The road paved with (broken) promises: from Val Duchesse to the Pillar of Social Rights. Three impressionistic narratives

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The promise was made your word was enough
We had dreams visions and plans
Broken Promises – Survivor

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1. Introduction.

The title and theme of this reflection on the case is inspired by a publication of *EPSU* called "The European Pillar of Broken promises, Time for a Social Europe"[131]. Even stronger than comes forward in the case at the General Court[132], *EPSU* expresses in this document its disappointment in the decision of the Commission not to present the agreement on information and consultation rights for public administration workers to the Council. Especially the words "broken promises" imply a lot. Among others, it implies that *EPSU* is under the impression that the institutional settings in the EU treaties, combined with the Charter on Fundamental Rights of the EU and the European Pillar of Social Rights, includes a firm certainty that the Commission must respond positively to requests of signatories to agreements. It also implies a "blind trust" in that the Commission would have responded positively to their request. The ruling of the General Court was, apparently, not helpful in restoring such trust, as on their website *EPSU* indicates the following:

While the General Court found shortcomings in the way the Commission had handled the agreement, it nonetheless ruled in favour of the Commission's unprecedented position. According to the Court, the Commission does not have to act in transparency based on a set of clear and predictable criteria and processes. There is a breach of confidence in the working of this institution. This cannot be left unchallenged[133].

The aim of this contribution is to analyse what these strong expectations by *EPSU* are based on. Did the EU indeed create institutional settings that justify those expectations and, consequently, did the Commission break the "promise"? Moreover, what narratives have coloured these institutional settings and to what extent has this contributed to such expectations? Three obvious narratives can be distinguished. The first narrative relates to the establishment of the social dialogue in historical perspective starting with the Val Duchesse meetings. The second narrative follows the regulatory developments in the field of EU social policy in general, with an emphasis of the roles of the Commission and Social Dialogue in those regulatory mechanisms. This is based on a review of a selected number of key documents dealing with, among others, EU social policy. The third narrative follows the perception of the social dialogue in the doctrine, especially in handbooks on EU labour law. These narratives together have created a kind of epistemic community about how to understand Social Dialogue in general and the relationship between Social Partners and the Commission. Understanding these narratives is important for any contextual as well as teleological interpretation of Articles 154 and 155 TFEU. Furthermore, combined these narratives may also provide insight in why there is apparently a gap between the expectations, of at least *EPSU*, and the practice that the indication of "broken promise" is given.

It goes beyond the scope of this brief to describe the narratives in detail; therefore, it is done as follows. Each narrative starts with a list of main documents that have been consulted, followed by characteristic impressions that tell the narrative. When relevant or functional quotes have been included. The contribution ends with a reflection on the three narratives with the aim to find an answer on what caused the impression (or feeling) that promises are broken. Furthermore, it should be underlined that the narratives focus on the issue of implementation of the by Social

[131] https://www.epsu.org/article/european-pillar-broken-promises-time-social-europe-one-year- slow-progress-and-disappointment (last visited 15 September 2020).
[132] Case T-310/18 *EPSU* ECLI:EU:T:2019:757.
[133] https://www.epsu.org/article/epsu-appeals-judgement-eu-general-court (last visited 15 September 2020).

Partners negotiated agreements by a Council decision as proposed by the Commission, and more particularly whether over the course of time an expectation has grown that such should be done without an appropriateness test. The texts hold many more interesting aspects related to the *EPSU*-case. These are addressed in other contributions and ignored here. This was sometimes difficult to do since most of the aspects are related to each other. Nonetheless, I tried to confine myself as much as possible to any signs about the main issue of this contribution.

2. Narrative 1- Social dialogue in historical (trade unionist) perspective.

(a) Main documents[134]

1. Jean Lapeyre (2018), *The European Social Dialogue. The history of a social innovation (1985–2003)* (ETUC; Brussels).

2. Jean-Paul Tricart (2019), *Legislative implementation of European social partner agreements: challenges and debates* (ETUI; Brussels) Working Paper 2019.09.

(b) Narrative

The start of the social dialogue as we now know it lies with the first Val Duchesse meetings initiated by Commission President Jacques Delors. At this time, the, then European Economic Community was deadlocked on almost every policy field, institutionally as well as topics related to social dialogue and consultation[135]. Against this background Delors saw only one way forward: "to implement the Single Market, thereby relaunching the EEC machine[136]." To achieve this goal employers and unions had to get involved[137]. Moreover, in his inaugural speech Delors called: "When shall we see the first European collective agreement? I want to insist on this point: the European collective agreement is not an empty slogan. It would provide a dynamic framework, one that respects differing views – a spur to initiative, not a source of paralysing uniformity"[138]. Also, during the first summit words were used as: "The Commission must play a triggering role… (however)… the social partners must not wait for directives, but must get into the driving seat… any delay in innovation will lead to major increases in the cost of labour and thus to greater unemployment"[139].

An event at the Social Dialogue Summit on 7 May 1987, which may seem harmless and merely encouraging, may have relevant meaning for this narrative in search of the "promise". When discussing the development of Social Dialogue, Delors, being aware of the still fragile stage of development, decided to let it develop at its own pace, rather than being forced by legislative intervention by the Commission. More-over, Delors deliberately decided not to legislate on the achieved

[134] I realise that both these documents come from trade union side. Normally that would be problematic as it could lead to a biased vision. In this case though it is not problematic, since the aim is to find out what has contributed to the social partners' understanding of what could be expected from the Commission in terms of giving *erga omnes* effect to their agreements. Especially the expectations of *EPSU*.

[135] J. LAPEYRE (2018), *The European Social Dialogue. The history of a social innovation (1985–2003).* (ETUC; Brussels), p. 30.

[136] LAPEYRE (2018), P. 30.

[137] LAPEYRE (2018), P. 30.

[138] LAPEYRE (2018), p. 34, with reference to: Speech by Jacques Delors to the European Parliament on 14 January 1985 on the basic guidelines underpinning the action that the new Commission planned to take (EP Debates N°2-321/3 dated 14.01.1985).

[139] LAPEYRE (2018), p. 37 (words spoken by unionist Bruno Trentin).

joint opinions, *unless social partners would jointly request such*[140] [emphasis author]. Delors thus left the prerogative to take the step to legislative action expressly with social partners.

The full historical description of the social dialogue by Lapeyre, indicates that during the early years it would have constantly deadlocked if it were not for the interference by the Commission. Especially from the employer's side there seemed little enthusiasm for developing a social dialogue. The strong involvement of the Commission with every step and every meeting at these early days, gives the social dialogue more the character of tri-partitism rather than a dialogue between labour and management. Progress was made though, as employers also realised that the development of the internal market would face severe difficulties if not supported also by dialogue between labour and management[141]. Hence, in the words of Lapeyre, social partners "metamorphosed" from lobbyists to (becoming) players and producers of social standards[142].

