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SOCIAL CLAUSES IN OUTSOURCING PROCESSES.

SOCIAL RIGHTS VERSUS ECONOMIC FREEDOMS IN THE PRISM OF THE MULTILEVEL LEGAL ORDER

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CHAPTER I

THE FISSURED WORKPLACE AND THE WORKERS' NEED FOR PROTECTION

SUMMARY: 1. The needs of workers' protection in outsourcing processes. - 2. Origin, development and classification of social clauses in the global market. - 3. The linkage between fundamental rights and the market in international free trade agreements. - 4. Structure of the thesis.

1. The needs of workers' protection in outsourcing processes

As widely acknowledged by scholars, there have been many transformations in the organization of the workplace in recent decades[1].

While in the "traditional" Fordist model the companies directly carried out all the phases of the production process, today companies increasingly externalize and outsource the activities not strictly connected to the core business of the company and purchase goods and services traditionally performed in-house.

The reasons behind this choice may be different: the diverse specialization of companies, the possibility of adapting their production process to meet the rapidly changing market demand, to handle sudden or temporary reductions or increases in demand, or to reduce labour costs[2]. Technological progress has certainly facilitated such outsourcing processes[3].

According to the neo-institutionalist economic theories, the companies prefer to purchase goods and services on the market, using supply and service contracts as cost-cutting measures. The choice of the entrepreneur to buy the productive factors rather

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[1] Indeed, «*the modern workplace has been profoundly transformed*», as stressed by WEIL D., *The Fissured Workplace. Why work became so bad for so many and what can be done to improve it*, Harvard University Press, 2014, 19 ss.

[2] See AIMO M., IZZI D., *Decentramento produttivo ed esternalizzazioni nell'era dell'impresa a rete: note introduttive*, in AIMO M., IZZI D. (a cura di), *Esternalizzazioni e tutela dei lavoratori*, Utet, Torino, 2014, XVIII; DE LUCA TAMAJO R., *Diritto del lavoro e decentramento produttivo in una prospettiva comparata: scenari e strumenti*, in *RIDL*, 2007, I, 3 ss; SPEZIALE V., *Le «esternalizzazioni» dei processi produttivi dopo il d.lgs. n. 276 del 2003: proposte di riforma*, in *RGL*, 2006, I, 3 ss; CORAZZA L., Contractual integration *e rapporti di lavoro*, Padova, 2004; CORAZZA L., Contractual integration*, impresa e azienda*, in *DLRI*, 1999, 385 ss; QUADRI G., *Processi di esternalizzazione: tutela del lavoratore e interesse dell'impresa*, Jovene, 2004; LO FARO A., *Processi di outsourcing e rapporti di lavoro*, 2003, dattiloscritto; DEL PUNTA R., *Mercato o gerarchia? I disagi del diritto del lavoro nell'era delle esternalizzazioni*, in *Dir. Mer. Lav.*, 2000, 49 ss; AA.VV*, Diritto del lavoro e nuove forme di decentramento produttivo. Atti delle giornate di studio di diritto del lavoro Trento*, 4-5 giugno 1999, 1999; MARIUCCI L., *Il lavoro decentrato. Discipline legali e contrattuali*, Milano, 1979.

[3] WEIL D., *The Fissured Workplace*, 27 ss. FERRUGGIA A., *Le esternalizzazioni «relazionali» nel decentramento di attività dell'impresa*, in *RGL*, 2013, 4, 809, who underlines «la progressiva perdita di consistenza del "profilo attrezzistico e impiantistico" delle produzioni contemporanee e la crescita di rilievo del *know how* e delle dotazioni immateriali nella determinazione di valore aggiunto di beni e servizi hanno concorso nella direzione di consolidare lo schema di un'impresa leggera».

than to carry out the activities in-house is based on transaction costs and on the assessment of the economic convenience: he will outsource whether it will turn out to be more convenient compared to employment contracts within a hierarchical internal structure[4].

In some scholars' opinion, the so-called relational contract theory is more suitable to describe those outsourcing and workplace fragmentation phenomena. According to such theories, long-term relationships such as supply and service contracts are characterised by the collaboration between the enterprises, which is based on "non-contractual" relationships and informal agreements, founded on loyalty, cooperation or influence[5]. Such business integration is particularly problematic when it takes on a hierarchical form, because of the dependence caused by the «hierarchical forms of outsourcing», in which a company is in a dominant position. In particular in this respect, there is the need for introducing specific protections for workers[6].

More generally, due to the seeking of economic efficiency, the workers affected by the outsourcing processes turn out to be particularly weak and their contractual weakness increases, since they aren't directly employed by the user company[7]. Usually, the workers employed in the so-called «fissured workplace» are more vulnerable, as a result of the decision of the company not to perform directly all the production phases and to entrust services to other companies. These practices result in a competition between such enterprises, which often is based on labour cost and working conditions[8].

Furthermore, the globalization has produced significant changes in the production processes and the organization of work. Considering the decentralization in the global market, the internationalization of markets, the regulatory competition that allows the employers to select the most convenient legal order, the social dumping and the other risks connected to law shopping practices, the need for fundamental social rights protections is even more evident. Such practices aimed at fostering competitiveness generate a "competitive devaluation" of social rights with the view of attracting investments and making economic operators more competitive at international level[9].

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[4] COASE R. H., *La natura dell'impresa*, in *Impresa, mercato e diritto*, Il Mulino, 1995, 73 ss; WILLIAMSON O. E., *Markets and Hierarchies: some elementary considerations*, in *The American Economic Review*, 1973, 63, 2, 316 ss. See also, in Italian literature, DEL PUNTA R., *Mercato o gerarchia? I disagi del diritto del lavoro nell'era delle esternalizzazioni*, 49 ss; ICHINO P., *Il diritto del lavoro e i confini dell'impresa*, in *DLRI*, 1999, 220 ss; CORAZZA L., *Contractual integration, impresa e azienda*, 385 ss.

[5] FERRUGGIA A., *Le esternalizzazioni «relazionali» nel decentramento di attività dell'impresa*, 809 ss; LO FARO A., *Processi di outsourcing e rapporti di lavoro*, 37 ss; D. CAMPBELL, *The Relational Theory of Contract: Selected Works of Ian Macneil*, London, 2001; BAKER G., GIBBONS R., MURPHY K. J., *Relational Contracts and the Theory of the Firm*, in *The Quarterly Journal of Economics,* 2002,117, 1 39 ss; RULLANI E., *La teoria dell'impresa nei processi di mondializzazione*, in *Dem. dir.*, 1988, p. 69.

[6] FERRUGGIA A., *Le esternalizzazioni «relazionali» nel decentramento di attività dell'impresa*, 819. MAZZOTTA O., *Rapporti interpositori e rapporto di lavoro*, Milano, 1979, 127 ss,

[7] GAROFALO D., *Presentazione*, in GAROFALO D. (eds), *Appalti e lavoro. Volume secondo. Disciplina lavoristica*, Giappichelli, Torino, 2017, XVII; LOZITO M., *Tutele e sottotutele del lavoro negli appalti privati*, Cacucci, Bari, 2013, 12 ss.

[8] WEIL D., *The Fissured Workplace*, 42 ss; FERRUGGIA A., *Le esternalizzazioni «relazionali» nel decentramento di attività dell'impresa*, 809.

[9] Concerning the need for protection of fundamental social rights in the glogal market, see PERULLI A., voce *Clausola sociale*, in *Enc. Dir*., Annali VII, Milano, 2014, 187 ss; PERULLI A., *Diritto del lavoro*

In this panorama of changes and transformations, the same attention paid to trade liberalization, protection of free competition and, more generally, of economic interests has not been paid to the protection of workers' rights. Indeed, as stressed on several occasions, international operators have avoided as far as possible the issue concerning the relationship between the economic interests of the companies and the protection of social rights: the *lex mercatoria* seems not to consider social concerns and, in many cases, it even hinders such interests[10].

Furthermore, the so-called "imperfect harmonization" of the labour law in the European Union integration process and the Court of Justice case law on the economic freedoms are not a sufficient limit to correct this current trend; actually, sometimes they justified social dumping and law shopping practices[11].

In order to avoid that entrepreneurs, reduce the remunerations and other workers protections, causing a downward competition, based entirely on cutting labour costs, with the view to be more competitive in outsourcing processes, often a minimum level of protection has been provided for by the law or collective agreements. The establishment of a level playing field, by preventing a competition based only on low wages and poor working conditions, is also a way to protect entrepreneurs from unfair competition[12]

In the course of time, at international level, with the aim of introducing minimum social protection and in the attempt of achieving a "fair globalization", various measures have been taken, such as the action of the International Labour Organization and ILO Conventions and Recommendations, the generalized system of preferences (GSP), the corporate social responsibility statements, the codes of conduct, and the social clauses in international free trade or investment agreements[13].

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e globalizzazione. Clausole sociali, codici di condotta e commercio internazionale, Padova, 1999, XII ss; BARBERA M., *«Noi siamo quello che facciamo». Prassi ed etica dell'impresa post-fordista*, in *DLRI*, 2014, 4, 631 ss; VOLPE M., *Delocalizzazioni e dumping sociale. La prospettiva delle teorie economiche*, in *LD*, 2011, 1, 45 ss; PESSI R., *Dumping sociale e diritto del lavoro*, in *RDSS*, 2011, 617 ss; SCARPONI S. (a cura di), *Globalizzazione, responsabilità sociale delle imprese e modelli partecipativi*, Trento, 2007. Concerning the competition between different legal order, see BELLAVISTA A., *Armonizzazione e concorrenza tra ordinmaneti nel diritto del lavoro*, in WP C.S.D.L.E. "Massimo D'Antona". INT – 47/2006.

[10] For exemple, the WTO has paid a little attention to social considerations. See TREU T., *Globalizzazione e diritti umani. Le clausole sociali dei trattati commerciali e negli scambi internazionali fra* imprese, in *Stato e mercato*, 2017, 1, 7 PERULLI A., *Fundamental social rights, market regulation and EU external action*, in *International Journal of Comparative labour law and industrial relations*, 2014, 1, 29; MARELLA F., *Lex mercatoria e diritto del lavoro*, in *RGL,* 2015, 4, 691 ss.

[11] Cfr. TULLINI P., *Concorrenza ed equità nel mercato europeo: una scommessa difficile (ma necessaria) per il diritto del lavoro,* in *RIDL,* 2018, I, 199 ss.

[12] See, in the past, S. WEBB, *The Economic Theory of a Legal Minimum Wage*, in *Journal of Political Economy*, 1912, 20, 975 ss.

[13] On this issues, see CAGNIN V., *Diritto del lavoro e sviluppo sostenibile,* Wolters-Kluwer-Cedam, 2018; TREU T., *Trasformazioni del lavoro: sfide per i sistemi nazionali di diritto del lavoro e di sicurezza sociale*, WP CSDLE "Massimo D'Antona", 371/2018, 24; PERULLI A., BRINO V., *Manuale di diritto internazionale del lavoro*, Giappichelli, Torino, 2015. Concering the codes of conduct and corporate social responsability, see GOTTARDI D., *CSR da scelta unilaterale datoriale a oggetto di negoziazione collettiva: la responsabilità sociale contrattualizzata*, in GUARRIELLO F., STANZANI C. (a cura di), *Sindacato e contrattazione nelle multinazionali*, Franco Angeli, 2018, 59 ss; PERULLI A. (a cura di), *La responsabilità sociale dell'impresa. Idee e prassi,* Il Mulino, 2013; LASSANDARI A., *Globalizzazione e ruolo del sindacato*, in SCARPONI S. (a cura di), *Globalizzazione, responsabilità sociale delle imprese e*

2. Origin, development and classification of social clauses in the global market

Due to the spread of outsourcing practices in modern production systems, social clauses have become a topical theme: more and more often, competition occurs between the workers employed in procurement contracts[14] and their pay and working conditions are lower than terms and condition that they would enjoy if they were employee of the clients. The weakness of such workers is due to the instability of employment in contractors' companies, which operate in a highly competitive market and whose performances are strongly influenced by the decisions of the clients[15].

At a first glance, social clauses can be defined as those statutory or contractual provisions establishing minimum standards of protections for workers involved in outsourcing and, in particular, employed in procurement contracts.

In many cases, the decentralization consists in the transfer of a part of the undertaking, which, in a second phase, is re-internalised through the procurement contract, which is the main «legal instrument allowing the company to acquire from the market some phases or parts of economic activity», indirectly taking advantage from the performance of contractor's employees[16].

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modelli partecipativi, Trento, 2007, 107 ss; SCARPONI S., *Globalizzazione, responsabilità sociale delle imprese transnazionali europee e modelli partecipativi*, in SCARPONI S. (a cura di), *Globalizzazione, responsabilità sociale delle imprese e modelli partecipativi*, 5 ss; ROGOWSKY N., OZOUX P., ESSER D., MARPE T., BROUGHTON A., *Restructuring for corporate success. A socially sensitive approach*, ILO, Geneve, 2005.

[14] RIVERSO R., *Cooperative spurie ed appalti: nell'inferno del lavoro illegale*, in *Questione giustizia online*, 30 April 2019.

[15] WEIL D., *The Fissured Workplace*, 477 ss.

[16] Cfr. CARINCI M. T., *Il concetto di appalto rilevante ai fini delle tutele giuslavoristiche e la distinzione da fattispecie limitrofe*, in CARINCI M. T., CESTER C., MATTAROLO M. G., SCARPELLI F. (a cura di), *Tutela e sicurezza del lavoro negli appalti privati e pubblici. Inquadramento giuridico ed effettività*, Utet, Torino, 2011, 5; AIMO M., *Stabilità del lavoro e tutela della concorrenza. Le vicende circolatorie dell'impresa alla luce del diritto comunitario*, in *LD*, 2007, 417 ss. On the notion of procurement contract in italian academic debate, see CARINCI M.T., *Il concetto di datore di lavoro alla luce del sistema: la codatorialità e il rapporto con il divieto di interposizione*, in CARINCI M.T. (a cura di), *Dall'impresa a rete alle reti d'impresa. Scelte organizzative e diritto del lavoro*, Milano, 2015, 3 ss; CARINCI M. T., *La somministrazione di lavoro altrui*, in CARINCI M. T., CESTER C. (a cura di), *Somministrazione, comando, appalto, trasferimento d'azienda*, Ipsoa, Milano, 2004, 5 ss; CARINCI M. T., *La fornitura di lavoro altrui. Interposizione, comando, lavoro temporaneo, lavoro negli appalti*, in SCHLESINGER P. (diretto da), *Commentario al Codice Civile*, Milano, 2000; DEL PUNTA R., *Le molte vite del divieto di interposizione nel rapporto di lavoro*, in *RIDL*, 2008, I, 129 ss; DEL PUNTA R., *Appalto di manodopera e subordinazione*, in *DLRI*, 1995, 625; ROMEI R., *L'elisir di lunga vita del divieto di interposizione*, in *RIDL*, 2005, II, 726 ss; BELLOCCHI P., *Interposizione e subordinazione*, in *Scritti in memoria di Massimo D'Antona*, I, Milano, 2004, 265 ss; DE LUCA TAMAJO R., *Metamorfosi dell'impresa e nuova disciplina dell'interposizione*, in *RIDL*, 2003, I, 167 ss; MAZZOTTA O., *Rapporti interpositori e rapporto di lavoro*, cit.; M. T., AVOGARO M., *Appalto, somministrazione di lavoro e trasferimento di ramo d'azienda tra giurisprudenza e prassi delle commissioni di certificazione,* in *RGL,* 2017, 3, 413; CARINCI M. T*., Utilizzazione e acquisizione indiretta del lavoro: somministrazione e distacco, appalto e subappalto, trasferimento d'azienda e di ramo*, Giappichelli, Torino, 2013, 113; ALBI P., *Il contratto di appalto*, in *Trattato di diritto del lavoro*, diretto da PERSIANI M., CARINCI F., vol, VI, *Il mercato del lavoro*, a cura di BROLLO M., Padova, Cedam, 2012, 1595 ss; MARESCA A., ALVINO I, *Il rapporto di lavoro nell'appalto*, in CUFFARO (a cura di), *I contratti di appalto privato*, in RESCIGNO, GABRIELLI (diretto da), *Il trattato dei contratti*, Padova, 2011, 405 ss; CORAZZA L., *La nuova nozione di appalto nel sistema delle tecniche di tutela del lavoratore*, in WP CSDLE "Massimo D'Antona".IT – 93/2009; SCARPELLI F., *Interposizione e appalti di servizi*

In this field, social clauses are aimed at protecting workers by requiring employers to meet certain minimum standards of protection as a condition for legitimately carrying out their economic activities.

