

Tricart, Jean-Paul

**Working Paper**

## Legislative implementation of European social partner agreements: Challenges and debates

Working Paper, No. 2019.09

**Provided in Cooperation with:**

European Trade Union Institute (ETUI), Brussels

*Suggested Citation:* Tricart, Jean-Paul (2019) : Legislative implementation of European social partner agreements: Challenges and debates, Working Paper, No. 2019.09, European Trade Union Institute (ETUI), Brussels

This Version is available at:

<https://hdl.handle.net/10419/299673>

**Standard-Nutzungsbedingungen:**

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

**Terms of use:**

*Documents in EconStor may be saved and copied for your personal and scholarly purposes.*

*You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.*

*If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.*

---

# Legislative implementation of European social partner agreements: challenges and debates

---

Jean-Paul Tricart

---

**Working Paper 2019.09**



# **Legislative implementation of European social partner agreements: challenges and debates**

Jean-Paul Tricart

**Working Paper 2019.09**  
european trade union institute

**Jean-Paul Tricart** has been an Associate Researcher at the European Trade Union Institute since August 2018. From 1988 to 2017, he worked in the Directorate-General for Employment and Social Affairs of the European Commission, where he was, among other things, head of unit responsible for European social dialogue (2008-2014). From 1973 to 1988, he worked in France as a social science researcher at a university laboratory (1973-1979) and later at the Centre National de la Recherche Scientifique (National Centre for Scientific Research, CNRS) (1980-1988).

This paper forms part of ongoing research work on the changes in European social policy during the years 1985-2020. This text exclusively represents the views of its author, who has exercised here the right of freedom of expression granted to him under the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European institutions. In line with the provisions of these Regulations, the draft of this text was submitted to the European Commission to get its authorisation prior to publication, and the Commission has expressed a number of remarks on its contents and the timing of the publication. While the final version of the text takes into consideration these remarks, it is clear that it therefore implies no commitment on the part of the institutions within which he has worked, in particular the European Commission.

ETUI publications are published to elicit comment and to encourage debate. The views expressed are those of the author(s) alone and do not necessarily represent the views of the ETUI nor those of the members of its general assembly.

Brussels, 2019  
© Publisher: ETUI aisbl, Brussels  
All rights reserved  
Print: ETUI Printshop, Brussels

D/2019/10.574/23  
ISSN: 1994-4446 (print version)  
ISSN: 1994-4454 (electronic version)



The ETUI is financially supported by the European Union. The European Union is not responsible for any use made of the information contained in this publication.

# Contents

<b>Introduction .....</b>	<b>5</b>
<b>1. Consultation and negotiation with the European social partners: the origins of the treaty provisions.....</b>	<b>15</b>
1.1 Background .....	15
1.2 The IGC and the Agreement of 31 October 1991 .....	15
<b>2. Arrangements for implementing the provisions relating to consultation and negotiation.....</b>	<b>18</b>
2.1 Proposals by the European social partners .....	18
2.2 The 1993 Communication.....	19
2.3 The 1998 Communication.....	20
2.4 A very broad consensus on the spirit of the provisions of the Treaty.....	22
2.5 The draft Constitutional Treaty and the Treaty of Lisbon.....	24
2.6 The primacy of collective bargaining at European level .....	25
<b>3. The first disputes over the reinterpretation of Article 155.....</b>	<b>29</b>
3.1 2012, a pivotal year.....	29
3.2 Questions about the arrangements by which the Commission may decide not to deal with a request to implement an agreement .....	30
3.3 The introduction of impact assessments into the consideration of requests to implement European social partner agreements.....	32
3.4 2015: The Juncker Commission and the 'Better Regulation' package .....	37
3.5 Words and deeds.....	42
<b>Conclusion .....</b>	<b>46</b>
A substantive reinterpretation .....	46
A divisive reinterpretation .....	47
<b>Notes .....</b>	<b>50</b>
<b>References .....</b>	<b>68</b>



## Introduction

‘Ignorance of the past not only confuses contemporary science, but confounds contemporary action’

Marc Bloch, *Apologie pour l'Histoire ou Métier d'Historien* [*The Historian's Craft*], 1949

This paper examines one of the most novel and yet, currently, one of the most controversial aspects of the European treaty articles on European social dialogue. It analyses the development of the interpretation that the Commission has given to the treaty provision under which the application of an agreement reached between European social partners can, at their request, be made binding *erga omnes* under European legislation. This provision is the part of Article 155(2) of the Treaty on the Functioning of the European Union (TFEU) under which ‘agreements concluded at Union level [by management and labour] shall be implemented [...], in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.’ (1)

This is what industrial relations analysts call a *mechanism for the extension of collective agreements*. This mechanism exists in various forms in most Member States of the European Union, and it is broadly acknowledged to be a significant factor contributing to the effectiveness of collective bargaining (2). The innovative aspect here is that this mechanism was instituted at European level, and thus it has significantly helped towards establishing a European contractual relations area, which is precisely what European social dialogue is about. By allowing the application of agreements entered into by the social partners at European level to be extended to all the employers and all the workers concerned in the European Union, this treaty provision helped towards the formation of organisations of employers and trade unions at European level, encouraged awareness of European integration in collective bargaining and fostered the development of a culture of social dialogue at European level.

The mechanisms of consultation and negotiation that allow the European social partners to contribute directly to the development of the EU’s social policy are described in Articles 154 and 155 TFEU. Article 154 requires the European social partners to be consulted in advance when the Commission is considering, and then preparing, an initiative in the social policy area, while Article 155 gives the social partners the opportunity to negotiate collective agreements at European level, in connection with this consultation or on their own initiative, and establishes the arrangements for implementing these agreements, including implementation by means of legislation that renders their application binding *erga omnes*. But these articles do not date from the TFEU: they reproduce almost in their entirety (and strengthen) Articles 138 and 139 of the Treaty on European Union (Amsterdam, 1997), which incorporated into the European Treaties Articles 3 and 4 of the Agreement on Social Policy annexed to the Maastricht Treaty (1992), an agreement from which the United Kingdom was granted an opt-out at the time.

These treaty provisions therefore already go back a long way. In fact, they are emblematic of both the emergence and recognition of European social dialogue in connection with the relaunch of European integration driven by the Delors Commissions (1985-1995). First and foremost, they are emblematic because of their content, which, in the Treaties, enshrines the role that the European social partners can play, as autonomous stakeholders and through collective bargaining at the European level, in the development and preparation of European legislation and social policy. But they are also emblematic because of their origin, since these articles are reproduced *verbatim* from the contribution that the European social partners submitted in 1991 to the Intergovernmental Conference (IGC) on Political Union that was charged with preparing the Maastricht Treaty, and because the European social partners can



therefore legitimately claim credit for this – at least in part, as their contribution was prepared with the very active assistance of the Commission staff (3).

Moreover, the European social partners were not only the authors or co-authors of the text of these treaty provisions: from the outset, the Commission also involved them in developing the arrangements for implementing these provisions, so that they could be used as soon as possible, thus to demonstrate the capacity of European collective bargaining to contribute to the regulation of working conditions in Europe. For that was the object of introducing these provisions into the Treaties in 1992, and that object was both clear and shared by all the parties involved (Commission, Council, Member States and social partners): it was about *establishing a contractual relations area at European level* and giving collective bargaining at this level the capacity effectively to regulate working conditions, in order to help develop the social dimension of European integration.

Since the Maastricht Treaty came into effect, these provisions have made it possible to give *erga omnes* binding effect to *some dozen European social partner agreements*, both cross-industry and sectoral, on subjects such as parental leave (1996, 2009), part-time work (1997) and fixed-term work (1999), working time of mobile workers in certain transport sectors (railways (2004), civil aviation (2000), inland waterways (2012)), specific injury risks to which workers in the hospital sector are exposed (2009), working conditions in the fisheries (2013) and maritime transport sectors (1998, 2008, 2016). During that period, there were, of course, consultations with the Commission on matters of social policy which did not fall within the specific responsibilities of the social partners, or on which the social partners (employers as well as unions) did not wish to enter into negotiation; or on which they had not been able to agree on starting negotiations even where one of the parties wished to, or again on which they had not reached an agreement following their negotiations; and also sometimes where they had reached an agreement opting for implementation on an *inter partes* basis; in most cases, consultations resulted in one or other of these possibilities, which highlights how European social dialogue is developing amid disagreement more often than agreement between employers' organisations and trade unions. But there were also the 12 aforementioned agreements (four cross-industry and eight sectoral agreements) for which the signatory social partners called for *erga omnes* implementation, as permitted by the Treaty, and for which the Commission presented legislative proposals to the Council, which the Council approved – all, incidentally, within very short periods (less than six months after the Commission proposal in most cases). This is all the more remarkable an achievement given that earlier legislative proposals had been made on several of these issues and had remained pending with the Council for several years, or the issues had been excluded from the scope of earlier legislative proposals on grounds of their complexity (4).

For this reason, the Commission long presented these provisions as being one of the distinctive traits of European integration, both one of the most exemplary achievements of Social Europe and one of the most meaningful instruments of European social dialogue: in short, a model of good governance and a symbol of the capacity of the European social partners to contribute to the management of economic and social changes within the EU. It mentioned and repeated this on numerous occasions, particularly in Communications and other documents specifically devoted to European social dialogue and the treaty provisions in this area (1993, 1996, 1998, 2002, 2004, 2010) (5). Aware that the number of agreements remained limited – on average, one agreement every 18 months to two years, including both cross-industry and sectoral social dialogue – it regularly called upon the European social partners, both cross-industry and sectoral, to make greater use of the opportunities for negotiation afforded to them by the Treaties. And in its legislative practice in the 1990s and 2000s, it gave priority to collective bargaining whenever the European social partners were ready to engage in it, and it demonstrated maximum flexibility about incorporating the agreements resulting from this collective bargaining in European legislation, when the social partners so requested. The Member States and the Council also recognised the added value of the treaty provisions on social dialogue, and the distinctive nature of this arrangement for regulating working conditions within the EU: firstly through the prompt approval of all proposals for legislative implementation of the agreements that were presented to them, and then through the strengthening of these provisions in the context of preparing the draft Constitutional Treaty, then in the Treaty of Lisbon (2007), not least by further broadening the negotiation arrangements that had existed up to that time.

But, today, the situation has changed: while the Commission still consults the social partners ahead of its initiatives in the social policy area, and even, with the Juncker Commission, beyond the strict confines of that area (in particular in the context of the implementation of the 'European Semester', which nowadays is the main instrument for monitoring economic and social reforms in progress in Member States), it now endeavours to control, limit and even *de facto discourage* their direct contribution, by means of the *erga omnes* implementation of their agreements under Art. 155 TFEU, to the development of European social legislation. In the course of the past few years, it has revisited the arrangements for involving the European social partners in the legislative process and has established new procedures for reviewing requests for legislative implementation of agreements entered into between the European social partners. These procedures are both lengthy and suspicion-laden and have even led, in practice, to the processing of some of these agreements being stalled. And, in March 2018, the Commission formally refused to propose to the Council the legislative implementation of a sectoral agreement – the agreement on rights of information and consultation for workers in the central government administrations sector, concluded in December 2015. This was an unprecedented refusal, given that the agreement had been reached following negotiations that had been entered into as part of a consultation procedure under Article 154 TFEU. This decision sparked around five years of sporadic disputes, tensions and latent conflicts resulting from the Commission's attitude to these European social partner agreements. And these disputes were so significant that the European Public Service Union (EPSU), the main trade union organisation that was a signatory to the agreement in the central government administrations sector, brought an action before the Court of Justice of the European Union, which is also unprecedented for a trade union organisation in this context of European social dialogue (6).

What happened? How and why did the Commission change its attitude to European collective bargaining, to the point of being perceived by the concerned social partners as having completely reinterpreted the implications of the treaty provisions on the European social dialogue, and all within just a few years, and only 5 years after the provisions had been strengthened by the Treaty of Lisbon? The first signs of change emerged during the Barroso 2 Commission (2009-2014), and more precisely in the course of 2012. During the spring of 2012, three agreements were concluded as part of European sectoral social dialogue, which the signatories wanted to be implemented by legislative means: an agreement on working time in the inland waterways sector, an agreement on working conditions in the sea- fisheries sector and an agreement on occupational health and safety in the hairdressing sector. This was a clear indicator of the vitality of European sectoral social dialogue, and it was therefore welcomed by the Commission staff responsible for promoting European social dialogue. But, by contrast, in other areas of the Commission, those leading the debates on the so-called simplification of legislation at the EU level, saw this as a potentially problematic development, because this vitality of sectoral social dialogue meant that the Commission had to consider presenting social legislation proposals that do not result from its initiative and are outside its control.

A few days before its signature, in April 2012, the agreement on occupational health and safety in the hairdressing sector was aggressively vilified in a campaign by the media and political circles in the United Kingdom. When this campaign further developed and intensified, these Commission departments inferred primarily that the treaty provisions on the legislative implementation of social partner agreements could damage the Commission and its image, particularly in the Member States that were most hostile to European social legislation, and that, therefore, it needed to demonstrate clearly that it felt in no way constrained to accede to requests for legislative implementation submitted to it by the signatories to these agreements, even if there were no precedent for refusing such requests. The way that this vilification campaign resonated within the Commission, and for President Barroso himself, had an impact well beyond the agreement in the hairdressing sector: it led the Commission to review the procedures for considering requests for legislative implementation of European social partner agreements as a whole, and to reconsider the very conditions for legislative implementation of these agreements. This led to lengthy paralysis in the departments concerned in the examination of the actual content of the hairdressing sector agreement, which was very different from the lampoons that had been presented in the British campaign (7). And, within the Commission, this gave rise to a general *mistrust* of agreements concluded between the European social partners, in particular in the context of sectoral social dialogue, and, even beyond these agreements, mistrust of the role of the social partners in developing European social legislation.

If this *mistrust* arose in this way, it is because, subject to certain conditions, the treaty provisions allow the European social partners to produce European *legislation*. And, in the early 2010s, for various reasons that it would take too long to explain here (8), the political climate of the European Union as a whole was increasingly averse to the use of legislation for European actions in general, and in social policy in particular — and doubtless also less favourable to European social dialogue (9). And the political and ideological context within the Barroso 2 Commission and the upper echelons of the European administration of the time, both of which were attached to the paradigms of neoliberal thought, was still less favourable to social legislation and European social dialogue, both being linked with the legacy of the Delors Commissions, which it was fashionable to decry as archaic and obsolete in the name of the necessary modernisation of European action. Sensitive to pressure from the Member States that were the most critical of European legislation, and also concerned to meet the demands of businesses and economic circles as far as possible, the Barroso 2 Commission, which upheld these paradigms, was involved at the time in a major exercise of reassessing the value of legislative instruments for the EU's actions and reducing and simplifying existing European legislation — not least social legislation, regarded by its detractors as an excessive burden hampering the competitiveness of the European economy. While it would be unfair to say that the Commission at the time was resolutely operating in favour of *deregulation* in social matters, it cannot be disputed that it was openly expressing its reservations about further developing European social policy, and had reduced to a minimum its ambitions in terms of new legislation in this area, as witnessed by the striking contrast between the EU's sustained activity in the 10-year periods 1985-1994 and 1995-2004, on the one hand, and its reduced activity in the 10-year period 2005-2014, on the other (10). And the direct consequence of this scaling back of the Commission's ambitions was that, during the latter 10-year period, social partner agreements became the main source of the rare new legislative proposals in social matters. Following the conclusion of the three sectoral agreements of 2012, the Commission began to fear that the vitality of European social dialogue, in particular sectoral social dialogue, was going to frustrate the approach it had adopted and force it to present social legislation proposals to the Council: it did not want to be active in this area, and did not even want to leave to the Council the decision as to whether or not to implement these agreements by legislative means, particularly as it did not wish to have to consider legislative proposals which, by nature, were outside its control, such as those arising from negotiations between the social partners, whose 'autonomy' is recognised by Article 152 TFEU. And the agreement reached in the hairdressing sector was a good illustration of the mismatch between the Commission's major concerns and those of the social partners in this sector: for a Commission seeking to delay any new legislative initiative on occupational health and safety, because it first wanted to assess the existing body of European law in this area and, in particular, the regulatory burden that it represented for businesses, the request for legislative implementation of an agreement on health and safety in the hairdressing sector was clearly not welcome.

Hence the growing reservations, suspicion and even outright hostility expressed about social partner agreements within the Commission and some of its departments in particular, especially about those sectoral agreements that many discovered, at the time of the signature of the three 2012 agreements, were already enshrined in provisions of the original treaties. This was not only reflected in the inclination from then onwards to subject any request for legislative implementation of an agreement to an *impact assessment*, as was the case at the time for ordinary legislative proposals from the Commission, but also in the desire to find ways of making a categorical refusal to contemplate legislative implementation on the part of the Commission legally and politically acceptable, even though there was no precedent for this. Along these lines, the Commission embarked upon a restrictive reinterpretation of treaty provisions on social dialogue and a redefinition of the arrangements for considering these agreements.

But hence also the tensions in this matter between the Commission and the European social partners, and in particular the trade unions and sectoral organisations, since this reinterpretation affected texts and processes that lay at the heart of European social dialogue, challenged the very legitimacy of collective bargaining at European level and introduced general uncertainty about all negotiations in progress or to come in connection with European social dialogue. These tensions arose under the Barroso 2 Commission but have persisted under the Juncker Commission though, as soon as it came into office, it announced its desire to 'give a

new start to European social dialogue’ – an announcement that was favourably received by the social partners (11).

This process evolved in several different forms and through various stages. Under the Barroso 2 Commission, the focus was on the obligation to subject social partner agreements to a form of *impact assessment*, with the underlying idea that this assessment could provide the Commission with substantive arguments on which to base a decision about the legislative implementation of an agreement: as the case may be, to recognise its relevance, which was to be the situation for two sectoral agreements, those reached in the inland waterways and sea fisheries sectors, but also (and there can be little doubt that this quickly became a major objective of the exercise) to make *rejection* – this is the somewhat unusual term that was to become de rigueur in the Commission’s official discourse, which is clearly not without significance – easier to justify, and first the rejection of the agreement concluded in the hairdressing sector, an agreement which the Barroso 2 Commission, moreover, formally resolved not to follow up with legislation ‘during the present mandate’, using a particularly ambiguous form of words and without explaining the grounds for this to the signatories to the agreement, as it was supposed to do (12). And yet, for this agreement in the hairdressing sector, the impact assessment was not actually completed: even before finishing its assessment, the Commission preferred to resolve not to follow through with it.

Here it is worth highlighting the word *rejection*, which turned into a key word in the documents in which the Commission made reference to European social partner agreements, for the specific purpose of signifying that it now considered that it had full discretion to ‘accept or reject’ an agreement and its legislative implementation. This is an extremely uncommon word in the strictly controlled discourse of the Commission, which tends to use neutral and, most often, euphemistic turns of phrase, and, if necessary, circumlocutions to that effect, and, moreover, it is a word that was completely unprecedented up to that time in any Commission document on European social dialogue and social partner agreements: it is not to be found at any point in any of the aforementioned texts, the Communications of 1993, 1996, 1998, 2002 or 2004, or the 2010 Staff Working Document. It is a strong word, far stronger than ‘refusal’, for instance, because it has connotations deriving from aggressive, derogatory and emotive registers. Its sudden appearance in the Commission’s discourse, followed by its recurrent use in that discourse, constitute a symptom of the emotionally charged hostility that then developed within the existing administration under the Barroso 2 Commission, and in the broader context of the freezing of any new Commission ambition in social legislation, around European social partner agreements and in particular sectoral agreements (13).

In reinterpreting the provisions on European social partner agreements, the Juncker Commission has continued where the Barroso 2 Commission left off. Some consider that it has even gone further. It has done so since the spring of 2015; that is to say, since the first few months of its term of office, when the internal procedures for preparing the Commission’s legislative initiatives were being redefined. This is what was known as the ‘Better Regulation Package’: a set of documents outlining the principles that were to govern European legislation from then onwards, which made the Commission’s future action a direct extension of the continuous efforts of the Barroso 2 Commission and its administration to impose and disseminate neoliberal paradigms in its departments’ operations. On that occasion, it expressed its desire to exercise as much control as possible over the involvement of the social partners in the legislative process, and resolved to subject requests for *erga omnes* implementation of social partner agreements to its new internal procedures: even if the forms of words used in the official documents on this matter are sometimes ambiguous, they tend to blur the distinctive nature of social dialogue and the provisions of Article 155(2) TFEU in such a way as to make the legislative implementation of an agreement merely a variant of the arrangements for the ordinary legislative process, and accordingly to legitimate the Commission’s discretionary power to approve that legislative implementation or otherwise (*reject*, to use the terminology that was then becoming official).

The measures introduced by the Better Regulation Package thus illustrate the shift in perspective that the Commission has undergone in the course of a few years. Since then, and contrary to what all past Communications have reiterated, the Commission no longer presents the legislative capacity of European collective bargaining as an aspect of good governance, the most appropriate means of regulating the organisation of work and an asset to European

integration – at least, it has completely stopped saying this: it no longer uses any of these turns of phrase from the past and, moreover, no longer conveys any positive message in this respect, and no longer encourages the social partners to directly contribute to the preparation of European social legislation by means of collective bargaining, as it sees in the related treaty provisions the possibility of an *intrusion* by European social partners in the European legislative process. That is an intrusion of stakeholders that are outside the Commission's control and who fall outside the Better Regulation guidelines, hence an intrusion that is a risk and that could be a *threat* to the Commission, which therefore needs to protect itself against this by duly exercising control over all involvement of the social partners in the legislative process. In so doing, the Commission has shown that it has no intention of leaving to the Council alone the decision as to whether or not to implement an agreement through European legislation: Better Regulation insists that the Commission should take action *ahead* of the Council decision, at the proposal stage, through a procedure that, in respect of these agreements, confers on the Commission the power of discretion that it has when preparing an ordinary legislative initiative. And, indeed, a detailed analysis of Better Regulation reveals that, in practice, in what appears to be a rationale of *discouragement* of EU level collective bargaining leading to the legislative implementation of an agreement, this reinterpretation of the arrangements for implementing Articles 154 and 155 TFEU nullifies the broadened scope for negotiation that the wording of Article 154 TFEU in the Treaty of Lisbon introduced in 2007.

In its efforts to relaunch European social dialogue, the Juncker Commission has placed emphasis on consultation of the social partners at both European and national level, but has avoided encouraging EU collective bargaining to conclude agreements to be implemented through social legislation at European level, and clearly has not discussed its reinterpretation of the related treaty provisions with the European social partners: on the contrary, it has asked the European social partners to follow the Better Regulation guidelines, even though it is clear that these guidelines institutionalise the mistrust that the Commission feels towards them. And, like the Barroso 2 Commission before it, it has considered that it can claim to be promoting European social dialogue while selecting those of its products that it wants to promote and those that it is going to discourage or oppose.

The very future of collective bargaining at European level is now under threat because of the change in the Commission's attitude towards the legislative implementation of EU social partner agreements. For the social partners, the *erga omnes* extension of their agreements is now subject to an unpredictable review procedure and, above all, a procedure fraught with suspicion: the Commission is wary of this extension of the application of social partner agreements and therefore intends to use the greatest possible discretion in assessing the content of these agreements and whether or not their possible legislative implementation is expedient. For that very reason, this review procedure is far longer than it used to be, and its implementation has, moreover, hardly been transparent, sometimes to the point of seeming arbitrary, inconsistent or totally anomic, as in practice the Commission has assumed the discretion not to comply with the arrangements for review that it had itself established, and even blatantly to contravene them.

Practically speaking, over the past few years, this has led to a substantial lengthening of the time taken for the Commission to process social partner agreements (of the order of two to three years instead of the former two to nine months), and to certain agreements being stalled for periods well in excess of these periods (first the stalling of the agreement in the hairdressing sector, concluded in 2012 and reviewed by the signatories in 2016, but still pending even if discussions were relaunched on it in 2018, and the processing – or neglect – of which in the Commission's departments is still shrouded in secrecy; and then the stalling of the agreement in the central government administrations sector, concluded in late 2015 and in practice being largely neglected for 18 months before being formally 'rejected' in early 2018: for these two agreements that met with its hostility, the Commission did not implement the expected review arrangements that it had recently established, and which it claimed would guarantee the transparency, consistency and objectivity of its decision). And, for many months (or even years), this stalling has gone hand in hand with a virtual communication breakdown between the Commission and the signatory organisations about these agreements, with the Commission and its departments refusing to inform these organisations about the *actual* state of play with regard to the examination (or non-examination) of these issues. It is hardly surprising if this has prompted repeated protests from the social partners involved about the Commission's lack of

communication and transparency in its relationship with the signatories to the agreements, the breakdown in the general consensus that had existed for more than 15 years on the implementation of these treaty provisions and the Commission's failures to follow the procedures that were supposed to govern the review of agreements and thereby its obligation to promote European social dialogue.

In January 2018, the Commission expressly asked the signatories to the two agreements in the hairdressing and central government administrations sectors to *withdraw their requests* for legislative implementation of these agreements, and to opt for implementation *inter partes* combined with financial support from the European budget (14). This kind of initiative suggests that the Commission took issue not so much with the content of these agreements, but with the fact that the social partners were calling for their *erga omnes* implementation, for which, however, the Treaty expressly gave them the option. But this was clearly an entirely unexpected and unprecedented initiative in European social dialogue, the settled interpretation in this matter (not only of the social partners but also of the Commission itself) being that the choice as to whether to implement an agreement on an *erga omnes* or *inter partes* basis came down entirely to the autonomy of the social partners, which is guaranteed by Article 152 TFEU, and cannot give rise to this kind of interference from the Commission. It is possible, and even likely, that this initiative of the Commission was an attempt to find a way to overcome the persisting stalemate of these social partners agreements, despite the positive impact of the efforts to give a new start to European social dialogue. But the attempt failed, at least for one agreement: while the social partners of the hairdressing sector agreed to explore with the Commission what might be an action plan to ensure the implementation of their agreement, the signatories of the agreement in the central government administrations sector refused to withdraw their request for *erga omnes* implementation of this agreement, and following this response, the Commission took the formal decision to refuse to accede to this request, which led to the action being brought before the Court of Justice as mentioned above.

