ALLEN & OVERY

Sustainability Belgium

Creating value through a workplace oriented ESG strategy

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"Stakeholder capitalism", or the idea that companies must seek long-term value creation by taking the interests of a broad group of stakeholders into account, has been gaining more and more traction in Belgium. Although its content, its very existence and viability remain debated, there is clearly an increasing societal and regulatory push for sustainability to play a larger role within the workplace.

In this paper we will look at the impact of sustainability issues on the internal work organisation of businesses and how a workplace-oriented ESG strategy can create value for companies, their employees and other internal and external stakeholders.

1. Introduction: Main sustainability issues in the workplace at a glance

Sustainability in the workplace encompasses a very broad range of issues, covering matters such as employee wellbeing and welfare, human rights at work (including modern slavery legislation, supply chain auditing for employment sustainability factors, etc.), the environmental impact of workplaces, corporate social responsibility through the increased awareness of sustainable corporate governance models and sound remuneration policies.

From a pure employment perspective, sustainability strategy revolves around three main themes.

1.1 Sustainability of the workplace as a location where people work

The first overarching theme relates to the organisation of the workplace as a place where people work, and how that organisation impacts on those people and its environment.

The most obvious aspect of this theme from a people perspective is how businesses approach and shape their employee-wellbeing strategy, where there has been a marked increase in awareness of the "employee experience", covering challenges such as an increased desire for better work-life balance schemes, mental health, etc.

But this also covers other issues that relate less to the internal organisation of a workplace and more to how the workplace and its internal organisation impact on the environment in which it operates. More specifically, businesses are increasingly attentive to the organisation's footprint on its surroundings and wider society. Typical examples are the movement towards paperless offices and green mobility policies.

1.2 Organisation of employment and future of the welfare state

The second theme that is typically identified with employment sustainability, and probably the most complex of the three themes, relates to the long-term effects of a number of societal changes caused by new technologies and changing attitudes to service consumption disrupting established employment patterns. The most conspicuous of these is the ascent of the "platform economy", with the rise of platform-enabled market operators such as Amazon, Uber and Deliveroo.

This has unlocked greater consumer accessibility to goods and services, but has also created tensions. In particular, this has put traditional welfare systems under pressure (for example, the financing of social security schemes), especially in Western economies, and has created challenges by changing how the parties to the employment relationship consider employment, its organisation, the reward system, etc.

1.3 Company culture

Arguably the most visible theme in respect of employment sustainability is company culture. While this is a very broad theme, a crucial core topic today relates to workplace culture and diversity issues, which has gained prominence in the context of the #MeToo and Black Lives Matter (**BLM**) movements and the global war for talent.

2. Company culture

2.1 The meaning of company culture

Company culture is what makes a workplace tick.

It is about the everyday values and attitudes expressed in leadership and management style, in workplace policies, and also in communications, employee behaviour and the interaction between employees. As such, company culture has traditionally been viewed through the lens of pay parity and transparency, workplace inclusivity and employee engagement.

2.2 Always important but increased awareness due to widely publicised global movements

Workplace culture has always been an important topic of attention for businesses: positive culture drives employee engagement, increases creativity and is fundamental for talent retention.

In recent years, workplace culture has received a lot of public attention due to the #MeToo and BLM movements. These societal movements have increased employers' awareness of the practical significance of a culture-driven HR policy, moving beyond a strict compliance-based culture, focusing more on culture as a strategy and taking a more value-based approach.

2.3 How the #MeToo and BLM movements have impacted the workplace

Protection against workplace harassment has traditionally been driven by governments through employee health and safety legislation. For example, in Belgium, a strong legal framework has existed since the mid 1990s to protect against workplace bullying and (sexual) harassment. Statutory protection against workplace discrimination is also relatively well developed in Europe, through the national transposition of EU directives since the 1970s combatting discrimination.

In recent years, employers have increasingly taken a more active and broader approach to protection against harassment, partly as a result of a number of global movements inspired by social justice, including the #MeToo and BLM movements.

More specifically, many global enterprises are adopting clear "zero tolerance" policies against (sexual) harassment as well as active diversity policies, backed by employee training to reinforce company culture in practice. Beyond policy, we have seen that employer sensitivity to harassment and culture-related concerns has increased. For instance, the number of internal investigations into allegations of (historical) harassment with the assistance of outside counsel has significantly increased in the last few years.