The first social clauses date back to the end of the Nineteenth century, well before the well-known Convention n. 94/1949 of the International Labour Organization concerning labour clauses in public contracts.

Since the end of the Nineteenth century, similar provisions have been adopted in the field of public procurement in order to deal with the weakness of the workers employed in this sector. The first provisions of this kind, the Fair Wages Resolutions, were approved by the British government in 1891, following the recommendations of a commission set up by the House of Lords (the Selected Committee on the Sweated Trades), which had highlighted the serious problem of labour exploitation and the high number of workers, especially women and home-workers, who were paid very low wages and to whom disgraceful working time and conditions were imposed. This provision required the insertion in the procurement contracts of a clause aimed at guaranteeing the payment of the rate of wages not lower than that generally accepted as current for a competent worker in the same trade[17]. This provision was one of the first measures for the protection of workers and introduced a sort of "private protection" through the procurement contract, without jeopardizing the unquestionable principle of non-intervention of the government in the market[18]. Preventing competition based exclusively on lowering wages and encouraging competition focused on improving productivity and "industrial efficiency" were considered the best way to pursue the public interest[19]. The Fair Wages Resolutions were modified in 1909 and 1946. In the

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informatici: un interessante «obiter dictum» della Cassazione sul ruolo del «know-how» di impresa, in *FI.,* 1992, I, 524, nota a Cass., S. U., 19 ottobre 1990, n. 10180; SCARPELLI F., *Interposizione ed appalto nel settore dei servizi informatici,* in ASSOCIAZIONE LAVORO E RICERCHE*, Nuove tecnologie e rapporti fra imprese. Profili giuslavoristici degli appalti di opere e servizi informatici*, Milano, 1990, 43 ss. On the notion of procurement contract under art. 1655 od Civil Code and art. 29 of legislative decree n. 267/2003, see ALVINO I., *La tutela del lavoro nell'appalto*, in AMOROSO G., DICERBO V., MARESCA A. *(a cura di)*, *Il diritto del lavoro. Costituzione, codice civile e leggi speciali*, I, Giuffrè, Milano, 2017, 1740 ss; ORRÙ T., *Appalto e somministrazione di lavoro. Codatorialità e tecniche di tutela*, in *RGL*, 2014, 143 ss; ANGIELLO L., *L'appalto di servizi*, in GALANTINO L. (a cura di), *La riforma del mercato del lavoro. Commento al d.lgs. 10 settembre 2003, n. 276 (artt. 1-32)*, Torino, 2004, 321 ss; MAGNANI M., *Le esternalizzazioni e il nuovo diritto del lavoro*, in MAGNANI M., VARESI P. A. (a cura di), *Organizzazione del mercato del lavoro e tipologie contrattuali. Commentario ai decreti legislativi n. 276/2003 e n. 251/2004*, Torino, 2004, 283 ss; SCARPELLI F., *Appalto e distacco*. *Art. 29*, in GRAGNOLI E., PERULLI A. (a cura di), *La riforma del mercato del lavoro e i nuovi modelli contrattuali. Commentario al decreto legislativo 10 settembre 2003, n. 276*, Cedam, Padova, 2004, 435 ss; ALLEVA P., *Articolo 29*, in GHEZZI G. (a cura di), *Il lavoro tra progresso e mercificazione. Commento critico al decreto legislativo n. 276/2003*, Ediesse, 2004, 165 ss.

[17] BRUUN N., JACOBS A., SCHMIDT M., *La convenzione 94 dell'ILO alla luce del caso Ruffert*, in *RGL*, 2009, 4, 649; MCCRUDDEN C., *Buying social justice. Equality, government procurement, & legal change*, OUP, Oxford, 2007, 42 ss; BERCUSSON B., *Fair Wages Resolutions*, Mansell, London, 1978, 11 ss.; ROCCELLA M., *I salari*, Il Mulino, Bologna, 1986, 30 ss; OSBORNE C., *"Fair wages" in government contracts, The Economic journal,* 1896, 6, 153 ss.

[18] ROCCELLA M., *I salari*, 31 ss; BERCUSSON B., *Fair Wages Resolutions*, 11 ss. It was also defined as a "weak" version of statutory minimum wage. See ROCCELLA M., *Il salario minimo legale*, in *PD*, 1983, 2, 262.

[19] WEBB S., *The economics of direct employment, with an account of the fair wages policy*, Fabian Tract. N. 84, 1898, 5 ss; MCCRUDDEN C., *Buying social justice*, 42.

latter version, the resolutions stated that suppliers of good and services to the State had to guarantee pay and working condition not lower that those provided for in collective agreements stipulated by trade unions and employers' associations "significantly" representative in a specific trade and district. In the absence of contractual provisions, the contractor had to guarantee wages and working conditions not less favourable than those ensured by employers in similar situations in the same sector and in the same area[20].

Between the end of the Nineteenth century and the early Twentieth century, similar provisions spread in many European countries[21]. For example, in France, in 1899 the Millerand decrees introduced a comparable obligation to guarantee a wage not lower than the salary normally paid in the place where the work was performed[22]. In the Italian legal system, the principle of equal treatment was introduced in law n. 272/1906 concerning the railways sector for the first time; it introduced the obligation for public administrations to «establish and submit to the approval of the Minister of public works the provisions guaranteeing an equal treatment to the staff, as well as disciplinary sanctions and procedures for their application, with similar rules to those applicable to the State Railways administration»[23]. In all these legal orders, such clauses have been particularly important, as they paved the way to general provisions protecting working conditions, in particular with regard to minimum wages, and supporting collective bargaining[24].

These provisions are the antecedents of the so-called "equal treatment" or "minimum treatment" social clauses or, in order to distinguish them from other types, "first-generation" social clauses. Such clauses require the contractor to guarantee to his employees minimum working conditions or wages, terms, and conditions not less favourable than that guaranteed to the employees of the client or provided for by a specific collective agreement. These provisions are aimed at guaranteeing minimum treatment to workers already employed in the same economic activity.

In the field of public procurement contracts, equal treatment clauses have been defined by influential academics as that particular type of normative provision

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[20] BERCUSSON B., *Fair Wages Resolutions*, 310 ss; CENTOFANTI S., *Art. 36*, in *Commentario dello statuto dei lavoratori. Tomo II*, diretto da PROSPERETTI U., Milano, 1975, 1194 ss. The Fair wages resolutions were definitively repealed by Thatcher in 1982. See BERCUSSON B, RYAN B., *The British case: before and after the decline of collective wage formation*, in BLAINPAIN R., BLANKE T., ROSE E. (eds.), *Collective Bargaining and Wages in Comparative Perspective*, Kluwer Law International, 2005, 53 ss.

[21] Similar provisions spread also in the US. See MCCRUDDEN C., *Buying social justice*, 39 ss; BRUUN N., JACOBS A., SCHMIDT M., *ILO Convention no. 94 in the aftermath of the Rüffert case,* in *Transfer*, 2010, 473 ss.

[22] Also the French provision referred to collective agreements. See MCCRUDDEN C., *Buying social justice*, 53 ss.

[23] Art. 21, law n. 272/2906. See NAPOLETANO D., *Appalto di opere pubbliche e tutela dei diritti del lavoratore*, in *RGL*, 1953, 275 ss; GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, in *DRI*, 2001, I, 133.

[24] On the relevance of these provision in fostering the application of collective agreements, see BRUUN N., JACOBS A., SCHMIDT M., *La convenzione 94 dell'ILO alla luce del caso Ruffert,* 654; KAHN-FREUND O., *Labour and the Law*, 1977, Londra, 159 ss. See BERCUSSON B., *The new Fair Wages policy. Schedule 11 to the Employment Protection Act*, in *ILJ*, 1976, 134 ss, who adopts a more critic point of view and criticizes such provisions, since they established only a minimum level and did not provided for appropriate sanctions.

establishing, for companies interested in granting financial benefits or in awarding of contracts for the execution of public works and concessions, the obligation to guarantee their employees a minimum standard of protection, mainly regarding to the salary, by ensuring compliance with collective agreements[25]. Today, the academic definition has found a statutory corroboration in art. 3, paragraph 1, lett. qqq), of the Public Procurement Code (Legislative Decree n. 50/2016), which describes social clauses are those «provisions requiring an employer to respect certain social and labour standards as a condition for awarding and carrying out public contracts or concessions or for granting legal and financial benefits».

Such clauses pursue more than one objective: they are aimed at achieving a «right balance in the employment relationship»[26], protecting the worker as weaker party of the relationship, and guiding the activity of public administrations and employers towards social aims; finally, they also intend to ensure a level playing field for competing contractors[27]. First-generation social clauses have also an "indirect" purpose of promoting collective bargaining and trade unions' activity, since often, especially in public procurements, the law refers to collective agreements to identify the protection standards to be guaranteed to contractor's employees, thus extending the scope of application of collective agreements[28].

Since the 2000s, scholars highlighted a «functional mutation of social clauses» in relation to some statutory or collective provisions[29]: besides equal treatment or first-generation social clauses, indeed, there is another kind of social clauses. The so-called "rehiring", or "employment stability", or "second-generation" social clauses aim at

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[25] GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, 133; ORLANDINI G., *Clausole sociali*, in *Diritto online, Treccani.it*, 2015; COSTANTINI S., *Limiti all'iniziativa economica privata e tutela del lavoratore subordinato. Il ruolo delle c.d. "clausole sociali",* in *Ianus*, 2011, 201; LOZITO M., *Tutele e sottotutele del lavoro negli appalti privati*, cit., 17; FORLIVESI M., *Le clausole sociali negli appalti pubblici: il bilanciamento possibile tra tutela del lavoro e ragioni del mercato*, in WP. C.S. D. L.E., "Massimo D'Antona". IT, 275/2915, 9.

[26] NAPOLETANO D., *Appalto di opere pubbliche e tutela dei diritti del lavoratore*, 267 ss; GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, 134.

[27] ORLANDINI G., *Clausole sociali*. Cfr. PALLINI M., *Diritto europeo e limiti di ammissibilità delle clausole sociali nella regolazione nazionale degli appalti pubblici di opere e servizi,* in *DLRI*, 2016, 3, 525 ss.

[28] GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, 134; CENTOFANTI S., *Art. 36*, 1194 ss; MANCINI F., *Sub art. 36*, in ROMAGNOLI, MONTUSCHI, GHEZZI, MANCINI (a cura di), *Statuto dei diritti dei lavoratori*, *Commentario del codice civile*, SCIALOJA, BRANCA (a cura di), Zanichelli, Bologna-Roma, 1972, 546. In fact, outsourcing processes may hinder trade unions activity, as stressed by ALVINO I., *La disciplina collettiva dell'appalto e della somministrazione*, in MARESCA A. (a cura di), *Somministrazione di lavoro e appalti di servizi. Tra conflitto e competizione*, FrancoAngeli, Milano, 2009, 70 ss.

[29] GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, 143 ss. See also BASENGHI F., *Decentramento organizzativo e autonomia collettiva*, in *Frammentazione organizzativa e lavoro: rapporti individuali e collettivi. Atti delle giornate di studio di diritto del lavoro. Cassino, 18-19 maggio 2017*, Giuffrè, Milano, 2017, 243; RATTI L., *Le clausole sociali di seconda generazione: inventario di questioni*, in *RGL*, 2017, 3, 469 ss; ORLANDINI G., *Mercato unico dei servizi e tutela del lavoro*, FrancoAngeli, 2013, Milano, 161 ss; MUTARELLI M. M., *Contrattazione collettiva e tutela dell'occupazione negli appalti*, in FERRARO G. (a cura di), *Redditi e occupazione nelle crisi d'impresa*, Torino, 2014, 303 ss; LOZITO M., *Tutele e sottotutele del lavoro negli appalti privati*, 107 ss; COSTANTINI S., *Limiti all'iniziativa economica privata e tutela del lavoratore subordinato: il ruolo delle c.d. "clausole sociali"*, 199 ss.

regulating the turnover of several contractors in the same procurement contract. These clauses may have different contents: sometimes they impose obligations on the employer to take on the workers of the previous contractor, already employed in the same contract; in other cases, they provide for a simple obligation to inform and consult trade unions with the view of finding the most suitable solution to guarantee the employment stability of the workers involved in the change of the contractors.

The aim pursued by these provisions is completely different compared to first-generation social clauses, which refer to a different phase of the employment relationship: the second-generation social clauses are intended to «regulate social effects of the market liberalization processes and of the privatization of companies operating in certain sectors»[30]. They also support trade unions' role in handling employment issues in corporate restructuring processes[31].

Also second-generation clauses are intended to regulate the competition: they are aimed at avoiding that the change of contractors in the execution of the contract is based exclusively on a reduction of labour costs. By imposing on the contractor taking over the contract the obligation to rehire all or a part of the workers previously employed in the same contract, they promote a model of "virtuous" entrepreneur and limit the risk that outsourcing practices cause unjustified and irrational reductions in employment levels. Indeed, contracts should be awarded to the contractor guaranteeing the most efficient management of the service, which shouldn't necessarily have negative impact on the workers employed in the contract[32].

Due to the limitation that first- and second-generation social clauses entail, they may reduce the contractors' freedom to carry out their economic activity and limit their freedom of trade union association: therefore, they risk to contrast with the constitutional and European provision those freedoms[33].

3. The linkage between fundamental rights and the market in international free trade agreements

Usually, besides domestic rules requiring employers to guarantee to workers a minimum standard of protection, in the notion of social clauses are included also provisions aimed at ensuring the protection of fundamental social rights in international free trade or investment agreements.

Social clauses or social chapters, containing provisions aimed at preventing and tackling labour exploitation, is increasingly spreading: usually, they require a commitment by the States stipulating the trade agreement to control and ensure the

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[30] GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa,* 144 ss.

[31] GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, 146; AIMO M., *Stabilità del lavoro e tutela della concorrenza. Le vicende circolatorie dell'impresa alla luce del diritto comunitario*, in *LD*, 2007, 419.

[32] BASENGHI F., *Decentramento organizzativo e autonomia collettiva*, 243 ss.

[33] GHERA E., ., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, 147 ss; SCARPELLI F., *Regolarità del lavoro e regole della concorrenza: il caso degli appalti pubblici*, in *RGL*, 2006, 757.

compliance of economic operators with minimum standards of protection. These clauses are also defined as "trade-labour social clauses", because of their important role in the linkage between fundamental rights and the market[34].

Concerning this issue, international agreements stipulated by the United States and the European Union with other countries are of particular interest.

Originally, the main objective of international trade policy was to prevent unfair competition. Thus, for example, the 1922 US Tariff Act gave to the President of the United States the power to adapt prices of goods to balance diverging production costs between domestic products and those from other countries with lower labour costs. Only later, since the 1980s, in US trade policy, a greater attention was paid at ensuring minimum protection for workers, not exclusively relying on protectionist purposes. One example is the social clause included in the US Generalized System of Preferences in 1984: in a rewarding perspective, in order to enjoy the favourable tariff treatments granted by this agreement, the State concerned had to undertake to guarantee certain rights to workers, such as the right of association and trade union organization, the right to stipulate collective agreements, the prohibition of forced labour, as well as the guarantee of certain minimum working conditions concerning wages, working hours and measures relating to health and safety at work[35].

