The controversies on the legislative implementation of European social partners' agreements: some lessons of the history

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1. Introduction.

In line with the overall approach adopted in this Amicus Curiae publication, this working paper offers a contribution to the European Union Court of Justice (CJEU) in view of its examination of the appeal (C-928/19) that the European Public Service Union (EPSU) has introduced against a ruling of the General Court (T-310/18, 24 October 2019, hereafter "the 2019 Court ruling") which rejected as ill-founded its request to annul a refusal of the European Commission to submit to the Council a proposal for a legislative implementation at EU level of a social partners agreement about information and consultation of employees and civil servants working for central administrations (hereafter "the Central Administrations agreement").

To this end, this paper draws the attention of the CJEU on the lessons that can be drawn from the history of European social dialogue and more specifically the history of the interpretation and implementation of the European treaties provision under which the application of an agreement concluded between European social partners can be made binding *erga omnes* under European legislation – a mechanism for the extension of collective agreements which exists in various forms in most of the EU Member States , and whose setting up at European level was decisive for the institutionalization of European social dialogue (this provision is currently in Article 155 (2) of the Treaty on the Functioning of the European Union [TFEU]).

In formulating these lessons, this paper does not propose a legal analysis of the Central Administrations agreement case and of the related 2019 Court ruling. But it questions some of the key arguments of the parties to this case, and of the ruling itself, in the light of the relevant findings of a historical analysis of European social dialogue. Based on a longstanding experience of, and expertise on, its developments since its creation in the 1980s, this historical analysis is presented in more details in two recent studies of the author, which were published in 2019 and 2020.

The decision of the Commission to refuse to propose to the Council the legislative implementation of an agreement was unprecedented, given that this agreement had been concluded following negotiations triggered by a formal consultation under Article 154 TFEU. The decision of a trade union involved in this agreement to bring an action against the Commission before the Court of Justice was also unprecedented. Both decisions illustrate the huge deterioration of the relations between the Com- mission and the social partners in the last decade, in particular the unions, at least with regard to the issue of the legislative implementation of European social partners' agreements. Tensions and controversies on this issue emerged under the Barroso 2 Commission, and exacerbated throughout its mandate (2009-2014) in the broader context of a general deterioration of European social dialogue and of the mutual trust between the parties. They persisted under the Juncker Commission (2014-2019) despite the initiatives of this last Commission aiming at restoring confidence with social partners with a view to give a "new start" to European social dialogue: it is under the Juncker Commission that the crisis about the Central Administration agreement occurred. The claim to the Court reflects the two key dimensions of these disputes: on one hand, it relates to an issue of substance, namely the interpretation of the Treaty provisions concerning the role of the social partners and the legislative implementation of their agreements; on the other hand, it relates to the erosion of the trust between the parties as, in the instruction of this file, the Commission did not respect the procedures that it had itself established with regard to the assessment of social partners agreements. On both issues, there are lessons of the history which can help understanding the case: first, on the issue of substance, this paper will underline that the controversies result from the recent and unilateral reinterpretation of the

Treaty provisions by the Commission, after some twenty years of overall consensus on their implementation; and second, on the issue of trust, the paper will underline the context of tensions and even hostility in which this reinterpretation took place.

For most of the observers and actors of European social dialogue, the 2019 Court ruling was surprising. The surprise was not that this ruling highlights the power of initiative of the Commission: this is the main argument put forward by the Commission to justify its decision and to contest the claims of the other party to the case. The surprise was that the ruling does not really address in its complexity the issue at stake, which is not only about the power of initiative of the Commission: within the framework of European social dialogue, the Commission has to exercise its power of initiative while fully respecting its obligation to promote European social dialogue and the role of social partners at EU level; and the European social dialogue as established by the treaties cannot work if the Commission considers that its power of initiative is such that it gives it even full discretion not to promote social dialogue and its outcomes if it so wishes. When the Commission deals with the implementation of social partners' agreements under Article 155 TFUE, the need for fully respecting the capacity of social partners to contribute to shaping EU legislation and social policy, and their autonomy in doing so, affects necessarily the exercise of its power of initiative.