On the more proactive front, several businesses have established practices of conducting periodic risk analyses in respect of (sexual) harassment and bullying.

We have also seen the emergence, mainly in the US but also increasingly in Europe, of new types of representations and warranties in M&A transactions that have been driven by the #MeToo movement. Going beyond the mere disclosure of ongoing (or threatened) litigation, these seek to also cover allegations or internal complaints of harassment in the broader sense. In practice, "#MeToo reps" typically require the disclosure of any allegations of sexual harassment or misconduct against key leadership figures, as well as any settlement agreements that might have been entered into with employees, contractors, directors or officers in that regard. Since just one single high-profile claim of (sexual) harassment or misconduct can have a material adverse effect on a business, it is clear that buyers are increasingly attentive to these types of risks.

A second movement that has had a significant impact on how businesses approach workplace culture is the BLM movement. Companies are increasingly looking at taking action to improve diversity, equal opportunities and inclusion in the workplace. An increasing number of companies are developing diversity and equality policies and are signing up to diversity charters to create a more inclusive workplace. There is also a marked growth in training offered on unconscious bias and respect in the workplace.

2.4 The development of whistleblowing

Against the background of these two movements, there has been an upward tendency for employees to speak up when things go wrong. In the workplace, whistleblowing has a significant role in creating a healthy speak-up culture.

A very topical development in this regard is the new EU Whistleblower Protection Directive[1](the **WB Directive**), which seeks to strengthen the legal protection granted to whistle-blowers throughout all EU Member States. It covers whistle-blowers, regardless of employment status, who have acquired information on breaches of EU law (eg, public procurement, financial services, protection of the environment, protection of personal data, etc) in a work-related context.

Pursuant to the WB Directive (once transposed into national law), all companies with a workforce in excess of 50 employees will (eventually[2]) be required to set up suitable internal reporting channels for whistle-blowers to report relevant breaches. In addition to internal processes, EU Member States will also be required to set up an external reporting process allowing whistle-blowers to contact the competent authorities directly.

Complementing this whistleblowing framework, the WB Directive also includes rules protecting whistle-blowers against retaliation. In particular, all persons who believe in good faith that the information they have reported within the scope of the WB Directive was correct at the time of the reporting, will be protected against retaliation. A wide range of acts have been classified as retaliation under the WB Directive, such as suspension, intimidation, dismissal, non-extension of a contract and demotion, but also include threats and attempts at retaliation.

Whilst EU Member States must encourage the use of internal reporting as a first option, protection against retaliation will not be conditional upon the whistle-blower first exhausting the internal process. Whistle-blowers will qualify for protection irrespective of whether they first used internal channels or reported breaches directly to competent authorities.

However, the WB Directive states that a person who makes a public disclosure (for example by informing the media) only enjoys protection subject to additional conditions. They are protected under the WB Directive if either (i) they first reported internally or externally but no appropriate action was undertaken, or (ii) they had reasonable grounds to believe that the breach constituted an imminent or manifest danger for the public interest, or in the case of external reporting, that there would be a risk of retaliation or a low prospect of the breach being effectively addressed due to particular circumstances of the case.

The WB Directive was adopted in 2019, with a requirement that EU Member States transpose the WB Directive into national law by 17 December 2021. Like many other EU Member States, Belgium has missed this deadline, but is now working towards having the WB Directive transposed into national law as soon as possible.

The WB Directive will certainly have a significant impact in Belgium. Legislation on whistleblowing in Belgium is currently piecemeal. Specific whistleblowing procedures exist for staff members of the federal and Flemish public authorities and for the private sector. For example a whistleblowing regime exists for reporting infringements of the financial laws and regulations supervised by the Financial Services and Markets Authority (the **FSMA**). Another example is the Anti-money laundering Act, which imposes a duty on entities such as financial institutions to allow staff members, agents and distributors to report breaches of the obligations under this Act.

Hence, Belgian financial services institutions are already accustomed to dealing with whistleblowing regimes. However, as stated above, the transposition of the WB Directive will compel Belgium to introduce a more comprehensive legal framework on whistleblowing.

3. Employee wellbeing

3.1 Latest trends at a glance

In contrast to many other jurisdictions, Belgian organisations have dealt with employee wellbeing issues in an informal "below-the-radar" manner for a long time, for two main reasons. Firstly, the legal protection associated with workplace culture such as gender pay parity, employee wellbeing, etc, has traditionally always occupied a prominent place in Belgium. Secondly, as explained above, since 2002, Belgian law has facilitated a speak-up environment in relation to harassment or any other form of psychosocial risks.

