Social Europe without Social Dialogue: Decision of the Court of Justice of the European Union in C-928/19 P *European Federation of Public Service Unions*

Perrine Carré* and Marc Steiert**

Introduction – Social Dialogue, a cornerstone to an unexpected future of Social Europe

C-928/19 P *European Federation of Public Service Unions* (*EPSU*) is a cornerstone to the future of Social Europe and the probably limited role of social dialogue in it. In this judgment, the Grand Chamber of the Court of Justice of the European Union confirms that the European Commission is not obliged to transmit a collective agreement negotiated by the European social partners to the Council for its adoption as an EU legal act under Article 155(2) TFEU.

What seems like a technical judgment on the Union's institutions is a constitutional decision on the European social model. In fact, EU labour lawyers have been heatedly discussing whether the Commission can examine and reject the content of collective agreements negotiated in the European Social Dialogue under Articles 154 and 155 TFEU.[1] One can effectively understand the European Social Dialogue as an alternative procedure of EU law-making that shares the right of legislative initiative in social policy among the Commission and the social partners. For this reason, the Commission should not be allowed to unilaterally reject a collective

*Ph.D. Researcher at the European University Institute.

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[1]S. Borelli and F. Dorssemont (eds.), *European Social Dialogue in the Court of Justice – An Amicus Curiae Workshop on the EPSU case* (Working Paper Centre for the Study of European Labour Law 'Massimo D'Antona' 2020).

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agreement negotiated by the European social partners. Rejecting a collective agreement further challenges the right to collective bargaining (Article 28 of the EU's Charter of Fundamental Rights – 'Charter') and the autonomy of the social partners, a common constitutional tradition enshrined in Article 152 TFEU. In this sense, the decision in *EPSU* puts the Union's repeated calls for its greater socialisation into question. By opposing any sharing of law-making power between the Commission and the social partners, the Court of Justice rejects the idea of participatory regulation improving social law. It refuses to conceive of social dialogue as an alternative form of European democracy, despite what was proclaimed by its own General Court in 1998.[2]

Within this conundrum, we emphasise the constitutional implications of the ruling in *EPSU*. After an introduction to the European Social Dialogue, we discuss how this decision rejects a right of legislative initiative shared between the social partners and the Commission. The decision establishes an anti-model of European Social Dialogue conceived as mere stakeholder consultations instead of a legislative process. Second, we expose how this understanding opposes conceiving of social dialogue as an essential democratic procedure. The realisation of EU fundamental rights, such as collective bargaining or information and consultation at work, does not play a role in the Court's reasoning. Therefore, we finally explain why the decision in *EPSU* is a lost chance to clarify that it is the Union's fundamental interest to protect and promote fundamental rights. These fundamental rights should have guided the Court towards a sharing of legislative power in the social dialogue. The European Social Dialogue must be an alternative process of law-making at the initiative of the social partners. It is in light of this strong normative conviction that the decision is examined.

The background of C-928/19 P *EPSU* – towards an abrupt change in the balance of powers in the Social Dialogue

C-928/19 P *EPSU* seems to be a technical decision dealing with the implementation in EU law of a collective agreement concluded by the social partners. To put this technical decision into perspective, it is necessary to have in mind the specificities of the EU's law-making process in the social field. Alongside standard legislative routes,[3] the Council can implement collective agreements of workers'

[2]A democratic understanding of the social dialogue satisfied the social partners, recognised as law-making actors, and the Commission, which saw its technical control of collective agreements confirmed: Court of First Instance of the European Union 17 June 1998, Case T-135/96, *Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME)*, ECLI:EU:T:1998:128.

[3]Depending on the field of social regulation, the institutions act either under an ordinary or special legislative procedure: Art. 153 TFEU.

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and employers' representatives (the social partners) to make social law (Articles 154 and 155 TFEU). This European Social Dialogue was introduced in 1992 to break a stalemate on social regulation,[4] and was incorporated into primary law in 1997.[5] As an alternative route to making EU social law, the social dialogue merits attention but is neglected in EU law scholarship,[6] which might explain the limited echo provoked by *EPSU*. This section underlines that the conflict in *EPSU* is a legal controversy on the sharing of law-making powers between the Commission and the social partners.

The European Social Dialogue is an unprecedented process as it, first, obliges the Commission to consult the social partners on any legislative initiative in the social field (Article 154 TFEU) and, second, allows the social partners to conclude European collective agreements to regulate labour relations (Article 155 TFEU). For an efficient implementation of agreements, this latter provision provides for two procedures either at the national or EU level. The social partners choose amongst these procedures. At the national level, they can rely on the procedures available in each member state to implement a collective agreement. This leads, however, to differences in the implementation of a collective agreement as diverse processes exist across Europe for this purpose. Otherwise, the social partners can request the Commission to present to the Council a proposal for implementing the agreement as EU law. The Council has the final say upon the agreement's incorporation into the EU's legal order. It is this procedure and the question whether the Commission has a duty to transmit a collective agreement to the Council or whether it can assess the appropriateness of the content of such an agreement that was at stake in *EPSU*.

