Ana Ribeiro, Milena da Silva Rouxinol

A Portuguese Tale on the Minimum Wage Directive and the Role Played by Autonomous but Economically Dependent Workers

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1. *Introduction*

The Directive on adequate minimum wages in the European Union (Directive (EU) 2022/2041) has raised a lot of anticipation and controversy, namely due to the concern that it may endanger States' sovereignty on this matter and/or the autonomy of national social partners[1].

In any case, so far, its transposition has been deemed underwhelming. In fact, while several Member States (namely Portugal) have not met the deadline[2],

[1] See, among others, https://www.cgtp.pt/cgtp-in/areas-de-accao/internacional/assuntos-comunitarios/16969-cgtp-in-rejeita-criterios-e-mecanismos-que-podem-significar-tectos-para-o-salario-minimo-nacional (accessed on 13 December 2024). The action brought on by Denmark against this legal instrument (Process C-19/23, still pending) also reflects this friction.

[2] In the meantime, the Government has presented a draft law (to be approved by the Assembly of the Republic) to ensure the transposition of the Directive, through the required legal changes to the Labour Code and to the General Act on Labour in Public Service The document (Proposal of Law No 43/XVI/1.ª) is available for consultation at https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=314435 (accessed on 9 January 2025). In the meantime, neither the social dialogue agreements on this matter, nor

others made only minimalistic changes, essentially confirming that the existing national legislation is in line with the Directive[3].

Specifically regarding Portugal, one may wonder what will be the Directive's impact. However, the answer to this question depends on what part of the Directive one considers. As will be discussed below, it is unlikely that this instrument will lead to significant alterations regarding the amounts and the procedures surrounding the determination of the national minimum wage[4]. But the coverage of collective agreements might be a whole other issue entirely. This is due to the "ambiguous formulation"[5] used by Article 2 of the Directive, that defines workers for the purpose of this Directive as those, in the EU, who have an employment contract or employment relationship as defined by law, collective agreements or practice in force in each Member State, with consideration to the case-law of the Court of Justice. In fact, this definition may pose a dilemma in countries where the notion of worker does not entirely match that of the Court and where some categories of workers have not, consequently, been allowed to enjoy collective agreements.

That is the case of Portugal, where, until very recently, the access to collective agreements was restricted to employees – that is, to those who possess an employment relationship –, with the exclusion of self-employed workers, even when in a situation of economic dependency. Although it should be noted that this last category, that of autonomous but economically dependent workers, was provided with a "collective status" – namely the right to collective bargaining (even if with misty contours) – in the context of the latest reform to the Labour Code.

the legal instruments determining the minimum wage, since 2022, have made any reference to the Directive.

[3] See SAUNTON, *Has the Minimum Wage Directive had an impact? In conversation with Torsten Müller*, https://www.etui.org/news/has-minimum-wage-directive-had-impact (accessed on 13 December 2024).

[4] Similarly, stating that the Directive's impact will be reduced in Portugal, see MOREIRA, PÉREZ DEL PRADO, *Iberian States*, in RATTI, BRAMESHUBER, PIETROGIOVANNI (eds.), *The EU Directive on Adequate Minimum Wages. Context, Commentary and Trajectories*, Bloomsbury, 2024, p. 473 and MARTINS, *EU Directive on adequate minimum wages: review and outlook from Portugal*, in *RDT*, 2023, 2, p. 147.

[5] MENEGATTI, *Scope (Article 2),* in RATTI, BRAMESHUBER, PIETROGIOVANNI (eds.), *cit.*, p. 155. This formulation has been previously used in Directives (EU) 2019/1152 on transparent and predictable working conditions, (EU) 2019/1158 on work-life balance for parents and carers, and (EU) 2024/2831 on improving working conditions in platform work.

Taking this panorama into consideration, the purpose of this article is to o.er an overview of the potential impact of this EU instrument in the Portuguese legal order and of the recent legal changes that (seemed to) have allowed economically dependent workers to access the rights of freedom of association and to collective bargaining.

2. *The Portuguese minimum wage and Directive (EU) 2022/2041*

This Directive has three main purposes, that are present in its Article 1. It wishes to provide a framework for (a) the adequacy of statutory minimum wages with the aim of achieving decent living and working conditions; (b) promoting collective bargaining on wage-setting; and (c) enhancing effective access of workers to rights to minimum wage protection where provided for in national law and/or collective agreements.

