On appropriateness and legality checks

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1. Introduction.

The *EPSU* case originated from the Commission's refusal to transmit a proposal for a Council Decision which would have given legislative implementation to the social partners' agreement stipulated by TUNED and EUPAE, providing a general framework for informing and consulting civil servants and employees of central government administrations. The point of contention that triggered the judicial proceeding is the scope of the Commission's power to reject the request of social partners to submit a proposal to the Council. *EPSU*, which before the EU judiciary represents TU- NED, argues that, by deciding not to submit a proposal for a Council Decision, the Commission acted *ultra vires*. The Commission, instead, essentially maintains that it falls within its legitimate sphere of discretion to decide, also on the base of opportunity and appropriateness, whether to exercise its power of legislative initiative.

Unfortunately, Article 155(2) TFEU does not provide clear guidance:

"Agreements concluded at Union level shall be implemented […] at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed".

The arguments of both parties thus require an in-depth consideration, based on the analytical observation of the relevant precedents, as well as of the official documents that throughout time the Commission has adopted to guarantee a sound implementation of the Treaty provisions on social dialogue at the EU level. Looking at the *EPSU* judgment, it is however rather surprising to note the absence of an adequate evaluation of the legitimacy and scope of the Commission's assessment that led to the refusal to the social partners' request to present a legislative proposal.

In this short paper it will be argued that by accepting that the Commission can refuse to process a social partners' agreement on the base of appropriateness of the content of that agreement, the General Court disclosed a lack of proper understanding of the purpose and extent of the assessment that the Commission can legitimately operate. In particular, it will be suggested that in relation to the framework agreement signed by EUPAE and TUNED the Commission should have exclusively carried an assessment focused on the legality of the agreement, the representativeness of the social partners and the burden for small and medium sized enterprises. Moreover, the paper will contend that the appropriateness assessment conducted by the Commission was grounded on criteria that are too vaguely defined, thus inevitably paving the way for an arbitrary decision.

2. The Commission's justification for refusing to submit a proposal for a Council decision.

With its Communication of 5 March 2018, the Commission replied to the joint request from EUPAE and TUNED and refused to present a proposal to implement by a Council Decision the agreement concerning a general framework for informing and consulting civil servants and employees of central government administrations.

The Commission submitted the following reasons to justify its refusal:[54]

[54] European Commission – DG Employment, Social Affairs and Inclusion – Brussels 5 March 2018, EMPL/A2/SM(ah(s(2018)135147-9

1- The central government administrations are placed under the authority of national governments and exercise the powers of a public authority. Their structure, organization and functioning are entirely a matter for the respective national authorities of Member States.

2- Provisions ensuring a degree of information and consultation of staff in that sector are already in place in many Member States.

3- The prerogative of national authorities to structure and organize the central government sector also leads to the fact that the organization of this sector varies widely between Member States, depending on the degree of decentralization of their public administration. Thus, a Directive transposing the Agreement into EU law would result in significantly different levels of protection depending on whether the Member State has a more centralized administration and therefore a wider coverage of central government, or a more decentralized or federal administration, which would leave a large proportion of the public sector excluded from the scope of such EU legislation.

The weakness of these arguments descends mainly from two elements. First, their merit. In its first justification, the Commission contends that the structure, organization and functioning of the central government administration fall entirely outside the Union's competence, as those aspects relate to the national governments' exercise of their public authority. It should be sufficient to recall that already in the *EU acquis* there are norms that, in specific circumstances, establish information and consultation rights for workers in the public sector. The functions of a public administration are indeed multiple and differentiated, and they do not always relate to the exercise of public authority. A significant example is Directive 2001/23/EC on workers' acquired rights in case of transfers of undertaking, which also applies to the public sec- tor, with exception.[55] Coherently with that approach, the framework agreement concluded by TUNED and EUPAE specifically differentiated between the various functions within the public sector and provided that:

"[…] the dispositions of the present agreement may not apply to public employees entrusted with sovereign responsibilities notably national security, public order or judiciary power".[56]

The Commission's third argument is also hard to comprehend. There, the Commission maintains that the structures of the public sector vary widely across Europe, and that therefore the adoption of a normative framework would lead to uneven levels of protection in the Member States. The logic of this assertion is rather obscure, since the adoption of a uniform set of rules such as those in the social partners' agreement would inevitably contribute to harmonize the different national systems.