To understand the conflict on the sharing of law-making power in *EPSU*, one must return to the dialogue's legal bases. Considering Articles 154 and 155 TFEU together gives the impression that the social dialogue limits one of the Commission's main prerogatives, its right to legislative initiative.[7] Under Article 154 TFEU – the social dialogue's first step – the Commission must consult social partners twice before '[any] proposals in the social policy field': once on the 'direction of Union action' and then on 'the content of the envisaged proposal'. On the occasion of these consultations or at their own initiative, the social partners can decide to negotiate a collective agreement within nine months. These negotiations prevent the Commission from following-up on the same issue during

[4]For a history of European social dialogue *see* B. Bercusson, 'The Strategy of European Social Dialogue', in B. Bercusson, *European Labour Law*, 2nd edn. (Cambridge University Press 2009).

[5]Arts. 153-156 TFEU repeat, with few modifications, the content of the Agreement on Social Policy (OJEU, C 191/91, 1992) annexed to the Maastricht Treaty.

[6]B. Ter Haar, 'The Road Paved with (Broken) Promises: From Val Duchesse to the Pillar of Social Rights. Three Impressionistic Narratives', in Borelli and Dorssemont, *supra* n. 1, p. 93.

[7]Art. 17(2) TFEU.

these nine months. The law-making process in the social field thus gives priority to collective agreements. The EU institutions are supposed 'to intervene, at the Commission's initiative, only where negotiations fail'.[8] This priority has become known as horizontal or social subsidiarity.[9]

In other words, collective agreements, eventually to be implemented by the Council, can be negotiated through two alternative procedures:

— collective agreements reached by social partners at their own initiative (*autonomous agreements*);
— collective agreements reached after the Commission initiated the legislative procedure through consultations but was pre-empted by the social partners (*induced agreements*).

Article 155 TFEU – the social dialogue's second step – is silent on the balance of powers between the social partners and the Commission when the latter is requested to implement collective agreements. From 1992 onwards, the Commission, in practice, confined its role to checking legal and technical requirements of the request for implementation: the legality of the agreement's content, the EU's competence, the representativeness of the signatories, and the impact of the text on small and medium-sized enterprises;[10] in the case of autonomous agreements, the appropriateness of EU action was checked too but *not* the appropriateness of the content of the agreement.[11]

Leading to the conflict in *EPSU*, the Commission progressively reinterpreted its role in the implementing procedure. As a first step, it decided in 2012 to carry out impact assessments before submitting collective agreements to the Council.[12]

[8]European Commission, COM (2002) 341 final, *The European Social Dialogue, A Force for Innovation and Change*, June 2002, section 1.1.

[9]'[T]here is [...] a dual form of subsidiarity in the social field: on the one hand, subsidiarity regarding regulation at national and Community level; on the other, subsidiarity as regards the choice, at Community level, between the legislative approach and the agreement-based approach': European Commission, COM (93) 600 final concerning the application of the Agreement on social policy, December 1993. For a scholarly account, *see* Bercusson, *supra* n. 4; C. Barnard, '(Hard) Law-making in the Field of Social Policy', in C. Barnard, *EU Employment Law*, 4th edn. (Oxford University Press 2012) Ch. 2.

[10]In 1998, the Court of First Instance confirmed that the Commission must check these requirements: *UEAPME*, *supra* n. 2, para. 86.

[11]European Commission, *supra* n. 8; European Commission, *supra* n. 9; European Commission, COM (2004) 557 final, *Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue*, August 2004.

[12]Regarding the *Framework Agreement on prevention from sharp injuries in the hospital and healthcare sector* (COM (2009) 577 final, October 2009), the Commission stated in 2009 that no impact assessment was necessary. After 2012, proposals were based on impact assessments, e.g., *European Agreement concerning certain aspects of the organization of working time in inland waterway transport* (COM (2014) 452 final, July 2014).

It opted for a larger control of collective agreements. As a second step, the Commission formalised this reinterpretation in 2015 through the Better Regulation Toolbox.[13] In the dispute giving rise to *EPSU*, the Commission went even further. It rejected an induced collective agreement, the General Framework for informing and consulting civil servants and employees of central government (General Framework) that seeks to improve the right of workers to information and consultation in the public sector.[14] This rejection was solely based on an assessment of the political appropriateness of the agreement's content, without providing the promised impact assessment.[15] This reinterpretation modified the role of the actors of the social dialogue: a political assessment by the Commission competed with the social partners' outcome of the negotiations and the Council's final political decision on implementation. The European Federation of Public Service Unions, a European trade union signatory of the General Framework, brought the Commission's decision of rejection before the General Court in order to return to the functioning of the European Social Dialogue as practised before the Commission's reinterpretation.

The General Court's decision on appeal – extending the Commission's powers in Social Dialogue

Before the General Court, the trade union argued that the Commission cannot reject a collective agreement submitted to the Council based on its content and the necessity for EU action. It believed that the social partners, empowered to conclude binding agreements potentially implemented as EU law, have a law-making power that limits the Commission's action. In support, the applicant pointed to the imperative wording of Article 155 TFEU, the Commission's duty to promote social dialogue (Article 154 TFEU), the Union's obligation to respect the autonomy of the social partners (Article 152 TFEU), the fundamental right to

[13]'Whenever the impacts of the agreement are likely to be significant [. . .] the Commission will carry out a proportionate impact assessment which will focus in particular on the representativeness of the signatories, the legality of the agreement vis-à-vis the EU legal framework and the respect of the subsidiarity and proportionality principles': European Commission, *Better Regulation Toolbox*, complementing the guidelines presented in SWD(2015)111, Tool #5 and #7.

[14]TUNED and UEPAE, *General Framework for informing and consulting civil servants and employees of central government*, 21 December 2015. This agreement was negotiated by TUNED (led by EPSU; worker representative) and UEPAE (employer representative) (European Commission, C(2015) 2303 final, April 2015). It is considered an *induced* agreement negotiated after first-stage consultations.