While old HR practices in relation to mental health were as such more reactive, organisations are now trying to be more proactive in dealing with these issues. We have seen an increased focus on raising employee awareness (eg by organising awareness weeks and workshops) as a way of helping to prevent mental health issues, but also on making adjustments in order to allow employees who have experienced mental health issues to return to work.

The increased attention paid to mental health has led to particular trends and innovations in the last couple of years such as the introduction of flexible reward programmes. Aside from allowing employees to tailor their remuneration package to suit their own needs, these programmes typically also allow employees to opt for more flexibility in terms of working time and/or vacations. This offers the employees more freedom to better balance their private lives.

Another innovation that we have witnessed relates to the rising number of long-term absences in Belgium for mental health-related issues and in particular, burnout. While it is generally recognised that the advancement in technologies has its benefits, this also means that employees are expected to be constantly connected. As a result, the line between professional and personal lives has become increasingly blurred. It has been suggested that this may contribute to the rising numbers of employees who suffer from mental illness (including burnout). In an innovative approach to this issue, several insurance companies have designed and rolled out programmes that offer counselling and guidance to employees who have been confronted with mental health issues, notably including early-stage burnout, as a complement to occupational incapacity insurance products. The right to disconnect has recently been introduced for federal public servants in Belgium and some form of right to disconnect will likely also be rolled out in the private sector in the near future (for companies with at least 20 employees).

3.2 Remote working

Although remote working has become more common in recent years prior to 2020, the real catalyst for integrating remote working arrangements into standard business practice has been the Covid-19 pandemic.

Where remote working has been a topic for regulation for quite some time (eg, the first Belgian legal framework in respect of telework was adopted in 2005), it is evident that structural remote working arrangements will increasingly become part of the "new normal".

Some businesses are now thinking of radically changing their ways of working, by looking into structural telework as the "new normal" and rethinking their office space and the office maintenance arrangements.

Despite all the benefits of remote working, businesses should not lose sight of its possible downsides, such as increased isolation and a blurring of the line between work and home.

4. The bigger picture: impact of societal developments on the future of the modern welfare state

In this last section, we will discuss two topical subjects that illustrate the impact of broader societal changes on the welfare state. The first relates to the platform economy and its effects on the organisation of social protection in the modern welfare state. The second relates to the impact of the sustainability movement on remuneration and remuneration policies.

4.1 The platform economy

The platform economy (or gig economy) is confronting welfare states with an enormous challenge: how to integrate the workers of Uber and Deliveroo into their social protection systems. The question here is whether workers in the platform economy can indeed be considered as self-employed contractors providing a task-based service or whether they should be classified as employees and be granted the associated benefits related to being an employee. This is a deep concern in many of the markets where the platform giants are active. It is clear from case law and legal policy that our legal systems are struggling with this question. Although their self-employed status is increasingly questioned, the gig players continue to strongly defend the right to qualify their workers as self-employed contractors.

(a) An insight into the international debate

Various rulings have already been issued in different countries on this question, such as, for example:

(i) **Belgium** – Whilst the Commission for labour relations had previously ruled that Deliveroo riders did not qualify as self-employed contractors, the Brussels employment court has recently issued a judgment following an investigation by the labour prosecutor, in which it held that Deliveroo riders do qualify as self-employed contractors.

(ii) **The United Kingdom** – The Employment tribunal ruled that Uber drivers cannot be considered as self-employed contractors but that they must be regarded as regular employees. This decision was also upheld by the Employment Appeal Tribunal and the Court of Appeal.

(iii) **Switzerland** – In May 2016, the Swiss National Accident Insurance Fund qualified Uber drivers as employees. The Swiss State Secretariat for Economic Affairs also stated that Uber drivers should be qualified as employees. Finally, the *Tribunal des prud'hommes de Lausanne* has recognized the drivers as employees.

(iv) **France** – *The Cour de Cassation* upheld the characterisation of Uber drivers as employees. The main justification adopted by the Court is based on the fact that an Uber driver cannot build his own client base or fix prices which they think are fair. These characteristics make the driver an employee of the company.

