Acta Juris Stetinensis

2020, No. 4 (Vol. 32), 77–92
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.32-06

Dagmara Skupień
Assoc. Prof.
University of Lodz, Poland
Faculty of Law and Administration
e-mail: dskupien@wpia.uni.lodz.pl
ORCID ID: 0000-0003-3620-5377

Refusal to implement European social partners' agreements: recent practice of the Commission

Abstract

European social partner agreements negotiated on the basis of Article 155 TFEU may be implemented at the level of the European Union at the joint request of the parties via a Council decision. Unlike the autonomous implementation, this 'institutional' method transforms the agreement into an EU legal act. This text analyses the refusal of the European Commission to submit to the Council, an Agreement that establishes a general framework for informing and consulting civil servants and employees of central government administrations which was concluded within the EU Social Dialogue Committee for the Central Government Administration. It discusses the scope of the Commission's competence to refuse to submit the agreement to the Council for implementation. Moreover, it presents a polemic on the judgment of the EU General Court that confirmed the European Commission's broad scope of competence in refusing to submit to the Council a proposal for a decision to implement the agreement. The author argues that giving the Commission such a large margin of appreciation could undermine the European social dialogue. Moreover, the author explains why the above-mentioned Agreement should be implemented via a Council decision.

Keywords: Article 155 TFEU, agreements of European social partners, implementation of agreements, right to information and consultation, public administration

Introduction

European social partners, namely European employers' organisations and trade unions deemed to be representative according to European Commission¹ statements,² have played an important role in shaping European Union (EU) social policy since the 1990s.³ For example, several Agreements concluded by the European social partners on the basis of Article 155 TFEU⁴ (ex Article 138 TEC⁵) were aimed at establishing minimum labour standards in all the Member States, while Article 152 TFEU strengthened the legal basis of negotiations guaranteeing the autonomy of the social partners. In line with the principle of autonomy, European social partners may initiate bilateral negotiations on freely chosen subjects, even without formal incentives from the Commission under Article 154 TFEU. Moreover, the subject scope of the agreement may extend beyond the fields of the European social policy specified in Article 153 TFEU. In addition, the dialogue of the European social partners may be held on a cross-industry or sectoral level. In the latter case, it is carried out within Sectoral Social Dialogue Committees.⁶ In order to enforce a given agreement in the Member States, it is necessary to implement it.

According to Article 155 second sentence TFEU, the implementation of European social partner agreements takes place either in accordance with the procedures and practices specific to management and labour and the Member States or in matters covered by Article 153 TFEU at the joint request of the signatory parties by a Council 'decision' (in practice, a directive) on a proposal from the Commission. This provision gives priority to autonomous implementation, but the effectiveness of this method is questioned. In fact, it leads to different results in different countries and does not always guarantee that agreements are properly implemented. For that reason, implementation by a Council decision ('institutional' implementation) on a proposal from the Commission is often preferred by the

¹ Hereinafter referred to as 'the Commission'.

² See Commission communication concerning the application of the Agreement on social policy presented by the Commission to the Council and to the European Parliament, COM(93) 600 final.

³ For more details on European Social Partners' agreements see: Welz, C., *The European social dialogue under Articles 138 and 139 of the EC Treaty: actors, processes, outcomes*, Alphen aan den Rijn 2008.

⁴ Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

⁵ Treaty establishing the European Community (Consolidated version 2002), OJ C 325, 24.12.2002, pp. 33–184.

⁶ Acting on the basis of the Commission Decision of 20 May 1998 (98/500/EC) on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level, OJ L 225, 12.8.1998, pp. 27–28.

European social partners, as it leads to the transformation of an agreement into a source of EU law with all its legal consequences. The question remains how large the margin of appreciation of the Commission concerning the submission to the Council of a proposal for a decision to implement the agreement is. It seems that excessive powers of the Commission in this realm may have a freezing effect on the European Social Dialogue (ESD). Therefore, it is important that the Commission applies clear and coherent rules executing its administrative powers to submit or not to submit an agreement to the Council for implementation. These issues will be discussed on the basis of EU law, the case law of the EU General Court, as well as the documents and practice of the Commission, with special focus on the Commission's refusal to submit to the Council for implementation the Agreement of 21 December 2015 establishing the general framework for informing and consulting civil servants and employees of central government administrations (referred to as the I&C Agreement of 2015).

