

The following article is a pre-print version of the contribution by Prof. Luisa Ficari “Workers’ Voice and Involvement in the Restructuring of Undertakings” which will be published in:

**R.Blainpain, W.Bromwich, O.Rymkevich & I.Senatori (eds),
Rethinking Corporate Governance: From Shareholder Value to
Stakeholder Value, pp.91-104, vol. 77, 2011
Kluwer Law International BV, The Netherlands, ISBN/ISSN: 0025-
4959**

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Workers’ voice and involvement in the restructuring of undertakings

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ABSTRACT

The paper intends to highlight different devices apt to give voice, on collective and/or individual basis, to workers involved in the restructuring of undertakings. The aim is to protect workers’ rights which might be in danger in consequence of the restructuring itself: continuity of jobs; payment of salaries and severance allowances; preservation of professional positions.

The paper also intends to analyse different forms of workers’ involvement in the national and EU framework, facing crisis and restructuring of undertakings at plant level as well as transnational level.

Provisions adopted in the European Union and in Italy’s national regulation are outlined: i) devices for workers’ voice and involvement in undertakings of transnational scale (workers’ councils; Societas Europaea); ii) collective agreements following to trade unions’ information and consultation, in case of redundancy due to restructuring; in case of transfer of undertakings; in case of bankruptcy; iii) devices and tools in case Italy’s national regulation provides workers’ right for allowances paid by public institutions in the place of salaries. Attention is given to the enforcement of regulation, especially to legal action by means of lawsuit in case of employer’s refusal of unions’ information and consultation as provided in Italy’s national regulation.

The paper suggests that different devices for workers’ voice are more or less effective in consideration: i) of the coverage of binding agreements, and ii) of the priority of employees’ involvement in respect of the announcement of enterprise’s crisis in an early stage of insolvency and bankruptcy. It will propose that implementation of involvement aimed to reduce effects of crisis on labour should consider the possibility of saving the source of work through flexibility and employability devices.

Other issues are addressed in the paper giving attention to the enforcement by Italian labour law in connection with EU Directives and the consequent main legal framework: i) if, and by what means, workers and trade unions can protect rights at work and employability and identify work alternatives in situations of business failure (bringing to insolvency and bankruptcy, etc.); ii) how effective, in case of business failure, insolvency and bankruptcy, is the right of workers and of trade unions to be informed and consulted and to conclude a generally binding agreement with the management.

Conclusions are meant to stress connections between workers' involvement and better and more employability.

SUMMARY: - 1. Workers' voice and workers' involvement: a voice aiming to involvement? - 2. Work's councils, European stock company (*Societas Europaea*). - 3. Involvement and coverage of binding collective agreements in restructuring through redundancy and transfer of undertakings or in case of bankruptcy. - 4. Involvement and restructuring through reduction of working time and wages. - 5. Public social security allowances in place of salaries. - Conclusion.

-1. Workers' voice and workers' involvement: voice aiming to involvement?

The restructuring of businesses in trouble near to bankruptcy, or in bankruptcy, which has characterized, even lately, Italian and international undertakings, has shown that risk of losing workplaces might be reduced thanks to *transparent decision-making* and to stakeholders' participation in decision-making. More, an "early diagnosis" of the crisis (see recent Italian law reform concerning bankruptcy) may allow rescue of businesses and of as many workplaces as possible and may also allow to identify job alternatives.

Hitherto, labour law has enforced the right to information and consultation *in an early-enough stage* of the crisis in order to protect (a part of the) existing jobs and, *in a last stage*, in order to protect (a part of) salaries and allowances in case of bankruptcy. In both stages, though, much less enforcement seems to have been given to protect *all* the existing jobs and, more than else, to find possible *new jobs and job alternatives* for the employees of the enterprise being restructured. Also, voice *and* participation in *earlier stages* of the crisis might be enhanced: it is during this *earlier stage* that workers and representatives of the business might intervene and participate in the decision-making in order to protect their workplaces and work continuity, as well as to identify work *alternatives*.

Workers' voice and participation ("involvement") in the business management offers a perspective that may establish a *link* between devices (meaning legal institutions) apt to rescue a business as a *source of work*, on one hand, and, on the other hand, devices (legal institutions) which enable the *awareness* (as early as possible *before the crisis announcement*) of workers and their representatives, concerning the

business crisis and possible bankruptcy, as well as concerning the effects of restructuring on workplaces.

