

RESEARCH

Particularistic Solidarity? Explaining the Nordic Opposition Against the European Minimum Wage Directive

Martin Höpner* and Maximilian Kiecker**

Abstract

The European Minimum Wage Directive triggered the most bitter internal dispute in the history of the European Trade Union Confederation (ETUC), due to the fundamental opposition from the side of the Danes and Swedes. The article traces the Nordics' opposition to the directive and identifies two causes. The first cause lies in the – from a continental perspective – peculiarly low importance of legally enforceable individual labour law and the corresponding strength of collective rule-making. The second cause lies in the specific experiences that Denmark and Sweden had with European assurances that their collective models would be protected. In light of these findings, we deny that the attitudes of the Nordic trade unions testify, as suggested by Nussbaum Bitran and Dingeldey in issue 2023/2 of this journal, to a transnational solidarity deficit.

Keywords: Minimum wages; collective agreements; Minimum Wage Directive; trade unions; European Trade Union Confederation; Denmark; Sweden.

1. Counterintuitive fundamental opposition

In October 2022, the European Union legislator adopted the Directive on Adequate Minimum Wages,¹ for which the European Trade Union Confederation (ETUC) had lobbied intensively. The European trade unions have every reason to congratulate

* Max Planck Institute for the Study of Societies, Paulstraße 3, 50676 Cologne, Germany, email: hoepner@mpifg.de

** Max Planck Institute for the Study of Societies, Paulstraße 3, 50676 Cologne, Germany, email: kiecker@mpifg.de

1 Directive (EU) 2022/2041, published in the Official Journal of the EU on 25 October 2022. An excellent account of the legislative process is Schreurs and Huguenot-Noël (2024).

themselves for their transnational unity and their success, one might think. In reality, however, Ursula von der Leyen's announcement in July 2019 that she was willing to present a legislative proposal for the coordination of minimum wages triggered the most bitter internal dispute in the history of the ETUC.

From the very start of the consultation phase, Swedish and Danish trade unions vehemently rejected both the idea of a Minimum Wage Directive and the ETUC's approval of the idea (Aranea 2022). Sweden's largest trade union confederation, LO,² boycotted ETUC meetings for several months and also temporarily stopped paying contributions. According to LO secretary Torbjörn Johansson, "you can't pay someone to kill you" (Nilsson 2021; our translation). The protests by the Nordic trade unions were not successful, however. They did not lead to a change in the ETUC's position, nor did they fluster the Union legislator. The final adoption of the directive did not end the dispute. On the contrary, at the insistence of the trade unions, the Danish government filed an annulment action with the European Court of Justice (ECJ) in January 2023, to the great displeasure of the ETUC and the governments and trade unions outside Denmark and Sweden. According to the Danish government, the European legislator had exceeded its competences.^{3, 4}

The process is not only important because of the significance of the directive. It also offers rich material for research on the European trade unions' ability and difficulties to reach common positions in the course of European integration. In issue 2023/2 of the *Journal of Political Sociology*, Ilana Nussbaum Bitran and Irene Dingeldey analysed the process from the perspective of the transnational solidarity orientations of the trade unions involved. According to the authors, the majority in the ETUC was guided by a universal form of solidarity, whereas the Danish and Swedish trade unions were guided by a particularised and therefore deficient form of solidarity. This result is remarkable: The majority, which pushed through its will despite the objections of a minority, ends up showing comprehensive solidarity, according to the authors. And the minority, whose objections were in vain and who now have to live with the consequences of a European regulation that they recognise as problematic,

2 LO (Landsorganisationen i Sverige) represents blue collar workers.

3 ECJ, C-19/23 (Denmark against EP and Council).

4 The directive is based on Article 153(1)(b) TFEU, which authorises the EU to legislate in the area of working conditions. The Danish government argues that minimum wages are excluded from the social competences of the EU legislator by the exception in Article 153(5) TFEU (more on this in section 5). The Danish government also argues that the legislator wrongly relied on Article 153(1)(b) TFEU with regard to the second matter of the directive, the coordination mechanism for collective bargaining: A suitable competence norm, they argue, is either not given or exists in Article 153(1)(f) TFEU, which deals with "representation and collective defence of the interests of workers and employers". Because the exercise of this competence norm requires a unanimous Council decision, a directive based on this norm could not have been adopted against the votes of Denmark and Sweden.

ends up with a solidarity deficit. In this article, we will trace the deeper causes of the conflict. This will lead us to a quite different conclusion.