Regarding the Member States where there is a statutory minimum wage (which is the Portuguese case), the Directive establishes substantive and procedural impositions present in Articles 5 and ff.

First, Member States shall establish the necessary procedures for the setting and updating of such minimum wages. And, when doing so, they shall be guided by criteria set to contribute to their adequacy, with the aim of achieving a decent standard of living, reducing in-work poverty, as well as promoting social cohesion and upward social convergence, and reducing the gender pay gap (Article 5, par. 1, of the Directive). The definition of these criteria belongs to the Member States, who shall do it in a clear fashion (and who may also decide on the relative weight of the elements that compose them). However, despite this leeway, the national criteria must include the following:

a) the purchasing power of statutory minimum wages, taking into account the cost of living;

b) the general level of wages and their distribution;

c) the growth rate of wages; and

d) long-term national productivity levels and developments (Article 5, par. 2, of the Directive).

The Portuguese regime is already quite aligned with this first set of demands. In fact, Article 273, par. 2, of the Labour Code[6] states that, when de-

[6] Approved by Act No 7/2009, of 12 February, available in English at:

termining the statutory minimum wage, the needs of workers, the increase in the cost of living, and the evolution of productivity are taken into account, among other factors, with a view to adapting it to the criteria of income and price policy. While the general level of wages and the growth rate of wages are not specifically mentioned, it should be noted that the aforementioned factors are illustrative, which allows the inclusion of other elements (such as these). Still, given that the Directive asks for clarity in the criteria used for this effect, the Portuguese legal provision should be amended to ensure full compliance with this demand[7]. In any case, it is doubtful that this change will lead to significant alterations in the concrete determination of the statutory minimum wage.

The Directive also urges the Member States to assess the adequacy of statutory minimum wages. And, to that end, it suggests the use of indicative reference values commonly used at international level such as 60 % of the gross median wage and 50 % of the gross average wage, and/or indicative reference values used at national level (Article 5, par. 4, of the Directive). Despite the fact that this "double decency threshold"[8] is not mandatory, some countries have implemented it, either through legislation or informally[9]. That is not the Portuguese case[10]. Nevertheless, as stressed by the data collected

https://files.dre.pt/diplomastraduzidos/7_2009_CodigoTrabalho_EN_publ.pdf (accessed on 13 December 2024).

[7] If the aforementioned Proposal of Law No No 43/XVI/1.ª comes to fruition, such clarification will take place (still, there is no express allusion to the purchasing power of statutory minimum wages, taking into account the cost of living. Instead, the already existing references to the needs of workers and the increase in the cost of living, which are expressions enshrined in the Portuguese Constitution – Article 59, par. 2, *a)* – are maintained). In turn, the General Act on Labour in Public Service (Act No 35/2014, of 20 June) does not state any criteria for the determination of the minimum wage for civil servants. However, it ensures that their salaries shall not be lower than the statutory minimum wage, applicable to workers of the private sector – see Article 147 of Act No 35/2014.

[8] See MÜLLER, *Dawn of a new era? The impact of the European Directive on adequate minimum wages in 2024*, ETUI Policy brief, 2024, p. 1. As noted by the Author, however, further measures should be put in place to ensure that a minimum wage that meets the double decency threshold effectively ensures a decent standard of living. Member States should examine whether a minimum wage that respects such threshold is sufficient for a worker to be able to afford the country's-specific basket of goods and services. And that might not be the case when wages overall are very low and so also are median and average wages (*Ibid.*, p. 2).

[9] MÜLLER, *cit.*, pp. 8-9.

[10] The Proposal of Law No 43/XVI/1.ª merely states that national or international indicative benchmarks may be used to assess the adequacy of the statutory minimum wage.

by ETUC[11], in 2024, the Portuguese statutory minimum wage almost met these conditions. However, that does not mean that the Portuguese minimum wage is adequate, since, as it is well known, Portuguese salaries are globally low[12]. To achieve more realistic results, it would be advisable to use additional barometers, such as measuring the minimum wage against a calculated "basket of goods and services" that is required to ensure a decent and secure living[13].

