

The reinterpretation of the principle of horizontal subsidiarity in European social law*

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1. The dimensions of the principle of subsidiarity.

The *Epsu* judgment of the European Union Tribunal issued at the end of 2019²⁷⁷ provides an opportunity to check the extent of the principle of horizontal or "social" subsidiarity in the supranational legal order, expressly referred to for the first time in a Communication from the Commission carried out almost twenty years ago²⁷⁸ and which joins the more traditional vertical subsidiarity referred to in Article 5.3 TEU. According to this provision, in fact, "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

The principle of horizontal subsidiarity has its cornerstone, however, in the Treaty on the Functioning of the European Union and, specifically, in Articles 154 and 155 included in Title X on Social Policy. The reference is first to Article 154.2.3 and 4, which provides for the involvement of the European social partners in "making" Union law. In particular, the Commission, before submitting proposals in the field of social policy, shall consult the social partners (paragraph 2). If, after this consultation, the institution deems an action appropriate, it consults the social actors on the content of the envisaged proposal (paragraph 3). These actors transmit an opinion or a recommendation to the same European institution or can inform it of their intention to start the bargaining procedure pursuant to Article 155, which cannot last more than nine months unless extended. In summary, in the application of the principle of vertical subsidiarity, the Union intervenes, in all the subject matters of "shared competence" only if its action is more effective than at the national level. By implementing the principle of horizontal subsidiarity, the Union intervenes instead, in the matter of social policy, with a legislative act of its own issued through the "ordinary legislative procedure", only if this is more effective than European collective bargaining.

The present reason for questioning the principle of subsidiarity in the supranational order stems from the statement contained in the *Epsu* judgement, according to which "that principle is understood as having a 'vertical' dimension, in the sense that it governs the relationship between the European Union on the one hand and Member States on the other. By contrast, ... *that principle does not have a horizontal dimension in EU law*, since it is not intended to govern the relationship between the European Union, on the one hand, and management and labour at EU level on the other"²⁷⁹.

2. The origin of social dialogue and the European collective agreement.

The functioning of the principle of subsidiarity in the field of social policy, in its twofold dimension, passes through the identification of the role of the European collective agreement in the system

²⁷⁷ Case T-310/18, 24 October 2019, *EPSU and Goudrian v European Commission*, EU:T:2019:757.

²⁷⁸ See the Communication from the Commission of 26 June 2002, COM (2002) 341 final, according to which the consultation of social partners "is a practical application of the principle of social subsidiarity. It is for the social partners to make the first move to arrive at appropriate solutions coming within their area of responsibility; the Community institutions intervene, at the Commission's initiative, only where negotiations fail" (paragraph 1.1, page 8).

²⁷⁹ *Epsu* judgement, paragraph 8. Italics added.

of the sources of Union law. It should be remembered that such an agreement, once concluded, can be implemented in two different ways, namely: either 1) “in accordance with the procedures and practices specific to management and labour and the Member States” (Article 155.2, first sentence); or 2) “in matters covered by Article 153” (in fact the whole social policy), “at the joint request of the signatory parties, by a Council decision on a proposal from the Commission” (in practice the directive is used) (Article 155.2, second sentence)²⁸⁰.

Of course, the key point in the matter of subsidiarity is represented by the second path indicated because it is only through the implementation by a directive of the European collective agreement that the social partners have the possibility to “make” Union law on a par with Council and the European Parliament. The *Epsu* judgment deals precisely with this issue, wondering whether the European Commission has any discretion when proposing the implementation of the agreement.

The issue is complex and therefore it is necessary to start from the (few) established certainties in this regard.

As it is known, the Treaty provides for a negotiation between the European social partners that can have a dual origin. There is a “voluntary” negotiation regulated by Article 155.1 TFEU, according to which “should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements”²⁸¹. This type of negotiation is flanked by “induced” negotiation, to which reference was made previously regarding the duty incumbent on the Commission to consult the social partners before making proposals in the social field. For the purposes of the discussion that is being conducted here, the origin of the social dialogue is irrelevant since both in the case of induced negotiation and in that of voluntary negotiation the Commission's position does not change, in the sense that, in neither of the two circumstances, the European institution is aware of the content of the collective agreement. It is true that Article 154.2 refers to the consultation of the social partners on the content of the envisaged proposal, but it is also undeniable that paragraph 4 of the same provision allows the social partners to “block” the ordinary procedure of making EU law²⁸² at that precise moment or even at the time of the first consultation and, therefore, in both the cases, prior to the elaboration of any collective agreement. What has been said above allows proceeding, at least up to a certain point, with a single discussion on the role of the Commission in the implementation of the collective agreement concluded at the supranational level²⁸³. In the *Epsu* case, the European social

