

## **Submission from Fórsa Trade Union**

### ***In response to the Department of Enterprise, Trade and Employment's public consultation on the proposed EU Directive on Adequate Minimum Wages***

**19th February 2021**

#### **1. Introduction**

Fórsa welcomes the opportunity to make this submission to the Department of Enterprise, Trade and Employment's (DETE) public consultation on the proposed EU Directive on Adequate Minimum Wages. The union is an active affiliate of the Irish Congress of Trade Unions (ICTU), and this submission should be read in conjunction with ICTU's response to this consultation, which we wholeheartedly support.

Fórsa has over 80,000 members in the Republic of Ireland. Although the largest number work in the civil and public service, the trade union also represents workers in the semi-state sector (commercial and non-commercial), private companies (predominantly in aviation and communications) and section 39-funded organisations in the community and voluntary sector.

As with the ICTU submission, Fórsa welcomes in principle the draft directive presented by the European Commission in October 2020.

In this submission, we will set out:

- *Some of the benefits brought about by stronger collective bargaining rights.*
- *That supporting and transposing this directive is in keeping with Ireland's obligations under international law.*
- *Some of the particularly important aspects of the draft directive.*
- *How the provisions of this directive support the policy objectives of Government.*
- *Potential areas where the directive could be strengthened and enhanced.*
- *Why a directive is the best vehicle to achieve EU and Government objectives in this area.*
- *Why this directive is important for Ireland.*

#### **2. Benefits of strengthened collective bargaining rights**

There is a long list of direct and associated benefits of collective bargaining, which have been well-established in international research and best practices. This includes the 'wage premium' delivered by collective bargaining, workplace democracy, higher productivity, greater employee innovation, and greater security and predictability for employer and employee.

Research published this month by the Illinois Economic Policy Institute '*Promoting Good Jobs and a Stronger Economy*' demonstrates how U.S. States that enable free collective bargaining outperform so-called 'right to work' States across a wide range of metrics – Financial security for workers, stronger economies with higher productivity, healthier communities and a more active citizenry.

For the purposes of this submission, we will focus on two key areas where stronger collective bargaining rights and coverage can support Ireland in addressing some of our major economic and societal challenges.

## **Tackling inequality**

Ireland has one of the highest levels of market income inequality across the OECD, however this is reduced to around the OECD average after taxes and social transfers are considered (at significant cost to the State).

This phenomenon can best be explained by the following finding from the OECD:

*'...greater dispersion in systems with no collective bargaining or where firms set wages independently. By contrast, wage dispersion is on average smallest among workers who are covered by sectoral bargaining. The distribution of earnings under registered individual contracts was more unequal than under collective agreements. Average and median earnings under registered individual contracts were lower than under collective agreements.'*

As a result, we have the highest level of wage inequality of any other country in our EU peer group of other high-income EU countries.

As pointed out above, the Commission also found that countries with high collective bargaining coverage, i.e. over 70%, tend to display *lower wage inequality*.

This is best demonstrated in those EU countries with high levels of collective bargaining coverage, such as Denmark and Sweden, who have significantly higher wage levels in many traditionally 'low-paid' sectors, despite not having a statutory minimum wage 'floor'.

## **Addressing the gender pay gap**

As a union with a predominantly female membership, we strongly believe that action is required to tackle the gender pay gap in Ireland, which at 14.4% is at a truly unacceptable level. We were one of the earliest and most vocal supporters of legislation to compel company-level gender pay gap reporting in Ireland.

A significant feature of this is that women are impacted more than men by low pay with almost a quarter suffering from inadequate incomes. Many of the most precarious and poorly-paid sectors of the economy are those which have a very high percentage of female employees.

A large number of sources, from the ETUC to the OECD, Eurostat and the European Commission, point to significant correlations in the data between those countries who have the lowest gender pay gaps, and those countries with higher levels of collective bargaining coverage and greater social dialogue.

The draft directive points out that addressing the inadequacy of the minimum wage '*contributes to gender equality, closing the gender pay and pension gap as well as elevating women out of poverty*', and says that addressing these issues also '*indirectly contributes to the effective implementation of the policy objectives*' of 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.

The Commission's impact assessment estimates that Ireland's gender pay gap could decline by almost 10% if Ireland's national minimum wage was to reach 60% of median wages.

