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Multinational Corporations and Social Rights' Protection: the Current Italian Approach

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SUMMARY

1. Introduction

While, on the one hand, driving the market towards greater flexibility certainly means meeting manufacturing-related needs,[1] on the other, this does not necessarily (and, in fact, very rarely) bring work relations – that are partially or entirely *extra ordinem* and scarcely synallagmatic – out of illegality.[2]

Similarly, if "free" entrepreneurship is oriented towards profit maximization, over and above the concept of "social utility", the alternative is as drastic as it is simple: either the business is shut down or it is directed back into the realm of legality.

The capacity of an employer (physical or legal person) shall not be reflected in the impunity from the consequences of exploitation and torts or, even worse, in the justification of their perpetration by raising the spectre of occupational repercussions associated with discontinued manufacturing or plant shutdown.

However, in recent years the conviction has spread regarding the need/opportunity to pursue – whenever possible – less drastic and more conservative routes, with the limitation that they do not result in a failure to impose legality in the entrepreneurial conduct.[3]

Especially in periods – like the current one – in which work is a rare commodity, looking for alternative routes instead of repression (monetary sanctions, seizure, activity suspension), on the wake of the "*fiat iustitia ne pereat mundus*" principle, has become key to prevent exploited workers from ceasing to be workers instead of ceasing to be exploited.

The envisaged controls on the performance of any individual or collective economic activity obviously remain – and it could not be otherwise – in order to ascertain potential irregularities, deviations or, also, torts, and the regulators drew up intervention criteria from scratch again – regarding the "freedom" of the entrepreneur – painstakingly oriented towards removing illegal profiles, yet – simultaneously – oriented towards preserving economic activities, whose existence is held to be socially beneficial (hence the abandonment of the other principle, based upon which legality must be confirmed without compromises and must prevail over any other value: *fiat iustitia et pereat mundus*).

1 *See* Barrientos, S. *et alii* (2011), p. 297; Gereffi, G., Humphrey, J., Sturgeon, T. (2005), p. 78, and Helfen, M., Fichter, M. (2013), p. 553.

2 *See* Miscione, M. (2009), p. 158; Roccella, M. (2011), p. 49; Thomann, L. (2011), p. 185; Chuang, J. A. (2014), p. 630. Especially regarding MNCs, *see* Gottardi, D. (2010), p. 516.

3 Efforts with different approaches have been made to remedy the situation: *see* ILO, *Decent Work in Global Supply chains*, 2016, p. 40; ILO, *Safety and health at the heart of the future of work. Building on 100 years of experience*, Geneva, 2019, p. 67, and Brino, V. (2019), pp. 562-563.

The best route to follow was identified in the principle of legality – taking into consideration the restrictions to be applied to economic freedom – and in the jurisdictional guarantee regarding the concrete adaptation of the restriction to the concrete case.

This reconstruction is made complicated also by the recent – though already consolidated – tendency to the delocalization of work relationships compared to the traditional workplace and the different relations between people, machines and the environment that characterise (and will increasingly characterise) the production and provision of goods and services.[4]

Hence, the need for the jurist – in a matter that transcends the individual national legal systems in terms of importance and relevance – to identify, at the regulatory level, different instruments (from private-soft law regulations through multi-stakeholder initiatives, transparency regulations, etc.), that are – in turn – more flexible and capable of contrasting the new and increasingly insidious risks associated with the fragmentation and disarticulation of production processes, especially through production chains at the transnational level.[5]

2. The effectiveness of Labour law before MNCs: public and private interventions

In this perspective, special importance is given to ensuring the concrete implementation of the fundamental principles set out in the ILO conventions, both by monitoring workers' rights on the ground in multi-layered international and national supply/value chains, by encouraging countries to adjust their national legislation to adopt them, and by motivating companies to act in first person in order to ensure compliance with the international social standards.

