

Shall or not shall be: That is the question

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Abstract

This contribution critically discusses the *EPSU* case of the Court of Justice of the European Union, delivered on 2 September 2021. It deals with the question of how to interpret Article 155 of the TFEU in relation to the scope of Article 155(2) TFEU, concluding that the European Commission has no obligation to propose a Directive to the Council implementing a collective agreement reached at European level.

Keywords

social dialogue, collective bargaining, autonomy, democracy

Case: Judgment of 2 September 2021, *European Federation of Public Service Unions (EPSU)*, C-928/19P, EU:C:2021:656.

1. Introduction

On 2 September 2021 the CJEU¹ issued a judgment in an appeal procedure against a decision of the General Court of 24 October 2019.² The CJEU dismissed the appeal. Both judgments constitute a major setback in the history of the European Social Dialogue insofar as it demonstrates that two major EU institutions (the Commission and the Court of Justice) have failed to ‘recognise and promote the role of the social partners at its level’, as is being prescribed in Article 152 TFEU. Numerous scholars have clearly indicated that they are not amused.³ Both judgments confirm

1. CJEU, 2 September 2021, C-928/19 P (*EPSU and Goudriaan v. Commission*).

2. 2 General Court, 24 October 2019, T-310/18 (*EPSU and Goudriaan v. Commission*).

3. M. A. Garcia-Munoz Alhambra, ‘An uncertain Future for EU-level Collective Bargaining: The New Rules of the Game After EPSU’, *Industrial Law Journal* 2022/2, 318–345; F. Dorssemont, ‘La non promozione del dialogo sociale europeo: osservazioni sul caso EPSU’, *Lavoro e Diritto*, 2020/1, 519–538 (see also F. Dorssemont and P. Van Mallegheem in *Verfassungsblog*: <https://verfassungsblog.de/sounding-the-death-knell-for-eu-social-dialogue/>); and S. Rainone, ‘EPSU

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that the European Commission has no obligation to propose a Directive to the Council implementing a collective agreement reached at European level. This is despite the fact that the European Commission has been envisaging such a legislative intervention; that the Commission has informed and consulted the social partners; and that the signatory parties have addressed a joint request to the Commission to do so. Both judgments elucidate the scope of Article 155(2) TFEU, concluding that there is no legal obligation for the Commission to table a proposal for implementation. For these reasons, the judgments have constitutional value. Despite the discretionary leeway of the European Commission to determine whether to table a proposal or not, both judgments also deal with the degree of formal justification of the decision not to propose a Directive and hence not to start the implementation procedure. This issue of administrative law will not be analysed in this contribution, albeit both labour law and administrative issues cannot be entirely dissociated from one another. Depending upon the nature of the Commission's role, the judicial scrutiny of the reasons potentially justifying a refusal can range from a close judicial control of the legality check by the Commission to a more marginal judicial control of the assessment of the appropriateness of the decision not to start the implementation. Hence, the intensity of the judicial control is a function of the nature of the powers exercised by the Commission. The third and the fourth grounds of appeal in the case dealt with these issues.

The genesis of the agreement and the history of the non-implementation of the ESPU agreement will be analysed (section 2). After a formal description of the procedure and the judgments (sections 3-4), I will take the liberty of formulating a series of critical observations (sections 5-9) and arrive at a conclusion (section 10).

II. The EPSU Agreement, a history of induced bargaining

The EPSU agreement is the outcome of a round of bargaining *induced* by the European Commission. Lo Faro has distinguished this bargaining process from voluntary bargaining on the basis of the origin of the bargaining process.⁴ The genesis of the bargaining procedure was heteronomous and the signatory parties asked the Commission to start a heteronomous avenue of implementation.⁵ Thus, in a Staff Working Document of 26 July 2013 the Commission considered enshrining the conclusions of a so-called fitness check on the issue of the information and consultation of workers regulated by Directives 98/59, 2001/23 and 2002/14:

More specifically, the exclusion of smaller enterprises and public administration from the scope of application of the Directives has been questioned on the grounds of the Directives' lack of practical relevance for a significant share of the workforce. Another gap was analysed in the separate exercise involving the exclusion of seafarers from the scope of application of a number of EU labour law Directives including the three I&C Directives.⁶

v European Commission: 'EU Social Dialogue: Valuable, But Only When Appropriate?', *International Labor Rights Case Law*, 2022/2, 17–22.

See also the acts of the Amicus curiae workshop organised by the Université catholique de Louvain and posted at http://csdle.lex.unict.it/sites/default/files/Documenti/WorkingPapers/20201012-071351_WP_CV_10-2020pdf.

4. A. Lo Faro, *Regulating Social Europe. Reality & Myth of Collective Bargaining in the EC Legal Order*, Oxford, Hart Publishing, 2000, 53–89.