The emphasis in the draft directive on promoting social dialogue and collective bargaining is also in line with the Government's 2017 National Strategy for Women and Girls, which had committed to tackling the gender pay gap '*including by initiating dialogue between union and employer stakeholders to address the gender pay gap...*'.

## **3. Ireland's obligations under international law**

## **International Labour Organisation (ILO)**

The most important instruments of the ILO on collective bargaining are Conventions 98 and 154. Article 4 of Convention 98 provides:

*Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.*

Ireland has also ratified Convention 87 on Freedom of Association, and the ILO Committee on Freedom of Association (which is empowered to make binding determinations on the requirements of ILO conventions under its purview), has held the following:

*The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent.*

The ILO has repeatedly expressed support for the extension of sectoral agreements. Recommendation 91 provides:

*Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.*

The undermining of the Labour Court and the reservation of employment regulation to Parliament, as effected by the judgement in the *Electrical Contractors Case*, is arguably in conflict with Ireland's obligations under the ILO Convention on Tripartite Consultation.

At the very least, it represents an unusually restrictive view, in a comparative international and European context, of the legitimacy of social partners and specialist bodies in setting labour standards and regulating aspects of the economy.

## **European Social Charter (ESC)**

Ireland has recently been subject to criticism from the European Committee on Social Rights for its weak protection for collective bargaining rights under Article 6 of the European Social Charter.

Part I (6) ESC provides that '*[a]ll workers and employers have the right to bargain collectively.*' Article 6 (2) ESC provides:

*'With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake... to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements...'*

In its recent decision in *ICTU v Ireland*, the European Committee on Social Rights (ECSR) observed:

*'[T]he Committee has constantly held that domestic law must recognise that employers' and workers' organisations may regulate their relations by collective agreement. If necessary and useful, and in particular if the spontaneous development of collective bargaining is not sufficient, positive measures should be taken to facilitate and encourage the conclusion of collective agreements.'*

## **European Court of Human Rights (ECHR)**

Article 11 of the ECHR protects the right to freedom of association. In *Demir and Baykara v Turkey*,<sup>1</sup> the Court held:

*‘...having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the ‘right to form and to join trade unions for the protection of [one’s] interests’ set forth in Article 11 of the Convention...’*

The impact of the *Electrical Contractors* judgement in undermining the ability of trade unions to bargain collectively on a sectoral basis, needs to be assessed by reference to the jurisprudence of the European Court of Human Rights in the areas of freedom of association and collective bargaining, in particular this ECHR position that ‘the right to bargain collectively with the employer is one of the essential elements of ... Article 11 of the Convention’.

The Court in the *Demir* case also stressed that it ‘takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation’ in determining whether the absence of any specific measure to support collective bargaining constitutes a violation of Article 11. It further insisted:

*‘Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision’.*

Thus, the Court has signalled a willingness to further widen the scope of rights of workers and unions under Article 11, in line with developments in international law and European practice. Therefore, it is necessary that Ireland consider the international and European context for collective bargaining rights, and the overall effect of its legal regime rather than any specific mechanism, in order to remain compliant with Article 11 of the ECHR.

This also applies with equal force to international legal instruments Ireland has not yet ratified:

*‘The Court observes... that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.’*

Therefore, the mere fact Ireland has not ratified ILO Convention 154, for example, which imposes specific obligations on contracting parties to take ‘measures adapted to national conditions to promote collective bargaining’, may not preclude the state from being bound by its requirements in so far as these are used to interpret Article 11 of the ECHR.

#### **4. Important aspects of the Directive**

##### **A worthy ambition**

One of the stated aims of the directive sets out to increase ‘collective bargaining coverage’. Given the comparatively low levels of collective bargaining coverage in Ireland, particularly in the private sector, this aspect is of particular significance.

It specifies that all member states should take ‘at least’ the following measures ‘in consultation with the social partners’:

##### **Minimum wage setting**

The specific measure is to *encourage constructive, meaningful and informed negotiations on wages among social partners.*

The Commission also comments as follows on the role of union and employer representatives in minimum wage setting under the auspices of the Low Pay Commission:

*'In some Member States, social partners often play only an advisory role in systems where the minimum wage setting is led by expert bodies. This is the case for Greece and Ireland, where the issued non-binding recommendations do not help to achieve adequate minimum wage levels, as the adequacy of minimum wages in both countries remains low.'*

The directive points out that the current level of Ireland's minimum wage lies well below the level of 'adequacy' as measured by international indicators such as the Kaitz index, which recommends that minimum wages should amount to at least 60% of the median wage. This approach is consistent with the opinion of Ireland's National Minimum Wage Commission in 1998, which recommended the introduction of a national minimum wage in Ireland of 'around' two-thirds of median wages.