Admittedly, the Commission is certainly not merely a "letterbox" through which the social partners requests for legislative implementation of their agreements would simply pass. But conversely, considering that the Commission would have full discretion to do what it wants with such requests would mean that European social partners agreements under Article 155 TFUE would be merely a form of "joint opinion" from "groups of interests" that the Commission could consider, disregard or ignore at its convenience. This would not be in line with the role which is recognized to European social partners in the Treaty: the introduction in the treaties of the provisions on European social dialogue which are at stake was not intended to just encourage the consultation of social partners or to invite them to express joint opinions, but to set up a mechanism making it possible to ensure the binding implementation of their agreements.

The history of the interpretation of the relevant Treaty provisions shows that it is only in the recent years that the Commission has claimed that it had this full discretion with regard to these agreements. For some twenty years, the Treaty provisions relating to the social partners agreements were implemented in accordance with an interpretation and "rules of the game" which reflected an overall consensus on some form of balance between the respective prerogatives and roles of the Commission and of the social partners within the framework of European social dialogue: this consensus made it possible to implement through EU legislation some twelve European social partners agreements , an outcome which was long presented by the Commission as one of the most exemplary achievements of Social Europe. Interestingly enough, it is when the Commission decided to reduce its use of legislation in general, and in the social policy area in particular, under the Barroso 2 Commission (2009- 2014), that it undertook a reinterpretation of the Treaty provisions relating to European social partners agreements, precisely with a view to define ways and modalities to make legally and politically acceptable the refusal of a request for legislative implementation of an agreement (and later on to discourage social partners to initiate negotiations in view of a legislative implementation). Hence the claim that it was founded to assess the contents of agreements on the basis of policy considerations, while in the past it was attentive to assess on policy considerations the appropriate- ness of EU action in an area, but not the contents of the agreement as such, as this would have been an interference with the autonomy of social partners.

Hence the introduction by the Commission, in its recent documents on social dialogue, of the recurrent message that it now considers to have full discretion "to accept or reject" an agreement and its legislative implementation. But this idea of "rejection" (and the word itself) on the basis of full discretion had never been used in any of the Communications that the Commission had devoted to European social dialogue in 1993, 1996, 1998, 2002, or 2004…. In other words, one of the lessons of the history is that there were successive interpretations of the Treaty provisions since the 1980s, and that the issue at stake has not to be artificially reduced to a choice between two extreme interpretations, the "letterbox" one, where the powers and responsibilities of the Commission would be denied, and the "full discretion" (or "carte blanche") one, where the role and responsibilities recognized to social partners would be reduced to those of ordinary "groups of interests" expressing an opinion.

Another lesson of the history of European social dialogue is that its successful development over the years was made possible by the mutual confidence between the Commission and the European social partners: the trust of the Commission in the legitimacy and responsibility of the social partners to contribute to European integration, and the trust of social partners in the loyalty of the commitment of the Commission to promote a balanced and fair European integration. It was not blind trust, as each of the parties involved were well aware of possible diverging or conflicting interests and visions, but all parties could rely on the legitimate expectation that com- promises and agreements would be sought through dialogue. But the reality of social dialogue today is that, to say the least, this mutual trust has been seriously eroded. Actually, mistrust increased gradually under the Barroso 2 Commission, in such a way that, in a number of occasions, the controversies which emerged with regard to the legislative implementation of the social partners' agreement even took a very passional and emotional tone, with verbal excesses and accusations of arrogance or con- tempt. The Central Administration agreement case is exemplary in this respect as one of the claims on the unions side is not only that the Commission did not assess the agreement as it was committed to do so but that for some eighteen months, it has constantly hidden and lied to the signatories about the progress of the expected assessment. Though the 2019 Court ruling notes that the Commission attitude in this circumstance "might surprise", it did not conclude that this would be a breach to what can be legitimately expected from a EU institution. For a number of observers of social dialogue, the 2019 Court ruling underestimated on that occasion the decisive importance of mutual trust for the very existence of European social dialogue, and the current need to appease the relations between the actors if European social dialogue is simply to be saved.

This paper develops these remarks by reviewing successively the origins of the Treaty provisions at stake, the twenty-year overall consensus on their interpretation and implementation, and the decade of disputes, mistrust and hostility which led to the current situation.