5. C (2015) 2303 final.

6. Brussels, 26.7.2013 SWD (2013) 293 final, p. 5.

On 10 April 2015, the European Commission initiated a formal consultation procedure on the basis of Article 154 (2) TFEU, *inter alia*, on the issue of the extension of the scope *ratione personae* of these Directives to civil servants and employees in the public administrations of the Member States.⁷ On 21 December 2015, EUPAE and TUNED concluded a Framework Agreement on the information and consultation rights of civil servants and employees of central government administrations. On 1 February 2016, they filed a joint request to implement the agreement, which was addressed to the European Commission. It took the European Commission more than two years to respond to this request. On 5 March 2018, the European Commission formally refused the request, indicating it would not submit a proposal to the Council to implement the agreement by means of a Directive for three reasons enumerated in a tiny paragraph.

First, the Commission stated that central government administrations were under the authority of the Member State governments, that they exercised the powers of a public authority, and that their structure, organisation and functioning were *entirely* the responsibility of the Member States. This statement is nothing more or less than an insult to human intelligence. First and foremost, the nature of information and consultation procedures is that they do not affect managerial prerogatives. Secondly, the suggestion that EU labour law in no way affects the powers of a public authority, its structure, organisation and functioning is simply untrue. Here and now, EU free movement rules affect the Member States' recruitment and promotion policies, prevent these administrations from committing acts of discrimination based upon sex, race, religion or belief, disability and sexual orientation. Multiple EU rules relating to health and safety apply to government administration as well.

Secondly, the Commission stated that provisions ensuring a certain degree of information and consultation of civil servants and employees of those administrations already existed in many Member States. The latter may well be the case, but that is immaterial. Until the Maastricht Treaty, EU labour law was solely based upon a model of approximation of labour laws of Member States which directly affected the establishment or functioning of the internal market. In sum, the mere fact that provisions existed was not considered an obstacle, but a condition to legislative intervention.

Thirdly, the Commission found that 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. This argument is not convincing either. It is contradicted by a major finding of the fitness test, that the cost of non-intervention was in fact unequal treatment, and that intervention would reduce the existing extent of that unequal treatment. As will be highlighted, *infra*, the European Council, on a proposal of the Commission, has explicitly invoked equality as a reason to intervene in order to address the exclusion of another category of workers from the Directives dealing with worker involvement.⁸

7. C (2015) 2303 final.

8. See Recital 4 Directive (EU) 2015/1794. This Directive relates to worker involvement in relation to collective redundancies, transfer of undertakings, information and consultation at the level of the establishment or undertaking and at community level.

III. The attack: taking Article 155 TFEU and civil society seriously

On 15 May 2018, the European Federation of Public Service Unions and its Secretary General, Mr. Willem Goudriaan, brought an application for annulment of the contested decision. Hence, the employer's side did not join the application. EPSU was not the signatory party of the agreement but was a co-founder of the signatory trade union TUNED.

The application was considered admissible. The refusal of the Commission was not seen as a preparatory act, but as a definitive position.⁹ It had the effect of concluding a preliminary procedure laid down for the social partners persons, and of not opening the procedure for the adoption of a substantive act. Hence, it produced legal effects. The Commission did not dispute that EPSU had legal standing. The Court accepted that EPSU had legal standing, since although addressed to TUNED, the latter lacked corporate personality and autonomy. Hence, the result of the social dialogue in which TUNED participated had to be approved by the decision-making bodies of the two co-founders, EPSU and CESI. Since the application was admissible for EPSU, the objection against the standing of its Secretary General became irrelevant.¹⁰

The claimants challenged the decision on two distinct grounds. First, they argued that Article 155(2) TFEU does not provide a right to the European Commission to refuse to submit a proposal following the joint request.¹¹ In other words, the claimants argued that the European Commission was under an obligation to grant a joint request to submit a proposal for a Directive implementing the agreement, except in case of an insufficient representativeness of the social partners or if the clauses of the agreement were contrary to EU law. The second line of arguments related to the merits of the reasons for the decision, considered to be mistaken and insufficient.¹²

IV. The Judgment of the General Court

In assessing the scope of Article 155(2), the General Court tried to sort out the arguments raised by the applicants in three categories. It distinguished arguments relevant for the literal interpretation, the contextual interpretation and the teleological interpretation from so-called other arguments. Given a closer look, these other arguments¹³ relate to provisions of the Treaties which in my view could have been integrated into a contextual and teleological analysis as well. By excluding these arguments from the contextual and teleological interpretation, the General Court severely undermined the legal strategy of the applicants and impoverished to a significant degree the contextual and teleological analysis concerned. Nor did this dissociation enhance the credibility of the General Court in dealing with the case.