In addition, the Directive makes procedural demands that are already met in Portugal, such as ensuring that regular and timely updates of statutory minimum wages take place at least every two years (Article 5, par. 5), that there are consultative bodies to advise the competent authorities on issues related to the statutory minimum wages (Article 5, par. 6), and that social partners are involved in the setting and updating of statutory minimum wages in a timely and effective manner (Article 7). In fact, in Portugal, the determination of the statutory minimum wage takes place annually and is

[11] See https://wage-up.etuc.org/ (accessed on 13 December 2024). According to the data, the Portuguese minimum wage represents 68% of the gross median wage and 48% of the gross average wage. In its 2014 Conclusions, Portugal, the European Committee of Social Rights stated that the Portuguese minimum wage did not ensure an adequate standard of living. However, in the 2022 Conclusions, Portugal, the Committee noted that in 2020 the minimum wage amounted to 53% of the average wage. And, when the net minimum wage lies between 50% and 60% of the net average wage, it is for the State Party to establish whether this wage is sufficient to ensure a decent standard of living.

[12] In-work poverty is present in the Portuguese labour market, since, as of 2022, 1 in 10 workers was poor – PERALTA, CARVALHO, FONSECA, *Portugal, Balanço Social 2023. Relatório executivo*, p. 4. In 2024, for the private sector, the national minimum wage was € 820 (set by Decree-Law No 107/2023, of 17 November) and it was increased to € 870 for 2025 (through Decree-Law No 112/2024, of 19 December). Initially, the goal was to ensure that, by 2026, the minimum wage would stand at € 900. However, this amount has been revised (to € 920) and the new goal is to ensure that, by 2028, the minimum wage reaches € 1.020 (see *Acordo de médio prazo de melhoria dos rendimentos, dos salários e da competitividade*, 2022, https://ces.pt/wp-content/uploads/2022/10/Acordo-Medio-Prazo_Melhoria_Rendimentos_Salarios-e-da-Competitividade_9out2022.pdf, and *Acordo Tripartido sobre valorização salarial e crescimento económico 2025-2028*, 2024, https://ces.pt/wp-content/uploads/2024/10/2024_Acordo-Tripartido-sobre-Valorizacao-Salarial-e-Crescimento-Economico_2025-2028-1.pdf). In turn, for civil servants, remunerations must always observe this minimum amount, and the lowest amount of the Single Remuneration Table was € 821,83 in 2024 (see https://www.dgaep.gov.pt/upload/catalogo/SRAP_2024_V1.pdf, accessed on 13 December 2024). This figure was increased to € 878,41 in 2025 (see https://observador.pt/2024/11/06/governo-e-sindicatos-afetos-a-ugt-assinam-novo-acordo-da-funcao-publica/, accessed on 4 December 2024).

[13] See BETHANY SAUNTON, *cit.* and MÜLLER, *cit.*, p. 2.

preceded by discussions at a tripartite consultative body (the Standing Committee on Social Dialogue, which is composed of members of the Government, trade unions, and employers' associations (Article 273, par. 1, of the Labour Code))[14].

3. *Directive (EU) 2022/2041 and the promotion of collective bargaining*

As previously stressed, one of the self-announced purposes of Directive (EU) 2022/2041 is to promote collective bargaining on wage-setting[15].

Given the sensitive nature of this domain, Article 1, par. 2, of the Directive clearly states that this instrument is without prejudice to the full respect for the autonomy of the social partners, as well as their right to negotiate and conclude collective agreements. And, again, on par. 4, it is stressed that the application of the Directive shall be in full compliance with the right to collective bargaining and that nothing in it shall be construed as imposing an obligation on Member States to introduce a statutory minimum wage (where wage formation is exclusively ensured via collective bargaining) or to declare any collective agreement universally applicable. Nevertheless, the Directive confers an emphasis to collective bargaining since it recognizes the role this mechanism plays regarding salaries. In fact, "Member States with a high collective bargaining coverage tend to have a small share of low-wage workers and high minimum wages" and "the majority of the Member States with high levels of minimum wages relative to the average wage have a collective bargaining coverage above 80 %"[16]. For this reason, Article 4 of the Directive requires Member States where collective bargaining coverage is less than a threshold of 80% to provide a framework to enable conditions for collective bargaining and to determine an action plan to this effect. And,

[14] In addition, the Labour Inspection services already enforce the respect of the statutory minimum wage (Article 8 of the Directive – although one could argue that there is always space for improvement, particularly regarding the development of the capability of enforcement authorities), and the Code of public procurement (approved by Decree-Law No 18/2008, of 29 January), one of the factors for the award of the contract may be the observance of the Labour Code and collective agreements. This last aspect should be reinforced, to ensure the compliance with Article 9 of the Directive.

