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Do the "categories" of labour law still exist? An Italian and European perspective.

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Abstract

The European Court of Justice (ECJ) has clarified the applicability of European Union law to collective redundancies. In a recent case, the ECJ ruled that the concept of "collective redundancies" should be interpreted broadly to cover both direct and indirect terminations. The Court emphasized that national legislation must include assimilated terminations into the definition of collective redundancies provided by EU law to ensure effective protection for workers. The contribution underlines the existing contrast between the above-mentioned European category and the one built by the Italian legal order with respect to the domestic jurisprudential interpretation.

Keywords: European law; National law; Collective redundancies; Assimilated terminations; ECJ Jurisprudence; Italian legal order compliance.

1. European / Italian conceptual framework.

The European/National conceptual framework has developed in a contrasting but extremely fruitful manner around the notions of workers, employer, public administration and public sector workers, business transfers, branch transfers, and, most recently, collective redundancies. The European legal system, after an initial phase of self-restraint and definitional abstention with reference to notions formulated at the national level, has taken on an increasingly interventionist position, both at the legislative level and through authentic interpretation by the Court of Justice. In this way, the sphere of influence of European Union law has strengthened, and the level of convergence of protective disciplines has expanded. However, not always in the direction set by European law, as demonstrated by the extension of the notion of worker as an economically dependent subject for the application of various

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European regulations (transparency, non-discrimination, equal remuneration, non-competition, etc.), where our legal system has deviated, at least conceptually, from the European context.

This divergence of notions/cases between EU law and national law, and therefore the scope of application of protective disciplines, is particularly evident at this stage in relation to the notion of collective redundancies, where a strong misalignment between the European and domestic contexts has been observed over the past two years. In particular, an irreconcilable conflict has arisen between the Union notion of termination of the employment relationship assimilated to dismissal for the purpose of verifying the minimum parameters for the application of the collective redundancy procedure, and the notion adopted at the national level based on the interpretation provided by case law from the Supreme Court and lower Courts in their examination of individual cases. The result is not only considerable applicative uncertainty resulting from the contradictory nature of domestic judicial decisions but also a conflict between European law and domestic law that significantly reduces the scope of application of European Union regulations.

2. The European definition of collective redundancies.

As well known, the notion of collective redundancies supplied by the European Council Directive 98/59/EC of 20 July 1998 (art. 1, par. 1, lett. A), means "dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is: (i) either, over a period of 30 days: at least 10 in establishments normally employing more than 20 and less than 100 workers; at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers; at least 30 in establishments normally employing 300 workers or more, (ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question; (…) For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies".

The 8th Whereas (recitals) of the Directive, confirms and strengthens the principle: "in order to calculate the number of redundancies provided for in the definition of collective redundancies within the meaning of this Directive, other forms of termination of employment contracts on the initiative of the employer should be equated to redundancies, provided that there are at least five redundancies".

The position assumed by EUCJ is clear, even though quite difficult to apply in every single specific case. The reference principles are uncontroversial: on one hand, "with a view to calculating the thresholds set in Article 1(1), first subparagraph, (a)(i) and (ii) of Directive 98/59, it should be recalled that that directive cannot be interpreted as meaning that the methods for calculation of those thresholds, and therefore the thresholds themselves, are within the discretion of the Member States, since such an interpretation would allow the

latter to alter the scope of that directive and thus to deprive it of its full effect (judgments of 18 January 2007, Confédération générale du travail and Others, C-385/05, paragraph 47, and of 11 November 2015, Pujante Rivera, C-422/14, paragraph 31)" (Judgement 11 November 2020, Marclean Technologies, C-300/19); on the other hand, "the condition laid down in the second subparagraph of that provision that "there [be] at least five redundancies" must be interpreted as relating not to terminations of employment contracts that may be assimilated to redundancies but only to redundancies *stricto sensu*" (Judgment 11 November 2015, Pujante Rivera, C-422/14, paragraph 46).

But then, which are the redundancies *stricto sensu*? Do they cover only the dismissals relating to a unilateral decision taken by the employer or do they cover even a decision agreed upon or adopted by the worker in response to relevant changes of employment conditions due to an organizational transformation of the company or to a redistribution of tasks and functions?

The EUCJ solves the issue stating that: "the Directive 98/59 must be interpreted as meaning that the fact that an employer — unilaterally and to the detriment of the employee — makes significant changes to essential elements of his employment contract for reasons not related to the individual employee concerned falls within the definition of "redundancy" for the purpose of the first subparagraph of Article 1(1)(a) of the directive" (Judgment Pujante Rivera, paragraph 55). This means that what is important to qualify as a collective redundancy a termination of employment contract is not the fact that the termination is unilateral rather than agreed upon or non-opposed by the employee, but the fact that it is the result of relevant changes carried out by the employer to the detriment of the employee.