The Danish and Swedish reactions are indeed counterintuitive. At first glance, they seem to be nativist (and perhaps irrational), which would at least be compatible with the diagnosis of a transnational solidarity deficit. Nobody doubts or denies that statutory minimum wages are a double-edged sword for trade unions. The advantages are obvious: Where collective agreements do not apply, minimum wages can be used to protect low-wage workers. But there are also disadvantages. The incentives to join trade unions could decrease.⁵ Employers could interpret minimum wages as wage targets instead of floors. Almost all experts as well as trade unionists agree that there is a latent tension between statutory requirements and collective bargaining autonomy (Adam 2022; Meyer 2016). Trade unions may therefore have good reasons to claim responsibility for enforcing good wages exclusively for themselves – if their power resources are sufficient. The best solutions from a trade union perspective must be determined from country to country and, if necessary, from sector to sector by carefully weighing the advantages that minimum wages offer against their disadvantages. There are no objectively superior standard solutions. Remember, for example, that German industrial trade unions hesitated to advocate for statutory minimum wages until the first decade after the turn of the millennium (Mabett 2016).⁶

In Denmark and Sweden, there are hardly any supporters of a statutory minimum wage (Eldring/Alsos 2012; Furåker/Seldén 2013). Almost all actors involved believe that the instrument is not a good fit for these countries. If the new directive required all EU countries to introduce national minimum wages, the vehemence of the Danish and Swedish resistance would therefore not be puzzling. But this is not what the Union legislator did. On the contrary, the directive imposes almost no adjustment requirements on Denmark and Sweden. Article 1 makes clear that the directive may not be interpreted in such a way that it obliges the introduction of minimum wages. Article 5 requires member states with statutory minimum wages to establish transparent criteria for determining minimum wage levels, without setting them themselves. The results are to be forwarded to the Commission. Countries without statutory minimum wages are not covered by these provisions.

With regard to the other matter of the directive, the measures to promote collective agreements, the overall picture is the same. Article 1 makes clear that the directive may not be interpreted in such a way that member states are obliged to make representative collective agreements generally binding. The obligations of

5 Critically: Kozák et al. (2024).

6 Within IG Metall, the favourable view of statutory minimum wages prevailed by 2007 at the latest.

the member states provided for in Article 4 only apply below collective agreement coverage rates of 80 per cent of employees. If such a shortfall exists, a process of very (!) soft coordination sets in: The respective member states have to draw up action plans to increase collective bargaining coverage, update these at least every five years and forward them to the Commission. The directive does not authorise the Commission to veto the action plans. Apart from the harmless nature of these provisions, it is difficult to understand what trade unions could have against a European measure pushing for better collective bargaining coverage rates.

Our article aims to contribute to an understanding of the conflict.⁷ Before we analyse the reasons behind the Danish and Swedish stances in sections 3-5, we consider the argument put forward by Nussbaum Bitran and Dingeldey in more detail and justify our approach on this basis.

2. Particularistic solidarity as the cause of a divergent preference for European legislation?

“Which forms of solidarity have been enacted by whom?” is the central question posed by Nussbaum Bitran and Dingeldey (2023: 7). Addressed here is solidarity as a disposition to act. The concept is not controversial between the authors and us: It is about the willingness to coordinate action while accepting (short-term, manageable) losses, in order to enable all parties involved to gain in the long run. The decisive point in this concept is the motivational willingness to make short-term sacrifices (ibid.: 9).⁸

In the conflict over the European regulation of minimum wages and collective bargaining, the actors operate in a multi-level constellation. Solidary orientations can be directed towards different levels. If a trade union pursues goals that only benefit employees in its own country, Nussbaum Bitran and Dingeldey speak of particularistic solidarity. In contrast, inclusive solidarity is given if there is a willingness to make sacrifices in the service of employees in other countries or in the service of a common, European public good (ibid.: 12). In the multi-level constellation, solidarity is particularly demanding. According to the authors, it requires *bridging and bonding* exercises to build, protect, and exercise transnational solidarity.

7 In the background of the article are around 60 semi-structured interviews conducted by one of the authors – Maximilian Kiecker – in 2021-2023 as part of a doctoral project with practitioners in Denmark, Finland and Sweden as well as with representatives of Union level institutions and organisations.

8 Solidarity can also be conceptualised as a structural term. In this sense, groups, organisations or societies are solidaristic if they have institutionalised processes that promote the described dispositions to act.

Contrary to what one might expect from the theoretical part of their article, however, the authors do not analyse empirically to what extent and why the Nordic trade unions feared a collision between the European regulation advocated by the ETUC and their models of industrial relations. Such an analysis would shed light on whether a transnational give-and-take might have had a prohibitive price for them: a potential decline in their own ability to organise. In that case the European regulation would not have made everyone involved better off in the long term. The authors also do not specifically analyse whether the changes to the directive made during the consultations, which they qualify as *bonding*, were really in line with Nordic concerns.

Instead, the attribution of different forms of solidarity on the part of the majority and the minority in the ETUC is based on a different indication: Inclusive solidarity is present when common European regulation is favoured; particularistic solidarity is present when the corresponding regulation is rejected. "Commitment to more transnational regulation / European cohesion", the authors write explicitly, is evidence of inclusive solidarity (see the entries in Table 1 on p. 13). Because the Nordics rejected the directive, the authors write: "With regard to this issue they remained loyal with a particularistic idea of national solidarity" (ibid.: 24). According to them, the Nordics not only lacked inclusive solidarity, they also "also held up a position of negative integration" (ibid.: 20).⁹

We doubt that the degree of solidarity of collective actors can be gauged by whether or not they are in favour of European regulation in social matters. If it were that simple, forms of solidarity could simply be read off the voting behaviour in the ETUC bodies (or, if we shift the focus from trade unions to political actors, in the EU bodies) - without having to undertake further analyses of the consequences of regulation hoped for or feared by the actors. In general, the identification of solidarity with joint regulation presupposes that European solutions are always superior to autonomy-friendly solutions, i.e. that they are more productive for everyone in the long term, despite any short-term losses suffered by some of those involved.

