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## GETTING THE BALL ROLLING? AN ANALYSIS OF IRISH SOCIAL PARTNER BEHAVIOUR AHEAD OF TRANSPOSITION OF THE DIRECTIVE ON ADEQUATE MINIMUM WAGES IN THE EUROPEAN UNION

Despite its title, the Directive on Adequate Minimum Wages in the EU has a much broader remit than simply the regulation of minimum wages, it expressly includes a commitment to enhancing opportunities for increasing collective bargaining coverage where currently it does not meet a threshold of covering 80 % of workers<sup>1</sup>. It is this aspect that is of particular interest in the Irish context where collective bargaining is at a low baseline, particularly in the private sector. Member states must transpose the directive into national legislation by November 2024. In anticipation of that, seemingly disparate actions and behaviour of social partners are worthy of analysis in consideration of how the directive is already influencing interest groups' positions. This article is structured as follows. It begins with an overview of the development and provisions of the Directive on Adequate Minimum Wages in the EU. We then outline why the aspect of collective bargaining is of special relevance in the Irish context, in particular how legal developments over the past two decades have contributed to the current industrial relations and collective bargaining context. We then examine a range of recent actions and behaviours taken by government, trade unions, and employer associations which although not apparently directly related to the directive, suggest the approach each are taking in anticipation of the directive being brought into effect.

### I - THE DIRECTIVE

The Directive on Adequate Minimum Wages in the EU was initially proposed in 2020. It is the first legally binding EU-level initiative concerned with the setting of minimum wages, and the extension of collective bargaining coverage, and as such is viewed as a move towards strengthening the institutions of collective bargaining in EU countries as a precondition for more sustainable and inclusive economic development<sup>2</sup>. Article 4 (Chapter 1-General provisions) of the detailed explanation of the specific provisions of the directive states that « Member States

1 M. Apelblat, « Minimum wages: What will a new EU directive look like? », *The Brussels Time*, December 2021: <https://www.brusselstimes.com/eu-affairs/197009/minimum-wages-what-will-a-new-eu-directive-look-like>

2 T. Schulten and T. Müller, « A paradigm shift towards Social Europe? The proposed directive on adequate minimum wages in the European Union », *Italian Labour Law e-journal*, 14(1), 2021, p. 1.

are required to take action to promote the capacity of social partners to engage in collective bargaining on wage setting, and to encourage constructive, meaningful and informed negotiations on wages ». The directive requires that Member States (where collective bargaining coverage does not reach the threshold of at least 80 % of workers) must « provide for a framework for collective bargaining and establish an action plan to promote collective bargaining) ».

Article 4(2) of the Directive sets out four obligations that member states must meet. Firstly, they must have in place a « framework of enabling conditions for collective bargaining ». Secondly, member states who do not meet the 80 % threshold must put in place an « action plan to promote collective bargaining ». Thirdly, that action plan must set out routes to « progressively increase » rates of bargaining coverage toward the 80 % threshold within a clear timeframe. Finally, these steps must be developed in consultation with the social partners, while respecting their autonomy.

The potential impact of the directive will undoubtedly be greater in EU countries with low levels of collective bargaining coverage<sup>3</sup>. Ireland represents a case in point, with collective bargaining coverage of only a little over a fifth of workers in the private sector, Ireland has one of the lowest rates in Europe in contrast with the European average of 75 %<sup>4</sup>. While the directive refers to collective bargaining coverage, it does not make explicit stipulations regarding the process through which the level bargaining is achieved i.e. enterprise level bargaining or a broader approach of extension agreements whereby the terms of collective bargaining are extended to larger segments of the labour market. However, further elements included in the directive directly or otherwise appear to provide support for enterprise level bargaining to be strengthened. These measures include encouraging social partners to voluntarily negotiate, developing capacity of the actors to engage in collective bargaining and renewed emphasis on protecting trade union officials and members.

## II - THE IRISH INDUSTRIAL RELATIONS CONTEXT

Ireland has traditionally been associated with a voluntarist approach to workplace cooperation<sup>5</sup>. Voluntarism being defined as a system of industrial relations based on voluntary settlements between employers, employees and their representatives, rather than legal regulation<sup>6</sup>. While social partners have at times appeared keen to retain such an approach, the dominant model of voluntary workplace collective bargaining has over time given way to a more fragmented system, particularly while

3 T. Pasquier, « Proposal for a directive on adequate minimum wages in the European Union: a look at French law », *Italian Labour Law e-Journal*, 14(1), 2021, p. 77.

4 ILO (2022) Statistics on Collective Bargaining : <https://ilostat.ilo.org/topics/collective-bargaining/>

5 T. Dobbins, « The case for “beneficial constraints”: Why permissive voluntarism impedes workplace cooperation in Ireland », *Economic and Industrial Democracy*, 31(4), 2010, p. 497.

