The notion of central government administration and the scope of EU law

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1. Introduction.

The differences between EU member States in the organisation and functions of central government and the question whether the EU has competence in that matter is particularly relevant because one of the main arguments of the Commission on sub- stance was that there were such differences and that therefore it was not possible to extend the agreement by the way of the Article 155 TFEU procedure.

By letter of 6 Mach 2018[4], the Commission stated: "[o]n 1 February 2016 you requested the European Commission to present a proposal to implement by a Council Decision the social partners' agreement concerning a general framework for informing and consulting civil servants and employees of central government administrations" concluded by EUPAE and TUNED", and that "the Commission informs you that it will not propose to the Council a decision to implement this agreement at EU level". This note only focusses on the arguments presented in the cited letter; the note is leaving aside the question whether the letter is to be considered as a final decision in the sense of EU law, hence open to an action for annulment pursuant to Article 263 TFEU or only as a statement that might be the basis for a procedure for failure to act pursuant to Article 265 TFEU. The note is also leaving aside the issue of the limits to the Commission's discretion to make a proposal pursuant to Article 155 (2) TFEU, albeit taking into account the fact that the ultimate decision power rests with the Council acting by qualified majority.

The Commission's announcement not to make a proposal to the Council relies on two series of considerations:

First: "The Commission notes that *central government administrations* are placed *under the authority of national governments* and *exercise the powers of a public authority*. Their *structure, organisation and functioning* are *entirely a matter* for the respective *national authorities* of member states. Provisions ensuring a degree of information and consultation of staff in that sector are already in place in many member states" [emphasis ad- ded].

Second: "Moreover, the prerogative of national authorities to structure and organise the central government sector also leads to the fact that the *organisation of this sector varies widely between member states,* depending on the degree of decentralisation 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 centralised administration and therefore a wider cover- age of central government, or a more decentralised or federal administration, which *would leave a larger proportion of the public sector excluded* from the scope of such EU legislation" [emphasis added].

Those two series of considerations will be analysed in detail both from a legal perspective and from an administrative and policy-making perspective.

[4] (EM PL/ A2/S M/ah/S(2018)135 1479) from the Director-General, DG Employment, Social Affairs and Inclusion of the European Commission, to Ms Britta Lejon, Chair of the EU Social Dialogue Committee for Central Government Administrations and TUNED's chair and to Mr Hector Casado Lopez, EUPAE's Chair.

2. The relevance of the notion of Central government administrations in member states.

The Commission first points to the fact that central government administrations are "*placed under the authority of national governments*". It is not clear what conclusion the Commission draws from this situation. It has at any rate to be stressed that the link between member states' governments and central government administrations is more complex: in all member states there are not only "departmental ser- vices" which are legally and politically placed in a hierarchy headed by a minister (or by government as a collegial body), but also "non-departmental services"[5] (or bodies) with managerial and or budgetary autonomy and sometimes a legal personality of their own[6]. Very often non-departmental services or bodies are not exercising public authority, but it is not possible to generalise; viceversa it cannot be said that depart- mental services are always exercising public authority. Furthermore, even in depart- mental services the degree of managerial, budgetary, legal and political autonomy varies, even in each single Member State. This being said, such differences in autonomy have no consequences as to the nature of the addressees of a possible Council directive, which are the member states[7].

The Commission further "notes" that central government administrations *"exercise the powers of a public authority"*. The letter does neither indicate whether in the Commission's mind all central administrations exercise such powers nor if it thinks they exercise always and only such powers. The Commission does not either refer to the legal nature of central government administrations, i.e. whether they are entities endowed with legal personality or they are part of State administration; the Commission does not either refer to the differences in degree of autonomy in decision making between different services. Therefore, the reader has to guess what the meaning and purpose of the letter's reference to public authority is.