²⁸⁰ The Council shall adopt such a directive by qualified majority or unanimity, depending on the subject matter. On these profiles see ALES, *The State, Industrial Relations and Freedom of Association: A History of Functional Embeddedness*, in PERULLI, TREU (eds.), *The Role of the State and Industrial Relations*, Wolters Kluwer, 2019, page 187 ff.. According to this author, European social dialogue is an example of corporatism, since “the jurisdiction in which the industrial relations is embedded entrusts Management and Labour with the authority of regulating working conditions through legislator-like prerogatives” (page 189).

²⁸¹ On the voluntary negotiation, see, in a pioneering perspective, GUARRIELLO, *Ordinamento comunitario e autonomia collettiva*, FrancoAngeli, 1993 and, in more recent times, PERUZZI, *L'autonomia nel dialogo sociale europeo*, il Mulino, 2011, Chapter IV.

²⁸² L. ZOPPOLI (*Intervento alla Tavola rotonda sul caso Epsu*, 28 January 2020, RGL, 2020) highlights opportunely that the role of the Commission towards the social partners cannot be considered as merely launching a debate, as it is stated in the *Epsu* judgment (paragraph 134).

²⁸³ On this profile, I agree with what is claimed by DORSEMONT, LÖRCHER, SCMITT, *On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case, ILJ*, 2019, page 1 ff. According to these authors, “nothing in Article 155 TFEU

partners had signed a collective agreement aimed at extending to the public sector the protection provided to private workers concerning information and consultation. The same parties had asked the Commission to implement the agreement and the European institution had refused to submit a proposal for a directive on that matter.

On a closer inspection, however, as regards to the principle of subsidiarity, three hypotheses must be distinguished, one concerning voluntary negotiation and two as regards to the induced negotiation.

In the event of a voluntary negotiation, concluding with a collective agreement that, at the request of the social partners, shall be implemented, neither the Commission nor any other Union institution has been involved in applying the principle of vertical subsidiarity set out in Article 5.3 TEU (*first hypothesis*).

On the contrary, in the event of an induced negotiation, a distinction must be made, depending on when the social partners decide to inform the Commission of the intention to start the procedure referred to in Article 155. Indeed, such a decision can be taken immediately after the consultation of the social partners by the Commission "on the possible direction of Union action" (Article 154.2 TFEU), as happened in the *Epsu* case (*second hypothesis*), or subsequently when "the Commission considers Union action advisable" and it consults "management and labour on the content of the envisaged proposal" (Article 154.3 TFEU) (*third hypothesis*).

The hypothesis of the voluntary negotiation is like that of the negotiation induced after the first consultation of the Commission. Instead, if the decision of the social partners is communicated at the time of the second consultation, the situation is different. In the first two hypotheses previously mentioned, a collective agreement is concluded where the Commission is only actually involved in the phase following the stipulation. Therefore, the first act that the Commission carries out is to apply the principle of subsidiarity and in doing this it cannot be replaced by the social partners because Protocol no. 2 annexed to the Treaty on European Union provides that the respect for the principle of subsidiarity shall be ensured by "each institution" of the Union, an expression that cannot be referred to the European social partners. Furthermore, one should remember that, pursuant to Article 17.2, TEU, "Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise", an exception that does not seem to occur in the case of social dialogue, since Article 155.2 TFEU provides that European collective agreements can be implemented at the joint request of the signatory parties "by a Council decision" but precisely "on a proposal from the Commission". Therefore, in the first and second hypotheses, the European institution, custodian of the prerogative of submitting a proposal and guardian of the Treaties, can motivate its possible refusal in any way because that is a political act of exercising the principle of (vertical) subsidiarity.