Another relevant impression from the early days of the Social Dialogue is that the initial regulation of it in the Social Protocol and its annexed Agreement seems to be surrounded by experimentation reflected by the inclusion of new and vague words. For example, the word "decision" was deliberately written with a small "d" instead of a capital "D" which would refer to the instrument "Decision". The use of the small "d" left the option open for the Council, on proposal by the Commission, to adopt whatever instrument they deemed best suitable[143]. Similarly, the legal nature of the "contractual agreements" was left vague to leave room for experimentation rather than adopting a model inspired by one or two Member States[144]. However, despite the uncertainties indicated by Lapeyre and Tricart, none concern Article 4, par. 2 of the Agreement on Social Policy which deals with the implementation of the agreements concluded by Social Partners via a Council decision, based on a proposal by the Commission.

In his historical account of the development of the Social Dialogue at EU level, Lapeyre quotes from the Venturini/Savoini analysis paper *Dialogue Social: bilan et perspectives* of December 1988:

> "The sectoral dimension of the Community social dialogue is not only an indispensable element in developing the whole industrial relations system, but also seems to offer the best prospects for ensuring effective representation, from a Community perspective, in the face of change, and to counter protectionist temptations possibly arising through the completion of the Single Market."[145]

The quote is interesting in the context of this narrative as it confirms the importance the Commission contributed to not only cross-industry or inter-professional dialogue, but also sectoral dialogue.

All in all, it is clear that at EU level the involvement of Social Partners in EU social policy making is considered very important. Consequently, so are also their agreements. Hence, Tricart's observation in light of paragraph 39 of the 1998 Commission Communication on *Adapting and promoting*

[140] LAPEYRE (2018), P. 47.
[141] LAPEYRE (2018), chapter 3 in general.
[142] LAPEYRE (2018), chapter 4 describes this transformation. An impression that is also supported by observations of the Commission expressed in its working documents and communications (see narrative 2).
[143] Cf. LAPEYRE (2018), p. 108.
[144] Ibidem
[145] LAPEYRE (2018), p. 123.

the Social Dialogue at Community level, which deals with the review by the Commission of Social Partners' agreements that have been submitted for elevation to EU law by a Council decision. The Communication will be discussed in more detail in Narrative 2, but important here is to understand what rationale was seen in it, at least from trade union perspective. The sentence of relevance in Paragraph 39 is the following:

> "[w]here it considers that it should not present a proposal for a decision to implement an agreement to the Council, the Commission will immediately inform the signatory parties of the reasons for its decision" [Emphasis BtH].

According to Tricart, the rationale of this text is that a refusal of the agreement can only be the result of applying the test on representativeness of the signatories, legality of the clauses, or implications for SMEs. The words "immediately" and "reasons" indicate, according to Tricart, that the Commission

> "has no discretionary power in this regard, precisely because it is also bound to promote social dialogue and is committed to promoting the double subsidiarity approach […]. By giving the signatories the reasons for the decision, the Commission also provides them with the opportunity to reconsider and to amend, as appropriate, the content of their agreement, if its legality is contested, or to broaden the negotiations to include other organisations (or to obtain broader support for their agreement), if there is insufficient representativeness; moreover, if the social partners respond accordingly to the reasons communicated to them, they may submit a revised agreement for further consideration by the Commission".[146]

Moreover, it leads Tricart to conclude that the whole way the review is phrased indicates that with reviewing the agreement of Social Partners, the Commission "exercises its right to initiative while fully respecting also its obligation to promote social dialogue."[147] Such a practice is, in Tricart's opinion, consistent with recurrent messages from the Commission on double subsidiarity[148]. More generally, in his historical account of the Social Dialogue, Tricart puts strong emphases on the Commission's obligation to promote social dialogue[149].

A strong promotion of Social Dialogue, or at least a further strengthened appreciation of Social Dialogue, is found by Tricart in the change of the consultation procedure in the Lisbon Treaty. Instead of completing the first two rounds of consultation the new Article 154 TFEU allows Social Partners to initiative the negotiation procedure after the first consultation (on the direction). Tricart mentions several reasons for this, among which an experience based need for more flexibility between consultation and negotiation, especially regarding subjects that would become part of a revision or update of existing standards or where existing standards explicitly created space for sectoral regulations (e.g. in working time)[150]. More interestingly though in the context of this narrative is the first reason Tricart mentions, namely that the second phase of negotiations could "deter

[146] Tricart (2019), p. 20.
[147] Tricart (2019), p. 21.
[148] Ibidem. In other contributions in this Working Paper discussed as "horizontal subsidiarity", i.e. by Melanie SCHMITT, Antonio GARCÍA-MUÑOZ ALHAMBRA, and Massimiliano DELFINO.
[149] In addition to the previous quotes, e.g. also on p. 23 with reference to the Court's ruling in the *UEAPME*-case (Case T-135/96; ECLI:EU:T:1998:128) "the Commission must primarily act in conformity with the principles governing its action in the field of social policy as laid down in the Treaty, which specifically include the promotion of social dialogue" (par. 85 *EUAPME*)
[150] TRICART (2019), P. 25.

negotiation rather than encourage it".[151] Especially when the definition of the content of the Commission's proposal extremely precise[152]. In Tricart's opinion the primary objective of the adjusted Treaty provision was to promote negotiations and "therefore, to broaden the social partners' capacity for action."[153]

Till 2012 the practice of giving *erga omnes* effect to the social partner agreements was always positive and resulted, on average, within about six months in a decision by the Council[154]. However, this changed with a first "no" of the Commission on the Hairdressers agreement and a second "no" on the Information and Consultation for Public Administration Agreement. Tricart traces part of the change in attitude by the Commission back to the deregulation agenda of the Barroso 2 Commission, which affected the field of social policy in particular[155]. In such a political setting there is simply no room for obligatory presentation of agreements to the Council to elevate it into EU law[156]. One way out of it was the introduction of an impact assessment especially on the costs and benefits of adopting legislation in the field of social policy. An assessment which, as convincingly argued by Tricart, runs contradictive to the whole idea of social dialogue of which the agreements are per definition a win/win-outcome for both sides of the industry (after all they negotiate in this balance), and therefore reflects a balance between costs and benefits[157]. Hence, making the outcome of such assessment obsolete as it will always be positive.

However, that route is not taken. Under Juncker, who announced the *New Start for Social Dialogue*, Social Partners, the Commission and the Dutch representative of the Presidency (The Netherlands held EU Presidency at that time) met with the aim to discuss a "clearer relation" between Social Partner agreements and the Better Work Agenda[158]. However, as Tricart points out, the formulation of this relation in the Quadripartite Statement is still rather vague, which Tricart interprets as a failure by the Commission to secure Social Partners' approval of their reading of the new Articles 154 and 155 TFEU, especially regarding a possible assessment[159]. Moreover, it seems to leave the two, Social Partners on the one hand and the Commission on the other, in a status quo that they agree to disagree.