Conditions for an 'institutional' implementation

Article 155 TFEU states that the 'institutional' implementation is restricted only to such agreements that concern matters covered by Article 153 TFEU. The implementation by a Council decision is thus only possible if the content of the agreement is limited to the fields of social policy stipulated in Article 153 TFEU. Moreover, several communications of the Commission complete the list of conditions to be fulfilled by social partners and also relating to the content of the agreement.⁷ Even though the non-binding nature of the communications is evident, these types of documents in fact defined various aspects of the ESD, from the definition of the concept of representativeness and different elements of the procedure of consultations and negotiations, to conditions of the implementation of negotiated agreements.

Therefore, according to the communications, the Commission, before submitting to the Council a proposal to enact an agreement, carries out an assessment

⁷ See respective Commission communications, concerning the application of the Agreement on social policy presented by the Commission to the Council and to the European Parliament, COM(93) 600 final; adapting and promoting the social dialogue at Community level, COM(98) 322 final; European social dialogue, a force for innovation and change, COM(2002) 341 final; and Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue, COM(2004) 557 final.

comprising a consideration of the representative status of the contracting parties,⁸ their mandate, and the legality of each clause in the collective agreement in relation to EU law and provisions regarding small and medium-sized enterprises (SMEs).⁹

The appropriateness of an EU legal act for the implementation of a given agreement may be analysed by the Commission where negotiations over the agreement have not been preceded by a previous phase of formal consultations.¹⁰ Appropriateness consists of the analysis of subsidiarity and proportionality. In recent years, the assessment criteria have been further extended by the power of the Commission to conduct impact assessments in the case of legislative and non-legislative initiatives or delegated acts, and establishing measures which are expected to have a significant economic, environmental or social effect.¹¹ The impact assessments cover the existence, scale, and consequences of a problem and the question of whether EU action is needed. The Commission document, called Toolbox (2017),¹² reduced the scope of impact assessments with respect to European social partner agreements, removing the analysis of alternative solutions and focusing especially on the representativeness of signatories, the legality of a given agreement vis-à-vis the EU legal framework, and the respect of principles of subsidiarity and proportionality. Nevertheless, the competence of the Commission to carry out impact assessments of the parties' request to implement an agreement via a Council decision was criticised as encroaching on the European social partners' autonomy.¹³

⁸ The competence of the European Commission to control the representativeness of the parties to an agreement was admitted by the Court of First Instance [General Court] in *UEAPME* Case (T-135/96), EU:T:1998:128, paras. 86–88.

⁹ COM(98) 322 final, op. cit., at 19 and COM (2002) 341, para. 2.4.2

¹⁰ COM(98) 322 final, op. cit., at 19

¹¹ The Interinstitutional Agreement between the EP, the Council of the EU, and the European Commission on better law-making of 13 April 2016 (paras. 12–18), OJ L 123, 12.5.2016, pp. 1–14.

¹² Point 11. Better regulation “Toolbox” SWD(2017) 350, European Commission, https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en (accessed 01.08.2020)

¹³ See Garben, I. and Govaere, S., *The multi-faceted nature of better regulation*, in: Garben, I. and Govaere, S. (eds.), *The EU Better Regulation Agenda: a critical assessment*, Oxford 2018, p. 7, and the ETUC declaration on ‘Better Regulation’ adopted at the ETUC Executive Committee on 17–18 June 2015, <https://www.etuc.org/en/document/etuc-declaration-better-regulation> (accessed 01.08.2020).

The Commission practice to refuse the 'institutional' implementation

The first situation where the Commission decided not to submit to the Council the request of the European Social Partners to implement an agreement via a directive concerned the European framework Agreement of 26 April 2012 on the protection of occupational health and safety in the hairdressing sector that was concluded between Coiffure EU and UNI Europa Hair & Beauty.¹⁴ This decision was justified by the will of the Commission to avoid imposing burdens on small businesses.¹⁵ In 2016, the revised agreement¹⁶ was signed by the same parties with a view to implementing it via a directive. However, so far, the agreement has still not come into effect.