But why should that be the case? Does regulation maximise the cumulative benefit for all parties involved simply because it is based at European level? There is no obvious reason for this. If we shift our focus to national configurations, the problem becomes clearer. No one would claim that the partial transfer of powers from municipalities to the national level would per se have beneficial effects for

9 In political science theories of integration, positive integration refers to the adoption of common market-shaping rules at European level, while negative integration refers to the removal of actual or perceived market barriers at member state level (Scharpf 1999). While positive integration relies on the activation of the Union legislator and is therefore susceptible to veto, negative integration can take place not only through Union legislation, but also by way of *integration through law*, i.e. through rulings by the ECJ.

all. Consequently, it is hardly possible to draw any conclusions about the solidarity orientations of the municipalities from their support for the transfer. In order to clarify the latter, one would have to analyse the effects expected by the actors. As Nussbaum Bitran and Dingeldey proceed, they proactively read the actors' orientations into their support or rejection of the directive under discussion. We are not convinced by this.

In the following, we will therefore take a different approach and trace the causes of the Nordic rejection of the Minimum Wage Directive. The guiding question will be whether the Danes and Swedes had understandable reasons for their objection that a Yes to the directive may impose prohibitive costs on them. It is not a question of deciding from the outside whether European regulation of minimum wages and collective bargaining is desirable or not. Rather, it depends on the perception of the Nordic trade unions, which in turn is shaped by their experiences with the history of European integration, especially with the history of European internal market and social integration. In order to reveal the problems inherent here, it will be necessary to examine the complex implications of the directive in terms of European law, in addition to a detailed examination of the characteristics of the Danish and Swedish models of industrial relations.

Our findings will differ significantly from those of Nussbaum Bitran and Dingeldey. We will conclude that the Nordics had quite understandable reasons for their rejection. We will argue that, from the perspective of the European trade unions, the battle over the minimum wage directive was essentially a zero-sum conflict, with no prospect of mutual gains through give-and-take solidarity. We will also deny that the Nordic trade unions are in favour of negative integration. With regard to the status quo, it should in addition be emphasised that the Danes and Swedes were not in a veto position. They could not make the legislation fail, neither in the ETUC nor in the Council. On the contrary, they were outvoted, their objections were disregarded and they now have to live with the uncertain consequences, which we will discuss in detail. Against this background, the accusation of deficient solidarism on the part of the Nordics seems particularly questionable to us.

3. Labour relations in Denmark and Sweden

The difficulties in reconciling the trade unions' positions on the Minimum Wage Directive result from the heterogeneity of industrial relations in the European Union (Höpner and Schäfer 2012). At first glance, two features of the *Nordic model* represented by Denmark and Sweden stand out. The first is the high level of unionisation. In both countries, around two thirds of employees are unionised. This is supported in particular by the *Ghent model*, in which the trade unions take a strong role the administration of unemployment insurance. The strong organisational power of the

trade unions and an extensive right to strike lead to an above-average collective bargaining coverage, which currently stands at around 82% in Denmark and 90% in Sweden (Kjellberg 2022).

A second special feature of the two countries is that the high coverage rates are maintained despite the absence of state support measures. In various continental countries, such support exists in the form of statutory bargaining extensions (SBEs); in other cases, there are compulsory memberships in employers' associations or constitutional *erga omnes* guarantees.¹⁰ The absence of such direct support gives way to a constellation in which the trade unions receive indirect support from the particular way the welfare state is organised, but remain ultimately responsible for protecting the high levels of membership and collective bargaining coverage. Ozols et al. (2024) see the combination of these two characteristics, which can only be found in Denmark and Sweden in the EU¹¹ - Finland deviates here because it has SBEs (Günther 2021: Ch. 7) - as the main reason for the Danish and Swedish trade unions' rejection of the directive. This is because if there is direct state support for collective agreements, trade unions have less reason to fear that minimum wages will cause collective bargaining coverage to collapse.

We agree that the high Scandinavian coverage rates of collective agreements in the absence of state support are important to understand the attitudes of Danish and Swedish trade unions. In addition, however, we argue that this explanation does not sufficiently illuminate a fundamental background factor: the, from a continental European perspective, peculiar weakness of individual labour law enforceable in courts. In Denmark in particular, statutory labour law is traditionally sparse and focuses largely on specific groups of employees as well as on occupational safety issues; we will come back to more recent developments below. Collective regulation by the bargaining parties takes the place of statutory individual labour law (Andersen et al. 2014; Kjellberg 2022). Where statutory regulations exist, they are often dispositive, that is, they allow for deviations at collective agreement level. The resulting room for manoeuvre is used extensively by the social partners and allows wages and working conditions to be tailored down to firm level, depending on the respective needs.

