



EUROPEAN SOCIAL DIALOGUE IN THE COURT OF JUSTICE

An Amicus curiae workshop on the EPSU case

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Bringing the voice of legal scholars into the courtrooms of Plateau de Kirchberg. An introduction

by Antonio Lo Faro

University of Catania

Starting from 1992, generations of European (labour) lawyers – some of them among the Authors of this collection – have been intensively investigating the social dialogue provisos originally included in the Maastricht Social Protocol and later incorporated within the Treaty.

Caught between an “EU law-institutional” perspective, and a “Labour Law-industrial relations” approach, the European social dialogue’s early life in the last decade of the XX century has been advancing among a series of “identity dilemmas”: is it an expression of true social partners’ autonomy, as its alternative appellation of “European collective bargaining” tends to suggest? Or is it rather just an EU legal system’s pre-regulatory technique? Or perhaps something in between, as the celebrated Brian Bercusson’s formula of “bargaining in the shadow of the law” alluded to?

Be that as it may, the just mentioned conceptual ambiguities did not turn into empirical impasse, at least not throughout the roaring years 1996-2000, when significant agreements have been concluded with regard to pivotal issues of employment law such as parental leaves, fixed-term work, part-time work, and (certain aspects of) working time. And even when, after the first booming phase, social dialogue began to narrow its quantitative, and perhaps qualitative, scope, the doctrinal debate concerning its role within the system of EU law sources did not shrink, until a certain degree of consensus was reached on the notion of “horizontal subsidiarity” as a conceptual tool able to explain and justify the pre-emption of EU legislative prerogatives by social partners.

All through the development of this intense and 30-years-long doctrinal debate - somehow echoed on the institutional side by a copious sequence of Commission's communications - a great absentee was however discernible: the EU judiciary, whose pronouncements on the institutional mechanisms regulated by Articles 154-155 of the Treaty have been quite rare so far.¹ So rare, indeed, that it could be easily agreed that social dialogue is one of the topic of the EU social law where a major disproportion is visible between a high academic commitment and a low jurisprudential concern.

The *EPSU* judgment to which this collection is dedicated², marks an (unfortunate) reversal of such a jurisprudential "abstentionism" (or absence) on the topic of European social dialogue: by making a questionable application of the recognized canons of statutory interpretation, the General Court surprisingly downgraded the institutional role recognized to social partners to a sort of "courtesy meeting" graciously octroyé by the Commission. By complying with the procedures regulated by Art. 154-155 of the Treaty - the General Court incredibly declared - the Commission "*merely launched a debate*" (!) (point 134 of *EPSU*).

*

It is precisely such a clear judicial misrepresentation of the social dialogue's role within the EU social law sources' system, which has induced a group of lawyers sensitive to, and experts of, the "normative function" of EU social dialogue, to find a way to bring the voice of the scientific debate into the courtrooms of the Plateau de Kirchberg.

In the perspective of the labour and constitutional law scholars gathered at the initiative of Filip DORSSEMONT (Atelier de droit social-Crides, UCLouvain, Louvain-La-Neuve), Silvia BORELLI (University of Ferrara), Edoardo TRAVERSA

¹ Basically, only the *UEAPME* case in the Tribunal (T-135/96 of 17.06.1998, ECLI:EU:T:1998:128), and the *Chatzi* case in the Court (C-149/10 of 16.09.2010, ECLI:EU:C:2010:534).

² General Court (Ninth Chamber, Extended composition), Judgment, 24 October 2019, T-310/18, *EPSU* and Goudriaan / Commission, ECLI:EU:T:2019:757, referred to as '*EPSU* judgment'.

(Crides and School of European Studies, UCLouvain, Louvain-La-Neuve), Antoine BAILLEUX (Institute for European Studies, Université Saint-Louis - Brussels) and Emmanuelle BRIBOSIA (Institut d'Études Européennes, Université Libre de Bruxelles), such very welcomed bridge between the academia and the judiciary has taken the form of "a *genuine albeit symbolic amicus curiae*" contribution, as it is declared in the opening manifesto of the workshop which this Collection originates from.

The papers presented on the occasion of the *Amicus Curiae Workshop on the EPSU Case (European Social Dialogue) - A Meta-dialogue with the Court of Justice* – held in Brussels on September the 16th 2020³ - are now assembled in this collective volume, and ideally offered (also) to the Court of Justice's consideration, with the sole ambition to broaden the spectrum of the possible points of view to be taken into account when deciding a case whose relevance is undoubtedly crucial, not only for the future of social dialogue, but also to understand future directions of democracy, regulatory dynamics and fundamental rights within the Union.

It is neither secret nor unexpected that the General Court ruling in the *EPSU* case has been considered by the majority of legal doctrine as highly unsatisfactory in its results, as well as poorly supported in its argumentative logic. The present collection of papers is no exception, since all of the Authors share the opinion that many of the basic assumptions upon which the *EPSU* ruling is founded could or should be appraised in a different, if not divergent, way. This is the case for the very same hermeneutical criteria used by the General Court to interpret the peculiar institutional mechanisms devised by the Treaty in the field of social law (Filip DORSSEMONT); for the underestimation of the notion of horizontal subsidiarity as an inherent feature of the entire European social policy model (Mélanie SCHMITT, Antonio GARCIA-MUÑOZ ALHAMBRA and Massimiliano DELFINO); for the substantial disregard of social

³ The integral video registration of the workshop is available on the YouTube channel of CRIDES - *Centre de recherche interdisciplinaire Droit Entreprise et Société* of the Université catholique de Louvain at <https://www.youtube.com/channel/UCikltzMeHV3DV5uD101jZCA>

dialogue factual and conceptual history (Beryl TER HAAR); for the misrepresentation of both the Commission's monopoly in the legislative initiative (Pieter-Augustijn VAN MALLEGHEM), and its prerogatives with regard to the outcomes of the social dialogue (Silvia RAINONE); for the misestimation of the very same 'rules of the game' posed by the Commission itself (Jean Paul TRICART); for the inaccuracies affecting the Court reasoning with regard to the interpretation of specific concepts such as 'general interest' (Klaus LÖRCHER) and 'central government' (Jacques ZILLER).

The Court of Justice will soon decide whether or not the critical remarks contained in this Working Paper *should* be considered as sufficient to overrule the *EPSU* judgment. The vast majority of the *Amici curiae* who drafted them trust that, at least, this *could* be the case. And so do I.

*

The Editorial Board of the The Working Papers Collection of the Centre for the Study of European Labour Law 'Massimo D'Antona' is glad to contribute to the advancement of a much needed dialogue between the academia and the European Court, and wish to thank the editors for this opportunity.

The editors of this Working Paper would like to thank Klaus Lörcher for his precious help with the collection and the editorial assemblage of the texts.

The notion of central government administration and the scope of EU law

by Jacques Ziller

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1) Introduction

The differences between EU member States in the organisation and functions of central government and the question whether the EU has competence in that matter is particularly relevant because one of the main arguments of the Commission on substance was that there were such differences and that therefore it was not possible to extend the agreement by the way of the Article 155 TFEU procedure.

By letter of 6 March 2018⁴, the Commission stated: “[o]n 1 February 2016 you requested the European Commission to present a proposal to implement by a Council Decision the social partners' agreement concerning a general framework for informing and consulting civil servants and employees of central government administrations" concluded by EUPAE and TUNED”, and that “the Commission informs you that it will not propose to the Council a decision to implement this agreement at EU level”. This note only focusses on the arguments presented in the cited letter; the note is leaving aside the question whether the letter is to be considered as a final decision in the sense of EU law, hence open to an action for annulment pursuant to Article 263 TFEU or only as a statement that might be the basis for a procedure for failure to act pursuant to Article 265 TFEU. The note is also leaving aside the issue of the limits to the Commission's discretion to make a proposal pursuant to Article 155 (2) TFEU, albeit taking into account the fact that the ultimate decision power rests with the Council acting by qualified majority.

The Commission's announcement not to make a proposal to the Council relies on two series of considerations:

First: “The Commission notes that *central government administrations* are placed *under the authority of national governments* and *exercise the powers of a public authority*. Their *structure, organisation and functioning* are *entirely a matter* for the respective *national authorities* of member states. Provisions ensuring a degree of information and consultation of staff in

⁴ (EM PL/ A2/S M/ah/S(2018)135 1479) from the Director-General, DG Employment, Social Affairs and Inclusion of the European Commission, to Ms Britta Lejon, Chair of the EU Social Dialogue Committee for Central Government Administrations and TUNED's chair and to Mr Hector Casado Lopez, EUPAE's Chair.

that sector are already in place in many member states" [emphasis added].

Second: "Moreover, the prerogative of national authorities to structure and organise the central government sector also leads to the fact that the *organisation of this sector varies widely between member states*, depending on the degree of decentralisation of their public administration. *Thus, a Directive transposing the Agreement into EU law would result in significantly different levels of protection* depending on whether the Member State has a more centralised administration and therefore a wider coverage of central government, or a more decentralised or federal administration, which *would leave a larger proportion of the public sector excluded from the scope of such EU legislation*" [emphasis added].

Those two series of considerations will be analysed in detail both from a legal perspective and from an administrative and policy-making perspective.

2) The relevance of the notion of Central government administrations in member states

The Commission first points to the fact that central government administrations are "***placed under the authority of national governments***". It is not clear what conclusion the Commission draws from this situation. It has at any rate to be stressed that the link between member states' governments and central government administrations is more complex: in all member states there are not only "departmental services" which are legally and politically placed in a hierarchy headed by a minister (or by government as a collegial body), but also "non-departmental services"⁵ (or bodies) with managerial and or budgetary autonomy and sometimes a legal personality of their own⁶. Very often non-departmental services or bodies are not exercising public authority, but it is not possible to generalise; vice-versa it cannot be said that departmental services are always exercising public authority. Furthermore, even in departmental services the degree of managerial, budgetary, legal and political autonomy

⁵ The vocabulary opposing "departmental" to "non departmental" services is that of the present day UK civil service; it has to be stressed that in the English language there is no commonly used vocabulary relating to the form of public administrations: the term "agencies", which comes from US practice, is getting more and more fashionable and is used indiscriminately, which generates quite some confusion as to the degree of legal, budgetary or managerial autonomy of services.

⁶ For more details on both issues in practice, see the paper I prepared in 2006 for the EU/OECD Sigma programme: OECD (2007), *Organising the Central State Administration: Policies & Instruments*, Sigma Papers, No. 43, OECD Publishing. <http://dx.doi.org/10.1787/5kml60q2n27c-en>

varies, even in each single Member State. This being said, such differences in autonomy have no consequences as to the nature of the addressees of a possible Council directive, which are the member states⁷.

The Commission further “notes” that central government administrations “**exercise the powers of a public authority**”. The letter does neither indicate whether in the Commission’s mind all central administrations exercise such powers nor if it thinks they exercise always and only such powers. The Commission does not either refer to the legal nature of central government administrations, i.e. whether they are entities endowed with legal personality or they are part of State administration; the Commission does not either refer to the differences in degree of autonomy in decision making between different services. Therefore, the reader has to guess what the meaning and purpose of the letter’s reference to public authority is.

It is not to be excluded that terms “the powers of a public authority” mean an **implicit reference to Article 45 (4) TFEU**, according to which “[t]he provisions of this Article [i.e. on the way in which freedom of movement for workers shall be secured within the Union] shall *not apply to employment in the public service*” [emphasis added]. Indeed, the jurisprudence of the CJEU on that provision⁸ has established that 45 (4) TFEU “removes from the ambit of article [45] (1) to (3) a series of posts which involve direct or indirect participation in the exercise of *powers conferred by public law* [in French *exercice de la puissance publique* which corresponds better to the wording used in the Commission’s letter, i.e. “powers of a public authority”] *and* duties designed to *safeguard the general interests* of the state or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the state and reciprocity of rights and duties which form the foundation of the bond of nationality” [highlights added].⁹ If such an implicit reference were intended by the Commission letter, we have to stress two points. *First*, Article 45 (4) TFEU is only relevant to the issue of access to public employment by citizens from another Member State than the host country and to their taking part in the management of bodies governed by public law.¹⁰ *Second*, that provision does not

⁷ It has to be recalled by the eye that Member States would also be the addressees of a directive if an agreement between social partners representing local and or regional authorities were signed and submitted to the Commission in order to make a proposal pursuant to Article 15 (2) TFEU.

⁸ See e.g. the Commission’s Staff Working Document on *Free movement of workers in the public sector*, Brussels, 14.12.2010, SEC(2010) 1609 final.

⁹ Judgment of the Court of 26 May 1982, *Commission of the European Communities v Kingdom of Belgium*, Case 149/79, ECLI:EU:C:1982:195, point 10.

¹⁰ Article 8 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27.5.2011, p. 1–12.

impede the application of other rules and principles to employment in the public service of EU member States.¹¹ Hence a reference to that provision would be of no legal relevance to the issue of informing and consulting civil servants and employees of central government administrations. If any, that provision might justify excluding the holders of a limited number of specific positions in public administration from participating personally in consultation procedures if they were not citizens of the host country.

It is probable that the Commission refers to the exceptions mentioned in its Consultation Document "First phase consultation of Social Partners under Article 154 TFEU on a consolidation of the EU Directives on information and consultation of workers", which is stating that "[t]he European Court of Justice clarified the interpretation of a number of provisions, most recently in its judgement in the *Nolan* case where it pointed out that Directive 98/59/EC does not cover activities of the public administration which fall within the exercise of public powers".¹² If that were the right interpretation of the Commission's letter, two major points need to be made.

First, the Commission itself was stating in the same Consultation Document that "it is opportune to consider whether the I&C Directives need to be reviewed, in order to clarify whether public administration should be included in their personal scope of application or whether the wording of the provisions of the different Directives regarding the exclusion of the public administration needs to be aligned in order to improve coherence and legal clarity in line with the ECJ case-law"¹³. In its letter of 6 March 2018, the Commission does not in any way refer to the **review that should have been undertaken** or to the results of such a review, or why it has not been undertaken, but just repeats the reference to public administration.

Second, the reference to the Judgement in *Nolan*,¹⁴ which is made in footnote 18, reiterated by footnote 22 of the Consultation Document is only applicable to Directive 98/59/EC on collective redundancies,¹⁵ where Article 1 (2) (b) provides that the Directive shall not apply to "workers employed by *public* administrative bodies or by establishments governed by *public law* (or, in member states where this concept is unknown, by equivalent bodies)" [emphasis added]. Furthermore, the judgement in *Nolan* responds to a request for preliminary ruling in a very special situation, i.e. to

¹¹ See e.g. the above cited Commission's Staff Working Document on *Free movement of workers in the public sector* <https://ec.europa.eu/social/main.jsp?langId=en&catId=465>, and my Report "Free Movement of European Union Citizens and Employment in the Public Sector" http://www.bollettinoadapt.it/old/files/document/10069eu_rep_14_12_10.pdf.

¹² Brussels, 10.4.2015, C(2015) 2303 final, p. 5.

¹³ *Idem* p. 5-6

¹⁴ Judgment of the Court (Third Chamber), 18 October 2012, *United States of America v Christine Nolan*, Case C-583/10, ECLI:EU:C:2012:638.

¹⁵ Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16–21.

the issue of applying the Directive in a dispute between the United States of America and Ms Nolan, a civilian employee of an American army base in the United Kingdom; it would be therefore a somewhat risky to quote the judgement as a ruling of general scope. Another CJEU ruling is often quoted for the same purpose¹⁶ as *Nolan*, the judgement in *Scattolon*¹⁷ which regards the Directive on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. Albeit that judgement not either regards information and consultation rights but Directive 77/187¹⁸ on transfers of undertakings, the ruling shows that a **thorough scrutiny is needed in order to find out in which specific cases the exercise of public powers** is at stake.¹⁹

From a practical point of view, it cannot be said that all civil servants and workers in central government administrations **exercise the powers of a public authority**. On the contrary, in the absence of a thorough and up to date comparative study relating to all member States, I submit that the situation has not changed radically in the last decade,²⁰ and that a while a number of services in central government administrations are specifically devoted to the exercise of public authority there are still a big number of services not exercising public authority.

Furthermore, nothing in the Commission's letter explains why the fact that "central government administrations are placed under the authority of national governments and exercise the powers of a public authority" would be an **impediment to granting civil servants and workers of those administrations information and consultation**

¹⁶ See e.g. the European Parliament's Fact Sheets on the European Union on *Workers' right to information, consultation and participation*, at http://www.europarl.europa.eu/atyourservice/en/display-Ftu.html?ftuid=FTU_2.3.6.html, last consulted on 21/03/2018.

¹⁷ Judgment of the Court (Grand Chamber) of 6 September 2011, *Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca*, Case C-108/10, ECLI:EU:C:2011:542.

¹⁸ Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, replaced by Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16–20.

¹⁹ See point 54 of the Judgement in *Scattolon*: "Whilst it is true that, as the Italian Government has pointed out, the Court has excluded from the scope of Directive 77/187 the 'reorganisation of structures of the public administration' and the 'transfer of administrative functions between public administrative authorities' and that that exclusion has subsequently been confirmed in Article 1(1) of that directive in the version resulting from Directive 98/50, and in Article 1(1) of Directive 2001/23, the fact remains, as the Court has already pointed out, and as the Advocate General points out in paragraphs 46 to 51 of his Opinion, the scope of those expressions is limited to cases where the transfer concerns activities which fall within the exercise of public powers (*Collino and Chiappero*, paragraphs 31 and 32 and case-law cited)".

²⁰ See e.g. The documents indicated in notes 4 and 9.

rights, if needed with specific adaptations. The mere fact that EUPAE and TUNED, representing *employers* and workers from central government administrations, have been able to come to an agreement on that topic demonstrates, on the contrary, that there is no impediment in principle to granting I&C rights to the relevant workers. Furthermore, it is the Council, whose members are representatives of member states' central administration, which has the ultimate decision power under Article 155 (2), and therefore best placed to examine whether there is such an impediment.

To sum up, if the Commission refers to the **exceptions mentioned in its cited Consultation Document**, such a reference does **not justify refusing to extend the agreement** concluded by EUPAE and TUNED by a directive pursuant to Article 155 (2) TFEU. On the contrary such a directive would be an appropriate way to respond to the cited concerns of the Commission regarding the differences in the applicability of the directive on collective redundancies and on information and consultation rights without waiting for a possible recast of Directive 2002/14/EC on information and consultation rights,²¹ as the request is presented by social partners representing the workers and employers of central administrations.

3) The relevance of the diversity of organisation of member states' central government administration.

The **second line of argumentation** of the Commission's letter is that of the **prerogative of national authorities to structure and organise the central government sector**. As a matter of fact, it should be added that under EU law member states have indeed kept *general prerogative* to structure and organise the government sector, be it central, local or regional. Such a prerogative is usually known in legal terms as "procedural" and "organisational" autonomy of the member states. It has to be underlined that the "autonomy", which results from the absence of a devolution of competences to the EU in matters of organisation and procedure of public authorities, encounters two series of limits. *First*, policy sectoral legislation – e.g. in the field of telecommunications or energy – as well transversal legislation – regarding e.g. data protection or competition rules – impose obligations to members States that are very strictly limiting the exercise of the said autonomy, even in situations where public authority is being exercised. *Second*, the CJEU has developed an elaborate jurisprudence on the limits to procedural and organisational autonomy,²² which also demonstrates the limitations to that prerogative which derive from EU membership. Hence,

²¹ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation, OJ L 080, 23.03.2002 p. 29 -34.

²² See e.g. D.U. GALETTA, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "Functionalized Procedural Competence" of EU Member States*, Springer-Verlag Berlin Heidelberg, 2010.

I submit that when the Commission's letter refers to that "prerogative of national authorities to structure and organise the central government sector" it is only relevant because it leads to the fact that the "organisation of this sector varies widely between member states, depending on the degree of decentralisation of their public administration".

Whereas is it undeniable the size and functions of central governments varies widely between member states, **those variations would not necessarily result in "significantly different levels of protection"** regarding information and consultation rights in the "public sector" as a result of a directive extending the agreement concluded by EUPAE and TUNED.

First, the Commissions' letter after having argued about the differentiation between "central government administrations" as opposed to other administrations, uses the **concept of "public sector", which goes far beyond that of "administration"**. It is well established that a very important part of the public sector in member states is anyway submitted to EU law in the same way as the private sector. This is especially true as far as EU legislation relevant to the letter's issue is concerned, which applies to e.g. "public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the member states".²³ Furthermore, EU law on free movement of workers applies to several branches of the public sector of member states, e.g. health services, education, postal services, research and technological development etc.²⁴ which quantitatively represent a very large part of the member states' public sector. Hence a Directive pursuant to art. 155 (2) extending the agreement on information and consultation rights to central government administrations would not increase the diversity of levels of protection in the public sector; on the contrary such a directive would lead to more approximation between the levels of protection of workers in bodies or undertakings carrying out an economic activities and workers in services which do not carry out such activities. The Commission does not indicate whether it deems desirable that those two categories of workers have different levels of protection or not and does not indicate either what it means by "different levels of protection".

Second, levels of protection in **central government administration as opposed to local or regional administration, or other autonomous administrative public bodies** would not necessarily be that different due to a directive extending the agreement. Indeed, nothing would impede social partners representing workers and employers from local or regional administration, or other autonomous administrative public bodies to conclude agreements similar to that concluded by EUPAE and TUNED for their respective fields. On the contrary it is probable that the extension

²³ Article 2(a) of Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

²⁴ See the Commission's Staff Working Document cited in note 6.

by directive of that agreement might serve as a model and trigger such other agreements. Furthermore, the Commission's letter indicates that "provisions ensuring a degree of information and consultation of staff in that sector are already in place in many member states", which is true not only for central state administration, but even more for other administrations. If the Commission thinks that differences in the level of protection are neither justified nor desirable – as the statement that "a Directive transposing the Agreement into EU law would result in significantly different levels of protection" seem to imply–, then the best way to avoid different levels of protection between member states and in member states between levels of government would on the contrary be to foster approximation on the basis of the requested directive, which could also have a spill-over effect towards agreements covering non central administrations

As a conclusion, the argumentation provided in the Commission's letter **does not meet the standards applying the social dialogue** as the letter does neither refer to any impact assessment on the potential impacts of the transposition, nor to the representativeness of the signatories, the legality of the clauses of the Agreement vis-à-vis the EU legal framework and whether it respects the subsidiarity and proportionality principles. Furthermore, if the letter were to be considered as the notification as a decision to EUPAE and TUNED, it is **doubtful whether it meet the standards of reason giving** that are set by the CJEU's jurisprudence on Article 296 TFEU, i.e. that there must be a clear and coherent statement: as indicated in this note the wording used in the letter leaves numerous doubts about the Commission's reasoning, and it is not coherent, e.g. in using concepts such as administration, public authority or public sector without more precision.

The controversies on the legislative implementation of European social partners' agreements: some lessons of the history

by Jean-Paul Tricart

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4) Introduction

In line with the overall approach adopted in this Amicus Curiae publication, this working paper offers a contribution to the European Union Court of Justice (CJEU) in view of its examination of the appeal (C-928/19) that the European Public Service Union (*EPSU*) has introduced against a ruling of the General Court (T-310/18, 24 October 2019, hereafter "the 2019 Court ruling") which rejected as ill-founded its request to annul a refusal of the European Commission to submit to the Council a proposal for a legislative implementation at EU level of a social partners' agreement about information and consultation of employees and civil servants working for central administrations (hereafter "the Central Administrations agreement").

To this end, this paper draws the attention of the CJEU on the lessons that can be drawn from the history of European social dialogue and more specifically the history of the interpretation and implementation of the European treaties provision under which the application of an agreement concluded between European social partners can be made binding *erga omnes* under European legislation – a mechanism for the extension of collective agreements which exists in various forms in most of the EU Member States²⁵, and whose setting up at European level was decisive for the institutionalization of European social dialogue (this provision is currently in Article 155 (2) of the Treaty on the Functioning of the European Union [TFEU]).

In formulating these lessons, this paper does not propose a legal analysis of the Central Administrations agreement case and of the related 2019 Court ruling. But it questions some of the key arguments of the parties to this case, and of the ruling itself, in the light of the relevant findings of a historical analysis of European social dialogue. Based on a longstanding experience of, and expertise on, its developments since its

²⁵ T. SCHULTEN (2016) The meaning of extension for the stability of collective bargaining in Europe, Policy Brief, European Economic, Employment and Social Policy 4/2016, Brussels, ETUI.

creation in the 1980s, this historical analysis is presented in more details in two recent studies of the author, which were published in 2019 and 2020²⁶.

The decision of the Commission to refuse to propose to the Council the legislative implementation of an agreement was unprecedented, given that this agreement had been concluded following negotiations triggered by a formal consultation under Article 154 TFEU. The decision of a trade union involved in this agreement to bring an action against the Commission before the Court of Justice was also unprecedented. Both decisions illustrate the huge deterioration of the relations between the Commission and the social partners in the last decade, in particular the unions, at least with regard to the issue of the legislative implementation of European social partners' agreements. Tensions and controversies on this issue emerged under the Barroso 2 Commission, and exacerbated throughout its mandate (2009-2014) in the broader context of a general deterioration of European social dialogue and of the mutual trust between the parties. They persisted under the Juncker Commission (2014-2019) despite the initiatives of this last Commission aiming at restoring confidence with social partners with a view to give a "new start" to European social dialogue: it is under the Juncker Commission that the crisis about the Central Administration agreement occurred. The claim to the Court reflects the two key dimensions of these disputes: on one hand, it relates to an issue of substance, namely the interpretation of the Treaty provisions concerning the role of the social partners and the legislative implementation of their agreements; on the other hand, it relates to the erosion of the trust between the parties as, in the instruction of this file, the Commission did not respect the procedures that it had itself established with regard to the assessment of social partners agreements. On both issues, there are lessons of the history which can help understanding the case: first, on the issue of substance, this paper will underline that the controversies result from the recent and unilateral reinterpretation of the Treaty provisions by the Commission, after some twenty years of overall consensus on their implementation; and second, on the issue of trust, the paper will underline the context of tensions and even hostility in which this reinterpretation took place.

For most of the observers and actors of European social dialogue, the 2019 Court ruling was surprising. The surprise was not that this ruling highlights the power of initiative of the Commission: this is the main argument put forward by the Commission to justify its decision and to contest the claims of the other party to the case. The surprise was that the ruling does not really address in its complexity the issue at sta-

²⁶ J.P. TRICART (2019) 'Legislative implementation of European social partner agreements: challenges and debates', ETUI Working Paper 2019.09, Brussels, ETUI; J.P. TRICART (2020) 'Once upon a time there was the European social dialogue' in B. VANHERCKE, D. GHAILANI, S. SPASOVA and P. POCHE (eds) (2020) *Social policy in the European Union 1999-2019: the long and winding road*, Brussels, ETUI and OSE

ke, which is not only about the power of initiative of the Commission: within the framework of European social dialogue, the Commission has to exercise its power of initiative while fully respecting its obligation to promote European social dialogue and the role of social partners at EU level; and the European social dialogue as established by the treaties cannot work if the Commission considers that its power of initiative is such that it gives it even full discretion not to promote social dialogue and its outcomes if it so wishes. When the Commission deals with the implementation of social partners' agreements under Article 155 TFUE, the need for fully respecting the capacity of social partners to contribute to shaping EU legislation and social policy, and their autonomy in doing so, affects necessarily the exercise of its power of initiative.

Admittedly, the Commission is certainly not merely a "letterbox" through which the social partners requests for legislative implementation of their agreements would simply pass. But conversely, considering that the Commission would have full discretion to do what it wants with such requests would mean that European social partners agreements under Article 155 TFUE would be merely a form of "joint opinion" from "groups of interests" that the Commission could consider, disregard or ignore at its convenience. This would not be in line with the role which is recognized to European social partners in the Treaty: the introduction in the treaties of the provisions on European social dialogue which are at stake was not intended to just encourage the consultation of social partners or to invite them to express joint opinions, but to set up a mechanism making it possible to ensure the binding implementation of their agreements.