The General Court ruled that a mere literal or lexical interpretation of Article 155(2) takes into account the literal meaning in the light of the *travaux préparatoires*. The applicants had strong reasons to argue that Article 155(2) generated an obligation for the Commission to submit a proposal at their joint request. The provision states 'that the agreements concluded at Union level *shall be* implemented either in accordance with the procedures and practices specific to

9. General Court, 24 October 2019, T-310/18, § 28.

10. General Court, 24 October 2019, T-310/18, §§ 39-40.

11. General Court, 24 October 2019, T-310/18, § 45.

12. General Court, 24 October 2019, T-310/18, §§ 120-141.

13. These other arguments related, *inter alia*, to the principle of democracy, of subsidiarity and the right to collective bargaining (Article 28 CFREU).

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’.

According to the General Court, the word ‘shall’ should be interpreted as ‘may’ in a literal interpretation. This means that words in a literal interpretation mean the opposite of what their lexical meaning entails. Astonishingly, the General Court considered some elements which might be more appropriate in an historical interpretation. It referred to the fact that initially in a proposal drafted by the European social partners and submitted to the Member States, the word ‘may’ had been used and was subsequently and deliberately replaced by the wording ‘shall’.¹⁴ If ‘shall’, however, means ‘may’, it is difficult to see why it was replaced at all.

It is hard to see how this analysis would speak to the optional character of a granting of the request addressed to the Commission. However, the General Court stated that the imperative function of the word ‘shall’ could be explained by the fact that the drafting States would have liked to indicate that there were *only* two ways to implement the agreement. In my view, this is a questionable interpretation. In fact, it is hard to see why it would be necessary in a legal provision to state that an agreement can only be implemented following an heteronomous *or* an autonomous avenue. What on earth would have been a third way which needed to be excluded? In fact, the added value of Article 155(2) can only relate to a potential role of the European institutions. Social partners can always ensure an autonomous avenue of implementation. They do not need any authorisation from the EU to implement European agreements according to the practices of social partners and the Member States at that local level. Hence, the added value of Article 155(2) TFEU only lies in the fact that the will of the people can be expressed by the representatives to whom these rules apply, i.e. management and labour rather than elected representatives of the European Parliament, and that there is a genuine obligation of the European Commission to promote the European Social Dialogue by submitting a proposal.

In support of its interpretation, the General Court stated that the interpretation of the applicants would even amount to an obligation for the Council to adopt a Directive, despite the fact that this issue was not at the heart of the annulment procedure, and despite the fact that the General Court recognised that it was common ground for all parties that they at least agreed on the non-existence of this obligation.¹⁵

The Court also submitted Article 155(2) to what it called a contextual interpretation.¹⁶ In my view, the extremely selective way in which this was done by the General Court is unfortunate. In fact, the Court deliberately chose to analyse solely those parts of the Treaties which were helpful in corroborating its decision. In fact, all the other provisions invoked by the applicants in favour of their contextual interpretation were reshuffled in the part of the judgment dealing with the teleological interpretation and the part dedicated to ‘other arguments’. Thus, the only provision deemed to be worthy of contextual analysis is not even derived from the TFEU. Hence, it cannot be physically part of the context of the relevant text. Nor is there a hierarchy of Treaties.

The provision concerned, Article 17 TEU, does not at all deal with the legitimate interests of the citizens of Europe, its values, or a vision of democracy. It solely deals with the institutional power of the European Commission. Hence, the General Court organised a confrontation between an institutional actor and civil society around the issue of *legislative powers* and around the idea of the

14. General Court, 24 October 2019, T-310/18, §§ 56-57.

15. General Court, 24 October 2019, T-310/18, § 62.

16. General Court, 24 October 2019, T-310/18, §§ 64-82.

independency of the Commission, which should be prevented from taking instructions from any government institution, body, office, or entity.

Article 17 TEU highlights the central role of the European Commission in *pushing* the process of European integration in an exclusive way. The rationale of this central role is indicated in Article 17(1) TEU. The European Commission's role is to *promote* the general interest of the Union by taking appropriate *initiatives* to that end.

Prima facie, Article 17(2) TEU does not constitute an obstacle at all for the thesis that a provision in an entirely different Treaty would oblige the Commission to submit a proposal for a Directive implementing an agreement. Indeed, it provides that the principle that Union legislative acts may only be adopted on the basis of a Commission proposal, *except where the Treaties provide otherwise*. According to the same provision, 'Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide'. In the latter scenario, no exceptions seem to be allowed.