2. The origins of the Treaty provisions.

The mechanisms which allow the European social partners to contribute directly to the development of the EU social policy through their agreements are described in Articles 154 and 155 TFUE. But these articles do not date from the TFUE; they reproduce in their entirety, and even strengthen, Articles 138 and 139 of the Treaty on the European Union (Amsterdam, 1997), which incorporated into the European Treaty Articles 3 and 4 of the Agreement on Social Policy annexed to the Maastricht Treaty (1992).

These Treaty provisions therefore already go back a long way. In fact, they are emblematic of both the emergence and recognition of European social dialogue in connection with the relaunch of European integration driven by the Delors Commission (1985-1995). They are emblematic because of their content, which enshrines the role that the European social partners can play in the development of EU social legislation and social policy. And they are emblematic because of their origin, as these articles are reproduced verbatim from the contribution that the European social partners sub- mitted in 1991 to the Intergovernmental Conference (IGC) on Political Union that was charged with preparing the Maastricht Treaty.

From his appointment in 1985, President Delors had taken steps to actively involve the European social partners in the relaunch of European integration, which was, at the time, driven by the prospect of the completion of the single market. The invention of the European social dialogue was part of the Commission efforts to give a "social dimension" to the single market and thereby to get the support of the European social partners to the Commission strategy

This is why European social dialogue as it was established has to be seen as a joint invention by the Commission and the European social partners, within the frame- work of a fundamentally tripartite cooperation process.

It is also through this tripartite cooperation that the Maastricht Treaty provisions on social dialogue were elaborated.

In this respect, the issue at stake was clearly, for the EU institutions as well as for the European social partners, the setting-up of an area for contractual relations at European level, and therefore the definition of the status and legal value of the agreements which would result from negotiations between the social partners, as well as the provisions which would guarantee their general application. The Single European Act had already established the basis for social dialogue at European level (Article 118b), and various modalities of consultation of social partners already existed at the time. The key issue for the IGC was therefore the potential of collective negotiation to con- tribute to forge the social dimension to be given to the single market. This had been emphasized in the Belgian contribution to the IGC early 1991, and in its contribution to the IGC in March 1991 , the Commission had put forward to this end the concept of "double subsidiarity", and had underlined the specificity of the role and responsibilities of social partners (who, by the way, cannot be considered, when they act within European social dialogue, as "groups of interests" or lobbies, as suggested by the 2019 Court ruling). Furthermore, the Commission had set up an *ad hoc* group consisting of the social partners with a view to propose to the IGC provisions on social dialogue and it had asked the IGC to wait for this contribution from the social partners before concluding its work on the social dialogue component of the provisions on social policy. It is precisely this contribution, which had been actually drafted by the Commission senior official who chaired the *ad hoc* group, which was approved and reproduced almost verbatim by the IGC. And this contribution states explicitly that agreements are concluded in order to be implemented (as already said, they are not a joint opinion which would be proposed jointly by the social partners within a consultation process).

As shown by the testimonies of the actors of social dialogue at the time, as well as the studies of historians on these developments, there is no doubt that the wording finally adopted by the IGC aimed at setting up a mechanism enabling the Council to ensure a binding general application of social partner's agreements. By the way, the whole purpose of the work of the IGC on social policy

was then precisely to set up the conditions of the legislative action which would promote the social dimension of the European integration: the Commission had already presented its Action Programme for the implementation of the Charter (1989), and most of the Members States had expressed their will to develop binding rules with regard to working conditions and labour law at European level. There is also no doubt that the wording of the articles was elaborated and approved by actors who were well aware of the respective roles of the EU institutions and the social partners, and who had also at national level an experience of such mechanisms for the legislative implementation of social partners' agreements.

The 2019 Court ruling refers to the history of the Treaty provisions to argue that, despite the final wording, the intent of the IGC was not to promote the binding general implementation of the social partners' agreements. Such a reasoning is not supported by the above elements.

3. An overall consensus on the interpretation and implementation of the Treaty provisions.

The provisions on social dialogue which were incorporated in the Agreement on Social Policy annexed to the Maastricht Treaty did not specify the modalities of their implementation. This was a concern for the European social partners, who regarded themselves as co-authors of the provisions and who wanted to ensure that these modalities of implementation would reflect their role and responsibilities. This was also a concern for the Commission, who saw in the provisions finally adopted a translation of its concept of double subsidiarity and who sought to clarify the "rules of the game" before the Treaty entered into force. And both the European social partners and the Commission were well aware that there was some urgency to act in this respect, as the Commission's Action Programme for the implementation of the Charter had announced several legislative initiatives of direct interest for the social partners.