The history of the interpretation of the relevant Treaty provisions shows that it is only in the recent years that the Commission has claimed that it had this full discretion with regard to these agreements. For some twenty years, the Treaty provisions relating to the social partners agreements were implemented in accordance with an interpretation and "rules of the game" which reflected an overall consensus on some form of balance between the respective prerogatives and roles of the Commission and of the social partners within the framework of European social dialogue: this consensus made it possible to implement through EU legislation some twelve European social partners agreements²⁷, an outcome which was long presented by the Commission as one of the most exemplary achievements of Social Europe. Interestingly

²⁷ Twelve European social partners agreements were implemented through European legislation: European social partners agreements on parental leave (1996, 2009); on part-time work (1997); on fixed-term work (1999); on working time of mobile workers in the railways sector (2004), in civil aviation (2000) and in inland waterways (2012); on specific injury risks to which workers in the hospitals sector are exposed (2009); on working conditions in the maritime transport sector (1998, 2008, 2016) and in the sea fisheries sector (2013). Four were concluded within the framework of cross-industry social dialogue (mainly in the 1990s), and eight were concluded within the framework of sectoral social dialogue (mainly in the 2000s onwards). Nine of these twelve agreements were concluded before 2012.

enough, it is when the Commission decided to reduce its use of legislation in general, and in the social policy area in particular, under the Barroso 2 Commission (2009-2014), that it undertook a reinterpretation of the Treaty provisions relating to European social partners agreements, precisely with a view to define ways and modalities to make legally and politically acceptable the refusal of a request for legislative implementation of an agreement (and later on to discourage social partners to initiate negotiations in view of a legislative implementation). Hence the claim that it was founded to assess the contents of agreements on the basis of policy considerations, while in the past it was attentive to assess on policy considerations the appropriateness of EU action in an area, but not the contents of the agreement as such, as this would have been an interference with the autonomy of social partners. Hence the introduction by the Commission, in its recent documents on social dialogue, of the recurrent message that it now considers to have full discretion "to accept or reject" an agreement and its legislative implementation. But this idea of "rejection" (and the word itself) on the basis of full discretion had never been used in any of the Communications that the Commission had devoted to European social dialogue in 1993, 1996, 1998, 2002, or 2004...²⁸. In other words, one of the lessons of the history is that there were successive interpretations of the Treaty provisions since the 1980s, and that the issue at stake has not to be artificially reduced to a choice between two extreme interpretations, the "letterbox" one, where the powers and responsibilities of the Commission would be denied, and the "full discretion" (or "carte blanche") one, where the role and responsibilities recognized to social partners would be reduced to those of ordinary "groups of interests" expressing an opinion.

Another lesson of the history of European social dialogue is that its successful development over the years was made possible by the mutual confidence between the Commission and the European social partners: the trust of the Commission in the legitimacy and responsibility of the social partners to contribute to European integration, and the trust of social partners in the loyalty of the commitment of the Commission to promote a balanced and fair European integration. It was not blind trust, as

²⁸ COM(93) 600 final of 14 December 1993; COM(96) 448 final of 18 September 1996; COM(98) 322 final of 20 May 1998; COM(2002) 341 final of 26 June 2002; COM (2004) 557 final of 12 August 2004. The Commission was used to present a Communication on social dialogue when there was an important change in the institutional or policy context which was expected to affect its development: the entry into force of the Maastricht Treaty for the Communication of 1993; the entry into force of the Amsterdam Treaty for the Communication of 1998 (the 1996 Communication was a consultative one in view of the preparation of the 1998 one); the launching of the Lisbon Strategy and the emergence of new forms of policy coordination as the Open Method of Coordination for the Communication of 2002; and the move to an enlarged EU for the Communication of 2004. Moreover, there was, in 2010, a Staff Working Document devoted to European sectoral social dialogue (SWD(2010) 964 of 22 July 2010), which had been conceived as the conclusion of an assessment of twenty years of sectoral social dialogue

each of the parties involved were well aware of possible diverging or conflicting interests and visions, but all parties could rely on the legitimate expectation that compromises and agreements would be sought through dialogue. But the reality of social dialogue today is that, to say the least, this mutual trust has been seriously eroded. Actually, *mistrust* increased gradually under the Barroso 2 Commission, in such a way that, in a number of occasions, the controversies which emerged with regard to the legislative implementation of the social partners' agreement even took a very passionate and emotional tone, with verbal excesses and accusations of arrogance or contempt. The Central Administration agreement case is exemplary in this respect as one of the claims on the unions side is not only that the Commission did not assess the agreement as it was committed to do so but that for some eighteen months, it has constantly hidden and lied to the signatories about the progress of the expected assessment. Though the 2019 Court ruling notes that the Commission attitude in this circumstance "might surprise", it did not conclude that this would be a breach to what can be legitimately expected from a EU institution. For a number of observers of social dialogue, the 2019 Court ruling underestimated on that occasion the decisive importance of mutual trust for the very existence of European social dialogue, and the current need to appease the relations between the actors if European social dialogue is simply to be saved.

This paper develops these remarks by reviewing successively the origins of the Treaty provisions at stake, the twenty-year overall consensus on their interpretation and implementation, and the decade of disputes, mistrust and hostility which led to the current situation.

5) The origins of the Treaty provisions.

The mechanisms which allow the European social partners to contribute directly to the development of the EU social policy through their agreements are described in Articles 154 and 155 TFUE. But these articles do not date from the TFUE; they reproduce in their entirety, and even strengthen, Articles 138 and 139 of the Treaty on the European Union (Amsterdam, 1997), which incorporated into the European Treaty Articles 3 and 4 of the Agreement on Social Policy annexed to the Maastricht Treaty (1992).

These Treaty provisions therefore already go back a long way. In fact, they are emblematic of both the emergence and recognition of European social dialogue in connection with the relaunch of European integration driven by the Delors Commission (1985-1995). They are emblematic because of their content, which enshrines the role that the European social partners can play in the development of EU social legislation and social policy. And they are emblematic because of their origin, as these articles

are reproduced *verbatim* from the contribution that the European social partners submitted in 1991 to the Intergovernmental Conference (IGC) on Political Union that was charged with preparing the Maastricht Treaty.

From his appointment in 1985, President Delors had taken steps to actively involve the European social partners in the relaunch of European integration, which was, at the time, driven by the prospect of the completion of the single market. The invention of the European social dialogue was part of the Commission efforts to give a "social dimension" to the single market and thereby to get the support of the European social partners to the Commission strategy

This is why European social dialogue as it was established has to be seen as a joint invention by the Commission and the European social partners, within the framework of a fundamentally tripartite cooperation process²⁹.

It is also through this tripartite cooperation that the Maastricht Treaty provisions on social dialogue were elaborated³⁰.

In this respect, the issue at stake was clearly, for the EU institutions as well as for the European social partners, the setting-up of *an area for contractual relations at European level*, and therefore the definition of the status and legal value of the agreements which would result from negotiations between the social partners, as well as the provisions which would guarantee their general application. The Single European Act had already established the basis for social dialogue at European level (Article 118b), and various modalities of consultation of social partners already existed at the time. The key issue for the IGC was therefore the potential of collective negotiation to contribute to forge the social dimension to be given to the single market. This had been emphasized in the Belgian contribution to the IGC early 1991, and in its contribution

²⁹ Underlining the fundamental tripartite nature of the European social dialogue as it was established does not imply that European social partners would not have the capacity to develop bipartite forms of dialogue (and they did so, mainly as from the years 2000s) and to work on issues on their own initiative (and not as a mere reaction to the Commission agenda). The key point here is that it would have been impossible to set up European social dialogue without the active involvement of the Commission in its invention. Already in 1972, in a report prepared for the Commission, G. LYON-CAEN called for the setting up at European level of a 'system of industrial relations' involving the employers' organizations, the unions and the Community institutions: he underlined that, in the absence at European level of the standard forms of expression of conflictuality (such as the strike), the active intervention of the Community authorities was a condition of the development of collective negotiation at this level. The notion of 'social dialogue', which will prevail in the mid-1980s at European level reflects precisely the specificity of a system of industrial relations which cannot be based on these forms of expression of conflictuality. See G. LYON-CAEN (1972) *A la recherche de la convention collective européenne*, Commission européenne, doc. V/855/72-F.

³⁰ For a detailed description, see C. DIDRY C. et A. MIAS (2005), *Le 'Moment Delors'. Histoire du Dialogue Social de Val Duchesse à Maastricht*, Rapport pour la Commission européenne, Ecole Nationale Supérieure de Cachan.

to the IGC in March 1991³¹, the Commission had put forward to this end the concept of “double subsidiarity”, and had underlined the specificity of the role and responsibilities of social partners (who, by the way, cannot be considered, when they act within European social dialogue, as “groups of interests” or lobbies, as suggested by the 2019 Court ruling). Furthermore, the Commission had set up an *ad hoc* group consisting of the social partners with a view to propose to the IGC provisions on social dialogue and it had asked the IGC to wait for this contribution from the social partners before concluding its work on the social dialogue component of the provisions on social policy. It is precisely this contribution, which had been actually drafted by the Commission senior official who chaired the *ad hoc* group, which was approved and reproduced almost *verbatim* by the IGC. And this contribution states explicitly that agreements are concluded in order to be implemented (as already said, they are not a joint opinion which would be proposed jointly by the social partners within a consultation process).

As shown by the testimonies of the actors of social dialogue at the time, as well as the studies of historians on these developments³², there is no doubt that the wording finally adopted by the IGC aimed at setting up a mechanism enabling the Council to ensure a binding general application of social partner’s agreements. By the way, the whole purpose of the work of the IGC on social policy was then precisely to set up the conditions of the legislative action which would promote the social dimension of the European integration: the Commission had already presented its Action Programme for the implementation of the Charter (1989), and most of the Member States had expressed their will to develop binding rules with regard to working conditions and labour law at European level. There is also no doubt that the wording of the articles was elaborated and approved by actors who were well aware of the respective roles of the EU institutions and the social partners, and who had also at national level an experience of such mechanisms for the legislative implementation of social partners’ agreements.

The 2019 Court ruling refers to the history of the Treaty provisions to argue that, despite the final wording, the intent of the IGC was not to promote the binding general implementation of the social partners’ agreements. Such a reasoning is not supported by the above elements³³.

³¹ SEC (91) 500 of 26 March 1991

³² See J. DEGIMBE (1999) ‘La politique sociale européenne: du traité de Rome au traité d’Amsterdam’. Bruxelles, Institut syndical européen; J. LAPEYRE (2017) ‘Le dialogue social européen. Histoire d’une innovation sociale’, Bruxelles, ETUI; DIDRY C. et MIAS A., quoted at footnote 52.

³³ When it refers to the work of the IGC on social dialogue provisions, the 2019 Court ruling considers only the text presented by the Luxembourg Council Presidency in June 1991. But the final wording of the IGC results from the exchanges on (and interactions between) at least eight successive texts proposed by the Luxembourg and then Dutch Council Presidencies, the Commission, the *Ad hoc* group with social partners and finally the Social Partners Agreement of 31 October 1991.

6) An overall consensus on the interpretation and implementation of the Treaty provisions.

The provisions on social dialogue which were incorporated in the Agreement on Social Policy annexed to the Maastricht Treaty did not specify the modalities of their implementation. This was a concern for the European social partners, who regarded themselves as co-authors of the provisions and who wanted to ensure that these modalities of implementation would reflect their role and responsibilities. This was also a concern for the Commission, who saw in the provisions finally adopted a translation of its concept of double subsidiarity and who sought to clarify the “rules of the game” before the Treaty entered into force. And both the European social partners and the Commission were well aware that there was some urgency to act in this respect, as the Commission’s Action Programme for the implementation of the Charter had announced several legislative initiatives of direct interest for the social partners.

The interpretation of the provisions and the definition of the arrangements for this implementation mobilised both the European social partners and the Commission throughout the years 1992 and 1993, in a form of cooperative process which was facilitated by the creation by the Commission, early 1992, of the Social Dialogue Committee, a forum for regular concertation between the Commission and the social partners: throughout 1992 and 1993, the Commission services worked on these arrangements and the European social partners presented their proposals on the various issues relating to the implementation of the provisions. These exchanges led progressively to an overall consensus, which is reflected in the Commission Communication of 1993, which specifies in particular the criteria to be met by an agreement if the Commission is requested to submit a proposal for its legislative implementation. It is worth noting that at the time, and this reflects the then degree of structuration of the social partners’ organisation at EU level, the collective negotiations which were envisaged were those which would be triggered by the consultations of the Commission, and generally those involving the cross-industry organisations, though it was explicitly agreed that the provisions applied also to sectoral social dialogue. In addition, the emphasis was clearly put on the implementation of agreements through legislation: the “autonomous” form of implementation included in the Treaty reflected the specific expectations of Danish social partners and it is only very later on, at the occasion of the negotiation on telework (2001-2002), that this “autonomous” form of implementation will be (re)elaborated³⁴.

³⁴ For the preparation of the social dialogue provisions within the IGC in 1991, the key issue at stake was that of the design of a mechanism which would guarantee a binding *erga omnes* implementation of the agreements. But in the end of the work of the *Ad Hoc* group which prepared the Social Partners Agreement of 31 October 1991 (which was finally endorsed by the IGC), another modality of implementation was introduced in the wording, at the request of Danish social partners (‘implementation

The contents of this broad consensus were confirmed in the Communication that the Commission presented in 1998, further to a consultation initiated with a 1996 Communication. This 1998 Communication can be seen as the reference document for the interpretation of the Treaty provisions and the definition of the modalities of their implementation³⁵.

In view of the issues at stake in the Central Administration agreement case, four points deserve to be noted here.

First, both the 1993 and 1998 Communications are not limited to procedural considerations. They also express an interpretation of the Treaty provisions and they deliver accordingly a strong policy message on the role of social dialogue with regard to the

in accordance with the procedures and practices specific to management and labour and the Member States' [currently in Article 155.2 TFEU]). The reason for the addition of this other modality of implementation is that the IGC had already accepted a request from Denmark (who had highlighted the specificity of its model of industrial relations) to introduce in the draft article on social policy a paragraph allowing a Member State to entrust its national social partners to implement a directive (currently in Article 153.3 TFEU). With the same argument of the specificity of the Danish model of industrial relations, the Danish social partners asked the *Ad Hoc* Group to include in the modalities of implementation of the agreements a direct implementation by national social partners in accordance with national practices, and this is the reason for the wording of this other modality of implementation of agreements in the final Treaty provisions. In practice, however, this second form of implementation of agreements was not immediately used as such, precisely because it corresponded to this specificity of the Danish model. The Communications of 1993 and 1998 do not develop significantly this aspect of the Treaty provisions, and cross-industry social partners will only envisage to use it as from 2001 and with a reinterpretation of its contents. At the occasion of their discussions in 2001 on a possible negotiation on telework, they agreed on some reinterpretation of this provision to meet the employers' wish to conclude a kind of 'voluntary' agreement i.e. a solemn commitment which would not be legally binding but whose implementation would be promoted and monitored by their affiliates (see LAPEYRE [2017]). This form of implementation will then be called 'autonomous' and several such autonomous agreements will be concluded by cross-industry and sectoral social partners in the 2000s. This is why, while the Commission Communications of 1993 and 1998 focus essentially on the legislative implementation of agreements, the Communications of 2002 and 2004 include also some developments on this second form of implementation

³⁵ Since 1999, all the Commission proposals for the legislative implementation of agreements contain a recital which states that "the Commission has assessed the agreement in accordance with the criteria laid down in the 1998 Communication". The same recital is also included in all the Council Directives which approve these agreements (see Tricart [2019] note 30). It is therefore possible to conclude that, from a formal point of view, there is a consensus between the Commission and the Council on these criteria, and these criteria are still the reference ones as the recital appears also in the most recent relevant directives (the last ones approved in 2017 and 2018: Directive 2017/159/EU of 19 December 2016 and Directive (EU) 2018/131 of 23 January 2018).

But as from the reinterpretation by the Commission of the Treaty provisions and the revision of the modalities of their implementation, the criteria which are considered by the Commission are no longer solely these criteria defined in 1998: see the analysis presented in the Staff Working Documents which accompany the Commission proposals for the legislative implementation of the inland waterways agreement (SWD (2014) 226 of 7 July 2014) and of the sea fisheries agreement (SWD(2016) 144 of 29 April 2016).

promotion of “double subsidiarity”, the understanding of the “autonomy” of social partners, and the importance that the commission attaches to the development of the negotiation component of European social dialogue. These messages will be confirmed in subsequent Communications in 2002 and 2004.

Second, the 1993 and 1998 Communications agree on the criteria on the basis of which, further to a request from the social partners, the Commission proposes to the Council the legislative implementation of an agreement: these criteria relate to the signatories of the agreement (their representativeness) and to the legality of the clauses of the agreement. In addition, the Commission has to check that the agreement takes into consideration the constraints of small and medium sized enterprises.

Third, the 1998 Communication provides a significant clarification in addressing explicitly, for the first time, the specificity of agreements resulting from negotiations which would be undertaken outside the framework of a two-phase consultation procedure i.e. at the own initiative of the social partners. The clarification is that, in such a case, if social partners request a legislative implementation of their agreement, the Commission has to assess, in addition to the abovementioned criteria, the ‘appropriateness’ of EU action in the field covered by the agreement. The reasoning here is that, under the consultation procedure, the Commission considers the appropriateness of EU action in the area when it presents its consultation documents: if it launches the second phase consultation, this means that it considers that EU action in the area is appropriate. And as it is at the occasion of this second consultation that social partners can initiate negotiations, there is no reason for the Commission to re-examine this appropriateness once the negotiation is concluded³⁶. But if the negotiation takes place outside the consultation procedure, then the Commission has to assess this appropriateness, and this is precisely part of its power of initiative.

Fourth, both Communications underline that the respect for the role of the social partners and their autonomy implies that the Commission does not interfere with the contents as such of the agreements: as working conditions are under the responsibil-

³⁶ When the Commission submits to the Council a proposal for the legislative implementation of a social partners’ agreement, it attaches to the text of the agreement an explanatory memorandum which follows a standard structure and reflects the consensus on the criteria for the assessment of the social partners’ request for this legislative implementation. Within this standard structure, there are headings devoted to subsidiarity and proportionality: here, the Commission proposes the reasons why it considers appropriate and advisable an EU action in the area covered by the agreement, and these reasons are those which had been explained in the document launching the second phase of consultation (if the agreement was concluded outside the consultation procedure, the Commission has to present here the results of its assessment of the ‘appropriateness of EU action’ criterion). The structure includes also headings devoted to the 1998 criteria as regard to representativeness and legality. This standard structure confirms the overall consensus on the modalities of assessment of the requests for legislative implementation.

ity of employers and workers, who both bear the benefits and costs of their agreements in this respect, it makes sense to encourage social partners to fully use the provisions of the Treaty, and it is better not to discourage them to seek agreements. This is why the assessment concerns the appropriateness of EU action in an area and does not concern the specific contents of the action defined by the agreement.

These elements show that, at the occasion of the definition of the modalities of implementation of the Treaty provisions, neither the Commission nor the social partners overlooked the sensitive issues of their respective roles, and the need to combine as appropriate the respect for the autonomy of the social partners as well as the respect for the power of initiative of the Commission. And precisely, a broad consensus was found on these issues, which made it possible to use the Treaty provisions. The Communications that the Commission issued in 2002 and 2004 deliver the same overall messages and confirm the validity of the “rules of the game” which apply to the agreements and their implementation³⁷. And in its practice throughout some twenty years, the Commission acted in accordance with these messages and these rules. It gave priority to collective bargaining whenever the European social partners were ready to engage in it, and it demonstrated maximum flexibility about incorporating the agreements resulting from this collective bargaining into European legislation when social partners so requested. And the Council and the Member States shared this overall approach: they swiftly approved all the proposals for legislative implementation that the Commission submitted to them³⁸; and they agreed to strengthen the Treaty provisions on social dialogue at the occasion of the preparation of the draft Constitutional Treaty and then the Lisbon Treaty in 2007.

The Lisbon Treaty is important here, because it makes the recognition and promotion of European social dialogue an obligation for the Union as a whole (Article 152 TFEU), and also because it enlarges the existing provisions on negotiations by enabling the social partners, at the occasion of a consultation procedure under Article 154 TFEU, to initiate negotiations as from the first phase of consultation (and not only

³⁷ The scope of the successive Commission Communications on social dialogue is not limited to the implementation of the Treaty provisions on consultation and negotiation. As already indicated, the key issues addressed in the Communications of 2002 and 2004 concern the impact on social dialogue of the development of the Lisbon Strategy and the new forms of policy coordination (2002) and the challenges of an enlarged Union (2004). But both Communications do confirm explicitly the Commission's strong encouragements to social partners to make full use of the Treaty provisions on agreements and they also confirm the validity of the criteria for the assessment of the requests for legislative implementation of agreements as they had laid down in the former Communications. As the Convention in charge of the preparation of the draft Constitutional Treaty started its work in 2003, both the Communications of 2002 and 2004 are relevant to understand the views on social dialogue which prevail at the time.

³⁸ The Council has approved all the proposals for a legislative implementation of social partners' agreements that the Commission presented to it, and it did so usually within six to nine months in average, most generally with a political agreement reached within three to six months.

the second one): this amendment may appear as a minor one but it deserves some attention.

As already indicated, these provisions of the Lisbon Treaty are taken from those presented in the draft Constitutional Treaty which had been prepared in 2004. They therefore reflect the concerns and orientations which were preeminent at that time, and in particular, as far as social dialogue is concerned, those which were addressed in the 2004 Commission Communication. There is therefore no doubt that these new provisions aimed at strengthening European social dialogue and encouraging the use of its negotiations component. Having in mind this context, it is possible to interpret this amendment of Article 154 TFEU as follows. First, it corresponds to a request which had been expressed in the past by the social partners: at the stage of the first consultation, the Commission has not yet specified the contents of the initiative that it is considering, and initiating a negotiation at this stage is therefore easier: the social partners have a greater flexibility because the contents of the initiative is more open³⁹. Second, it reflects the progressive obsolescence of the model of two-phase consultation: in the years 2000s, the first phase consultation appears often as a formal procedural requirement rather than the initiation of a new in-depth debate on the orientation and justification of EU action: most of the legislative proposals of the Commission at that time do not concern new issues and they merely consist in updating, consolidating or complementing existing legislation, for example after an evaluation exercise; there is therefore no doubt that an EU action in the area is possible and appropriate and it then makes sense not to wait for the second phase to invite the social partners to consider a possible negotiation. This is why this change was not perceived by anyone as a fundamental one, which would have required the presentation by the Commission of an interpretative Communication: it was rather seen as a technical improvement of the existing provisions of the Treaty, which confirmed the primacy given to the social partners negotiation whenever possible, even if it contained some ambiguity with regard to the difference between the first and second consultations as regard the formal commitment of the Commission to actually prepare an initiative. By the way, the Commission anticipated the implementation of this amendment: as from the middle of the 2000s, well before the entry into force of the Lisbon Treaty, it introduced in its documents of first phase consultation an explicit question on the intent of social partners to enter in a negotiation. It can be argued that when a Commission first phase consultation document includes such an explicit invitation to negotiate, there cannot be doubt that the Commission considers that some EU action in the area is possible and appropriate, especially if the consultation

³⁹ In its Opinion on the Commission Communication of 1993 (94/C 397/17 of 23 November 1994), the Economic and Social Committee had already called for the possible opening of negotiations as from the first phase of consultation, precisely to give the negotiating parties a greater margin of manoeuvre.

concerns a consolidation or updating of existing EU legislation⁴⁰. And in any case, it can be concluded that with the Lisbon Treaty, the Commission and the Council continued to encourage the social partners to use the Treaty provisions on collective bargaining in line with their implementation throughout the years 1990s and 2000s.

Let's summarize the lessons of this section. The Treaty provisions relating to the legislative implementation of social partners' agreements have been implemented without controversy for some twenty years, on the basis of an interpretation of these provisions which took into consideration the power of initiative of the Commission as well as the role of the social partners and the respect of their autonomy and which contributed to develop the mutual confidence among the parties involved in European social dialogue. The overall consensus on this interpretation made it possible to swiftly implement through EU legislation a dozen of agreements, involving both the cross-industry (mainly in the 1990s) and the sectoral social dialogue organisations (mainly in the 2000s), and to feed some dynamism of collective bargaining among social partners despite their frequent diverging interests and visions. Taking into account this past twenty-year period can help understanding the tensions and controversies which developed later on.

7) Disputes, distrust and hostility: the reinterpretation of the Treaty provisions. Under the Barroso 2 Commission (2009-2014), and then the Juncker Commission (2014-2019), the Commission has developed a substantive reinterpretation of the Treaties provisions on the implementation of social partners' agreements.

In spring 2012, three agreements were concluded within the framework of sectoral social dialogue, which the signatories wanted to be implemented by legislative means: one on health and safety at work in the hairdressing sector, the second on working time in the inland waterways sector and the third on working condition in the sea fisheries sector. This was a clear indicator of the vitality of European sectoral

⁴⁰ The Central Administrations agreement was negotiated further to the first phase consultation procedure launched by the Commission on 10 April 2015 (C[2015] 2303 final). This consultation was a follow-up to an in-depth REFIT evaluation of three EU directives containing provisions on workers' rights to be informed and consulted, which took place in 2012-2013 and included the auditions of a number of experts and stakeholders: the results of this evaluation, including the discussion of the extension of the information and consultation rights to the public sector, were presented in a Commission Staff Working Document (SWD[2013] 293 of 26 July 2013) and the Commission announced later on its intent to propose a consolidation of the three directives (COM(2013) 685 final of 2 October 2013). It is therefore difficult to argue that this first consultation was merely an exploratory consultation which only aimed at collecting views as to whether an EU action in the area could be envisaged. It is worth reminding here that consultations under Article 154 TFEU are not technical consultations initiated by the Commission services but formal procedural steps initiated on a decision of the College.

social dialogue. But it was also interpreted, within some departments of the Commission, as a problematic development, as it obliged the Commission to consider the presentation of legislative proposals that did not result from its own initiative.

If this was considered as problematic, it is because the then Commission Barroso 2 was engaged in an ambitious programme of simplification and streamlining of EU legislation, the so-called "Smart Regulation" programme, through which it wanted to reconsider the use of the legislative instrument within the EU action and accordingly revisit its past legislative acquis and submit all its future legislation to a strict assessment of its added value. The motto of the programme was "to cut the red tape", and the assumption behind was that legislation generates an excessive administrative burden on businesses and hamper competitiveness while feeding the discontent of citizens towards the EU integration process. As businesses called for more flexibility to face the consequences of the economic crisis, the Commission was scaling back its ambitions in the social area, and certainly not prepared to welcome requests for social legislation coming from the social partners' initiatives.

The three agreements of spring 2012 gave new exposure to the potential of European social dialogue, and in particular sectoral social dialogue, as well as to the specificity of the Treaties provisions concerning the legislative implementation of agreements. Many people discovered at that occasion, including within the Commission, that due to the significant reduction of the number of labour legislation proposals from the Commission, the implementation of social partners' agreements was becoming the main source of development of EU labour legislation⁴¹.

A few days before its signature in spring 2012, the agreement on occupational health and safety in the hairdressing sector was aggressively vilified in a campaign by the media and political circles in the United Kingdom. The campaign of the tabloids was to rail against the excesses of European regulation, but the political campaign was focussed on the EU social policy and its instruments, in particular the social partners agreements: at that time, the European cross-industry social partners were engaged in a negotiation on working time, a highly sensitive issue for the UK due to its will to preserve its opting out possibility, and the lampooning of the agreement in the hairdressing sector was also used to discredit the Article 155 procedure.

But the agreement's critics were echoed and supported within the Commission, and even by President Barroso himself. And this generated, within the Commission departments, pressures and debate as to whether the interpretation and arrangements

⁴¹ See J.P. TRICART (2019) note 24. European labour legislation gained 24 new directives between 1985 and 1994, 23 new directives between 1995 and 2004, and 7 new directives between 2005 and 2014. Out of these 7 directives of the period 2005-2014, 4 are directives to implement social partners' agreements, and 2 are directives which had been proposed before 2005: it can be said that as from 2005, under the Barroso Commissions, European labour legislation was hardly expanding at all, except through the legislative implementation of social partners' agreements.

for the implementation of the related Treaty provisions had to be revisited. As long as the cross-industry negotiation on working time was under way, it was not politically possible to raise openly such a debate: the earlier Commission attempt to revise the working time directive had failed due to the impossibility to find a compromise between the Council and the Parliament, and the social dialogue negotiation was seen as the only remaining chance to get this revision. But as soon as this negotiation failed, end 2012, the debate intensified: is it legally and politically possible for the Commission to refuse a request for legislative implementation of an agreement, even if there is no precedent? Is it possible and appropriate to reinterpret the Treaty provisions and/or revisit the arrangement for their implementation of to give clearly the Commission full discretion in the matter? Or to say it more bluntly, as this became usual within the involved services, how to “reject” an agreement or a request for its legislative implementation? With such questions, the attitude towards the social partners’ agreements was clearly moving towards suspicion and hostility.

It is in this context that the Commission decided that the agreements whose signatories request a legislative implementation would now be subject to a form of “impact assessment” with a view to provide substantive arguments whether or not this agreement deserved to be implemented through legislation. Technical work started internally to adapt the methodology of impact assessments to the specificity of social partners’ agreements. It should be noted, however, that this was already a significant change with the approach developed in the past Communications, where the Commission considered that, in view of the autonomy of social partners, its assessment had to be limited to the appropriateness of EU action (and not interfere with the contents of the agreement itself).