The social clause, or social chapter, takes different forms and contents in the various international agreements[36]. Some contain provisions aimed at fostering a dialogue between the stipulating parties and monitoring the established protection standards; others require the States to comply with certain minimum standards of protection under penalty of sanctions; others contain clauses imposing certain minimum levels of protection as a condition for the conclusion of the agreement[37].

In "first-generation" agreements, such as 1994 North American Free Trade Agreement (NAFTA), agreed by the US, Canada and Mexico, the clauses relating to social rights were placed outside of the agreement, in an attached document, namely the North American Agreement on Labour Cooperation (NAALC), in the case of NAFTA. In succeeding agreements, the so-called second-generation international agreements, the chapter concerning social rights has been inserted directly into the agreements, as an integral part[38].

The content of social clauses differs considerably from agreement to agreement. For example, NAALC requires the parties to promote not the implementation of minimum standards of protection provided for at international level, but the compliance with of

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[34] COMPA L., *La clausola sociale commercio-lavoro a 20 anni dal NAFTA: il punto*, in *RGL*, 2015, 4, 763 ss. On social clauses in free trade agreements, see also ILO, *Social dimension of free trade agreements*, 2015.

[35] The Generalized System of Preferences (GSP) is a system providing tariff reduction to promote economic growth in the developing countries. See HEPPLE B., *Labour laws and global trade*, Hart, 2005, 90 ss.

[36] See COMPA L., *La clausola sociale commercio-lavoro a 20 anni dal NAFTA: il punto*, 765, who classified free trade international agreement on the basis of the characteristic of social clauses.

[37] TREU T., *Globalizzazione e diritti umani. Le clausole sociali dei trattati commerciali e negli scambi internazionali fra imprese,* 17 ss.

[38] Sees PERULLI A., BRINO V., *Manuale di diritto internazionale del lavoro*, 85 ss; HEPPLE B., *Labour laws and global trade*, 108 ss.

domestic labour law; moreover, it only identifies some principles to be respected, but no specific commitment. In the most recent agreements, instead, the States undertake to introduce and guarantee the application of regulations ensuring the respect of the rights of workers and to comply, at least, with the core labour standards of the ILO[39].

Social clauses in free trade agreements are "conditionality instruments" in the regulation of market: the States must respect the rights provided for in such agreements to benefit of the advantages deriving from trade liberalization or to avoid penalties[40]. From a functional point of view, initially, these provisions were included in international agreements for economic reasons, to avoid distortions of competition caused by competitive advantages due to a reduction in the standards of protection of workers' rights[41]. Only later additional goals, such as ensuring the implementation of core labour standards, emerged.

By now, all "new-generation" international agreements contain the so-called "sustainable development clauses", aimed at promoting a socially sustainable development. Undoubtedly, these social clauses are useful in the attempt to reduce the poverty gap between developed and developing countries[42]. However, the effectiveness of these instruments is reduced, because of the low levels of protection that they are intended to guarantee and for the weak enforcement mechanisms provided for. For example, in NAALC disputes on the interpretation and implementation of social rights are decided by an independent arbitration panel; however, the sanctioning system has never been fully implemented, mainly due to the lack of will of the States in this regard. Sometimes, the only consequence of the violation of social clause is the application of fines with low effectiveness, as in Central America Free Trade Agreement (CAFTA); in other cases, the agreements expressly exclude social issues from the system set up for the resolution of disputes, the scope of which is limited to the commercial ones; thus, their effectiveness and cogency is considerably reduced. Only in exceptional cases, as in the agreement between the US and Jordan, the mechanism set up for the violation of commercial clauses is extended to social issues and economic sanctions apply also in the event of a violation of social commitments[43]. In the most recent agreements, such as

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[39] E.g. CAFTA, which refers to the principles agreed in the ILO Declaration on fundamental principles. See also *Tras-Pacific Partnership* (*TPP*) and *CET*A (*Comprehensive Trade and Ecnomic Ageement*). See COMPA L., *La clausola sociale commercio-lavoro a 20 anni dal NAFTA: il punto*, 772 ss. The debate on the *TTIP* (*Transatlantic Trade and Investment Partnership*) is not considered in this research. On this topic, see CAGNIN V., *La convergenza normativa in tema di diritto del lavoro tra Ue e Usa nell'accordo commerciale geopolitico Ttip*, 1, 2016, in *LD,* 2016, 1, 87 ss; PERULLI A., *Sustainability, Social Rights and International Trade: The TTIP*, in *The International Journal of Comparative Labour Law and Industrial Relations, 2015,* 31, 4, 473 ss; TREU T., *TTIP: Raccomandazioni europee per un labor chapter,* in *DRI,* 2015, 4, 915 ss; GRUNI G., L*aw or aspiration? Proposal for a labour standard clause in the Transatlantic Trade and Investment Partnership*, in *Legal issues of economic integration*, 2016, 4, 399.

[40] PERULLI A., *Commercio globale e diritti sociali. Novità e prospettive, in RGL,* 2016, 4, 735 SS; PERULLI A., *Clausola sociale, 190*; SANYAL R. N., *The social clause in trade treaties: implication for international firms, in Journal of business ethics, 2001, 29, 380.*

[41] In this respect, see the NAALC. See TREU T., *Globalizzazione e diritti umani. Le clausole sociali dei trattati commerciali e negli scambi internazionali fra imprese,* 12.

[42] TREU T., *Globalizzazione e diritti umani. Le clausole sociali dei trattati commerciali e negli scambi internazionali fra imprese*, 8.

[43] See COMPA L., *La clausola sociale commercio-lavoro a 20 anni dal NAFTA: il punto*, 766 ss; PERULLI A., BRINO V., *Manuale di diritto internazionale del lavoro*, 85 ss; PERULLI A., *Fundamental*

CETA between Europe and Canada and EPA with Japan, there are significant innovations: according to such agreements, a panel of experts with the involvement of civil society is created to provide advices and opinions on the implementation of the clauses; also a specialised court have been set up to settle disputes on the agreements with private investors[44]. An important step towards the effective implementation of these commitments was made by the European Commission: for the first time, on 17 December 2018, the Commission launched formal consultations with the South Korean government over the violation of the provisions of the relevant international free trade agreement. Indeed, violations have been detected regarding the non-compliance and non-ratification of four fundamental ILO conventions concerning the freedom of association, freedom of collective bargaining and forced labour[45].

Concerning the linkage between fundamental social rights and economic regulation, the debate on the insertion of a social clause in the system of the World Trade Organization should also be mentioned. The attempt to highlight social standards in this multilateral framework, including them among the regulations and principles governing international trade, has failed, due to the difficulties in identifying common social standards and because of the lack of will economic operators in international trade to give up the advantages deriving from the differences in domestic labour laws[46].

In social clauses provided for in international agreements, the "humanitarian" interest of rich countries for working conditions in developing countries is linked to a protectionist interest of countering the competition of those countries whose only advantage in international competition consists in low wages. Even in the most recent international agreements, besides the aims of promoting sustainable development, decent work and human rights, the economic objective of protecting the proper functioning of the market, the fair trade, and preventing dumping practices consisting in reducing the protection standards provided for in national legislation to obtain competitive advantages, is predominant[47]. At international level, those instruments are

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social rights, market regulation and EU external action, cit., 31; HEPPLE B., *Labour laws and global trade*, 108 ss.

[44] TREU T., *Trasformazioni del lavoro: sfide per i sistemi nazionali di diritto del lavoro e di sicurezza sociale*, 23.

[45] GRUNI G., *Enforcing labour standards via EU free-trade agreements*, in *Social Europe*, 18 February 2019, https://www.socialeurope.eu/enforcing-labour-standards.

[46] MELO ARAUJO B., *Labour provisions in EU and US mega-regional trade agreements: rhetoric and reality*, in *International Comparative law Quarterly*, 2018, 67, 1, 237; ROYLE T., *The ILO's Shift to Promotional Principles and the ''Privatization'' of Labour Rights: An Analysis of Labour Standards, Voluntary Self-regulation and Social Clauses*, in *The International Journal of Comparative Labour Law and Industrial Relations*, 2010, 3, 266; BENEDEK W., *The World Trade Organization and human rights*, in DE FEYTER K., MARRELLA F. (a cura di), *Economic globalization and human rights*, Cambridge University Press, 2008, 137 ss; CREMONA M., *Rhetoric and reticence: EU external commercial policy in a multilateral context*, in *Common market law review*, 2001, 38, 359 ss. On this issue, see DORE R., *Il lavoro nel mondo che cambia*, 2004, Il Mulino, 96, who ciritces the idea of inserting a social chapter in the WTO sysmte: he argues that such a clause imposing the obligation to ensure better employment condition for workers on developing countries is a "protectionist" idea. In its opinion, an agreement between developing countries would be more effective in preventing downward competition.

[47] Concerning the social chapter's aims in free trade agreements, see MELO ARAUJO B., *Labour provisions in EU and US mega-regional trade agreements: rhetoric and reality*, 233 ss; CORVAGLIA M. A., *Public Procurement and Labour Rights: Towards Coherence in International instruments of*

also intended to deal with the reducing ability of States to freely decide social policies in the context of global trade[48].

This consideration is valid, in a broad sense, for all kinds of social clauses: the altruistic purposes often cover utilitarian interests, the aim of protecting social rights and guaranteeing minimum working standards entail those concerning the regulation of competition[49]. The interaction of such interests generates a contrast between the protection of social rights, on the one hand, protection of competition and freedom of enterprise, on the other, and the need to fairly balance these aims.

4. Structure of the thesis

In the light of these brief introductory remarks, the importance of social clauses in protecting the rights of workers involved in outsourcing processes at international level, in Italian legal system, and in the European Union, emerges[50].

Due to the variety of provisions that can be included in the general notion of social clause, this study is intended to offer an in-depth and systematic analysis of some types

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procurement regulation, Hart, 2017, 69 ss; SIROEN J.-M., *Labour provisions in preferential trade agreements: current practice and outlook*, in *International Labour Review*, 2013, 152, 1, 85 ss; MCCRUDDEN C., *Buying social justice,* 114 ss; LIM H., *The social clauses: issues and challenges*, ILO; SANYAL R. N., *The social clause in trade treaties: implication for international firms,* 380; SCHERRER C., *The economic and political argument for and against social clauses*, in *Intereconimics*, 1996, 69 ss.

[48] PERULLI A.*, Alcune riflessioni sulla tutela dei diritti fondamentali dei lavoratori nel diritto internazionale*, in SCARPONI S. (a cura di), *Globalizzazione, responsabilità sociale delle imprese e modelli partecipativi*, 81.

[49] DORE R., *Il lavoro nel mondo che cambia*, 15 ss e 93 ss.

[50] See LUNARDON F., *Contrattazione collettiva e governo del decentramento produttivo*, in *RIDL*, 2004, I, 213 ss. There are many measures aimed at regulating outsourcing practices and protecting the workers involved in decentralization processes, i.e. joint liability, health a safety measures, and the obligation to inform and consult the social partners. On joint liablity in Italian legal order, see VILLA E., *La responsabilità solidale come tecnica di tutela del lavoratore*, BUP, Bologna, 2017, particularly 55 ss; GAROFALO D., *La responsabilità solidale,* in GAROFALO D. (a cura di), *Appalti e lavoro. Volume secondo. Disciplina lavoristica*, cit., 119 ss; IZZI D., *Appalti e responsabilità solidale*, in AIMO M., IZZI D. (a cura di), *Esternalizzazioni e tutela dei lavoratori*, 52 ss; IMBERTI L., *Il trattamento economico e normativo*, in CARINCI M. T., CESTER C., MATTAROLO M. G., SCARPELLI F. (a cura di), *Tutela e sicurezza del lavoro negli appalti privati e pubblici. Inquadramento giuridico ed effettività*, 63 ss; CORDELLA C., *Appalti: nozione lavoristica e tutela dei crediti retributivi dei lavoratori*, in *DRI*, 2016, 521 ss. Concerning health a safety measures, see ALBI P., *Il contratto di appalto*, in *Trattato di diritto del lavoro*, diretto DA PERSIANI M., CARINCI F., vol, VI, *Il mercato del lavoro*, a cura di BROLLO M., Padova, Cedam, 2012, 1595 ss; CESTER C., PASQUALETTO E., *Il campo di applicazione dell'art. 26 del testo unico n. 81/2008,* in CARINCI M. T., CESTER C., MATTAROLO M. G., SCARPELLI F. (a cura di), *Tutela e sicurezza del lavoro negli appalti privati e pubblici. Inquadramento giuridico ed effettività*, cit., 99 ss; MARESCA A., ALVINO I., *Il rapporto di lavoro nell'appalto*, in CUFFARO (a cura di), *I contratti di appalto privato*, in RESCIGNO, GABRIELLI (diretto da), *Il trattato dei contratti*, Padova, 2011, 446 ss. On the obligation to inform and consult the social partners, provided for in legislative decree n. 25/2007, see ALVINO I., *La disciplina collettiva dell'appalto e della somministrazione*, in MARESCA A. (a cura di), *Somministrazione di lavoro e appalti di servizi*, 74 ss. There are many provisions also in collective agreements aimed at governing outsourcing processes, such as art. 9, section IV, Contratto collettivo nazionale metalmeccanici (metalworking industry collective agreement), which prohibit to externalise core business activities. See ICHINO P., *La disciplina della segmentazione del processo produttivo e dei suoi effetti sul rapporto di lavoro,* 67 ss; MATTEI A., *Scomposizione dell'impresa, lavoro esternalizzato e inclusione sociale: azioni della negoziazione collettiva*, in *RGL*, I, 2016, 768.

of social clauses in the Italian and European Union legal order, of their regulation and of the legal interests protected by these provisions.

A further preliminary consideration seems appropriate to explain the field of interest of this study and define the research plan. Procurement contract is important for private companies as for public administrations in purchasing goods or services or in carrying out public works. The public or private nature of the contract may condition the judgment on the legitimacy of social clauses in the internal and supranational legal order with regard to economic freedoms, due to the different regulations applicable in the two fields[51].

Directive 2014/24/EU on public procurement defines the procurement as «the acquisition by means of a public contract of workers, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose»[52]. Art. 2 of the Directive defines public contracts as «contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services». Similarly, art. 3 of Legislative Decree n. 50/2016 defines public procurement contracts as contracts for pecuniary interest, concluded in writing between one or more contracting authority and one or more economic operators, having as their object the execution of works, the supply of products and the provision of services[53].

Public procurement contract is a private law contract and the scheme is the same as for a private procurement contract. However, public procurements differ from a functional-instrumental point of view: since public administration must pursue the public interests, in this context, besides the typical interests of the private employer, the principles of impartiality and good performance of the administration referred to in art. 97 of Constitution must be considered[54]. The tension between the protection of competition and social objectives, which historically characterizes the action of the public administration in this sector, justifies the different regulations, particularly concerning the phase of the conclusion of the contract and the awarding procedure[55].

Therefore, social clauses in the field of public procurement will be studied: in this field, the law demands the introduction of social provisions through regulations that oblige entrepreneurs to respect certain minimum standards of protection as a condition for the award of public contracts or concessions or for the grant of financial benefits.

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[51] RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, Wolters Kluwer – Cedam, Milano, 2018, 27.

[52] Art. 1 (2), Directive 2014/24/EU.

[53] Art. 3 (1), (ii), legislative decree n. 50/2016.

[54] RUBINO D., IUDICA G., Art. 1655-1677. *Dell'appalto: art. 1655-1677*, in GALGANO F. (a cura di), *Commentario del Codice Civile Scialoja-Branca*, Zanichelli-Il Foro Italiano, Bologna-Roma, 2007, 6 ss; CAFFIO S., *Appalto, costo del lavoro e contratto collettivo di riferimento*, in GAROFALO D. (a cura di), *Appalti e lavoro. Volume primo. Disciplina pubblicistica*, Giappichelli, Torino, 2017, 855; GIACONI M., *Il lavoro nella pubblica amministrazione partecipata da privati*, *DLRI*, 2017, 3, 528. See Cons. Stato 6 giugno 2011 n. 3377; Cons. Stato 15 maggio 2002 n. 2634. Cfr.

