Some preliminary thoughts on the General Court's EPSU decision from the perspective of EU constitutional law

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This note formulates some observations on specific themes related to the *EPSU*[223] case from the perspective of EU constitutional law. I will address the following questions: whether an agreement concluded at Union level and implemented pursuant to Article 155(2) TFEU ought to be considered as a legislative act or not; the extent the Commission's right of initiative as it exists in the particular context of Article 155(2) TFEU; and the extent of the Commission's duty to motivate a refusal to submit an agreement to the Council in order for that agreement to be implemented. *In fine* I will address the normative case for overruling the *EPSU* decision. The gist of my argument will be the following: the deck of cards of EU constitutional law currently appears to be stacked against *EPSU* and, therefore, the social partners when they attempt to transform their negotiated agreements into binding European law. Nevertheless – and though I think it is unlikely the Court will follow this path – there is a path of principle, based on well-known past constitutional precedents, which might lead the CJEU to reaffirm the importance of social dialogue.

1. Some legal questions.

An agreement by the social partners at EU level: a legislative act?

At first sight, precedent seems to indicate that agreements reached between the social partners at EU level ought to be recognized as "legislative measures". In its judgment in *UEAPME,* the Court of First Instance held that Directive 96/34 on the framework agreement on parental leave had to be considered as a "legislative measure" rather than as a "decision adopted in the form of a directive".[224] The Court further held that the "parties representative of management and labour" ensured the "participation of the people" required by the "principle of democracy"[225]. Of course, the value of the *dicta* in *UEAPME* may be doubted given that these determinations where made merely relating to the question of standing of individual applicants under the action for annulment.

But the question must be raised whether the *dicta* in *UEAPME* still carry the day in 2020. Indeed, the category of legislative acts was not formally recognized by Union constitutional law until the adoption of the Lisbon Treaty. The category is not without importance: it triggers certain procedural consequences, such as the role of national parliaments in light of the principle of subsidiarity (Protocols No 1 and 2 of the Treaties), but also the requirement of the Council and of the European Parliament to sit in public when deliberating on legislative acts (Article 16(8) TEU and 15(2) TFEU). The Lisbon Treaty attempted a definition in its Article 289(3) TFEU: "Legal acts adopted by legislative procedure shall constitute legislative acts." The interpretation given by what has meanwhile become the leading case on this issue makes matters difficult for the applicants in the *EPSU* case. According to the Grand Chamber of the Court, "a legal act can be classified as a legislative act of the European Union *only if* it has been adopted on the basis of a provision of the Treaties which expressly refers either to the ordinary legislative procedure or to the special legislative procedure."[226]

[223] Case T-310/18, *EPSU*, EU:T:2019:757.
[224] Case T-135/96, *UEAPME v Council*, EU:T:1998:128, paragraph 64.
[225] *Ibid*., paragraph 89.
[226] Joined Cases C-643/15 and C-647/17, *Slovak Republic and Hungary v Council*, EU:C:2017:631, paragraph 62 (I underline).

The final nail in the coffin of the recognition of such agreements as legislative in nature may well lie in the importance of a policy consideration: legal certainty. Echoing its Advocate General, the Court found in that case that such a straightforward rule "provides the requisite legal certainty in procedures for adopting EU acts, in that it makes it possible to identify with certainty the legal bases empowering the institutions of the European Union to adopt legislative acts and to distinguish those bases which can serve only as a foundation for the adoption of non-legislative acts"[227]. The Advocate General adds (without being confirmed on this point by the Court) that the suggestion of classifying an act as a legislative act on the basis of its content is "irrelevant"[228]. If that is the case, it might well be considered that the considerable legitimacy of an agreement negotiated by the social partners, or the principled language of *UEAPME*, is likely to be deemed an equally irrelevant consideration. This offers a damning perspective on the *EPSU* case: Article 155(2) merely states that an agreement "shall be implemented … by a Council decision on a proposal from the Commission", omitting any mention of a legislative procedure[229]. In light of the CJEU's motivation of legal certainty, it seems unlikely that the Court would reconsider its decision in this regard.

