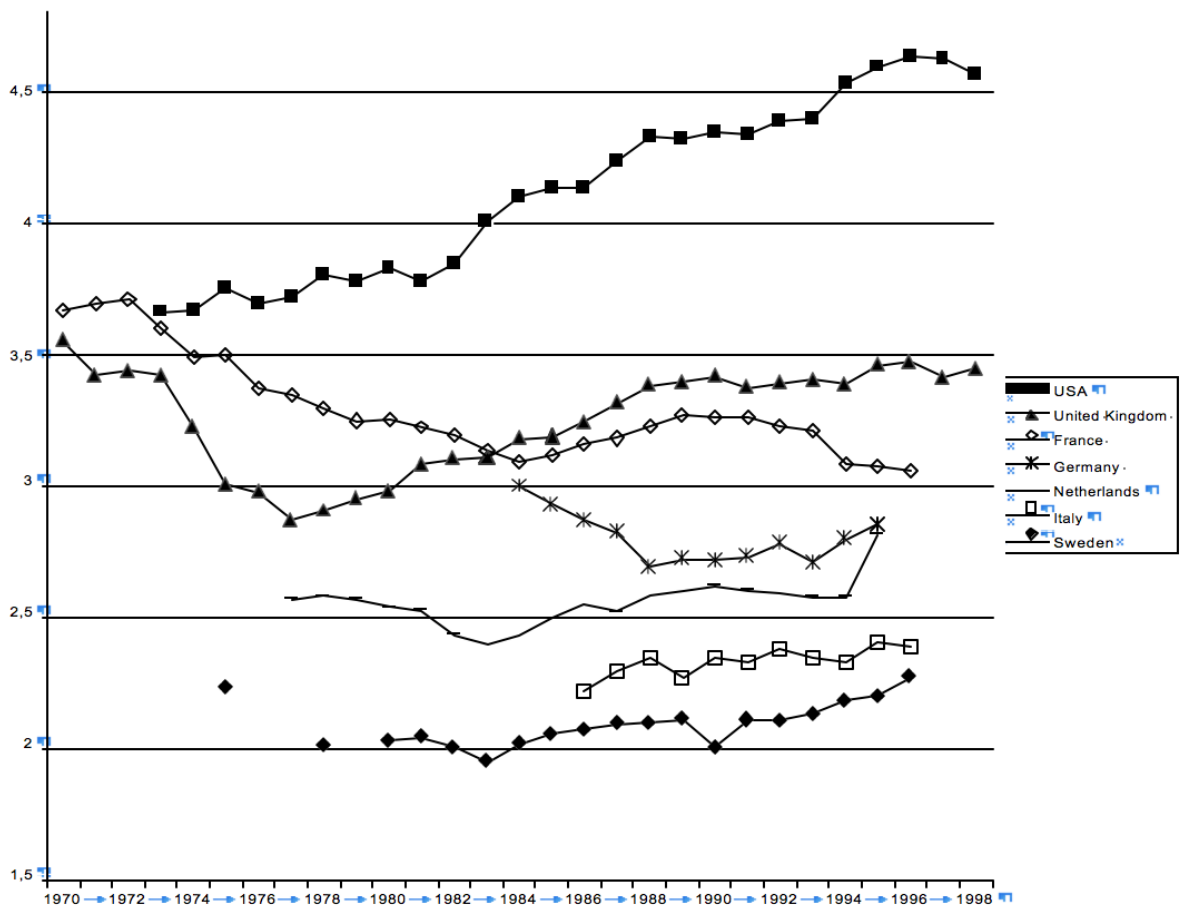
Compared with the net distribution between capital and labour – which is very clear and, within Europe, is largely convergent – the net distribution of wages within the workforce is much more difficult to categorise. Based on available OECD data on the trend of income deciles, wage spread within the EU varies considerably.¹⁶ The most egalitarian wage structures exist in those countries which, like in Scandinavia, have a strong tradition of a solidaristic wage policies. By contrast, wage differentials are most pronounced in the United Kingdom, Ireland, Spain and Portugal. In most countries, the wage spread upwards – towards top earners – is more pronounced than the wage spread downwards, towards low-wage earners.

¹⁶ See OECD, 'Online income distribution database'

www.oecd.org/social/inequality.htm accessed 25 February 2018.

In general, data on the long-term trend of wage differentiation is incomplete. However, it is almost universally accepted that the wage spread fell sharply between 1950 and 1975. Since this time, in most Member States, the wage spread has risen again more or less as steeply (see Chart 2). The greatest rise in wage inequality is clearly visible in the UK but, since the 1980s, a slight increase is also visible in the wage spread of traditionally egalitarian Member States like Sweden (albeit starting from a much lower initial level). By contrast, in Germany, the wage spread fell quickly until the late 1980s, not rising again until the early 1990s. Overall, in most Member States, the trend towards a reduction in wage disparities came to a standstill in the 1980s and in some countries it has since regressed.

Chart 2: Evolution of wage dispersion (select countries)



Source: OECD 'Inequality in historical perspective' (2011)

5.4 Critiques of solidaristic wages

Since the 1980s, not only has it become more difficult for European trade unions to translate the concept of a solidaristic wage policy into action but, at the same time, they have been faced with broad criticism of its normative objectives.

The core of this criticism draws on the work of Friedrich August von Hayek and focuses on the traditional social democratic equation of 'equality' with 'justice' and the political correction of market results which this legitimates. For scholars in the tradition of Hayek, this correction essentially results in greater inefficiency and thereby ensures that:

[It] is precisely the distribution mechanism instituted on grounds to do with justice that ends up undermining the interests of all citizens in prosperity and growth.¹⁷

Neo-liberal critics ultimately even view the distributive justice sought by a solidaristic wage policy as 'less fair', since by setting non-market wages it is said to result in the emergence of unemployment, thereby generating a new inequality in the labour market between those 'inside' and those left 'out'. This perspective corresponds with the now-widespread view that too little wage differentiation – especially downward – is one of the basic causes of unemployment.¹⁸

As a consequence, neo-liberal criticisms of solidaristic wage policies have led to demands for an 'end to equality'.¹⁹ Moreover, the redefinition of social equality is said to be "the Archimedes point in the social democratic policy

¹⁷ R. Hank, *Das Ende der Gleichheit oder Warum der Kapitalismus mehr Wettbewerb braucht* (2000 Frankfurt A.M.) 155.

¹⁸ Streek (n 8).

¹⁹ Hank (n 17).

debate in Europe".²⁰ Here, there is notable resistance to what is perceived to be 'prescribed equality', with it described as the death of justice and freedom.²¹ Consequently, ideas about justice are increasingly reduced to the concept of 'equal opportunities'. In this regard, the job of policy is to ensure that all individuals can hold their own equally in the market, in the sense of 'supply-side egalitarianism'. In contrast to this, a policy of active correction and redistribution of market results, such as the one underlying the concept of a solidaristic wage policy, has largely taken a back seat.

5.5 A solidarity enhancing EU minimum wage policy?

If the basic normative objective of a just and egalitarian wage trend is to be preserved, the concept of a solidaristic wage policy has to be reformulated against the background of the current political and economic environment in Europe. Along these lines, the European Trade Union Confederation has previously called for a fundamental debate on a European solidaristic wage policy.²² These calls included the articulation of a policy that:

- guarantees workers a fair share of income
- counters the danger of social dumping
- counters growing income inequality in some countries
- contributes to a reduction in disparities in living conditions' and
- contributes to effective implementation of the principle of equal treatment of the sexes

This broad programme for reformulating a solidaristic wage policy in Europe must fulfil two basic conditions. First, it must present a political concept for the 'Europeanisation' of wage policy and, second, it must ensure that this is

²⁰ *ibid.*

²¹ *ibid.*

²² ETUC, 'Towards a European System of Industrial Relations', Resolution adopted by the IX ETUC Statutory Congress, 26 June - 2 July 1999 (Helsinki)

embedded in an overall European economic policy concept.²³ On the first count, a EU minimum wage could contribute towards this aim. In the next chapter, the potential basis for such a policy is investigated.

²³ *ibid.*

6. Legal and normative foundations for an EU minimum wage policy

6.1 Introduction

In the pursuit of a more comprehensive EU minimum wage policy an important question to ask is on what legal or other normative basis could it be established? The aim for an EU minima to aid social cohesion and reduce wage inequality is of little value without a serious proposal for how it could be achieved in practice. Moreover, this area of debate has, surprisingly, received very little attention. As such, this chapter aims to fill this gap in academic knowledge and provide a workable foundation for the realisation of an EU minimum wage policy.

As discussed in chapter 3, this gap in knowledge exists as a serious impediment to the articulation of a more comprehensive policy and thus its future realisation. Consequently, this chapter explores a wide range of legal and normative bases, identifying those that warrant further examination. Literature on this topic has tended to focus on action the Union could undertake, at the expense of investigating the potential of alternative modes of governance; specifically those that involve actors such as trade unions and employers' associations. This blind spot is not unique to debates on the idea of an EU minimum wage policy and can be found in scholarship on European labour law more generally (especially issues like health and safety that are considered to require strong state involvement in order to ensure compliance). Subscribing to this orthodox approach, however, risks missing the potential benefits of alternative modes of governance, for example, the improved compliance with rules that is associated with involving those subject to their terms in their development. Here, a link can be made to the design of laws and regulations, which will be explored in chapter 8 on the potential design of an EU minimum wage policy.

Although overly simplistic, this division, between Union-based action and that which is premised upon the independent governance regimes developed by societal actors, is used as a way of ordering discussion of potential legal and

normative bases. Below, the legislative competences of the Union are considered, including recent innovations in law-making such as Enhanced Cooperation and the turn to international law-based agreements (during the financial and sovereign debt crisis). In the second half of this chapter, the governance procedures and practices of actors such as trade union are investigated, including formalised social dialogue and initiatives aimed at the transnational coordination of collective bargaining.

In light of the Union's limited ability to regulate in the area of pay it is perhaps not surprising this chapter suggests the only way forward for an EU minima is at the hands of trade unions and employers' associations, whether through social dialogue or initiatives aimed at wage coordination, however, this would not necessarily lead to the side-lining of the Union and its institutions. Rather the following discussion sheds light upon the important role of the Union and its institutional and policy framework in underpinning alternative modes of governance, including those that are described as occurring autonomously of such involvement (e.g. certain forms of social dialogue). The next chapter on transnational labour law builds on this insight and explores what it means for regulating in an increasingly fragmented European legal space, specifically as a foundation for the design of a workable EU minimum wage policy (the topic of the final substantive chapter of this thesis).

6.2 Legislative competences

In accordance with the principle of conferral, action can only be taken by the Union within the limits of the competences conferred upon it by the Member States.¹ Usually these competences are employed to pass legislative acts such as Regulations, Directives and Decisions. For a Union-initiated minimum wage policy, it must be determined whether the Union has competence to act in the area of pay, and if such action is justified in the pursuit of an objective provided

¹ Article 13(2) TFEU reads that each institution is to "act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them".

for in the Treaties. Understood in a slightly different way, proposals for legislative action must have a legal basis and be founded upon objective factors. Undoubtedly the greatest challenge for a Union-initiated minimum wage policy is whether the Union has competence to act in the area of pay i.e. whether direct intervention is possible. Creative Treaty interpretation is not ruled out, and is explored below, but must be exercised with established practice and political constraints in mind.

Action based upon the legal bases discussed below can, crudely, be divided between those that are 'institutional' in form and those that are more 'societal'. At EU-level, institutional lawmaking processes can be characterised by the role of the European Commission in developing proposals for legislation; qualified majority voting in the Council; the involvement of the European Parliament; and the oversight of the Court of Justice of the European Union (CJEU).² Whereas for more societal processes, actors such as trade unions and employers' associations rely upon their own forms of ordering, having varying degrees of involvement with the Union's institutions and its regulatory architecture. For example, as discussed in detail below, societal lawmaking processes can be defined to encompass modes of governance including the European Social Dialogue – with trade unions and employers' associations utilising the Union's institutional and policy framework to give effect to their own autonomous agreements – to strictly independent processes such as trade union attempts at the transnational coordination of collective bargaining.

With regard to institutional lawmaking processes, the adoption of more socially oriented legislation has proven difficult at EU-level (especially for hard issues such as pay). Consequently, Title IX TFEU (Articles 145-150), specifically the Open Method of Coordination (OMC), has been used with increasing frequency to by-pass legislative inertia. Over the last two decades, considerable amounts

² Article 17(2) TEU; Article 16(3) TEU; Articles 289 and 294 TFEU; and Article 19(1) TEU.

has been written on this issue,³ arguably to the detriment of discussions on the future of the Community method and, importantly, the direction of EU social policy. What follows, although limited, outlines the difficulties of regulating on issues such as pay, with reference to the employment of specific and more general legal bases and also via newer developments such as Enhanced Cooperation and the post-crisis turn to international law-based agreements.

6.2.1 Specific legal bases

The Union ordinarily acts based upon 'specific powers' outlined in the Treaties. In accordance with Article 153(1) TFEU the Union has competence to legislate on a range of issues in the social policy field. These include:

- (a) improvement in particular of the working environment to protect workers' health and safety;
- (b) working conditions;
- (c) social security and social protection of workers;
- (d) protection of workers where their employment contract is terminated;
- (e) the information and consultation of workers;
- (f) representation and collective defence of the interests of workers and employers; including co-determination, subject to paragraph 5;
- (g) conditions of employment for third-country nationals legally residing in Union territory;
- (h) the integration of persons excluded from the labour market, without prejudice to Article 166;
- (i) equality between men and women with regard to labour market opportunities and treatment at work;
- (j) the combatting of social exclusion;

³ Illustrative examples include Kenneth Armstrong, *Governing Social Inclusion: Europeanization through Policy Coordination* (OUP 2010); and Mark Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (CUP 2011).

- (k) the modernisation of social protection systems without prejudice to...
(c).

Importantly, issues considered to be of national sensitivity are excluded from the Union's competence and include lock-outs, strikes and pay (as detailed under Article 153(5) TFEU). However, as was discussed in chapter 4 on economic governance, this restriction has not prevented the Union from regulating on issues relating to pay, for example, with regard to equal pay for equal work. Although it must be remembered that the Gender Equality Directive does not cover levels or constituent elements of pay.⁴ Indeed, in the case of *Bruno & Pettini*,⁵ the CJEU decided that Article 153(5) TFEU should be construed narrowly due to its function as a derogation from Article 153; excluding more direct intervention on minimum or collectively agreed wages.

6.2.2 General legal bases

The Union may also act based upon 'general powers' outlined in the Treaties. General legal bases under Articles 114, 115 and 352 TFEU allow the Union to act in the absence of specific powers (for example Article 153(1) TFEU). Article 114(1) TFEU allows the Union to adopt:

[M]easures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

Article 115 TFEU allows the Union to adopt Council Directives towards this end but because action under Article 114 and 115 TFEU must have as its objective the 'establishment or functioning of the internal market', the use of either provision as a basis for regulatory action in the social policy field is significantly

⁴ 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 occupation (recast) (OJ [2006] L204/23).

⁵ Joined Cases C-395/08 and C-396/08 *Bruno and Others* [2010] ECR I-5119 [37].

constrained. Moreover, and of specific relevance to social policy, action under Article 114 TFEU cannot cover the rights and interests of workers.⁶ With regard to the issue of pay, neither provision can be used as a legal basis to circumvent the exclusion of harmonisation in a specific Treaty article e.g. Article 153(5) TFEU and pay.⁷

In the absence of specific powers, the Union may also legislate based upon Article 352 TFEU. Under Article 352, the Union may adopt measures in order to attain a Treaty objective if an appropriate competence does not exist for its achievement.⁸ The Council has broad discretion to determine whether action is necessary, however, this is subject to two caveats. First, action is only justified under Article 352 where no other Treaty article either expressly or impliedly gives the Union the power to adopt such measures.⁹ Second, this power must be exercised in accordance with the principle of conferral and not exceed the scope of the Treaties (as illustrated by the CJEU's opinion on the Union's proposed use of Article 352 as a basis for its accession to the *European Convention on Human Rights*).¹⁰

Article 352 TFEU cannot be used to supplement a specific Treaty provision that limits Union competence by excluding certain policy areas or instruments. Furthermore, action cannot entail the harmonisation of Member States' laws where this has been excluded by the Treaties e.g. Article 153(5) TFEU and pay.¹¹ Importantly, after the CJEU's judgments in *Viking* and *Laval*,¹² the

⁶ Article 114(2) TFEU.

⁷ See Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11572 [80].

⁸ Article 352(1) TFEU.

⁹ Joined Cases C-51/89, C-90/89 and C-94/89 *United Kingdom, France and Germany v Council* [1991] ECR I-2757 [6]; and Opinion 2/92 *Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment* [1995] ECR I-521 [36].

¹⁰ Opinion 2/94 *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759 [25].

¹¹ Article 352(3) TFEU.

Commission sought to use Article 352 as the basis for its proposal for the so-called 'Monti II Regulation'.¹³ The proposal concerned the establishment of a warning system for Member States to inform one another of industrial relations problems or situations of social unrest. Member States' and the social partners successfully argued that Article 352 could not be used as a basis for the Monti II Regulation as it would allow the Union to circumvent its lack of competence in the area of strikes (under Article 153(5) TFEU).

Consequently, the future likelihood of social policy measures being adopted under Article 352 TFEU appears to be rather slim. This is not to say that social issues will be overlooked during the drafting and implementation of policies in other areas. Article 9 TFEU, the so-called 'horizontal clause', requires the Union to take into account social issues, including employment and social protection, in all of its activities. However, Article 9 does not constitute a new competence rather it serves to mainstream social issues into actions in other policy areas e.g. those concerned with EMU.

Interestingly, if Article 9 TFEU is read strictly against the Union's recommendations under the European Semester, it would appear advice could not be given for Member States to reduce minimum or collectively agreed wages that would lead to a worsening of social conditions. For more direct intervention, as would be required for a Union-initiated minimum wage policy, Treaty change would be necessary. Although Treaty change and the conferral of further competences to the Union is highly unlikely in the foreseeable future, this does not preclude Member States from undertaking complementary action in policy areas which remain under their control.

¹² Cases C-438/05 *Viking* [2007] ECR I-10779; and C-341/05 *Laval un Partneri* [2007] ECR I-11767.

¹³ European Commission, *Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom to establishment and the freedom to provide services* COM(2012) 130 final ('Monti II Regulation').