[15]European Commission, Internal Document, C(2018) 1422: Letter from Michel Servoz (DG Employment, Social Affairs and Inclusion) to Britta Lejon (TUNED) and Héctor Casado Lòpez (EUPAE), March 2018. It was the first formal rejection decision of the Commission. Previously (hairdressing sector), the Commission had refused to answer a request without decision.

collective bargaining (Article 28 of the EU Charter of Fundamental Rights), and the fact that Article 155 TFEU gives only the Council the explicit power to reject collective agreements. In addition, it noted that previously the Commission itself had refused to assess the content of agreements,[16] and mentioned that collective agreements were the fruit of a deliberative process underpinned by the principle of democracy. The Commission, in contrast, understood Article 155 TFEU as a simple request at its discretion. Due to its legislative monopoly (Article 17 TEU), it can assess the political appropriateness of the content of collective agreements. Subsidiarily, the trade union submitted that the Commission's reasons for refusal were insufficient.

The General Court did not engage with the applicant's understanding of a balance of initiative power in the European Social Dialogue. Instead, it narrowed the claim to a quite different question: did Article 155 TFEU oblige the Commission to make a proposal to the Council when social partners submit such a request? The General Court did not think so. The reasoning employed to arrive at this conclusion is remarkable and questionable in light of the Court's strategies of interpretation. In its *literal* interpretation, the General Court noticed Article 155's imperative wording but concluded *against* any duty under the provision. While *contextually* interpreting, it did not read Article 155 together with the title on social policy, but with Article 17 TEU on the Commission's powers. The judges distinguished between negotiation and conclusion of the agreement and its implementation: implementation, unlike the others, fell under the Commission's control.[17] Article 155 TFEU was read as an expression of the Commission's monopoly of legislative initiative under Article 17 TEU, that literally obliges the Commission to assess the appropriateness of an agreement and its content.[18] *Teleologically*, the bench acknowledged that the Commission must promote social dialogue and recognised that rejecting a collective agreement 'would reduce the scope of the [social partners'] autonomy'.[19] These duties paradoxically did not bind the Commission as 'Article 155 TFEU merely involves the social partners in the [. . .] adoption of certain non-legislative acts without [. . .] any decision-making power'.[20] After that, the General Court briefly rejected all other arguments in favour of a duty to implement, in particular the existence of a principle of horizontal subsidiarity and the vision of the European Social Dialogue as a democratic process.[21]

[16]European Commission, *supra* n. 11.

[17]General Court of the European Union (General Court) 24 October 2019, Case T-310/18, *European Federation of Public Service Unions (EPSU) and Jan Goudriaan* v *European Commission*, para. 74.

[18]Ibid., para. 79.

[19]Ibid., para. 88.

[20]Ibid., para. 89.

[21]Ibid., paras. 91-105.

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Having opposed the applicant's vision of the social dialogue, the General Court concretely assessed the reasons for the Commission's decision to reject.[22] Based on the case law on the European Citizens' initiative, it granted the Commission a 'broad' – essentially political – discretion.[23] The political nature of this discretion is shown by the General Court confining its judicial review 'to verifying that the relevant rules governing procedure and the duty to give reasons have been complied with, that the facts relied on have been accurately stated and that there has been no error of law, manifest error in the assessment of the facts or misuse of power'.[24] While the Court did not give up its power to carry out a judicial review of the Commission's decision, it was difficult to meet the standards of this limited review in a political decision-making process.[25] This judgment was heavily criticised by scholarship and appealed by the European Federation of Public Service Unions.[26]

The Opinion of Advocate General Pikamäe – confirming the General Court

In his Opinion, Advocate General Pikamäe uncritically analysed the decision on appeal, which he seemed to support in its entirety. His stance on Articles 154 and 155 TFEU and his take on the Commission's right of initiative announced a minimalist model of the European Social Dialogue.

Pikamäe's stance on the European Social Dialogue is intriguing. It did not appear clearly from the General Court's decision whether the European Social Dialogue, established by Articles 154 and 155 TFEU *together*, was a single procedure with different stages, as suggested by the General Court's previous case law,[27] or two distinct procedures. To the appellant, the European Social Dialogue was indeed a single procedure and the Commission's launch of consultations left no space for rejecting the content of collective agreements. Interestingly, Pikamäe acknowledged that Articles 154 and 155 form a specific social law-making process.[28] He recognised that the social partners 'move [temporarily] from a consultative role to an active role' in the dialogue by pre-empting

[22]Ibid., paras. 106-141.

[23]Ibid., para. 33.

[24]Ibid., para. 110.

[25]The General Court acknowledged that the 'Commission's manner of proceeding [was] surprising' as it only provided a 'relatively succinct statement' of reasons potentially infringing the principle of legal certainty but was not prepared to review the decision: ibid., paras. 117-118.

[26]Borelli and Dorssemont, *supra* n. 1. F. Dorssemont, 'La Non Promozione Del Dialogo Sociale Europeo: Osservazioni Sul Caso EPSU', 3 *Lavoro e diritto* (2020) p. 519.

[27]*UEAPME*, *supra* n. 2, para. 74.