[15] Article 1, par. 1, *b)*, of Directive (EU) 2022/2041.

[16] See Directive (EU) 2022/2041, recital 25.

it should be stressed, such obligation applies to all Member States. Including the ones where there is a statutory minimum wage[17].

Particularly relevant to this effect is, as acknowledged in the Directive, collective bargaining at sector or cross-industry level. Yet, "traditional collective bargaining structures have been eroding during recent decades" and "sectoral and cross-industry level collective bargaining came under pressure in some Member States in the aftermath of the 2008 financial crisis". Therefore, "sectoral and cross-industry level collective bargaining (…) needs to be promoted and strengthened"[18].

It is quite clear that the EU has reversed its position vis-à-vis collective bargaining and is now providing signals in the opposite direction from the ones it gave during the 2010s crisis. In fact, and particularly regarding the countries subject to economic intervention during this period, the "Troika" (the European Central Bank, the International Monetary Fund, and the European Commission) endeavoured to promote the decentralization of collective bargaining[19]. Whereas now the EU requires Member States to fight against the erosion of sector and cross-industry level collective bargaining…

According to the OECD, collective bargaining coverage in Portugal is high, albeit below 80% (in 2021, it was of 77,2%). This means that, unless there is a complete change of paradigm and considering that, in Portugal, collective agreements have limited personal scope[20], the controversial exten-

[17] Member States are asked to provide information regarding the period of 2021-2023 until 15 October 2025.

[18] See Directive (EU) 2022/2041, recital 16, emphasis added.

[19] Regarding the measures imposed to Portugal, with this purpose, by the Memoranda of Understanding, see Ribeiro, *The extension of collective agreements by State intervention: the Portuguese regime and the protection it may offer to SMEs*, in Ales, Basenghi, Bromwich, Senatori (eds.), *Employment relations and the transformation of the enterprise in the global economy. Proceedings of the thirteenth international conference in commemoration of Marco Biagi*, Giappichelli Editore, 2015, pp. 247-262.

[20] According to Article 496 of the Labour Code, in principle, collective agreements, in the private sector, only apply to workers affiliated with the signing trade unions. Given the low levels of union density displayed in the Portuguese system, this would lead to a meagre coverage of collective agreements (in fact, union density is estimated to be low – around 8-9% in the private sector – see Ministério do Trabalho, Solidariedade e Segurança Social, *Atualização do Livro Verde sobre as Relações Laborais 2016*, 2018, p. 15, https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=%3d%3dBAAAAB%2bLCAAAAAAABAAzMTA3AgDOpLYiBAAAAA%3d%3d, accessed on 13 December 2024). Thanks to extension ordinances enacted by the Ministry of Labour, that is not the case.

sion ordinances that are currently used to ensure the agreements' wider application will have to be maintained[21].

Furthermore, when considering the notion of worker for the purpose of this instrument, civil servants are to be included, since the Directive does not exempt them. "All those who can be classified as workers in both the private and public sector fall under the personal scope of the Directive. This includes civil servants, whether appointed by law or employed with a standard labour contract"[22]. However, in Portugal, collective bargaining on the public sector may not lead to the celebration of collective agreements. But rather to legal or administrative instruments that reflect the agreed upon terms[23]. Will this phenomenon be considered to ascertain collective bargaining coverage?

Also doubtful is whether Article 2 of the Directive also encompasses autonomous but economically dependent workers. In fact, as underlined by Emanuele Menegatti, even though this category is not expressly named in recital 21 of the Directive, its inclusion is supported by the jurisprudence of the Court of Justice of the European Union (CJEU), whose notion of worker is wider than the traditional concept of employee, usually used by national courts[24].

In fact, the element of direction/control, in the traditional employment

[21] Portuguese Literature has been denouncing the long-term negative effect of these ordinances regarding union density. On this matter, see Ana Teresa Ribeiro, "The extension of collective agreements by State intervention: the Portuguese regime and the protection it may offer to SMEs", cit.

[22] Directorate-General for Employment, Social Affairs & Inclusion, *Report Expert Group, Transposition of Directive (EU) 2022/2041 on adequate minimum wages in the European Union*, November 2023, p. 13.

[23] Article 347, par. 2, a), Act No 35/2014.