6.2.3 Enhanced Cooperation

One method for facilitating such complementary action is Enhanced Coordination. Enhanced Cooperation allows Member States to group together and establish advanced integration in an area within the institutional structures of the Union, without the participation of all Member States. Enhanced Cooperation is enshrined in Title IV of the TEU (Article 20) and Title III of Part Six of the TFEU (Articles 326-334). To date, Enhanced Cooperation has been used to facilitate action in three areas: common rules for cross-border divorces; the establishment of a European patent; and the property of

international couples (in relation to divorces and separations).¹⁴ Discussions regarding its use for a financial transaction tax are currently ongoing.¹⁵

Of specific interest to proponents of 'Social Europe', is that Enhanced Cooperation was initially used to facilitate action on divorce and was only later adopted for the establishment of a unitary patent and proposals for a financial transaction tax. Indeed, its use for the first time in 2010, on common rules for cross-border divorces, suggests that it may have been viewed by Member States' as a way of overcoming political blockages in the social policy field. Advocate General Bot in *Unitary Patent* endorsed this suggestion when he held that "only those situations in which it is impossible to adopt such legislation in

¹⁴ Council Decision 2010/405/EU of 12 July 2010 authorising enhanced cooperation in the area of law applicable to divorce and legal separation (OJ [2010] L189/12), leading to Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ [2010] L343/10); Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (OJ [2011] L76/53), leading to Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (OJ [2012] L361/1) and Council Regulation (EU) No 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation agreements (OJ [2012] L361/89); and Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced coordination in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering matters of both matrimonial property regimes and the property consequences of registered partnerships (OJ [2016] L159/16) leading to Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ [2016] L183/1) and Council Decision (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (OJ [2016] L183/30).

¹⁵ Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (OJ [2013] L22/11).

the foreseeable future may give rise to a decision authorising enhanced cooperation”.¹⁶

The establishment of a Union-initiated minimum wage policy is certainly such an impossibility. Whereas Eurozone Member States have expressed an interest in the idea of an EU minima, many outside of the monetary union have consistently voiced their opposition. Enhanced Cooperation is only possible with respect to existing Union competences; excluding the development of a minimum wage policy by a group of interested Member States. In *Pringle*, the CJEU held that it was clear from Article 20(1) TEU that “enhanced cooperation may be established only where the Union itself is competent to act in the area concerned by the cooperation”.¹⁷

6.2.4 *International agreements*

The main focus in *Pringle* was the legality of the European Stability Mechanism; a treaty concluded under international law that established financial assistance programmes for Eurozone member states in financial difficulty. In *Pringle* consideration was given to whether Member States should first make recourse to Enhanced Cooperation before concluding an agreement under international law. This raises the idea of Member States cooperating outside of the Union’s institutions and questions whether an international agreement could be used as the basis for establishing an ‘independent’ or ‘international’ minimum wage policy (understood as being restricted to the geographical boundaries of the Union).

As the Union is excluded from regulating over pay under Article 153(5) TFEU, competence remains with the Member States under Articles 4(1) and 5(2) TEU. However, in circumstances where the Union has regulated on issues relating to pay e.g. as with the Gender Equality Directive, Member States are not

¹⁶ Joined Cases C-274/11 and C-295/11 *Spain and Italy v Council* EU:C:2013:782 [48] – [50].

¹⁷ Case C-370/12 *Pringle* EU:C:2012:756 [167].

prevented from introducing more stringent measures providing they are compatible with the Treaties. In this situation, Member States would be best advised to frame what would be a higher common standard as a lower standard, in order to avoid a potential infringement of the Union's competence to conclude international agreements that may alter common rules or affect their scope.¹⁸

It is highly unlikely that an agreement outlining an international minimum wage policy would affect existing EU rules in this area due to its explicit focus upon wages. Importantly, recourse to international law and, as a consequence of this approach, regulating outside of the Union's institutions, questions the focus of this thesis. Exploring the idea of an EU minimum wage policy necessitates Union involvement, whether this be with the Union at the helm or in the provision of institutional support. Whereas the former route has been ruled out on the grounds of limited competence, the latter is considered in the following section on the European social dialogue.

6.3 European Social Dialogue

The European Social Dialogue is a fundamental element of Europe's social model.¹⁹ The representatives of management and labour that are recognised within the social dialogue are known as the 'social partners'.²⁰ With regard to EU social law and policy, the social partners perform information and consultation roles within multiple fora, including now under the European Semester, and are recognised as co-legislators. EU-level social dialogue takes place at both cross-industry and sectoral levels and can lead to agreements implemented by

¹⁸ See Opinion 2/91 *ILO Convention No 170* [1993] ECR I-1061 [18]; and Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters* [2006] ECR I-1145 [123] – [127].

¹⁹ Brian Bercusson, *European Labour Law* (2nd edn, CUP 2009) 521.

²⁰ In accordance with its own criteria (last updated in 1993), the Commission currently recognises the ETUC, BusinessEurope, UEAPME and Ceep as social partners organised at cross-industry level.

Council Directive or in accordance with the procedures and practices specific to management and labour in the Member States.

Below, the history of the social dialogue is briefly told, from its roots in the European Coal and Steel Community to the formal recognition of the role of the social partners as co-legislators with the passage of the Maastricht Treaty. Following this, the outputs of the social dialogue are considered – in terms of their type, the number of agreements reached and trends in their development – before those that cover pay are explored in detail.

6.3.1 History

EU-level social dialogue has a long and varied history; its origins can be traced to the *Treaty Establishing the European Coal and Steel Community* of 1952.²¹ Representatives of management and labour (along with consumers' organisations), were appointed to consultative committees covering economic and social activities. Later, the *Treaty Establishing the European Economic Community* of 1958 established the Economic and Social Committee, which regularly consulted stakeholders such as the social partners on social and employment issues. However, it was a further 30 years before these informal procedures and processes were given a constitutional basis in the Treaties.

The *Single European Act* of 1986 and, later, the *Community Charter of the Fundamental Social Rights of Workers* of 1989 laid the foundation for the formalisation of European social dialogue. These instruments placed a duty on the Commission to promote social dialogue and to acknowledge that the social partners could enter into contractual relations based upon their own special agreements. During this time, what became known as the 'Val Duchesse dialogue', served as a cross-industry forum for the Commission to discuss with the social partners their potential consultative and co-legislative

²¹ For a detailed history see Christian Welz, *The European Social Dialogue under Articles 138 and 139 of the EC Treaty: Process, Actors, Outcomes* (Wolters Kluwer 2008).

role. In 1991, an agreement was reached between the Commission and the social partners and later enacted as ex Articles 138 and 139 of the *Treaty on European Union*.

As current Articles 154 and 155 TFEU, these provisions provide for the formal consultation of the social partners on any proposed action in the social policy field,²² and that dialogue between management and labour may lead to contractual relations based upon their own special agreements.²³ Article 155 TFEU also provides for agreements to be implemented voluntarily in accordance with the procedures and practices specific to management and labour and their affiliates in Member States or by way of Council Decision (which, to date, has taken the form of a Directive).²⁴

In practice, the social partners may inform the Commission of their intention to negotiate an agreement between themselves on an issue suggested for regulation.²⁵ The resulting 'European collective agreement' (ECA) can be implemented either voluntarily by the social partners or presented to the Commission to be considered for implementation by Council Directive.²⁶ Conversely, the social partners can present an agreement that is not the result of a specific Commission consultation.²⁷ Experience with the operation of the social dialogue has led the social partners to experiment with 'autonomous'

²² Article 154(2) TFEU.

²³ Article 155(1) TFEU.

²⁴ Article 155(2) TFEU.

²⁵ Article 154(4) TFEU.

²⁶ Article 155(2) TFEU.

²⁷ Article 155(2) TFEU.

ECAs.²⁸ These agreements are the product of similar independent social partner initiatives but are implemented voluntarily.

Last year celebrated the 30th anniversary of the first meeting between Jacques Delors and the social partners at Val Duchesse.²⁹ In the time that has since passed, social dialogue has undergone considerable change. The joint actions of the representatives of management and labour organised at EU-level have evolved, progressively developing from information exchange and consultation to concertation and the negotiation of agreements.³⁰ This development is often read against a background comprised of three phases: from informal to formal social dialogue; the implementation of agreements by Council Directive under former Article 138 EC (now Article 154 TFEU); and the greater autonomy and independence of the social partners *vis-à-vis* the EU's institutions e.g. the implementation of agreements in accordance with the procedures and practices specific to national affiliates.³¹

²⁸ See Ann Branch, 'The evolution of the European social dialogue towards greater autonomy: challenges and potential benefits' (2005) 21(2) *International Journal of Comparative Labour Law and Industrial Relations* 321; and Christophe Degryse, 'Historical and Institutional Background to the Cross-industry Social Dialogue' in Anne Dunfresne, Christophe Degryse and Philippe Pochet (eds), *The European Sectoral Social Dialogue: Actors, Developments and Challenges* (Peter Lang 2006) 31.

²⁹ For a history of the European social dialogue see Christian Welz, *The European Social Dialogue under Articles 138 and 139 of the EC Treaty: Actors, Processes, Outcomes* (Wolters Kluwer 2008).

³⁰ Christophe Degryse, 'Historical and Institutional Background to the Cross-industry Social Dialogue' in Anne Dunfresne, Christophe Degryse and Philippe Pochet (eds), *The European Sectoral Social Dialogue: Actors, Developments and Challenges* (Peter Lang 2006) 31; and see Ann Branch, 'The evolution of the European social dialogue towards greater autonomy: challenges and potential benefits' (2005) 21(2) *International Journal of Comparative Labour Law and Industrial Relations* 321.

³¹ Christophe Degryse, 'European Social Dialogue: State of Play and Prospects' (2011) ETUI/OSE Final Report 26 – 39.

To these three phases a fourth can be added. The negative social consequences of EU measures to contain the financial crisis have undermined its popular legitimacy.³² The Commission has consequently sought to strengthen Europe's social dimension, with the social dialogue well placed to fulfil this function without the need for reform. President Jean-Claude Juncker's 'new start' for the social dialogue focuses heavily upon involving the social partners in economic governance and policymaking areas outside the purview of traditional industrial relations; the role of the social partners in the European Semester is to be expanded and their input sought on initiatives such as the Digital Single Market and Energy Union.³³

This new phase of European tripartism is being advanced at the expense of the traditional role of social dialogue: as an alternative route to regulation in the EU.³⁴ Social partner agreements implemented by Council Directive and autonomously by the social partners have received limited support since the Treaty of Amsterdam. The Commission is now tasked with 'facilitating' social dialogue under Article 154 TFEU rather than 'developing' social dialogue under previous Article 118b SEA. Indeed, it has been argued the Commission considers itself less of a 'guardian' and more of a 'partner' in European social dialogue.³⁵ A consequence has been fewer social partner agreements and poor results with those implemented autonomously. Recent Commission initiatives, including the new start, fail to present a sufficient range of measures to address this situation.

³² See Daniel Vaughn-Whitehead, 'The European Social Model in times of crisis: An overview' in Daniel Vaughn-Whitehead (ed), *The European Social Model in Crisis: Is Europe Losing its Soul?* (Edward Elgar 2015) 1.

³³ European Commission, 'A new start for social dialogue' <<http://ec.europa.eu/social/main.jsp?langId=en&catId=329&eventId=1028&furtherEvents=yes>> accessed 3 February 2018.

³⁴ On the European social dialogue and tripartism see Thomas Prosser and Emmanuelle Perrin, 'European tripartism: chimera or reality? The 'new' phase of the European social dialogue in the light of tripartite theory and practice' (2015) 57(3) *Business History* 376.

³⁵ Degryse (n 31) 34.

6.3.2 *Outputs*

In a political climate favourable to social policy, the post-Maastricht period saw cross-industry ECAs concluded and subsequently implemented by Council Directive on parental leave (1995), part-time work (1997) and fixed-term work (1999).³⁶ However, following the launch of the Lisbon Strategy in 2001 and the introduction of ‘soft’ modes of governance, such as the Open Method of Coordination, the Commission’s interest in regulating through the social dialogue appeared to wane. Indeed, the ECA on fixed-term work was the last, original, cross-industry agreement to be implemented by Council Directive (that on parental leave was revised in 2009).³⁷ The important role of the Commission in encouraging representatives of management to the negotiating table is also cited as a reason for this stalled output (curtly expressed as “you negotiate or we legislate”).³⁸

This apparent stasis in social dialogue at cross-industry level stands in contrast to its more progressive development at sectoral level; ten ECAs have been concluded and implemented, or there are currently plans for their implantation, by Council Directive. These agreements have been reached during roughly even intervals throughout the operation of the sectoral social dialogue. Recently, agreements have been reached on the consultation rights of civil

³⁶ Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the EUTC (OJ [1996] L145); Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the EUTC (OJ [1997] L14/9); and Council Directive 1999/70/EC concerning the Framework Agreement on Fixed-term Work concluded by ETUC, UNICE and CEEP (OJ [1999] L175/43).

³⁷ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance) (OJ [2010] L68/13).

³⁸ See Brian Bercusson, ‘The Dynamic of European Labour Law After Maastricht’ (1994) 23(1) *Industrial Law Journal* 1; and Stijn Smismans, ‘The European Social Dialogue in the Shadow of Hierarchy’ (2008) 28(1) *Journal of Public Policy* 161.

servants (2015) and on improving occupational safety and health in the hairdressing sector.³⁹ One reason for the greater number of agreements reached at sectoral level is the logistics of industry specific negotiations; it is easier for agreements to be reached across a single rather than multiple sectors. Additionally, Commission support for sectoral Social Dialogue Committees (SDCs) has encouraged social partners to organise at EU-level and meet with one another; facilitating the negotiation of agreements later implemented by Council Directive.⁴⁰

The so-called 'autonomous' route of the social dialogue has seen a number of ECAs implemented voluntarily by the social partners (in accordance with the procedures and practices specific to management and labour). However, this label is somewhat confusing as it is often used to refer to agreements that are both the result of a Commission consultation for legislation and of the social partner's own initiative. Here, the label 'autonomous' is used to refer to agreements that are the result of independent negotiations between social partners and are implemented voluntarily. To date, the telework agreement is the only agreement to have been implemented voluntarily by the social partners having originated from a Commission consultation.

Autonomous ECAs have been reached at both cross-industry and sectoral levels (eight are currently listed in the Commission's online social dialogue database).⁴¹ These agreements have all been reached after the last cross-

³⁹ EUPAI and TUNED (EPSU and CESI), 'General framework for informing and consulting civil servants and employees of central government administrations' (2015); on the 'Hairdressing Agreement' see Krzysztof Bandasz, 'A framework agreement in the hairdressing sector: the European social dialogue at a crossroads' (2014) 20(4) *Transfer: European Review of Labour and Research* 1.

⁴⁰ An important innovation was the creation of 'Sectoral Social Dialogue Committees' by Commission Decision 98/500/EC of 20 May 1998 on the establishment of Sectoral Dialogue Committees Promoting the Dialogue between the Social Partners at European Level (OJ [1998] L225).

⁴¹ See European Commission, 'Social dialogue texts database' <<http://ec.europa.eu/social/main.jsp?catId=521>> accessed 23 October 2017.

industry social partner agreement implemented by Council Directive (that on fixed-term work in 1999). Consequently, it has been suggested that the social dialogue has moved towards greater autonomy from the Commission, in terms of the topics negotiated and the methods used for their implementation i.e. those other than Council Directive.⁴² However, the ‘autonomy’ of autonomous agreements is somewhat of an illusion as implementation is heavily dependent upon arrangements with national affiliates.⁴³

Without the involvement of the EU’s institutions, the content of autonomous ECAs is not restricted to those areas in which the EU has competence to regulate. Importantly, the social partners are not bound by the same exclusion on regulating over matters of pay under Article 153(5) TFEU as the institutions of the Union. (although the Commission could, technically, present a proposal covering elements of remuneration to the social partners, for implementation using their own methods, this would be highly unlikely given the politically sensitive nature of pay at EU-level). As such, the autonomous route of the social dialogue allows the social partners to reach agreements setting wages and thus could, in theory, serve as a foundation for a cross-industry or sectoral EU wage norm.

Another theme, complementary to that of greater autonomy, is the development of ‘new generation texts’ by the social partners. As a response to the Lisbon Strategy, at the Laeken European Council in 2001, the social partners made a joint declaration on their intention to develop their own policy instruments based upon the OMC.⁴⁴ This proposal was later endorsed by the Commission who considered the use of “machinery based upon the OMC as

⁴² See Branch (n 30) and Degryse (n 30).

⁴³ This point is discussed in greater detail in the next chapter on transnational labour law.

⁴⁴ ETUC, UNICE and CEEP, ‘Joint contribution by the social partners to the Laeken European Council’ <<http://erc-online.eu/wp-content/uploads/2014/04/2007-01093-EN.pdf>> accessed 23 October 2017.

an extremely promising way forward”.⁴⁵ Moreover, later in the same communication, the social partners were directed to “adapt the open method of coordination to their relations in all appropriate areas”.⁴⁶

In similarity with institution variants of the OMC, new generations texts are used for benchmarking and target setting, peer review, and the exchange of best practice. The Commission has distinguished between three types of new generation text: ‘process-oriented texts’ that contain provisions mandating separate processes to monitor implementation, including frameworks of action, codes of conduct, guidelines, and policy orientations; ‘joint opinions and tools’, including policy opinions, declarations, and training materials; and ‘procedural texts’ that detail the procedural rules to be followed for cross-industry and sectoral social dialogue.⁴⁷ Furthermore, the Commission also differentiates between policy instruments that set ‘reciprocal commitments’ and ‘common positions’.⁴⁸

There are currently 790 new generation texts listed in the Commission’s database. This development, along with the increasing number of autonomous ECAs, has been characterised as signalling a movement towards soft law within the social dialogue (and away from hard law Council Directives).⁴⁹ Consideration of the legal pedigree of these instruments, both autonomous agreements and new generation texts, will be made in chapter 8 on the potential regulatory design of an EU minimum wage policy. However, for present purposes, it is important to raise the idea that these instruments could

⁴⁵ European Commission, *The European social dialogue, a force for innovation and change* COM(2002) 341 final 19.

⁴⁶ *ibid.*

⁴⁷ European Commission, *Partnership for change in an enlarged Europe – Enhancing the contribution of the European social dialogue* COM(2004) 557 final 15 – 19.

⁴⁸ *ibid.*

⁴⁹ Thomas Prosser, ‘The implementation of the Telework and Work-related Stress Agreements: European social dialogue through ‘soft’ law?’ (2011) 17(3) *European Journal of Industrial Relations* 245.

be used in combination e.g. with an autonomous agreement detailing the rate of a minima and guidelines monitoring its implementation.

6.3.3 Pay

First, the inclusive labour markets agreement (2010) makes reference to pay in relation to Council Decision 2005/600/EC.⁵⁰ The agreement details the main challenges low skilled workers face in the labour market and sets out a range of actions the social partners can take to aid their entry, retention and development. Furthermore, in an annex to the agreement, the social partners address a list of recommendations to public authorities.⁵¹ The annex calls attention to the above Council Decision on employment policy guidelines and that in order for its realisation “work must be made to pay for job-seekers, including disadvantaged people...”.⁵² Although only a cursory mention of pay, debates during the drafting of the agreement considered the importance of ‘decent’ pay in achieving inclusive labour markets.