So, this debate is far from over, and it presents our modern welfare states with significant and fundamental questions: how should the gig workers be classified? Should a third (hybrid) status be created? What kind of protection should be granted to these workers? Sustainability issues are also raised: what kind of minimum social protection must be provided for the platform workers? How to ensure safe working standards? How to ensure minimum income protection? Who should bear the risk of industrial accidents (the platform player or the platform worker)? What about collective bargaining and collective representation?

There is a real struggle in this debate to find the right balance between progressing and benefitting from the opportunities that new technologies present, without compromising social protection.

(b) Changes in legislation and legal policy

In Europe and the EU, hard law interventions remain scarce.

A notable exception is the EU Directive on Transparent and Predictable Working Conditions in the EU, adopted in July 2019 and requiring transposition into national law by 2022. This Directive applies to platform workers, but also to workers in casual or short-term employment, on-demand workers, intermittent workers, and voucher-based workers, but does not cover self-employed individuals.

The Directive requires employers to inform workers, as from their first working day and no later than the seventh calendar day, of the essential aspects of their employment relationship. It sets a number of further minimum rights for workers, including the right to take up a job in parallel with another employer, to limit the probationary period to a maximum of 6 months, with longer periods allowed only where this is in the interests of the worker or is justified by the nature of the work, to request employment with more predictable and secure working conditions after at least six months service with the same employer, to receive training cost-free when such training is required by EU law or national legislation.

It is unlikely that the Directive will resolve the platform economy issue, as its ambitions are limited and in particular does not address the status of platform economy workers.

However, initiatives continue to be taken at European level:

(i) In November 2019, the European Council adopted the Recommendation on access to social protection for workers and the self-employed, including reference to platform workers.

(ii) On 13 March 2020, the European Commission published a study on working conditions of platform workers. The study, drafted by independent experts, provided an overview of the challenges platform workers face. The main challenges identified included employment status, information available to the workers about their working conditions, dispute resolution, collective rights and non-discrimination[3].

(iii) In the Letter of Intent of the Commission President, published in September 2020, Ursula von der Leyen indicated that the Initiative to improve the working conditions of people working in the platform economy would be one of the key new initiatives for 2021[4].

(iv) Following a process of engagement with gig-economy workers, trade unions and experts in labour law, the Left group in the European Parliament presented the text proposal for an EU Directive on Digital Platform Workers on 16 November 2020[5].

(v) Under the Action plan to implement the European Pillar of Social Rights, the Commission is looking at how to improve the working conditions for people working through digital labour platforms. On 15 June 2021, the Commission launched the second-stage consultation of the social partners on possible instruments for EU action. The Commission is considering both legislative and non-legislative instruments.

In December 2021 the European Commission published its proposal for a Directive on improving working conditions in platform work[6]. The Directive aims to determine the employment status of platform workers. It provides a list of control criteria to determine whether the platform qualifies as an "employer". If the platform meets at least two of the criteria, it is legally presumed to be an employer. The people working through the platform would then benefit from the labour and social rights that attach to a "worker". The Directive also aims to increase transparency in the use of algorithms by digital labour platforms.

It is clear that attention at EU level has increased and that they are high on the Commission's agenda. Combined with increased attention at EU level on technology players and their role in our societies, means that we may see further developments in this area shortly.

In Belgium, things are moving as well. In February 2022, as part of its labour deal, the federal government announced that it will set a list of 8 criteria to determine whether there is a rebuttable presumption of employment in case of platform work, which in reality is however in line with the rules that currently apply in the broader transport sector that were already applied in the recent Deliveroo case (see above). As such, the labour deal would seemingly not change much to the current framework in respect of employment status.

4.2 The impact of the sustainability movement on effective remuneration systems

In relation to remuneration and remuneration policies, the impact of the sustainability movement can be seen on two separate and complementary levels: at top management level, ie in relation to remuneration and remuneration policies for directors and executives and at workplace level, ie in relation to remuneration and minimum wages for rank and file employees.

(a) Developments at the top level

In Europe, a clear trend exists both in soft law and hard law, that sustainability (and attention to sustainability) must be increasingly reflected in remuneration and remuneration policies for directors and executives. This can be seen in particular in developments around remuneration policies of listed companies. The following figures illustrate this phenomenon:

(i) **Italy** – The 2020 Corporate Governance Code includes a recommendation on sustainability values in relation to the remuneration policy for executive directors, and top management: performance objectives must be consistent with the aim of promoting the company's sustainable success and must include non-financial parameters.