Second, and most importantly for the theme of this contribution, the refusal of the Commission is questionable inasmuch as it is fully grounded on an assessment of the opportunity and appropriateness of a EU regulatory initiative in the area covered by the social partners' agreement. The fact that the Commission's refusal is rooted in its evaluation of the absence of appropriateness of the proposed measures is also correctly recognized by the General Court, which in paragraph 137 states that:

[55] Article 1(1-c). The Court of Justice has specified that the exceptions to the scope of application of the Directive to the public sector are limited to cases where the activities carried out fall within the exercise of public powers (See *Scattolon* C-108/10 par. 54; *Collino and Chiappero* C-343/98 par. 31 and 32, among others).

[56] Agreement between TUNED and EUPAE establishing a 'General framework for informing and consulting civil servants and employees of central government administrations', Article 2.

"it is clear from the reasons given for the contested decision that the Commission considered that the implementation of the Agreement at the EU level did not appear to it to be either necessary or appropriate […]".

It is hereby argued that the fact that the Commission's assessment was based on an appropriateness test entirely invalidates the opposition to the social partners' request. As it will be illustrated in the following paragraph, with its decision the Commission departed from what established in previous Commission Communications on the social dialogue at the EU level. It also contradicts the rhetoric expressed in other several recent policy documents (among which most notably the European Pillar of Social Rights), which place the accent on the relevance of information and consultation rights as well as of social dialogue.

3. The normative framework defining the Commission's assessment in relation to social partners' agreements.

The analysis of the Commission Communications that, throughout time, have addressed the implementation of the Treaty provisions on social dialogue helps to bring clarity about the extent and nature of the Commission's power to scrutinize social partners' framework agreements. From those Communications, it indeed emerges that the scope of the assessment that the Commission can perform varies depending on the nature of the agreement concluded by the social partners.

Before addressing the different criteria on which the Commission can base the assessment, it might be useful to recall that the European social dialogue produces two different types of agreement: the own-initiative framework agreements and the framework agreements negotiated during the formal consultation procedure. Own initiative agreements find their legal basis in Article 155(1) TFEU, which establishes that:

"Should management and labour so desire, the dialogue between them at the Union level may lead to contractual relations, including agreements".

Framework agreements negotiated during the formal consultation procedure instead stem from Article 154(4) TFEU providing that:

"On the occasions of the consultation referred to in paragraphs 2 and 3, management and labour may inform the Commission of their wish to initiate the process provided for in Article 155(1) TFEU".

Basically, Article 154(2) and (3) mandate that, before submitting proposals in the social policy field, the Commission has to consult the social partners on the possible direction of Union action (Article 154(2)) and on the content of the envisaged proposal (Article 154(3)).

The main difference between these two categories of framework agreements is that the own-initiative agreements find their origins in a spontaneous decision of the social partners to negotiate and reach an accord establishing a set of rules on a specific matter. In this case, the Commission is (at least formally) not involved neither in the choice of the policy area to address, nor in the determination of the scope or objective of the provisions. The Commission will only enter the process if the social partners decide to submit a joint request to implement the agreement by means of a Council Decision, as then the Commission is asked to formulate a proposal addressed to the Council.

The situation is instead different in relation to framework agreements negotiated du- ring the formal consultation procedure established in Article 154(2)(3) TFEU. Here, it is the Commission that takes the first step towards the possible adoption of EU legislation. It follows that when the social partners decide to negotiate and conclude an agreement, they do so on the basis of an initial input from the Commission, which either had already explored possible directions of Union action (Article 154(2) TFEU) or had even drafted the content of the envisaged proposal (Article 154(3) TFEU). Contrary to own-initiative agreements, the Commission is thus not entirely external to the process that leads to the adoption of the framework agreement.

It is precisely in consideration of the different degrees of the Commission's involvement in determining the direction and the content of the social partners' agreement, that the 1998 Communication on social dialogue defined the criteria upon which the Commission's assessment of the agreement should be based:[57]

"Before any legislative proposal implementing an agreement is presented to the Council, the Commission carries out an assessment involving consideration of the representative status of the contracting parties, their mandate and the legality of each clause in the collective agreement in relation to the Community law, and the provisions regarding small and medium sized enterprises".