Using these adequacy indicators, the Commission finds that statutory minimum wages were in 2019 below 60% of the median wage and 50% of the average in 19 of the 21 countries with statutory minimum wages, and 'even below 45%' in three countries – Estonia, Malta, and Ireland.

Ireland has the 4th highest percentage of workers (25%) in the EU27 with wages lower than this basic threshold of decency, trailing only Greece, Poland and Romania in the league table for low pay.

This underlines the importance of accelerating the process of moving towards a 'Living Wage' in Ireland as committed to in the Programme for Government, as well as strengthening collective bargaining rights.

A study published in recent days by the Economic and Social Research Institute (ESRI) has shown that the increase in the minimum wage in 2016 did not lead to a significant increase in labour costs or damage Ireland's economic competitiveness, as projected by certain commentators and employer spokespersons.

The research assessed the impact of the government's decision to increase the minimum hourly rate from €8.65 to €9.15 per hour five years ago.

It found that while this led to higher labour costs among companies where more than half of the employees received the minimum statutory rate, these types of firms accounted for just 3 per cent of all businesses here. The study found that for 90 per cent of companies with minimum-wage employees, average labour costs increased by roughly the same amount as businesses with no minimum-wage workers.

### **Collective bargaining**

The specific measure is to *promote the building and strengthening of the capacity of the social partners to engage in collective bargaining on wage setting at sector or cross-industry level;*

Given recent political, legal and industrial impediments to the enhancement of sectoral and cross-industry level bargaining in Ireland, including the effective gutting of the Joint Labour Committee and the failure of many employers to engage with this system since its re-establishment, and the recent *Electrical Contractors* Court decision on sectoral bargaining which is under appeal, this measure is particularly timely and necessary in an Irish context.

In member states where collective bargaining coverage is less than 70% (e.g. as in Ireland), they shall *'in addition provide for a framework of enabling conditions for collective bargaining, either by law after consultation of the social partners or by agreement with them, and shall establish an action plan to promote collective bargaining.'*

Collective bargaining coverage is a particularly urgent and pressing matter in Ireland. Eurostat data estimates that only 34% of Irish employees are covered by collective agreements. This represents a drop of 8% since 2000, and less than half of the high density mark of 70% as established by the Commission, and which is commonplace in most of our peer group countries in the EU 27. Most of these countries achieve higher levels of collective bargaining coverage through meaningful bargaining processes at sectoral and cross-industry levels.

As a direct consequence of this, we have a low pay problem in the Irish economy. One-fifth of workers (19.8%) earned below the low-pay threshold in 2018, 7% more than the average of our EU peer group.

Statutory minimum wage setting alone will not address the scourge of low pay in the Irish economy. As pointed out in the text of the draft directive -

*‘countries with high collective bargaining coverage [i.e. at least 70%] tend to display a lower share of low-wage workers, higher minimum wages relative to the median wage, lower wage inequality and higher wages than the others.’*

## **5. How this Directive supports Government policy objectives**

Fórsa would encourage the Government support to actively support this directive at an EU level. There are many compelling reasons for doing so, some of which have been summarised in earlier sections of this submission.

We also believe that it would be in keeping with both the policy of Government, and the commitments of individual Government parties at both a national and European level.

This includes:

### **Commitments during the 2019 European elections**

ICTU’s pre-European elections pledge asked candidates to support *‘the full implementation of the European Pillar of Social Rights’ [and] ‘the adoption of European legislation that strengthens social dialogue and the right of all workers to engage in collective bargaining’*.

These pledges were endorsed by MEPs from two of the three parties now in Government, and can be clearly applied as being relevant in the case of this directive.

It also called for an EU initiative to promote collective bargaining – the very basis of the specific measures included in this directive seeks to ‘encourage’ and ‘promote’ collective bargaining.

### **Support for 2019 European Parliament resolution**

The European Parliament’s 10 October 2019 resolution on employment and social policies in the euro area called on the Commission to *‘...put forward a legal instrument to ensure that every worker in the Union has a fair minimum wage, which can be set according to national traditions, or through collective agreements or legal provisions;’*.

MEPs from the three parties in Government voted for this resolution.

