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After the 'Hairdressing agreement', the EPSU case: can the Commission control the EU social dialogue?

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Key points:

- In 2015, the European Public Administration Employers (EUPAE) and the Trade Unions' National and European Administration Delegation (TUNED) signed a framework agreement providing workers in the central government administration with information and consultation rights. The social partners then asked the European Commission to initiate the procedure for transposing the agreement into EU legislation, in compliance with the Treaty's provisions. The Commission refused and based its decision on appropriateness grounds.
- Following the institutionalisation of the EU social dialogue in 1992, it was established that the Commission should exempt social partners' agreements stipulated in the context of consultation procedure – such as the agreement signed by TUNED and EUPAE – from an appropriateness test.
- The Commission's guidelines adopted under the Better Regulation strategy partially extended the Commission's power vis-à-vis the legislative transposition of social partners' agreements, but with no effects in relation to the TUNED and EUPAE agreement.
- In any case, the appropriateness assessment that the Commission carried out on the TUNED and EUPAE agreement was grounded on vague criteria, which inevitably pave the way for arbitrary decisions.
- Failing to identify the invalidity of the Commission's rejection of the social partners' request, the General Court misinterpreted the role and rationale of the EU social dialogue and endangered the social partners' autonomy, thus contravening the spirit of the EU Treaties.

1. Introduction

In the coming months, the European Court of Justice (ECJ) will reach a decision on the case *European Public Service Union (EPSU) and Goudriaan v Commission* (C-928/19 P), which could be crucial for the future of the EU social dialogue. The EPSU case initially originated from the Commission's refusal to transmit a proposal for a Council Decision, which could have given legislative implementation to the social partners' agreement stipulated by TUNED and EUPAE. This would have provided a general framework for informing and consulting civil servants and employees of central government administrations. If the agreement had been transposed into EU law it would have remedied a normative void, because EU law on workers' information and consultation does not yet cover civil servants.

The ECJ was vested with the case following an appeal brought by EPSU against the General Court's judgment (T-310/18), which ruled in favour of the European Commission.[2] The point of contention that triggered the action for annulment before the General Court was the legitimacy of the Commission's decision to reject the request of the social partners to submit a proposal to the Council. EPSU, which represents TUNED before the EU judiciary, argued that, by refusing to submit a proposal for a Council Decision and, consequently, to give *erga omnes* implementation to the agreement, the Commission acted *ultra vires*. The Commission,

1 This policy brief is based on the author's presentation at the Amicus Curiae Workshop on the EPSU case of 16 September 2020, organised by F. Dorssemont and S. Borelli, and subsequently collected in the collective volume *European social dialogue in the Court of Justice*, Working Paper 10/2020, CSDLE Massimo D'Antona.

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

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instead, essentially maintained that it falls within its legitimate sphere of discretion as defined by the EU Treaties to decide, also on the basis of opportunity and appropriateness, whether to exercise its power of legislative initiative.

The present policy brief aims to highlight some critical aspects of the General Court's decision and elaborate arguments to redirect the Court of Justice's reasoning towards a better appraisal of the legal questions at stake. Looking at the General Court's judgment, it is indeed rather surprising to note the absence of an adequate evaluation of the legitimacy and scope of the Commission's assessment that led to the rejection of the social partners' request. The Commission's refusal to submit a proposal for the legislative implementation of the EUPAE and TUNED agreement confirms that the hostility that the Commission showed towards sectoral social dialogue in relation to the hairdressing agreement was not an isolated episode. The EPSU case now gives to the Court of Justice the occasion to clarify the effective boundaries of the Commission's control over social partners' agreements. This judgment could be determinant in defining the institutional value of social partners' negotiations at the European level and the role of EU social dialogue, with broader repercussions for the EU social model.

2. Two types of social partner agreements

It is worth remembering that there are two types of framework agreement that the social partners may conclude. The first type are agreements stipulated in the context of the formal consultation procedure outlined in Article 154 of the Treaty on the Functioning of the European Union (TFEU). When considering proposing a legislation in the field of labour and social policy, the Commission is obliged to launch a two-phase consultation with the social partners. The first round of consultation is on the possible direction of Union action; the second concerns the content of the envisaged proposal. Article 154(4) TFEU establishes that, during both phases of the consultation, the social partners have the right to inform the Commission that they intend to launch negotiations to conclude a framework agreement on the matter. The other type of agreements are so-called 'own-initiative agreements', and are reached spontaneously by the social partners in accordance with Article 155(1) TFEU: 'Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.'

It is important to note that, in practice, the difference between the two types of agreements, as well as the distinction between the first- or second-phase agreements, can be very slight. In the context of the EU social dialogue, the social partners often address topics that remain in the air for years and have been officially discussed for some time with the Commission. The EUPAE and TUNED agreement is a clear example. Even if formally stipulated within the framework of the first-phase consultation, the Commission, on more than one occasion, had already invited the social partners to negotiate the extension of workers' information and consultation rights to the public sector (European Commission 2013a, 2013b).