"In additions [to the abovementioned criteria], before proposing a decision implementing an agreement negotiated on a matter […] outside the formal consultation procedure, the Commission has the obligation to assess the appropriateness of Community action in that field".

Basically, the 1998 Communication establishes that in case of agreements negotiated during the formal consultation process, the Commission's assessment should focus exclusively on:

- The representativeness of the contracting parties;
- The lawfulness of all clauses of the agreement under EU law;
- The absence of excessive burdens for small and medium sized enterprises.

Only when the social partners stipulate an own-initiative agreement, the Commission shall carry out an assessment on the appropriateness of adopting a EU legislation in the policy area addressed by the agreement.[58] The reason for this dual regime is that, in relation to the framework agreements negotiated during the formal consultation procedure, the Commission supposedly had already evaluated the opportunity of adopting EU legislation in that field before launching the social partners' consultation.

It should be noted that this dichotomy between own-initiative agreements (subject to appropriateness check) and agreements negotiated during the formal consultation process (exempted from appropriateness check) was challenged by a change of direction that, during the past decade, has characterized the Commission's approach to social dialogue.[59] In the context of a generalized

[57] COM(1998)322 final, *Communication from the Commission adapting and promoting the social dia- logue at Community level*.
[58] This "dual regime" is also confirmed by COM(93)600 final, *Communication concerning the application of the Agreement on social policy*, COM(96)448 final, *Commission communication concerning the development of the social dialogue at Community level*; COM(2002)341 final, *Commission Communication on 'The European social dialogue, a force for innovation and change – proposal for a Council Decision establishing a Tripartite Social Summit for Growth and Employment*, COM(2004)557 final, *Commission Communication on a partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue'*.
[59] TRICART, 'Legislative implementation of European social partner agreements: challenges and debates', working paper 2019-9, ETUI.

revision of the law-making activity at the EU level, the Barroso II as well as the Juncker Commission introduced some innovations to filter and streamline the EU legislative activity. Even if these changes were not specifically directed towards regulating the EU social dialogue, the novelties applied also to the procedure set out in Article 154 and 155 TFEU. First, the Commission launched the Smart Regulation initiative, aimed at, among other things, improving the stock of EU law by evaluating benefit and costs of existing and future legislation.[60] Fitness checks of the legislation in force and impact assessment of prospective law-making were thus institutionalised.[61] Those analytical exercises relate not only to the "standard" law-making process, but also to the social partners agreements submitted for implementation by a Council Decision. In practice, as a result of the Smart Regulation policy, the consultation document that the Commission prepares in accordance to Article 154(3) is accompanied by an "analytical document" that the social partners have to take into account if they decide to negotiate an agreement. In addition, the Commission began submitting the agreements signed by the social partners to an impact assessment, with the effect of sensibly lengthening the process leading to the Commission's proposal for a Council Decision.[62] These layers of institutional checks allowed the Commission to expand its ownership in the social dialogue process at the expenses of the autonomy of social partners.[63] However, even these heavier procedural hurdles did not change the fact that the Commission's appropriateness test only concerned the own-initiative agreements.

Still, the practices underpinning the EU social dialogue further evolved in the context of the Better Regulation agenda launched by the Juncker Commission.[64] The 2015 Better Regulation Toolbox published by the Commission in 2015 indeed established that:

"When considering an agreement by the social partners after Article 154 consultation, […] the impact assessment should provide for the same assessment as under [the own-initiative agreements] but would not need to revisit the need for EU action when this has already been covered by a previous analytical document".

As mentioned above, since the launch of the Smart Regulation strategy, the Commission regularly prepares an analytical document that then submitted to the social partners during the second phase consultation (Article 154(3) TFEU). This analytical document is instead generally absent during the first phase of consultation (Article 154(2) TFEU). This implies that, in accordance to the 2015 Better Regulation Toolbox, the framework agreements stipulated in the context of the first phase

[60] COM(2010)543 final, *Commission Communication on Smart Regulation in the European Union*. See also COM(2012)746 final, *Commission Communication on EU Regulatory Fitness*.