Therefore, according to EUCJ jurisprudence, fall within the scope of application of the EU Directive either a resignation or a mutual termination subsequent to a transfer of the employee in different productive units, functionally or geographically far from the original workplace, or a mutual termination subsequent to the employer communication of the intention to proceed with an employee dismissal on objective reasons, or a mutual release of the employment contract to a new company due to a restructuring and transfer of assets not founding (configurating) a transfer of undertaking.[1]

3. The Italian definition of collective redundancies.

The Italian definition of collective redundancies for the regulation protective purposes is wider than the one embraced at European level, and includes, pursuant to article 24 legislative decree n. 223/1991, all the undertakings "which employ more than 15 employees, including managers, and who, in as a result of a reduction or transformation of activity work, intend to make at least five redundancies, over the time of one hundred and twenty days, in each productive unit, or in more than one production within the territory of the same province".

[1] Barnard C., *The Substantive Law of the EU - 7th Edition*, Oxford University Press, Oxford, 2022, 736; Aleksynska M., Muller A., *The regulation of collective dismissals: Economic rationale and legal practice*, ILO Working Paper 4, 2020, 40.

Thus, it is not provided a differentiation between redundancies and assimilated terminations, in the sense that what is relevant for the applicability of the Italian law is only the occurrence of a minimum of 5 redundancies (in each productive unit, or in more than one productive unit within the territory of the same province), within 120 days, in an undertaking of more than 15 employees. This has led the Italian jurisprudence to consider assimilated terminations not included into the legal parameter of 5 minimum dismissals, and so far, the procedural discipline of collective redundancies not applicable in cases in which the minimum requisite of 5 is reached also trough assimilated terminations. Therefore, assimilated terminations, not included in the calculation base of the number of redundancies, have been deemed by the Italian jurisprudence as equivalent to redundancies for the applicability of the selection criteria and the involvement of the corresponding positions in the collective procedural steps.

But the advent of EUCJ Pujante Rivera has pushed back the Italian judicial acquiring and the Supreme Court, dealing with the new precedent, has had to admit that also consensual termination, stemming from a failure to accept a transfer or other negative substantial changes in labour conditions, should be taking into account in the calculation of the number of dismissals required for the application of the discipline concerning collective redundancies (Supreme Court, 20 July 2020, No. 15401). In particular the Supreme Courts has stated that: "Based on a correct interpretation of Article 1, paragraph 1, subparagraph a) of Council Directive 98/59/EC of 20 July 1998, the notion of "dismissal" includes the fact that an employer unilaterally and to the detriment of the employee proceeds with a substantial modification of the essential elements of the employment contract for reasons not inherent to the employee's person, resulting in the termination of the employment contract, even at the employee's request (Court of Justice of the European Union, 11 November 2015, Case C-422/14, points 50 to 54). Such an interpretation, in line with the aforementioned case law of the Court of Justice, implies the overcoming of the previous provision of Law No. 223 of 1991, Article 24, also in light of Legislative Decree No. 151 of 1997, implementing Community Directive No. 56 of 26 June 1992, in the sense that different types of employment termination, even if attributable to the employer's initiative, could not be included in the minimum number of five dismissals, which was considered sufficient to constitute a collective redundancy (Supreme Court, 6 November 2001, No. 13714; Supreme Court, 22 January 2007, No. 1334)".

Following this shift made by the Supreme Court in interpreting Italian notion consistent with EUCJ evolving jurisprudence, the Italian trial judges moved towards a more extensive definition, noting that: "For the purposes of the directive, any act capable, in advance, of determining a substantial unilateral change in working conditions, from which it can be deemed reasonable to expect the termination of the employment relationship, falls within the scope of application" (Tribunal Napoli 4 January 2022); "In other words, for the purpose of the numerical calculation indicated by the directive, the community notion of "dismissal" includes, alongside those formally considered as such, (also) acts of termination of the employment relationship that may seem to result from the employee's consent (such as consensual terminations), but are actually causally attributable to a prior substantial unilateral modification made by the employer to a substantial element of the employment contract for

reasons not related to the employee's personal circumstances" (Tribunal Firenze, 23 July 2021, No. 563; see also, to the same effect, Appeal Court Milano 26 August 2021, No. 1030).

Unfortunately, the Supreme Court ruling consistency has been overturned only one year later, by the judgment 31st of May 2021, No. 15118. Though in the different case of a consensual termination following the opening of the dismissal procedure for objective reason set up by the employer according to art. 7, law n. 604/1966, the Supreme Court has stated the opposite principle, i.e. a consensual termination, even if coming up after the beginning of an individual dismissal procedure, should not be considered as a redundancy and should not be counted for the reaching of the legal threshold ("the minimum number of five dismissals, considered sufficient to constitute a collective redundancy, cannot include other different types of termination of the employment relationship, even if initiated by the employer"). And the Supreme Court has done so on the (wrong) assumption of giving an interpretation of the internal provision consistent with the European notion, which is not, as above mentioned.