Second, the sectoral agreement on minimum requirements for standard player contracts in the professional football sector (2011) deals more explicitly with pay.⁵³ The agreement aims to ensure that players in the EU and UEFA territories are employed on standard contracts, in particular, focus is directed towards clubs in Central and Eastern Member States. Although somewhat

⁵⁰ BusinessEurope, Ceep, UEAPME and ETUC, ‘Framework Agreement on Inclusive Labour Markets’ (2010)

<<http://ec.europa.eu/social/BlobServlet?mode=dsw&docId=8850&langId=en>> accessed 23 October 2017; Council Decision of 18 July 2006 on guidelines for the employment policies of the Member States (2006/544/EC) (OJ [2006] L215/26).

⁵¹ Annex 2.

⁵² *ibid.*

⁵³ EPFL, ECA and FIFPro, ‘Agreement regarding the minimum requirements for standard player contracts in the professional football sector in the European Union and in the rest of the UEFA territory’ (2012)

<<http://ec.europa.eu/social/BlobServlet?mode=dsw&docId=9053&langId=en>> accessed 23 October 2017.

unusual given the high wages associated with professional football, pay is often an issue in lower leagues. Article 14 of the agreement states that “The Club has to respect minimum wages for the Player if they are agreed in [a] national collective bargaining agreement”. Furthermore, in relation to pay more generally, Article 6 (first indent) provides that a “Player [contract’s] [must define] all [of] the Club’s financial obligations”, specifically, with regard to salary calculation, other benefits and the manner of payment.

Third, the agreement on work in fishing (2012) also covers elements of pay but was concluded in cooperation with the Council as an alternative method for giving effect to the 2007 ILO Work in Fishing Convention.⁵⁴ After a long delay, the agreement was presented to the Commission for implementation by Council Directive in early 2016.⁵⁵ The agreement provides that, where not regulated by national laws, a fisherman’s work agreement is to detail “the amount of wages and any agreed minimum wage”, which, furthermore, are to be paid on a “monthly or other regular payment [date]”.⁵⁶ The agreement also endorses ILO Recommendation No. 199 which provides that on vessels over 24 meters long “all fishers should be entitled to minimum payment”.⁵⁷

⁵⁴ Europeche Cogeca and EFT, ‘Agreement between the social partners in the European Union’s sea-fisheries sector of 21 May 2012 concerning the implementation of the Work in Fishing Convention, 2007 of the International Labour Organization’ (2012) <<http://ec.europa.eu/social/BlobServlet?mode=dsw&docId=9089&langId=en>> accessed 24 October 2017.

⁵⁵ European Commission, Proposal for a Council Directive implementing the Agreement concluded between the General Confederation of Agricultural Cooperatives in the European Union (COGECA), the European Transport Workers’ Federation (ETF) and the Association of National Organisations of Fishing Enterprises (EUROPÊCHE) of 21 May 2012 as amended on 8 May 2013 concerning the implementation of the Work in Fishing Convention, 2007 of the International Labour Organisation COM(2016) 235 final.

⁵⁶ Annex II (i)

⁵⁷ *ibid.*

However, common to each of these agreements is the ancillary nature of pay e.g. mention of making work pay or of respect for minimum wages are made with the aim of facilitating more inclusive labour markets or of employment security in football. Although the work in fishing agreement requires a fisher's work contract to specify the amount and time of payment, as with the other two agreements considered, wage rates or wage-setting mechanisms are not the subject of regulation. Importantly, this may be more telling of the current stage of development of the autonomous route of the social dialogue, and of how it is used by the social partners, rather than of its potential as a foundation for an EU minimum wage policy.

The autonomous route of the social dialogue is based upon a complex relationship between public and private forms of power. When negotiating autonomous ECAs, the social partners utilise an institutional and policy framework that is supported by Commission. For example, the social partners receive significant financial and technical support during the establishment of SDCs. Just as voluntary implementation is dependent upon national affiliates for success, the autonomous negotiation of agreements requires institutional involvement (whether this be providing the fora, legal expertise or technical assistance etc.).

Importantly, this situation makes the characterisation of the autonomous route of the social dialogue, as either an institution or societal lawmaking process, difficult. Initially, one can suggest that it sits somewhere in-between, however insights from research on normative and legal pluralism provide a more sophisticated account (and will be explored in detail in the next chapter). This stands in contrast to the transnational coordination of collective bargaining, which is an informal process, developed in response to closer economic integration discussed in chapter 4.

6.4 Transnational coordination of collective bargaining

Unlike experience with the European social dialogue, hard issues such as wages and working conditions have been the subject of transnational

coordination. Coordination initiatives are union-driven and initially developed as a response to closer economic integration during the 1990s.⁵⁸ Employers have little interest in developing processes for coordinating wages and working conditions across borders rather they seek to take advantage of the differences that exist between countries. Multinational companies operating across borders enjoy a bargaining advantage due to the greater mobility of capital versus labour and often threaten to relocate production to other countries, whether sincere or not, if their demands are not met.⁵⁹ The transnational coordination of collective bargaining can be viewed as an attempt by unions to address this structural inequality.

There is no legal framework at EU-level for the coordination of collective bargaining, instead unions have developed their own autonomous governance regimes. Although developing outside of the institutional and policy framework of the EU, coordination initiatives have had an important influence upon social dialogue and are considered with regard to company level agreements in the next section. Coordination aims to strengthen cross-border cooperation in bargaining policy by facilitating the exchange of information on national bargaining developments and developing rules and guidelines for the negotiation of collective agreements. Coordination is procedural and seeks to achieve similar results in different countries e.g. wage rises in line with a specific formula, not of a predetermined nominal value. Consequently, it is dependent upon the continued existence of national systems and does not seek to establish a supranational level of collective bargaining in Europe. Although coordination initiatives have focussed almost exclusively upon wages, bargaining guidelines have recently been introduced that cover qualitative issues.

Below, three coordination initiatives are considered. These examples have been chosen as a consequence of their influence upon wage coordination in

⁵⁸ See Keith Sisson and Paul Marginson, *The Impact of Economic and Monetary Union on Industrial Relations: A Sectoral and Company View* (Eurofound 2000).

⁵⁹ See Colin Crouch, *Postdemocracy (Themes for the 21st Century)* (Polity 2004).

Europe. Various, they have been organised at regional, sectoral and cross-industry levels.

6.4.1 Initiatives

The first and perhaps the most well known coordination initiative was 'Doorn'.⁶⁰ Doorn took its name from the Dutch town where in 1998 trade union representatives from the Benelux countries and Germany met to discuss closer regional cooperation. These meetings were initiated by Belgian unions, in response to the introduction of a 'statutory wage norm' by the Belgian government.⁶¹ According to this wage norm, collectively agreed wages were to be limited to expected average wage increases in Belgium's major trading partners (i.e. France, the Netherlands and Germany). Initially, unions exchanged information on collective bargaining developments, with the intention of providing context for one another's future national negotiations.

A year later, unions agreed upon the aims and principles of the 'Doorn Declaration'.⁶² The main aim of the declaration was to prevent further downward wage competition, specifically, that had arisen in the context of EMU (as discussed in chapter 4). However, the declaration also recognised the negative distributional trends in wages, with a falling wage share going to labour, beginning to take hold across Europe. Importantly, the aim of using wage coordination to halt negative capital redistribution is similar to the rationale for the solidaristic wage policy discussed in the last chapter. The three principles that formed the basis of the declaration required unions to:

⁶⁰ Information on the Doorn Initiative is somewhat scarce, however, see Thorsten Schulten, 'Europeanisation of Collective Bargaining: An Overview of Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy' (2002) WSI Discussion Paper No. 101.

⁶¹ See Jürgen Osten, Jacques Vilroix and Jan de Schampheleire 'Collective bargaining in Belgium metalworking under EMU' in Thorsten Schulten and Reinhard Bispinck (eds), *Collective Bargaining under the Euro: Experiences from the European metal Industry* (ETUI 2001) 61-94.

⁶² Schulten (n 60) 7.

- (1) Aim to achieve collective bargaining settlements that correspond to the sum total of the evolution of prices and the increase in labour productivity;
- (2) Aim to achieve both the strengthening of mass purchasing power and employment-creating measures (e.g. shorter work times) [and]
- (3) Inform and consult each other on developments in bargaining policy.⁶³

Principle 1 is often cited as the first union-initiated coordination guideline at EU-level. This 'inflation plus productivity' rule has served as a reference for other initiatives. Such guidelines are not legally binding and are dependent for their success upon the political and moral commitment of national unions.

The Doorn group met regularly until 2006 and introduced qualitative guidelines on issues such as on life-long learning. However, meetings became less regular and are now held on an infrequent basis. Doorn is example of the difficulties of coordination at inter-sectoral level, where due to a multiplicity of competing interests, it is especially hard to reach the agreement required for collective action.⁶⁴

The most successful coordination initiatives have been organised at sectoral level. Wage coordination is especially relevant to export-oriented manufacturing sectors, where exposure to international trade is greatest.⁶⁵ In anticipation of the effects that EMU would have upon intensifying these pressures in the metalworking industry, German trade union IG Metall developed its own regional coordination policy; individual districts created networks for collective bargaining cooperation with metalworkers' unions in

⁶³ *ibid.*

⁶⁴ Vera Glassner and Philippe Pochet, 'Why trade unions seek to coordinate wages and collective bargaining in the Eurozone: past developments and future prospects' (2011) ETUI Working Paper 2011.03. 7.

⁶⁵ *ibid* 13.

neighbouring countries. These networks now form the backbone of the European Metalworkers' Federation's (EMF) sectoral initiative.

The EMF had embarked upon transnational wage coordination as early as 1993. Indeed, its "Statement of Principle on Collective Bargaining Policy" predates Doorn.⁶⁶ In similarity with Doorn, it provided for "regular annual compensation for price increases in order to protect real wages" and a "fair share in productivity gains".⁶⁷ These goals were formalised in the EMF's 'European Coordination Rule' of 1998.⁶⁸ The EMF rule has been described as a 'Magna Carta against wage dumping' as it defines a common framework for non-competitive collective bargaining whilst at the same time allowing national unions to follow their own political bargaining priorities.⁶⁹

The policies of the EMF are decided centrally and implemented through trade union networks such as those of IG Metall (this has been described as a situation where so-called 'top-down' (the EMF) and 'bottom-up' (IG Metall) processes meet in the Europeanisation of collective bargaining).⁷⁰ The EMF has also developed a system for the exchange of information. Its 'European Collective Bargaining Network' ('Eucob@n') is an electronic system that allows unions to share information on national bargaining developments and to submit reports on their progress towards achieving targets set by its guidelines. The EMF has also adopted guidelines on the coordination of non-wage issues, such as training and precarious employment.⁷¹

⁶⁶ European Metalworkers' Federation, 'Collective Bargaining Policy in a Changing Europe: Statement of Principle on Collective Bargaining' (Resolution adopted at the 1st EMF Collective Bargaining Conference, Luxembourg, 11 – 13 March 1993).

⁶⁷ *ibid.*

⁶⁸ European Metalworkers' Federation, 'Collective Bargaining with the Euro' (Resolution adopted at the 3rd EMF Collective Bargaining Conference, Frankfurt am Main, 9 – 10 December 1998).

⁶⁹ IG Metall quoted in Schulten (n 60)

⁷⁰ Glassner and Pochet (n 64) 16.

⁷¹ See the first and second common demands of the EMF (cited in Glassner and Pochet (n 64) 17).

At cross-industry level, for a considerable time, coordination was poorly developed. During the 1990s, the European Trade Union Confederation (ETUC) focussed almost exclusively upon the social dialogue. However, the introduction of EMU and the experiences of European industry federations with transnational coordination, promoted the ETUC to explore developing its own initiative at cross-industry level. Initially, this was to follow the idea of a 'European solidaristic wage policy' which, along with other considerations, would aim to "counter growing income inequality".⁷²

Here, further parallels can be drawn with the normative orientation of this thesis; when in December 2000 the ETUC adopted its own guideline for wage coordination, trade unions were directed to ensure that nominal wage increases exceeded inflation "whilst maximising the proportion of productivity allocated to the rise in gross wages", hinting at a more progressive redistributive policy than under Doorn or the EMF.⁷³ The following year, the ETUC endorsed a resolution calling on national unions to:

Include a quantifiable object regarding a reduction, in stages, in the number of low paid workers (i.e. those with 60 [per cent] or less of the median salary).⁷⁴

The inclusion of a target for coordination, set at 60 per cent of the median wage, along with the aim to reduce the number of low wage workers in covered industries, illustrates the development of a reasonably sophisticated wage policy by the ETUC (although lacking in terms of institutional support). This should also be read against its prior aim of countering rising income inequality.

⁷² ETUC, 'Towards a European System of Industrial Relations' (Resolution adopted at the 9th Statutory Congress of the ETUC, Helsinki, 29 June – 2 July 1999).

⁷³ ETUC, 'Recommendation on the coordination of collective bargaining (adopted by the ETUC Executive Committee, 13 – 14 December 2000).

⁷⁴ ETUC, 'Resolution on the coordination of collective bargaining (adopted by the ETUC Executive Committee, 14 December 2001).

More recently, the ETUC has included coordination as part of its strategy for defence against so-called 'new' EU economic governance (discussed in detail in chapter 4).⁷⁵ The now labelled 'golden rule' of inflation plus productivity is to be used to counter wage freezes and wages cuts, protect collective rights, and to fight against the decentralisation of collective bargaining (in support of these objectives the ETUC has established an electronic system for information exchange similar to Eucob@n).⁷⁶ Reference is also made in more recent resolutions to non-crisis related issues, including tackling gender inequalities and ending all forms of discrimination.⁷⁷

This shift in focus appears to be the consequence of current political priorities. During the early development of coordination, the greatest threat labour faced was that EMU would adversely effect wages, hence the ETUC's focus upon issues such as rising wage inequality and solidarity. However, the response of the EU and national governments to the economic crisis threatens more fundamental issues, such as social partner autonomy and institutional support for industrial relations.

Importantly for the purpose of this research, at various points over the last 20 years, a number of union coordination initiatives have developed European wage policies. These policies have found expression in guidelines and rules for national bargaining and have been supported by networks, and processes for information exchange. Furthermore, more sophisticated policies, such as those of the ETUC, have been outlined in pursuit of specific normative goals, including inequality and solidarity. Despite the similarity in focus of some of these initiatives to that of this thesis, practical experiences with coordination

⁷⁵ ETUC, 'The ETUC Coordination of Collective Bargaining and Wages in the EU Economic Governance' (Resolution adopted by the ETUC Executive Committee, 22 – 23 October 2013).

⁷⁶ *ibid.*

⁷⁷ ETUC, 'Collective Bargaining: The ETUC Priorities and Working Programme' (Resolution adopted by the ETUC Executive Committee, 6 – 7 March 2012).

undermine its potential as a foundation for the wage policy that has so far been articulated (specifically in the previous chapter).

6.4.2 Experiences

The real test for the success of coordination initiatives is whether they have an impact upon the negotiations of national unions. To date, there have been few empirical studies exploring this issue in detail. However, early assessments showed that guidelines had almost no perceptible impact upon bargaining settlements.⁷⁸ Indeed, analysis suggests that European industry federations often fail to meet the requirements of their own coordination rules.⁷⁹ Moreover, as discussed in chapter 4, wage convergence in Europe during the 1990s was the result of political decisions taken by national unions rather than of their commitment to European guidelines.⁸⁰

More recently, the popularity of coordination has suffered at the hands of greater interest in transnational company agreements (discussed in the next section). Additionally, changing political allegiances within national unions, exemplified by the waning influence of the left-wing at IG Metall, have resulted in a reduction in support for policies that are overtly European in focus (such as cross-border coordination).⁸¹ Furthermore, structural factors, at national and European-level, can be identified that limit the effectiveness of wage coordination.

⁷⁸ Thorsten Schulten, 'The European Metalworkers' Federation Approach to a European Coordination of Collective Bargaining: Experiences, Problems and Prospects' in Schulten and Bispinck (n 61).

⁷⁹ *ibid.*

⁸⁰ See Roland Erne, *European Unions: Labor's Quest for a Transnational Democracy* (Cornell University Press 2008).

⁸¹ See Roland Erne, 'Book Review: Le salaire, un enjeu pour l'euro-syndicalisme. Histoire de la coordination des négociations collectives nationales' (2013) 19(3) *Transfer: European Review of Labour and Research* 433.

First, the decentralisation of bargaining and falling coverage of collective agreements in Member States limits the influence of unions over the process of wage formation. Second, the predominance of single-employer bargaining in some Member States is a significant impediment to the uniform implementation of bargaining guidelines. Third, harmonisation, in terms of an agreements length, the industries it covers and the level at which it is negotiated, would be required for more effective coordination. Fourth, and perhaps most importantly, guidelines are not legally binding and are viewed by national unions as political declarations that do not require further action.

Whereas guidelines are voluntary and do not involve employers' associations, transnational company agreements are, at the very least, reciprocal undertakings; detailing commitments between trade unions and multinational companies. Coordination initiatives provide a foundation for the negotiation of these agreements, in terms of existing institutional arrangements such as bargaining networks and processes for the exchange of information. Transnational company agreements are considered the next stage in the development of industrial relations in Europe.

6.5 Transnational company agreements

Transnational company agreements are defined by the European Commission as:

...[agreements] comprising reciprocal commitments the scope of which extends to the territory of several states and which has been concluded by one or more representatives of a company or group of companies on the one hand, and one or more workers' organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives.⁸²

⁸² European Commission, *The role of transnational company agreements in the context of increasing international integration* SWC(2002) 2155 (see the text accompanying footnote 2).

The Commission's definition is especially inclusive and takes account of the various different situations that can give rise to transnational collective agreements (TCAs). TCAs that result from negotiations between global union federations and multinational companies are also known as international framework agreements (IFAs or in some literature Global FAs), whereas agreements restricted in scope to Europe are generally referred to as European framework agreements (EFAs). However, this practice appears to have ended due to the potential for confusion with European collective agreements (ECAs) resulting from formalised social dialogue.

Historically, TCAs developed as a union response to the growing internationalisation of companies during the late 1960s.⁸³ Initially, unions sought to establish global worker representation bodies for the purpose of exchanging information between multinational companies and workers (based upon so-called world works councils).⁸⁴ Later, transnational negotiations led to the conclusion of a number of agreements (e.g. between the EMF and Thomson-CSF) but coordination remained the focus of global and European industry federations.⁸⁵ Although now disputed by global unions, early initiatives focussed upon developing international collective bargaining.⁸⁶

However, a significant shift in approach occurred as a consequence of the growing importance of corporate social responsibility (CSR) to multinational

⁸³ Volker Telljohann et. al., *European and international framework agreements: Practical experiences and strategic approaches* (Eurofound 2009) 5.