Similarly, the Commission decided not to make a proposal to the Council concerning the activation of the I&C Agreement of 2015, which was concluded within the EU Social Dialogue Committee for Central Government Administration (SDC CGA) by TUNED¹⁷ (bringing together CESI¹⁸ and EPSU¹⁹) and EUPAE.²⁰ In a letter dated 5 March 2018,²¹ the Commission informed the parties to the agreement that it would not request that the Council implements the agreement at the EU level. Two arguments were presented to justify this decision. Firstly, the Commission noted that central government administrations are placed under the authority of national governments and exercise the powers of public authority. Therefore, their structure, organisation, and operation, according to the Commission, fall under

¹⁴ See Broughton, A., *Commission rejects proposed agreement in hairdressing sector*, 18.11.2013, Eurofound, <https://www.eurofound.europa.eu/publications/article/2013/commission-rejects-proposed-agreement-in-hairdressing-sector> (accessed 01.08.2020).

¹⁵ Vogel, L., *The fight to protect the hairdressers' health: the inside story*, 2018, ETUI, https://www.researchgate.net/publication/325929496_The_fight_to_protect_hairdressers_health_the_inside_story_2018/citation/download (accessed 01.08.2020).

¹⁶ Coiffure EU, UNI Europa Hair & Beauty, European framework agreement on the protection of occupational health and safety in the hairdressing sector of 23 June 2016, http://www.uni-europa.org/wp-content/uploads/2016/06/EFA_OHS_HairdressingSector_signed_20160623.pdf (accessed 01.08.2020).

¹⁷ Trade Unions' National and European Administration Delegation.

¹⁸ European Confederation of Independent Trade Unions.

¹⁹ The European Federation of Public Service Unions.

²⁰ European Public Administration Employers.

²¹ The letter is published on the EPSU website. A letter from Director-General Michel Servoz to Ms Britta Lejon, Chair of the EU Social Dialogue Committee for Central Government Administrations and TUNED's chair and to Mr Hector Casado López, EUPAE's Chair, 05.03.2018, <https://www.epsu.org/sites/default/files/article/files/EC%20refusal%20letter%205%20March%202018.PDF> (accessed 01.08.2020).

the competence of the respective national authorities. Secondly, the refusal was based on the fact that the degree to which administration is decentralised varies from one country to another and, therefore, would result in different proportions of public sector employees excluded from the scope of the requested EU legislation.²²

The annulment of the above-mentioned decision of the Commission was requested, pursuant to Article 263 TFEU, by EPSU and W. Goudriaan, its General Secretary, before the General Court (EGC)²³ in case T-310/18. First of all, the applicants claimed that the contested decision was an act adopted in breach of Article 155(2) TFEU and contrary to the requirement that the autonomy of the social partners be respected, as enshrined in Article 152 TFEU. In their opinion, the Commission lacked the power to refuse to propose that the Council makes real the Agreement by its decision, in the absence of any objection either to the representative status of the parties to the Agreement or to its legality. The applicants argued that the Commission was bound by a duty to make a proposal to the Council – unless it produced justified grounds that the social partners who were party to the Agreement were not sufficiently representative or that the agreement was not lawful. It was also claimed that the Commission was not entitled to assess the appropriateness of the Agreement.

Moreover, the applicants alleged that the contested decision was flawed by reasons which were manifestly mistaken and ill-grounded, and finally that the Commission failed to undertake any impact assessment and so could not justify on grounds of proportionality or subsidiarity any conclusion to refuse to propose that the Agreement be implemented as a directive by a Council decision, even if in principle it was permissible to do so.

By its judgment of 24 October 2019, the EGC dismissed the action for annulment of the above-mentioned decision. In its reasoning, the EGC highlighted in particular the Commission's power of discretion in deciding whether to present the agreement to the Council for implementation, its capacity to examine the appropriateness of such implementation in the light of the aims of the EU in any case, and the lack of any error of law in the argumentation for the refusal. The EGC approved particularly of the argument that the possible Council decision establishing agreement could have different scopes of application in EU Member States,

²² See the reasons for the Commission's decision: A letter from Director-General Michel Servoz to Ms Britta Lejon, Chair of the EU Social Dialogue Committee for Central Government Administrations and TUNED's chair and to Mr Hector Casado López, EUPAE's Chair, 05.03.2018, <https://www.epsu.org/sites/default/files/article/files/EC%20refusal%20letter%205%20March%202018.PDF> (accessed 01.08.2020).

