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AN EU DIRECTIVE ON ADEQUATE MINIMUM INCOME: A LEGAL ASSESSMENT

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for the European Anti-Poverty Network.**

§ 1

INTRODUCTION

1. In the framework of its Campaign on Adequate Minimum Income, and of the European Year for Combating Poverty and Social Exclusion, the European Anti-Poverty Network (EAPN) has asked us to analyse the legal framework, under EU law, relevant for the possible adoption of a EU Directive on Minimum Income.
2. Such a Directive would aim at extending Minimum Income (MI) schemes to all Member States (currently absent in three Member States) and to improve existing schemes (by ensuring adequacy to a decent standard of living and an appropriate articulation with minimum wages, reducing barriers to accessibility, etc.).
3. This memorandum will first describe the existing legal framework, and subsequently demonstrate the appropriateness of the proposed legal basis – Article 153(1)(h) + 153(2) TFEU – and analyse the applicable legislative procedure. This analysis starts from the premise that the proposed Directive will not include provisions affecting minimum wage or the social security systems of Member States.



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CURRENT LEGAL FRAMEWORK

4. MI has not remained limited to the sphere of national law. In the international legal order, several treaties include provisions which may be used to approach the issue of MI, although in indirect and abstract terms¹.
5. At the EU level, the relevant legal framework may be summarized as follows:
 - (i) Fundamental rights: While the existence of a right to minimum income is not expressly stated in the EU legal order, such a right may arguably derive from the general protection of human dignity², and it is clearly required by the right to social welfare schemes (although limited by practical feasibility and “*the rules laid down by Community law and national laws and practices*”). EU institutions, as well as Member States (MS) when implementing EU Law, are legally bound by these fundamental rights³.
 - (ii) EU objectives: The introduction and improvement of MI fits into the EU’s aims of promoting “*the well-being of its peoples*”, of combating “*social exclusion and discrimination*”, and of promoting “*social justice and protection*” and “*improved living (...) conditions, so as to make possible their harmonization while the improvement is being maintained, [and]*”

¹ See, e.g., Universal Declaration of Human Rights (1948), Art. 25; International Covenant on Economic, Social and Cultural Rights (1966), Art. 11; European Social Charter (1961, revised 1996), Arts. 13 and 30. See also, by way of contrast, ILO Convention 102 on Social Security (Minimum Standards) (1952) and the European Code of Social Security (1964).

² In this sense, Commission Recommendation of 3 October 2008 on the active inclusion of people excluded from the labour market (OJ L 307/11, of 18/11/2008), recital §1.

³ Charter of Fundamental Rights of the EU (OJ C 83/389, of 30/03/2010), Arts. 1 and 34, made binding under Art. 6(1) TEU, which states that the Charter may not be interpreted so as to increase EU competencies. On respect for human dignity, see also Art. 2 TEU. The fundamental right to social assistance can also arguably derive from the common constitutional traditions of the Member States, under Art. 6(3) TEU. See, e.g., ECJ Judgment of 9 October 2001, *Netherlands v. EP and Council* (C-377/98), ECR (2001) I-7079, para. 70 *et ss.*; and ECJ Judgment of 17 December 1998, *Stefan Demand* (C-186/96), ECR (1998) I-8529, para. 35.

proper social protection"⁴. After the Lisbon Treaty, any EU policy must take into account *"the guarantee of adequate social protection [and] the fight against social exclusion"*⁵ (i.e. a horizontal policy objective).

- (iii) Free movement of workers and EU citizenship rights: Current EU Law on the right to access minimum income in other MS is not entirely transparent. On the one hand, the European Union legal order still does not allow, in principle, a national of one MS to move to another with the purpose of obtaining social benefits. EU citizens who are not "workers" may only remain in another MS for more than 3 months if they have *"sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State"*⁶. On the other hand, the Court's case law has increasingly extended the situations where an EU national may benefit from social benefits in another MS.

*"A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality", and he/she "shall enjoy the same social and tax advantages as national workers"*⁷. The ECJ has clarified that this right includes a worker's access to non-contributory social benefits, including MI⁸, and has accordingly struck down minimum residency requirements to access a national MI scheme, as *de facto*

⁴ Art. 3(1) and (3) TEU and Art. 151(§1) TFEU.

⁵ Art. 9 TFEU.

⁶ Directive 2004/38/EC of the European Parliament and of the Council, of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158/77, of 30/04/2004), Art. 7(1)(b) and (c).. In what concerns family members of non-EU citizens with the right of residency in a MS, the same principle is included in Council Directive 2003/86/EC, of 22 September 2003, on the right to family reunification (OJ L 251/12, of 03/10/2003), Art. 7(1)(c).

