

European Economic Governance And Its Impact On The Collective Bargaining System: The Italian Case*

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RESUMEN**ABSTRACT**

The new economic governance has pursued a radical decentralisation of collective bargaining. The European system of economic policies represents a new model that can be described as new European interventionism and marks a paradigm change in the EU's approach to collective bargaining to direct political intervention in national bargaining outcomes and procedures. The European economic governance pressure was very clearly on Italy, where the industrial relations system is strongly under pressure, since the "secret" letter sent from the ECB to Italy on August 5th, 2011, which immediately influenced both Italian legislator and social parties. This paper focuses on the trends of the Italian firm-level bargaining system from the perspective of the subjects who negotiate and the agreements' effectiveness. In relation to the subjects, in Italy this pressure resulted in the adoption of the majority principle. From another point of view, in Italy, until the end of last century, the national-level collective agreement seemed to be 'inviolable', inserted as it was in a context of absolute centrality. If this was the traditional approach, in recent years the Italian system has experienced a shift away from the model, where the legal support has been combined with a 'deconstruction' of collective regulation. Here we will briefly consider these more recent dynamics, in particular by the intervention made by the Italian legislator with the so-called economic manoeuvre of August 2011 (Legislative Decree No. 138/2011, converted by Law No. 148/2011), which, in a framework of progressive fragmentation of labour relations, changed traditional attitudes.



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1. The new European economic governance and the collective bargaining models.

The European system of economic governance represents a new model of European policies and, at same time, a paradigm change in the EU's approach to collective bargaining as a result of the "European Semester" mechanism. Every year the EU issues policy recommendations for all EU Member States on the basis of a detailed economic analysis. These prescriptions must then be transposed into national reform programmes, whose effectiveness will again be assessed by the EU. As a consequence, in numerous European States the most relevant changes have concerned collective bargaining following the recommendations of the European institutions (Schulten, Muller, 2015: 331). In particular, the new economic governance has pursued a radical decentralisation of collective bargaining, representing a new model of European policies that can be described as new European interventionism. This archetype was based on the same strategy of a radical decentralisation of collective bargaining in all cases, even if in many countries this model of collective bargaining is irrespective of specific national traditions and structures of industrial relations. In the case of Italy, it is possible to observe an evolution of these recommendations. At beginning, the EU limited the intervention prescribing recommendations about the "content" of the firm-level collective agreements. In the 2011, in fact, the EU Council recommended that Italy took action to "*ensure that wage growth better reflects productivity developments as well as local and firm conditions, including clauses that could allow firm level bargaining to proceed in this direction*".¹ Recently, the intervention concerns also the institutional aspects. In 2015 recommendations, the Council endorses that Italy takes action "*to promote, in consultation with the social partners and in accordance with*

1. See EU Council Recommendation of 12 July 2011 on the National Reform Programme 2011 of Italy and delivering a Council opinion on the updated Stability Programme of Italy, 2011-2014 (2011/C 215/02).

national practices, an effective framework for second-level contractual bargaining"². It is clear that this intervention concerns the necessity to fix the procedures of the second-level collective bargaining, not only the content of these agreements. In particular, this paper focuses on the trends of the Italian firm-level bargaining system from the perspective of the subjects who negotiates and the agreements' effectiveness.

2. The Italian firm-level bargaining system: the subjects.

The European economic governance pressure was very clearly on Italy, where the industrial relations system is strongly under pressure, since the "secret" letter sent from the ECB to Italy on August 5th, 2011, which immediately influenced both Italian legislator and social parties. In relation to the subjects, in Italy this pressure resulted in the adoption of the majority principle. In the private sector the criteria for measuring the union representation are not set by legislative rules, but are based on the associative spread and the organizational diffusion of each trade union.

The lack of any legal provision for collective bargaining has become a major characteristic of Italian industrial relations, as the pressure to implement Article 39 of the Italian Constitution has declined. As is known, the second part of this article provides for the registration of trade unions and employers' association, and the consequent recognition of their legal personality as a prerequisite to allowing them the power to conclude collective agreements binding on all employees.