3. Narrative 2- Historical development of Social Dialogue in EU Policy Documents.

(a) Documents

1. 1988 Commission Working Paper *Social Dimension of the Internal Market* (SEC(88) 1148 final)

2. 1993 Commission Communication *concerning the application of the Agreement on Social Policy* (COM(93) 600 final)

[151] TRICART (2019), P. 24.
[152] Ibidem.
[153] TRICART (2019), P. 26.
[154] TRICART (2019), p. 6 and 21. NB as Tricart mentions, six months is really short for the adoption of EU which normally takes a few years. Of course, this could partly be explained by the fact that the content of the agreement is already fixed as it is the outcome of the negotiations, but still, for EU notions it is remarkably fast.
[155] See on this also: B.P. TER HAAR and P. COPELAND (2010), 'What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy', *European Law Journal* Vol. 16, no. 3, pp. 273-291.
[156] Cf. TRICART (2019), P. 33.
[157] TRICART (2019), p. 35.
[158] TRICART (2019), p. 41; and Quadripartite Statement of 27 June 2016, p. 1. (available at: https://ec.eu- ropa.eu/social/main.jsp?catId=329&langId=en).
[159] TRICART (2019), p. 41.

3. 1998 Commission Communication, *Adapting and promoting the Social Dialogue at Community level* (COM(1998) 322 final)

4. 2002 Commission Communication, *The European social dialogue, a force for innovation and change* (COM(2002) 341 final)

5. 2004 Commission Communication *Partnership for change in an enlarged Europe Enhancing the contribution of European social dialogue* (COM(2004) 557 final)

6. 2010 Commission Staff Working Document *on the functioning and potential of European sectoral social dialogue* (SEC(2010) 964 final)

7. 2016 Commission *A new start for social dialogue* (KE-02-16-755-EN-N)

8. 2016 Commission Communication *Better Regulation: Delivering better results for a stronger Union* (COM(2016) 615 final)

9. 2018 Commission Communication on *the principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking* (COM(2018) 703 final)

10. European Pillar of Social Rights[160]

NB This list is not exhaustive but holds all the information to trace the narrative about the role of Social Partners in EU law-making in the field of social policy.

(b) Narrative

In the first policy document consulted for this narrative we find a clear statement about the role of social dialogue in EU social policy:

"The Commission is convinced that the dialogue between labour and management has an absolutely essential role to play in building Europe since it provides means of reaching agreements which can subsequently be turned into proposals for new Community rules"[161] [emphasis BtH].

In its 1993 Communication, the Commission further explains the position of social dialogue as part of EU law-making in the field of social policy. Paragraph 6(c) of this Communication confirms a form of "dual subsidiarity":

> "[…] 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" [Emphasis BtH].

In the same paragraph the Commission continues with stressing that:

> "[…] The Commission can only express its pleasure at the fact that this principle of dual subsidiarity, which was in fact introduced by the Commission as part of its contribution to the intergovernmental conference and subsequently adopted by the social partners, has now been incorporated into the Agreement."

[160] https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social- rights-booklet_en.pdf
[161] SEC(88) 1148 final, p. 32.

Paragraph 9 adds to this in its last sentence, that Social Partners

> "also open up a new prospect for the Community social dialogue in that it may now lead to the establishment of contractual relations, including agreements, which may be implemented, in defined circumstances, by a Council decision based on a proposal from the Commission" (Emphasis by me).

Furthermore, paragraph 39 concludes with the following words:

> "Where it [the Commission; BtH] considers that it should not present a proposal for a decision to implement an agreement to the Council, the Commission will immediately inform the signatory parties of the reasons for its decision" [emphasis BtH].

Although a form of dual subsidiarity is recognised by the Commission, at the same time the Communication holds in paragraph 9 a few words (see emphasised) that could be interpreted as for the Commission always keeping the last say in whether or not an agreement should be elevated to Union law. The last words in paragraph 39 are even more explicit in this. Although this was noticed by Social Partners, at least Lapeyre makes note of it in his historical account of the Social Dialogue[162], this didn't seem to be a point of main concern at the time. There seem to have been more issues about implementing the agreement through a Council decision as an "as is" agreement with merely an informative role for the European Parliament[163].

Furthermore, even though it is stated that the Commission may have "considerations" not to present a proposal to the Council, an appropriateness test is not (explicitly) indicated in the document. Paragraph 39 "merely" states that

> "[b]y virtue of its role as guardian of the Treaties, the Commission will prepare proposals for decisions to the Council following consideration of the representative status of the contracting parties, their mandate and the "legality" of each clause in the collective agreement in relation to Community law, and the provisions regarding small and medium-sized undertakings set out in Article 2(2). At all events, the Commission intends to provide an explanatory memorandum on any proposal presented to the Council in this area, giving its comments and assessment of the agreement concluded by the social partners" [emphasis BtH].

In this context it is also interesting to include here paragraph 42, which determines that

> "[i]f the Council decides, in accordance with the procedures set out in the last subparagraph of Article 4(2), not to implement the agreement as concluded by the social partners, the Commission will withdraw its proposal for a decision and will examine, in the light of the work done, whether a legislative instrument in the area in question would be appropriate".

Thus, even when the Council decides not to adopt a decision, the Commission must consider the legislative route as means to elevate (part of) the content of the agreement to Union law. Hence, another signal that agreements of Social Partners are to be taken seriously and as such contributing to the expectation that any agreement submitted to the Commission will be taken forward.

[162] LAPEYRE (2018), P. 120.
[163] LAPEYRE (2018), P. 120.

This test is repeated in several documents[164], the need for an appropriateness test is mentioned, however, only in relation to agreements that have been negotiated outside the consultation process. More precisely, it its 1998 Communication the Commission formulated it as follows:

> "In addition, before proposing a decision implementing an agreement negotiated on a matter within the material scope of Article 2 ASP, but outside the formal consultation procedure, the Commission has the obligation to assess the appropriateness of Community action in that field" [emphasis BtH].

The need to include this is clearly given by the fact that at this time Social Partners had matured more and became somewhat less dependent from the Commission for its functioning. Although the Commission clearly still saw as its main task to support Social Partners in their negotiation processes, including offering services when negotiations would deadlock[165]. Moreover, while in 1998 the Commission noted that the European Sectoral Social Dialogue should pick up pace and with that aim established a common framework for sectoral committees[166], in 2004 the Commission noticed that

> "In recent years the social partners have wished to pursue a more autonomous dialogue and are adopting a diverse array of initiatives, including an increasing number of "new generation" joint texts, characterised by the fact that they are to be followed-up by the social partners themselves."[167]

In 2010 the Commission noticed in a Staff Working Document that:

> "More recent developments suggest that the number of sectoral agreements may grow even further and that such negotiations are increasingly independent from formal consultations initiated by the Commission. There are negotiations starting or on-going in a range of sectors including personal services, professional football, inland waterways, and sea fisheries.

However, […] The public sector was also absent from sectoral negotiations until the benchmark agreement on sharp injuries in the hospital sector, completed in 2009".[168]

Thus, within a period of 12 years the ESSD has, like cross-industry SD, matured which resulted, among other things, in an increase of the number of agreements negotiated independent from formal consultations, and the public sector was especially singled out and encouraged to pick up pace as well[169].