[55] RUBINO D., IUDICA G., *Dell'appalto: art. 1655-1677,* cit., 6 ss; MATTEI A., *Scomposizione dell'impresa, lavoro esternalizzato e inclusione sociale: azioni della negoziazione collettiva*, cit., 770.

Due to the spread of outsourcing practices and fragmentation, social clauses have a considerable importance also in private procurement contracts. In this context, usually collective agreements include social clauses, which are one of the main instruments for trade unions to govern outsourcing processes and protect employees, preventing and tackling abuses.

Dealing with this topic, it is necessary to study and describe social clauses in the so-called multilevel legal order, taking into consideration the legislative evolution and the case law, both at EU and national level. Only in this way, by jointly analysing the internal and supranational systems and the regulatory framework created by their interaction, it is possible to define the sources, nature and characteristics of these provisions. The present study is intended to adopt this perspective or, as has been defined by reliable scholars, this "methodology" or "interpretative technique", which is the only way to comprehensively deal with the topic of social clauses[56].

The most relevant distinction for this research relies on the classification developed by Italian scholars: on the basis of contents and interests protected by social clauses, they usually distinguish between equal treatment and rehiring social clauses[57].

Chapter two will analyse equal treatment social clauses, starting from the regulations concerning public procurements. In this field, the European Union has introduced a broad and complex regulation, recently amended and updated in Directive 2014/24/EU, which has been implemented in the Italian legal system by Legislative Decree n. 50/2016, containing the Code of public contracts.

After the repeal of art. 3 of law n. 1369/60, in the Italian legal system, there is no provision establishing a general principle of equal treatment protecting the contractor's employees, apart from the ones concerning public procurement and transnational posting of workers. Nor such a principle exist at European level. Therefore, in the private sector, equal treatment social clauses in national or territorial collective agreements are very important.

Collective agreements are also relevant with regard to public procurements, since the rules of the Code of public contracts (legislative decree n. 50/2016) refer to national and territorial collective agreements for the sector and the area in which the work or the services are performed[58] or to collective agreements under art. 51 of Legislative Decree 15 June 2015, n. 81[59].

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[56] SCIARRA S., *Metodo e linguaggio multilivello dopo la ratifica del Trattato di Lisbona*, in CARUSO B., MILITELLO M. (a cura di), *I diritti sociali tra ordinamento comunitario e Costituzione italiana: il contributo della giurisprudenza multilivello*, *WP C.S.D.L.E. "Massimo D'Antona".Collective Volumes* - 1/2011, 76 ss; VIDIRI G., *Il trasferimento d'azienda: un istituto sempre in bilico tra libertà d'impresa (art. 41 cost.) e diritto al lavoro (artt. 1 e 4 cost.)*, in *Il corriere giuridico*, 2018, 7, 965 ss.

[57] GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, cit., 134 ss. This classification has been adopted by many scholars, such as IZZI D., *Lavoro negli appalti e dumping salariale,* Giappichelli, Torino, 2018; IZZI D., *Le clausole di equo trattamento dei lavoratori impiegati negli appalti: i problemi aperti*, in *RGL*, 2017, I, 451 ss; RATTI L., *Le clausole sociali di seconda generazione: inventario di questioni*, in *RGL*, 2017, 3, 469 ss; BASENGHI F., *Decentramento organizzativo e autonomia collettiva*, 243; ORLANDINI G., *Clausole sociali*; COSTANTINI S., *Limiti all'iniziativa economica privata e tutela del lavoratore subordinato. Il ruolo delle c.d. "clausole sociali",* in *Ianus*, 2015, 5.

[58] Art. 30, legislative decree n. 50/2016.

[59] Art. 50, legislative decree n. 50/2016.

Chapter three will explore the phenomenon of the turnover of contractors and it will deal with rehiring social clauses. Concerning such clauses, it is necessary to consider the transfer of undertaking regulations, since at certain conditions the succession of contractors in the same procurement contract may constitute a transfer of undertaking, with the consequent applicability of art. 2112 of Civil code. Therefore, it is essential to identify the notions of transfer and of organized economic entity, in the light of the case law of the Court of Justice, to draw the line between the two cases, to identify the applicable regulation and the levels of protection of the employment stability and job stability.

The in-depth and systematic study of the different regulatory provisions included in the notion of social clause, their characteristics, the interests that are aimed at protecting, and their classification in the multilevel legal order is preliminary for the assessments concerning the legitimacy of such clauses with regard to economic freedoms.

From such introductory remarks, it is clear that, concerning first- and second-generation social clauses, there are problems of conflicting interests: thus, it is necessary to explore the topic of the relationship and the contrast between economic freedoms and social rights, between freedom to conduct a business and employment stability, as well as the relationship between labour law and competition law, and to analyse anti-competitive and anti-dumping function of labour law and its role in tackling downward coopetition[60]. It is undeniable that freedom to conduct a business also includes the freedom to choose the form, size and structure of the economic activity and that provisions such as social clauses, which bind or condition the entrepreneur in the decisions on outsourcing methods, may limit the freedom to conduct a business[61].

In the search for a reasonable balance between economic freedoms and social rights, it seems appropriate to explore whether the various interests protected by the different types of social clauses can fall within that notion of employment protection which constitutes an overriding reason relating to the public interest justifying a limitation of the economic freedoms. Therefore, the study of social clauses is the occasion for broader study on the relationship between social rights and economic freedoms and the balance in Italian legal system and in the European Union.

For this purpose, it is necessary to consider social clauses and their legitimacy with respect to Italian constitutional principles, in particular in relation to art. 4 and 35 of Constitution, on the one hand, and art. 41 Cost., on the other hand.

Furthermore, the analysis will focus on the supranational level. On several occasions, in the reasoning of the Court of Justice, economic freedoms have been considered superordinate to social rights. It is necessary to understand if and to what extent it is possible to achieve a fair balance between these elements with regard to social clauses.

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[60] On the anti-dimping and unti-competitive function of labour law, see DE LUCA TAMAJO R., *Concorrenza e diritto del* lavoro, in PERULLI A. (a cura di), *L'idea di diritto del lavoro, oggi,* Wolter Kluwer-Cedam, 2016, 14 ss; LYON CAEN A., *A proposito di dumping sociale*, in *LD*, 2011, 8 ss; PESSI R., *Dumping sociale e diritto del lavoro*, cit., 617 ss; LISO F., *Autonomia collettiva e occupazione*, in *DLRI*, 1998, 214.

[61] Also the decision to outsource is an expression of the freedom to conduct a business; see DEL PUNTA R., *Le nuove regole dell'outsourcing*, in *Studi in onore di Giorgio Ghezzi. Volume I*, Cedam, Padova, 2005, 625; MARIUCCI L., *Il lavoro decentrato. Discipline legislative e contrattuali*, 157 ss.

In this reasoning, some useful indications can be found in the principles and provisions having general application contained in the EU Treaties, such as art. 3 (3) of the Treaty on European Union or art. 9 of Treaty on the functioning of the European Union, containing the so-called horizontal social clause. The case law and academic interpretation of EU law, both primary and secondary legislation, offers elements that cannot be ignored in balancing economic freedoms and social rights.

With a view of finding out how social rights and economic freedoms can be fairly balanced in the multilevel legal order, it will be useful to investigate the relevance of the interests protected by the different kinds of social clauses: to what extent the prevention of unfair competition and social dumping, the protection of workers' rights and employment stability can justify a restriction of fundamental economic freedoms?

Furthermore, it is a matter of considerable importance to determine the type of balancing and the equilibrium point identified by the Italian case law and by the Court of Justice of the European Union. The same reasoning on the multilevel protection of social rights requires to consider the different levels and different methods of protection in the legal systems considered[62].

Finally, the aim of the present study is to investigate if it is possible to achieve a fair balance between opposing interests, social rights, on the one hand, and economic freedoms and free competition, on the other, and to comprehend how the interests contrasting with them in relation to the case of social clauses can be balanced.

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[62] On multilevel protection of rights, see SORRENTINO F., *La tutela multilivello dei diritti*, in *Riv. Ital. Dir. Pubbl. comunitario*, 2005, 1, 71 ss; CARUSO B., MILITELLO M. (a cura di), *I diritti sociali tra ordinamento comunitario e Costituzione italiana: il contributo della giurisprudenza multilivello*, *WP C.S.D.L.E. "Massimo D'Antona".Collective Volumes* - 1/2011.

CHAPTER II

EQUAL TREATMENT SOCIAL CLAUSES: THE EQUAL TREATMENT OF WORKERS IN PROCUREMENT AND SERVICE PROVISION CONTRACTS

SUMMARY: 1. The international regulation: ILO Convention n. 94/1949 as a model for social clauses in public procurement contracts. - 2. The linkage between the economic interests of public administrations and the protection of workers: art. 36 of Workers' Statute. - 3. Social considerations in the EU directives on public procurement. - 4. Social obligations in the Italian implementation of EU directives: the Code of public procurement contracts. - 5. The equal treatment principle in private procurement contracts in Italy. – 6. The role of collective bargaining: effectiveness of equal treatment social clause in Italian collective agreements.

1. The international regulation: ILO Convention n. 94/1949 as a model for social clauses in public procurement contracts

The equal treatment social clauses[1], also called "first generation" social clauses, date back a long time ago, particularly in the field of public procurement contracts: it has been one of the first measures used by the States for regulating the employment relationship, even if only for workers employed in public procurement.

The relevance of such provisions in the regulation of public contracts has been acknowledged also by the International Labour Organization since 1949 when the Convention n. 94/1949 concerning Labour Clauses in Public Contracts was adopted. Art. 1 clarifies the scope of application of the Convention: it applies only to contracts in which at least one of the parties to the contract is a public authority. More in detail, according to art. 1, the convention applies to contracts concluded by public authorities for: «(i) the construction, alteration, repair or demolition of public works; (ii) the manufacture, assembly, handling or shipment of materials, supplies or equipment; or (iii) the performance or supply of services», if the execution of the contract involves «the expenditure of funds by a public authority» and «the employment of workers by the other party to the contract». Article 2 of the Convention stipulates that such contracts «shall include clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on» by collective agreement, by an arbitration award, or by national laws. In the absence of any specific regulation, the clauses shall ensure working conditions established by collective agreement or other recognised machinery

[1] This espressione was adopted for the first time by CARNELUTTI F., *Sul contratto di lavoro relativo ai pubblici servizi assunti da imprese private*, in *Riv. Dir. Comm.*, 1909, 1, 416 ss. See NAPOLETANO D., *Appalto di opere pubbliche e tutela dei diritti del lavoratore*, in *RGL*, 1953, 275.

of negotiation, or by national laws, «for work of the same character in the trade or industry concerned in the nearest appropriate district» or at least «the general level observed in the trade or industry in which the contractor is engaged by employers whose general circumstances are similar»[2].

Concerning the content of the social clause, this Convention doesn't require only the respect of fundamental rights: it states that contractors shall respect the levels of protection guaranteed in each country for work of the same character and for the same industry concerned. In this way, it guarantees not only the minimum standards of protection established, but a higher level, at least in developed countries, and it endorses the idea that the public authorities should act as a "model employer"[3] and that competition shouldn't be based on wages and working conditions, particularly in the public procurement sector, in which the risk of social dumping has always been considerable. Indeed, often the most favourable tender is the one presented by the contractor paying the lowest wages and reducing as much as possible the labour costs.

In the case of failure to observe the provisions of labour clauses in public contracts, the convention provides that adequate sanctions shall be applied and appropriate measures shall be taken, such as « the withholding of contracts or otherwise».

The Convention was a powerful stimulus and a model for the approval of similar provisions in the domestic legislation in many countries. However, as stressed in 2008 by the Committee of Experts on the Application of Conventions and Recommendations in the Report of the 97th International labour conference, «the Convention has suffered in recent years from a lack of interest underpinned by "modern" public procurement policies which, in promoting competition at all costs among potential contractors», and in achieving the "best value for money" and an unrestricted competition, go against the Convention's aim[4]. In response to this trend, the ILO Committee of Experts in its 2008 report emphasised the importance of such an instrument, since, «today, more than ever before, fierce competition for public contracts constrains tenderers to lower costs and as part of this process to economize on labour costs including workers' pay and other costs related to working conditions».

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[2] Art. 2, ILO Convention n. 94/1949.

[3] One of the first scholars who suggested such an idea was WEBB S., *The economics of direct employment, with an account of the fair wages policy*, cit., 1898, 5 ss.

[4] Report of the Committee of Experts on the Application of Conventions and Recommendations "*Labour clauses in public contracts,* 97th International labour conference*, Report III (Part 1B), General Survey concerning the Labour Clauses (Public Contracts) Convention, 1949 (No. 94) and Recommendation (No. 84)*", in http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2008-97-1B)140.pdf, xiii. The Report states: «*the objectives of the instruments are twofold. First, to remove labour costs being used as an element of competition among bidders for public contracts, by requiring that all bidders respect as a minimum certain locally established standard. Second, to ensure that public contracts do not exert a downward pressure on wages and working conditions, by placing a standard clause in the public contract to the effect that workers employed to execute the contract shall receive wages and shall enjoy working conditions that are not less favourable than those established for the same work in the area where the work is being done by collective agreement, arbitration award or national laws and regulations*». See BRUUN N., JACOBS A., SCHMIDT M., *La convenzione 94 dell'ILO alla luce del caso Ruffert*, cit., 652 ss; CORVAGLIA M. A., *Public Procurement and Labour Rights: Towards Coherence in International instruments of procurement regulation*, cit., 65 ss.

Seventy years after the adoption, the topicality of the Convention is precisely its important role in preventing the competition based on labour costs and in being a model for social clauses[5].

2. The linkage between the economic interests of public administrations and the protection of workers: art. 36 of Workers' Statute

In the Italian legal system, the first general provision introducing this kind of protection has been art. 36 of the Workers' Statute: as stressed by many scholars, this rule strengthened the principle of the necessary and inseparable link between the economic and contractual activity of the State and the protection of labour and employment conditions[6]. According to this rule, adjudicating administrations shall introduce in the tender notice a specific clause requiring all the contractors or beneficiaries of tax relief to ensure the application of employment conditions not lower than those provided by sectoral or territorial collective agreements[7].

Originally, in addition to the granting of benefits and tax reliefs, only the procurement contracts for the execution of public works fell within the scope of application of art. 36, while similar cases, such as supply contracts or public service concessions were excluded[8]. The question concerned the different treatment between public works and supply contracts or public service concessions: since only in the first case it was provided for the mandatory insertion of equal treatment clauses in the contracts, therefore, such provision might infringe the art. 3 of Italian Constitution. In judgement n. 226/1998 on the legitimacy of art. 36 of Workers' Statute, the Italian Constitutional Court took the first step to overcome this difference in treatment. Since such provision is intended to ensure the protection of employees in cases in which the State directly or indirectly intervene, the Constitutional Court declared unconstitutional the exclusion of supply contracts or public service concessions from the scope of application of art. 36 of Workers' Statute. Therefore, it declared illegitimate art. 36 insofar as it didn't impose to the public authorities the obligation to introduce in public service concessions contracts a social clause ensuring to the workers labour conditions at least as good as those set by collective agreements[9].

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[5] *Labour clauses in public contracts,* 97th International labour conference, 10. See BRUUN N., JACOBS A., SCHMIDT S., IL*O Convention No. 94 in the aftermath of the Rüffert case,* cit., 473 ss.

[6] GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, cit., 147 ss

[7] Art. 36, comma 1, of the Workers' Statute (law n. 300/1970).