Free from legal schemes and regulations, collective bargaining has been able to adapt more easily to the radical changes in economic and technological conditions which happened in the post war period. In particular, the non-implementation of the procedure of the Article 39, developed exclusively on national bargaining and chiefly concerned with the extension of collective agreements, has facilitated the decentralisation of bargaining (Treu, 2014: 195).

Nevertheless, this collective laissez-faire has been a factor of instability and of unpredictability in industrial relations. The "de facto" representative system began to enter into crisis from 2010, due to the disagreement over Union unity and the underwriting of separate collective agreements. The well-known story of the dispute between Fiat Chrysler Automobiles and the metalworkers' Union Fiom was the symbol of this crisis. The existence of separate agreements for the main Italian industrial group (Fiat), not signed by Fiom and as the previous (unitary and more favourable to workers) was still in force (Ales, 2011), caused significant problems and could represent a more generalized tendency. Without the consent of Fiom, the company introduced downward derogations on pauses, working

2. See EU Council Recommendation of 12 July 2015 on the 2015 National Reform Programme 2011 of Italy and delivering a Council opinion on the 2015 Stability Programme of Italy, (2015/C 272/16).

time shifts and overtime, as well as limitations to the rights to strike. New companies were virtually created, where all workers had to apply for the job. In order to definitively exclude Fiom from all its plants, Fiat even left the national employers' association and signed a first-level agreement apart from the national metal worker's agreement. For re-establishing co-operative relations, the social partners gradually started to recover the unity at least in relations to the rules framework. Then, to avoid a legislative intervention, in 2011 and in 2013 the trade unions signed two important agreements where set relevant provisions concerning the realization of a regulated industrial relations system, establishing, among the other things, a system for measuring trade unions representativeness. It was necessary to prevent a further legislative initiative. In fact, as discussed in the following paragraph, the article 8 of the law n. 148 of 2011 was already the immediate answer of the Italian government to the European Central Bank letter. Regarding the subjects, the article 8 has relevant critical issues. The important regulatory competence, which will be examined in the following pages, is attributed to trade unions generically described as "most representatives at national or local level" or "their representatives at enterprise level". This ambiguity was the most important reason that induced Italian trade unions to continue their efforts in the direction of a better self-regulation.

Subsequently, these agreements converged in a single contract. In 2014 the major representative Italian Confederation Union and the employers' Association of the manufacturing sector signed an important agreement on union representation (T.U.-Testo Unico sulla Rappresentanza, Confindustria-CGIL, CISL, UIL of 10 January 2014) (Carinci, 2014; Del Punta, 2014; Di Stasi, 2014; Barbieri, 2014; Garilli, 2015; Ferraro, 2014; Giorgi, 2015). In this contract the social parties adopt the majority principle. At national level, the representativeness now is measured through a double system, calculating a mix number of members and votes obtained in the works councils (RSU) elections. The trade unions are admitted to the national negotiation tables if they have a representation level within the category, namely the relevant workforce, of not less than 5%. Then, the collective bargaining subscribed by not less than 50% plus one of the relevant workfare is binding for all, also for the dissenting workers and organizations. Anyhow, workers have the right to be consulted in useful time on the draft agreement and their vote has to be kept in consideration by their unions before to sign. Then the sanctions could be given to those dissenting organizations that do not adequate to the will of the majority and they will be decided into the sectorial agreements and will consist in economic penalties or in a strong restriction of access to the unions' facilities.