⁷ Regulation (EEC) 1612/68 of the Council, of 15 October 1968, on freedom of movement for workers within the Community (OJ L257/2, of 19/10/1968), last revised by Directive 2004/58/EC, Art. 7(1) and (2). The prohibition of discrimination on the grounds of nationality derives primarily from Art. 18 TFEU.

⁸ ECJ Judgment of 27 March 1985, *Hoecx* (249/83), ECR (1985) 973, para. 22.

discriminatory⁹. But this only applies when there is an actual link with the job market of the host MS – nationals of other MS must be working or must have worked before in that State¹⁰.

The Court has stated that MI should be provided to an EU citizen who is studying in another MS and worked there to support himself, but is unable to work while writing the thesis required to complete his degree¹¹. It has also concluded that a non-contributory job-seeker's allowance must be extended to nationals of other MS, as long as a link with the host State is established (e.g. having resided in that State for a certain period, effectively looking for work)¹².

(iv) Non-binding documents: For over two decades, European institutions have adopted documents addressing the issue of MI, and even expressing the desirability of its provision in all MS and recommending parameters for its concretion under national law. Such positions have been taken by the MS¹³, the European Council¹⁴, the Council of Ministers¹⁵, the European Parliament¹⁶, the European

⁹ ECJ Judgment of 20 June 2002, *Commission v. Luxembourg* (C-299/01), ECR (2002) I-5899, paras. 12-14.

¹⁰ ECJ Judgment of 23 March 2004, *Brian Francis Collins* (C-138/02), ECR (2004) I-2703, paras. 27 and 29-31.

¹¹ ECJ Judgment of 20 September 2001, *Grzelczyk* (C-184/99), ECR (2001) I-6193, para. 46 [confirmar].

¹² ECJ Judgment *Brian Francis Collins*, quoted above, paras. 67-73. See also, for non-contributory child-raising allowances: ECJ Judgment of 12 May 1998, *Martínez Sala* (C-85/96), ECR (1998) I-2691.

¹³ See, e.g., Community Charter of the Fundamental Social Rights of Workers (1989), §§10 and 25.

¹⁴ See, e.g., Presidency conclusions of Brussels European Council of 14 December 2007 (No. 16616/1/07), para. 50.

¹⁵ See, e.g., Council Recommendation 92/441/EEC, of 24 June 1992, on common criteria concerning sufficient resources and social assistance in social protection systems (OJ L 245/46, 26/08/1992) (see also the Commission reports on the implementation of this Recommendation); Council Recommendation 92/442/EEC, of 27 July 1992, on the convergence of social protection objectives and policies (OJ L 245, 26/08/1992); Council Conclusions of 17 December 1999 on the strengthening of cooperation for modernising and improving social protection (OJ C 8/7, 12/01/2000); Communication from the Council – Objectives in the fight against poverty and social exclusion (OJ C 82/4, 13/03/2001); Decision 50/2002/EC of the European Parliament and of the Council, of 7 December 2001, establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion (OJ L 10/1, 12/01/2002); Council Recommendation of 21 June 2002 on the broad guidelines of the economic policies of the Member States and the Community (OJ L 182/1, 11/07/2002).

Commission¹⁷, the Economic and Social Committee¹⁸ and the Committee of the Regions¹⁹.

- (v) Semi-binding documents: The Council is empowered to “each year draw up guidelines which the Member States shall take into account in their employment policies”²⁰. On this basis, it has adopted Decisions stating, *inter alia*, that MS should “fight poverty and exclusion of marginalised

¹⁶ See, e.g., EP Resolution on combating poverty in the EC (OJ C 262/194, 10/10/1988); EP Resolution on the Medium-Term Social Action Programme 1995-1997 (COM(95)0134); EP Resolution on Commission Communication “The Future of Social Protection” (OJ C 85/63, 17/03/1997); European Parliament resolution on social protection and social inclusion (2005/2097(INI); OJ C 291E/304, 30/11/2006).