[24] Menegatti, *cit.*, pp. 155 and 165. We allude to "a notion" of worker since, as noted by the Author, despite the Court's fragmented approach, according to which there would not be a single definition of worker in EU law (Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, par. 31; C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, par. 63; C-543/03, *Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse*, par. 27), recent decisions seem to have broken away from this paradigm, moving towards the idea of a single notion of worker for the different purposes of EU law (see C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, par. 34; C-428/09, *Union syndicale Solidaires Isère v. Premier ministre and Others*, par. 28; C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH v. Ruhrlandklinik gGmbH*, par. 32). Stating also that the Court has a tendency to unify the concept of worker, see Risak, Dullinger, *The concept of "worker" in EU law: Status quo and potential for change*, ETUI, 2018, p. 41.

test, has been significantly watered down by the Court's jurisprudence, encompassing also scenarios of coordination (such as the duty to report and to cooperate with corporate bodies), while little relevance is given to the commitment to an ongoing engagement[25].

And despite its hybrid formulation, a purposive interpretation of Article 2, that takes into account the fragile bargaining position of economically dependent workers, as well as the often poor working conditions that they face, leads to the conclusion that these workers should enjoy from the right to adequate statutory minimum wages, as well as from the right to collective bargaining[26]. Which means that such an access has to be ensured and these workers must be taken in consideration, when assessing the coverage of collective agreements.

What does that mean to the Portuguese legal regime, considering that, until very recently, it relied exclusively on the traditional concept of subordination to determine the personal scope of collective agreements? As will be detailed below, there were recent changes to this panorama, however, it is not clear how they should be read and put into practice.

4. *A new framework for autonomous workers who are economically dependent*

4.1. *A new definition of the concept*

Although legal subordination is the traditional criterion for circumscribing the scope of Labour Law and even though such concept should not be mistaken for that of economic dependence, the question of how the borders of Labour Law should be defined has been in permanent dialogue with that other of defining the terms in which autonomous (that is, non-subordinated) but economically dependent workers should be protected.

And so, beyond dogmatic conceptions such as those underlying the categories of *lavoro senza aggetivi*, or *travail sans phrase*, legal systems have shown signs of a certain tendency to equate, or bring closer together, to a certain extent and given certain conditions, economically dependent work with

[25] See MENEGATTI, *cit.*, p. 165 and Judgements *Dita Danosa v. LKB L zings SIA* (C-232/09) and *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* (C-229/14).

[26] In this sense, MENEGATTI, *cit.*, p. 167. See also RAINONE, COUNTOURIS, *Collective bargaining and self-employed workers*, ETUI policy brief, 2021, p. 5 ff.

legally subordinated work, either in the form of applying some labour law rules to it, or through the conception of a formally distinct regime, but with obvious affinities with labour law. None of this is new. It is very well known, for example, the Spanish so-called TRADE (*trabajador autonomo economicamente dependiente*), referred to in the *Estatuto del Trabajo Autonomo* (Act No 20/2007, of 11 July). And the Portuguese legal system is no exception to this trend. As mentioned before, the concept of economically dependent worker has been set in the legal system for a long time. However, it has never been entirely unambiguous in the Portuguese legal scene. The consensus has gone beyond a negative circumscription: "autonomous work is work that is not performed under legal subordination"…[27]. The scarce literature that referred to the issue discussed if the criterion should be linked to the way in which the activity was undertaken, or, alternatively, to the economic return.

Act No 13/2023, of 3 April, known as the *Decent Work Agenda*, brought a large-scope reform in the domain of Labour Law and one of its key points is what we can easily consider a redefinition of the status of autonomous, although economically dependent workers[28].

With this Act, the Legislator set forth that economic dependency is considered to exist for this effect when the subject in question is a natural person who, directly and without the intervention of third parties, provides their activity, in more than 50 per cent, to the same beneficiary (a single one, or several, if they are in a corporate relationship of reciprocal holdings, control or group, or if there are common organizational structures between them), obtaining the income from that activity under the terms of Article 140 of the Code on Social Security Welfare Contributions (Act No 110/2009, of 16 September) (Article 10, par. 2, of the Labour Code). This means that there is economic dependency if this beneficiary absorbs more than 50 per cent of the worker's total activity, provided that the latter has an obligation to contribute to Social Security and the annual income from providing services is equal to or greater than six times the so-called *IAS* (*indexante de apoios sociais*/social support index). The provider must supply the beneficiary with a declaration stating that these

[27] Lambelho, *Trabalho autónomo economicamente dependente: da necessidade de um regime jurídico próprio*, in Aa.Vv. (org. João Reis/Leal Amado/Liberal Fernandes/Regina Redinha), *Para Jorge Leite - Escritos Jurídico-Laborais*, Coimbra Editora, Coimbra, 2014, p. 433.

