The hermeneutics applied by the General Court in *EPSU* judgment

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1. Introduction.

In this contribution, I will analyse the hermeneutics applied by the General Court in *EPSU and Willem Goudriaan versus Commission*. The notion hermeneutics refers to the methods of interpretation which the GC states it is applying to treat the first plea, *id est* the scope of Article 155 (2) TFEU. The first plea relates to the claim of the applicants that this provision would oblige the Commission to submit a proposal of a decision to implement the agreement concluded to the Council, provided that the agreement satisfies a previous legality check, including a test of representativeness of the social partners.

The method of interpretation undertaken by the General Court will be analysed at two levels. First, I will explain the overall structure of the judgment indicating how the GC claims to interpret Article 155 (2) TFEU. Secondly, the various methods of interpretation (literal, contextual, teleological) will be made subject to a critical assessment, in order to verify whether the General Court has actually applied these alleged methods of interpretation in a convincing way. I will terminate by some concluding observations.

2. The rules of interpretation put forward by the General Court.

The General Court explains its method of interpretation in § 49 where it states

> "Article 155(2) TFEU must be interpreted taking into account not only the wording of that provision, but also its context and objectives".

The judgment stands out for its attempt to qualify the hermeneutical methods applied. First, the GC tends to distinguish the methods of interpretation, separating the literal, the contextual and the purposive or teleological methods of interpretation. More importantly, it also added another box, containing "other arguments". These arguments based upon Treaty provisions, invoked by the applicants make it abundantly clear that the GC refused to take these provisions into account for the sake of contextual or purposive interpretation. Furthermore, in applying this literal method, the GC checks the outcome of what is called a literal interpretation in the light of the *Travaux préparatoires.*

3. The (so) called literal interpretation.

In the interpretation given by the GC, the "literal interpretation" of the phrase

> "Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to 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".

amounts to the opposite ordinary meaning of what the text states[25]. According to the GC "shall be implemented", just means "may be implemented". In my modest opinion this is slightly paradoxical. It amounts to an interpretation where the provision would be deprived of any normative scope, not imposing any obligation incumbent on anyone at all. Interpreting a legal provision as a provision not entailing any legal consequence at all is manifestly absurd and unreasonable. It is hard to see e.g. why one needs a TFEU provision at all to enable social partners at national level

[25] GC, 24 October 2019, T-310/18, §§ 49-63.

to conclude an agreement at that level or indeed the Commission to table a proposal for the adoption of a decision, as if these actors would not be able to do so if Article 155 (2) would be abolished. The only relevance relates to the ability not to involve the European Parliament. The GC uses the *Travaux préparatoires* not to reject or overcome such an interpretation, but to overcome this unease. In doing so, the GC is not convincing in my modest opinion, since the *Travaux préparatoires* just demonstrate the opposite, that is that a formula without legal strings attached was replaced by a formula with strings attached, which the GC however interprets as one not entailing obligations. If the aim was to adopt a provision not entailing obligations, there would not have been any need to change the original formula at all.

4. The (so) called contextual interpretation.

In what the General Court calls a contextual interpretation[26], it actually refuses to take into acount all the provisions within the same Social Policy Title put forward by the applicants and seeks refuge in another Treaty which has a more general nature and is not hierarchically superior to the TFEU. The question is how this can be reconciled with a very basic principle of interpretation; commonly known as *Specialia derogant generalibus.*

The Court seeks refuge in Article 17 TEU, which has been written down to confirm the role of the EU Commission not as a *primus motor immobilis*, but as the architect of positive European integration. *In casu*, this provision is being mobilized in order to justify the right of the EU Commission to kill bottom up initiatives emerging from a relevant part of civil society by refusing to implement them. Thus, the choice in favour of Article 17 TEU tends to give precedence to the procedural machinery of power rather than to a more substantive part of the Treaty in line with e.g. the right to collective bargaining (Article 28 CFREU) or with the social values of the TEU (Article 2 TEU)[27].

The fact that the GC disqualifies in its interpretation of Article 17 TFEU implementing directives, thus stating that the latter are not constituting legislation is at odds with the history of the introduction of the European social Dialogue[28]. Thus, Lo Faro has in the immediate aftermath of the genesis of the European Social Dialogue concluded the exact opposite[29]. He has disqualified the agreements as product of a fictitious collective bargaining demonstrating that they were in fact functional to a legislative purpose. In the same vein, Bercusson and Didry have made it abundantly clear how the introduction of the Social Dialogue under Jacques Delors served to overcome a legislative deadlock[30]. Far from undermining a balance of power to the detriment of the EU Commission, the mechanism served to strengthen the balance of power in favour of the EU Commission. The idea that directives implementing agreements would be anyway different from "ordinary" legislative directives has been rejected explicitly by the CJEU in the context of the issue of interpretation[31]. The suggestion[32] that a powerful role for the social partners would jeopardise