[8] BORTONE R., *Commento all'art. 36*, in *Lo statuto dei lavoratori. Commentario,* diretto da GIUGNI G., Giuffrè, 1979, 648; CENTOFANTI S., *Art. 36*, cit., 1207; COSTANTINI S., *Limiti all'iniziativa economica privata e tutela del lavoratore subordinato. Il ruolo delle c.d. "clausole sociali",* cit., 216.

[9] C. Cost. 19 giugno 1998, n. 226, in *GC*, 1998, I, 2423, con nota di PERA G., *Il rispetto della contrattazione collettiva nelle concessioni di pubblici servizi*. The Author doesn't agree with the Court on the rationale of social clauses. According his opinion, the justification may be found in the obligation of the Republic to generally protect the work under art. 35 of the Constitution: it implies that the protection of work must be pursued not only by the legislator, but also by the public administrations in all situations in which they contract with companies, whether to commit services or entrust construction of works or grant benefits of all kinds.

The law of 7 November 2000, n. 327 on the evaluation of labour and safety costs in procurements, definitely overcame the disparities. This provision stated that, in the awarding of public procurement contracts and in the evaluation of abnormally low tenders, the public authorities shall assess that the economic value is adequate with respect to the labour cost as set periodically in the specific tables prepared by the Ministry of Labour, on the basis of the minimum wage rates agreed in the collective agreements stipulated by the more representative unions, as well as on the basis of the rules concerning social security and welfare, the different sectors, and the different areas. This rule applies to awarding procedures for public works, services provision contracts, and supply contracts[10].

Art. 36 of the Workers' Statute addressed directly the contracting authorities, making mandatory for them the inclusion of the social clause in the tender documents[11].

Regarding the structure of this provision, in identifying the content of social clauses to be included in the tender specifications, art. 36 refers "*per relationem*" to collective agreements applicable in the area where the contract is performed[12]. It doesn't determine an *erga omnes* application of collective agreements, nut it refers to collective agreements as parameter-rule setting the minimum employment conditions to be applied to the contractor's employees. According to such "technique of the material and indirect receiving of the collective agreement", the obligation of ensuring to the employees labour conditions not lower than those resulting from collective agreements rests upon the entrepreneur not under the law, but as a consequence of the awarding of the public contract. For this reason, art. 36 of the Workers' Statute doesn't infringe the contractor's freedom of association and it avoids a contrast with art. 39 Cost of the Italian Constitution regarding the rules on *erga omnes* applicability of collective agreements[13].

Furthermore, it can be difficult to identify the collective agreement to be taken as a parameter. This issue is important in order to avoid that the contractor may arbitrarily select which collective agreement to apply on the basis of his economic convenience. According to some scholars and the case law, art. 2070 of the Civil Code is applicable in those cases in which the entrepreneurs carries out various economic activities and it

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[10] Law n. 327/2000 was repealed by the legislative decree n. 163/2006. See ROMEO C., *La clausola sociale dell'art. 36 dello Statuto: Corte Costituzionale e L. n. 327/2000,* in *LG*, 2001, 613 ss.

[11] BORTONE R., *Commento all'art. 36*, cit., 647. *Contra*, ASSANTI C., *Art. 36*, in ASSANTI C., PERA G. (a cura di), *Commento allo statuto dei diritti dei lavoratori*, Cedam, 1972, 420.

[12] BALANDI G. G., *Le «clausole a favore dei lavoratori» e l'estensione dell'applicazione del contrato collettivo*, in *RTDPC*, 1973, 710; TULLINI P., *Finanziamenti pubblici alle imprese e "clausole sociali",* in *Riv. trim. dir. proc. civ.*, 1990, 43 ss; GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, cit., 135 ss; BORTONE R., *Commento all'art. 36*, cit., 650; MANCINI F., *Sub art. 36,* cit., 555; LUCIANI V., *La clausola sociale di equo trattamento nell'art. 36*, in *Dir. lav. mer.*, 2010, 3, 909 ss.

[13] Pursuant to art. 39 of Italian Constitution, «trade unions may be freely established. No obligations may be imposed on trade unions other than registration at local or central offices, according to the provisions of the law. A condition for registration is that the statutes of the trade unions establish their internal organisation on a democratic basis. Registered trade unions are legal persons. They may, through a unified representation that is proportional to their membership, enter into collective labour agreements that have a mandatory effect for all persons belonging to the categories referred to in the agreement». Since this rule has never been implemented, in Italy, collective agreements aren't universally applicable. CENTOFANTI S., *Art. 36*, *cit.*, 1204; GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, cit., 135 ss. See Cass. 21 dicembre 1991, n. 13834; Cass. 23. Aprile 1999, n. 4070.

is not clear how to identify the collective agreement applicable[14]. According to a different interpretation, the applicable collective agreement is the one stipulated between employers' organisations and trade unions, respectively representative of substantial proportions of the employers and workers in the trade or industry concerned, as art. 2 of the ILO Convention n. 94/1949 states[15].

Concerning the nature of such clauses, scholars and the case law usually apply the scheme of the contract for the benefit of a third party, under art. 1411 - 1413 of the Civil Code. Indeed, it is possible to find all the essential elements of this contract in art. 36 of the Workers' Statute: the will of a party to contract for the benefit of a third person and his interest in it[16]. As already stressed, in the case of the social clause under art. 36, the awarding administrations and the State have a specific interest in the proper execution of the tender and the correct performance of the works and services[17]. As a consequence of such interpretation, art. 36 of the Workers' Statute provides to employees the right to labour conditions not lower than those provided for by the collective agreements[18]: according to automatic insertion principle under art. 1339 of the Civil Code, the employees may take legal action to enforce their rights in the case of failure of the awarding administration in inserting the social clause in the tender documents[19].

In this respect, however, in some judgements the Courts have taken a converse opinion: since art. 36 of the Workers' Statute provides for a sanction other than invalidity or automatic replacement of the clause non-compliant with the statutory provision, this obligation would not be binding whether the public authority hadn't introduced the specific clause in the tender documents, nor it would be applicable under art. 1339 c.c.[20]. According to art. 36, paragraph 3, as consequence of the noncompliance with those provisions, the contracting authority can revoke the tax relief or order the exclusion of the contractor from public procurement procedures until 5 years. In this way, it gives a broad discretion to the awarding administration in applying the sanctions. It isn't clear the reference to the "revocation" of the benefit: some scholars argue that it should be

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[14] Cass., S. U., 26 marzo 1997, n. 2665, in *GC*, 1997, 1203, PERA G., *La contrattazione collettiva di diritto comune e l'art. 2070 c.c.*; Cass. 25 luglio 1998, n. 7333, in *RIDL*, 1999, II, 459 ss, BELLAVISTA A., *La clausola sociale dell'art. 36 st. lav. e l'art. 2070 c.c.;* Cass. 4 settembre 2003, n. 12915, PANAIOTTI L., *Ritorna la nozione "oggettiva" di categoria ex art. 2070 c.c. per l'applicazione dei benefici della fiscalizzazione contributiva?*

[15] See VARVA S., *Il lavoro negli appalti pubblici*, in AIMO M., IZZI D., *Esternalizzazioni e tutela dei lavoratori*, cit., 212.

[16] Concerning the contract for the benefit of a third party, see MESSINEO F., voce *Contratto nei rapporti col terzo*, in *Enc. Dir.*, X, Milano, 1962, 198; FRANZONI M., *Il contratto e i terzi*, in *I contratti in generale* a cura di GABRIELLI E., Torino, 1999, 2, 1083.

[17] CENTOFANTI S., *Art. 36*, cit., 1225; ASSANTI C., *Art. 36*, cit., 421; TULLINI P., *Finanziamenti pubblici alle imprese e "clausole sociali",* cit., 53 ss.

[18] MANCINI F., *Sub art. 36*, cit., 551 ss; CENTOFANTI S., *Art. 36*, cit., 1224 ss; BORTONE R., *Commento all'art. 36*, cit., 651. See Cass. 21 dicembre 1991, n. 13834; Cass. 23 aprile 1999, n. 4070.

[19] BORTONE R., *Commento all'art. 36*, cit., 648; CENTOFANTI S., *Art. 36*, cit., 1217; MANCINI F., *Sub art. 36*, cit., 547 ss; VINCENTI E., *Origine ed attualità della c.d. clausola sociale dell'art. 36 dello Statuto dei Lavoratori,* cit.,442.

[20] Cass. 23 aprile 1999, n. 4070; Cass. 5 giugno 1997, n. 5027; Cass. 21 dicembre 1991, n. 13834. See VARVA S., *Il lavoro negli appalti pubblici*, cit., 210.

interpreted in a non-technical way, as loss of the financial benefit or a dissolution of the contract[21].

3. Social considerations in the EU directives on public procurement

In the public sector, the procurement contracts have gained a considerable importance, especially as a result of the widespread outsourcing processes, and it has taken a pivotal role both at national and EU level[22]. The EU has taken many actions in this field. Indeed, as the Commission stated in the Communication "*Europe 2020. A strategy for smart, sustainable and inclusive growth*", public procurement is of crucial importance in the single market for the economic growth of the EU[23], «as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds»[24].

Since the first directives on public procurement[25], the EU regulations have pursued the objective of eliminating tariff and non-tariff barriers and achieving regulatory coordination, to ensure the freedom to provide services in the single market, in order to prevent competition's distortion in the Member States and ensure the proper functioning of the common market[26]. In line with these objectives, today, the guiding principles in the awarding of public procurement contracts shall be the principle of equal treatment, the prohibition of discrimination and free competition. Alongside these, other elements, such as social and labour obligations, shall be considered, although the horizontal policies seem to be in contrast with the "traditional" goal of promoting the creation of

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[21] BORTONE R., *Commento all'art. 36*, in *Lo statuto dei lavorat ori. Commentario*, cit., 653; TULLINI P., *Finanziamenti pubblici alle imprese e "clausole sociali",* cit., 81 ss.

[22] Every year public authorities in the EU spend around 14% of GDP on public procurement. This amounts to more than EUR 1.9 trillion. See https://ec.europa.eu/growth/single-market/public-procurement_en and https://ec.europa.eu/info/sites/info/files/file_import/european-semester_thematic-factsheet_public-procurement_en.pdf. See also SCARPELLI F., *Regolarità del lavoro e regole della concorrenza: il caso degli appalti pubblici*, cit., 761; VARVA S., *Il lavoro negli appalti pubblici*, cit., 194.

[23] Communication from the Commission, "*Europe 2020. A strategy for smart, sustainable and inclusive growth*". See CORVAGLIA M. A., *Public procurement and labour rights. Towards coherence in international instruments of procurement regulation*, cit., 153.

[24] Recital 2, Directive 2014/24/EU.

[25] The first directive on public procuremetn were adopted in 1970s: Directive 71/305/EECof 26 July 2971 concerning the co-ordination of procedures for the award of public works contracts and Directive 77/62/EEC of 21 December 1976, coordinating procedures for the waward of public supply contracts. A second series of public procurement directives were adopted in 1990s: Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts, Directive 93/36/EEC coordinating procedures for the award of public supply contracts, and Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts. on the evolution of public procurement regulations, see TREUMER S., *Evolution of the EU Public Procurement Regime: The New Public Procurement Directive*, in LICHERE F., CARANTA R., TREUMER S. (a cura di), *Modernising Public Procurement: The New Directive*, Djof, 2014, 9 ss.

[26] Court of Justice 19 June 2008, C-454/07, *GmbH c. Republik Österreich*, para 31; Court of Justice 17 September 2002, C-5137/99, *Concordia Bus Finland*, para. 81. See DRAGOS D. C., NEAMTU B., *Sustainable public procurement in the EU: experiences and prospects*, in LICHERE F., CARANTA R., TREUMER S. (eds.), *Modernising Public Procurement: The New Directive*, cit., 303; BERCUSSON B., BRUUN N., *Labour law aspects of public procurement in the EU*, in NIELSEN R., TREUMER S. (eds.), *The new Eu public procurement directive*, Djof publihing, 2005, 97 ss.

the common market, since it may contrast with the principles of non-discrimination and free competition.

In Directive 2004/18/EC, for the first time, all the provisions concerning the procedures for the award of public service contracts, public supplies, and public works were comprised in one directive[27]. The insertion of social and environmental concerns was one of the most significant innovations: according to art. 26, contracting authorities may lay down special conditions regarding social and environmental considerations, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications[28].

The public procurement is considered as a tool to pursue the so-called horizontal policies, i.e. environmental, social and employment policies, in particular in Directive 2014/24/EU. At least according to some scholars, some textual elements in the Directive 2014/24 may bring about change in the Court of Justice case law compared to the past: it may lead to an interpretation that takes into greater consideration social issues in the balancing with economic freedoms[29]. However, it is important to consider that the provisions of the directive are often vague or unclear, as a result of the negotiation process in the formulation of the directive[30].

Among the general rules, art. 18 concerning "Principles of procurement" is particularly relevant. This article identifies goals and principles in this field: in paragraph 1, it requires compliance with the principles of equal treatment, non-discrimination and free competition; in paragraph 2, it demands Member States to take appropriate measures to ensure that economic operators «comply with the applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X»[31].

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[27] According to Recital 1, Directive 2004/18/EC, «on the occasion of new amendments being made to Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (5), 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (6) and 93/37/EEC of 14 June 1993 concern- ing the coordination of procedures for the award of public works contracts (7), which are necessary to meet requests for simplification and modernisation made by contracting authorities and economic operators alike in their responses to the Green Paper adopted by theCommission on 27 November 1996, the Directives should, in the interests of clarity, be recast».

[28] BERCUSSON B., BRUUN N., *Labour law aspects of public procurement in the EU*, cit., 98.

[29] BARNARD C., *To boldly go: social clauses in public procurement*, in *Industrial law journal*, 2017, 46, 2, 209; MASTINU E. M., *Le clausole sociali nel diritto del lavoro. Ordinamento nazionale, comunitario e internazionale a confronto*, in CORTI M. (eds.), *Il lavoro nelle Carte internazionali,* Vita e Pensiero, 2017, 69; FORLIVESI M., *La clausola sociale di garanzia del salario minimo negli appalti pubblici al vaglio della Corte di Giustizia europea: il caso Bundesdruckerei*, in *RIDL*, 2015, II, 558 ss; COSTANTINI S., *Direttive sui contratti pubblici e Corte di giustizia: continuità e discontinuità in tema di clausole sociali*, in *WP CSDLE "Massimo D'Antona".IT*, 309/2016, 18; GIACONI M., *Il lavoro nella pubblica amministrazione partecipata da privati*, cit., 530 ss.

[30] This process is usually called "*constructive ambiguity*". See TREUMER S., *Evolution of the EU Public Procurement Regime: The New Public Procurement Directive*, cit., 22.

[31] The international provisions listed in Annex X are the ILO Eight Fundamental Conventions: the Forced Labour Convention, 1930 (No. 29) , the Abolition of Forced Labour Convention, 1957 (No. 105) , the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) , the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) , the Equal Remuneration Convention, 1951 (No. 100) , the Discrimination (Employment and Occupation) Convention, 1958 (No.

Therefore, it is necessary to consider two perspectives in the regulation of public procurements, particularly in awarding the contract. First of all, as also stated in Recital 1 of the Directive, Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union: the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency[32]. Indeed, as stated in Recital 90, only guaranteeing compliance with the principles of transparency, non-discrimination and equal treatment, is possible to ensure «an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender». Fostering an effective competition, by eliminating provisions and practices that could limit the access to the public procurement market, was already provided for in Recitals 2 and 36 of Directive 2004/18[33]. Article 18, paragraph 1 of Directive 2014/24 only restated and strengthened this principle.

The guiding principle for the action of the public administration in this field is closely related to the previous rules: the so-called principle of "best value for money", which is expressed for the first time in Recitals 2 and 47 of Directive 2014/24[34]. The efficiency of public tendering has become a priority; therefore, it is necessary to use flexible and simple instruments «which allow public authorities and their suppliers to conclude

111) , the Minimum Age Convention, 1973 (No. 138) , and the Worst Forms of Child Labour Convention, 1999 (No. 182). The list doesn't include the ILO Convention Labour Clauses (Public Contracts) Convention, 1949 (No. 94).

