The principle of social (horizontal) subsidiarity

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1. The concept of subsidiarity. 47

2. The system of social subsidiarity in EU Law. 48

The purpose of this paper is to demonstrate that horizontal subsidiarity which applies in the area of social policy (*i.e*. social subsidiarity) do have a legal consistency in EU Law. It translates into legal mechanisms enshrined in EU primary law a principle of subsidiarity which is anchored in European societies and in the European thought since Antiquity. The first part of the presentation deals with this philosophical principle (concept) of social organisation (the idea of subsidiarity), which founds the "dual form of subsidiarity in the social field"[77] recognised by the TFEU (1). The second part focuses on the "system" of social/horizontal subsidiarity in the EU legal system, which defines a coherent set of primary law provisions aiming at the deployment of social partners' collective autonomy and social dialogue in social policy (2).

1. The concept of subsidiarity.

The EU principle of subsidiarity, both in its vertical and in its horizontal dimensions, lies on the philosophical and political principle of subsidiarity. Evidence of this principle can be traced back to the thought of Aristotle, of Saint Thomas Aquinas and later, at the turn of the 17th century, to the philosophy of Althusius, who was the first who described a "subsidiary society"[78]. The context of the emergence and building of the concept is crucial: European societies are indeed composed of multiple social groups, whose respective interventions need to be organised. The work of these European great thinkers and philosophers further contributed to the building of modern theories of the subsidiary State. In our contemporary post-modern complex European context, where the principle of democracy needs to be further elaborated, subsidiarity appears to be a key notion[79].

In substance, the function of subsidiarity, as a principle of governance, is to designate the actor who will be given decision and law-making powers. It lies on the so-called "principle of proximity", which reflects the conviction that social groups, and after them, local authorities are best placed, compared to distant public authorities, to regulate relationships and activities of people whose interests they represent. The best placed actor will have priority in the decision-making process. Subsidiarity is a twopronged principle. It thus means that actions, including those of legal nature, from central public authorities are subsidiary: they are supposed to be taken only when actions emanating from social groups (horizontal dimension) or local authorities (vertical dimension) have proven insufficient to achieve the common good of citizens.

Subsidiarity places collective autonomy of social group at its heart, both as the foundation of its resulting operative system, and as the objective for all actors of the system. In the relationships between social partners and public institutions generally speaking, subsidiarity means that social dialogue and collective bargaining have precedence over public initiatives as regards matters related to employment, working conditions and social policy as a whole. Subsidiarity founds and guarantees collective autonomy of social partners, even when actions from public institutions turn to be necessary. Moreover, in these cases, the very aim of public interventions must be to restore,

[77] Communication concerning the application of the agreement on social policy presented by the Commission to the Council and the European Parliament. COM (93) 600 final, 14 December 1993, pt 6 c).

[78] For an in-depth analysis of the idea of subsidiarity, see. M. SCHMITT, *Autonomie collective des partenaires sociaux et principe de subsidiarité dans l'ordre juridique communautaire*, Presses universitaires d'Aix-Marseille, 2009.

[79] J. CHEVALLIER, *L'État post-moderne*, Paris, LGDJ, 2003. For Chevallier, "le modèle de l'État post-moderne repose sur le 'principe fondamental de subsidiarité' e ou de défaillance des mécanismes d'autorégulation sociale (*suppléance*), étant entendu qu'il convient alors de privilégier les dispositifs les plus proches des problèmes à résoudre (*proximité*) et de faire appel à la collaboration des acteurs sociaux (*partenariat*)" (p. 49).

to help or to complement collective autonomy following a principle of graduation. Respect of social partners' collective autonomy thus lies at the very heart of the concept subsidiarity.

This brief overview showcases that the principle of subsidiarity comprises both a vertical and a horizontal dimension. The EU legal system reflects this duality, by including in the treaties both vertical subsidiarity (Article 5 TEU) and horizontal subsidiarity in the framework of social policy. Although they are enshrined in different legal ways, both principles lie on the same conceptual foundation. The EU principle of vertical subsidiarity thus finds its direct origin in the philosophical notion of subsidiarity[80]. With respect to horizontal subsidiarity, it is "a concept used to address the fundamental role of the social partners in the implementation of the social dimension of the EU"[81].