In order to overcome the absence of this obstacle, the General Court simply disqualified Directives implementing agreements as legislative instruments.¹⁷ This *obiter dictum* is probably a more major blow than the *dictum finale* of the judgment. In order to do so, the General Court referred to the definition of Article 289 TFEU of a legislative procedure. This provision was introduced by the Lisbon Treaty. The disqualification of Directives implementing agreements can only be explained by the fact that the European Parliament does not participate in the process. In sum, the General Court interpreted Article 155(2) TFEU dating back to Maastricht in the light of an original TCE provision, enshrined in an entirely different Treaty (Article 17 TEU), which it interpreted in the light of a provision as recent as the Lisbon Treaty.

The General Court underlined that the Commission has a margin of appreciation which is not limited at all to issues of legality, but also involves the appreciation of the appropriateness of the implementation, by having regard to all political, economic and social considerations.¹⁸ It further highlighted that management and labour are not capable of promoting the general interest of the Union, since they only represent a part of the multiple interests that must be taken into account. The General Court furthermore observed that the interpretation proposed by the applicants would alter the institutional balance.¹⁹

In its teleological interpretation, the General Court focused on two key provisions in the Social Policy Title, which tend to indicate an objective to be promoted.²⁰ Whereas Article 151 TFEU indicates that the dialogue between management and labour is one of the objectives to be promoted, Article 152 states that the Union (hence all European Institutions, including the General Court) need to promote the role of the actors of that dialogue. The General Court reduced the obligations stemming from these objectives to obligations to respect and refrain from influencing the social partners, whereas an obligation to promote should logically entail an obligation to ensure and to intervene. Although these provisions constitute what could be called the conceptual framework of the Social Policy Title, including Article 155(2) TFEU, the Court did not consider them relevant for the sake of a contextual interpretation.

Other provisions relate to the principle of democracy, horizontal subsidiarity, and the right to negotiate and conclude collective agreements, as well as the notion of a social market economy,

17. General Court, 24 October 2019, T-310/18, § 69.

18. General Court, 24 October 2019, T-310/18, § 79.

19. General Court, 24 October 2019, T-310/18, § 81.

20. General Court, 24 October 2019, T-310/18, § 83.

full employment, social progress and adequate social protection, which are at the core of two very teleological provisions (Article 3 TEU and Article 9 TFEU). The General Court not only refused to take these provisions into account within the context of a contextual and teleological interpretation, but it also provided proof of a very narrow approach to these crucial concepts. Thus, democracy has been reduced to parliamentary democracy. The General Court was unable to recognise that the principle of subsidiarity has a horizontal dimension, and last but not least, the Court also considered that neither Article 28 of the CFREU, Article 3 TEU, nor Article 9 TFEU read in isolation meant that management and labour could compel the institutions to implement an agreement.

The General Court also refused to take into account the fact that the policy of the European Commission was unprecedented and at odds with numerous communications on the European Social Dialogue.²¹ Despite the fact that the refusal of the Commission was incompatible with this long-standing tradition of communications, the General Court quashed the argument on the basis that the communications were not legally binding.

V. The judgment of the CJEU

The appeal against the judgment of the General Court dealing with the *constitutional* issue of an alleged obligation to table a proposal was based on two distinct grounds of appeal, rearranged by the CJEU.

First, the appellants argued that the literal, contextual and teleological interpretation of Articles 154 and 155 TFEU was vitiated by errors of law.²² They argued that there was an obligation for the Commission to table a proposal, unless there was an issue of representativeness of the signatory parties or an issue of legality of the substance of the agreement. They insisted on an important part of the *UEAPME* judgment which construes the role of social partners as an alternative way to ensure democratic participation.²³ The CJEU fully endorsed the position adopted by the General Court that the mandatory nature of Article 155(2) is sufficiently realised by the idea that the Treaty would have sought to restrict the number of methods of implementation to two. The CJEU also argued, following the General Court, that the line of interpretation developed by the appellants would imply that the Council would be under an obligation to approve the proposal and that even the social partners at Member State level would be under an obligation to opt for an autonomous avenue of implementation in the absence of a joint request. According to the Court,²⁴ such an obligation would be contrary to a Declaration which was attached to the Agreement on Social Policy which reads:

The eleven High Contracting Parties declare that the first of the arrangements for application of the agreements between management and labour at Community level – referred to in Article 4(2) – will consist in developing, by collective bargaining according to the rules of each Member State, the content of the agreements, and that consequently this arrangement implies no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation

21. General Court, 24 October 2019, T-310/18, § 101.

22. CJEU, 2 September 2021, C-928/19 P (*EPSU and Goudriaan v. Commission*), §§ 24-80.

23. Court of First Instance, 17 June 1998, T-135/96 (*UEAPME v. Council of the European Union*).

24. CJEU, 2 September 2021, C-928/19 P (*EPSU and Goudriaan v. Commission*), § 39.

The question arises as to whether this argument is convincing, since it does not address the obligations of the social partners at a national level.