[61] Ibidem, in relation to existing legislation (p.4): *"[…] "fitness checks" will assess if the regulatory framework for a policy area is fit for purpose and, if not, what should be changed. The aim will be to identify excessive burdens, inconsistencies and obsolete or ineffective measures and to help to identify the cumulative impact of legislation*". Regarding new legislation (p.5), "*the Commission has put in place an impact assessment system to prepare evidence for political decision-making and to provide transparency on the benefits and costs of policy choices".*

[62] TRICART, 'Legislative implementation of European social partner agreements: challenges and debates', working paper 2019-9, ETUI. TRICART (p. 34) in particular notes that "*In respect of the inland waterways and fishing agreements, where neither the content nor the signatories' representativeness was a priori in question, and the relevance of Community action was not really at issue, it took 29 and 35 months for the Commission services to conduct the necessary assessments, first enlisting the help of external consultants, then drafting the document to submit to the Impact Assessment Board responsible for procedural quality control, and finally the presentation by the Commission of the proposals for legislation, an action that confirmed the quality of the two agreements in terms of legality and, as expected even before the assessment began, the relevance of European action in these matters"*.

[63] TRICART, *ibidem*.

[64] COM(2015)215 final, Commission Communication '*Better regulation for better results – An EU agenda'*.

consultation can be subject to an appropriateness check by the Commission, except when the opportunity of EU action in that area has already been addressed in a previous analytical document.[65]

In sum, while the criteria for the Commission's assessment of the social partners' framework agreements were quite clear before 2012 (appropriateness test only for own-initiative agreement), during the past decade the limits of the Commission's control became blurrier (exemption from appropriateness test only in presence of previous analytical document covering the opportunity to adopt legislation in the policy area addressed by the framework agreement). However, it is worth mentioning that if the relevance of the guidelines established by the Commission Communication prior to 2012 is undisputed, the status and validity of the more recent criteria is questionable.

The pertinence of the early Commission Communications on social dialogue, as well as their significance in the context of judicial proceedings, was first confirmed by the Court of First Instance in the *UEAPME* case.[66] Moreover, the 1998 Communication, and *not* the Better Regulation documents, was still referred to in the Council Decisions that in January 2018 gave legislative implementation to a social partners' agreement in the maritime transport sector.[67] What's more, in relation to that same framework agreement in the maritime transport sector, the Commission departed from its own guidelines, since it submitted a proposal to the Council without having carried an impact assessment.[68] No formal impact assessment was carried also in occasion of the refusal to implement via legislation the social partners' agreement in the hairdressing sector.[69] The same happened in relation to the agreement that triggered the *EPSU* case, as the Commission never performed a written impact assessment, even if more than two years passed from the request of EUPAE and TUNED (February 2016) and the communication that the request was refused (March 2018).

Finally, it should be also noted that the more stringent control that the Smart Regulation and the Better Regulation strategies endowed to the Commission in relation to social partners' agreements is hardly compatible with the spirit of the Lisbon Treaty. Avoiding opening a lengthy digression, it is sufficient to recall that the Lisbon Treaty intervened on Article 138 TEC to actually expand the scope of the negotiation autonomy of social partners. While Article 138 TCE allowed the social partners to initiate the social dialogue only in occasion of the second phase consultation, since the entry into force of the Lisbon Treaty social partners can negotiate agreements also from the first phase consultation.[70] Moreover, the Lisbon Treaty introduced Article 152 TFEU to reiterate the essential role of EU social dialogue for the definition of social and labour policies:

[65] In this sense, also TRICART, 'Legislative implementation of European social partner agreements: challenges and debates', working paper 2019-9, ETUI.

[66] See judgment of 17 June 1998, T-135/96, *UEAPME*, ECLI:EU:T:1998:128. In paragraphs 4 and 72 the Court explicitly refers to the criteria for the Commission's assessment of the social partners' agreements established in the Commission Communication COM/93/600 final, then restated in the 1998 Commission.

[67] See, as noted by TRICART (ibidem), that the Council Directive (EU) 2018/131 of 24 January 2018 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (EFT) to amend Directive 2009/13/EC in accordance with the amendments of 2014 to the Maritime Labour Convention, at recitals 7 states that "*In accordance with the Commission communication of 20 May 1998 on adapting and promoting the social dialogue at Community level, the Commission has assessed the representative status of the signatory parties and the legality of each clause of the social partners' agreement*".