Tensions have therefore been heightened, and there has been a serious deterioration in the relationship between the Commission and the signatories to the agreements. This is in proportion to the Commission's reinterpretation of the treaty provisions, which is substantive and raises serious legal and political questions. Admittedly, the Commission is certainly not merely a 'letterbox' through which requests for legislative implementation of European social partner agreements simply pass. But, even so, does it have a discretionary power as to the interpretation, reinterpretation and implementation of the treaty provisions on European social dialogue? Given that the Commission is obliged to promote European social dialogue, can it deliberately restrict or discourage in practice the use by the social partners of certain treaty provisions on European social dialogue? What is the promotion of European social dialogue and respect for the autonomy of the social partners if the Commission can select at will, and without explanation, the outcomes of social dialogue that it wishes to promote, and, without any qualms, neglect, reject or lampoon those that it does not like? Can the Commission expressly ask the social partners to consider negotiating under Articles 154 and 155 TFEU in connection with a formal consultation procedure and then refuse to implement their agreement because of its current distaste for legislation in this area? Can the Commission neglect for months, or even years, a request for *erga omnes* implementation of an agreement without examining it in accordance with the procedures that it established and announced, without even having to explain why? Can the Commission claim to be promoting European social dialogue when it deliberately ceases to communicate about actual progress on reviewing agreements with the signatories to those agreements? Can it, as it did (and contrary to what it had stated that it could not do), ask the social partners to forgo *erga omnes* implementation of an agreement and to opt, on the contrary, for implementation *inter partes*, if that *erga omnes* implementation is what they had negotiated and approved in the agreement, as they are permitted to do by the Treaty? And supposing that such a request were possible, can the Commission include in it what looks like a form of financial incentive, drawing on the European budget? These are the many questions raised by the reinterpretation of the provisions on the agreements and the specific developments observed in the past few years in the relationship between the Commission and the signatories to these agreements. These questions are all the more sensitive today in that the Juncker Commission has committed itself to relaunching European social dialogue and European social policy, and has taken a series of specific initiatives along these lines, which the European social partners have welcomed and actively supported, especially on the trade union side. And its record in that respect is remarkable and

incontestably better than that of the Commission that preceded it. But that record is inevitably tarnished by the persistence of tensions over the implementation of agreements throughout its mandate, the message of mistrust conveyed by the section of the Better Regulation Package devoted to the social partners and the very fact that proceedings have been brought before the Court of Justice of the European Union by a trade union organisation.

These developments underline the breadth of the differences that now lie between the Commission and the social partners (primarily the trade unions) on the interpretation of these treaty provisions. Admittedly, these differences concern, first and foremost, organisations involved in sectoral social dialogue, and indeed only some of them, in particular the sectoral trade union organisations. Cross-industry organisations have not made this into a *casus belli* that would override the efforts made by the Juncker Commission to relaunch social dialogue, or call into question their support for its initiative to proclaim a European Pillar of Social Rights, an initiative on which they are basing the hope of a relaunch of 'Social Europe' (15). Many observers and academics think that cross-industry social dialogue has now been seriously weakened, and it no longer has any *legislative* momentum: the last cross-industry agreement implemented by legislative means was the 2009 agreement on parental leave, which was an agreement revising and updating a directive implementing a previous agreement (1994) on the same subject (16). And, with the exception of the sectoral employers' organisations directly affected by the agreements being reviewed, employers' organisations have failed to react at all as regards the interpretation of the treaty provisions by the Commission: the involvement of employers in European collective bargaining depends primarily on the Commission's political will for the development of the European Union's social legislation, and the very low level of the Commission's ambitions in this field over several years clearly does not encourage employers to engage in the negotiation of agreements to be implemented by legislative means. But there exists a sense of unease that extends beyond the organisations involved in sectoral social dialogue, because the challenges of these differences over Article 155 TFEU affect European social dialogue as a whole.

Firstly, because the treaty provisions that lie at the centre of the disputes make no distinction between cross-industry and sectoral social dialogue: since their first appearance in the Treaties, they have applied equally to cross-industry organisations and to sectoral organisations, and the reinterpretation of these provisions by the Commission through the Better Regulation Package has drawn no further distinction on this matter: although this reinterpretation was doubtless first conceived to rein in the legislative momentum of sectoral social dialogue, it institutionalises suspicion of the social partners in general, and discourages collective bargaining at European level as a whole.

Secondly, because the reinterpretation of the treaty provisions and their modalities of implementation affects key aspects of the interaction between the stakeholders concerned, and indeed their identity within European social dialogue. From the Agreement on Social Policy annexed to the Maastricht Treaty in 1992 to the Treaty of Lisbon in 2007, the articles of the Treaties expressed the *trust* of the European institutions, and particularly the Commission, in the legitimacy, responsibility and capacity of the social partners to contribute to European integration, combining justice and effectiveness in modernising the labour market and working conditions, and more broadly to help forge the social dimension of the European Union. And this message of trust on the part of the Commission was echoed in a message of trust on the part of the social partners as regards the process of European integration in general, and as regards the Commission in particular, precisely because the Commission was making sure that this European integration could combine an economic dimension with a social dimension. Clearly, this was not blind trust, either on the part of the Commission or on the part of the social partners: each of the parties concerned was aware of possible diverging interests and visions between employers' organisations, trade union organisations and European institutions. But there was a shared trust on the part of all stakeholders in the capacity of European social dialogue to help find balanced, realistic solutions to the problems common to all of them, and to find these solutions within the framework of European integration.

But the Commission's reinterpretation of the treaty provisions over the past few years conveys quite the opposite message. First, the Commission undertook it unilaterally, which, since these are provisions directly arising from a historic European social partner agreement, underlines how far the Commission and its upper administration have shifted away from the

forementioned European social partners, to the point that they no longer see it as necessary to involve them in this reinterpretation, as if the remarkable origin of these treaty provisions was of no importance and could (or perhaps should) be ignored, or even denied: that shift, which is primarily ideological in nature, but which also reflects the loss of the institution's historical memory, or indeed the denial of its relevance, has played a major role in this reinterpretation, which does not appear to have been steered through in reference to the obligation to promote EU social dialogue. This reinterpretation, moreover, formalises in the administrative practices and procedures for European agreements what appears now to be a *mistrust* on the part of the Commission towards the social partners, which are implicitly suspected or even explicitly accused (particularly when it comes to the sectoral social partners) of what the Commission regards as misusing the treaty provisions on social dialogue – perhaps not suspected or accused of entering into ill-judged agreements, but certainly of rashly requesting their legislative implementation.

Above all, the social partners are suspected or accused of failing to understand, or failing to accept, that the time for using legislative instruments at European level has passed, even, or particularly, in the social field, and that the European Union now has to be left to deal with the '*big things*', without being burdened by the '*small things*', which, for the Commission, are therefore the things tackled in these agreements – in this case, the health and safety of workers in the hairdressing sector or the information and consultation rights of employees in central government administrations. Beyond the passions and verbal excesses that poisoned the atmosphere of the discussions about the agreement on the hairdressing sector (where the repeated misuse of lampooning was seen as an expression of the Commission's contempt and arrogance towards workers in this industry) this 'argument' about the big and small things was a severe knock to the social partners concerned, especially the trade unions: it clearly sowed a doubt about the reality of the Commission's commitment to social dialogue and, further, to the effective promotion of social rights within the European Union. This doubt applies to the Members of the Commission, but also to those of its departments that were particularly industrious in reinterpreting the social provisions that had arisen from past Commissions.

Contrary to the Barroso Commissions in this respect, the Juncker Commission has unquestionably indicated its wish to promote European social dialogue and the social dimension of European integration and has been able to reestablish cooperative relations with European social partners' organisations, and in particular with the European Trade Union Confederation. But, paradoxically, and even if the intent of the last aforementioned initiatives was to try to clean the situation of the pending agreements in hairdressing and central administrations sectors, it is also the Commission that has committed the most aggressive act against a European social partner agreement, undoubtedly because, on this particular aspect of the legislative implementation of these agreements, it has not broken with the rationale of mistrust and hostility that developed under the Barroso 2 Commission at all, but, on the contrary, has followed it. There is little doubt that, on the Commission side, this rationale of mistrust and hostility is denied: among those who deal with EU social dialogue and EU social policy within the Commission today, there is certainly the conviction that the Juncker Commission is the most 'social' Commission for several years, and there are certainly good arguments to support this conviction. But on the side of the concerned sectoral social partners, there is a lot of resentment about the Commission's view that their agreements deal with small things and that further EU social legislation is not appropriate: it is these doubts and this climate of mistrust and hostility that created the conditions for the action brought before the Court of Justice, mentioned above.

This paper collates and presents factual information to shed light on these controversies. It shed light on some of the challenges and debates raised by providing information on the historical background to the controversies on Art.155.2 TFEU which developed in the recent years.

The purpose of this paper is **not** to develop or take a position on the key arguments put forward by the parties involved in this Case T310/18, and in particular the legal arguments at stake, as the author is not a legal expert (the readers interested can find a good overview of the positions of legal experts in Dorsemont *et al.* (2018)).



To that end, it tackles the following points in turn:

- (1) the origins of these treaty provisions and their wording;
- (2) the implementation arrangements initially adopted by the Commission, which prevailed until recently, and the lessons learned from experience;
- (3) the main aspects of the reinterpretation of these implementing provisions and arrangements by the Commission and the challenges posed by this reinterpretation.

# **1. Consultation and negotiation with the European social partners: the origins of the treaty provisions**

## **1.1 Background**

European social dialogue first saw the light of day during the relaunch of European integration driven by the Delors Commissions (1985-1995). This relaunch encompassed the significant impetus given to achieving the internal market and then the preparations for Economic and Monetary Union – two processes of major and lasting transformation of the economies and societies of Member States and of the political nature of European integration, which had their supporters but also their opponents. It therefore entailed the broadest possible mustering of pro-European political, economic and social forces. The continued efforts on the part of the Delors Commissions to involve the social partners in the ongoing process of European integration was part of that mustering strategy, the aim of which was to encourage a drive for transformation which was essentially economic but which offered the prospect of a ‘social dimension’ being thereby created (17). On his appointment, President Delors had invited the unions and employers’ associations to participate actively in this drive for European integration, initiating what is known as ‘Val Duchesse social dialogue’ process, paving the way for what would, over the following years, become European social dialogue.

Progress towards this social dimension had been made at the time of the negotiation of the Single European Act (Articles 118a and 118b of the 1986 Act), the adoption of the Community Charter of the Fundamental Social Rights of Workers (1989) and the Commission’s Action Programme relating to the Implementation of the Charter (1989). However, there was broad consensus between the Commission and the Member States, with the exception of the United Kingdom, on the need to go further and to use the preparation of the Maastricht Treaty as an opportunity to give a new legal framework and new momentum to the development of European social legislation and social policy.

Experience had revealed the limitations of the Council’s rule of unanimity and of the legal bases afforded to European social policy by the Treaty, leading to a need for the further development of Articles 118a and 118b from their origins in the Single European Act. A key question here was the role that the social partners could play in the development and implementation of that social policy. Article 118b of the Single European Act provided that ‘*The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.*’ But the Treaty did not specify what those relations based on agreement could produce, in other words, *agreements*; in practice, dialogue between the European social partners led them only to formulate ‘*joint opinions*’, the impact of which was very limited. For many stakeholders at the time – President Delors but also ministers from several Member States and the social partners – a crucial question was the status that collective agreements negotiated at European level could potentially have in the context of the completion of the internal market.

## **1.2 The IGC and the Agreement of 31 October 1991**

On the basis of the documents discussed at the IGC, expert writings and the testimonies of the stakeholders involved in those discussions (18), the process leading to the wording which was finally adopted in the Maastricht Treaty can be summarised as follows.

The deliberations on the provisions concerning social dialogue took place in two forums: first, within the IGC proper, which discussed proposals made by certain delegations during the first

part of 1991 and, secondly, within an *ad hoc* group consisting of the social partners assisted by the Commission services (DG V at that time, responsible for employment and social affairs). It was this *ad hoc* group which finally determined the wording which would be approved by the IGC and which would form the provisions of the Treaty relating to European social dialogue, which are, in the main, still in force.

During this deliberation process, discussions did not touch on the relevance of *consulting* the social partners ahead of Community initiatives, as there was broad consensus on that matter between the Member States, and the social partners had already begun to produce joint opinions on various topics relating to social policy. Instead, discussions essentially focused on a potential area for *collective bargaining at European level* and therefore, more specifically, on the prospect of negotiations that might lead to the conclusion of agreements between the social partners at European level, together with the legal value that could or should be placed on such agreements, and thus on the provisions that would guarantee their application. It should be noted that, with the exception of the United Kingdom, various types of mechanism existed in all the Member States of the then Community for extending the application of agreements resulting from collective bargaining, while, in the case of Denmark, the general application of those agreements was recognised *de facto* (19).

Within the IGC, the contribution from Belgium, in January 1991, proposed a form of occupational parliamentary system involving the establishment of a European Labour Committee that would be a joint body authorised to conduct negotiations and conclude agreements, which would then be formalised to take legal effect (Belgium has a National Labour Council, which plays a key role in collective bargaining). The contribution from the Commission, in March 1991 (20), put forward the concept of '*double subsidiarity*' to refer to the establishment of a contractual relations area at European level: where regulation was deemed necessary, that regulation would need to be developed through a legislative process or, alternatively, through a process of dialogue leading to agreement, specifically involving the parties concerned and therefore capable of producing a positive compromise between those parties. The Commission therefore invited the IGC to organise consultation of the social partners by means of an 'institution' to be defined and to come up with a mechanism that would allow the application of concluded agreements to be made compulsory.

Within the *ad hoc* group of social partners, discussions centred on the concept of the framework agreement, through which the social partners would define minimum standards, and also on an 'approval mechanism' for such agreements, or a specialised court to guarantee their effect *erga omnes*.

Discussions within the IGC gave up the idea of creating an institution or specialised court to enable the agreements to be given legal value. They preferred the idea of a mechanism for extension to Community level by means of a legislative instrument involving the Council, which was similar to what existed in many Member States at the time. However, it was agreed, at the request of the Commission, that the IGC should await the proposals of the *ad hoc* group of social partners to conclude discussions on the provisions relating to European social dialogue.

Following a complex negotiation process which remained uncertain until the very end, the social partners concluded an agreement on 31 October 1991. The text adopted several elements taken from the IGC discussions, but articulated them in terms of a 'double consultation' mechanism establishing a link between the consultation process and the negotiation process. In other words, the social partners must first be consulted by the Commission on the possible direction of an initiative, and then on the content of that initiative, and it is on the occasion of that second consultation, relating to content, that they may initiate a negotiation process if they wish. As for the mechanism enabling an agreement to be given legal value *erga omnes*, the social partners' wording referred to a 'decision' of the Council, in the generic sense of the word, without specifying the nature of the legal instrument in question, but making it clear that the Council's intervention was limited to approving, or not, the extension *erga omnes* of the application of the agreement as concluded and, therefore, without the ability to amend it. In other words, the political aspect of the Council's decision is to approve, or not, to give a binding effect *erga omnes* to an agreement, while the putting of that decision into the form of a legal instrument is merely a means of securing that approval/extension (the choice of appropriate legal instrument being left to the Commission); what the Council decides, on a proposal of the

Commission, is whether to validate the general and binding application of the agreement, and the legal form given to that decision of the Council is merely a way of obtaining that effect (21).

The social partners' wording also included the possibility of implementing agreements 'in accordance with the procedures and practices specific to management and labour and the Member States'. This method of implementation stems from the discussions which took place within the IGC concerning the implementation of directives relating to working conditions: having regard to the key role played by Danish social partners in the regulation of the labour market (with at the time a Danish model which *de facto* recognized the general applicability of social partners agreements without the need for any related legislation [22]), Denmark wished to include in the treaty a clause allowing Member States to give the social partners responsibility for implementing all or part of the social directives in accordance with national practices. The IGC agreed to include a paragraph on this aspect in its proposals on social policy (in what became Article 2 of the Agreement on Social Policy, now Article 153(3) TFEU). And when the *ad hoc* group of social partners finalised its discussions on the modalities of implementation of European social partners agreements, its Danish social partners referred to the consensus within the IGC on such a clause and requested that European social partners agreements could also be implemented by the social partners themselves, without going through European legislation and therefore 'in accordance with national procedures and practices'. The social partners' wording thus adopted this implementation method specific to the Danish model, even though they had not considered it in their deliberations as a real alternative to what, at the time, was at the heart of their concerns as European social partners, namely the conditions and mechanisms for approval of their agreements guaranteeing the application thereof *erga omnes* (23).

With regard to the legislative implementation of agreements between the social partners, the history of the development of the treaty provisions highlights the fact that, even though, in practice, the 'decision' of the Council would subsequently take the form of the approval of a directive, the process for producing that directive differs fundamentally from that defined by ordinary legislative procedures. The process does not involve the European Parliament and does not allow the Council to amend the text of the agreements; in line with the notion of double subsidiarity put forward by the Commission, it is a decision to approve the application *erga omnes* of an agreement rather than an ordinary piece of legislation.

The IGC went on to adopt the proposals of the social partners almost in their entirety (24). During the final negotiations within the Council for the approval of the Treaty, the social provisions did not receive agreement from the United Kingdom, which for several years had been engaged in a strategy of social deregulation at national level and which opposed any extension of European social policy (25). They were therefore relocated to the Agreement on Social Policy annexed to the Treaty, the provisions of which applied to the other 11 Member States.

## **2. Arrangements for implementing the provisions relating to consultation and negotiation**

Once the provisions of the Agreement of 31 October 1991 had been incorporated into the Agreement on Social Policy annexed to the Treaty of Maastricht, it was essential to determine the arrangements governing their implementation and, to this end, to interpret their entire systematic aim and scope. This was a key concern for both the social partners, which regarded themselves as co-authors of the text, and the Commission, which sought to clarify the rules before the Treaty entered into force. And both parties' concerns were further heightened by the fact that the context involved was that introduced by the Commission's Action Programme for the implementation of the Charter, which set out 18 legislative proposals, seven of which concerned working conditions (26). The Commission specifically sought to implement this legislative programme, overcoming the opposition to it expressed, in particular, by the United Kingdom (which had not signed up to the Charter, nor to the Agreement on Social Policy). The trade unions specifically sought to move forward with social legislation in order to give tangible form to the concept of Social Europe. The employers, which were particularly circumspect towards European social legislation, considered it essential, in particular, to limit its effects, for example by substituting the collective bargaining method for the legislation method where the outcome they thought they could obtain from that method appeared more favourable to them.

However, during this period which saw the development of European social dialogue, the social partners and the Commission shared common interests on many issues, their thoughts and initiatives constantly interacting. Even the manner in which European social dialogue was structured lent itself to such interaction. For instance, social dialogue summits were held at the highest political level, providing the stage for President Delors to meet national and European leaders of employer and trade union organisations; furthermore, each European organisation's team was backed up by a 'European secretariat' in Brussels so as to maintain a continuous connection between those organisations and the Commission; and, shortly after the Agreement of 31 October 1991, in early 1992, a 'Social Dialogue Committee' was established with the cross-industry organisations to facilitate such interaction, not just at the level of the individual secretariats but also at the level of the affiliated national or sector-based organisations, which convened on that basis periodically at meetings chaired by the Commission.

There was a clear convergence of interests in the initial stages, when the arrangements for implementing the provisions of the Treaty were to be defined, but this convergence was also evident in the actual implementation of those provisions and, initially, in the course of the first negotiations, relating to parental leave, which provided the opportunity for a full-scale test as to whether the arrangements adopted were appropriate, given that this was a longstanding matter, deadlocked in the Council since 1983 by a British veto.

### **2.1 Proposals by the European social partners**

The social partners presented a 'joint declaration on the future of social dialogue' at the Social Dialogue Summit of 3 July 1992. Subsequently, within their 'Social Dialogue Committee' (SDC), established in early 1992, they jointly put forward 'Proposals by the social partners for implementation of the Agreement annexed to the Protocol on social policy of the Treaty on European Union' (SDC, 29 October 1993).

Their objective was, primarily, to reinforce the principle of creating an area for contractual relations at European level, the results of which, namely the agreements, would receive the approval/extension needed to guarantee their application *erga omnes*. Hence their proposals concerning the criteria for establishing the representativeness of the social partners' organisations, clarification that the new provisions governing European social dialogue apply

for cross-industry organisations and sectoral organisations alike, and, of course, their insistence on the need for the institutions' absolute compliance with the letter of the agreements 'in the form that they have been concluded'. Moreover, among the social partners, the trade unions were concerned with preventing any opportunity for employers to use consultations and negotiations for the sole purpose of delaying or bringing to a halt the Commission's legislative action. It was therefore agreed that a short period be introduced for the consultation process and suggested that the initiation of negotiations should temporarily 'suspend' – but not challenge – the Commission's legislative action.

## 2.2 The 1993 Communication

On 14 December 1993, the Commission presented a Communication concerning the application of the Agreement on Social Policy (COM(93) 600 final). That Communication is not confined to describing the successive stages of the procedures: it begins with a reference to the principle of 'dual subsidiarity' which had been presented in the Commission's initial proposals for the IGC, and it sets out the political reasoning underpinning the new social policy measures, namely the establishment of an area for contractual relations at European level with a view to securing appropriate regulation for the social dimension of European integration. The Communication accordingly points out that the legislative process and the agreement process are separate, even though they both ultimately lead to a legislative act by the Council. It also mentions the dynamic role assigned to the Commission in promoting social dialogue in accordance with its obligation (paragraphs 11 and 12 of the Communication).

The 1993 Communication confirms that, although the Commission has the right of initiative when it comes to undertaking consultations on a possible Community action, the social partners themselves enjoy the right of initiative when it comes to deciding whether or not to enter into negotiations in the second consultation phase; if initiated, those negotiations begin an agreement process which temporarily suspends the legislative process developed by the Commission for the duration of the negotiations.

On many procedural matters, the 1993 Communication echoes the social partners' proposals mentioned above. Thus, it lays down the criteria it will apply to assess whether the organisations are representative, and it also defines the maximum time allowed for the consultation phases. It states that the provisions relating to negotiations may be relied upon in the context of social dialogue at both sectoral and cross-industry level (27). Generally speaking, it proposes flexible consultation arrangements which may be open to review in the light of experience gained.

The Communication clearly acknowledges what it refers to as the social partners' independence (which the Treaty of Lisbon recognised in Article 152 as 'their autonomy'): it accordingly states, at paragraph 31, that, '[i]n their independent negotiations, the social partners are in no way required to restrict themselves to the content of the proposal in preparation within the Commission or merely to making amendments to it [...]

Bearing in mind that the principal innovation introduced by the provisions of the Agreement on Social Policy was the possibility of making an agreement of the European social partners applicable *erga omnes*, one essential feature of the Communication was the description of the criteria to be met by an agreement if the Commission were to submit a proposal for its legislative implementation by the Council. The Communication therefore sets out those criteria and thereby determines the specific action to be taken by the Commission where the social partners conclude an agreement and request its implementation by the European legislation (paragraph 39 of the Communication). It states that this action must consist in verification that the signatory organisations are representative (which factor underpins the legitimacy of the agreement), as well as verification of the legality of the clauses of the agreement in relation to the relevant Community texts and of compliance with the obligation not to impose an excessive burden on small and medium-sized enterprises (SMEs) (an obligation mentioned in Article 2 of the Agreement on Social Policy).

Also in paragraph 39, immediately after setting out the above-mentioned assessment criteria, the Communication points out that, '[w]here it considers that it should not present a proposal

for a decision to implement an agreement to the Council, the Commission will immediately inform the signatory parties of the reasons for its decision.’ The rationale of the text is that this option of refusing the request made by the social partners can arise only as a result of applying the tests concerning representative status, legality and implications for SMEs. Echoing the notion of double subsidiarity developed at the beginning of the Communication, the entire text points to the primacy of the agreement-based approach and the need to comply with the text of the agreements concluded without making any amendments. And, once the Commission has decided – initiating the second consultation phase – that Community action in a particular matter is appropriate, it is no longer required to return to this matter if the social partners reach an agreement. The fact that the text expressly mentions the obligation for the Commission to inform the social partners *immediately* of the *reasons* for its decision not to present their proposal indicates that the Commission has no discretionary power in this regard, precisely because it is also bound to promote social dialogue and is committed to promoting the double subsidiarity approach: it may decide not to propose the implementation of the agreement, but it can only do this on the basis of the criteria defined exhaustively in the Communication, and it must explain the reasons for that decision to the signatory parties. By giving the signatories the reasons for the decision, the Commission also provides them with the opportunity to reconsider and to amend, as appropriate, the content of their agreement, if its legality is contested, or to broaden the negotiations to include other organisations (or to obtain broader support for their agreement), if there is insufficient representativeness; moreover, if the social partners respond accordingly to the reasons communicated to them, they may submit a revised agreement for further consideration by the Commission.

## 2.3 The 1998 Communication

This interpretation is borne out by the Commission’s Communication of 1998 focusing on social dialogue (COM(1998) 322 final of 20 May 1998), in conjunction with the entry into force of the Treaty of Amsterdam which, specifically, incorporates into the treaty text the provisions of the Agreement on Social Policy, which had in the meantime been accepted by the United Kingdom.

This Communication had been preceded by a consultative Communication in 1996 in which the Commission invited the Member States and the social partners to give their views on the development of social dialogue at Community level (COM (96) 448 final of 18 September 1996). By that date, the provisions of the Agreement on Social Policy had already facilitated the conclusion of an agreement, namely, on parental leave (6 November 1995), and approval by the Council of its implementation by means of a directive (3 June 1996), an outcome which had been achievable in such a short time frame only because all parties concerned had been committed to achieving an initial success in time for the opening of the IGC dealing with the preparation of the Treaty of Amsterdam (28).

Like the 1993 Communication before it, the 1998 Communication was not limited to procedural considerations. It points to the ambitions set out in the Treaty of Amsterdam for European social policy, in connection in particular with European cooperation in employment matters introduced by the Treaty. In view of the upcoming developments of Economic and Monetary Union, it gives new impetus to sectoral social dialogue and calls for enhanced joint action at the highest European level. Generally speaking, it calls on the social partners to ‘*[e]mphasiz[e] joint action and negotiation*’ (heading of paragraph 5): ‘*The Commission considers that the development of contractual relations ... is a most effective mechanism to implement relevant commitments on Social Policy. [It] hopes the social partners will further develop their contractual relations at both interprofessional and sectoral level*’ (paragraph 5.3).

As regards the arrangements for implementing the provisions relating to consultation and negotiation, the 1998 Communication in essence sets out the information described in the 1993 Communication. It refers *inter alia* to the assessment criteria on the basis of which the Commission submits a proposal to the Council for the binding implementation of an agreement, namely the representative status of the signatory organisations, the legality of the clauses of the agreement and consideration of small and medium-sized enterprises. However, it provides significant clarification in addressing, for the first time, the possibility of negotiations undertaken by the social partners outside the framework of the consultation procedure, that is

to say, on a formal basis, on their own initiative. On this point, it expressly states that, when an agreement is concluded in that manner ‘outside the formal consultation procedure’, the Commission ‘has the obligation to assess the appropriateness of Community action in that field’ [covered by that agreement] (paragraph 5.4.2, boxed text). This confirms *a contrario* the interpretation that, where negotiations are carried out under a consultation procedure, i.e. under Article 138, in the second consultation phase relating to the content of an initiative, the Commission will have already made a decision on the appropriateness of Community action, and it will have no need to review this once the agreement is concluded. It is important to note that the assessment criterion which is therefore added in the event of an agreement concluded outside the consultation procedure is not a criterion for assessment of the agreement *per se*; it involves an assessment of the appropriateness of Community action *in the field covered by the agreement*: it is a matter of examining whether a problem or matter can justify Community action and not of examining the specific response that the agreement concluded on the initiative of the social partners gives to that problem or matter. In this regard, the Communication demonstrates great clarity: the agreements concluded on the initiative of the social partners are applied subject to an assessment of appropriateness of Community action, which would have been carried out in the initial consultation phase provided that the initial phase had been initiated and brought to a conclusion, that is to say, provided that the Commission had consulted the social partners on the possible direction of Community action and subsequently concluded that the Community action concerned was desirable, as per the consultation procedure, by initiating the second consultation phase which then focuses on the content of the action envisaged; therefore, it is not the content of the agreement that must be examined on the basis of that criterion but, more generally, the appropriateness of Community action in that field (given that examining the content of the agreement from this perspective, i.e. examining the response that the social partners provide to a problem, would effectively be prejudicial to their autonomy: the content of the agreement is subject to analysis on the basis of the criteria of legality and consideration of the constraints on SMEs).