[26] GC, 24 October 2019, T-310/18, §§ 65-82.
[27] For a critique of the interpretation given by the GC of Article 17 TEU, see also K. LÖRCHER "On the notion of general interest of the European Union" (in this Working Paper).
[28] GC, 24 October 2019, T-310/18, §§ 69.
[29] A. LO FARO, *Regulating Social Europe. Reality & Myth of Collective Bargaining in the EC Legal Order,* Oxford, Hart Publishing, 2000, 53-89.
[30] B. BERCUSSON, *European Labour Law,* London, Butterworths, 1996, 541 and C. DIDRY and A. MIAS, *Le moment Delors,* Brussels, Peter Lang, 2005, p. 349.
[31] CJEU, 16 September 2010, C-149/10 (*Chatzi*), § 24-25.
[32] GC, 24 October 2019, T-310/18, §§ 81-82.

in an undemocratic way a balance between institutions runs against a quintessential part of the *UEAPME* judgement, where the then "Court of First Instance" confirmed the legislative and the democratic character of the procedure as followed:

> "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"[33].

5. The (so) called teleological interpretation.

Just as the materials for the contextual interpretation has been dissociated from the literal interpretation, the General Court dissociates the materials of the purposive or teleological interpretation[34] from the examination of the literal one. Just like the GC restricts the analysis of the contextual interpretation to solely one provision, the GC restricts its purposive interpretation to one provision, *id est* Article 152 TFEU. It only construes the reference to autonomy as a source for obligations of abstention[35]. It fails to take sufficiently[36] into account in my view that Article 151 TFEU, which constitutes the *Incipit* of the Social Policy Title states that "The Union and the Member States shall have as their objective (…) dialogue between management and labour". The Court also fails to highlight that the EU institutions need to promote the rights enshrined to the CFREU, including the right to collective bargaining (Article 28 CFREU). Indeed, Article 51 CFREU states that "They (the EU Institutions, including the CJEU and consequently also the GC) shall therefore respect the rights, observe the principles and *promote* the application thereof in accordance with their respective powers". The complete disregard of the CFREU in this part of the judgment is astonishing, since the CFREU is intertwined with the values of the Treaty and once the primary objective of the European Union is in fact to promote these values. (Article 3 TEU).

6. The provisions damned from earth.

Last but not least, the GC created a toolbox of "other arguments", apparently unfit for the purpose of contextual or teleological interpretation[37]. Some of these arguments are quintessential in my view for the purposes of contextual interpretation (democracy, horizontal subsidiarity) and for the sake of a purposive interpretation (Article 28 CFREU). Hence, the tendency of the GC to state that these provisions taken in isolation do not entail an obligation for the Commission to table a proposal for a decision, is twisted. Indeed, these provisions should not be read in isolation of Article 155(2) TFEU. The *obiter dictum*[38] that the Commission could choose freely after a joint request between and ordinary parliamentary avenue and a non-parliamentary avenue is shocking and odd with the vow which the Commission has always pledged in its communications to implement *ne varietur*. Last but not least, the mere denial[39] of the horizontal dimension of the principle of

[33] Court of First Instance, 17 June 1998, T-135/96 (*UEAPME*), § 89.
[34] GC, 24 October 2019, T-310/18, §§ 83-90.
[35] GC, 24 October 2019, T-310/18, § 86.
[36] Article 151 TFEU is only mentioned in GC, 24 October 2019, T-310/18, §83.
[37] GC, 24 October 2019, T-310/18, §§ 91-104.
[38] GC, 24 October 2019, T-310/18, § 96.
[39] GC, 24 October 2019, T-310/18, § 98.

subsidiarity as well as its judicial understanding of democracy puts us back to times immemorial, inspired by a Jacobine conception of public authority for which it is dangerous to bow one's head. Apparently, the GC is not aware of the widespread use of the notion subsidiary in a number of EU directives.

7. No critique, just a number of concluding observations.

The method of legal interpretation adopted by the General Court continues to be puzzling. A literal interpretation has amounted to something which is the exact opposite of what a lexical and grammatical interpretation would entail. There is a textual use of the *Travaux préparatoires* which is completely at odds with the historical context of the invention of the European Social Dialogue at the Moment Delors. Neither does the General Court seem to remember that the horizontal dimension constitutes the oldest nucleus of the principle. Once more, a lack of historical know- ledge paradoxically reveals itself to be detrimental to interpret the TFEU as a *living* instrument, fit for present day society. What should be integrated in my view is dissociated, and what should be dissociated is integrated. Thus, the distinction between contextual and teleological is artificial. A provision defining an objective is obviously part of the context as well.

The GC has refused to balance the arguments of the applicants by a cunning reshuffling of these arguments in the wrong boxes, thus disregarding them for the sake of determining the ordinary meaning of Article 155 (2) TFEU.

In sum, just to paraphrase Mario Monti talking about other judgments in a different context, the *EPSU* judgment has the potential "to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration"[40]

[40] Report of Mario Monti, 'A new strategy for the single market' to the President of the Commission, 9 May 2010, p. 68.