As indicated in Narrative 1, the change in the Lisbon Treaty (2009), meaning that based on Art. 154, par. 2 TFEU social partners can already choose to start negotiations after the first round of

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[164] E.g. COM(1998) 322 final, p. 19.
[165] Cf. COM(1998) 322 final, p. 22.
[166] J. KŠIŇAN, 'EU Issues on tripartism', and A. GARCÍA-MUÑOZ ALHAMBRA, 'European Sectoral Social Dialogue', both forthcoming in B.P. TER HAAR and A. KUN (eds), *EU Collective Labour Law* (Edward Elgar; Cheltenham).
[167] COM(2004) 557 final, p.3.
[168] SEC(2010) 964 final, p. 14.
[169] How much social dialogue in general has matured can be read in the Commission's document *A new start for social dialogue*, which lists on p. 15 the following forums for social dialogue: Tripartite Social Summit (TSS); Macroeconomic Dialogue (MED); Social Dialogue Committee (cross-industry) (SDC); Sectoral social dialogue committees (SSDCs); and The Liaison Forum (which facilitates the exchange of information between all EU social partner organisations and the Commission). Besides these, the same document refers also to numerous advisory committees and seminars and joint projects by the social partners (p. 16).

consultations. However, the consultation concerns not only Social Partners but also others, which, after the first round of consultations, could still result in a change of vision by the Commission resulting in a conclusion that the proposed initial idea for EU legislation is not appropriate[170].

In addition to this change, since the Barroso Commission took office for a first term in 2004 and a second term starting in 2010, the agenda for EU regulation changed into an agenda of deregulation. This was characterised by limited adoption of new legislation, especially in the field of social policies (which in this period was dominated by soft law in the form of the Open Method of Coordination) and the programme REFIT[171] by which existing legislation was re-evaluated for burden reduction and simplification[172]. This line was continued by the Juncker Commission in the Better Regulation programme (with support of REFIT). Interesting in the context of our narrative here, is when the Commission talks about how to achieve this, it underlines that "all actors need to buy into this agenda".[173] These actors are, besides the Commission, the European Parliament and the Council, not (also) Social Partners[174].

The importance of the role of Social Partners and Social Dialogue is (re-)confirmed by the Juncker Commission with the document *A new start for social dialogue*. This document includes a diagram of the "consultation and negotiation procedure under Articles 154 and 155". In this diagram the assessment of Social Partners' agreement before elevating it to EU law is explicitly included (see Annex 2). This can be the result of the clearer relation between Social Partners' agreements and the Better Regulation Agenda, which was indicated by Juncker as a necessity[175].

The last document in this narrative is the European Pillar of Social Rights (EPSR). The aim of the Pillar is to serve as a guide towards efficient employment and social outcomes when responding to current and future challenges which are directly aimed at fulfilling people's essential needs, and towards ensuring better enactment and implementation of social rights[176]. When it comes to the role of Social Partners three indications are of relevance. In paragraph 17 of the preamble of the EPSR it is indicated that the Pillar is to be implementation at EU as well as Member State level, taking into account the socio-economic differences and diversity of national systems, "including the role of social partners". The second indication of relevance is found in paragraph 20 of the preamble, which reads as follows:

> "Social dialogue plays a central role in reinforcing social rights and enhancing sustainable and inclusive growth. Social partners at all levels have a crucial role to play in pursuing and implementing the European Pillar of Social Rights, in accordance with their autonomy in negotiating and concluding agreements and the right to collective bargaining and collective action" [emphasis BtH].

The last indication of interest is found in key principle 8 of the EPSR:

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[170] Cf. COM(2018) 703 final, p. 9

[171] https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit- making-eu-law-simpler-less-costly-and-future-proof_en (last visited 29 September 2020).

[172] COM(2016) 615 final, p. 5.

[173] Ibidem, p. 9.

[174] Ibidem, p. 9 with reference to the Interinstitutional Agreement on Better Law-making (EU OJ [2016] L123/1), in which Social Partners are also not named.

[175] Commission *A New Start for Social Dialogue* (2016), p. 9.

[176] Par. 12 Preamble EPSR (https://ec.europa.eu/commission/sites/beta-political/files/social-summit- european-pillar-social-rights-booklet_en.pdf).

> "The social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. Where appropriate, agreements concluded between the social partners shall be implemented at the level of the Union and its Member States" [emphasis BtH].

When reading this in combination with the above development in the policy documents this seems to give at least a mixed expectation. In paragraph 17 of the preamble Social Partners have not been mentioned at the same level of implementation responsibility as the EU (institutions) or the Member States. In paragraph 20 of the preamble this is sort of compensated as they have been attributed a specific role in the implementation of the Pillar. However, when reading Key principle 8, we find the words "where appropriate" which builds in a disclaimer for an assessment by others, likely the EU or the Member States as both are indicated as level of implementation. Thus, while on the one hand Social Partners are recognized as having an "essential" role to play, at the same time this role is made subordinate to an "appropriateness test".

4. Narrative 3 – Doctrine's perception.

(a) Handbooks

The handbooks are divided into two types: those dealing with EU Government and EU law in general and those dealing with EU Labour law in particular. The reason for this is that part of the issues in the *EPSU*-case are related to general issues of EU Government and EU Law, such as the Commission's prerogative on initiating EU legislation and related to that the appropriateness test. Hence the vision of general EU Government and EU law scholars on Social Dialogue and the role of Social Partners in EU law-making is interesting. Since a good part of the EU is politics rather than legal, two handbooks on EU government (or governance) have been included. However, most of the attention in the narrative will be paid to the specific textbooks on EU Labour Law, which accounts also for the majority of handbooks consulted.

(a.1) Handbooks on EU law

1. 2006 J. Richardson (ed.), *European Union. Power and policy-making* (Routledge; Oxon) 3rd edition
2. 2008 P. Craig and G. De Búrca, *EU Law. Text, Cases and Materials* (OUP; Oxford) 4th edition
3. 2008 E. Szyszczak and A. Cygan, *Understanding EU Law* (Sweet & Maxwell; London) 2nd edition
4. 2011 A. Dashwood, M. Dougan, B. Rodger, E. Spaventa and D. Wyatt, *European Union Law* (Hart Publishing; Oxford) 6th edition
5. 2017 N. Nugent, *The government and politics of the European Union* (Palgrave; London) 8th edition

(a.2) Handbooks on EU labour law

1. 1993 R. Nielsen and E. Szyszczak, *The Social Dimension of the European Community* (HF; Copenhagen) 2nd edition