¹⁷ See, e.g., Communication from the Commission to the Council and the EP on the future of social protection: a framework for a European debate (COM/95/466 final); Communications from the Commission to the Council, the EP, the ESC and the CoR on strategies for modernising social protection (COM/1997/102 final; COM/1999/347 final; COM/2003/842 final; COM/2007/620 final and SEC/2007/1416 final); Commission Report on social protection in Europe 1999 (COM/2000/0163 final); Communication from the Commission to the Council, the EP, the ESC and the CoR - Joint report on social inclusion summarising the results of the examination of the National Action Plans for Social Inclusion (2003-2005) (COM/2003/0773 final); Communication from the Commission on the Social Agenda (COM/2005/33 final); Communications from the Commission to the Council, the EP, the ESC and the CoR - Proposal for the Joint Report on Social Protection and Social Inclusion (COM/2005/14 final; COM/2007/13 final and SEC/2007/0329; COM/2009/58 final; COM/2010/0025 final); Communication from the Commission to the Council, the EP, the ESC and the CoR concerning a consultation on action at EU level to promote the active inclusion of the people furthest from the labour market (COM/2006/44 final); Communication from the Commission to the Council, the EP, the ESC and the CoR on a Commission Recommendation on the active inclusion of people excluded from the labour market (COM/2008/639 final); Commission Recommendation of 3 October 2008, quoted above.

¹⁸ See, e.g., ESC own-initiative Opinion on Poverty (OJ C 221/10, of 28/08/1989); ESC Opinion on Commission Communication “The Future of Social Protection” (OJ C 66/58, of 03/03/1997); ESC Opinion on the “Communication from the Commission on modernizing and improving social protection in the European Union” (OJ C 73/85, 09/03/1998); ESC Opinion on the “Proposal for a Council Decision on guidelines for the Employment Policies of the Member States (COM(2003) 176 final) (OJ C 208, 03/09/2003); ESC Opinion on the “Communication from the Commission to the Council, the EP, the ESC and the CoR - Strengthening the social dimension of the Lisbon strategy: Streamlining open coordination in the field of social protection” (COM(2003) 261 final) (OJ C 32, 05/02/2004); ESC Opinion of the European Economic and Social Committee on the Communication from the Commission on the Social Agenda (COM(2005) 33 final) (OJ C 294/14, 25/11/2005); ESC Opinion on a new European Social Action Programme (OJ C 27/99, 03/02/2009).

¹⁹ See, e.g., CoR Opinion on Active inclusion (OJ C 257/1, of 09/10/2008).

²⁰ Art. 148(2) TFEU.



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groups”²¹. However, MS are only legally bound to “consider” these guidelines – they are not meant to be enforced.

- (vi) Financial support: The EU also occasionally supports national MI schemes through the funding of specific projects, such as supporting the training of people on MI²² or projects for research, cooperation and exchange of best practices in this area²³.

²¹ Council Decision 2008/618/EC, of 15 July 2008, on guidelines for the employment policies of the Member States (OJ L 198/47, of 26/07/2008), p. 1 of the Annex; Council Decision 2009/536/EC, of 7 July 2009, on guidelines for the employment policies of the Member States (OJ L 180/16, of 11/07/2009).

²² See, e.g., Written Question no. 2428/97, by Claude Desama to the European Commission (OJ C 76/110, of 11/03/1998).

²³ Decision 50/2002/EC of the European Parliament and of the Council, of 7 December 2001, establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion (OJ L 10/1, of 12/01/2002).

§3

EU COMPETENCE

6. A key issue regarding the prospect of a Minimum Income Directive is demonstrating the EU's competence to legislate on this issue. Under the principle of conferral, there must be a specific legal basis (or bases) in the Treaties enabling the EU to act²⁴. It is necessary to select the appropriate legal basis, in accordance with the case law of the Court, whenever more than one legal basis may be invoked²⁵. Finally, EU legislation may only be adopted if the principles of subsidiarity and proportionality are complied with²⁶.

²⁴ Art. 5(1) and (2) TEU.

²⁵ The basic principles of the Court's case law in this regard may be summarized as the following:

- *"The choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure (...), and not on the legal basis used for the adoption of other Community measures which might, in certain cases, display similar characteristics (...). In addition, where the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision"* (ECJ Judgment of 6 November 2008, *EP v. Council* (C-155/07), ECR (2008) I-8103, para. 34)
- *"A mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty. Such a practice cannot therefore create a precedent binding on Community institutions with regard to the correct legal basis"* (ECJ Judgment of 23 February 1988, *UK v. Council* (68/86), ECR (1988) 855, para. 24)
- *"If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component"* (C-155/07, quoted above, para. 35; ECJ Judgment of 8 September 2009, *Commission v. EP and Council* (C-411/06), ECR (2009) not yet published, para. 46);
- *"Exceptionally, if on the other hand it is established that the act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, such an act will have to be founded on the various corresponding legal bases"* (C-155/07, quoted above, para. 36; C-411/06, quoted above, para. 47).
- *"recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other"* (C-155/07, quoted above, para. 37).