The three agreements had been negotiated outside a procedure of consultation, and it was therefore expected from the Commission, in accordance with the criteria laid down in 1998, that it would assess the appropriateness of the EU action in the areas covered by these agreements. It was clear from the outset that there were strong arguments to support the appropriateness of EU action with regard to working time in the inland waterways as well as to working conditions in the fisheries sector⁴². The

⁴² See J.P. TRICART (2019) page 32. The agreement on working time in the inland waterways sector is one of the many sectoral agreements tailoring the EU provisions on working time to the specificity of the various transport sectors which were implemented through EU legislation (railways sector, civil aviation). The agreement on working conditions in the sea fisheries sector aimed at transposing in EU legislation the standards defined in the ILO Convention C188, a Convention which had been negotiated with the active support of the EU and its Member States; this transposition was a condition of the ratification of the Convention by the Member States. By contrast, for the agreement on occupational health and safety in the hairdressing sector, while there was plenty of scientific evidence that the sector faced specific risks as regard skin diseases and some respiratory and musculoskeletal problems, the agreement also addressed some other occupational health and safety issues, on which there was less evidence for the relevance of a sector-specific response and less consensus on the added value of a legislative implementation of the provisions of the agreement.

debate was more open with regard to the agreement in the hairdressing sector, which had both strengths and weaknesses in this respect, and the assessment of this agreement became therefore emblematic of the new process of assessment that the Commission wanted to set up.

A major consequence of the new approach was the considerable extension in the time taken to scrutinize the agreements concluded in the inland waterways and in the fisheries sectors⁴³, which generated a lot of discontent and resentment among the signatories of these agreements. For the agreement in the hairdressing sector, the assessment was initiated but it was stalled after the completion of a study which was too supportive of the agreement in view of the Commission expectations. And the Barroso 2 Commission took a very ambiguous decision on this agreement: it decided not to wait for the outcome of the assessment and to already conclude that "within its mandate" it would not propose a legislative implementation while noting that the assessment would continue, thereby enabling the subsequent Commission to re-examine the follow-up to the social partners' request. Such an ambiguous decision was clearly seen by the concerned social partners as a breach of the obligations incumbent on the Commission and contributed to the deterioration of the relations between the social partners and the Barroso 2 Commission (which was also fuelled, throughout its mandate, and first and foremost, by the Commission and Union responses to the Eurozone crisis⁴⁴).

⁴³ See J.P. TRICART (2019). Until 2012, the Commission proposal for a legislative implementation of a social partners' agreement was usually presented some two to three months after the signature of the agreement (up to one year in the case of an agreement concluded outside the consultation procedure). By contrast, after 2012, it took 29 months for the Commission to present the legislative proposal for the inland waterways (approved by the Council 5 months later), and 35 months to present the legislative proposal for the sea fisheries sector (approved by the Council eight months later).

⁴⁴ The relations between the Commission and the social partners (in particular the unions) deteriorated continuously under the Barroso Commissions (in particular the Barroso 2 Commission). The controversies relating to the legislative implementation of the agreements were neither the only nor the main cause of this deterioration, which was also a deterioration of the relations between the Council and the social partners. The tensions between the Commission and the social partners emerged first in relation to the policy responses which were given by the Union to the Eurozone crisis: the unions contested the guidelines and recommendations on budgetary discipline and structural reforms as well as the conditions imposed to the Eurozone countries receiving a financial assistance (including the role of the 'Troika' made up of the European Central Bank, the International Monetary Fund and the Commission). Also on the unions side, tensions developed throughout the term of the Commission with regard to the initiatives simplify and streamline legislation known as 'Smart Regulation' or REFIT (Regulatory fitness and performance programme). Finally, both employers and unions contested the attempts of the Commission to 'instrumentalise' the EU social dialogue i.e. not to respect the autonomy of social partners and to dictate them an agenda aiming at supporting the Commission policies (on its side, the Barroso Commission criticized the social partners for being unable to deliver a contribution to the reforms needed in the Union, and for example unable to conclude their negotiation on working time). See J.P. TRICART (2020), *Once upon a time*, cit. at footnote 26.

The Juncker Commission inherited this deterioration of European social dialogue. This is why one of its first announcements of President Juncker was that he would give a “new start” to European social dialogue, as part of a strong emphasis, throughout his mandate, on the promotion of “Social Europe”. And later on, he took the initiative of proposing a “European Pillar of social rights”, which was welcome by the social partners.

But with regard to the controversies on the legislative implementation of social partners’ agreements, the Juncker Commission pursued the orientations of the Barroso 2 Commission, and it even amplified and formalised them.

At the very beginning of its mandate, the Juncker Commission presented a set of documents on the EU legislative action, which is known as the “Better Regulation” package. As suggested by its title, this package builds on the work which had been carried out under the “Smart Regulation” programme. The package contains a section on the intervention of the social partners within the legislative process at EU level, which presents in particular the new arrangements along with the Commission will deal with the request for legislative implementation of social partners’ agreements⁴⁵. While the text uses the standard elements of language on European social dialogue, it states very clearly, for the first time as such⁴⁶, that the Commission considers now that “it can accept or reject the (social partners) agreements”, and that it has full discretion to do so, a message which formalises the reinterpretation of the Treaty provisions which had been initiated under the Barroso 2 Commission. While this package is presented a few weeks after the launching of the “new start” for European social

⁴⁵ When the Better Regulation states that ‘the Commission can accept or reject’, it is the first time that this statement is made public in a political document of the Commission: but this statement was already contained in internal guidance documents relating to the modalities of application of impact assessment procedures to social partners agreements and as a result in the text of the Commission Staff Working Documents which present the results of this assessment (see for example SWD (2014) 226 of 7 July 2014, on the assessment of the inland waterways agreement). On the Better Regulation package, see COM(2015) 215 final of 19 May 2015 ‘Better regulation for better results - an EU agenda’, which was accompanied by two Staff Working Documents (SWD 110 and SWD 111).

⁴⁶ For a detailed analysis of the modalities of assessment established in practice the Better Regulation package in the case of negotiations initiated during the first phase of consultation, see J.P. TRICART (2019) pages 39-40. It is worth noting that, in its defense in the Central Administration agreement case, the Commission did not use this argument that it had already made clear in this Better Regulation package that it would consider agreements negotiated as from the first phase as agreements negotiated on social partners’ own initiative (and therefore in line with the 1998 Communication, requiring a full analysis of appropriateness of EU action). This is likely because in this particular case, the Commission has not assessed the agreement in accordance with the procedure that it had set up in the Better Regulation package and it has not even started the ‘proportionate impact assessment’ that it had announced to perform. Precisely because it did not respect the political commitments that it made in its Communications, the Commission was obliged to deny that such Communications would contain any commitment on its side.

dialogue, it no longer contain any of the messages of the past with regard to the crucial importance, for the EU, of the active participation of the social partners in the legislative process: the Commission no longer says that the social partners are the best placed to regulate working conditions and relations, that it encourage them to fully use the Treaty provisions on negotiation, or that it intends to promote the double subsidiarity. On the contrary, the text emphasizes how the Commission intends to shape the possible intervention of the social partners in the legislative process, and describes the long and suspicious assessment which will be applied to any agreement for which social partners would request a legislative implementation. In short, it is a defensive text, to discourage social partners to engage in such negotiations. It even contains statements which can be seriously contested, for example when it indicates that, while the Treaty allows social partners to initiate negotiations at the occasion of the first phase of consultation under Article 154 TFEU, the Commission will consider that any agreement concluded under such negotiations after the first phase will be considered as an agreement concluded outside the scope of consultation and therefore engaged at the sole initiative of the social partners (22). In short, it is a defensive reinterpretation of the Treaty provisions.

In practice, the Juncker Commission had mainly to deal with two social partners requests for legislative implementation of their agreement, which were both politically sensitive in the context of the emphasis put on the new start for social dialogue but also the continuity with the "smart regulation" orientations: first, the agreement in the hairdressing sector, which was still pending and whose assessment had been stalled, and second, the central administration agreement, resulting from a negotiation initiated within the first phase of consultation on the consolidation of the existing directives on information and consultation of workers. In both cases, the signatories could expect that their agreements would be assessed along the modalities described in Better Regulation (and, in the case of Central administrations, confirmed in a letter of the Commissioner)

But the fact is that they were not. In the case of the hairdressing sector, President Juncker used himself some of the parodies of his predecessor, and the file remained at a standstill. In the case of the central administration, the expected "proportionate" assessment was never initiated, as if, right from the outset, the Commission (or its departments) had taken the view that it would not deal with it, that it was not even necessary to assess it in line with the arrangements set in Better Regulation, and that nothing prevented the Commission to constantly lie to the signatories about the progress of the assessment. Hence the feeling among the social partners concerned that the Commission failed to fulfil its obligation to promote social dialogue and that it despised them, forwarding them misleading or downright false information, an attitude which can only be deliberate, on the part of an institution as the Commission

Here is certainly the very dark face of the developments of European social dialogue over the last years, an attitude of the Commission (or of some of its departments)

that the social partners concerned perceived as extremely violent, hostile and arrogant, as if the Commission considered that its right of initiative allowed it to do what it wanted, irrespective of any of the rules or principles which are usually attached to public institutions and which shape the legitimate expectations of citizens.

The deterioration of the relations between the Commission and the social partners contributes to explain the final developments of the file. The Commission asked the signatories to withdraw their request for legislative implementation and to implement their agreement "autonomously" with a financial support of the EU budget on social dialogue. It was an unprecedented proposal, as the Commission had constantly acknowledged that the decision to implement an agreement through EU legislation or through an autonomous process is entirely a matter for social partners, without any possible interference of the Commission (and indeed without any financial incentive). Having regard to the context, such a proposal could only be perceived by the signatories as an attempt to create a precedent (the precedent of authorizing the Commission to decide itself that an agreement will be implemented by the social partners themselves)

8) Conclusion

The Treaty provisions on the European social partners' agreements have existed for more than 25 years. Their introduction in the Treaty have marked the formal recognition of the role and value of European social dialogue in the European integration process and it has in turn strongly contributed to the structuration of this social dialogue. For almost 20 years, there was a broad consensus between the European institutions and the European social partners on their interpretation and on the related implementation arrangements, and more generally on the need for a close involvement of European social partners in the design and implementation of European social policy and legislation. This broad consensus was broken when the Commission put into question the place of legislation among the various instruments of the action of the Union, and in particular social legislation: the Commission has considered that the legislative dynamism of social dialogue, though it was based on these Treaty provisions, was going against the logic of restrictive use of legislation that it wanted to develop, and it has accordingly reinterpreted unilaterally the Treaty provisions which related to social partners agreements. This has been a substantive and divisive reinterpretation: a substantive reinterpretation because in claiming that it had full discretion to accept or reject any agreement, the Commission has unavoidably restricted what was so far recognized as the autonomy of the social partners; a divisive reinterpretation because it was unilaterally decided and imposed to social partners, and because by so doing, the Commission destroyed the mutual trust between actors which is a fundamental condition of social dialogue. Furthermore, the reinterpretation was imposed through practical decisions and behaviour which were in breach of what other actors could legitimately expect from the Commission.

The most negative consequence of this reinterpretation is this destruction of mutual trust Between the Commission and the social partners, and as a result the expansion of mistrust and distrust: it is the main reason why it was not possible for the actors to find a way to overcome their conflicts related to the interpretation of the Treaty provisions, and why on the contrary tensions exacerbated and culminated in a complaint to the CJEU

While the 2019 Court ruling has brought its support to the reinterpretation of the Commission, this paper suggest to pay attention to the interpretation which made it possible a consensus for some 20 years.

While the 2019 Court ruling considered that the Commission attitude on the file at stake has sufficiently complied with what could be expected from it, this paper insists on the breach by the Commission of the conditions of trust and in particular of legitimate expectations

A last remark has to be made, which concerns the expectations which can be attached to the Communications of the Commission. As said in various occasions in the paper, the Commission has produced a number of Communications on social dialogue, which have been the basis for the common understanding and consensus between the actors of social dialogue for many years. As these Communications did not support its reinterpretation, the Commission argued that they should be disregarded as obsolete. In addition, as the Commission did not comply with the procedures that it had set in subsequent Communications, it did not argue to the Court that these more recent Communications should be now references for the (new) interpretation of the provisions. The Court ruling agreed to disregard these Communications on the ground that they have no legally binding effect. However, in doing so, and in opting for a general indulgence with regard to the Commission attitude in relation to the signatories of agreements, the Court contribute to deny any value, and even political value, to these Communications. But how to deal afterwards with the consequences of a Court ruling? In such circumstances, further to a key Court ruling, the Commission presents a Communication which proposes some lessons and consequences of the ruling for the future. But here, whatever the final position of the Court will be, the Court ruling has clearly said that Communications had no legal effect and that the Court does not object if the Commission breaches deliberately any political commitment which would be contained in a Communication. The extensive indulgence of the Court ruling in favour of the Commission implies that from now on, social partners should never believe any Communication Commission...

The hermeneutics applied by the General Court in *EPSU* judgment

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9) Introduction

In this contribution, I will analyse the hermeneutics applied by the General Court in *EPSU and Willem Goudriaan versus Commission*. The notion hermeneutics refers to the methods of interpretation which the GC states it is applying to treat the first plea, *id est* the scope of Article 155 (2) TFEU. The first plea relates to the claim of the applicants that this provision would oblige the Commission to submit a proposal of a decision to implement the agreement concluded to the Council, provided that the agreement satisfies a previous legality check, including a test of representativeness of the social partners.

The method of interpretation undertaken by the General Court will be analysed at two levels. First, I will explain the overall structure of the judgment indicating how the GC claims to interpret Article 155 (2) TFEU. Secondly, the various methods of interpretation (literal, contextual, teleological) will be made subject to a critical assessment, in order to verify whether the General Court has actually applied these alleged methods of interpretation in a convincing way. I will terminate by some concluding observations.

10) The rules of interpretation put forward by the General Court

The General Court explains its method of interpretation in § 49 where it states

“Article 155(2) TFEU must be interpreted taking into account not only the wording of that provision, but also its context and objectives”.

The judgment stands out for its attempt to qualify the hermeneutical methods applied. First, the GC tends to distinguish the methods of interpretation, separating the literal, the contextual and the purposive or teleological methods of interpretation. More importantly, it also added another box, containing “other arguments”. These arguments based upon Treaty provisions, invoked by the applicants make it abundantly clear that the GC refused to take these provisions into account for the sake of contextual or purposive interpretation. Furthermore, in applying this literal method, the GC checks the outcome of what is called a literal interpretation in the light of the *Travaux préparatoires*.

11) The (so) called literal interpretation

In the interpretation given by the GC, the “literal interpretation” of the phrase

“Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission”.

amounts to the opposite ordinary meaning of what the text states⁴⁷. According to the GC “shall be implemented”, just means “may be implemented”. In my modest opinion this is slightly paradoxical. It amounts to an interpretation where the provision would be deprived of any normative scope, not imposing any obligation incumbent on anyone at all. Interpreting a legal provision as a provision not entailing any legal consequence at all is manifestly absurd and unreasonable. It is hard to see e.g. why one needs a TFEU provision at all to enable social partners at national level to conclude an agreement at that level or indeed the Commission to table a proposal for the adoption of a decision, as if these actors would not be able to do so if Article 155 (2) would be abolished. The only relevance relates to the ability not to involve the European Parliament. The GC uses the *Travaux préparatoires* not to reject or overcome such an interpretation, but to overcome this unease. In doing so, the GC is not convincing in my modest opinion, since the *Travaux préparatoires* just demonstrate the opposite, that is that a formula without legal strings attached was replaced by a formula with strings attached, which the GC however interprets as one not entailing obligations. If the aim was to adopt a provision not entailing obligations, there would not have been any need to change the original formula at all.

12) The (so) called contextual interpretation

In what the General Court calls a contextual interpretation⁴⁸, it actually refuses to take into account all the provisions within the same Social Policy Title put forward by the applicants and seeks refuge in another Treaty which has a more general nature and is not hierarchically superior to the TFEU. The question is how this can be reconciled with a very basic principle of interpretation; commonly known as *Specialia derogant generalibus*.

The Court seeks refuge in Article 17 TEU, which has been written down to confirm the role of the EU Commission not as a *primus motor immobilis*, but as the architect of positive European integration. *In casu*, this provision is being mobilized in order to justify the right of the EU Commission to kill bottom up initiatives emerging from a

⁴⁷ GC, 24 October 2019, T-310/18, §§ 49-63.

⁴⁸ GC, 24 October 2019, T-310/18, §§ 65-82.

relevant part of civil society by refusing to implement them. Thus, the choice in favour of Article 17 TEU tends to give precedence to the procedural machinery of power rather than to a more substantive part of the Treaty in line with e.g. the right to collective bargaining (Article 28 CFREU) or with the social values of the TEU (Article 2 TEU)⁴⁹.

The fact that the GC disqualifies in its interpretation of Article 17 TFEU implementing directives, thus stating that the latter are not constituting legislation is at odds with the history of the introduction of the European social Dialogue⁵⁰. Thus, Lo Faro has in the immediate aftermath of the genesis of the European Social Dialogue concluded the exact opposite⁵¹. He has disqualified the agreements as product of a fictitious collective bargaining demonstrating that they were in fact functional to a legislative purpose. In the same vein, Bercusson and Didry have made it abundantly clear how the introduction of the Social Dialogue under Jacques Delors served to overcome a legislative deadlock⁵². Far from undermining a balance of power to the detriment of the EU Commission, the mechanism served to strengthen the balance of power in favour of the EU Commission. The idea that directives implementing agreements would be anyway different from “ordinary” legislative directives has been rejected explicitly by the CJEU in the context of the issue of interpretation⁵³. The suggestion⁵⁴ that a powerful role for the social partners would jeopardise in an undemocratic way a balance between institutions runs against a quintessential part of the *UEAPME* judgement, where the then “Court of First Instance” confirmed the legislative and the democratic character of the procedure as followed:

“The principle of democracy on which the Union is founded requires - in the absence of the participation of the European Parliament in the legislative process - that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at Community level”⁵⁵.

⁴⁹ For a critique of the interpretation given by the GC of Article 17 TEU, see also K. LÖRCHER “On the notion of general interest of the European Union” (in this Working Paper).

⁵⁰ GC, 24 October 2019, T-310/18, §§ 69.

⁵¹ A. LO FARO, *Regulating Social Europe. Reality & Myth of Collective Bargaining in the EC Legal Order*, Oxford, Hart Publishing, 2000, 53-89.

⁵² B. BERCUSSON, *European Labour Law*, London, Butterworths, 1996, 541 and C. DIDRY and A. MIAS, *Le moment Delors*, Brussels, Peter Lang, 2005, p. 349.

⁵³ CJEU, 16 September 2010, C-149/10 (*Chatzi*), § 24-25.

⁵⁴ GC, 24 October 2019, T-310/18, §§ 81-82.

⁵⁵ Court of First Instance, 17 June 1998, T-135/96 (*UEAPME*), § 89.

13) The (so) called teleological interpretation

Just as the materials for the contextual interpretation has been dissociated from the literal interpretation, the General Court dissociates the materials of the purposive or teleological interpretation⁵⁶ from the examination of the literal one. Just like the GC restricts the analysis of the contextual interpretation to solely one provision, the GC restricts its purposive interpretation to one provision, *id est* Article 152 TFEU. It only construes the reference to autonomy as a source for obligations of abstention⁵⁷. It fails to take sufficiently⁵⁸ into account in my view that Article 151 TFEU, which constitutes the *Incipit* of the Social Policy Title states that “The Union and the Member States shall have as their objective (...) dialogue between management and labour”. The Court also fails to highlight that the EU institutions need to promote the rights enshrined to the CFREU, including the right to collective bargaining (Article 28 CFREU). Indeed, Article 51 CFREU states that “They (the EU Institutions, including the CJEU and consequently also the GC) shall therefore respect the rights, observe the principles and *promote* the application thereof in accordance with their respective powers”. The complete disregard of the CFREU in this part of the judgment is astonishing, since the CFREU is intertwined with the values of the Treaty and once the primary objective of the European Union is in fact to promote these values. (Article 3 TEU).

14) The provisions damned from earth

Last but not least, the GC created a toolbox of “other arguments”, apparently unfit for the purpose of contextual or teleological interpretation⁵⁹. Some of these arguments are quintessential in my view for the purposes of contextual interpretation (democracy, horizontal subsidiarity) and for the sake of a purposive interpretation (Article 28 CFREU). Hence, the tendency of the GC to state that these provisions taken in isolation do not entail an obligation for the Commission to table a proposal for a decision, is twisted. Indeed, these provisions should not be read in isolation of Article 155(2) TFEU. The *obiter dictum*⁶⁰ that the Commission could choose freely after a joint request between and ordinary parliamentary avenue and a non-parliamentary avenue is shocking and odd with the vow which the Commission has always pledged in its communications to implement *ne varietur*. Last but not least, the mere denial⁶¹ of the horizontal dimension of the principle of subsidiarity as well as its judicial understanding of democracy puts us back to times immemorial, inspired by a Jacobine

⁵⁶ GC, 24 October 2019, T-310/18, §§ 83-90.

⁵⁷ GC, 24 October 2019, T-310/18, § 86.

⁵⁸ Article 151 TFEU is only mentioned in GC, 24 October 2019, T-310/18, §83.

⁵⁹ GC, 24 October 2019, T-310/18, §§ 91-104.

⁶⁰ GC, 24 October 2019, T-310/18, § 96.

⁶¹ GC, 24 October 2019, T-310/18, § 98.

conception of public authority for which it is dangerous to bow one's head. Apparently, the GC is not aware of the widespread use of the notion subsidiary in a number of EU directives.

15) No critique, just a number of concluding observations

The method of legal interpretation adopted by the General Court continues to be puzzling. A literal interpretation has amounted to something which is the exact opposite of what a lexical and grammatical interpretation would entail. There is a textual use of the *Travaux préparatoires* which is completely at odds with the historical context of the invention of the European Social Dialogue at the Moment Delors. Neither does the General Court seem to remember that the horizontal dimension constitutes the oldest nucleus of the principle. Once more, a lack of historical knowledge paradoxically reveals itself to be detrimental to interpret the TFEU as a *living* instrument, fit for present day society. What should be integrated in my view is dissociated, and what should be dissociated is integrated. Thus, the distinction between contextual and teleological is artificial. A provision defining an objective is obviously part of the context as well.

The GC has refused to balance the arguments of the applicants by a cunning reshuffling of these arguments in the wrong boxes, thus disregarding them for the sake of determining the ordinary meaning of Article 155 (2) TFEU

In sum, just to paraphrase Mario Monti talking about other judgments in a different context, the *EPSU* judgment has the potential "to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration"⁶².

⁶² Report of Mario Monti, 'A new strategy for the single market' to the President of the Commission, 9 May 2010, p. 68.

On the notion of 'general interest of the Union' in the context of the General Court's *EPSU* judgment

by Klaus Lörcher

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16) Introduction

By way of introduction, I would admit that it might appear a bit hybrid to deal with the issue of "general interest" as such and in relation to the EU in particular. Obviously, such a general attempt would fail. The starting point will therefore be much more pragmatic.

The analysis of the General Court's (GC) reasoning reveals that entrusting the Commission the promotion of the "general interest of the European Union" (Article 17 para. 1 subpara. 1, 1 sentence TEU) is one of the central arguments for rejecting any obligation of the Commission to transmit a Social Partner Agreement to the Council for decision:

In sum, there are two main arguments in paras. 79 and 80 of the judgment:

1. Commission would be prevented from fulfilling its role (para. 79).
2. Social partners could not promote the general interest of the EU (para. 80).

Before dealing with these arguments more in detail, it is necessary to reflect what "general interest" means and how this applies to the present case. Moreover, it has to be clarified whether and – in the affirmative – which institution will monitor its respect and proper implementation.

According to these issues my presentation will address three questions:

- First: What is the meaning of "general interests of the European Union"?
- Second: What does this mean for the GC's arguments to refuse Commission's obligations of transferal?
- Third: Who has the competence to scrutinise the proper implementation?

Finally, short Conclusions will summarise the contents and try to give a certain outlook.

17) (Elements of the) Meaning of 'general interest of the Union'

Before going into any details, it appears important to recall that the "general interest" is a fundamental notion which refers to several contexts. For example, in the

human rights context it serves as one of the elements to justify limitations (see Article 52(1) CFREU).⁶³ There is abundant CJEU case law on what can be considered as “general interest” in this context. Most obviously, the protection of workers’ interests is considered to be included.

More specifically in relation to Article 17(1) TEU, the GC has obviously the meaning that solely the Commission is in position to understand and assess what is the “general interest”, due to the complexity of interests that must be considered. However, this technical approach fails to understand its basic value which is required by the Treaties.

General considerations

Obviously, lacking a legal definition in the Treaties, it is difficult to construe the basic elements for the “general interests” even in relation to the Union. There are several possible approaches ranging from a (very) wide political understanding (like the GC: all sorts of “political, economic and social considerations”⁶⁴) to a more legal orientation which would look first at the legal requirements and only at a second stage at further considerations.

Other elements like the principles of democracy and legitimacy as well as consistency⁶⁵ (Article 13(1) TEU) will have to be taken into account. In any event, a hierarchy will be necessary ensuring that the (rule of) law will always precede any other (political) considerations.

But before further analysing the possible content it appears necessary to look at the case law of EU’s constitutional court, the CJEU:

What is the CJEU’s position?

Although there is only rare case law specifically dealing with the content of the EU’s “general interest” the CJEU appears to be in favour of the GC’s position of leaving the definition to the Commission.⁶⁶ However, it is not excluded that the CJEU might look

⁶³ It is interesting to note that in contrast to many other language versions which use the same term for Articles 17(1) TEU and 52(1) CFREU the German versions differ: Article 52(1) CFREU uses the term “Gemeinwohl” whereas the notion of “general interest” in Article 17(1) TEU is translated into “allgemeinen Interessen”. This difference might perhaps be explained by chronological and thematic reasons: Chronologically, the CFREU was elaborated in its main parts several years before the Lisbon Treaty and in the different context of a human rights instrument in which “Gemeinwohl” is a much more specifically used to limit individual rights. “Allgemeine Interessen” would probably be regarded as too wide.

⁶⁴ See para. 79 of the judgment.

⁶⁵ In the present case for example, the Commission’s behaviour fundamentally lacks consistency: It has started to initiate negotiations between the partners of the agreement; it has even welcomed the outcome but finally rejected it.

⁶⁶ If the “general interest” in Article 17(1) TEU is referred to it is normally in a very general way that the CJEU quotes the terms of the provision without giving any indication about its content, see e.g. the

more into the details of the legal framework. In this respect, it is illustrative that the CJEU has at least in two cases referred to legal aspects defining the “general interest” of the Union:

- the ESM Treaty (“By its involvement in the ESM Treaty, the Commission promotes the general interest of the Union”)⁶⁷
- elements of a (secondary law) Regulation.⁶⁸

The core: values, objectives and fundamental social rights

For the purpose of trying to define (at least elements of) the Union’s “general interests” it is of utmost importance to take into account that the provision of Article 17 TEU is placed within the framework of the core provision of Article 13(1) TEU introducing its Title III “Provisions on the institutions”. This provision defines that “the Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests ... and ensure the consistency, effectiveness and continuity of its policies and actions”.⁶⁹ Accordingly, this has to be the starting point for an analysis what ‘general interest of the European Union’ could or even should mean.

Therefore, the Union’s “general interest” is to be defined in the first place by its values and objectives and also by the fundamental rights (Articles 2, 3 and 6 TEU). In this understanding the Chamber should have taken specifically into account

- in relation to Article 2 TEU: the “human rights” and “solidarity”;
- in relation to Article 3 TEU: the social objectives like “social market economy” and “social progress”;⁷⁰

following Grand Chamber judgments: 14/04/2015 - C-409/13 - ECLI:EU:C:2015:217 - *Council v Commission*, para. 70; 06/09/2017 - C-643/15 - ECLI:EU:C:2017:631 - *Slovakia v Council*, para. 146; 19/12/2019 - C-418/18 P - ECLI:EU:C:2019:1113 - *Puppinck and Others v Commission*, para. 59 (the latter two judgments refer to the first authority).

⁶⁷ Judgment 27/11/2012 - C-370/12 - ECLI:EU:C:2012:756 - *Pringle*, para. 164.