It is worth highlighting here that this clarification helps in understanding how the Commission was considering, at the time, the rationale of its assessment of the social partners' requests for a legislative implementation of their agreements. In the Communications of 1993, 1996 and 1998, the Commission never said that it considered having a duty to present to the Council a proposal for such a legislative implementation (28 bis). But it never said either that it considered to have full discretion to decide whether to accede or not to such requests. Instead, these Communications describe criteria to be used for the assessment, and they use very cautious and soft wording to refer to the possibility for the Commission not to present a legislative proposal: if the Commission is considered here to have full discretion in any circumstance, it would not have been necessary for it to be so specific with regard to the criterion to be used in case of an agreement concluded outside of the consultation process, and to commit itself to explain to social partners the reasons for its decision. The very soft reference to the possibility that the Commission decides not to follow the social partners' requests suggests that the Commission considers that when dealing with such requests, the Commission exercises its right of initiative while fully respecting also its obligation to promote social dialogue. This is consistent with the recurrent messages of the Commission on double subsidiarity.

This clarification by the 1998 Communication also indicates the very purpose of the first consultation phase: to propose the possible direction of European action for the purpose of addressing the appropriateness of such action in a given field. Here it must be noted that social partner consultation does not involve technical or informal consultations by the Commission; it involves formal acts defined in treaty articles, which are therefore initiated on the basis of a text approved by the College and made public. Initiation of the second consultation phase by the College means that it has been duly informed, and the social partners are thus afforded the opportunity to enter into negotiations which suspend the Community legislative process and may lead to a request for an agreement to be made binding in law.

Agreements concluded in the light of negotiations commenced as part of the consultation procedure must therefore be assessed on the basis of the three criteria set out above. This is also borne out by the text of a further Communication, adopted in 2002 (COM(2002) 341 final of 26 June 2002), which states at paragraph 2.4.2 that *[t]he Commission presents a proposal for a Council Decision in areas covered by Article 137 [...] at the joint request of the signatory*



*parties and following examination by the Commission of the following: sufficiently representative contracting parties, lawfulness of all clauses of the agreement under Community law, and compliance with the provisions concerning small and medium-sized enterprises*'. The Commission thus provides a specific and exhaustive list of the conditions to be met so that an agreement can be the subject of a proposal for its implementation into law, conditions which relate to the signatories (sufficient representativeness) and the content of the agreement (lawfulness and provisions relating to SMEs). It should be noted that, from one communication to another, the wording of those criteria does not change (29), and this consistency highlights – if proof were needed – the consensus within the Commission regarding the interpretation of the provisions of the Treaties.

Furthermore, it is important to note that all the directives adopted under Article 139 of the EC Treaty, and subsequently under Article 154 of the TFEU, even the most recent directives (for example, Directive (EU) 2018/131 of 23 January 2018), include a recital explicitly referring to those assessment criteria and having regard generally to the 1998 Communication (*'[t]he Commission has drafted its proposal for a directive, in accordance with its Communication of 20 May 1998, [...] taking into account the representative status of the signatory parties and the legality of each clause of the Agreement'*) (30). This shows that, in the view of the Commission and the Council alike, the 1998 Communication is considered always to be the reference text for defining the assessment criteria governing the social partners' agreements and the arrangements for implementing those provisions of the Treaty.

It should also be noted in this regard that, although the proposals for the legislative implementation of the agreements presented by the Commission comprise, in the respective explanatory memorandums, explanations regarding the principles of subsidiarity and proportionality, they are not criteria for assessing the agreements as such but criteria justifying Community action in the area concerned: when agreements are drafted in the light of negotiations initiated in a consultation process, those criteria are initially analysed and discussed by the Commission in its consultation documents, prior to the negotiations, and are then set out formally in the explanatory memorandum to the legislative proposals presented, along with the agreements, subsequent to those negotiations; and, as explained above, where an agreement is concluded outside the consultation process, those criteria justifying Community action in the matter must be the subject of a specific examination, but they are not criteria for assessing the content of the agreements as such (31).

## **2.4 A very broad consensus on the spirit of the provisions of the Treaty**

The above-mentioned Communications are concerned not only with defining procedures; they also convey a consistent message from the Commission regarding the very spirit of the provisions of the Treaty, namely, to develop contractual relations at European level and to encourage the European social partners to use those provisions actively and consolidate European social dialogue through joint actions and negotiation. The 2004 Communication from the Commission (COM(2004) 557 final of 12 August 2004) presents this message with new wording, referring to social dialogue as *'a form of better governance'*, illustrating *'subsidiarity in practice'* and pointing to the *'proximity of the social partners to the realities of the workplace'* and the fact that, for the Commission, *'negotiations are the most appropriate means for settling questions related to work organisation [...] at both cross-industry and sector level'* (32). This 2004 Communication merits even more attention, as it clearly sets out the Commission's approach for that year, the year in which the draft Constitutional Treaty was drawn up, a draft which would contain the provisions to be adopted in the Treaty of Lisbon and would broaden the arrangements governing negotiations to include the European social partners.

The 2004 Communication also notes that the social partners may conclude agreements on their own initiative and opt for their agreements to be implemented *inter partes*, including where negotiations are initiated following a consultation prior to a legislative initiative by the Commission. In addition, since the European cross-industry social partners had opted for such implementation *inter partes* in respect of their last agreements of the period (of the time?) (on

telework in 2002 and work-related stress in 2004), the Communication provides specific details on the implications, from the Commission's perspective, of an agreement implemented *inter partes* (or, to use the terminology which would be adopted ultimately through usage, an 'autonomous agreement'). It also points out that, where such an agreement is concluded following a consultation and has consequently suspended the legislative process initiated by the Commission, the Commission is entitled and obliged to ensure that the autonomous implementation of that agreement actually makes it possible to meet the objectives the Commission had set out to achieve when it began that legislative process, and therefore to assess whether the agreement is in effect implemented by the social partners throughout the European Union. Moreover, the Communication clearly sets out the Commission's preference for implementation by legislative means in circumstances where it is essential to guarantee application to all employers and workers concerned, and also where the agreement relates to the revision of an existing directive (33).

Throughout the period from 1993 to 2012, the criteria for assessing agreements as defined by the Commission remained uncontentious. The only contention relating to the legislative implementation of an agreement was voiced by an organisation which challenged the legislative text adopted on the ground that it had not been involved in negotiating the agreement: this gave rise to an action for annulment in 1996 by a category-specific employer organisation, namely the 'Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises' (UEAPME), in respect of the directive implementing the agreement on parental leave. However, the Court of First Instance dismissed the UEAPME's application, finding that, taken together, the signatory organisations were sufficiently representative (34). In general terms, the Court held, on this occasion, that the legitimacy of the social partners' role stems from their representativeness having regard to the content of the agreement and that, faced with an agreement of the social partners, the Commission must primarily act in conformity with the principles governing its action in the field of social policy as laid down in the Treaty, which specifically include the promotion of social dialogue (paragraph 85 of the judgment).

As already stated, the Council approved all proposals for directives submitted to it within a very short period, although it was unable to amend the text of the agreements. Furthermore, the Council expressed its support on a number of occasions for developing European social dialogue. Accordingly, in December 1994, the Council adopted a resolution which called on the two sides of industry to make use of the treaty provisions on negotiation, pointing out that they are '*closer to social reality and to social problems*' (35). A further example of its support lies in its Decision of 13 March 2000 on guidelines for employment policies, in which it invited '*the social partners to negotiate [...] at all appropriate levels agreements to modernise the organisation of work*' (36).

Upon the adoption of the Treaty of Maastricht, the European Parliament had welcomed 'the new social dimension' of the Treaty, but regretted being excluded from the procedure for implementing social partner agreements (37). However, in practice, Parliament made arrangements so that it could give an opinion on the agreements concluded, even though the time frame for adopting the Council decision was very short. Thus, on preparation of the first agreement on parental leave, the Commission presented its proposal on 31 January 1996, the European Parliament adopted an opinion on 14 March 1996, and the Council found political agreement on the directive by 29 March, thereby allowing for formal approval on 3 June 1996 (38).

Generally speaking, at least up until 2012, the procedure for implementing agreements by way of a Council decision was very short, and it did not lead to disputes. The Commission presented the agreements on part-time work and fixed-term contracts to the Council less than two months after their adoption by the social partners, and the Council approved the Commission proposals within a maximum six-month period (39). The sectoral agreements were also approved within a very tight schedule, most often within six to nine months of the Commission's proposal (40). From 2006, responsibility for the studies of representative status conducted on the basis of a standardised – and non-controversial – methodology and for the large-scale development of sectoral social dialogue was attributed to Eurofound, a European agency with a tripartite Administrative Board, thereby reinforcing consensus on the application of that criterion for assessing agreements. Moreover, to prevent disputes on the legality of agreements, the social

partners knew that they could, during their negotiations, and if they so wished, request the Commission's technical expertise on the legal matters associated with their agreement (41).

## 2.5 The draft Constitutional Treaty and the Treaty of Lisbon

The broad consensus which existed in the early 2000s around the added value of European social dialogue demonstrates that the Member States and the European institutions, as well as the social partners, had wanted to strengthen the relevant provisions on the occasion of the preparation of the draft Constitutional Treaty and subsequently of the Treaty of Lisbon.

No party sought to rewrite the 'historic' text emanating from the social partners' 1991 Agreement. That said, two new aspects were introduced, adopting the same wording in the draft Constitutional Treaty and in the Treaty of Lisbon, yet inserted at different points in the respective texts.

First, there was a new article, which asserted in essence that *the Union* promotes social dialogue at its level and respects the autonomy of the social partners (42). This article was intended to be included in Title VI [Part I] of the Treaty establishing a Constitution for Europe, concerning the democratic life of the EU. The Treaty of Lisbon would incorporate it in full, but would insert it into Title X on social policy in a secondary position, namely as a new article 136 bis i.e. Article 152 TFEU, preceding Article 153 which lists the various areas of social policy, thus highlighting the provision's importance. This article bolstered the recognition of social dialogue by making its promotion an obligation for the European Union (and not, as previously, for the Commission alone) and by establishing the principle of the social partners' autonomy, which had already been asserted in various Commission documents but was not yet acknowledged in the treaty text.

This was followed by an amendment of Article 138 of the EC Treaty, the article concerning the consultation of management and labour. The amendment appears relatively minor, but is significant in its scope, as it concerns the relationship between consultation and negotiation. While Article 138 provided that management and labour could initiate negotiations at the *second* consultation phase (the phase relating to the content of the initiative envisaged by the Commission), the amended text provided that those negotiations could be initiated 'on the occasion of the consultation [...]', therefore, as early as the first consultation phase, which, it should be recalled, concerns the possible direction of Community action. This new wording features, similarly, in Article III-211 of the draft Constitutional Treaty and in Article 154 TFEU.

This amendment barely changed, or so it seemed at least, the 'historic' text dating from 1991. However, as will be explained below, it significantly broadened the options for negotiation within the consultation process. It reflected the ambition of the institutions and the Member States to encourage negotiations as between management and labour and those parties' desire to have greater freedom in such negotiations. The amendment must be construed as the translation into the Treaty of the broad consensus described above regarding the primacy of the negotiation process and the social partners' capacity to act as key players in the preparation of legislation and social policy.

At least three underlying reasons must be taken into account.

The first reason pertains to the lessons learned from experience of past consultations. In their periodical discussions on the instruments of social dialogue, the social partners and the Commission had noted that the second consultation phase could, at times, deter negotiation rather than encourage it, in particular when the Commission was either very or excessively precise in its definition of the content of its envisaged proposal. In those circumstances, any negotiations would be excessively confined by the Commission's text, and there would therefore be little for the social partners to negotiate, in spite of the two parties' conviction as to the added value of Community action; in addition, either of the two parties could feel that it had more to gain (or, at least, greater certainty of what it might gain), from the proposal envisaged by the Commission than from the inevitably uncertain outcome of negotiations. In its 1994 opinion on the 1993 Communication of the Commission, the European Economic and Social Committee

had already suggested enabling social partners to initiate negotiations as from the first phase of consultation, precisely for these reasons (42 bis). Hence, based on the experience of both the Commission and social partners, the growing support to the idea of opening up the opportunity for negotiation in the initial consultation phase, when the possibilities are wide open because the Commission has not as yet favoured any one content option.

The second reason is connected with the actual progress achieved in European social policy. In the early 2000s, the actors in social policy, including the social partners, began to realise that the envisaged legislative initiatives would often be adjustments to existing working standards rather than completely new initiatives affording new rights, and that those adjustments would be envisaged in particular following the periodical assessments of existing legislation. And thus it was considered that the dual – ‘possible direction/content’ – consultation mechanism was impractically lengthy and laborious in terms of supplementing, updating or revising an existing law (and, on occasions, even a law which implements a social partner agreement), and that it should be possible, in that case, for the social partners to enter into negotiations as early as in the initial phase, without waiting for the second consultation phase.

Finally, a third reason is connected with the actual practice of the negotiations since 1994, which had led both the Commission and the social partners to introduce some flexibility into the relationship between consultation and negotiation, and to recognise the benefit and value of negotiations conducted outside the formal framework of the second consultation phase. Accordingly, negotiations on the organisation of working time in the sectors of maritime transport, rail transport or civil aviation had been expressly encouraged by the Commission well before the start of a formal consultation process. As early as in 1994, the Commissioners responsible for transport, employment and social affairs respectively pointed out to the social partners in those sectors that, under Directive 93/104/EC on the organisation of working time, Community rules could be adapted to the specific features of the particular sectors concerned, and that they were therefore allocated a ‘negotiating space’. In the following years, the Commission consequently developed informal consultations, on the basis of a ‘Commission Staff Working Document’ which assisted the sectoral organisations to explore the prospects of negotiation. It was not until 1997, in the light of this informal consultation phase, that the Commission used a Communication to set out a comprehensive approach to the sectors excluded from Directive 93/104/EC and thereby initiated a formal consultation procedure on that comprehensive approach (43). It was specifically because negotiations had been conducted outside the formal framework of the consultation procedure (but as part of informal consultations) that the aforementioned 1998 Communication on social dialogue (COM[1998] 322) had made clear that, as far as such negotiations were concerned, the Commission was required to consider the appropriateness of Community action so as to conform, from the procedural perspective, with the systematic aim of the dual-phase consultation procedure (possible direction and content) defined by then Article 138 of the EC Treaty (44). In practice, in most cases, the Commission set in motion consecutive informal and formal consultations, and, when it launched the formal consultation procedure, its specific aim was to formalise the outcome of its previous informal consultations and, therefore, to seek out the formal position of the social partners, and not to explore an issue from scratch: the very fact that these prior informal consultations had been held meant that the six-week consultation period posed no major problem for the organisations consulted (and the period could even be shortened in agreement with those organisations), and the very fact that the Commission was rolling out this permanent practice involving formal or informal consultation meant that it was willing to exercise a degree of flexibility whenever the social partners indicated their intention to address an issue through negotiation.

## **2.6 The primacy of collective bargaining at European level**

The broadening of the negotiating options provided for under the Lisbon Treaty therefore forms part of the continuing flexibility advocated by the Commission, which acknowledged that its formal initiatives are, in most cases, preceded by informal consultations and rely on reviews of existing legislation, and agreed that a negotiating mechanism could be developed only if the parties involved enjoyed a proper measure of discretion (45). The Commission appears even to have started to implement these amendments to the Treaty before they were formally approved,

as shown by some consultations predating the entry into force of the Treaty of Lisbon. While, in the 1990s, *first* phase consultation documents did not question the social partners regarding any potential opening of negotiations (under Article 4 of the Agreement on Social Policy or, subsequently, under Article 139 of the EC Treaty), in the 2000s, by contrast, although the draft Constitutional Treaty had not yet been approved nor, of course, ratified, and clearly prior to the entry into force of the Treaty of Lisbon, there were a number of first-phase consultations which expressly asked the social partners whether they intended to initiate negotiations on the matter subject to consultation (46).

By allowing the social partners to initiate negotiations at the first consultation phase, Article 154 TFEU confirms that the provisions of the Treaty relating to social dialogue are firmly aimed at encouraging collective bargaining at European level, thereby broadening the relevant procedural options available to the social partners. This corresponds to the practice developed by the Commission, which uses the first consultation phase as the first stage in formalising its intended initiative, not as a phase for exploring the matter from scratch: at the very least, if the first-phase consultation document relies explicitly on previous technical or informal consultations, and especially if that document expressly calls on the European social partners to consider entering into negotiations, this implies that the Commission is fully aware that such consultation opens up the possibility for the social partners to initiate these negotiations, and therefore to suspend temporarily the legislative process and ultimately to conclude an agreement and request that it be implemented by means of legislation (47). After all, how could the Commission expressly call on the social partners to enter into negotiations on a given matter and subsequently tell them, once their agreement is concluded, that it no longer wishes to proceed in that manner? The fact that the Commission has produced no clarifying text on this issue in the wake of the Lisbon Treaty confirms that this new treaty provision was, to a large extent, expected and that, in the Commission's view, it was sufficiently clear to all parties that the primary objective of the relevant treaty articles was to promote negotiation and, therefore, to broaden the social partners' capacity for action in this regard, which is consonant with the consensus consistently noted throughout the period concerned (48).

Other examples confirm this broad consensus and the primacy conferred on the negotiations and agreements of the social partners. All these examples relate to the period immediately preceding or following the adoption of the Treaty of Lisbon, and they therefore clearly reflect the context in which the amended wording of Article 154 TFEU was adopted.

First of all, one example of the Commission's flexibility involves the schedule of the consultation and negotiation process. The negotiations concerned were directed at revising Directive 96/34/EC on parental leave, which was based on the first agreement concluded between the cross-industry social partners in 1995. In the mid-2000s, the Commission had announced its intention to give new impetus to the policy on the reconciliation of work, family and private life, and this meant having to revise the 1996 Directive. However, the social partners were unwilling to reopen the matter because the employers in particular entertained reservations regarding the use of European law to enhance the right to parental leave. The revision process consequently progressed very slowly: the first consultation phase was launched on 12 October 2006 (SEC(2006) 1245); the second consultation phase was launched on 30 May 2007 (SEC(2007) 571); at the end of the second consultation phase, the Commission could, of course, take back the initiative by preparing a legislative proposal itself, but it agreed to continue waiting and suspend its own work, because on 11 July 2007 it received notification from the European social partners of their intention to undertake a joint assessment of the 1996 Directive, potentially culminating in negotiations; that assessment ended in March 2008, but the social partners did not announce their intention to conduct negotiations with a view to revising the Directive until 11 September 2008. The new agreement would be concluded on 18 June 2009 and would lead to Directive 2010/18/EU of 8 March 2010. Although the agreement was concluded more than two years after the second consultation phase had been launched, the Commission still regarded it as an agreement relating to a consultation process.

A further example shows that flexibility was not restricted to the schedule or to action by the Commission alone. Dating from 2008, this example highlights the state of mind prevailing in all the European institutions in the ratification period for the Lisbon Treaty. It involves the revision of the Directive on the establishment of a European Works Council (Directive 94/45/EC of 22 September 1994), which was scheduled for 2004 and on which the

Commission had, on a number of occasions, called for negotiations by the cross-industry social partners, but to no avail.

At the end of the second consultation phase, in spring 2008, the social partners had had talks but had not managed to agree on negotiation in this regard. The Commission therefore submitted a legislative proposal to the Council and the European Parliament in early July 2008. However, immediately after that proposal by the Commission, over the summer, the social partners commenced, on their own initiative, and rapidly concluded negotiations allowing them, in late August 2008, jointly to submit a compromise text to the Council Presidency. Although that text was submitted outside the framework of the consultation process, and even after the Commission's legislative proposal had been submitted, the Council and the Commission agreed to retain it as a basis for a political agreement within the Council. Of course, this intervention by the social partners, and its favourable reception within the Council, significantly reduced the possibilities for intervention by the European Parliament, which expressed its disappointment in that regard. However, the Directive was adopted by the Council and the European Parliament on 6 May 2009 on the basis of that compromise set forth by the social partners (Directive 2009/38/EC).

A third example highlights the attention that the Commission gave to the social partners' negotiating mechanism and indicates how it responded to it, showing flexibility as regards both the schedule and the scope of the issues to be addressed. Here the negotiations involved injuries caused by sharp instruments in hospitals ['medical sharps']. Initially, in July 2006, the European Parliament adopted a resolution concerning the risks of blood-borne infections associated with needlestick injuries in hospitals, a clearly sensitive issue in view of the risks of transmitting HIV and other infectious diseases (49). This resolution prompted the Commission to prepare for a directive on this matter and, therefore, to launch a consultation procedure with the social partners as required by the Treaty (first phase commencing in December 2006 and second phase in December 2007). The social partners from the hospital sector expressed their interest in this initiative, but found no common ground between them on conducting negotiations within the consultation period (ending in February 2008). The Commission services therefore set about preparing the legislative text while the social partners continued their discussions: in November 2008, they informed the Commission of their intention to initiate negotiations on the broader issue of preventing the risks of injury due to the use of sharp instruments in hospitals. In this case, the second consultation phase had been closed for a number of months, and the intended negotiations broadened the scope of the legislative initiative in preparation. However, the Commission, at that stage, suspended its work, and it not only acknowledged the principle of broadening the initiative's scope in that manner, but also allowed the social partners the time needed for negotiating an agreement. The European Parliament, which had carried out the work on the matter, albeit reluctantly in the initial stages, would be persuaded that the issue raised in its 2006 Resolution could be resolved satisfactorily by these European sectoral social partners' negotiations. The agreement would be concluded on 17 July 2009, and the Commission would propose its legislative implementation on 26 October 2009, which would be approved by the Council on 10 May 2010 (Directive 2010/32/EU) (50).

One final example shows that the primacy afforded to negotiation may extend beyond the framework of social policy legislation: the Commission launched a legislative initiative which affected undertakings and workers in the private security industry. In July 2010, the Commission proposed a regulation on the professional cross-border transport of euro cash by road between euro-area Member States. That proposal met specific euro-area operating requirements, but it also affected some aspects of the working conditions of cash-in-transit operators when carrying out their work across borders. The social partners from the private security sector therefore took charge of that aspect and, among other contributions to the preparation of the regulation, they concluded an agreement on professional training matters associated with the regulation and submitted the agreement to the Commission. Although professional training does not fall within the scope of Article 153 TFEU on social policy, bearing in mind that this provision was not, in any event, the legal basis for the intended regulation and, therefore, legislative implementation of the agreement was impossible under Article 155(2) TFEU, the Commission agreed to include that agreement by the sectoral social partners in the annex to its proposal for a regulation, and it invited the Council and the European Parliament to approve that part of the text without amendment. The Regulation,

together with the unamended annex, would be adopted by the Council and the European Parliament on 16 November 2011 (Regulation (EU) No. 1214/2011) (51).

The origin of the provisions of the Treaties and of the definition of the arrangements for their implementation, the consensus between the institutions and the European social partners with regard to the spirit of those provisions, and the priority afforded to European collective bargaining by the Commission over the years are three factors that shine a light on the commitment shown by the social partners and the Commission to those Treaty provisions and on the system of mutual expectations which has developed between these players in terms of their implementation. That unity of purpose would continue at least until 2011/2012. Then, in late 2011, the cross-industry social partners announced the start of their negotiations on the revision of the Working Time Directive (2003/88/EC), a decision that the Commission not only expected but in fact welcomed, conceding the problematic nature of the matter: after all, five years of discussions between the Council, the European Parliament and the Commission had resulted in an acknowledgement of failure in 2009, and it was that failure specifically which led the Commission to relaunch the legislative process.

### 3. The first disputes over the interpretation of Article 155

#### 3.1 2012, a pivotal year

The year 2012 began with the opening of negotiations on working time – clearly a major challenge for the cross-industry social partners – which the Commission hoped would result in success. The legislative dynamics of sectoral social dialogue had been underlined in a Commission Staff Working Document of July 2010 (52), and several sets of negotiations were completed, including three led by the sectoral social partners in explicit anticipation that the agreement reached in each case would be implemented through legislation. The negotiations in question concerned working time in inland waterways, which concluded with an agreement on 15 February 2012; occupational health and safety at work in the hairdressing sector, which concluded with an agreement on 26 April 2012; and the implementation of the ILO Fishing Convention, which concluded with an agreement on 21 May 2012. These three agreements of spring 2012 gave new exposure to the potential of European sectoral social dialogue and did so first and foremost within the Commission itself and its services. The exposure was so much greater that the then Barroso 2 Commission curtailed its ambitions for further social legislation. The dominant view within the Commission at the time was that the Member States, businesses and the public were suffering European legislation fatigue and that there should be a shift towards ‘smart regulation’ (COM(2010) 543 final of 8 October 2010); first there should be a fitness check, followed, if necessary, by a recasting and simplification of existing legislation before new proposals were planned. This led to initiatives to assess the legislative *acquis* (referred to by the Commission as ‘fitness checks’ and then the ‘REFIT programme’), enhanced impact assessments and the definition of the principles of smart legislation to respond ‘to the economic imperative’ (COM(2012) 746 of 12 December 2012) (53). Furthermore, the background to this situation was the slow emergence from the economic and financial crises and budget consolidation (or austerity) programmes within the euro area. The Commission did not view this as a favourable environment for new social policy proposals, let alone social legislation. The requests to implement the three sectoral agreements therefore immediately sparked reservations within the Commission, and especially its Secretariat-General which is in charge of overall coordination of the Commission’s actions and was behind the movement calling the usefulness of legislation into question and restricting ambitions for social legislation.

In April 2012, a few days before the agreement in the hairdressing sector was signed, a thunderous campaign appeared in the British press, against this agreement and its possible legislative implementation; it was presented as an example of the aberrations to which European social legislation could lead, especially legislation deriving from European social dialogue. The British tabloid press was very active in the campaign, as were the British authorities (53 bis): the campaign was both media and policy-driven, and although it took issue with the content of the agreement in the hairdressing sector, it kicked up a greater storm over the implementation procedure laid out in Article 155 TFEU and European social legislation generally. Frankly, the challenge to the content of the agreement would appear to have been nothing more than an excuse: the campaign was blatantly over-the-top and even invented provisions that were not in the text of the agreement simply in order to ridicule it (e.g. the claim that the agreement would prevent women working in the sector from wearing high heels); additionally, without any justification, it dismissed the science presented by the signatories in support of their agreement and even challenged those provisions in the agreement that echoed the recommendations in the official literature of the British Occupational Health and Safety Executive (54).