²³ Case T-310/18, *EPSU and Goudriaan v. Commission*, EU:T:2019:757.

due to the varying degrees of decentralisation of public administration among EU Member States. The Court also emphasised the alleged adverse influence of the agreement on the functioning of the central government administrations of the Member States. The dismissal of the action for annulment was also justified by the fact that in several Member States, the right to information and consultation in the central administration is already enforced. Moreover, the EGC rejected the concept of 'horizontal subsidiarity' within social policy, as the EGC assigned no role to the Commission communications in the shaping of the European Social Dialogue (ESD). The case is now under appeal before the Court of Justice (ECJ).²⁴

The reasoning of the Commission in the administrative decision-making procedure and of the General Court refusing to annul the above-mentioned decision in the procedure pursuant to Article 263 TFEU raises doubts over its correctness. In order to indicate flaws in this reasoning it is necessary first to analyse the content and meaning of the I&C Agreement of 2015.

The I&C Agreement of 2015

Background

Article 153 (1) TFEU establishes the power of the European Union to act in the field of "the information and consultation of workers" not restricting it to undertakings. However, EU directives concerning the right to information and consultation with workers' representatives at the national level – namely, Directives 98/59/EC, 2001/23/EC, and 2002/14/EC – do not cover public administration employees.²⁵ This exclusion is not justified.

The European Parliament (EP), in its resolution of 19 February 2009 on the implementation of Directive 2002/14/E,²⁶ expressed the wish to guarantee that public administration employees and employees in the public and financial sectors

²⁴ Case C-928/19 P, *EPSU v. Commission*.

²⁵ See Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, pp. 16–21; Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of undertakings or businesses, OJ L 82, 22.3.2001, pp. 16–20; and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council, and the Commission on employee representation, OJ L 80, 23.3.2002, pp. 29–34.

²⁶ (2008/2246(INI)) (2010/C 76 E/03), para. 16.

enjoy the same rights to information and consultation as are granted to other groups of employees.

In April 2015, the Commission started first phase consultation with social partners on the basis of Article 154 TFEU on consolidating the EU Directives on the informing and consulting of workers.²⁷ One of the intentions of the Commission launching the first-phase consultation was to invite European social partners to assess whether directives concerning the information and consultation rights at the national level need to be reviewed in order to include public administration workers within their personal scope of application.²⁸ The Commission underlined two aspects which would support extending the EU information and consultation rights to public administration, namely massive restructuring – resulting in redundancies and changes in working conditions – and increasing the role of a ‘private’ employment contract in the public sector in the Member States.²⁹

In response to the first phase consultations,³⁰ cross-industry European employers organisations, BusinessEurope³¹ and the CEEP³², did not demonstrate a positive attitude towards the possible extension of information and consultation rights to the public administration at the EU level. In consequence, the Commission did not launch the second-phase consultations on the need to reform the I&C Directives. However, the social partners, being members of the EU SDC CGA, expressed their will to negotiate the agreement on information and consultation rights within their

²⁷ European Commission, Consultation Document, ‘First phase consultation of Social Partners under Article 154 TFEU on a consolidation of the EU Directives on information and consultation of workers’ C(2015) 2303 final, Brussels, 10.4.2015. See also Laulom, S., *Better regulation and the social acquisition: is the REFIT fit for purpose?* “European Labour Law Journal” 2018, Vol. 9(1), p. 15.

²⁸ See C(2015) 2303 final, op. cit., para. 3.2, pp. 5–6.

²⁹ Ibidem, p. 5.

³⁰ See the ETUC document *First phase consultation on a consolidation of the EU Directives on information & consultation of workers – ETUC answer*, 18.06.2015, EPSU, https://www.epsu.org/sites/default/files/article/files/ec212_1st_phase_ic_consultation_finalresponse_en.pdf (accessed 01.08.2020).

³¹ A letter from Markus J. Beyrer, Director General of Business Europe, to EC Vice-President Frans Timmermans, Vice-President Valdis Dombrovskis and Commissioner Marianne Thyssen, 29.06.2015, Business Europe, <https://www.buinessurope.eu/sites/buseur/files/media/imported/2015-00548-E.pdf> (accessed 01.08. 2020).

³² See the CEEP response on First-phase consultation of Social Partners under Article 154 TFEU on a consolidation of the EU Directives on information and consultation (I&C) of workers, 29.06.2015, CEEP, https://www.ceep.eu/wp-content/uploads/2015/07/15Response02_CEEP_Response_to_consultation_on_I_C_29_06_2015.pdf (accessed 01.08.2020).

sector.³³ Therefore, the I&C Agreement of 2015 is a result of the previous consultation procedure under Article 154 TFEU, but only in the scope of the sector of central government administration.