The interpretation of the provisions and the definition of the arrangements for this implementation mobilised both the European social partners and the Commission throughout the years 1992 and 1993, in a form of cooperative process which was facilitated by the creation by the Commission, early 1992, of the Social Dialogue Committee, a forum for regular concertation between the Commission and the social partners: throughout 1992 and 1993, the Commission services worked on these arrangements and the European social partners presented their proposals on the various issues relating to the implementation of the provisions. These exchanges led progressively to an overall consensus, which is reflected in the Commission Communication of 1993, which specifies in particular the criteria to be met by an agreement if the Commission is requested to submit a proposal for its legislative implementation. It is worth noting that at the time, and this reflects the then degree of structuration of the social partners' organisation at EU level, the collective negotiations which were envisaged were those which would be triggered by the consultations of the Commission, and generally those involving the cross-industry organisations, though it was explicitly agreed that the provisions applied also to sectoral social dialogue. In addition, the emphasis was clearly put on the implementation of agreements through legislation: the "autonomous" form of implementation included in the Treaty reflected the specific expectations of Danish social partners and it is only very later on, at the occasion of the negotiation on telework (2001-2002), that this "autonomous" form of implementation will be (re)elaborated.

The contents of this broad consensus were confirmed in the Communication that the Commission presented in 1998, further to a consultation initiated with a 1996 Communication. This 1998 Communication can be seen as the reference document for the interpretation of the Treaty provisions

and the definition of the modalities of their implementation.

In view of the issues at stake in the Central Administration agreement case, four points deserve to be noted here.

First, both the 1993 and 1998 Communications are not limited to procedural considerations. They also express an interpretation of the Treaty provisions and they deliver accordingly a strong policy message on the role of social dialogue with regard to the promotion of "double subsidiarity", the understanding of the "autonomy" of social partners, and the importance that the commission attaches to the development of the negotiation component of European social dialogue. These messages will be confirmed in subsequent Communications in 2002 and 2004.

Second, the 1993 and 1998 Communications agree on the criteria on the basis of which, further to a request from the social partners, the Commission proposes to the Council the legislative implementation of an agreement: these criteria relate to the signatories of the agreement (their representativeness) and to the legality of the clauses of the agreement. In addition, the Commission has to check that the agreement takes into consideration the constraints of small and medium sized enterprises.

Third, the 1998 Communication provides a significant clarification in addressing explicitly, for the first time, the specificity of agreements resulting from negotiations which would be undertaken outside the framework of a two-phase consultation procedure i.e. at the own initiative of the social partners. The clarification is that, in such a case, if social partners request a legislative implementation of their agreement, the Commission has to assess, in addition to the abovementioned criteria, the 'appropriateness' of EU action in the field covered by the agreement. The reasoning here is that, under the consultation procedure, the Commission considers the appropriateness of EU action in the area when it presents its consultation documents: if it launches the second phase consultation, this means that it considers that EU action in the area is appropriate. And as it is at the occasion of this second consultation that social partners can initiate negotiations, there is no reason for the Commission to re-examine this appropriateness once the negotiation is concluded. But if the negotiation takes place outside the consultation procedure, then the Commission has to assess this appropriateness, and this is precisely part of its power of initiative.

Fourth, both Communications underline that the respect for the role of the social partners and their autonomy implies that the Commission does not interfere with the contents as such of the agreements: as working conditions are under the responsibility of employers and workers, who both bear the benefits and costs of their agreements in this respect, it makes sense to encourage social partners to fully use the provisions of the Treaty, and it is better not to discourage them to seek agreements. This is why the assessment concerns the appropriateness of EU action in an area and does not concern the specific contents of the action defined by the agreement.