In the third hypothesis, the issue changes. The Commission intervenes at the time of the second consultation and therefore has carried out an assessment on the appropriateness of the regulative intervention although not yet on its contents. In this circumstance, the European institution,

suggests that an obligation to propose a decision to the Council would only exist where the Commission has consulted the social partners" (page 33). This appears confirmed by the 2019 judgement of the EU Tribunal, which considers the fact that the social dialogue at the time was started by the Commission is not indicative of the application of the principle of subsidiarity. The EU judges declare that "on that occasion the Commission merely launched a debate without prejudging the form and content of any possible action to be undertaken" (*Epsu* judgement, paragraph 134).

again in application of the principle of subsidiarity, deemed it advisable to carry out a regulatory intervention by the Union, entrusting the social partners, upon their joint request, to define the content of this intervention through the conclusion of a collective agreement. If the social partners, after concluding the collective agreement, ask for its implementation by a directive, the Commission will have already expressed an appropriateness assessment and will only have the possibility of making an appreciation of the contents of this intervention, i.e. of the clauses of such an agreement. In this case, however, it will be necessary to provide a rationale for the possible refusal to submit a directive with legal and non-political reasons, whose "borders" will be analysed below.

3. The role of the Commission and the Council in the European social dialogue.

It is time to come to the state of the debate on the role of the Commission in the implementation of a European collective agreement by a directive. Here the best way to approach the problem is to wonder how the Commission proceeded by regulating that profile through a series of Communications²⁸⁴, being conscious of the fact, however, that the European institution has never differentiated based on when the social partners intervene.

After this clarification has been made, it is without doubt that the Commission can exercise the control over the representativeness of the signatories parties to the collective agreement and on the legality of the clauses of the agreement itself with respect to the provisions of Union law²⁸⁵; the control of the second profile is considered necessary indeed, as it is not possible to pass a legislative act contrary to the primary sources of EU law. Therefore, under the suggested interpretation, in all the hypotheses that have been highlighted above, the Commission is required to carry out at least the legality test.

The problem arises with regard to the assessment of the appropriateness of the contents of the collective agreement²⁸⁶, which the Commission has considered in recent years as a condition for the implementation by a directive, as underlined by the European Pillar of Social Rights, solemnly proclaimed on 17 November 2017 by the European Parliament, the Commission and the Council²⁸⁷. Point 8 of this document states that "the agreements concluded between the social

²⁸⁴ Communications from the Commission: COM (93) 600 final; COM (96) 448 final; COM (98) 322 final; COM (2002) 341 final. See TRICART, *Legislative implementation of European social partners agreements: challenges and debates*, Working paper 2019.09, European Trade Union Institute.

²⁸⁵ This profile was well highlighted more than twenty years ago by LO FARO, *Funzioni e finzioni della contrattazione collettiva comunitaria*, Giuffrè, 1999, pages 194-202.

²⁸⁶ See v. LO FARO, *Funzioni e finzioni...*, according to whom the Commission certainly cannot be denied to express evaluations on the contents of a collective EU agreement intended to be implemented by a Council decision to be adopted on the basis of a proposal, but it does not seem possible that these discretionary assessments are presented as part of a legality check. This is a real "approval clause", whose consistency with the repeated intention of the Commission to guarantee the autonomy and independence of the social partners is at least doubtful (pages 205-206). See also LO FARO, *Articles 154, 155 TFEU*, in ALES, BELL, DEINERT, ROBIN-OLIVIER (eds.), *International and European Labour Law*, Beck, Hart, Nomos, 2018, page 173.

²⁸⁷ On the European Pillar of social rights, see, *ex multis*, ALES, *La dimensione "costituzionale" del modello sociale europeo tra luci e ombre (con particolare riferimento ai diritti collettivi e al licenziamento)*, in CARINCI M.T. (ed.), *L'evoluzione della disciplina del licenziamento. Giappone ed Europa a confronto*, Milano, 2017, 159 ff.; ALES, *The European Employment Strategy as Enhanced Coordination: A holistic approach to the EU social commitment*, ELLJ, 2017, vol. 8(2), 122 ff.; CORTI, *Flessibilità e sicurezza dopo il Jobs Act. La Flexicurity italiana nell'ordinamento multilivello*, Torino, 2018, 73 ff.; HENDRICKX, *European Labour Law and the Millennium Shift: From Post to (Social) Pillar*, BCLR, 2018; RATTI, *Il pilastro europeo per i diritti sociali nel processo di rifondazione dell'Europa sociale*, in

partners shall be implemented at the level of the Union and its Member States" not always but only "where appropriate", implying a margin of action of the Commission that goes beyond the control of legality and possibly of representativeness. And this is precisely the conclusion reached by the EU Tribunal, which ruled that "before using its power of initiative, [the Commission] determines ... whether the initiative proposed is appropriate. Therefore, when it receives a request to implement at EU level an agreement concluded between management and labour, the Commission must not only verify the strict legality of the clauses of that agreement, but also assess whether implementation of the agreement at EU level is appropriate, including by having regard to political, economic and social considerations"²⁸⁸. However, to be honest these conclusions should have been differentiated according to when the social partners intervene in the legislative procedure.