Even though the chief aim of the British media was clearly to rail against the potential excesses of European regulation, the political campaign was focused more narrowly on European social policy and its instruments, and, to that end, it copied the most grotesque aspects of the media campaign: criticism of the hairdressing agreement allowed issue to be taken both with European occupational health and safety legislation, which the British authorities wanted to see



completely recast, and the procedure for legislative implementation of the agreements entered into by social partners under Article 155, which also posed a problem for the British authorities, particularly as a result of the cross-industry negotiation under way on working time. On this point, the timeline of the events is enlightening: the British offensive of 2012 on the 'hairdressing' agreement was developed at the moment when the cross-industry negotiation entered its final phase, with reasonable prospects of success (55). Now, success in those negotiations would call into question a principle to which the British were particularly attached, namely the principle of opting-out contained in the 1993 Directive; unless the United Kingdom, together with enough other Member States, could use lampooning of the agreement in the hairdressing sector to discredit the Article 155(2) procedure, it would be unable to veto proposals to implement agreements reached by the European social partners, since they fall under qualified majority voting.

The British authorities' campaign against the hairdressing sector agreement was supported by some national governments, as shown by a joint letter addressed to the Commission by 10 or so Member States (56). There was no let up, even though the cross-industry negotiations on working time failed at the end of 2012. However, the shadow that the campaign cast over European social dialogue also led the social partners to remind the Commission of the obligations incumbent upon it to promote social dialogue and respect the social partners' autonomy. Additionally, the European trade unions stressed that the agreement reached in the hairdressing sector addressed indisputable occupational health and safety issues: even though some aspects of the agreement could be improved on or simplified it had the advantage of clearly addressing risks based on sound science, namely the significant overexposure of workers in the sector, mainly young women, to serious skin and respiratory diseases associated with their working conditions, including the conditions of use for cosmetic products (57). However the agreement's critics were echoed and supported within the Commission, even by President Barroso himself, who on several occasions referred to the tabloids' lampooning of the agreement, giving the impression that the Commission and he himself were paying greater attention to the tabloid campaign than to the actual agreement and the issues that the agreement was attempting to tackle (58). The political sensitivity of this issue clearly had knock-on effects for the actions of the services concerned: disputes went beyond the agreement in the hairdressing sector and spilled over onto all agreements concluded under Article 155 TFEU, in particular those emanating from sectoral social dialogue because the dynamics of sectoral dialogue required the Commission to consider how to deal with a number of agreements reached at the initiative of the social partners. In response, some of the services of the Commission openly raised the issue of refusing to implement the agreements and, if necessary, reinterpreting the arrangements for scrutinising them in order to give the Commission full discretion in the matter.

### **3.2 Questions about the arrangements by which the Commission may decide not to deal with a request to implement an agreement**

The background to the year in question, 2012, was a conflict between a Commission that sought to restrict the number and ambition of its proposals for legislation in social matters, and a European sectoral social dialogue which, although limited to a few particular sectors, demonstrated genuine momentum as reflected in the conclusion of several agreements and the presentation of several requests for legislative implementation (in the hairdressing, inland waterways and fishing sectors). Strictly speaking, the Commission should scrutinise each of the requests in line with the criteria laid down in the 1998 Communication, and reiterated in subsequent such documents: representativeness, legality, provisions regarding SMEs and, for agreements negotiated without a consultation period, the relevance of Community action in such matters. The Commission too was under significant political pressure to ensure that its scrutiny could justify the refusal of at least one of the agreements – including the hairdressing agreement, which was perceived to be a source of criticism that threatened the Commission and its image – even if it meant reinterpreting the scrutiny arrangements. There was no precedent to fall back on, since the Commission had never refused to deal with a request to implement, through legislation, an agreement reached by the European social partners.

It was not *politically* possible for the Commission to reinterpret the arrangements for implementing Article 155(2) while the cross-industry negotiations on working time were under way. In view of this, the Commission hoped that the social partners would help it to bypass the political deadlock it had encountered previously in that matter and making its reinterpretation public would have opened a head-on conflict with the European cross-industry organisations. If those organisations were to reach an agreement on the revision of the Working Time Directive, and, of course, the criterion concerning the legality of its clauses were met, how could the Commission tell them that it felt no obligation to submit the text of that agreement to the Council with a view to legislative implementation? Or that it would need more time to undertake further study in order to reach a view on the importance of the agreement in order to be able to decide whether to submit it to the Council? However, when the cross-industry negotiations failed in December 2012, the debate within the relevant Commission services could openly shift towards the possibility of refusing requests for legislative implementation of sectoral social partner agreements. In October 2012, some actors had noticed the Commission engaging in some discreet political signalling when it adopted the Commission Work Programme 2013 (COM(2012) 629 final of 23 October 2012): the programme did not include a single reference to the potential approval in 2013, by the College, of proposals to implement, through legislation, the sectoral agreements entered into in spring 2012 (59). Given that the Commission's previous practice had been to present proposals for legislation within just a few months of an agreement's conclusion, the absence of any reference in the Work Programme 2013 to any potential such proposal gave an indication of the strength of opposition to such agreements within the Commission. Thus, the Commission set the scene for a slow and difficult internal investigation in the face of strong pressure to say no to at least one of the agreements.

The debate did not cover the possibility that the Commission would not accept a request from an agreement's signatories to implement it through legislation, because that possibility was already expressly referred to in the Communication of 1993. However, pursuant to the wording of the Treaty and the obligation incumbent upon the Commission to promote European social dialogue, the established practice of the Commission had always been to encourage collective bargaining at European level, to facilitate such negotiations logistically and technically, and to promote the outcomes. Additionally, as noted previously, the Commission had always prioritised collective bargaining in the name of 'double subsidiarity', and there was no precedent for refusing a request to implement an agreement through legislation. In any case, none of the previous Communications on social dialogue had expressly dealt with the criteria or arrangements for the Commission to follow in the event that it moved away from its established practice. When scrutinising the social partner agreements, was the Commission bound by the criteria of representativeness, legality, effects on SMEs and, for agreements negotiated outside the formal framework for consultations set out in Article 154 TFEU, the relevance of Community action in the area covered by the agreement? How should it set out the reasons for a decision not to deal with an agreement (give a few general outlines or a full, detailed argument)? And at what level and in what form should such a decision be taken and notified (an administrative note from the Commission as a body, or a formal decision at College level in accordance with the 'principle of parallel forms', since approval is determined by the College)? These were the kinds of questions doing the rounds about the conditions under which it would be possible to reach a decision not to deal with a request to implement a social partner agreement. In the search for an answer to these questions, the relevance of Community action is clearly the criterion that commands attention because it lends itself most easily to political considerations and is under the Commission's full control. In any event, it had been clear from the outset that none of the agreements under consideration could easily be refused on the basis of criteria concerning representativeness and effects on SMEs, and that any weaknesses that could be raised in respect of legality could probably be remedied by the signatory social partners amending the text of the agreements, therefore making it difficult to justify a straight refusal (60).

Now, scrutiny of the three agreements in question could incorporate an analysis of that kind under the criterion of the relevance of Community action on the ground that the link between them and the formal consultation procedures was too indirect, old or tenuous (61).

In fact, there was barely any serious question about the relevance of European legislative action in the areas covered by the agreements concluded by the social partners in the inland waterways and sea fisheries sectors, namely working time and the adaptation of European social law to the

wording of the ILO Fishing Convention respectively. Where inland waterways transport was concerned – a small sector in employment terms but highly international in nature (62) – the agreement made it possible to introduce flexibility into working times and was part of an ongoing series of working time directives for mobile staff in various transport sectors; those directives were based on agreements concluded, with the Commission's encouragement, by the sector's social partners. Moreover, the Directorate-General for Transport supported the agreement and was present when it was signed by the social partners in the sector. By the same token, when the agreement was concluded, cross-industry negotiations on working time were under way, and the Commission paid close attention to them in view of the failure of its previous attempts to review European provisions in this regard. There was therefore little scope for questioning the legitimacy either of efforts to modernise European legislation in this field or of the legitimacy of the initiative taken by the social partners to that end.

Where the fishing agreement is concerned, it would have been unthinkable to challenge the relevance of legislative action in this field. The salient point was the transposition into European social law of the effects of ILO Convention C188, a Convention that had been supported by the Commission and all the Member States (and in whose negotiation the European sectoral social partners had been actively involved). The Commission and the Council expressly wanted it to be ratified, which meant that European law had to change. The point at issue therefore, was not the relevance of legislative action in this field (if the Commission had refused the social partner request for the implementation of their agreement, it would have had to table its own proposal for legislation which, once adopted, would enable the Member States to ratify the Convention) but the quality of its wording, given the aim of adapting Community law to the provisions of the Convention (the social partners had some expertise in that regard, which is logically a separate matter from the relevance of Community action, since they had participated in the ILO negotiations) (63).

Conversely, there was plenty of scope for debating the relevance of European action in respect of the agreement in the hairdressing sector, i.e. the agreement that was the object of the liveliest disputes and was, as a result, coming to symbolise the 'intrusion' of sectoral social dialogue into the process of developing European social legislation. The reality of certain occupational health and safety risks specific to this sector was not in serious doubt, for example skin ailments and some respiratory, musculoskeletal or allergy problems were well established in specialist international literature. It was precisely because those risks were firmly established that the agreement had been welcomed by various international organisations (64). Nonetheless, the agreement also referred to risks to which workers in the sector were no more exposed or overexposed than workers in other sectors, and contained provisions that merely reiterated requirements already laid down in other Community texts in relation to those risks. The scope of the agreement and the added value of at least some of its provisions therefore leant itself to discussion. In particular, there were arguments to be had generally about subsidiarity and proportionality, and whether there was a need for any European initiative on occupational health and safety in this particular sector.

### **3.3 The introduction of impact assessments into the consideration of requests to implement European social partner agreements**

In spring 2012, shortly after the conclusion of the three sectoral agreements referred to, the Secretariat-General of the Commission, which was the driver both of the shift towards simplifying legislation and the development of 'impact assessments' within the Commission, introduced a requirement for proposals for legislation concerning social partner agreements henceforth to be subject to impact assessments.

This was a radical change in the approach to the consideration of these proposals; until that point, the Commission had always taken the view that proposals for legislative implementation of social partner agreements did not have to include an impact assessment. The most recent proposal was dated October 2009, when the Commission presented a proposal to the Council for a directive implementing the Framework Agreement on prevention from sharp injuries in

the hospital sector. In that Communication (COM(2009) 577 of 26 October 2009), the Commission noted that it had not prepared a specific impact assessment on its proposal to give legal effect to an agreement between social partners, ‘as it is not required to do so’ (paragraph 2.3 of the Preamble). The Commission had made the same statement a few months earlier in its proposal for a directive implementing the revised Framework Agreement on parental leave (COM(2009) 410 of 30 July 2009, also point 2.3). This was also the case for previous proposals for directives, for example the proposal of 2008 on the agreement in the maritime transport sector that sought to adapt the European labour law to the Maritime Labour Convention adopted by the ILO in 2006 (Convention C186), an agreement identical in nature to the 2012 agreement in the fishing sector (65). In all these areas, the position consistently maintained by the Commission was that it would not conduct an impact assessment, first because the stakeholders directly affected by the implementation of the agreement were also directly involved in its negotiation (and therefore accepted its various effects by dint of signing the agreement), and secondly because the procedure for implementation *erga omnes* of an agreement was regarded as a specific procedure, and the Commission was protecting the specific features that distinguish it from the ordinary legislative procedure (as noted above, this was about validating a collective agreement and extending its applicability, not about developing legislation as such). Indeed, the absence of an impact assessment was not challenged by the Council at all during the process for adopting decisions to implement the agreements concerned. By the same token, the Communication of 8 October 2010 launching the ‘Smart Regulation’ programme made no reference either to the implementation of social partner agreements or to submitting them to impact assessments (COM(2010) 543 of 8 October 2010). The same is true of subsequent Communications (e.g. the REFIT Communication, COM(2012) 746 of 12 December 2012).

The decision to introduce impact assessments into the process for appraising social partner agreements therefore broke with the Commission’s previous approach and occurred unexpectedly. The decision was not set out formally in a Communication (i.e. at College level). It was taken at the level of the services, as part of the Barroso 2 Commission’s boost for the Smart Regulation programme, and of the Commission’s firm intention not to be seen to be obliged to present proposals for social legislation resulting from social partner agreements while it was trying to curtail its ambitions in that area. The key role here was played by the Secretariat-General of the Commission, which was precisely in charge of the coordination of impact assessments and of the Smart Regulation Agenda and which argued that, once the Commission attached an impact assessment to its proposals for legislation, it would have to do the same for proposals for legislative implementation of social partner agreements. It goes without saying that this change in approach also gave rise, especially for the Commission, to a broader measure of discretion in the scrutiny of agreements, allowing it, in practice, to enhance the criteria by which their added value would be analysed. It thereby gave the process of scrutiny a more starkly political slant, since responsibility for impact assessments and their monitoring lay with the Secretariat-General of the Commission (66). As the services concerned mapped out what the extension of impact assessments to social partner agreements could cover, the development of disputes concerning such agreements enhanced the political slant: although the introduction of the impact assessment did not perhaps initially aim to provide the Commission with arguments to justify a refusal to implement an agreement through legislation, there is no doubt that that aim was indeed incorporated into the new approach and even became a key part of the scrutiny process, especially for agreements that gave rise to disputes.

The first practical consequence at the Commission of the dynamics of sectoral social dialogue was therefore the introduction of an impact assessment into the procedure for scrutinising agreements whose signatories had requested legislative implementation. The idea was to produce an ‘analytical document’ that would weigh up the costs and benefits of implementing an agreement and would therefore supplement the assessment of the agreement using the standard criteria identified in the Commission’s previous Communications, namely the representativeness of the signatories and the legality of the clauses of the agreement, including the constraints on SMEs; it was also anticipated that the analytical document could, if necessary, cast light on the debate on the relevance of European action in the field covered by the agreement, although, on the latter point, there was an obvious risk of confusion between the analysis of relevance of European action in the field in general and an assessment specifically relating to the relevance of the action defined by the agreement in particular (as noted above), respect for the social partners’ autonomy made it necessary to conduct an assessment of the

relevance of Community action in the field concerned, and not in terms of the specific provisions of an agreement). The introduction of the impact assessment into the procedure for considering agreements was therefore intended to provide the Commission with the information necessary to appraise the added value of European action and thus refuse or approve the request for legislative implementation of an agreement.

However, the introduction of the impact assessment into the process for considering social partner agreements was not so easy and simple to put into practice. The standard methodology for Commission impact assessments had been designed with an emphasis on the preparation of legislative initiatives *upstream* of the drafting of a text, at the stage when aims and issues were being identified, and the potential policy options being compared. However, applying this approach to the *downstream* assessment of the potential impact of an agreement that had already been concluded between the social partners required adjustments to the standard methodology: in contrast to the preparation of an ordinary legislative initiative, when scrutinising an agreement already concluded between the social partners, there were only two options for comparison – the application or the non-application of the agreement – there was no possibility of considering alternative scenarios in order to compare their respective costs and benefits (hence the name ‘analytical document’, denoting that it was different from impact assessments *per se*, and was constrained to a comparison of the costs and benefits expected to result from implementing an agreement’s provisions).

That is why importing impact assessments into the field of social partner agreements led the relevant services to give consideration also to how the standard methodology could and should be applied upstream of agreement scrutiny, namely during the social partner consultation stages where it could apply in full because negotiations were not yet under way. The result was an adjustment to the consultation procedure under Article 154 TFEU, consisting in the consultation document for the second phase being accompanied by an ‘analytical document’ that would ‘shape’ upstream any negotiation involving the social partners by establishing the negotiation’s potential scope and content at the outset: the nature and extent of the issue, the European dimension on its causes and possible solutions, foreseeable impacts and objectives, etc. In practice, however, making that adjustment to the consultation procedure also meant restricting the negotiating parties’ room for manoeuvre and risked removing (or possibly trying to remove) the incentive behind the procedure by scoping out the area for the negotiations as fully as possible.: this ran counter to the innovation introduced by the Lisbon Treaty and the new form of words in Article 154 TFEU, namely the possibility for social partners to initiate negotiation at the first stage of consultation, precisely when the scope of the negotiations has not be fully scoped out by the Commission. The process of refining these arrangements gave rise to lengthy discussions between the services involved and were rendered even more complex by the fact that it was clear that the objective was not only to import the impact assessment methodology and the smart/better regulation principles agreed between the institutions into the consideration procedure but to provide the Commission with greater freedom to make political decisions on requests for legislative implementation of social partner agreements by *de facto* introducing into the assessment of these agreements considerations that went far beyond not only the criteria set out in the Communications of the 1990s, but also the spirit of all previous Communications and even the spirit of the new form of words introduced into Article 154 TFEU by the Treaty of Lisbon.

The second practical consequence of this dispute was a considerable extension in the time taken to scrutinise the agreements in question, with some reviews even grinding to a halt: mistrust and suspicion were widespread. In respect of the inland waterways and fishing agreements, where neither the content nor the signatories’ representativeness was *a priori* in question, and the relevance of Community action was not really at issue, it took 29 and 35 months for the Commission services to conduct the necessary assessments, first enlisting the help of external consultants, then drafting the document to submit to the Impact Assessment Board responsible for procedural quality control, and finally the presentation by the Commission of the proposals for legislation, an action that confirmed the quality of the two agreements in terms of legality (a criterion which has no reason to be included an impact assessment) and, as expected even before the assessment began, the relevance of European action in these matters (67).

The procedure for the hairdressing agreement was not completed, and the Commission services did not draft the ‘analytical document’ that should have concluded their scrutiny and be

presented to the Impact Assessment Board. The Commission farmed the study out to a team of specialist external consultants, but did not make their report public, and the review process was *de facto* suspended: work on the matter ground to a halt. This was interpreted by the signatories to the agreement as a sign that the findings of the external study endorsed their arguments and did not help the Commission to justify its *rejection* decision, which predated the impact assessment. This lent credence to the stakeholders' view that their issues were being managed in an arbitrary, biased fashion, and that the mockery made of the agreement as a result of the campaign run by the British tabloids and authorities had become more important to the Commission than the agreement's actual content, or even that the actual content was of little interest for it. That interpretation was boosted by the 'REFIT' Communications of 2 October 2013 (COM(2013) 685 final) and 18 June 2014 (COM(2014) 368 final), both of which contain muddled wording but state that the Barroso 2 Commission would not follow up the request to implement the hairdressing agreement even though its assessment was not yet complete: the refusal was therefore potentially temporary and was not accompanied by any reasoning based on an assessment of the agreement; instead, it accepted that the assessment should continue and that the next Commission could therefore reconsider the matter (68). It goes without saying that, by announcing a decision to refuse the request before completing the assessment that was supposed to inform and cast light on that decision, and then allowing work on the matter to grind to a halt with no explanation, the Commission gave the impression that it had no respect either for the procedures it had itself laid down, or for the principles of transparency that it claimed to espouse.

Several factors culminated in the time frame for processing requests being considerably extended or, in the case of the most sensitive issues, even grinding to a halt: namely, the time needed to clarify procedures; the hostile environment for social partner agreements within the Commission, and the tensions and disagreements between the services involved; the objective difficulty in gathering high-calibre information on working conditions in certain sectors of activity; and of course, for the hairdressing sector agreement, the structural incompatibility between the rationale behind an objective, transparent assessment and the barely concealed objective of justifying an *a priori* political choice to reject (as confirmed by the fact that the REFIT Communications of 2013 and 2014 announced the refusal before the assessment of the agreement had been completed). We must note the tenacity of the sectoral social partners in view of the delays noted above, which they could have taken to be a strategy to allow their issues to be swept under the carpet.

For the Commission, the aim of the cost-benefits analysis of implementing the agreements was not to improve upon them: the Commission had not the possibility to amend the text of the agreements itself (even though it could obviously draw the signatories' attention to inaccuracies or ambiguities in the wording and suggest corrections to make the text applicable and therefore admissible). The aim of the assessment was to provide the Commission with information to help it decide whether to submit a proposal to implement the agreements through legislation. That reflects a significant change in the attitude towards the expertise and accountability of organisations involved in European social dialogue. As emphasised by the concept of dual subsidiarity, the very principle behind the provisions on social partner agreements was that the social partners were closest to the economic and social realities and working premises and conditions, and could therefore jointly draw up appropriate responses to the issues they had identified by agreeing on the balance to be struck between the costs and benefits of the chosen solution and, to the extent possible, achieve the objective of any negotiation, namely a win/win solution where both parties gain. Once agreement was reached, the Commission and then the Council could extend the scope of the agreement through legislation on the basis of the signatories' representativeness, and their confidence in the effectiveness of social dialogue, and the social partners' capacity to come up with an appropriate response whose costs and benefits would be borne and enjoyed respectively by their members. That is why the proposals for legislative implementation of the agreements were not subject to impact assessment at that point. The introduction of the cost-benefits analysis of implementing the agreements bears witness to the fact that that trust had broken down or was no longer sufficient (and, by correlation, that the assessment of agreements using the criteria laid down in the 1998 Communication was no longer sufficient): the Commission was of the view that it needed to verify (and to show the Council that it had verified) that the social partners had not, whether deliberately or otherwise, overlooked costs or overestimated benefits (even though they would be the ones to bear the costs or gain from the benefits), and it no longer credited the signatories

with being best placed to find an appropriate, effective, balanced response to a problem. Naturally, this was linked to the changes in the Commission's approach to the usefulness of social legislation: the Commission now brought cost considerations into the assessment because it had identified risks of excessive costs in social legislation and, more generally, wanted to subordinate any legislative proposal on an agreement to a demonstration that *legislative* implementation was necessary.

The impact assessments of the first three agreements reveal the limits and inconsistencies in this new approach. It was no great surprise that the analytical documents accompanying the inland waterways and fishing agreements (69) confirmed both the relevance of European action in the fields covered by the agreements and the social partners' capacity to draw up an appropriate response to the problems facing them. For the social partners concerned, however, the balance sheet for the exercise showed, firstly, that the Commission's new approach had imposed disproportionate constraints upon them in terms of justifying their agreement and demonstrating its quality, and that it had held up implementation of the agreement for two years or more while the only value it had added in that time was to reassure itself and make a self-righteous declaration of discretionary authority that was also regarded as disproportionate. In view of the length of the procedure and the intensity of the controversy triggered by the agreement in the hairdressing sector, the social partners in fishing and inland waterways may well have regarded themselves as victims of the ensuing political sensitivity that crept into the legislative momentum of sectoral social dialogue between the years 2012 and 2014. However the changes in the agreement review procedure reflected a change in approach within the Commission to all social partner agreements that went way beyond the dispute concerning the hairdressing sector agreement. That much is suggested by the way the Commission treated the two agreements in the inland waterways and fishing sectors compared to other previous agreements on working time in the transport sector, or the adaptation of European law to an ILO Convention. In fact, in 2012, the Commission no longer trusted the social partners' accountability and expertise, and planned to take control of the outcomes of collective bargaining at European level (70). Additionally, the issue was undoubtedly related less to the content of any particular agreement than to the Commission's determination to bolster its aim of limiting the expansion of social legislation while weakening what had become the chief source of that expansion under the Barroso Commissions, namely the social partner agreements. Here comes the paradoxical outcome of the introduction of impact assessments into the assessment of social partners' requests to implement their agreements: when these assessments were completed, their conclusion was that the agreements added value and were relevant, and the Commission ultimately proposed that the Council should implement them through legislation; conversely, the Commission preferred not to complete the assessment of the hairdressing agreement, thus epitomising the interference of social dialogue in the development of European social legislation: the Commission *de facto* chose to allow work on the matter to grind to a halt and/or to 'reject' the agreement without waiting for the outcome of the assessment, as if it had doubts that the outcomes would, if published, fail to justify that refusal, or would do so inadequately.

The Commission's proposals on the legislative implementation of the agreements in the inland waterways and fishing sectors (2014 and 2016 respectively) included the standard statement that the Commission assessed the agreements in accordance with the Communication of 1998. Given the review process described above, that statement may surprise. In fact, we have seen that those agreements were reviewed using a reinterpretation by the Commission of provisions laid down in the 1998 Communication, and the legislative proposals were supported by documents from the Commission services evidencing the extent of the change in approach (71). What we cannot fail to see in this astonishing statement is a symptom of what psychoanalysis describes as a *denial of reality*. Although the Barroso 2 Commission initiated a substantive reinterpretation of the provisions of the Treaties and their means of application, which continued under the Juncker Commission, it did not acknowledge that it had done so, and neither did it explain it in public documents or during public consultations with the European social partners. From 2012, reinterpretation had largely been an improvised process that occurred when the Commission wanted to reject the hairdressing agreement and heavily shape how collective bargaining at European level would develop, especially because sectoral social dialogue might thwart the mothballing of the Commission's aims in the area of social legislation. This new interpretation was applied retrospectively to agreements negotiated and concluded in 2012 when the previous interpretation had been in place. However, when the new Commission

assumed office, it was gradually formalised in procedures and public documents: the Better Regulation programme would strengthen the approaches taken under the Barroso 2 Commission and further weaken the capacity of collective bargaining at European level to contribute to the development of European legislation (72).

### 3.4 2015: The Juncker Commission and the 'Better Regulation' package

Under the Barroso 2 Commission, tensions between the Commission and the European social partners, especially European trade unions, grew. The tensions were focused on the political response of the EU as a whole to the crisis in the euro area, starting with the Council and the Member States and including the Commission: the European trade unions had heavily challenged the priority placed by the European Council and the Commission on fiscal consolidation and labour market flexibility, their neo-liberal approach to necessary structural reforms, the Commission's role within the troika it formed with the ECB and the IMF in relation to Greece and, more broadly, the action taken in respect of countries requiring assistance (including the calling into question of collective bargaining in those countries). For its part, the Commission had often criticised the social partners for what it regarded as their inability or refusal to assume their responsibility for the structural reforms it deemed necessary which, in its eyes, were epitomised by the failure of the working time negotiations and the heightening of disputes between employers and unions on flexicurity and industrial restructuring. Hence the continued tension between the Commission and the unions, and between the Commission and the social partners as a whole; there was even mutual exasperation between the Commission and the European social partners: the Commission criticised the social partners for not contributing to the reforms under way, while the social partners criticised the Commission for trying to exploit European social dialogue by dictating a reform agenda and thus prejudicing the partners' autonomy. Where substantive differences were concerned, disputes relating to the implementation of sectoral agreements were minor: they had certainly racked up the tensions between cross-industry organisations, but they had done much more to mobilise the individual sectoral organisations concerned than the cross-industry organisations.

In view of these past disputes, the installation of the Juncker Commission was welcomed by the European social partners, all the more so since, upon his arrival, President Juncker announced his intention to bring about a new start for European social dialogue, an aim that was fulfilled when a high-level European Conference was held on 5 March 2015, followed by the establishment of working groups tasked with preparing a future agreement on social dialogue between the Council, the Commission and the European social partners. Additionally, the Juncker Commission very soon took a new approach to certain aspects of the EU's economic policy, for example in respect of investment and the euro area countries requiring assistance, and, through various initiatives, it demonstrated its commitment to the social dimension of the European Union, particularly by emphasising the 'Social Triple A' concept, relaunching Commission action in occupational health and safety, then proposing a 'European Pillar of Social Rights', which was particularly welcomed by the European trade unions.