### **Commitments in the 2020 Programme for Government**

The Programme for Government commits to *‘Progress to a living wage over the lifetime of the Government’*, as well as to develop *‘new models of sectoral engagement’*

It also sets out to create ‘*A new national social contract between citizens and the State*’, and that this new contract ‘*will be founded on the principle of equality and ensuring that every citizen can achieve their full potential.*’

Given the significant benefits of collective bargaining in reducing inequality as established earlier in this submission, it is essential that any such contract should have stronger collective bargaining rights at its core.

### **Supports the implementation of the European Pillar of Social Rights (EPSR)**

Implementing the 2017 EPSR, in particular Principle 6 (wages), Principle 8 (social dialogue and involvement of workers), and Principle 2 (gender equality), compels action on collective bargaining rights and adequate minimum wages.

The-then Taoiseach Leo Varadkar T.D. in 2018 described the EPSR as a ‘political compass for the years ahead’, and in 2019 called for the implementation of the EPSR as part of the European Council’s *Strategic Agenda 2019-24* (June 2019) agreed by EU leaders. The implementation of the EPSR also featured in the 2019 Fine Gael manifesto.

### **Acts on the political priorities set by the European Council and the EC President**

The European People’s Party candidate for the Presidency of the European Commission, Ursula Von der Leyen, made the following commitment in July 2019:

*‘The dignity of work is sacred. Within the first 100 days of my mandate, I will propose a legal instrument to ensure that every worker in our Union has a fair minimum wage. This should allow for a decent living wherever they work. Minimum wages should be set according to national traditions, through collective agreements or legal provisions. I am a firm believer in the value of social dialogue between employers and unions, the people who know their sector and their region the best... [and by 2024] ...every worker should have a fair minimum wage.’*

This clear and explicit commitment formed a central part of the programme on which the European Parliament elected Von der Leyen as European Commission President that same month, supported by the Irish Government. This directive represents the EC and its President acting on that commitment.

## **6. Potential areas for improvement of the Directive**

For the reasons outlined earlier in this submission, this draft directive is on the whole a very positive development for low-paid workers in Europe.

Nevertheless, there are several areas where the directive could be potentially strengthened and improved, by providing particular clarifications on areas of the text, and addressing certain omissions.

In this section Fórsa suggests the following 5 areas as warranting further examination:

### **Public contracts and procurement**

As Ireland’s largest public service union, we in Fórsa have specific concerns regarding the use of public contracts and public procurement. It is vital that we ensure that outsourced employment is not used purely for cost reduction purposes and to undercut terms and conditions of employment.

Therefore we suggest that Article 9 of the draft directive could be amended to ensure that public procurement contracts and the award of public funds respect collective bargaining.

## **Inspection and enforcement**

A key issue is that of strengthened inspection and enforcement. For precarious and low-pay workers, and in particular vulnerable groups such as migrant workers, the vindication of their existing legal rights is often unobtainable. We have seen in many recent reforms to the legal regime in this area that often the most effective measure in improving working conditions for these workers can be contained in the enforcement directive, rather than in any substantive legal changes.

For this reason the enforcement provision currently contained in the draft minimum wage directive should be enhanced.

## **Social dialogue**

We need to ensure that unions and employer representatives are closely involved in the monitoring mechanism for the provisions of the directive, to ensure that the aims of the directive around adequate minimum wages and the promotion of collective bargaining are respected.

This can be achieved in Ireland through an enhanced form of meaningful social dialogue. Fórsa have consistently called for this to be established, in order to develop tripartite solutions to the significant policy challenges facing us as a society.

## **Competition law**

It is important to view this directive in the context of the Commission's current initiative to enhance collective bargaining for non-standard workers, as part of reforms to the competition law regime. This is being dealt with under the proposed regulation '*Collective bargaining agreements for self-employed – scope of application EU competition rules*', which is due to go out to public consultation this quarter, and planned to be adopted by the Commission by the end of this year.

Therefore the inclusion of non-standard workers included in the scope of this directive, as suggested in the ICTU submission referenced earlier, makes sense to ensure this directive is fully comprehensive and up-to-date with legal developments elsewhere, and to also ensure that its provisions cannot be circumnavigated by 'gig economy' employers and bogus self-employment.

## **Certainty of hours**

As we are well aware here in Ireland following recent debates on 'if and when' and 'zero-hour' contracts, one major cause of in-work poverty is not just that hourly wages are too low, but that many workers do not have access to sufficient hours on a regular and consistent basis. Adequate wages only provide adequate income when combined with a certain minimum number of hours.

