The horizontal subsidiarity: one principle, different applications

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1. Reason for questioning the principle of subsidiarity.

The present reason for questioning the principle of subsidiarity in the supranational order stems from the statement contained in the *EPSU* judgement, according to which "that principle is understood as having a "vertical" dimension, in the sense that it governs the relationship between the European Union on the one hand and Member States on the other. By contrast, … *that principle does not have a horizontal dimension in EU law*, since it is not intended to govern the relationship between the European Union, on the one hand, and management and labour at EU level on the other"[119].

2. The different origins of the European social dialogue.

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 European collective agreement in the system of the sources of Union law. It should be remembered that such an agreement, once concluded, can be implemented in two different ways, namely: either 1) "in accordance with the procedures and practices specific to management and labour and the Member States" (Article 155.2, first sentence); or 2) "in matters covered by Article 153" (in fact the whole social policy), "at the joint request of the signatory parties, by a Council decision on a proposal from the Commission" (in practice the directive is used) (Article 155.2, second sentence)[120].

Of course, the key point in the matter of subsidiarity is represented by the second path indicated because it is only through the implementation by a directive of the European collective agreement that the social partners have the possibility to "make" Union law on a par with Council and the European Parliament. The *EPSU* judgment deals precisely with this issue, wondering whether the European Commission has any discretion when proposing the implementation of the agreement.

As it is known, the Treaty provides for a negotiation between the European social partners that can have a dual origin. There is a "voluntary" negotiation regulated by Article 155.1 TFEU, according to which "should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements"[121]. This type of negotiation is flanked by "induced" negotiation, which regards the duty incumbent on the Commission to consult the social partners before making proposals in the social field. For the purposes of the discussion that is being conducted here, the origin of the social dialogue is irrelevant since both in the case of induced negotiation and in that of voluntary negotiation the Commission's position does not change, in the sense that, in neither of the two circumstances, the European institution is aware of the content of the collective agreement. It is true that Article 154.2 refers to the consultation of the social partners on the content of the envisaged proposal, but it is also undeniable that paragraph 4 of the same provision allows the social partners to "block" the ordinary

[119] *EPSU* judgement, paragraph 8. Italics added.

[120] The Council shall adopt such a directive by qualified majority or unanimity, depending on the subject matter. On these profiles see ALES, 'The State, Industrial Relations and Freedom of Association: A History of Functional Embeddedness', in PERULLI, TREU (eds.), *The Role of the State and Industrial Relations*, Wolters Kluwer, 2019, page 187 ff. According to this author, European social dialogue is an example of corporatism, since "the jurisdiction in which the industrial relations is embedded entrusts Management and Labour with the authority of regulating working conditions through legislator-like prerogatives" (page 189).

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

procedure of making EU law[122] at that precise moment or even at the time of the first consultation and, therefore, in both the cases, prior to the elaboration of any collective agreement. What has been said above allows proceeding, at least up to a certain point, with a single discussion on the role of the Commission in the implementation of the collective agreement concluded at the supranational level[123]. In the *EPSU* case, the European social partners had signed a collective agreement aimed at extending to the public sector the protection provided to private workers concerning information and consultation. The same parties had asked the Commission to implement the agreement and the European institution had refused to submit a proposal for a directive on that matter.

3. One principle, three cases.

As regards to the principle of subsidiarity, three hypotheses must be distinguished, one concerning voluntary negotiation and two as regards to the induced negotiation.

In the event of a voluntary negotiation, concluding with a collective agreement that, at the request of the social partners, shall be implemented, neither the Commission nor any other Union institution has been involved in applying the principle of vertical subsidiarity set out in Article 5.3 TEU (*first hypothesis*).

On the contrary, in the event of an induced negotiation, a distinction must be made, depending on when the social partners decide to inform the Commission of the intention to start the procedure referred to in Article 155. Indeed, such a decision can be taken immediately after the consultation of the social partners by the Commission "on the possible direction of Union action" (Article 154.2 TFEU), as happened in the *EPSU* case (*second hypothesis*), or subsequently when "the Commission considers Union action advisable" and it consults "management and labour on the content of the envisaged proposal" (Article 154.3 TFEU) (*third hypothesis*).