In this respect, the recent ILO recommendation no. 204 of 2015 is worth underscoring – "the transition from an informal economy to a formal economy", intended to promote the concrete implementation of the core labour standards and identify the opportune temporary measures for this to happen, taking the cultural and legal peculiarities of the member states into account, while at the European level, the European platform for the promotion of cooperation is worth considering, conceived to contrast irregular work and established based on EU resolution 2016/344, and in any case leaving to the individual governments the responsibility of implementing a suitable sanction-based system to pursue the

4 Brino, V., Gragnoli, E. (2018), p. 214.

5 *Cf*. Baylos Grau, A. (2006), p. 71; Sanguineti Raymond, W. (2009), pp. 547 and 569; Brollo, M. (2012), p. 856; James, P. *et alii* (2015), p. 727; Nuzzo, V. (2018), pp. 3 and 26; Kaplinsky, R., Morris, M. (2002), p. 4.

common objectives already implicitly contained in the European Strategy for Employment (EES).[6]

While at the international level legal sources pursue the identification of a general level of minimum protection of social rights, at the European level the objective is different and is mainly based on the need to balance the preservation of such rights vis-à-vis a production scenario (differentiated on the economic, structural and cultural level) that needs to be harmonised.[7]

An interesting aspect for both perspectives is that there is a tendency to move (also) towards solutions that do not (only) find their regulatory or sanctionary reason in the imposition of the (national) law,[8] especially in consideration of the fact that the deterrent power of sanctions (poorly effective in transnational production contexts and, even more so, globalized ones) should be overcome by the primary attention paid to prevention.

In this respect, there are many examples that have been thoroughly analysed in recent years, starting from the analysis of the processes – voluntary and autonomously decided by enterprises – regarding Corporate Social Responsibility, including efforts to more closely involve other interlocutors (trade unions, first and foremost).[9]

As an example, the stipulation of the so-called *Global Framework Agreements* (GFA), underwritten by a multinational company (MNC) and one or more trade unions or federations in compliance with (and as an expression of) a Social Dialogue that transcends individual jurisdictions is worth mentioning.[10]

The advantage of these agreements lies in their hopefully greater impact, as their disclosure and the economic-promotional and also organizational relevance of some of their clauses allow the principal or the performer of the services to carry out controls on the management of work relations and the monitoring activities and verify compliance with the obligations by the underwriting social subjects, which should work as disincentives for the multinationals, preventing them from committing any (at least macroscopic) violations.[11]

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6 *See* Giaconi, M. (2016), p. 439; Varva, S. (2016), p. 461, and Ferrante, V. (2017), p. 8.

7 On the other hand, *see also* the Regulation 2017/821 of the European Parliament and the Council of 17 May 2017.

8 *See* O'Rourke, D. (2003), p. 5; Gil y Gil, L. (2016), p. 98, and Weiss, M. (2018), p. 121.

9 In this sense, Global Union Federation (GUFs) and European trade union federations (ETUFs) tend to be involved in the implementation of social initiatives and due diligence plans – concluding transnational company agreements (TCAs), international framework agreements (IFAs) and European framework agreements (EFAs) – especially in relation to violations committed by multinational companies' subsidiaries and contractors. *See* Gottardi, D. (2006), pp. 11-12, and Perulli, A. (2011), pp. 36-37.

10 Dehnen, V., Pries, L. (2014), p. 335; Donaghey, J., Reinecke, J. (2018), p. 26, and Scarponi, S. (2018), p. 258.

11 Colombo, S., Guerci, M., Miandar, T. (2017), p. 3; Egels-Zandén, N., Hyllman, P. (2007), p. 216; Lévesque, C. *et alii* (2016), p. 6, and Sanguineti Raymond, W. (2009), pp. 561-563.

The desired objective is that enterprises – i.e., suppliers – comply not only with the national laws applicable in the country in which they carry out production activities, but also – by necessary emulation – with the requirements set out by the buying companies, their customers, which if not more sensitive to the social standards, fall under more controllable jurisdictions.

Another example worth mentioning with particular reference to multinationals are the private compliance initiatives (PCIs)[12] and, more specifically, codes of conduct.

Starting from a (formally) unilateral initiative (but usually the result of the involvement of collective organizations or the aforementioned international agreements), these documents, especially if drawn up following discussions with the social parties (or non-governmental organizations, consumer associations, etc.), can be considered valid tools to regulate relations with suppliers and subcontractors,[13] mitigating the scarce effectiveness of international labour law.[14]

Although it may indeed become a useful tool to counterbalance the aforementioned lack of regulatory limits to the exercise of employer powers, the English term used evokes the voluntary origin of the institution, as a system conceived "by and for businesses"[15] and as a tool that any institution can reasonably draw on in its work of (self-)organization and socially responsible management.[16]

It suggests that a mixture of public and private interventions represents an opportunity to improve working conditions and environmental standards within global supply chains, as well as to target, dismantle and disrupt serious and organized human trafficking.[17]

12 ILO standards inclusively define "Private Compliance Initiatives" as private, voluntary mechanisms for monitoring compliance with established public (law or regulations) or private (codes of conduct, etc.) standards and they exist in a variety of types, including self-assessment (management systems), auditing (internal and external), certification and labelling, and public reporting. *See* ILO, *Labour inspection and private compliance initiatives: trends and issues. Background paper for the Meeting of Experts on Labour Inspection and the Role of Private Compliance Initiatives*, Geneva, 10-12 December 2013, p. 10.