With regard to the firm-level agreements, the contract subscribed to by the majority members of RSU, which are an employee elective representative body, is effective and binding for all the workers and for the Unions as expression of the Confederations which signed the Testo Unico. If in the company there aren't RSUs, but there are RSA, which are

an employee non-elective representative body, the contract is binding if it is adopted by the RSA established within the unions that have the majority of the members. In this case, for the purpose of guaranteeing the democracy principle, the contract signed by RSA should be submitted to a confirmative referendum of employees and the agreement is rejected by the vote of a simple majority of workers. It is important to underline that these rules are not law and they are not binding on all trade unions or all employees. Moreover, within the trade Unions and employer associations that signed the agreement of 2014 the concrete application of these rules is slow, considering that this system has the limit to cover only the industrial sector at the moment. However, this model is crucial because the Italian majority representative Confederations endorse it and, at same time, it is the paradigm for the legislator too as it is possible to deduce from the draft bills on the issue of union representativeness currently being discussed in Parliament. It is clear that the numerical measurement (through the electoral data or the number of members) is certainly an instrument for photographing the unions' consensus. Anyway, there are critical issues in relation to institutional, technical and practical aspects.

From an institutional point of view, generally speaking, the majority principle, without any sort of corrections, does not take into account the value of dissenting opinion as expression of the union freedom affirmed by the art. 39 of the Italian Constitution, a value that was also strongly affirmed in a recent important sentence by the Italian Constitutional Court in the case of Fiom versus Fiat (sent. n. 231/2013) (De Luca Tamajo, 2014). According to the Court, the principle that only trade unions which had signed a collective agreement applied in the enterprise could benefit of the important rights (assembly, referendum, billposting etc...) (article 19 of the law n. 300/1970), it cannot be any more adopted, due to the unions tendency of doing separate agreements. It could happen that the participative, but dissenting, trade unions could lose their rights if they do not accept the contractual conditions and do not sign the agreement. To avoid this effect, in the opinion of the Italian Constitutional Court any trade union participating to the negotiation table should benefits of the mentioned facilities.

Besides, from a techno-legal perspective the adoption of this archetype could encounter various difficulties. On the one hand, the individuation of the "category" within is necessary to verify the majority could be very complex, given that there is an increase expansion of collective rules even if there is no coherence between the concrete company activity and the traditional field of the productivity category. In other words, it is necessary that the interest group is uniform so that the numerical measurement operates in a correct way (Bavaro, 2014: 19). On the other hand, the second-level of collective bargaining is not compulsory: social partners can negotiate at that level but are not obliged to. In practice, depending on the existence of works councils and on the power relations in each firm or plant whether significant negotiations may take place. Second-level agreements are al-

most absent among small enterprises. According a specific analysis (Leonardi, 2014: 72), recently decentralized bargaining covered approximately 54% of workforces in enterprises with more than 20 workers. These firms accounted for over 70% of employees in manufacturing industry, and almost 60% in the area of non-financial sector. In the small and medium enterprises the coverage is esteemed to be far below that threshold. In this regard, it is not possible to ignore that the Italian productivity system is based on the small and medium enterprises, where often there are not work councils and the decentralized bargaining could be done by trade unions without any numerical and certified measurement of their representativeness, through the employer recognition as negotiating partners. In addition the same rules of the T.U. could represent an obstacle to diffusion of work councils, and in particular of the RSU, because the passage from the RSA to the RSU (important for the election measurement) could only happen with the unanimous consensus of the trade unions belonging to the confederations that signed the T.U., thus limiting the spread of an instrument (RSU) crucial for the union representativeness measurement.

Finally, from a practical point of view, this system requires a specific coordination and collaboration between employers and various institutions in order to collect the data about the election results and the number of members that, to our knowledge, in Italy are still a long way off.

3. Recent trends in Italian collective bargaining policies and practice.

In recent years the subject of collective bargaining has been hampered in Italy by an important legislative intervention that has significantly altered the traditional relationship between the 'weight' of national collective labour contracts and decentralised bargaining, as well as, in parallel, the attitude of the rules concerning non-derogability/derogability in the basic relationship between collective agreements and legislation.

