On the notion of 'general interest of the Union' in the context of the General Court's *EPSU* judgment

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1. Introduction.

By way of introduction, I would admit that it might appear a bit hybrid to deal with the issue of "general interest" as such and in relation to the EU in particular. Obvious- ly, such a general attempt would fail. The starting point will therefore be much more pragmatic.

The analysis of the General Court's (GC) reasoning reveals that entrusting the Com- mission the promotion of the "general interest of the European Union" (Article 17 para. 1 subpara. 1, 1 sentence TEU) is one of the central arguments for rejecting any obligation of the Commission to transmit a Social Partner Agreement to the Council for decision:

In sum, there are two main arguments in paras. 79 and 80 of the judgment:

1. Commission would be prevented from fulfilling its role (para. 79).
2. Social partners could not promote the general interest of the EU (para. 80).

Before dealing with these arguments more in detail, it is necessary to reflect what "general interest" means and how this applies to the present case. Moreover, it has to be clarified whether and – in the affirmative – which institution will monitor its respect and proper implementation.

According to these issues my presentation will address three questions:

- First: What is the meaning of "general interests of the European Union"?
- Second: What does this mean for the GC's arguments to refuse Commission's obligations of transferal?
- Third: Who has the competence to scrutinise the proper implementation?

Finally, short Conclusions will summarise the contents and try to give a certain outlook.

2. (Elements of the) Meaning of 'general interest of the Union'.

Before going into any details, it appears important to recall that the "general interest" is a fundamental notion which refers to several contexts. For example, in the human rights context it serves as one of the elements to justify limitations (see Article 52(1) CFREU).[41] There is abundant CJEU case law on what can be considered as "general interest" in this context. Most obviously, the protection of workers' interests is considered to be included.

More specifically in relation to Article 17(1) TEU, the GC has obviously the meaning that solely the Commission is in position to understand and assess what is the "general interest", due to the complexity of interests that must be considered. However, this technical approach fails to understand its basic value which is required by the Treaties.

General considerations.

[41] It is interesting to note that in contrast to many other language versions which use the same term for Articles 17(1) TEU and 52(1) CFREU the German versions differ: Article 52(1) CFREU uses the term "Gemeinwohl" whereas the notion of "general interest" in Article 17(1) TEU is translated into "allgemeinen Interessen". This difference might perhaps be explained by chronological and thematic reasons: Chronologically, the CFREU was elaborated in its main parts several years before the Lisbon Treaty and in the different context of a human rights instrument in which "Gemeinwohl" is a much more specifically used to limit individual rights. "Allgemeine Interessen" would probably be regarded as too wide.

Obviously, lacking a legal definition in the Treaties, it is difficult to construe the basic elements for the "general interests" even in relation to the Union. There are several possible approaches ranging from a (very) wide political understanding (like the GC: all sorts of "political, economic and social considerations"[42]) to a more legal orientation which would look first at the legal requirements and only at a second stage at further considerations.

Other elements like the principles of democracy and legitimacy as well as consistency[43] (Article 13(1) TEU) will have to be taken into account. In any event, a hierarchy will be necessary ensuring that the (rule of) law will always precede any other (political) considerations.

But before further analysing the possible content it appears necessary to look at the case law of EU's constitutional court, the CJEU:

What is the CJEU's position?

Although there is only rare case law specifically dealing with the content of the EU's "general interest" the CJEU appears to be in favour of the GC's position of leaving the definition to the Commission.[44] However, it is not excluded that the CJEU might look more into the details of the legal framework. In this respect, it is illustrative that the CJEU has at least in two cases referred to legal aspects defining the "general interest" of the Union:

- the ESM Treaty ("By its involvement in the ESM Treaty, the Commission promotes the general interest of the Union")[45]
- elements of a (secondary law) Regulation.[46]

The core: values, objectives and fundamental social rights.

For the purpose of trying to define (at least elements of) the Union's "general interests" it is of utmost importance to take into account that the provision of Article 17 TEU is placed within the framework of the core provision of Article 13(1) TEU introducing its Title III "Provisions on the institutions". This provision defines that "the Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests … and ensure the consistency, effectiveness and continuity of its policies and actions".[47] Accordingly, this has to be the starting point for an analysis what 'general interest of the European Union' could or even should mean.

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[42] See para. 79 of the judgment.

