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The Role of Collective Bargaining in Italian Labour Law

Mariella Magnani ¹

Abstract

Purpose. The purpose of this paper is to analyse the most important features of the Italian collective bargaining system, together with its historical developments.

Design/methodology/approach. We examine the legal framework under Italian law, the structure of the Italian collective bargaining system and the transnational dimension of Italian collective bargaining.

Findings. The increasing integration of markets and rapidly evolving entrepreneurial needs have led to ever greater flexibilisation of national labour regulations, bringing about major changes in European collective bargaining systems.

Research limitations/implications. This research provides a critical debate about Italian collective bargaining.

Originality/value. A number of transnational collective agreements concluded by Italian firms are investigated, alongside their content and the academic debate that these arrangements have generated.

Paper type. Research paper.

Keywords: *Collective bargaining, Italy, globalisation.*

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Summary: Section I – 1. The legal framework of collective bargaining. – 2. The relationship between collective agreements and the law. – 3. Collective agreements and the individual contract of employment. – 4. The legal status of collective agreements with respect to the general principles of civil law concerning contracts. – 5. Duration of a collective agreement. – 6. The obligatory part of a collective agreement. – 7. Enforcement of collective agreements. - Section II – 1. The structure of collective bargaining. – 2. Decentralisation v. centralisation - a historical perspective. – 3. The relationship between collective agreements of different levels. – 4. The role of national collective agreements in the Italian system of collective bargaining. – 5. The national collective bargaining model and the globalised economy. – Section III – 1. The transnational dimension of collective bargaining - the Italian experience. – 2. The academic debate in Italy.

Section I

1. There is no systematic legal regime regulating collective bargaining and collective agreements in Italy. In actual fact, article 39 of the Italian Constitution, dated 1948, after affirming the right of “trade unions to organise freely” (paragraph 1), provides that trade unions may acquire, through a special registration procedure, legal personality (paragraph 2) and that unions with legal personality may enter into collective agreements binding on all members of the category to which the agreement refers (paragraph 4). The legislation necessary to implement this provision was never passed.

The reasons why this legislation was never passed are both political (which can be summed up in union opposition to the idea of a systematic law regulating the trade unions and trade union activity) and technical. Indeed, its implementation should have resolved – and should resolve – technical issues of some importance, such as the definition of the boundaries of the “industry” on which a collective agreement would be binding, in the event of a dispute between trade unions and employers on the fringes of the “industry”. This problem does not arise in systems which provide for the possibility of an *ex post* extension of an existing collective agreement by a public authority order, after ascertaining the presence of a public interest (e.g. Germany and France).

The consequence of the failure to implement art. 39 of the Italian Constitution is that trade unions do not have legal personality and that

collective agreements have not been able – nor will they, until article 39 of the Italian Constitution is enacted or repealed – to acquire *erga omnes* effect. So, we can say that, for the above reasons, there is at present no possibility of collective agreements being universally applicable in the Italian system.

While paragraph 2 of art. 39 of the Italian Constitution requires an ordinary law for its implementation (fleshing out what the Constitutional legislator left unspecified, namely how trade unions are to actually acquire legal personality and how the procedure for the conclusion of collective agreements with *erga omnes* effect is to function) the first paragraph of art. 39, which, as noted, solemnly states that “trade union organization is free”, is directly enforceable.

It recognises the freedom of individuals to form a trade union as well as the freedom of a trade union to determine its internal organisation, to engage in union activity and to negotiate collective agreements.

The upshot of the failure to implement art. 39 of the Italian Constitution is that, at present, a collective agreement stipulated by trade unions, on the basis of the principle of freedom of association, does not have its own regulatory regime but is a part of ordinary contract law.

However, this failure has not prevented the legislator from intervening in trade union matters. Examples include the enactment, in the 1970s, of the so-called Workers' Statute (law no. 300 of May 20, 1970), which contains a central part, in title no. 3, dedicated to workers and union representation at company/plant level and their rights. In addition, a sizeable amount of legislation, especially since the 1980s, has frequently delegated to collective bargaining the task (and power) to “flexibilize” the regulations of labour relations, by derogating from statutory rules (e.g. in the area of fixed-term contracts, the rights of employees in the event of business difficulties, etc.)².

In any case, despite the fact that art. 39 of the Italian Constitution has not been fully implemented, it has considerable legal force, since it prevents the legislator from attributing *erga omnes* effect to collective agreements by means of a different mechanism from the one described above. This has led to issues of constitutional legitimacy, which have been raised on several occasions in the Italian legal system, when the legislator has sought to make, directly or indirectly, collective agreements generally applicable. This happened, for example, at the end of the 1950s, with law no. 741 of 14 July 1959, when the government was authorised to set the minimum

² See, for example, art. 23 of law no. 56/1987 and art. 4 of law no. 223/1991.

standards of protection based on the collective agreements entered into until then, thus making them generally binding. Much more recently the problem arose with art. 8 of law no. 148 of 2011, which provided that so-called ‘proximity’ (at company or local level) agreements should have *erga omnes* effect (as well as derogating from the law and national collective agreements).