2. 1997 R. Nielsen and E. Szyszczak, *The Social Dimension of the European Community* (HF; Copenhagen) 3rd edition
3. 2000 R. Nielsen, *European Labour Law* (DJØF Publishing; Copenhagen)
4. 2000 E. Szyszczak, *EC Labour Law* (Longman; London)
5. 1996 B. Bercusson, *European Labour Law* (Butterworths; London) 1st edition
6. 2000 C. Barnard, *EC Employment Law* (OUP; Oxford) 2nd edition
7. 2006 C. Barnard, *EC Employment Law* (OUP; Oxford) 3rd edition
8. 2012 C. Barnard, *EU Employment Law* (OUP; Oxford) 4th edition
9. 2009 Ph. Watson, *EU Social and Employment Law. Policy and Practice in an Enlarged Europe* (OUP: Oxford)
10. 2012 A.C.L. Davies, *EU Labour Law* (EE; Cheltenham)
11. 2012 K. Riesenhuber, *European Employment Law. A systematic Exposition* (Intersentia; Cambridge/Antwerp)
12. 2014 R. Blanpain, *European Labour Law* (Wolters Kluwer; Alphen aan de Rijn) 14th edition
13. 2019 T. Jaspers, F. Pennings, and S. Peters (eds.), *European Labour Law* (Intersentia; Cambridge)

A number of caveats need to be addressed before starting the narrative. The sources for this narrative is limited to Handbooks on EC/EU Labour/Employment Law since these are written in such a way to give a quick and accessible insight on the topic for students as well as people in practice. Hence, these books reflect a general understanding on issued of EU Labour/Employment Law, including the Social Dialogue and the position of Social Partners in the EU law-making process in the field of Social Policies. The selection is limited to Handbooks that are written in English and therefore accessible for a wide audience. An attempt is made to find a balance between books written by English native speakers, which reflect a mainly Anglo-Saxon/common law take on EC/EU Labour/Employment Law and those written by non-natives in English, which reflect a more continental European/civil law approach. One book aims to deliver a "national biased free" view (Jaspers, Pennings and Peters). Most of the books have been updated regularly (all books on EU Government and general on EU Law; Nielsen and Szyszczak; Bercusson; Barnard; Blanpain) and some have been published only after the adoption of the Lisbon Treaties in 2009 (Watson; Davies; Riesenhuber; Jaspers c.s.). To stay with the historical approaches followed in the previous two narratives, the Handbooks are also treated in chronological order. For as far as applicable and possible[177] different editions of a Handbook have been consulted. In any case they are consulted in chronological order following the date of publication.

(b) Narrative perception of the role of social partners by the legal doctrine

To tell the narrative of the role of Social Partners and Social Dialogue in EU law-making as perceived by the legal doctrine a number of aspects are interesting. These include the perspective in which Social Dialogue is discussed: as part of the legislative process; as part of (legal) sources of EU (labour) law; or as part of EU collective labour law. The narrative first starts with an account found in the general EU law and EU government books, followed by the narrative as found in the specific EU labour law handbooks.

[177] COVID19 seriously limits access to the university library, therefore consultation is the handbooks is further limited to those privately possessed by the author.

(b.1) Narrative in general EU law and EU government books

This is a rather short narrative because in general social partners and/or the social dialogue is simple not addressed at all. In the books on EU government (or governance), Social Dialogue or Social Partners are simply non-existent. Not even with the description of the consultation procedures, the position and role of Social Dialogue and/or Social Partners is mentioned[178]. In the book by Nugent "Social Dialogue" is mentioned one time, in a "box", so not even in the main body of the text, namely as a "way in which interests can communicate their views to the Commission"[179] [emphasis BtH]. Hence, Social Partners are reduced to "interests". At least the historical development accounts mention reform in linking the single European market (SEM) to institutional settings, social regulation, and economic cohesion[180]. But very general only.

What makes a review of these books interesting in the context of this contribution is that they provide some insight in the changes the Commission as institution has undergone. Delors' Commission was very different than the later Commissions, with first significant changes introduced when Delors' successor, Prodi took office[181]. Furthermore, power shifts between the institutions have resulted in an in general very different position of the Commission. These shifts include: an increased role for the Council and European Parliament in legislation; a growing importance of the use of new governance mechanisms like the Open Method of Coordination (OMC) which weakened in general the role of the Commission; and in general, as for many national administrations, a smaller role/rolling back responsibilities of the public sector[182]. Better Regulation is part of these changes as well. When viewed in the context of this contribution, these changes may (partly) explain the changing attitude found in narratives 1 and 2 towards the role and position of Social Partners and Social Dialogue as part of the EU law-making process.

The general handbooks on EU Law are just as depressing in this perspective. Even though De Búrca has done considerable work in the field of EU human rights law and social policy, no special attention is paid to the Social Dialogue. Definitely not as part of a (special) law-making procedure, and barely as an instrument of EU law. Regarding the latter, Social Dialogue is mentioned in reference of the implementation of the Social Policy Agenda, for which "all existing Community instruments bas none must be used: the open method of co-ordination, legislation, the social dialogue, the Structural Funds, the support programmes, the integrated policy approach, analysis and research"[183] [emphasis BtH]. Dashwood c.s. only mention Social Dialogue under the heading of "Non-legislative Acts Adopted Directly Under the Treaties", where they raise the question whether the Council decisions implementing the social partner agreements are correctly categorised as non-legislative in character[184]. Which with having the CFI ruling in the *EUAPME-case* in mind[185], is

[178] N. NUGENT, *The government and politics of the European Union*, pp. 330 – 331. Interestingly, but a side path, Nugent does describe that none of the citizen initiatives (56 in total in 2017, of which 36 properly submitted and only 3 with the required number of signatures) have resulted in the proposition of new legislation by the Commission.
[179] N. NUGENT, *The government and politics of the European Union*, p. 271.
[180] E.g. LAFFAN and MAZEY, 'European Integration: The European Union – reaching an equilibrium?', in RICHARDSON (ed.) *European Union. Power and Policy-Making*, p. 43.
[181] See on this in particular: T. CHRISTIANSEN, 'The European Commission: the European executive between continuity and change', in RICHARDSON (ed.) *European Union. Power and Policy-Making*, pp. 97 – 120.
[182] Cf. N. NUGENT, *The government and politics of the European Union*, pp. 159 – 161.
[183] P. CRAIG and G. DE BÚRCA, *EU Law*, p. 87.
[184] Dashwood c.s. *European Union Law*, p. 85.
[185] ECLI:EU:T:1998:128, par. 67.

actually a weird positioning of these decisions (or better: directives). Nonetheless, this is how it is viewed in this handbook, which is the narrative I try to unpack here.

An exception on these accounts ignoring the role and position of Social Partners and Social Dialogue is the handbook by Szyszczak and Cygan. Maybe not entirely surprising knowing that Szyszczak has written specific handbooks on EU Labour Law (see below). In the very comprised text addressing EU social policy, it is stated that the Amsterdam Treaty created with the new Articles 136–139 "a broad legal base for employment law measures recognising the Social Partners as institutional actors in the process."[186] [emphasis BtH].

The more general chapters in these handbooks reflect the same developments as the EU policy government handbooks: the development of a more confined and restricted role of the Commission in EU policy and law-making. All in all, these books together sketch the image of an actor that has become more strictly bound by its Treatyattributed task with less room for progressive development by its own insights. Freedoms Delors' Commission certainly still had.