²⁶ Art. 5(1), (3) and (4) TEU.



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7. It is not possible to fully determine the appropriate legal basis without analysing the exact content of the proposal, which has not yet been drafted and adopted by the European Commission. At this stage, therefore, this analysis must limit itself to relatively abstract considerations on the proposed use of Art. 153(1)(h) + 153(2) TFEU.
8. Together, with Art. 153(2)(b) TFEU, Art. 153(1)(h) allows the adoption of Directives relating to the *“integration of persons excluded from the labour market”*, setting *“minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States”*, following the ordinary legislative procedure (co-decision + QMV).
9. The primary objective of MI schemes is precisely to ensure dignified living conditions for those who, for different reasons, are unable to carry out remunerated work and have no other means of providing financially for their own subsistence. Human dignity and social integration are thus the dominant concerns behind the introduction of the right to a minimum income.
10. A Directive adopted under this provision may not *“affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof”*, and it *“shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties”* (Art. 153(4) TFEU). It also may not apply to *“pay”* (Art. 153(5) TFEU), but this is not an issue when it comes to MI, which does not constitute remuneration for work.
11. There are other Treaty provisions allowing for the adoption of binding norms which may be called into play in the discussion of a MI Directive. None of these, however, for the reasons indicated below, are appropriate for this purpose:

- Art. 21(3): With the Lisbon Treaty, there is now a general legal basis for the regulation of issues relating to EU citizens' right to move and reside freely in other MS. Alongside the general conferring provision [Art. 21(2)], which follows the ordinary legislative procedure, a provision was included specifically addressing "*measures concerning social security or social protection*". However, this clause may only be invoked "*if the Treaties have not provided the necessary powers*", i.e. in the absence of another legal basis. As a subsidiary provision, the existence of a specific Treaty rule allowing for the adoption of a MI Directive is enough to exclude its use (exclusive or concurrent) for this purpose.
- Art. 352(1): Whenever action is required to meet an EU objective for which the Treaty failed to award the necessary powers, this "last case scenario" provision may be used. Once again, this is a subsidiary provision, regarding which the same conclusion must be reached.
- Art. 153(1)(c) + Art. 153(2)(b): These provisions allow for the adoption of Directives relating to the "*social protection of workers*", setting "*minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States*". MI schemes, however, do not concern the social protection of workers. While in some formulations such schemes might also benefit persons who would fit the concept of "worker", established in EU case-law, this would be a marginal impact (only rarely would persons not excluded from the labour market meet the requirements of MI schemes) and would not correspond to the Directive's main objective, which would aim primarily at ensuring dignified conditions for persons excluded from the labour market - the main or predominant purpose or component.
Together with the fact that the legislative procedures applying to Arts. 153(1)(c) and 153(1)(h) are drastically different (e.g. one requires unanimity, the other QMV), and that they thus cannot be deemed

compatible and used as a dual basis²⁷, the conclusion must be drawn that Art. 153(1)(c) should not be considered an appropriate legal basis for a MI Directive.

- Art. 46: This provision allows for the adoption of Directives setting out “*measures required to bring about freedom of movement for workers*”²⁸, entailing the abolition of discrimination based on nationality between workers of the MS. Even more so than in the previously mentioned legal basis, any effect a MI Directive might have on the free movement of workers would be merely incidental.

In any case, the use of more than one legal basis, when only one of them corresponds to the main purpose and content of the Directive, is inconsequential as long as the procedure followed would not have changed if the single correct basis had been used²⁹, as would be the case here.

12. There are also Treaty provisions which are not meant to allow for harmonization through the adoption of a Directive, but for coordination of national policies on a less stringent level (e.g. recommendations or non-binding guidelines) or for the promotion of cooperation between MS, specifically:

- (i) Art. 5(3): “*The Union may take initiatives to ensure coordination of Member States' social policies*”;
- (ii) Art. 153(1)(j) and (k) + Art. 153(2)(a): measures aimed at “*the combating of social exclusion*” and at “*the modernization of social protection systems*”;

²⁷ See, e.g., ECJ Judgment of 29 April 2004, *Commission v. Council* (C-338/01), ECR (2004) I-4829, para. 58.