So, in the restructuring of businesses and enterprises in trouble and near to bankruptcy, workers' voice may be empowered in different ways in the crisis management in order to protect their jobs, salaries and wage guarantees, their pension funds and future prospects of job continuity. Such ways ("patterns") of empowerment may range from *direct involvement* in the structure of stock company (see provisions in EU Directive concerning employees' involvement in the *Societas Europea*) to *union information* and *consultation* and, eventually, final *collective agreements* concerning jobs and wages (see EU Directives concerning the transfer of enterprises). They range, also, to individual or collective acquisition of corporate shares. Different forms of voice and involvement represent various legal institutions, some of which provide an active role for workers in the safety of the employer's business as *source* of jobs (not only of *their job at present*).

"Voice" and "Involvement" are also characterized by *direction* (scope) and *object* (substance): one can't really refer to them without specifying "towards" what, "about" what. This is why my presentation is addressed to the issue concerning "*voice and involvement*" in *undertaking's restructuring and crisis*. The following issues will be addressed in the paper giving attention to the enforcement by Italian labour law in connection with EU Directives and the consequent main legal framework:

- i) if, and by what means, workers and trade unions can protect rights at work and employability and identify work alternatives in situations of business failure (bringing to insolvency and bankruptcy, etc.);
- ii) how effective, in case of business failure, insolvency and bankruptcy, is the right of workers and of trade unions to be informed and consulted and to conclude an agreement with the management.

I believe the *first* question now to be posed is the following: how is, and eventually by what means and devices, workers' "voice" connected to workers' involvement"? Workers' voice and workers' involvement do not mean, in a strict sense, or *merely*, or *necessarily*, workers' *participation in corporate governance*. Nor are they *social dialogue*. Also, they are not *collective bargaining*. On the other hand, workers' voice and involvement may be attained *through* social dialogue as well as *through* collective bargaining, at *sectoral* level as at *plant* level. .

It should also be stressed that "voice" and "involvement" may play their role on a transnational scale (see European Works Council and EWCs 2009 EU recast-Directive) whilst collective bargaining "takes place at national level only" and, in this regard, is not to be confused with social dialogue.

Possible various forms of involvement referred to in this paper are to be found, on national scale, looking at specific examples of collective bargaining in Italian legal framework (mentioned above) and, on a transnational scale, looking at the structure of large stock companies (see SE and SCE EU Directive) and groups of undertakings (again see EWCs 2009 EU recast-Directive).

The *second* and the *third* questions to be posed are the following: *who* are the workers whose voice we listen to, who are the workers involved? And: what are the *effects* of involvement? Answers depend on the national legal framework. I will obviously refer myself to the Italian framework, at the same time stressing the fact that the Italian legal framework presents a “special” problem in the matter of collective bargaining binding, concerning *extension* and *coverage* (the “*non erga omnes*” problem) and also bears special provisions concerning collective bargaining enforcement and collective legal action. I do believe solutions to such problems offered in Italian framework may apply to different contexts and be consequently of general interest.

Regarding to *whom* are the individual *workers* included in involvement devices, one should strictly refer to workers in a *dependant* job position, i.e. with an employment contract based on labour law regulation (which, in Italy’s labour law, does *not* necessarily mean collective bargaining general coverage). Workers who are not in a dependant job position are *not* directly concerned, , with participation and involvement in enterprise decision-making, although they do resent the effects of dependant workers’ participation and involvement. The last statement is generally correct but goes in for exceptions: in recent Italian legislation, the benefit of social security severance and unemployment allowances is exceptionally provided, in a few fixed cases, also to *not dependant* individuals who have been working for (only one) enterprise and have lost their job.

Aiming to highlight workers’ involvement in the restructuring of business in trouble and in the undertaking’s *crisis*, different models and details of corporate governance and of legal provisions for acquisition of corporate shares are beyond the scope of this paper.

Last, it must be said that in Italy’s fundamental Constitution, enacted in 1948, is embodied a principle (article 46) which provides a general provision - to be enforced by the legislator - allowing workers to participate in decision’ making and enterprises’ management. Such general provision, although it has no direct or specific enforcement, stands on the level of constitutional principles.

- 2. *Work’s councils, European stock company (Societas Europaea)*

It is well known that the right of workers to information and consultation on company decisions at *European level* is provided across the EU by statute. The Works Council Directive (94/45/EC) applies to companies with 1,000 or more employees, including at least 150 in two or more Member States (Italy’s transposition of the Directive is enacted by D.lgs. n. 74/2002). A *recast* Directive has been enacted in May 2009 (Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009, on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees), which seems to give EWC more chances to influence management decisions.

The recast Directive stresses (*considerandum* n.1) that “a number of substantive changes are to be made” to the previous Directive 94/45/EC on the establishment of a EWC Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees”¹.