(b.2) Narrative in handbooks on EU labour law Perception of the role of social dialogue in EU law-making

The Handbook by Nielsen and Szyszczak (2nd edition of 1993) gives an interesting ac-

count of the doctrinal debate about Social Dialogue at that time. They quote Blanpain who is very reserved about the effectiveness of Social Dialogue, since, in his view, "trade unions do not have enough power at the European Level to force the employers' associations or multinational groups to meet around the bargaining table"[187]. Bercusson is more optimistic as he argued another side of the Social Dialogue, namely that is provides "flexibility and consensus by the maximum democratic involvement of employers and workers".[188] Nielsen and Szyszczak hold a more middle position as they conclude the section with the remark that it "remains to be seen whether this new procedure is a viable alternative to Community legislation".[189]

In Nielsen's handbook (published in 2000), Collective Agreements are considered a source on their own, as she positions them not only in a separate subsection in the chapter on "Sources", but also writes that "Article 138 EC and 139 EC provide for the possibility of *adopting EU legislation* on the basis of European collective agreements concluded by the social partners at EU level […]"[190] [emphasis BtH]. Further down in the book she talks about "Legislative competence of Social Partners"[191] [emphasis BtH]. This resonates one of the conclusions of the CFI in the *UEAPME*-case on the point of democracy as quoted by Nielsen: "[…] 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, […], with a legislative foundation at Community level."[192]

[186] E. SZYSZCZAK and A. CYGAN, *Understanding EU Law*, p. 288.
[187] R. NIELSEN and E. SZYSZCZAK (1993 2nd edition), p. 35.
[188] Ibidem.
[189] Ibidem.
[190] R. NIELSEN (2000), *European Labour Law* (DJØF Publishing; Copenhagen), 51.
[191] NIELSEN (2000), P. 132.
[192] NIELSEN (2000), p. 137; and CFI *UEAPME* ECLI:EU:CFI:1998:128, par. 89.

In her book, also published in 2000, Szyszczak, labels collective bargaining as a source of Community labour law, more precisely "a binding piece of Community law by means of a Council Directive."[193] She clearly distinguishes a doctrinal debate on the role of social partners as institutional actors. The strongest reference is to the works by Dølvick, who argued that "social partners have been recognised and integrated in a modest but new kind of co-regulatory regime of international labour market governance at Community level which has no counterpart at any other place in the world"[194] [emphasis BtH].

Bercusson, wrote his 1st edition of *European Labour Law*[195] in 1996 when the Social Dialogue was still relatively new. In his preface he therefore indicates that since European labour law is in evolutionary change, the prospects of further operationalisation of the European Social Dialogue is one of the two features for the long-term perspective[196]. Moreover, as part of the historical development of EC Labour Law, he devotes a whole chapter on the Strategy of European Social Dialogue[197]. In this chapter, Bercusson draws a picture of both the Commission (in establishing consultation bodies, including from both sides of the industry) and the European Parliament (being very open to relations with social partners because this was important for their electability), being very favourable towards social partners[198]. However, making Social Partners work together was not so easy. Bercusson explains this from the wider context of social dumping and "social regime competition". A context that put both sides of the industry on different sides of possible EU social policy strategies. Approaches that, despite various developments, still seem not resolved. According to Bercusson the 1989 Charter and the 1991 Protocol and Agreement did achieve a consensus between Social Partners that Social Dialogue "should become a, if not the, primary instrument for social and labour regulation in the EU."[199] To what extend such role will also be successful depends on the possibilities of sectoral social dialogue at EU level. After analysing some of these developments, Bercusson concludes that there are opportunities, however, much depends on strategies and directions to be taken in the future[200].

In the context of the different approaches, or incentives, for Social Partners to go along with Delors' idea of a Social Dialogue at EU level, Bercusson introduced referred to the principle of "negotiating in the shadow of the law". This has been picked up by several other scholars. Barnard, for example, elaborates on this by explaining rather clearly the different approaches to Social Dialogue by Social Partners. For employers Social Dialogue is interesting, because if they do not negotiate an agreement, the Commission may take the proposal to the legislative route, which may have a for them disadvantage result since in general legislation is less flexible and holds fewer options for derogations[201]. Trade Unions, on the contrary, prefer legislation with room for collective bargaining "to top up the minimum standards provided by the law."[202] Davies, who also

[193] Ibidem, p. 36.
[194] Ibidem, p. 38; J. DØLVICK (1997), *The ETUC and Development of Social Dialogue and European Negotiations after Maastricht*, Arena Working Paper 2, p. 76.
[195] And as indicated in the list above also the only one consulted.
[196] BERCUSSON (1996), p vii.
[197] Ibidem, p. 72 ff.
[198] Ibidem, p. 72-73.
[199] Ibidem, p. 78.
[200] Ibidem, p. 94.
[201] BARNARD (2000 – 2nd edition), p. 102.
[202] Ibidem; and S. FREDMAN (1998), 'Social Law in the European Union: the Impact of the Lawmaking Process', in CRAIG and HARLOW (eds.), *Lawmaking in the European Union* (Kluwer; Deventer), p. 409.

considers social dialogue as part of the legislative process, since the examination thereof will focus "on the role of the social partners and their power to develop labour law by reaching agreements […]," [203] follows a similar interpretation[204]. These explanations based on the principle of "negotiating in the shadow of the law" are much in line with the developments described in Narratives 1 and 2 with regard to the early days of EU Social Dialogue which resulted in strong involvement by the Commission.

Interpretations of the Treaty provisions on social dialogue

In the context of this contribution two handbooks are rather disappointing with the information they provide about the Social Dialogue. Riesenhuber is extremely short about the Social Dialogue. He qualifies it as a source of EU employment law and states that with the possibility to extend the agreements to EU law by means of a Council decision Social Partners "can directly influence the content of EU legislation"[205]. This is basically all he says about it. Blanpain addresses Social Dialogue elaborately. He too underlines the important role of Social Partners in shaping EU labour law. He acknowledges that there are a number of extremely complex problems of legal nature for which further EU legislation may be needed[206]. However, none of the problems he identifies relate to the issue of the Commission performing an appropriateness test and whether or not this may give rise for the Commission to refuse to present an agreement to the Council.