²⁸ Art. 48 is not an appropriate legal basis, since it refers exclusively to “*measures in the field of social security*”. Some consideration could be given to combining this legal basis with the provisions relating to freedom of establishment, so as to encompass self-employed persons (or persons moving to another MS in order to pursue self-employment).

²⁹ ECJ Judgment of 10 December 2002, *British American Tobacco* (C-491/01), ECR (2002) I-11453, para. 98.

- (iii) Art. 156: provision empowering the Commission for cooperation measures relating to the achievement of the objectives of Art. 151; and
- (iv) Art. 160: relating to the tasks of the Social Protection Committee.

13. The existence of legal bases for cooperation – rather than harmonisation – on overlapping issues cannot, however, deprive Art. 153(1)(h) of its meaning by prohibiting the adoption of Directives in the cases encompassed by that provision. This would result in that provision being entirely deprived of its *effet utile*.
14. It should be noted that the constant practice of the European Institutions, when adopting acts under Art. 153(2) TFEU, is to refer generally to this number, rather than specifically to one of its clauses³⁰, even though the

³⁰ See, e.g.:

- Directive 2003/10/EC of the European Parliament and of the Council, of 6 February 2003, on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (OJ L 42/38, of 15/02/2003);
- Directive 2003/18/EC of the European Parliament and of the Council, of 27 March 2003, amending Council Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work (OJ L 97/48, of 15/04/2003); [and other Directives adopted under Article 16(1) of Council Directive 89/391/EEC]
- Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299/9, of 18/11/2003);
- Decision 1098/2008/EC of the EP and of the Council, of 22 October 2008, on the European Year for Combating Poverty and Social Exclusion (2010) (OJ L 298/20, of 07/11/ 2008);
- Directive 2007/30/EC of the European Parliament and of the Council, of 20 June 2007, amending Council Directive 89/391/EEC, its individual Directives and Council Directives 83/477/EEC, 91/383/EEC, 92/29/EEC and 94/33/EC with a view to simplifying and rationalising the reports on practical implementation (OJ L 165/21, of 27/06/2007);
- Directive 2008/94/EC of the European Parliament and of the Council, of 22 October 2008, on the protection of employees in the event of the insolvency of their employer (Codified version) (OJ L 283/36, of 28/10/2008);
- Directive 2008/104/EC of the European Parliament and of the Council, of 19 November 2008, on temporary agency work (OJ L 327/9, of 05/12/2008);
- Directive 2009/38/EC of the European Parliament and of the Council, of 6 May 2009, 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 (Recast) (OJ L 122/28, of 16/05/2009);

powers and procedure to be followed vary significantly between them. Thus, even if Art. 153(2)(b) TFEU can only be used in conjunction with one of the clauses of Art. 153(1), it is formally sufficient for a MI Directive to indicate Art. 153(2) as its legal basis, all the while following the legislative procedure applicable to acts encompassed by Art. 153(1)(h).

15. The content of the Directive (not corresponding to an exclusive competency) must further comply with the tests of subsidiarity and proportionality, as laid out in the Treaty³¹ and in its Protocol no. 2³², according to which: *“Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal’s financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved”*³³. It should be noted that the choice of the type of act in itself (Directive) must be justified under the principle of proportionality³⁴.

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- Directive 2009/104/EC of the European Parliament and of the Council, of 16 September 2009, concerning the minimum safety and health requirements for the use of work equipment by workers at work (OJ L 260/5, of 03/10/2009); and
 - Directive 2009/148/EC of the European Parliament and of the Council, of 30 November 2009, on the protection of workers from the risks related to exposure to asbestos at work (OJ L 330/28, of 16/12/2009).

³¹ Art. 5(1), (3) and (4) TEU.

³² See also: C-491/01, quoted above, Summary §6; and ECJ Judgment of 12 November 1996, *UK v. Council* (C-84/94), ECR (1996) I-5755, para. 57.

³³ Lisbon Treaty Protocol no. 2, Art. 5.

³⁴ Art. 296(§2) TFEU



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16. The Commission has indicated that it believes the principle of subsidiarity requires that MS be “*responsible for defining the level of income support and for establishing the appropriate policy mix in the light of the different situations and needs at local, regional and national level*”³⁵. This statement, however, does not imply that an EU determination of a minimum level of MI support would violate this principle.