The social partners are also responsible for monitoring compliance with the collective agreements. If conflicts arise, they are usually not resolved by ordinary courts, but by arbitration proceedings that are codified in the collective agreements

10 A constitutional *erga omnes* guarantee exists if the generally binding nature of representative collective agreements is not established politically, but is enforced by the courts on the basis of a corresponding interpretation of constitutional law. This is the case in Italy.

11 The combination of high collective bargaining coverage and low direct state protection can also be found in Iceland and Norway, which however are not members of the EU.

(Bruun/Malmberg 2004; Jørgensen 2010; Kristiansen 2015). This mechanism is based on *collective* rights: Employees are not litigants themselves, but rely on their trade union for enforcement. Only if no agreement is reached in the arbitration proceedings does the case go to a labour court. Sweden largely reflects this dominance of collective regulation and enforcement (Bruun/Malmberg 2004: 34).

But even where conflicts are brought before the labour courts, we are still not in the continental setting with which most readers are familiar. This is because the Nordic labour courts are not ordinary public courts, but are largely owned by the social partners, who have the right to appoint judges and act directly as plaintiffs on behalf of their members (Kjellberg 2022). These courts have sole jurisdiction over the interpretation of collective agreements. This conflict resolution model is highly regarded by both employers and trade unions and avoids the high costs and lengthy negotiations associated with ordinary court proceedings.¹² Collective labour law thereby offers a strong incentive to organise in trade unions. Firms are interested in quick and cost-effective conflict resolution, too, which in turn increases the willingness of employers to organise. In Denmark in particular, the low level of legalisation of the system is often seen as the basis for the trust-based negotiation orientation of the collective actors (Kristiansen 2015; Larsen et al. 2016: Ch. 7).

The fundamental opposition to the Minimum Wage Directive is fuelled by the fear that this high degree of self-regulation in the shadow of the state will be disrupted. Trade unions fear that the Minimum Wage Directive could ultimately lead to an individual right to minimum wages. If unorganised employees take legal action, if these cases end up before the European Court of Justice (ECJ), and if the ECJ recognises the corresponding legal claims of individual employees, Denmark and Sweden would have practically no choice but to either resort to the SBEs rejected by all parties involved or to introduce a statutory minimum wage.

The trade unions would then be exactly where they do not want to be: Individual rights would be strengthened at the expense of collective bargaining autonomy and the incentives to join trade unions would be weakened by the improved protection of non-organised outsiders. In Denmark, there are also fears of a strengthening of yellow unions, which have gained massive strength during the last decade through the reform of the Ghent model (Ibsen et al. 2013). They recognise more enforceable individual rights as a power resource and have repeatedly attracted attention due to their willingness to take legal action. In short, the Danish and Swedish trade unions fear an erosion of their collective regulation and conflict resolution model.

12 The Danish trade union 3F estimates the savings of this system in its bargaining area compared to ordinary jurisdiction in 2018 at 134 million euros (internal 3F document, available from the authors).

This point reveals a reasoning error on the part of Nussbaum Bitran and Dingeldey (2023). In the Commission President's original announcement, the Minimum Wage Directive was intended to deal exclusively with minimum wages. The authors see the addition of the provisions on collective bargaining as an attempt to reach a fair compromise by the means of *bonding* - as "an 'offer' made by the ETUC and the Commission to the Nordic trade unions, taking into account their self-interest" (ibid.: 21). This may hold true for the Finnish trade unions, for whom the new provisions may have implied an additional (albeit redundant) safety anchor for their SBEs. The Danes and Swedes, however, *fear* that an individual-right interpretation of the directive could impose undesirable SBEs on them. For them, therefore, the addition of the bargaining aspects to the directive did not signal concessions on the part of its supporters. On the contrary, for them it was an additional threat and, therefore, a further radicalisation of the directive.

4. The Nordic experience

But how realistic is the erosion scenario feared by the Nordic trade unions? How understandable are their objections? As described in section 1, the wording of the directive does not give Danish and Swedish employees any individual right to a minimum wage that they could invoke before courts. The legislative act does not impose more than minor reporting obligations regarding collective bargaining coverage on Denmark and Sweden. Social Affairs Commissioner Nicolas Schmit and European Parliament rapporteur Agnes Jongerius have repeatedly made assurances that nothing else is intended (Axelsson 2022). And indeed, the Danish and Swedish trade unions do not believe that the Commission is pursuing the hidden goal of imposing minimum wage laws on them. Rather, their fears relate to European case law.

The ECJ has been described as the engine of integration, that is as a court that ongoingly and creatively maximises the normative content of European law (Höpner/Schmidt 2020). The Minimum Wage Directive was communicated as one of several implementation steps of the European Pillar of Social Rights proclaimed in 2017.¹³ This is also explicitly stated in recital 5 of the directive. The Pillar does not operate in the language of European legislative proposals - it cannot, because most of the issues it addresses are outside the competences of the Union legislator - but in the language of individual rights. Accordingly, Principle 6 of the Pillar states: "Workers have the right to fair wages [...]. Adequate minimum wages shall be ensured [...]." The Pillar is also intended to serve as a guideline for the realisation of fundamental European social rights. These rights are codified in Chapter IV of the European Charter

13 Recitals serve as interpretative aids for courts.

of Fundamental Rights, where Article 31 contains an individual right to dignified working conditions. Recital 3 of the Minimum Wage Directive explicitly refers to this article. The possibility of an ECJ interpretation of the legislative act in the light of the Social Pillar and the Charter of Fundamental Rights, which ultimately postulates new individual rights, therefore does not seem far-fetched (see also Sjödin 2022: 290).