[28]Opinion of AG Pikamäe, delivered on 20 January 2021 in Case C-928/19, *European Federation of Public Service Unions (EPSU)*, ECLI:EU:C:2021:38, paras. 59 and 64.

the Commission's initiative.[29] Yet, Pikamäe immediately disregarded these 'specific features'.[30] Calling for a *systematic* interpretation of the social dialogue, he separated negotiation from consultation and implementation, concluding that the Commission controlled these two latter stages. Pikamäe thereby rejected any duty to implement,[31] as well as the legislative nature of the process.[32] More explicit than the General Court, this position brought forward a restrictive stance on the Commission's initiative. Despite the social partners pre-empting the Commission in drafting proposals,[33] Pikamäe stated that the Commission's power to initiate consultations 'cannot be equated to its power to adopt proposals [. . .]'.[34]

The Advocate General's Opinion confirmed the rejection of any special legislative powers of the social partners in the European Social Dialogue. Pikamäe opted for a minimalist social dialogue controlled by the Commission.

The judgment in C-928/19 P *EPSU* – a departure from Social Dialogue

The social partners' hopes for revising the decision on appeal were finally dashed in C-928/19 P *EPSU*. In this judgment, the Court of Justice's Grand Chamber confirms the General Court. It splits the European Social Dialogue into two distinct procedures,[35] opposes any duty of the Commission to forward European collective agreements to the Council,[36] validates a duty of the Commission to assess agreements and their content and,[37] finally, grants broad discretion in such assessments.[38] What follows from this judgment is that the Commission assesses the appropriateness of the content of a collective agreement before submission to the Council. Therein, it is only constrained by a limited review through the Union's courts.

[29]Ibid., para. 63.

[30]Ibid., para. 64.

[31]Ibid., paras. 62 and 65.

[32]Ibid., paras. 72, 75 and 78.

[33]Art. 154 TFEU.

[34]Opinion of AG Pikamäe, *supra* n. 28, para. 65.

[35]EPSU's argument on Art. 154 *and* 155 TFEU is narrowed to a question on Art. 155(2) TFEU in ECJ 2 September 2021, Case C-928/19 P, *European Federation of Public Services Unions* v *European Commission,* ECLI:EU:C:2021:656, para. 24.

[36]Ibid., para. 80.

[37]'[T]he Commission *must* also assess whether [. . .] implementation of the agreement at EU level is appropriate': ibid., para. 98.

[38]Ibid., para. 98.

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To understand this decision, it is key to look for what is missing from it. The applicant requested determining the balance of power between the social partners and the Commission *within* the social dialogue (Articles 154 and 155 TFEU), but the Court transformed the case into an institutional decision on the Commission's right of initiative under Article 155 TFEU and, importantly, Article 17 TEU. The applicant, conversely, considered Articles 154 *and* 155 as a single procedure creating an exception to the Commission's right of initiative.[39] Therefore, it invoked a duty of the Commission to implement the agreement as a product of a procedure *initiated* by the Commission's launch of consultations. In 1998, the General Court had indeed referred to the *stages* of a single legislative procedure.[40] The Court of Justice considered, however, that 'the power to propose the implementation at EU level of [a collective agreement under Article 155(2) TFEU] falls within the framework of the powers conferred by the Treaties on the Commission, in particular in Article 17 TEU'.[41] The social dialogue is to be interpreted in light of the Commission's right of initiative.

This latter conclusion develops its full potential when reflecting about the second element missing from the Court's reasoning: its refusal to examine whether a decision by the Council to implement a collective agreement is a legislative act;[42] in other words, whether the European Social Dialogue is a different kind of special legislative procedure not explicitly referred to in Article 289 TFEU.[43] These legislative procedures need to be launched based on a proposal by the Commission under Article 17 TEU, but previous case law establishes that the Commission can be obliged to submit legislative proposals effectively derogating from its right of initiative.[44] The appellant claimed that Article 155(2) TFEU was such a case, in which the Commission was obliged to submit a proposal in a legislative procedure. Not engaging with its legislative nature allowed the Court to circumvent the question of whether the social dialogue derogates from the Commission's right

[39]Ibid., para. 41: 'EPSU submits [that] the General Court committed an error of law in its interpretation of Article 17(1) and (2) TEU, on the ground that that general provision cannot extend the Commission's powers beyond the limits laid down in Articles 154 and 155 TFEU, as those articles constitute a lex specialis': also ibid., paras. 24-30.

[40]*UEAPME*, *supra* n. 2.

[41]Case C-928/19 P, *supra* n. 35, para. 44.

[42]Ibid., para. 77.

[43]Art. 289 TFEU: '(1) *The* ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. [. . .] (2) In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure' (emphasis added). Textually, the category of the *special legislative procedure* is not exhaustively described by the two mentioned procedures.

[44]ECJ 14 April 2015, Case C-409/13, *Council* v *Commission*, ECLI:EU:C:2015:217, para. 70.

of initiative. In turn, the Court of Justice compared the prerogatives of the social partners under Articles 154 and 155 TFEU with the right of the 'Parliament and the Council to request the Commission to submit appropriate proposals for the purpose of implementing the Treaties' under Articles 225 and 241 TFEU, in which the Commission is not bound by their requests.[45]

Based on these arguments, the Court of Justice refused to recognise any duty of the Commission to submit a collective agreement to the Council. Neither did the Court accept that the autonomy of the social partners (Article 152 TFEU) or the right of collective bargaining (Article 28 Charter) were breached, as the social partners negotiated their agreement without direct interference by the Union's institutions.[46] Finally, the Grand Chamber confirmed the Commission's broad discretion and its limited judicial review by the Court of Justice. In particular, the Court underlined the Commission's *duty* to assess the appropriateness of the content of a collective agreement by balancing 'political, economic and social' interests.[47] It is the balancing of these interests that justifies the Commission's broad discretion and leads to an acceptance of its reasons for rejecting the collective agreement in question.[48]

To conclude, *EPSU* confirms the General Court's judgment. It rejects any special sharing of law-making power between Commission and social partners in the social dialogue. On a broader level, the principle of democracy and the Union's fundamental rights do not affect the Court's reasoning. It is in light of these three dimensions that we analyse C-928/19 P *EPSU*.