The text of the recast-Directive also stresses (*cons.* n.7) how it is necessary to *modernise* Community legislation on transnational information and consultation of employees “with a view to ensuring the *effectiveness* of employees’ transnational information and consultation rights” (same *cons.* n.7) and “...ensuring that Community legislative instruments on information and consultation of employees are better linked” (same *cons.* n.7). But does effectiveness of *information and consultation rights* come from linking together tools and legal institutions providing information and consultation rights? It also said (*cons.* n.9) that the 2009 Directive is part of the Community framework (see Directive 2002/14/EC, *supra* quoted, of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community) intended to support and complement the action taken by Member States in the field of information and consultation of employees. This framework should keep to a *minimum* the *burden* on undertakings or establishments while *ensuring the effective exercise of the rights granted*.

On the other hand, a pivotal problem concerning involvement on a transnational scale is intervening on the ground of possible *unequal treatment of employees* affected by decisions within *one* and the *same* transnational undertaking or group of undertakings².

¹ It is not possible to go into the details of the regulation of the 2009 recast EWCs Directive but it must be recalled that the Directive (*cons.* n.37) stresses the need for a linkage between the Directives and the levels of informing and consulting employees established by Community and national law and/or practice, with no prejudice (*cons.* n. 38) to the information and consultation procedures referred to in Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community and to the specific procedures referred to in Article 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies and Article 7 of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

² Directive’s *cons.* n. 16 states that all matters which concern the entire undertaking or group or at least two Member States are considered to be *transnational*. Directive’s *cons.* nn. 12, 14, 15 state that appropriate provisions must be adopted to ensure that the employees of Community-scale undertakings or Community-scale groups of undertakings are properly informed and consulted *when decisions which affect them are taken in a Member State other than that in which they are employed*. It is also stated that only *dialogue at the level where directions are prepared and effective involvement of employees’ representatives* make it possible to anticipate and manage change; furthermore, that workers and their representatives must be guaranteed information and consultation at the relevant level of management and representation, according to the subject under discussion, and, finally, that to achieve this purpose, the *competence and scope of action* of a European Works Council must be distinct from those belonging to national representative bodies and must be *limited to transnational matters*. Directive’s *cons.* n. 19 states that, in accordance with the principle of autonomy of the parties, it is for the representatives of employees and the management of the undertaking or the group’s controlling undertaking to determine by *agreement* the nature, composition, the function, mode of operation, procedures and financial resources of European

The question now is, will the statutory right to involvement through EWC be more effective in case of *restructuring* in European scale undertakings?

The 2009 Directive is clear in stating that the functioning of the internal EU market “involves a process of concentrations of undertakings, cross-border mergers, take-overs, joint ventures and, consequently, a transnationalisation of undertakings and groups of undertakings” (*cons.* n.10); and, “if economic activities are to develop in a harmonious fashion, undertakings and groups of undertakings operating in two or more Member States must inform and consult the representatives of those of their employees who are affected by their decisions” (same *cons.* n.10). This doesn’t seem, though, very reassuring as far as protection of salaries and continuation of employment contracts: what, in the way economic activities develop is less, or not at all, “harmonious” fashion?

It must be stressed that the recast Directive regulation gives definitions of “*information*” and of “*consultation*” which are relevant to understand the possible contents of workers’ “voice for involvement” in EU transnational scale³.

Works Councils or other *information and consultation procedures* so as to suit their *own particular circumstances*.

³ Directive 2009/38/EC, *cons.* 22, must be quoted : “information”, needs to take account of the goal of allowing employees representatives to *carry out an appropriate examination*, which implies that the information be provided at such time, in such fashion and with such content as are appropriate *without slowing down the decision-making process in undertakings*. Directive’s *cons.* n. 23, states that “consultation” needs to take account of the goal of allowing for the expression of an *opinion* which will be *useful* to the *decision-making process*, which implies that the consultation must take place at such time, in such fashion and with such content as are appropriate. The same Directive 2009/38/EC, provides (article 2(“definitions”: “1. For the purposes of this Directive:...(f) “information” means transmission of data by the employer to the employees’ representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees’ representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings; (g) “consultation” means the establishment of dialogue and exchange of views between employees’ representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees’ representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings; (h) “European Works Council” means a council established in accordance with Article 1(2) or the provisions of Annex I, with the purpose of informing and consulting employees. The information of the European Works Council shall relate in particular to the *structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings*. The information and consultation of the European Works Council shall relate in particular to the *situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies*. The consultation shall be conducted in such a way that the employees’ representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express. The European Works Council shall have the right to meet with the central management once a year, to be informed and consulted, on the basis of a report drawn up by the central management, on the progress of

Attention has to be given the so-called “*confidential information*”⁴, which may be looked at as a sort of a “final stop” or lock-out to EWC’s ‘right of information and consultation

Conclusively, although workers’ involvement through EWCs will probably attain the goal of stronger enforcement of workers’ participation at a general level, *companies’ restructuring* (especially at sectoral level) doesn’t appear to be directly affected by the recast Directive regulation, which aims to gear information and consultation rights to *the transnational structure of the entity which takes the decisions affecting those employees*, so that the EWC may assess the possible impact on employees’ interests in at least two different Member States.