This brings us to the heart of the problem. The Danish and Swedish trade unions doubt the reliability of the assurances made to them. They see their doubts confirmed by their experience with European integration, which they perceive as a series of broken promises. After the Danes rejected the Maastricht Treaty in an initial referendum in 1992, the country was granted concessions in the Edinburgh Agreement. In this context, the then Social Affairs Commissioner Pdraig Flynn gave a written guarantee that Denmark would be allowed to retain its social model based on collective agreements despite extended European social competences: Nothing should stand in the way of implementing labour and social directives via collective agreements instead of legislation. Around the same time, Finland and Sweden applied to join the European Community. The Swedish government asked Commissioner Flynn for similar assurances and received them before accession was finalised in 1994 (Ahlberg 2010; Bengtsson 2017: 168).

Things turned out differently. In the course of the 1990s, the Community legislator began to engage with individual labour law and adopted, among others, a Working Time Directive, a Parental Leave Directive and a Part-Time Work Directive.¹⁴ Nordic governments and social partners learnt that the Flynn Guarantee had a short half-life. The conflict particularly flared up in the course of the Danish implementation of the Working Time Directive: The Commission threatened to take Denmark to the ECJ because, despite a coverage rate at that time (as today) ranging between 80 and 90 per cent, it perceived an implementation via collective agreements as insufficient (Leiber 2005: 126). In view of the risk that the European highest court might declare the Danish implementation method to be altogether unlawful, the Danish government gave in and adopted supplementary legislation in consultation with the social partners. As a result, the European directives have led to legislation gaining more influence over the formerly collectively bargained labour conditions (Kristiansen 2015).

In several cases, Nordic trade unions also perceived ECJ rulings as damaging to their social models. The most serious case, which continues to have an impact until today, was the *Laval* ruling from 2007.¹⁵ It was directed at Sweden. The ECJ interpreted

14 Directive 93/104/EC, published in the Official Journal of 28 November 1992; Directive 96/34/EC, published in the Official Journal of 20 August 1994; Directive 97/81/EC, published in the Official Journal of 20 January 1998.

15 ECJ, C-341/05 (*Laval and Partneri Ltd*).

the mandatory labour standards listed in the Posting of Workers Directive, which are to be imposed on posted workers, as maximum standards. On this basis, the ECJ qualified an industrial action aimed at enforcing the application of local labour standards as a disproportionate interference with the freedom to provide services, and therefore as a violation of European law. In the Nordic countries, whose social models are the result of an extensive interpretation of collective bargaining autonomy, judicial checks on the proportionality of labour disputes had been unknown until then. The ECJ judgement came largely unanticipated and resulted in restrictive interventions in the Swedish right to strike, described by Seikel (2015: 1175-1177) as “regulatory surrender”, and also led to conflicts between the social partners in Denmark (Arnholtz/Andersen 2018). It is therefore particularly far-fetched to assume, as Nussbaum Bitran and Dingeldey (2023: 20) do, that the Danish and Swedish trade unions are in favour of “negative integration”, of which the *Laval* case is an example. Rather, the Nordic trade unions are the crucial victims and the staunchest opponents of this form of integration.

In light of these experiences, it becomes understandable why the Danish and Swedish trade unions are sceptical, even suspicious, of the guarantees given to them. They fear that, despite all the sincere assurances, they will ultimately be overrun by court interpretations of the directive. The individual rights language of the Pillar of Social Rights and the reference to fundamental social rights in the recitals of the Directive could serve as a starting point for this.¹⁶ An ECJ ruling would actually not have to administer the introduction of minimum wages *contra legem*. Recognising an individual right, without specifying how it is to be taken into account, would suffice and would ultimately leave Denmark and Sweden with the choice between statutory bargaining extensions and statutory minimum wages.

If one aims at understanding the attitudes of the Danish and Swedish trade unions, one should not concentrate on quantifying the probability of this outcome occurring. Rather, the decisive factor is their perception: In the shadow of Flynn and Laval, Danish and Swedish unions are keen to avoid past mistakes. They have learnt that it is questionable “whether the promises you get from politicians in phase one or two (...) hold up at the European Court of Justice”, as one interviewee put it. With “Laval as a Freudian nightmare at the back of our heads” they are aware “that every uncertainty could turn out to be a big problem when it comes to the European Court of Justice”. The Swedish and Danish trade unions see the European train threatening to collide with their collective models.

16 Another connecting factor could be Article 12 of the directive, which provides for an individual right to legal remedies.