6 A. Flanders, *Management and Unions*, London: Faber and Faber, 1970.

a system of national social partnership prevailed<sup>7</sup>. The decline of social partnership in the wake of the global financial crises laid bare the problems that exist in Ireland in relation to declining rates of collective bargaining coverage outside agreement brokered through the partnership approach. While union membership had increases during Ireland's economic expansion, trade union density overall was in decline since the 1980's. By 2021 union density had dropped to approximately 25 % of all employees and even more precipitously to less than 15 % in the private sector of the economy based on Labour Force Survey figures from the Central Statistics Office. Unions have attributed this to the difficulties associated with achieving union recognition in the absence of a statutory route towards achieving recognition<sup>8</sup>. While commentators and academics have also pointed to the disconnect in workers minds between union membership and the gains secured under social partnership<sup>9</sup>. Thus, the issues of collective bargaining and union recognition have long become intertwined in the Irish industrial relations landscape where various legislative amendments to the industrial relations acts have attempted to enhance provisions for bargaining but have been viewed as a backdoor route to union recognition<sup>10</sup>. Eustace<sup>11</sup> argues that the obligations required for the transposition of the directive on adequate minimum wages now leaves collective labour law in Ireland at a crossroads, generating pressures and risks for actors within the industrial relations system.

### III - GOVERNMENT ACTION

While the directive was still in development, a significant legal case occurred in Ireland whereby a trade representative body challenged the legitimacy of sectoral employment orders (SEO). The outcome of the case was a High Court decision which struck down the legislation providing for the setting of certain minimum pay and conditions in various economic sectors traditionally covered by mandatory collective arrangements. The Judge also ruled that the SEO system that provided for these collective agreement was unconstitutional as again it represented an impermissible delegation of legislative power to the Labour Court, and ordered Electrical Contracting Sector SEO 2019 be struck down immediately<sup>12</sup>.

In response the government set about developing proposals for reform to be conducted by a High-Level Working Group under the auspices of the

7 W. K. Roche, « Social partnership and workplace regimes in Ireland », *Industrial Relations Journal*, 38(3), 2007, p. 188.

8 C. Murphy and T. Turner, « Tipping the scales for labour in Ireland? Collective bargaining and the industrial relations (Amendment) Act 2015 », *Industrial Law Journal*, 2020, 49(1), p. 113.

9 D. D'Art and T. Turner, « Irish trade unions under social partnership: a Faustian bargain? », *Industrial Relations Journal*, 42(2), 2011, p. 157.

10 C. Murphy and T. Turner, « Tipping the scales for labour in Ireland? Collective bargaining and the industrial relations (Amendment) Act 2015 », *op. cit.*

11 A. Eustace, « Dancing at the crossroads: Lessons from Ireland on collective labour law reform », *Industrial Relations Journal*, 1-23, 2024: <https://doi.org/10.1111/irj.12430>

12 D. Thomas, *An Opportunity to Review and Reframe Collective Bargaining and the Industrial Relations Regime*, National Economic and Social Council, Dublin, 2022.

Labour-Employer Economic Forum (LEEF)<sup>13</sup>. The decision in the original case was subsequently overturned by the High Court, however the Working Group remained in place developing plans for reform. Arguably, the activities of the working group share commonality with the groundwork to be undertaken in relation to the directive. Elements of commonality can be seen in the remit of the working group which included: promoting mechanisms to increase sectoral coverage of collectively bargained terms and conditions; measures to improve the functioning of the Industrial Relations (Amendment) Acts to allow trade unions to represent members in relation to terms and conditions of employment, where the employer does not engage in collective bargaining with a trade union or excepted body; and a process to encourage and facilitate good faith engagement between trade unions and employers at enterprise level, where a trade union has organised members in the enterprise, but where the employer does not engage in collective bargaining with a trade union or excepted body<sup>14</sup>. For the purposes of this paper, the element of most interest is the undertaking to explore a means to promote good faith engagement between employers and workers at the level of the enterprise. The result of this was that the group took the view that there is « nothing inconsistent about encouraging parties to engage with one another, in good faith - and imposing an obligation upon them to try to do so - but at the same time not compelling parties to reach any outcomes or agreement »<sup>15</sup>. The final report set out a proposed process for good faith engagement. This did not include a minimum threshold for union membership but did refer to a « meaningful » level (which could be determined by another body such as the Labour Court. A non-exhaustive list of suggested elements of good faith engagement were provided which include: participating in a meeting within a reasonable timeframe; giving genuine consideration to representations made by the other party; providing relevant information in a timely manner; giving a clear, considered written response to representations made by the other party following a good faith meeting within an agreed timeframe. Several other important recommendations were made in group's final report which are of relevance to the transposition of the directive. However, for the purposes of this article, the issues of « meaningful level » or union membership and definition of « good faith » engagement can be viewed as important facets guiding union and employer groups behaviour over the recent past.