If it is therefore correct to assert[82] that social/horizontal subsidiarity cannot be formally based on Article 5 (3) TEU which only enshrines the vertical dimension of the principle. However, contrary to the assumption of the General Court[83], it is not correct to deduce from Article 5 (3) TFEU that social subsidiarity does not exist at all in EU law, even if the horizontal dimension of the principle is not explicitly recognised in a specific provision. Certainly, the term "subsidiarity" is not used in the TFEU to designate its horizontal dimension. However, and paradoxically, the TFEU together with other major primary law provisions, go much beyond than a formal recognition of the word: they put in place a genuine system of horizontal subsidiarity, which was initiated by the Agreement of Social Policy annexed to the Treaty Maastricht and further reinforced by the Treaty of Lisbon.

2. The system of social subsidiarity in EU Law.

Recognition of a 'dual form of subsidiarity. In the context of social policy, the principle of subsidiarity is reflected both in its vertical and in its horizontal dimension. While the former regulates shared competence between the EU and Member States (Article 153 TFEU), the latter intends to govern the relationship between the EU, on the one hand, and management and labour at EU level on the other[84]. Despite the lack of explicit enshrinement in the TFEU and previous treaties, horizontal subsidiarity was explicitly recognised by the European Commission itself, in its Communication of 1993[85], as the foundation of interpretation and application of Articles 3 and 4 of the Agreement on Social Policy (Articles 154 and 155 TFEU). As stated by the Commission,

> "The Agreement confirms the fundamental role of the social partners as recognised by Article 118 B of the Single Act in the implementation of the social dimension at Community level. In conformity with the fundamental principle of subsidiarity enshrined in Article 3 B 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

[80] J.L. CLERGERIE, 'Les origines du principe de subsidiarité', *Les Petites Affiches* 13 août 1993, n. 97.

[81] https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/subsidia- rity

[82] CJEU, General Court, *European Federation of Public Service Unions (EPSU) and Jan Willem Goudriaan v European Commission*, Case T-310/18, 24 October 2019, ECLI:EU:T:2019:757, para. 98.

[83] *Ibid*

[84] See B. BERCUSSON, 'Maastricht: A fundamental change in European labour law', *Industrial Relations Journal* 1992, vol. 23, n. 3, p. 177; B. BERCUSSON, 'The Dynamic of European Labour Law after Maastricht', *Industrial Law Journal* 1994, vol. 23, n° 1, p. 1.; J.E. RAY, 'À propos de la subsidiarité horizontale', *Droit social* 1999, p. 459 et s.

[85] Communication concerning the application of the agreement on social policy presented by the Commission to the Council and the European Parliament. COM(93) 600 final, 14 December 1993, para. 6 c).

> Community level: on the other, subsidiarity as regards the choice, at Community level, between the legislative approach and the agreement-based approach" (emphasis added).
>
> Undoubtedly, this third element is likely to have the greatest consequences. The Commission can only express its pleasure at the fact that this principle of dual subsidiarity (...), has now been incorporated into the Agreement."

The former Court of first instance took this communication into consideration in *UEAPME*[86] (dealing with an agreement negotiated and concluded after the consultation of social partners by the Commission), in order to draw legal obligations for the Commission (obligation to assess the representativeness of the signatories of an agreement and the legality of this agreement).

Articles 154 and 155 TFEU thus translate into legal mechanisms the horizontal dimension of subsidiarity,[87] which lies on, and justifies, the social partners' collective autonomy.

Collective autonomy as a space of freedom for social partners. The notion of autonomy has rightly been defined by the CJEU[88] as the right of self-government. In the French language version, the CJEU states more accurately from an etymological point of view that autonomy means "le droit de se gouverner par ses propres lois"[89]. Though the application of this notion can differ from one case to another, the definition given by the CJEU has a generic scope.

By virtue of the first facet of horizontal subsidiarity, collective autonomy of social partners has precedence over EU acts and actions. Social dialogue can develop freely and must be protected from public authorities' interference. Collective autonomy implies the preservation of a space of freedom for European social partners' social dialogue, such space being already enshrined in the TFEU. The idea is thus raised that the EU institutions respect collective autonomy, *i.e.* the capacity of social partners to adopt laws applicable to the employment relations concerned. The latter are the employment relations linked to their sectoral representative status. Since 2002, the Commission itself states that "the Treaty [Article 155(1)] also recognises the social partners' ability to undertake genuine *independent social dialogue*, that is to negotiate independently agreements which become law"[90].