[32] On the importance of the protection of the free competition in public procurements, see SANCHEZ GRAELLS A., *Public Procurement and the Eu competition rules*, Hart, 2015, specialmente 195 ss; SANCHEZ GRAELLS A., *Public Procurement and competition: some challenges arising from recent developments in EU public procurement law,* in BOVIS C.(a cura di), *Research handbook on EU public procurement law*, Elgar, 2016, 423 ss; SANCHEZ GRAELLS A., *Truly competitive public procurement as a Europe 2020 lever: what role for principle of competition in moderatin horizontal process?, European public law,* 2016, 2, 377 ss, spec- 391 ss; SANCHEZ GRAELLS A., *Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24*, in LICHERE F., CARANTA R., TREUMER S. (a cura di), *Modernising Public Procurement: The New Directive*, Djof, 2014, 127 ss.

[33] According Recital n. 2 of Directive 2004/18, «the award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of propor- tionality and the principle of transparency». To reach this goal, Recital 36 stated that «to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community». Rectial n. 1 of Directive 2014/24 only restated such principles.

[34] Recital 2 stresses the key role of public procurement and the iportance of revising and modernising the directives «in order to increase the efficiancy of public spending». Recital 47 reiterates the importance of research and innovation. Moreover, «buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for public money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable economic growth».

transparent, competitive contracts as easily as possible and at the best value for money»[35].

On the other hand, the second paragraph of art. 18 includes social considerations and imposes on the Member States a series of binding requirements not only concerning the execution phase, as provided for in Directive 2004/18, but in the entire process of awarding of the contract[36]. As Recital 40 states, the control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure concerning the general principles governing the choice of participants and the award of contracts, the exclusion criteria, and the provisions concerning abnormally low tenders. This rule demands compliance with social and labour law obligations in general and imperative terms, similarly to the requirement to respect the principles of equal treatment and non-discrimination. In support of those scholars' interpretation focusing on the greater attention of the Directive to social issues, in addition to the aim of increasing the efficiency of public spending, it can be highlighted that, according Recital 2, the new regulation will «enable procurers to make better use of public procurement in support of common societal goals»[37]. With the view to an appropriate integration of environmental, social and labour requirements into public procurement procedures, Recital 37 stresses the importance that «Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law that apply at the place where the works are executed or the services provided», resulting from laws, regulations, decrees and decisions, at both national and Union level, or from collective agreements[38]. However, in pursuing social objectives, the prohibition of discrimination and the limits set in the Treaty shall not be infringed: the rules and the measures concerning horizontal policies must always comply with EU law, shall be applied in conformity with the basic principles of EU law, and, particularly, in accordance with Directive 96/71/EC. In applying such rules, once more, Members States shall «ensure equal treatment and not to discriminate directly or indirectly against economic operators from other Members States»[39].

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[35] European Commission – Press release "*Modernisinf European public procurement to support growth and employment"*, in http://europa.eu/rapid/press-release_IP-11-1580_en.htm

[36] CORVAGLIA M. A., *Public procurement and labour rights. Towards coherence in international instruments of procurement regulation*, cit., 18.

[37] Rectial 2, Directive 2014/24/EU. See BARNARD C., *To boldly go: social clauses in public procurement*, cit., 208 ss.

[38] Recital 37 continues: «Equally, obligations stemming from international agreements ratified by all Member States and listed in Annex X should apply during contract performance». On the debate concerning the goal of EU public procurements regulation, see COMBA M. E., *Variations in the scope of the new EU public procurement Directives of 2014: efficiency in public spending and a major role of the approximation of laws*, cit., 38; BOVIS C. H., *EU public procurement law*, Elgar, 2nd ed., 2012; ARROWSMITH S., KUNZLIK P., *Social and environmental policies in EC procurement law*, cit.; SANCHEZ GRAELLS A., *Public procurement and the Eu competition rules*, cit.; CORVAGLIA M. A., *Public procurement and labour rights*, cit.,153 ss; LUDLOW A., *The public procurement rules in action: an empirical exploration of social impact and ideology*, *Cambridge Yearbook of European Legal Studies 2013-14*, 2014, 17 ss.

[39] Recital 37, DIrective 2014/24/UE. According to Recital 97, «with a view to the better integration of social and environmental considerations in the procurement procedures, contracting authorities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services

The rules concerning the awarding of the contract confirm and implement these statements. Art. 67 lays down the rule of the awarding on the basis of the most economically advantageous tender and identifies the criteria that the contracting authorities shall apply in identifying this offer: in addition to the price or cost, they may use a cost-effectiveness approach considering the best price-quality ratio, which should be assessed on the basis of several criteria, such as «qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question». Compared to the Directive 2004/18, it expressly includes social considerations in the elements that the awarding authorities can use in identifying the most economically advantageous tender[40]. In the case of abnormally low tenders, the contracting authorities may require economic operators to explain the price and costs in the tender and shall reject the tender which is «abnormally low because it does not comply with the applicable obligations referred to in article 18 (2)»[41]. Art. 56 (1), permits the administrations not to award a contract to a tenderer who submits the most economically advantageous tender, where they have established that it doesn't comply with the applicable obligations referred to in art. 18 (2). This assertion is strengthened by the inclusion of the «violation of applicable obligations referred to in Article 18 (2)» among the grounds for exclusion from participation in the procurement procedure[42].

From an Italian perspective, an issue concerning art. 18 (2) is the reference to the mandatory compliance with obligations in the field of social and labour law, where established by collective agreements. This rule doesn't clarify which collective agreements are recalled, if they have to be universally applicable, or whether the overall treatment referred to in such agreements should be guaranteed or only the minimum wage rates. Recital 98 deals with this issue: according to this recital, «requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as

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to be provided under the public contract in any respect and at any stage of their life cycles», in accordance with the case-aw of the Court of Justice of the European Union.

[40] Art. 53 of Directive 2004/18 included criteria such as «quality, price, technical merit, aesthetic and functional characteristics, en- vironmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion». See CORVAGLIA M. A., *Public procurement and labour rights. Towards coherence in international instruments of procurement regulation*, cit., 183; ALLAMPRESE A., ORLANDINI G., *Le norme di rilievo lavoristico nella nuova direttiva appalti pubblici*, in *RGL*, 2014, I, 176.

[41] Art. 69 (1) and (3), Directive 2014/24/EU. Recital 103 states that if the tenderer cannot provide a sufficient explanation, «the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with mandatory Union law or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions».

[42] Art. 57 (4) of Directive 2014/24/EU. According to art. 57 (5), with the view of protecting the public interest, «contracting authorities shall at any time during the procedure exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs 1 and 2. At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4». See SANCHEZ GRAELLS A., *Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24*, cit., 100. Recital 101 states that «contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations».

minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive». In the light of such a statement[43], it seems that in this case, as in the application of Directive 96/71, only the minimum standards of protection should be guaranteed; it means that a real equal treatment between foreign and domestic workers isn't ensured[44]. Actually, in light of the amendments to Directive 96/71 made by Directive 2018/957, posted workers in a transnational provision of service are entitled to a higher level of protection compared to the past, at least regarding the wages: according to art. 3, paragraph 1, lett. c), the equal treatment concerning the wages must be ensured, since the concept of remuneration means «all the constituent element of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements universally or generally applicable[45]. Regarding Italian legal order, however, the application of the working conditions set by collective agreements not universally applicable is called into question, despite art. 3 of the Directive, as amended by Directive 2018/957, has made the working conditions referred to in collective agreements of general application, even outside the construction sector, compulsory[46].

Concerning the provisions on the performance of contracts, art. 70 quotes art. 26 of Directive 2004/18[47]. The current rule states that contracting authorities «may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract» and indicated in the call for competition or in the

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[43] Concerning the role of the whereas in the interpretation of the directives, see Court of Justice 13 July 1989, C- 215/88, *Casa Fleischhandels-GmbH v Bundesanstalt für landwirtschaftliche Marktordnung*, punto 31. See TREUMER S., *Evolution of the EU Public Procurement Regime: The New Public Procurement Directive*, cit., 22.

[44] ALLAMPRESE A., ORLANDINI G., *Le norme di rilievo lavoristico nella nuova direttiva appalti pubblici*, cit., 170 ss.

[45] Directive 2018/957/EU of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. These amendements incorporates the interpretation of the Court of Justice the judgment of 12 February 2015, C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*. See ZAHN R., *Revision of the posted workers' directive: a europeanisation prespective*, in *Cambridge yearbook of European legal studies*, 2017, 19, 187 ss.

[46] In the past, Directive 96/71 required Member States to guarantee posted workers the terms and conditions laid down by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex. Under art. 3 (1), «Member States shall ensure that, whatever the law applicable to the employment relationship , the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down: by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex». Such activities include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings. the new version of art. 3, as amended by Directive 2018/957, only refers to terms and conditions laid downa «by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8». See ZAHN R., *Revision of the posted workers' directive: a europeanisation prespective*, cit., 187 ss.

[47] According to art. 26 of Directive 2004/18, «Contracting authorities may lay down special conditions relat- ing to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions govern- ing the performance of a contract may, in particular, concern social and environmental considerations».

procurement documents. The second part of art. 70 provides that those conditions may include «economic, innovation-related, environmental, social or employment-related considerations»: in this way, it introduces new fields to be considered, compared to the previous version of the provision in art. 26 of Directive 2004/18. Concerning this rule, with the view of supporting a more social-oriented interpretation, some scholars emphasise the fact that this provision doesn't require anymore that those conditions are «compatible with Community law», as in the previous version[48]. However, it doesn't seem sensible to give crucial importance to this element, since the compliance of the national regulations with EU law and its fundamental principles is expressly required in several parts of the Directive.

The provisions concerning subcontracting are much more detailed than in the past. Directive 2014/24 doesn't only replicate the content of art. 25 of Directive 2004/18. As the former, art. 71 of Directive 2014/24 states that the contracting authority «may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors»[49]; in addition, it requires subcontractors to comply with obligations referred to in art. 18 (2). Furthermore, it identifies some "appropriate" measures, aimed at avoiding breaches of obligations of environmental, social and labour law referred to in art. 18, paragraph 2, as verifying if there are grounds for exclusion of subcontractors according art. 57[50].

Therefore, Directive 2014/24 is more social- and labour-oriented, provided that the awarding criteria don't infringe the provisions of Directive 96/71/EC and the principle of non-discrimination and they are linked to the subject-matter of the contract. The latter condition, which is required in several provisions of the directive[51], is aimed at ensuring that social and labour obligations aren't in contrast with the proper conduct of the awarding procedure. As stated in the "Green Paper on the modernization of the EU's public procurement policy", the link with the subject-matter of the contract «is a fundamental condition that has to be taken into account when introducing into the public procurement process any considerations that relate to other policies», to prevent the economic operators from a Member State to be favoured to the expense of the operators from another Member State: it is a way for guaranteeing certainty and predictability to entrepreneurs and preventing any discrimination[52].

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[48] BARNARD C., *To boldly go: social clauses in public procurement*, in *Industrial law journal*, cit., 209; FORLIVESI M., *La clausola sociale di garanzia del salario minimo negli appalti pubblici al vaglio della Corte di Giustizia europea: il caso Bundesdruckerei*, cit., 558 ss; COSTANTINI S., *Direttive sui contratti pubblici e Corte di giustizia: continuità e discontinuità in tema di clausole sociali*, cit., 18.

[49] Art. 71 (2) of Directive 2014/24.

[50] The same exclusion grounds providd for contractors apply. See COSTANTINI S., *Il subappalto nelle recenti direttive europee in materia di appalti pubblici e concessioni*, in CARINCI M. T., *Dall'impresa a rete alle reti d'impresa: scelte organizzative e diritto del lavoro: atti del Convegno internazionale di studio*, 2015, Milano, 373 ss.

[51] Namely art. 67 and 70 or Recitals n. 92, 97 e 98. Under Recital 98, «it is essential that award criteria or contract performance conditions concerning social aspects of the production process relate to the works, supplies or services to be provided under the contract».

[52] Concerning the subject-matter with the contract, see CORVAGLIA M. A., *Public procurement and labour rights,* cit., 188.

At the end of the study of the provisions of Directive 2014/24/EU, it seems reasonable to assert that in this directive a different balance between economic freedoms and social rights, less unbalanced in favour of the former than in the past. However, the case law of the Court of Justice cannot be ignored; concerning the previous version of the directive and, in particular, Directive 96/71, the Court has considered the economic freedoms to prevail over the protection of social rights[53].

4. Social obligations in the Italian implementation of EU directives: the Code of Public procurement contracts

In describing the evolution of the legislation on social clauses in public procurement in Italian legal order, reference should be made to legislative decree 12 April 2006, n. 163, which implemented Directives 2004/17/EC and 2004/18/EC; afterwards the analysis will focus the Code of public procurement contracts (legislative decree n. 50/2016).

In the academic debate and in the case law, several issues on the regulation of social clauses has been brought up. Art. 118 of Legislative Decree no. 163/2006, first, and art. 30 of Legislative Decree no. 50/2016, then, introduced some innovations compared to the provision in art. 36 of the Workers' Statute, in the attempt to overcome doubts on the interpretation of this article[54].

Although art. 118 of the legislative decree n. 163/2006 was entitled to subcontracting, this rule, in the sixth paragraph, introduced a relevant provision for public procurements in general: it required the tenderers to ensure the application of pay, terms, and conditions established by national and territorial collective agreements for the sector and the area where the work is carried on[55]. Art. 4 (1) of presidential decree 5 October 2010, n. 207, on regulation for the implementation of the Code of public contracts, completed the former provision. It identifies a criterion to select the collective agreement to be referred to: it recalled national and territorial collective agreements stipulated by the comparatively more representative trade unions at national[56].

The "new" Code of public procurement contracts (Legislative Decree n. 50/2016) revokes the previous legislative decree n. 163/2006, and, in implementing Directive

[53] GIACONI M., *Il lavoro nella pubblica amministrazione partecipata da privati*, cit., 539.

[54] Art. 36 of the Workers' Statute hasn't been revoked. It has a different and broader scope of application. See MASTINU E. M., *Le clausole sociali nel diritto del lavoro. Ordinamento nazionale, comunitario e internazionale a confronto*, cit., 62.

[55] SCARPELLI F., *Regolarità del lavoro e regole della concorrenza: il caso degli appalti pubblici*, cit., 772.

[56] Another relevant rule, reproducing the content of art. 26 of Directive 2004/18, was art. 69 on special conditions in the execution of the contract, according to which the contracting authorities may lay down special and conditions for the execution of the contract, provided that they are compatible with Community law, and inter alia with the principles of equality of treatment, non-discrimination, transparency, proportionality, and provided that they are specified in the tender notice. In relation to Legislative Decree 163/2006, see MASTINU E. M., *Le clausole sociali nel diritto del lavoro. Ordinamento nazionale, comunitario e internazionale a confronto*, cit., 59 ss; VARVA S., *Il lavoro negli appalti pubblici*, cit., 214; SCARPELLI F., *Regolarità del lavoro e regole della concorrenza: il caso degli appalti pubblici*, cit., 772.

2014/24/UE[57], it seems to seize the opportunities offered by this directive in relation to the protection of social rights[58]; however, it doesn't deal with compatibility issues of such provisions with the EU law, as in respect of the former Code of public procurement, nor solves them.

One of the most relevant rules is art. 30 on the principles for the awarding and execution of contracts, which recall the structure and contents of art. 18 of Directive 2014/24. Art. 30 (1) requires that in the awarding of public contracts the public administration comply with the principles of affordability, effectiveness, timeliness, correctness, free competition[59], non-discrimination, transparency, proportionality. However, art. 30 (3) states that economic operators must comply with environmental, social, and labour obligations established by Union and national law, collective agreements or by international provisions. In support of the latter statement, art. 30 (1) also requires that, within the limits set by the rules of the Code of public procurement contracts itself, the principle of affordability may be subject to social, health, environmental, cultural, or sustainable development criteria.