Representativeness of the parties

The SDC CGA was established and adopted its internal Rules of Procedure in 2010.³⁴ The members of the Committee, namely the EUPAE and TUNED,³⁵ stated in the Preamble to the Rules of Procedure that they mutually recognise each other at all levels as being representative of the interests of employers and employees in the CGA sector in the EU. The study of 2017 confirmed that the EUPAE and TUNED are the most representative organisations in the central administration sector and that both have the capacity to negotiate agreements on behalf of their members.³⁶

When the I&C Agreement of 2015 was concluded, the EUPAE consisted of 11 Member States and 5 observer countries, whereas TUNED represented government employees in 27 of the 28 EU Member States.³⁷ Even though the representativeness of the EUPAE is objectively unsatisfactory, as it had a minority of EU countries as member representatives, it is compliant with Article 1(B) of the above-cited Commission Decision 98/500/EC, which allows sectoral dialogue committees to be set up by organisations that are 'representative of several Member States'. The EUPAE, as well as the CESI and the EPSU are listed in the catalogue of representative European social partners' organisations consulted by the Commission under Article 154 TFEU.³⁸

³³ See Response to the Consultation of the European Commission on a consolidation of the EU Directives on information and consultation of workers, 2.06.2015, EPSU, <https://www.epsu.org/article/response-consultation-european-commission-consolidation-eu-directives-information-and> (accessed 01.08.2020).

³⁴ Rules of Procedure for the European Social Dialogue Committee for the Central Government Administration Sector in the EU, 17.12.2010, EPSU, <https://www.epsu.org/article/rules-procedure-european-social-dialogue-committee> (accessed 01.08.2020).

³⁵ TUNED is a joint trade union delegation of affiliates of the European Federation of Public Service Unions (EPSU) and the European Confederation of Independent Trade Unions (CESI).

³⁶ See Eurofound, *Representativeness of the European social partner organisations: Central government administration*, Dublin 2017, pp. 40–41.

³⁷ See *CESI and EPSU sign landmark social partner agreement on right for central administration employees*, 4.01.2016, European Movement International, <https://europeanmovement.eu/news/cesi-and-epsu-sign-landmark-social-partner-agreement-on-right-for-central-administration-employees> (accessed 01.08.2020).

³⁸ See the document List of consulted organisations, 2017, available on the European Commission website: <https://ec.europa.eu/social/main.jsp?catId=522> (accessed 01.08.2020).

Scope and content

The I&C Agreement of 2015 concerns both civil servants and employees of the central government administration. According to Article 3 of the I&C Agreement of 2015, central government administrations are administrations under the authority of governments at the federal, national, and/or equivalent level. The aim and the essence of the agreement is to establish minimum requirements for information and consultation rights of public employees through their representatives in central government administrations. The concepts of information and consultation are visibly influenced by the respective definitions of the Directive 2002/14/EC.

The scope of consultations, according to the agreement, should cover at least, unless defined as wider by national social partners, health and safety at work, working time and work-life-balance policy, and the consequences of decisions on employment conditions that change the organisation of structures and services or when there is a threat to employment. Moreover, remuneration guidelines, employee training, gender equality, non-discrimination measures and social protection specifically applicable to public employees should also be the subject of information and consultation procedures in relation to national legislation and social dialogue. The information and consultation herein should concern proposed measures that cause changes to the situation of public employees.

The application of the I&C Agreement of 2015 may be excluded on the basis of particular provisions in national legislation, in relation to public employees entrusted with sovereign responsibilities, especially national security, public order or judicial power.

The I&C Agreement of 2015, like other previous framework agreements, worded in an appropriate way for implementation via a directive, contains a non-regression clause stating that the requirements defined by it should not constitute valid grounds for weakening of the general level of protection afforded to public employees in the field covered by this agreement. In addition, the I&C Agreement of 2015 does not prevent the application of more favourable national legislation on information and consultation rights, including negotiation rights, to public employees.

In summary, the I&C Agreement of 2015 establishes minimum rights of central government administration employees to information and consultation, regardless of whether they have civil servant status. Thus, the I&C Agreement of 2015 is a successful effort to extend Directive 2002/14/EC to this sector.