In addition to being enshrined in the Italian Constitution, freedom of association (namely the freedom of union organization and trade union activity) is recognised by ILO Conventions no. 87 and no. 98, to which Italy adheres through law no. 367 of 23 March 1958, by art. 28 of the Charter of Fundamental Social Rights of the European Union, and by the European Convention on Human Rights of 1950 (Article 11, as interpreted by the European Court of Human Rights in the landmark *Demir and Enerji* judgments), ratified by Italy through law no. 848 of 4 August 1955, and the European Social Charter of 3 May 1996.

The lack of specific legal rules for collective bargaining has led to autonomous regulation by the social partners (the biggest workers’ and employers’ confederations), which have defined important aspects, starting with the relationship between the different levels of collective bargaining, of course with the legal force typical of contractual regulation. Significant agreements on the functioning of the collective bargaining process, on the duration of agreements, as well as on the relationship between industry-wide agreements and company agreements etc., were concluded by Confindustria (the main Italian employers’ confederation) and CGIL, CISL and UIL (the 3 main workers’ confederations) in 1993, and more recently in 2014 (see below).

2. Collective agreements regulate labour relations and the relationships between signatory trade unions (e.g. sometimes through a peace obligation for the duration of the collective agreement). Moreover, with respect to the original contents of collective agreements, which essentially regulated only pay and working hours, bargaining rules today, particularly in the case of industry-wide agreements, are wide-ranging.

A collective agreement, as well as an individual employment contract, may improve but cannot worsen conditions for the worker with respect to the law. The Italian legal system does not have any explicit provision on the matter, but it is considered to derive from the nature of labour law, which seeks to protect workers; a derogation *in melius* merely extends the scale of worker protection contained in the same legal provisions, and it cannot, therefore, be considered to conflict with them.

There are a number of exceptions to this general rule concerning the relationship between the law and collective agreements: in some cases, the law has allowed collective agreements to derogate even *in peius* from it; in other cases, the law has provided that no derogation is permissible, resulting in the invalidity of collective bargaining clauses both *in peius* and *in melius*. This was what happened in the 1970s and 1980s in the case of provisions which set maximum limits on the cost of the living wage adjustment, with the aim of keeping inflation low³.

Controlled (i.e. negotiated with the trade unions) flexibilization of legal provisions was widely used by the Italian legislator in the closing decades of the last century. For instance, the legislator has allowed collective agreements to flexibilize the legal rules about transfer of undertakings (art. 47, para. 5 of law no. 428 of 1990), part-time employment contracts (art. 1, para. 3 of legislative decree no. 61 of 2000, as amended by legislative decree no. 276 of 2003), fixed-term employment contracts (art. 5, para. 4 *bis* of legislative decree no. 368 of 2001, as amended by law no. 133 of 2008) and annual leave (art. 10, para. 1 of legislative decree no. 66 of 2003, as amended by legislative decree no. 213 of 2004).

Controlled flexibilization of legal provisions reached its apogee in 2011 with art. 8 of decree law no. 138, converted into law no. 148, which, as has already been said, allowed local and company-level collective agreements to derogate from mandatory statutory provisions – and from provisions in industry-wide collective agreements – on a broad range of subjects.

This legislative technique was very controversial – if only for the breadth of subjects where derogation from mandatory statutory provisions was allowed – and rejected by the trade unions, which used it with great parsimony, and sometimes “in secret”.

Hence, the introduction of law no. 92 of June 28, 2012, followed by the so-called Jobs Act (law no. 183 of 2014 and the legislative decrees implementing it), through which the legislator directly implemented “flexibilization” of the legal regulations that had been previously left to collective bargaining.

The Jobs Act still makes reference to collective bargaining rules, but these must now adapt to/specify the legal norm rather than derogate from it⁴. Thus, for example, on the matter of job duties, collective agreements are allowed to identify additional cases, besides those laid down by law, when

³ See decree law no. 12/1977, converted into law no. 91/1977, decree law no. 70/1984, converted into law no. 219/1984 and law no. 38/1986.

⁴ See M. MAGNANI, *Il rapporto tra legge e autonomia collettiva*, in *Dir. Rel. Ind.*, 2017, p. 1 ff.

performance of lower-level jobs is permissible. In the case of part-time work, collective agreements now regulate the issue of overtime, except for the minimum additional remuneration for the hours worked, which is set by law. They also regulate so-called elastic and flexible clauses. In the case of on-call work, they regulate the situations in which it is admissible and measures regarding the availability allowance, except for the minimum set by law. In the case of apprenticeship contracts, in particular, they regulate the training programmes.