The hypothesis of the voluntary negotiation is like that of the negotiation induced after the first consultation of the Commission. Instead, if the decision of the social partners is communicated at the time of the second consultation, the situation is different. In the first two cases, a collective agreement is concluded where the Commission is only actually involved in the phase following the stipulation. Therefore, the first act that the Commission carries out is to apply the principle of subsidiarity and in doing this it cannot be replaced by the social partners because Protocol no. 2 annexed to the Treaty on European Union provides that the respect for the principle of subsidiarity shall be ensured by "each institution" of the Union, an expression that cannot be referred to the European social partners. Furthermore, pursuant to Article 17.2, TEU, "Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide

[122] L. ZOPPOLI (Intervention at the round table 'La sentenza *EPSU* c. Commissione europea, ovvero: il dialogo sociale europeo messo sotto sorveglianza', *Rivista giuridica del lavoro*, 2020, page 337) highlights opportunely that the role of the Commission towards the social partners cannot be considered as merely launching a debate, as it is stated in the *EPSU* judgment (paragraph 134). See also the interventions of GUARRIELLO, LO FARO, BAVARO and IZZI.

[123] On this profile, I agree with what is claimed by DORSSEMONT, LÖRCHER, SCHMITT, 'On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case', *Industrial law journal*, 2019, page 1 ff. According to these authors, "nothing in Article 155 TFEU suggests that an obligation to propose a decision to the Council would only exist where the Commission has consulted the social partners" (page 33). This appears confirmed by the 2019 judgement of the EU Tribunal, which considers the fact that the social dialogue at the time was started by the Commission is not indicative of the application of the principle of subsidiarity. The EU judges declare that "on that occasion the Commission merely launched a debate without prejudging the form and content of any possible action to be undertaken" (*EPSU* judgement, paragraph 134).

otherwise", an exception that does not seem to occur in the case of social dialogue, since Article 155.2 TFEU provides that European collective agreements can be implemented at the joint request of the signatory parties "by a Council decision" but precisely "on a proposal from the Commission". Therefore, in the first and second hypotheses, the European institution, custodian of the prerogative of submitting a proposal and guardian of the Treaties, can motivate its possible refusal in any way because that is a political act of exercising the principle of (vertical) subsidiarity.

In the third hypothesis, the issue changes. The Commission intervenes at the time of the second consultation and therefore has carried out an assessment on the appropriateness of the regulative intervention although not yet on its contents. In this circumstance, the European institution, again in application of the principle of subsidiarity, deemed it advisable to carry out a regulatory intervention by the Union, entrusting the social partners, upon their joint request, to define the content of this intervention through the conclusion of a collective agreement. If the social partners, after concluding the collective agreement, ask for its implementation by a directive, the Commission will have already expressed an appropriateness assessment and will only have the possibility of making an appreciation of the contents of this intervention, i.e. of the clauses of such an agreement. In this case, however, it will be necessary to provide a rationale for the possible refusal to submit a directive with legal and nonpolitical reasons.

It is without doubt that the Commission can exercise the control over the representativeness of the signatories parties to the collective agreement and on the legality of the clauses of the agreement itself with respect to the provisions of Union law[124]; the control of the second profile is considered necessary indeed, as it is not possible to pass a legislative act contrary to the primary sources of EU law. Therefore, under the suggested interpretation, in all the hypotheses that have been highlighted above, the Commission is required to carry out at least the legality test.

The problem arises with regard to the assessment of the appropriateness of the contents of the collective agreement[125], which the Commission has considered in recent years as a condition for the implementation by a directive, as underlined by the European Pillar of Social Rights, solemnly proclaimed on 17 November 2017 by the European Parliament, the Commission and the Council. Point 8 of this document states that "the agreements concluded between the social partners shall be implemented at the level of the Union and its Member States" not always but only "where appropriate", implying a margin of action of the Commission that goes beyond the control of legality and possibly of representativeness.

The discourse of the irrelevance of the Communications from the Commission issued between 1993 and 2002, where only a legality check of the agreement and a representativeness test of the contracting parties was envisaged, is persuasive. As a matter of fact, the provisions of non-binding secondary sources cannot be used to interpret primary provisions such as those of the Treaty referred to above. Of course, this statement by the EU Tribunal also applies to subsequent non-

[124] This profile was well highlighted more than twenty years ago by LO FARO, *Funzioni e finzioni della contrattazione collettiva comunitaria*, Giuffrè, 1999, pages 194-202.