There is nevertheless a (narrow) path of principle which might lead the Court of Justice away from this apparently conclusive set of arguments. It is indeed well known that the Court sometimes takes liberties with the text of the Treaties, or overrules (explicitly or implicitly) existing lines of precedent. The Court might depart from precedent in order to reaffirm the importance of European democracy, and in order to strengthen the constitutional position of social dialogue. In a series of bold judgments with an often doubtful basis in the text of the Treaties, the Court expanded the procedural rights and duties of the European Parliament[230] and ensured that the requirement that the Council consult the Parliament had at least some teeth[231]. Nothing stands in its way if it wants to do so once more. To the contrary, the Lisbon Treaty has emphasized the importance of "democratic principles" (*eg* Articles 2 and 10 TEU) and Article 3 TFUE calls upon the creation of a social market economy while Article 9 ensures the mainstreaming of social objectives across all policy fields. In light of such a contextual interpretation, the Court might well find that agreements negotiated by the social partners deserve recognition in the form of the ascription of the label of legislative acts. Yet many commentators have grown disillusioned with the positions taken up by the Court of Justice in recent years. One commentator observes that if *UEAPME* did affirm the importance of the social partners for European democracy, "neither the General Court nor the Court have reiterated or confirmed" the importance of this point in subsequent judgments[232]. The glorious days of the CJEU's heroic pro-democracy jurisprudence seem long gone.

The right of initiative of the Commission

It is doubtful whether the status of an agreement reached by the social partners as a legislative or non-legislative act has much of an impact on the extent of the Commission's right of initiative. Although Article 17(2) TEU does explicitly provide that "Union legislative acts may only be adopted

[227] *Ibid.*, paragraph 63. *See also* Opinion of AG Bot in the same case, EU:C:2017:618, paragraphs 66.
[228] Opinion of AG Bot in the same case, EU:C:2017:618, paragraph 64.
[229] The General Court rightly underlines this in *EPSU*, paragraph 69.
[230] Case 70/88, *Parliament v Council*, EU:C:1990:217; Case 294/83, *Les Verts*, 294/83, EU:C:1986:166.
[231] Case 138/79, *Roquette Frères,* 138/79, EU:c:1980:249; see also Case C-65/90, *Parliament v Council*, EU:C:1992:325 (about the reconsultation of Parliament).
[232] D. BLANC, 'L'Europe démocratique: récit des récits ou matrice d'îlots narratifs?' in A. BAILLEUX, E. BERNARD, S. JACQUOT, *Les récits judicaires de l'Europe*, Bruxelles, Bruylant, 2019, p. 138.

on the basis of a Commission proposal", this is the case "except where the Treaties provide otherwise".

The heart of the problem raised in *EPSU* is therefore the interpretation of Article 155(2) TFEU. I concur with my colleagues who have argued that there is a relatively strong textual case that Article 155(2) can be understood as an exception to the quasimonopoly of the Commission. If Article 155(2) TFEU states that "[a]greements concluded at Union level *shall* be implemented … in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal of the Commission", the word *shall* can be understood as imposing an obligation on the Commission to submit such submit such an agreement to the Council. The problem with this argument is perhaps that it reaches so far as to be vulnerable to a *reductio ad absurdum*: if the Commission is forced to submit such a proposal, why wouldn't the Council then also be compelled to adopt it?[233] Whereas the word *shall* may provide the Court of Justice with a plausible justification to quash the General Court's decision in *EPSU*, the Court also has a plausible justification at its disposal to confirm this holding.

Unfortunately, the constitutional deck of cards appears once more to be stacked against the case of the social partners. First of all, it is significant to note that a leading commentary states, co-authored by none less than the current president of the CJEU, states simply that the "Commission and the Council are *in no case* obliged to implement agreements at the request of signatory parties"[234]. This position is not justified with reference to arguments derived from the case-law or from other scholarly work.

Second, the CJEU has protected the right of initiative of the Commission even against explicit wording of conclusions of other institutions, like the European Council. In this context, the Court emphasized that the power of legislative initiative attributed to the Commission "reflects the principle of conferred powers, enshrined in Article 13(2) TEU, and, more broadly, the principle of institutional balance, characteristic of the institutional structure of the European Union."[235] Even the hypothesis of a political consensus reflected in institutional practice to alter the rules of the Treaties is excluded by the Court because only the Masters of the Treaties can alter the constitutional settlement of the Union[236].