[68] TRICART (ibidem), p. 43.

[69] See VOGEL, 'The fight to protect hairdressers' health: the inside story', special report 3/29, HesaMag#17, spring-summer 2018

[70] Article 138(4) TEC vs Article 154(4) TFEU

"The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national system. It shall facilitate dialogue between the social partners, respecting their autonomy".

4. The Commission's assessment in the *EPSU* case.

Having introduced the (rather complex) set of rules and criteria that define the Commission's assessment in relation to the social partners' agreements, it is now possible to identify several problematic elements in the appropriateness test that was carried out on the TUNED and EUPAE agreement.

First, the TUNED and EUPAE agreement was negotiated in the framework of the formal consultation procedure. On 10 April 2015 the Commission launched the first phase consultation of social partners under Article 154(2) TFEU on a consolidation of the EU Directives on information and consultation of workers. The consultation document explicitly stated that

"[…] it is opportune to consider whether the I&C Directives need to be reviewed, in order to clarify whether public administration should be included in their personal scope of application or whether the wording of the provisions of the different Directives regarding the exclusion of the public administration needs to be aligned in order to improve coherence and legal clarity in line with the ECJ case law".[71]

On 20 June 2015, the social partners informed the Commission that they wanted to negotiate an agreement, pursuant to Article 154(4) TFEU. This means that, according to the Communications on the implementation of the EU social dialogue,[72] the Commission was only allowed to carry an assessment on the legality of the agreement, the representativeness of the signatories, and the impact for small and medium sized companies. The assessment on the appropriateness of transposing the agreement by means of legislation is indeed exclusively reserved to own-initiative agreements.

Second, even considering the more recent guidelines stemming out the Smart Regulation and the Better Regulation strategies, the assessment of the Commission should have not covered the appropriateness of the provisions of the social partners' agreements. In paragraph 3 it was explained that according to the Better Regulation Toolbox, the Commission can operate an assessment test only if the need for EU action was not already addressed by previous analytical documents. It is important to note that when the TUNED and EUPAE initiated the negotiations that then led to the stipulation of the framework agreement, the opportunity to harmonize the information and consultation rules in the public sector had been already addressed in multiple occasions by the Commission itself. A significant example is the Quality Frame- work for anticipation of change and restructuring (2013), which places the accent on the importance of information and consultation

[71] The fact that the Commission consultation already covered the possibility to harmonize the rules on information and consultation applicable to the public sector was also acknowledged by the General Court which in paragraph 1 of the *EPSU* judgment noted that *"[…] that consultation concerned inter alia the possible extension of the scope of application of those directives to cover civil servants and employees in public administrations in the Member States*". Similarly, in paragraph 117: *"[…] first, the Com- mission consulted the social partners as to whether EU action relating to the information and consultation of civil servant and employees of public administrations was appropriate and it is precisely following that consultation that the social partners negotiated and signed the Agreement"*.

[72] COM(93)600 final, COM(96)448 final, COM(1998)322 final, COM(2002)341 final, COM(2002)557 final, mentioned in note 55.

rights in anticipating restructuring and managing changes.[73] In that document, the Commission noted that

"As public sector employees, including civil servants, see their employment relationship becoming more and more like a private sector contract, especially with regard to job security, it appears not only legitimate but also necessary to extend to them also the adaptation mechanism envisaged [of which workers' information and consultation are part]". Then, "The Commission therefore calls on Member States to explore ways of applying the proposed QFR to public sector employees, regard less of the statutory nature of their employment relationship".[74]

Similarly, the "Fitness check" on EU law in the area of information and consultation of workers led the Commission to conclude that the current EU framework was subject to uneven level of implementation in the public sector across the Member States. The Commission then even suggested the social partners to address the issue:

"With regard to the I&C in the public administration, there is need for further research regarding in particular the state of play in the EU Member States, and, specifically, what role I&C actually plays and could or should play in the light of the current restructurings in the public sector in several countries. This issue could be discussed within the sectoral social dialogue committee which brings together central government administrations".[75]

These two examples provide sufficient ground to assert that the Commission had adopted "analytical documents" on the opportunity to adopt EU rules on information and consultation of workers in the public sector already before the launch of the first phase consultation with TUNED and EUPAE. This should be recognized especially in consideration of the Commission's own flexible interpretation concerning the necessity to prepare the social partners' consultation with a preliminary analytical study.