[28] Describing this new regime, Redinha, Trabalho economicamente dependente: *the soft labour approach*, in *Ques Lab*, 2023, 63, p. 7 ff.

requirements have been met, along with supporting evidence (Article 10-B of the Labour Code).

Several doubts arise from this legal definition, namely those deriving from the fact that the income of the worker may vary considerably from one year to another, which leads to the possibility that when he/she starts benefitting from the legal protection therefor designed, the requirements for that are no longer fulfilled! From our point of view, however, the most important difficulty might be the following: has the Legislator intended to provide a closed concept of autonomous but economically dependent worker, or, which is different, its intention has been to establish a presumption, even *juris et de jure*, of having such quality if those conditions verify? If the correct answer is this latter, that leads to the conclusion that other subjects can be recognized as autonomous but economically workers, if they meet the traditional criteria used for that qualification. Maybe the impact of the problem is more theoretical than practical, but, be as it may, it might be worth discussing it.

4.2. *The widening of the protection – towards a new paradigm*

4.2.1. Application of pre-existing collective provisions

As previously said, the category of autonomous but economically dependent workers was already considered in the Labour Code. According to Article 10, par. 1, they were covered by the labour provisions on personality rights, equality and non-discrimination, and occupational health and safety. It must be underlined that, despite the shyness of this provision, the Labour Code legislator surpassed the level of protection previously granted; indeed, until then, that category of workers was entitled to the application not of legal provisions, but of a set of *principles* on the above-mentioned subjects, a vague expression that was never totally understood by the Literature[29].

The novelty is that, after the entry into force of the *Decent Work Agenda*, those workers also became entitled to the application of *collective agreements* – that is, not only, anymore, to the legal prescriptions on the above-men-

[29] Conversely, the delimitation of subjects was made in non-exhaustive terms, which allowed a wideness that seems impossible at the light of the current wording. See ANA LAMBELHO, *cit.*, pp. 448-449.

tioned subjects, but also to the provisions contained in collective agreements, as long as in force in the same activity, professional, and geographical domains (Article 10, par. 1, after being amended).

Such application is not, however, as effortless as one could suppose after reading Article 10, par. 1. In fact, this novelty is further developed in Article 10-A. This latter provision clarifies, in its par. 2, that the collective status of autonomous but economically dependent workers depends on the issuance of specific legislation, which shall detail how the bargaining of collective agreements aiming at these workers shall occur and, in what concerns the application of previously existing collective provisions, shall secure that it derives from the use of the mechanism enshrined in Article 497 of the Labour Code (subparagraph *c)* of par. 2). The latter is a controversial tool[30] that allows employees – and, in the future, *mutatis mutandis*, autonomous but economically dependent workers – to choose a collective agreement already in force in the company. Furthermore, the application of these agreements to that category shall occur in the "terms therein established" (Article 10-A, par. 1, c)).

Alternatively, according to Article 10-A, par. 1, d), those workers may become included in the scope of previously existing collective agreements by means of governmental extension, in the terms established in Articles 514 and ff. of the Labour Code. In regard of this possibility, no reference to specific legislation is made, but we would say that the governmental bodies in charge of the extension shall ensure the adequacy of the regulation to autonomous workers, namely by determining partial extensions[31].

Should the application of preexisting agreements, both through the individual choice of a collective agreement or its governmental extension, to autonomous workers be restricted to the subjects referred to in Article 10, par. 1, of the Labour Code?... Although the answer is far from being clear, we would say that if the application is without material limitations, it is highly probable that issues of inadequacy will occur…

[30] On this, referring to further literature, RIBEIRO, *The Scope of Representation of Trade Unions in Portugal: A New Reality?*, in *EJICLS*, 2023, 12, 13, p. 84.

[31] Act No 13/2023 stated that the prerogative set in Article 497 is not possible for employees already covered by governmental decisions of extension, an option that is not coherent with the idea of privileging autonomy rather than heteronomy… See JÚLIO GOMES, *Nótula sobre as alterações recentes ao artigo 497.º do Código do Trabalho*, in *Ques Lab*, 2023, 63, p. 288.