The Court also criticised the reading of the appellants as to the relation between Articles 155 TFEU and Article 17 TEU. The appellants indeed claimed that no use could be made of Article 17 TEU, since Article 155 constituted a *lex specialis*. The CJEU, following the reasoning of the General Court, refused to recognise any contradiction between both provisions. Instead, it suggested that the power of the Commission under Article 155(2) TFEU is just a mere concretisation of its powers under Article 17 TEU. The CJEU hence considered that in the exercise of these powers the Commission has to ‘promote the general interest of the Union and take appropriate initiatives to that end’, despite the fact that the EPSU case was about the Commission not taking appropriate initiatives or adopting a decision not to take an initiative at all.²⁵

In the framework of the so-called contextual and teleological analysis, the CJEU strongly reduced the impact of the constitutional duties to respect the autonomy of the social partners and to promote the role of the social partners as well as the reference to Article 28 of the CFREU.²⁶ *Ratione temporis*, the respect of autonomy is being limited to the timeframe of the negotiations as a duty to refrain from intervention and does not entail any further positive action following that conclusion, despite the fact that charter rights need not just be respected, but also to observed and promoted.²⁷

Secondly, the appellants strongly criticised the judgment of the General Court insofar as it would have denied that the Directives implementing the agreements could not be seen as legislative in nature.²⁸ Building on the Opinion of the AG, the Court adopted an interesting position. Without formally distancing itself from the General Court, it seemed to indicate that the discussion on the legislative nature was not relevant to assessing whether the Commission has the power to decide whether it is appropriate or not to submit the proposal implementing the agreement to the Council. The Court did not explicitly endorse the idea that there is a hierarchy between Directives in the field of social policy implementing agreements and those in the field of social policy which would not qualify as legislative acts. Such a hierarchy might be applied to the detriment of the implemented agreements insofar as they could not derogate from more common standards in social policy based upon genuine Directives. In practice, a number of ‘genuine Directives in the field of EC policy, have avoided this problem, by indicating that they were not applicable to specific sectors where social partners have stepped in’.²⁹

VI. EU Social Dialogue as a means to enhance the legitimacy of the European Commission and to restore institutional balance

The General Court stated, in a remarkable dictum, that the reasoning of the applicants would alter the institutional balance to the detriment of the European Commission.³⁰ It is difficult to adopt a less myopic view on the role of social partners to the development of Social

25. CJEU, 2 September 2021, C-928/19 P (*EPSU and Goudriaan v. Commission*), § 45.

26. CJEU, 2 September 2021, C-928/19 P (*EPSU and Goudriaan v. Commission*), § 67.

27. Article 51 CFREU.

28. CJEU, 2 September 2021, C-928/19 P (*EPSU and Goudriaan v. Commission*), §§ 81-89.

29. See Article 1(3) Directive 2003/88/EC: ‘This Directive shall not apply to seafarers, as defined in Directive 1999/63/EC without prejudice to Article 2(8) of this Directive’.

30. General Court, 24 October 2019, T-310/18, § 81.

Policy. Rather than stating that the vision of the applicants on the European Social dialogue would alter the institutional balance to the detriment of the Commission, it is better to put an end to this falsification of its history. The European Social Dialogue was invented by the European Commission to enhance its legitimacy and to restore an institutional balance, enabling it to push the process of the European integration. This invention has even been referred to as the *Moment Delors*.³¹ Its invention has helped to empower both the trade unions as well as the European Commission in a dynamic which the late Brian Bercusson so accurately described as bargaining under the shadow of the law.³² The 'risk' of a legislative intervention by the Commission has been helpful in convincing the employers' association to start a bargaining process, whereas the fact that a proposal was based upon a previous agreement concluded by management and labour has been helpful for the Commission to convince the Council to adopt its proposal.

This mechanism obviously presupposes that the Commission is open to a progressive development of labour standards. In other words, the Commission cannot just use the social partners when it wishes to push integration and ignore them when it wants to push an alternative agenda of so-called Better Regulation. If the Commission is only willing to push the kind of agreements supported by management and labour of its own liking and is in practice even urging to renegotiate agreements until they like it, the institutional balance will indeed be altered, but this time to the detriment of the social partners. There is a serious risk that the social dialogue will not take place under the shadow of the law, however imprecise and unpredictable, but under the negative shadow of the European Commission. This transformation would mean a *mancipation* instead of an emancipation of the social partners and a threat to their autonomy.