Another relevant question is the following: how are workers’ voice and workers’ involvement considered by regulation concerning stock company of transnational EU scale (SE, SCE⁵)?

As it is well known, the *Societas Europaea* (SE) regulation states “*involvement*” to be a fundamental part of European stock company’s statute. Such regulation has been discussed, for many decades, at all different levels in EU institutions before being, at last, enacted a very few years ago as Council Regulation (EC) No. 2157/2001, which establishes a Statute for a European company (SE). Workers’ representatives *information* and *consultation* are, in fact, amply provided in the SE and the SCE, through different, alternative, models⁶. Nevertheless, it may be

the business of the Community-scale undertaking or Community-scale group of undertakings and its prospects. The local managements shall be informed accordingly.

Where there are exceptional circumstances or decisions affecting the employees’ interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies, the select committee or, where no such committee exists, the European Works Council shall have the right to be informed. It shall have the right to meet, at its request, the central management, or any other more appropriate level of management within the Community-scale undertaking or group of undertakings having its own powers of decision, so as to be informed and consulted”.

⁴ Directive, Article 8, Confidential information....[...]...members of special negotiating bodies or of European Works Councils and any experts who assist them are not authorised to reveal any information which has expressly been provided to them in confidence. The same shall apply to employees’ representatives in the framework of an information and consultation procedure.[...]...in specific cases and under the conditions and limits laid down by national legislation, [that] the central management situated in its territory is not obliged to transmit information when *its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them*. A Member State may make such dispensation subject to prior administrative or judicial authorisation...

⁵ Directives n. 86 of 2001 and Directive n.72 of 2003 Council Directive 2001/86/EC of 8 October 2001, supplementing the Statute for a European company with regard to the involvement of employees. *The SE Directive is strictly related to* Council Regulation (EC) No 2157/2001, which establishes a Statute for a European company (SE). Italy’s transposition of the Directive n.86 has been enacted by D. lgs. n. 188/2005; the transposition of Directive n.72 has been enacted by D.Lgs. n. 48/2007.

⁶ Directive n. 86, Article 2, states that [...] (h) “involvement of employees” means *any mechanism, including information, consultation and participation, through which employees’ representatives may*

observed how, on the one hand, *restructuring* does not appear to be among the scope of *involvement* in the legal framework of European stock company; and how, on the other hand, *restructuring* appears a difficult objective to attain in such a framework. Anyhow, the regulation enacted with the two forementioned Directives stands, in different regards, as a most relevant form of involvement and *participation*.

3. *Involvement and coverage of binding collective agreements in restructuring through redundancy, transfer of undertakings, or in case of bankruptcy*

Among the relevant statements concerning the issue of restructuring through *redundancy*, *transfer* of undertakings, or in case of *bankruptcy*, one is especially relevant. I mean to refer to the statement concerning the problem of *general coverage* and *binding* of *collective agreements*, when such agreements are aimed to provide, and do provide, specific regulation for dismissals and a plan of social measures for the employees.

Such problem exists within a national legal framework which, as a rule, does *not* allow an agreement (collective, or individual ones, have the same technical nature from this point of view) to bear *effects*, on a legal basis, *ultra partes*. This is what happens in Italy's legal framework, so this is the problem concerning those collective agreements which *conclude* the procedures of union information and consultations and are *a prius* to all the forementioned events (*redundancy*, *transfer* of undertakings, *bankruptcy*) which may, separately one from the other, or joined together, affect the enterprise's activity and the employer's company.

As it is well known, when no extension mechanism exists, the coverage of collective agreements cannot be extended to those (employers, employees) who are not directly involved in the collective bargaining. And a legal enforcement mechanism (correctly said, a substitutive device of extension) is provided in Italy's legal framework only for those special *restructuring* collective agreements just in order for them to become effective.

exercise an influence on decisions to be taken within the company; (i) "information" means the informing of the body representative of the employees and/or employees' representatives by the competent organ of the SE *on questions which concern the SE* itself and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State at a time, in a manner and with a content which *allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the SE;* (j) "consultation" means the establishment of *dialogue and exchange of views* between the body representative of the employees and/or the employees' representatives and the competent organ of the SE, at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to *express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE;* (k) "participation" means the *influence of the body representative of the employees and/or the employees' representatives in the affairs of a company* by way of:- the right to elect or appoint some of the members of the company's supervisory or administrative organ, or - the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.

