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The European Social Dialogue under siege?

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1. *Why starting with the* Epsu *cases*

Starting the new "adventure" of *DLM.int* with an editorial concerning the *Epsu* cases decided by the General Court EU (hereinafter GC) in 2019 and the Court of Justice EU (hereinafter the Court) in 2021 is not an odd choice. The reason for that is twofold.

On the one hand, both judgments provide an opportunity to check the extent of one of the key principles of the European Union, i.e. the principle of horizontal or "social" subsidiarity in the supranational legal order.

On the other hand, the judgments, although not so positive from the social dialogue's point of view, at least provide a final word on social partners' role within the legal framework of the Treaty on the Functioning of the European Union (hereafter TFEU).

2. *The "boundaries" of the principle of horizontal subsidiarity*

The principle of horizontal or social subsidiarity is referred to for the first time in a Communication adopted by the Commission twenty years ago[1] it

[1] See the Communication from the Commission of 26 June 2002, COM (2002) 341 final, according to which the consultation of social partners "is a practical application of the principle

complements the more traditional vertical subsidiarity referred to in Article 5.3 TEU[2].

The principle of horizontal subsidiarity has its cornerstone, however, in the TFEU and, specifically, in Articles 154 and 155 included in Title X on Social Policy. The reference is first to Article 154.2.3 and 4, which, as well known, provides for the involvement of the European social partners in the "making" of EU Law. In summary, in the application of the principle of vertical subsidiarity, the Union intervenes, in all the subject matters of 'shared competence' only if its action is more effective than at the national level. By implementing the principle of horizontal subsidiarity, the Union intervenes instead, in the matter of social policy, with a legislative act of its own issued through the "ordinary legislative procedure", only if this is more effective than European collective bargaining.

The functioning of the principle of subsidiarity in the field of social policy, in its twofold dimension, passes through the identification of the role of the "contractual relations, including agreements" signed by the European Social Partners in the system of the sources of EU Law. It should be remembered that those agreements, once concluded, can be implemented in two different ways: 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)[3].

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

of social subsidiarity. It is for the social partners to make the first move to arrive at appropriate solutions coming within their area of responsibility; the Community institutions intervene, at the Commission's initiative, only where negotiations fail" (par. 1.1, 8).

[2] According to this provision, in fact, "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

[3] The Council shall adopt such a directive by qualified majority or unanimity, depending on the subject matter. On these profiles see Ales, *EU Collective Labour Law: if any, how?*, in B. ter Haar, A. Kun (eds.), *EU Collective Labour Law*, Edward Elgar, 2021, 26 ff.

the possibility to take part in the procedure of making Union law on a par with Council and the European Parliament. The *Epsu* judgments deal precisely with this issue, wondering whether the European Commission has any discretion when proposing the implementation of the agreement.

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

As it is known, the Treaty provides for a negotiation between the European social partners that can have a dual origin. There is a "voluntary" negotiation regulated by Article 155.1 TFEU, according to which "should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements"[4]. This type of negotiation is flanked by "induced" negotiation, to which reference was made previously regarding the duty incumbent on the Commission to consult the social partners before making proposals in the social field.

At the first sight, for our purposes, 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 (formally) 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 Law 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. Therefore, at least up to a certain stage, the role of the Commission in the implementation of the collective agreement concluded at the supranational level does not differ according to the origin of the agreement at stake[5].

[4] On the voluntary negotiation, see Guarriello, *Ordinamento comunitario e autonomia collettiva*, Franco Angeli, 1993 and, in more recent times, Peruzzi, *L'autonomia nel dialogo sociale europeo*, Il Mulino, 2011.

[5] On this point, one can agree with Dorssemont, Lörcher, Scmitt, *On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case*, in *ILJ*, 2019, 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" (33). This seems to be confirmed by the 2019 judgement of the GC, 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

In the *Epsu* cases, the European social partners had signed a framework 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.