It is not to be excluded that terms "the powers of a public authority" mean an implicit reference to Article 45 (4) TFEU, according to which "[t]he provisions of this Article [i.e. on the way in which freedom of movement for workers shall be secured within the Union] shall *not apply to employment in the public service*" [emphasis added]. Indeed, the jurisprudence of the CJEU on that provision[8] has established that 45 (4) TFEU "removes from the ambit of article [45] (1) to (3) a series of posts which involve direct or indirect participation in the exercise of *powers conferred by public law* [in French *exercice de la puissance publique* which corresponds better to the wording used in the Commission's letter, i.e. "powers of a public authority"] *and* duties designed to *safeguard the general interests* of the state or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the state and reciprocity of rights and duties which form the foundation of the bond of nationality" [highlights

[5] The vocabulary opposing "departmental" to "non departmental" services is that of the present day UK civil service; it has to be stressed that in the English language there is no commonly used vocabulary relating to the form of public administrations: the term "agencies", which comes from US practice, is getting more and more fashionable and is used indiscriminately, which generates quite some con- fusion as to the degree of legal, budgetary or managerial autonomy of services.

[6] For more details on both issues in practice, see the paper I prepared in 2006 for the EU/OECD Sigma programme: OECD (2007), *Organising the Central State Administration: Policies & Instruments*, Sigma Papers, No. 43, OECD Publishing. http://dx.doi.org/10.1787/5kml60q2n27c-en

[7] It has to be recalled by the eye that Member States would also be the addressees of a directive if an agreement between social partners representing local and or regional authorities were signed and submitted to the Commission in order to make a proposal pursuant to Article 15 (2) TFUE.

[8] See e.g. the Commission's Staff Working Document on *Free movement of workers in the public sector,* Brussels, 14.12.2010, SEC(2010) 1609 final.

added].[9] If such an implicit reference were intended by the Commission letter, we have to stress two points. *First*, Article 45 (4) TFEU is only relevant to the issue of access to public employment by citizens from another Member State than the host country and to their taking part in the management of bodies governed by public law.[10] *Second*, that provision does not impede the application of other rules and principles to employment in the public ser- vice of EU member States.[11] Hence a reference to that provision would be of no legal relevance to the issue of informing and consulting civil servants and employees of central government administrations. If any, that provision might justify excluding the holders of a limited number of specific positions in public administration from participating personally in consultation procedures if they were not citizens of the host country.

It is probable that the Commission refers to the exceptions mentioned in its Consultation Document "First phase consultation of Social Partners under Article 154 TFEU on a consolidation of the EU Directives on information and consultation of workers", which is stating that "[t]he European Court of Justice clarified the interpretation of a number of provisions, most recently in its judgement in the *Nolan* case where it pointed out that Directive 98/59/EC does not cover activities of the public administration which fall within the exercise of public powers".[12] If that were the right interpretation of the Commission's letter, two major points need to be made.

First, the Commission itself was stating in the same Consultation Document 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"[13]. In its letter of 6 March 2018, the Commission does not in any way refer to the review that should have been undertaken or to the results of such a review, or why it has not been undertaken, but just repeats the reference to public administration.

Second, the reference to the Judgement in *Nolan*,[14] which is made in footnote 18, reiterated by footnote 22 of the Consultation Document is only applicable to Directive 98/59/EC on collective redundancies,[15] where Article 1 (2) (b) provides that the Directive shall not apply to "workers employed by *public* administrative bodies or by establishments governed by *public law* (or, in member states where this concept is unknown, by equivalent bodies)" [emphasis added]. Furthermore, the judgement in *Nolan* responds to a request for preliminary ruling in a very special situation, i.e. to the issue of applying the Directive in a dispute between the United States of America and Ms Nolan, a civilian employee of an American army base in the United Kingdom; it would

[9] Judgment of the Court of 26 May 1982*, Commission of the European Communities v Kingdom of Belgium*, Case 149/79, ECLI:EU:C:1982:195, point 10.
[10] Article 8 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27.5.2011, p. 1–12.
[11] See e.g. the above cited Commission's Staff Working Document on *Free movement of workers in the public sector* https://ec.europa.eu/social/main.jsp?langId=en&catId=465, and my Report "Free Movement of European Union Citizens and Employment in the Public Sector" http://www.bollettinoadapt.it/old/files/document/10069eu_rep_14_12_10.pdf
[12] Brussels, 10.4.2015, C(2015) 2303 final, p. 5.
[13] Idem p. 5-6
[14] Judgment of the Court (Third Chamber), 18 October 2012, *United States of America v Christine Nolan*, Case C-583/10, ECLI:EU:C:2012:638.
[15] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16–21.