In *UEAPME*[91], the former Court of first instance recognised that certain elements of the processes stemming from Articles 3 and 4 of the Agreement of Social Policy (Articles 154 and155 TFEU) must be left to social partners' collective autonomy and preserved from any interference from the Commission. Regarding the decision to initiate negotiations, be they voluntary or induced by a

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[86] Judgement of the Court of First Instance of 17 June 1998, Case T-135/96 *Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME) v Council of the European Union,* ECLI:EU:T:1998:128.

[87] https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/subsidi- arity

[88] CJEU, 29 July 2010, C-151/09, *Federación de Servicios Públicos de la UGT (UGT-FSP) v Ayuntamiento de La Línea de la Concepción, María del Rosario Vecino Uribe and Ministerio Fiscal*, para. 42: "Next, it must be observed that the word 'autonomy', according to its usual meaning in everyday language, describes the right of self-government".

[89] This idea of collective autonomy also corresponds to the concept of "autonomy of the parties" used by EU secondary legislation. See Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ *L* 254, 30/09/1994 p. *64*, see Recital No. 15). It is only where no agreement has been reached (on the nature, composition, function, mode of operation, procedures and financial resources of European Works Councils or other information and consultation procedures) or by the common will of both parties that "*subsidiary requirements*" as implemented in national legislation apply.

[90] Communication from the Commission of 26 June 2002, *The European social dialogue, a force for innovation and change*, COM(2002) 341 final, para. 1.

[91] Judgement of 17 June 1998, Case T-135/96.

consultation, and the recognition of the legitimate partners and their capacity to join the table of negotiations, the Court held[92] that:

> "The negotiation stage, which may come into being during the consultation stage initiated by the Commission, depends exclusively on the initiative of those representatives of management and labour who wish to launch such negotiations. The representatives of management and labour concerned in the negotiation stage are therefore those who have demonstrated their mutual willingness to initiate the process provided for in Article 4 of the Agreement and to follow it through to its conclusion."

As to the choice of the topics of negotiations and of the content agreements, the Court[93] founded its interpretation on Commission's Communication of 1993 and approved the following Commission's statement: "*in their independent negotiations, the social partners are in no way required to restrict themselves to the content of the proposal in preparation within the Commission or merely to making amendments to it, bearing in mind, however, that Community action can clearly not go beyond the areas covered by the Commission's proposal; [t]he social partners concerned will be those who agree to negotiate with each other; [s]uch agreement is entirely in the hands of the different organisations (…)*." The decision to sign or not an agreement is obviously also left to social partners' collective autonomy, as an essential aspect of the achievement of the negotiation process.

The notion of collective autonomy is to be understood as entailing an obligation for public authorities to refrain from intervention[94]. The position of the former Court of first instance in *UEAPME* is in line with this requirement. The Court indeed ruled that "it is the representatives of management and labour concerned, and not the Commission, which have charge of the negotiation stage properly so called"[95].

Horizontal subsidiarity also applies within the consultation process. As stated in Article 154 (4) TFEU, social partners "may inform the Commission of *their wish to initiate* the process provided for in Article 155" (emphasis added). It thus follows that "(the) negotiation stage, which may come into being during the consultation stage initiated by the Commission, depends exclusively on the initiative of those representatives of management and labour who wish to launch such negotiations"[96].

Furthermore, horizontal subsidiarity is reflected in Article 155 (2) TFEU: social partners freely decide whether their agreement will be implemented at the level of management and labour and the Member States or at EU level.

Horizontal subsidiarity requires respect for social partners' autonomy. Implementation of horizontal subsidiarity, implying both the freedom of, and the respect for collective autonomy, is

[92] *Ibid*., para. 75.
[93] *Ibid*., para. 76.
[94] In a similar vein, see the use of autonomy as "collective laissez faire" in A. BOGG and R. DUKES, 'The European Social Dialogue: from autonomy to here', in N. CONTOURIS and M. FREEDLAND (eds), *Resocialising Europe,* Cambridge, CUP, 2013, p. 479-484.
[95] Case T-135/96, 17 June 1998, para. 78.
[96] *Ibid*, para. 75.

intrinsically linked to the right of collective bargaining. Since the entry into force of the Charter of Fundamental Right of the EU, collective autonomy of European social partners has an even stronger legal basis, in Article 28 CFREU, which protects the right to negotiate and conclude a European sectoral agreement. According to the Explanations relating to Article 28 CFREU, which refer to the clarification concerning Article 27 CFREU, "(t)he reference to appropriate levels refers to the levels laid down by Union law or by national laws and practices, which might include the European level when Union legislation so provides". There is no doubt that the European sectoral level dialogue is laid down by primary law provisions recognising the role of social dialogue and social partners' autonomy (Articles 154-155, Article 152 TFEU). As a consequence, Articles 154-155 TFEU must be interpreted in the light of Article 28 CFREU.