VII. EU social Dialogue: perhaps not bargaining, but definitely an issue of legislation

The suggestion that Directives do not constitute legislation is at odds with the historiography on the emergence of the European Social Dialogue and of its institutionalisation prior to the conclusion of the agreements.³³ In a seminal Ph.D. thesis, Lo Faro questioned whether agreements concluded within the framework of the European Social Dialogue could actually be interpreted as a genuine expression of collective autonomy at EU level.³⁴ He considered this as an instrumentalisation of social partners to overcome a legislative deadlock. The fact that the negotiation of social partners was functional to a legislative process made him suggest that collective autonomy at EU level was fictitious. The position of the General Court has reversed this analysis in a

31. See C. Didry and A. Mias, *Le Moment Delors*, Brussels, P.I.E. Lang, 349p.

32. B. Bercusson, *European Labour Law*, London, Butterworths, 1996, 538-539.

33. See especially, J. Degimbe, *La politique sociale européenne. Du traité de Rome au traité d'Amsterdam*, Brussels, ETUI, 1999, 260p and C. Didry, and Mias, A. *Le moment Delors. Les syndicats au cœur de l'Europe sociale*, Frankfurt, Peter Lang, 2005, 349p; J. Dolvik, *An emerging island? ETUC, social dialogue and the europeanisation of the trade unions in the 1990s*, Brussels, ETUI, 1999, 249p. and D. Dumont, "Le dialogue social européen et ses instruments: du soft au hard law, et retour" in *Les sources du droit revisitées*, Limal, Anthemis, 2013, 329-380.

34. A. Lo Faro, *Regulating Social Europe. Reality & Myth of Collective Bargaining in the EC Legal Order*, Oxford, Hart Publishing, 192p. The Italian title of the Ph.D. thesis is more clear and more poetic: *Funzioni e Finzioni della Contrattazione collettiva comunitaria*; the European Social Dialogue is fictitious bargaining and is ancillary to a legislative process, despite the rhetoric of the provisions of the TFEU. Hence, it is not the intervention of the Council which is ancillary to the European Social Dialogue.

Copernican way.³⁵ It suggests that EU Directives implementing these agreements are not *genuine* legislation.

In my view, the idea that EU Directives implementing these agreements do not constitute legislation in the meaning of Article 17 TEU is awkward. The reasoning of the General Court is essentially based upon a Treaty provision which only came into force in 2009, whereas nearly all the Directives implementing agreements were adopted prior to the entering into force of the Lisbon Treaty. The idea that Directives implementing agreements prior to 2009 could cease to constitute legislative acts was simply unheard of prior to the *EPSU* judgment. In fact, the General Court mobilised a provision which is much more recent than the implemented agreements to make that point. These Directives were all implemented after a process of induced bargaining. Thus, the Commission was already consulting the social partners because it envisaged *legislative* interventions through a proposal of a Directive. It is extremely bizarre that if a successful bargaining process resulted in a joint request for implementation, the subsequent Directive would not constitute legislation.

In a judgment not sufficiently taken into account while analysing the European Social Dialogue, the Court indicated that it will interpret a Directive implementing an agreement in exactly the same way as it would interpret a legislative act. In *Chatzi*, the Court made it abundantly clear against a position developed by the German State that it would interpret Directives implementing collective agreements concluded at European level just like any other (legislative) Directive:

The Court, for its part, derives its jurisdiction to interpret Directives from Article 267 TFEU. The Framework Agreement is admittedly the product of a dialogue, based on the Agreement on Social Policy, between management and labour at European level, but it has been implemented, in accordance with Article 4(2) of the Agreement on Social Policy, by a Council Directive, of which it is thus an integral component (see, to this effect, Case C-537/07 Gómez-Limón Sánchez-Camacho [2009] ECR I-6525, paragraph 34).

*It follows that the jurisdiction of the Court to interpret the Framework Agreement does not differ from its general jurisdiction to interpret other provisions contained in Directives.*³⁶

VIII. EU Social Dialogue: a part of the ‘democratic life of the Union’

The General Court and the CJEU took very narrow approach of the notion of democracy. They essentially *reduced* the democratic process as an issue of parliamentary participation. According to the Court, the applicants’ proposal would amount to an undemocratic solution whereby the Commission would be prevented from following an ordinary legislative avenue after the conclusion of an agreement and a subsequent joint request.³⁷

In order to construe the quintessential involvement of the Parliament, the General Court furthermore invoked the *UEAPME* judgment. It is true that the *Tribunal* stated in *UEAPME* that ‘the participation of that institution (EP) in the Community legislative process reflects at Community level the fundamental democratic principle that the people must share in the exercise of power through a

35. See Opinion of AG Pikamäe § 72: ‘As the Commission rightly submits, Article 155 TFEU makes no express reference to the legislative procedure, whether ordinary or special, which means, according to the Court of Justice’s case-law, (74) that the measures adopted at the end of the procedure provided for in Article 155(2) TFEU are not legislative acts within the meaning of Article 289(3) TFEU’.