⁶⁸ “In accordance with Article 2 of the CFP Regulation, in the fisheries sector the European Union interest is, inter alia, to ensure exploitation and management that is sustainable in the long term”, Grand Chamber judgment 30/04/2019 - C-611/17 - ECLI:EU:C:2019:332 - *Italy v Council* (Quota de pêche de l’espadon méditerranéen), para. 75 (in relation to “general interest” see the preceding para. 74: as regards the breach of Article 17 TEU, it should be recalled that the first paragraph of that provision states that the Commission is to promote the general interest of the European Union).

⁶⁹ It is to be noted that Article 13(1) TEU does not explicitly refer to the “general interests” of the Union. The underlying understanding of this contribution is that the Unions “general interests” include all the aspects mentioned in Article 13(1) TEU starting with the values and objectives.

⁷⁰ See F DORSEMONT, ‘Values and Objectives’, in N. BRUUN, K. LÖRCHER and I. SCHÖMANN (eds.), *The Lisbon Treaty and Social Europe* (Oxford, Hart Publishing), 2012, p. 45 ff.

- in relation to Article 6 TEU: all fundamental (social) rights included mainly in the “Solidarity” Title of the CFREU⁷¹ which contains the obligation to promote the application of fundamental rights in general (Article 51(1)) and in particular
 - o Article 28 CFREU,⁷² in particular the Right of collective bargaining which is of special importance here,
 - o Article 27 CFREU in relation to the fundamental right to information and consultation (at least in combination with Article 20, equality before the law).⁷³

Besides the general objectives defined by Article 3 TEU there are, more specifically, important social objectives provided for in Article 151(1) TFEU. *Inter alia* it mentions explicitly “dialogue between management and labour” as one of these objectives. This is not only confirmed but significantly strengthened by the newly (Treaty of Lisbon) introduced Article 152(1) TFEU requiring the Union (thus all its institutions) to promote the role of the social partners at its level as well as to facilitate dialogue between the social partners, respecting their autonomy.⁷⁴ Moreover, it has to be taken into account that the primary law legislators have recognised the specific competence of SP in the social policy field in a double way. First, they have mainly taken over the SP’s Agreement in the primary law provisions which are i.a. now Articles 154 and 155 TFEU. Second, in particular Article 154 provides for the SP a specific role in all legislative procedures dealing with social policy.

In sum, the GC has failed to take these legal provisions into account when referring to the Union’s “general interest”.

18) Consequences for the GC’s arguments to refuse Commission’s obligations of transferal

On the basis of the previous considerations the GC’s argumentation in relation to Article 17(1) TEU containing the Commission’s obligation to promote the “general interest” of the Union is not correct, neither from a methodological nor from a substantial point of view.

⁷¹ F. DORSSEMONT, K. LÖRCHER, S. CLAUWAERT, M. SCHMITT (eds.), *The Charter of Fundamental Rights of the European Union and the Employment Relation*, (Oxford, Hart Publishing), 2019.

⁷² F. DORSSEMONT and M. ROCCA, ‘Right of Collective Bargaining and Action’, note 9, p. 466 ff.

⁷³ It might appear problematic to refer to this right because it is addressed specifically to “undertakings” which in its ordinary meaning would refer to private entities. However, it is containing a principle which should also be recognized in the public sector (see B. VENEZIANI, ‘Article 27 – Worker’s Right to Information and Consultation within the Undertaking’, note 9, p. 429 ff., 436). But if central administrations would not be included there is still the obligation to ensure equality before the law (Article 20 CFREU) meaning that public service cannot be excluded totally.

⁷⁴ B. VENEZIANI, ‘The Role of the Social Partners in the Lisbon Treaty’, in N. BRUUN, K. LÖRCHER AND I. SCHÖMANN (eds.), *The Lisbon Treaty and Social Europe* (Oxford, Hart Publishing), 2012, p. 123 ff (see also the TTUR Recommendation on the effective application of Article 152 TFEU, *ibid.* p 307.

Preliminary observations: general application of the principles mentioned above

All the elements mentioned above have to be taken into account when defining the Union's "general interest". Applying them to the present case means that the reference to the "general interest" cannot justify a Commission's refusal to submit a proposal under Article 155(2) TFEU unless it is based on legal arguments or on the lack of representativity. All elements mentioned above require a limitation of the Commission's powers in relation to defining the Union's "general interest". If those obligations should still have any legal value, the Commission cannot undermine them by using an appropriateness test.

In any event, such a necessary limitation would still have to ensure the fulfilment of the two following conditions:

- the Commission's role as guardian of the Treaties (Article 17(1) 3rd sentence TEU) requires that the limitation does not touch upon the verification of the legality of the provisions of the agreement concerned.
- the democracy principle requires the verification of representativeness.

Against this background, the two main arguments used by the GC will have to be assessed.

GC's first argument: Commission would be prevented to fulfil its role

The crucial question is what the "role" of the Commission is all about. In assessing the "general interest" it has to fulfil first and foremost the promotion of the values and objectives of the Union as outlined above. In following this line of argumentation, the Commission would not be prevented but, instead, strengthened to fulfil its role if it were obliged to transfer the agreement to the Council for adoption.

The GC's underlying understanding of the Commission's competence to define whatever it thinks would be fit for "general interests" is contrary to its legal obligations.

GC's second argument: social partners cannot promote the general interest of the EU

Coming secondly to the GC's additional argument that social partners could not promote the general interest of the EU this demonstrates, once again, the misunderstanding of the SP's role in the Social Policy Title. According to the GC, the Commission would have a legitimacy based on its technical capacities and knowledge, and this legitimacy would overturn the democratic legitimacy of the SPs.

First and more generally, this approach departs from a model where political decisions should be adopted through a democratic procedure that leads to a consensus deriving from a contrast between different regulatory projects.

Second, and more specifically, in Articles 153(3), 154 and 155 TFEU the EU primary law legislator recognises the specific competence of SPs dealing best with social issues in the “general interest”. Moreover, the additional condition of representativity cannot be justified if the SP are denied this competence in a general democratic way.

Third, the pertinent issue of “information and consultation” is most obviously in the best competence of the EU social partners.

19) Scrutinizing the proper implementation of the Union’s ‘general interests’

From a methodological point of view, it is to be criticised that the Chamber leaves the definition of what “general interest” is supposed to represent totally open apparently assuming that it is up to the Commission only to define its content. This is not acceptable. As legal notion it is (finally) up to the EU judges to provide a clear substantial guidance i.e. to define it.

A similar/parallel problem has arisen between the CJEU and the German Federal Constitutional Court (Bundesverfassungsgericht) in relation to the interpretation of EU law requiring “effective judicial review”.⁷⁵ Therefore, it cannot be left to the Commission to define “general interest” at its (own) will.

20) Conclusions

The general interest of the Union must first and foremost ensure the proper implementation of the Union’s values, objectives and fundamental (social) rights. Interests cannot override legal obligations.

The Union’s values, objectives and fundamental (social) rights require that the Commission promotes the role of the social partners and does not undermine it by rejecting the transferal of an agreement to the Council.

The specific role of representative social partners in EU primary law illustrates that they are part of the legislative procedure. Thus, they are recognised and entrusted in the social policy field to ensure (or at least contribute to ensure) the “general interest” of the Union’ (together with the Council).

⁷⁵ “... religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be subject, if need be, to effective judicial review by which it can be ensured that the criteria set out in that provision are satisfied in a particular case (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 59).”, CJEU, Grand Chamber, 11 September 2018, *IR*, ECLI:EU:C:2018:696, para. 43.

On appropriateness and legality checks

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21) Introduction

The *EPSU* case originated from the Commission's refusal to transmit a proposal for a Council Decision which would have given legislative implementation to the social partners' agreement stipulated by TUNED and EUPAE, providing a general framework for informing and consulting civil servants and employees of central government administrations. The point of contention that triggered the judicial proceeding is the scope of the Commission's power to reject the request of social partners to submit a proposal to the Council. *EPSU*, which before the EU judiciary represents TUNED, argues that, by deciding not to submit a proposal for a Council Decision, the Commission acted *ultra vires*. The Commission, instead, essentially maintains that it falls within its legitimate sphere of discretion to decide, also on the base of opportunity and appropriateness, whether to exercise its power of legislative initiative.

Unfortunately, Article 155(2) TFEU does not provide clear guidance:

"Agreements concluded at Union level shall be implemented [...] at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed".

The arguments of both parties thus require an in-depth consideration, based on the analytical observation of the relevant precedents, as well as of the official documents that throughout time the Commission has adopted to guarantee a sound implementation of the Treaty provisions on social dialogue at the EU level. Looking at the *EPSU* judgment, it is however rather surprising to note the absence of an adequate evaluation of the legitimacy and scope of the Commission's assessment that led to the refusal to the social partners' request to present a legislative proposal.

In this short paper it will be argued that by accepting that the Commission can refuse to process a social partners' agreement on the base of appropriateness of the content of that agreement, the General Court disclosed a lack of proper understanding of the purpose and extent of the assessment that the Commission can legitimately operate. In particular, it will be suggested that in relation to the framework agreement signed by EUPAE and TUNED the Commission should have exclusively carried an assessment focused on the legality of the agreement, the representativeness of the social partners and the burden for small and medium sized enterprises. Moreover, the paper will contend that the appropriateness assessment conducted by the Commission

was grounded on criteria that are too vaguely defined, thus inevitably paving the way for an arbitrary decision.

22) The Commission's justification for refusing to submit a proposal for a Council decision

With its Communication of 5 March 2018, the Commission replied to the joint request from EUPAE and TUNED and refused to present a proposal to implement by a Council Decision the agreement concerning a general framework for informing and consulting civil servants and employees of central government administrations.

The Commission submitted the following reasons to justify its refusal:⁷⁶

- 1- The central government administrations are placed under the authority of national governments and exercise the powers of a public authority. Their structure, organization and functioning are entirely a matter for the respective national authorities of Member States.
- 2- Provisions ensuring a degree of information and consultation of staff in that sector are already in place in many Member States.
- 3- The prerogative of national authorities to structure and organize the central government sector also leads to the fact that the organization of this sector varies widely between Member States, depending on the degree of decentralization of their public administration. Thus, a Directive transposing the Agreement into EU law would result in significantly different levels of protection depending on whether the Member State has a more centralized administration and therefore a wider coverage of central government, or a more decentralized or federal administration, which would leave a large proportion of the public sector excluded from the scope of such EU legislation.

The weakness of these arguments descends mainly from two elements. First, their merit. In its first justification, the Commission contends that the structure, organization and functioning of the central government administration fall entirely outside the Union's competence, as those aspects relate to the national governments' exercise of their public authority. It should be sufficient to recall that already in the *EU acquis* there are norms that, in specific circumstances, establish information and consultation rights for workers in the public sector. The functions of a public administration are indeed multiple and differentiated, and they do not always relate to the exercise of public authority. A significant example is Directive 2001/23/EC on workers' ac-

⁷⁶ European Commission – DG Employment, Social Affairs and Inclusion – Brussels 5 March 2018, EMPL/A2/SM(ah(s(2018)135147-9

quired rights in case of transfers of undertaking, which also applies to the public sector, with exception.⁷⁷ Coherently with that approach, the framework agreement concluded by TUNED and EUPAE specifically differentiated between the various functions within the public sector and provided that:

“[...] the dispositions of the present agreement may not apply to public employees entrusted with sovereign responsibilities notably national security, public order or judiciary power”.⁷⁸

The Commission’s third argument is also hard to comprehend. There, the Commission maintains that the structures of the public sector vary widely across Europe, and that therefore the adoption of a normative framework would lead to uneven levels of protection in the Member States. The logic of this assertion is rather obscure, since the adoption of a uniform set of rules such as those in the social partners’ agreement would inevitably contribute to harmonize the different national systems.

Second, and most importantly for the theme of this contribution, the refusal of the Commission is questionable inasmuch as it is fully grounded on an assessment of the opportunity and appropriateness of a EU regulatory initiative in the area covered by the social partners’ agreement. The fact that the Commission’s refusal is rooted in its evaluation of the absence of appropriateness of the proposed measures is also correctly recognized by the General Court, which in paragraph 137 states that:

“it is clear from the reasons given for the contested decision that the Commission considered that the implementation of the Agreement at the EU level did not appear to it to be either necessary or appropriate [...]”.

It is hereby argued that the fact that the Commission’s assessment was based on an appropriateness test entirely invalidates the opposition to the social partners’ request. As it will be illustrated in the following paragraph, with its decision the Commission departed from what established in previous Commission Communications on the social dialogue at the EU level. It also contradicts the rhetoric expressed in other several recent policy documents (among which most notably the European Pillar of Social Rights), which place the accent on the relevance of information and consultation rights as well as of social dialogue.

⁷⁷ Article 1(1-c). The Court of Justice has specified that the exceptions to the scope of application of the Directive to the public sector are limited to cases where the activities carried out fall within the exercise of public powers (See *Scattolon* C-108/10 par. 54; *Collino and Chiappero* C-343/98 par. 31 and 32, among others).

⁷⁸ Agreement between TUNED and EUPAE establishing a ‘General framework for informing and consulting civil servants and employees of central government administrations’, Article 2.

23) The normative framework defining the Commission's assessment in relation to social partners' agreements

The analysis of the Commission Communications that, throughout time, have addressed the implementation of the Treaty provisions on social dialogue helps to bring clarity about the extent and nature of the Commission's power to scrutinize social partners' framework agreements. From those Communications, it indeed emerges that the scope of the assessment that the Commission can perform varies depending on the nature of the agreement concluded by the social partners.

Before addressing the different criteria on which the Commission can base the assessment, it might be useful to recall that the European social dialogue produces two different types of agreement: the own-initiative framework agreements and the framework agreements negotiated during the formal consultation procedure. Own-initiative agreements find their legal basis in Article 155(1) TFEU, which establishes that:

“Should management and labour so desire, the dialogue between them at the Union level may lead to contractual relations, including agreements”.

Framework agreements negotiated during the formal consultation procedure instead stem from Article 154(4) TFEU providing that:

“On the occasions of the consultation referred to in paragraphs 2 and 3, management and labour may inform the Commission of their wish to initiate the process provided for in Article 155(1) TFEU”.

Basically, Article 154(2) and (3) mandate that, before submitting proposals in the social policy field, the Commission has to consult the social partners on the possible direction of Union action (Article 154(2)) and on the content of the envisaged proposal (Article 154(3)).

The main difference between these two categories of framework agreements is that the own-initiative agreements find their origins in a spontaneous decision of the social partners to negotiate and reach an accord establishing a set of rules on a specific matter. In this case, the Commission is (at least formally) not involved neither in the choice of the policy area to address, nor in the determination of the scope or objective of the provisions. The Commission will only enter the process if the social partners decide to submit a joint request to implement the agreement by means of a Council Decision, as then the Commission is asked to formulate a proposal addressed to the Council.

The situation is instead different in relation to framework agreements negotiated during the formal consultation procedure established in Article 154(2)(3) TFEU. Here, it is the Commission that takes the first step towards the possible adoption of EU legislation. It follows that when the social partners decide to negotiate and conclude an

agreement, they do so on the basis of an initial input from the Commission, which either had already explored possible directions of Union action (Article 154(2) TFEU) or had even drafted the content of the envisaged proposal (Article 154(3) TFEU). Contrary to own-initiative agreements, the Commission is thus not entirely external to the process that leads to the adoption of the framework agreement.

It is precisely in consideration of the different degrees of the Commission's involvement in determining the direction and the content of the social partners' agreement, that the 1998 Communication on social dialogue defined the criteria upon which the Commission's assessment of the agreement should be based:⁷⁹

"Before any legislative proposal implementing an agreement is presented to the Council, the Commission carries out an assessment involving consideration of the representative status of the contracting parties, their mandate and the legality of each clause in the collective agreement in relation to the Community law, and the provisions regarding small and medium sized enterprises".

"In additions [to the abovementioned criteria], before proposing a decision implementing an agreement negotiated on a matter [...] outside the formal consultation procedure, the Commission has the obligation to assess the appropriateness of Community action in that field".

Basically, the 1998 Communication establishes that in case of agreements negotiated during the formal consultation process, the Commission's assessment should focus exclusively on:

- The representativeness of the contracting parties;
- The lawfulness of all clauses of the agreement under EU law;
- The absence of excessive burdens for small and medium sized enterprises.

Only when the social partners stipulate an own-initiative agreement, the Commission shall carry out an assessment on the appropriateness of adopting a EU legislation in the policy area addressed by the agreement.⁸⁰ The reason for this dual regime is that, in relation to the framework agreements negotiated during the formal consultation procedure, the Commission supposedly had already evaluated the opportunity of

⁷⁹ COM(1998)322 final, *Communication from the Commission adapting and promoting the social dialogue at Community level*.

⁸⁰ This "dual regime" is also confirmed by COM(93)600 final, *Communication concerning the application of the Agreement on social policy*, COM(96)448 final, *Commission communication concerning the development of the social dialogue at Community level*; COM(2002)341 final, *Commission Communication on 'The European social dialogue, a force for innovation and change – proposal for a Council Decision establishing a Tripartite Social Summit for Growth and Employment*, COM(2004)557 final, *Commission Communication on a partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue*'.

adopting EU legislation in that field before launching the social partners' consultation.

It should be noted that this dichotomy between own-initiative agreements (subject to appropriateness check) and agreements negotiated during the formal consultation process (exempted from appropriateness check) was challenged by a change of direction that, during the past decade, has characterized the Commission's approach to social dialogue.⁸¹ In the context of a generalized revision of the law-making activity at the EU level, the Barroso II as well as the Juncker Commission introduced some innovations to filter and streamline the EU legislative activity. Even if these changes were not specifically directed towards regulating the EU social dialogue, the novelties applied also to the procedure set out in Article 154 and 155 TFEU. First, the Commission launched the Smart Regulation initiative, aimed at, among other things, improving the stock of EU law by evaluating benefit and costs of existing and future legislation.⁸² Fitness checks of the legislation in force and impact assessment of prospective law-making were thus institutionalised.⁸³ Those analytical exercises relate not only to the "standard" law-making process, but also to the social partners agreements submitted for implementation by a Council Decision. In practice, as a result of the Smart Regulation policy, the consultation document that the Commission prepares in accordance to Article 154(3) is accompanied by an "analytical document" that the social partners have to take into account if they decide to negotiate an agreement. In addition, the Commission began submitting the agreements signed by the social partners to an impact assessment, with the effect of sensibly lengthening the process leading to the Commission's proposal for a Council Decision.⁸⁴ These layers of institutional checks allowed the Commission to expand its ownership in the social

⁸¹ TRICART, 'Legislative implementation of European social partner agreements: challenges and debates', working paper 2019-9, ETUI.

⁸² COM(2010)543 final, *Commission Communication on Smart Regulation in the European Union*. See also COM(2012)746 final, *Commission Communication on EU Regulatory Fitness*.

⁸³ *Ibidem*, in relation to existing legislation (p.4): "[...] 'fitness checks' will assess if the regulatory framework for a policy area is fit for purpose and, if not, what should be changed. The aim will be to identify excessive burdens, inconsistencies and obsolete or ineffective measures and to help to identify the cumulative impact of legislation". Regarding new legislation (p.5), "the Commission has put in place an impact assessment system to prepare evidence for political decision-making and to provide transparency on the benefits and costs of policy choices".

⁸⁴ TRICART, 'Legislative implementation of European social partner agreements: challenges and debates', working paper 2019-9, ETUI. TRICART (p. 34) in particular notes that "In respect of the inland waterways and fishing agreements, where neither the content nor the signatories' representativeness was a priori in question, and the relevance of Community action was not really at issue, it took 29 and 35 months for the Commission services to conduct the necessary assessments, first enlisting the help of external consultants, then drafting the document to submit to the Impact Assessment Board responsible for procedural quality control, and finally the presentation by the Commission of the proposals for legislation, an action that confirmed the quality of the two agreements in terms of legality and, as expected even before the assessment began, the relevance of European action in these matters".

dialogue process at the expenses of the autonomy of social partners.⁸⁵ However, even these heavier procedural hurdles did not change the fact that the Commission's appropriateness test only concerned the own-initiative agreements.

Still, the practices underpinning the EU social dialogue further evolved in the context of the Better Regulation agenda launched by the Juncker Commission.⁸⁶ The 2015 Better Regulation Toolbox published by the Commission in 2015 indeed established that:

“When considering an agreement by the social partners after Article 154 consultation, [...] the impact assessment should provide for the same assessment as under [the own-initiative agreements] but would not need to revisit the need for EU action when this has already been covered by a previous analytical document”.

As mentioned above, since the launch of the Smart Regulation strategy, the Commission regularly prepares an analytical document that then submitted to the social partners during the second phase consultation (Article 154(3) TFEU). This analytical document is instead generally absent during the first phase of consultation (Article 154(2) TFEU). This implies that, in accordance to the 2015 Better Regulation Toolbox, the framework agreements stipulated in the context of the first phase consultation can be subject to an appropriateness check by the Commission, except when the opportunity of EU action in that area has already been addressed in a previous analytical document.⁸⁷

In sum, while the criteria for the Commission's assessment of the social partners' framework agreements were quite clear before 2012 (appropriateness test only for own-initiative agreement), during the past decade the limits of the Commission's control became blurrier (exemption from appropriateness test only in presence of previous analytical document covering the opportunity to adopt legislation in the policy area addressed by the framework agreement). However, it is worth mentioning that if the relevance of the guidelines established by the Commission Communication prior to 2012 is undisputed, the status and validity of the more recent criteria is questionable.

The pertinence of the early Commission Communications on social dialogue, as well as their significance in the context of judicial proceedings, was first confirmed by the

⁸⁵ TRICART, *ibidem*.

⁸⁶ COM(2015)215 final, Commission Communication '*Better regulation for better results – An EU agenda*'.

⁸⁷ In this sense, also TRICART, 'Legislative implementation of European social partner agreements: challenges and debates', working paper 2019-9, ETUI.

Court of First Instance in the *UEAPME* case.⁸⁸ Moreover, the 1998 Communication, and *not* the Better Regulation documents, was still referred to in the Council Decisions that in January 2018 gave legislative implementation to a social partners' agreement in the maritime transport sector.⁸⁹ What's more, in relation to that same framework agreement in the maritime transport sector, the Commission departed from its own guidelines, since it submitted a proposal to the Council without having carried an impact assessment.⁹⁰ No formal impact assessment was carried also in occasion of the refusal to implement via legislation the social partners' agreement in the hair-dressing sector.⁹¹ The same happened in relation to the agreement that triggered the *EPSU* case, as the Commission never performed a written impact assessment, even if more than two years passed from the request of EUPAE and TUNED (February 2016) and the communication that the request was refused (March 2018).

Finally, it should be also noted that the more stringent control that the Smart Regulation and the Better Regulation strategies endowed to the Commission in relation to social partners' agreements is hardly compatible with the spirit of the Lisbon Treaty. Avoiding opening a lengthy digression, it is sufficient to recall that the Lisbon Treaty intervened on Article 138 TEC to actually expand the scope of the negotiation autonomy of social partners. While Article 138 TCE allowed the social partners to initiate the social dialogue only in occasion of the second phase consultation, since the entry into force of the Lisbon Treaty social partners can negotiate agreements also from the first phase consultation.⁹² Moreover, the Lisbon Treaty introduced Article 152 TFEU to reiterate the essential role of EU social dialogue for the definition of social and labour policies:

"The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national system. It shall facilitate dialogue between the social partners, respecting their autonomy".

⁸⁸ See judgment of 17 June 1998, T-135/96, *UEAPME*, ECLI:EU:T:1998:128. In paragraphs 4 and 72 the Court explicitly refers to the criteria for the Commission's assessment of the social partners' agreements established in the Commission Communication COM/93/600 final, then restated in the 1998 Commission.

⁸⁹ See, as noted by TRICART (*ibidem*), that the Council Directive (EU) 2018/131 of 24 January 2018 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (EFT) to amend Directive 2009/13/EC in accordance with the amendments of 2014 to the Maritime Labour Convention, at recitals 7 states that "*In accordance with the Commission communication of 20 May 1998 on adapting and promoting the social dialogue at Community level, the Commission has assessed the representative status of the signatory parties and the legality of each clause of the social partners' agreement*".

⁹⁰ TRICART (*ibidem*), p. 43.

⁹¹ See VOGEL, 'The fight to protect hairdressers' health: the inside story', special report 3/29, *Hesa-Mag#17*, spring-summer 2018.

⁹² Article 138(4) TEC vs Article 154(4) TFEU.

24) The Commission's assessment in the *EPSU* case

Having introduced the (rather complex) set of rules and criteria that define the Commission's assessment in relation to the social partners' agreements, it is now possible to identify several problematic elements in the appropriateness test that was carried out on the TUNED and EUPAE agreement.

First, the TUNED and EUPAE agreement was negotiated in the framework of the formal consultation procedure. On 10 April 2015 the Commission launched the first phase consultation of social partners under Article 154(2) TFEU on a consolidation of the EU Directives on information and consultation of workers. The consultation document explicitly stated that

"[...] it is opportune to consider whether the I&C Directives need to be reviewed, in order to clarify whether public administration should be included in their personal scope of application or whether the wording of the provisions of the different Directives regarding the exclusion of the public administration needs to be aligned in order to improve coherence and legal clarity in line with the ECJ case law".⁹³

On 20 June 2015, the social partners informed the Commission that they wanted to negotiate an agreement, pursuant to Article 154(4) TFEU. This means that, according to the Communications on the implementation of the EU social dialogue,⁹⁴ the Commission was only allowed to carry an assessment on the legality of the agreement, the representativeness of the signatories, and the impact for small and medium-sized companies. The assessment on the appropriateness of transposing the agreement by means of legislation is indeed exclusively reserved to own-initiative agreements.

Second, even considering the more recent guidelines stemming out the Smart Regulation and the Better Regulation strategies, the assessment of the Commission should have not covered the appropriateness of the provisions of the social partners' agreements. In paragraph 3 it was explained that according to the Better Regulation

⁹³ The fact that the Commission consultation already covered the possibility to harmonize the rules on information and consultation applicable to the public sector was also acknowledged by the General Court which in paragraph 1 of the *EPSU* judgment noted that "[...] that consultation concerned *inter alia* the possible extension of the scope of application of those directives to cover civil servants and employees in public administrations in the Member States". Similarly, in paragraph 117: "[...] first, the Commission consulted the social partners as to whether EU action relating to the information and consultation of civil servant and employees of public administrations was appropriate and it is precisely following that consultation that the social partners negotiated and signed the Agreement".

⁹⁴ COM(93)600 final, COM(96)448 final, COM(1998)322 final, COM(2002)341 final, COM(2002)557 final, mentioned in note 55.

Toolbox, the Commission can operate an assessment test only if the need for EU action was not already addressed by previous analytical documents. It is important to note that when the TUNED and EUPAE initiated the negotiations that then led to the stipulation of the framework agreement, the opportunity to harmonize the information and consultation rules in the public sector had been already addressed in multiple occasions by the Commission itself. A significant example is the Quality Framework for anticipation of change and restructuring (2013), which places the accent on the importance of information and consultation rights in anticipating restructuring and managing changes.⁹⁵ In that document, the Commission noted that

“As public sector employees, including civil servants, see their employment relationship becoming more and more like a private sector contract, especially with regard to job security, it appears not only legitimate but also necessary to extend to them also the adaptation mechanism envisaged [of which workers’ information and consultation are part]”. Then, “The Commission therefore calls on Member States to explore ways of applying the proposed QFR to public sector employees, regardless of the statutory nature of their employment relationship”.⁹⁶

Similarly, the “Fitness check” on EU law in the area of information and consultation of workers led the Commission to conclude that the current EU framework was subject to uneven level of implementation in the public sector across the Member States. The Commission then even suggested the social partners to address the issue:

“With regard to the I&C in the public administration, there is need for further research regarding in particular the state of play in the EU Member States, and, specifically, what role I&C actually plays and could or should play in the light of the current restructurings in the public sector in several countries. This issue could be discussed within the sectoral social dialogue committee which brings together central government administrations”.⁹⁷

These two examples provide sufficient ground to assert that the Commission had adopted “analytical documents” on the opportunity to adopt EU rules on information and consultation of workers in the public sector already before the launch of the first phase consultation with TUNED and EUPAE. This should be recognized especially in consideration of the Commission’s own flexible interpretation concerning the necessity to prepare the social partners’ consultation with a preliminary analytical study.

⁹⁵ COM(2013)882 final, *Commission Communication on an EU Quality Framework for anticipation of change and restructuring*.

⁹⁶ *Ibidem*, p. 13.

⁹⁷ SWD(2013)293 final, *Commission Staff Working Document, Fitness check’ on EU law in the area of Information and Consultation of Workers*.

Third and lastly, it is worth mentioning that *when* the Commission is allowed to carry an appropriateness assessment, that assessment should be grounded on precisely defined criteria, to prevent an arbitrary exercise of public power. The Commission, however, did not communicate the criteria that guided its assessment of the agreement signed by TUNED and EUPAE, with implications for the (in)validity of the Commission's refusal to present a proposal for a Council Decision.