5. Conclusion: No Nordic solidarity deficit

We hope that the previous sections on the characteristics of the Danish and Swedish social models and on the specific experiences with guarantees addressed to Denmark and Sweden have made the existence and vehemence of the trade unions' resistance to the Minimum Wage Directive more understandable. Our aim was not to qualify the Danish and Swedish positions as *right* (or *wrong*). Rather, we aimed at shedding light on the background of their perceptions. In view of their experiences with European law, the Danish and Swedish reactions have at least a comprehensive internal logic. They do not reflect a lack of solidarity, but rather a concern that the architects and supporters of the directive did not take sufficient account of the characteristics of their social models. If solidarity is based on a willingness to empathise with the perceptions of partners, then the minorities in the ETUC and Council have at least as much reason to question the solidarity exercised by the majority as the other way around. As a result, we propose that the one-sided diagnosis of a lack of transnational solidarity among Nordic trade unions made by Nussbaum Bitran and Dingeldey must be rejected. It is a misdiagnosis.

Other cases of non-congruent European policy preferences of European trade unions could undoubtedly be cited, which nevertheless did not lead to comparable upheavals in the ETUC. It is fair to say that the disputes with the two Nordic trade unions escalated beyond an unavoidable level. Many of those involved described the Swedish boycott of ETUC meetings and the temporary suspension of dues payments in particular as overreactions. To put it bluntly, the Nordic trade unions did not behave like organisations that were outvoted but like organisations that felt betrayed. As with the analysis of the reasons for the exceptional forcefulness of the Danish and Swedish objections to the directive, we will refrain from making any judgements or even taking sides. However, it may be worth asking about the Danish and Swedish perceptions with regard to this as well.

In the perception of the Nordic trade unions, it was not them but their continental sister unions that had cancelled a previously shared consensus. Until the announcement of a legislative initiative in 2019, trade union attitudes towards minimum wages were held together by formulaic compromises. As Seeliger (2017: Ch. 5) describes in detail, transnational trade union debates on minimum wages can be traced back to at least early in the first decade after the turn of the millennium. As the ETUC was of the opinion that the social competences of the European legislator exclude minimum wage determination, announcements on the subject merely served to coordinate the lobbying of member unions vis-à-vis their respective member state governments (see, for example, the wording of the Athens Compromise from 2011, documented in Seeliger 2017: 75).

All parties involved were able to live with this, without having to position themselves in favour of or against action by the Union legislator. The announcement and

drafting of a proposal for a directive destroyed the formula compromise, as the trade unions now had to take a stand on the prospect of a legislative act as well as on the individual regulations envisaged. From the perspective of the Nordic trade unions, it was therefore the supporters of the directive who changed their position. They found it all the more irritating that their continental sister unions were not prepared to advocate an *opt-out* regulation for Denmark and Sweden, which would have been possible in principle. Such solutions were also proposed by Scandinavian MEPs, in particular by the current *LO* candidate for the European elections, Johan Danielsson. However, they failed in the European Parliament. It is no coincidence that the Swedish boycott of the ETUC began about a month later.¹⁷

Another irritation was (and continues to be) even more fundamental. The repositioning of the ETUC was only possible at the price of a reinterpretation of the Union's competences in labour and social law. Recall the reactions to *Viking*¹⁸ and *Laval*. At that time, there was a consensus among European trade unions that the exception in Article 153(5) TFEU, according to which pay, the right of association, and the right to strike are excluded from the social competences of the European legislator, should be interpreted *broadly*. The idea behind this was that the ECJ should not be allowed to transform in the name of fundamental market freedoms (= negative integration!) what is excluded from Union legislation for good reasons (see the details in Rödl 2018: 42-49).

The Yes to the Minimum Wage Directive, however, required (and continues to require) a *narrow* interpretation of the exception, and a correspondingly broad interpretation of paragraph 1(b) of the same TFEU article, which authorises the Union to legislate in the area of working conditions (the competence norm on which the directive is based). Given the circumstances discussed in our article, it is not surprising that the Danes and Swedes are alarmed by this new interpretation: For them, a broadly defined Union competence in collective labour and social law would clearly be outside the basis of their EU membership.¹⁹ Indeed, even if the ECJ does not introduce an individual right to a minimum wage by judicial fiat, a wide interpretation of union competences would allow the legislator to introduce such a right in a future

17 See EMPL Committee Meeting 11 November 2023, final proposal: "Oral Amendmend 432: Member States where there are no statutory minimum wages or systems for declaring collective agreements generally binding, where minimum wage protection is provided exclusively by collective bargaining between autonomous social partners, shall have the option not to apply this Directive, either totally or in part, provided that the social partners at national level jointly demand this, provided that they represent a joint collective bargaining coverage that comprises a majority of the work force on national level."

18 ECJ, C-438/05 (*Viking Line*).

19 „I think it's a problem because it is against the treaty, we think so. And what could be the next (proposal) when you have this? What about our pension system?“, says one interviewee.

revision of the directive ECJ. This also makes understandable why Denmark wants the ECJ to clarify the normative content of Article 153(1)(b) (Kiecker 2022).