3. An individual contract of employment may not worsen conditions with respect to the collective agreement – in its subjective scope of effect (see below). It is interesting to note that both the courts and legal scholars have reached this absolutely incontrovertible conclusion, despite the lack of specific regulation, either by applying art. 2077 of the Italian Civil Code (introduced in the Fascist era and which should now no longer apply) or by exploiting a reference to article 2113 of the Italian Civil Code concerning the settlement of labour grievances which implicitly confirms the rule⁵.

In essence, non-derogability *in peius* is considered to be a co-essential feature of a collective agreement. Of course, this applies within the scope of the agreement itself i.e. to the employers and employees who are members of the signatory trade unions.

As already stated, collective agreements do not have general applicability in Italy.

However, by applying art. 36 of the Italian Constitution, case law has extended the scope of application of a collective agreement also to employees who are not members of the signatory trade unions, albeit indirectly and only *with regard to pay*. This ‘bold’ solution on the part of the Courts has, on the one hand, made the need for “*erga omnes*” extension of collective agreements less “urgent” in the Italian system and, according to some, has also made the need to set a minimum legal wage less urgent.

Article 36 of the Italian Constitution gives a worker the right to receive pay commensurate with the quality and quantity of the work performed and, in any event, sufficient to ensure a free and dignified existence for himself and his family. In applying this provision, the Courts use the parameter of “fair” pay set by collective agreements, declaring individual contractual arrangements which provide for lower pay null and void, not

⁵ For more details see T. TREU, *Labour Law and Industrial Relations in Italy*, Alphen aan den Rijn: Kluwer Law International, 2007, p. 186 ff.

because they do not comply with the collective agreement, but because they conflict with article 36 of the Constitution.

The very existence of this case-law, regarding art. 36 of the Italian Constitution, would make the introduction of a minimum legal wage in Italy unnecessary, according to a number of legal scholars, and some in the union movement, which is fearful that it would weaken collective bargaining. Another, more probable, view is that legislation on a minimum wage is necessary, if only because the application of art. 36 depends on an individual claim, while the application of a minimum legal wage is enforced by public bodies. Indeed, it could also be a useful basis for collective bargaining⁶.

4. As there is no systematic legislation on this subject, the only conditions applicable to a collective agreement are those found in ordinary contract law (with, as we have seen⁷, more than minor integrations).

A collective agreement is deemed to be any contract whose purpose is to settle conflicts of interest or rights among opposing professional groups. Therefore – in order to be described as such – it must be stipulated by collective parties (typically trade unions of employees and employers, or, in the case of a company-level agreement, the single employer and workers' representatives).

Agreements stipulated by groups of workers that are not organised as an association are also considered collective agreements.

5. As we have seen, in its objective and subjective scope, a collective agreement has legal effect on an individual contract of employment, comparable to that of a mandatory provision of law, in that the contract can only derogate from it *in melius*.

Of course, as happens with mandatory statutory rules, a collective agreement *is not incorporated* into the individual contract of employment, but regulates it 'from the outside'. As a result, a subsequent collective agreement may modify, even for the worse, the regulations laid down in the previous collective agreement.

As determined by the contracting parties, a collective agreement (at least at industry level) has a pre-established duration – usually 3 years – and does not have *de iure* effect beyond its termination, unless this is foreseen by the parties, which it normally is.

⁶ See M. MAGNANI, *Il salario minimo legale*, in *Riv. It. Dir. Lav.*, 2010, I, p. 769 ff.

⁷ See *supra*, para. 3.

6. Collective bargaining may also give rise to obligations on the part of the signatories which, *per se*, do not affect individual agreements, for example, the peace obligation i.e. the obligation not to take industrial action and not to call strikes for the period that the collective agreement is in force.

Peace obligation clauses are generally considered to be an obligatory part of a collective agreement, since they place trade unions under an obligation to refrain from industrial action, though individual union members are under no such obligation. They remained outside the Italian collective bargaining system when industrial conflict was at its height.

They have begun to re-appear recently, although they are often linked solely to the phase and procedures related to the renewal of collective agreements. Interestingly, the parties signing the interconfederal agreement of 10 January 2014 on union representation⁸ agreed on the need to set broader rules in national collective agreements to prevent and punish any action violating the stability of collective agreements. This indicates a shift towards a more organised system, and hence more stable bargaining relations.

