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LABOUR LAWS AND WELFARE MODELS IN TIMES OF CRISIS: THE DECENTRALIZED NEGOTIATING REGULATION IN ITALY*

LAVORO E WELFARE NELLA CRISI: LA REGOLAZIONE NEGOZIALE DECENTRATA IN ITALIA

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ABSTRACT

The article analyses the recent trend of the decentralized negotiating regulation during the economic crisis, with particular attention to the Italian system. It focuses in particular on some issues, such as the negotiating welfare.

KEYWORDS: Labour law. Decentralized bargaining . Negotiating welfare.

RIASSUNTO

L'articolo analizza la recente tendenza alla regolazione negoziale decentrata durante la crisi economica, con particolare riferimento al sistema italiano. Si concentra in particolare su alcune questioni, come ad esempio il welfare negoziale.

PAROLE CHIAVE: *Diritto del lavoro contrattazione decentrata. Welfare negoziale.*

1 INTRODUCTION: EUROPEAN TENSIONS AND CONSEQUENCES ON THE NATIONAL LABOUR RULES

Hitting every European Union member State, the economic and financial crisis deeply affected the Welfare state and the labour rules both on a collective bargaining and on an individual level.

The crisis involved not only Italy, a country which has adopted, in the last few years, actions on the welfare and the labour system of rules on an almost annual basis¹, but also other “indebted” EU countries (i.e. countries exposed at an excessive deficit risk with reference to European standards), which have required measures to

* I'm grateful to Serena Vantin (CRID – Centro di ricerca interdipartimentale su discriminazione e vulnerabilità University of Modena and Reggio Emilia) for support in the translation of this article.

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1 E.g.: L. 183/10 (*Collegato Lavoro*); L. 92/12 (*Monti Fornero Reform*); L. 183/14 (*Jobs Act*).

control public expenditure and to reduce the public debt, resulting in wage cuts for public employees, a block of collective bargaining in some industries and labour market reforms².

In almost a decade, the crisis hit private institutions such as banks and finance, as well as public budgets and the real economy, provoking a social regression of the national systems³. It is clear and uncontested that social indicators in employment, social security and poverty risks suffered a sharp worsening. At the same time, the national systems reacted by altering the labour law regimes in a regressive direction⁴.

The European Union, at the present stage in which a country as United Kingdom is leaving after a referendum consultation (i.e. Brexit), has been corroded by creeping “tensions” jeopardizing the future of the Union itself.

Together with a general tension between solidarity at a national level, where Welfare State systems are facing a specific crisis, and economic integration at a supranational level, four different sub-tensions can be identified⁵:

1) the sub-tension between the economic sphere and the social sphere in the process of European integration as such, provided that EU has been conceived since its very origins through an approach aiming at the development of a shared market built over decades by the Court of Justice⁶, while, on a national level, the single Western European countries were creating welfare State programs aiming at preventing the “contagion effect” from Eastern European countries, before the fall of the Berlin Wall⁷;

2) there is a sub-tension, aggravated in times of crisis, between Northern European countries which are “creditors” with

2 GUARRIELLO, 2016b, p. 1 ss.

3 BARNARD, 2012, p. 98 ss.

4 LO FARO, 2014, p. 215 ss.

5 FERRERA, 2016, p. 5.

6 WEILER, 2003, p. 308.

7 ROMAGNOLI, 2013, p. 588.

a central role in economic affairs, such as Germany, and Southern Europe “debtors”, which lie on a situation of State crisis resulting in the increase of the public debt, such as Portugal, where there have been decisions made by the National Constitutional Court⁸;

3) the third line moves on the Eastern European axis, compound by countries which have entered the European Union after the enlargement of the 2000s, and Old Europe countries, which are set on the Western part. This tension particularly deals with the free movement of people, services and business, which represent the cornerstones of the single market. It involves countries with a weak welfare system, low labour costs and fewer labour rules, such as Eastern countries, compared with countries in which welfare systems are more generous and where there is a more sophisticated labour regulation, such as Western countries: the *Laval Quartet* cases, expressing a juridical conflict between economic freedoms and collective social rights, are an emblematic example, solved exactly at the beginning of the economic-financial crisis in Europe⁹;