The other handbooks are somewhat more insightful regarding the issues relevant for this narrative. Regarding the more legal technical nature of the Social Dialogue, Nielsen and Szyszczak write that "at the joint request of the social partners the agreements are to be given legally binding force by a decision of the Council."[207] [emphasis BtH] In the 3rd edition of their book this wording is adjusted to "any agreement reached may be implemented by a Council decision." Barnard is maybe the most explicit in qualifying Social Dialogue as part of EU social legislation. She calls social dialogue "the collective route to legislation" and "the second limb of the twin-track approach", with the first being the legislative route, to EU social legislation[208]. Furthermore, she writes "social partners at Community level negotiate agreements which are then extended to all workers by Council "decision"."[209] Additionally, she refers to Streeck who described Social Dialogue as "neo-voluntarism", i.e. "putting the will of those affected by a rule, and the "voluntary" agreements negotiated between them, above the will or potential will of the legislature."[210]

When the signatories have requested to give extended effect to their agreement, a common doctrinal view is that the Commission takes back control over the procedure. In this context Barnard writes that as part of its role as guardian of the Treaties, the Commission "considers the mandate of the social partners and the "legality" of each clause in the collective agreement in relation to Community law, and the provisions regarding SMEs set out in Article 137(2)."[211] In the footnote

[203] DAVIES (2012), P.29.
[204] DAVIES (2012), p. 35-39.
[205] RIESENHUBER (2012), P. 16.
[206] BLANPAIN (2012), p. 193.
[207] R. NIELSEN and E. SZYSZCZAK (1993 2nd edition), p. 34.
[208] BARNARD (2000 – 2nd edition), p. 90; and exactly the same: BARNARD (2012 – 4th edition), p. 71.
[209] BARNARD (2000 – 2nd edition), p. 90.
[210] Ibidem; and W. STREECK (1999), 'Competitive Solidarity: Rethinking the "European Social Model"' *MPIfG Working Paper* 99/8; and W. STREECK (1995), 'Neo-Voluntarism: A New Social Policy Regime', *European Law Journal* Vol. 1, 31.
[211] BARNARD (2000 – 2nd edition), p. 93; and BARNARD (2012 – 4th edition), p. 76, both with references to: CFI *UEAPME*-case ECLI:EU:CFI:1998:128, par. 84; and COM(93) 600 final, par. 39. BLANPAIN (2012), p. 195 does the same.

reference is made to an Opinion by ECOSOC[212] in which the assumption of power (over the process) by the Commission was contested "on the grounds that the Commission has no discretion whether a collective agreement should be put to the Council."[213] To understand the implication of this, it is helpful to combine this with the account by Watson.

Watson also qualifies Social Dialogue as "legislative role of the Social Partners".[214] She also confirms that the Commission verifies a number of factors inherent to the EU legislative process before presenting the agreement to the Council, albeit it different ones than Barnard (and most others) identified. Watson lists as factors to be verified: 1) a check whether the agreement falls within the competence of Art. 137 EC (now Art. 153 TFEU) "in the sense that it contributes to the realization of the social aims defined in that provision"; 2) the legality of the clauses in the agreement; 3) compliance with the provisions regarding SMEs; and 4) "compatibility with the principles of subsidiarity and proportionality"[215]. The Commission then sets out its assessment of the agreement in an Explanatory Memorandum which is attached to the proposal for the implementation of the agreement[216]. Whatever the outcome of the assessment, in the account of Watson, the Commission cannot refuse to forward the agreement to the Council when requested to do so – its role it simply that of a postbox"[217] [emphasis BtH]. However, the Commission may advise the Council not to adopt the agreement since "the Council may decline to adopt the agreement in the terms presented to it."[218]

While Jaspers uses similar vocabulary and interpretations about the position of Social Dialogue in the law-making apparatus of the EU, his view on what the Commission can do with the request of the signatories to the agreement is radically different. Similar to Watson he acknowledges the task of the Commission to review whether the agreement contributes to the achievement of the Community's objectives. However, unlike the others, he then concludes that when "in the view of the Commission the agreement does not satisfy these requirements, it may itself put forward a proposal for legislative act"[219]. He grounds his conclusion on paragraph 4.4 of the 2004 Communication of the Commission, however, this must be a (unfortunate) mistake, since this paragraph deals with autonomous agreements where it follows on the monitoring of the implementation of such agreements[220]. Furthermore, Jaspers too lists among the checks of requirements a subsidiarity (or appropriateness) test. Here he indicates that if the agreement was negotiated following the consultation procedure, "it can be assumed that the question of appropriateness of supporting and complementing the activities of the Member States has already been answered."[221] In other cases, thus when negotiations have started autonomously, "the Commission will have to make up for this assessment in the course of determining whether to propose a Council decision".[222] With

[212] Opinion 94/C 397/17 (OJ [1994] C397/40).
[213] The Opinion was originally cited by: B. BERCUSSON (1999), 'Democratic Legitimacy and European Labour Law', *Industrial Law Journal* Vol. 28, p. 162.
[214] WATSON (2009), P. 83.
[215] WATSON (2009), p. 84, with reference to: S. SMISMANS (2007), 'The European Social Dialogue between Constitutional and Labour Law', *European Law Review* Vol. 32, p. 351. NB Nothing is mentioned about checking the representativity (or mandate) of the signatories to the agreement.
[216] WATSON (2009), P. 84.
[217] WATSON (2009), P. 85.
[218] Ibidem
[219] JASPERS, PENNINGS and PETERS (2019), p. 265.
[220] COM(2004) 557 final (listed under narrative 2).
[221] JASPERS, PENNINGS and PETERS (2019), p. 266.
[222] Ibidem.

this phrasing Jaspers suggests that the Commission has a choice whether or not to present the agreement to the Council who can then either accept or reject it. Unfortunately, Jaspers makes no reference to the change in the provision that Social Partners can already indicate to start negotiations after the first round of consultation, consequently, he also doesn't mention anything about whether such agreements should still undergo an appropriateness test or not. This is exactly the crux in the *EPSU*-case.

5. Concluding reflections on the three narratives.

The aim of this contribution was to analyse what the strong expectations by Social Partners, and in the case in particular *EPSU*, are based on. Did the EU indeed create institutional settings that justify those expectations and, consequently, did the Commission break the "promise"? To analyse these three impressionistic narratives have been sketched.

The first narrative is that of Social Partners, or more precisely of trade unions. The impression this narrative gives is that at the start of the Social Dialogue the Commission was much involved and supported Social Partners in any possible way to get them to participate successfully. This included presenting all agreements of Social Partners to the Council to be extended to EU law when signatories requested such. This attitude started to change since 2012. While Narrative 1 mainly reflects how the change in attitude is perceived by Social Partners, Narrative 2 provides more clarity in the background of the changed attitude.

Narrative 2 is mainly based on documents from the Commission and hence reflects more the view of the Commission. This narrative reveals two story lines. The first is the continuous emphasis the Commission has put on the importance of Social Dialogue (at cross-sectoral and sectoral level) for the EU. For EU social policy in particular, but also for the EU's internal market and economic and employment policies. Especially the early documents demonstrate this as they strongly support the development of Social Dialogue. Many are from the Delors Commission, but this also includes the EPSR (especially paragraph 20 of the preamble) from the Juncker Commission. The second story line is one in which the Commission starts to take a bit of distance from Social Partners and starts to treat Social Dialogue more similar to any other aspects of EU law-making. This is particularly apparent in the REFIT programme from the Barroso Commission and the continuation thereof in the Juncker Commission's Better Work Agenda. It is also apparent in the interpretation of Article 154 TFEU on the point where Social Partners indicate after the first round of consultation their desire to initiate negotiations. On the one hand this is clearly presented as leaving Social Partners more room to negotiate in autonomy, on the other hand it is used to argue that because of that room it makes their agreements part of the appropriateness test.