be therefore a somewhat risky to quote the judgement as a ruling of general scope. Another CJEU ruling is often quoted for the same purpose[16] as *Nolan*, the judgement in *Scattolon*[17] which regards the Directive on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. Albeit that judgement not either regards information and consultation rights but Directive 77/187[18] on transfers of undertakings, the ruling shows that a thorough scrutiny is needed in order to find out in which specific cases the exercise of public powers is at stake.[19]

From a practical point of view, it cannot be said that all civil servants and workers in central government administrations exercise the powers of a public authority. On the contrary, in the absence of a thorough and up to date comparative study relating to all member States, I submit that the situation has not changed radically in the last decade,[20] and that a while a number of services in central government ad- ministrations are specifically devoted to the exercise of public authority there are still a big number of services not exercising public authority.

Furthermore, nothing in the Commission's letter explains why the fact that "central government administrations are placed under the authority of national governments and exercise the powers of a public authority" would be an impediment to granting civil servants and workers of those administrations information and consultation rights, if needed with specific adaptions. The mere fact that EUPAE and TUNED, rep- resenting *employers* and workers from central government administrations, have been able to come to an agreement on that topic demonstrates, on the contrary, that there is no impediment in principle to granting I&C rights to the relevant workers. Furthermore, it is the Council, whose members are representatives of member states' central administration, which has the ultimate decision power under Article 155 (2), and therefore best placed to examine whether there is such an impediment.

To sum up, if the Commission refers to the exceptions mentioned in its cited Consultation Document, such a reference does not justify refusing to extend the agreement concluded by EUPAE and TUNED by a directive pursuant to Article 155 (2) TFEU. On the contrary such a directive would be an appropriate way to respond to the cited concerns of the Commission regarding the differences in the applicability of the directive on collective redundancies and on information and consultation rights without waiting for a possible recast of Directive 2002/14/EC on information and

[16] See e.g. the European Parliament's Fact Sheets on the European Union on *Workers' right to information, consultation and participation*, at http://www.europarl.europa.eu/atyourservice/en/display-Ftu.html?ftuId=FTU_2.3.6.html, last consulted on 21/03/2018.
[17] Judgment of the Court (Grand Chamber) of 6 September 2011, *Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca*, Case C-108/10, ECLI:EU:C:2011:542.
[18] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, replaced by Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16–20.
[19] See point 54 of the Judgement in *Scattolon*: "Whilst it is true that, as the Italian Government has pointed out, the Court has excluded from the scope of Directive 77/187 the 'reorganisation of structures of the public administration' and the 'transfer of administrative functions between public administrative authorities' and that that exclusion has subsequently been confirmed in Article 1(1) of that directive in the version resulting from Directive 98/50, and in Article 1(1) of Directive 2001/23, the fact remains, as the Court has already pointed out, and as the Advocate General points out in paragraphs 46 to 51 of his Opinion, the scope of those expressions is limited to cases where the transfer concerns activities which fall within the exercise of public powers (*Collino and Chiappero*, paragraphs 31 and 32 and case-law cited)".
[20] See e.g. The documents indicated in notes 4 and 9.

consultation rights,[21] as the request is presented by social partners representing the workers and employers of central administrations.