4.2.2. Collective representation and negotiation of new collective agreements

The creation of a collective status for autonomous but economically dependent workers, as enshrined in Act No 13/2023, goes further than the aspects mentioned *supra*, which, albeit representing in itself a shift of paradigm regarding the protection of that category, seems less disruptive than other novelties comprised in the "Decent Work Agenda".

According to Article 10-A, par. 2, *a)* and *b)*, those workers are now entitled to trade union representation and to the negotiation, by these unions and on their behalf, of collective agreements.

This inclusion of (a sort of) autonomous workers within the borders of trade union activity and representation, besides being recognized in neighbouring legal systems[32], corresponds to the vision of several international bodies based on legal instruments that bind Portugal[33].

In what concerns, especially, the European Union, aside from the jurisprudence already alluded above, the fact is that, more recently, the European Commission acknowledged that "collective agreements by solo self-employed persons who are in a situation comparable to that of workers fall outside the scope of Article 101 TFEU; and (…) the Commission will not intervene against collective agreements of solo self-employed persons who experience an imbalance in bargaining power vis-à-vis their counterparty/ies"[34]. Accordingly, some Literature had been pointing out that ex-

[32] Namely, the Spanish and the German systems. On the latter, RICHARDI, BAYREUTHER, *Kollektives Arbeitsrecht*, Verlag Franz Vahlen, München, 2016, 3rd ed., p. 23. See, for more general considerations, MCCRYSTAL, *Collective bargaining beyond the boundaries of employment: a comparative analysis*, in *Melb. Univ. Law Rev*, 2014, 37, 3, p. 662 ff.

[33] The Committee on Freedom of Association of the International Labour Organization has already had the occasion of noting that "all workers (…) should have the right to establish and join organizations of their own choosing. *The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship*, which is often non-existent, for example in the case of (…) self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize. Otherwise, Convention No. 87 is violated" (*Freedom of association. Compilation of decisions of the Committee on Freedom of Association*, 6th ed., 2018, pars. 387, 389 and also1285, emphasis added). Providing this and further information, RIBEIRO, *The Scope of Representation*, cit., p. 85 ff.

[34] Communication from the Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02), recital 9. See, also, Council Recommendation C/2023/1389, on strengthening social dialogue in the European Union, of 12 June 2023, recitals 23 and 24.

cluding self-employed workers from the right to collective bargaining increases the risk of degrading working conditions, due to imbalanced conditions for negotiation. According to SILVIA RAINONE and NICOLA COUNTOURIS[35], "there is a rising number of self-employed workers whose livelihood are characterised by increasing precariousness and whose working conditions could be improved by ensuring that collective agreements fall outside the scope of competition law" and "access to collective bargaining should ensure that employing businesses with a dominant bargaining position do not push labour conditions downwards".

In Portugal, these issues are not ignored. Authorised voices[36] had already held that autonomous workers should be able to create and join trade unions, as a mere expression of the need for protection of a category that, in some cases, is indeed very close to that of (subordinated) employees, since the first steps towards that enlargement had already been taken, given the legal enshrinement of the applicability of some of the regimes conceived for those with an employment contract *stricto sensu*.

But we cannot say that there is a consensus. The entry into force of the new regulation aiming at autonomous but economically dependent workers has originated an adverse reaction from some scholars, who consider this category as an *intruder*, an *outsider* in what concerns the rights to freedom of association and to collective bargaining, given the way in which they are constitutionally enshrined[37]. The major argument is that extending these rights to autonomous workers might violate the Portuguese Constitution. In fact, the Constitution includes the right to freedom of association in a section dedicated to fundamental labour rights and recognises it to *employees*, while determining that the entities empowered to negotiate collective agreements are trade unions. Still, it seems to us that the scope of the constitutional concept(ion) of employee (worker?) may be discussed and, even if we should conclude it covers strictly those who perform a professional activity under an employment contract, we would have to debate if the assignment of freedom of association to employees and the right to collective bargaining to trade unions entails necessarily, under penalty of unconstitutionality, exclusivity.

[35] RAINONE, COUNTOURIS, *cit.*, p. 1.

[36] With convincing and deeply founded arguments, REIS, *O conflito colectivo de trabalho*, Gestlegal, Coimbra, 2017, p. 296 ff.

