Bringing the voice of legal scholars into the courtrooms of Plateau de Kirchberg. An introduction

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Starting from 1992, generations of European (labour) lawyers – some of them among the Authors of this collection – have been intensively investigating the social dialogue provisos originally included in the Maastricht Social Protocol and later incorporated within the Treaty.

Caught between an "EU law-institutional" perspective, and a "Labour Lawindustrial relations" approach, the European social dialogue's early life in the last decade of the XX century has been advancing among a series of "identity dilemmas": is it an expression of true social partners' autonomy, as its alternative appellation of "European collective bargaining" tends to suggest? Or is it rather just an EU legal system's pre-regulatory technique? Or perhaps something in between, as the celebrated Brian Bercusson's formula of "bargaining in the shadow of the law" alluded to?

Be that as it may, the just mentioned conceptual ambiguities did not turn into empirical impasse, at least not throughout the roaring years 1996-2000, when significant agreements have been concluded with regard to pivotal issues of employment law such as parental leaves, fixed-term work, part-time work, and (certain aspects of) working time. And even when, after the first booming phase, social dialogue began to narrow its quantitative, and perhaps qualitative, scope, the doctrinal debate concerning its role within the system of EU law sources did not shrink, until a certain degree of consensus was reached on the notion of "horizontal subsidiarity" as a conceptual tool able to explain and justify the pre-emption of EU legislative prerogatives by social partners.

All through the development of this intense and 30-years-long doctrinal debate- somehow echoed on the institutional side by a copious sequence of Commission's communications- a great absentee was however discernible: the EU judiciary, whose pronouncements on the institutional mechanisms regulated by Articles 154-155 of the Treaty have been quite rare so far[1]. Sorare, indeed, that it could be easily agreed that social dialogue is one of the topic of the EU social law where a major disproportion is visible between a high academic commitment and a low jurisprudential concern.

The EPSU judgment to which this collection is dedicated[2], marks an (unfortunate) reversal of such a jurisprudential "abstentionism" (or absence) on the topic of European social dialogue: by making a questionable application of the recognized canons of statutory interpretation, the General Court surprisingly downgraded the institutional role recognized to social partners to a sort of "courtesy meeting" graciously octroyé by the Commission. By complying with the procedures

[1] Basically, only the *UEAPME* case in the Tribunal (T-135/96 of 17.06.1998, ECLI:EU:T:1998:128), and the *Chatzi* case in the Court (C-149/10 of 16.09.2010, ECLI:EU:C:2010:534).

[2] General Court (Ninth Chamber, Extended composition), Judgment, 24 October 2019, T- 310/18, *EPSU* and Goudriaan / Commission, ECLI:EU:T:2019:757, referred to as '*EPSU* judg- ment'

regulated by Art. 154-155 of the Treaty- the General Court incredibly declared- the Commission "merely launched a debate" (!) (point 134 of EPSU).

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It is precisely such a clear judicial misrepresentation of the social dialogue's role within the EU social law sources' system, which has induced a group of lawyers sensitive to, and experts of, the "normative function" of EU social dialogue, to find a way to bring the voice of the scientific debate into the courtrooms of the Plateau de Kirchberg.

In the perspective of the labour and constitutional law scholars gathered at the initiative of Filip DORSSEMONT (Atelier de droit social-Crides, UCLouvain, Louvain-La-Neuve), Silvia BORELLI (University of Ferrara), Edoardo TRAVERSA (Crides and School of European Studies, UCLouvain, Louvain-La-Neuve), Antoine BAILLEUX (Institute for European Studies, Université Saint-Louis - Brussels) and Emmanuelle BRIBOSIA (Institut d'Études Européennes, Universitè Libre de Bruxelles), such very welcomed bridge between the academia and the judiciary has taken the form of "a *genuine albeit symbolic amicus curiae"* contribution, as it is declared in the opening manifesto of the workshop which this Collection originates from.

The papers presented on the occasion of the *Amicus Curiae Workshop on the EPSU Case (European Social Dialogue) - A Meta-dialogue with the Court of Justice* – held in Brussels on September the 16th 2020[3]- are now assembled in this collective volume, and ideally offered (also) to the Court of Justice's consideration, with the sole ambition to broaden the spectrum of the possible points of view to be taken into account when deciding a case whose relevance is undoubtedly crucial, not only for the future of social dialogue, but also to understand future directions of democracy, regulatory dynamics and fundamental rights within the Union.

It is neither secret nor unexpected that the General Court ruling in the *EPSU* case has been considered by the majority of legal doctrine as highly unsatisfactory in its results, as well as poorly supported in its argumentative logic. The present collection of papers is no exception, since all of the Authors share the opinion that many of the basic assumptions upon which the *EPSU* ruling is founded could or should be appraised in a different, if not divergent, way. This is the case for the very same hermeneutical criteria used by the General Court to interpret the peculiar institutional mechanisms devised by the Treaty in the field of social law (Filip DORSSEMONT); for the underestimation of the notion of horizontal subsidiarity as an inherent feature of the entire European social policy model (Mélanie SCHMITT, Antonio GARCIA-MUÑOZ ALHAMBRA and Massimiliano DELFINO); for the substantial disregard of social dialogue factual and conceptual history (Beryl TER HAAR); for the misrepresentation of both the Commission's monopoly in the legislative initiative (Pieter-Augustijn VAN MALLEGHEM), and its prerogatives with regard to the outcomes of the social dialogue (Silvia RAINONE); for the misestimation of the very same 'rules of the game' posed by the Commission itself (Jean Paul TRICART); for the inaccuracies affecting the Court reasoning

[3] The integral video registration of the workshop is available on the YouTube channel of CRIDES - *Centre de recherche interdisciplinaire Droit Entreprise et Société* of the Universitè catholique de Louvain at https://www.youtube.com/channel/UCikItzMeHV3DV5uD101jZCA

with regard to the interpretation of specific concepts such as 'general interest' (Klaus LÖRCHER) and 'central government' (Jacques ZILLER).

The Court of Justice will soon decide whether or not the critical remarks contained in this Working Paper should be considered as sufficient to overrule the EPSU judgment. The vast majority of the Amici curiae who drafted them trust that, at least, this could be the case. And so do I.

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The Editorial Board of the The Working Papers Collection of the Centre for the Study of European Labour Law 'Massimo D'Antona' is glad to contribute to the advancement of a much needed dialogue between the academia and the European Court, and wish to thank the editors for this opportunity.

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