In its first month of operation in spring 2015, however, the Juncker Commission also adopted a set of documents on legislative action by the Commission. This 'package', known as *Better Regulation* (73), is based principally on the work and discussions on the 'simplification' of European legislation conducted under the Barroso 2 Commission, and might appear to be the continuation or even extension of its predecessor's efforts. Having regard to the horizontal scope of this major document, it was drawn up principally within the Commission services, especially the Secretariat-General.

*Better Regulation* relates to all Commission legislative activity, but it includes a number of provisions specifically involving the social partners and their contribution to that legislative activity, in particular the arrangements for the Commission to review the agreements concluded between the European social partners, who are the subject of a specific section in a document annexed to the principal text. *Better Regulation* sets out the Commission's reinterpretation of the provisions on consultation with and negotiation between social partners, and, in so doing, publishes the guidance that had been used and distributed internally under the Barroso 2



Commission, for example in relation to impact assessments and their links to consultation and negotiation procedures.

Any reader familiar with the Commission's previous texts on social dialogue will note that the general tone of the sections of *Better Regulation* concerning social partner agreements is rather one of the Commission's *mistrust* and *suspicion* of the intervention of European social partners in the legislative process, and more precisely of their intervention through the possible conclusion of an agreement for which they would request a legislative implementation. The text recalls that the Treaty allows the social partners to conclude agreements and recognises their autonomy in that respect. However, precisely because that autonomy implies the possibility that the social partners may move away from what the Commission deems desirable, it describes how the Commission can, even must, do as much as it can to shape or guide the social partners' actions and how it can and must evaluate social partner agreements to ensure that they do not deviate from what it regards as acceptable. Even though the text is not a general Communication on social dialogue, it is likely to find that it contains no encouragement or positive message concerning the social partners' active involvement in the European legislative process, in particular by way of collective bargaining resulting in agreements to be implemented through legislation at European level, or even a simple factual reference to the initiative to restart European social dialogue recently declared by President Juncker: in fact, it would appear, by contrast, to be a text that is likely to actively dissuade the social partners from any temptation to negotiate that they may feel, or at least to be an attempt at self-defence by the Commission in a bid to protect itself from the risk posed by agreements resulting from an initiative and containing provisions that are inevitably beyond its control.

Admittedly, the wording of the text is not explicit in expressing that mistrust: it states that the Commission has full respect for the social partners' autonomy and that it will fully promote social dialogue. Like many similar policy documents, it uses the Community jargon and its established euphemisms ('proportionate', 'appropriate', etc.), and phrases that are open to many interpretations ('better regulation principles must be applied without prejudice to the role and autonomy [of the social partners]'). In practice, however, it tends to depict social partners' actions in the legislative process as an intrusion by a foreign body that could disrupt the flow of operations, and therefore describes the instruments which will now be available to the Commission to ensure either that the social partners' involvement will, as far as possible, be in line with the guidance previously provided by it, or that it will retain the greatest possible political discretion when conducting its review, in other words deciding whether to approve or *reject* the social partner agreements. Compared to previous Commission documents on the area available for collective bargaining at European level, and therefore to agreements concluded by the European social partners, the salient feature of the section on such agreements within *Better Regulation* is the statement that *the Commission can accept or reject the agreements*. This is a completely new statement that does not appear in any of the Commission Communications on social dialogue of the preceding 20 years, and the presence in the text of such a strong word as 'reject' contrasts sharply with the systematic use in the rest of the document of the established euphemisms referred to above. This suggests that the main message that the Commission wanted to communicate here was that it is now of the view that it has full discretion and freedom in this area, since the statement is not accompanied by a list of strict criteria that would guarantee that that discretion cannot be abused (additionally, from the Commission's point of view, getting this message across is clearly also a means of dissuading the European social partners from presenting it with an agreement for which it had not previously identified and guided the possible content by providing a preliminary negotiating framework) (74).

In respect of the implementation of Articles 154 and 155 TFEU, the Commission first goes into *upstream* shaping to guide future negotiations: in a continuation of the structure drawn up under the Barroso 2 Commission, it consisted in accompanying the text for the second stage consultation, concerning the content of the envisaged proposal, with an 'analytical document' describing, *inter alia*, the problems for consideration, the objectives to be pursued, the possible impact of the measures under consideration and the value added of Community action. Even though the text states 'In order to respect [...] the autonomous decision-making of the social partners, such an analytical document should not identify [the Commission's] "*preferred policy solution*", the analytical document is, in fact, an upstream scoping exercise by the Commission to establish what the social partners could include and conclude in a negotiation. We know that

scoping of this kind may just deter or restrain negotiation, since it identifies and defines in advance the full extent of the object of the negotiation. As stated above, that is precisely why the new form of words in Article 154 initiated negotiation at the first stage, when the negotiating parties have greater room for manoeuvre, because the Commission has not yet shaped the scope of the negotiation. Here, the Commission is doing the exact opposite of what the extension of the negotiation opportunities set out in the draft Constitution and then the Treaty of Lisbon was intended to achieve, in that it further closes the door by accompanying the second stage consultation with an analytical document designed with the express purpose of shaping the scope for negotiation more so than in the past.

However, there is also a *downstream* shaping process for assessing agreements that social partners seek to have implemented through legislation: this consists in a 'proportionate impact assessment' that must 'focus in particular on the representativeness of the signatories, the legality of the agreement [...] and the respect of the subsidiary and proportionality principles' in order to enable the Commission to decide whether to accept or reject implementation of the agreement. This is a rather strange and confusing interpretation of the impact assessment concept because the content which is described does not refer to impacts that should be assessed: on the contrary, it focuses on matters such as representativeness or legality, which have nothing to do with an impact assessment as such, no matter how 'proportionate' (and, we stress, it is unclear what the notion of 'proportionate' assessment is doing here); the assessment of subsidiarity and proportionality as referred to here is an assessment of the agreement, whereas the 1998 Communication clearly established, as stated above, that it should relate to European action in the matters covered by an agreement, and not the agreement itself, in order to respect the autonomy of the social partners. The text of the Better Regulation Toolbox does not clearly explain why it refers to the concept of proportionate impact assessment, but that lack of clarity indicates that the intention here is none other than to group together, in a single document and under a single name, the multi-criteria analysis introduced by the Commission in its communications on social dialogue that describe the arrangements for assessing the European social partner agreements. These consist in the criteria used to review the agreements themselves (representativeness of the signatories and legality of the agreement, including the absence of excessive burdens on SMEs), the criteria used to review the justification for and the added value of European action in the field covered by the agreement, and compliance with the concepts of subsidiarity and proportionality (although here the Toolbox wording creates confusion by suggesting that those criteria would apply to the agreement as such). The document is then submitted for review by the Regulatory Scrutiny Board established under Better Regulation. It is quite surprising that the review of agreements' legality and representativeness is submitted to the Regulatory Scrutiny Board for an opinion because a review made pursuant to those criteria employs completely different methodologies and competences from those used for impact assessments and do not, *a priori*, bear any relation to the composition or mandate of the Board (75). Most importantly, as the text expressly stresses that the objective of proportionate impact assessment is to furnish the Commission with the information enabling it to decide whether to accept or reject an agreement, we must take the view that a recommendation to accept or reject as a result of that process will essentially hinge on how well the agreement aligns with the conclusions of the subsidiarity and proportionality assessments presented with the impact assessment drawn up downstream of the agreement, or in the analytical document drawn up upstream of the negotiation for the second stage consultation (the analytical document must discuss the added value of European action). Moreover, the Toolbox also states that the proportionate impact assessment should refer to the previous analytical document (if any) and should not repeat it, which means that, if it does so, then the risk of rejection will be greatest either for agreements that diverge from the scoping proposed in the upstream analytical document or for those concluded as part of the negotiations that were not shaped by such a document.

This determination to shape and therefore close off negotiating possibilities is confirmed by the statement that the agreements concluded following a consultation will now be treated by the Commission as agreements concluded at the social partners' own initiative 'but would not need to revisit the need for EU action when this has already been covered by a previous analytical document' (76). This wording too is strange and somewhat obscure (it would have been much more straightforward to refer to agreements concluded following a negotiation initiated at the first stage consultation), but is worthy of discussion because it again illustrates the

Commission's mistrust of social partner negotiations that have not been shaped in advance by the Commission.

As noted above, the 1998 Communication drew a distinction between the agreements concluded following negotiations initiated as part of the consultation (at that time, this meant the second stage consultation on the content of the proposal envisaged) and the agreements concluded following negotiations initiated outside such consultations – at the initiative, therefore, of the social partners. Where agreements conducted at the social partners' own initiative were concerned, the Commission was of the view that it should discuss the relevance of Community action, since it had not had the opportunity to do so at the occasion of a presentation of consultation documents. Now, since the Treaty of Lisbon authorised negotiations at the first stage consultation, it allowed negotiations to be initiated as part of the first-stage consultation procedure, namely before the Commission confirmed (by opening the second stage consultation) that it regarded Community action as desirable in a given field (Better Regulation planned to develop this through an analytical document accompanying the text of the second stage consultation in order to shape the scope of the consultation as much as it could, and thereby shape the scope of any negotiation). As noted above, this novel feature in the Treaty of Lisbon reflected the intention to encourage negotiations between the social partners while not scoping the field and content out in detail in advance, and also satisfied the drive for simplification where consultations and negotiations related to matters that had previously been addressed in European legislation or in documents evaluating it. By applying that provision and, as we have seen, even by anticipating treaty recognition, the Commission was fully alive to the fact that it was thereby broadening the negotiating possibilities open to the social partners before achieving the aim of the first consultation stage, namely formally concluding its review of the possible focus of European action. In the documents for the first consultation stage, it expressly asked the social partners whether they intended to negotiate an agreement. However, Better Regulation restrained the scope of the new Treaty of Lisbon provision by stating that agreements resulting from a negotiation initiated prior to the Commission producing its analytical document (therefore after a negotiation initiated during the first consultation stage) would be treated as agreements concluded *at the social partners' own initiative*.

Thus, at a stroke, it reversed the scope of the new form of words introduced under the Treaty of Lisbon: even before that Treaty, the social partners were able to initiate negotiations on their own initiative at any time, including during the first consultation stage if they so wished. If negotiations initiated at the first stage consultation in conformity with the Treaty of Lisbon provisions were merely regarded as negotiations initiated at their own initiative, it would be difficult to see what the new form of words introduced under the Treaty of Lisbon brought to the table. To put it another way, Better Regulation abolished the previously very clear distinction between an agreement concluded at the social partners' initiative and an agreement concluded as part of the consultation process, and replaced it with a distinction between an agreement concluded within an area scoped out in an analytical document produced by the Commission and an agreement concluded in matters that had not be scoped out in advance in such a document: therefore, although the wording of Article 154 TFEU as established under the Treaty of Lisbon allowed the European social partners to initiate negotiations either in the first or second stage consultation, the key role that Better Regulation confers on the existence or otherwise of the analytical document allows the Commission, when assessing such agreements, to treat them differently depending on whether the negotiations leading to the agreements were initiated during the first or the second stage consultation, even though this approach does not appear to be compatible with the wording of Article 154 TFEU. The underlying rationale of Better Regulation therefore results in what is, to say the least, a strange situation where the Commission can launch the first consultation stage on a given subject (i.e. with no analytical document) and expressly invite the social partners to give consideration to a negotiation on that subject at that time, while stating in Better Regulation that it will, as a matter of principle, regard such a negotiation as having been initiated at the sole social partners' initiative, which amounts to denying that the Commission ever invited them to consider such a negotiation.

Evidently, the forms of words used in *Better Regulation* are far removed from the encouraging approach for European collective bargaining made by the Commission for more than 20 years in the name of dual subsidiarity and confidence in the social partners' ability to contribute to balanced European integration. The message here is not, as in the past, that the Commission

would like to promote the social partners' active involvement in the regulation of working conditions at European level, nor that it regards negotiation between the social partners as the most appropriate means of deciding matters concerning the organisation of work. It is instead that it has established the necessary procedures to: shape any actions by the social partners in the European legislative process, ensure that the European social partners are not able to disrupt its priorities or approaches, and protect itself against what it views as the potentially undesirable impacts of those actions, whether they are taken at their own initiative or in the framework of a consultation initiated by the Commission itself. In other words, as reflected in the oft-repeated phrase for accepting or rejecting an agreement, the Commission is of the view that it has full discretion to 'reject' any agreement (and the text does not even state that it has to justify its decision): the developments in European collective bargaining are part of a vision for European action and of the procedures laid down by the Commission, and must not disturb its vision of European action whether in terms of approaches, instruments or content.

Thus the message is also that the Commission intends to temper the specific features of the procedure for implementing the agreements and convert it into merely a variation on the ordinary legislative procedure where the Commission itself has the initiative and directly controls the process: although, as we have seen, the procedure concerning the agreements as a whole is specific in nature (concept of dual subsidiarity, rationale for approving an agreement rather than legislation in the true sense, inability of the Council to amend the text, Parliament is merely informed, etc.), the Commission subjects it to the general mechanisms for developing ordinary European legislation (77). Moreover, *Better Regulation* is a document that first aims to lay down principles and procedures for all of the Commission's regulatory activity and then to ensure, as far as possible, that those principles and procedures are applied across the board. It therefore comes as no surprise that *Better Regulation* was not the subject of prior consultation with the European social partners, as had been the case for previous Communications on the treaty provisions concerning social dialogue. The section on social dialogue in *Better Regulation* should not be regarded as a contribution to promoting social dialogue, but rather as a document that sets out how the Commission intends to develop its legislative activity in general and how it intends, in that regard, to shape the actions of the social partners as provided for under the Treaties and to provide itself with as much protection as it regards as necessary. Adopted in May 2015, *Better Regulation* at no time refers to the new start for European social dialogue announced by President Juncker two months earlier. This was therefore no coincidence; rather, it was an indication that these are developments that reflect different political rationales.

Although two different processes are involved, the Commission seems to view one as subordinate to the other. Against the backdrop of the new start for European social dialogue, the Commission did not suggest that it should, together with the social partners, review how to give fresh impetus to collective bargaining at European level (as might have been expected given the Commission's repeated calls in past Communications to make full use of the new ground broken by the Treaty in respect of collective bargaining); it proposed that they should discuss 'a clearer relation' between social partner agreements and the *Better Regulation* Agenda. This discussion is reflected in the Quadripartite Statement approved on 27 June 2016 by the cross-industry social partners, the Commission and the Dutch Presidency of the Council. However, the Commission did not succeed in securing the social partners' approval for the *Better Regulation* Agenda and its operative provisions, and we cannot conclude from the Statement that the cross-industry social partners accepted the Commission's reinterpretation of the treaty provisions on the implementation of agreements. Yet the preparatory work on the Statement does show that the Commission worked to secure, if not the support, then at least the neutrality of cross-industry organisations in relation to disputes concerning Article 155(2) TFEU, in other words disputes relating primarily to agreements concluded by sectoral organisations (78).

The definition of the arrangements for reviewing agreements that the social partners want to have implemented through legislation is obviously crucial to European social dialogue, both at cross-industry level and sectoral level: in the future, the social partners will not initiate any negotiation if they do not have clear and precise information about the criteria that the Commission will use to review any agreements where they request implementation *erga omnes* (79). The recent texts described above do not provide the social partners with any certainty or guarantee because, for the Commission, the rationale underpinning those texts is, first and foremost, to underline that it has unilaterally conferred upon itself full discretion in the

assessment of the agreements and that it regards itself as justified for rejecting them at will. This is clearly a significant change in attitude compared to past readings of the treaty texts and the Commission's practice over 15 years. The very principle of collective bargaining at European level is seriously weakened as a result. In any case, the disincentive inherent in the Commission's message was heard loud and clear by the European social partners: it was without question one of the reasons, although not the only one, behind the recent stark drop in the number of negotiations under way as part of European social dialogue, especially European sectoral social dialogue.

### **3.5 Words and deeds**

Although the Commission *de facto* reinterpreted the very substance and implications of the provisions of Articles 154 and 155 TFEU, in particular the arrangements for reviewing requests to implement agreements concluded under Article 155(2), it did not put forward a consolidated text updating all the arrangements. In practice, the section of *Better Regulation* (2015) concerning such agreements was merely added to the previous Communications of 2004, 2002, 1998, 1996 and 1993, even though the spirit and letter of those documents differ considerably. Their message is one of trust in and encouragement of collective bargaining, whereas the wording of the Better Regulation toolbox rather draws on a rationale of mistrust and a determination to shape and close the area for contractual relations. This mismatch is reflected in the texts' specific implications. It comes as no surprise, therefore, that the social partners who concluded the agreements struggle to understand how the Commission reconciles its obligation to promote European social dialogue with what would appear to be more akin to determination to stifle that dialogue and protect itself from it.

However, the situation becomes even more confused when we take stock, as we must, not only of words but deeds. And it would appear that, in its recent actions when reviewing social partner agreements, the Commission has cast aside not only the interpretation defined in its past Communications but also the rules that it had just set out in Better Regulation.

Since the adoption of Better Regulation in May 2015, the Commission has received four requests to implement European social partner agreements through legislation, all of which were concluded under the sectoral social dialogue framework. Two of those agreements were concluded before May 2015, and their review therefore began under the Barroso 2 Commission in accordance with the procedure that included an impact assessment; the agreement concluded in 2012 in the fishing sector on the adaptation of European labour law to ILO Convention C188, and the agreement concluded in May 2012 in the hairdressing sector concerning occupational health and safety, the review of which was suspended by the Barroso 2 Commission. Additionally, two agreements were concluded after May 2015, and their review opened under the proportionate impact assessment procedure described in Better Regulation, namely the agreement of December 2016 in the maritime transport sector to adapt labour law to amendments made to ILO Convention C186 in 2014, and the agreement of December 2015 in the central government administrations sector on the provision of information to and consultation of workers. Additionally, in 2016, the social partners in the hairdressing sector heavily revised and simplified their 2012 agreement and submitted it to the Commission, meaning that the revised agreement would be reviewed under the Better Regulation provisions.

Two of the four agreements referred to above concern the adaptation of European labour law to the provisions of ILO Conventions, namely the ILO Conventions in the fishing sector and in the maritime transport sector, concluded in 2012 and 2016 respectively. Both agreements were negotiated and concluded at the social partners' own initiative, and therefore are formally outside the Article 154 TFEU consultation process. As noted above, the relevance of European action in this field has never been in any doubt in either sector. Yet the agreement concluded in the fishing sector gave rise to a very lengthy investigation within the Commission services that opened when the Commission introduced impact assessment into the review process; the investigation continued after the adoption of Better Regulation, in line with the new procedures, and resulted in a proposal for legislation from the Commission that was tabled only in 2016 (involving, in total, almost three years of assessment). By contrast, the agreement concluded in the maritime transport sector in December 2016 was the subject of a very short investigation,

since the Commission tabled a proposal for legislation in July 2017 (80). Indeed, the Commission was of the view that it was not necessary to submit the agreement to the proportionate impact assessment set out in Better Regulation: admittedly, all that was required to bring European labour law into line with the ILO Maritime Convention was an amendment to a previous directive implementing an agreement involving the same European social partners. It should be noted here that the Commission's proposal for legislation of July 2017 referred, like its predecessors, to the agreement review criteria set out in the 1988 Communication, not to those in Better Regulation.

The agreement in the hairdressing sector continued to be the focus of hostility from the Commission and its services. In November 2015, illustrations in a Commission public information leaflet on the Better Regulation programme once again used the high-heels parody of the hairdressing agreement to showcase the merits of its approach in legislative matters, clearly to the anger of the agreements' signatories. On 23 June 2016, the social partners in the sector presented a revised version of their 2012 agreement that aimed to simplify it and focus on the aspects where there was little scope for challenging added value. But, given that President Barroso had made his position clear, and had repeated the British tabloids' send-ups, the Commission seems to have viewed the agreement only through the ridiculing and has paid barely any attention to its content. Similarly, President Juncker dashed the expectations of those hoping he would have a more open attitude in the matter than his predecessor: during a speech to the Executive Committee of the European Trade Union Confederation on 7 November 2016, he underlined his belief that the EU should not bother with the 'small stuff' in the agreement and repeated the reference to the parody of the sector's employees and high heels (81). Even though, strictly speaking, the matter should have been the subject of a proportionate impact assessment as described in Better Regulation, review of the agreement remained at a standstill, as if the Commission's chief concern was merely to prevent this sectoral dispute from dampening the support of the European cross-industry social partners too much, especially where trade unions were concerned, for initiatives it was developing elsewhere in the social field.

Similarly, the review of the social partners' agreement in the central government administrations sector of 21 December 2015 was not conducted in line with the arrangements set out in the spring 2015 package. The social partners requested legislative implementation of their agreement on 1 February 2016. Commissioner Thyssen acknowledged receipt of the request and announced the opening of a proportionate impact assessment, citing Better Regulation and the associated Toolkit for social partner agreements word for word. But, in fact, the Commission neither carried out nor genuinely opened the assessment. The review of the representativeness of the signatories to the agreement was the subject of a Eurofound study that found that the signatories' involvement was in conformity with Eurofound's standard methodology in the matter. The Commission did not forward a detailed written assessment of the legality of the agreement to the social partners concerned; it merely informed them of a few provisional, informal observations orally, thus precluding them from detailing any problematic points or adjusting them where necessary. The proportionate impact assessment as a whole, especially the section on the relevance of European action in the area covered by the agreement was virtually at a standstill for almost two years. This was not a case of things grinding to a halt, as had happened with the agreement in the hairdressing sector from 2012 onwards. As noted previously, in the hairdressing agreement, the Commission had launched the assessment process in association with a team of specialist consultants, and it was that process that was halted in 2014, in the context of discussions among the services involved as to the outcomes of the assessment and the Barroso 2 Commission's announcement that it would, in any event, not deal with the agreement during its term in office. However, in the central government administrations sector, the actual impact assessment was not even really opened: it was as if, from the outset, the Commission had taken the view that it would not deal with it and it was not even necessary to investigate it in line with the arrangements set out in Better Regulation and referred to in Commissioner Thyssen's letter noted above.

In response to a letter from the signatories, who were concerned at the situation, the Commission stated that it first had to explore 'the feasibility' of such an assessment. Ultimately, as part of the procedure brought before the Court of Justice, it explained that the assessment could not be conducted because of the lack of precision in the wording of the agreement. However, for the signatories of the agreement, these explanations are neither credible nor tenable: either they are a deliberate lie to try and justify, after the fact, that, as early as 2016,

the Commission had decided not to open the impact assessment because it had no intention of properly investigating the issue, or there was some confusion that proved prejudicial to respect for the social partners' autonomy: as noted on several occasions, the Commission itself stated that the relevance assessment concerns the area covered by an agreement and not its content; consequently, that assessment can be conducted irrespective of the detail or lack of it in the agreement: its content is of no consequence and claiming that lack of detail in an agreement made the relevance assessment infeasible is the same as declaring a lack of respect for the social partners' autonomy (82).

In the eyes of the signatories to the agreements in the hairdressing and central government administrations sectors, it was obviously hardly going to be acceptable for the Commission not to comply with the review procedure that it had itself drawn up. Just as unfathomable was the fact that the Commission had avoided all communication with them about the agreements for several years and had refused to forward the outcomes of the assessments it had conducted or claimed to have opened. This was in stark contrast to the Commission's practice toward the signatories of agreements concluded before 2012 which, for the most part, were presented to the Council in less than six months – a short time frame that enabled direct, open communication between the social partners and the Commission services. Hence the feeling among the social partners concerned that the Commission on this point failed to fulfil the obligation incumbent upon it to promote social dialogue, since it refused even to speak to them, and even forwarded them misleading or downright false information.

In January 2018, the Commission invited the signatories to the agreements in the hairdressing and central government administrations sectors to withdraw their requests for implementation *erga omnes* and to opt for implementation *inter partes* through action plans that would be supported by a grant from the European budget. The proposal reflected the Juncker Commission's effort to try to extricate itself from the contradictory situation in which it found itself: the fact that the two matters were at a standstill, or had possibly been swept under the carpet, stood in stark, unfavourable contrast to its actions on social dialogue and its recognition of a pillar of social rights. But, although any Commission initiative to restore the communication that it had broken off with the agreements' signatories could only be welcome, the proposal it made on this occasion was completely unprecedented in European social dialogue. The Commission had always recognised, and no one had, until then, challenged the point that the decision to implement an agreement *erga omnes* or *inter partes* was entirely a matter for the social partners and therefore was their decision alone, with no possibility of interference from the Commission (83).

The organisations that had signed the agreement in the hairdressing sector opened talks with the Commission services, with a view to discussing an action plan. However, their counterparts for the agreement in the central government administrations sector refused the proposed deal and asked for detailed information and documentation on the assessment outcome. By a letter dated 5 March 2018, the Commission formally notified them of its decision to reject their request to implement their agreement through legislation. The letter did not really give the reasons for the decision, and, in particular, did not set out the conclusions of a new assessment or detailed study into the legality of the agreement. Instead, it gave a brief account focusing on the Commission's view that a proposal for legislation was not appropriate given that the Member States had exclusive responsibility for the management of their administrations and that those administrations were organised in a variety of ways in the EU. Following that letter, the chief trade union involved, the European Federation of Public Service Unions (EPSU), brought an action before the European Court of Justice (84).

We should note, at this point, that the Commission later acknowledged that it had little or no objection to the content of the agreement and was ready to support and finance its implementation *inter partes*; its objection related specifically to legislative implementation. This is another reminder that all the disputes concerning the social partner agreements at issue here in fact involve a principle at the heart of the treaty provisions on social dialogue, namely the principle that a social partner agreement can lead to European legislation.

Now, the Commission openly states that that indeed is the difficulty posed by Article 155(2) TFEU; obviously, it has no objection to the social partners' concluding agreements to be implemented autonomously (*inter partes*), and would unquestionably welcome all signatories

to agreements choosing this method of implementation, even though it would result in very uneven implementation across the territory of the European Union. Conversely, it regards any negotiation initiated with a view to legislative implementation as dangerous: it considers that particular part of Article 155(2) as problematic, obsolete or irrelevant and therefore seeks to thwart it and discourage its use. We have noted that the European social partners had indeed taken on board the hostile attitude towards their agreements contained in Better Regulation. Clearly, they also understood the hostility in the Commission's actions: this is likely one of the reasons why sectoral social dialogue in this area lost momentum.