The proper equal treatment social clause is contained in art. 30 (4). Under this provision, to employees working in the public works or public concessions must be applied national and territorial collective agreement applicable in the sector and the area where the works are carried on, stipulated by the comparatively more representative national employers' associations and trade unions, and whose field of application is closely linked with the subject-matter of the contract, even in a prevalent manner. Concerning subcontracting, similarly, art. 105 (9) requires the contractors to fully observe the economic treatment, terms, and conditions established by national and territorial collective agreements for the sector and the area in which the works are carried on.

Art. 30 confirms the approach of art. 118 of legislative decree n. 163/2006, which amended the mechanism of social clauses. Unlike art. 36 of Workers' Statute, indeed, art. 30 makes mandatory not for the contracting authorities, but directly for the employers to comply with social obligations[60]. Therefore, the enforceability of workers' right to an equal treatment doesn't depend on the inclusion of the social clause in the tender documents. This is a statutory obligation[61], according to which working conditions established by collective agreement must be applied, regardless of the will of the parties and their trade union membership. In fact, as stressed by the Guidelines of the National Anti-Corruption Authority n. 13/2019 concerning the "regulation on social

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[57] The legislative decree implements also Directive 2014/23/EU on the award of concession contracts and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

[58] BORGOGELLI F., *Modelli organizzativi e tutele dei lavoratori nei servizi di interesse pubblico*, in *Frammentazione organizzativa e lavoro: rapporti individuali e collettivi. Atti delle giornate di studio di diritto del lavoro. Cassino, 18-19 maggio 2017,* Giuffrè, Milano, 2018, 388.

[59] This principle is specified in art. 30 (2): «contracting authorities shall not limit artificially the competition in order to unduly favor or disadvantage economic operators».

[60] ORLANDINI G., *Clausole sociali*, cit.

[61] GIUGNI G., *Diritto sindacale,* Bari, Cacucci, 2016, 143; VARVA S., *Il lavoro negli appalti pubblici*, cit., 214.

clauses", the rationale of this provision is to ensure, that, through the general application of collective agreements, the employees are adequately protected and earn a wage proportionate to the work actually carried out.

The new code, which partly incorporates the wording of Legislative Decree n. 163/2006, enhances collective bargaining role[62] and intends to effectively guarantee an equal treatment to the workers, ensuring the application of the entire treatment provided for in the collective agreements selected pursuant to criteria established in art. 30 (4). Consequently, contracting authorities will break the law, if the applicable collective agreement isn't precisely identified in the tender documents or the one selected doesn't comply with the criteria referred to in art. 30 (4)[63].

The public administrations must specify the applicable collective agreement in the tender documents and have to ensure the compliance with working conditions established in the collective agreements for the area and the sector; they must exclude the economic operators who infringed the obligation referred to in art. 30 (3) and proposed an abnormally low tender. Therefore, the interpretative debate concerning the functioning of the social clauses, the applicability of the "integration mechanism" according to art. 1339 c.c., and sanction mechanisms in the event of a violation of the social clause seems to be inconsistent.

Regarding the nature of social clauses, it is still reasonable to apply the scheme of the contract for the benefit of a third party to the social clause[64].

In an attempt of solving the issues in relation to art. 36 of Workers' Statute, art. 30 adopts a specific criterion to identify which collective agreement is applicable. Art. 118 of the legislative decree n. 163/2006, art. 30 selects national or territorial collective agreements, stipulated by comparatively more representative trade unions for the sector and the area where the work is carried on. It also requires that the scope of application of collective agreements is closely related to the subject-matter of the contract, even in a prevalent manner. In this way, it intends to solve the issues concerning the identification of the applicable collective agreement in sectors where several collective agreements are simultaneously in place[65]. Nevertheless, it is still difficult to exactly identify the applicable collective agreement, unless it is explicitly indicated in the tender notice. It is a matter of considerable importance if we consider that one of the goals of social clauses in this field is to avoid unfair competition between companies, in

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[62] Collective agreements are also relevant in the assessment of the adequacy of tenders. See TARDIVO D., *Contrattazione collettiva e anormalità dell'offerta nel nuovo Codice dei contratti pubblici*, in *Variazioni su temi di diritto del lavoro*, 2017, 4, 1133 ss

[63] It means that the contracting authorities can't decide to apply or not to apply the collective agreements' provisions. See CAFFIO S., *Appalto, costo del lavoro e contratto collettivo di riferimento*, in GAROFALO D. (a cura di), *Appalti e lavoro. Volume primo. Disciplina pubblicistica*, Torino, 2017, 867; ORLANDINI G., *Mercato unico dei servizi e tutela del lavoro*, cit., 185.

[64] The awarding administrations and the State have an interest which is the proper execution of the tender and the correct performance of the work. *Contra*, see MASTINU E. M., *Le clausole sociali nel diritto del lavoro. Ordinamento nazionale, comunitario e internazionale a confronto*, cit., 63.

[65] TAR Torino 22 gennaio 2015, n. 144; Cons. Stato 3 luglio 2015, n. 3329; Cons. Stato 13 ottobre 2015, n. 4699. See LOZITO M., *Tutele e sottotutele del lavoro negli appalti privati*, cit., 126; MATTEI A., *Scomposizione dell'impresa, lavoro esternalizzato e inclusione sociale: azioni della negoziazione collettiva*, cit., 773; LASSANDARI A., *Pluralità di contratti collettivi nazionali per la medesima categoria*, in *LD.*, 1997, 261 ss; PERA G., *Note sui contratti collettivi "pirata"*, in *RIDL,* 1997, I, 381 ss.

accordance with art. 97 of the Constitution, preventing that economic operators can take advantage from non-compliance with collective agreements or from the application of the so-called "downward" collective agreements[66].

Concerning the content of the social clause, the new Code of public procurement contracts recall the legislative decree n. 163/2006: it doesn't require only the application of labour conditions not lower than those provided collective agreements, as art. 36 of the Workers' Statute did, but it introduces a positive and wider obligation[67]. This statutory obligation to apply the entire treatment provided for in the collective agreements, however, raises many doubts about the legitimacy of this rule regarding art. 39 Cost.

The analysis of the other provisions of the Code of the public procurement contracts poses further issues on the level of protection guaranteed to employees in public procurements[68]. Art. 95 (10) requires economic operators to indicate in the offer the labour costs and the costs concerning the fulfilment of health and safety obligations. Art. 97 concerns abnormally low tenders and requires economic operators to provide explanations on the price or costs proposed in the tenders upon request of the awarding authority. According to art. 97 (5), the contracting authority must exclude an economic operator when its tender is abnormally low due to the violation of obligations referred to in art. 30 (3) or in art. 105, it is inconsistent concerning the costs related to health and safety provisions[69], or, finally, if labour costs are lower than the minimum wage rates established in the tables referred to in art. 23 (16). In these tables arranged by the Ministry of Labour, the labour costs are determined annually for procurement contracts on the basis of the minimum rates established by national collective agreements stipulated by the comparatively more representative trade unions and employers' associations and social security and welfare regulations. In the absence of an applicable collective agreement, the labour costs are set on the basis of the provisions established in collective agreement for the closest sector[70]. It means that only the minimum wage is guaranteed, as provided by art. 36 of Workers' Statute. This restrictive interpretation is supported by the administrative case law, in relation to the legislative decree n. 163/2006: according the administrative courts, the rates set in ministerial tables do not constitute a mandatory threshold, but only a parameter for assessing the adequacy of the

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[66] GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, cit., 137.

[67] ORLANDINI G., *Clausole sociali*, cit.; MASTINU E. M., *Le clausole sociali nel diritto del lavoro. Ordinamento nazionale, comunitario e internazionale a confronto*, cit., 59 ss; VARVA S., *Il lavoro negli appalti pubblici*, cit., 214; SCARPELLI F., *Regolarità del lavoro e regole della concorrenza: il caso degli appalti pubblici*, cit., 772.

[68] FORLIVESI M., *Le clausole sociali negli appalti pubblici: il bilanciamento possibile tra tutela del lavoro e ragioni del mercato,* cit., 20; GOTTARDI D., *La contrattazione collettiva tra destrutturazione e ri-regolazione*, in *LD*, 2016, 4, 900.

[69] Under art. 95 (10), indeed, in the economic offer the operator must indicate the labour costs and organizational and workplace modifications required for the fulfillment of the provisions on health and safety.

[70] According to the Council of State, the determination of costs based on labous costs lower that the minimum wages established in collective agreements for workers in the same sector means that the tender is unreliable and may jeopardize the equal treatment of the tenderers. See Cons. Stato, sez. III, 15 maggio 2017, n. 2252, in *RIDL*, 2017, 4, 686 ss, con nota di FORLIVESI M., *Sulle clausole sociali di equo trattamento nel nuovo codice degli appalti pubblici*.

tender; consequently, the tender will be judged abnormally low only if the variance from the minimum rates set in the tables is significant and unjustified[71].

In an attempt to ensure application at least the application of the minimum rates established in these tables, the Code of public procurement contracts requires the compliance with these rates under the penalty of exclusion from the tender; art. 97 (6) rejects any kind of justification for any deviation[72]. Moreover, to strengthen the obligation referred to in art. 30, art. 80, paragraph 5, (a), which implements art. 57 (6) of Directive 2014/24, indicates serious infringements duly ascertained concerning health and safety at work or the violation of the obligations referred to in art. 30 (3), as reasons for exclusion from the tender.

Also with regard to the execution of the contract, art. 100, in compliance with art. 70 of Directive 2014/24, states that contracting authorities may lay down special conditions concerning social and environmental requirements, provided that they are applied in accordance with Union law and provided that they are explicitly indicated in the tender documents[73].

5. The equal treatment principle in private procurement contracts in Italy

The purpose of equal treatment social clauses in private procurement is similar to the objective pursued by such provisions in the field of public procurements, even if they don't perfectly overlap: as for the latter, equal treatment clauses in the private sector intend to protect the employees involved in the execution of the contract, since they are the weaker parties in the employment contract. Conversely, in this case, there is no "special" interest, such as the public interest in the correct performance of the public works or service[74]. In private procurement, equal treatment social clauses are aimed at avoiding the adoption of outsourcing practices as a way to reduce labour costs[75]; on the contrary, such clauses intend to foster "genuine" decentralization, where subcontracting is a way to take advantage of the contractor's specialization and of the know-how of his enterprise[76]. Furthermore, equal treatment social clauses are measures to prevent the avoidance and the circumvention of labour standards[77].

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[71] Cons. Stato, sez. III, 23 marzo 2018, n. 1609; Cons. Stato, sez. III, 15 aggio 2017, n. 2252; Cons. Stato, sez. III, 21 luglio 2017, n. 3623; Cons. Stato, sez. III, 3 luglio 2015, n. 3329; Cons. Stato, sez. III, 2 aprile 2015, n. 1743; Cons. Stato 3 luglio 2015, n. 3329; Cons. Stato, sez. V, 24 luglio 2014, n. 3937; Cons. Stato sez. V, 18 febbraio 2019, n.1099. See FRAIOLI A. L., *Appalti pubblici e contrattazione collettiva: spunti ricostruttivi*, in GAROFALO D. (a cura di), *Appalti e lavoro. Volume primo. Disciplina pubblicistica*, Torino, 2017, 922 ss.

[72] TAR 27 ottobre 2017, n. 958. See BORGOGELLI F., *Appalti pubblici e dumping salariale: un caso di subordinazione dell'autonomia collettiva?*, in *LD*, 2016, 4, 986.

[73] PAOLITTO L., *Le clausole sociali tra il bando di gara e la disciplina del contratto collettivo,* in GAROFALO D. (a cura di), *Appalti e lavoro. Volume primo. Disciplina pubblicistica*, Torino, 2017, 893 ss.

[74] LOZITO M., *Tutele e sottotutele del lavoro negli appalti privati*, cit., 57

[75] CIUCCIOVINO S., ALVINO I., *La tutela del lavoro nell'appalto*, in AMOROSO G., DI CERBO V., MARESCA A. (a cura di), *Diritto del lavoro. La Costituzione, il Codice civile e le leggi speciali*, Giuffrè, Milano, 2013, 1229 ss; SPEZIALE V., *Le «esternalizzazioni» dei processi produttivi dopo il d.lgs. n. 276 del 2003: proposte di riforma*, cit., 51 ss.

[76] IZZI D., *Lavoro negli appalti e dumping salariale*, cit., 8.

[77] Corte Cost. 9 luglio 1963, n. 120.

The first general rule introducing the obligation to guarantee an equal treatment to the contractor's employees was art. 3 of law n. 1369/1960. This law concerned the employment relationship of the employees of the contractor in the so-called "internal procurement", namely the contracts to be performed within the production cycle of the client, using the contractor's organization and management. In addition to joint liability, the contracting entrepreneur was obliged to ensure that to contractor's employees the payment of a wage and the application of a treatment not lower than those enjoyed by the client's employees. The Constitutional Court has deemed legitimate the obligation for the contractor to apply the more favourable treatment enjoyed by the client's employees, since it aims at implementing the constitutional requirements laid down in art. 36 and 38 of the Constitution: it would be incongruous, if the implementation of art. 39 was in contrast with the implementation of those rules – namely articles 36 and 38 - which are the expression of fundamental principles of the Constitution, such as articles 1, 3, 4[78].

Concerning art. 3 of law n. 1369/1960 serious issues had arisen, such as the difficulty of identifying comparable employees and tasks as a parameter[79] and the fact that the burden of proving of getting a lower wage than the client's employees lies on the worker[80].

This law was repealed by Legislative Decree no. 276/2003, which did not reiterate the rule of equal treatment in the private procurement contract; it only restates the rule of joint liability in art. 29 (2). According to scholars, the reason for this decision was the reduced attention to this issue: in fact, the idea that the decentralization was genuine has taken root[81].

The principle of equal treatment has been also laid down in art. 3 (1) of legislative decree n. 72/2000, which implemented Directive 96/71/EC concerning the posting of workers in the framework of the provision of services within a company in the territory of a different Member States. The rule stated that, during the period of the posting, posted workers were entitled to enjoy the same terms and conditions of employment provided for in law, regulation or administrative provisions, as well as in collective agreements stipulated by comparatively more representative trade unions at national level for employees who carry out the same work in the place where workers are posted. Following the repeal of art. 3 of law n. 1369/60, several compatibility issues with Union law arose concerning the provision of this principle only regarding companies from another member state. Since it required foreign companies to comply with requirements not provided for the Italian ones, the law increased the risk of distortion of competition at EU level and it was in contrast with the principle of equal treatment and freedom of

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[78] Corte Cost. 9 luglio 1963, n. 120.

[79] SPEZIALE V., *Le «esternalizzazioni» dei processi produttivi dopo il d.lgs. n. 276 del 2003: proposte di riforma*, cit., 53; CIUCCIOVINO S., ALVINO I., *La tutela del lavoro nell'appalto*, cit., 1235.

[80] Cass. 12 luglio 1999, n. 7361.

[81] LOZITO M., *Tutele e sottotutele del lavoro negli appalti privati*, cit., 21. RIVERSO R., *Cooperative spurie ed appalti: nell'inferno del lavoro illegale*, cit., stresses the irrationality and the uncostitutionality in relation to art. 3 Cost. of the decisionin to eliminate the equal treatment principle in the field of procurement, keeping it only for the temporary agency work.

establishment[82]. This problematic regulation on the transnational posting of workers was repealed and amended by Legislative Decree n. 136/2016[83], which intends to overcome these compatibility issues with Union law. Art. 4 (1) of Legislative Decree no. 136/2016 requires that the same conditions of employment enjoyed by the employees working in the place where the workers are posted are ensured to posted workers. According to art. 2, working conditions to be guaranteed are those laid down by law and collective agreements referred to in art. 51 of Legislative Decree no. 81/2015, covering a list of seven matter including the minimum rates of pay, comprising of increased overtime rates[84]. According to scholars, this provision may overcome the issues in relation to the equal treatment of workers posted in Italy by foreign undertakings, since it doesn't set a general rule, but it is applicable only to the matters listed in art. 2[85]. Indeed, on the basis of regulations in Legislative Decree 136/2016, according the Ministry of Labour[86], even Italian employers who aren't members of the stipulating unions are required to ensure their employees a proportionate and sufficient remuneration pursuant to art. 36 of the Constitution: according to the settled Italian case law, the level of the fair remuneration is determined by referring to the minimum wages established by national collective agreements for the sector[87].