[37] DO ROSÁRIO RAMALHO, *Tratado de Direito do Trabalho. Parte III - Situações laborais colectivas*, 4th edition, Coimbra, Almedina, 2023, p. 50.

Regardless of this discussion, the new legal framework poses a set of problems[38]. The new Article 10-A of the Labour Code establishes, on par. 2, *b)*, that specific legislation (to be issued and still not existing) shall ensure that the negotiation of collective agreements on behalf of autonomous but economically dependent workers requires previous consultation of associations of self-employed workers, representative in that sector. In other words, on the one hand, Article 10, par. 1, b), prescribes that the bodies entitled to negotiate on behalf of those workers are trade unions, but, on the other hand, par. 2, b) requires the consultation of a different entity, which is an association of self-employed workers. Naturally, these associations may exist, under the general freedom of association. However, several questions arise. Is the consultation of those associations a mandatory requirement for the negotiation of collective agreements, that, in any case, is for trade unions to conduct? Will the application of such agreements depend on workers joining such associations? Or should they join the unions in charge with the burden of negotiating? Will double membership (trade unions and self-employed workers associations) be required? Will it be permitted? And which associations are at stake, since criteria of representativeness are still lacking in Portugal (not only for trade unions, but also for other kinds of professional associations)? What is exactly the role played by self-employed workers associations? We would say that reconciling the role of both trade unions and self-employed workers associations is a challenging task, which entails the risk of interference with unions activity…

These (and, probably, other) questions remain unanswered and, with the aforementioned "specific legislation" lacking, it is audacious to propose answers. In any case, we would venture to say that, even if permitted, autonomous workers' affiliation with trade unions is not going to be a mandatory requirement for collective agreements to apply. Nor with self-employed workers associations. The wording of Article 10-A, par. 2, a) and b) suggests this conclusion. If this suspicion is accurate, if the negotiation on behalf of these workers occurs irrespective of their membership, then this regime entails a disruption of the pre-existing framework, according to which, in principle, collective agreements only apply to the employees that are affiliated with the signing union (Article 496 of the Labour Code). The fact is that, despite this principle, the exceptions are several and on a broad-

[38] Again, RIBEIRO, *The Scope of Representation*, cit., pp. 87-89.

spectrum: not only are employees entitled to, by an individual decision, require to be covered by any agreement that is applicable within the enterprise, but collective agreements may also become applicable to employers and employees not originally covered, due to an extension ordinance. These possibilities exist as well in regard of autonomous but economically dependent workers. But, possibly, in this field, the Legislator might have gone even further in stepping away from the principle of affiliation.

In addition, if unionisation of autonomous workers does not become allowed, it means that, despite the steps forward taken with this "Decent Work Agenda", the Portuguese Legislator might have failed to seize the opportunity to fully reconcile the national system with International and European guidelines, which recommend recognizing autonomous workers the right to join trade unions.

5. *Conclusions*

It does not seem that the impact of the Directive on adequate minimum wages will be significant in what concerns the determination of the Portuguese statutory minimum wage. Regarding the coverage of collective agreements, however, its effects might be interesting given the exclusion of economically dependent workers from collective bargaining that (in practical terms) still subsists.

The Portuguese Legislator had recently taken steps to ensure the access of this category of workers to collective agreements, but their materialization is taking time. And given the changes that, in the meantime, have taken place in the political landscape, there is a chance they will not see the light of day. In fact, according to the social media, the new Government intends to introduce changes in the Labour Code and one of them is, precisely, aimed at this subject[39].

Therefore, and for the moment, it is unclear, whether Portugal will fully comply with this Directive.

[39] See https://www.publico.pt/2024/10/16/newsletter/ambiente-trabalho (accessed on 13 December 2024).

Abstract

This Article aims at assessing the potential impact of the Directive on adequate minimum wages in the European Union, in the Portuguese legal order, by examining the current legal framework. In particular, it delves into the changes that might occur regarding the coverage of collective agreements, taking into account that, until recently, in Portugal, economically dependent workers were not legally entitled to benefit from these instruments. Therefore, it takes notice of the new regime applicable to these workers and the issues that trouble its practical application. Issues that might lead to the (partial) incompatibility of the Portuguese legal regime with the Directive.

Keywords

Minimum wage directive, Portuguese minimum wage, Economically dependent workers, Collective bargaining, Collective representation.