These elements show that, at the occasion of the definition of the modalities of implementation of the Treaty provisions, neither the Commission nor the social partners overlooked the sensitive issues of their respective roles, and the need to com- bine as appropriate the respect for the autonomy of the social partners as well as the respect for the power of initiative of the Commission. And precisely, a broad consensus was found on these issues, which made it possible to use the Treaty provisions. The Communications that the Commission issued in 2002 and 2004 deliver the same overall messages and confirm the validity of the "rules of the game" which apply to the agreements and their implementation. And in its practice throughout some twenty years, the

Commission acted in accordance with these messages and these rules. It gave priority to collective bargaining whenever the European social partners were ready to engage in it, and it demonstrated maximum flexibility about incorporating the agreements resulting from this collective bargaining into European legislation when social partners so requested. And the Council and the Member States shared this overall approach: they swiftly approved all the proposals for legislative implementation that the Commission submitted to them; and they agreed to strengthen the Treaty provisions on social dialogue at the occasion of the preparation of the draft Constitutional Treaty and then the Lisbon Treaty in 2007.

The Lisbon Treaty is important here, because it makes the recognition and promotion of European social dialogue an obligation for the Union as a whole (Article 152 TFEU), and also because it enlarges the existing provisions on negotiations by enabling the social partners, at the occasion of a consultation procedure under Article 154 TFEU, to initiate negotiations as from the first phase of consultation (and not only the second one): this amendment may appear as a minor one but it deserves some attention.

As already indicated, these provisions of the Lisbon Treaty are taken from those presented in the draft Constitutional Treaty which had been prepared in 2004. They therefore reflect the concerns and orientations which were preeminent at that time, and in particular, as far as social dialogue is concerned, those which were addressed in the 2004 Commission Communication. There is therefore no doubt that these new provisions aimed at strengthening European social dialogue and encouraging the use of its negotiations component. Having in mind this context, it is possible to interpret this amendment of Article 154 TFEU as follows. First, it corresponds to a request which had been expressed in the past by the social partners: at the stage of the first consultation, the Commission has not yet specified the contents of the initiative that it is considering, and initiating a negotiation at this stage is therefore easier: the social partners have a greater flexibility because the contents of the initiative is more open. Second, it reflects the progressive obsolescence of the model of two-phase consultation: in the years 2000s, the first phase consultation appears often as a for- mal procedural requirement rather than the initiation of a new in-depth debate on the orientation and justification of EU action: most of the legislative proposals of the Commission at that time do not concern new issues and they merely consist in updating, consolidating or complementing existing legislation, for example after an evaluation exercise; there is therefore no doubt that an EU action in the area is possible and appropriate and it then makes sense not to wait for the second phase to invite the social partners to consider a possible negotiation. This is why this change was not perceived by anyone as a fundamental one, which would have required the presentation by the Commission of an interpretative Communication: it was rather seen as a technical improvement of the existing provisions of the Treaty, which confirmed the primacy given to the social partners negotiation whenever possible, even if it contained some ambiguity with regard to the difference between the first and second consultations as regard the formal commitment of the Commission to actually pre- pare an initiative. By the way, the Commission anticipated the implementation of this amendment: as from the middle of the 2000s, well before the entry into force of the Lisbon Treaty, it introduced in its documents of first phase consultation an explicit question on the intent of social partners to enter in a negotiation. It can be argued that when a Commission first phase consultation document includes such an explicit invitation to negotiate, there cannot be doubt that the Commission considers that some EU action in the area is possible and appropriate, especially if the consultation concerns a consolidation or updating of existing EU

legislation. And in any case, it can be concluded that with the Lisbon Treaty, the Commission and the Council continued to encourage the social partners to use the Treaty provisions on collective bargaining in line with their implementation throughout the years 1990s and 2000s.

Let's summarize the lessons of this section. The Treaty provisions relating to the legislative implementation of social partners' agreements have been implemented without controversy for some twenty years, on the basis of an interpretation of these provisions which took into consideration the power of initiative of the Commission as well as the role of the social partners and the respect of their autonomy and which contributed to develop the mutual confidence among the parties involved in European social dialogue. The overall consensus on this interpretation made it possible to swiftly implement through EU legislation a dozen of agreements, involving both the cross-industry (mainly in the 1990s) and the sectoral social dialogue organisations (mainly in the 2000s), and to feed some dynamism of collective bargaining among social partners despite their frequent diverging interests and visions. Taking into ac- count this past twenty-year period can help understanding the tensions and controversies which developed later on.

4. Disputes, distrust and hostility: the reinterpretation of the Treaty provisions.

Under the Barroso 2 Commission (2009-2014), and then the Juncker Commission (2014-2019), the Commission has developed a substantive reinterpretation of the Treaties provisions on the implementation of social partners' agreements.