13 Jiang, B. (2009), 78; Egels-Zandén, N., Merk, J. (2014), p. 461, and Ferraresi, M. (2018), p. 451.

14 Ferraresi, M. (2018), p. 469, and Murgo, M. (2019), pp. 7-8.

15 Brino, V. (2018), p. 178, and Del Punta, R. (2017), p. 93.

16 *See also* Magnani (2006), pp. 110-112.

17 From this point of view, *see* the *California Transparency in Supply Chains Act* of 2010. It requires certain manufacturers and retailers doing business in the State to disclose information regarding their efforts to eradicate slavery and human trafficking from their direct supply chains (for example, through so-called "supplier audits").
In the European perspective, *see* Directive 2014/95/EU (also named CSR-Directive) of 22 October 2014, amending Directive 2013/34/EU, and Brino, V. (2019), p. 560. Following the "report or explain approach", it demands to publish reports on the policies implemented in relation to "as a minimum, environmental, social and employee matters" and the regulation 2017/821.

This explains why, in doctrine and among sector experts, doubts have often been raised about the effectiveness of these institutions (and, more generally, about CSR), whose adoption is voluntary,[18] and yet there is no doubt that in terms of employment protection in a Social Accountability (rather than Social Responsibility) perspective, regulations have also begun to move in this direction.[19]

The objective can be said to be twofold. In addition to facilitating the ratification of instruments of international law, which are often only cosmetic and not supported by inspection tools designed to make them effective,[20] the hope is that these initiatives will take on importance as instruments designed to enhance the value of companies engaged in activities to combat labour exploitation, promote regular hiring, train all subjects responsible for protecting legality and safety in employment relationships, strengthen consumer awareness of the production process[21] and support incentive, promotion and control actions by member states in the face of a growing obligation to make known "and account" for what has been done or not by companies with regard to the protection of social rights.

3. Labour exploitation, corporate responsibility and judicial control

In the Italian legal system, in the light of a regulatory framework – including the EU – so outlined, a recent clue revealing a tendency to encourage (or force) companies to act "from within" to comply with the law is found in Law no. 199 of 29 October 2016.

This law represents a precise choice by the regulator in favour of a private economic initiative which is effectively in line with the requirements set out in Article 41 of the Constitution, and that is, a "free" entrepreneurial activity, that is not such as to be "in contrast with social welfare or to cause damage to security, freedom, and human dignity."

If this entrepreneurial activity does not voluntarily conduct itself in a constitutionally compatible manner, the "freedom" can be suppressed or restricted in a way that Article 41 of the Constitution does not specify, but that necessarily follows the criteria already provided for in the same Charter to affect other activities, although recognized as "inviolable" (unlike the provisions provided for in Article

18 *Cf*. Lee, E., 1997, p. 173, and Locke, R. M., Rissing, B. A., Pal, T. (2013), p. 523, and Locke, R. M. (2013), p. 126.

19 Rombouts, B. (2019), pp. 245-246.

20 *Cf*. Weiss, M. (2013), p. 12.

21 *See* Chowdhury, M. S. (2017), p. 84.

41, paragraph 1 of the Constitution), such as personal freedom (Article 13 of the Constitution), freedom of domicile (Article 14 of the Constitution), freedom and secrecy of correspondence (Article 15).

Italian Law no. 199/2016 introduces "provisions on combating the phenomena of undeclared work, the exploitation of labour in agriculture and the realignment of wages in the agricultural sector", the aim of which is to remove expressions of economic activities by employers, natural persons and legal entities that are in conflict with the constitutional requirement that work must respect the dignity and safety of the contractual counterpart and which is not deformed by the abuse of a dominant position in terms of economic conditions, work environment and working hours, insurance and social security contribution profiles.[22]

In this sense, there are institutes, such as the Rating of Legality and the Network of Quality Agricultural Work, aimed at identifying – and rewarding – agricultural producers that operate consistently with the objectives of legality applicable to the sector, as well as promoting the so-called ethical chains through the publication and promotion of a list of companies considered "virtuous", so as to encourage large retailers to commit themselves publicly to obtaining supplies only from the latter.[23]

Particular attention is paid to the requirements for access to the Network: only companies that have never been convicted – nor subject to administrative sanctions in the last three years – of violating labour regulations and social regulations may apply for registration and benefit from certain exemptions and facilitations (also in terms of inspection checks).