With this clarification, the arguments used by the Court can be shared when referring to Article 17.3 TEU, according to which "in carrying out its responsibilities, the Commission shall be completely independent", even though a reference to paragraph 2 of the same provision, which has been recalled above, should have been appropriate, since that provision establishes that a Union legislative act may only be adopted on the basis of a Commission proposal. Furthermore, the discourse of the irrelevance of the Communications from the Commission issued between 1993 and 2002, where only a legality check of the agreement and a representativeness test of the contracting parties was envisaged, is persuasive. Indeed, European judges recall that such Communications "are devoid of any binding legal force. Consequently, ... may not successfully be invoked to preclude the interpretation of a provision of the treaties that follows from its wording, context and the purpose of that provision"²⁸⁹. In summary, the provisions of non-binding secondary sources cannot be used to interpret primary provisions such as those of the Treaty referred to above. Of course, this statement by the EU Tribunal also applies to subsequent non-binding sources, where reference is made to the presence of a wider discretionary power of the Commission in submitting the proposal for a directive implementing a collective agreement, such as the European Pillar of Social Rights, which has been previously mentioned. It is true, however, that the wording of point 8 of the Pillar leaves room for the differentiated interpretation of the application of the role of the Commission based on the moment when the social partners intervene²⁹⁰.

The reasoning of the Tribunal is also relevant when it refers to Article 13.1 TEU and declares that "the interpretation proposed by the applicants would alter the institutional balance to the detriment of the Commission in favour of management and labour even though they are not amongst the institutions exhaustively listed in"²⁹¹ that provision of the Treaty, analysis that is linked to what have been said above.

On the contrary, the explanations related to the general interest issue are controversial and

CHIAROMONTE, FERRARA (eds.), *Bisogni sociali e tecniche di tutela giuslavoristica. Questioni aperte e prospettive future*, Milano, 2018, 7 ff.; under the perspective of digital work, see CARUSO, *I diritti dei lavoratori digitali nella prospettiva del Pilastro sociale*, WP C.S.D.L.E. "Massimo D'Antona".INT – 146/2018.

²⁸⁸ *Epsu* judgement, paragraph 79.

²⁸⁹ *Epsu* judgement, paragraph 102.

²⁹⁰ Simply emphasizing that the implementation of the collective agreement by the Union can take place "where appropriate".

²⁹¹ *Epsu* judgement, paragraph 81.

overabundant. In this regard, the EU Tribunal refers to Article 17.1 TEU - according to which “the Commission shall promote the general interest of the Union and take appropriate initiatives to that end” - ruling that such a function “cannot, by default, be fulfilled by the management and labour signatories to the agreement alone. Management and labour, even where they are sufficiently representative and act jointly, represent only one part of multiple interests that must be considered in the development of the social policy of the European Union”²⁹². The discourse on the interests that the social partners and political institutions can bear would be very long. Here it is enough to say that the assessment of the general interest is up to the Commission in the differentiated ways referred to above, but also and, I would say, particularly to the Council, called to intervene in the approval of the directive. In this regard, if, as it has been anticipated, the existence of a discretion of the Commission is still under discussion, there is no doubt that, once the proposal for a directive has been submitted, the Council can freely decide whether to approve it or not, respecting the majorities required by the Treaty, according to the subject matter of the collective agreement. This is one of the cornerstones of the *Epsu* judgment as the Council's discretion in this regard is contested by neither the Commission nor the (union) applicants²⁹³. Since the Parliament shall simply be informed in this case, the Council is the only EU institution that exercises the legislative power of the Union and cannot be bound by the determinations of the European social partners. The discretion of the Council is wide and any vote against the approval of the directive, being a wholly political-legislative act, does not require any motivation. Nevertheless, the continuation of this reasoning retains its usefulness, since, even within the ordinary legislative procedure, Parliament and Council may or may not approve a Commission proposal, but this does not prevent the interpreter from questioning the role played by the last-mentioned European institution.