3. Scope of the Commission's assessment

In the years that followed the institutionalisation of the European social dialogue through the Maastricht Treaty, a series of Commission Communications brought clarity concerning the extent and nature of the checks that the Commission can perform on the framework agreements that the social partners ask to be implemented via EU legislation (European Commission 1996; 1998; 2004). From these Communications, it emerges that the scope of the Commission's assessment varies depending on the type of the agreement concluded by the social partners.

The 1998 Communication on social dialogue established that:

> 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 addition, 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 (European Commission 1998, emphasis added).

It is thus clear that, in the case of agreements negotiated during the formal consultation procedure, the Commission's assessment should focus exclusively on:

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

Only when the social partners stipulate 'own-initiative agreements' the Commission can carry out an assessment of the appropriateness of adopting EU legislation in the policy area addressed by the agreement (see also European Commission 2002). The reason for this dual regime is that, in relation to the framework agreements negotiated during the formal consultation procedure, the Commission supposedly has already evaluated the opportunity of adopting EU legislation in that field before launching the social partners' consultation.

4. The Better Regulation package: confused guidelines and arbitrary implementation

The clear dichotomy between own-initiative agreements, subject to appropriateness checks, and agreements negotiated during the formal consultation process, exempted from appropriateness checks, was partially affected by the Smart Regulation and the

Better Regulation strategies under the Barroso II and the Juncker Commissions, which aimed at filtering and streamlining the EU policymaking (European Commission 2010 and 2015; Van den Abeele 2015). It was established that social partner consultations under Article 154 TFEU should be accompanied by the publication of an analytical document prepared by the Commission outlining the relevance of the envisaged EU legislation. Contextually, it was decided that, in the absence of this analytical document addressing the need for EU action, framework agreements stipulated during the consultation process have to be subject to the same assessment that the Commission conducts in relation to the own-initiative agreements, thus including appropriateness checks (European Commission 2015). Since then, analytical documents have been prepared by the Commission only in combination to the second phase of the consultation process (Article 154(3) TFEU). This implies that not only own-agreements, but even the social partners' agreement concluded during the first-phase consultation can be subject to the Commission's appropriateness checks, *unless* an analytical document had already addressed the opportunity to adopt EU measures in that policy area (Tricart 2019).

Furthermore, it was established that, before the launch of the legislative process, all prospective legislation (including social partners' agreements) have to be subject to an impact assessment evaluating the cost and benefits of the future legislation (European Commission 2010). This additional institutional check not only expanded the Commission's control over framework agreements, but also had the effect of substantially lengthening the process leading to the implementation of the agreements via a Council Decision.

It is worth noting that, while the relevance of the earlier Commission Communications on social dialogue is undisputed, the status and effective validity of the guidelines adopted in the context of the Smart Regulation and the Better Regulation package are questionable. The hermeneutical weight of the early Commission Communications on social dialogue, as well as their significance in the context of judicial proceedings, was confirmed by the Court of First Instance in the *UEAPME* case (T-135/96).[3] The 1998 Communication, and *not* the more recent Smart Regulation and Better Regulation documents, was also referred to in the recitals of the Council Decisions that in January 2018 gave legislative implementation to a social partners' agreement in the maritime transport sector (Council 2018). Interestingly, in the same framework agreement in the maritime transport sector, the Commission departed from its Smart Regulation guidelines as it presented a proposal to the Council without previously carrying out an impact assessment (Tricart 2019). Nor was a formal impact assessment performed in relation to the social partners' agreement in the hairdressing sector, which the Commission eventually refused to submit to the Council (Vogel 2018). The same happened with the agreement between EUPAE and TUNED, even if more than two years had passed from the social partners' request to the Commission's rejection.

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

Finally, it should be noted that the guidelines outlined in the Smart Regulation and Better Regulation strategies inevitably led to the expansion of the Commission's ownership and control over the EU social dialogue process, at the expense of the social partners' autonomy. This is hardly compatible with the spirit of the EU Treaties and with the EU Social Model enshrined therein, especially in view of Article 152 TFEU, which states that: 'The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.' This provision, introduced in 2008 with the Treaty of Lisbon, indicates that the promotion of EU Social Dialogue and of the autonomy of the social partners is an obligation for the whole Union, meaning that all institutions and, *in primis*, the Commission have to respect it and guarantee its functioning (Tricart 2019; Dorssemont *et al*. 2019). Moreover, enabling the Commission to exert its control over the implementation of framework agreements would clash with another novelty of the Lisbon Treaty, namely the expansion of the social partners' negotiating autonomy. While Article 138 of the Treaty establishing the European Community (TCE) allowed the social partners to initiate the social dialogue only during second-phase consultation, the Lisbon Treaty allowed the social partners to negotiate agreements also during first-phase consultation.