Social Europe without Social Dialogue

An anti-model of European Social Dialogue

The decision of the Court of Justice has broad constitutional consequences, since it validates the Commission's departure from what used to be a model of social law-making in which social partners are the co-authors of the law. The decision confirms a push by the Commission for an *anti-model* of social dialogue as a process of mere consultations led by the Commission.

Even if the European Social Dialogue is neither well-known nor often used, its understanding as a process of social law-making by the social partners was widely accepted until 2012.[49] Based on this understanding, the trade union argued,

[45]Case C-928/19 P, *supra* n. 35, para. 46.
[46]Ibid., paras. 60-68.
[47]Ibid., para. 98.
[48]Ibid., paras. 98-100 and 107-132.
[49]Section 2 on the Commission's reinterpretation of its role in implementation.

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translated into institutional terms, that Article 154 and 155 TFEU are an exception to the Commission's monopoly of legislative initiative, sharing the initiative power between social partners and Commission.

On a literal but also systemic reading of Articles 154 and 155 TFEU, the applicant's vision is convincing. By giving priority to law-making by the social partners, Articles 154 and 155 TFEU intend to attribute four components of the legislative initiative power in social policy between the social partners and the Commission: the decision to make a proposal; the definition of the proposal's subjects and objectives; the drafting of its content; and the choice of the means of implementation.[50] The Commission's powers in the social field must be determined in comparison to those of the social partners.

Based on the sequence of the dialogue, we propose a coherent sharing of the power of initiative in the terms illustrated by Table 1. In line with the principle of collective autonomy, the social partners draft the content of their agreement and choose its means of implementation. The Commission, on the other hand, has to assess the representativeness of the agreement's signatories, the legality of each clause and the impact of the agreement on small- and mid-sized enterprises for any kind of agreement, as imposed by the General Court in 1998.[51] However, the systemic nature of Articles 151–155 TFEU and the Union's constitutional principles impose a distinction between autonomous and induced agreements on the sharing of legislative initiative between Commission and the social partners.

To preserve the Commission's role as *guardian of the Treaties* under Article 17 TEU and the constitutionally enshrined principle of vertical subsidiarity, it appears admissible that the Commission assesses the general appropriateness of EU action in the case of autonomous agreements in addition to the three mentioned criteria. Autonomous agreements are negotiated outside the Union's framework and not submitted to any check of compliance with the principle of vertical subsidiarity. However, the Commission should not be allowed to assess the appropriateness of EU action in the case of induced agreements. In this case, an assessment of vertical subsidiarity has already been carried out by the Commission launching consultations and determining their object. It is the Commission's sole decision to start consulting. In any case, the Commission should never be allowed to assess the appropriateness of the content of a collective agreement due to the fundamental nature of the autonomy of the social partners, the right to collective bargaining, and the principle of horizontal subsidiarity. In other words, the Commission should not be allowed to carry out a political assessment of the

[50]The Commission's initiative powers in Case C-409/13, *supra* n. 44, para. 70. The Commission also chooses the legal instrument if the Treaties allow therefor.

[51]*See UEAPME*, *supra* nn. 2 and 10.

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Table 1. An appropriate sharing of power between the Commission, the social partners and the Council of the EU under Articles 154 and 155 TFEU proposed by the authors

	Autonomous Agreement	Induced Agreement: Launched After First-stage Consultations	Induced Agreement: Launched After Second-stage Consultations
Defintion of subjects and objectives	Social partners	Commission	
Decision to propose an EU action	Social partners		Commission
Drafting of the Content	Social partners		
Choice of the means of implementation (National/EU procedure)	Social partners choose between EU and member states level		
In case of implementation at EU-level: Decision to adopt an EU act extending the collective agrement	Before its proposal for implementation, the Commission assesses: - Representativeness - of the signatories - Legality of - each clause - Impact on SMEs (Article 153(2) TFEU) - Appropriateness of an EU action	Before its proposal for implementation, the Commission assesses: - Representativeness - of the signatories - Legality of - each clause - Impact on SMEs (Article 153(2) TFEU)	
	The Council of the European Union takes the political decision implementing the collective agreement as binding EU law		

agreement's content, which is in any case the Council's role under Article 155 TFEU. Article 155(2) TFEU is therefore one of the rare cases[52] in which the Commission should be obliged to submit a legislative proposal, provided that the negotiations were launched after consultations and the three other criteria mentioned in Table 1 were complied with.

Under this understanding of the European Social Dialogue, the Commission had no reason to reject the General Framework, an induced agreement, as it complied with the three other criteria.[53] A previous fitness check had even shown that an EU intervention was needed to protect information and consultation rights in public administration.[54] The refusal of the Commission was based on an assessment of the content of the agreement, which breaches the constitutionally appropriate sharing of powers indicated above.