The signatories to the agreement on the provision of information and consultation in the central government administrations sector made a point of noting that their agreement was rejected at the very time when the Juncker Commission was welcoming the announcement of the European Pillar of Social Rights, which was the Commission's flagship for its work on the social dimension of the European Union. The Pillar expressly recognises the right of all workers, whether in the private or public sectors, to be informed and consulted – a major advance on the relevant clauses of the Charter of Social Rights of 1989 which applied only to employees in undertakings (that was one of the reasons cited as why the Directive on informing and consulting employees, which was adopted well after the 1989 Charter, did not include the public sector in its scope of application (Directive 2002/14/EC of 11 March 2002)). One of the reasons for this was that the evaluation of the effects of that Directive had attention to the fact that that exclusion did not appear to be justified and that, in 2015, the Commission had included the extension to the public sector within the scope of the social partners' consultation that led to the agreement (85). However the Commission did not use the central government administrations agreement as an opportunity to start covering the public sector, or to propose a follow-up to that agreement by developing legislation that would cover both central government administrations as well as local and regional administrations, since the public sector obviously does not consist solely of central government administrations. In this particular instance, the Commission argued instead that, regardless of what was stated under the Pillar, any promotion of those rights was exclusively a national responsibility and therefore depended on the goodwill of each Member State. In the view of the Commission, the issue at stake was therefore the competence of the Union in this respect and the request for legislative implementation of the social partners' agreement in the central government administrations sector had to be rejected. It would come as no surprise if the social partners concerned interpreted this decision as a sign of Commission doublespeak.



## Conclusion

Treaty provisions on the establishment of a contractual relations area at European level have existed for some 25 years. In this paper, we have examined the spirit in which these provisions were originally conceived and how they have been implemented throughout those 25 years. What can we learn from this examination? First that, for almost 20 years, there was a broad consensus between the European institutions and the European social partners on the added value of collective bargaining at European level and on the related implementation arrangements, but that, over the past few years, the Commission has undertaken a substantive reinterpretation of the meaning and scope of these provisions and the modalities of their implementation. And, second, that it is not surprising that, in many respects, this reinterpretation has been divisive, and that its legitimacy has been challenged.

### A substantive reinterpretation

When the provisions on social dialogue were first introduced in the Treaties, the intended objective, which was shared by all the stakeholders – European institutions, Member States and social partners – was undoubtedly to open up an area for collective bargaining at European level. Any collective bargaining system implies that arrangements must be adopted for implementing agreements reached, and the choice made in the Treaties was to ensure not only that agreements be implemented *inter partes* by their signatories and affiliated bodies, but also that their application be rendered binding *erga omnes* in the EU by a decision of the Council, at the request of the signatories, through an extension and approval mechanism that, in principle, was widespread in the current Member States (and still is widespread, although somewhat less so since the most recent enlargements).

The introduction of these provisions into the Treaties is inseparable from the process of structuring social dialogue at European level, which long involved the Commission and the European social partners in close interaction. And it was the objective of promoting European social dialogue, first recognised as a Commission objective, then as a commitment for the EU as a whole, that prevailed over the implementation of these provisions, and first the establishment of the arrangements for the *erga omnes* application of European social partner agreements, because this was indeed the major innovation introduced by the treaty provisions. European social dialogue itself developed within this framework, through the energetic efforts of the social partners, but also the active support of the Commission, which played a key part in this development, because promoting the social dimension of European integration was indeed one of the conditions for progress in integration.

The arrangements adopted for the *erga omnes* implementation of European social partner agreements did not give rise to any difference of opinion for almost 20 years. They were a way of allowing cross-industry and sectoral social dialogue to contribute directly to the development of European legislation: a dozen or so European social partner agreements were thus implemented by European directives. This was seen by all the institutions and stakeholders involved as evidence of the vitality of the European social partners, but also as evidence of the effectiveness of the support given by the Commission to social dialogue and the legitimacy and added value of this very special way of creating social standards at European level. Throughout this 20-year period, the European institutions, in particular the Commission, strongly encouraged collective bargaining at European level; they gave priority to this collective bargaining in the development of legislative initiatives on working conditions and expressed their confidence in the capacity of the European social partners to contribute in this way to the process of European integration: confidence, in other words, in their collective responsibility, their expertise on workplaces and industrial relations, and the potential of collective bargaining to work out appropriate solutions to problems relating to working conditions. In fact, if this positive record requires any qualification, it is primarily a case of stressing that only a limited number of agreements were concluded and recalling that the Commission often emphasised that the European social partners might not be using the provisions of the Treaties on collective

bargaining at European level as much as they could, which serves as a reminder that social dialogue develops against a background of converging but also diverging interests between trade unions and employers' organisations and that, throughout this period, there were clearly ups and downs in the promotion of the EU's social dimension.

But this paper has also shown how the situation has radically changed, and that this is essentially linked to the Commission's reinterpretation of the treaty provisions on the legislative implementation of social partner agreements: a reinterpretation arising from the Commission's redefinition of the arrangements for using legislative instruments in the process of European integration and in European social policy, but which also entailed the Commission's redefinition of what it understood by promotion of European social dialogue.

This is a substantive reinterpretation because the Commission ceased to encourage European collective bargaining, at least if it might lead the signatories to an agreement to request its legislative implementation: with its Better Regulation initiative (2015), the Commission established procedures and developed practices that had the effect of dissuading the social partners from engaging in negotiations resulting in such requests for legislative implementation. Moreover, although it had been the established practice of the Commission since 1993 to forward the agreements presented to it to the Council, with a view to their *erga omnes* implementation, and although it had never used the term '*rejection*' of an agreement in the numerous Communications that it had issued on European collective bargaining over the previous 20 years, it then stated that it deemed that it had complete discretion to accept or reject these requests for legislative implementation of the agreements (and, in so doing, it introduced into the Commission's vocabulary of common usage this notion of rejection of an agreement). And, moreover, in early 2018, it formally decided to refuse the request that had been submitted to it in 2016 by the signatories to an agreement on information and consultation for workers reached in the central government administrations sector. This "rejection" was unprecedented in the history of the European social dialogue, especially as it concerned an agreement concluded as part of a consultation procedure initiated by the Commission, which, in this connection, had formally asked the social partners concerned about their intention of entering into negotiations as permitted by the Treaty.

In this process, there was strong continuity between the Barroso 2 and Juncker Commissions, although these two successive Commissions differed appreciably in terms of the level and content of their ambitions in social matters. As regards redefining the arrangements for using legislative instruments, the new Commission followed and expanded upon the guidelines developed by the previous Commission: the Better Regulation programme stems from the Smart Regulation initiative and appears to be even more restrictive and dissuasive as regards the role of the social partners in the legislative process. And, while the Juncker Commission asserted its desire to give a new impetus to European social dialogue, in actual fact it took over from the Barroso 2 Commission the idea that it could declare itself to be fully committed to promoting European social dialogue at the same time as choosing at will those outcomes of social dialogue that it would promote and those that it would not, and even those that it would go all out to discourage, lampoon or oppose.

## A divisive reinterpretation

While, in the course of 2012, the Barroso 2 Commission started reinterpreting the arrangements for implementing the treaty provisions on European social partner agreements, this was first and foremost because it was firmly committed to a process of drastic limitation of the use of legislative instruments at European level, particularly in the social sphere. It was this political approach that came to thwart the legislative momentum that had become apparent in a few rare sectors of European sectoral social dialogue, where agreements had been reached whose signatories sought their legislative implementation. In fact, this affected only three agreements concluded in 2012 in the hairdressing, fisheries and inland waterways sectors, and the conclusion of these three agreements might, at first sight, appear to express a certain vitality in European social dialogue. But the Commission primarily saw in them the risk of a legislative momentum that might challenge the political choice to limit the EU's new legislative ambitions in the social area. And, as these agreements were concluded on the initiative of the social

partners, rather than following a consultation initiated by the Commission, at least from the formal viewpoint, the Commission regarded the requests for legislative implementation of these agreements with the suspicion. And, in order to make them more selective and facilitate a rejection decision, it altered the agreement review arrangements that had been established when the provisions on European social dialogue were introduced into the Treaties, and which had been in use for nearly 20 years without ever giving rise to a difference of opinion. And the Commission also reviewed all the provisions on the involvement of the European social partners in the legislative process and accordingly established procedures that had the effect of discouraging collective bargaining at European level, at least negotiations leading to a request for legislative implementation of an agreement.

In this process of limitation of any new ambitions in the area of European social legislation, the Commission clearly acted under the influence of the Council and the Member States, in particular those that were the most hostile to European social legislation and especially its expansion. But the Commission itself played a major role in defining and formalising this approach and in promoting it among its staff and in its relationships with the other European institutions. And, as it considered that this limitation of new ambitions on social legislation could be thwarted by the legislative momentum of European social dialogue, it also played a major role in weakening this aspect of collective bargaining at European level. Thus, given that the Treaty grants the Council the power to decide on the legislative implementation of a European social partner agreement, the Commission could have submitted the agreements concerned to the Council and left it to the latter to agree to legislative implementation or refuse it. But it considered that the proposals for *erga omnes* implementation of the agreements should be regarded as ordinary legislative proposals, which therefore fall under its full control, and insisted on itself proceeding with the ‘rejection’ of agreements where it did not regard implementation as justified, starting with rejecting the agreement on occupational health and safety in the hairdressing sector, which the Commission itself treated as emblematic of the social partner initiatives that it should reject (86).

The result was an unilateral reinterpretation by the Commission of the provisions on collective bargaining at European level, but also a reconfiguration of some of the paradigms underlying the relationship between the Commission and the social partners in the context of European social dialogue.

It is hardly surprising that this reinterpretation was, and still is, divisive, with the conflict basically setting the Commission against the trade union organisations, in particular the sectoral organisations. This reinterpretation was divisive, firstly, because the Commission embarked upon it following the vilification campaign surrounding the agreement reached in 2012 in the hairdressing sector – a campaign that was echoed and supported within the Commission itself, right up to the President: for the social partners concerned, there were a number of reasons to think that the Commission was establishing new arrangements for reviewing agreements only in order to find an ‘acceptable’ manner formally to reject the hairdressing sector agreement, which provided a focus for its hostility; and the fact that the process of formal review of this agreement was not completed by the Commission in line with the arrangements it had announced, and that its key documents had not been made public, raised further doubts as to whether the matter had been processed in due form. This context of hostility contributed to the deterioration in the relationship between the Commission and the signatories to the agreement: in turn, the Commission’s misuse of the lampooning of the agreement was seen by employers and workers in this sector as an expression of contempt (and in certain respects, class contempt) (87).

But the impact goes well beyond the differences of opinion that arose in connection with the agreement in the hairdressing sector. It affected collective bargaining at European level as a whole, whether as part of cross-industry or sectoral social dialogue, and in this area it signified a fundamental breach of trust between the Commission and the European social partners, that is to say a breach of the trust that had been key to the development of European social dialogue. Specifically, the Better Regulation initiative established procedures that institutionalised the Commission’s mistrust and suspicion towards the social partners and their role in the legislative process, allowing the Commission thus to protect itself against social partner initiative that would be considered outside its control. But the Commission is thus assuming a discretionary power such that it cannot help but discourage the social partners from engaging in collective

bargaining at European level, since they are given no guarantee as to respect for their autonomy (on the contrary, the Commission is trying its utmost to exercise control over the scope for any possible negotiations in advance), or even predictability, transparency and due compliance in the processing of any agreements by the Commission (the experience of the review of the most recent agreements has shown that the Commission scarcely complied with the procedures that it had itself laid down for this).

The reinterpretation undertaken by the Commission was not motivated by concern to do more to promote European social dialogue: on the contrary, it is the expression of what is now the Commission's concern to protect itself from any kind of involvement of the social partners in the European legislative process. Indeed, this is where the distance between the Commission and the social partners, in particular the trade unions, and primarily the sectoral organisations, has increased. Whereas the now dominant vision within the Commission is that European sectoral agreements can be an excessive burden and a cause of inflexibility hampering the economic performance of businesses and the EU, and there is therefore a need to work towards reducing rather than expanding it, the trade unions continue to see it primarily as an instrument to promote balanced European integration, protecting workers and reducing disparities within the EU. What is more, this is also where distinct differences lie between the Commission and the social partners as regards the definition of what the EU could and should be dealing with – the 'small issues' and the 'big issues', to use the political vocabulary of the time within the European institutions: here, the difference is all the more sensitive because the social partners, in particular the trade unions, clearly cannot give up on certain issues that are important in their eyes (such as occupational health and safety or workers' rights to information) or cease to make full use of the treaty articles available to them for this purpose, on the grounds that the EU, and the Commission claiming to act on the EU's behalf, might regard these subjects as small issues. And, whereas the vitality of sectoral social dialogue could allow the Commission to demonstrate its concern for specific aspects of working conditions, where there was a consensus between employers and trade unions on their improvement, its hostility to legislation has led it to see sectoral agreements as a threat and, therefore, to weaken rather than encourage social dialogue.

These questions have given rise to major disagreements between the Commission and the concerned social partners, particularly the trade unions. And, of course, the debate remains completely open as regards the legitimacy of the selective, restrictive approach adopted by the Commission: if, from social dialogue and its outcomes, the Commission wants to choose what it intends to promote and what it intends to oppose or discourage, can it still claim to be promoting social dialogue? If the promotion of social dialogue referred to in the Treaty is confined to promoting what the Commission sees fit to promote, is it still the promotion of social dialogue? Or is it very precisely what should be called the *instrumentalisation* of social dialogue by and in the service of the Commission? Instrumentalisation which, by definition, runs completely counter to respect for the *autonomy* of the social partners recognised by Article 152 TFEU, which is precisely the article of the Treaty providing that the EU should promote European social dialogue.

In this regard, it is certainly not healthy that the reinterpretation was never discussed with the European social partners and was expressly conducted by the Commission to justify its claim to have the greatest possible discretion as regards the promotion of social dialogue. Moreover, the Commission has never expressly recognised that it had thus fundamentally reinterpreted the treaty provisions, nor, of course, has it ever explained in any document how or to what extent this reinterpretation helped boost the promotion of European social dialogue (88).

These developments concern a specific element of both European social dialogue and European social policy. They do not allow us to draw conclusions on the overall achievements and record of the Barroso 2 Commission or the Juncker Commission in these areas. In particular, as far as the Juncker Commission is concerned, they coexist with a number of policy developments and social legislation which were and are considered positively by European social partners. But they reflect some significant changes in relations between the Commission and social partners, which deserve to be further taken into consideration.

## Notes

(1) Article 155(2) provides that the agreements may also be implemented ‘in accordance with the procedures and practices specific to management and labour and the Member States’, in other words through the voluntary actions of the signatory organisations and their affiliated bodies, and without obligation of any kind for the Member States or the Commission. But this arrangement for implementation *inter partes*, which has also been used by the social partners for some of their agreements, particularly since the year 2000, has given rise to scarcely any differences of opinion with the Commission to date as regards its principles.

(2) Schulten (2016).

(3) This contribution by the social partners is known as the ‘Agreement of 31 October 1991’, and it is universally regarded as one of the principal founding texts of European social dialogue, and indeed the most important of these founding texts in the light of its verbatim reproduction in the treaty provisions. Its origin demonstrates that European social dialogue is a *joint* creation of the Commission and the social partners.

(4) The agreement on parental leave (1996) covers an issue that had been the subject of a Commission legislative proposal in 1983, which had been blocked in the Council ever since by a British veto. The agreements on part-time (1997) and fixed-term work (1999) relate to types of work that, at the time, were known as ‘non-standard’, which had been the subject of a Commission legislative proposal in 1990 that had also been blocked in the Council since that time (COM(90) 228 final of 29 June 1990). These various proposals rested on legal bases of limited scope, which required unanimity, particularly Article 118a, and they were therefore blocked if vetoed by a Member State (usually the United Kingdom). The legislative logjam of these issues cleared by the *erga omnes* implementation of the agreements between the social partners cannot, therefore, be explained solely by the quality of the content of these agreements, but also by the new legal set-up established by the Maastricht Treaty: the legal base for legislative action in social matters became Article 2 of the Agreement on Social Policy, the Commission’s legislative proposal was presented to the Council under Article 4 of the Agreement, and was adopted by qualified majority of the 11 Member States that had approved the Agreement (i.e. without the United Kingdom). The agreements on working time in the maritime transport (1998), civil aviation (2000), railway (2004) and, later, the inland waterways (2012) sectors relate to sectors that had been deliberately excluded from the scope of the 1993 Working Time Directive (93/104/EC), because of the complexity of the situation of mobile workers in these sectors in respect of working time (Directive 93/104/EC was also based on Article 118a, in the name of protection of safety and health at work, and there were difficulties in the process of adoption, as the United Kingdom’s agreement was secured only on the condition that the Directive should allow for opt-outs).

(5) There were numerous Communications on European social dialogue between 1993 and 2004, all of which convey a message encouraging collective bargaining at European level, including the use of the Treaty provisions which make possible the implementation of a social partners agreement through EU legislation: COM(93) 600 final of 14 December 1993; COM(96) 448 final of 18 September 1996; COM(98) 322 final of 20 May 1998; COM(2002) 341 final of 26 June 2002; COM(2004) 557 final of 12 August 2004. There was, moreover, a Commission Staff Working Document devoted to the European sectoral social dialogue in 2010: SWD(2010) 964 of 22 July 2010.

(6) The Agreement on rights of information and consultation for civil servants and employees of central government administrations was entered into on 21 December 2015 between TUNED (Trade Unions’ National and European Administration Delegation) and EUPAE (European Public Administration Employers). The action was brought before the Court of Justice of the European Union by EPSU (European Federation of Public Service Unions), which is the main trade union organisation in the TUNED platform (*Case T310/18*). An action had been brought

against the Council by an employers' organisation in 1996 in respect of the legislative implementation of a European social partner agreement (*Case T135/96 UEAPME v. Council*).

(7) The report on 'Industrial Relations in Europe 2012', presented by the Commission in spring 2013 (European Commission, 2013), establishes a direct link between the campaign opposing the agreement in the hairdressing sector and the initiation of a discussion within the Commission on the criteria to be used in the assessment of social partners' agreements (p. 207). There have been numerous scientific studies on occupational health and safety risks in the hairdressing sector, and they are substantiated in publications of the World Health Organization, the International Labour Organization and the European Agency for Safety and Health at Work (OSHA). These risks are mainly about dermatological, respiratory and musculoskeletal disorders. The negotiation of the agreement by the social partners came after work carried out jointly by the European social partners in the sector and a scientific team from the University of Osnabrück, conducted as part of a project financially supported by the Commission, which contributed towards the preparation of the agreement. For a consolidated publication, see: OSHA (2014). On the agreement in the hairdressing sector, see, in particular: Bandasz (2014), Vogel (2018) and Dorssemont *et al.* (2018).

(8) The decline in European social legislation under the two Barroso Commissions (2004-2014) is well illustrated in the quantitative analysis recently presented by Christophe Degryse and Philippe Pochet (Degryse and Pochet, 2018). There are many different factors that can explain why the relevance of European legislation in general, and social legislation in particular, was being challenged in the years in question. Without any claim to be exhaustive, let us first cite the factors that are dismissive of supranational and/or European public regulations and, conversely, set store by national regulations in the name of considerations relating to subsidiarity and proportionality: these include the growth of Euroscepticism and the renewal of nationalist or sovereignist political forces and/or doctrines, but also the effects of the increasing distance between the elites who can benefit from globalisation and internationalisation and the mass of citizens who feel only the effects of the resulting precarisation; they also include the growing complexity of European governance following the enlargements of 2004 and 2007 and the considerable aggravation of political, economic and social disparities within the Union. Then there are the factors that are dismissive of legislative instruments as such and conversely set store by the effects of market operations or 'soft regulation' incentive policies: these include the hegemonic development of liberal analyses and theses among the political elites, administrations, businesses, certain sectors of civil society and the various places of intellectual or cultural production, and this is also linked to the development of inequalities, self-interest on the part of beneficiaries of this trend and intense lobbying to promote these liberal analyses and theses. Finally, there are the factors challenging the legitimacy of policies and legislation in social matters on grounds of considerations of efficiency or cost-effectiveness, or in the name of political priorities to be given, temporarily or permanently, to other areas and/or institutions and stakeholders, such as cutting public spending. Of course, these various factors can combine and accentuate each other, and their effects on the ambitions of European social policy depend on the balance of power within the European institutions.

(9) The relationship between governments and the social partners, and between the social partners – employers and trade unions – themselves, deteriorated sharply between 2000 and 2010, at the level of the European Union and in most of the Member States. When the 2008 economic crisis hit the countries of Europe, the EU and its Member States introduced policies to rescue banks, safeguard employment and relaunch business or cushion the impact of the recession that were broadly supported by the European and national social partners. But, subsequently, the explosion of public debt led the Union and the Member States to develop austerity policies, which broke with the consensus between governments and the social partners and caused tensions to develop between governments and trade unions, especially as the reduction in public spending, particularly social expenditure, went hand in hand with an increase in unemployment and inequality. When the economic crisis led the euro area into crisis, the Union and the Member States placed even more emphasis on austerity measures, and also the flexibilisation of working conditions, in particular in countries receiving assistance from other countries in the euro area: this sharply aggravated tensions between the European institutions and the trade unions, and also increased the divisions between the social partners. Given the Commission's role within the supervision mechanisms for the euro area, and also

within the Troika which, on behalf of the donor countries, supervised the expected reforms in the debtor countries, the relationship between the Commission and the trade unions deteriorated sharply during this period, and, in particular, the trade unions denounced what the Troika was doing and the industrial relations reforms it had encouraged or imposed (decentralisation of collective bargaining, termination of pay agreements, etc.). Moreover, within this same period, the relationship between the Commission and the trade unions worsened with the Commission's launch of its programme of reassessing the value of European legislation, not least social legislation (information and consultation for workers and occupational health and safety), a programme in which the unions perceived a risk of social regression.

(10) Between 1985 and 1994, European labour legislation gained 32 legislative acts, consisting of 24 new directives and eight revisions. Between 1995 and 2004, it gained 38 legislative acts, consisting of 23 new directives and 15 revisions or geographical extensions. Between 2005 and 2014, it added only 13 legislative acts, consisting of seven new directives and six revisions. And of those seven new directives, two were the outcome of institutional negotiations that had begun before 2005, and four of them were implementing European social partner agreements. After 2005, therefore, European labour legislation was hardly expanding at all, except through agreements between the European social partners, in particular stemming from the sectoral social dialogue, which thus became its main source of expansion (Silva, 2015).

(11) The relaunch of European social dialogue announced by President Juncker in 2015 was warmly welcomed by the European social partners because their relationship with the Commission had deteriorated very severely under the Barroso 2 Commission. The concept of relaunching social dialogue clearly contained a reference to the launch of European social dialogue by President Delors in 1985, with the year 2015 marking its 30th anniversary, and, for most of the European social partners, the years of the Delors Commissions were those of the Charter of Social Rights and of the social dimension of the internal market, making it the 'golden age' of European social dialogue (by contrast, the dominant discourse of the Barroso 2 Commission and its administration treated that as a bygone era). President Juncker's personal background clearly contributed to this positive welcome, in particular his role in the Luxembourg Government and later leading that Government during the years of building Social Europe.

(12) In its REFIT Communications of 2 October 2013 (COM(2013) 685 final) and 18 June 2014 (COM(2014) 368 final), the Barroso 2 Commission stated that it had decided not to bring forward a proposal for legislative implementation of the agreement on occupational health and safety in the hairdressing sector 'during the present mandate'. The wording of this decision is ambiguous: clearly a sign of tensions within the College of Commissioners and across the departments, which had necessitated compromise wording that could be read in different ways. The text of the 2013 Communication states, in a footnote, that the Commission was obliged to analyse the social partner agreement and to inform the signatories of its decision, that it would continue analysing the agreement and, during the present mandate, would not bring forward a proposal for implementation (note 14, p. 8). One can read into this wording the description of successive sequences in the current and future work of analysis, which in no way prejudices the conclusions of the analysis (apart from indicating that the Barroso 2 Commission did not deem the issue worthy of more rapid treatment); on the other hand, one can read into it a substantive, at least implicit, decision by the Barroso 2 Commission on the agreement in question, if only because the Barroso 2 Commission is keen at least to communicate expressly in this way that it had decided not to bring forward a proposal during its mandate (whereas it could have confined itself to stating that the analysis was in progress). The text of the 2014 Communication confirms that the Barroso 2 Commission would not bring forward a proposal during its current mandate, without referring to the aspects of the work schedule mentioned in 2013. If the correct reading is that this was a substantive decision, then the Commission did not meet its obligation to inform the signatory parties immediately of the reasons for its decision: this obligation is clearly stated in Communication COM(93) 600 final of 14 December 1993 on the treaty provisions on social dialogue, of which the Commission was clearly aware, as it had referred to it in its 2013 text. Within the Commission departments, the adopted wording was undoubtedly understood to be the clear expression of an intention to refuse to allow the implementation of the agreement (implying, for the departments concerned, an invitation to ensure that the analysis of the agreement should lead to the conclusion that it was not appropriate to accede to the request for

legislative implementation of this agreement), even though this clearly conflicts with the statement whereby the purpose of analysing the agreement is to elucidate the Commission's decision completely objectively and transparently, which prohibits that decision from being taken before the analysis is completed and the conclusions of the analysis from being somehow dictated in advance.

(13) The statement according to which *the Commission can accept or reject* an agreement (and the request for legislative implementation of that agreement) is the one that most epitomises the reinterpretation by the Barroso 2 and Juncker Commissions of the treaty provisions on social partner agreements. Nowhere is this statement to be found in any of the Communications that the Commission had devoted to European social dialogue since 1993, and the use of the heavily charged concept of *rejection* alone points to the strange nature of such a statement in the discourse of an institution like the Commission. This statement appeared publicly under the Barroso 2 Commission, in the Staff Working Documents accompanying the Commission proposals on the implementation of the agreements on working time in the inland waterways sector (SWD(2014) 226 and 227 of 7 July 2014). It was then reiterated, verbatim, in the documents of the Better Regulation programme adopted under the Juncker Commission in May 2015 (COM(2015) 215 final and SWD(2015) 110 and 111 of 19 May 2015: 'Since the Commission cannot amend the text of the agreement but only accept or reject it'), and therefore in the documents adopted following the introduction of the Better Regulation Agenda (such as SWD(2016) 144 of 29 April 2016 concerning the agreement on the implementation of the ILO Work in Fishing Convention). The novel nature of this statement and its recurrence in these documents emphasise its central importance in the reinterpretation of the treaty provisions, and hence it can be seen only as a carefully, deliberately chosen statement. But it can be seen also as a questionable, statement, which, moreover, constitutes a symptom of the form of hostility that has grown up, within the Commission, around European social partner agreements. Here, three aspects are to be stressed. First, there is the use of the word *rejection*, which has aggressive, deprecatory or emotive connotations, rather than a more neutral term such as, for instance, refusal, or indeed a euphemistic circumlocution, as is customarily to be found in comparable documents; there is a hostile dimension to this word, and it can be inferred that either the Commission wanted to convey a message of hostility, or this was some kind of slip – which clearly conveys the same message, and emphasises that, in this case, the hostility was such that no one realised that it had been expressed in this way. And then there is the, at best, vague nature of the wording used in the Better Regulation Guidelines and the accompanying Toolbox ('since the Commission cannot amend the text of the agreement but only accept or reject it'), according to which the Commission would therefore accept or reject the *text* of the agreement, or indeed the *agreement* itself, whereas it should be ruling exclusively on the *request* for legislative implementation of the agreement, and not on the text of the agreement or the agreement as such. Finally, though the issue is debated among lawyers and experts, there is the questionable, deceptive nature of a statement suggesting that the Commission has full discretion to choose between acceptance and rejection, as though these were two equally available options, whereas many legal experts consider that cannot be the case, since it is a choice that the Commission can make only in full compliance with Article 152 TFEU and the obligation to promote social dialogue at European level, which is an obligation for the Union and hence for the Commission, which cannot avoid it. That is why it can be argued that the choice here cannot be a matter of discretion and must be based on criteria that are strictly defined, justified on specific grounds and consistent with this obligation arising from the Treaty, from which the Commission cannot, therefore, exempt itself at will (that is why this statement is not to be found in any past Communications: the Commission confines itself to formulating the criteria that the agreement must meet in order for its legislative implementation to be proposed to the Council; clearly, the Commission has to check that the criteria are met by the agreement). Beyond these observations, it is necessary to outline the context for the climate of hostility surrounding the Commission's reinterpretation of the treaty provisions on social dialogue, which materialised among its staff during the review of the agreements reached in 2012. The Barroso 2 Commission had made its Smart and then Better Regulation Agendas a top priority, to be implemented by all Commission services under the lead and coordination of its Secretariat General (to the point of structuring the Secretariat-General's organisation chart around the words 'Better Regulation'). In this context, the sudden appearance of the three sectoral social partner agreements in 2012 was seen as the unexpected *intrusion* of a 'foreign body' into the ordinary legislative process and into the reform of the arrangements for the Commission's legislative activity. Moreover, within an administration striving to project a



modernising image, which was very largely of the neo-liberal persuasion, European social dialogue appeared to be associated with a different era, that of the Delors Commissions, which, at that time, was something of a *bête noire*, so it is hardly surprising that the very idea of refusing to accept an agreement, thus creating a precedent, might have appeared to be a necessary contribution to the modernisation of Commission activities.