3. The relevance of the diversity of organisation of member states' central government administration.

The second line of argumentation of the Commission's letter is that of the prerogative of national authorities to structure and organise the central government sector. As a matter of fact, it should be added that under EU law member states have indeed kept *general prerogative* to structure and organise the government sector, be it central, local or regional. Such a prerogative is usually known in legal terms as "procedural" and "organisational" autonomy of the member states. It has to be under- lined that the "autonomy", which results from the absence of a devolution of competences to the EU in matters of organisation and procedure of public authorities, encounters two series of limits. *First*, policy sectoral legislation – e.g. in the field of telecommunications or energy – as well transversal legislation – regarding e.g. data protection or competition rules – impose obligations to members States that are very strictly limiting the exercise of the said autonomy, even in situations where public authority is being exercised. *Second*, the CJEU has developed an elaborate jurisprudence on the limits to procedural and organisational autonomy,[22] which also demonstrates the limitations to that prerogative which derive from EU membership. Hence, I submit that when the Commission's letter refers to that "prerogative of national authorities to structure and organise the central government sector" it is only relevant because it leads to the fact that the "organisation of this sector varies widely between member states, depending on the degree of decentralisation of their public administration".

Whereas is it undeniable the size and functions of central governments varies widely between member states, those variations would not necessarily result in "significantly different levels of protection" regarding information and consultation rights in the "public sector" as a result of a directive extending the agreement concluded by EUPAE and TUNED.

First, the Commissions' letter after having argued about the differentiation between "central government administrations" as opposed to other administrations, uses the concept of "public sector", which goes far beyond that of "administration". It is well established that a very important part of the public sector in member states is anyway submitted to EU law in the same way as the private sector. This is especially true as far as EU legislation relevant to the letter's issue is concerned, which applies to e.g. "public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the member states".[23] Furthermore, EU law on free movement of workers applies to several branches of the public sector of member states, e.g. health services, education, postal services, research and technological development etc.[24] which quantitatively represent a very large part of the member states' public sector. Hence a Directive pursuant to art. 155 (2) extending the agreement on information and

[21] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community- Joint declaration of the European Parliament, the Council and the Commission on employee representation, OJ L 080, 23.03.2002 p. 29-34.
[22] See e.g. D.U. GALETTA, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "Functionalized Procedural Competence" of EU Member States*, Springer-Verlag Berlin Heidelberg, 2010.
[23] Article 2(a) of Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.
[24] See the Commission's Staff Working Document cited in note 6.

consultation rights to central government administrations would not increase the diversity of levels of protection in the public sector; on the contrary such a directive would lead to more approximation between the levels of protection of workers in bodies or undertakings carrying out an economic activities and workers in services which do not carry out such activities. The Commission does not indicate whether it deems desirable that those two categories of workers have different levels of protection or not and does not indicate either what it means by "different levels of protection".

Second, levels of protection in central government administration as opposed to local or regional administration, or other autonomous administrative public bodies would not necessarily be that different due to a directive extending the agreement. Indeed, nothing would impede social partners representing workers and employers from local or regional administration, or other autonomous administrative public bodies to conclude agreements similar to that concluded by EUPAE and TUNED for their respective fields. On the contrary it is probable that the extension by directive of that agreement might serve as a model and trigger such other agreements. Furthermore, the Commission's letter indicates that "provisions ensuring a degree of information and consultation of staff in that sector are already in place in many member states", which is true not only for central state administration, but even more for other administrations. If the Commission thinks that differences in the level of protection are neither justified nor desirable – as the statement that "a Directive transposing the Agreement into EU law would result in significantly different levels of protection" seem to imply–, then the best way to avoid different levels of protection between member states and in member states between levels of government would on the contrary be to foster approximation on the basis of the requested directive, which could also have a spill-over effect towards agreements covering non central administrations

As a conclusion, the argumentation provided in the Commission's letter does not meet the standards applying the social dialogue as the letter does neither refer to any impact assessment on the potential impacts of the transposition, nor to the representativeness of the signatories, the legality of the clauses of the Agreement visà- vis the EU legal framework and whether it respects the subsidiarity and proportionality principles. Furthermore, if the letter were to be considered as the notification as a decision to EUPAE and TUNED, it is doubtful whether it meet the standards of reason giving that are set by the CJEU's jurisprudence on Article 296 TFEU, i.e. that there must be a clear and coherent statement: as indicated in this note the wording used in the letter leaves numerous doubts about the Commission's reasoning, and it is not coherent, e.g. in using concepts such as administration, public authority or public sector without more precision.