36. CJEU, 16 September 2010, C-149/10, §§ 24-25.

37. General Court, 24 October 2019, T-310/18, §§ 95-96.

representative assembly'.³⁸ However, the General Court's approach to presenting the reasoning developed in *UEAPME* was selective and misleading, not to mention fallacious. It completely disregarded that the *Tribunal de première Instance* indicated in the subsequent paragraph as clearly as possible that the sufficiently representative status of the social partners drafting the agreement is a valid and legitimate substitute for that parliamentary participation:

However, 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. In order to make sure that that requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative.³⁹

The suggestion of the General Court that the Commission could just completely ignore the expression of the will of the people as represented by management and labour on issues which directly affect *in casu* their interests, by submitting a proposal according to the ordinary legislative avenue, is irresponsible. Not only would it make a mockery of the constitutional role devoted to the European Social Dialogue in the field of social policy, as well as being at odds with the repeated pledge of the Commission to implement *ne varietur*, but it would also pose a serious threat to the legitimacy of both social partners as well as the European Parliament. It would actually allow for the expression of the will of the people to be contradicted. In such an irresponsible game, only populists will win.

In essence, there is no contradiction between democracy and collective autonomy. As the Court indicated itself in *UGT FSP*, autonomy means the right of self-government or, as the Court stated more accurately in French, '*le droit de se gouverner par ses propres lois*'.⁴⁰ In the *EPSU* case, the substance of the agreement concerned the organisation of industrial relations between the employers and the employees duly represented by the representative signatory parties. Democracy is about the right of the people to govern themselves as well.⁴¹ Democracy and autonomy can go hand in hand, as long as the *demos*, or the people concerned, are identified. In the case of the agreement at hand, the *demos* concerned by the information and consultation procedure are the persons who need to inform and consult and those who have a right to be informed and consulted. That *demos* is more adequately represented by the social partners concerned, than by elected parliamentarians.

The idea that the role of social partners could be a threat to democracy boils down to a very 19th century and parliamentarian vision of democracy with a disregard for civil society and its intermediaries. It will not be helpful to construe the European Union in a more bottom-up fashion. In the now abandoned Constitutional Treaty on the European Union, this crucial contribution of the autonomous Social Dialogue to the democratic life of the Union was expressed *a monte* by distinguishing it from representative and parliamentary democracy.⁴²

38. General Court, 17 June 1998, T-135/96 (*UEAPME*), § 88.

39. General Court, 17 June 1998, T-135/96 (*UEAPME*), § 89.

40. CJEU, 29 July 2010, Case C-151/09 (*UGT FSP*), § 42.

41. This statement is based upon the etymological analysis of the word 'democracy'.

42. See Article I-48 Treaty establishing a Constitution for Europe.

IX. Horizontal subsidiarity as a means to protect citizens

The ability to recognise the European Social Dialogue as an aspect of democracy is intertwined with a vision of horizontal subsidiarity. Horizontal Subsidiarity is much older than vertical subsidiarity. It relates to the relationship between institutional actors and social partners within the same geographical borders, whereas vertical subsidiarity relates to the relationship between institutional actors active within different borders.⁴³ The General Court has indicated it ignores the existence of horizontal subsidiarity. The latter is astonishing and *another* example of historical amnesia.⁴⁴ Horizontal subsidiarity is in fact older than vertical subsidiarity. It can be traced back to at least *Quadragesimo Anno*.⁴⁵ In this encyclical, the Pope issued a critique of the way that the so-called *leggi fascistissime* undermined the autonomy of industrial relations that was perhaps too subtle.

Horizontal subsidiarity as enshrined in Article 155(2) has, in essence, a procedural dimension. Thus, the Commission is forced to consult management and labour if it envisages an action in the field of social policy. The question of whether it is more appropriate for the Commission to act on its own rather than leaving an issue up to the social partners should not even be raised here. An action of the Commission without prior consultation is *per se* unconstitutional. It is not even an issue of appropriateness, but of legality. In the same vein, it is argued here that the Commission has an obligation, provided some legal checks have been completed, to submit a proposal. A similar example of horizontal subsidiarity can be found in the syntax and the language of a number of Directives, particularly in the area of worker involvement. In the EWC Directive 94/45 as well as in the Recast EWC Directive 2009/38, the notion of subsidiary requirements has been used. These requirements will apply if a so-called special negotiating body has been unsuccessful in concluding an agreement with central management. The statutory solution has a subsidiary character. This model has been the kiss of life for the introduction of the European company. The SE Directives 2001/86 and 2003/72 copy this model.⁴⁶ Hence, the General Court has missed an opportunity to recognise a general principle of subsidiarity of which Article 5 TEU might be the vertical expression.