In spring 2012, three agreements were concluded within the framework of sectoral social dialogue, which the signatories wanted to be implemented by legislative means: one on health and safety at work in the hairdressing sector, the second on working time in the inland waterways sector and the third on working condition in the sea fisheries sector. This was a clear indicator of the vitality of European sectoral social dialogue. But it was also interpreted, within some departments of the Commission, as a problematic development, as it obliged the Commission to consider the presentation of legislative proposals that did not result from its own initiative.

If this was considered as problematic, it is because the then Commission Barroso 2 was engaged in an ambitious programme of simplification and streamlining of EU legislation, the so-called "Smart Regulation" programme, through which it wanted to reconsider the use of the legislative instrument within the EU action and accordingly revisit its past legislative acquis and submit all its future legislation to a strict assessment of its added value. The motto of the programme was "to cut the red tape", and the assumption behind was that legislation generates an excessive administrative burden on businesses and hamper competitiveness while feeding the discontent of citizens towards the EU integration process. As businesses called for more flexibility to face the consequences of the economic crisis, the Commission was scaling back its ambitions in the social area, and certainly not prepared to welcome requests for social legislation coming from the social partners' initiatives.

The three agreements of spring 2012 gave new exposure to the potential of European social dialogue, and in particular sectoral social dialogue, as well as to the specificity of the Treaties provisions concerning the legislative implementation of agreements. Many people discovered at that occasion, including within the Commission, that due to the significant reduction of the number of labour legislation proposals from the Commission, the implementation of social partners' agreements was becoming the main source of development of EU labour legislation.

A few days before its signature in spring 2012, the agreement on occupational health and safety in the hairdressing sector was aggressively vilified in a campaign by the media and political circles in the United Kingdom. The campaign of the tabloïds was to rail against the excesses of European regulation, but the political campaign was focussed on the EU social policy and its instruments, in particular the social partners agreements: at that time, the European cross-industry social partners were engaged in a negotiation on working time, a highly sensitive issue for the UK due to its will to preserve its opting out possibility, and the lampooning of the agreement in the hair- dressing sector was also used to discredit the Article 155 procedure.

But the agreement's critics were echoed and supported within the Commission, and even by President Barroso himself. And this generated, within the Commission departments, pressures and debate as to whether the interpretation and arrangements for the implementation of the related Treaty provisions had to be revisited. As long as the cross-industry negotiation on working time was under way, it was not politically possible to raise openly such a debate: the earlier Commission attempt to revise the working time directive had failed due to the impossibility to find a compromise between the Council and the Parliament, and the social dialogue negotiation was seen as the only remaining chance to get this revision. But as soon as this negotiation failed, end 2012, the debate intensified: is it legally and politically possible for the Commission to refuse a request for legislative implementation of an agreement, even if there is no precedent? Is it possible and appropriate to reinterpret the Treaty pro- visions and/or revisit the arrangement for their implementation of to give clearly the Commission full discretion in the matter? Or to say it more bluntly, as this became usual within the involved services, how to "reject" an agreement or a request for its legislative implementation? With such questions, the attitude towards the social partners' agreements was clearly moving towards suspicion and hostility.

It is in this context that the Commission decided that the agreements whose signatories request a legislative implementation would now be subject to a form of "impact assessment" with a view to provide substantive arguments whether or not this agreement deserved to be implemented through legislation. Technical work started internally to adapt the methodology of impact assessments to the specificity of social partners' agreements. It should be noted, however, that this was already a significant change with the approach developed in the past Communications, where the Commission considered that, in view of the autonomy of social partners, its assessment had to be limited to the appropriateness of EU action (and not interfere with the con- tents of the agreement itself).

The three agreements had been negotiated outside a procedure of consultation, and it was therefore expected from the Commission, in accordance with the criteria laid down in 1998, that it would assess the appropriateness of the EU action in the areas covered by these agreements. It was clear from the outset that there were strong arguments to support the appropriateness of EU action with regard to working time in the inland waterways as well as to working conditions in the fisheries sector. The debate was more open with regard to the agreement in the hairdressing sector, which had both strengths and weaknesses in this respect, and the assessment of this agreement became therefore emblematic of the new process of assessment that the Commission wanted to set up.