(ii) **France** – The 2018 Corporate Governance Code of listed Corporations includes a very explicit reference to sustainability in the context of directors' remuneration. Indeed, their compensation must be competitive, adapted to the company's strategy and context and must aim, in particular, to improve its performance and competitiveness over the medium and long term, notably by incorporating one or more criteria related to social and environmental responsibility.

(iii) **Belgium** – Firstly, reference can be made to the new Belgian Corporate Governance Code that was adopted in 2020. According to the new Belgian Corporate Governance Code, the board should, amongst other things, when exercising its duty of care, "*develop an inclusive approach that balances the legitimate interests and expectations of shareholders and other stakeholders*".

Secondly, an important development has occurred due to the recent changes implemented in the Belgian Code for Companies and Associations in the context of the Say on Pay changes and in particular, the two following changes to the remuneration policy:

– Listed companies must indicate how criteria on variable remuneration "contribute to the long term interests of the company and the sustainability of the company".

– This policy must explain to what extent the terms and conditions of employees of the company have been taken into account in the remuneration policy for directors and executives.

In light of the above, it is clear that sustainably considerations are increasingly shaping remuneration policies and remuneration awards for executives in listed companies.

(b) Developments at the workplace level

For more rank and file type employees, a significant development has occurred at EU level. The European Commission issued a proposal for a minimum wage Directive in October 2020 (the **Proposed MW Directive**)[7]. The Proposed MW Directive would "only" introduce a framework aiming at "setting adequate levels of minimum wages", through promotion of a collective bargaining of wage setting.

In terms of scope, the proposal would apply to all workers who have an employment contract or an employment relationship as defined by the law, including a collective agreement or practice in each EU Member State. The Proposed MW Directive would also apply to workers in non-standard forms of employment, including domestic workers, on-demand workers, intermittent workers, voucher-based workers, bogus self-employed, platform workers, trainees, and apprentices.

According to the proposal, the EU Member States would be able to choose between two models: *"set statutory minimum wages or promote access to minimum wage protection provided by collective agreements"*. Nothing in the Proposed MW Directive must be construed as imposing an obligation on the EU Member States where wage setting is ensured exclusively via collective agreements to introduce a statutory minimum wage, nor to make the collective agreements universally applicable.

EU Member States with statutory minimum wages are required to put in place the conditions for adequate statutory minimum wages. This includes setting clear and stable criteria, providing for regular and timely updates, and the effective involvement of the social partners. The proposal also would also aim to improve adequacy by limiting the use of variations of statutory minimum wages for specific groups and deductions from the remuneration.