§ 4

PROCEDURE LEADING TO ADOPTION

17. Under Art. 153(1)(h) and 153(2) TFEU, as indeed almost under any other legal basis, the right of legislative initiative rests exclusively with the European Commission³⁶, although there may be a formal, but non-binding, request for the submission of a proposal, presented by the Council³⁷ or the EP³⁸ or even through a Citizens’ Initiative³⁹. The Council may only amend the Commission’s proposal by unanimous vote, although the Commission may revise its proposal at any time to facilitate its adoption⁴⁰.
18. The Directive would have to be adopted following the ordinary legislative procedure (formerly known as co-decision⁴¹), which means a joint adoption by the European Parliament and the Council, the latter voting by qualified majority.

³⁵ Commission Recommendation of 3 October 2008, quoted above, recital §7.

³⁶ Art. 289 TFEU.

³⁷ Art. 241 TFEU.

³⁸ Art. 225 TFEU.

³⁹ Art. 11(4) TEU.

⁴⁰ Art. 293 TFEU.

⁴¹ See Art. 16(3) TEU.

19. Questions have been raised as to whether a MI Directive should be called a “Framework Directive”. It should be noted that there is no formal difference between a “Directive” and a “Framework Directive”. The latter expression does not appear in the treaties, but it has been occasionally used by the European Institutions, in varying contexts (especially within environmental policy), apparently for political, rather than legal, reasons⁴². Generally, the expression “Framework Directive” allows for a perception of a lesser degree of harmonization of national legislation.

⁴² “Framework Directives” previously adopted:

- Directive 2002/21/EC of the European Parliament and of the Council, of 7 March 2002, on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108/33, of 24/04/2002);
- Directive 2007/46/EC of the European Parliament and of the Council, of 5 September 2007, establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ L 263/1, of 09/10/2007);
- Directive 2008/56/EC of the European Parliament and of the Council, of 17 June 2008, establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) (OJ L 164/19, of 25/06/2008).

Other Directives are subsequently described as “Framework Directives”, because their titles state that they establish a “framework” or a “general framework”:

- Directive 1999/93/EC of the European Parliament and of the Council, of 13 December 1999, on a Community framework for electronic signatures (OJ L 13/12, of 19/01/2000);
- Directive 2000/60/EC of the European Parliament and of the Council, of 23 October 2000, establishing a framework for Community action in the field of water policy (OJ L 327/1, of 22/12/2000);
- Council Directive 2000/78/EC, of 27 November 2000, establishing a general framework for equal treatment in employment and occupation (OJ L 303/16, of 02/12/2000);
- Council Directive 2003/96/EC, of 27 October 2003, restructuring the Community framework for the taxation of energy products and electricity (OJ L 283/51, of 31/10/2003);
- Council Directive 2009/71/Euratom, of 25 June 2009, establishing a Community framework for the nuclear safety of nuclear installations (OJ L 172/18, of 02/07/2009);
- Directive 2009/125/EC of the European Parliament and of the Council, of 21 October 2009, establishing a framework for the setting of ecodesign requirements for energy-related products (OJ L 285/10, of 31/10/2009);
- Directive 2009/128/EC of the European Parliament and of the Council of, 21 October 2009, establishing a framework for Community action to achieve the sustainable use of pesticides (OJ L 309/71, of 24/11/2009).



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§ 5

CONCLUSIONS

20. In light of the above, not precluding subsequent reassessment based on the precise content of the proposed Directive, we conclude that the Treaty has awarded the European Union the competence to harmonise Minimum Income systems in the Member States, to some extent, and that the appropriate (exclusive) legal basis for such a Directive is Art. 153(1)(h), read together with Art. 153(2)(b) TFEU. The European Commission has seemingly hinted that this is also its interpretation⁴³.
21. According to this legal basis, a Minimum Income Directive should be adopted following the ordinary legislative procedure, i.e. adopted jointly by the European Parliament and the Council of Ministers, the latter voting by qualified majority.
22. It is formally sufficient, and in accordance with the constant practice of the European institutions, for the Minimum Income Directive to indicate Art. 153(2) TFEU as its legal basis.
23. In drafting the Directive, care should be taken that its Preamble presents the integration of persons excluded from the labour market as the Directive's "main and predominant objective"⁴⁴, any effect on "workers" being merely incidental. Also, issues which would clearly fall within the scope of another legal basis, to the extent that doubts might arise as to the incidental nature of their regulation by the Directive, should be excluded from its scope⁴⁵.

⁴³ See Commission Recommendation of 3 October 2008, §§1-2.

⁴⁴ C-411/06, quoted above, para. 51 *et ss.*

⁴⁵ ECJ Judgment of 10 February 2009, *Ireland v. EP and Council* (C-301/06), C.J. (2009) I-593, para. 83



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