In Italy, until the end of last century, the national-level collective agreement seemed to be 'inviolable', inserted as it was in a context of absolute centrality, as well as assured an undisputed domain of the negotiating system, with the recognised prerogative to regulate the different categories of association, as a sign of positive and spontaneous dynamics, and this in tribute to the principle of 'mutual recognition' typical of the theory of inter-trade union rules. If this was the traditional approach, in recent years the Italian system has experienced a shift away from the model, where the legal support has been combined with a 'deconstruction' of collective regulation.

Here we will briefly consider these more recent dynamics, in particular by the intervention made by the Italian legislator with the so-called economic manoeuvre of August 2011 (see Legislative Decree No. 138/2011, converted with amendments by Law No. 148/2011),

which, in a framework of progressive destabilisation and fragmentation of labour relations, changed traditional attitudes, highlighting a substantial distrust in its persistent regulatory power. Article 8 of Law No. 148, in fact, entitled "*Support for proximity collective bargaining*" was qualified by early commentators as a regulation with a potentially «disruptive» (Pessi, 2011: 537) and destabilising capacity with respect to the Italian employment law system. It contributed (and is contributing) to the emergence of a new negotiation system, at decentralised level, much more structured and much more varied than it was until very recently, with a clear reversal of the game rules in relations between collective labour agreements, broken down into different levels of competence (process accompanied by a progressive weakening of legal safeguards).

This article provides that: «1. *Collective labour agreements signed at company or territorial level, or by workers' associations comparatively more representative on national or territorial level or by their trade union representatives operating in the company (...) can carry out specific agreements with efficacy in respect of all workers interested on the condition that they are signed on the basis of a majority criterion concerning the above-mentioned trade union representatives, aimed at increasing employment, the quality of the work contracts, the adoption of forms of worker participation, the emergence of irregular work, increments in competitiveness and wage levels, company crisis and employment management, investments and the launch of new activities.*

2. *The specific agreements referred to in paragraph 1 may affect the regulation of matters concerning the organisation of work and production with reference to: (a) audio-visual equipment and the introduction of new technologies; (b) worker's tasks, the classification and grading of staff; and (c) fixed-term contracts, reduced, modular or flexible hours contracts, with solidarity in procurement and in cases of recourse to an employment agency; (d) the discipline of working hours; (e) the recruitment method and discipline of the employment relationship including coordinated and ongoing collaborations on a project and VAT numbers, the transformation and conversion of employment contracts, and the consequences of withdrawing from the employment relationship, exception is made for discriminatory dismissal, dismissal of a female worker coinciding with marriage, dismissal at the beginning of the pregnancy period until the end of the periods of being prohibited from working, as well as until the child is one year old, dismissal caused by a request or the taking of parental leave and for the child's illness by the male or female worker and dismissal in the event of adoption or custody.*

2-bis. *Without prejudice to the provisions of the Constitution, as well as the constraints imposed by Community legislation and international labour conventions, the specific agreements referred to in paragraph 1 also work by way of derogation from the legal provisions governing matters covered in paragraph 2 and the related regulations contained in national collective work contracts. (...)*» (our translation).

By briefly skimming through the text of the regulation, a legislative option is immediately obvious (also accepted with very critical evaluations of a substantial part of Italian employment law doctrine: see, e.g., Carinci 2012; Perulli, Speziale 2011; Veneziani 2012; Barbieri, 2012; Ferraro, 2012; Alleva, 2012; Garilli, 2012; Scarpelli, 2012; Lassandari, 2012, Gottardi, 2012; Carabelli, 2012) for possible flexibility of the regulations governing the individual work relationship carried out by granting the social partners - under certain conditions - (extensive) powers of derogation, even worse, with the instrument of proximity bargaining, compared with many profiles regulated not only by collective bargaining at national level, but also by the same legislature.