7. Since there are no specific regulations, collective bargaining takes place as a negotiation between private parties. There is no provision for the involvement of public bodies in this process, except possibly the Ministry of Labour in its capacity as mediator, on the basis of the institutional duties assigned to it to facilitate the settlement of individual and collective labour disputes. These have recently seen a considerable decline. The problem of applying or not applying the collective agreement does not give rise to collective disputes, but are resolved in the context of individual disputes concerning the rights that the plaintiff claims to be based on a particular collective agreement. In interpreting a collective agreement – precisely because it is a contract – the Courts follow the criteria laid down by the Italian Civil Code for interpreting contracts and not those devoted to interpreting the law. Among the various criteria laid down by the Civil Code for interpreting contracts, as happens in the modern theory of contract interpretation in general, so-called “objective” criteria prevail, without regard to psychological motivations.

In 2006 a special procedure was introduced when the validity and effect of the interpretation of a collective agreement are challenged. This procedure

⁸ See *infra* Section II, para. 2.

allows the trial court to seek a preliminary ruling from the Court of Cassation, which is the highest court in Italy, before arriving at its decision. The procedure, which is not mandatory, has not had any significant success.

Section II

1. The collective bargaining system in Italy is organised on several levels, reflecting the multi-tier structure of trade union organisation. Industry-wide agreements, despite moves towards greater decentralization, continue to be the basis of collective bargaining. Alongside these, there are, on the one hand, inter-confederal agreements and, on the other, company-level agreements and, in certain sectors (construction and agriculture in particular), local agreements.

In the absence of legal regulation of collective bargaining and collective agreements, this multi-tier structure is the result of the self-determination of workers' unions and employers' associations. This structure is due to various factors ranging from the degree or level of unionization to general economic conditions.

In times of crisis, we have traditionally always witnessed more centralised bargaining, with a prevalence of national collective bargaining, conducted in particular by the main trade-union confederations. Today, the picture is more varied, and we are seeing more decentralised bargaining due both to the internationalization of the economy and to a prolonged economic and financial crisis⁹.

2. In any case, the evolution of the collective bargaining structure can be divided into various periods.

The inter-confederal level of bargaining played a central, if not exclusive, role in the 1950s: working conditions were regulated by inter-confederal agreements, that is by collective agreements concluded by the union confederations, which set wage levels for workers according to industry, professional status and territorial area.

However, the differences in profitability among the various production sectors, soon, and inevitably, led to the dominance of industry-wide collective bargaining, which became the cornerstone of the process and the basic source of workplace regulation, setting minimum wages, as well

⁹ See T. TREU, *La contrattazione collettiva in Europa*, in *Dir. Rel. Ind.*, 2018, p. 371 ff.; F. GUARRIELLO, *Legge e contrattazione collettiva*, in *Giorn. Dir. Lav. Rel. Ind.*, 2017, p. 97 ff.

as defining working conditions (e.g. working hours) and trade union rights.

Inter-confederal agreements survived, but they regulated general aspects of labour relations, covering all sectors of production, such as the inter-confederal agreements of 20 December 1950 and 5 May 1965 on collective redundancies; the inter-confederal agreements of 18 October 1950 and 29 April 1965 on individual dismissals and the inter-confederal agreements of 8 May 1953 and 18 April 1966 on works committees (*commissioni interne*), which are now no longer applied.

Collective bargaining remained centralised, but had shifted to the industry level. At the beginning of the 1960s the trade unions began to press for company-level collective bargaining, not as a replacement for, but in addition to industry-level collective bargaining. The reason lay in the fact that collective bargaining, both in setting wages and establishing other working conditions, had to take into account the level of profitability of all the firms in the sector, including the more inefficient ones, without considering the (theoretically higher) level of profitability of individual companies.

Union demands for an additional level of bargaining, which private employer associations opposed, were accepted by the state-owned employer associations, leading to an agreement in the metalworking industry, which also had a knock-on effect on private companies. It was in fact adopted by collective agreements initially covering metalworkers and later those of the entire industrial sector.

The bargaining system was multi-tier since, alongside the national level, there was a level related sometimes to the sector (e.g. the shipbuilding sector in the case of metalworkers), but above all to the company. It was hierarchical in that industry-level collective bargaining delegated the regulation of certain issues to company-level bargaining, provided that the trade unions did not call into question, through industrial action, what had been agreed in the industry-level agreement for the length of the agreement's validity.

In 1969, this multi-tier bargaining system, while formally unchanged, was in fact turned on its head as a result of the events of the so-called 'Hot Autumn': forms of spontaneous representation of workers arose in companies in opposition to the trade unions themselves through so-called 'factory councils'. The 'factory councils' presented themselves as interlocutors of individual employers in collective bargaining but wanted to be outside the bargaining system organised by the trade unions and, therefore, refused to recognise the spheres of competence imposed by industry-level agreements.