Third, the case-law in an adjacent domain, that related to European citizens' initiatives, does not bode well. Indeed, the Grand Chamber of the Court of Justice found that the principle of institutional balance implied that the Commission retains full freedom in its decision to submit or not submit a proposal to adopt an act to the European institutions. It is thus "for the Commission to decide whether or not to submit a proposal for a legislative act"[237], and the right to submit an ECI "does not undermine the Commission's power of legislative initiative, and the Commission remains free not to submit a proposal provided that it informs the institution concerned of the reasons."[238] The Court emphasized that although the "system of representative democracy was complemented, with the Treaty of Lisbon, by instruments of participatory democracy, … that objective fits within the pre-existing institutional balance and is pursued within the limits of the powers

[233] *EPSU*, *supra* note 1, paragraph 62.
[234] K. LENAERTS, P. VAN NUFFEL, *European Union Law*, London, Thomson Reuters, 2011, p. 682 (I underline).
[235] *Slovak Republic and Hungary v Council*, *supra* note 4, paragraph 146.
[236] *Ibid.*, paragraph 149, with reference to case C-363/14, Parliament v Council, paragraph 43.
[237] Case C-418/18 P, *Puppinck*, EU:C:2019:1113, paragraph 59.
[238] *Ibid.*, paragraph 61.

attributed to each EU institution by the Treaties, the authors of which did not intend, by means of the introduction of that mechanism, to deprive the Commission of the power of legislative initiative conferred on it by Article 17 TEU"[239].

One may obviously doubt the relevance of these conclusions for the topic which concerns us here. Generalizations on the basis of particular cases are only worth so much. It is easy enough to distinguish the case-law on the basis of citizens' initiative on the grounds that the democratic legitimacy of such initiatives remains relatively weaker compared to agreements negotiated by the social partners at a pan-European level, or the Treaty's recognition of the autonomy of the dialogue between social partners (Article 152 TFEU) or the recognition of collective bargaining as a fundamental right (Article 28 Charter) only reinforce this proposition[240]. This would be the principled case for overruling the General Court's judgment. But one cannot exclude the possibility that these judgments indicate a systematic policy stance of the CJEU biased decidedly against anything other than representative democracy.

An argument that might provide at least some solace relates to the Commission's communications on the subject of the negotiations of the social partners. The suggestion of the General Court that these communications "are devoid of any binding legal force" seems hasty to say the least. Although communications may not have binding force as such, individuals may rely on the legitimate expectations they create[241]. The social partners – who are not mere individuals, but critical players in the European democratic process – ought to be able to rely on the expectations created by European institutions such as the Commission. The principle of legitimate expectations could therefore be sufficient for the Court to find that – although the Commission in principle has a broad margin of discretion when exercising its right of initiative – it has limited that margin of discretion by its own doing. This solution, tempting as it might be for the Court, has the significant disadvantage for the social partners that it relies on Commission communications which could be altered in the future.

The duty of the Commission to state reasons

An additional question is whether the General Court adequately justified its decision not to implement the agreement. *EPSU* merely reiterates the settled case-law of the Court in this regard. Perhaps the most doubtful observation made by the General Court in this context is the fact that because Commission must evaluate "whether implementation of the agreement at EU level is appropriate, including by having regard to political, economic and social considerations", the Commission has "broad discretion" and accordingly the Court's power of review must be "limited"[242].

It is in this context that reference to *UEAPME*'s stress on the role of social dialogue for European democracy might be relatively important[243]. Indeed, one can recognize the outlines of a sliding scale of intensity of review of the justification given by decisions to the Commission in function of their importance for the democratic process as a whole. For standard executive decision-making, the ordinary test may well be sufficient. However, for decisions which affect legal acts or potential

[239] *Ibid.*, paragraph 65.
[240] *See generally* F. DORSSEMONT, K. LÖRCHER, M. SCHMITT, 'On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case', 48 *Industrial Law Journal* 571.
[241] *See generally* K. LENAERTS, P. VAN NUFFEL, *supra* no. 139, p. 855.
[242] *EPSU*, *supra* note 1, paragraphs 79, 109, 111 and 112.
[243] *UEAPME*, *supra* note 2, paragraph 89.