In paragraph 71 of the *EPSU* judgment, the General Court accepted that the Commission's revision could be based on:

"[...] whether the implementation of the agreement at EU level is appropriate, including by having regard to political, economic and social considerations".

The broadness of "political, economic and social considerations" is unsuited for criteria regulating the exercise of a public authority's discretion. The invalidity of these criteria is also supported by the Court of Justice's reasoning in the *AGET Iraklis* case, also concerning the exercise of the power of opposition of a power authority (the Greek Ministry of Labour). There, the Court ruled that:

"[...] it is clear that, in absence of details of the particular circumstances in which the power in question may be exercised, [the addressees of the public authority's decision] do not know in what specific objective circumstances the power may be applied, as the situations allowing its exercise are potentially numerous, undetermined and indeterminable and leave the authority concerned a broad discretion that is difficult to review. Such criteria which are not precise and are not therefore founded on objective, verifiable conditions go beyond what is necessary in order to attain the objective stated and cannot therefore satisfy the requirement of the principle of proportionality"⁹⁸

In absence of more qualified conditions that allow the social partners to direct their negotiations in a fruitful direction and that consent the Commission's refusal to be

⁹⁸ Judgment of the Court of Justice of 21 December 2016, C-201/15, *AGET Iraklis*, ECLI:EU:C:2016:972, par. 100. In this case, the Court of Justice had to assess the validity, under EU law, of the criteria that the Greek Minister of Labour had been using to evaluate the employers' request to carry out collective dismissals. Those criteria were: a) the conditions in the labour market; b) the situation of the undertaking; c) the interests of the national economy. These criteria resemble the "political, economic and social considerations" on the base of which the Commission rejected the TUNED and EUPAE joint request. The Court of Justice (par. 99) found that "[...] such criteria are formulated in a very general and imprecise terms. As it is apparent from settled case law, where powers of intervention of a Member state or a public authority, such as the powers of opposition which the Minister is vested in the present instance, are not qualified by any conditions, save for a reference to such criteria formulated in general terms, without any indications of the specific objective circumstances in which those powers are to be exercised, this results in a serious interference with the [employers'] freedom which may have the effect of excluding that freedom altogether".

reviewed, the appropriateness assessment carried by the Commission in relation to the TUNED and EUPAE's agreement should be considered invalid.

25) Concluding remarks

With the arbitrary decision to reject the TUNED and EUPAE's request for a legislative implementation of their agreement, the Commission challenged the role and significance of social dialogue within the EU legal order. By allowing the Commission to exercise full discretion in relation to the social partners' request, the General Court's judgment jeopardizes not only the foundations of EU social dialogue, but also imposes a setback in the process of maturation of the EU legal order. The *EPSU* ruling found acceptable that the Commission can overtly depart from consolidated practices and procedures guiding the functioning of EU social dialogue. Moreover, the General Court authorizes the Commission to ground its opposition to (eventual, future) social partners' requests on entirely indeterminable and volatile justifications. This is inevitably at odds with the very fundamental principle of transparency in public administration, as well as with the EU principles and objectives which govern the EU action in the social and labour policy areas (that is, the pursuit of a social market economy, the promotion of industrial relations and social dialogue, the emphasis on the European Pillar of Social Rights as compass for future EU policy-making...).

The principle of social (horizontal) subsidiarity

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The purpose of this paper is to demonstrate that horizontal subsidiarity which applies in the area of social policy (*i.e.* social subsidiarity) do have a legal consistency in EU Law. It translates into legal mechanisms enshrined in EU primary law a principle of subsidiarity which is anchored in European societies and in the European thought since Antiquity. The first part of the presentation deals with this philosophical principle (concept) of social organisation (the idea of subsidiarity), which founds the “dual form of subsidiarity in the social field”⁹⁹ recognised by the TFEU (1). The second part focuses on the “system” of social/horizontal subsidiarity in the EU legal system, which defines a coherent set of primary law provisions aiming at the deployment of social partners’ collective autonomy and social dialogue in social policy (2).

26) The concept of subsidiarity

The EU principle of subsidiarity, both in its vertical and in its horizontal dimensions, lies on the philosophical and political principle of subsidiarity. Evidence of this principle can be traced back to the thought of Aristotle, of Saint Thomas Aquinas and later, at the turn of the 17th century, to the philosophy of Althusius, who was the first who described a “subsidiary society”¹⁰⁰. The context of the emergence and building of the concept is crucial: European societies are indeed composed of multiple social groups, whose respective interventions need to be organised. The work of these European great thinkers and philosophers further contributed to the building of modern theories of the subsidiary State. In our contemporary post-modern complex European context, where the principle of democracy needs to be further elaborated, subsidiarity appears to be a key notion¹⁰¹.

⁹⁹ Communication concerning the application of the agreement on social policy presented by the Commission to the Council and the European Parliament. COM (93) 600 final, 14 December 1993, pt 6 c).

¹⁰⁰ For an in-depth analysis of the idea of subsidiarity, see. M. SCHMITT, *Autonomie collective des partenaires sociaux et principe de subsidiarité dans l'ordre juridique communautaire*, Presses universitaires d'Aix-Marseille, 2009.

¹⁰¹ J. CHEVALLIER, *L'État post-moderne*, Paris, LGDJ, 2003. For Chevallier, “le modèle de l'État post-moderne repose sur le ‘principe fondamental de subsidiarité’ e ou de défaillance des mécanismes d'auto-régulation sociale (*suppléance*), étant entendu qu'il convient alors de privilégier les dispositifs les plus proches des problèmes à résoudre (*proximité*) et de faire appel à la collaboration des acteurs sociaux (*partenariat*)” (p. 49).

In substance, the function of subsidiarity, as a principle of governance, is to designate the actor who will be given decision and law-making powers. It lies on the so-called “principle of proximity”, which reflects the conviction that social groups, and after them, local authorities are best placed, compared to distant public authorities, to regulate relationships and activities of people whose interests they represent. The best placed actor will have priority in the decision-making process. Subsidiarity is a two-pronged principle. It thus means that actions, including those of legal nature, from central public authorities are subsidiary: they are supposed to be taken only when actions emanating from social groups (horizontal dimension) or local authorities (vertical dimension) have proven insufficient to achieve the common good of citizens.

Subsidiarity places collective autonomy of social group at its heart, both as the foundation of its resulting operative system, and as the objective for all actors of the system. In the relationships between social partners and public institutions generally speaking, subsidiarity means that social dialogue and collective bargaining have precedence over public initiatives as regards matters related to employment, working conditions and social policy as a whole. **Subsidiarity founds and guarantees collective autonomy of social partners**, even when actions from public institutions turn to be necessary. Moreover, in these cases, the very aim of public interventions must be to restore, to help or to complement collective autonomy following a principle of graduation. Respect of social partners’ collective autonomy thus lies at the very heart of the concept subsidiarity.

This brief overview showcases that the principle of subsidiarity comprises both a vertical and a horizontal dimension. The EU legal system reflects this duality, by including in the treaties both vertical subsidiarity (Article 5 TEU) and horizontal subsidiarity in the framework of social policy. Although they are enshrined in different legal ways, both principles lie on the same conceptual foundation. The EU principle of vertical subsidiarity thus finds its direct origin in the philosophical notion of subsidiarity¹⁰². With respect to horizontal subsidiarity, it is “a concept used to address the fundamental role of the social partners in the implementation of the social dimension of the EU”.¹⁰³

If it is therefore correct to assert¹⁰⁴ that social/horizontal subsidiarity cannot be formally based on Article 5 (3) TEU which only enshrines the vertical dimension of the principle. However, contrary to the assumption of the General Court¹⁰⁵, it is not correct to deduce from Article 5 (3) TFEU that social subsidiarity does not exist at all in

¹⁰² J.L. CLERGERIE, ‘Les origines du principe de subsidiarité’, *Les Petites Affiches* 13 août 1993, n. 97.

¹⁰³ <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/subsidiarity>

¹⁰⁴ CJEU, General Court, *European Federation of Public Service Unions (EPSU) and Jan Willem Goudriaan v European Commission*, Case T-310/18, 24 October 2019, ECLI:EU:T:2019:757, para. 98.

¹⁰⁵ *Ibid.*

EU law, even if the horizontal dimension of the principle is not explicitly recognised in a specific provision. Certainly, the term “subsidiarity” is not used in the TFEU to designate its horizontal dimension. However, and paradoxically, the TFEU together with other major primary law provisions, go much beyond than a formal recognition of the word: they put in place a genuine system of horizontal subsidiarity, which was initiated by the Agreement of Social Policy annexed to the Treaty Maastricht and further reinforced by the Treaty of Lisbon.

27) The system of social subsidiarity in EU Law

Recognition of a 'dual form of subsidiarity. In the context of social policy, the principle of subsidiarity is reflected both in its vertical and in its horizontal dimension. While the former regulates shared competence between the EU and Member States (Article 153 TFEU), the latter intends to govern the relationship between the EU, on the one hand, and management and labour at EU level on the other¹⁰⁶. Despite the lack of explicit enshrinement in the TFEU and previous treaties, horizontal subsidiarity was explicitly recognised by the European Commission itself, in its Communication of 1993¹⁰⁷, as the foundation of interpretation and application of Articles 3 and 4 of the Agreement on Social Policy (Articles 154 and 155 TFEU). As stated by the Commission,

“The Agreement confirms the fundamental role of the social partners - as recognised by Article 118 B of the Single Act - in the implementation of the social dimension at Community level. In conformity with the fundamental principle of subsidiarity enshrined in Article 3 B of the Treaty on European Union, **there is thus recognition of a dual form of subsidiarity in the social field:** on the one hand, subsidiarity regarding regulation at national and Community level: on the other, subsidiarity as regards the choice, at Community level, between the legislative approach and the agreement-based approach” (emphasis added).

Undoubtedly, this third element is likely to have the greatest consequences. The Commission can only express its pleasure at the fact that this principle of dual subsidiarity (...), has now been incorporated into the Agreement.”

¹⁰⁶ See B. BERCUSSON, 'Maastricht: A fundamental change in European labour law', *Industrial Relations Journal* 1992, vol. 23, n. 3, p. 177; B. BERCUSSON, 'The Dynamic of European Labour Law after Maastricht', *Industrial Law Journal* 1994, vol. 23, n° 1, p. 1.; J.E. RAY, 'À propos de la subsidiarité horizontale', *Droit social* 1999, p. 459 et s.

¹⁰⁷ Communication concerning the application of the agreement on social policy presented by the Commission to the Council and the European Parliament. COM(93) 600 final, 14 December 1993, para. 6 c).

The former Court of first instance took this communication into consideration in *UEAPME*¹⁰⁸ (dealing with an agreement negotiated and concluded after the consultation of social partners by the Commission), in order to draw legal obligations for the Commission (obligation to assess the representativeness of the signatories of an agreement and the legality of this agreement).

Articles 154 and 155 TFEU thus translate into legal mechanisms the horizontal dimension of subsidiarity,¹⁰⁹ which lies on, and justifies, the social partners' collective autonomy.

Collective autonomy as a space of freedom for social partners. The notion of **autonomy** has rightly been defined by the CJEU¹¹⁰ as the right of self-government. In the French language version, the CJEU states more accurately from an etymological point of view that autonomy means "le droit de se gouverner par ses propres lois".¹¹¹ Though the application of this notion can differ from one case to another, the definition given by the CJEU has a generic scope.

By virtue of the first facet of horizontal subsidiarity, collective autonomy of social partners has precedence over EU acts and actions. Social dialogue can develop freely and must be protected from public authorities' interference. Collective autonomy implies the preservation of a space of freedom for European social partners' social dialogue, such space being already enshrined in the TFEU. The idea is thus raised that **the EU institutions respect collective autonomy**, *i.e.* the capacity of social partners to adopt laws applicable to the employment relations concerned. The latter are the employment relations linked to their sectoral representative status. Since 2002, the Commission itself states that "the Treaty [Article 155(1)] also recognises the social

¹⁰⁸ Judgement of the Court of First Instance of 17 June 1998, Case T-135/96 - *Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME) v Council of the European Union*, ECLI:EU:T:1998:128.

¹⁰⁹ <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/subsidiarity>

¹¹⁰ CJEU, 29 July 2010, C-151/09, *Federación de Servicios Públicos de la UGT (UGT-FSP) v Ayuntamiento de La Línea de la Concepción, María del Rosario Vecino Uribe and Ministerio Fiscal*, para. 42: "Next, it must be observed that the word 'autonomy', according to its usual meaning in everyday language, describes the right of self-government".

¹¹¹ This idea of collective autonomy also corresponds to the concept of "autonomy of the parties" used by EU secondary legislation. See Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254, 30/09/1994 p. 64, see Recital No. 15). It is only where no agreement has been reached (on the nature, composition, function, mode of operation, procedures and financial resources of European Works Councils or other information and consultation procedures) or by the common will of both parties that "subsidiary requirements" as implemented in national legislation apply.

partners' ability to undertake genuine *independent social dialogue*, that is to negotiate independently agreements which become law".¹¹²

In *UEAPME*¹¹³, the former Court of first instance recognised that certain elements of the processes stemming from Articles 3 and 4 of the Agreement of Social Policy (Articles 154 and 155 TFEU) must be left to social partners' collective autonomy and preserved from any interference from the Commission. Regarding the decision to initiate negotiations, be they voluntary or induced by a consultation, and the recognition of the legitimate partners and their capacity to join the table of negotiations, the Court held¹¹⁴ that:

"The negotiation stage, which may come into being during the consultation stage initiated by the Commission, depends exclusively on the initiative of those representatives of management and labour who wish to launch such negotiations. The representatives of management and labour concerned in the negotiation stage are therefore those who have demonstrated their mutual willingness to initiate the process provided for in Article 4 of the Agreement and to follow it through to its conclusion."

As to the choice of the topics of negotiations and of the content agreements, the Court¹¹⁵ founded its interpretation on Commission's Communication of 1993 and approved the following Commission's statement: "*in their independent negotiations, the social partners are in no way required to restrict themselves to the content of the proposal in preparation within the Commission or merely to making amendments to it, bearing in mind, however, that Community action can clearly not go beyond the areas covered by the Commission's proposal; [t]he social partners concerned will be those who agree to negotiate with each other; [s]uch agreement is entirely in the hands of the different organisations (...).*" The decision to sign or not an agreement is obviously also left to social partners' collective autonomy, as an essential aspect of the achievement of the negotiation process.

The notion of collective autonomy is to be understood as entailing an obligation for public authorities to refrain from intervention.¹¹⁶ The position of the former Court of first instance in *UEAPME* is in line with this requirement. The Court indeed ruled that

¹¹² Communication from the Commission of 26 June 2002, *The European social dialogue, a force for innovation and change*, COM(2002) 341 final, para. 1.

¹¹³ Judgement of 17 June 1998, Case T-135/96.

¹¹⁴ *Ibid.*, para. 75.

¹¹⁵ *Ibid.*, para. 76.

¹¹⁶ In a similar vein, see the use of autonomy as "collective laissez faire" in A. BOGG and R. DUKES, 'The European Social Dialogue: from autonomy to here', in N. CONTOURIS and M. FREEDLAND (eds), *Resocialising Europe*, Cambridge, CUP, 2013, p. 479-484.

“it is the representatives of management and labour concerned, and not the Commission, which have charge of the negotiation stage properly so called”.¹¹⁷

Horizontal subsidiarity also applies within the consultation process. As stated in Article 154 (4) TFEU, social partners “may inform the Commission of *their wish to initiate* the process provided for in Article 155” (emphasis added). It thus follows that “(the) negotiation stage, which may come into being during the consultation stage initiated by the Commission, depends exclusively on the initiative of those representatives of management and labour who wish to launch such negotiations”.¹¹⁸

Furthermore, horizontal subsidiarity is reflected in Article 155 (2) TFEU: social partners freely decide whether their agreement will be implemented at the level of management and labour and the Member States or at EU level.

Horizontal subsidiarity requires respect for social partners’ autonomy. Implementation of horizontal subsidiarity, implying both the freedom of, and the respect for collective autonomy, is intrinsically linked to the right of collective bargaining. Since the entry into force of the Charter of Fundamental Rights of the EU, collective autonomy of European social partners has an even stronger legal basis, in Article 28 CFREU, which protects the right to negotiate and conclude a European sectoral agreement. According to the Explanations relating to Article 28 CFREU, which refer to the clarification concerning Article 27 CFREU, “(t)he reference to appropriate levels refers to the levels laid down by Union law or by national laws and practices, which might include the European level when Union legislation so provides”. There is no doubt that the European sectoral level dialogue is laid down by primary law provisions recognising the role of social dialogue and social partners’ autonomy (Articles 154-155, Article 152 TFEU). As a consequence, Articles 154-155 TFEU must be interpreted in the light of Article 28 CFREU.

A duty for EU institutions to act for the achievement and effectiveness of collective autonomy. The second facet of the concept of subsidiarity requires subsidiary intervention from EU institutions when necessary. Horizontal subsidiarity implies, for EU institutions, a “duty to act” *i.e.* in case of failure of collective autonomy. In 2002, the Commission indeed stated that: “(T)he outcome may be independent social dialogue, multi-sectoral or sectoral, and ultimately, therefore, agreements which may subsequently be incorporated into Community law. This is a practical application of the principle of social subsidiarity. It is for the social players 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”.¹¹⁹

¹¹⁷ Case T-135/96, 17 June 1998, para. 78.

¹¹⁸ *Ibid*, para. 75.

¹¹⁹ *Ibid*.

This failure can be of different types – be they factual or legal – and of different degree. Conversely, subsidiary intervention must be adapted, in nature and intensity, to the failure of collective autonomy. Moreover, as it is governed by the principle of cooperation, subsidiary EU intervention must be seen as a means to help collective autonomy to be fully deployed. The very notion of subsidiarity is not neutral: EU institutions must act in a way that ensures maximum respect for collective autonomy.

Through its second facet, subsidiarity imposes to public authorities an obligation to ensure and to promote collective autonomy. Article 154 (1) exemplifies this requirement by imposing to the Commission the “task of promoting the consultation of management and labour at Union level and shall *take any relevant measure to facilitate their dialogue* by ensuring balanced support for the parties”. **Article 152(1) TFEU** constitutes a significant new element in favour of this second interpretation. It is indeed clear that its provisions do not put an emphasis on the issue of “respect” in the meaning of refraining from intervention. In fact, Article 152(1) TFEU stresses an obligation to recognize and to promote the development of collective autonomy.

Furthermore, having a general scope Article 152 (1) TFEU complements Article 154 (1) TFEU which is more focused on the consultation procedure and the bargaining process as opposed to its outcome and implementation. Article 152 (1) TFEU is applicable to all stages of the collective bargaining process, from the very first discussions about possible future negotiations until the agreement’s implementation phase. Based on Article 155 TFEU read in conjunction with Article 154(1) and Article 152(1) TFEU, supporting collective autonomy means for EU institutions to provide social partners with all means which are necessary to *the exercise* and *the effectiveness* of their autonomy. Should these “first stage” interventions not be sufficient for the achievement of these aims, EU institutions shall then reinforce their interventions by acts or actions complementing those of the social partners.

The Commission’s obligation to submit a proposal for a directive implementing the European agreement. This cooperative approach precisely corresponds to the meaning of implementation of agreements by a directive as laid down by Article 155(2) TFEU: this process tends to ensure the (broadest) effectiveness of the European agreement while social partners themselves are unable to do so. As ruled in *UEAPME*, “(t)he participation of the two institutions in question [Commission and Council] has the effect [...] of endowing an agreement concluded between management and labour with a Community foundation of a legislative character”.¹²⁰

Article 152(1) TFEU strengthens the Commission’ obligation to endeavour the reception of the precepts of collective autonomy into the realm of the EU legal order. Collective autonomy as a legal order is indeed not tantamount to independence or self-

¹²⁰ Case T-135/96, 17 June 1998, para. 88.

sufficiency *vis-à-vis* the EU legal order. The most significant element of the relationship between both legal orders is precisely the implementation process set out in Article 155(2) TFEU. Social subsidiarity requires from the Commission to act in order to ensure the implementation of the European agreement and thus, its effectiveness. However, this subsidiary action must be limited. This means that the Commission's scrutiny must be limited to the legality check.

Based on all the provisions forming the system of social subsidiarity (Articles 154-155, 152 (1) TFEU, Article 28 CFREU), also in conjunction with Article 151 TFEU which enshrines social dialogue among the objectives of social policy, as well as with Article 12 CFREU protecting freedom of association, the most coherent interpretation of the obligation to respect autonomy is that the Commission must endeavour the process of collective autonomy and table legislative proposal which guarantee that agreements, provided they pass the legality check, are received within the EU legal order.

The meaning of horizontal subsidiarity and the General Court's *EPSU* judgment

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28) Introduction

The principle of horizontal subsidiarity has played a key role in the legitimacy and theoretical foundations of the system regulated in Articles 153, 154 and 155 of the Treaty on the Functioning of the European Union (TFEU). However, the General Court in its *EPSU* judgment¹²¹ states that a principle of horizontal subsidiarity does not exist in EU law. The present contribution proposes an explanation for that statement and reflects on the consequences that it may have for the European social dialogue and collective bargaining.

In my view the outcome of the *EPSU* judgment, i.e., that the European Commission is not obliged to send a social partners' agreement to the Council for its transposition, grounded in the Commission's power to evaluate the appropriateness of the social partner's agreements in broad terms, is not compatible with the idea of horizontal subsidiarity. Therefore, I argue, the General Court had no other option but to disregard it. However, this has profound theoretical implications, not only for the functioning of European social dialogue, but also for its meaning and for the very model of democracy implicit in the idea of horizontal subsidiarity. Last but not least, I suggest that the judgment is only the last step of a dynamic that has eroded the meaning of horizontal subsidiarity at least since 2012, altering the balance of power between the social partners and the European Commission in the making of regulations in the social field.

29) The meaning of horizontal subsidiarity

The General Court of the European Union has stated, in its ruling of 24 October 2019 in case T-310/18 that a horizontal dimension of the subsidiarity principle does not exist. In its own words:

"(...) the principle of subsidiarity governs the exercise by the EU of the competences that it shares with Member States. Therefore, that principle is understood as having a "vertical" dimension (...) contrary to what the

¹²¹ Case T-310/18, *European Federation of Public Service Unions (EPSU) and Jan Goudriaan v. European Commission*. ECLI:EU:T:2019:757

applicants suggest, 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".¹²²

It would hardly be an exaggeration to say that this statement has a tremendous impact on the system of social dialogue and collective bargaining in place at the EU level and the meaning of Articles 153, 154 and 155 of the TFEU. Indeed, the idea of horizontal subsidiarity has been the cornerstone of the system of participation of the social partners in the regulation of social Europe. Its meaning goes far beyond an additional dimension of the principle of "vertical" subsidiarity of Article 5(3) TEU understood as a rule to decide the level of competence.

The principle of horizontal subsidiarity explains, firstly, why the social partners have the power to suspend the legislative process if they so request in order to negotiate an agreement among themselves (Article 154.4 TFEU). Indeed, in the social field, the Treaty gives precedence to the regulation agreed by the social partners over the Commission's action. This is so for a reason that the Commission itself made explicit in several of its communications on European social dialogue: the social partners are considered best located to understand the reality of the workplace and, therefore, to propose regulations adapted to real problems. Horizontal subsidiarity is, after all, the recognition of the collective autonomy of the social partners at EU level.

In its 1993 Communication¹²³, the Commission introduced the idea of double subsidiarity. In its words:

"In conformity with the fundamental principle of subsidiarity enshrined in Article 38 of the Treaty on European Union, there is thus recognition of a dual form of subsidiarity in the social field: on the one hand, subsidiarity regarding regulation at national and Community level; on the other, subsidiarity as regards the choice, at Community level, between the legislative approach and the agreement-based approach".¹²⁴

This double subsidiarity idea is functional to the "*fundamental role of the social partners (...) in the implementation of the social dimension at Community level*"¹²⁵. Later Communications describe the social dialogue as a key element of governance, where "*social partners have a unique position within civil society because they are best-placed*

¹²² Paragraph 98 of the judgement.

¹²³ *Communication concerning the application of the Agreement on social policy*, COM (93) 600 final, of 14 December 1993.

¹²⁴ COM (93) 600 final, paragraph 6)

¹²⁵ *Idem*.

*to address issues related to work and can negotiate agreements that include commitments*¹²⁶ and social dialogue is a “*pioneering example of improved consultation and the application of subsidiarity in practice and is widely recognized as making an essential contribution to better governance, as a result of the proximity of the social partners to the realities of the workplace*”.¹²⁷

The statement in *EPSU* about the non-existence of a horizontal subsidiarity is only possible if the abovementioned Communications are ignored. However, this is necessary, I argue, to justify the Commission’s refusal to send the agreement to the Council on grounds of a “control of appropriateness”. In fact, this control of appropriateness is conceived in very broad terms in the judgment, including “*political, economic and social considerations*”.¹²⁸ The reason is, allegedly, that the European Commission has the role (under Article 17.1 TEU) to promote the general interest of the European Union. It is assumed that only the European Commission can promote this general interest and, on the contrary, “*management and labour, even where they are sufficiently representative and act jointly, represent only one part of multiple interests that must be taken into account in the development of the social policy of the European Union*”.¹²⁹ Here we find a frontal challenge to the idea that social partners are best situated to adequately represent the interests at stake and, therefore, to appropriately regulate at European level, even in the social field. This is, therefore, incompatible with the idea of collective autonomy, which is the core of the principle of horizontal subsidiarity. *Ergo* the Court had no other option but to affirm that such a principle does not exist in EU law.

However, the consequences are huge and alter, in my view, the original sense of system designed in Articles 153, 154 and 155 TFEU. Article 154.4, in particular, loses its meaning, since it is not clear why the social partners can suspend the Commission’s initiative to negotiate an agreement if at a later stage the Commission will evaluate whether the agreement is appropriate in political, economic and social terms. What can be the meaning then of the intervention of the social partners? If there is no horizontal subsidiarity, the intervention by the social partners has no any precedence and its potential results are devaluated. In practice, given the resources and time that are necessary to develop a collective bargaining process, the social partners will have few incentives to do so if they are not sure about the Commission approval beforehand.

¹²⁶ *The European social dialogue, a force for innovation and change*, COM (2002) 341 final, of 26 June 2002, pp 4-5.

¹²⁷ *Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue*, COM (2004) 557 final, p 6.

¹²⁸ See paragraph 79 in *EPSU*.

¹²⁹ Paragraph 80 in *EPSU* judgment.

However, as *EPSU* proves, the fact that the European Commission initiates a consultation process is no guarantee in this regard. Therefore, the social partners' potential intervention takes place in a highly uncertain scenario.

In its ruling, the General Court argues that the refusal of the Commission to submit an agreement to the Council in terms of appropriateness of the agreement does not undermine the social partner's autonomy, since "Article 155 TFEU merely involves the social partners in the process of adoption of certain non-legislative acts without according them any decision-making power"¹³⁰. Beyond the practical consequences¹³¹, the theoretical implications are important. There is a clear devaluation of the role of the social partners, from co-legislators in the social field to mere participants in the process of adoption of certain "non-legislative acts". There is also a reinforcement of the Commission's power and its control over the whole process and a parallel devaluation of the meaning of autonomy of the social partners at EU level. Article 155 TFUE also becomes devaluated, since it does not mean anymore that the social partners have the capacity to regulate autonomously an issue in the social field at EU level, but more that they may have a symbolic participation in a process totally controlled by the Commission. The references in Articles 151, 152 and 154 TFUE to the social dialogue as an objective of the Union and the references to its promotion also become devaluated.¹³²

Furthermore, the Court's findings also have implications in the idea of democracy in the European Union. Indeed, a certain idea of democracy is implicit in the principle of horizontal subsidiarity. The participation of the social partners in the making of EU law in the social field as a democratic device was an idea highlighted in the *UEAPME* case¹³³, when discussing the representativeness of the social partners. In that judgment it is written that in "the classic procedures provided for under the Treaty for the preparation of legislation (...) the participation of that Institution [the Parliament] reflects at Community level the fundamental democratic principle that the people must share in the exercise of power (...)".¹³⁴ Thus, given that the process designed in Articles 153, 154 and 155 TFUE "does not provide for the participation of the European Parliament (...) the principle of democracy on which the Union is founded requires (...) that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement".¹³⁵ In addition,

¹³⁰ Paragraph 89 in *EPSU* judgment.

¹³¹ In this framework of uncertainty, it is easy to imagine a paralysis of EU level collective bargaining.