A duty for EU institutions to act for the achievement and effectiveness of collective autonomy. The second facet of the concept of subsidiarity requires subsidiary intervention from EU institutions when necessary. Horizontal subsidiarity implies, for EU institutions, a "duty to act" *i.e*. in case of failure of collective autonomy. In 2002, the Commission indeed stated that: *"(T)he outcome may be independent social dialogue, multi-sectoral or sectoral, and ultimately, therefore, agreements which may subsequently be incorporated into Community law. This is a practical application of the principle of social subsidiarity. It is for the social players to make the first move to arrive at appropriate solutions coming within their area of responsibility; the Community institutions intervene, at the Commission's initiative, only where negotiations fail*"[97].

This failure can be of different types – be they factual or legal – and of different degree. Conversely, subsidiary intervention must be adapted, in nature and intensity, to the failure of collective autonomy. Moreover, as it is governed by the principle of cooperation, subsidiary EU intervention must be seen as a means to help collective autonomy to be fully deployed. The very notion of subsidiarity is not neutral: EU institutions must act in a way that ensures maximum respect for collective autonomy.

Through its second facet, subsidiarity imposes to public authorities an obligation to ensure and to promote collective autonomy. Article 154 (1) exemplifies this requirement by imposing to the Commission the "task of promoting the consultation of management and labour at Union level and shall *take any relevant measure to facilitate their dialogue* by ensuring balanced support for the parties". Article 152(1) TFEU constitutes a significant new element in favour of this second interpretation. It is indeed clear that its provisions do not put an emphasis on the issue of "respect" in the meaning of refraining from intervention. In fact, Article 152(1) TFEU stresses an obligation to recognize and to promote the development of collective autonomy.

Furthermore, having a general scope Article 152 (1) TFEU complements Article 154

(1) TFEU which is more focused on the consultation procedure and the bargaining process as opposed to its outcome and implementation. Article 152 (1) TFEU is applicable to all stages of the collective bargaining process, from the very first discussions about possible future negotiations

[97] *Ibid*

until the agreement’s implementation phase. Based on Article 155 TFEU read in conjunction with Article 154(1) and Article 152(1) TFEU, supporting collective autonomy means for EU institutions to provide social partners with all means which are necessary to *the exercise* and *the effectiveness* of their autonomy. Should these “first stage” interventions not be sufficient for the achievement of these aims, EU institutions shall then reinforce their interventions by acts or actions complementing those of the social partners.

The Commission’s obligation to submit a proposal for a directive implementing the European agreement. This cooperative approach precisely corresponds to the meaning of implementation of agreements by a directive as laid down by Article 155(2) TFEU: this process tends to ensure the (broadest) effectiveness of the European agreement while social partners themselves are unable to do so. As ruled in *UEAPME*, *“(t)he participation of the two institutions in question [Commission and Council] has the effect [...] of endowing an agreement concluded between management and labour with a Community foundation of a legislative character*”[98].

Article 152(1) TFEU strengthens the Commission’ obligation to endeavour the reception of the precepts of collective autonomy into the realm of the EU legal order. Collective autonomy as a legal order is indeed not tantamount to independence or self-sufficiency *vis-à-vis* the EU legal order. The most significant element of the relationship between both legal orders is precisely the implementation process set out in Article 155(2) TFEU. Social subsidiarity requires from the Commission to act in order to ensure the implementation of the European agreement and thus, its effectiveness. However, this subsidiary action must be limited. This means that the Commission’s scrutiny must be limited to the legality check.

Based on all the provisions forming the system of social subsidiarity (Articles 154-155, 152 (1) TFEU, Article 28 CFREU), also in conjunction with Article 151 TFEU which enshrines social dialogue among the objectives of social policy, as well as with Article 12 CFREU protecting freedom of association, the most coherent interpretation of the obligation to respect autonomy is that the Commission must endeavour the process of collective autonomy and table legislative proposal which guarantee that agreements, provided they pass the legality check, are received within the EU legal order.

[98] Case T-135/96, 17 June 1998, para. 88.