4) the last tension concerns the juridical-institutional relationship between supra-national institutions, such as the European Union institutions, primarily the Council and the Commission, and the EU member States, which would maintain their sovereignty in areas such as pensions and/or labour market rules. This has been increasingly impeded, as the Greek case shows¹⁰, most recently in July 2015 when measures to be implemented at a national level have been drawn at a European level.

More generally, a conflict is emerged in the European Union between law and politics in constructing the European economic integration, thought at its origins as a political project subjected to the fulfillment of economic processes mediated by law¹¹, according to a view that has shown and is showing all its fragility.

8 COELHO, DE SOUSA, 2013, p. 527 ss.; MONTEIRO FERNANDES, 2013, p. 339.

9 DEAKIN, 2012, p. 32.

10 PAPADIMITRIOU, 2012, p. 389; ZAMBARLOUKOU, 2012, p. 410 ss.

11 JOERGES, GIUBBONI, 2013, p. 343.

These tensions cause serious difficulties for the future European perspectives and currently destabilize the balance of the Welfare State systems at a national level and the labour law as traditionally conceived.

A clear dividing line could thus not be traced, with reference to the Italian case, between how much the reforms are imposed from outside and how much the reforms are due to an internal political-legislative will.

In this direction, an example can be provided by the letter in which the Governor of the European Central Bank asked Italy to reform the Italian labour market in August 2011, resulting in the approval of laws such as art. 8 of d.l. 138/11 (e.g.: the legislative promotion of the “proximity” bargaining) and the market labour reform (e.g.: rules on the flexibility in entering, exiting and inside the employment relationship since 2012 until today), as well as the institutions of social insurance and social security derived from the Welfare State (e.g.: pension reform 2011).

Even the intermediate socio-economic bodies suffered the crisis. There is a direct link between the requirements formulated outside the national boards and the responses given inside the boards themselves. It provokes a hierarchical subjection of the social expenditure of the States, such as Italy, to the balance of the public budget, already altered by the economic-financial crisis, with a direct impact on collective bargaining and on trade unions¹².

2 SUBSIDIZED COLLECTIVE BARGAINING IN TIMES OF CRISIS

With reference to the general overview, it is now necessary to examine in depth the production of labour rules inside the specific national legal system, with particular consideration for the collective bargaining.

As we already know, the collective agreement historically represents, in the Italian legal system, the outcome of a collective bargaining, i.e. the general process in which the organizations that

12 GOTTARDI, 2014, p. 105 ss.

represent employees and employers define together the regulation of the individual and collective employment relationships. The collective bargaining is therefore the method used to settle the conflict and the system managed by the trade union to protect the subjects who represents, starting with the remuneration guarantee as set forth in art. 36 of the Italian Constitution¹³.

During the years following the non-fulfillment of the constitutional provision imposing a registration procedure for trade unions in order to proceed in stipulating collective contracts with general effectiveness (art. 39.2; 39.3 Italian Constitution), the collective bargaining and the industrial relations actually developed, with respect to the fundamental principle of trade union freedom (art. 39.1), progressively acquiring new contents and new functions. It was expanded both at a national level, through the national sectoral collective bargaining, and at the second-level collective bargaining, at a business or local level, as set forth in the Ciampi-Giugni Protocol of 23th July 1993¹⁴.

This Protocol declined the regulation of the competences of remuneration at contractual levels, acknowledging, on the one hand, the aim of protecting the purchasing power of remunerations to the national sectoral collective contract and the aim of proceeding at a redistribution of the industry productivity. On the other hand, the Protocol acknowledged, regarding the second-level contract, the settlement of supplies linked to the trend of productivity in the single production realities or local realities¹⁵.