The Commission may exercise the control over the representativeness of the signatories parties to the collective agreement and shall do it on the legality of the clauses of the agreement itself with respect to the provisions of Union law, as it is not possible to pass a legislative act contrary to the primary sources of EU law[6]. Therefore, in both the hypotheses that have been highlighted above, the Commission is required to carry out at least the legality test[7].

3. *The discretionary power of the Commission within the legal framework of the Treaties. Is it the end or a new beginning of the European Social Dialogue?*

The problem arises with regard to the assessment of the appropriateness of the contents of the collective agreement[8]. Both the judgements ruled that "before using its power of initiative, [the Commission] determines … whether the initiative proposed is appropriate. Therefore, when it receives a request to implement at EU level an agreement concluded between management and labour, the Commission must not only verify the strict legality of the clauses of that agreement, but also assess whether implementation of the agreement

that occasion the Commission merely launched a debate without prejudging the form and content of any possible action to be undertaken" (*Epsu* GC par. 134).

[6] See Lo Faro, *Regulating Social Europe. Myths and Reality of European Collective Bargaining in the EC legal system*, Hart Publishing, 2000.

[7] For further details see Delfino, *The reinterpretation of the principle of horizontal subsidiarity*, Working Paper CSDLE "Massimo D'Antona".INT, 152/2020 (www.lex.unict.it).

[8] See Lo Faro, *Regulating Social Europe*, cit., according to whom the Commission certainly cannot be denied assessing 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 such 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. See also Lo Faro, *Articles 154, 155 TFEU*, in Ales, Bell, Deinert, Robin-Olivier (eds.), *International and European Labour Law*, Beck, Hart, Nomos, 2018, 173.

at EU level is appropriate, including by having regard to political, economic and social considerations"[9].

The opinion of those who found the existence of a duty for the Commission to propose a directive implementing a collective agreement on Article 152 TFEU appears unconvincing[10], as it will be thoroughly demonstrated hereinafter. In fact, this provision merely states that "the Union recognises and promotes the role of the social partners at its level" and facilitates "dialogue between the social partners, respecting their autonomy".

As a matter of fact, the Court highlights that the autonomy of the social partners enshrined in Article 152 TFEU is safeguarded since "they may engage in dialogue and act freely without receiving any order or instruction from whomsoever and, in particular, not from the Member States or the EU institutions"[11].

Nevertheless, this autonomy has to be guaranteed only at the stage of negotiation of a possible agreement between social partners while it "does not mean that the Commission must automatically submit to the Council a proposal for a decision implementing such an agreement at EU level at the joint request of the social partners, because that would be tantamount to according the social partners a power of initiative of their own that they do not have"[12].

The same conclusion can be reached on the right to negotiate and conclude collective agreements, enshrined in Article 28 of the Charter of Fundamental Rights of the European Union, which was respected at the stage of negotiation of the agreement[13].

[9] *Epsu* GC par. 79 and *Epsu* CJEU par. 35, according to which "the imperative formulations used in the French-language version of the first subparagraph of Article 155(2) TFEU ('*intervient*') and in the English-language version of that provision ('shall be implemented') do not in themselves permit the conclusion that the Commission is obliged to submit a proposal for a decision to the Council when it receives a joint request to that effect from the signatories to an agreement".

[10] Dorssemont, Lörcher, Schmitt, *On the Duty to Implement*, cit. Those authors believe that "Article 152(1) TFEU obliges the Commission to try to bring about the translation of the regulations stemming from the exercise of collective autonomy into the realm of the EU legal order" (17). Later, the same authors state that "there is an obligation for the Commission to submit a proposal if a joint request was made by the signatory parties" (22).

[11] *Epsu* CJEU par. 61.

[12] *Epsu* CJEU par. 62.

[13] *Epsu* CJEU par. 67.