⁸⁴ Isabel da Costa and Udo Rehfeldt, 'Transnational collective bargaining at company level: Historical developments' in Konstantinos Papadakis (ed), *Cross-Border Social Dialogue and Agreements: An Emerging Global Industrial Relations Framework?* (ILO 2008) 45.

⁸⁵ Isabelle Schömann, 'Transnational company agreements: towards an internationalisation of industrial relations?' in Isabelle Schömann et. al. (eds), *Transnational collective bargaining at company level: A new component of European industrial relations?* (ETUI 2012) 199.

⁸⁶ Telljohan et. al. (n 83) 17.

companies.⁸⁷ Multinationals saw CSR policies as a way of responding to criticisms made by the general public of the negative social and environmental impact of their operations. Indeed, at the turn of the millennium, the ILO renewed its *Tripartite Declaration* and the United Nations launched its 'Global Compact'.⁸⁸ Multinationals introduced voluntary codes of conduct and declarations, before later turning to negotiated texts; which served as the basis for modern TCAs.

The content of TCAs varies depending upon whether they have been concluded by international or European industry federations. Generally, internationally focussed agreements cover core ILO labour standards, such as on freedom of association, whereas those that concentrate on Europe deal with more specific issues. Importantly, at the European, and more recently, international level, these have included wages and wage-setting mechanisms. Here, the difference in content between European and internationally focussed TCAs appears to be narrowing. However, it was not until the establishment of European Works Councils that TCAs were concluded in any significant number. As a potential consequence of the crisis, the number of TCAs concluded has stalled, perhaps due to national trade unions focussing upon domestic issues that are considered to be of greater importance.

The European Works Council Directive (EWC) provides information and consultation rights for employees in Community-scale undertakings and groups of undertakings.⁸⁹ EWCs are important as they represent the first institutional

⁸⁷ Schömann (n 85) 197.

⁸⁸ Telljohan et. al. (n 83) 178.

⁸⁹ Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ [1994] L254), adapted by Council Directive 2006/109/EC of 20 November 2006 adapting Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, by reason of the accession of Romania and Bulgaria (OJ [2006] L365).

attempt at EU-level to develop interest representation in companies. The Directive covers companies with “at least 1,000 employees within the Member States and at least 150 employees in each of at least two Member States”.⁹⁰ Additionally, Member States are left to decide upon the criteria for selecting representatives (in accordance with subsidiarity).⁹¹ Essentially, the Directive aims to promote the negotiation of voluntary agreements between management and workers on the establishment and operation of EWCs. During the introduction of the EWC Directive, these agreements were exempt from certain provisions of the Directive, however, later they were required to establish a special negotiating body and detail the specific form and function of the EWC.⁹²

The engagement of management and labour in these voluntary agreements is argued to have aided their identification and legitimation as bargaining parties and facilitated the future negotiation of TCAs.⁹³ Indeed, research has suggested that EWCs are involved in the negotiation and conclusion of over two-thirds of TCAs.⁹⁴ Moreover, half are signed with multinational companies headquartered in Europe.⁹⁵ EWCs have developed from their legislated function of providing a space for informing and consulting workers to the negotiation of transnational agreements. Consequently, the EWC Directive is often cited in commentary on company-level arrangements for social dialogue in Europe.

This last point raises the distinction drawn at the beginning of this chapter between institutional and societal lawmaking processes. Although TCAs originated from union-initiated attempts to develop an international level of collective bargaining, what amounts to the co-option of EWCs for the purpose

⁹⁰ Article 1(5)(c).

⁹¹ Article 6(3) and Article 7, respectively.

⁹² Article 13.

⁹³ Schömann (n 85) 211.

⁹⁴ Telljohan et. al. (n 83) 2.

⁹⁵ Telljohan et. al. (n 83) 1.

of institutional support, challenges the characterisation of this process as an informal mode of governance. This situation has been likened to that where "...transnational social norms can emerge from a legal order and draw legitimacy from an institutional framework".⁹⁶ Moreover, one labour lawyer has suggested this amounts to "normative self-service", where management and labour 'forum shop' for the greatest levels of support.⁹⁷

There is currently no legal framework for the conclusion of TCAs at EU-level, however discussions have been ongoing within the trade union movement regarding the introduction of an (optional) legal framework since the so-called 'Ales Report'.⁹⁸ The introduction of such a framework has been likened to 'regulated self-regulation', where, in accordance with one suggestion, the EU could provide legal certainty to TCAs by guaranteeing their effects through legislating by way of Council Directive (which will be discussed in more detail with regard to 'reflexive law' in chapter 8).⁹⁹ As a result of this legal 'no man's land', a number of procedures have developed for the negotiation and conclusion of TCAs.

6.5.1 Procedures

The centrality of EWCs in the negotiation of TCAs has led trade unions to develop procedures to ensure their own involvement. The negotiating

⁹⁶ Marie-Ange Moreau, 'The originality of transnational social norms as a response to globalisation' in Brian Bercusson and Cynthia Estlund (eds), *Regulating labour in the wake of globalisation: new challenges, new institutions* (Hart 2008) 266.

⁹⁷ Alain Supiot, 'Du nouveau au self-service normatif : la responsabilité sociale des entreprises' in Etudes offertes à Jean Pélissier, *Analyse juridique et valeurs en droit social* (Daloz 2004) 541 – 548.

⁹⁸ Edoardo Ales et. al., *Transnational Collective Bargaining: Past, Present and Future* (European Commission 2006).

⁹⁹ Hans-Wolfgang Platzer, 'Europäisierung und Transnationalisierung der Arbeitsbeziehungen in der EU' (2002) *Internationale Politik und Gesellschaft* No. 2 103 – 121.

procedure of the EMF is considered a 'blueprint' in this regard;¹⁰⁰ it seeks to establish national unions as leading players in the negotiation of agreements, vs. works council representatives, and to respect their right to negotiate over issues that are European in focus.¹⁰¹ Consequently, the Secretariat of the EMF is prevented from acting unilaterally, with national unions having prerogative over which issues are suggested for negotiation. The EMF procedure sets out rules on how TCAs are negotiated and concluded.

First, a resolution is required from national affiliates for the initiation of negotiations. As far as is reasonably practicable, this should be sought from all unions concerned. Affiliated unions in a specific country can block the commencement of negotiations, unless they represent less than five per cent of the workforce of the undertaking. Second, a resolution is required in order for the conferral of a bargaining mandate (and is subject to the five per cent rule). Third, a final resolution must be sought from unions on the text of the proposed agreement (before being signed by the EMF). These rules aim to ensure that national unions retain control of the procedure and TCAs have a wide scope of application, preventing their erosion by competitors. Additionally, the EMF is argued to demonstrate its legitimacy as a bargaining agent by securing a strong mandate from its affiliates.

The form of this procedure is also dependent upon the involvement of EWCs. Whereas in Germany, Austria and the Netherlands, works council representatives are assigned a central role in negotiations (providing they are trade union members) in southern Europe, Scandinavia and the UK, they are not involved in any way (German trade unions often provide advice to

¹⁰⁰ Torsten Muller et. al., 'Transnational company agreements and the role of European Works Councils in negotiations: A quantitative analysis in the metalworking sector' (2013) ETUI Report 127 12.

¹⁰¹ European Metalworkers' Federation, 'EMF procedure for negotiations at multinational company level' (2006) <<http://www.emf-fem.org/Areas-of-work/Company-Policy/Adopted-documents-Position-papers-Publications/Position-papers2/Internal-EMF-Procedure-for-negotiations-at-multinational-company-level>> accessed 24 October 2017.

members of national works councils). With regard to the first, EWC-led, scenario, the responsibility for negotiating and concluding agreements resides with the EWC (and the EMF procedure is rejected). Here, trade union representatives may still be invited to take part in negotiations. With regard to the second scenario, the EWC accepts the lead of the trade union and transfers responsibility for the negotiation of company level agreements.

The results of a recent research projected, funded by the European Parliament, show that almost all TCAs signed with companies headquartered in the EU involve EWCs in some way shape or form e.g. negotiation, implementation or monitoring. However, from 2006, the number of TCAs signed independently by trade unions, following variants of the EMF procedure, has increased by almost 15 per cent (although, as of 2013, they accounted for less than 20 per cent of all agreements). This increase has been attributed to more companies headquartered in France taking part in company level negotiations. Importantly, 'country of origin differences' also explain the ancillary nature of pay as a topic of regulation at company level.

6.5.2 Pay

To date, as with autonomous ECAs, pay has not been the explicit focus of TCAs. The popularity of wages and working time as topics for transnational negotiation appears to have suffered as a consequence of the number of German-led EWCs; the German model of codetermination allows works councils to bargain over all issues apart from wages and working time, which are reserved for trade unions. However, the increasing number of French and southern European companies involved in transnational negotiations, and their tradition of single-track bargaining, has begun to challenge this situation (although it must be emphasised that TCAs covering pay have been signed by companies headquartered in both countries).

The most specific example is that on profit-sharing at the defence company EADS.¹⁰² The agreement aims to establish a link between the activities of workers and the financial success of the company in order to improve motivation and commitment. Importantly, pay has also been the subject of more informal agreements at EADS. These have covered profit-sharing bonuses, bonuses for employees in sales roles, standardisation of pay scales and payment of national minimum severance pay.¹⁰³ Informal agreements are not usually made public or listed in trade union databases and have been described as an ‘overlooked phenomenon’ in literature on TCAs.¹⁰⁴ Indeed, research suggests that a quarter of companies in the metalworking sector have concluded informal agreements with their management counterparts.¹⁰⁵

More generally, monetary issues, including wages, have been included in agreements on restructuring programmes. For example, Ford signed a series of TCAs between 2000-2010 guaranteeing the acquired rights of workers involved in the spinoff of car component producers, specifically regarding wages and salaries.¹⁰⁶ A somewhat more defensive example is that of General Motors Europe (GME), where after Europe-wide industrial action initiated by the EMF against restructuring, management agreed to the terms of a TCA that included a limit to wage cuts.¹⁰⁷ However, both of these examples also illustrate the strength of the EMF, who, because of their regional bargaining networks (discussed in the previous section), were able to exert significant pressure on management to enter into negotiations.

¹⁰² EADS, ‘Group Agreement for the Implementation of a Success-Sharing Plan within the EADS-NV Group’ (2011)
<http://ec.europa.eu/social/PDFServlet?mode=tca&agreementId=53&langId=en>
 accessed 24 October 2017.

¹⁰³ Muller et. al. (n 100) 47.

¹⁰⁴ *ibid* 40.

¹⁰⁵ *ibid* 41.

¹⁰⁶ See Telljohan et. al. (n 83) 74 – 75.

¹⁰⁷ *ibid*.

Interestingly, the International Metalworkers' Federation (IMF) has developed a model framework agreement for its affiliates to follow in transnational negotiations.¹⁰⁸ This references statutory/state-extended minimum wages and informal benchmarks:

Wages and benefits paid for a standard working week shall meet at least legal and industry minimum standards and always been sufficient to meet basic needs of workers and their families and provide some discretionary income.¹⁰⁹

Its aim of ensuring that workers' and their families 'basic needs' are met and that wages provide 'some discretionary income' directs attention towards the criteria against which minimum wages are set (as outlined in chapter 2 on their history). Although not detailing how these aims are to be translated into quantifiable targets (e.g. 60 per cent of the national medium wage), the IMF model agreement provides the foundations for what could be a very sophisticated transnational wage policy; guidelines are offered on the negotiation, content, implementation and monitoring of agreements that are based upon its principles (this model is of particular interest with regard to the regulatory design of an EU wage norm discussed later in chapter 8).¹¹⁰ Moreover, the inclusion of a wage clause serves to mainstream the issue of pay, requiring its consideration in all negotiations (and also warrants further investigation). Agreements following the IMF model have been concluded with large multinationals, including Bosch, Renault, EADS, BMW, Arcelor and PSA Peugeot Citroën.¹¹¹

¹⁰⁸ International Metalworkers' Federation, 'Background to the International Framework Agreements in the IMF' (IFA World Conference, Frankfurt am Main, 26 – 27 September 2006) <<http://library.fes.de/pdf-files/gurn/00251.pdf>> accessed 24 October 2017.

¹⁰⁹ *ibid* 4.

¹¹⁰ *ibid* 5 – 14.

¹¹¹ *ibid* 5.

6.6 Conclusion

In light of the Union's limited ability to directly regulate in the area of pay it should not come as a surprise that this chapter points towards modes of governance instituted by representative of management and labour as the only realistic way forward for the establishment of an EU minimum wage policy. Modes of governance such as efforts to create a transnational level to collective bargaining and experiments with transnational collective agreements have produced a number of interesting outputs. Respectively, these range from setting targets for collectively agreed pay to outlining criteria for the determination of wages.

However, these processes are often initiated almost exclusively by trade unions, with limited involvement from employers' associations (unless they can be brought to the bargaining table by industrial action or the threat that strikes will be called). Conversely, addressing this structural imbalance in bargaining power was the guiding rationale behind the development of formalised European social dialogue. Although recent action has been somewhat limited, particularly in the last decade, this does not detract from the stability of the social dialogue as a law-making process provided for in EU law and, perhaps more importantly, which has a sizable budget that is used to support the social partners to reach their own agreements.

Similar levels of support and structures are not present in trade union-led initiatives. Indeed, although those such as Doorn are highly developed, they have suffered problems associated with organising unions established across multiple sectors. Moreover, although the EMF have, for example, reached substantive agreements in a number of European Works Councils, they do not receive support for actions other than those relating to fulfilling their information and consultation function.

It is the possibility of such institutional support, along with its position outside of the Article 153(5) TFEU restriction on pay, which makes an autonomous agreement the only realistic basis for an EU minimum wage.

However, it is clear from the preceding discussion that there is a great deal about the operation of the autonomous route of the social dialogue that is not fully understood. For example, the development of 'new' governance-style instruments and their adoption by the social partners raises questions about the impact they are having on the uptake of autonomous agreements. Are they seen as being interchangeable (and, as a consequence, in competition) or is it possible they could be used together i.e. alongside each other or in an arrangement designed to facilitate their interaction? The next chapter adopts work on transnational legal pluralism as an approach to understanding the operation of the autonomous social dialogue, with the resulting insights used to inform the design of an EU minima in final substantive chapter of this thesis.

7. Insights from transnational (labour) law

7.1 Introduction

In the last chapter, the search for a potential legal or, indeed, normative foundation for an EU minimum wage policy shed light upon how interlinked many of the methods of governance are that makeup the field of European industrial relations. This chapter seeks to more fully understand these ‘hidden dynamics’ with a view to suggesting an appropriate form for an EU minima – undertaken in the next chapter – which takes into account the reality of regulating labour and employment law issues at EU-level. In doing so, it adopts work on transnational legal pluralism as a framework for understanding how the autonomous route of the European social dialogue operates. To-date, this approach has been overlooked by scholarship on European industrial relations and this chapter constitutes a first exploration of the utility of this theory for better understanding the social dialogue.

From the detailed investigation in the previous chapter of the law-making processes that are often very roughly described as being based upon either more public or more private forms of power, considerable overlap was observed, calling into question the utility of this distinction and whether the apparent collapse of this boundary has implications for the potential design of an EU minimum wage policy.

Whereas the most promising foundation appears to be the so-called ‘autonomous’ route of the European social dialogue (given it sits outside of the Article 153(5) TFEU restriction on regulating pay and a agreements have been reached covering constituent elements of remuneration), there appears to be far more going on under the surface than initially meets the eye.

By way of example, the autonomous route is dependent for its success on the national procedures and practices of management and labour for implementation, and the ability of the social partners to organise at EU-level and reach agreements. Explained in another way, it appears less ‘autonomous’

of public forms of power and more contingent on the existence of institutional structures and support for success. Furthermore, the development of 'new' governance-style instruments and their adoption by the social partners raises questions about the impact they are having on the uptake of autonomous agreements, for example, are they seen interchangeable (and, as a consequence, in competition) or is it possible they could be used together i.e. alongside each other or in an arrangement designed to facilitate their interaction?

It is of imperative importance that these hidden dynamics are fully understood if an EU minimum wage policy is to be designed that could realistically stand a chance of being adopted by the social partners and of serving a solidarity enhancing function. Here, studying the autonomous route of the social dialogue through the lens of transnational legal pluralism sheds light upon the complexity involved in its operation.

Moreover, the insights gained from this approach present the social dialogue as an alternative space for societal governance; where labour law's main objectives of constraining market power/furthering concerns regarding economic/social justice can be achieved because of, not in spite of, the fragmentation of European law (especially with regard to the complexity of industrial relations at European level). This mode of governance is no longer viewed as occurring separately from the institutions of the Union and the Member States, rather its dependency is revealed. These insights have the potential to reach beyond the policy proposal under consideration to other areas, for example, the use of the social dialogue to regulate other 'hard' issues such as working hours.

Any EU minimum wage policy based upon an autonomous social partner agreement, as alluded to in the previous chapter, would not operate away from public power but would be contingent upon institutional support at both European and national levels: in terms of the provision of negotiating fora for the conclusion of any agreement, funding and technical support for its drafting and the creation and maintenance of avenues for its implementation and

review (whether at European or national level). Put simply, a wage norm based on an autonomous social partner agreement would not be at the mercy of trade unions for its success but would be more closely tied to the institutional framework of the Union and Member States than current research on the idea of an EU minima acknowledges.

As a consequence, the ideas appraised in chapter 3 – that a policy instituted by the social partners rather than the Member States would have little chance of success due to the limited support they would receive – is considered to be overly simplistic. Not only does this insight render the autonomous route of the social dialogue a more likely basis for an EU minimum wage policy but also questions prevailing thought about the potential of alternative modes of governance (such as the social dialogue) for regulating at a time of malaise in Europe (where the ‘social’ *acquis* has undergone very little development, specifically in terms of new ‘hard’ law legislation, since the post-Maastricht agreement on the original Atypical Workers Directives).

As a consequence, the challenge appears to be alerting trade unions and employers’ associations to the possibilities for regulating offered by law-making fora like the social dialogue, whilst pressuring the Commission and Member States to do more to support the negotiation, conclusion, implementation, monitoring, and revision of their actions.

At the same time, viewing the operation of the social dialogue through the lens of transnational legal pluralism alerts law-makers (including European social partners), to the potential for interaction to occur between different types of legal instruments. The contested legal pedigree of norms like autonomous social partner agreements and so-called ‘new’ generation texts, modelled on the open method of coordination, is set aside in favour of a purposive approach focussing on their practical effects. Traditional forms of ordering – like collective agreements – should not be considered superior to recent innovations like guidelines (usually because they are seen as binding and therefore somehow more effective), rather they should be considered different ways of achieving the same aims.

Taking this normativity more seriously opens up the possibility of using instruments like new generations texts, for example guidelines, for regulating issues that are commonly covered by collective agreements. Importantly, freed from the moorings of traditional legal thought, transnational legal pluralism, also directs attention towards the possibility of combining different norms (in order to improve their effectiveness).