The Commission's refusal to implement the I&C Agreement of 2015 and EGC judgment T-310/18

The refusal of the Commission to submit the I&C Agreement of 2015 to the Council for a decision on the implementation is based on the alleged lack of competence of the EU relating to the structure, organisation and functions of public administration and the different scopes of decentralisation of tasks, which leads to varying extents of competencies of the central administration in the Member States.

Firstly, it should be emphasised that, according to the Commission's own rules stemming from its Communication (COM(98) 322 final), an analysis of the agreement focused on its appropriateness may only be carried out by the Commission in cases where no previous consultations under Article 154 TFEU have taken place. In the circumstances under discussion, the consultations in fact did take place, and the Commission was informed on this occasion of the will of the social partners to negotiate the agreement on the I&C in the SDC CGA. As a consequence, the Commission should have restrained its assessment of the agreement to conditions of the representativeness of the parties, the legality of the agreement, and its impact on SMEs, the final point being irrelevant in this context.

Secondly, even if the appropriateness test were legitimately carried out in relation to the I&C Agreement of 2015, the results presented by the Commission still cannot be accepted for the following reasons:

Article 4(2) TEU guarantees the respect of the organisational autonomy of the Member States, including their fundamental political and constitutional structures. In particular, national security remains the sole responsibility of the Member States. However, this does not mean that establishing minimum standards concerning the right to information and consultation in public administration would undermine the exclusive prerogatives of the Member States to shape their public administration structure, organisation and functions. In fact, instituting rules for information and consultation throughout the EU does not affect the very essence of central administration; it only extends the civilised, internationally promoted standards of social dialogue to employees of this sector.

It should be also added that a simple extension of the existing directives to the sector of public administration would not be an appropriate tool. The above-cited Directives, namely 98/59/EC, 2001/23/EC, and 2002/14/EC, were construed in a way to cover the undertakings of the private sector and not that of public administration bodies with regard to their material scope. The subjects of information and consultation, the procedures, and the confidentiality issues are different in the private and public sectors to a large extent. The nature of public administration

requires a separate act to provide the employees of this sector with mechanisms relevant to them.

Additionally, the Commission cannot justify its refusal on the basis of different scopes of the central administration among the Member States. Logically, public administration as such also has different dimensions in different Member States, but this fact did not prevent the Commission consulting the European social partners on the appropriateness of EU action in this field.

The judgment of the EGC (in case T-310/18) dismissing action for annulment of the above-cited decision introduced pursuant to Article 263 TFEU appears to be neglecting the practice of the Commission concerning the scope of assessment of agreements which was set up through a series of communications. The EGC justifies the large margin of competence of the Commission to reject the requests of the European social partners on the basis of Article 17(1) TEU, which states that the Commission shall promote the general interests of the Union and take appropriate initiatives to that end. It therefore seems that the EGC is following the path adopted in its case law concerning the European Citizens Initiative (ECI),³⁹ allowing broad discretion of the Commission in deciding whether or not to take action following an ECI pursuant to Article 17(1) TEU.⁴⁰

Moreover, the EGC states in the judgment in case T-310/18 that Commission's communications are devoid of any binding legal force (point 102 of the judgment). However, the practice elaborated on the basis of these communications has never been questioned and has been applied on a regular basis for twenty years within the realm of the ESD.

Similarly, neither the above-cited interinstitutional agreement between the EP, the Council of the EU, and the Commission on better law-making – which established the procedure of impact assessments – nor the limitations on the appropriateness analysis relating to the European social partners' agreements established by the Commission, were taken into consideration by the EGC.

³⁹ The European Citizens Initiative is established in Article 11(4) TEU, which states that no less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the EU is required for the purpose of implementing the treaties.

⁴⁰ Case T-561/14, *European Citizens' Initiative One of Us*, ECLI:EU:T:2018:210, point 169.

It may be thus concluded that the legitimate expectations of the parties to the agreement to have it assessed within the limits delineated in the previous documents of the EU institutions were not respected in this case.⁴¹

The judgment of the EGC also presents a surprisingly 'fresh' insight into the theory of the ESD. It negates the existence of the principle of 'horizontal subsidiarity', which was commonly acknowledged in the European academic doctrine.⁴² This principle refers to the system guaranteed under Articles 154–155 TFEU, which gives priority to collective negotiations of the European social partners over the legislative initiative of the Commission in the field of European social policy. In fact, the whole logic of the ESD is based on the will of EU legislation to give the European social partners priority in handling labour law issues that must be dealt with at the EU level.