Such a duty on the European institution can also not be derived from the combined reading of this provision with Articles 154 and 155 TFEU[14]. The judgment of 2021 is the clearest one on this profile. "Article 155(2) TFEU has conferred on management and labour a right comparable to that possessed more generally, under Articles 225 and 241 TFEU respectively, by the Parliament and the Council to request the Commission to submit appropriate proposals for the purpose of implementing the Treaties". According to the Court, there is no legal reason for recognizing the social partners a greater power in comparison to that one of the Parliament and the Council that cannot impose on the Commission to submit a proposal for a directive[15].

In the Court's words, if the social partners had such a power "the institutional balance resulting from Articles 154 and 155 TFEU would be altered, by granting the social partners a power *vis-à-vis* the Commission, which neither the Parliament nor the Council has"[16].

The reasoning about that is interesting since the Court of Justice goes further on the topic of the general interest expressed by the GC. As a matter of fact, the GC referred 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"[17].

In the Court's view, an interpretation of Article 155(2) TFEU under which the Commission would be obliged, in the exercise of its power of initiative, to submit to the Council a proposal for a decision implementing at EU level the agreement concluded by management and labour would result in "that the interests of the management and labour signatories to an agreement alone would prevail over the task, entrusted to the Commission, of promoting the general interest of the European Union"[18]. This "would be contrary to the

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

[15] *Epsu* CJEU par. 62.

[16] *Epsu* CJEU par. 63.

[17] *Epsu* GC par. 80.

[18] *Epsu* CJEU par. 49.

principle, as laid down in the third subparagraph of Article 17(3) TEU, that the Commission is to carry out its responsibilities independently"[19]. Nor "the Commission's independence would be safeguarded since it would, in any event, be able to present its view to the Council by means of an 'explanatory memorandum'. Indeed, the explanatory memorandum that accompanies a Commission proposal is supposed merely to state the grounds that justify the proposal"[20].

This point is not convincing at all: there is no evidence whatsoever that the explanatory memorandum cannot contain a grounded dissenting opinion by the Commission, thus safeguarding the general interests of the EU and providing arguments to the Council that could deny its decision.

More in general, although not expressing its view on it, the Court qualifies the principle of "horizontal subsidiarity" as "alleged"[21], thus seeming to share the view of the GC, according to which "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. Furthermore, the principle of subsidiarity cannot be relied on in order to alter the institutional balance"[22].

The claim of a "political discretion" by the European Commission, supported and endorsed by the Court, clearly jeopardizes the same existence of the horizontal subsidiarity principle, at least at a supranational level, thus emphasizing the embeddedness of European Social Dialogue[23], the relevance of recognition and the trade-off between the importance of the agreements and the constraints they are subjected to by the EU institutions[24].

Therefore, the two judgments can be considered as a negative turning point for the European social dialogue. However, in a more optimistic view, they may be supposed to play a different role in that procedure that is more similar to that played in the domestic legal systems of most of the Member States where, within the trilateral social dialogue (involving the Government, trade unions and employers' associations), the Government has discretionary

[19] *Epsu* CJEU par. 50; *Epsu* GC par. 78.
[20] *Epsu* CJEU par. 51.
[21] *Epsu* CJEU par. 72.
[22] *Epsu* GC par. 98.
[23] Ales, *EU Collective Labour Law: if any, how?*, cit.
[24] Lo Faro, *Regulating Social Europe*, cit.

power in transforming the agreements signed by the social partners into statutory provisions or bills.

In the end, this turning point might be a starting point for a more mature social dialogue where the social partners propose to the Commission an agreement and that institution can decide whether or not to submit it to the Council. The difference after the *Epsu* judgments stands in the discretionary power of the Commission in submitting the proposal for a directive but this can also be considered as a positive aspect, since sometimes the social partners, especially the employers' associations, were worried about stipulating collective agreements that could become Union law and for that reason decided not to sign them, as happened in the case of temporary agency work.

As a result, the presence of the discretionary power of the Commission could facilitate the social dialogue in the sense that the social partners act on the social dialogue's ground where the aim is to promote the interest of the signatory parties and in the end the collective interest. That is the natural ground of operation for the social partners where they feel freer to play their natural role, which does not usually include the promotion of the general interest.