With this in mind, the perplexities of those who emphasise the ambiguity of a system that, while leaving art. 39 of the Constitution unimplemented, at the point of subjective efficacy of the collective agreement, it finishes by now ensuring a derogatory effectiveness to proximity contracts by means of an ordinary law, can be understood. Certainly, for stipulations to be enabled in derogation of which it has been said, the trade unions must still be “comparatively more nationally or territorially representative”. Therefore, the expression originally used in art. 8, where it talks about collective agreements signed “*by*” (and not “*by (plural)*”) comparatively more representative associations, without a shadow of a doubt legitimising the ‘activation’ of the system of exceptions shown above «also at the prerogative of a single association» (Romeo, 2014, 881), must now be corrected in the light of art. 7 of Law No. 99/2013 (conversion of Legislative Decree No. 76/2013) that, by invoking the power of company-level agreements to structure exceptions to national bargaining, specifies the need for the former to be concluded “by workers’ and employers’ *trade unions* comparatively more representative on a national level”.

The legislator’s option for a change of collective bargaining at company level suffers from an emergency logic attributable in the first place to the desire to stop the haemorrhaging of the employed caused by the crisis, betting on the bargaining instrument in derogation as a possible means of containing redundancies to cut staff. Moreover, as underlined by a scholar (Sciarra, 2006), one cannot help but notice how the push toward the decentralisation of bargaining has affected many European industrial relations systems for some time now: even Italy, with choices recent made, it becomes part of this mainstream. In spite of this, we share the concerns of those who recently observed how, if, on the one hand, the uniforming push to standardise globalisation processes ends up shaping negotiating structures in the direction of an ever-greater decentralisation that respond to market needs, on the other hand, in the presence of a prolonged crisis, it reveals the risk that a gradual erosion of collective bargaining systems involves (Guarriello, 2012: 355-356).

The question remains of what have the consequences been to date of art. 8 of Law 148, in the light of a repeatedly affirmed maximum opposition to the trade union organisations to take advantage of the regulation’s expectations. The lack of an official and complete data-

base of second-level bargaining is not an insignificant obstacle for those who wish to tackle this subject. However, some elements for a first evaluation may also be taken from the qualitative analysis by the CISL (Italian Confederation of Trade Unions) using data from the Observatory of Second-Level Bargaining (OCSEL). In an initial report (Cisl, 2014) for the years 2009-2012 (so largely attributable to a period prior to the entry into force of art. 8) it should be noted that, out of 2402 agreements surveyed (89% of which were company-level agreements, 10% territorial agreements and 1% sectoral), only 5% are attributable to the category of agreements with exemptions, regarding exemption matters in a higher percentage the organisation of work (71%) and, to follow, working hours (65%), salary (62%) and job classification (13%). An analysis of the data carried out by the CISL also shows a significant slowdown in the period of all innovative contractual practices regarding – for example – welfare, participation, training, organisational innovation and equal opportunities, and looking at the last topic a scholar has recently pointed out the permanent difficulties in Italy of consolidating a stable bargaining model, capable of integrating the legislative policies on the subject of equal opportunities (Ferrara, 2014: 519).

As has been noticed recently - and as emerges from informal discussions with those who operate within the framework of industrial relations (trade unionists, labour consultants, employment law lawyers, representatives of employers’ associations) - the feeling that you get is that «exceptions are being made, but they are not mentioned» (Imberti, 2014) and that the bargaining decentralised at the time of the crisis has in a significant number of cases taken parallel paths than those provided for in art. 8 to arrive at basically the same results, i.e. departing not only from the Italian national collective labour contracts, but also from some relevant legislation (Imberti, 2014: 256), while news has emerged of a few company contracts concluded explicitly departing from art. 8 (Bavaro, 2012: 159), all, however, relating to companies of significant size. It can be lexically more fascinating to talk about “pathways to stabilisation” or “expansive solidarity” contracts rather than “agreements with exceptions”. Certainly, the lack of a reference to art. 8 tries to ‘undermine’ the symbolic value, attributable to the significant extent of possible exceptions as mentioned above. However, the fact that this «karst» (Imberti, 2014: 268) decentralised bargaining continues to be largely reduced to an “exception to the rule”, which is useful to deal with the specific case (company), but not likely to rise to the rank of a general rule, does not detract from - indeed it accentuates - the feeling that Italy is now in an obvious process of ‘rebalancing’ the equilibria of collective bargaining, with the company negotiation level definitively given a role of new leadership, which is more pragmatic and stripped of ideology, but from the results it is still uncertain and with the risks associated with the emergence of a sort of «trade union localism» (Scarpelli, 2011).