A major consequence of the new approach was the considerable extension in the time taken to scrutinize the agreements concluded in the inland waterways and in the fisheries sectors, which generated a lot of discontent and resentment among the signatories of these agreements. For the

agreement in the hairdressing sector, the assessment was initiated but it was stalled after the completion of a study which was too supportive of the agreement in view of the Commission expectations. And the Barroso 2 Commission took a very ambiguous decision on this agreement: it decided not to wait for the outcome of the assessment and to already conclude that "within its mandate" it would not propose a legislative implementation while noting that the assessment would continue, thereby enabling the subsequent Commission to re-examine the follow-up to the social partners' request. Such an ambiguous decision was clearly seen by the concerned social partners as a breach of the obligations incumbent on the Commission and contributed to the deterioration of the relations bet- ween the social partners and the Barroso 2 Commission (which was also fuelled, throughout its mandate, and first and foremost, by the Commission and Union responses to the Eurozone crisis.

The Juncker Commission inherited this deterioration of European social dialogue. This is why one of its first announcements of President Juncker was that he would give a "new start" to European social dialogue, as part of a strong emphasis, through- out his mandate, on the promotion of "Social Europe". And later on, he took the initiative of proposing a "European Pillar of social rights", which was welcome by the social partners.

But with regard to the controversies on the legislative implementation of social partners' agreements, the Juncker Commission pursued the orientations of the Barroso 2 Commission, and it even amplified and formalised them.

At the very beginning of its mandate, the Juncker Commission presented a set of documents on the EU legislative action, which is known as the "Better Regulation" pack- age. As suggested by its title, this package builds on the work which had been carried out under the "Smart Regulation" programme. The package contains a section on the intervention of the social partners within the legislative process at EU level, which presents in particular the new arrangements along with the Commission will deal with the request for legislative implementation of social partners' agreements. While the text uses the standard elements of language on European social dialogue, it states very clearly, for the first time as such, that the Commission considers now that "it can accept or reject the (social partners) agreements", and that it has full discretion to do so, a message which formalises the reinterpretation of the Treaty pro- visions which had been initiated under the Barroso 2 Commission. While this package is presented a few weeks after the launching of the "new start" for European social dialogue, it no longer contain any of the messages of the past with regard to the crucial importance, for the EU, of the active participation of the social partners in the legislative process: the Commission no longer says that the social partners are the best placed to regulate working conditions and relations, that it encourage them to fully use the Treaty provisions on negotiation, or that it intends to promote the double subsidiarity. On the contrary, the text emphasizes how the Commission intends to shape the possible intervention n of the social partners in the legislative process, and describes the long and suspicious assessment which will be applied to any agreement for which social partners would request a legislative implementation. In short, it is a defensive text, to discourage social partners to engage in such negotiations. It even contains statements which can be seriously contested, for example when it indicates that, while the Treaty allows social partners to initiate negotiations at the occasion of the first phase of consultation under Article 154 TFEU, the Commission will consider that any agreement concluded under such negotiations after the first phase will be considered as an agreement concluded

outside the scope of consultation and therefore engaged at the sole initiative of the social partners (22). In short, it is a defensive reinterpretation of the Treaty provisions.

In practice, the Juncker Commission had mainly to deal with two social partners requests for legislative implementation of their agreement, which were both politically sensitive in the context of the emphasis put on the new start for social dialogue but also the continuity with the "smart regulation" orientations: first, the agreement in the hairdressing sector, which was still pending and whose assessment had been stalled, and second, the central administration agreement, resulting from a negotiation initiated within the first phase of consultation on the consolidation of the existing directives on information and consultation of workers. In both cases, the signatories could expect that their agreements would be assessed along the modalities de- scribed in Better Regulation (and, in the case of Central administrations, confirmed in a letter of the Commissioner).

But the fact is that they were not. In the case of the hairdressing sector, President Juncker used himself some of the parodies of his predecessor, and the file remained at a standstill. In the case of the central administration, the expected "proportionate" assessment was never initiated, as if, right from the outset, the Commission (or its departments) had taken the view that it would not deal with it, that it was not even necessary to assess it in line with the arrangements set in Better Regulation, and that nothing prevented the Commission to constantly lie to the signatories about the progress of the assessment. Hence the feeling among the social partners concerned that the Commission failed to fulfil its obligation to promote social dialogue and that it despised them, forwarding them misleading or downright false information, an attitude which can only be deliberate, on the part of an institution as the Commission.