For a period of time, the tightly-organised bargaining system failed to work. Industry-level bargaining and company-level bargaining ran parallel: at the company level, depending on negotiating strength, everything could be renegotiated, including matters already regulated by an industry-wide agreement.

In the Eighties, with the onset of a new economic downturn and, above all, with the urgent need to bring inflation under control, collective bargaining once again became centralised. And the inter-confederal bargaining level regained importance. The same period also saw the birth of the first *concertation* agreements: these trilateral or tripartite agreements involved not just the trade unions and employer associations, but also the government, which not only took on the role of mediator, but also negotiator of its own resources¹⁰.

The spheres of competence at the various levels (in particular industry and company) continued to overlap until the signing of the landmark Protocol of 23 July 1993, which sought to re-organise the collective bargaining system. The Protocol is a concertation agreement, and the parties to it were the main trade union organisations, employer associations and the government.

One part of the Protocol related to collective bargaining structure and procedures. In particular, it established two levels of bargaining (industry and company level), or, alternatively, local level, depending on practices in specific sectors (e.g. the building and agriculture sectors mentioned above), without any overlap of competences. The Protocol of 1993 explicitly provided that company-level bargaining should cover matters that differ from those of the national agreements, particularly as regards pay; moreover, any additional pay bonuses at company level were to be closely related to enterprise productivity.

The 1993 Protocol was rightly defined, given the conditions of the time, “historic”. It had a significant influence on the reorganization of bargaining relations between the national and the company levels and tamed wage growth, with the aim of helping the country back to economic recovery. The agreement committed all the parties (trade unions, employers and the government) to pursuing behaviour consistent with the macro-economic goals of aligning inflation with the average of the economically most virtuous European countries and reducing the debt-to-GDP ratio as well as the public debt.

¹⁰ See, for example, the so-called Scotti Agreement of 22 January 1983.

The streamlining of collective bargaining extended to the definition of the duration of national and company-level collective labour agreements and the establishment of precise terms for the opening of negotiations for the renewal of contracts. These, in turn, were reinforced by peace obligation clauses binding the parties not to undertake unilateral initiatives and not to take direct action in the preceding three months and in the month following the expiry of an agreement.

Once the Protocol had served its purpose, and inflation had been brought under control, there followed a period of deadlock between employers and trade unions.

After a long phase, marked also by tensions among the various trade unions, new rules were set for collective bargaining by the inter-confederal agreement of January 10, 2014, called “*Testo unico sulla rappresentanza sindacale*” (“Consolidated document on trade-union representativeness”). It amounts to a comprehensive set of negotiating rules covering the parties, procedure, levels, legal effect of collective bargaining, rules of trade union representation, and the “resilience” of collective agreements, in terms of (possible) peace obligation clauses as well as cooling-off and arbitration procedures.

As for the relationship between negotiating levels, it stipulates that company-level bargaining is to take place on matters delegated to it and in the manner foreseen by the industry-wide agreement or by law.

These rules are programmatic in nature, as they must be incorporated into industry-wide agreements. Even if incorporated in the individual industry-wide agreement, they remain contractual rules and, therefore, failure to comply with them does not invalidate company-level agreements in cases in which they overstep the limits laid down by the industry-wide agreement.

3. On the basis of the latest developments in case-law¹¹, the company-level agreements will prevail, even if they are less favourable for the worker, on the basis of a specialty criterion or of the source closest to the employment relationship to be regulated. The abovementioned art. 8 of decree law no. 138 of 2011, which specifically allowed company/local level collective agreements to derogate not only from the law on certain matters, but also from national collective agreements, may in fact be seen as confirmation of a direction in which case-law had already been moving.

¹¹ See Cass. 19 April 2006, no. 9052, in *Mass. Giur. Lav.*, 2007, p. 230; Cass. 18 May 2010, no. 12098, *ibidem*, 2010, p. 842; Cass. 8 September 2017, no. 20988, unpublished.

The Jobs Act (see above), in particular art. 51 of legislative decree no. 81 of 2015, states that when the law delegates regulation to collective agreements, this must be understood as *collective agreements at any level*. Clearly the aim is to encourage company-level bargaining. The legislator has provided other incentives to encourage company-level bargaining. These include fiscal ones, since productivity-related wages negotiated at company (and local) level have benefitted, following the introduction of law no. 247 of 2007, from tax breaks and a partial reduction in social security contributions. In addition, payments into company welfare schemes are not taxed.

4. Given the large number of small- and medium-sized businesses, which makes company-level bargaining impractical, the role of industry-wide agreements remains central to the Italian collective bargaining system.

The number of national agreements is high and has increased in recent years. The latest CNEL (National Economic and Social Council) census indicates that there were as many as 868 national collective agreements in September 2017, a 54.7% increase since 2013 (when the number recorded was 561).

