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

Manuel Antonio Garcia-Muñoz Alhambra

1. 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* judgment[99] 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.

2. 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 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"[100].

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,

[99] Case T-310/18, *European Federation of Public Service Unions (EPSU) and Jan Goudriaan v. European Commission.* ECLI:EU:T:2019:757
[100] Paragraph 98 of the judgement.

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 Communication[101], 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"[102].

This double subsidiarity idea is functional to the *"fundamental role of the social partners (…) in the implementation of the social dimension at Community level*[103]*.* 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 to address issues related to work and can negotiate agreements that include commitments"*[104] 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"*[105].·

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"*[106]. 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*"[107]. 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,

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[101] *Communication concerning the application of the Agreement on social policy,* COM (93) 600 final, of 14 December 1993
[102] COM (93) 600 final, paragraph 6)
[103] Idem.
[104] *The European social dialogue, a force for innovation and change*, COM (2002) 341 final, of 26 June 2002, pp 4-5.
[105] *Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue,* COM (2004) 557 final, p 6.
[106] See paragraph 79 in *EPSU*
[107] Paragraph 80 in *EPSU* judgment

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.

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*"[108]. Beyond the practical consequences[109], the theoretical implications are important. There is a clear devaluation of the role of the social partners, from co-legislators in the social filed 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[110].

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* case[111], 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 (…)*"[112]. 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"*[113]. In addition, 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[114]. This is, on the one

[108] Paragraph 89 in *EPSU* judgment.
[109] In this framework of uncertainty, it is easy to imagine a paralysis of EU level collective bargaining.
[110] *"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.
[111] Case T-135/96 of 17 June 1998, *UEAPME* vs Council, ECLI:EU:T:1998:128
[112] Paragraph 88 in *EPSU* judgment.
[113] Paragraph 89 in *EPSU* judgment.
[114] *The European social dialogue, a force for innovation and change*, COM (2002) 341 final, of 26 June 2002, p 6.

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 field[115], the findings of the General Court in its *EPSU* judgment seem to challenge this conception.

3. 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 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' agreements[116], *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.

[115] 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. 7184.

[116] 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.

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 agreement[117], 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 Directive[118].

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-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.

[117] *European framework agreement on the protection of occupational health and safety in the hairdressing sector.*
[118] See paragraph 5 in *EPSU* judgment.