[43] In the present case for example, the Commission's behaviour fundamentally lacks consistency: It has started to initiate negotiations between the partners of the agreement; it has even welcomed the outcome but finally rejected it.

[44] If the "general interest" in Article 17(1) TEU is referred to it is normally in a very general way that the CJEU quotes the terms of the provision without giving any indication about its content, see e.g. the following Grand Chamber judgments: 14/04/2015- C-409/13- ECLI:EU:C:2015:217- *Council v Commission*, para. 70; 06/09/2017- C-643/15- ECLI:EU:C:2017:631- *Slovakia v Council*, para. 146; 19/12/2019-C-418/18 P- ECLI:EU:C:2019:1113- *Puppinck and Others v Commission*, para. 59 (the latter two judgments refer to the first authority).

[45] Judgment 27/11/2012- C-370/12- ECLI:EU:C:2012:756- *Pringle*, para. 164.

[46] "In accordance with Article 2 of the CFP Regulation, in the fisheries sector the European Union interest is, inter alia, to ensure exploitation and management that is sustainable in the long term", Grand Chamber judgment 30/04/2019- C-611/17- ECLI:EU:C:2019:332- *Italy v Council* (Quota de pêche de l'espadon méditerranéen), para. 75 (in relation to "general interest" see the preceding para. 74: as regards the breach of Article 17 TEU, it should be recalled that the first paragraph of that provision states that the Commission is to promote the general interest of the European Union).

[47] It is to be noted that Article 13(1) TEU does not explicitly refer to the "general interests" of the Union. The underlying understanding of this contribution is that the Unions "general interests" include all the aspects mentioned in Article 13(1) TEU starting with the values and objectives.

Therefore, the Union's "general interest" is to be defined in the first place by its values and objectives and also by the fundamental rights (Articles 2, 3 and 6 TEU). In this understanding the Chamber should have taken specifically into account

- in relation to Article 2 TEU: the "human rights" and "solidarity";
- in relation to Article 3 TEU: the social objectives like "social market economy" and "social progress";[48]
- in relation to Article 6 TEU: all fundamental (social) rights included mainly in the "Solidarity" Title of the CFREU[49] which contains the obligation to promote the application of fundamental rights in general (Article 51(1)) and in particular
    - Article 28 CFREU,[50] in particular the Right of collective bargaining which is of special importance here,
    - Article 27 CFREU in relation to the fundamental right to information and consultation (at least in combination with Article 20, equality before the law).[51]

Besides the general objectives defined by Article 3 TEU there are, more specifically, important social objectives provided for in Article 151(1) TFEU. *Inter alia* it mentions explicitly "dialogue between management and labour" as one of these objectives. This is not only confirmed but significantly strengthened by the newly (Treaty of Lis- bon) introduced Article 152(1) TFEU requiring the Union (thus all its institutions) to promote the role of the social partners at its level as well as to facilitate dialogue between the social partners, respecting their autonomy.[52] Moreover, it has to be taken into account that the primary law legislators have recognised the specific competence of SP in the social policy field in a double way. First, they have mainly taken over the SP's Agreement in the primary law provisions which are i.a. now Articles 154 and 155 TFEU. Second, in particular Article 154 provides for the SP a specific role in all legislative procedures dealing with social policy.

In sum, the GC has failed to take these legal provisions into account when referring to the Union's "general interest".

3. Consequences for the GC's arguments to refuse Commission's obligations of transferal.

On the basis of the previous considerations the GC's argumentation in relation to Article 17(1) TEU containing the Commission's obligation to promote the "general interest" of the Union is not correct, neither from a methodological nor from a substantial point of view.

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[48] See F DORSSEMONT, 'Values and Objectives', in N. BRUUN, K. LÖRCHER and I. SCHÖMANN (eds.), *The Lisbon Treaty and Social Europe* (Oxford, Hart Publishing), 2012, p. 45 ff.

[49] F. DORSSEMONT, K. LÖRCHER, S. CLAUWAERT, M. SCHMITT (eds.), *The Charter of Fundamental Rights of the European Union and the Employment Relation*, (Oxford, Hart Publishing), 2019.

[50] F. DORSSEMONT and M. ROCCA, 'Right of Collective Bargaining and Action', note 9, p. 466 ff.