X. Conclusions

The judgments of the General Court and the Court of Justice are very twisted. Two positive outcomes can already be ensured. First, signatory parties have legal standing to challenge a refusal by the Commission to implement their agreements. Secondly, these refusals will need to be duly motivated. The General Court and the Court of Justice have missed an excellent opportunity to do justice to the principles of democracy, subsidiarity and to uphold an active duty to promote

43. See F. Dorssemont, 'Contractual government by management and labour in EC law', in A. Van Hoek and others, *Multilevel governance in Enforcement and Adjudication*, Antwerpen, Intersentia, 2006, 285.

44. The first amnesia relates to the fact that the whole idea of the European Social Dialogue was a way to overcome a legislative deadlock. See also Jean-Paul Tricart quoting Marc Bloc in the introduction of his study *Legislative implementation of European social partners agreements: challenges and debates*, ETUI, Brussels, Working paper 2019/09: 'Ignorance of the past not only confuses contemporary science but confounds contemporary action'.

45. See, *inter alia*, D.Z. Cass, 'The word that saves Maastricht? The principle of subsidiarity and the division of Powers within the European Community', *Common Market Law Review*, 1992, 1110-1112 and V. Constantinesco, 'Who is afraid of subsidiarity?', *Yearbook of European Law*, 1991, 34-35.

46. See F. Dorssemont, 'Contractual government by management and labour in EC law', in A. Van Hoek and others, *Multilevel governance in Enforcement and Adjudication*, Antwerpen, Intersentia, 2006, 285-312.

the social dialogue and the autonomy of the social partners.⁴⁷ Both Courts have also prevented an attempt to bridge a discriminatory gap between private employees and workers in central governmental administrations enjoying a right to information and consultation, to which the EU Directives tend to turn a blind eye.

One cannot but get the impression that the General Court and the Court of Justice have reduced democracy to parliamentary democracy and have failed to see that involvement of social partners can enhance the democratic life of the European Union. In the same vein, it reduces the subsidiarity debate to public law actors, disregarding the more horizontal dimension of that principle. The argument of equality has not convinced the General Court either, thus allowing State actors, in their relations with their staff, to ignore the obligations that these States have to impose upon private employers in their relation to their workers. This vision takes us back to a Jacobine conception that prevailed during the French Revolution, which is unfit for the 21st century and which generates a painful contradiction.

The refusal of the European Commission has had a chilling effect on the trustworthiness of the European Social Model. Where the Commission used social dialogue in an era of legislative deadlock organised by the Council, it has now betrayed its trust in an era where it is organising this deadlock on the altar of Better Regulation.

The European Social Dialogue cannot function outside the shadow of the law, but negotiations can *a fortiori* neither take place under the dark and negative shadow of the European Commission. The refusal of the Commission to submit a proposal is all the more problematic in the light of the uncertain status of agreements which are not implemented at all. Whereas governmental intervention in the Member States seeks to extend legal binding, in this scenario, the implementation is a prerequisite for the very quid of legal binding.

The very idea that the right of collective bargaining just generates obligations to respect and not to promote is at odds with the most relevant instruments in the field of human rights. An ILO Recommendation dating back nearly 75 years already insisted on policies ensuring the binding character of collective agreements and the extension of that binding character. It does not take a genius to understand that the intervention of the Commission and the Council is the best way to ensure both the binding as well as the extension.⁴⁸

In a recent unpublished document that the Commission communicated to the social partners of 29 march 2022, the Commission has pledged to support the social partners by developing a new frame for social partners' agreements at EU level. The background note of the Commission only reiterates the powers recognised in the *EPSU* judgment and the firm will of the Commission to use these powers. Furthermore, the Commission indicates that it is willing to offer its services before or during the negotiations to offer 'early indicative/informal feedback from the Commission services flagging issues that could potentially impact the implementation of their SPA as EU law (...). This feedback would be indicative, neither binding for the social partners, nor prejudging the final Commission position. - social partners would have the possibility to receive, upon request, at any stage during their negotiations legal and administrative support, including assistance with legal drafting if demanded. The Commission would never interfere in the content of the negotiations and its support would not prejudice the final Commission position'.

47. M. A. Garcia-Munoz Alhambra, 'An uncertain Future for EU-level Collective Bargaining: The New Rules of the Game After *EPSU*', *Industrial Law Journal* 2022/2, 318-345.

48. R091 - Collective Agreements Recommendation, 1951 (No. 91).

Purely legal advice upon request might even be useful if the Commission would just stick to legality checks. Legal advice is expensive and one should never refuse a free lunch. The passages about the early indicative and informal feedback on flagging issues in combination with a threat not to implement rather reads as the intention of the Commission red-flag issues of appropriateness. The idea that this would not have an impact on the substance of ongoing negotiations lacks credibility. *In casu*, bargaining will take place under a dark shadow of a veto, rather than under the shadow of the law.

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