#### IV - UNION ACTION

Undoubtedly the unions see the transposition of the directive as an opportunity, with the general secretary of the Irish Congress of Trade Unions (ICTU) stating that 2024 could be a « huge strategic opportunity » for Ireland's industrial landscape, viewing the directive as tool in removing impediments to joining a union that currently

13 A. Eustace, « Dancing at the crossroads: Lessons from Ireland on collective labour law reform », *op. cit.*

14 LEEF, *Final Report of the LEEF High Level Working Group on Collective Bargaining*, October 2022: <https://enterprise.gov.ie/en/publications/publication-files/final-report-of-the-leef-high-level-working-group-on-collective-bargaining.pdf>

15 *Ibid.*, p. 19.

exist in Ireland<sup>16</sup>. While the recommendation of the high-level working group did not set out a threshold for union membership and instead used the term « meaningful », unions, being pragmatic, will likely have taken the view that increased membership will strengthen their demands for engagement and bargaining position. The union movement has seized the opportunity presented by the directive to reinvigorate organising efforts aimed at increasing membership. At the end of April 2024, ICTU launched Ireland's inaugural « union week » in activities in schools, colleges and universities, as well as information stalls, public talks and film screenings<sup>17</sup>. The aim is to encourage affiliated members to reach out to colleagues to talk about the benefits of trade union membership and is pitched as the largest mobilisation of trade union members in decades in Ireland. As part of the campaign, unions urged the Government to prioritise the transposition of the EU's Adequate Minimum Wage Directive to promote and facilitate collective bargaining in workplaces, highlighting how Ireland is an outlier in Europe when it comes to the right of workers to negotiate collectively through a union.

## V - EMPLOYER ACTION

For employers, the transposition of the directive brings renewed focus on the need to create, support and enhance the conditions for collective bargaining at workplace level. However, employers have been here before when it comes to government commitments to creating conditions for collective bargaining to thrive, both the 2001, 2004 and 2015 amendments to the Industrial Relations Act aimed to deliver on such promises. Yet for employers, there has been little substantive change in the landscape to generate concern over how they currently determine terms and conditions. However, the weight of EU regulation adds a new dimension to this already well-travelled road. Early in 2024 the main employer association body, Ibec (Irish Business Employers Confederation) argued there was no need for new legislation to be passed in order for the Government to transpose the EU's minimum wage directive, stating that current practice in Ireland is in line with the directive and provides clear and stable criteria for minimum wage-setting<sup>18</sup>. However, as unions activity has intensified around the directive, the employers' body later in 2024 themed their conference « The Employment Paradox - Navigating Regulations, Nurturing Relations ». At the conference, a senior figure within Ibec noted that while employers are not indisposed to the principle of the regulation in the employment sphere, it noted that significant change had occurred in the Irish landscape that were introduced in an « uncoordinated » manner, and impacted employers' ability « to nurture employee relations within their organisations »<sup>19</sup>. Some of the changes

16 E. Walsh, « New collective bargaining laws to radically transform Ireland's industrial landscape », *Irish Examiner*, 6/01/24.

17 B. O'Donnovan, « Ireland's first 'trade union week' announced », *RTE News*, 14/02/24: <https://www.rte.ie/news/business/2024/0214/1432328-irelands-first-trade-union-week-announced/>

18 I. Curran, « Ibec denies "massive contradiction" in position on minimum wage-setting », *Irish Times*, 24/01/24.

19 A. Prendergast, « Ibec tackles "employment paradox" at annual law conference », *Industrial Relations News*, 25/04/2024.

that have occurred in Ireland over the past two years include a significant increase in minimum wage, enhanced entitlement to paid sick leave, and an increase in employer pay related social insurance contributions. Expectations of employers are likely that collective bargaining will contribute potentially further to even greater costs. Key to the recommendations already set out by the working group and can be viewed as part of the enabling conditions referred to in the directive, is that bargaining take place in « good faith » between unions and employers. Promoting social dialogue between unions and employers is a commonly expressed goal of many EU institutions. At the conference, a senior legal director at Ibec noted that the « good faith » engagement proposal (for non-union employers) amounts to a « one-off meeting » and that this does not mean an obligation on employers to have additional meetings, or to reach an agreement<sup>20</sup>. The body advised employers to « be disciplined » about the concept of a « good faith » engagement meeting<sup>21</sup>.

## Conclusion

A report issued by the European Committee of Social Rights in 2023 found Ireland to be in breach of a range of labour rights but in particular the right to organise, and the right to collective bargaining<sup>22</sup>. In Ireland, the constitutional right of association (to join a union), and its interpretation as providing an equal and opposite right of disassociation, has been described as an impediment to change. However, Eustace and Kenny<sup>23</sup> conclude that the Constitution is not a barrier to a statutory right to collective bargaining in Ireland, and that no constitutional change would be necessary to facilitate a statutory right of such sort. The transposition of the directive is still some way off, but what is clear is that each of the actors have already set in motion a pattern of behaviour in anticipation of its introduction.

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20 *Ibid.*

21 *Ibid.*

22 M. Carolan, « Ireland found in breach of labour rights in European Social Charter », *Irish Times*, 22/03/23.

23 A. Eustace and D. Kenny, *Collective Bargaining and The Irish Constitution - Barrier or Facilitator?*, Irish Human Rights and Equality Commission Report, 2023.