The coordination model between the national level and the decentralized level collapsed. Since 1997, during a Protocol inquiry¹⁶, the autonomous and specialized function of the second-level collective bargaining has appeared extremely unsatisfactory, because

13 GIUGNI, 2014.

14 Protocollo between the Italian Government and National Social Partners “politica dei redditi e dell’occupazione, assetti contrattuali, politiche del lavoro e sostegno al sistema produttivo”.

15 BELLARDI, 1999.

16 Giugni Commission “Commissione per la verifica del protocollo del 23 luglio 1993”.

the use of objective parameters provided for by the Protocol itself was unsatisfactory for the trade unions negotiating and endorsing the contracts.

In the years following the economic crisis and the trade union division at a national level, the collective bargaining fragmentation and weakness increased, as well as the trade union ones.

A clear index of this fragmentation is represented by the growing presence of the collective bargaining at a national level. This kind of bargaining has been increasing sharply since 2008: More than 700 contracts have been surveyed until 2015, nearly twice with respect to 2008, when almost 400 were counted, creating an effective and real problem of reduction and unification¹⁷.

A decentralized collective bargaining has simultaneously developed, which could not be always easily supervised and surveyed, save in case of single research realities and sample analysis examining specific aspects of this kind of bargaining¹⁸.

In this respect, the most recent labour legislation in Italy set forth a number of measures concerning the bargaining levels and the monitoring of the contractual agreements.

Firstly, a levelling of the contractual levels has been adopted with reference to art. 51 of d.lgs. 81/15, a Jobs Act decree, establishing that “collective contracts” means both the national collective contracts stipulated by trade unions comparatively more represented on a national level, and the decentralized ones (local or business ones), stipulated by the trade unions or by the trade union representatives (*rappresentanze sindacali unitarie*).

In such regard, extremely complex theoretical issues arose about the effects of this provision. According to the labour law interpreters this provision poses constitutionality legitimacy concerns with reference to art. 39 of the Italian Constitution, providing the

17 OLINI, 2015.

18 E.g.: Farecontrattazione, Adapt (www.adapt.it/farencontrattazione); OCSEL – Osservatorio contrattazione di secondo livello, CISL (www.cisl.it/osservatori/ocsel-contrattazione-di-2-livello.html); Os.Me.R. – Osservatorio Mercato del Lavoro e Relazioni Collettive, University of Brescia (www.osmer.org); Osservatorio trentino sui diritti sociali del lavoro, University of Trento (www.dirittisocialitrentino.it).

opportunity to legitimate the stipulation of a decentralized bargaining made by trade union minorities¹⁹.

Furthermore, in strictly operative terms and with reference to the clarity and transparency of the contractual system, a deposit of decentralized collective contracts has been set forth in art. 14 of d.lgs. 151/15, another Jobs Act decree. In particular, it consists of a telematic deposit at the Territorial Labour Offices (*Direzioni del lavoro territoriali*), provided for those collective contracts taking advantage from tax or contributory duties. In this way, a possibility is provided to monitor and follow this kind of subsidized bargaining, which is useful in order to monitor the trend of these agreements made by interested public bodies²⁰.

The subsidized collective bargaining refers to that measure according to which the State, through interventions annually provided since 2008²¹, intended to lighten the tax burden on employees' remunerations and to promote the productivity to be negotiated at a decentralized level.

The issue of productivity and bargaining creates many questions that cannot be considered hereinafter, being one of the most relevant issues in the Italian academic and non-academic debate of the last years, with reference both to juridical and economic profiles. As already stated above, the Italian system has a bad productivity output, considered as the fall in the growth trend, with reference to other countries such as Germany. Trade unions are believed to play an essential role in the increase of the flexibility linked to the labour organization, in order to improve the productivity, although the productivity trend does not depend exclusively on this factor²².