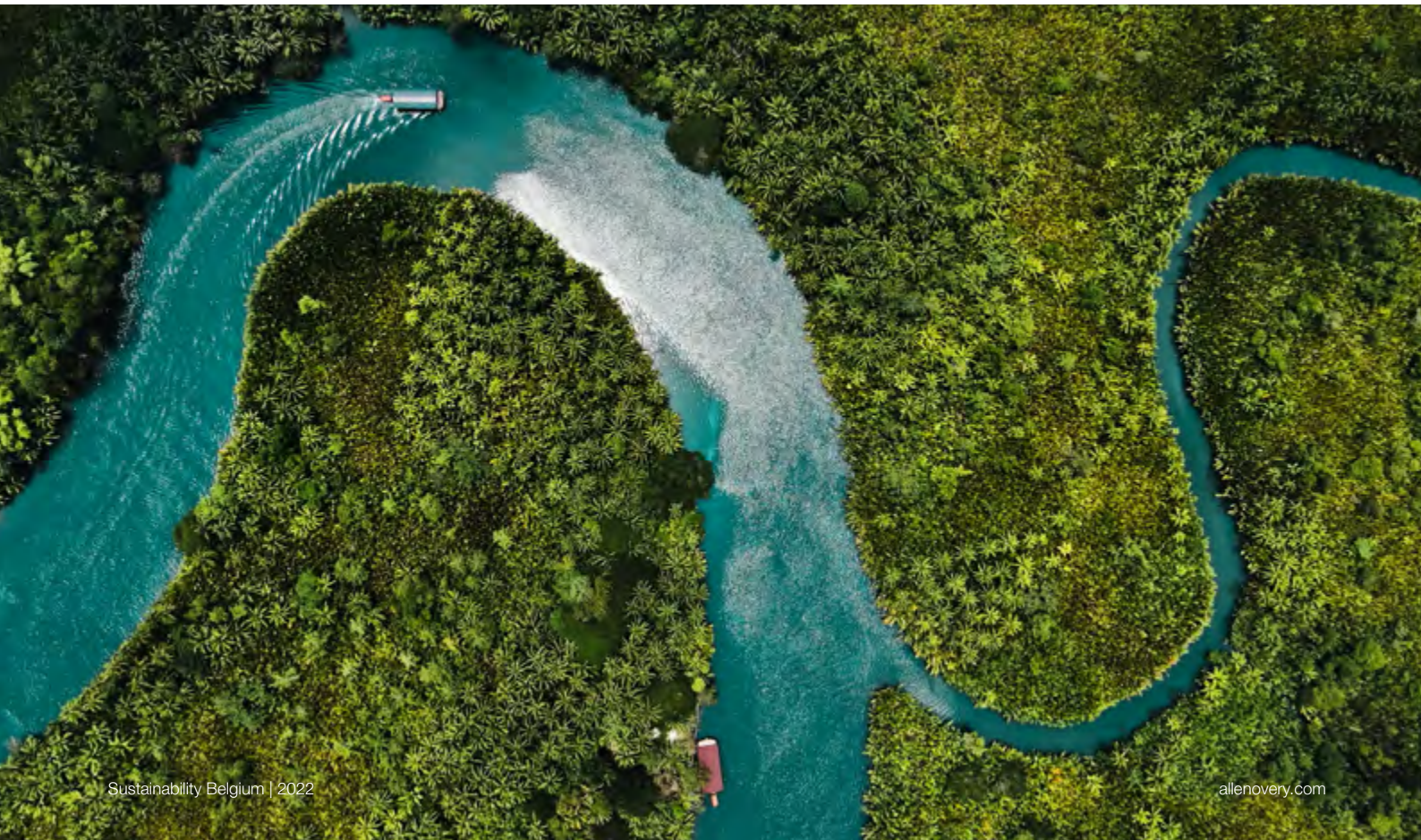
All EU Member States would be asked to take measures to (further) increase the coverage of collective bargaining, notably by supporting the capacity of social partners and encouraging negotiations on wages among social partners. If collective bargaining coverage is below 70%, EU Member States will also have to provide for a framework of enabling conditions for collective bargaining, either by law or through an agreement with the social partners.

The European Parliament has in the meantime agreed its negotiating position in December 2021, and although it still remains to be seen whether it will pass the European Council, this initiative deserves to be mentioned for two reasons.

Firstly, the proposal is clearly driven by a sustainability agenda. According to the European Commission, ***"when set at adequate levels, minimum wages do not only have a positive social impact but also bring wider economic benefits as they reduce wage inequality, help sustain domestic demand and strengthen incentives to work.*** *Adequate minimum wages can also* ***help reduce the gender pay gap****, since more women than men earn a minimum wage. The proposal also* ***helps protect employers that pay decent wages to workers by ensuring fair competition****." and "Countries with high collective bargaining coverage tend to have a lower share of low-wage workers, lower wage inequality and higher minimum wages. Therefore, the Commission proposal aims at promoting collective bargaining on wages in all Member States".* Establishing minimum wages is also a measure ensuring a decent living conditions for workers and reducing in-work poverty *("not only important during the crisis but also essential for a sustainable and inclusive economic recovery").*

Secondly, it is also a bold proposal by the European Commission as, pursuant to article 153(5) of the Treaty on the functioning of the European Union, the EU is not competent to legislate on (minimum) wages. The question could thus be raised as to whether the proposal complies with this treaty provision.

In light of the above, the European Commission is clearly pushing a sustainability agenda in relation to one of the core pillars of the organisation of the modern welfare state.



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Appendix

1. EU Directive 2019/1937.
2. Companies employing between 50 and 250 employees to comply with this requirement will be given an additional 2-year period to implement the necessary processes, meaning that they would only need to comply by 27 December 2023 (subject to national legislation).
3. https://ec.europa.eu/social/BlobServlet?docId=22450&langId=en.
4. https://ec.europa.eu/info/sites/info/files/state_of_the_union_2020_letter_of_intent_en.pdf.
5. https://www.guengl.eu/content/uploads/2020/11/English.pdf.
6. https://ec.europa.eu/social/BlobServlet?docId=24992&langId=en
7. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0682&from=EN.

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