future legal acts with heightened democratic legitimacy, such as acts deriving from citizens' initiatives or acts implementing negotiated agreements, decision-making should be subject to higher scrutiny. At the extreme of this spectrum would stand decisions having an impact on the ordinary legislative procedure, as the pinnacle of democratically legitimate law-making in the European Union. In this respect, the Court held that a decision of the Commission to withdraw a proposal, must be justified by particularly weighty reasons: reasons "supported by cogent evidence or arguments"[244]. The sliding scale argument relies in essence on the familiar policy argument that democratic legitimacy should play a role in the analysis of legal arguments, which has considerable pedigree in EU law[245].

This approach could take inspiration from *Anagnostakis*, in which the Court adapted its doctrine in the context of citizens' initiatives. In light of the democratic importance of citizens' initiatives, the Commission's decision was subject to a more stringent obligation of motivation and, accordingly, to a more demanding standard of review. The Court found that because "the refusal to register" an ECI "may impinge upon the very effectiveness of the right of Union citizens to submit a citizens' initiative", "such a decision must clearly disclose the grounds justifying the refusal" in order to ensure that the ECI does indeed "reinforce citizenship of the Union and enhance the democratic functioning of the Union through the participation of citizens in the democratic life of the Union (...)"[246]. Should such a line of argument be followed, the Commission would be subject to a more stringent duty to state reasons when it rejects a request by the social partners to implement an agreement and the CJEU could subject such decisions to a more demanding type of scrutiny. A plausible factual case could then be constructed that the current justifications offered by the Commission are insufficient.

2. *In lieu* of a conclusion: the case for overruling the General Court's *EPSU* decision.

Whatever the constitutional text and current case law might suggest, there's an important normative case to be made that the CJEU ought to overrule the General Court's decision in *EPSU*. What's at stake is a provocation by the European Commission which is attempting to "control, limit and even *de facto discourage*" social dialogue at the European level[247]. This process of social dialogue is a crucial asset to ensure the legitimacy of a crisis-ridden European Union. For what seems like an eternity, a dominant theme among European lawyers on the centre-left has been that the balance between the market and the social has been out of joint[248] because of the Court's judgments in *Viking*, *Rüffert* and *Laval*[249]. The euro crisis only reinforced this perception, this time because executive law-making in order to combat the economic crisis managed to undermine

[244] Case C-409/13, *Council v Commission*, EU:C:2015:217, paragraph 76.
[245] See *supra* text accompanying notes 19-20. The reliance on particular democratic legitimation has been noted in other contexts as well: AG Kokott referred to it in relation to the standing of private applicants under the action for annulment. *See* Opinion of AG Kokott in Case C-583/11 P *Inuit*, para. 38.
[246] Case T-450/12, *Anagnostakis*, EU:T:2015:739, paragraphs 25 and 26.
[247] J.P. TRICART, 'Legislative implementation of European social partner agreements: challenges and debates', *ETUI Working Paper*, 2019.09.
[248] Among the innumerable contributions related to this theme, see for instance P. SYRPIS, 'The EU and national systems of labour law' in A. ARNULL, D. CHALMERS (eds.), *The Oxford Handbook of European Union Law,* Oxford, Oxford University Press, 2015, 943; S. GARBEN, 'The Constitutional (Im)balance between 'the Market' and 'the Social', 13 *European Constitutional Law Review.*
[249] For some examples out of a rich array of critical literature, *see eg* C. JOERGES, F. RÖDL, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the judgments of the ECJ in *Viking* and *Laval*', 15 *European Law Journal* 1 (2009); S. SCIARRA, 'Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU', 10 *Cambridge Yearbook of European Legal Studies* 563 (2007).

much of the social law in the Member States[250]. In such circumstances, the EU can ill afford to sound the *de facto* death knell for the process of social bargaining by undermining the process through which their outcome becomes legally binding.

[250] *See generally* P. TSOUKALA, 'Euro Zone Crisis Management and the New Social Europe' 20 *Colum. J. Eur. L*. 31, p. 66 (2013); M. DAWSON, F. DE WITTE, 'Constitutional Balance in the EU after the Euro-Crisis' 76 *The Modern Law Review* 817 (2013).