For the idea of an EU minimum wage, this could mean a target being set for collectively agreed wages to reach, for example, 60% of the sectoral median wage in incremental stages to be determined in guidelines set by workers themselves. Moreover, new generation texts like reporting forms could be used by workers to keep peak-level organisations – party to the agreement – informed of their progress. These forms of interaction are explored below and serve as a basis for more detailed discussion on regulatory design in the next chapter.

This chapter proceeds through three main parts:

- (1) It discusses transnational law as a legal theory and contrasts it to earlier movements in normative and legal pluralism;
- (2) It analyses the European social dialogue and other elements of the so-called 'European system of industrial relations'; and
- (3) Based upon this case study, links transnational law's recognition of the interactions between actors, norms and processes inherent in globalisation to the operation of the social dialogue (e.g. European collective agreements).

In conclusion, it is suggested that the exploration of the social dialogue from the vantage point of transnational legal pluralism also provides insights into those areas that are underplayed by the theory, for example, the relative autonomy of the state. These are outlined for consideration in the next chapter and conclusion of this thesis.

7.2 Transnational legal pluralism

Initially, one may ask, what do we mean when we speak of transnational law? Academia is littered with words which appear to serve no other purpose than to attract the attention of leading journals, funding bodies and/or potential employers. With regard to EU-level social dialogue, research has fallen victim to this trap; European collective agreements are increasingly considered examples of transnational social partner activity but the reasons why are often not explained. Simplistically, the appeal of the transnational appears to lie in its utility as a descriptive frame for the geographical border crossing involved in such activities; European collective agreements operate beyond the territorial borders of states. However, in socio-legal theory, a more complex understanding has developed.

A common starting point is Phillip Jessup's seminal work on transnational law. Jessup proposed to use the term to include:

All law which regulates actions or events that transcend national frontiers. Both public and private international law... and other rules which do not wholly fit into such standardised categories.¹

In doing so, firstly, the idea of transnational law acknowledges issues of place (specifically the terrain over which legal acts are concluded and have effect). Secondly, private sources of law are considered on an equal footing with public law. Jessup later described the extralegal or metajudicial arrangements possible when the perceived monopoly of the state on authoritative legal acts was questioned.² Interestingly, similar points were raised by C. Wilfred Jenks, who envisaged an "emerging field" in which the "law governing relations between states is only one".³ Indeed, Jessup considered a variety of

¹ Phillip Jessup, *Transnational Law* (Yale University Press 1956) 2.

² *ibid* 6.

³ C. Wilfred Jenks, *The Common Law of Mankind* (University of Michigan 1958) 2.

transnational arrangements involving “individuals, corporations, states, organizations of states, or other groups”.⁴

Jessup’s work has been revisited by contemporary scholars investigating the evolution of state institutions and the development of the global political economy, particularly from perspectives related to theories of normative and legal pluralism (given its focus upon territoriality and the relationship between the state and law). Here, Peer Zumbansen’s work on transnational legal pluralism is instructive.⁵ Zumbansen’s approach is a radicalisation of both Jessup’s work and his own; transnational legal pluralism is cast as a methodological approach to the study of law (in light of the complexity of modern society).⁶

For labour law, this includes the challenges of so-called ‘polycentric globalisation’,⁷ such as the informalisation of work, labour migration, and growing wage inequality. In the EU, with regard to the European single market, these problems are intensified, with the free movement of capital promoted to the detriment of social considerations. However, these observations are also manifestations of deeper structural changes. In reading Jessup’s work alongside insights from modern sociological theories, Zumbansen rejects the relativisation of society as the “other side of the state”.⁸

This approach calls into question two assumptions commonly associated with law; namely, its connection with state authority and, as a consequence, its territoriality.

⁴ Jessup (n 1) 3 – 4.

⁵ See Peer Zumbansen ‘Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism’ (2012) 21(2) *Transnational Law and Contemporary Problems* 305.

⁶ *ibid* 323.

⁷ *ibid*.

⁸ *ibid* 307.

7.2.1 State/law nexus

The transformation of political sovereignty in the ongoing process of globalisation renders the state/law nexus, long held within legal thought, increasingly untenable. Early work by sociologists alerted jurists to a panoply of non-state originating norms binding human and organisational behaviour.⁹ For past and present labour lawyers, situations of plurality are not unusual, indeed, they are a part of its disciplinary fabric. The history of labour law in Western and Northern Europe is a story of oscillation; between periods of state intervention on the one hand and abstention on the other. Wages and collective bargaining in twentieth century Britain are examples; paternalism gave rise to the first statutory minimum wages through trade boards, intended to protect workers in industries with poor collective bargaining coverage, before their alteration and later disbandment under collective *laissez faire*.¹⁰

Such historical events gave rise to the coexistence of state and non-state norms; statutory and collectively agreed wages are considered functional equivalents and exist alongside one another in an increasing number of industrial relations systems. Importantly, the recognition of autochthonous forms of ordering is a challenge to understandings that restrict the moniker 'law' to that which emanates from the state. The legal effect of collective agreements, e.g. normative/contractual/mandatory, have long been acknowledged by labour lawyers (ensuring a healthy scepticism of theories that are overtly state-centric in focus), but the development of alternatives capable of accounting for this normativity has been somewhat neglected.¹¹

⁹ See Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Transaction Press 1962).

¹⁰ The Trades Boards Act 1909 was a paternalistic response to the problem of 'sweated labour'. However, more accurately, trade boards were an intervention into the system of collective *laissez faire* (distinct from that promoted by Thatcher in the 1980s).

¹¹ The ongoing debates over hard vs. soft law are an example (discussed in more detail in section 4).

Although exploring its contested nature is beyond the scope of this chapter, transnational legal pluralism views law first and foremost as a ‘social phenomena’, inviting insights from sociological theories.¹² A prominent example is systems theory; law is perceived from a functional perspective within a differentiated modern society (which is defined not in contrast to the state but rather as “without peak or centre”), operating according to its own rationality and through its own particular vocabulary.¹³ Recent research on reflexive law has applied these insights to labour law.¹⁴ Consequently, alerting labour lawyers to evolving forms of law, the importance of which are overlooked by traditional approaches (that seek to reconcile the assumption of a strong state/law nexus with the proliferation of non-state norms). Importantly, the ‘decentering’ of the state also effects law’s perceived territoriality.

7.2.2 *Deterritorialisation*

Systems theoretical approaches suggests that the boundaries of society cannot accurately be drawn in relation to the state (or the regional, supra- or inter-national), rather they should be understood as extending to include society in its entirety. Within so-called ‘world society’, the study of regulatory governance refers to territory only in the acknowledgement of politico-historically contingent legal frameworks. Importantly, this point signals a shift from Jessup’s focus upon place to that of space; the transnational dimension of legal pluralism is less about considerations of territory and more about the form and function of law within differentiated modern societies.¹⁵ For example, the supply chains of multinational enterprises are the loci of a growing number of corporate codes of conduct (not states or international organisations).

¹² Zumbansen (n 5) 317.

¹³ See Niklas Luhmann, *A Sociological Theory of Law* (2nd edn, Routledge: Glasshouse 2013).

¹⁴ See Ralf Rogowski, *Reflexive Labour Law in the World Society* (Edward Elgar 2013).

¹⁵ Reinforcing the view that it is not a distinct field of study but rather a methodological approach.

Some labour lawyers view transnationalisation in this form as especially concerning. They ask how labour law can achieve its objectives without the 'shadow of the law',¹⁶ whilst others contest that to serve as an effective countervailing force to capital, especially in light of ongoing globalisation, formal support is necessary. (unsurprisingly, for those who share these concerns, corporate codes of conduct are not held aloft as examples of how transnationalisation can benefit organised labour). Interestingly, these views align with certain political currents within legal pluralism. Specifically, suggestions for intervention are also matched with calls for abstention and the embrace of new forms of governance.¹⁷

However, the replication, transnationally, of forms of support modelled upon the state (e.g. attempts in the early 1970s by trade unions to establish world works councils) or a turn towards those that are more epistemic (e.g. directly deliberative polyarchy) are not the only options for how to govern labour related issues in a changing world. Transnational legal pluralism charts a pathway between these opposite approaches. In this context, manifesting itself as state support for societal modes of governance; where the Union and Member States provide for the actions of the social partners (e.g. through capacity building initiatives, legal aid, and financing programmes). Consequently, promoting the facilitative, rather than directive, role of public power.¹⁸

7.3 European social dialogue

As explored in the previous chapter, at EU-level, the European social partners perform information and consultation roles within a number of different forums, including now under the European Semester, and are recognised as co-

¹⁶ In particular, see Brian Bercusson, 'The Dynamic of European Labour Law After Maastricht' (1994) 23(1) *Industrial Law Journal* 1.

¹⁷ For example, at the right of political spectrum, legal experimentalism and the idea of 'ratcheting' labour standards.

¹⁸ Understood in reflexive law terms as 'steering'.

legislators. EU-level social dialogue takes place at both cross-industry and sectoral levels and can lead to agreements implemented by Council Directive or in accordance with the procedures and practices specific to management and labour in the Member States (governed under Articles 154 and 155 TFEU, previously Articles 138 and 139 TEU).

The second of these two routes is of particular interest to the focus of this chapter. Here, so-called 'voluntary' European collective agreements are implemented by the national affiliates of the social partners (rather than by way of Council Directive). From around the turn of the millennium, these agreements have resulted exclusively from the initiatives of the social partners, as opposed to from official consultations. (to date, the telework agreement (2002) is the only agreement to have been implemented by the social partners based upon a proposal from the Commission). As such, the social dialogue is argued to have moved towards greater autonomy, both in terms of the topics negotiated and the methods used for implementation.

As a result of this greater independence vis-à-vis the institutions of the Union, various 'autonomous' European collective agreements have been reached that would not have been considered appropriate for regulation by the Commission. Examples include the furore over the hairdressing agreement after it was rejected for implementation by the Council based upon the regulatory fitness agenda.¹⁹ Moreover, without the involvement of the Union, autonomous agreements are not restricted in content to those areas in which it has specific competence to legislate (for example, the social partners are not bound by the same exclusion on regulating over matters of pay under Article 153(5) TFEU as the institutions of the Union).²⁰

¹⁹ See Krzysztof Bandasz, 'A framework agreement in the hairdressing sector: the European social dialogue at a crossroads (2014) 20(4) *Transfer: European Review of Labour and Research* 1.

²⁰ A number of agreements, including that on contracts in professional football, cover elements of pay (also see the inclusive labour markets agreement and the agreement on work in fishing).

Another theme, complementary to that of greater autonomy, is the development of 'new generation texts' by the social partners. As a response to the Lisbon Strategy, at the Laeken European Council in 2001, the social partners made a joint declaration outlining their intention to develop their own instruments modelled upon 'the OMC'.²¹ In similarity with institutional variants of the OMC, new generation texts are used for benchmarking and target setting, peer review, and the exchange of best practice. There are currently 790 new generation texts listed in the Commission's database. These instruments are commonly considered examples of social partner 'soft law'.

Conventional readings of the social dialogue suggest the development of instruments such as new generation texts and autonomous agreements are the result of a political climate within the Union unfavourable to social legislation.²² Indeed, its stalled output in terms of agreements implemented by Council Directive, the last of which was reached at cross-industry level on fixed-term work in 1999,²³ has been cited as evidence of a change in approach on behalf of the Commission.²⁴ Action in support of the conclusion of agreements, such as the threat of legislation,²⁵ has not been forthcoming since the revision of the parental leave directive in 2009.²⁶ Furthermore, the use of the social dialogue

²¹ ETUC, UNICE, CEEP, 'Joint contribution by the social partners to the Laeken European Council' <<http://erc-online.eu/wp-content/uploads/2014/04/2007-01093-EN.pdf>> accessed 28 November 2017.

²² Christophe Degryse, 'Historical and Institutional Background to the Cross-industry Social Dialogue' in Anne Dunfresne et. al. (eds), *The European Sectoral Social Dialogue* (Peter Lang 2006).

²³ Although the parental leave directive was revised in 2009, it is not considered a new agreement; Council Directive 1999/70/EC concerning the Framework Agreement on Fixed-term Work concluded by ETUC, UNICE and CEEP (OJ [1999] L175/43).

²⁴ Degryse (n 22) 31.

²⁵ Also referred to by the maxim 'you negotiate or we legislate'.

²⁶ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP

as an alternative to the community method has been all but superseded by modes of governance modelled upon the OMC.²⁷

However, such readings lead to a somewhat fatalistic view of the social dialogue; whereby through regulating in accordance with their own procedures and practices, the representatives of labour, in particular, are making the most of a bad situation (i.e. the limited likelihood of their actions being transposed by Council Directive). Conversely, one can suggest this reality has been embraced by the social partners, as they have purposely chosen to utilise the framework of social dialogue to negotiate and conclude agreements independently of the institutions of the Union. Furthermore, forums such as the social dialogue committees also appear to have been repurposed towards these ends (e.g. a significant number of new generation texts and seven out of eight agreements have been reached within their auspices).

7.3.1 Hidden Dynamics

This alternative reading is neglected within scholarship on the social dialogue. Importantly to the detriment of a clearer understanding of its operation and thus its potential for the establishment of an EU minima.

On the surface, this appears to be an act of opportunism by the social partners, locked out of a policy process post-99' that has proven unfavourable to social issues, they have sought to repurpose the social dialogue to support their own actions. Importantly, a similar situation is visible with regard to European Works Councils.

Multinational companies and trade unions have driven their development from forums for worker information and consultation to the conclusion of agreements

and ETUC and repealing Directive 96/34/EC (Text with EEA relevance) (OJ [2010] L68/13).

²⁷ E.g. the European Employment Strategy and the OMC in Social Protection and Social Inclusion (both of which are now a part of the Europe 2020 strategy and the yearly European Semester).

(which was not the intention of legislators during the drafting of the directive).²⁸ Labour lawyers have suggested this is an example of ‘normative self-service’, “whereby social norms draw their legitimacy from an institutional framework”.²⁹

This view is reinforced by the ‘forum shopping’ of representatives of labour. Depending upon the issue under review, other routes inside and outside of the institutional and policy framework of the Union are also considered for regulation. Here, examples include informal modes of governance such as wage coordination. European industry federations have created networks of national affiliates with the intention of influencing the outcome of domestic collective bargaining rounds.³⁰ Importantly, to aid their perceived legitimacy, rules such as inflation plus productivity are subject to monitoring processes similar to those employed under the OMC (although their normative force is ultimately drawn from national legal systems).

This complexity, in terms of processes, but also extending to the actors and norms, involved in the operation of industrial relations, is well known to experts in the field. However, research on each aspect is almost exclusively undertaken in isolation, without regard for the possibility for interaction (especially at the European level). Here, sociologists working on issues of legal pluralism have challenged lawyers to take situations of normativity more seriously.³¹

²⁸ So-called ‘transnational company agreements’ have been concluded on a variety of issues (although they mainly cover corporate social responsibility).

²⁹ Alain Supiot, ‘Du nouveau au self-service normatif : la responsabilité sociale des entreprises’ in *Etudes offertes à Jean Pélissier, Analyse juridique et valeurs en droit social* (Daloz 2004) 541 – 548.

³⁰ Examples include the initiatives of the Doorn Group and the European Metalworkers’ Federation discussed in the previous chapter.

³¹ See Saskia Sassen, *Territory – Authority – Rights: From Medieval to Global Assemblages* (Princeton University Press 2006).

7.4 Transnational labour law

Literature on legal pluralism has recently caught the attention of scholars investigating the emergence of transnational law and what it means for workers.³² This builds upon the research of Zumbansen, operationalising his approach towards the achievement of objectives related to the furtherance of social/economic justice.³³ Drawing upon the work of De Sousa Santos, Blackett and Trebilcock frame their conceptualisation of transnational labour law in terms of its potential to provide “spaces for and strategies of counter-hegemony wherever they may be found”.³⁴ Importantly, they recognise this may “develop in startlingly unbound ways”, both in terms of the objectives pursued and methods used by representatives of labour.³⁵

Viewed in this way, the fragmentation of law provides labour with new opportunities “through opening up an included middle where multivalent options are available”.³⁶ Whether between public/private power, formal/informal governance or hard/soft law, all arrangements are legitimate if capable of being employed counter-hegemonically; understood as prioritising the transnational interests of labour over those of capital.³⁷ This includes diverse objectives related to the furtherance of social/economic justice. For example, inter- vs. intra-union solidarity or distributive vs. integrative bargaining.

When read against the discussion above, on the development of the social dialogue, its potential as an alternative space for societal governance is brought to the fore. The popularity of autonomous agreements amongst the representatives of labour can be interpreted as a response to a market-based

³² See Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar 2015)

³³ The descriptive nature of Zumbansen’s account allows for its combination with other approaches (including those with a specific normative orientation).

³⁴ Blackett and Trebilcock (n 32).

³⁵ *ibid.*

³⁶ H. Patrick Glenn, *The Cosmopolitan State* (OUP 2013) 275.

³⁷ Blackett and Trebilcock (n 32) 31.

form of integration that has prioritised economic over social issues, by facilitating the greater mobility of capital (parallels can be drawn with Karl Polanyi's work on social counter-movements; whereby societal actors attempt to re-embed the economy within social relations).³⁸ Of particular interest to this chapter is the approach of the representatives of labour, who in an attempt to address this asymmetry, have developed forms of regulation based upon the so-called 'neo-liberal legal technologies' favoured by management (of which, autonomous agreements and new generations texts are examples).³⁹

Here, descriptions draw parallels with soft law and new governance instruments; neither are legally binding or justiciable, and have been characterised in opposition to command and control regulation as:

Less rigid, prescriptive, committed to uniform outcomes, and hierarchical... than older forms of governance (e.g. hard law Council Directives).⁴⁰

Furthermore, to ensure practical effect, they make use of strategies such as benchmarking and target setting, peer review, and the exchange of best practice. Multinational companies have been willing to commit to these instruments as they convey an intention to act but carry limited sanctions in the event of non-compliance.

Conversely, trade unions have employed them in a more offensive manner, for regulating issues that have been, or would be, overlooked for legislation at EU-level. An example, discussed in the next chapter, is the crystalline silica

³⁸ E.g. through the development of the single market; see Karl Polanyi, *The Great Transformation: The Political and Moral Origins of Our Time* (2nd edn, Beacon 2002).

³⁹ This characterisation is arguably a result of their use towards the deregulation of the labour market (in particular, within organisations such as the OECD).

⁴⁰ Gráinne de Búrca and Joanne Scott, 'Introduction: New Governance, Law and Constitutionalism' in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and US* (Hart 2006) 2.

agreement, that was initiated by representatives of labour as a response to the exclusion of an occupational exposure limit from the Carcinogens and Chemical Agents Directives.⁴¹ Also, it combines elements of soft law and new governance instruments in order to improve the effectiveness of its implementation.