5. Arguments against the appropriateness assessment in the EPSU case

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

First, the agreement was negotiated within the framework of the formal consultation procedure. On 10 April 2015 the Commission launched the first-phase consultation of the social partners under Article 154(2) TFEU on the opportunity to consolidate the EU Directives on the information and consultation of workers. The Commission consultation document explicitly stated that:

> it is opportune to consider whether the [information and consultation] 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.

On 20 June 2015, the social partners informed the Commission that they wanted to negotiate an agreement, pursuant to Article 154(4) TFEU. The agreement was therefore concluded in the context of the formal consultation process. This means that, according to the Communications on EU social dialogue, the Commission was only allowed to carry out an assessment on the legality of

the agreement, the representativeness of the signatories and the impact on small and medium-sized companies (see in particular European Commission 1998).

Second, even considering the more recent guidelines stemming from the Smart Regulation and the Better Regulation strategies, the assessment of the Commission should have not covered the appropriateness of the agreement. As already mentioned, the Commission can indeed conduct an appropriateness test only if the need for EU action was not already addressed by previous analytical documents. When the TUNED and EUPAE initiated their negotiations, the opportunity to harmonise the information and consultation rules in the public sector had already been addressed on multiple occasions by the Commission itself. A significant example is the EU Quality Framework for Anticipation of Change and Restructuring (QFR) (European Commission 2013b), to which the social partners explicitly refer at the beginning of their agreement. There, 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].
>
> 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.

Similarly, in 2013 the Commission ran a 'fitness check' on EU law in the area of information and consultation of workers, which led to the conclusion that the existing EU framework is unevenly implemented in the public sector (European Commission 2013a). The Commission thus invited the social partners to start negotiations at the European level:

> With regard to the [information and consultation rights] 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.

These two examples provide sufficient grounds to assert that, before the launch of the first-phase consultation, the Commission had published 'analytical documents' affirming the opportunity to adopt EU rules in the same area that will subsequently be covered by the TUNED and EUPAE agreement. These analytical documents should have exempted the agreement from the Commission's appropriateness assessment, even more so in light of the Commission's flexible interpretation of the Smart Regulation and the Better Regulation guidelines in the cases of the framework agreement in the maritime transport sector and of the hairdressing agreement.

Third and lastly, it is worth mentioning that when the Commission performs its appropriateness assessment, that assessment should be grounded on precisely defined criteria, to prevent the arbitrary exercise of public power. That was evidently not the case in relation to the TUNED and EUPAE agreement because, as the General Court noted in Para 71 of the EPSU judgment, the Commission's assessment was based on vague '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 supported by the Court of Justice's reasoning in the *AGET Iraklis* case (C-201/15) that, similar to the EPSU case, concerned the exercise of the power of opposition of a power authority, in this case 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.

The appropriateness assessment should be based on criteria that provide at least a minimum level of guidance to the social partners' negotiations and that enable a review of the Commission's possible refusal to propose the legislative implementation of the agreement. Regarding the TUNED and EUPAE agreement, the absence of sensitive criteria underpinning the appropriateness assessment has the inevitable effect of undermining the validity of the Commission's decision to reject the social partners' request.

6. Conclusion

In the EPSU case (T-310/18), the General Court accepted that the Commission can exercise a broad and discretionary control over the policy effects of social partners' negotiations at the European level. It was ruled that the Commission could legitimately refuse to propose the *erga omnes* implementation of the EUPAE and TUNED agreement on the basis of appropriateness reasons and without the slightest consideration for the context in which that agreement was negotiated.

It is important to remember that this is not the first time that the Commission has rejected a similar request from the social partners; the hairdressing agreement went the same way. The Commission's behaviour and the validation from the General Court's ruling challenge the foundation of the EU social dialogue. Most notably, the General Court's decision questions the relevance of Article 152 TFEU, as it is now unclear why the Lisbon Treaty would establish a duty for all EU institutions to promote the EU social dialogue if the Commission can have full control over the implementation of

framework agreements. The Commission and the General Court have indeed added an additional layer of confusion about the extent of the Commission's power to block social partners' agreements on appropriateness grounds. This confusion inevitably makes it more difficult for the social partners to exercise their Treaty rights.

With the forthcoming ruling on the EPSU case, the Court of Justice is asked to clarify the scope of the Commission's control over the social partners' agreements and, therefore, the Court is given the opportunity to ensure that EU social dialogue is understood and implemented in line with the spirit of the Treaty. This policy brief suggests that the Court of Justice should be careful to adequately redefine the boundaries of the Commission's appropriateness test. In particular, the Court should recognise that, in the case of the EUPAE and TUNED agreement, the Commission's check should have been limited to control of the legality of the provisions, the representativeness of the social partners and the implications for small and medium-sized enterprises. It was also suggested that when a public authority, such as the Commission, performs an appropriateness assessment, that assessment should be grounded on clear criteria. This rules out the admissibility of the test that the Commission exerted on the EUPAE and TUNED agreement, because the vague criteria on which it was based cannot exclude the arbitrary nature of the decision.

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