The retail and commerce sector has the highest number of agreements, namely 213. There are also a high number of agreements in the construction sector (68), agriculture (49), transport (65), and entertainment (44). The increases are more modest in the metalworking, textile and chemical sectors with 31, 31 and 34 agreements respectively¹².

Behind the increase in the number of industry-wide agreements is the growth both in the number of trade unions and employers' associations. This growth is due to the greater competition among both employers' associations and workers' representatives¹³. But the increase in the number of agreements is also due, albeit less significantly, to the fact that large companies sometimes break away from their industry to enter into what are both national and company agreements at the same time. Fiat is a case in point but not the only one.

In any case, the degree of coverage of collective bargaining is estimated to be very high. According to data provided by ISTAT (Italy's National Statistical Institute) in 2014, and based on the responses provided by

¹² See 6th CNEL Report, published in September 2017, at www.cnel.it.

¹³ See V. PAPA, *L'attività sindacale delle organizzazioni datoriali. Rappresentanza, rappresentatività e contrattazione*, Torino, 2017; L. BELLARDI, *L'associazionismo dei datori di lavoro: un elemento di fragilità delle relazioni industriali?*, in *Giorn. Dir. Lav. Rel. Ind.*, 2016, p. 403 ff.; G. OLINI, *I contratti nazionali: quanti sono e perché crescono*, in *Giorn. Dir. Lav. Rel. Ind.*, 2016, p. 417 ff.

companies with more than 10 employees to specific questionnaires, it is thought to be on average around 80%¹⁴.

In some sectors, especially those characterised by small and medium-sized enterprises (construction, agriculture), company-level bargaining is replaced by the provincial one. But in traditional industries, both industrial and service-based, bargaining takes place only at national and company level. As we have seen¹⁵, recent legislation has tended to encourage decentralised i.e. company/local-level bargaining, though not to replace national collective bargaining rules, but as a way of adapting them to specific local/company-level conditions.

5. The profound economic and financial crisis affecting the world economy and the macroeconomic constraints imposed by membership of the European Union have affected the regulation of collective bargaining in the public sector in Italy. The legislator has frozen collective bargaining in this area for a number of years in order to reduce public spending¹⁶.

The freeze on collective bargaining, which was initially set for the years 2013-2014, but extended to 2015, came under the scrutiny of the Italian Constitutional Court, which, in judgment no. 178 of 2015, ruled that the systematic nature of the bargaining freeze generated an unreasonable imbalance between trade union freedom (Article 39, paragraph 1, Italian Constitution) and the need for distributing resources rationally and curbing spending. The Italian Constitutional Court's decision was in line with previous decisions on the matter: in particular through ruling no. 124 of 1991 the Court had found that legislation intended to restrict collective

¹⁴ See also J. VISSER, *ICTWSS Data base*, September 2016, at www.uva-aias.net/en/ictwss; T. BOERI, C. LUCIFORA, *Salario minimo e legge delega*, 26 September 2014, at www.lavoce.info; A. GARNERO, *Chi si rivede, la lotta sindacati-imprenditori*, 25 luglio 2017, at www.lavoce.info; C. LUCIFORA, *Il salario minimo: contrattazione o minimo legale?*, in C. DELL'ARINGA, C. LUCIFORA, T. TREU (eds.), *Salari, produttività, disuguaglianze. Verso un nuovo modello contrattuale?*, Bologna, 2017, p. 401 ff. However, the impact of collective bargaining differs depending on the economic activity: for instance, in the agricultural sector it is 100%, while it is 83.4% in industry and 68.9% in private services: see www.istat.it.

¹⁵ See *supra*, para. 3.

¹⁶ See F. GUARRIELLO, *Legge e contrattazione collettiva in Europa: verso nuovi equilibri?*, in *Giorn. Dir. Lav. Rel. Ind.*, 2016, p. 124, according to whom the collective bargaining freeze serves the wage moderation policy pursued by EU institutions "in order to implement structural reforms that should lead to an improvement in the competitiveness of the national system. This assumes that the salaries of public workers are on average higher than those of the private sector and that wage moderation in the public sector has a knock-on effect on the private sector, which must comply with the criterion imposed by the reforms to link wage dynamics more closely with productivity trends".

bargaining is only admissible in exceptional circumstances, in order to safeguard overriding general interests and must, therefore, be transient. The private sector has not been affected by these phenomena, but the globalised economy has made it less attractive for companies to make use of industry-wide agreements. Their role has weakened as markets have become more integrated at a supranational level, thereby reducing the interest of companies, especially those most exposed to competitive pressures, to abide by common rules. So, while there is a growing number of enterprises (see above) wishing to move away from industry-wide agreements or even to exit from the collective bargaining system altogether, it should be emphasised that the picture is very mixed: a majority of companies, especially the smaller and less exposed ones, still appear to appreciate the stabilizing function of the industry-wide collective agreement, although seeking more flexible rules which are set at national level¹⁷.