Secondly, the 2016 reform advocates greater involvement of public bodies in management and control activities: the number of members of the Network (including one-stop-shops for immigration, local institutions, employment centres and bilateral bodies set up by employers' and workers' organizations in agriculture, and subjects authorized to use transportation means for the transport of agricultural workers) increases with the possibility of promoting initiatives; greater control is envisaged by the Ministry of the Interior and the National Labour Inspectorate, through a centralization of roles in the so-called *Cabina di Regia* [Director's booth]. This clarifies the prerogatives in terms of monitoring market trends (with the possibility of formulating "indexes of consistency" of corporate behaviour closely related to the characteristics of agricultural production in the area),[24] the number of foreign workers, dialogue with the social partners

22 De Marzo, G. (2016), p. 377; Ferranti, D. (2016); Padovani, T. (2016), p. 48; Calafà, L. (2016), p. 169, and Miscione, M. (2017), p. 118.

23 Ranieri, M. (2015), p. 387.

24 Regarding a previous experience in the agricultural sector, *see* Pinto, V. (2014), p. 356; Garofalo, M. G. (2007), p. 65; Barbieri, M. (2010), p. 79-80.

in terms of active labour policies, combating undeclared work and tax evasion, promoting the stipulation of agreements on wages to be paid to the agricultural workers, including through a joint plan of actions for the reception of all workers engaged in seasonal activities regarding the harvesting of agricultural products.

This being said, the greater involvement of the institutions does not exclude that forms of legislative incentive can and must be extended to enterprises with the specific intention of increasing the number of instruments available to governments (and the other competent authorities) to check on the legal persons found to be in breach of their legal obligations, using both repressive and – above all – preventive instruments.

In this perspective, the innovative profile presented by Article 3, Law no. 199/2016, is worth mentioning: "*Judicial company control and removal of the conditions of exploitation*", with which the regulator – being aware of the objections when it comes to substituting the entrepreneur in the management of the company – provides for the "judicial company control" through a "judicial administrator" appointed by the Court. However, it also starts to define its *raison d'être*, on the one hand, in preventing the "interruption of entrepreneurial activity" (thus ensuring continuity of employment) and, on the other, in ensuring the "removal of the conditions of labour exploitation", in order to encourage an economic activity that recognizes the necessary space to values other than the maximization of profit.[25]

In other words, the judicial administration is justified in order to avoid "negative repercussions on employment levels" and the compromise of the "economic value of the company complex", but the growing possibility on the part of the government to begin to valorise for the future (through, as we shall see, the adoption of codes of conduct and organizational models) the "inside" knowledge of organizational precautions adopted by the company to guarantee transparency and legality in the production process should not be underestimated.

The judge's discretion is limited by the legislative predefinition of the assumptions and objectives underlying the "legal control", while the regulator clearly excludes that the protection of production can have relevance in a sector where the prevalence is undoubtedly to be attributed to the protection of the working conditions and where the continuity of the work, subject to the elimination of conditions that imply exploitation and insecurity, is pursued also through the legal defence of the economic value of the company as a guarantee itself of safeguard of the employment levels and ability to make investments and generate income, which are jointly essential for any hiring policy.

25 Corso, S. M. (2020), p. 111.

Legal control is, therefore, certainly a form of state interference in the economy and management of a business, but – where the conditions exist – it is resolved through the provision that one or more experts in business management, appointed as judicial administrators, support (and do not replace) the entrepreneur, monitoring "from within" that the latter effectively corrects the "irregularities in the performance of business activities", eliminates "situations of serious labour exploitation", and respects the rules and working conditions whose violation has led to the illegal exploitation of workers (in Italy and abroad).

In two respects, the judicial administrator acts directly in the pursuit of objectives set by the regulator and at the basis of his appointment *iussu iudicis*, i.e., to regularize the workers who "at the time of the initiation of the procedure" were performing their work in the absence of a regular contract, and "to take appropriate measures even in divergence from those proposed by the entrepreneur or manager".