Third and lastly, it is worth mentioning that *when* the Commission is allowed to carry an appropriateness assessment, that assessment should be grounded on precisely defined criteria, to prevent an arbitrary exercise of public power. The Commission, however, did not communicate the criteria that guided its assessment of the agreement signed by TUNED and EUPAE, with implications for the (in)validity of the Commission's refusal to present a proposal for a Council Decision.

In paragraph 71 of the *EPSU* judgment, the General Court accepted that the Commission's revision could be based on:

"[…] whether the implementation of the agreement at EU level is appropriate, including by having regard to political, economic and social considerations".

The broadness of "political, economic and social considerations" is unsuited for criteria regulating the exercise of a public authority's discretion. The invalidity of these criteria is also supported by the Court of Justice's reasoning in the *AGET Iraklis* case, also concerning the exercise of the power of opposition of a power authority (the Greek Ministry of Labour). There, the Court ruled that:

[73] COM(2013)882 final, *Commission Communication on an EU Quality Framework for anticipation of change and restructuring*.
[74] *Ibidem*, p. 13.
[75] SWD(2013)293 final, Commission Staff Working Document, *Fitness check' on EU law in the area of Information and Consultation of Workers*.

"[…] it is clear that, in absence of details of the particular circumstances in which the power in question may be exercised, [the addressees of the public authority's decision] do not know in what specific objective circumstances the power may be applied, as the situations allowing its exercise are potentially numerous, undetermined and indeterminable and leave the authority concerned a broad discretion that is difficult to review. Such criteria which are not precise and are not therefore founded on objective, verifiable conditions go beyond what is necessary in order to attain the objective stated and cannot therefore satisfy the requirement of the principle of proportionality".[76]

In absence of more qualified conditions that allow the social partners to direct their negotiations in a fruitful direction and that consent the Commission's refusal to be reviewed, the appropriateness assessment carried by the Commission in relation to the TUNED and EUPAE's agreement should be considered invalid.

5. Concluding remarks.

With the arbitrary decision to reject the TUNED and EUPAE's request for a legislative implementation of their agreement, the Commission challenged the role and significance of social dialogue within the EU legal order. By allowing the Commission to exercise full discretion in relation to the social partners' request, the General Court's judgment jeopardizes not only the foundations of EU social dialogue, but also imposes a setback in the process of maturation of the EU legal order. The *EPSU* ruling found acceptable that the Commission can overtly depart from consolidated practices and procedures guiding the functioning of EU social dialogue. Moreover, the General Court authorizes the Commission to ground its opposition to (eventual, future) social partners' requests on entirely indeterminable and volatile justifications. This is inevitably at odds with the very fundamental principle of transparency in public administration, as well as with the EU principles and objectives which govern the EU action in the social and labour policy areas (that is, the pursuit of a social market economy, the promotion of industrial relations and social dialogue, the emphasis on the European Pillar of Social Rights as compass for future EU policy-making…).

[76] Judgment of the Court of Justice of 21 December 2016, C-201/15, *AGET Iraklis*, ECLI:EU:C:2016:972, par. 100. In this case, the Court of Justice had to assess the validity, under EU law, of the criteria that the Greek Minister of Labour had been using to evaluate the employers' request to carry out collective dismissals. Those criteria were: a) the conditions in the labour market; b) the situation of the under- taking; c) the interests of the national economy. These criteria resemble the *"political, economic and social considerations"* on the base of which the Commission rejected the TUNED and EUPAE joint request. The Court of Justice (par. 99) found that *"[…] such criteria are formulated in a very general and imprecise terms. As it is apparent from settled case law, where powers of intervention of a Member state or a public authority, such as the powers of opposition which the Minister is vested in the present instance, are not qualified by any conditions, save for a reference to such criteria formulated in general terms, without any indications of the specific objective circumstances in which those powers are to be exercised, this results in a serous interference with the [employers'] freedom which may have the effect of excluding that freedom altogether*".