Here is certainly the very dark face of the developments of European social dialogue over the last years, an attitude of the Commission (or of some of its departments) that the social partners concerned perceived as extremely violent, hostile and arrogant, as if the Commission considered that its right of initiative allowed it to do what it wanted, irrespective of any of the rules or principles which are usually attached to public institutions and which shape the legitimate expectations of citizens.

The deterioration of the relations between the Commission and the social partners contributes to explain the final developments of the file. The Commission asked the signatories to withdraw their request for legislative implementation and to implement their agreement "autonomously" with a financial support of the EU budget on social dialogue. It was an unprecedented proposal, as the Commission had constantly acknowledged that the decision to implement an agreement through EU legislation or through an autonomous process is entirely a matter for social partners, without any possible interference of the Commission (and indeed without any financial incentive). Having regard to the context, such a proposal could only be perceived by the signatories as an attempt to create a precedent (the precedent of authorizing the Commission to decide itself that an agreement will be implemented by the social partners themselves).

5. Conclusion.

The Treaty provisions on the European social partners' agreements have existed for more than 25 years. Their introduction in the Treaty have marked the formal recognition of the role and value of European social dialogue in the European integration process and it has in turn strongly contributed to the structuration of this social dialogue. For almost 20 years, there was a broad

consensus between the European institutions and the European social partners on their interpretation and on the related implementation arrangements, and more generally on the need for a close involvement of European social partners in the design and implementation of European social policy and legislation. This broad consensus was broken when the Commission put into question the place of legislation among the various instruments of the action of the Union, and in particular social legislation: the Commission has considered that the legislative dynamism of social dialogue, though it was based on these Treaty pro- visions, was going against the logic of restrictive use of legislation that it wanted to develop, and it has accordingly reinterpreted unilaterally the Treaty provisions which related to social partners agreements. This has been a substantive and divisive reinterpretation: a substantive reinterpretation because in claiming that it had full discretion to accept or reject any agreement, the Commission has unavoidably restricted what was so far recognized as the autonomy of the social partners; a divisive re- interpretation because it was unilaterally decided and imposed to social partners, and because by so doing, the Commission destroyed the mutual trust between actors which is a fundamental condition of social dialogue. Furthermore, the reinterpretation was imposed through practical decisions and behaviour which were in breach of what other actors could legitimately expect from the Commission.

The most negative consequence of this reinterpretation is this destruction of mutual trust Between the Commission and the social partners, and as a result the expansion of mistrust and distrust: it is the main reason why it was not possible for the actors to find a way to overcome their conflicts related to the interpretation of the Treaty provisions, and why on the contrary tensions exacerbated and culminated in a complaint to the CJEU.

While the 2019 Court ruling has brought its support to the reinterpretation of the Commission, this paper suggest to pay attention to the interpretation which made it possible a consensus for some 20 years.

While the 2019 Court ruling considered that the Commission attitude on the file at stake has sufficiently complied with what could be expected from it, this paper insists on the breach by the Commission of the conditions of trust and in particular of legitimate expectations.

A last remark has to be made, which concerns the expectations which can be attached to the Communications of the Commission. As said in various occasions in the paper, the Commission has produced a number of Communications on social dialogue, which have been the basis for the common understanding and consensus bet- ween the actors of social dialogue for many years. As these Communications did not support its reinterpretation, the Commission argued that they should be disregarded as obsolete. In addition, as the Commission did not comply with the procedures that it had set in subsequent Communications, it did not argue to the Court that these more recent Communications should be now references for the (new) interpretation of the provisions. The Court ruling agreed to disregard these Communications on the ground that they have no legally binding effect. However, in doing so, and in opting for a general indulgence with regard to the Commission attitude in relation to the signatories of agreements, the Court contribute to deny any value, and even political value, to these Communications. But how to deal afterwards with the consequences of a Court ruling? In such circumstances, further to a key Court ruling, the Commission presents a Communication which proposes some lessons and consequences of the ruling for the future. But here, whatever the final position of the Court will be, the Court ruling has clearly said that Communications had no legal effect and that the Court does not object if the Commission breaches deliberately any political commitment which would be contained in a

Communication. The extensive indulgence of the Court ruling in favour of the Commission implies that from now on, social partners should never believe any Communication Commission.