It is also well known how, in case of *redundancy*, union information and consultation stand as statutory rights, enacted at national level as a result of implementation of EU Directives. Consequently, the employer's preliminary and preparatory decision to proceed to collective dismissals has to be communicated to unions and discussed jointly: the subsequent agreement on the matter will embody alternative measures and, more than else, will embody the *criteria* for the choice of the following collective dismissals. This particular agreement is provided - as I have anticipated - with a substitutive device of extension which fulfils, at the same time, the *intra partes* general rule for contracts and the objective of *effectiveness* of the particular agreement in respect to the enterprise's and plant's workforce. The mechanism, and consequent problems in Italy's legal framework, has included ruling with sentence of the Constitutional Court.

In such manner involvement *in restructuring* is provided for, although expressed through a device of collective *voice* like negotiation and *bargaining*. If one looks at the possible contents of the agreement, the provisions may range (according to Italy's regulation) from *work-time reduction* to job alternatives like workers' *posting* in *group undertakings* and *companies* and may include workers accepting, on collective agreement's basis, to fulfil lower positions and receive corresponding lower wages.

The same problem arises regarding the regulation⁷ concerning the event of transfer of undertakings: collective agreements are binding through a legal enforcement mechanism which, as above said, should be defined as a substitutive device of extension. And aiming to what, is the extension provided to? Is it provided aiming to *prevent*, in case the company or the plant is in a condition of severe crisis (insolvency; bankruptcy), the effect of *job continuity* in favour of the total of the employer's (transferor) workforce passing to a new employer (transferee). In fact, according to general regulation on legal basis job continuity *would be* (but is prevented to be) a "natural" effect of the transfer of the undertaking or of a part of the undertaking, and an *individual right* for employees in case of transfer. By such means, aiming to the scope of enhancing the transfer of undertakings, or part of undertakings, in order to save *at least a part* of existing jobs and *at least a part* of the source of work, the specific collective agreement, negotiated at the moment the transfer takes place, is permitted to embody the number and professional position of workers who are entitled to maintain job continuity – *they* pass to the transferee, who becomes their new employer – and workers who are not – *they* remain with the transferor, their original employer, to face redundancy.

In case of *bankruptcy*, workers' involvement takes place in a special situation: if a bankruptcy procedure is opened, the employer is temporarily "put aside" during the procedure and his place in the management is taken by an official trustee, who acts in place of the former in paying obligations to stakeholders and, possibly, rescuing the enterprise through restructuring (in a general meaning).

Restructuring implies *redundancy*, *transfer* of the undertaking or of a part of it, admission to public social *allowances* in place of salaries. Consequently, all forms of

⁷ Regulation is provided by article 47, comma 5, Legge n.428/1990 and article 2112, codice civile.

involvement (information, consultation) and devices allowing workers' involvement in such situations can take place, albeit *not* on the same terms and conditions as they would if the original employer were still there: the rescue of the enterprise as a source of work may be possible, through the loss and sacrifice of many of workers' rights provided by the employment contract or by collective agreements at sector or at plant level. This sort of *sacrifice* is often decided in a specific collective agreement, negotiated with the trustee-in place of employer. Such agreement has, as said above, *binding* effects towards all the workforce: in case of transfer, for example, the amount of severance allowances due to individual workers by the former employer may be renounced to by the unions negotiating the agreement at plant level, with no extra burden onto the transferee.

Recent reforms of bankruptcy procedures have aimed to *anticipate* the moment of *awareness* of the crisis and, consequently, of the need of restructuring. Anyhow, such anticipation apparently does not always, or not yet, include enhancement of *early workers' involvement* whilst it seems to be (only) aimed to allow certain stakeholders to take part in influencing decisions apt to *avoid* the opening of a formal bankruptcy procedure. It must be stressed that formal bankruptcy procedure does *allow collective voice* and workers' involvement, while (too) early arrangements between stakeholders don't possibly seem to do the same.

Finally, the provision concerning a special *judicial procedure*⁸ to enable the obligations deriving from the regulations concerning unions' rights to information and consultation must be mentioned, as it offers remedy against the employer in case of unfulfilment, on his side, of such obligations. The provision⁹ does not allow individual procedure: in fact, the procedure is reserved to unions themselves as the (only) holders of the above said rights. In other words, it is *not* as if the unions were submitting claims *on behalf of workers*.

4. *Involvement and restructuring through reduction of working time and wages*

The need of restructuring the enterprise in order to solve the crisis can be fulfilled *reducing working time* from full-time to part-time and, consequently, reducing *wages*, or else *lowering* individual professional positions in the job and, consequently, lowering individual wages.