(14) The proclamation of the European Pillar of Social Rights was made at the Social Summit for Fair Jobs and Growth held on 17 November 2017 in Gothenburg. The Juncker Commission hoped that this proclamation would enjoy the full support of the European social partners, in particular the European Trade Union Confederation (ETUC). The announcement of its refusal to follow through with the agreements in the hairdressing and central government administrations sectors, which would only have antagonised the two major ETUC federations involved in these agreements (UNI Europa and EPSU) was done immediately after the Summit that the Commission invited the signatory organisations to meetings about the status of the review of these agreements. In the course of these meetings, on 17 January 2018, it informed the organisations concerned that it would not be acceding to their requests for legislative implementation of these agreements and that, consequently, it asked them to withdraw these requests and opt for implementation of their agreements on an *inter partes* basis. In the case of the agreement reached in the central government administrations sector, these proposals were confirmed in the documents brought before the Court of Justice in the context of Case T 310/18.

(15) Establishing a European Pillar of Social Rights has been one of the major initiatives of the Juncker Commission, and its solemn proclamation in Gothenburg by the Council, the European Parliament and the Commission gave the European institutions the opportunity to reiterate the importance they attached to the social dimension of European integration. Preparations for the Pillar involved wide-ranging consultation of the European Parliament, the social partners and civil society, and, at that point, the Pillar was widely supported and raised many expectations, but, since it was a political declaration, its actual scope is still uncertain today, especially as its implementation is very largely left to the initiative of national authorities and the social partners. The European Trade Union Confederation came out heavily in favour of the Pillar, which it felt could give momentum to Social Europe, even though the adopted text was not binding. It is worth mentioning here that the political proposal to establish a European Pillar of Social Rights was first raised on 26 May 1987 by Michel Hansenne, the Belgian Minister for Social Affairs, who was chairing an informal meeting of the Ministers for Employment (at the time of the Europe of the Twelve): this meeting took place after the Single Act had come into force, and Michel Hansenne advocated that Social Europe should be built on a pillar of social rights alongside European collective agreements. President Delors took up the idea of a pillar of social rights at the 1988 ETUC Congress in Stockholm and embodied it in the 1989 Charter of the Fundamental Social Rights of Workers.

(16) While the treaty provisions on collective bargaining at European level stem directly from the 'historic' agreement reached by the cross-industry social partners on 31 October 1991, and while the legislative momentum of the cross-industry social dialogue was considerable in the 1990s, it must be acknowledged that this momentum then declined sharply and is now extremely low. In the first few years after the Maastricht Treaty and its Agreement on Social Policy, followed by the Treaty of Amsterdam, came into force, the European cross-industry social partners entered into three agreements that were implemented by European directives: parental leave (1994), part-time work (1997) and fixed-term contracts (1999); but there has followed a very long period (2000-2019) during which they have no longer been able to reach a successful conclusion in cross-industry negotiations leading to an agreement implemented by legislative means, apart from the negotiations leading to their 2009 agreement on revision of the directive on parental leave, which itself had been based on their 1994 agreement (which could therefore be amended or updated only through an agreement also implemented by a directive). During this long period, there have also been two sets of cross-industry negotiations with the aim of reaching an agreement implemented by legislative means, but which failed (on temporary agency work in 2002 and on working time in 2012); and there have been four sets of successful negotiations, but with the aim of establishing 'autonomous' agreements, because their implementation is a matter for the signatory organisations and their affiliated bodies and is not effected through European legislation (agreements on teleworking in 2002, stress at work in 2004, harassment at work in 2007, inclusive labour markets in 2010 and active ageing in

2017). In total, and this is a result, in particular, of employers' strong reservations about the conclusion of agreements implemented through legislation, the capacity of cross-industry social dialogue to produce legislation has been four agreements implemented by European directives, three of which dated from the 1990s (the fourth one being merely an update of the first). It is also because the legislative momentum of cross-industry social dialogue had substantially declined that the Commission thought that the European cross-industry social partners would not rally firmly and jointly to oppose the reinterpretation of treaty provisions, of which they were, however, if not the authors, then at least the co-authors. Given the failure of the negotiations on working time in 2012 and the differences between employers and trade unions over the value of legislative instruments at European level, the European cross-industry social partners were clearly not in the best position to act jointly with a view to preserving the former interpretation of these provisions in full.

(17) See, for example, Didry and Mias (2005) and Mias (2004). The *creation* of European social dialogue from 1985 onwards owes much to the personal commitment of President Delors to social dialogue, a commitment aligned with his own professional, ideological and political journey. However, the support given by the Delors Commissions to European social dialogue did not derive solely from the personal views of President Delors or from the commitment of most of the members of those Commissions, who in general were European social democrats or Christian democrats, to the common values of the 'European social model'. It also reflected the political need for the then Commission to rally the economic and social forces of Europe at that time around the single internal market project as widely as possible, including those forces who feared that the opening up of competition within that market would have negative consequences and who might try to frustrate the market project by mobilising their powers to resist or disrupt it. For the private sector and its employees, the prospect of the single market signified a potential boost for growth and employment, but there was also a temptation, particularly among small and medium-sized undertakings, to seek to preserve national markets and, therefore, to oppose the liberalisation of competition. As for the public sector and its employees, it was clear that they would be the ones most directly affected by the internal market project, as it would liberalise the transport, energy, postal, telecommunications and many other service sectors, all of these being sectors often dominated by monopoly-holding public undertakings whose employees frequently had the status of civil servants and among whom there was also a high level of unionisation, leading to a marked ability to resist change. Establishing European social dialogue and embodying it in the broader project of the promotion of social Europe was a way of involving these stakeholders in the internal market project and reducing potential resistance to it. Conversely, the weakening of the trade union movement, in particular the reduction in its ability to resist the economic liberalisation processes, later led the Commission and the Member States to consider that the EU could reduce its ambitions in respect of the 'social dimension' of European integration and also reduce its support for European social dialogue.

(18) As well as the works of Didry and Mias (2005), see Welz (2008); see also the testimonies of Jean Degimbe (1999) and Jean Lapeyre (1997), who were, respectively, the then Director General of DG V [Employment and Social Affairs] of the Commission and the then Deputy General Secretary of the European Trade Union Confederation (ETUC).

(19) Schulten (2016).

(20) European Commission (1991).

(21) The Commission considered that a directive was the most appropriate legal form by which to legally formalise the implementation of an agreement *erga omnes*. As recalled by the Court in its judgment in Case T-135/96 UEAPME v. Council, the German Government had contemplated the possibility of a decision *sui generis* (paragraph 45 of the judgment).

(22) Within the EU12 of the time, the Danish model of industrial relations was specific and it was well known at the time of the negotiation of the Maastricht Treaty that Danish public opinion feared that further European integration would endanger this model: hence the attention paid by the Commission to finding wordings which would be acceptable by all the then Member States, including Denmark. The Danish industrial relations model is characterised by a high membership of employers' and workers' organisations, which explains why the universal

applicability of agreements between the social partners has long been recognised in fact and in use without the need for legal validation. The situation is similar in the other Scandinavian countries. That is why the Scandinavian countries were the scene of disputes over the applicability of collective agreements to posted workers when, following the enlargement of the EU in 2004, the number of postings in those countries rose. After the new Member States and their undertakings obtained the freedom to provide services, the question of applicability of collective agreements to posted workers was brought before the European Court of Justice, which held that universal applicability needed to be expressly established by the law. This is plainly an argument in favour of the implementation of agreements between the social partners being guaranteed by a process of legislative extension.

(23) Until the early 2000s, all the agreements concluded by the cross-industry social partners led to a request for legislative implementation, confirming that, in the eyes of the social partners, this was the preferred and most secure method of implementing their agreements. However, although their 1991 Agreement saw the European social partners start to work closely with the Commission to define the means of implementing their agreements *erga omnes*, they did not devote the same attention during that period to the means of implementation *inter partes* which was also covered in the 1991 Agreement. It was only in the early 2000s that they began to consider the possibility of implementing certain agreements *inter partes*. There were two reasons for this: first, general misgivings on the part of employers with regard to legislation made it increasingly difficult to conclude agreements destined to be implemented by way of a directive (hence the failure of negotiations on temporary employment contracts); secondly, those employers' misgivings with regard to legislation became almost unanimous when the social partners needed to tackle questions together involving concepts the definition and legal scope of which appeared insufficiently precise or secure; in these situations, the employers opposed the legislative implementation of agreements because they feared that uncertain wording would later give rise to disputes of interpretation before the national or European courts. This was, in particular, the case with agreements on telework, work-related stress and harassment at work, which led to the conclusion of agreements needing to be implemented *inter partes*. It is now commonplace to use the term 'autonomous' agreements in relation to agreements that are implemented by the signatory parties and their members 'in accordance with the procedures and practices specific to management and labour and the Member States' (Article 155(2) TFEU) (the term 'autonomous' therefore qualifying the implementation procedure and not the initiation of the agreement, that is to say, without there being any link to a consultation procedure initiated by the Commission). It is more than likely that employers engaged with this form of 'autonomous' agreement precisely because they feared that the Commission would otherwise propose a directive on the topics in question, which would have dictated the exact meaning of concepts that were problematic for the employers. In the eyes of the employers, therefore, the very existence of an autonomous agreement of the European social partners on a particular topic afforded the best protection against the risk of a legislative initiative by the Commission, since it allowed the potential added value to be questioned. The Commission realised this and, in certain cases, expedited the launch of its procedures for consulting the social partners in order to demonstrate its intention to present a legislative proposal, precisely in the areas where it feared that the social partners could effectively jeopardise any possibility of legislation by concluding an autonomous agreement. In this way, consultation of the social partners on stress at work was brought forward by the Commission (which had, at the time, begun to prepare an initiative on psychosocial problems at work) when it learned that the social partners were preparing to begin negotiations on this topic on their own initiative, with a view to reaching an agreement which would be implemented autonomously; the launch of the consultation procedure allowed the potential negotiations to be seen as negotiations linked to a Commission consultation, thereby enabling the Commission to assert its right to undertake an assessment of the implementation of the autonomous agreement which thus took the place of potential European legislation (hence the comments in Communication COM(2004) 557 final of 12 August 2004 about the Commission monitoring the implementation of autonomous agreements: see above). The agreement of the cross-industry social partners on telework was signed on 16 July 2002. Four other 'autonomous' agreements in the context of cross-industry social dialogue would follow: on work-related stress (8 October 2004), harassment at work (26 April 2007), inclusive labour markets (25 March 2010) and active ageing (8 March 2017). It must be noted that, in European social dialogue, the use of this form of *inter partes* implementation with effect from the 2000s represents a considerable departure from the Danish model which formed the original basis of its formulation in the

Treaty: the Danish model of industrial relations is based on high levels of membership of employers' organisations and unions, as it is these high membership levels which guarantee an effective general application of the agreements; by contrast, when membership levels are lower, on the union side and even more so on the employers' side, as is the case in most European countries, 'autonomous' implementation is necessarily limited and, therefore, the organisations concerned more often than not consider it as merely voluntary and optional. This is confirmed by an analysis of the effective implementation of the 'autonomous' agreements cited above, an implementation which proves to be very unequal within the EU. Given the current state of the structures and capacities of the social partners in Europe, opting for the autonomous implementation of an agreement amounts to the acceptance of wide disparities in the implementation of that agreement.

(24) With the exception of a minor amendment concerning the extension of the nine-month time limit on negotiations (decided by common agreement between the Commission and the social partners, and not by the social partners alone). In addition, the Member States amended the sentence of the Agreement concerning the binding implementation of the text of the agreements 'as they have been finalised' and the signatories of the Agreement were very worried about the removal of these last words. However, the Commission made clear in its Communication of 1993 that any amendment (by the Council) to the text of an agreement would imply that the text would no longer be a social partner agreement.

(25) Brian Bercusson (1996) suggested that the creation of European social dialogue could also be regarded as a reaction to the deregulation process happening in the United Kingdom from 1979 onwards and, thus, as an unexpected consequence of that process (characterised by the weakening of collective bargaining and national social legislation and resistance to European social legislation).

(26) Action Programme relating to the Implementation of the Community Charter of Basic Social Rights for Workers COM(89) 568 final of 29 November 1989. This action programme comprised 47 proposals for action, 18 of which were legislative proposals from the Commission (some of those proposals were not entirely new, but the 1989 Action Programme relating to the Implementation of the Charter undeniably led to a significant enrichment of European social legislation).

(27) When the Treaty of Maastricht entered into force, European sectoral social dialogue involved only 15 or so sectors (fishing, agriculture, extractive industries, steel, textile, various transport sectors, etc.), that is to say, in essence, those sectors whose activities were international by nature or were directly affected by the Community policies at the time. Sectoral social dialogue would develop in parallel with the establishment of the Single Market, and the Commission would set up a general framework for organising sectoral social dialogue in its 1998 Communication on social dialogue (COM(1998) 322 final and Decision 98/500/EC of 20 May 1998). Today, there are 43 Sectoral Dialogue Committees, corresponding to sectors of activity which together cover some 75% of paid employment.

(28) As the IGC dealing with the preparation of the Treaty of Amsterdam was due to commence its work in 1996, all the parties involved in the parental leave issue collaborated to achieve rapid success in illustrating the appropriateness of Articles 3 and 4 of the Agreement on Social Policy and the arrangements for their implementation. In many respects, the Agreement on Parental Leave was more valuable in terms of its very existence rather than in terms of its content: the pomp and ceremony involved in the signing of the agreement, followed by the adoption of the Directive, highlight the symbolic value attached to such events by the Commission, European social partners and Member States alike. The schedule for the work undertaken illustrates the cooperation involved: the Commission began the first phase of consultation on 22 February 1995, and the second consultation phase was initiated on 21 June 1995; the social partners announced their intention to negotiate on 5 July 1995, only two weeks after the second consultation had begun, and they concluded their agreement on 6 November 1995 (taking five months in total, including the summer recess, to conclude the agreement and have it validated by the decision-making authorities of the signatory organisations, while the Treaty proposes a negotiation period of nine months, which may be extended); the Commission presented its proposal for a directive on 31 January 1996, and the Council adopted a political agreement after

less than two months, by 29 March 1996; the European Parliament gave an opinion on 14 March 2016; the Directive would be formally adopted on 3 June 1996. See Falkner (1997).

(28bis) In its Opinion 94/C 397/17 of 24 November 1994, the European Economic and Social Committee considered that the Commission had a duty to propose to the Council the legislative implementation of an agreement if the signatories of this agreement jointly requested it. See EESC (1994).

(29) As from the 1993 Communication, the Commission has pointed out that the agreements whose signatories request their legislative implementation must satisfy the conditions of representativeness and legality, to which is added a further condition that constraints imposed on SMUs as a result of the agreement's legislative implementation must be taken into consideration. From one Communication to another, those criteria remain the same, but the condition relating to the SMUs is sometimes incorporated into the legality condition as such consideration of the SMUs is a general condition applying to all proposals for European social legislation: it is set out in Article 2 of the Agreement on Social Policy annexed to the Treaty of Maastricht, then in Article 137 of the EC Treaty, and now in Article 153 TFEU (paragraph 2(b)).

(30) See Directives (EU) 2018/131, recital 7; 2017/159, recital 7; 2014/112/EU, recital 7; 2010/18/EU, recital 9; 2009/13/EC, recital 11; 2005/47/EC, recital 14; 2000/79/EC, recital 13; 1999/70/EC, recital 18; and 1999/63/EC, recital 14; Directives 2010/32/EU and 2010/18/EU cite precisely the same criteria in their respective recitals 5 and 9 but without explicit reference to the 1998 Communication.

(31) Aukje van Hoek (2018) recently wrote an interesting article on directives adopted on the basis of social partner agreements. She points out that the explanatory memorandums included in the Commission's proposals cover not only the criteria of representative status, legality and impact on the SMUs but also the criteria of subsidiarity and proportionality. However, these are not criteria for assessing the agreements *per se* but criteria for examining the appropriateness or advisability of Community action in the field of the agreement.

(32) COM(2004) 557 final of 12 August 2004, paragraphs 3.1 and 4.1.

(33) In one paragraph which identifies the cases in which the Commission considers that preference should be given to implementation by a decision of the Council (rather than to 'autonomous' implementation by the social partners and their affiliates), the 2004 Communication states that '[a]utonomous agreements are [...] not appropriate for the revision of previously existing directives adopted by the Council and European Parliament through the normal legislative procedure' (paragraph 4.4 of the Communication). That assessment by the Commission should be borne in mind in the light of its decision of March 2018 to reject the implementation by legislative means of the agreement of the social partners from the central government sector, an agreement which sought specifically to broaden the scope of Directive 2002/14/EC establishing a general framework for informing and consulting employees to include employers and employees in central government, and on the contrary to invite the signatories to the agreement to opt for autonomous implementation. This may present a topic for debate. After all, extending the scope of the existing directive to cover employees and employers within central government does not, strictly speaking, constitute a revision of that previously existing directive. However, the focus of the consultation was specifically to consider recasting existing directives, following large-scale assessment of their effects, and, rather than involving an area which would never have been addressed by the European legislature, the negotiations concern the revision of some limits to the scope of an existing directive. According to the recommendation set out in the 2004 Communication, this approach could advocate implementation by a Council decision rather than autonomous implementation.

(34) Judgment of the Court of First Instance (Fourth Chamber, Extended Composition) of 17 June 1998, Case T135/96.

(35) Council Resolution of 6 December 1994 on certain aspects for a European Union social policy, OJ 1994 C 368, p. 6.

(36) Council Decision 2000/228/EC of 13 March 2000 on guidelines for Member States' employment policies for the year 2000, OJ L 72, 31.3.2000, p. 15.

(37) See the opinions of the European Parliament on the Agreement on Social Policy: PE 205.306/II/fin of 18 February 1994 and PE 209.928/fin of 20 April 1994.

(38) See note 28 above.

(39) The Agreement on Part-Time Work was concluded on 6 June 1997; the Commission presented its proposal for a directive on 23 July 1997 (COM(97) 392 final), and the Council adopted Directive 97/81/EC on 15 December 1997, six months after the conclusion of the agreement. The Agreement on Fixed-Term Work was concluded on 18 March 1999; the Commission presented its proposal for a directive on 28 April 1999 (COM(99) 203 final) and the Council adopted Directive 1999/70/EC on 28 June 1999, i.e. little more than three months after the agreement had been concluded.

(40) The Agreement on the organisation of working time of seafarers of 30 September 1998 gave rise to a Commission proposal for a directive on 18 November 1998 and to Council Directive 1999/63/EC of 21 June 1999. The Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation of 22 March 2000 gave rise to a Commission proposal for a directive of 23 June 2000 and to Directive 2000/79/EC of 27 November 2000. The Agreement on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector of 27 January 2004, concluded outside the consultation procedure, gave rise to a proposal for a directive on 8 February 2005 and to Directive 2005/47/EC of 18 July 2005. The Agreement on the [ILO] Maritime Labour Convention of 19 May 2008 gave rise to a Commission proposal for a directive on 2 July 2008 and to Directive 2009/13/EC of 16 February 2009. The revised Framework Agreement between the cross-industry social partners on parental leave of 18 June 2009 gave rise to a Commission proposal for a directive on 30 July 2009 and to Directive 2010/18/EC of 8 March 2010. The Framework Agreement on Prevention from Sharp Injuries in the Hospital and Healthcare Sector of 17 July 2009 gave rise to a proposal for a directive on 26 October 2009 and to Directive 2010/32/EU of 10 May 2010. For all those agreements, the period for examination by the Commission was between six weeks and six months (with the exception of the railway sector agreement), and the period for examination by the Council was approximately six months (and, in most cases, political agreement was reached in the Council within three months). The periods for examination by the Commission would increase from 29 to 35 months for agreements concerning the 'inland waterway transport' and 'fishing' sectors (see note 67 below). It should be noted that the maritime transport agreement of 5 December 2016 would give rise to a proposal for a directive on 27 July 2017 and to Directive (EU) 2018/131 of 23 January 2018, which re-established the preceding timescales, but this was an agreement confined to updating a directive which implemented a previous agreement (Directive 2009/13/EC implementing the agreement of 19 May 2008).

(41) Negotiations were organised by the social partners, in most cases with the Commission's logistical assistance. During those negotiations, the social partners could request a technical opinion from the Commission services on the content or wording of some of the clauses of the agreement under discussion, for example to ensure the clarity and legal certainty of the clauses of the agreement: in that case, the services responsible for social dialogue requested the expertise of those responsible for the substance of the agreement. In general, that technical expertise provided by the Commission was assessed by the social partners; the quality of the text of the agreement and, subsequently, the analysis of its legality benefited from such expertise. On occasions, however, tensions arose between the Commission services and the signatories to some agreements, for example, where an expression which had been retained in the agreement after its submission for technical verification by the Commission services was then rejected on analysis of the legality of the agreement once it was concluded. Here, as elsewhere in European social dialogue, one condition for success hinges on whether there can be mutual trust between the social partners and the Commission services.

(42) Article 152 also introduced into the Treaty a reference to the Tripartite Social Summit for Growth and Employment: this was a six-monthly social consultation meeting held at the highest level between the EU social partners and the institutions, whose practice was initially

established informally in 1997, then formalised by a Council decision in 2003 (Decision 2003/174/EC of 6 March 2003) and revised in 2016 (Decision (EU) 2016/1859 of 13 October 2016). For the reasons underlying that development, see Commission proposal COM(2013) 740 final of 31 October 2013.

(42) See EESC (1994).

(43) The 1993 Working Time Directive (93/104/EC) did not cover some sectors of activity, in particular the transport sectors (rail, road, civil aviation, maritime transport and inland waterways). In 1994, Commissioners Flynn and Kinnock urged the social partners of those various sectors to negotiate appropriate rules, and negotiations were conducted in some of those sectors. One informal consultation was arranged with the social partners at sectoral level, on the basis of a Commission Staff Working Document. In 1997, after that informal consultation, the Commission issued a White Paper proposing a comprehensive approach on the sectors excluded from the 1993 Working Time Directive (COM(97) 334 final of 15 July 1997), which served as the first consultation phase of the social partners, and negotiations recommenced on that occasion in the rail, road and maritime transport sectors. On 31 March 1998, the Commission launched a second consultation phase (SEC (98) 537 final) but fixed the deadline for concluding sectoral agreements at 30 September 1998. The maritime transport sector concluded an agreement within the period prescribed (that agreement would be implemented by Directive 1999/63/EC of 21 June 1999); the rail sector likewise concluded an agreement on 30 September 1998, but that agreement would not result in a specific legislative instrument because its content would be included in a horizontal legislative proposal from the Commission (COM(2000) 382 final, which would lead to Directive 2000/34/EC).

(44) See above.

(45) In the early days of European social dialogue, the Commission had realised that the social partners themselves would not enter into negotiations unless they considered that they actually held some bargaining power. The successive Commission Communications on Social Dialogue can be interpreted as a persistent call to the social partners for them to seize the opportunities for negotiation as they are presented to them. But, clearly, those opportunities present themselves only if the Commission does not remove them again immediately after opening them up.

(46) By the early 2000s, first-phase consultation documents contained questions relating to a possible negotiation or initiative by the social partners under Article 139: see, for example, the consultation on work-related stress (2002), the consultation on harassment and violence at work (2004), the consultation on the ILO Maritime Labour Convention (2006) as well as the invitation for the social partners from the fishing sector to negotiate an agreement relating to the ILO Convention on Work in the Fishing Sector, which was formally conveyed by the Commission on the occasion of a first-phase consultation (COM(2007) 591 final of 10 October 2007) concerning the legislation applying to seafaring jobs (2007: see note 61 below). It must be recalled here that, in the case of the first-phase consultation on work related stress, the Commission sought expressly to show that it was preparing a legislative proposal, and that it did not intend for the social partners to undertake, on their own initiative, the negotiation of an 'autonomous' agreement on the matter; in asking the social partners whether they sought to conduct negotiations, the Commission was not really seeking to obtain any new information (it had been duly informed of the discussions on that matter between the social partners) but rather to point out that it would consider any negotiations on the matter to be negotiations in relation to a consultation, which would suspend the legislative process initiated by the Commission and would therefore give rise to a review of its implementation.

(47) The consultation of management and labour under Article 154 TFEU is a formal procedure which is subject to a decision by the College of Commissioners: the College is duly informed that the undertaking of the consultation affords management and labour the possibility of initiating negotiations in accordance with Articles 154(4) and 155 TFEU.

(48) The broadening of the negotiating options established by Article 154 TFEU in 2007 (and, previously, by Article III-211 of the draft Constitutional Treaty) accurately reflects the broad consensus prevailing throughout the 2000s between the European institutions and the Member

States with regard to the primacy of collective bargaining at European level, a consensus which is clearly expressed in the Commission's Communications dating from 2002 (COM(2002) 341 final of 26 June 2002) and 2004 (COM(2004) 557 final of 12 August 2004), and in the practice adopted by the Commission and the Council during that period: the Convention which was entrusted with focusing on possible reform of the functioning of the EU carried out its work in 2002 and 2003, and the Intergovernmental Conference drawing up the draft Constitutional Treaty conducted its work in 2003 and 2004); the Lisbon Treaty was drawn up in 2007.