4. *Towards new interactions among social partners?* - Decentralised bargaining also involves a (possible) level of territorial bargaining, with different models of interaction among social parties, local Governments and/or other agents operating on a specific territory (Regalia, 2015; Scarponi, 2015; Zoppoli, 2015), that could play a significant role in the fu-

ture particularly for smaller and medium-size enterprises: in fact, in a territorial logic, these kinds of negotiations should strive to intercept and support the productive interests of the territorial community in the name of an broader and shared economic and social growth plan (Vergari, 2014) from which smaller sized actors could certainly benefit. Just think, in this regard, about the interesting experiences in Italy of artisan 'bilateralism' («*bilateralità artigiana*»), in its regional dislocation, albeit with sharp territorial differences that see a use for the instrument (and even the presence of bilateral institutions) dotted around, with a strong prevalence of experience in the central/northern area of Italy [on this topic see Nogler (a cura di), 2014]. More generally, the scope of these territorial bargaining activities could allow not only the profiles of organisational flexibility to be increased – with respect to which, however, with the choices made recently by the Italian legislator with the adoption of the so-called *Jobs Act* (2015) many regulatory constraints have now been definitely loosened (see Nunin 2016) – but also, in an approach more attentive to the needs of workers, to build a possible 'additional basket' of welfare tools for use at company level (for example, with the offer of services to families and to people, healthcare support, help with the costs of educating children, family life-work balance, public transport support, etc.), as well as to encourage investment in training, as a rule not only inadequate, but completely absent (with the exception of training on workplace safety, statutorily required) in the 'circuit' of small employers, although in this area the need to enhance the technological level is often felt to maintain competitiveness.

Of course, these are interventions that also call into question a regulatory support activity, for example the work of regional legislator, called on to devise instruments that promote the system of contributing to these welfare interventions and support the conclusion at company level of agreements such as, for example, those dedicated to implementing the care services offered to workers, an indispensable tool for balancing work and family life. Under the profile above, an important ground for second-level bargaining – unfortunately rarely undertaken these days – is the link between gender policies and those of corporate welfare; as recently observed, this theme calls into question a new breakdown of the relationship between individual interests and collective interests, in the sense that the universalism of the protection afforded by the trade union movement should be entrusted with the defence of minimum rights for all, while the allocation of further benefits can be obtained through the intervention of decentralised bargaining, without fearing an excessive customisation of the measures in the case of gender policies becoming inevitable if you want to meet the personal needs of male and female workers (Ferrara, 2014: 536).

By the end, the lines of a possible future development of territorial bargaining not only appear multiple but also potentially innovative and cannot necessarily be broken down into just an approach of flexibility geared toward reducing safeguards. However, there are

many obstacles still to overcome, that could be related to poor knowledge of opportunities that can be achieved in practice, and the consequent rigidity of a certain entrepreneurial class to make itself available for trade union discussions: in this sense, as has been observed (Vergari, 2014) and as some Italian experiences show us (e.g., the innovative so-called "*contrattazione sociale*" for sustaining the territorial economy in the autonomous Province of Trento, in north-eastern Italy) [Mattei, 2015; Mattei (a cura di), 2014)], it is only the desirable resumption of social consultation practices disseminated at territorial level that could provide support and useful solutions to accompany decentralised contractual initiatives, through agreements 'on the rules', in which to outline, for example, priority areas and boundaries of the (next) negotiating action.

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