Importantly, such arrangements capture what it means to act counter-hegemonically; in that all methods, irrespective of how they have been used previously, should be considered in the pursuit of labour's and, more broadly, civic society's objectives. However, the potential of any such strategy is dependent upon how it is received, requiring insights on transnationalisation to be read in light of practical experiences.

7.4.1 Possibilities

The decentering of the state, consequent of a pluralist approach, opens governance, specifically by way of traditional legal methods, to instruments previously overlooked. Moving away from defining law against politico-historically contingent institutions, what has been described as the 'pedigree' of an instrument is no longer important.⁴² Distinctions between thick/thin, formal/informal, and hard/soft, are replaced with a purposive approach toward their study, which focuses upon their practical effects. For example, guidelines

⁴¹ Directive 2004/37/EC of the European Parliament and of the Council of 29 April 2004 on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (Sixth individual Directive within the meaning of Article 16(1) of Council Directive 89/391/EEC) (codified version) (Text with EEA relevance) (OJ [2004] L229/23); Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks relating to chemical agents at work (fourteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).

⁴² Which is, of course, an illusion to Lon Fuller, see *The Morality of Law* (Yale University Press 1964).

are not *prima facie* inferior to collective agreements, rather they may be the most effective form of regulation in a particular situation.⁴³

However, this view is often given short shrift within literature on the social dialogue. This is no doubt a consequence of how European industrial relations is studied. Here, there is a tendency to focus upon comparisons with national systems, rather than its development as a distinct field (in terms of actors, norms and processes).⁴⁴ As such, autonomous agreements are compared to national collective agreements, with the former characterised, versus the latter, as soft law due to their legal effect (in that they are not viewed as contracts, nor is there provision for their extension). Seemingly due to such differences, research is quick to cast them as ineffectual.

Within these debates, one can read the prefix 'soft' as code for 'less than...' law. Reflections on the implementation of autonomous agreements suggest poor results are attributable to the limited nature of sanctions in the event of non-compliance; strategies of naming and shaming are compared to those of financial penalties (which are commonly included as provisions in national collective agreements). However, these views are based more upon allegiance to the canon of labour law, and the protections won at the national level through state-based forms of legislation, than scientific investigation of the potential of alternative methods of governance.

Neglecting this avenue of enquiry, based upon dogma, is unnecessarily limiting. Exploring how autonomous agreements and new generations texts could be used to further the objectives of organised labour should be a top priority for scholarship. Only by doing so, can the emancipatory potential of the

⁴³ This was the case with the telework agreement in the UK, that was implemented via guidelines due to the predominance of enterprise level collective bargaining (and thus the difficulty of transposition by way of cross-industry or sectoral level collective agreements).

⁴⁴ Which has been presented in this chapter as an example of transnationalisation and legal pluralism. Conversely, see the rich literature on multi-level governance.

social dialogue be realised (i.e. in terms of its functioning as an alternative space for societal governance).

Here, research on designing effective and, as a consequence, developing an workable proposal for an EU minima should be directed in three areas.

Firstly, the relationship between autonomous agreements and new generation texts and the potential for their use together/in combination warrants further investigation. Research in this area has been undertaken from perspectives on legal hybridity,⁴⁵ which focus upon the design of regulation and the interaction of policy instruments. For example, the aforementioned autonomous agreement on crystalline silica, serves as a framework for feedback processes, that provide information which is used to ensure that its objectives remain current.⁴⁶

Secondly, given positive experiences with such experimental forms of governance, would transposition by way of Council Directive be encouraged by the Commission or, in other words, could autonomous action lay the groundwork for legislation? Although, would this be desired by labour if their own methods were effective? Thirdly, how does transnationalisation effect the social dialogue more broadly? Based upon this approach, is it possible to view its operation in isolation from other modes of governance within a multi-level system of European industrial relations? What are the synergies between these and how could they be exploited to the advantage of the representatives of labour?

⁴⁵ See George Wilson, 'The View from Law and New Governance: A Critical Appraisal of Hybridity in Peace and Development Studies' in Nicolas Lemay-Hebert and Rosa Freedman (eds) *Hybridity: Law, Culture and Development* (Routledge 2017).

⁴⁶ E.g. site-level experiences with monitoring protocols that are intended to reduce exposure to dust.

7.4.2 Dependencies

Importantly, the decentering of the state does not disregard its facilitative role; meaning that although no longer a point of reference for understanding what law is, the success of autonomous forms of ordering are still dependent upon its support (whether directly through Member States or more indirectly through the Union). Indeed, the implementation of autonomous agreements under Article 154(4) TFEU relies upon national unions affiliated with peak-level European industry federations.

Once reached at EU-level, autonomous agreements are not directly effective but require transposition by way of collective agreement in each Member State. However, the heterogeneity of industrial relations traditions within the Union challenges the effectiveness of this method. Systems of company level bargaining, coupled with poor articulation between levels, make transposition especially difficult. For example, with regard to central and eastern European Member States, significant replication would be required in order to ensure meaningful coverage. Moreover, this is without considering low, and declining, trade union density.

With regard to EU-level industrial relations, a recurrent theme is the need for support (e.g. through capacity building initiatives, legal aid, and financing programmes). However, experience with the autonomous route of the social dialogue directs attention towards a different strategy; being the avoidance of the Member States. Recently, the implementation of agreements has been attempted by directly issuing multinational companies with guidelines, rather than pursuing transposition in “accordance with the procedures and practices specific to management and labour”. In effect, bypassing employers’ associations and trade unions in Member States.

Importantly, such strategies reintroduce dependence but at the level of the Union. The Commission provides the fora, through the Social Dialogue Committee (SDCs), at both cross-industry and sectoral levels, in which

management and labour meet.⁴⁷ Since their establishment, almost all agreements have been reached within SDCs. This popularity is no doubt a result of the role they play in facilitating negotiation but the official recognition of both sides of industry is dependent upon their participation. Which, in turn, is a prerequisite for further technical, legal, and financial support.⁴⁸ Without SDCs, it is likely agreements would be restricted to well organised sectors, with a tradition of transnational action e.g. in metalworking not hairdressing.

7.5 Conclusion

Adopting transnational legal pluralism as approach to the study of the social dialogue sheds light upon the complexity, which is often overlooked, involved in its operation (in terms of actors, norms and processes). It recognises the myriad forms of regulatory innovation and interaction illustrative of the transformation of rule-making in the ongoing process of globalisation or ever closer political and economic union.⁴⁹ Distinctions between thick/thin, formal/informal, and hard/soft, are replaced with a purposive approach towards the study of law, that focuses upon its practical effects; encouraging experimentation with previously overlooked forms of regulation. Importantly, this approach alerts law-makers to the potential for interaction to occur between different types of legal instruments which, to-date, has often been overlooked.

For the idea of an EU minimum wage policy, this directs the social partners to take advantage of the full panoply of governance instruments they have developed in furtherance of outlining a workable policy; autonomous agreements must not be viewed as the only possible option nor as being siloed

⁴⁷ Decision 98/500/EC of 20 May 1998 on the establishment of Sectoral Dialogue Committees Promoting the Dialogue between the Social Partners at European Level (OJ [1998] L225).

⁴⁸ Which can take the form of funding for research projects, financial programmes for joint actions, seconding staff to help with the drafting of agreements etc.

⁴⁹ With regard to the potential future direction of the Union.

from recent developments (i.e. new generation texts based upon open method of coordination-type processes).

Importantly, this point is picked-up in the next chapter on design, which explores how new generation texts and autonomous agreements could be combined to improve the effectiveness of an EU minima (and to flesh out how it would operate in practice). This is vitally important when considered in light of the issues raised in this chapter. Here, the effective implementation of autonomous agreements under Article 154(4) TFEU relies upon national unions affiliated with peak-level European industry federations; with the success of joint actions dependent upon institutional forms of support (whether directly through Member States or more indirectly through the Union).

Especially noteworthy for the development of transnational legal pluralism – as a theory – is how its application to the social dialogue illustrates its limitations, specifically, its underestimation of the continuing importance of the state. This point is not recognised in current literature and serves to illustrate the methodological value of using empirical evidence – by way of the case study of the social dialogue – to inform the development of (legal) theory.

With regards to the social dialogue, although without a monopoly on normativity, the state still has significant powers of support. As work on commercial arbitration illustrates,⁵⁰ such situations direct attention towards the relative autonomy of legal fields and their connections to the state; serving to facilitate industrial democracy rather than directing industrial action (interestingly, this casts legal pluralism, in particular, as a third way political theory, attempting to chart a pathway between strategies of intervention and abstention).

⁵⁰ See Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Creation of a Transnational Legal Order* (University of Chicago Press 1996).

This can manifest itself not only through technical, legal, and financial support etc. but also administrative law concerns e.g. regarding the representativeness of those involved in the conclusion of agreements, and whether they are undertaken in conformity with fundamental economic and social rights. Structures addressing these concerns have been developed by the Commission, however, they would require repurposing in order to more fully support the actions of the social partners. Although it is not possible to resolve these issues entirely, they can be partially mitigated against by designing a policy that takes into account the reality of regulating in a legal space that is fragmented and deeply contested. It is only by doing so that policy proposals in this area – like that of an EU minima – can be effective. It is to this endeavour that this thesis turns next.

8. Designing an EU minimum wage policy

8.1 Introduction

The real value of this thesis lies in creating a proposal that outlines how an EU minimum wage policy could work in practice. As the literature discussed in chapter 3 illustrates, this is a notable blind spot in current debates.

As suggested in the previous chapter, it appears that basing a wage norm around an autonomous European social partner agreement, reached between the social partners within the auspices of the European social dialogue, is a promising way forward, however, in order to present a workable proposal, attention must be directed towards how it would operate in practice. What role, for example, would the EU-level social partners, their national affiliates and workers have in setting its value? How would they ensure it is kept up to date with wage developments within their industry and how would the effectiveness of its implementation be ensured?

This chapter argues that the social partners have the ability to improve the effectiveness of their agreements, specifically those implemented autonomously, by combining the various policy instruments they have trialled since the launch of the Lisbon Strategy in 2000. This point builds on insights from the last chapter on transnational labour law, exploring how the full panoply of instruments available to the social partners can be exploited in furtherance of developing a workable proposal for an EU minima.

A framework for understanding this combination is developed from literature on law and new governance and is used as a basis against which to suggest a hybrid regulatory design for an EU minimum wage based on an autonomous social partner agreement. This framework is unique and contributes a new perspective to the design of regulation, in particular, for European social partner agreements, that has not previously been explored. Moreover, this unique approach to the design of regulation has potential implications beyond suggestions for the design of an EU minima, as a strategy that could be

adopted for improving the effectiveness of other agreements (including national level collective agreements).

This hybrid approach to the design of regulation is explored through the autonomous social partner agreement on crystalline silica, a novel agreement that itself has received very little attention from social dialogue scholars and regulationists. Its design – whether intentional or not – is subsequently used as a basis for outlining what a more comprehensive EU minimum wage policy could look like in practice.

8.2 The context of implementation

Of the negotiation, conclusion and implementation of agreements, implementation is the weakest aspect of the overall policy cycle. This is especially true of agreements implemented via the voluntary route of the European social dialogue, where the moral and political obligation for implementation by national affiliates is not as strong as the legally binding effect of agreements transposed by Council Directive.¹ Assessments of the autonomous implementation of agreements have been mixed. Research conducted on the Telework Agreement shows that the procedures and practices used for implementation differed markedly between Member States, resulting in ‘gaps’ or uneven implementation.² Issues including weak linkages between bargaining levels and undeveloped systems of industrial relations in central and eastern Member States have also been argued to hinder implementation.³

¹ Stijn Smismans, ‘The European Social Dialogue in the Shadow of Hierarchy’ (2008) 28(1) *Journal of Public Policy* 161, 174.

² Thomas Prosser, ‘The implementation of the Telework and Work-related Stress Agreements: European social dialogue through ‘soft’ law?’ (2011) 17(3) *European Journal of Industrial Relations* 245, 254.

³ *ibid*; and more recently see Thomas Prosser, ‘Accounting for National and Sectoral Variance in the Implementation of European Social Partner ‘Soft’ Law: The Cases of the Implementation of the Telework and Work-Related Stress Agreements’ (2015) 53(2) *British Journal of Industrial Relations* 254.

These issues were recognised by the Commission at a special conference held in March 2015 to mark the new start for the social dialogue. The Commission sought to facilitate discussion between itself and the social partners on how to strengthen the social dialogue. It committed to “[work] more closely with the social partners to improve the quality and effectiveness of the social dialogue at all levels”.⁴ These commitments are to be realised through future capacity building initiatives.⁵ Irrespective of the motivations of the Commission (e.g. facilitating the greater involvement of the social partners in policymaking), by improving links between bargaining levels and developing industrial relations in newer Member States, capacity building can have a positive (indirect) effect upon the implementation of autonomous agreements. The response of the social partners, though, highlights those areas neglected by the Commission.

The employers’ and employees’ representatives raised concerns regarding the overt focus of the new start on procedural issues. The employers’ representative BusinessEurope suggested that this was to the detriment of having a clear vision of the substantive problems facing Europe (e.g. high levels of youth unemployment).⁶ In the context of the debate on better regulation, trade unions argued that insufficient value is attached to high quality regulation.⁷ This directs attention towards a perspective neglected by research on implementation: the design of agreements. Previous calls by the European Economic and Social Committee for the social partners to utilise all instruments available to ensure effective implementation and to “develop current

⁴ European Commission (n 6).

⁵ *ibid.*

⁶ BusinessEurope, ‘Introductory remarks’ (High Level Conference: A new start for social dialogue, Brussels, 5 March 2015)

<<http://ec.europa.eu/social/BlobServlet?docId=13590&langId=en>> accessed 3 February 2018.

⁷ ETUC, ‘Introductory remarks’, (High Level Conference: A new start for social dialogue, Brussels, 5 March 2015)

<<http://ec.europa.eu/social/BlobServlet?docId=13609&langId=en>> accessed 3 February 2018.

arrangements further and define new rules for ensuring that their European agreements are effectively implemented” speak to this perspective.⁸

Adopting a design perspective involves creating regulation that effectively achieves its policy goals with minimal economic costs and performs well in terms of other criteria such as equity and political acceptability.⁹ Regulationists also stress the importance of using multiple policy instruments in combination and involving a broad range of actors in developing effective regulation.¹⁰ This implies a micro rather than macro focus upon the operation of social dialogue, investigating the ways in which the functioning of agreements can be tailored to promote, amongst other concerns, effective implementation. With regard to the voluntary route of the social dialogue, specific considerations include the relationship between autonomous agreements and ‘new generation texts’ modelled upon the Open Method of Coordination (OMC), and between actors established at company, sector and cross-industry levels.

Now is an appropriate time to develop a perspective on the design of regulation specific to the European social dialogue; not only in the pursuit of a more comprehensive EU minimum wage policy but also in order to improve effectiveness of existing agreements. The new start for the social dialogue appears to change little in respect of the Commission’s willingness to involve the social partners as co-regulators in the social policy field. The last genuine cross-industry agreement implemented by Council Directive was the Framework Agreement on Fixed-Term Work in 1999.¹¹ The voluntary route of the social dialogue has suffered similar problems, with regulation on core labour law issues failing to materialise without pressure from the Commission

⁸ European Economic and Social Committee, *Social dialogue in the context of EMU* (2014) SOC/507 6.

⁹ Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (OUP 1998) 4.

¹⁰ *ibid.*

¹¹ Directive 1999/70/EC of 28 June 1990 concerning the framework agreement on fixed-term work concluded by ETUC, UNCIE and CEEP (OJ [1999] L175/43).

for the representatives of management to negotiate with those of labour. The recent controversy over the transposition of the Hairdressing Agreement is perhaps illustrative of the future challenges agreements submitted to the Commission after voluntary negotiation will face in light of the better regulation agenda.¹²

A better understanding of how to design agreements holds the promise of improving the ability of the social partners to reach their goals in light of these challenges. Agreements designed to take full advantage of the policy instruments and actors available to the social partners could overcome problems with implementation and contribute towards the development of the voluntary route of the social dialogue as an alternative space for societal governance (with implementation by the national affiliates of the social partners a viable alternative to that by Council Directive). Similar policy instruments and proposals for their combination have been explored in literature on law and new governance.

8.3 Combining policy instruments

With a view to the Laeken European Council in 2001, the social partners made a joint declaration outlining their intention to develop policy instruments modelled upon the OMC.¹³ This was later endorsed by the Commission who considered the “use of... machinery based upon the open method of coordination as an extremely promising way forward” for the European social dialogue and directed the social partners to “adapt the open method of coordination to their relations in all appropriate areas”.¹⁴ Developing policy

¹² Krzysztof Bandasz, ‘A framework agreement in the hairdressing sector: the European social dialogue at a crossroads (2014) 20(4) Transfer: European Review of Labour and Research 1, 16.

¹³ ETUC, UNICE and CEEP, ‘Joint contribution by the social partners to the Laeken European Council’ <<http://erc-online.eu/wp-content/uploads/2014/04/2007-01093-EN.pdf>> accessed 3 February 2018.

¹⁴ European Commission, *The European social dialogue, a force for innovation and change* COM (2002) 341 final 19.

instruments based upon the OMC was seen as a way of managing some of the problems with implementation associated with enlargement.¹⁵

Commonly known as ‘new generation texts’, these policy instruments share similarities with institutional variants of the OMC – such as the European Employment Strategy – and are characterised by the use of benchmarking and target setting, evaluation by way of peer review, and the exchange of best practice.¹⁶ The Commission broadly distinguishes between three types of new generation text: ‘process-oriented texts’ that contain provisions mandating separate processes to monitor implementation, including frameworks of action, codes of conduct, guidelines, and policy orientations; ‘joint opinions and tools’, including policy opinions, declarations, and training materials; and ‘procedural texts’ that detail the procedural rules to be followed for cross-industry and sectoral social dialogue.¹⁷ The Commission also differentiates between policy instruments that outline ‘reciprocal commitments’ (e.g. autonomous agreements and process-oriented texts) and ‘common positions’ (e.g. joint opinions).¹⁸

In contrast to agreements implemented by Council Directive, autonomous agreements and new generation texts are considered examples of ‘soft’ law.¹⁹ According to international relations literature, soft law is characterised as non-legally binding but as capable of having practical effect.²⁰ Conversely, ‘hard’ law is characterised as legally binding, precise and for which the power for

¹⁵ Degryse (n 4) 34.

¹⁶ On the OMC and social policy see Mark Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (CUP 2011).

¹⁷ European Commission, *Partnership for change in an enlarged Europe – Enhancing the contribution of the European social dialogue* COM (2004) 557 final 15 – 19.

¹⁸ *ibid.*

¹⁹ See Philippe Pochet, ‘European Social Dialogue between Hard and Soft Law’ (EUSA Tenth Biennial Conference, Montreal, May 2007).