Could the conflict have been avoided with more solidarity on *both* sides? May a lack of willingness to consider the experiences, perceptions and interests of the respective other side have left a compromise line undiscovered that would have put both sides in a better position? We conclude that this must be answered in the negative. Essentially, one side wanted to see the Union's competences extended to minimum wage issues and wanted to activate the European legislator accordingly, while the other side wanted to prevent precisely this. It is not due to a lack of solidarity that this is a zero-sum conflict. Note that the adoption of the directive resulted in an extremely asymmetrical constellation to the detriment of the supposedly non-solidaristic Nordics: As long as the directive is interpreted softly, it promises mainly symbolic gains for the ETUC majority and has at best no impact on Denmark and Sweden. However, if the provisions of the directive are interpreted in terms of individual rights, the Nordics have to fear that this may shake the foundations of their social models.

As a last question, we might ask whether it would not at least have been possible to prevent the *level* of conflict from escalating to such an extent. We can only speculate on this. It may have been possible to reduce the level of escalation if the majority in the ETUC had agreed to the demand that the directive either include an opt-out clause for Denmark and Sweden or take the path of enhanced cooperation under Article 20 TEU, which would have excluded the two Nordic countries from the scope of the directive from the outset. The Commission and the EP would very probably not have followed these demands, the same holds true for the Council. Differential integration is usually only favoured in speeches and theoretical considerations, but not in practice. The ETUC majority would probably not have achieved anything in legislative terms with such a proposal (nor would it have caused any damage), but internally an important signal would have been sent: Colleagues from Denmark and Sweden, we understand your problem.

Even if the Union legislator had followed the ETUC demand postulated in our thought model, the conflict would nevertheless not have been fully solved. This is because enhanced cooperation requires the presence of an adequate competence norm, too – a presence which Denmark and Sweden fundamentally dispute. The diversity of the labour and welfare systems within the European Union places irretrievable limits on the ability to reach common positions among trade unions (see also Seeliger 2018: 432).

For a European umbrella organisation of trade unions, which is supposed to promote coordination and cooperation between the member unions, this is an unpleasant insight. In such constellations, it can only concentrate on keeping the resulting damage to a minimum. In the context of rapid changes in the Union's fields

of activity – and in view of members that may soon include Albania and later Ukraine – frictions become more likely to occur. A great deal of tact, understanding for different perceptions and, where necessary, a willingness to find differential, autonomy-protective solutions will be necessary to preserve the (modest, but nevertheless significant) coordination capacity that has been achieved so far. This, in our view, is the decisive lesson to be learnt from the ETUC's Minimum Wage Directive saga. It implies that favouring European regulations does not necessarily testify to inclusive, transnational solidarity, contrary to what Nussbaum Bitran and Dingeldey (2023) have argued. Transnational solidarity can also consist of protecting autonomy.

Literature

- Adam, Georg. 2022. "Die Entwicklung der gesetzlichen Mindestlohnsetzung in der EU und ihre Bedeutung für die Gewerkschaften." *Wirtschaft und Gesellschaft* 48(3): 365-406.
- Ahlberg, Kerstin. 2010. "The Age of Innocence – and Beyond." Formula Working Paper 21. University of Oslo: Law Faculty.
- Andersen, Søren Kaj, Jon Erik Dølvik, and Christian Lyhne Ibsen. 2014. "Nordic Labour Market Models in Open Markets." ETUI Report 132. Brussels: European Trade Union Institute.
- Aranea, Mona. 2022. "German Trade Unions and The EU Minimum Wage Debate: Between National Elite and Transnational Working Class." Pp. 233-257 in *European Trade Unions in the 21st Century: The Future of Solidarity and Workplace Democracy*, edited by B. Colfer. Cham: Springer International Publishing.
- Arnholtz, Jens and Søren Kaj Andersen Andersen. 2018. "Extra-Institutional Changes Under Pressure From Posting." *British Journal of Industrial Relations* 56(2): 395-417.
- Axelsson, Karin. 2022. "Danmark og Sverige deler ikke Eu-jubel over ny mindsteløn." *Politiken*, July 8. Retrieved February 26, 2024 (<https://www.pressreader.com/search?query=schmit%20eu%20mindstel%C3%B8n>).
- Bengtsson, Erik. 2017. "Swedish Trade Unions and the ETUC." Pp. 161-175 in *National Trade unions and the ETUC: A History of Unity and Diversity*, edited by A. Ciampani and P. Tilly. Brussels: European Trade Union Institute.
- Bruun, Niklas, and Jonas Malmberg. 2005. "The Evolution of Labour Law in Denmark, Finland and Sweden (1992-2003)." Report to the European Commission. <https://uu.diva-portal.org/smash/get/diva2:317640/FULLTEXT01.pdf>.
- Eldring, Line, and Kristin Alsos. 2012. "European Minimum Wage: A Nordic Outlook." Fafo, Fafo-report, 16.
- Furåker, Bengt, and Kristina Lovén Seldén. 2013. "Trade Union Cooperation on Statutory Minimum Wages? A Study of European Trade Union Positions." *Transfer: European Review of Labour and Research* 19(4): 507-520.
- Günther, Wolfgang. 2021. *Staatliche Stützung der Tarifpolitik. Die Allgemeinverbindlicherklärung in Deutschland, den Niederlanden und Finnland*. Wiesbaden: Springer VS.
- Höpner, Martin, and Armin Schäfer. 2012. "Integration Among Unequals: How the Heterogeneity of European Varieties of Capitalism Shapes the Social and Democratic Potential of the EU." MPIfG Discussion Paper 12/5. Cologne: Max Planck Institute for the Study of Societies.
- Höpner, Martin, and Susanne Schmidt. 2020. "Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review." *Cambridge Yearbook of European Legal Studies* 22: 182-204.
- Ibsen, Flemming, Laust Høgedahl, and Steen Scheuer. 2013. "Free Riders: The Rise of Alternative Unionism in Denmark." *Industrial Relations Journal* 44(5-6): 444-461.