Both solutions are possible in the Italian legal framework and are provided on legal basis¹⁰, upon one condition: these sorts of arrangements, in order to apply to individual employees, need to be enacted through a specific and *particular* collective agreement between employer and workers' representatives. The agreement is *particular*

⁸ Provided by article 28 Legge 300/1970,

⁹ Article 28 forementioned.

¹⁰ This sort of collective agreements, in legal jargon *contratti di solidarietà*, with the scope of redistributing working-time, have been first enacted with Legge n. 863/1984. See, amongst others, MISCIONE, M., *I contratti di solidarietà*, in *Diritto del lavoro*, Commentario diretto da F. Carinci, vol. III, Il rapporto di lavoro subordinato: garanzie del reddito, estinzione e tutela dei diritti, Wolters Kluwer-Utet, Torino, 2007, 157- 174.

and consequently has, on a legal basis, a “special” nature compared to “ordinary” collective agreements concerning, for example, wages: in fact, it is endowed a larger coverage than “ordinary” collective (sector) agreements and it will apply to *all the workforce* in the plant or in the enterprise concerned, whilst general coverage for “ordinary” collective agreements at sector level is not general nor total. As it appears obvious, only general and total coverage in respect to of the *workforce concerned by the reduction plan*, enables the plan to be *effective* and allows the restructuring to produce results.

The aim is to avoid redundancy and dismissal, through general reduction of working-time in the plant on a *daily, weekly, monthly* or even *annual* basis. Direct benefits to both parties of the employment contract are provided: the public social authority grants an allowance to employees *and* to employers and, in some circumstances, it may reduce the amount of social security contributions due by the employer. This legal institution has been enacted in two different and alternative “patterns”, one of which also allows to offer *new jobs* (in the place of the “suppressed” working-time) to more workers: it appears obvious, though, that *restructuring*, if it is taking place in an enterprise which is in trouble or in case of insolvency, is *certainly not* to allow new jobs nor more workers.

From a general point of view, the institution can be considered as an example of *involvement “through” collective agreement*: this statement is not perfectly correct on a legal basis but can be accepted for descriptive purposes.

5. Public social security allowances in place of salaries

When a company is in economic difficulty and trouble, the first danger obviously concerns regular *payment of salaries* to employees.

In such a case, referring to Italy’s labour law, the company might choose to temporarily suspend its activity and ask the public authority to be permitted – in certain circumstances and for a certain period of time and previously presenting an enterprise *program* aimed to manage the crisis– to suspend (with effects on employment contact obligations) the payment of monthly salaries (or a part of them) and to benefit from of public allowances to be paid to employees in place of salaries. The fund which gives such allowances is paid partly by the State and partly by companies. The allowance takes place of salaries but is not considered an unemployment allowance nor a redundancy allowance: from a legal point of view, it is a social security allowance¹¹.

¹¹ In the *Cassa integrazione guadagni ordinaria* system, the social security public institution (National Institute for Social Security, INPS) will guarantee employees (white collars, blue collars, not the management) the payment of an allowance (eighty per cent of the wage lost because of the inactivity) for maximum a year: the employer may anticipate the allowance and count it in compensation with what he himself should pay the same National Institute for workers’ social security (pension) contribution; in case of employer’s insolvency, the National Institute will directly pay employees the same allowance.

After the fixed period of time, companies' economic difficulties and troubles being (mostly) "solved", enterprises' activity can begin again and regular payment of salaries can be faced again by the employer.

This "solution" of the crisis bears different effects – as I will try to make clear - in case it concerns a company which is passing through a *temporary* difficulty for market reasons and presumably will pick up again, or in case it concerns a company which is foregoing *restructuring, failure, bankruptcy*. In both cases, the system which I have roughly depicted and which corresponds to Italian social allowances system known as *Cassa integrazione guadagni*, includes statutory obligation for the employer to *inform and consult unions* (at sectoral and at plant level) *prior* to obtaining admission by the public authority to suspend payment of wages and to benefit the allowance in place of salaries.

Most aspects of the legal system of *Cassa integrazione guadagni*¹² cannot be examined here and the system itself can be only be sketched in a very approximate way. Crucial points of interest for the issue can, all the same, be sufficiently focused.

The first relevant question is, does the fulfilment of union information and consultation obligation, together with presentation of a *program* to the public authority, correspond to, and in case does it enhance, workers' "involvement" in the management of the crisis?