¹³² "The objective of promoting the role of the social partners and the dialogue among them, respecting their autonomy, does not mean that the institutions, namely the Commission and the Council, are bound to give effect to a joint request presented by the signatory parties to an agreement seeking the implementation of that agreement at EU level". Paragraph 90 in *EPSU* judgment.

¹³³ Case T-135/96 of 17 June 1998, *UEAPME* vs Council, ECLI:EU:T:1998:128.

¹³⁴ Paragraph 88 in *EPSU* judgment.

¹³⁵ Paragraph 89 in *EPSU* judgment.

the European Commission has repeatedly described the social dialogue as a "*component of democratic government*", highlighting its "*unique position in the democratic governance of Europe*" in its Communications.¹³⁶ This is, on the one hand, coherent with the meaning of horizontal subsidiarity. On the other hand, it is quite different from the findings of the General Court in *EPSU*.

At the core of this idea of democracy lies the principle of participation of those affected by a regulation in its making and the idea that the exercise of power is shared. This is a model typical of complex democracies in pluralistic societies. It acknowledges that there are different, even contradictory interests at stake in any given society and a balance is only possible if the bearers of those contradictory interests have the opportunity to voice them. On the contrary, in *EPSU* we find a rather formal and vertical idea of democracy. Its rationale of a general interest that can only be guaranteed by the Commission and its refusal to acknowledge capacity to the social partners to adequately represent the interests at stake challenge the idea of a more participatory democratic procedure. If the participation of the social partners as co-legislators founded in the principle of horizontal subsidiarity has been understood as a democratic institution and a tool that improves the legitimacy of the EU level regulations in the social field¹³⁷, the findings of the General Court in its *EPSU* judgment seem to challenge this conception.

30) The *EPSU* case as the last stage of the erosion of horizontal subsidiarity.

Although very briefly, I want to highlight here that the Court's findings in *EPSU* largely follow a re-reading of Article 155 TFUE by the Commission that departs from the previous praxis in the functioning of EU level social dialogue.

This re-reading is heavily influenced, in turn, by the ideas and dynamics of the EU *Better Regulation* programme. In this sense, the *EPSU* ruling can be interpreted as the last episode in an erosion of the principle of horizontal subsidiarity that can be traced back, at least, to 2012. The origin of the reductionist understanding of the role and autonomy of the social partners that is at the core of the *EPSU* ruling has to be found in connection with broader developments at EU level that affected the ideas about regulation. This is reflected in the *REFIT* and *Better Regulation* agendas. In fact, the turn to the so-called *smart* regulation that materialized in those agendas reinforced

¹³⁶ *The European social dialogue, a force for innovation and change*, COM (2002) 341 final, of 26 June 2002, p 6.

¹³⁷ M.E. CASAS BAAMONDE, 'La negociación colectiva europea como institución democrática (y sobre la representatividad de los interlocutores sociales europeos)', *Relaciones Laborales* No.2, (1998) pp. 71-84.

the Commission's power in the name of impact analysis and the need to lift the burden of EU regulation. A whole revision of the EU *acquis*, grounded in competitiveness and efficiency arguments, was set in motion.

Although previous programmes of impact assessment were not applicable to regulations originated in social partners' agreements¹³⁸, *REFIT* will not make an exception for them. This is already an intrusion in the autonomy of the social partners and the idea of horizontal subsidiarity, since the content of the social partners' agreement is evaluated, not in terms of legality or legitimacy (representativeness), but in terms of economic impact and efficiency. This cost-benefit analysis of the regulations implies *per se* a lack of confidence in the social partner's capacity to develop adequate regulations based on their close knowledge of the workplace.

The practical impact of the *Better Regulation* became visible from 2012 onwards, when the Commission delayed its decision on whether to send an agreement to the Council for its transposition in the name of the need to complete impact assessment analysis in several occasions. The (in)famous case of the hairdresser's agreement¹³⁹, which requested to be implemented via a Council decision in 2012 and for six years was never sent by the Commission to the Council in the name of an incomplete evaluation, is paradigmatic. Finally, in 2018, the Commission invited the signatories of that agreement to withhold their proposal and follow the autonomous route for the implementation of their agreement. Indeed, this same *iter* led to the *EPSU* case when the Commission invited the signatories of the agreement on information and consultation signed three years before in the central government administration's sector to withhold their proposal and, after their refusal to do so, announced its decision not to send their agreement to the Council for its application as a Directive¹⁴⁰.

In conclusion, it seems arguable that the *Better Regulation* rationales had displaced the co-legislative role of the social partners, rejecting the idea of horizontal subsidiarity in the social field, even before the *EPSU* ruling. Horizontal subsidiarity was perceived as dangerous, since the social partners were thought as not able to adequately represent the complex interests at stake. In the same way, the role of the Commission had been much reinforced, as well as its monopoly on the legislative initiative. Its powers to evaluate the social partner's agreements had been extended beyond legality checks to include appropriateness in broad terms. In this light, the *EPSU* judgment becomes less surprising and the statement of the General Court about the non-

¹³⁸ See for example the Proposal for a Directive on prevention from sharp injuries in the hospital and healthcare sector, where it can be read in the Preamble that the Commission "has not prepared a specific impact assessment on this proposal, as it is not required to do so when it proposes to give legal effect to an agreement between social partners in accordance with Articles 139(2) of the EC Treaty". COM (2009) 577 final, paragraph 2.3 Preamble, p 6.

¹³⁹ *European framework agreement on the protection of occupational health and safety in the hairdressing sector*.

¹⁴⁰ See paragraph 5 in *EPSU* judgment.

existence of a principle of horizontal subsidiarity more logical, since the very meaning of this principle challenges the way in which the system of European social dialogue and collective bargaining is being re-interpreted.

The horizontal subsidiarity: one principle, different applications

by Massimiliano Delfino

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31) Reason for questioning the principle of subsidiarity

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”¹⁴¹.

32) The different origins of the European social dialogue

The functioning of the principle of subsidiarity in the field of social policy, in its two-fold dimension, passes through the identification of the role of the European collective agreement in the system 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)¹⁴².

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

¹⁴¹ *EPSU* judgement, paragraph 8. Italics added.

¹⁴² 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).

deals precisely with this issue, wondering whether the European Commission has any discretion when proposing the implementation of the agreement.

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"¹⁴³. This type of negotiation is flanked by "induced" negotiation, which regards 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 law¹⁴⁴ 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 level¹⁴⁵. In the *EPSU* case, the European social 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.

¹⁴³ On the voluntary negotiation, see, in a pioneering perspective, GUARRIELLO, *Ordinamento comunitario e autonomia collettiva*, Franco Angeli, 1993 and, in more recent times, PERUZZI, *L'autonomia nel dialogo sociale europeo*, il Mulino, 2011, Chapter IV.

¹⁴⁴ L. ZOPPOLI (Intervention at the round table 'La sentenza *EPSU* c. Commissione europea, ovvero: il dialogo sociale europeo messo sotto sorveglianza', *Rivista giuridica del lavoro*, 2020, page 337) 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). See also the interventions of GUARRIELLO, LO FARO, BAVARO and IZZI.

¹⁴⁵ On this profile, I agree with what is claimed by DORSEMONT, LÖRCHER, SCHMITT, 'On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case', *Industrial law journal*, 2019, page 1 ff. According to these authors, "nothing in Article 155 TFEU 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).

33) One principle, three cases

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 cases, 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, 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.

3. 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, again in application of the principle of subsidia-

riety, 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.

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 law¹⁴⁶; 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 agreement¹⁴⁷, 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 Council. Point 8 of this document states that "the agreements concluded between the social 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.

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. As a matter of fact, 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

¹⁴⁶ 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.

¹⁴⁷ 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.

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 intervene¹⁴⁸.

34) The general interest and the role of the Council

The most controversial part of the judgement are the explanations related to the general interest issue. 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”¹⁴⁹. 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) applicants¹⁵⁰. 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

¹⁴⁸ Simply emphasizing that the implementation of the collective agreement by the Union can take place “where appropriate”.

¹⁴⁹ *EPSU* judgement, paragraph 80.

¹⁵⁰ 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).

proposal, but this does not prevent the interpreter from questioning the role played by the last-mentioned European institution.

35) The reasons for the Commission's refusal

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 TFEU¹⁵¹. 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".

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"¹⁵².

36) Short conclusions

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

¹⁵¹ 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).

¹⁵² It is possible to read the three motivations in paragraph 9.

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 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.

The road paved with (broken) promises: from Val Duchesse to the Pillar of Social Rights. Three impressionistic narratives

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*The promise was made your word was enough
We had dreams visions and plans
Broken Promises – Survivor*

37) Introduction

The title and theme of this reflection on the case is inspired by a publication of *EPSU* called “The European Pillar of Broken promises, Time for a Social Europe”.¹⁵³ Even stronger than comes forward in the case at the General Court,¹⁵⁴ *EPSU* expresses in this document its disappointment in the decision of the Commission not to present the agreement on information and consultation rights for public administration workers to the Council. Especially the words “broken promises” imply a lot. Among others, it implies that *EPSU* is under the impression that the institutional settings in the EU treaties, combined with the Charter on Fundamental Rights of the EU and the European Pillar of Social Rights, includes a firm certainty that the Commission must respond positively to requests of signatories to agreements. It also implies a “blind trust” in that the Commission would have responded positively to their request. The ruling of the General Court was, apparently, not helpful in restoring such trust, as on their website *EPSU* indicates the following:

While the General Court found shortcomings in the way the Commission had handled the agreement, it nonetheless ruled in favour of the Commission’s unprecedented

¹⁵³ <https://www.epsu.org/article/european-pillar-broken-promises-time-social-europe-one-year-slow-progress-and-disappointment> (last visited 15 September 2020).

¹⁵⁴ Case T-310/18 *EPSU* ECLI:EU:T:2019:757.

position. According to the Court, the Commission does not have to act in transparency based on a set of clear and predictable criteria and processes. There is a breach of confidence in the working of this institution. This cannot be left unchallenged.¹⁵⁵

The aim of this contribution is to analyse what these strong expectations by *EPSU* are based on. Did the EU indeed create institutional settings that justify those expectations and, consequently, did the Commission break the “promise”? Moreover, what narratives have coloured these institutional settings and to what extent has this contributed to such expectations? Three obvious narratives can be distinguished. The first narrative relates to the establishment of the social dialogue in historical perspective starting with the Val Duchesse meetings. The second narrative follows the regulatory developments in the field of EU social policy in general, with an emphasis of the roles of the Commission and Social Dialogue in those regulatory mechanisms. This is based on a review of a selected number of key documents dealing with, among others, EU social policy. The third narrative follows the perception of the social dialogue in the doctrine, especially in handbooks on EU labour law. These narratives together have created a kind of epistemic community about how to understand Social Dialogue in general and the relationship between Social Partners and the Commission. Understanding these narratives is important for any contextual as well as teleological interpretation of Articles 154 and 155 TFEU. Furthermore, combined these narratives may also provide insight in why there is apparently a gap between the expectations, of at least *EPSU*, and the practice that the indication of “broken promise” is given.

It goes beyond the scope of this brief to describe the narratives in detail; therefore, it is done as follows. Each narrative starts with a list of main documents that have been consulted, followed by characteristic impressions that tell the narrative. When relevant or functional quotes have been included. The contribution ends with a reflection on the three narratives with the aim to find an answer on what caused the impression (or feeling) that promises are broken. Furthermore, it should be underlined that the narratives focus on the issue of implementation of the by Social Partners negotiated agreements by a Council decision as proposed by the Commission, and more particularly whether over the course of time an expectation has grown that such should be done without an appropriateness test. The texts hold many more interesting aspects related to the *EPSU*-case. These are addressed in other contributions and ignored here. This was sometimes difficult to do since most of the aspects are related to each other. Nonetheless, I tried to confine myself as much as possible to any signs about the main issue of this contribution.

¹⁵⁵ <https://www.epsu.org/article/epsu-appeals-judgement-eu-general-court> (last visited 15 September 2020).

38) Narrative 1- Social dialogue in historical (trade unionist) perspective

(a) Main documents¹⁵⁶

1. Jean Lapeyre (2018), *The European Social Dialogue. The history of a social innovation (1985–2003)* (ETUC; Brussels).
2. Jean-Paul Tricart (2019), *Legislative implementation of European social partner agreements: challenges and debates* (ETUI; Brussels) Working Paper 2019.09.

(b) Narrative

The start of the social dialogue as we now know it lies with the first Val Duchesse meetings initiated by Commission President Jacques Delors. At this time, the then European Economic Community was deadlocked on almost every policy field, institutionally as well as topics related to social dialogue and consultation.¹⁵⁷ Against this background Delors saw only one way forward: “to implement the Single Market, thereby relaunching the EEC machine.”¹⁵⁸ To achieve this goal employers and unions had to get involved.¹⁵⁹ Moreover, in his inaugural speech Delors called: “When shall we see the first European collective agreement? I want to insist on this point: the European collective agreement is not an empty slogan. It would provide a dynamic framework, one that respects differing views – a spur to initiative, not a source of paralysing uniformity”.¹⁶⁰ Also, during the first summit words were used as: “The Commission must play a triggering role... (however)... the social partners must not wait for directives, but must get into the driving seat... any delay in innovation will lead to major increases in the cost of labour and thus to greater unemployment”.¹⁶¹

An event at the Social Dialogue Summit on 7 May 1987, which may seem harmless and merely encouraging, may have relevant meaning for this narrative in search of the “promise”. When discussing the development of Social Dialogue, Delors, being aware of the still fragile stage of development, decided to let it develop at its own pace, rather than being forced by legislative intervention by the Commission. More-

¹⁵⁶ I realise that both these documents come from trade union side. Normally that would be problematic as it could lead to a biased vision. In this case though it is not problematic, since the aim is to find out what has contributed to the social partners’ understanding of what could be expected from the Commission in terms of giving *erga omnes* effect to their agreements. Especially the expectations of EPSU.

¹⁵⁷ J. LAPEYRE (2018), *The European Social Dialogue. The history of a social innovation (1985–2003)*. (ETUC; Brussels), p. 30.

¹⁵⁸ LAPEYRE (2018), P. 30.

¹⁵⁹ LAPEYRE (2018), P. 30.

¹⁶⁰ LAPEYRE (2018), p. 34, with reference to: Speech by Jacques Delors to the European Parliament on 14 January 1985 on the basic guidelines underpinning the action that the new Commission planned to take (EP Debates N°2-321/3 dated 14.01.1985).

¹⁶¹ LAPEYRE (2018), p. 37 (words spoken by unionist Bruno Trentin).

over, Delors deliberately decided not to legislate on the achieved joint opinions, ***unless social partners would jointly request such***¹⁶² [emphasis author]. Delors thus left the prerogative to take the step to legislative action expressly with social partners.

The full historical description of the social dialogue by Lapeyre, indicates that during the early years it would have constantly deadlocked if it were not for the interference by the Commission. Especially from the employer's side there seemed little enthusiasm for developing a social dialogue. The strong involvement of the Commission with every step and every meeting at these early days, gives the social dialogue more the character of tri-partitism rather than a dialogue between labour and management. Progress was made though, as employers also realised that the development of the internal market would face severe difficulties if not supported also by dialogue between labour and management.¹⁶³ Hence, in the words of Lapeyre, social partners "metamorphosed" from lobbyists to (becoming) players and producers of social standards.¹⁶⁴

Another relevant impression from the early days of the Social Dialogue is that the initial regulation of it in the Social Protocol and its annexed Agreement seems to be surrounded by experimentation reflected by the inclusion of new and vague words. For example, the word "decision" was deliberately written with a small "d" instead of a capital "D" which would refer to the instrument "Decision". The use of the small "d" left the option open for the Council, on proposal by the Commission, to adopt whatever instrument they deemed best suitable.¹⁶⁵ Similarly, the legal nature of the "contractual agreements" was left vague to leave room for experimentation rather than adopting a model inspired by one or two Member States.¹⁶⁶ However, despite the uncertainties indicated by Lapeyre and Tricart, none concern Article 4, par. 2 of the Agreement on Social Policy which deals with the implementation of the agreements concluded by Social Partners via a Council decision, based on a proposal by the Commission.

In his historical account of the development of the Social Dialogue at EU level, Lapeyre quotes from the Venturini/Savoini analysis paper *Dialogue Social: bilan et perspectives* of December 1988:

"The sectoral dimension of the Community social dialogue is not only an indispensable element in developing the whole industrial relations sys-

¹⁶² LAPEYRE (2018), P. 47.

¹⁶³ LAPEYRE (2018), chapter 3 in general.

¹⁶⁴ LAPEYRE (2018), chapter 4 describes this transformation. An impression that is also supported by observations of the Commission expressed in its working documents and communications (see narrative 2).

¹⁶⁵ Cf. LAPEYRE (2018), p. 108.

¹⁶⁶ *Ibidem*.

tem, but also seems to offer the best prospects for ensuring effective representation, from a Community perspective, in the face of change, and to counter protectionist temptations possibly arising through the completion of the Single Market."¹⁶⁷

The quote is interesting in the context of this narrative as it confirms the importance the Commission contributed to not only cross-industry or inter-professional dialogue, but also sectoral dialogue.

All in all, it is clear that at EU level the involvement of Social Partners in EU social policy making is considered very important. Consequently, so are also their agreements. Hence, Tricart's observation in light of paragraph 39 of the 1998 Commission Communication on *Adapting and promoting the Social Dialogue at Community level*, which deals with the review by the Commission of Social Partners' agreements that have been submitted for elevation to EU law by a Council decision. The Communication will be discussed in more detail in Narrative 2, but important here is to understand what rationale was seen in it, at least from trade union perspective. The sentence of relevance in Paragraph 39 is the following:

"[w]here it considers that it should not present a proposal for a decision to implement an agreement to the Council, the Commission will **immediately** inform the signatory parties of the **reasons** for its decision" [Emphasis BtH].

According to Tricart, the rationale of this text is that a refusal of the agreement can only be the result of applying the test on representativeness of the signatories, legality of the clauses, or implications for SMEs. The words "immediately" and "reasons" indicate, according to Tricart, that the Commission

"has no discretionary power in this regard, precisely because it is also bound to promote social dialogue and is committed to promoting the double subsidiarity approach [...]. By giving the signatories the reasons for the decision, the Commission also provides them with the opportunity to reconsider and to amend, as appropriate, the content of their agreement, if its legality is contested, or to broaden the negotiations to include other organisations (or to obtain broader support for their agreement), if there is insufficient representativeness; moreover, if the social partners respond accordingly to the reasons communicated to them, they may submit a revised agreement for further consideration by the Commission".¹⁶⁸

¹⁶⁷ LAPEYRE (2018), p. 123.

¹⁶⁸ Tricart (2019), p. 20.

Moreover, it leads Tricart to conclude that the whole way the review is phrased indicates that with reviewing the agreement of Social Partners, the Commission “exercises its right to initiative while fully respecting also its obligation to promote social dialogue.”¹⁶⁹ Such a practice is, in Tricart’s opinion, consistent with recurrent messages from the Commission on double subsidiarity.¹⁷⁰ More generally, in his historical account of the Social Dialogue, Tricart puts strong emphases on the Commission’s obligation to promote social dialogue.¹⁷¹

A strong promotion of Social Dialogue, or at least a further strengthened appreciation of Social Dialogue, is found by Tricart in the change of the consultation procedure in the Lisbon Treaty. Instead of completing the first two rounds of consultation the new Article 154 TFEU allows Social Partners to initiate the negotiation procedure after the first consultation (on the direction). Tricart mentions several reasons for this, among which an experience based need for more flexibility between consultation and negotiation, especially regarding subjects that would become part of a revision or update of existing standards or where existing standards explicitly created space for sectoral regulations (e.g. in working time).¹⁷² More interestingly though in the context of this narrative is the first reason Tricart mentions, namely that the second phase of negotiations could “deter negotiation rather than encourage it”.¹⁷³ Especially when the definition of the content of the Commission’s proposal extremely precise.¹⁷⁴ In Tricart’s opinion the primary objective of the adjusted Treaty provision was to promote negotiations and “therefore, to broaden the social partners’ capacity for action.”¹⁷⁵

Till 2012 the practice of giving *erga omnes* effect to the social partner agreements was always positive and resulted, on average, within about six months in a decision by the Council.¹⁷⁶ However, this changed with a first “no” of the Commission on the Hairdressers agreement and a second “no” on the Information and Consultation for Public Administration Agreement. Tricart traces part of the change in attitude by the

¹⁶⁹ Tricart (2019), p. 21.

¹⁷⁰ Ibidem. In other contributions in this Working Paper discussed as “horizontal subsidiarity”, i.e. by Melanie SCHMITT, Antonio GARCÍA-MUÑOZ ALHAMBRA, and Massimiliano DELFINO.

¹⁷¹ In addition to the previous quotes, e.g. also on p. 23 with reference to the Court’s ruling in the *UEAPME*-case (Case T-135/96; ECLI:EU:T:1998:128) “the Commission must primarily act in conformity with the principles governing its action in the field of social policy as laid down in the Treaty, which specifically include the promotion of social dialogue” (par. 85 *EUAPME*)

¹⁷² TRICART (2019), P. 25.

¹⁷³ TRICART (2019), p. 24.

¹⁷⁴ Ibidem.

¹⁷⁵ TRICART (2019), p. 26.

¹⁷⁶ TRICART (2019), p. 6 and 21. NB as Tricart mentions, six months is really short for the adoption of EU which normally takes a few years. Of course, this could partly be explained by the fact that the content of the agreement is already fixed as it is the outcome of the negotiations, but still, for EU notions it is remarkably fast.

Commission back to the deregulation agenda of the Barroso 2 Commission, which affected the field of social policy in particular.¹⁷⁷ In such a political setting there is simply no room for obligatory presentation of agreements to the Council to elevate it into EU law.¹⁷⁸ One way out of it was the introduction of an impact assessment especially on the costs and benefits of adopting legislation in the field of social policy. An assessment which, as convincingly argued by Tricart, runs contradictive to the whole idea of social dialogue of which the agreements are per definition a win/win-outcome for both sides of the industry (after all they negotiate in this balance), and therefore reflects a balance between costs and benefits.¹⁷⁹ Hence, making the outcome of such assessment obsolete as it will always be positive.

However, that route is not taken. Under Juncker, who announced the *New Start for Social Dialogue*, Social Partners, the Commission and the Dutch representative of the Presidency (The Netherlands held EU Presidency at that time) met with the aim to discuss a “clearer relation” between Social Partner agreements and the Better Work Agenda.¹⁸⁰ However, as Tricart points out, the formulation of this relation in the Quadripartite Statement is still rather vague, which Tricart interprets as a failure by the Commission to secure Social Partners’ approval of their reading of the new Articles 154 and 155 TFEU, especially regarding a possible assessment.¹⁸¹ Moreover, it seems to leave the two, Social Partners on the one hand and the Commission on the other, in a status quo that they agree to disagree.

39) Narrative 2 - Historical development of Social Dialogue in EU Policy Documents

(a) Documents

1. 1988 Commission Working Paper *Social Dimension of the Internal Market* (SEC(88) 1148 final)
2. 1993 Commission Communication *concerning the application of the Agreement on Social Policy* (COM(93) 600 final)
3. 1998 Commission Communication, *Adapting and promoting the Social Dialogue at Community level* (COM(1998) 322 final)

¹⁷⁷ See on this also: B.P. TER HAAR and P. COPELAND (2010), ‘What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy’, *European Law Journal* Vol. 16, no. 3, pp. 273-291.

¹⁷⁸ Cf. TRICART (2019), P. 33.

¹⁷⁹ TRICART (2019), p. 35.

¹⁸⁰ TRICART (2019), p. 41; and Quadripartite Statement of 27 June 2016, p. 1. (available at: <https://ec.europa.eu/social/main.jsp?catId=329&langId=en>).

¹⁸¹ TRICART (2019), p. 41.

4. 2002 Commission Communication, *The European social dialogue, a force for innovation and change* (COM(2002) 341 final)
5. 2004 Commission Communication *Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue* (COM(2004) 557 final)
6. 2010 Commission Staff Working Document *on the functioning and potential of European sectoral social dialogue* (SEC(2010) 964 final)
7. 2016 Commission *A new start for social dialogue* (KE-02-16-755-EN-N)
8. 2016 Commission Communication *Better Regulation: Delivering better results for a stronger Union* (COM(2016) 615 final)
9. 2018 Commission Communication *on the principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking* (COM(2018) 703 final)
10. European Pillar of Social Rights¹⁸²

NB This list is not exhaustive but holds all the information to trace the narrative about the role of Social Partners in EU law-making in the field of social policy.

(b) Narrative

In the first policy document consulted for this narrative we find a clear statement about the role of social dialogue in EU social policy:

“The Commission is convinced that the dialogue between labour and management has an **absolutely essential** role to play in building Europe since it provides means of reaching agreements which **can subsequently** be turned into proposals for new Community rules”¹⁸³ [emphasis BtH].

In its 1993 Communication, the Commission further explains the position of social dialogue as part of EU law-making in the field of social policy. Paragraph 6(c) of this Communication confirms a form of “dual subsidiarity”:

“[...] In conformity with the fundamental principle of subsidiarity enshrined in Article 38 of the Treaty on European Union, **there is thus recognition of a dual form of subsidiarity** in the social field: on the one hand, subsidiarity regarding regulation at national and Community level; on the other, **subsidiarity as regards the choice**, at Community level, **between the legislative approach and the agreement-based approach**” [Emphasis BtH].

In the same paragraph the Commission continues with stressing that:

¹⁸² https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf

¹⁸³ SEC(88) 1148 final, p. 32.

"[...] The Commission can only express its pleasure at the fact that this principle of dual subsidiarity, which was in fact introduced by the Commission as part of its contribution to the intergovernmental conference and subsequently adopted by the social partners, has now been incorporated into the Agreement."

Paragraph 9 adds to this in its last sentence, that Social Partners

"also open up a new prospect for the Community social dialogue in that it may now lead to the establishment of contractual relations, including agreements, which may be implemented, **in defined circumstances**, by a Council decision based on a proposal from the Commission" (Emphasis by me).

Furthermore, paragraph 39 concludes with the following words:

"Where it [the Commission; BtH] considers that **it should not present** a proposal for a decision to implement an agreement to the Council, the Commission will immediately inform the signatory parties of the reasons for its decision" [emphasis BtH].

Although a form of dual subsidiarity is recognised by the Commission, at the same time the Communication holds in paragraph 9 a few words (see emphasised) that could be interpreted as for the Commission always keeping the last say in whether or not an agreement should be elevated to Union law. The last words in paragraph 39 are even more explicit in this. Although this was noticed by Social Partners, at least Lapeyre makes note of it in his historical account of the Social Dialogue,¹⁸⁴ this didn't seem to be a point of main concern at the time. There seem to have been more issues about implementing the agreement through a Council decision as an "as is" agreement with merely an informative role for the European Parliament.¹⁸⁵

Furthermore, even though it is stated that the Commission may have "considerations" not to present a proposal to the Council, an appropriateness test is not (explicitly) indicated in the document. Paragraph 39 "merely" states that

"[b]y virtue of its role as guardian of the Treaties, the Commission will prepare proposals for decisions to the Council following **consideration of the representative status** of the contracting parties, their mandate and **the "legality" of each clause** in the collective agreement in relation to Community law, and **the provisions regarding small and medium-sized undertakings** set out in Article 2(2). At all events, the Commission in-

¹⁸⁴ LAPEYRE (2018), P. 120.

¹⁸⁵ LAPEYRE (2018), p. 120.

tends to provide an explanatory memorandum on any proposal presented to the Council in this area, giving its comments and assessment of the agreement concluded by the social partners” [emphasis BtH].

In this context it is also interesting to include here paragraph 42, which determines that

“[i]f the Council decides, in accordance with the procedures set out in the last subparagraph of Article 4(2), not to implement the agreement as concluded by the social partners, the Commission will withdraw its proposal for a decision and will examine, in the light of the work done, whether a legislative instrument in the area in question would be appropriate”.

Thus, even when the Council decides not to adopt a decision, the Commission must consider the legislative route as means to elevate (part of) the content of the agreement to Union law. Hence, another signal that agreements of Social Partners are to be taken seriously and as such contributing to the expectation that any agreement submitted to the Commission will be taken forward.

This test is repeated in several documents,¹⁸⁶ the need for an appropriateness test is mentioned, however, only in relation to agreements that have been negotiated outside the consultation process. More precisely, in its 1998 Communication the Commission formulated it as follows:

“In addition, before proposing a decision implementing an agreement negotiated on a matter within the material scope of Article 2 ASP, but **outside the formal consultation procedure, the Commission has the obligation to assess the appropriateness** of Community action in that field” [emphasis BtH].