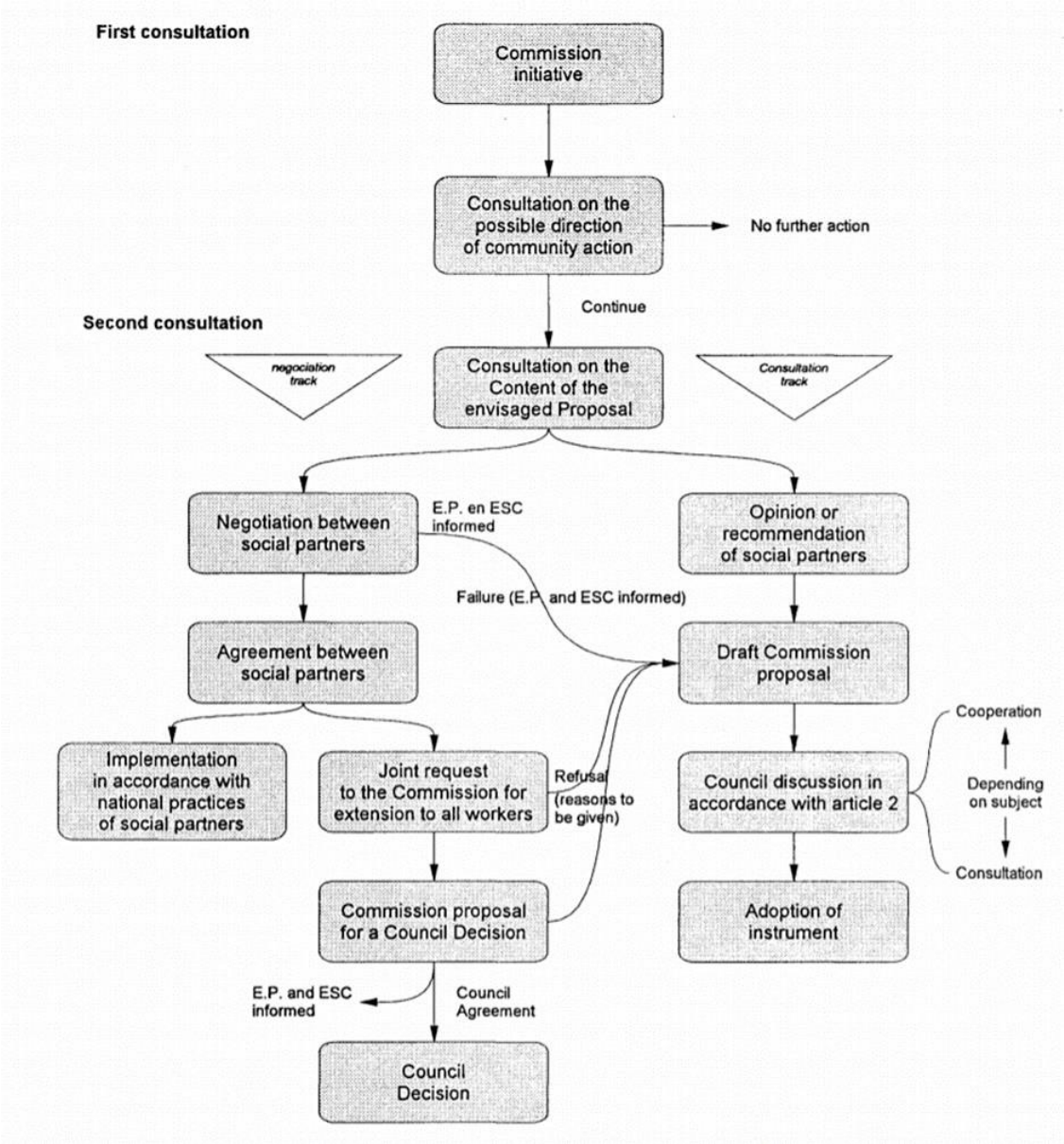
Narrative 3 is more neutral as it reflects the view of (legal) scholars on the position and regulation of Social Dialogue in EU (labour) law as expressed in Handbooks. Given the continuous emphasise on the importance of Social Dialogue for EU social policy, but also for the internal market and economic and employment policies it is actually shocking that basically no attention at all is paid on Social Dialogue in the general handbooks on EU Government and EU Law. The information in these handbooks is still interesting as it helps to understand the changed position of the Commission over the course of time, which understandably affects its attitude towards Social Partners and Social Dialogue. Nonetheless, it is shocking and should be a red flag that apparently in general EU government and law there is a huge gap in knowledge about the importance of Social Dialogue and the involvement of Social Partners in law-making.

The handbooks on EU labour law seem to understand this much better, obviously. However, all of them seem to have missed the changing relationship between the Commission and Social Partners. Many texts are based on the perception of Social Dialogue as established in the Delors period (including the scheme in Annex 1). This is most visible in handbooks that have been updated over the course of time since their texts on Social Dialogue has hardly changed. For some of these books that make sense as their last edition was around 2000 or in 2012, the latter being the year in which this relationship started to change. The more recent handbooks though also do not pick up on these changes. For sure the implications of REFIT and the Better Work Agenda have been collectively missed. A few scholars mention the appropriateness test being part of the checks the Commission needs to make before presenting the agreement to the Council. However, they are unclear about what this means for the next step, especially whether this means the Commission can decide not to present the agreement to the Council. Thus, while these handbooks do help to understand what promise was made, they are of little help how this promise has changed over the course of time and whether we should consider the current attitude and practice of the Commission as a broken promise.

To conclude one final reflection based on the three narratives together. All three are clear in that Social Dialogue is important for EU law-making. Not only for social policy, but also for the internal market, and economic and employment policies. This is clearly reflected also in the numerous for a Social Partners are involved and various levels Social Dialogue takes place. Although different from practices in the Member States, EU Social Dialogue does reflect a European value of a special role for both sides of the industry in policy and law-making. As recognised by most scholars, this value holds many complex legal challenges in the context of the EU. A number of these challenges are related to the EU's specific legal order and institutional setting with the Commission as guardian of EU goals and initiator of EU legislation. This is further complicated by the requirement of subsidiarity (and proportionality) which plays an important role in REFIT and the Better Work Agenda. While from a (constitutional) general EU law perspective and requirements of democracy such critical programmes are understandable, completely ignoring the specific nature, meaning and value of the role of Social Partners and Social Dialogue in these programmes is incomprehensible. In fact, this indeed results in a broken promise. To put it in another metaphor: in word Social Dialogue is part of the heart of the EU, in practice though, this part of the heart is neglected. As such it was just a matter of time for a heart attack to happen: the *EPSU*-case.

Annex 1 Procedure EU social policy law-making

Source: COM(93) 600 final; also referred to in the Handbook(s) by Barnard



Annex 2 Consultation and negotiation procedure under Art. 154 and 155

Source: Commission, *A New Start for Social Dialogue*, p.7