It must be stressed that the whole system embodies two different (and alternative to each other) legal institutions, one (*Cassa integrazione guadagni ordinaria*) considering *temporary* reasons (events) forcing the company to suspend or reduce its activity - for example, in the case the public authority stops the activity for public health reasons, in the case the activity has to be suspended for an earthquake, etc and, so far, enabling the company to proceed in applying to the public authority; the other (*Cassa integrazione guadagni straordinaria*) considering the more severe event of *restructuring*. The second institution also applies in case of bankruptcy, of a company's final closure and operates prior to redundancy and collective dismissal. The first one considers the perspective of possible rescue of company's economic health and balance possible in almost reasonable time, if not near. The second does not consider such a perspective and in most cases it brings to redundancy and collective dismissal.

The point of relevance is that the Cassa Integrazione Guadagni (CIG) system provides, in general, *payment of allowances to employees* who are *not at work* in the plant but, at the same time, *have not lost their job*, which still exists, because there is no dismissal nor redundancy (at least, not yet) nor unemployment. Such system allows companies to possibly recover from the crisis and to save and rescue financial resources corresponding to workers' wages. So the question related to this point is (rather roughly

¹² First enacted in 1945 and often modified and revised, until reformed in a substantial way in 1991 (Legge n. 223, same act concerning legal provisions for redundancy). CIG was originally provided for industrial sector and, in time, has been extended to companies belonging to a great number of sectors and sorts of activities. The CIG system (also named, in labour law jargon, "ammortizzatori sociali") is actually in course of being totally reformed (in accordance to Legge n.247, enacted in 2007).

put): does workers' voice enhance or guarantee *salaries' protection* and workers' *involvement* in the forementioned *Cassa integrazione* legal system? Does it enhance protection for *continuity of existing jobs*? And, finally, does it enhance *continuity of the source of job*? The answer to each question might be at first affirmative but dubious in a second moment, when one looks at the rather narrow space left to employees' participation, consisting in mere information and consultation.

In the course of time the first of the forementioned institutions (*Cassa integrazione guadagni ordinaria*) has not only applied in the case where the employer was totally enabled to pay salaries but also in case of (simple) *difficultas* in payment on the employer's side. So, it has served to rescue companies and enterprises. Whilst, on the other hand, the second institution (*Cassa integrazione guadagni straordinaria*) has applied to companies¹³ - prior to redundancy *connected with restructuring* (due to technical changes), in the case of reduction of enterprises' activities, in the case of *insolvency* and of *bankruptcy procedure*. Therefore, the crisis which is considered in such cases is, in respect to the one previously considered, not only more severe but also irreversible as it may result in definite business failure and in the closing of the company. More, it is considered a crisis which needs a (very) long time to get to (final) solution: the period of time permitted for the allowance may consequently reach a period of *two running years* in case of restructuring, which can be brought to *four*.

So the questions related to this second point are, again: is there, and at which *level*, any workers' *involvement*? And, on which topics? And, is such involvement effective in protecting workers' rights?

Effectiveness of involvement *in the restructuring* means that influence is made possible in respect to decision making process, i.e. the economic *program* applicable to the enterprise's restructuring. The submission of such a program to the public authority by the company, in order to be granted the payment of allowances in place of salaries, is a necessary prior fulfilment on the employer's part. The company's program, in order to be approved by the public authority¹⁴, must provide *measures* to relaunch the enterprise's activity and to safeguard the workforce and, if closure of enterprise or of the plant are decided, the program must also contain a *plan* for *alternative jobs* and *professional education*.

Individual workers who will be obliged to stop work and suspend their employment contract and who will receive the allowance, are to be *chosen* following the rule of rotation¹⁵. and a series of general *criteria* previously established. Such *criteria* must be *communicated* to the unions at plant level and must be *jointly examined* by both parties, unions and management. Also the program presented by the employer is *considered* by both parties through a *joint exam*, which must be concluded within 25 days.

¹³ Companies performing activity in industrial sector, if the plant has had more than 15 (50 in commercial sector) employees medium in the prior six months.

¹⁴ The request is presented by the company to the Ministry of Labour; the decision is enacted by decreto ministeriale.

¹⁵ As provided by Article 1, Legge 223/1991.

Although workers who benefit from the CIG are still (virtually) employed in the firm, they might be offered the *chance of a new job* by another employer, in a different sector. In such a case, if the offer concerns a job in a *lower professional level* in respect to the previous one, workers accepting it have the right to an *extra allowance* to cover the *difference*. I would like to stress the special interest of this last provision, even in my simplistic depiction.

In first place, it shows how, and but what means, the right to maintain *wages level* is protected. In second place, it shows the legal device used to combine, on the one hand, *continuity of the existing employment contract* and, on the other hand, the enhancement of *work alternatives*. The question is, is there also statutory workers' involvement in the forementioned device? In other words, when the work alternative is offered to the individual worker, is there a place for worker' participation in the decision concerning work alternatives and/or is previous union information or consultation provided?