Securing the Commission's absolute freedom to refuse to submit the agreement to the Council for implementation would deprive the European social partners of any constructive role in the process. They would be discouraged from requesting the implementation of an agreement via a Council decision, as the result could be arbitrary and unpredictable. As a consequence, the second method of implementation, namely the autonomous one, would be applied instead, which in fact is recommended by the EGC. However, as the implementation reports and studies show, the autonomous implementation leads to very different results among the EU countries, depending on the strength of national social partners.⁴³ The effectiveness of the autonomous implementation in central government administrations is particularly dubious, as certain EU countries are not represented in this sectoral committee.

Moreover, the fact that several Member States have already introduced mechanisms for information and consultation in their central governmental administrations cannot serve as an argument against adopting a legal act harmonising the minimum standards across the whole EU. On the contrary, this argument shows that discrepancies in the level of exercise of the right to information and consultation

⁴¹ For more on the protection of legitimate expectations, see Schwarze, J., *European administrative law*, London 2006, p. 868.

⁴² Cf. Bercusson, B., *The EU Charter of Fundamental Rights and the Constitution of the European Union*, in: Bercusson, B. (ed.), *European labour law and the EU Charter of Fundamental Rights*, Baden-Baden 2006, p. 483, or Welz, C., op. cit., pp. 190–194. See also Delfino, M., *The reinterpretation of the principle of horizontal subsidiarity in European social law*, "WP CSDLE 'Massimo D'Antona' INT" 2020, No. 152, pp. 2–13.

⁴³ See also Skupień, D., *European social partners' agreements – current situation and perspectives*, in: Pichrt, J. et al. (eds.), *Obrana pracovního práva. The defence of labour law. Pocta prof. JUDr. Miroslavu Bělinovi*, Praha 2020, pp. 554–555.

persist and should be eliminated. The influence of the possible directive on the organisation of the central government administration is not an argument, either. Provisions concerning the free movement of workers or non-discrimination directives also concerned the organisation of administration, but this fact did not prevent them being adopted.

At the end of this analysis, we should draw attention to the similarities between the recent practice of the Commission in the realm of the ESD and the reality of the European Citizens Initiative, which was established in 2012 as a tool to promote participative democracy in the EU and has yielded little to no results so far, due especially to refusals of the Commission to engage in legislative activity as a consequence of the ECI.⁴⁴ The recent reform of the ECI introduced by Regulation (EU) 2019/788⁴⁵ strengthens the guarantees that the Commission will properly examine the ECI, in particular, establishing a clearer timetable of Commission actions (Article 15) in comparison with the previous Regulation, (EU) 211/2011.⁴⁶ Even though the ECI framework allows for the refusal of the Commission to take any legislative measure as a follow-up of the ECI, it must at least establish in the communication the reasons not to take it. Such communication shall be addressed not only to the group of organisers of the ECI, but also to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and shall be made public. According to Recital 28 of the Preamble to Regulation (EU) 2019/788, the Commission should explain in a clear, comprehensible, and detailed manner the reasons for its intended action, including whether it will adopt a proposal for a legal act of the Union in response to the initiative, and it should likewise provide reasons if it does not intend to take any action. The Commission should examine initiatives in accordance with the general principles of good administration, as set out in Article 41 of the Charter of Fundamental Rights of the European Union⁴⁷. Requirements concerning the treatment of an ECI may be a source of inspiration for the future Commission conduct in decision-making

⁴⁴ As results from the Bertelsmann Stiftung Study, no legislative acts were adopted by the EU institutions as a result of ECIs. See Hierlemann, D. and Huesmann, C., *More initiative for Europe's citizens, future of democracy*, 02.2018, Bertelsmann Stiftung, https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/ZD_EINWURF_2_2018_EN_final2.pdf (accessed 01.08.2020).

⁴⁵ Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative, OJ L 130, 17.5.2019, p. 55–81, which came into force 1 January 2020 and repeals the previous Regulation (EU) 211/2011.

⁴⁶ Regulation (EU) 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ L 65, 11.3.2011, pp. 1–22, effective 1 April 2012.