In particular, through the subsidized bargaining a mechanism is acknowledged, according to which the State subsidizes the collective bargaining with a favorable taxation applicable to the

19 ZOPPOLI, 2015, p. 22.

20 GUARRIELLO, 2015a.

21 CAMPANELLA, 2013.

22 DELL'ARINGA, 2013, p. 293 ss.

subsidizing remuneration linked to the result bonus or to the profit sharing or to the company's organization²³. Before 2016, previous dispositions provided measures for subsidizing the productivity remuneration. Tax subsidiary measures could therefore be applied to those items that were exclusively retributive, such as productivity bonus (*superminimi*) or overtime hours. Today a link is provided between the given bonus and one of the areas established in the decree (e.g.: quality), plus a further subsidy in case of equal engagement of employees.

The acknowledgement mechanism has been drawn as more rigorous, because the previous experiences did not produce the expected results in terms of productivity recovery, being agreements aimed at redistributing the public subsidiaries inconsistently with the law's provisions with the risk of producing a collusion derived from the collaborative behaviour between the parties thereby, damaging a third subject unrelated to the relationship between the employer and the trade union, i.e. the State allocating tax subsidiaries²⁴.

Partly for these reasons, according to 2015 law, the bonus acknowledgement mechanism aims at being measured and measurable according to objective standards established through a negotiating procedure by the parties signatory the agreement, at the business or at the local level, providing a reference from the law to the collective contracts set forth in art. 51 of d.lgs. 81/15.

Furthermore, the idea of standard objectivity should be considered as a consequence of the negotiating agreement between the parties. The objectivity of the parameter, as set forth in the ministerial decree, recalls the issue of the objectivity of the standards already stated during the Protocol inquiry in 1993.

More specifically, the decree establishes standards aiming at measuring the increases in profitability and business productivity (e.g.: reduction of the number of injuries); other standards depend on the quality of the business activity (e.g.: client's satisfaction indexes); others, furthermore, aim at measuring the company's efficiency (e.g.: waste reduction); while other standards are relative to innovation

23 D.M., 26 March 2016.

24 BORDOGNA, 2012, p. 27; CELLA, 2013, p. 285 ss.

(e.g.: number of patents registered) or to working conditions (e.g.: the so-called “smartworking”).

These standards can be used severally, jointly or can even be substitutes, save for any case the principle according to which it is possible to subsidize something which merely promotes a subsidiary which is objectively measurable.

To clarify and organize the supervision of these agreements, in order to verify the practices applied by the single companies and by territories at a local level, a form must be filled in, including the company’s data, the number of beneficiaries, the bonus, aims and standards, and the concurrent attachment of the undersigned contract.

It is however a solely procedural mechanism. According to some, the collective contract is to be deposited by thirty days after undersignment, but no assessment on the merit is to be done by the Territorial Labour Office, because the parties of the contract remain sovereign with reference to the content they agree upon. The Public Administration therefore is not able to assess and supervise the substance of the agreement, an aspect which arises some criticalities (as stated above), but is asked to agree to the subsidiary only on the basis of the procedural timing deadline accomplishment.

3 ... AND NEGOTIATING WELFARE IN TIMES OF CRISIS

The previous pages focused upon the negotiating regulation procedure according to which the parties of a contract identify, at a decentralized level, result bonuses following objective and measurable standards.

The novelty of 2015 law consists in the provision, as an alternative to the acknowledgement of the result bonus, of the subsidiary to business welfare or to contractual welfare, i.e. all those measures that find their strength in the business bargaining aiming at matching the employees’ needs, both in terms of their employment conditions and their life necessities.

It does not result in monetary retributions, but in some advantages rendered as services, typically measures through which the company acquires the responsibility for the employee’s needs, such

as nursery school, the payment of medical cares, the reimbursement for public transport, the scholarships for the employees' children (some experiences have been consolidated in the national context, such as in the biggest productive realities, e.g.: Luxottica). In this way, it is possible to reach different stakeholders and a variety of demands: the contractual welfare is implemented by trying to fill in the gaps of the public system; the purchase power is sustained in a time of crisis, and the children of the employees are prioritized as well as their social mobility²⁵.