The Italian past jurisprudential trend seems to reemerge, reviving the interpretation whereby the term "dismissal" should be understood in a technical sense, without equating it to any other type of termination of the employment relationship, even if solely resulting from the employee's choice, as in the cases of resignations, mutually agreed terminations, or early retirements, even if such forms of termination could be traced back to the same operation of reducing excess labor force that justifies resorting to dismissals (Supreme Court, 22 February 2006, No. 3866; Supreme Court, 29 March 2010, No. 7519). A confirming case in this regard is the judgment of the Tribunal of Milano dated June 10, 2022, No. 1459, which, referring to the judgment of the Supreme Court of Cassation No. 15118/2021, denies that settlements resulting from an individual dismissal procedure under Article 7 of Law No. 604/1966 can be classified as collective redundancies within the meaning of the directive and the implementing domestic legislation.[2]

4. The urgent need for a conceptual reconciliation between European and Italian legal notions.

The current interpretative conflict regarding the notions of "redundancy" and "assimilated termination" between EU law and domestic law is creating a serious situation of uncertain application in Italy, which greatly challenges both companies and workers and

[2] Biasi M., *La "missione di civiltà" del diritto sociale europeo e il nuovo assetto dei licenziamenti collettivi in Italia: rileggendo Mario Grandi*, in *Variazioni su Temi di Diritto del Lavoro*, 2020, 1229-1262; Cosio R., *La nozione di licenziamento collettivo. Le precisazioni della Corte di Giustizia*, in *Il Lavoro nella Giurisprudenza*, 2021, 5, 502-508; De Luca M., *I licenziamenti collettivi nel diritto dell'Unione europea e l'ordinamento italiano: da una remota sentenza storica della Corte di giustizia di condanna dell'Italia alla doppia pregiudizialità per il nostro regime sanzionatorio nazionale (note minime) - prima parte*, in *Labor*, 2020, 2, 149-164; De Luca M., *I licenziamenti collettivi nel diritto dell'Unione europea e l'ordinamento italiano: da una remota sentenza storica della Corte di giustizia di condanna dell'Italia alla doppia pregiudizialità per il nostro regime sanzionatorio nazionale (note minime) - seconda parte*, in *Labor*, 2020, 3, 267-286; Limena F., *I licenziamenti collettivi nei più recenti orientamenti della giurisprudenza italiana e UE*, in *Il Lavoro nella Giurisprudenza*, 2022, 7, 760-767; Vidiri G., *L'infinita storia del licenziamento collettivo tra incertezze e sentenze creative*, in *Il Lavoro nella Giurisprudenza*, 2021, 11, 1021-1028.

fuels a new and costly litigation process with unpredictable outcomes. Furthermore, it is also not possible to rely on a clarifying intervention from the Supreme Court, given the current division within the Court and the risk that the fragmentation of decisions may be exacerbated by the multitude of concrete cases that may fall within the aforementioned notions, with the risk of differentiated solutions depending on the specific case at hand.

Therefore, a legislative amendment of Article 24 of Law 223/1991 seems to be urgently needed. Such an amendment should clarify, beyond any reasonable doubt and in line with the jurisprudence of the EUCJ, what is meant by "collective redundancies" and what is meant by "assimilated terminations", as well as determining the applicable regime of effects for each category. A definitional dualism such as the one depicted above cannot exist based on the principle of the primacy of EU law and conforming interpretation. If, as we have seen, the Italian jurisprudence is unable to adopt a clear position that safeguards the primary good of legal certainty, then it will be the responsibility of the legislator to address the urgent and pressing issue by intervening specifically on the legislative text and aligning it with the European definitional framework.

From the example provided it becomes clear how, on one hand, labor law categories remain vibrant and dynamic through constant updates ensured by the creative contribution of jurisprudence. On the other hand, the process of aligning the domestic legal system with the European Union framework is influenced by the often-extended time required for internal awareness of the renewed European arrangements, as well as the lengthy duration of legal proceedings. As a result, it suffers from cyclical phases of misalignment and conceptual opposition that must be addressed through appropriate legislative measures when judicial responses are delayed or contradictory.

Such measures should ensure the application of European protective regulations within the domestic legal system and preserve their proper and uniform scope of application, while respecting the discretionary implementation space reserved for the domestic legal order by the European act. It is no coincidence that the reference by the EU legal system to internal labor law categories is increasingly rare and residual, and European categories tend to assert their primacy and conforming influence. The European/National categorical pairing, however, persists and evolves according to unpredictable patterns, yet based on a case by case and sectoral approach. There is no homogeneous descriptive model on the categorization side that applies to all European/National relationships, which unfold along their own paths depending on the specific characteristics of each case and the socio-economic context of reference.

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