²⁰ See Kenneth Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54(3) *International Organization* 421

implementation and interpretation is delegated.²¹ New generation texts belong to the family of ‘new’ governance instruments developed by the EU in the early 2000s. In addition to the description of soft law above, new governance instruments are said to be “less rigid, less prescriptive, less committed to uniform outcomes, and less hierarchical in nature” than old(er) forms of governance (e.g. hard law Council Directives).²²

8.3.1 Hybridity, law and new governance

Research on hybridity and the relationship between law and new governance provides a starting point for understanding the proposed use of autonomous agreements and new generation texts together. De Búrca and Scott suggest that law may be blind to new governance (the ‘gap’ thesis), that law and new governance may coexist and engage with one another (the ‘hybridity’ thesis), or that new governance has demanded, and will increasingly demand, a reconceptualisation of our understanding of law (the ‘transformation’ thesis).²³ In relation to their hybridity thesis, de Búrca and Scott identify three types of hybridity: fundamental/baseline hybridity; instrumental/developmental hybridity; and default hybridity.²⁴ However, descriptive and conceptual issues with this research must be resolved before it can serve as a basis for the design of an EU minimum wage policy.

The implicit equation of law with hard law and new governance with soft law by this research is particularly problematic. Substituting hard law with autonomous agreements causes descriptive inaccuracies. As sources of norms, autonomous agreements are similar to collective agreements in Member States, in that they often serve a procedural function, but differ in that they very

²¹ *ibid.*

²² Gráinne de Búrca and Joanne Scott, ‘Introduction: New Governance, Law and Constitutionalism’ in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and US* (Hart 2006) 2.

²³ *ibid* 4 – 10.

²⁴ *ibid* 6 – 9.

rarely serve a normative or contractual function.²⁵ Established practice amongst the social partners is for their use as non-legally binding reciprocal commitments.

Suggesting that autonomous agreements and new generation texts exist along a continuum of legality between the poles of hard and soft law goes part way towards mitigating against these descriptive inaccuracies but creates conceptual problems. As ideal-types, the properties of hard and soft law take the form of 'logical opposites'. Their combination creates incoherence: centralisation is pitted against decentralisation; singular against multi-level authority; command against deliberation; rigid and stable against flexible and revisable norms etc.²⁶ Either the properties of each are mixed e.g. creating norms that are deliberatively produced but rigidly applied, or matched e.g. creating norms that are relatively (in)flexible.²⁷ The fixation within the academy on the terms hard and soft law has limited the potential of research on hybridity, law and new governance.²⁸ Redirecting its focus towards instruments of governance, as opposed to typologies of law, is a solution to this problem and allows for the application of this research to the social dialogue.²⁹

²⁵ Simon Deakin and Gillian Morris, *Labour Law* (6th edn, Hart 2012) 68 – 69. For an alternative view on the contractual effect of autonomous agreements see Dagmar Sheikh, 'Autonomous Collective Agreements as a Regulatory Devise in European Labour Law: How to Read Article 138 EC' (2005) 34(1) *Industrial Law Journal* 23, 47.

²⁶ Neil Walker, 'Constitutionalism and New Governance in the European Union: Rethinking the Boundaries' (2005) EUI Working Paper Law No. 2005/15 7.

²⁷ *ibid.*

²⁸ On the false distinction between hard and soft law see Mark Dawson, 'Soft Law and the Rule of Law in the European Union' in Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart 2013) 221.

²⁹ A similar extension of de Búrca and Scott's work has been made by Ter Haar and Copeland but to modes, rather than instruments, of governance and has subsequently been considered by Armstrong. See Beryl Ter Harr and Paul Copeland, 'EU Youth Policy: A Waterfall of Softness' (EUSA Twelfth Biennial Conference, Boston, March 2011); Kenneth Armstrong, 'EU social policy and the governance architecture of Europe 2020' (2012) 18(3) *Transfer* 285; and Kenneth Armstrong, 'New Governance

8.3.2 (Re)developing hybridity

Of de Búrca and Scott's types of hybridity, instrumental/developmental hybridity best captures the interaction between autonomous agreements and new generation texts necessary for their successful combination. When adapted for the social dialogue, instrumental/developmental hybridity stipulates a relationship whereby autonomous agreements provide a dynamic framework for the operation of new generation texts.³⁰ This could manifest itself as a new generation text providing information as a mandated implementation monitoring process that is subsequently used in the development of an autonomous agreement; for example, a specific provision, goal or the overall structure of the agreement. This potential for 'transformation' resulting from hybridity is recognised by Trubek and Trubek, who focus upon "situations of real integration and mutual dependence" between law and new governance.³¹ Hybridity is thus cast as a theory capable of accounting for change beyond the initial combination of law and new governance, to their progressive development together.

This understanding of hybridity is similar to that expressed in literature on post-colonial theory, in particular, post-colonial cultural theory, with regard to modern cultural, social and political relationships.³² Here, Peterson explains that the appropriation and development of the term in post-colonial cultural

and the European Union: An Empirical and Conceptual Critique' in Gráinne de Búrca, Claire Kilpatrick and Joanne Scott (eds), *Critical Legal Perspectives on Global Governance: Liber Amicorum David M Trubek* (Hart 2014) 249.

³⁰ de Búrca and Scott (n 22) 8.

³¹ David Trubek and Louise Trubek, 'New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation' (2007) University of Wisconsin Law School Legal Studies Research Paper Series Paper No. 1047 (this quote accompanies the text with footnote 10).

³² See George Wilson, 'The View from Law and New Governance: A Critical Appraisal of Hybridity in Peace and Development Studies' in Nicolas Lemay-Hebert and Rosa Freedman (eds), *Hybridity: An Interdisciplinary Perspective* (Routledge: GlassHouse Series 2017).

theory has “found increasing currency in the analysis of externally driven peace and development interventions”.³³ Indeed, Richmond and Mitchell describe how the process of ‘hybridization’ occurs at the ‘site’ where international peace interventions meet “the every-day activities, needs, interests and experiences of local groups”.³⁴ This conceptualisation – of hybridity occurring between different entities or groups, unequal in terms of power – is most commonly associated with the work of Homi Bhabha.

For Bhabha, hybridity occurs within a ‘third space’, between the dominant and subaltern.³⁵ It results from an “immanent difference, distortion and fracture”³⁶ *within* identities, that creates a ‘contact zone’³⁷ for relationships *between* identities. This is said to allow both influence over each another and,³⁸ as claimed by Bhabha, for “the possibility of a cultural hybrid that entertains difference without an assumed or imposed hierarchy”.³⁹ Freedman suggests that Bhabha’s contact zone may be a metaphorical or a physical space,⁴⁰ in the case of the latter, enabling his work to be extended along structural/functionalist lines to hybrid norms and institutions. However, this

³³ Jenny H. Peterson, ‘A Conceptual Unpacking of Hybridity: Accounting for Notions of Power, Politics and Progress in Analyses of Aid-Driven Interfaces’ (2012) 7(2) *Journal of Peacebuilding & Development* 9, 11.

³⁴ Oliver P. Richmond and Audra Mitchell, ‘Introduction – Towards a Post-Liberal Peace: Exploring Hybridity via Everyday Forms of Resistance, Agency and Autonomy’ in Oliver P. Richmond and Audra Mitchell (eds), *Hybrid Forms of Peace: From Everyday Agency to Post Liberalism* (Palgrave Macmillan 2011) 1.

³⁵ Homi K. Bhabha, *The Location of Culture* (Routledge 1994) 52-56.

³⁶ Gëzim Visoka, ‘Three Levels of Hybridisation Practices in Post-conflict Kosovo’ (2012) 7(2) *Journal of Peacebuilding & Development* 23, 25.

³⁷ Bill Ashcroft, Gareth Griffiths and Helen Tiffin, *Post-Colonial Studies: The Key Concepts* (Routledge 2000) 118.

³⁸ Visoka (n 36) 25.

³⁹ Bhabha (n 35) 4.

⁴⁰ Rosa Freedman, ‘‘Third Generation’ Rights: Is There Room for Hybrid Constructs Within International Human Rights Law?’ (2013) 2(4) *Cambridge Journal of International and Comparative Law* 935, 941.

development is still premised upon an implicit understanding of hybridity as a process of combination.

In response to concerns that Bhabha's conceptualisation of hybridity leads to 'in-betweenness' or liminality, contemporary accounts have suggested that hybridity should be viewed as a process that gives rise to new transcultural forms.⁴¹ As such, the allure of hybridity appears to lie in its perceived ability to transcend absolutes (Western versus non-Western, modern versus traditional, universal versus particular) and, in doing so, uncovering and acknowledging the complexity or 'messiness' of reality. Surprisingly, given the myriad ways in which hybridity has been conceptualised, ideas regarding "the series of iterations and in-betweens"⁴² that lead to the creation of hybrids have remained somewhat underdeveloped. The division between hybridity as in-betweenness and hybridity as a process is apparent in literature on peace and development studies.⁴³

The work of Richmond and Mac Ginty, respectively, provides examples of these configurations. Richmond's 'local-liberal hybridity' describes the relationship between 'the local' and 'the international', where both co-exist, rather than assimilate or dominate.⁴⁴ Although scope is provided for local resistance, modification, and adaptation to the liberal peace, 'local-liberal' hybridity is said to represent a combination of different political practices.⁴⁵ Mac Ginty's 'hybrid peace' considers the role of agency and structure in the process of hybridisation, including the power of liberal agents to enforce and incentivise compliance and local actors to resist and maintain alternatives.⁴⁶ These

⁴¹ Ashcroft, Griffiths and Tiffin (n 16) 118.

⁴² Peterson (n 33) 12.

⁴³ Visoka (n 36) 25.

⁴⁴ Oliver P. Richmond, 'Resistance and Post-liberal Peace' (2010) 38(3) *Millennium: Journal of International Studies* 665, 687.

⁴⁵ Oliver P. Richmond, *A Post-Liberal Peace* (Routledge 2011) 189.

⁴⁶ Roger Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (Palgrave Macmillan 2011) 69.

processes are presented as taking place against a background of conflict and disparities in power between liberal agents and local actors.⁴⁷

As Freedman recognises, hybridity can thus be understood in multiple ways: either as a theory, as a process and/or as an entity.⁴⁸ The result is a trade-off: as hybridity becomes more conceptually inclusive, its explanatory potential is diminished. Kraidy's challenge for scholars to develop "tools to tackle [this] vexing ambiguity"⁴⁹ must be accepted. Literature from law and new governance and peace and development studies considers hybrid entities as outputs but approaches the inputs of theory and process in different ways.⁵⁰ Whereas research has often focussed upon hybridity as a process of combination, little work has been undertaken on the transformative potential of hybridisation. Here, Trubek and Trubek's research on the transformative potential of hybridity is the exception and can be interpreted as a call for conceptual clarity, for hybridity to be elevated from its use to describe the combination of two entities, to the creation of a new distinct entity. Given the significance attributed to the term, a distinction can be drawn between those theories that advance only a 'partial' understanding of hybridity and those that invest more in its ability to serve as a descriptive and normative frame of reference for the investigation and design of regulation.

This modest contribution to legal theory has the potential to have a significant impact upon the design of social partner agreements. Designing regulation on this basis holds the promise of improving the implementation of autonomous agreements and, as a consequence, the potential success of an EU minima. Towards this end, consideration must be given to the individual properties of each governance instrument in order to create a governance architecture that facilitates hybridity. However, it is also possible that transformative hybridity

⁴⁷ *ibid.*

⁴⁸ Freedman (n 40) 940-42.

⁴⁹ Kraidy 70.

⁵⁰ Hybridity as understood in terms of inputs and outputs is developed by Freedman (n 40) 940-41.

may be achieved based upon the development of an existing relationship of partial hybridity between an autonomous agreement and new generation text. This has been described as a process of 'programmatic development',⁵¹ whereby transformative hybridity develops through progressive stages with the operation of law and new governance together. The autonomous social partner agreement on crystalline silica is the only agreement, including those implemented by Council Directive, to display hybridity in this form. The agreement is explored below as potential mode for the design of an EU minima.

8.4 The Crystalline Silica Agreement

The 'Agreement on Workers Health Protection Through the Good Handling and Use of Crystalline Silica and Products Containing it',⁵² was originally signed between 15 European employers' organisations and 2 European industry federations from the chemical and metallurgical industries on 24th April 2006. With the signature of the European Expanded Clays Association on 17th June 2009, the agreement is estimated to cover more than 2 million workers in an industry worth over €250 billion.⁵³ To date, very little research has been conducted on the operation of the agreement. Although its unique institutional features have been recognised,⁵⁴ it has not been investigated from a legal or, indeed, regulatory design perspective.

The main aim of the Crystalline Silica Agreement is to minimise exposure to respirable crystalline silica at work, by applying good practices in order to

⁵¹ See Wilson (n 32).

⁵² Agreement on Workers Health Protection through the Good Handling and Use of Crystalline Silica and Products containing it (OJ [2006] C279/2) (Crystalline Silica Agreement).

⁵³ NEPSI, 'Welcome to the NEPSI Website' <<http://www.nepsi.eu>> accessed 3 February 2018.

⁵⁴ Marco Peruzzi, 'Autonomy in European Social Dialogue' (2001) 27(1) *International Journal of Comparative Labour Law and Industrial Relations* 3, 18.

prevent, eliminate or reduce potential health risks to exposed workers.⁵⁵ Crystalline silica – simply understood as fine grain sand – is used in multiple industries in the production of products such as bricks, cement and glass. Inhalation of crystalline silica can lead to the development of silicosis and, consequently, an increased risk of lung cancer.⁵⁶ In recent years, respirable crystalline silica has been likened to asbestos with the number of claims for exposure rising significantly (especially in the United States).⁵⁷ An ancillary aim of the agreement is to increase knowledge of these potential health risks and to promote the use of good practices.⁵⁸ Recent research on the application of the agreement in Finland has shown that over the course of its operation, workplace exposure to respirable crystalline silica has decreased ten-fold.⁵⁹

Negotiations on the Crystalline Silica Agreement were initiated in 2003 by the European Silica Producers Association in response to the EU Scientific Committee on Occupational Exposure Limits' recommendation that an occupational exposure limit (OEL) be introduced for respirable crystalline silica.⁶⁰ There is currently no harmonised OEL for respirable crystalline silica at EU-level, however all Member States apart from Germany have their own national limits. Respirable crystalline silica is exempt from registration under REACH, whereas it has become standard practice, although not legally necessary, for it to be labelled as 'STOT RE Category 1' under the Classification, Labelling and Packaging Regulation (STOT stands for 'Specific

⁵⁵ Crystalline Silica Agreement, Article 1.

⁵⁶ See Claudio Peluccchi et al., 'Occupational silica exposure and lung cancer risk: a review of epidemiological studies 1996 – 2005' (2006) 17(7) *Annals of Oncology* 1039.

⁵⁷ The Actuary, 'Is silica the new asbestos?' <<http://www.theactuary.com/archive/old-articles/part-6/is-silica-the-new-asbestos-3F/>> accessed 3 February 2018.

⁵⁸ Crystalline Silica Agreement, Article 1.

⁵⁹ See Tapani Tuomi et al., 'Application of Good Practices as Described by the NEPSI Agreement Coincides With a Strong Decline in the Exposure to Respiratory Crystalline Silica in Finnish Workplaces' (2014) 58(7) *The Annals of Occupational Hygiene* 806.

⁶⁰ Scientific Committee on Occupational Exposure Limits, *Recommendation for silica, crystalline (respirable dust)* (2002) SCOEL/SUM/94 final.

Target Organ Toxicity' and RE for 'Repeated Exposure').⁶¹ Debates continue within the context of the revision of the Carcinogens Directive regarding whether respirable crystalline silica should be included as a carcinogen or rather an OEL set under the Chemical Agents Directive.⁶² A similar threat of EU legislation motivated Eurosil to propose the Crystalline Silica Agreement and negotiate its form with the European industry federations (a typical example of the 'shadow of the law' or the maxim 'you negotiate or we legislate').⁶³

The Crystalline Silica Agreement is unique in many respects: it was the first multi-sectoral autonomous agreement; is implemented through a network of links from site to European sector level by a bipartite council (unlike agreements implemented in accordance with national procedures and practices as per Article 155(2) TFEU); and has been adopted as a blueprint for similar regulation outside of the EU.⁶⁴ The agreement was concluded

⁶¹ Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EEC, and amending Regulation (EC) No 1907/2006 (Text with EEA relevance) (OJ [2008] L353/1).

⁶² Directive 2004/37/EC of the European Parliament and of the Council of 29 April 2004 on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (Sixth individual Directive within the meaning of Article 16(1) of Council Directive 89/391/EEC) (codified version) (Text with EEA relevance) (OJ [2004] L229/23); and Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks relating to chemical agents at work (fourteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC (OJ [1998] L131/110. On the revision of the Carcinogens Directive see Tony Musu, 'Revision of the Carcinogens Directive: anything happening?' (*HesaMag* Autumn/Winter 2013)

<http://www.etui.org/content/download/12306/105754/file/HESAMag_08_EN.pdf> accessed 3 February 2018.

⁶³ Brian Bercusson, 'The Dynamic of European Labour Law After Maastricht' (1994) 23(1) *Industrial Law Journal* 1, 20.

⁶⁴ The agreement has been applied in Norway, Serbia, Switzerland, Turkey and the USA.

independently of the sectoral social dialogue committees, although the social partners received financial help and technical assistance from the Commission. In a somewhat unusual move, employers' associations that were not recognised as social partners were granted temporary recognition by the Commission for the purpose of the negotiations. The Commission has since referred to the agreement as innovative,⁶⁵ whilst former Commissioner for Employment, Social Affairs and Equal Opportunities, Vladimír Špidla, commented at its signing that it was dynamic and a good example of partnership.⁶⁶

8.4.1 Hybrid architecture

Until now the uniqueness of the agreement's governance architecture has not been recognised and, as such, has not been investigated. The relationship between the agreement and the new generation texts it utilises can be described with reference to de Búrca and Scott's work on hybridity. This appears to be unintentional with no evidence of *ex ante* design but, given the relative success of the agreement, provides important insights into how an EU minima could be designed in order to improve its functioning (specifically efforts to improve implementation).