The Stability Law for 2016 subsidized these mechanisms through a review of the tax law in favour of businesses when the business welfare is negotiated with the trade unions through a collective contract. Time and an effective monitoring will be the best tests in order to assess the effect of this measure but, from a first reading, it is possible to state that the more these measures are developed inside a systematic coordination at a decentralized level, the more a modernization of the system of social security will be reached as a form of social investment²⁶.

The way to ensure the full application is however still strewn with obstacles, not only because this kind of perspective is to be joined up with the traditional concepts of remuneration, with the labour measure and classification standards, as well as with the development of the employment relationship in time, but also inside the trade union culture intervening when the result bonuses and the negotiating welfare are negotiated.

4 FROM A EUROPEAN RESEARCH: WHAT HORIZONS FOR NEGOTIATING REGULATION?

In this respect, the research on the gender pay gap “Close the Deal Fill the Gap”, involving different European Universities, such as the University of Verona, and trade union partners, aiming at assessing the interaction and interdependence between two different purposes of the European Union (the involvement of the social

25 FERRERA, 2009; MALLONE, 2011.

26 TREU, 2016b.

partners in the reduction of the gender pay gap and the stimolous at a deeper contractual decentralization process promoted by the EU institutions themselves) underlined, in one of the case study that have been analysed, a concern related to the effective trade unions' capability to influence a potential gender pay gap in the distribution of the results-based bonuses²⁷.

In particular, considering a case study relative to the agreements deposited during 2014 at the Territorial Labour Office in Verona, in order to acknowledge the de-taxation, the bonus redistribution criteria and the gender correctives set forth in the collective bargaining were considered.

The analysis demonstrated that the work attendance is the sole or one of the most relevant criteria for the assignment of the distribution of the result bonus. Furthermore, the gender correctives to protect female employees are not so trenchant (e.g.: maternity leave, parental leave).

The analysis moreover emphasises some concerns relative to the certainty of law, the validity of some contractual clauses, and the minor importance given to the issue in the decentralized collective bargaining approach, due also to gender stereotypes.

As was discussed above, a serious deficiency lies both upstream and downstream in the negotiating regulation procedure: upstream, because trade unions' guidelines for negotiating lack, at a national and/or decentralized level, with particular reference to those relative to the gender pay gap; downstream, because these bonuses acknowledgement and acknowledgement mechanisms are not subjected to a public oversight from the relevant administration,

27 "Close the deal, fill the gap". Project funded by the Progress Programme of the European Union – Call for Proposals JUST/2013/PROG/AG/GE Gender Pay Gap. Co-beneficiary partners: University of Verona (coordinator) (Italy); IRES Veneto (Italy); Queen Mary University of London (United Kingdom); University of West of England (United Kingdom); University of Silesia (Poland). The website is: www.fillthegap.eu and the publication is forthcoming *The Gender Pay Gap and Social Partnership in Europe: Findings from the Close the Deal, Fill the Gap Project* (Routledge, 2017) e *Differenziali retributivi di genere e contrattazione collettiva. Risultati del progetto europeo «Close the Deal, Fill the Gap»* (Giappichelli, 2017). For a more in-depth explanation, see PERUZZI, 2017.

except for a simple assessment of procedures' compliance.

More generally, however, the decentralized negotiating regulation, can represent one of the most relevant criteria due to the role and the importance that the collective bargaining will receive in a near future, where the local or business proximity is always more meaningful, influencing the welfare and indirectly the traditional costs of labour law, such as remuneration²⁸, notwithstanding the EU institutions' crisis, worsened not only by the different tensions (see above), but also by the continuous and penetrating nationalist outbreaks emerging from the electoral tests and referenda in the different countries of the European Union.

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28 TREU, 2016a.

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