The need to include this is clearly given by the fact that at this time Social Partners had matured more and became somewhat less dependent from the Commission for its functioning. Although the Commission clearly still saw as its main task to support Social Partners in their negotiation processes, including offering services when negotiations would deadlock.¹⁸⁷ Moreover, while in 1998 the Commission noted that the European Sectoral Social Dialogue should pick up pace and with that aim established a common framework for sectoral committees,¹⁸⁸ in 2004 the Commission noticed that

¹⁸⁶ E.g. COM(1998) 322 final, p. 19.

¹⁸⁷ Cf. COM(1998) 322 final, p. 22.

¹⁸⁸ J. KŠIŃAN, ‘EU Issues on tripartism’, and A. GARCÍA-MUÑOZ ALHAMBRA, ‘European Sectoral Social Dialogue’, both forthcoming in B.P. TER HAAR and A. KUN (eds), *EU Collective Labour Law* (Edward Elgar; Cheltenham).

“In recent years the social partners have wished to pursue a more autonomous dialogue and are adopting a diverse array of initiatives, including an increasing number of “new generation” joint texts, characterised by the fact that they are to be followed-up by the social partners themselves.”¹⁸⁹

In 2010 the Commission noticed in a Staff Working Document that:

“More recent developments suggest that the number of sectoral agreements may grow even further and that such negotiations are increasingly independent from formal consultations initiated by the Commission. There are negotiations starting or on-going in a range of sectors including personal services, professional football, inland waterways, and sea fisheries.

However, [...] The public sector was also absent from sectoral negotiations until the benchmark agreement on sharp injuries in the hospital sector, completed in 2009”.¹⁹⁰

Thus, within a period of 12 years the ESSD has, like cross-industry SD, matured which resulted, among other things, in an increase of the number of agreements negotiated independent from formal consultations, and the public sector was especially singled out and encouraged to pick up pace as well.¹⁹¹

As indicated in Narrative 1, the change in the Lisbon Treaty (2009), meaning that based on Art. 154, par. 2 TFEU social partners can already choose to start negotiations after the first round of consultations. However, the consultation concerns not only Social Partners but also others, which, after the first round of consultations, could still result in a change of vision by the Commission resulting in a conclusion that the proposed initial idea for EU legislation is not appropriate.¹⁹²

In addition to this change, since the Barroso Commission took office for a first term in 2004 and a second term starting in 2010, the agenda for EU regulation changed into an agenda of deregulation. This was characterised by limited adoption of new legislation, especially in the field of social policies (which in this period was domi-

¹⁸⁹ COM(2004) 557 final, p.3.

¹⁹⁰ SEC(2010) 964 final, p. 14.

¹⁹¹ How much social dialogue in general has matured can be read in the Commission’s document *A new start for social dialogue*, which lists on p. 15 the following forums for social dialogue: Tripartite Social Summit (TSS); Macroeconomic Dialogue (MED); Social Dialogue Committee (cross-industry) (SDC); Sectoral social dialogue committees (SSDCs); and The Liaison Forum (which facilitates the exchange of information between all EU social partner organisations and the Commission). Besides these, the same document refers also to numerous advisory committees and seminars and joint projects by the social partners (p. 16).

¹⁹² Cf. COM(2018) 703 final, p. 9

nated by soft law in the form of the Open Method of Coordination) and the programme REFIT¹⁹³ by which existing legislation was re-evaluated for burden reduction and simplification.¹⁹⁴ This line was continued by the Juncker Commission in the Better Regulation programme (with support of REFIT). Interesting in the context of our narrative here, is when the Commission talks about how to achieve this, it underlines that “all actors need to buy into this agenda”.¹⁹⁵ These actors are, besides the Commission, the European Parliament and the Council, not (also) Social Partners.¹⁹⁶

The importance of the role of Social Partners and Social Dialogue is (re-)confirmed by the Juncker Commission with the document *A new start for social dialogue*. This document includes a diagram of the “consultation and negotiation procedure under Articles 154 and 155”. In this diagram the assessment of Social Partners’ agreement before elevating it to EU law is explicitly included (see Annex 2). This can be the result of the clearer relation between Social Partners’ agreements and the Better Regulation Agenda, which was indicated by Juncker as a necessity.¹⁹⁷

The last document in this narrative is the European Pillar of Social Rights (EPSR). The aim of the Pillar is to serve as a guide towards efficient employment and social outcomes when responding to current and future challenges which are directly aimed at fulfilling people’s essential needs, and towards ensuring better enactment and implementation of social rights.¹⁹⁸ When it comes to the role of Social Partners three indications are of relevance. In paragraph 17 of the preamble of the EPSR it is indicated that the Pillar is to be implemented at EU as well as Member State level, taking into account the socio-economic differences and diversity of national systems, “including the role of social partners”. The second indication of relevance is found in paragraph 20 of the preamble, which reads as follows:

“Social dialogue plays **a central role** in reinforcing social rights and enhancing sustainable and inclusive growth. Social partners at all levels have **a crucial role** to play in pursuing and implementing the European Pillar of Social Rights, in accordance with their autonomy **in negotiating and concluding agreements** and the right to collective bargaining and collective action” [emphasis BtH].

The last indication of interest is found in key principle 8 of the EPSR:

¹⁹³ https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof_en (last visited 29 September 2020).

¹⁹⁴ COM(2016) 615 final, p. 5.

¹⁹⁵ Ibidem, p. 9.

¹⁹⁶ Ibidem, p. 9 with reference to the Interinstitutional Agreement on Better Law-making (EU OJ [2016] L123/1), in which Social Partners are also not named.

¹⁹⁷ Commission *A New Start for Social Dialogue* (2016), p. 9.

¹⁹⁸ Par. 12 Preamble EPSR (https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf).

“The social partners **shall be consulted** on the design and implementation of economic, employment and social policies according to national practices. They shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. **Where appropriate**, agreements concluded between the social partners shall be implemented at the level of the Union and its Member States” [emphasis BtH].

When reading this in combination with the above development in the policy documents this seems to give at least a mixed expectation. In paragraph 17 of the preamble Social Partners have not been mentioned at the same level of implementation responsibility as the EU (institutions) or the Member States. In paragraph 20 of the preamble this is sort of compensated as they have been attributed a specific role in the implementation of the Pillar. However, when reading Key principle 8, we find the words “where appropriate” which builds in a disclaimer for an assessment by others, likely the EU or the Member States as both are indicated as level of implementation. Thus, while on the one hand Social Partners are recognized as having an “essential” role to play, at the same time this role is made subordinate to an “appropriateness test”.

40) Narrative 3 - Doctrine’s perception

(a) Handbooks

The handbooks are divided into two types: those dealing with EU Government and EU law in general and those dealing with EU Labour law in particular. The reason for this is that part of the issues in the *EPSU*-case are related to general issues of EU Government and EU Law, such as the Commission’s prerogative on initiating EU legislation and related to that the appropriateness test. Hence the vision of general EU Government and EU law scholars on Social Dialogue and the role of Social Partners in EU law-making is interesting. Since a good part of the EU is politics rather than legal, two handbooks on EU government (or governance) have been included. However, most of the attention in the narrative will be paid to the specific textbooks on EU Labour Law, which accounts also for the majority of handbooks consulted.

(a.1) Handbooks on EU law

1. 2006 J. Richardson (ed.), *European Union. Power and policy-making* (Routledge; Oxon) 3rd edition
2. 2008 P. Craig and G. De Búrca, *EU Law. Text, Cases and Materials* (OUP; Oxford) 4th edition
3. 2008 E. Szyszczak and A. Cygan, *Understanding EU Law* (Sweet & Maxwell; London) 2nd edition

4. 2011 A. Dashwood, M. Dougan, B. Rodger, E. Spaventa and D. Wyatt, *European Union Law* (Hart Publishing; Oxford) 6th edition
5. 2017 N. Nugent, *The government and politics of the European Union* (Palgrave; London) 8th edition

(a.2) Handbooks on EU labour law

1. 1993 R. Nielsen and E. Szyszczak, *The Social Dimension of the European Community* (HF; Copenhagen) 2nd edition
2. 1997 R. Nielsen and E. Szyszczak, *The Social Dimension of the European Community* (HF; Copenhagen) 3rd edition
3. 2000 R. Nielsen, *European Labour Law* (DJØF Publishing; Copenhagen)
4. 2000 E. Szyszczak, *EC Labour Law* (Longman; London)
5. 1996 B. Bercusson, *European Labour Law* (Butterworths; London) 1st edition
6. 2000 C. Barnard, *EC Employment Law* (OUP; Oxford) 2nd edition
7. 2006 C. Barnard, *EC Employment Law* (OUP; Oxford) 3rd edition
8. 2012 C. Barnard, *EU Employment Law* (OUP; Oxford) 4th edition
9. 2009 Ph. Watson, *EU Social and Employment Law. Policy and Practice in an Enlarged Europe* (OUP: Oxford)
10. 2012 A.C.L. Davies, *EU Labour Law* (EE; Cheltenham)
11. 2012 K. Riesenhuber, *European Employment Law. A systematic Exposition* (Intersentia; Cambridge/Antwerp)
12. 2014 R. Blanpain, *European Labour Law* (Wolters Kluwer; Alphen aan de Rijn) 14th edition
13. 2019 T. Jaspers, F. Pennings, and S. Peters (eds.), *European Labour Law* (Intersentia; Cambridge)

A number of caveats need to be addressed before starting the narrative. The sources for this narrative is limited to Handbooks on EC/EU Labour/Employment Law since these are written in such a way to give a quick and accessible insight on the topic for students as well as people in practice. Hence, these books reflect a general understanding on issued of EU Labour/Employment Law, including the Social Dialogue and the position of Social Partners in the EU law-making process in the field of Social Policies. The selection is limited to Handbooks that are written in English and therefore accessible for a wide audience. An attempt is made to find a balance between books written by English native speakers, which reflect a mainly Anglo-Saxon/common law take on EC/EU Labour/Employment Law and those written by non-natives in English, which reflect a more continental European/civil law approach. One book aims to deliver a “national biased free” view (Jaspers, Pennings and Peters). Most of

the books have been updated regularly (all books on EU Government and general on EU Law; Nielsen and Szyszczak; Bercusson; Barnard; Blanpain) and some have been published only after the adoption of the Lisbon Treaties in 2009 (Watson; Davies; Riesenhuber; Jaspers c.s.). To stay with the historical approaches followed in the previous two narratives, the Handbooks are also treated in chronological order. For as far as applicable and possible¹⁹⁹ different editions of a Handbook have been consulted. In any case they are consulted in chronological order following the date of publication.

(b) Narrative perception of the role of social partners by the legal doctrine

To tell the narrative of the role of Social Partners and Social Dialogue in EU law-making as perceived by the legal doctrine a number of aspects are interesting. These include the perspective in which Social Dialogue is discussed: as part of the legislative process; as part of (legal) sources of EU (labour) law; or as part of EU collective labour law. The narrative first starts with an account found in the general EU law and EU government books, followed by the narrative as found in the specific EU labour law handbooks.

(b.1) Narrative in general EU law and EU government books

This is a rather short narrative because in general social partners and/or the social dialogue is simply not addressed at all. In the books on EU government (or governance), Social Dialogue or Social Partners are simply non-existent. Not even with the description of the consultation procedures, the position and role of Social Dialogue and/or Social Partners is mentioned.²⁰⁰ In the book by Nugent "Social Dialogue" is mentioned one time, in a "box", so not even in the main body of the text, namely as a "way in which **interests** can communicate their views to the Commission"²⁰¹ [emphasis BtH]. Hence, Social Partners are reduced to "interests". At least the historical development accounts mention reform in linking the single European market (SEM) to institutional settings, social regulation, and economic cohesion.²⁰² But very general only.

What makes a review of these books interesting in the context of this contribution is that they provide some insight in the changes the Commission as institution has undergone. Delors' Commission was very different than the later Commissions, with

¹⁹⁹ COVID19 seriously limits access to the university library, therefore consultation of the handbooks is further limited to those privately possessed by the author.

²⁰⁰ N. NUGENT, *The government and politics of the European Union*, pp. 330 – 331. Interestingly, but a side path, Nugent does describe that none of the citizen initiatives (56 in total in 2017, of which 36 properly submitted and only 3 with the required number of signatures) have resulted in the proposition of new legislation by the Commission.

²⁰¹ N. NUGENT, *The government and politics of the European Union*, p. 271.

²⁰² E.g. LAFFAN and MAZEY, 'European Integration: The European Union – reaching an equilibrium?', in RICHARDSON (ed.) *European Union. Power and Policy-Making*, p. 43.

first significant changes introduced when Delors' successor, Prodi took office.²⁰³ Furthermore, power shifts between the institutions have resulted in an in general very different position of the Commission. These shifts include: an increased role for the Council and European Parliament in legislation; a growing importance of the use of new governance mechanisms like the Open Method of Coordination (OMC) which weakened in general the role of the Commission; and in general, as for many national administrations, a smaller role/rolling back responsibilities of the public sector.²⁰⁴ Better Regulation is part of these changes as well. When viewed in the context of this contribution, these changes may (partly) explain the changing attitude found in narratives 1 and 2 towards the role and position of Social Partners and Social Dialogue as part of the EU law-making process.

The general handbooks on EU Law are just as depressing in this perspective. Even though De Búrca has done considerable work in the field of EU human rights law and social policy, no special attention is paid to the Social Dialogue. Definitely not as part of a (special) law-making procedure, and barely as an instrument of EU law. Regarding the latter, Social Dialogue is mentioned in reference of the implementation of the Social Policy Agenda, for which "all existing Community instruments bas none must be used: the open method of co-ordination, legislation, **the social dialogue**, the Structural Funds, the support programmes, the integrated policy approach, analysis and research"²⁰⁵ [emphasis BtH]. Dashwood c.s. only mention Social Dialogue under the heading of "Non-legislative Acts Adopted Directly Under the Treaties", where they raise the question whether the Council decisions implementing the social partner agreements are correctly categorised as non-legislative in character.²⁰⁶ Which with having the CFI ruling in the *EUAPME*-case in mind,²⁰⁷ is actually a weird positioning of these decisions (or better: directives). Nonetheless, this is how it is viewed in this handbook, which is the narrative I try to unpack here.

An exception on these accounts ignoring the role and position of Social Partners and Social Dialogue is the handbook by Szyszczak and Cygan. Maybe not entirely surprising knowing that Szyszczak has written specific handbooks on EU Labour Law (see below). In the very comprised text addressing EU social policy, it is stated that the Amsterdam Treaty created with the new Articles 136–139 "a broad legal base for employment law measures **recognising the Social Partners as institutional actors** in the process."²⁰⁸ [emphasis BtH]

²⁰³ See on this in particular: T. CHRISTIANSEN, 'The European Commission: the European executive between continuity and change', in RICHARDSON (ed.) *European Union. Power and Policy-Making*, pp. 97–120.

²⁰⁴ Cf. N. NUGENT, *The government and politics of the European Union*, pp. 159 – 161.

²⁰⁵ P. CRAIG and G. DE BÚRCA, *EU Law*, p. 87.

²⁰⁶ Dashwood c.s. *European Union Law*, p. 85.

²⁰⁷ ECLI:EU:T:1998:128, par. 67.

²⁰⁸ E. SZYSZCZAK and A. CYGAN, *Understanding EU Law*, p. 288.

The more general chapters in these handbooks reflect the same developments as the EU policy government handbooks: the development of a more confined and restricted role of the Commission in EU policy and law-making. All in all, these books together sketch the image of an actor that has become more strictly bound by its Treaty-attributed task with less room for progressive development by its own insights. Freedoms Delors' Commission certainly still had.

(b.2) Narrative in handbooks on EU labour law

Perception of the role of social dialogue in EU law-making

The Handbook by Nielsen and Szyszczak (2nd edition of 1993) gives an interesting account of the doctrinal debate about Social Dialogue at that time. They quote Blanpain who is very reserved about the effectiveness of Social Dialogue, since, in his view, "trade unions do not have enough power at the European Level to force the employers' associations or multinational groups to meet around the bargaining table".²⁰⁹ Bercusson is more optimistic as he argued another side of the Social Dialogue, namely that it provides "flexibility and consensus by the maximum democratic involvement of employers and workers".²¹⁰ Nielsen and Szyszczak hold a more middle position as they conclude the section with the remark that it "remains to be seen whether this new procedure is a viable alternative to Community legislation".²¹¹

In Nielsen's handbook (published in 2000), Collective Agreements are considered a source on their own, as she positions them not only in a separate subsection in the chapter on "Sources", but also writes that "Article 138 EC and 139 EC provide for the possibility of **adopting EU legislation** on the basis of European collective agreements concluded by the social partners at EU level [...]"²¹² [emphasis BtH]. Further down in the book she talks about "**Legislative competence** of Social Partners"²¹³ [emphasis BtH]. This resonates one of the conclusions of the CFI in the *UEAPME*-case on the point of democracy as quoted by Nielsen: "[...] the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council, [...], with a **legislative foundation** at Community level."²¹⁴

In her book, also published in 2000, Szyszczak, labels collective bargaining as a source of Community labour law,²¹⁵ more precisely "a binding piece of Community law by means of a Council Directive."²¹⁶ She clearly distinguishes a doctrinal debate on the

²⁰⁹ R. NIELSEN and E. SZYSZCZAK (1993 - 2nd edition), p. 35.

²¹⁰ Ibidem.

²¹¹ Ibidem.

²¹² R. NIELSEN (2000), *European Labour Law* (DJØF Publishing; Copenhagen), 51.

²¹³ NIELSEN (2000), P. 132.

²¹⁴ NIELSEN (2000), p. 137; and CFI *UEAPME* ECLI:EU:CFI:1998:128, par. 89.

²¹⁵ SZYSZCZAK (2000), p. 35.

²¹⁶ Ibidem, p. 36.

role of social partners as institutional actors. The strongest reference is to the works by Dølvick, who argued that “social partners have been recognised and integrated in a modest but new kind of **co-regulatory regime** of international labour market governance at Community level which has no counterpart at any other place in the world”²¹⁷ [emphasis BtH].

Bercusson, wrote his 1st edition of *European Labour Law*²¹⁸ in 1996 when the Social Dialogue was still relatively new. In his preface he therefore indicates that since European labour law is in evolutionary change, the prospects of further operationalisation of the European Social Dialogue is one of the two features for the long-term perspective.²¹⁹ Moreover, as part of the historical development of EC Labour Law, he devotes a whole chapter on the Strategy of European Social Dialogue.²²⁰ In this chapter, Bercusson draws a picture of both the Commission (in establishing consultation bodies, including from both sides of the industry) and the European Parliament (being very open to relations with social partners because this was important for their electability), being very favourable towards social partners.²²¹ However, making Social Partners work together was not so easy. Bercusson explains this from the wider context of social dumping and “social regime competition”. A context that put both sides of the industry on different sides of possible EU social policy strategies. Approaches that, despite various developments, still seem not resolved. According to Bercusson the 1989 Charter and the 1991 Protocol and Agreement did achieve a consensus between Social Partners that Social Dialogue “should become a, if not the, primary instrument for social and labour regulation in the EU.”²²² To what extent such role will also be successful depends on the possibilities of sectoral social dialogue at EU level. After analysing some of these developments, Bercusson concludes that there are opportunities, however, much depends on strategies and directions to be taken in the future.²²³

In the context of the different approaches, or incentives, for Social Partners to go along with Delors’ idea of a Social Dialogue at EU level, Bercusson introduced referred to the principle of “negotiating in the shadow of the law”. This has been picked up by several other scholars. Barnard, for example, elaborates on this by explaining rather clearly the different approaches to Social Dialogue by Social Partners. For employers Social Dialogue is interesting, because if they do not negotiate an agree-

²¹⁷ *Ibidem*, p. 38; J. DØLVICK (1997), *The ETUC and Development of Social Dialogue and European Negotiations after Maastricht*, Arena Working Paper 2, p. 76.

²¹⁸ And as indicated in the list above also the only one consulted.

²¹⁹ BERCUSSON (1996), p vii.

²²⁰ *Ibidem*, p. 72 ff.

²²¹ *Ibidem*, p. 72-73.

²²² *Ibidem*, p. 78.

²²³ *Ibidem*, p. 94.

ment, the Commission may take the proposal to the legislative route, which may have a for them disadvantage result since in general legislation is less flexible and holds fewer options for derogations.²²⁴ Trade Unions, on the contrary, prefer legislation with room for collective bargaining “to top up the minimum standards provided by the law.”²²⁵ Davies, who also considers social dialogue as part of the legislative process, since the examination thereof will focus “on the role of the social partners and their power to develop labour law by reaching agreements [...],”²²⁶ follows a similar interpretation.²²⁷ These explanations based on the principle of “negotiating in the shadow of the law” are much in line with the developments described in Narratives 1 and 2 with regard to the early days of EU Social Dialogue which resulted in strong involvement by the Commission.

Interpretations of the Treaty provisions on social dialogue

In the context of this contribution two handbooks are rather disappointing with the information they provide about the Social Dialogue. Riesenhuber is extremely short about the Social Dialogue. He qualifies it as a source of EU employment law and states that with the possibility to extend the agreements to EU law by means of a Council decision Social Partners “can directly influence the content of EU legislation”.²²⁸ This is basically all he says about it. Blanpain addresses Social Dialogue elaborately. He too underlines the important role of Social Partners in shaping EU labour law. He acknowledges that there are a number of extremely complex problems of legal nature for which further EU legislation may be needed.²²⁹ However, none of the problems he identifies relate to the issue of the Commission performing an appropriateness test and whether or not this may give rise for the Commission to refuse to present an agreement to the Council.

The other handbooks are somewhat more insightful regarding the issues relevant for this narrative. Regarding the more legal technical nature of the Social Dialogue, Nielsen and Szyszczak write that “at the joint request of the social partners the agreements **are to be given** legally binding force by a decision of the Council.”²³⁰ [emphasis BtH] In the 3rd edition of their book this wording is adjusted to “any agreement reached **may be** implemented by a Council decision.” Barnard is maybe the most explicit in qualifying Social Dialogue as part of EU social legislation. She calls social dia-

²²⁴ BARNARD (2000 – 2nd edition), p. 102.

²²⁵ Ibidem; and S. FREDMAN (1998), ‘Social Law in the European Union: the Impact of the Lawmaking Process’, in CRAIG and HARLOW (eds.), *Lawmaking in the European Union* (Kluwer; Deventer), p. 409.

²²⁶ DAVIES (2012), p. 29.

²²⁷ DAVIES (2012), p. 35-39.

²²⁸ RIESENHUBER (2012), p. 16.

²²⁹ BLANPAIN (2012), p. 193.

²³⁰ R. NIELSEN and E. SZYSZCZAK (1993 - 2nd edition), p. 34.

logue “the collective route to legislation” and “the second limb of the twin-track approach”, with the first being the legislative route, to EU social legislation.²³¹ Furthermore, she writes “social partners at Community level negotiate agreements which are then extended to all workers by Council “decision”.”²³² Additionally, she refers to Streeck who described Social Dialogue as “neo-voluntarism”, i.e. “putting the will of those affected by a rule, and the “voluntary” agreements negotiated between them, above the will or potential will of the legislature.”²³³

When the signatories have requested to give extended effect to their agreement, a common doctrinal view is that the Commission takes back control over the procedure. In this context Barnard writes that as part of its role as guardian of the Treaties, the Commission “considers the mandate of the social partners and the “legality” of each clause in the collective agreement in relation to Community law, and the provisions regarding SMEs set out in Article 137(2).”²³⁴ In the footnote reference is made to an Opinion by ECOSOC²³⁵ in which the assumption of power (over the process) by the Commission was contested “on the grounds that the Commission has no discretion whether a collective agreement should be put to the Council.”²³⁶ To understand the implication of this, it is helpful to combine this with the account by Watson.

Watson also qualifies Social Dialogue as “legislative role of the Social Partners”.²³⁷ She also confirms that the Commission verifies a number of factors inherent to the EU legislative process before presenting the agreement to the Council, albeit it different ones than Barnard (and most others) identified. Watson lists as factors to be verified: 1) a check whether the agreement falls within the competence of Art. 137 EC (now Art. 153 TFEU) “in the sense that it contributes to the realization of the social aims defined in that provision”; 2) the legality of the clauses in the agreement; 3) compliance with the provisions regarding SMEs; and 4) “compatibility with the principles of subsidiarity and proportionality”.²³⁸ The Commission then sets out its assessment of the agreement in an Explanatory Memorandum which is attached to the

²³¹ BARNARD (2000 – 2nd edition), p. 90; and exactly the same: BARNARD (2012 – 4th edition), p. 71.

²³² BARNARD (2000 – 2nd edition), p. 90.

²³³ Ibidem; and W. STREECK (1999), ‘Competitive Solidarity: Rethinking the “European Social Model”’ *MPIfG Working Paper* 99/8; and W. STREECK (1995), ‘Neo-Voluntarism: A New Social Policy Regime’, *European Law Journal* Vol. 1, 31.

²³⁴ BARNARD (2000 – 2nd edition), p. 93; and BARNARD (2012 – 4th edition), p. 76, both with references to: CFI *UEAPME*-case ECLI:EU:CFI:1998:128, par. 84; and COM(93) 600 final, par. 39. BLANPAIN (2012), p. 195 does the same.

²³⁵ Opinion 94/C 397/17 (OJ [1994] C397/40).

²³⁶ The Opinion was originally cited by: B. BERCUSSON (1999), ‘Democratic Legitimacy and European Labour Law’, *Industrial Law Journal* Vol. 28, p. 162.

²³⁷ WATSON (2009), p. 83.

²³⁸ WATSON (2009), p. 84, with reference to: S. SMISMANS (2007), ‘The European Social Dialogue between Constitutional and Labour Law’, *European Law Review* Vol. 32, p. 351. **NB** Nothing is mentioned about checking the representativity (or mandate) of the signatories to the agreement.

proposal for the implementation of the agreement.²³⁹ Whatever the outcome of the assessment, in the account of Watson, the Commission cannot refuse to forward the agreement to the Council when requested to do so – **its role is simply that of a post-box**²⁴⁰ [emphasis BtH]. However, the Commission may advise the Council not to adopt the agreement since “the Council may decline to adopt the agreement in the terms presented to it.”²⁴¹

While Jaspers uses similar vocabulary and interpretations about the position of Social Dialogue in the law-making apparatus of the EU, his view on what the Commission can do with the request of the signatories to the agreement is radically different. Similar to Watson he acknowledges the task of the Commission to review whether the agreement contributes to the achievement of the Community’s objectives. However, unlike the others, he then concludes that when “in the view of the Commission the agreement does not satisfy these requirements, it may itself put forward a proposal for legislative act”.²⁴² He grounds his conclusion on paragraph 4.4 of the 2004 Communication of the Commission, however, this must be a (unfortunate) mistake, since this paragraph deals with autonomous agreements where it follows on the monitoring of the implementation of such agreements.²⁴³ Furthermore, Jaspers too lists among the checks of requirements a subsidiarity (or appropriateness) test. Here he indicates that if the agreement was negotiated following the consultation procedure, “it can be assumed that the question of appropriateness of supporting and complementing the activities of the Member States has already been answered.”²⁴⁴ In other cases, thus when negotiations have started autonomously, “the Commission will have to make up for this assessment in the course of determining whether to propose a Council decision”.²⁴⁵ With this phrasing Jaspers suggests that the Commission has a choice whether or not to present the agreement to the Council who can then either accept or reject it. Unfortunately, Jaspers makes no reference to the change in the provision that Social Partners can already indicate to start negotiations after the first round of consultation, consequently, he also doesn’t mention anything about whether such agreements should still undergo an appropriateness test or not. This is exactly the crux in the *EPSU*-case.

²³⁹ WATSON (2009), p. 84.

²⁴⁰ WATSON (2009), p. 85.

²⁴¹ Ibidem.

²⁴² JASPERS, PENNINGNS and PETERS (2019), p. 265.

²⁴³ COM(2004) 557 final (listed under narrative 2).

²⁴⁴ JASPERS, PENNINGNS and PETERS (2019), p. 266.

²⁴⁵ Ibidem.

4.1) Concluding reflections on the three narratives

The aim of this contribution was to analyse what the strong expectations by Social Partners, and in the case in particular *EPSU*, are based on. Did the EU indeed create institutional settings that justify those expectations and, consequently, did the Commission break the “promise”? To analyse these three impressionistic narratives have been sketched.

The first narrative is that of Social Partners, or more precisely of trade unions. The impression this narrative gives is that at the start of the Social Dialogue the Commission was much involved and supported Social Partners in any possible way to get them to participate successfully. This included presenting all agreements of Social Partners to the Council to be extended to EU law when signatories requested such. This attitude started to change since 2012. While Narrative 1 mainly reflects how the change in attitude is perceived by Social Partners, Narrative 2 provides more clarity in the background of the changed attitude.