Section III

1. The subject of the transnational dimension of collective bargaining has not been explored in depth by Italian legal scholars. Those who have¹⁸ generally use the term “transnational company agreements” to indicate agreements concluded between the central management of a multinational or transnational company and various workers’ representatives

¹⁷ See M. CARRIERI, *Migliorare il decentramento contrattuale: come le parti affrontano questa sfida*, in C. DELL’ARINGA, C. LUCIFORA, T. TREU (eds.), *Salari, produttività, disuguaglianze. Verso un nuovo modello contrattuale?*, mentioned in footnote no. 13, p. 471. He notes that the majority of small companies (80% of companies with under 50 employees) prefer to apply only industry-wide collective agreements because they do not have the organizational, technical and cultural means to implement company-level collective agreements.

¹⁸ See the two “*Euracta*” studies, edited by S. LEONARDI, which were also funded by the European Union with contributions from various foreign academics: *European action on transnational company agreements: a stepping stone towards a real internationalization of industrial relations*, Rome, 2012, and *Transnational company agreements. Parameters and prospects*, Rome, 2015. A more narrowly labour law perspective can be found in A. ALAIMO, B. CARUSO, *Dialogo sociale e negoziazione collettiva nell’ordinamento europeo (parte II)*, in *Arg. Dir. Lav.*, 2013, I, p. 51 ff.; S. SCARPONI, *Gli accordi transnazionali a livello di impresa: uno strumento per controllare il social dumping?*, in AA. VV., *Studi in onore di Tiziano Treu*, I, Napoli, 2011, p. 597 ff.; S. SCIARRA, *Transnational and European ways forward for collective bargaining*, in *WP CSDLE, Int.* – 73/2009; A. LO FARO, *La contrattazione collettiva transnazionale: prove di ripresa del dialogo sociale in Europa?*, in *Giorn. Dir. Lav. Rel. Ind.*, 2007, p. 551 ff.; E. ALES, *La contrattazione collettiva tra passato, presente e futuro*, in *Giorn. Dir. Lav. Rel. Ind.*, 2007, p. 541 ff.

(international or European trade union federations, European works councils, or national trade unions).

The Italian experience of collective bargaining at the level of a transnational enterprise began to develop in the early 2000s. To date, there have been five global framework agreements signed by Italian multinationals (Merloni/Indesit, ENI, Italcementi, Enel and Impregilo). They are characterised by the fact that they are signed on the employer side by the company's central management (daughter companies or subsidiaries are seldom involved) and, on the worker side, by international trade union federations, and often by national sectoral federations.

As for the goals and content, the global framework agreements signed by Italian multinationals do not differ significantly from those entered into by companies from other European countries. Regarding the first issue (that of *goals*), they focus primarily on building solid relationships of trust and co-operation between the enterprise and the trade union federations involved, so that constructive dialogue can be established. In turn, this dialogue is seen as essential to promote decent work in the world and, in a more entrepreneurial perspective, to reinforce existing social responsibility tools.

As regards their *content*, they refer primarily to the main international instruments on corporate social responsibility (OECD Guidelines for Multinational Enterprises, ILO Tripartite Declaration of Principles on Multinational Enterprises and Social Policy, UN Global Compact), as well as fundamental social rights or core labour rights, as set out in the ILO's eight core conventions (freedom of association and collective bargaining, prohibition of child labour and forced labour, equal treatment and non-discrimination). In addition to this, companies often commit themselves (rather broadly and programmatically, it must be said) to respect the laws of the countries in which the enterprise operates; to pay adequate wages (generally the reference is to the minimum wage foreseen or to the cost of living); not to require excessive working hours (also in this case, with reference to local laws); to ensure a healthy working environment, minimizing the risks for the safety of employees. As regards the reciprocal relationships between the contracting parties, the agreements foresee an annual meeting in which to discuss the actual implementation of the agreement.

On this last point, the agreement involving ENEL, which seeks to set up a global works council, is of particular interest. This agreement was signed by Enel, "also on behalf of all the companies/Divisions of the Group", and by the Global Union Federations IndustriALL and PSI (Public Services International), as well as by three of the biggest Italian trade

unions in the energy sector. In addition, the “Foreword” describes the “pivotal role” of Enel’s European Works Council, and the involvement in the negotiations of the respective trade union organisations in EU Member States, Russia and Latin America. As regards the content, the agreement can be conceptually divided into two parts. Part one – a kind of preface - clarifies the aims of the agreement (to create a global information and consultation system for employees) and its guiding principles (reference is made to some of the most important ILO conventions). Part two regulates the composition, purpose, duties and powers of the Global Works Council. It should be noted that the Works Council does not have any bargaining power¹⁹. This is in fact an interesting strategy (mainly adopted by the Global Union Federation *IndustriALL*) to create a network of global solidarity among workers belonging to the same company.