The Crystalline Silica Agreement is structured around a bipartite council that is responsible for, amongst other considerations, implementation and application. Known as the NEPSI council – an acronym for the 'European Network for Silica' resulting from the agreement – the body serves as an important bridge between the provisions of the agreement and the various new generation texts

⁶⁵ NEPSI, 'Reading Guidelines'

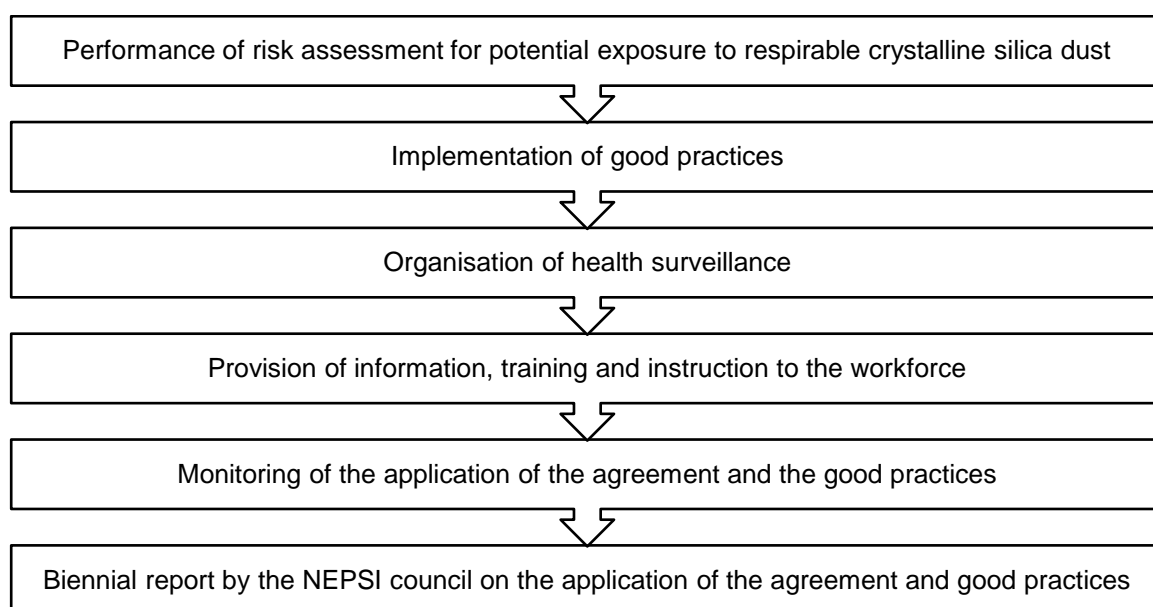
<http://www.nepsi.eu/media/2481/nepsi_reading_guidelines.pdf> accessed 3 February 2016.

⁶⁶ Vladimír Špidla, 'Keynote Address' ('Signing ceremony of the Agreement on Workers Health Protection through the Good Handling and Use of Crystalline Silica and Products Containing it', Brussels, 25 April 2006)

<http://www.nepsi.eu/media/2487/2006-04-25_spidla.pdf> accessed 3 February 2018.

it utilises. The agreement requires a risk assessment be performed at site level for potential exposure to respirable crystalline silica dust, followed by the organisation of health surveillance should it be required (this is in addition to the implementation of the good practices as held in the good practice guide). The NEPSI council is responsible for reviewing the agreement every two years from site to European sector level.

The structure of the agreement's operation is detailed in the graphic below:



Source: <http://www.nepsi.eu/agreement-good-practice-guide/agreement.aspx>

When viewed through the lens of control theory,⁶⁷ the agreement and the resulting NEPSI council can be understood as serving a command and control function; providing a framework for structuring interaction with new generation texts. The (re)developed account of hybridity presented above recognises that hierarchy is not a property restricted to traditional hard law instruments but that soft law instruments, such as autonomous agreements, are also capable of performing a similar function.

⁶⁷ See Colin Scott, 'The Governance of the European Union: The Potential for Multi-Level Control' (2002) 8(1) European Law Journal 59, 64.

Various new governance instruments are utilised by the Crystalline Silica Agreement. The main provisions of the agreement are supplemented by 8 annexes that mandate the use of new generation texts for purposes such as monitoring potential exposure to respirable crystalline silica dust and collecting information for the biennial reporting exercise on the application of the agreement. Of greatest interest is the relationship between the agreement and the good practice guide (which is the main instrument for its application). In accordance with the Commission's own categorisation of new generation texts,⁶⁸ good practice guides can be understood as 'tools' or, more specifically, training materials.

The good practice guide is held under Annex 1 of the Crystalline Silica Agreement and contains an introduction to the agreement, silica and the silica industry, respirable crystalline silica and its health effects, and advice on risk management. The good practice guide also includes a task manual comprised of separate task sheets for use at site level, providing general, and more specific, guidance for limiting exposure to respirable crystalline silica. Article 5(3) of the agreement provides that "Annex 1 [containing the good practice guide] may be adapted in accordance with the procedure provided for in Annex 7". The focus of this procedure is the revision of the task sheets rather than the good practice guide in general. Article 1 of Annex 7 encourages employers and employees to submit new or revised task sheets to be considered for adoption. The NEPSI council makes a decision on the adoption of submitted task sheets at the end of its biennial reporting exercise.

Whereas the task sheets held in the good practice guide may be added to or altered in light of experience with their application, provision is not made for the use of such experience to inform the development of the framework the agreement provides or, as transformative hybridity would demand, the broader functioning of the agreement e.g. its objectives, definitions, or principles. This governance architecture is similar to de Búrca and Scott's description of

⁶⁸ European Commission (n 17).

situations of fundamental/baseline hybridity;⁶⁹ whereby new governance instruments serve to improve the effectiveness of law e.g. the Crystalline Silica Agreement mandates the use of the good practice guide and provides for the adaptation of the task sheets in order to improve its implementation. De Búrca and Scott argue the dynamic of such relationships is strictly one way;⁷⁰ the agreement can change the new generation text but the reverse is not possible (this is similar to early suggestions for the combination of framework agreements and OMC-like processes in the social policy field).⁷¹ This partial form of hybridity is visible upon closer analysis of the agreement and is presented below as a basis against which to outline a hybrid governance architecture for an EU minimum wage policy.

8.4.2 Operation

Since the entry into force of the Crystalline Silica Agreement ten years ago, the NEPSI council has completed its biennial reporting exercise four times. A preliminary report on the application of the agreement was published in 2007, followed by full reports in 2008, 2010, 2012 and 2014. These reports show the agreement has reached a stage of maturity; the number of workers covered by risk assessments increased by 5% between 2008 and 2014,⁷² whilst those covered by health surveillance increased by 10% during the same period.⁷³ Importantly, during this time, the number of workers who had been provided with information, training and instruction on the task sheets increased from 44% to 66% of the total workforce.⁷⁴

⁶⁹ de Búrca and Scott (n 30) 7.

⁷⁰ *ibid.*

⁷¹ Fritz Scharpf, 'The European Social Model: Coping with the Challenges of Legitimate Diversity' (2002) 40(4) *Journal of Common Market Studies* 645, 662.

⁷² NEPSI, '2014 Executive Summary on the Application of the Agreement' <<http://www.nepsi.eu/media/4508/nepsi%202014%20executive%20summary%20public.pdf>> accessed 3 February 2018.

⁷³ *ibid.*

⁷⁴ *ibid.*

Figures from the biennial reports show that as the number of workers provided with information, training and instruction on the task sheets has increased, so has the number of workers aware of the general principles promoted by the agreement (increasing by 22% between 2008 and 2014).⁷⁵ The task sheets aid implementation efforts by involving workers at site level in the application of the agreement (the task sheets are based upon the general principles expressed in the agreement). The partially hybrid governance architecture of the Crystalline Silica Agreement further facilitates the involvement of workers by allowing the task sheets to be added to and altered in light of experience with their application. The sense of ownership over the agreement this engenders is recognised in literature on regulation as being necessary for more effective implementation.⁷⁶

To date task sheets have been added to the good practice guide in 2011 and 2012. These include guidance on the wet and dry cutting, sanding and grinding of materials that produce respirable crystalline silica dust. In 2014, the Belgian National Action Committee for Health and Safety in the Construction Industry submitted five task sheets for inclusion in the good practice guide but funding was not available for their translation into English in order for inclusion. Funding difficulties also prevented the translation of the task sheet adopted in 2012 into all 22 languages of the agreement.

Powers conferred upon the NEPSI council give it considerable influence over the future development of the agreement. As suggested in chapter 3, for an EU minimum wage policy a similar body, for example, a wage council, should be established to deal with the general operation of the agreement and, as discussed below, issues of strategic importance such as the level at which minimum rates of pay are set.

⁷⁵ *ibid.*

⁷⁶ OECD, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance* (OECD 2000) 19 and 26 (which provides an example specific to occupational safety and health regulation).

For example, in accordance with Article 8(2) of the Crystalline Silica Agreement, the NEPSI council may discuss issues of importance for the working of the agreement and publish recommendations regarding its possible revision. A similar clause in an agreement on an EU mina would allow a wage council to suggest amendments to the rates of pay detailed in the agreement. A new generation text could be used to allow workers to provide feedback on the broader functioning of the agreement e.g. whether its objectives have been met and, if so, how they should be revised. Representative of management and labour in Member States could provide direct feedback to the wage council – via a reporting exercise – on wage developments in linked sectors and whether the floor set in the agreement is comparable (and is thus fulfilling its main function of fostering solidarity between workers).

A target for wages in the sector the agreement covers, for example, 55% of the national median wage in the metalworking sector, could be set as a main objective. This figure could serve as a basis for the future revision of the agreement, with a commitment to continuous improvement on behalf of national social partners who have secured higher pay rates for their members.⁷⁷ Once this target has been met for all workers, the wage council could set a higher target in concert with the social partners.

Unlike the partial hybridity displayed by the Crystalline Silica Agreement, this proposal is modelled upon a transformative approach to the design of regulation; a target wage is set as an objective of the agreement which is then subject to periodic review by the social partners in light of experience with its operation. This process could be performed by a new generation text that requires representative of management and labour in Member States to provide feedback on progress towards the target wage and outline their

⁷⁷ This commitment to continuous improvement and the subsequent discussion of democratising regulation is explored in literature on legal experimentalism. For an appraisal specific to labour law, see Charles Sabel, Dara O'Rourke and Archon Fung, 'Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace' (2000) KSG Working Paper No. 00-010.

suggestions regarding its revision to the wage council.⁷⁸ Furthermore, it could be integrated into a biennial reporting exercise (as with the Crystalline Silica Agreement).

In keeping with transformative hybridity, the new generation text informs the broader functioning of the agreement i.e. the level at which the target wage is set. Both governance instruments are mutually dependent upon each other for success; in order to maintain a progressive target wage the agreement is dependent upon the new generation text for information about the progress of national social partners towards this objective, whereas the new generation text is dependent upon the agreement to exert pressure on the social partners to ensure participation, specifically through the wage council. A situation ensues whereby both instruments progressively develop together, with changes to one subsequently affecting the other. Unlike partial hybridity, transformative hybridity sees the new generation text alter the functioning of the agreement e.g. the objective of attaining an initial target value of, for example, 55% of the national median wage in the sector concerned.

This hybrid approach to the design of regulation can be said to foster ownership amongst those who have a stake in its success. Management and labour are directly involved in setting the targets against which they are judged. Adapting a new generation text for this purpose, for example, for reporting, ensures information is available for the revision of the agreement (regulatory failure is often a consequence of norms becoming out-dated over time). Changes necessary for the successful operation of the agreement can be made without the need for formal renegotiations e.g. a new target wage can be suggested by national social partners and set by the wage council rather than through the consultation and approval of all signatories to the agreement (which is often time consuming). Transformative hybridity sees the agreement

⁷⁸ This suggestion speaks to the idea of reflexive law and the dual aim of inducing self-regulatory processes and avoiding over prescription with regard to outcomes. For a broad overview specific to labour law, see Ralph Rogowski, *Reflexive Labour Law in the World Society* (Edward Elgar 2013).

provide a framework for this interaction, managing ongoing discussions in order to facilitate its more effective implementation.

8.5 Conclusion

Adopting a hybrid approach to the design of social partner agreements seeks to improve implementation by combining the various policy instruments available to the social partners since the launch of the Lisbon Strategy in 2000. The framework provided by literature on law and new governance is a useful starting point for understanding this combination which, with further development, serves as a firm foundation against which to suggest a hybrid regulatory design for an EU minimum wage policy (based on an autonomous social partner agreement, operating in combination with a series of new generation texts).

As experience with the operation of the Crystalline Silica Agreement illustrates, there are tangible benefits to be gained from combining the policy instruments available to the social partners. New generation texts are especially suited to situations that require a differentiated approach to the implementation of standards, whilst their employment alongside autonomous agreements allows for the retention of centrally set targets.

For the idea of an EU minimum wage policy, this could mean the social partners commit to set wages in national-level collective agreements at a rate no lower than 55% of the national median wage in Member States but are free to suggest revisions to this rate – in cooperation with a centrally organised wage council – as and when it is met. National collective agreements also appear ripe for similar experimentation with hybridity; formal implementation monitoring processes could be combined with agreements in the same way suggested for new generation texts and autonomous agreements.

However, this approach to the design of an EU minima is not without its limitations. As highlighted in the previous chapter, institutional support must be forthcoming in order for it to stand a realistic chance of success. Alternative

regulatory strategies such as hybridity may be capable of improving the implementation of autonomous social partners agreements but they are still dependent in large part upon support from the Commission, the social partners and the national procedures and practices of their affiliates for implementation.

Indeed, this is further demonstrated by the history of the Crystalline Silica Agreement, where the Commission provided the additional funding, technical assistance and capacity building initiatives necessary for its conclusion and continued operation. If the social partners wished to follow this model for the conclusion of an EU minima, they would be well advised to more strongly articulate their vision for the social dialogue to the Commission and request further help and support. Only by doing so can the most be made of regulatory strategies like hybridity and, subsequently, do the policies they seek to give effect to – e.g. the idea of an EU minima – stand any chance of success.

9. Conclusion

This thesis investigated the idea of an EU minimum wage policy and, as a consequence of significant gaps in current literature, sought to develop a proposal that could be adopted by law-makers. This involved finding a workable basis and outlining how such a policy would operate in practice. These aims were justified as significant contributions towards academic debate and as being of fundamental importance for developing a workable proposal.

Early in the thesis, the idea of an EU minimum wage was forwarded that was based upon coordinating wages in Member States around a target value set against mean or median wages. In comparison to common response to the idea of an EU minima, it was argued that – taking into account the heterogeneity of wage levels and industrial relations systems in Member States – the only practical way forward for such a proposal was as a form of coordination. This would see Member States or, indeed, social partners, set their statutory minimum wages or those set by collective agreement against a certain target (for example, 60% of the national median wage).

The development of an EU minima was justified as a counterbalance to the Union's interference in wages and wage-setting mechanisms in Member States. Irrespective of its limited ability to act in the area of pay (as per Article 153(5) TFEU), the complex economic governance arrangements the Union has developed were investigated. It was shown that the Article 153 exemption on the Union regulating in the area of pay has not prevented it from indirectly regulating wages and wage-setting mechanisms in Member States, both in the past and at present. Indeed, it was argued that current debates on the idea of an EU minimum wage policy understate the influence of the Union on wages.

As an alternative approach, this counterbalance was fleshed out as a solidaristic wage policy, aiming to take account of the losses labour has made to capital, in terms of wage share, over the last four or so decades. This justification – of reversing the negative consequences of economic governance

for wages in Member States – was argued to fit well with the idea of an EU minima, in particular, as a uniform response from social society.

This point was picked up when the thesis turned to consider the potential legal and normative foundations for an EU minima. Contrary to common suggestions that the Union or the Member States should be placed at the helm of an EU minima, this thesis argued that greater attention should be paid to the capacity of the social partners, including both representatives of management and labour at EU and national level. This was suggested both as a response to the limited competence of the Union to act in the area of pay and because of the benefits of involving societal actors – like the social partners – in law-making processes.

This approach was argued to have important consequences for the idea of an EU minima which sets it apart from current suggestions; not only does it remove the centrality of the Union in its development but it has important implications for its scope (social partner agreements are commonly reached at cross-industry or sectoral levels, they do not, and cannot, cover an entire national economy). Any policy based on the social dialogue would be less of an EU-wide minima and, more realistically, a ‘transnational’ wage policy, restricted to the national affiliates of European signatory associations.

Looking in closer detail at the operation of European social dialogue in the search of a basis for an EU minima, however, revealed a complex system of multi-level governance. By way of example, the autonomous route of the social dialogue is dependent for its success on the national procedures and practices of management and labour for implementation, and the ability of the social partners to organise at EU-level and reach agreements.

Explained in another way, it appears less ‘autonomous’ of public forms of power and more contingent on the existence of institutional structures and support for success. Furthermore, the development of ‘new’ governance-style instruments and their adoption by the social partners raises questions about the impact they are having on the uptake of autonomous agreements, for

example, are they interchangeable and, as a consequence, in competition, or is it possible they could be used together (alongside each other or in an arrangement designed to facilitate their interaction)?

It was argued that in order for the most to be made of the opportunities the social dialogue provides – as an alternative space for the social partners to give effect to their own agreements – there was a need for these so-called ‘hidden dynamics’ to be better understood. It was only against this more detailed understanding of the operation of the social dialogue that an effective EU minimum wage policy could be articulated (that could stand a realistic chance of being adopted by the social partners and of serving a solidarity enhancing function). Here, studying the autonomous route of the social dialogue through the lens of transnational legal pluralism shed light upon the complexity involved in its operation and served as a basis for the development of a more complete policy proposal. This approach had been overlooked by scholarship on European industrial relations and its employment in this thesis constitutes a first exploration of its utility for building a better understanding of the operation of the social dialogue. Furthermore, by adopting the social dialogue as a ‘case study’, important insights were gained into its limitations, in particular, concerning the contingent role of the state in regulating.

These insights served to reveal the full range of instruments available to the social partners – whether legal or not – and encouraged experimentation with their combination in furtherance of labour law’s objectives. For the autonomous route of the social dialogue, this was argued to involve exploring the possibility of combining autonomous agreements and new generation texts.

This approach was argued to improve the effectiveness of social partner agreements, which is especially important in light of the limited support they receive from the national affiliates of social partners and Member States after their implementation. This combination was informed by research on hybridity, law and new governance, and was used as a basis to develop a ‘transformative’ understanding of the combination of different policy instruments. The development of this framework is unique and contributes a

new perspective to the design of regulation, in particular, for European social partner agreements, that has not previously been explored. Here, autonomous agreements are seen as providing an outline – for setting a target minimum wage – which is supported by new governance instruments – such as reporting exercises – for ensuring progress is made towards the realisation of a target wage by covered national affiliates.

This unique approach to the design of regulation has implications beyond suggestions for the design of an EU minima, as a strategy that could be adopted for improving the effectiveness of other agreements (including at national level).

However, this approach to the design of an EU minima is not without its limitations. As highlighted in literature on transnational law, institutional help and support must be forthcoming in order for it to stand a realistic chance of success in practice. Alternative regulatory strategies such as hybridity may be capable of improving the implementation of autonomous social partners agreements but they are still dependent in large part on the European Commission, the social partners and the national procedures and practices of their affiliates for their effective implementation.

As such, it is possible to articulate a *form* of EU minimum wage policy which takes into account the difficulties of regulating in Europe but its success will still be dependent on a wide range of structural and institutional factors.

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