(49) European Parliament Resolution of 6 July 2006 (2006/2015 (INI), OJ C 303E, 13.12.2006, p. 754.

(50) Directive 2010/32/EU of 10 May 2010. Political agreement on the text was reached at the Council meeting of 8 March 2010.

(51) Degryse (2015).

(52) SEC (2010) 964 final of 22 July 2010; this document includes an analysis of developments in sectoral social dialogue since its inception and notes its dynamics and potential, especially with regard to the development of collective bargaining at European level.

(53) Communication COM(2012) 746 final of 12 December 2012 (EU Regulatory Fitness), which presents various measures that the Commission will implement to ease the burden of regulation in the European Union, opens with an introduction bearing the heading 'Smart Regulation: Responding to the Economic Imperative'. In this Communication (and the documents accompanying it, SWD(2012) 422 and 423), the Commission makes no reference to the decision to submit all social partner agreements to an impact assessment, although preparations for the assessments were already under way for the sectoral agreements concluded in spring 2012. At the date of adoption of this Communication, cross-industry negotiations on working time had not yet failed.

(53 bis) On 9 April 2012, *The Sun* newspaper devoted its front page to the forthcoming agreement in the hairdressing sector, with a title which fully illustrates the violence of the campaign ('Hair Hitlers!'). Then, another paper, *The Daily Mail* came up with a story on the agreement with a title referring to the prohibition of 'high heels'. Both tabloids referred to the intention of the UK government to block the implementation of the forthcoming agreement. See Vogel (2018).

(54) The Health and Safety Executive (HSE) – the British agency for occupational health and safety – undertook a publicity campaign on the hairdressing sector in 2006 [see the following site: <http://www.hse.gov.uk/hairdressing>]. The HSE ended its campaign following the controversy caused by the European social partner agreement in the sector, but it is not possible to identify whether the two are directly linked or whether other factors were involved. Information on the situation in the sector in the UK is also available on the employers' organisation's website, Habia [UK Hair and Beauty Industry Authority], which is affiliated to the European employers' organisation Coiffure EU, the signatory to the European agreement and the body that approved its content, although it was not in favour of the request for implementation to make it binding. See <https://habia.org/shop/health-safety-pack-for-hairdressing-download/?HSC>.

(55) The negotiations undertaken as part of Article 154 TFEU can last up to nine months; that period may be extended by common agreement between the social partners and the Commission. In September 2012, the European cross-industry social partners involved in the negotiation on working time requested and secured the Commission's agreement to extend their negotiation until December 2012. The extension was requested and secured because the negotiating teams were of the view that there was a good chance of the negotiation leading to an agreement. The campaign against the hairdressing sector agreement intensified in October and November 2012.

(56) In October 2012, at the initiative of the United Kingdom and the Netherlands, 10 national governments wrote a joint letter to the Commission asking it not to submit a proposal to



implement the agreement in the hairdressing sector to the Council: the signatories were the United Kingdom, the Netherlands, Germany, Sweden, Finland, Poland, Slovenia, Romania and Estonia, i.e. nine Member States plus Croatia which, at the time, was a candidate country. In the wake of the letter, the Commission received various letters of support for the agreement, including from MEP groupings.

(57) The vast majority of businesses in the hairdressing sector are very small, most frequently a salon with a few employees, and, as a result, employers' working conditions and those of their staff are very similar: they use the same products, do the same work and breathe the same air, i.e. they are exposed to the same risks and experience the same remedies in occupational health and safety. However, some forms of division of labour exist, e.g. tasks related to shampooing are allocated to unqualified young people, especially young women. This is why employers and trade unions have had very little difficulty in identifying risks in this area. For an overview of scientific analysis of risks in the sector, see the document published by OSHA (2014).

(58) In their campaign to denigrate the hairdressing sector agreement and its implementation, the British tabloids stated that the agreement prohibited workers (specifically female workers) in the sector from wearing high-heeled shoes. This was completely untrue, but became one of the ideas that was brandished most frequently in the British press. President Barroso often used this gross distortion to summarise the content of the agreement and justify his opposition to its implementation. *'As I have said very clearly and very often before, not everything needs a solution at European level. Europe must focus on where it can add most value. It does not have to meddle where it should not. That is why we have not proposed European legislation (...) to stop hairdressers from wearing high heels'* [[http://europa.eu/rapid/press-release\\_SPEECH-14-131\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-131_en.htm)]. See also Vogel (2018).

(59) The Commission adopted its Work Programme 2013 on 23 October 2012, and it is therefore possible to consider that it is as from that date that the Secretariat-General of the Commission and the College took it as read that the Commission had full discretion to refuse a request to implement any agreement whatsoever (and this is what they did, for the hairdressers' agreement in the REFIT Communication COM(2013) 685 of 2 October 2013; see note 12 above). Since it made no reference to any potential legislative proposal ('potential' because it was subject to the outcome of the investigation into the social partners' requests), and therefore made no reference to the agreements' characteristics, the work programme appeared to disavow the existence of the three requests to implement agreements and the fact that they had been presented to the Commission.

(60) Since the Commission is responsible for assessing the legality of the clauses of an agreement upstream of any proposal for legislation, it can recognise problematic wording or content. However the social partners are always in a position to correct their agreement where it is crucial to do so to ensure legality: if the Commission formally refuses an agreement for that reason, it must state its reasons, and the signatories can then immediately review the agreement if they wish, and submit the reviewed agreement to the Commission with a view to implementation. To date, there are no examples of an agreement that the Commission has refused to allow to proceed solely on grounds of legality (and there are several examples of agreements where the text was amended by the social partners because the Commission pointed out that their wording could cause a problem or was not clear enough).

(61) The agreements in the fishing, inland waterways and hairdressing sectors have a definite, albeit tenuous, long-standing or merely indirect link with the consultation procedures. For the fishing agreement (2012), which aims to bring European labour law into line with the ILO Convention of 2007 (C188, 14 June 2007), the Commission 'invite[d] therefore the social partners in the sea fishing sector to examine the possibilities of a joint initiative to promote the application within the EU of the provisions of the recent ILO Work in Fishing Convention, 2007'. It extended that invitation in October 2007, only a few weeks after the ILO Convention was adopted, in a Communication reassessing the regulatory social framework for seafaring jobs in the EU (COM(2007) 591 final of 10 October 2007), a first phase consultation; however, the formal negotiation with the social partners opened later outside any formal consultation process. Turning to the agreement in the inland waterways sector (2012), which concerns working time, we note the consultation initiated by the Commission in 1997-98 (see note 36). At that time, however, the social partners in the sector had been unable to open a negotiation,

and, although long-standing from a formal point of view, the consultation was conducted outside the framework of a consultation procedure. In so far as the agreement in the hairdressing sector was concerned, the negotiation originated in the Commission's work in the mid-2000s on the review of regulations that applied to the marketing of cosmetic products, i.e. it was not in the field of social legislation with its attendant consultation procedures. At that time, the social partners in the sector requested that the new regulations should have regard to the professional use of cosmetic products, and not just their use by private consumers; however, the Commission services with responsibility for the issue refused that request and invited the social partners to review the matter of professional use as part of the social dialogue framework, thus leading the social partners to embark upon their negotiation on the occupational health risks associated with the professional use of cosmetic products, then to extend the negotiation gradually to cover all occupational health and safety matters in their sector.

(62) The analytical document accompanying the proposal to implement this agreement highlighted the sector's specific features: it is small (9 600 undertakings and 42 000 jobs, three quarters of which are performed by mobile workers), by far the bulk of activity is cross-border in nature and chiefly involves the Rhine and Danube river basins (SWD(2014) 226 of 7 July 2004).

(63) The European social partners that negotiated the agreement on the application in European law of the provisions of ILO Convention C188 concerning work in the fishing sector had played an active role in negotiating the ILO Convention adopted in 2007.

(64) The Agreement on the protection of occupational health and safety in the hairdressing sector was signed on 26 April 2012 in Brussels during a study day on identifiable risks in the sector. It was attended by experts from the WHO, the ILO, the OSHA and the University of Osnabrück.

(65) See the Commission proposal to adopt the European social partner agreement in the maritime transport sector: COM(2008) 422 final of 2 July 2008. Note the striking contrast in the Commission's treatment of the agreements concluded in the maritime transport sector in 2008 and the fishing sector in 2012/2013. Both cases concern sectors where activity is highly international and the ILO in particular is involved in regulatory matters; the agreements seek to bring European labour law into line with the provisions of an ILO Convention. Where the Maritime Labour Convention (C186) is concerned, the social partners concluded an agreement on 19 May 2008, and the Commission presented a proposal to implement it on 2 July 2008, i.e. within *45 days* of the agreement's signature. By contrast, where Convention C188 on Work in Fishing (2007) was concerned, the social partner agreement was concluded in 2012 and immediately reviewed in 2013, but the Commission proposal for legislation was not tabled until *35 months* after the reviewed agreement was signed. The same trade-union sectoral organisation, the ETF, coordinated trade-union activity in both cases.

(66) The changing role of the Secretariat-General of the Commission, particularly its role in policy coordination, is worthy of an in-depth analysis of its own. The Secretariat-General of the Commission has long been the body ensuring *consistency* in Commission procedures and decisions. It has gradually taken on a coordinating role to ensure that cooperation and discussion between services actually occurs, and therefore, that policy preparation within the Commission is a collegiate process. It also performs policy coordination roles for the actions of all European administration services, to the point that it can also appear to be an extension of the Private Office of the President of the Commission. The way it has developed has therefore bolstered its policy and political function.

(67) Inland waterway transport: agreement signed on 15 February 2012; Commission proposal for a directive on 7 July 2014 (COM(2014) 452 final), 29 months after the agreement; adoption of Directive 2014/112/EU on 19 December 2014, i.e. 5 months after the proposal from the Commission. Fishing: agreement signed on 21 May 2012 and reviewed on 10 May 2013; proposal for a directive presented by the Commission on 29 April 2016 (COM(2016) 235 final) 35 months after the reviewed agreement; adoption of Directive 2017/159/EU on 19 December 2016, eight months after the proposal from the Commission. The increase in the time taken to implement the agreements was the result of the increase in the time taken by the Commission, not the Council, to scrutinise them.

(68) Hitherto, analysis ordered by the Commission of the foreseeable cost-benefits of implementing the agreement, which was completed in 2014, has not been made public. Generally, the Commission has so far refused to grant public access to all the documents associated with this agreement and its scrutiny of it on the ground that such access would jeopardise its internal decision-making process. In its Communication of 2 October 2013, the Barroso 2 Commission stated that, during its term in office, it would not table legislation in the area of occupational safety and health for hairdressers, noting that the relevance and added value of the agreement would first have to be assessed in full. Furthermore, that Communication (COM(2013) 685 final of 2 October 2013) stated that ‘the [Barroso 2] Commission will not bring forward a proposal for legislative implementation of this agreement’ and stated in a footnote that it would continue its assessment of the agreement, thus postponing the final decision for the Juncker Commission, although this has often been interpreted inside and outside the Commission as a definitive rejection of the matter (see note 12 above). Note that the 1993 Communication (COM(1993) 600 final) concerning the application of the Agreement on social policy clearly stated that, where the Commission considered that it should not present a proposal for a decision to implement an agreement, it would immediately inform the signatory social partners and provide them with the reasons for its decision. Here, the Barroso 2 Commission has released itself from the obligation to provide the social partners with the reasons for its decision and stated that a decision to reject can be taken before a full assessment has been conducted. The ambiguities in the wording also point to the divergence of opinion that existed at the time on these matters within the Barroso 2 Commission.

(69) Commission staff working documents concerning agreements in inland waterways transport: SWD(2014) 226 of 7 July 2014; and in the fishing sector: SWD(2016) 144 of 29 April 2016.

(70) As those two agreements show (working time in inland waterways transport and working conditions in maritime fishing), sectoral agreements can be a very effective means of producing high-quality legislation exactly where it is needed, first because the social partners have genuine expertise that officials, parliamentarians and the politicians involved in an ordinary legislative procedure lack, but also because the clashing points of view of employers’ and employees’ representatives can result in relevant, responsible solutions to issues addressed during a negotiation. In the case of inland waterways transport, which is highly individual in respect of working conditions and where activity is cross-border in structure, it would undoubtedly have proved difficult, lengthy and costly to draft legislation on working time using the ordinary legislative route: firstly, because of the difficulties in marshalling the expertise required and, secondly, because many of the stakeholders would have found the burden of work disproportionate given the number of jobs involved. For maritime fishing, where obligations arising from an ILO Convention had to be implemented in European labour law, it was undoubtedly more effective to involve the social partners that had acted as the negotiators of the Convention because, under the ordinary legislative procedure, it would have been a difficult, lengthy and costly process to bring the expertise needed into the Commission to produce a text that satisfied all parties. The time taken to review the agreements concluded in these two sectors shows that mistrust of social partners can result in validation procedures that are so cumbersome and suspect that they could forever deter the social partners from undertaking such a negotiation again. In other words, by creating mistrust and suspicion around the principles governing the review of these agreements, the Commission could deprive itself of the benefits that confidence in the sectoral social partners’ expertise and accountability can bring.

(71) The staff working documents referred to above do not merely provide an analysis of the agreements in terms of the criteria set out in the 1998 Communication, demonstrating that the analysis is not undertaken solely on the basis of those criteria (SWD(2014) 226 of 7 July 2014 and SWD(2016) 144 of 29 April 2016).

(72) In relation to the three sectoral agreements concluded in 2012, it can easily be shown that the negotiations began in 2009 or earlier, i.e. at a time when no one wanted to introduce a monitoring mechanism that is as drawn-out, suspect and opaque as the one implemented by the Commission (and which, to boot, it has not followed in certain cases).

(73) Communication COM(2015) 215 final of 19 May 2015 ‘Better regulation for better results – An EU agenda’, accompanied by staff working documents SWD 110 and SWD 111.

(74) One of the features that shows very clearly that the section of *Better Regulation* concerning social partner agreements represents a substantive reinterpretation of the provisions on European social dialogue is the repeated use of the phrase to the effect that ‘since the Commission can only accept or reject an agreement ...’ (a phrase also found in staff documents submitted to the Impact Assessment Board and the Regulatory Scrutiny Board as part of the review of agreements concluded in the inland waterways transport and fishing sectors). At no time does that wording appear in any of the previous Commission Communications on social dialogue (1993, 1996, 1998, 2002 and 2004), all of which expressly address the matter of implementation of European social partner agreements: in those Communications, the Commission *never* uses the expression ‘reject an agreement’. The Communications set out the conditions that the agreements (and their signatories) must satisfy in order for the agreements to be implemented by a Council Decision, and thus the criteria that the Commission must verify before tabling its proposal, implying that any agreements that fail to fulfil those conditions will not be able to be implemented through legislation. However, the wording of those Communications never includes, as such, the concept of rejection, and their tone is consistently one of supporting developments in European collective negotiation by formally drawing the attention of the relevant social partners to the conditions governing implementation of the treaty provisions and the spirit that underlies them. In all of those Communications, there are only *two phrases* that expressly refer to the situation where the Commission might decide ‘not to present an agreement’: the 1993 Communication states that, where the Commission considers that it should not present a proposal for a decision to implement an agreement to the Council, it would immediately inform the signatory parties of the reasons for its decision (paragraph 39), and the 1998 Communication states that the Commission will not make a legislative proposal to the Council making the agreement binding if it considers that the signatory parties are not sufficiently representative in relation to the scope of their agreement (paragraph 5.4.2). On the misleading nature of the statement in *Better Regulation* ‘the Commission can either accept or reject an agreement’, see note 13 above.

(75) The Regulatory Scrutiny Board was initially established to oversee the quality of evaluation and impact assessment work. We have noted that grouping different analyses together – namely analysis of (i) the legality of a text, (ii) the representativeness of its signatories, and (iii) the costs and benefits of implementing the provisions of an agreement – into a single document named a ‘proportionate impact assessment’ was an odd action that was open to challenge. This raises the issue of the Board’s capacity to assemble, among its members, the expertise required to consider the various analyses.

(76) The original text reads as follows: ‘(3) When considering an agreement by the social partners after Art. 154 consultation: [...] The impact assessment should provide for the same assessment [as for an agreement concluded at the social partners’ own initiative] but would not need to revisit the need for EU action when this has already been covered by a previous analytical document [...]’ To put it more clearly, this means that, where an agreement results from a negotiation initiated under the framework of an Article 154 consultation but at the first stage of consultation (which does not include an analytical document), the impact analysis will be the same as for a negotiation initiated at the social partners’ own initiative (and will therefore consider *inter alia* the need for European action, since that need will not have been considered in a previous analytical document). Using this wording, the Commission introduced the principle under which the agreements would be treated differently depending on whether they concern a matter that had already been scoped out or shaped in an analytical document. Therefore, the existence or otherwise of an analytical document by the Commission is the principle of distinction between the agreements rather than whether the negotiation was initiated during a consultation with the social partners under Article 154 TFEU, or at the social partners’ own initiative.

(77) The intention to take account of the principles of subsidiarity and proportionality recognised in Article 5 TEU does not, in any way, involve erasing the specific features of the procedure for legislative implementation of an agreement under Article 155 TFEU compared to the ordinary legislative procedure.

(78) The policy of moving Commission staff between posts inevitably leads to institutional memory loss in respect of the policies that were pursued previously and the rationale behind them. The risk of error, and sometimes plain denial of the past, is greater when the allocation of roles across services leads to a policy coordination role being given to officials who have barely any prior knowledge or experience. Where the social partner agreements are concerned, the fact that disputes arose over the sectoral agreements led some officials involved in handling the issues to assume that the provisions of Article 155(2) TFEU related only to cross-industry social partners (because cross-industry social partners concluded the initial agreement that resulted in these particular treaty provisions), and therefore to propose excluding sectoral agreements from those provisions, or to provide for very restrictive rules on the representativeness of sectoral organisations in order to make it more difficult and preferably impossible to use the provisions of this Article. It should be noted here that that interpretation is erroneous. Since 1992, the Commission and the social partners have accepted that the provisions in question applied to sectoral dialogue and to cross-industry dialogue; indeed, the number of sectoral agreements is greater than the number of cross-industry agreements. That interpretation was also dangerous because it risked discouraging sectoral social dialogue even though it is an integral part of European social dialogue and has demonstrated its capacity to contribute to regulating developments in industry: it should be noted here that the legislative implementation of sectoral agreements should also be regarded as an effective means of helping to resolving issues that arise in a given sector, including small sectors, by harnessing the expertise and practical knowledge of the stakeholders in the sector concerned.

(79) In industrial relations, a negotiation is not conducted in the same way, and the content of the resulting agreement is not and cannot be the same whether the parties envisage implementation *erga omnes* or implementation *inter partes*. That is why the interpretation of the arrangements governing implementation set out in Article 155 as a whole, and in Article 155(2) in particular, must be clear and precise for all stakeholders concerned. It is also why, contrary to the Commission's occasional proposals (or apparent belief?), the social partners cannot convert an *erga omnes* agreement into an *inter partes* agreement without renegotiating the content.

(80) This Commission proposal would result in Directive (EU) 2018/131 of 23 January 2018 which also refers to the 1998 Communication in recital 7.

(81) President Juncker spoke briefly about this agreement during a question and answer session at the Executive Committee meeting of the ETUC on 7 November 2016. His remarks received a very frosty reception by the organisations concerned, including the link he made between occupational health and safety issues and Association, especially those concerning the 'small stuff' that the Union should not or should no longer bother with, and his repetition of the spoof argument that it should not legislate on high heels. Within the Commission services, they were clearly interpreted as the final ruling on the agreement, and the only outstanding question was when would be the appropriate moment to formalise and notify the decision.

(82) From 2016, the Commission's annual work programmes have contained no references to any initiative on the provision of information to and consultation of workers (nor to a proposal based on the sectoral agreement in the central government administrations sector, nor to a second stage consultation on the matter). This suggests that a decision in principle to end all activity in this field was taken shortly after the end of the first stage consultation in spring 2016, and that, from the outset, that decision in principle undermined a favourable response to the request to implement the agreement concerning the central government administrations sector; it was therefore inevitable that scrutiny of the request would be chaotic and problematic. Neither the outcomes of the first stage consultation nor the reasons why the Commission decided not to proceed with it have been set out anywhere.

(83) The wording of Article 155 TFEU does not allow the Commission to interfere in the choice between *inter partes* and *erga omnes* implementation of an agreement; that choice is a matter for the social partner signatories to the agreement. That has been the settled interpretation of the Commission and the European social partners since those provisions were incorporated into the Treaty (paragraph 31 of the Commission Communication of 1993 clearly states that agreement is entirely in the hands of the different organisations). This interpretation is also to be found in more recent Commission Staff working documents: 'It is up to the social partners

who conclude an agreement to decide the modality of implementing it. [...] The Commission cannot request the social partners to implement their agreement autonomously as this is the prerogative of social partners according to Article 155.2 TFEU' (SWD (2014) 226 final of 7 July 2014, p. 7). It should also be noted that industrial relations practitioners and analysts are very well aware that it is not possible to convert an agreement intended for *erga omnes* implementation into an agreement intended for *inter partes* implementation without renegotiating all or some of the content: the two types of agreement are not negotiated in the same way by the parties (see note 79).

(84) As already indicated, the conflict between the Commission and EPSU in relation to the agreement on the rights of civil servants and employees of central government administrations to be informed and consulted is now before the Court of Justice of the EU (Case T-310/18). The purpose of this paper is not to take a position on the key arguments put forward by the parties involved, and in particular the legal arguments at stake, as the author is not a legal expert. However, this paper can obviously cast light on some of the disputes raised by providing information on the historical background to the controversies on Art.155.2 TFEU which developed in the recent years. Part of the disputes concerns the discretion of the Commission to decide whether to accede or not to a request by the social partners to get the legislative implementation of their agreement to be proposed to the Council (an overview of the positions of legal experts can be found in Dorssemont *et al.* (2018)). In addition, the disputes also concern the competence of the Union to deal with the rights of employees of central administrations, and the Commission has also stated that implementation *erga omnes* of the agreement would lead to a rights gap between the officials and employees of the central government administrations, who would enjoy those rights, and the officials and employees of local and regional government administration, who would not (Epsu, The EU Pillar of broken promises, Time for a Social Europe, 2019). It should be noted here that the consultation that sparked the negotiation of this agreement followed a detailed analysis or 'fitness check' of the European directives on informing and consulting workers, which *inter alia* discussed the rights gap in this respect between public and private sector workers and the possibility of extending coverage to the public sector employees (SWD(2013) 293 of 26 July 2013)

(85) In 2012-2013, the Commission services evaluated three directives containing provisions on workers' rights to be informed and consulted (Directives 98/59/EC on collective redundancies, 2001/23/EC on transfers of undertakings and 2002/14/EC on a general framework relating to information and consultation of workers). The results of the evaluation, or 'fitness check', were the subject of a Commission staff working document (SWD(2013) 293 of 26 July 2013), and the Commission subsequently announced its intention to propose consolidation of the three directives (COM(2013) 685 final of 2 October 2013). On 10 April 2015, the Commission launched the first stage consultation of social partners on this initiative (COM(2015) 2303 final).

(86) The social partner agreement in the hairdressing sector first became a symbol in the media and political campaign that grew up in 2012 in the United Kingdom, but it later became a symbol of the new Commission's attitude to and management of requests for implementation of agreements arising from sectoral social dialogue.

(87) As has been seen, the 'high-heels' lampoon was publicly aired in addresses by Presidents Barroso and Juncker and in a Commission publication on the Better Regulation programme. The *misuse* of this lampooning is to be seen in the light of the hostility that the agreement was met with in the Commission.

(88) The legitimacy or otherwise of reinterpreting the provisions of Articles 154 and 155 TFEU should, in fact, be assessed in the light of the obligation to promote European social dialogue and to respect the autonomy of the social partners (which, in the view of most experts and of course of social partners, rules out any instrumentalisation of this social dialogue by the Commission).

## References

- Bandasz K. (2014) A framework agreement in the hairdressing sector: the European social dialogue at a crossroads, *Transfer*, 20 (4), 505-520.
- Bercusson B. (1996) *European labour law*, London, Butterworths.
- Degimbe J. (1999) *La politique sociale européenne : du traité de Rome au traité d'Amsterdam*, Bruxelles, ETUI.
- Degryse C. (2015) *The European sectoral social dialogue: an uneven record of achievement?*, Working Paper 2015.02, Brussels, ETUI.
- Degryse C. and Pochet P. (2018) *European social dynamics: a quantitative approach*, Working Paper 2018.02, Brussels, ETUI.
- Didry C. and Mias A. (2005) *Le moment Delors : les syndicats au cœur de l'Europe sociale*, Bruxelles, PIE-P. Lang.
- Dorssemont F., Lörcher K. and Schmitt M. (2018) On the duty to implement social partners' agreement concluded at Union level: lessons to be learned from the Hairdressers-case, *Industrial Law Journal* [forthcoming, TBC].
- EESC (1994) *Opinion of the EESC on the Communication of the Commission (COM(1993) 600 final)*.
- European Commission (1991) *Initial contribution to the intergovernmental conference on political union*, ESC(91) 500, 26 March 1991.
- European Commission (2013) *Industrial relations in Europe 2012*, Luxembourg, Publications Office of the European Union.
- Falkner G. (1997) *L'accord européen sur le congé parental : vers un corporatisme dans la politique sociale européenne ?*, *Politiques et management public*, 15 (1), 171-193.
- Lapeyre J. (2017) *The European social dialogue: the history of a social innovation (1985-2003)*, Brussels, ETUI.
- Mias A. (2004) *Du dialogue social européen au travail législatif communautaire : Maastricht, ou le syndical saisi par le politique*, *Droit et société*, 58 (3), 657-682.
- OSHA (2014) *Occupational health and safety in the hairdressing sector*, Luxembourg, Publications Office of the European Union.
- Silva A. (2015) *Le droit européen du travail à la croisée des chemins*, in Gosseries P. and Morsa M. (eds.) *Le droit du travail au XXI<sup>e</sup> siècle : liber amicorum Claude Wantiez*, Bruxelles, Larcier.
- Schulten T. (2016) *The meaning of extension for the stability of collective bargaining in Europe*, Policy Brief. European Economic, Employment and Social Policy 4/2016, Brussels, ETUI.
- Van Hoek A.A.H. (2018) *Social dialogue as a source of EU legal acts: past performance and future perspectives*, in Cremona M. and Kilpatrick C. (eds.) *EU legal act: challenges and transformations*, Oxford, Oxford University Press.
- Vogel L. (2018) *The fight to protect hairdressers' health: the inside story*, *HesaMag* 17, 12-15.
- Welz C. (2008) *The European social dialogue under articles 138 and 139 of the EC Treaty: actors, processes, outcomes*, Alphen aan den Rijn, Kluwer Law International.

**European  
Trade Union Institute**

Bd du Roi Albert II, 5  
1210 Brussels  
Belgium

+32 (0)2 224 04 70  
[etui@etui.org](mailto:etui@etui.org)  
[www.etui.org](http://www.etui.org)