Even in the light of what has been said so far, however, the opinion of those who found the existence of a constraint for the Commission to propose a directive implementing a collective agreement on Article 152 TFEU appears unconvincing²⁹⁴. In fact, this provision merely states that “the Union recognises and promotes the role of the social partners at its level” and facilitates “dialogue between the social partners, respecting their autonomy”. Such a strict obligation on the European institution cannot derive even from the combined reading of this provision with Articles 154 and 155 TFEU²⁹⁵.

²⁹² *Epsu* judgement, paragraph 80.

²⁹³ As a matter of fact, “both the applicants and the Commission recognise that the Council has a discretion as to whether it is appropriate for it to adopt a decision implementing an agreement and that it may not be able to adopt such a decision in the absence of agreement by qualified majority or unanimity, depending on the case, within the Council” (*Epsu* judgement, paragraph 76).

²⁹⁴ DORSEMONT, LÖRCHER, SCMITT, *On the Duty to Implement ...*. Those authors believe that “Article 152(1) TFEU obliges the Commission to try to bring about the translation of the regulations stemming from the exercise of collective autonomy into the realm of the EU legal order” (page 17). Later, the same authors state that “there is an obligation for the Commission to submit a proposal if a joint request was made by the signatory parties” (page 22).

²⁹⁵ Scepticism about the potential of Article 152 TFEU is also expressed by NUNIN, *Pluralismo e governance istituzionale dei sindacati a livello europeo*, DLM, *Quaderno*, 2019, 6, pages 235-236.

4. The reasons for the Commission's refusal to submit a proposal for a directive.

Related to the question of whether the Commission may refuse to submit a proposal for a directive from the social partners is the issue of whether the Commission must provide its motivation for doing so. In situations encompassing the hypothesis where the social partners are involved at the time of the second consultation, provided by Article 154.3, it is not necessary to provide a motivation for the refusal to submit the proposal for a directive since the Commission has not yet applied the principle of subsidiarity in any way and therefore is entitled to broad political discretion.

However, according to the EU Tribunal in the case before it, the Commission has a duty to give a motivation for its refusal, based on Articles 225 and 241 TFEU²⁹⁶. Another primary rule referred to in this regard is Article 296.2 TFEU, according to which “legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties”. The Court reiterates that the Commission's refusal to submit a proposal for a directive is not limited solely to the reasons for the lack of representativeness of the signatory parties or the illegality of the clauses of the agreement. Other reasons are admissible if, in the Tribunal's opinion, they are not materially incorrect or irrelevant.

In the current case, the reasons given by the Commission are three:

- 1) “central government administrations were under the authority of the Member States’ governments, ... their structure, organisation and functioning were entirely the responsibility of the Member States”;
- 2) “provisions ensuring a certain degree of information and consultation of civil servants and employees of those administrations already existed in many Member States”;
- 3) “the significance of those administrations depended on the degree of centralisation or decentralisation of the Member States, so that, in the event of the implementation of the Agreement by a Council decision, the level of protection of civil servants and employees of public administrations would vary considerably across Member States”²⁹⁷.

5. ... Cancellation of horizontal subsidiarity? The "boundaries" of the Commission's motivation.

At this point one wonders whether the interpretation here suggested involves the cancellation of horizontal subsidiarity in favour of vertical subsidiarity only.

One should remember that in the *Epsu* case the collective agreement, whose implementation was requested, was the result of an induced negotiation, which started at the time of the first consultation of the social partners by the Commission when the European institution had not yet carried out an appropriateness assessment. In such a case (or in the analogous circumstance of a voluntary collective agreement), the consequence deriving from Articles 154 and 155 TFEU is that there is no need to provide a motivation for the refusal because the Commission has not yet applied the principle of subsidiarity by means of a political act. The same happens in the ordinary

²⁹⁶ Those provisions “authorise the Parliament and the Council respectively to request the Commission to submit any appropriate proposal, while providing that the Commission may decide not to submit a proposal, subject to the condition that it gives reasons for its refusal” (*Epsu* judgement, paragraph 82).