Narrative 2 is mainly based on documents from the Commission and hence reflects more the view of the Commission. This narrative reveals two story lines. The first is the continuous emphasis the Commission has put on the importance of Social Dialogue (at cross-sectoral and sectoral level) for the EU. For EU social policy in particular, but also for the EU’s internal market and economic and employment policies. Especially the early documents demonstrate this as they strongly support the development of Social Dialogue. Many are from the Delors Commission, but this also includes the EPSR (especially paragraph 20 of the preamble) from the Juncker Commission. The second story line is one in which the Commission starts to take a bit of distance from Social Partners and starts to treat Social Dialogue more similar to any other aspects of EU law-making. This is particularly apparent in the REFIT programme from the Barroso Commission and the continuation thereof in the Juncker Commission’s Better Work Agenda. It is also apparent in the interpretation of Article 154 TFEU on the point where Social Partners indicate after the first round of consultation their desire to initiate negotiations. On the one hand this is clearly presented as leaving Social Partners more room to negotiate in autonomy, on the other hand it is used to argue that because of that room it makes their agreements part of the appropriateness test.

Narrative 3 is more neutral as it reflects the view of (legal) scholars on the position and regulation of Social Dialogue in EU (labour) law as expressed in Handbooks. Given the continuous emphasise on the importance of Social Dialogue for EU social policy, but also for the internal market and economic and employment policies it is actually shocking that basically no attention at all is paid on Social Dialogue in the general handbooks on EU Government and EU Law. The information in these handbooks is still interesting as it helps to understand the changed position of the Commission over the course of time, which understandably affects its attitude towards Social Partners and Social Dialogue. Nonetheless, it is shocking and should be a red

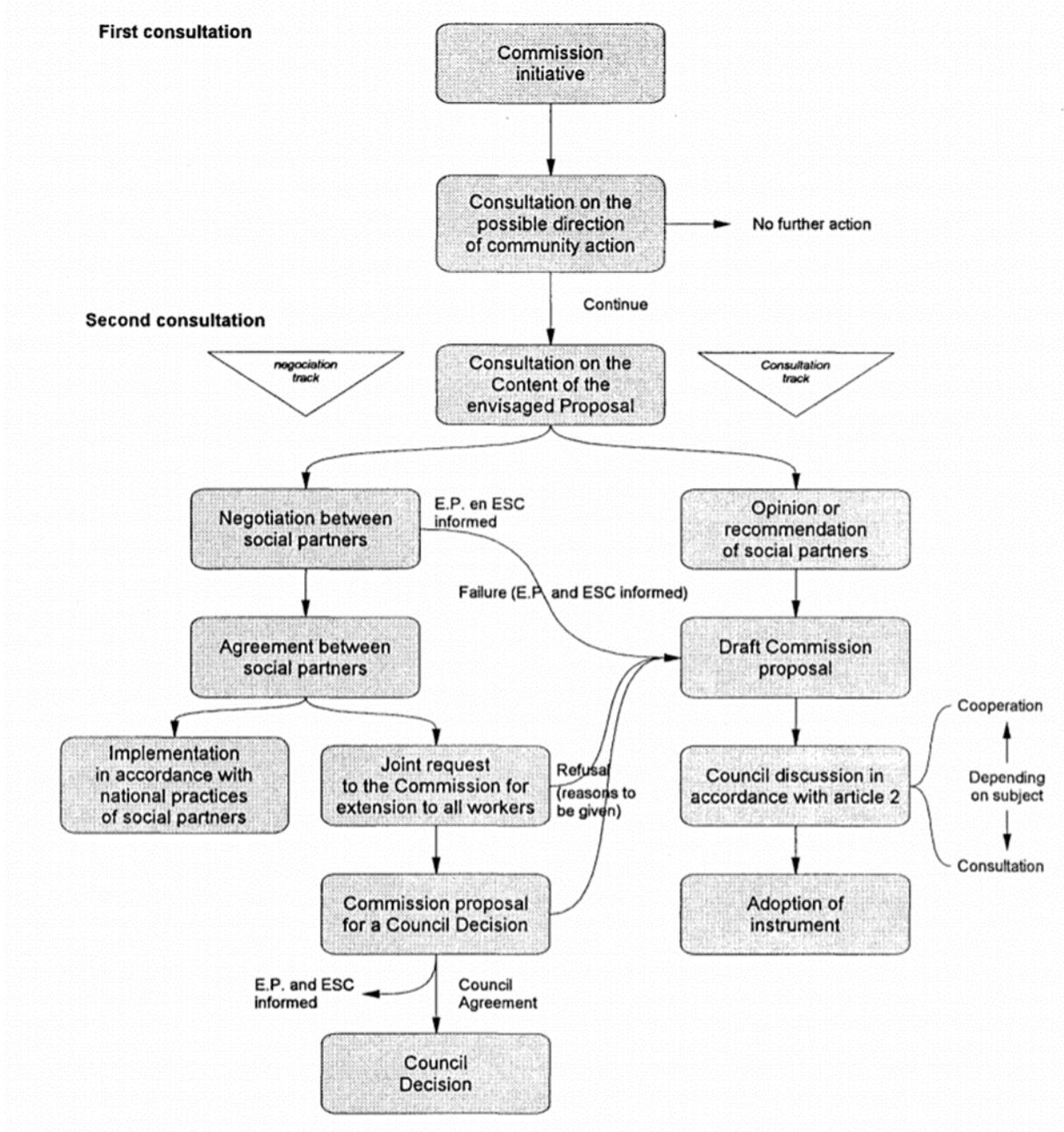
flag that apparently in general EU government and law there is a huge gap in knowledge about the importance of Social Dialogue and the involvement of Social Partners in law-making.

The handbooks on EU labour law seem to understand this much better, obviously. However, all of them seem to have missed the changing relationship between the Commission and Social Partners. Many texts are based on the perception of Social Dialogue as established in the Delors period (including the scheme in Annex 1). This is most visible in handbooks that have been updated over the course of time since their texts on Social Dialogue has hardly changed. For some of these books that make sense as their last edition was around 2000 or in 2012, the latter being the year in which this relationship started to change. The more recent handbooks though also do not pick up on these changes. For sure the implications of REFIT and the Better Work Agenda have been collectively missed. A few scholars mention the appropriateness test being part of the checks the Commission needs to make before presenting the agreement to the Council. However, they are unclear about what this means for the next step, especially whether this means the Commission can decide not to present the agreement to the Council. Thus, while these handbooks do help to understand what promise was made, they are of little help how this promise has changed over the course of time and whether we should consider the current attitude and practice of the Commission as a broken promise.

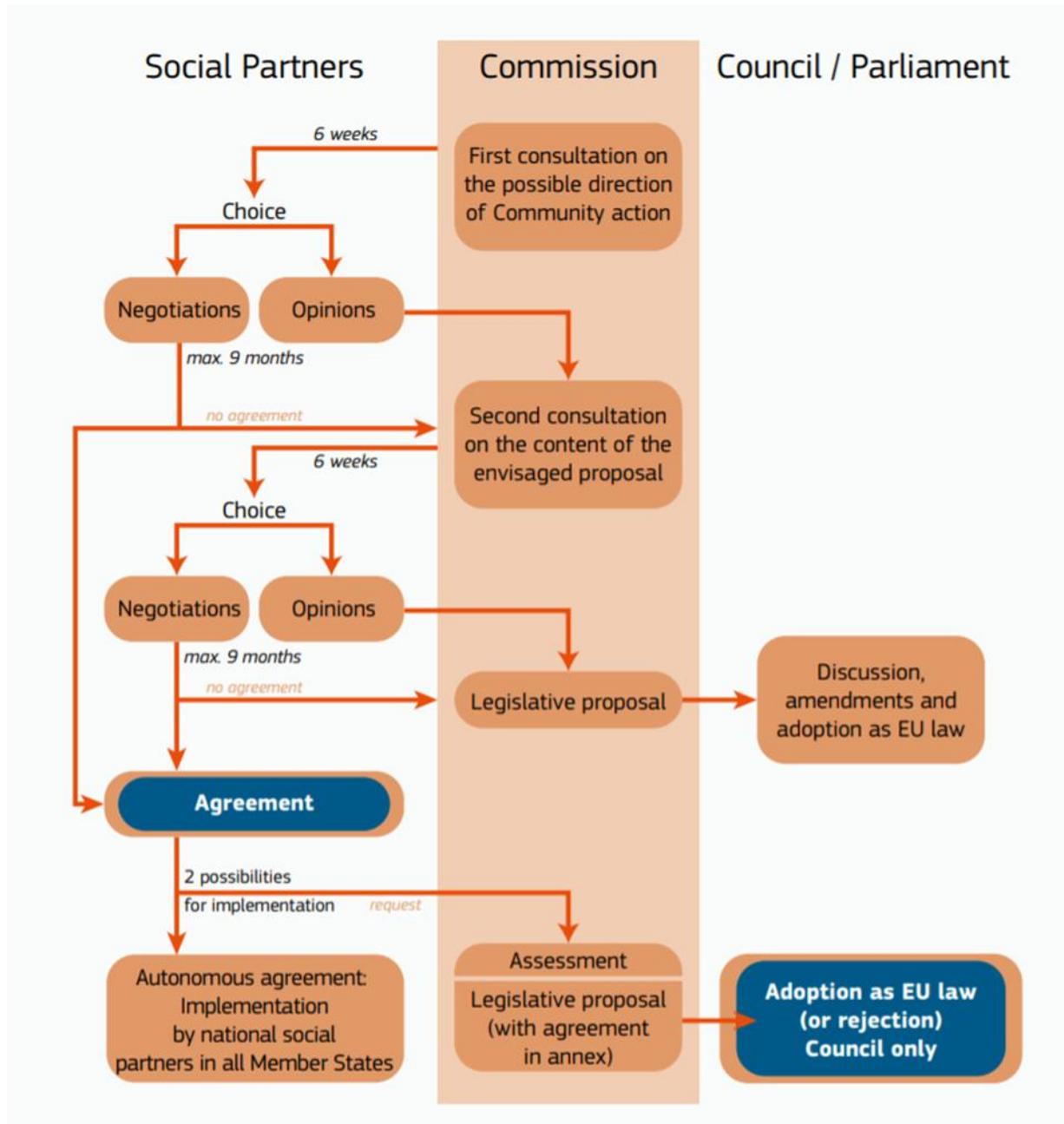
To conclude one final reflection based on the three narratives together. All three are clear in that Social Dialogue is important for EU law-making. Not only for social policy, but also for the internal market, and economic and employment policies. This is clearly reflected also in the numerous for a Social Partners are involved and various levels Social Dialogue takes place. Although different from practices in the Member States, EU Social Dialogue does reflect a European value of a special role for both sides of the industry in policy and law-making. As recognised by most scholars, this value holds many complex legal challenges in the context of the EU. A number of these challenges are related to the EU's specific legal order and institutional setting with the Commission as guardian of EU goals and initiator of EU legislation. This is further complicated by the requirement of subsidiarity (and proportionality) which plays an important role in REFIT and the Better Work Agenda. While from a (constitutional) general EU law perspective and requirements of democracy such critical programmes are understandable, completely ignoring the specific nature, meaning and value of the role of Social Partners and Social Dialogue in these programmes is incomprehensible. In fact, this indeed results in a broken promise. To put it in another metaphor: in word Social Dialogue is part of the heart of the EU, in practice though, this part of the heart is neglected. As such it was just a matter of time for a heart attack to happen: the *EPSU*-case.

Annex 1 Procedure EU social policy law-making

Source: COM(93) 600 final; also referred to in the Handbook(s) by Barnard



Annex 2 Consultation and negotiation procedure under Art. 154 and 155
 Source: Commission, *A New Start for Social Dialogue*, p.7



Some preliminary thoughts on the General Court's *EPSU* decision from the perspective of EU constitutional law

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This note formulates some observations on specific themes related to the *EPSU*²⁴⁶ case from the perspective of EU constitutional law. I will address the following questions: whether an agreement concluded at Union level and implemented pursuant to Article 155(2) TFEU ought to be considered as a legislative act or not; the extent the Commission's right of initiative as it exists in the particular context of Article 155(2) TFEU; and the extent of the Commission's duty to motivate a refusal to submit an agreement to the Council in order for that agreement to be implemented. *In fine* I will address the normative case for overruling the *EPSU* decision. The gist of my argument will be the following: the deck of cards of EU constitutional law currently appears to be stacked against *EPSU* and, therefore, the social partners when they attempt to transform their negotiated agreements into binding European law. Nevertheless – and though I think it is unlikely the Court will follow this path – there is a path of principle, based on well-known past constitutional precedents, which might lead the CJEU to reaffirm the importance of social dialogue.

4.2) Some legal questions

An agreement by the social partners at EU level: a legislative act?

At first sight, precedent seems to indicate that agreements reached between the social partners at EU level ought to be recognized as "legislative measures". In its judgment in *UEAPME*, the Court of First Instance held that Directive 96/34 on the framework agreement on parental leave had to be considered as a "legislative measure" rather than as a "decision adopted in the form of a directive".²⁴⁷ The Court further held that the "parties representative of management and labour" ensured the "participation of the people" required by the "principle of democracy".²⁴⁸ Of course, the value of the *dicta* in *UEAPME* may be doubted given that these determinations where

* I would like to thank all the participants of the *Amicus Curia Workshop on the EPSU Case* organized on September 16th 2020 for their helpful comments and feedback, as well as the organizers of the event (Silvia Borelli and Filip Dorssemont). All errors are mine alone.

²⁴⁶Case T-310/18, *EPSU*, EU:T:2019:757.

²⁴⁷Case T-135/96, *UEAPME v Council*, EU:T:1998:128, paragraph 64.

²⁴⁸*Ibid.*, paragraph 89.

made merely relating to the question of standing of individual applicants under the action for annulment.

But the question must be raised whether the *dicta* in *UEAPME* still carry the day in 2020. Indeed, the category of legislative acts was not formally recognized by Union constitutional law until the adoption of the Lisbon Treaty. The category is not without importance: it triggers certain procedural consequences, such as the role of national parliaments in light of the principle of subsidiarity (Protocols No 1 and 2 of the Treaties), but also the requirement of the Council and of the European Parliament to sit in public when deliberating on legislative acts (Article 16(8) TEU and 15(2) TFEU). The Lisbon Treaty attempted a definition in its Article 289(3) TFEU: “Legal acts adopted by legislative procedure shall constitute legislative acts.” The interpretation given by what has meanwhile become the leading case on this issue makes matters difficult for the applicants in the *EPSU* case. According to the Grand Chamber of the Court, “a legal act can be classified as a legislative act of the European Union *only if* it has been adopted on the basis of a provision of the Treaties which expressly refers either to the ordinary legislative procedure or to the special legislative procedure.”²⁴⁹

The final nail in the coffin of the recognition of such agreements as legislative in nature may well lie in the importance of a policy consideration: legal certainty. Echoing its Advocate General, the Court found in that case that such a straightforward rule “provides the requisite legal certainty in procedures for adopting EU acts, in that it makes it possible to identify with certainty the legal bases empowering the institutions of the European Union to adopt legislative acts and to distinguish those bases which can serve only as a foundation for the adoption of non-legislative acts”.²⁵⁰ The Advocate General adds (without being confirmed on this point by the Court) that the suggestion of classifying an act as a legislative act on the basis of its content is “irrelevant”.²⁵¹ If that is the case, it might well be considered that the considerable legitimacy of an agreement negotiated by the social partners, or the principled language of *UEAPME*, is likely to be deemed an equally irrelevant consideration. This offers a damning perspective on the *EPSU* case: Article 155(2) merely states that an agreement “shall be implemented ... by a Council decision on a proposal from the Commission”, omitting any mention of a legislative procedure.²⁵² In light of the CJEU’s motivation of legal certainty, it seems unlikely that the Court would reconsider its decision in this regard.

²⁴⁹Joined Cases C-643/15 and C-647/17, *Slovak Republic and Hungary v Council*, EU:C:2017:631, paragraph 62 (I underline)

²⁵⁰*Ibid.*, paragraph 63. See also Opinion of AG Bot in the same case, EU:C:2017:618, paragraphs 66 – 70.

²⁵¹Opinion of AG Bot in the same case, EU:C:2017:618, paragraph 64.

²⁵²The General Court rightly underlines this in *EPSU*, paragraph 69.

There is nevertheless a (narrow) path of principle which might lead the Court of Justice away from this apparently conclusive set of arguments. It is indeed well known that the Court sometimes takes liberties with the text of the Treaties, or overrules (explicitly or implicitly) existing lines of precedent. The Court might depart from precedent in order to reaffirm the importance of European democracy, and in order to strengthen the constitutional position of social dialogue. In a series of bold judgments with an often doubtful basis in the text of the Treaties, the Court expanded the procedural rights and duties of the European Parliament²⁵³ and ensured that the requirement that the Council consult the Parliament had at least some teeth.²⁵⁴ Nothing stands in its way if it wants to do so once more. To the contrary, the Lisbon Treaty has emphasized the importance of “democratic principles” (eg Articles 2 and 10 TEU) and Article 3 TFEU calls upon the creation of a social market economy while Article 9 ensures the mainstreaming of social objectives across all policy fields. In light of such a contextual interpretation, the Court might well find that agreements negotiated by the social partners deserve recognition in the form of the ascription of the label of legislative acts. Yet many commentators have grown disillusioned with the positions taken up by the Court of Justice in recent years. One commentator observes that if *UEAPME* did affirm the importance of the social partners for European democracy, “neither the General Court nor the Court have reiterated or confirmed” the importance of this point in subsequent judgments²⁵⁵. The glorious days of the CJEU’s heroic pro-democracy jurisprudence seem long gone.

The right of initiative of the Commission

It is doubtful whether the status of an agreement reached by the social partners as a legislative or non-legislative act has much of an impact on the extent of the Commission’s right of initiative. Although Article 17(2) TEU does explicitly provide that “Union legislative acts may only be adopted on the basis of a Commission proposal”, this is the case “except where the Treaties provide otherwise”.

The heart of the problem raised in *EPSU* is therefore the interpretation of Article 155(2) TFEU. I concur with my colleagues who have argued that there is a relatively strong textual case that Article 155(2) can be understood as an exception to the quasi-monopoly of the Commission. If Article 155(2) TFEU states that “[a]greements concluded at Union level *shall* be implemented ... in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal of the Commission”, the word *shall* can be understood as imposing an obligation on the Commission to submit such submit such an agreement to the Council. The problem

²⁵³Case 70/88, *Parliament v Council*, EU:C:1990:217; Case 294/83, *Les Verts*, 294/83, EU:C:1986:166.

²⁵⁴Case 138/79, *Roquette Frères*, 138/79, EU:C:1980:249; see also Case C-65/90, *Parliament v Council*, EU:C:1992:325 (about the reconsultation of Parliament).

²⁵⁵D. BLANC, ‘L’Europe démocratique: récit des récits ou matrice d’îlots narratifs?’ in A. BAILLEUX, E. BERNARD, S. JACQUOT, *Les récits judiciaires de l’Europe*, Bruxelles, Bruylant, 2019, p. 138.

with this argument is perhaps that it reaches so far as to be vulnerable to a *reductio ad absurdum*: if the Commission is forced to submit such a proposal, why wouldn't the Council then also be compelled to adopt it?²⁵⁶ Whereas the word *shall* may provide the Court of Justice with a plausible justification to quash the General Court's decision in *EPSU*, the Court also has a plausible justification at its disposal to confirm this holding.

Unfortunately, the constitutional deck of cards appears once more to be stacked against the case of the social partners. First of all, it is significant to note that a leading commentary states, co-authored by none less than the current president of the CJEU, states simply that the "Commission and the Council are *in no case* obliged to implement agreements at the request of signatory parties".²⁵⁷ This position is not justified with reference to arguments derived from the case-law or from other scholarly work.

Second, the CJEU has protected the right of initiative of the Commission even against explicit wording of conclusions of other institutions, like the European Council. In this context, the Court emphasized that the power of legislative initiative attributed to the Commission "reflects the principle of conferred powers, enshrined in Article 13(2) TEU, and, more broadly, the principle of institutional balance, characteristic of the institutional structure of the European Union."²⁵⁸ Even the hypothesis of a political consensus reflected in institutional practice to alter the rules of the Treaties is excluded by the Court because only the Masters of the Treaties can alter the constitutional settlement of the Union.²⁵⁹

Third, the case-law in an adjacent domain, that related to European citizens' initiatives, does not bode well. Indeed, the Grand Chamber of the Court of Justice found that the principle of institutional balance implied that the Commission retains full freedom in its decision to submit or not submit a proposal to adopt an act to the European institutions. It is thus "for the Commission to decide whether or not to submit a proposal for a legislative act",²⁶⁰ and the right to submit an ECI "does not undermine the Commission's power of legislative initiative, and the Commission remains free not to submit a proposal provided that it informs the institution concerned of the reasons."²⁶¹ The Court emphasized that although the "system of representative democracy was complemented, with the Treaty of Lisbon, by instruments of participatory democracy, ... that objective fits within the pre-existing institutional balance and is

²⁵⁶*EPSU*, *supra* note 1, paragraph 62.

²⁵⁷K. LENAERTS, P. VAN NUFFEL, *European Union Law*, London, Thomson Reuters, 2011, p. 682 (I underline).

²⁵⁸*Slovak Republic and Hungary v Council*, *supra* note 4, paragraph 146.

²⁵⁹*Ibid.*, paragraph 149, with reference to case C-363/14, *Parliament v Council*, paragraph 43.

²⁶⁰Case C-418/18 P, *Puppinck*, EU:C:2019:1113, paragraph 59.

²⁶¹*Ibid.*, paragraph 61.

pursued within the limits of the powers attributed to each EU institution by the Treaties, the authors of which did not intend, by means of the introduction of that mechanism, to deprive the Commission of the power of legislative initiative conferred on it by Article 17 TEU".²⁶²

One may obviously doubt the relevance of these conclusions for the topic which concerns us here. Generalizations on the basis of particular cases are only worth so much. It is easy enough to distinguish the case-law on the basis of citizens' initiative on the grounds that the democratic legitimacy of such initiatives remains relatively weaker compared to agreements negotiated by the social partners at a pan-European level, or the Treaty's recognition of the autonomy of the dialogue between social partners (Article 152 TFEU) or the recognition of collective bargaining as a fundamental right (Article 28 Charter) only reinforce this proposition.²⁶³ This would be the principled case for overruling the General Court's judgment. But one cannot exclude the possibility that these judgments indicate a systematic policy stance of the CJEU biased decidedly against anything other than representative democracy.

An argument that might provide at least some solace relates to the Commission's communications on the subject of the negotiations of the social partners. The suggestion of the General Court that these communications "are devoid of any binding legal force" seems hasty to say the least. Although communications may not have binding force as such, individuals may rely on the legitimate expectations they create.²⁶⁴ The social partners – who are not mere individuals, but critical players in the European democratic process – ought to be able to rely on the expectations created by European institutions such as the Commission. The principle of legitimate expectations could therefore be sufficient for the Court to find that – although the Commission in principle has a broad margin of discretion when exercising its right of initiative – it has limited that margin of discretion by its own doing. This solution, tempting as it might be for the Court, has the significant disadvantage for the social partners that it relies on Commission communications which could be altered in the future.

The duty of the Commission to state reasons

An additional question is whether the General Court adequately justified its decision not to implement the agreement. *EPSU* merely reiterates the settled case-law of the Court in this regard. Perhaps the most doubtful observation made by the General Court in this context is the fact that because Commission must evaluate "whether

²⁶²*Ibid.*, paragraph 65.

²⁶³See generally F. DORSSEMONT, K. LÖRCHER, M. SCHMITT, 'On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case', 48 *Industrial Law Journal* 571.

²⁶⁴See generally K. LENAERTS, P. VAN NUFFEL, *supra* no. 139, p. 855.

implementation of the agreement at EU level is appropriate, including by having regard to political, economic and social considerations”, the Commission has “broad discretion” and accordingly the Court’s power of review must be “limited”²⁶⁵.

It is in this context that reference to *UEAPME*’s stress on the role of social dialogue for European democracy might be relatively important²⁶⁶. Indeed, one can recognize the outlines of a sliding scale of intensity of review of the justification given by decisions to the Commission in function of their importance for the democratic process as a whole. For standard executive decision-making, the ordinary test may well be sufficient. However, for decisions which affect legal acts or potential future legal acts with heightened democratic legitimacy, such as acts deriving from citizens’ initiatives or acts implementing negotiated agreements, decision-making should be subject to higher scrutiny. At the extreme of this spectrum would stand decisions having an impact on the ordinary legislative procedure, as the pinnacle of democratically legitimate law-making in the European Union. In this respect, the Court held that a decision of the Commission to withdraw a proposal, must be justified by particularly weighty reasons: reasons “supported by cogent evidence or arguments”.²⁶⁷ The sliding scale argument relies in essence on the familiar policy argument that democratic legitimacy should play a role in the analysis of legal arguments, which has considerable pedigree in EU law.²⁶⁸

This approach could take inspiration from *Anagnostakis*, in which the Court adapted its doctrine in the context of citizens’ initiatives. In light of the democratic importance of citizens’ initiatives, the Commission’s decision was subject to a more stringent obligation of motivation and, accordingly, to a more demanding standard of review. The Court found that because “the refusal to register” an ECI “may impinge upon the very effectiveness of the right of Union citizens to submit a citizens’ initiative”, “such a decision must clearly disclose the grounds justifying the refusal” in order to ensure that the ECI does indeed “reinforce citizenship of the Union and enhance the democratic functioning of the Union through the participation of citizens in the democratic life of the Union (...)”.²⁶⁹ Should such a line of argument be followed, the Commission would be subject to a more stringent duty to state reasons when it rejects a request by the social partners to implement an agreement and the CJEU could subject such decisions to a more demanding type of scrutiny. A plausible factual case could then

²⁶⁵*EPSU*, *supra* note 1, paragraphs 79, 109, 111 and 112.

²⁶⁶*UEAPME*, *supra* note 2, paragraph 89.

²⁶⁷Case C-409/13, *Council v Commission*, EU:C:2015:217, paragraph 76.

²⁶⁸See *supra* text accompanying notes 19-20. The reliance on particular democratic legitimation has been noted in other contexts as well: AG Kokott referred to it in relation to the standing of private applicants under the action for annulment. See Opinion of AG Kokott in Case C-583/11 P *Inuit*, para. 38.

²⁶⁹Case T-450/12, *Anagnostakis*, EU:T:2015:739, paragraphs 25 and 26.

be constructed that the current justifications offered by the Commission are insufficient.

43) *In lieu of a conclusion: the case for overruling the General Court's EPSU decision*

Whatever the constitutional text and current case law might suggest, there's an important normative case to be made that the CJEU ought to overrule the General Court's decision in *EPSU*. What's at stake is a provocation by the European Commission which is attempting to "control, limit and even *de facto discourage*" social dialogue at the European level.²⁷⁰ This process of social dialogue is a crucial asset to ensure the legitimacy of a crisis-ridden European Union. For what seems like an eternity, a dominant theme among European lawyers on the centre-left has been that the balance between the market and the social has been out of joint²⁷¹ because of the Court's judgments in *Viking*, *Rüffert* and *Laval*.²⁷² The euro crisis only reinforced this perception, this time because executive law-making in order to combat the economic crisis managed to undermine much of the social law in the Member States.²⁷³ In such circumstances, the EU can ill afford to sound the *de facto* death knell for the process of social bargaining by undermining the process through which their outcome becomes legally binding.

²⁷⁰J.P. TRICART, 'Legislative implementation of European social partner agreements: challenges and debates', *ETUI Working Paper*, 2019.09.

²⁷¹Among the innumerable contributions related to this theme, see for instance P. SYRPIS, 'The EU and national systems of labour law' in A. ARNULL, D. CHALMERS (eds.), *The Oxford Handbook of European Union Law*, Oxford, Oxford University Press, 2015, 943; S. GARBEN, 'The Constitutional (Im)balance between 'the Market' and 'the Social'', 13 *European Constitutional Law Review*.

²⁷²For some examples out of a rich array of critical literature, see eg C. JOERGES, F. RÖDL, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the judgments of the ECJ in *Viking* and *Laval*', 15 *European Law Journal* 1 (2009); S. SCIARRA, 'Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU', 10 *Cambridge Yearbook of European Legal Studies* 563 (2007).

²⁷³See generally P. TSOUKALA, 'Euro Zone Crisis Management and the New Social Europe' 20 *Colum. J. Eur. L.* 31, p. 66 (2013); M. DAWSON, F. DE WITTE, 'Constitutional Balance in the EU after the Euro-Crisis' 76 *The Modern Law Review* 817 (2013).

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