The Court of Justice, however, does not interpret Articles 154 and 155 TFEU in a way that preserves this sharing of power between the Commission and the social partners. Instead, it understands the implementation of collective agreements as following the usual tracks of EU law-making under the Commission's legislative monopoly and refuses to consider any systemic logic behind the sharing of initiative power within the European Social Dialogue. The process is reduced to a mere stimulation of the Commission, tantamount to the rights of Parliament and Council under Articles 225 and 241 TFEU. Under these provisions, the two institutions can request a proposal but the Commission can refuse these requests and, if accepted, the proposal is drafted by the Commission. These provisions are not an exception but are only a stimulus to the Commission's initiative. The Court's interpretation thus denies any legislative power to the social partners, since the Commission has discretion to reject the request, similar to Articles 225/241 TFEU. This interpretation is highly questionable due to the many institutional differences between the procedures,[55] but it is the latest manifestation of the European Social Dialogue.

What is more, in rejecting the European Social Dialogue's constitutional uniqueness, the Court of Justice refuses to recognise the existence of horizontal subsidiarity in social law-making, i.e. the principle that due to 'the proximity of the social partners to the realities of the workplace' their regulatory initiatives will result in 'better governance'.[56] Yet, the European Social Dialogue was designed

[52]Case C-409/13, *supra* n. 44.

[53]Case C-928/19 P, *supra* n. 35, para. 8.

[54]European Commission, SWD (2013)293 final, *'Fitness check' on EU law in the area of Information and Consultation of Workers*, July 2013.

[55]E.g., the social partners define the content of the proposal; Arts. 225/241 TFEU relate to issues the Commission is not dealing with, and launch the social dialogue.

[56]European Commission, COM (2004) 557 final, *Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue*, August 2004, p. 6.

precisely to bring EU law closer to citizens through law-making by the social partners. Without horizontal subsidiarity, there is indeed no longer any reason to distinguish social partners from any other group of interests, nor to distinguish between the social dialogue and usual stakeholders' consultations. The European Social Dialogue has turned into its *anti-model* of mere consultations.

To sum up, the decision in *EPSU* holds the understanding of social dialogue as a participatory legislative process incompatible with the EU's legal order. This is not convincing, as it is inconsistent with the spirit and previous practice of social dialogue. While Articles 151–155 aim at involving the social partners in the law-making process, the Court's interpretation of Articles 154 and 155 prevents the social partners from effectively participating in the making of EU social law. The following discussion of the decision's relation to the principle of democracy and the Union's fundamental rights underline that the Court is stepping back from a balanced and constitutionally justified sharing of power in the European Social Dialogue.

European democracy at the Commission's discretion

The preceding discussion has stressed that the ruling in *EPSU* denies the architecture of Social Europe that has existed since 1992. In line with that, this section reflects on the impact of the decision on yet another fundamental element of the EU's social legal order: social dialogue as an alternative form of democratic law-making. Indeed, the applicant argued that the Commission was obliged to submit a proposal due to the agreements emerging from a democratic process.[57] The context of the Conference on the Future of Europe, the Union's largest ever experiment on transnational democracy, further justifies exploring why the principle of democracy should have led the Court towards considering the social dialogue as a democratic procedure and towards sharing the initiative power. Yet, we argue that, following the General Court, the Court of Justice subordinated European democracy in the social dialogue – and maybe beyond that – to the Commission's political discretion.

The applicant believed that the European Social Dialogue is a democratic legislative procedure because of earlier case law by the General Court. In 1998, in *UEAPME*, the General Court held that the principle of democracy required 'the *participation of the people*' to be ensured through the social partners in the social dialogue.[58] In other words, it considered social dialogue as an alternative form of EU democracy and obliged the Commission and Council to verify the democratic

[57]Case C-928/19 P, *supra* n. 35, para. 72; Opinion of AG Pikamäe, *supra* n. 28, paras. 67 and 73; Case T-310/18, *supra* n. 17, paras. 94-95.

[58]Emphasis added; *UEAPME*, *supra* n. 2, para. 89.

nature of this process. Moreover, the European Citizens' Initiative and the recent Conference on the Future of Europe highlight the need for a plurality of means of expressing democracy in the EU. The principle of democracy should reflect these processes.

The ruling in *EPSU* has drastically altered the understanding of social dialogue as a democratic procedure. In the decision on appeal in *EPSU*, the General Court had already held that 'only where the Parliament does not act [. . .] respect for the principle of democracy may be assured, in the alternative, by the social partners [. . .]', revoking its mentioned earlier case law.[59] This understanding blatantly contradicts the sequence of the European Social Dialogue, in which the social partners pre-empt the Commission's initiative *before* the Parliament can become involved. Social dialogue should have priority as democratic legislative procedure. It is true that the Court of Justice does not deny the democratic nature of social dialogue at all, but it transforms the latter into a subsidiary form of democracy and expresses a generally negative stance on plurality in expressing EU democracy.[60]

What is more, the decision fleshes out the conflicts underlying the Commission's role in EU democracy. Under Article 17 TEU, the Commission is the guardian of the EU treaties and their application, as well as a political actor with a seemingly exclusive legislative monopoly. In other words, the Commission is the guardian of the outcome of EU democracy, as well as politically orienting the latter. This inherent contradiction manifests on various occasions in the decision in *EPSU* and directs the Court's rejection of alternative means of democracy. For instance, the decision gives the Commission broad political discretion to assess collective agreements allegedly justified by the Union's institutional balance,[61] i.e. the Commission's role as guardian of the Treaties 'promoting the general interest of the [EU]'.[62] This discretion, however, alters the institutional balance to the detriment of the Council's political role, deprived from its democratic power to decide on collective agreements under Article 155 TFEU, and the Union's Courts judicial control.[63] Put differently, the Commission's role as guardian of the Treaties paradoxically justifies its political functions and a lack of control thereof.