⁴⁷ Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

process concerning the submission of European Social Partners' Agreements to the Council for a decision on implementation.

Conclusion

The right to information and consultation should be the right of every worker, irrespective of the sector or his/her employment status. Workers of the administration sector should not be excluded from the application of this right to information and consultation. Such exclusion cannot be justified by the national competence to decide on the structure, organisation, and functions of the administration. As this right is not guaranteed by all Member States in the administration sector, the EU should have the power to extend the application of it to this sector using its own measures. The I&C Agreement of 2015 was a step in the right direction, but it was blocked by the Commission's decision not to submit it to the Council for the implementation.

The above-mentioned decision was not properly justified. It was adopted with disrespect for the rules concerning the possible scope of assessment of agreements, established by the Commission itself. The judgment of the EGC dismissing the action for annulment of this decision should also be criticised. It neglected the administrative practice of the Commission that allowed the assessment of 'appropriateness' only in cases where there were no previous consultations on the given matter. Even though the agreement does not cover all employees of the public administration and is limited to the central government administration, this circumstance itself cannot be an obstacle to the 'institutional' implementation of the agreement. Its personal scope could be further supplemented with the Commission's appropriate legislative initiative.

To summarise, the recent practice of the Commission and the following judgment of the EGC introduce much uncertainty to the ESD procedure and may even discourage European social partners to negotiate agreements in the future.

It is therefore postulated that an EU legislative act (preferably a regulation)⁴⁸ be adopted in order to precise such aspects as: the scope of control of the European social partners' agreements by the Commission, clear conditions of Commission's refusal not to submit a proposal to the Council for the agreement's implementation as a follow-up of the request of the given agreement's parties, the obligation to reveal the reasons of refusal in a public document, as well as the timetable of

⁴⁸ For more on the need of regulation in the realm of the ESD, compare Skupień, D., *Porozumienia europejskich partnerów społecznych*, Toruń 2016, p. 348.

Commission's actions while dealing with the agreement. Without transparent rules, the ESD will become an instrument at the mercy of the Commission with disrespect of the autonomy of European social partners.

References

- Bercusson, B., *The EU Charter of Fundamental Rights and the Constitution of the European Union*, in: Bercusson, B. (ed.), *European labour law and the EU Charter of Fundamental Rights*, Baden-Baden 2006.
- Broughton, A., *Commission rejects proposed agreement in hairdressing sector*, 18.11.2013, Eurofound, <https://www.eurofound.europa.eu/publications/article/2013/commission-rejects-proposed-agreement-in-hairdressing-sector>.
- Delfino, M., *The reinterpretation of the principle of horizontal subsidiarity in European social law*, "WP CSDLE 'Massimo D'Antona' INT" 2020, No. 152.
- Garben, I. and Govaere, S., *The multi-faceted nature of better regulation*, in: Garben, I. and Govaere, S. (eds.), *The EU Better Regulation Agenda: a critical assessment*, Oxford 2018.
- Hierlemann, D. and Huesmann, C., *More initiative for Europe's citizens, future of democracy*, 02.2018, Bertelsmann Stiftung, https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/ZD_EINWURF_2_2018_EN_final2.pdf.
- Laulom, S., *Better regulation and the social acquisition: is the REFIT fit for purpose?*, "European Labour Law Journal" 2018, Vol. 9(1).
- Schwarze, J., *European administrative law*, London 2006.
- Skupień, D., *European social partners' agreements – current situation and perspectives*, in: Pichrt, J. et al. (eds.), *Obrana pracovního práva. The defence of labour law. Pocta prof. JUDr. Miroslavu Bělinovi*, Praha 2020.
- Skupień, D., *Porozumienia europejskich partnerów społecznych*, Toruń 2016.
- Vogel, L., *The fight to protect the hairdressers' health: the inside story*, 2018, ETUI, https://www.researchgate.net/publication/325929496_The_fight_to_protect_hairdressers'_health_the_inside_story_2018/citation/download.
- Welz, C., *The European social dialogue under Articles 138 and 139 of the EC Treaty: actors, processes, outcomes*, Alphen aan den Rijn 2008.

CITATION

Skupień, D., *Refusal to implement European social partners' agreements: recent practice of the Commission*, "Acta Iuris Stetinensis" 2020, No. 4 (Vol. 32), 77–92, DOI: 10.18276/ais.2020.32-06.