²⁹⁷ It is possible to read the three motivations in paragraph 9.

legislative procedure when the Commission is not required to state the reasons for not submitting a proposal for a directive on a specific subject matter, just like the national government is not obliged to give a motivation for the non-submission of a bill.

Things change in the event of a consultation of the social partners on the content of the regulatory intervention. In this case, the presence of the primary sources of Union law requires that the motivation cannot be based on appropriateness reasons. Therefore, it is useful to trace the "boundaries" of the Commission's motivation. Furthermore, the permanence or otherwise of the principle of horizontal subsidiarity in the EU legal order depends on the delimitation of these borders.

The analysis of the reasons given by the Commission in the *Epsu* case, therefore, retains its usefulness, although it should be referred to the third hypothesis of the proposed classification. As anticipated, the Commission argues that: 1) the organization and functioning of public administrations fall within the competence of the Member States; 2) many of the Member States have already statutory provisions protecting information and consultation of civil servants; 3) the level of protection of civil servants would have varied considerably among the Member States, due to the different degree of centralization or decentralization existing in the various national contexts.

The first and third reasons touch on some aspects of the legality check as the Commission excludes the possibility that the Union has competence in the matter of public administration and believes that a directive implementing the collective agreement would have produced a differentiated protection in the national legal orders.

The second reason, on the contrary, constitutes an assessment of appropriateness, perfectly admissible in this case but not in the event of a social dialogue started after the second consultation.

What has just been said must also consider the European framework agreement on the protection of occupational health and safety in the hairdressing sector, which was concluded in 2012²⁹⁸ as a result of a voluntary negotiation. Even in this circumstance, the Commission refused to propose the implementation and, similarly to the agreement on the provisions of information and consultation rights to civil servants, could have motivated the refusal even on political reasons only. In this sense, the arguments put forward by the then President of the Commission must be interpreted. Jean-Claude Juncker founded the refusal on the fact that the agreement dealt with very marginal profiles, which were already regulated by the EU legislation, such as the 'generalist' directives concerning safety and health in the workplace²⁹⁹.

In summary, on a closer inspection, the principle of horizontal subsidiarity is not weakened by the proposed interpretation. More precisely, in the cases of voluntary negotiation and of a negotiation induced at the time of the first consultation, the principle of horizontal subsidiarity gives way to that of vertical subsidiarity because the Commission has a duty to apply the latter principle, according to the articles of the Treaty on European Union that have been mentioned above and to Protocol no. 2. The suggested interpretation is that the Commission must monitor compliance

²⁹⁸ That agreement was concluded on 26 April 2012 and, following the Commission's reluctance to implement it by directive after the joint request of the signatory parties, was amended on 23 June 2016.

²⁹⁹ Juncker discussed this collective agreement during the meeting with the ETUC Executive Committee held on November 7, 2016 and stressed that the Union could not implement by a directive an agreement that contained a ban on hairdressers to wear high heels.

with such a principle. What is important is that in any case the European institution always carries out an assessment of appropriateness concerning the directive implementing a collective agreement, regardless of the choices made by the social partners.

Instead, if the negotiation is induced at the time of the second consultation, the Commission has already carried out a political assessment and has decided, by applying the vertical subsidiarity, that the Union should regulate a certain subject matter. In view of this intervention, the scope of the Commission's areas of action are reduced since the European institution cannot motivate its refusal to implement the collective agreement for political reasons, but only for legal reasons, the content of which is limited. In fact, a more careful reading of Articles 154 and 155 TFEU requires that, in this case, the motivation can only concern the legality of the clauses of the collective agreement and the representativeness of the signatory contracting parties. There is no further room for *manoeuvre* for the Commission. In this circumstance, the social partners must apply the principle of horizontal subsidiarity downstream of the implementation of vertical subsidiarity by the Commission. In such a case, the narrow boundaries of the motivation for the refusal lead to the enhancement of the role of the European social partners in making Union law and require to correct the above-mentioned declaration of the EU Tribunal, according to which the principle of subsidiarity "does not have a 'horizontal' dimension in Union law".

The judgement of the EU Tribunal has been appealed before the Court of Justice. Therefore, it is now a matter of waiting for what the higher Court will rule, being conscious of the fact that it is burdened with the onerous task of providing more precise and definitive indications on the complex issue of the relationship between horizontal and vertical subsidiarity.