Besides the abovementioned agreements, there are also those that are exclusively European in scope and/or that concern only specific issues (e.g. the Joint Declaration on “Equal Opportunities and Non-Discrimination” by Unicredit and its European works council or the “Joint Health and Safety Initiatives” proposed by Marazzi, or the Generali Group’s “European Social Charter”). Aside from the features just mentioned, they differ from global agreements, also with regard to the signatories (on the workers’ side) and objectives. These are in fact mostly agreements negotiated and signed by European works councils to meet specific needs that emerge from time to time at the meetings of these bodies. As a result, they cannot be quantified since they are often informal arrangements with the management²⁰.

2. As noted above, Italian legal scholars have, on the whole, neglected the subject. In general, the most discussed issues have essentially been the ones that have triggered a lively debate among all academics who have dealt with the topic, regardless of the legal system in question. The

¹⁹ As for its composition, the Council has a maximum of 12 members, which are appointed by the employees of each concerned country according to the proportionality principle. To be represented, a country must have at least 500 employees within the Enel Group. The signatory Global Union Federations will represent countries that do not meet the abovementioned requirement.

²⁰ This has been proven particularly in the case of the metalworking sector by T. MÜLLER, H. W. PLATZER, S. RÜB, *Transnational company agreements and the role of European Works Councils in negotiations. A quantitative analysis in the metalworking sector*, Brussels, 2013, at <https://www.etui.org/Publications2/Reports/Transnational-company-agreements-and-the-role-of-European-Works-Councils-in-negotiations>.

problem has in fact been to understand whether such agreements constitute soft law or hard law instruments, and if they are the latter, then what legal effects they could produce.

One issue concerns the language chosen by the parties, which is often generic or exhortatory. However, even when the vocabulary is clearer and more precise, agreements often contain provisions that are not directly applicable to individual employment relationships, insofar as instruments are still needed to implement them. Furthermore, questions have been raised as to whether and to what extent these agreements, since they are usually only signed by the parent company, have an impact on subsidiaries - and, moreover, on other commercial partners over which there is no form of corporate control.

In any case, the above issues have so far been purely theoretical in nature, since there has been no case of legal action relating to an enterprise-wide transnational agreement.

Likewise, there are currently no studies on the implementation of transnational agreements concluded by multinationals headquartered in Italy. Nevertheless, it can be argued that the initial difficulties faced by the various workers' representatives in negotiating an enterprise-wide transnational agreement lie in fact in seeking an interlocutor on the employer's side. This explains why, in many cases, European works councils play a decisive role in the conclusion of such agreements, even when they are not themselves signatories (as happened in the case of the Enel agreement mentioned above). They have a privileged channel of dialogue with the company management, as attributed by Directive 2009/38/EC, due to their role as bodies established to inform and consult workers in European-level company groups. Under the directive, European works councils have the right to be informed and consulted by the management before any decisions that affect European employees are taken, as per the agreement for the creation of each committee or, failing this, in compliance with the subsidiary requirements laid down in annex 1 of the same directive. This sometimes allows them to act as intermediaries between the European and global trade union federations and company management²¹.

²¹ An indication of the practical importance of European Works Councils' role in signing transnational company agreements, can be seen in the fact that, out of the 282 agreements recorded in the European Commission database (<http://ec.europa.eu/social/main.jsp?catId=978> – the database was updated in April 2015), 105 were signed also or solely by a European Works Council. In addition, according to T. MÜLLER, H. W. PLATZER, S. RÜB, in *Transnational company agreements and the role of*

There are no indications of particularly critical issues encountered by the parties in the actual implementation of these agreements either from the websites of the trade union federations concerned or elsewhere. However, this does not always mean proper and comprehensive implementation. Indeed, identifying infringements may often be complex due to the relatively small organizations of international trade federations, especially when these are performed by subsidiaries or non-unionised commercial partners (or whose employees are members of unions that are not affiliated to the signatory federations).

As has already been pointed out, the agreements concluded by Italian multinationals (particularly the global framework agreements) make wide reference to the most important international corporate social responsibility instruments, and are indeed considered as such by the companies that sign them. However, there is no law in Italy imposing or encouraging links (nor is there discussion of one at present) between the results of collective bargaining and socially responsible practices undertaken by multinational corporations.

European Works Councils in negotiations. A quantitative analysis in the metalworking sector, mentioned in footnote no. 19, p. 51, European Works Councils have helped start negotiations related to all the informal arrangements mentioned in the study.

ADAPT International Network



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