[51] It might appear problematic to refer to this right because it is addressed specifically to "undertakings" which in its ordinary meaning would refer to private entities. However, it is containing a principle which should also be recognized in the public sector (see B. VENEZIANI, 'Article 27 – Worker's Right to Information and Consultation within the Undertaking', note 9, p. 429 ff., 436). But if central administrations would not be included there is still the obligation to ensure equality before the law (Article 20 CFREU) meaning that public service cannot be excluded totally.

[52] B. VENEZIANI, 'The Role of the Social Partners in the Lisbon Treaty', in N. BRUUN, K. LÖRCHER AND I. SCHÖMANN (eds.), *The Lisbon Treaty and Social Europe* (Oxford, Hart Publishing), 2012, p. 123 ff (see also the TTUR Recommendation on the effective application of Article 152 TFEU, ibid. p 307

Preliminary observations: general application of the principles mentioned above.

All the elements mentioned above have to be taken into account when defining the Union's "general interest". Applying them to the present case means that the reference to the "general interest" cannot justify a Commission's refusal to submit a proposal under Article 155(2) TFEU unless it is based on legal arguments or on the lack of representativity. All elements mentioned above require a limitation of the Com- mission's powers in relation to defining the Union's "general interest". If those obligations should still have any legal value, the Commission cannot undermine them by using an appropriateness test.

In any event, such a necessary limitation would still have to ensure the fulfilment of the two following conditions:

- the Commission's role as guardian of the Treaties (Article 17(1) 3rd sentence TEU) re- quires that the limitation does not touch upon the verification of the legality of the provisions of the agreement concerned.
- the democracy principle requires the verification of representativeness.

Against this background, the two main arguments used by the GC will have to be assessed.

GC's first argument: Commission would be prevented to fulfil its role.

The crucial question is what the "role" of the Commission is all about. In assessing the "general interest" it has to fulfil first and foremost the promotion of the values and objectives of the Union as outlined above. In following this line of argumentation, the Commission would not be prevented but, instead, strengthened to fulfil its role if it were obliged to transfer the agreement to the Council for adoption.

The GC's underlying understanding of the Commission's competence to define whatever it thinks would be fit for "general interests" is contrary to its legal obligations.

GC's second argument: social partners cannot promote the general interest of the EU.

Coming secondly to the GC's additional argument that social partners could not promote the general interest of the EU this demonstrates, once again, the misunderstanding of the SP's role in the Social Policy Title. According to the GC, the Commission would have a legitimacy based on its technical capacities and knowledge, and this legitimacy would overturn the democratic legitimacy of the SPs.

First and more generally, this approach departs from a model where political decisions should be adopted through a democratic procedure that leads to a consensus deriving from a contrast between different regulatory projects.

Second, and more specifically, in Articles 153(3), 154 and 155 TFEU the EU primary law legislator recognises the specific competence of SPs dealing best with social is- sues in the "general interest". Moreover, the additional condition of representativity cannot be justified if the SP are denied this competence in a general democratic way.

Third, the pertinent issue of "information and consultation" is most obviously in the best competence of the EU social partners.

4. Scrutinizing the proper implementation of the Union's 'general interests'.

From a methodological point of view, it is to be criticised that the Chamber leaves the definition of what "general interest" is supposed to represent totally open apparently assuming that it is up to the Commission only to define its content. This is not acceptable. As legal notion it is (finally) up to the EU judges to provide a clear substantial guidance i.e. to define it.

A similar/parallel problem has arisen between the CJEU and the German Federal Constitutional Court (Bundesverfassungsgericht) in relation to the interpretation of EU law requiring "effective judicial review".[53] Therefore, it cannot be left to the Commis- sion to define "general interest" at its (own) will.

5. Conclusions.

The general interest of the Union must first and foremost ensure the proper implementation of the Union's values, objectives and fundamental (social) rights. Interests cannot override legal obligations.

The Union's values, objectives and fundamental (social) rights require that the Commission promotes the role of the social partners and does not undermine it by rejecting the transferal of an agreement to the Council.

The specific role of representative social partners in EU primary law illustrates that they are part of the legislative procedure. Thus, they are recognised and entrusted in the social policy field to ensure (or at least contribute to ensure) the "general interest" of the Union' (together with the Council).

[53] "… religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be subject, if need be, to effective judicial review by which it can be ensured that the criteria set out in that provision are satisfied in a particular case (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 59).", CJEU, Grand Chamber, 11 September 2018, *IR*, ECLI:EU:C:2018:696, para. 43.