A similar device has been embodied in a legal provision recently enacted in Italy's labour law, concerning another case of the same sort, and, even in this last case, the question about workers' involvement appears to be relevant. The provision is enacted by Decreto-legge n. 78/2009 convertito in legge n. 102/2009, bearing regulation entitled «Provvedimenti anticrisi» (articles 1, 7)¹⁶.

Such provision authorizes a sort of *mutatio causae* in the position of the individual worker who benefits from a social allowance but, actually, is not at work, being an employee in a company which has suspended employment contracts consequently to admission to *Cassa integrazione* system as previously outlined. In fact, the position of such an individual worker may substantially *change*: the provision enables him two different choices. The first choice, is to go back to work and receive, from his (old) employer (only) the *amount* of the difference between the social allowance and the (old) wage he used to have: this amount is, from a legal point of view, a *salary* and not an allowance. In this case, the worker goes back to work (in the same firm but not necessarily to the original job) but is also obliged to follow an educational program aimed at the original professional skill or at a new one.

The second choice given to the worker, is to renounce his job and to receive all together the amount (capitalization) of the (future) allowance he was (presumed) to receive. The main point of interest is that the provision states that the whole arrangement *may be* provided through a specific collective agreement between the employer (the employment contract is *still* existing) and those workers' representatives belonging to the same unions which have previously agreed to to *Cassa integrazione*. So, there seems to be place in the picture, and not a small one, for workers' involvement, with effects, in this case, on wages, job continuity, work alternatives.

¹⁶ The provision - enacted for a definite period of time, applying (only) in years 2009 and 2010 - states (article 1) that it aims to implement maintenance and value of human resources existing in the enterprise. The amount of the expense which is going to be afforded by public authority (the State) is estimated in 20 mln euro for 2009 and 150 mln euro for 2010, which are going to be paid by the National Institute for Social Security (I.N.P.S.).

Actually, though, there is a problem here concerning *involvement*: the *collective* agreement forementioned is *possible* but not *necessary* for the arrangement, which seems (the matter is still under discussion) to be enforceable also through mere *individual agreement* (with employer on one side and individual workers on the other). Another problem is that the provision considers only workers who are *already* getting a public social allowance and not others who are in a different *status*.

It also must be added that the forementioned legal provision also states the continuation (for *two years*) in granting the *Cassa integrazione* allowances for employees who, formerly, were at work in enterprises now closed (gone in for restructuring through closing of the activity and stopping the business).

Finally, a last provision must be mentioned¹⁷, which has been enacted in the same time as that one to which I have previously referred and, although it does *not* concern *workers' involvement*, it may enlighten solutions adopted for the problem concerning *continuity of jobs*.

A *special allowance* may be granted, on demand, to *individual workers* who benefit from a social allowance but, actually, are not at work as they are employees of a company which has suspended employment contracts consequently to admission to *Cassa integrazione*. The allowance is granted if the individual worker intends using it to start an independent work or a small enterprise of his own on the condition of terminating the employment contract with the employer. The amount of the special allowance, which is *granted to the employee at once* by the public social authority, corresponds to the total of *all the monthly allowances* which the same employee is expected to benefit from in the forthcoming period of time (such period of time, known in advance, corresponds to the time in which the employment contract is suspended). It appears clear enough that such a device – which is not enacted here for the first time¹⁸ – may find different work alternatives and different sources of the job, out of the firm or the plant going through restructuring, rather than inside. In such a case, restructuring will not rescue the (original) source of work. It is also clear that, in this circumstance, workers' representatives' voices are not called for, the solution being totally left to individual choice and personal initiative.

Conclusion

This paper analyses different forms of workers' involvement in a national and EU framework facing crisis and restructuring of undertakings at plant level as well as transnational level. It suggests that different forms of involvement offer different solutions to problems concerning workers' rights (wages and salaries, existing jobs, job continuity) which are more or less effective in consideration of the coverage of binding agreements and of the priority of employees' involvement in respect to the announcement of enterprise's crisis in early stage before insolvency and bankruptcy. It

¹⁷ The provision is enacted by Decreto-legge n. 78/2009, convertito in legge n. 102/2009, which adds to article 7-ter, comma 7, decreto-legge n. 5/2009, convertito in legge n. 33/2009.

¹⁸ In the past, the legal system of *Cassa integrazione* has provided other examples of the same sort, which it would be too long to mention.

proposes that implementation of involvement aimed to reduce effects of crisis on labour should consider the possibility of saving the source of work through flexibility and employability devices.

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