Recent Irish legislation on 'banded hours' to provide more certainty to workers on the number of hours they will work is a good example which could be raised by the Irish Government in our feedback on this draft directive, to support the achievement of the objective of adequate minimum wages.

## **7. Why a Directive?**

The European Commission conducted an impact assessment on the contents of this draft directive, which considered at length whether a non-binding Council recommendation or a directive of the European Parliament and of the Council would be the better approach. They came to the following conclusion on the effectiveness of a recommendation to deliver the intended outcomes of the draft directive:



*‘...would not deliver the same level of protection for workers as a Directive, due to its non-binding nature. Moreover, the key added value of having more specific and non-binding guidance would fade, if it led to more selective implementation and diverse results in the Member States, making a Recommendation a less effective tool to promote collective bargaining and to achieve adequate and regularly updated minimum wages. More specific rules would also entail deeper interference with national frameworks. Therefore, a Council Recommendation would not effectively address the issue of inadequate minimum wages due to non-compliance with the already existing frameworks, leaving those affected by non-compliant behaviour without remedies and compensation against infringements.’*

Furthermore, Article 153(2)(b) of the Treaty on the Functioning of the European Union authorises it to adopt directives in the field of working conditions that set ‘*minimum requirements for gradual implementation*’. It is clearly the case that this draft directive is covered by that categorisation.

In fact, Article 153 (2) only allows for the adoption of a directive that sets out ‘minimum requirements for gradual implementation’. As the EC’s impact assessment points out (p.74), a directive would therefore ‘*leave room for Member States to decide on the way to implement them, and would not take away the freedom of Member States and social partners to set the level of minimum wages*. This undermines any argument that suggests that this directive fails to afford flexibility to member states, or that Ireland would not have the necessary degree of discretion to comply with its terms.

Finally, the sole legal opinion submitted to the Oireachtas Joint Committee in December (out of 6) that took the view that it was ‘doubtful’ whether Article 5 of the draft directive complied with the subsidiarity principle, still maintained the view that there was ‘*little doubt that a Directive would be the appropriate choice of instrument to achieve the ends pursued by the proposal*’.

## **8. Conclusion - Why this Directive is important for Ireland**

In co-signing a letter from one-thirds of the EU-27 member states calling for these issues to be dealt with through a non-binding recommendation rather than a directive, Ireland allied itself with two other clear groupings who oppose this directive for very different reasons.

1) Countries who are seeking to protect their current wage-setting structures, who have strong collective bargaining rights and high levels of coverage, such as Austria, Denmark, Estonia, the Netherlands, and Sweden.

2) Countries who have a long track record of being implacably opposed to any strengthening of workers’ rights, such as Hungary and Poland.

The opposition to the directive from some north European countries as listed in 1) above, comes from a fear that it will undermine their existing collective bargaining mechanisms. This is simply not a concern for Ireland, where our systems of collective bargaining are already very weak.

In any event, the collective bargaining provisions of the draft directive are very flexible. There is a suggested target of 70% coverage, but no defined prescription as to how to get there. Therefore it is difficult to reconcile opposition to this directive on the basis of excessive interference with collective bargaining laws.

Failing to support the passage of this directive at EU level and to implement it at State level will leave Ireland’s industrial policy, which as established earlier is significantly out of line with European

norms when it comes to collective bargaining protections and coverage, in an even more isolated and exposed position in a post-Brexit context.

Ireland is very much an outlier in Europe when it comes to the weakness of our collective bargaining rights and coverage, despite the stated objectives of Government and DETE being the inverse of this.

Supporting the passing of this directive, and working to achieve the stated aims contained within it, is the clearest and most practical way for the Government to make a meaningful commitment to addressing this. It is also the best way to achieve the stated objectives both of our own Government's policies, and of the European Union as supported by the Irish Government.

Given that significant flexibility exists in the transposition of the directive, it is not a plausible position to feign support for the principles of the directive but to call for a less meaningful vehicle, as part of a coalition seeking to undermine the directive for very different reasons.

We believe that supporting this directive is in the interests of the hundreds of thousands of low-paid workers in Ireland who stand to gain from this directive, and also in the interests of delivering upon commitments and priorities that the Government has agreed over recent years, particularly through the European Pillar of Social Rights, European Council resolutions, and in the 2020 Programme for Government.

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