This disguised extension of the Commission's power in comparison to the other institutions fits well with other lines of the case law, such as the decisions granting the Commission the option to withdraw a legislative initiative distorted by Council and Parliament in the ordinary legislative procedure.[64] Similarly, the

[59]Case T-310/18, *supra* n. 17, para. 95.
[60]Case C-928/19 P, *supra* n. 35, para. 72.
[61]Ibid., para. 48.
[62]Case C-928/19 P, *supra* n. 35, para. 49.
[63]EPSU criticised this altered institutional balance: Opinion of AG Pikamäe, *supra* n. 28, para. 34.
[64]Case C-409/13, *supra* n. 44, para. 83.

Court justified the right to withdraw with a superficial link to the Union's institutional balance and very succinctly rejected any reference to respect for the principle of democracy, subduing the ordinary legislative procedure to Article 17 TEU on the Commission's initiative.[65] Much as in *EPSU,* the review of the Commission's reasons to withdraw was limited and the principle of democracy barely played any role. Yet, the Court went even further on social dialogue. Here, the Commission's interests *need* to prevail as it *must assess* the social dialogue's outcome.[66] Essentially, the Court considers the Commission as a central legislator of the Union. Moreover, this central legislator ironically controls EU democracy and the decision may cement the ongoing extension of the Commission's prerogatives. This assessment is questionable in light of the recent attempts to establish a citizens' assembly, to give the European Parliament a right of legislative initiative or to allow the latter to launch an exceptional yet EU-wide referendum.[67] It seems that as long as the Commission remains the guardian of the Treaties, it cannot become a properly political actor as the Union's executive – or, put differently, its politically accountable government.[68]

In conclusion, the ruling in *EPSU* detrimentally affects EU democracy at a time when it should be strengthened. Social dialogue is reduced to a subsidiary democratic process under the control of the Commission, and the Court confirms its refusal to support alternative means of democracy, such as the European Citizens' Initiative.[69] Within the existing ambiguities of the Treaties, the Court consciously puts the Union's democracy at the Commission's discretion, and it seems that only a modification of the latter's role might help to build a more democratic Union. The principle of democracy did not guide the Court towards respecting the constitutionally appropriate role of the social partners in the European Social Dialogue. While other pathways were available, this decision has subordinated European democracy to an abstract, political, and inconsistent interest controlled by the Commission.

[65]Ibid., para. 96.

[66]Ibid., para. 98.

[67]Conference on the Future of Europe, 'Conference on the Future of Europe – Report on the Final Outcome' Recommendation 36 – Citizens Information, Participation and Youth; Recommendation 38 – Democracy and Elections (May 2022).

[68]Discussed in the Conference on the Future of Europe, M. Mota Delgado and M. Steiert, 'We, the Citizens of the European Union: The First Recommendations of the Conference on the Future of Europe', *EU Law Live*, ⟨https://eulawlive.com/op-ed-we-the-citizens-of-the-european-union-the-first-recommendations-of-the-conference-on-the-future-of-europes-european-citizens-panels-by-miguel-mota-delgado-and-marc/⟩, visited 26 June 2022.

[69]The ECJ rejected any Commission duty to follow up on a European Citizens Initiative: ECJ 19 December 2019, Case C-418/18, *Puppinck and Others*, ECLI:EU:C:2019:1113. Linked to social dialogue, *see* P.-A. Van Malleghem, 'Some Preliminary Thoughts on the General Court's *EPSU* Decision from the Perspective of EU Constitutional Law', in Borelli and Dorssemont, *supra* n. 1.

A lost chance to protect and promote fundamental rights

Although the decision in *EPSU* has subordinated EU democracy to the Commission's interests as a political actor, the Union's legal order contains essential guarantees that restrain the discretion of its institutions: the fundamental rights enshrined in the EU's Charter of Fundamental Rights. Protecting these fundamental rights must form part of the Union's general interest and should have guided the Court's decision in determining the role of the Commission and the social partners.[70] Yet, this structural element is neglected in the decision. In addition, the case is a lost chance to clarify that it is a fundamental interest of the Union to protect and promote the Charter,[71] the effectiveness of its rights and the duties of the EU institutions thereunder.

How does *EPSU* relate to fundamental rights? Clearly, Article 28 of the Charter establishes a right of collective bargaining. The applicant underlined that giving the Commission control of collective agreements will affect the strategies of negotiation of the social partners.[72] The Court does not follow this argument. Since the social partners negotiated their agreement without direct interference by the institutions, the guarantee was considered to have been observed.[73] This conclusion reduces collective bargaining to a right to enter and conclude negotiations. The manifestation of this right in the Union's legal order neither reflects how negotiations are carried out, nor protects their outcome. Further, the decision neglects the autonomy of the social partners (Article 152 TFEU).