- Kiecker, Maximilian. 2022. "Dänemark klagt gegen die Europäische Mindestlohn-Richtlinie." *Makroskop*, December 23. Retrieved February 26, 2024 (<https://makroskop.eu/45-2022/danemark-klagt-gegen-die-europaische-mindestlohn-richtlinie/>).
- Kjellberg, Anders. 2022. "The Nordic Model of Industrial Relations." Lund University. *Studies in Social Policy, Industrial Relations, Working Life and Mobility*, Vol. 2022 No. 2.
- Kozák, Michal, Georg Picot, and Peter Starke. 2024. "Do minimum wages crowd out union density?" *British Journal of Industrial Relations*, online first (01 April 2024).
- Kristiansen, Jens. 2015. *The Growing Conflict Between European Uniformity and National Flexibility: The Case of Danish Flexicurity and European Harmonisation of Working Conditions*. Copenhagen: DJØF Publishing.
- Larsen, Trine Pernille, and Anna Ilsøe. 2016. *Den danske model set udefra*. Copenhagen: DJØF Publishing.
- Leiber, Simone. 2005. *Europäische Sozialpolitik und nationale Sozialpartnerschaft*. Frankfurt a.M.: Campus.
- Mabbett, Deborah. 2016. "The Minimum Wage in Germany: What Brought the State In?" *Journal of European Public Policy* 23(8): 1240-1258.
- Meyer, Brett. 2016. "Learning to Love the Government: Trade Unions and Late Adoption of the Minimum Wage." *World Politics* 68(3): 538-575.
- Nilsson, Mårten Martos. 2021. "Minimilönerna: LO bryter med Europafacket." *Arbetet*, December 20. Retrieved December 5, 2024 (<https://arbetet.se/2021/12/20/minimilonerna-lo-drar-in-sitt-stod-till-europafacket/>).
- Nussbaum Bitran, Ilana, and Irene Dingeldey. 2023. "Transnational Solidarity in the World of Work? Theoretical Framework Applied to the European Minimum Wage Directive." *Journal of Political Sociology* 1(2): 5-28.
- Ozols, Eriks, Stefan Ivanaov, and Hristov Thomas Paster. 2024. "Unions Divided? Trade Union Attitudes Towards the European Union's Directive on Adequate Minimum Wages." *Economic and Industrial Democracy*, online first (21 April 2024).
- Ratti, Luca, Elisabeth Brameshuber, and Vincenzo Pietrogiovanni (eds.). 2024. *The EU Directive on Adequate Minimum Wages: Context, Commentary and Trajectories*. London: Bloomsbury Publishing.
- Reder, Michael and Alexander Heindl. 2020. "Politische Solidarität in transnationaler Perspektive." *WSI-Mitteilungen* 73(5): 349-355.
- Rödl, Florian. 2018. *Europäischer Pakt für sozialen Fortschritt. Die Alternative zur liberalistischen Verfassung des EU-Binnenmarktes*. Wien: Kammer für Arbeiter und Angestellte für Wien.
- Scharpf, Fritz W. 1999. *Regieren in Europa - effektiv und demokratisch?* Frankfurt a.M.: Campus.
- Schmidt, Susanne. 2018. *The European Court of Justice & the Policy Process*. Oxford: Oxford University Press.
- Schreurs, Sven and Robin Huguenot-Noël. 2024. "Workers of all Member States Unite? Europeanising the Power Resources Approach via the Minimum Wage Directive" *Journal of European Public Policy*, online first (06 April 2024).
- Schulten, Thorsten. 2012. "Stellenwert der Allgemeinverbindlicherklärung für die Tarifvertragssysteme in Europa." *WSI-Mitteilungen* 65(7): 485-495.
- Seeliger, Martin. 2017. *Die soziale Konstruktion organisierter Interessen. Gewerkschaftliche Positionsbildung auf europäischer Ebene*. Frankfurt a.M.: Campus.
- Seeliger, Martin. 2018. "Die soziale Konstruktion internationaler Solidarität. Gewerkschaftspolitische Positionsbildung im Bereich der Dienstleistungsfreiheit." *Industrielle Beziehungen* 25(4): 425-445.
- Seikel, Daniel. 2015. "Class Struggle in the Shadow of Luxembourg. The Domestic Impact of the European Court of Justice's Caselaw on the Regulation of Working Conditions." *Journal of European Public Policy* 22(8): 1166-1118.
- Sjödin, Erik. 2022. "European Minimum Wage: A Swedish Perspective on EU's Competence in Social Policy in the Wake of the Proposed Directive on Adequate Minimum Wages in the EU." *European Labour Law Journal* 13(2): 273-291.