[125] See v. LO FARO, *Funzioni e finzioni…*, according to whom the Commission certainly cannot be denied to express evaluations on the contents of a collective EU agreement intended to be implemented by a Council decision to be adopted on the basis of a proposal, but it does not seem possible that these discretionary assessments are presented as part of a legality check. This is a real "approval clause", whose consistency with the repeated intention of the Commission to guarantee the autonomy and independence of the social partners is at least doubtful (pages 205-206). See also LO FARO, 'Articles 154, 155 TFEU', in ALES, BELL, DEINERT, ROBIN-OLIVIER (eds.), *International and European Labour Law*, Beck, Hart, Nomos, 2018, page 173.

binding sources, where reference is made to the presence of a wider discretionary power of the Commission in submitting the proposal for a directive implementing a collective agreement, such as the European Pillar of Social Rights, which has been previously mentioned. It is true, however, that the wording of point 8 of the Pillar leaves room for the differentiated interpretation of the application of the role of the Commission based on the moment when the social partners intervene[126].

4. The general interest and the role of the Council.

The most controversial part of the judgement are the explanations related to the general interest issue. In this regard, the EU Tribunal refers to Article 17.1 TEU – according to which "the Commission shall promote the general interest of the Union and take appropriate initiatives to that end" ruling that such a function "cannot, by default, be fulfilled by the management and labour signatories to the agreement alone. Management and labour, even where they are sufficiently representative and act jointly, represent only one part of multiple interests that must be considered in the development of the social policy of the European Union"[127]. The discourse on the interests that the social partners and political institutions can bear would be very long. Here it is enough to say that the assessment of the general interest is up to the Commission in the differentiated ways referred to above, but also and, I would say, particularly to the Council, called to intervene in the approval of the directive. In this regard, if, as it has been anticipated, the existence of a discretion of the Commission is still under discussion, there is no doubt that, once the proposal for a directive has been submitted, the Council can freely decide whether to approve it or not, respecting the majorities required by the Treaty, according to the subject matter of the collective agreement. This is one of the cornerstones of the *EPSU* judgment as the Council's discretion in this regard is contested by neither the Commission nor the (union) applicants[128]. Since the Parliament shall simply be informed in this case, the Council is the only EU institution that exercises the legislative power of the Union and cannot be bound by the determinations of the European social partners. The discretion of the Council is wide and any vote against the approval of the directive, being a wholly political-legislative act, does not require any motivation. Nevertheless, the continuation of this reasoning retains its usefulness, since, even within the ordinary legislative procedure, Parliament and Council may or may not approve a Commission proposal, but this does not prevent the interpreter from questioning the role played by the last-mentioned European institution.

5. The reasons for the Commission's refusal.

In situations encompassing the hypothesis where the social partners are involved at the time of the second consultation, provided by Article 154.3, it is not necessary to provide a motivation for the refusal to submit the proposal for a directive since the Commission has not yet applied the principle of subsidiarity in any way and therefore is entitled to broad political discretion. However, according to the EU Tribunal in the case before it, the Commission has a duty to give a motivation

[126] Simply emphasizing that the implementation of the collective agreement by the Union can take place "where appropriate".
[127] *EPSU* judgement, paragraph 80.
[128] As a matter of fact, "both the applicants and the Commission recognise that the Council has a discretion as to whether it is appropriate for it to adopt a decision implementing an agreement and that it may not be able to adopt such a decision in the absence of agreement by qualified majority or unanimity, depending on the case, within the Council" (*EPSU* judgement, paragraph 76).

for its refusal, based on Articles 225 and 241 TFEU[129]. Another primary rule referred to in this regard is Article 296.2 TFEU, according to which "legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties".

In the current case, the reasons given by the Commission are three:

1) "central government administrations were under the authority of the Member States' governments, … their structure, organisation and functioning were entirely the responsibility of the Member States";

2) "provisions ensuring a certain degree of information and consultation of civil servants and employees of those administrations already existed in many Member States";

"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"[130].

6. Short conclusions.

In the *EPSU* case the collective agreement, whose implementation was requested, was the result of an induced negotiation, which started at the time of the first consultation of the social partners by the Commission when the European institution had not yet carried out an appropriateness assessment. In such a case (or in the analogous circumstance of a voluntary collective agreement), the consequence deriving from Articles 154 and 155 TFEU is that there is no need to provide a motivation for the refusal because the Commission has not yet applied the principle of subsidiarity by means of a political act. The same happens in the ordinary legislative procedure when the Commission is not required to state the reasons for not submitting a proposal for a directive on a specific subject matter, just like the national government is not obliged to give a motivation for the non-submission of a bill.

[129] Those provisions "authorise the Parliament and the Council respectively to request the Commission to submit any appropriate proposal, while providing that the Commission may decide not to submit a proposal, subject to the condition that it gives reasons for its refusal" (*EPSU* judgement, paragraph 82).
[130] It is possible to read the three motivations in paragraph 9.