A regulatory framework emerges which requires a steady information flow to the judicial administrator by the entity (or subject) managing the company, a cross-examination on the decisions to be made in the matter of labour policy and criteria for its implementation, and a *ex lege* prevalence of the will of the judicial administrator. However, such prevalence is limited both by the latter's obligation to report to the judge "every three months" and by the implicit consequence that the last word is due to the prosecuting judicial authority, to which the entrepreneur – *sub iudice* – can directly turn for an opinion on the suitability of the management conduct of the administrator appointed by him.

4. Concluding remarks: examples of transparency requirements beyond national borders

Apart from the forms of legal control, in Italy, a synergy between private autonomy and heteronomous state intervention is also economically and legally stimulated through the adoption of internal control systems, which act as genuine forms of indirect coercion.

In this sense, the organizational, management and control models set out in Legislative Decree no. 231 of 8 June 2001, i.e., those particular compliance tools introduced on the model of the American Compliance and Ethics programs, and aimed at adapting the internal organization of the company to respect legality, have great potential. As for the codes of conduct,[26] the adoption of the models is not compulsory (although strongly encouraged) but unlike the

26 For a more in-depth analysis, Mangarelli, C. (2009), pp. 74-75; Sanguineti Raymond, W. (2009), p. 555.

former, the contents of the latter are not completely free (in order to benefit from the relative promotional effects and exemption from responsibility), as they have to comply with certain legal requirements.[27]

The importance of this minimum requirements in terms of the right to information or disclosure (also with regard to ILO principles) is still scarcely investigated in this sense, forcing companies (especially transnationals/multinationals and in business relations with other partner companies) to learn in the first place who are the players in their production chain and, secondly, allow easier verification by the national authorities.

In this perspective, the organizational and management models perform a fundamental information and due diligence function,[28] as instruments of legitimacy suitable for assessing facts and decisions not according to abstract reconstructions and standards but based on (social) reports obtained from documented or documentable factual evidence provided by the company by reason of its operational choices, its economic and training investments and, in brief, any possible element useful for reconstructing its internal mechanisms (including commercial ones and those with third parties).[29]

Only in this way can the judgment on the organizational and managerial activity of the entity differentiate the position of the company that has invested in the fight against exploitation (for example, by providing for auditing procedures for workers and their representatives) from that which has shown a lack of interest and superficiality.[30]

The first consequence of this "comply-or-explain" approach is the need for (also) the employers (i.e., the legal persons) to take charge of developing internal organizational and management strategies aimed at combating the phenomena of worker exploitation, also across countries. In fact, in accordance with ILO principles, society at large expects companies to behave in absolute adherence to a culture of legality, of which the protection of individual and collective legal assets is an essential part and, in particular, the protection of the psychophysical well-being of workers against all forms of exploitation and regardless of any mode of productive outsourcing used by the company.

The disappointment of this expectation – as a result of business strategy, underestimation of the problem, unsustainability of the increased personnel costs, a sector characterised by harsh competition and reduced profit margins, or even

27 Tullini, P. (2010), p. 407.

28 Regarding art. 54 *UK Modern Slavery Act* of 2015, and French law 27 March 2017 no. 399, *see* Cossart, S., Chaplier, J., De Lomenie, T. B. (2017), p. 320; Lyon-Caen, A. (2018), p. 242; Brino, V. (2018), p. 188.

29 *See* Turner, R. J. (2017), p. 195.

30 Lyon-Caen, A. (2018), p. 246.

just as a result of the "rigidity" of the current regulatory framework[31] – opens the way both to the inclusion of a minimum heteronomic content in the codes of conduct[32] in order to favour prevention (from exploitation) through transparency, accountability and a better identification (also in a judicial perspective) of the productive organization, and – in the most severe cases – to a legal control of the company limited to the elimination of the conditions of exploitation.

In conclusion, the constitutional obligation to promote the conditions that make the right to work effective can only be explained through the protection of the stability of work and of the fundamental social rights, which is accompanied by the commitment of the regulator to design innovative tools aimed both at removing the conditions of labour exploitation without compromising a substantially "healthy" business management, and combining the freedom of economic initiative with the "essential" restoration of legality, dignity and safety in the workplace.

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31 For an in-depth and up-to-date analysis, *see* the essays of Casale, D. (2014) and Ferrante, V. (2018), p. 1074.

32 On this topic, Corso, S. M. (2018), p. 94.

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