Similarly, the Court of Justice does not engage with the right to information and consultation within the undertaking (Article 27 EU Charter of Fundamental Rights) and the impact of implementing the agreement on this provision. Article 27 is well known due to the decision in C-176/12 *Association de Médiation Sociale*. In that decision, the Court held that, to be fully effective, Article 27 'must be given more specific expression in European Union or national law'.[74] Implementing the General Framework would have precisely extended this right to workers and civil servants that have not yet been covered by EU legislation on information and consultation at work. In other words, it would have given more specific expression to Article 27 under EU law. At least, the Council could have politically decided on extending the right. Yet there is no mention of Article 27 in the judgment. This omission is intriguing, as the

[70]K. Lörcher, 'On the Notion of "General Interest of the Union" in the Context of the General Court's *EPSU* Judgment', in Borelli and Dorssemont, *supra* n. 1, p. 38-41.

[71]Art. 51 Charter.

[72]Case T-310/18, *supra* n. 17, para. 88.

[73]Case C-928/19 P, *supra* n. 35, paras. 61 and 67.

[74]ECJ 15 January 2014, Case C-176/12, *Association de mediation sociale* v *Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône and Confédération générale du travail (CGT)*, ECLI:EU:C:2014:2, para. 45.

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Commission itself has previously emphasised that 'where fundamental rights [. . .] are at stake [. . .] preference should be given to implementation by Council decision'.[75] More specifically, the Court was even aware of the agreement's effect, stating that *only* '22 Member States already [have] rules on the information and consultation of civil servants and employees of central government administrations'.[76]

These fundamental rights should have led the Court towards sharing the power of initiative in the special legislative procedure that is the European Social Dialogue. More specifically, the Treaty itself mandates the Union to realise its fundamental rights, including fundamental social rights under Article 151 TFEU. Even more importantly, a neglected element to one of the Charter's most notorious provisions, its Article 51, supports a similar assessment:

> [The Union's institutions [. . .] and the Member States when implementing Union law] shall therefore respect the rights, observe the principles and *promote the application thereof* in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.[77]

The Charter calls on the EU's institutions to promote the effectiveness of its fundamental rights.[78] The agreement at stake in the decision in *EPSU* also falls within the Union's competences, i.e. the Charter's scope. What is more, the promotion of fundamental rights must be a general interest of the Union, as emphasised by the position of Article 17 TEU within Title III of the Treaty imposing the institutions to promote the Union's values,[79] i.e. its fundamental rights.[80]

Unfortunately, the Court disregarded the mandates of primary law with regard to the promotion of fundamental rights when it determined the role of the Commission and the social partners in social law-making. Applying Article 51 should have led to the conclusion that an effective right of collective bargaining opposed any – even indirect – interference with collective agreements. Under this provision, the Court should have considered the positive effect of the agreement on the right to information and consultation. In addition, Union law lost an opportunity to make its fundamental rights not only legally but also practically effective.[81] It appears that the protection and promotion of fundamental rights is still not truly essential to the Union, despite what is mandated by Article 51 of the

[75]European Commission, *supra* n. 11, section 4.4.

[76]Case C-928/19 P, *supra* n. 35, para. 121.

[77]Emphasis added: Art. 51 Charter.

[78]On the duty to promote the Charter's rights in social dialogue *see* Dorssemont, *supra* n. 26, p. 529.

[79]Art. 13(1) TEU. *See* Lörcher, *supra* n. 70.

[80]Compare Arts. 2 and 3 TEU with the Preamble of the Charter.

[81]E.g., the European Social Charter 'requires the State Parties to take not merely legal action but also practical action to give full effect to [its] rights [. . .]': European Committee of Social Rights (ECSR), 4

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Charter. Believe it or not, EU fundamental rights might not bind the institutions to the fullest extent possible.

Conclusion – the doomed future of the EU's Social Dialogue?

Regarding the European Social Dialogue, it seems difficult to turn the clock back. Throughout this case note, we have sought to identify and emphasise the many inconsistencies within the Court of Justice's decision in EPSU and how this disregard for the constitutional uniqueness of the European Social Dialogue profoundly affects the future of Social Europe, the Union's democracy and its protection of fundamental rights.

The Court did not rise to meet its chance to build a more progressive and inclusive Union truly close to its citizens and their interests. Instead, it opted to transform an appeal on the Union's social dimension into an institutional decision on the Commission's powers, relying on the latter's ambiguous role under the Treaties. Conversely, the principle of democracy, the respect for the Union's fundamental rights and the history of the European Social Dialogue should have guided the Court towards sharing legislative initiative between the Commission and the social partners in the social dialogue. It is remarkable that the Court's decision is presented as following an obvious reasoning, by largely disregarding the three mentioned elements under the premise of the Commission's role. The Court consciously opted to expand the Commission's power at the expense of Social Europe and EU democracy. The latter have been subordinated to the Union's executive, an executive that – it cannot be emphasised enough – is still not fully politically accountable for its actions. In harsher words, the transformation of a technical assessment of collective agreements into political discretion nearly without control raises doubts in terms of the concept of the rule of law in the EU.

While the future of social dialogue appears doomed for now, there could, though, be some light at the end of the tunnel. Recently, the Commission announced the need to clarify the conditions for implementation of collective agreements.[82] We have sought to propose a more coherent vision of social dialogue, respecting its constitutional uniqueness, which might be useful for this process of redefinition. It remains to be seen whether the European Social Dialogue can be resuscitated.

November 2003, Complaint No. 13/2002, *Autism Europe* v *France,* para. 53. *See also* ECSR 9 September 1999, Complaint No. 1/1998, *International Commission of Jurists* v *Portugal*, para. 32.

[82]European Commission, COM (2021) 645 final, *Commission Work Programme 2022 – Making Europe Stronger Together*, October 2021, section 2.3.

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