6. The role of collective bargaining: effectiveness of equal treatment social clause in Italian collective agreements

Following the repeal of art. 3 of law 1369/1960, the principle of equal treatment between the client's employees and the contractor's ones in the private sector is stated only in collective agreements. Indeed, the inclusion in collective agreements of

[82] ORRÙ T., *Appalto e somministrazione di lavoro. Codatorialità e tecniche di tutela*, cit.,157; SCARPELLI F., *Appalto e distacco. Art. 29*, cit., 437; LOZITO M., *Tutele e sottotutele del lavoro negli appalti privati*, cit., 37 e 47 ss.

[83] It implements Directive 2014/67/UE on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

[84] The matters listed are: «1) maximum work periods and minimum rest periods; 2) minimum paid annual holidays; 3) the minimum rates of pay, including overtime rater; 4) the conditions of hiring-out of workers; 5) health and safety at work; 6) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; 7) equality of treatment between men and women and other provisions on non-discriminations».

[85] GAROFALO D., *Lavoro, impresa e trasformazioni organizzative*, in *Frammentazione organizzativa e lavoro: rapporti individuali e collettivi. Atti delle giornate di studio di diritto del lavoro. Cassino, 18-19 maggio 2017*, Giuffrè, Milano, 2018, 123.

[86] In accordance with art. 5 of Directive 2014/67 and art. 7 of Legislative Decree n. 136/2016, on the institutional website of the Ministry of Labour, there are the informations regarding working and employment conditions that must be respected in transnational posting (see http://www.distaccoue.lavoro.gov.it/Pages/Home.aspx?lang=en). However, only the tables of minimum remuneration for collective agreements applicable to the sectors most affected by the posting of workers have been published: the construction sector, the metalworking industry sector and the transport sector; other collective agreements can be consulted on the CNEL (Consiglio Nazionale dell'Economia e del Lavoro - National Council for Economics and Labour) website.

[87] The same issues will probaly arise also in relation to the regulation that will implement 2018/957, since it amends art. 3 of Directive 96/71 and replace «minimum rates of pay» with the reference to «the remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes».

minimum or equal treatment social clauses is quite common. Historically, trade unions have adopted these provisions to control the decentralization and prevent the risk of outsourcing practices to "weaken" the collective autonomy[88].

The contractual provisions have different contents: often they include the employers' commitment to inform trade unions on subcontracting; sometime they impose the obligation to ensure the economic standards of protection, terms and conditions established by a specific collective agreement.

Often, national collective agreements demand the client to require the contractors to comply with social security and safety standards and with the contractual provision for sector. In this way, they provide for the application of equal and fair treatment established by the collective agreements[89]. For this purpose, some collective agreements require the inclusion of a specific clause on this issue in the procurement contract[90]. Sometimes, under a contractual provision, the client is obliged to require the contractor to make a statement undertaking to apply the contractual provisions laid down for his sector, as well as to comply with social security and safety requirements. Furthermore, with the aim of ensuring the effectiveness of the social clause, the client cannot renew the contract once expired, where the contractor failed to respect this commitment[91].

With the aim of guaranteeing greater effectiveness to the protection provided by social clauses and tackling the growing illegal practices in logistics, porterage and cargo handling services, for example, the national collective agreement for logistic sector requires the clients to incorporate within the contract the conditions of employment» and obliges them to terminate economic relationships with contractors, in the presence of breach of statutory social security provisions or whether the contractor applies a different collective agreement[92].

Even in company-level collective agreements, there are often provisions regulating the outsourcing practices. Some collective agreements only provide obligations to inform trade unions[93]; others require the clients' commitment to select the more virtuous contractors, at least for what concern the application of collective agreements[94].

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[88] IZZI D., *Le clausole di equo trattamento dei lavoratori impiegati negli appalti: i problemi aperti*, cit., 454; MATTEI A., *Scomposizione dell'impresa, lavoro esternalizzato e inclusione sociale: azioni della negoziazione collettiva*, cit., 777.

[89] See art. 9, section IV, title I, Contratto collettivo nazionale di lavoro per i lavoratori addetti all'industria metalmeccanica privata e all'installazione di impianti (Metalworking industry national collective agreement), 05/12/2012.

[90] Art. 218, Contratto collettivo nazionale di lavoro per i dipendenti da aziende del terziario, della distribuzione e dei servizi, 2008; art. 4 (3), Contratto collettivo nazionale di lavoro per i lavoratori dell'industria alimentare; art. 5, Contratto Collettivo Nazionale di Lavoro per i quadri direttivi e per il personale delle aree professionali delle banche di credito cooperativo, casse rurali e artigiane.

[91] Art. 16, CCNL per i quadri direttivi e per il personale delle aree professionali dipendenti dalle imprese creditizie. See LOZITO M., *Tutele e sottotutele del lavoro negli appalti privati*, cit., 62 ss.

[92] Art. 42 (4) and (5), CCNL Logistica, trasporto merci e spedizioni, 3/12/2017.

[93] Contratto aziendale Coca-Cola HBC Italia s.r.l., in *Banca dati Contrattazione collettiva Adapt*; Accordo integrativo aziendale del Gruppo Mediaset, 11/07/2018, in http://www.fistelveneto.cisl.it/cms/files/file/55440-na180711-mediaset---verbale-ipotesi-di-accordo-integrativo-aziendale.pdf.

[94] Contratto aziendale Coca-Cola HBC Italia s.r.l., in *Banca dati Contrattazione collettiva Adapt*; Contratto Collettivo Aziendale di Lavoro, 19/07/2017 Gucci. In the latter, the company has committed to

Numerous company-level agreements, completing the provisions of the national collective agreements, require the client to insert in the procurement contracts clauses constraining the contracting companies to comply with national collective agreements stipulated by most representative or comparatively more representative trade unions[95]. With the view of avoiding that such outsourcing practices are solely aimed at reducing labour costs and wages and in order to foster genuine decentralization in the search for efficiency, sometimes company-level agreements oblige the contractor to comply with minimum wage levels set in those agreements[96].

Social clauses laid down in collective agreements have a reduced effectiveness compared to the statutory ones, due to the collective agreements' effectiveness in Italian legal order, where collective agreements only apply to those employees and employers who are members of the stipulating trade unions or employers' associations. This entails a lot of issues concerning the effectiveness of equal treatment social clauses in the private procurement sector.

It does not seem reasonable to apply the rules on the contract in favour of third parties. It can apply only where the social clause is included in the procurement contract, thus giving rise to a right to equal treatment for the contractor's employees. Otherwise, this particular case doesn't fall into the scheme of contract in favour of third, due to the limited effectiveness of collective: if the social clause is not included in the procurement contract, the contractor is not forced to apply the treatment provided for by the clause, where they aren't members of the stipulating union; nor art. 1339 of the Civil Code is applicable to contractual clauses. As a result, workers cannot take legal action, if the social clause has not been included in the contract. Obviously, this issue is solved where the obligation to comply with the minimum treatment laid down in collective agreements is provided for in a social clause, which, under a provision of procurement contract, must be included in the contract. In this case, however, the only way to protect workers is the procedure for the repression of the anti-union conduct against the client who, violating

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demand the contractors to perform the contract in accordance with law, collective agreements, and ILO, OECD and UN conventions and principles.

[95] Contratto collettivo Holcim Aggregati calcestruzzi s.r.l. (Merone, Como); Contratto integrativo aziendale 2018 Automobili Lamborghini S.p.a., in Banca dati Contrattazione collettiva Adapt; Accordo integrativo aziendale del Gruppo Mediaset 11/07/2018; Contratto Collettivo Aziendale di Lavoro del 19/07/2017 Gucci; Contratto Collettivo Aziendale di Lavoro Barilla; Contratto integrativo aziendale 2018 – 2020 Goldoni Spa, in *Banca dati contrattazione collettiva Adapt*; Accordo aziendale Grandi Salumifici italiani S.p.a. 21/02/2018, in *Banca dati contrattazione collettiva Adapt*. See INGLESE I., *Le clausole sociali nelle procedure di affidamento degli appalti alla luce delle novità normative*, in *DRI*, 2, 571 ss; LASSANDARI A., *Pluralità di contratti collettivi nazionali per la medesima categoria*, cit., 261 ss; LASSANDARI A., *Sulla verifica di rappresentatività delle organizzazioni sindacali datoriali*, in *DLRI*, 2017, 1, 1 ss; PERA G., *Note sui contratti collettivi "pirata"*, cit., 381 ss; OLINI G., *I contratti nazionali: quanti sono e perché crescono*, in *DLRI*, 2016, 417 ss; CIUCCIOVINO S., *Mettere ordine nella giungla dei ccnl: un'esigenza indifferibile*, in *DLRI*, 2018, 1, 227 ss.

[96] Accordo integrativo aziendale del Gruppo Mediaset, 11/07/2018, in http://www.fistelveneto.cisl.it/cms/files/file/55440-na180711-mediaset---verbale-ipotesi-di-accordo-integrativo-aziendale.pdf. In the Goldoni Spa company-level agreement 2018 – 2020, the company undertakes to demand the contractor to pay at least 10 €/hour.

the obligations established in the collective agreement, has failed to insert the clause in the procurement contract[97].

In this context, the risk that the contractual social clauses are ineffective is anything but hypothetical, also because of the contractual weakness of the contractor's employees, who for this reason rarely take legal action against their employers.

[97] SPEZIALE V., *Le «esternalizzazioni» dei processi produttivi dopo il d.lgs. n. 276 del 2003: proposte di riforma*, cit., 52; IZZI D., *Le clausole di equo trattamento dei lavoratori impiegati negli appalti: i problemi aperti*, cit., 463; ALVINO I., *La disciplina collettiva dell'appalto e della somministrazione*, cit., 89 ss. *Contra*, cfr. LUNARDON F., *Contrattazione collettiva e governo del decentramento produttivo*, cit., 227; BASENGHI F., *Decentramento organizzativo e autonomia collettiva*, cit., 243.

CHAPTER III

REHIRING SOCIAL CLAUSES: THE TURNOVER IN THE PROCUREMENT CONTRACT AND THE PROTECTION OF EMPLOYMENT

SUMMARY: 1. The frequent turnover of contractors in the execution of contracts. - 2. Rehiring social clauses and transfer of undertakings: the notion of economic entity in the light of the Court of Justice case law. - 3. Employers' turnover in service provision and transfer of undertaking: art. 29, co. 3, Legislative Decree no. 276/2003. - 4. The role of collective bargaining in service provision change: varieties and effectiveness of protection techniques. - 5. The consequences of the application of rehiring social clauses on redundancy legislation: dismissals, exemptions from redundancy benefits and length of service - 6. Employers' turnover in public procurement contracts.

1. The frequent turnover of contractors in the execution of contracts

In labour-intensive sectors, such as cleaning, logistics, catering, private security, groundhandling services, tourism, in which the production does not require many tangible assets nor a high level of competence or a specific know how to carry out the contract, the turnover of entrepreneurs in the procurement is frequent[1]. Therefore, rehiring social clauses are quite common in collective agreements applicable to those sectors.

In Italian legal system, alongside the rehiring social clauses in collective agreements, there are some statutory provisions aimed at regulating the effects of the frequent change of contractors in the same procurement contract[2]. One of the first examples of this type of regulatory provision was art. 26 of royal decree 8 January 1931, n. 148, which was applicable to the personnel employed in the railways, tramways and inland waterways under concession: in the case of transfer of the lines to another company, it established the transfer of permanent staff to the new company, ensuring, as far as possible, to the

[1] See ARIOLA L., *Subentro nell'appalto* labour intensive *e trasferimento d'azienda*, in GAROFALO D., *Appalti e lavoro. Disciplina lavoristica*, cit., 211.; LOZITO M., *Le clausole di assorbimento della manodopera negli appalti privati tra vincoli costituzionali ed europei*, in *Carinci* M. T. (a cura di), *Dall'impresa a rete alle reti di impresa. Scelte organizzative e diritto del lavoro*, Giuffrè, Milano 2015, 307; MUTARELLI M. M., *Riassunzione nell'avvicendamento di appalti e jobs act*, in *Dir. Merc. Lav.*, 2015, 293 ss; MUTARELLI M. M., *Contrattazione collettiva e tutela dell'occupazione negli appalti*, in FERRARO G. (a cura di), *Redditi e occupazione nelle crisi d'impresa. Tutele legali e convenzionali nell'ordinamento italiano e dell'Unione europea,* Giappicheli, Torino, 2014, 303 ss; AIMO M., *Stabilità del lavoro e tutela della concorrenza. Le vicende circolatorie dell'impresa alla luce del diritto comunitario*, in BALLESTRERO M. V. (a cura di), *La stabilità come valore e come problema*, Torino, Giappichelli, 2007, 103 ss.

[2] MUTARELLI M. M., *Riassunzione nell'avvicendamento di appalti e jobs act*, cit., 296.

personnel a treatment not lower than the treatment previously enjoyed and guaranteeing the acquired rights[3].

Other sectoral provisions introduce a similar obligation to take on the staff previously employed in the contract or require collective agreements or administrative measures to regulate the succession: art. 140, paragraph 1, of presidential decree n. 858/1963 on tax collection services; art. 28, paragraph 6, of legislative decree n. 164/2000, on the liberalization of public services for the market in natural gas; art. 48, paragraph 7, lett. (e), law decree n. 50/2017 on local public transport services.

One of the most interesting legal provisions is art. 14 of Legislative Decree no. 18/1999 concerning the groundhandling services, transposing Directive 96/67 on access to the groundhandling market at Community airports. In the original version, art. 14 provided for the protection of employment of the personnel employed by the previous contractor: «any transfer of activity in one or more categories of groundhandling (…) shall include the transfer of staff, named by those concerned, and in agreement with trade unions, from the previous supplier to the subsequent supplier, in proportion to the volume of traffic or to the scale of the activities being taken over by the subsequent supplier». The EU Commission considered that provision to be an obstacle for service providers to access to the market groundhandling services, since it reduced the freedom to choose the employees and the type of organization of the services, while the purpose of Directive 96/67 is to ensure free access to the groundhandling market and fostering competition in this field[4]. Following the ruling of the Court of Justice on this case[5], art. 14 of legislative decree n. 18/1999 was amended several times. In the current version, this article provides that, without prejudice to statutory and contractual protection provisions, in the event of any transfer of groundhandling services' activity, in order to identify the measures for regulating the social effects deriving from the process of liberalization, the Minister of Transport, with the Minister of Labour and Social Security, guarantees the involvement of the social partners, also by means of appropriate forms of consultation. Because of such a generic provision, the trade unions intervened

[3] See MASTINU E. M., *Le clausole sociali nel diritto del lavoro. Ordinamento nazionale, comunitario e internazionale a confronto*, cit., 64.

[4] See Court of Justice 9 December 2004, C – 460/02, *Commission v. Italian Republic*. See also Court of Justice 14 July 2005, C-386/03, *Commission c. Federal Republic of Germany*, concerning the legitimacy of the German law of 11 November 1997, on ground assistance services at airports (Gesetz über Bodenabfertigungsdienste auf Flughäfen), and of the implementing regulation of 10 December 1997, transposing Directive 96/67. In particular, art. 8 of this regulation recognized the possibility for the airport manager to demand a service provider to rehire the workers employed by the previous one, based on the share of ground assistance transferred to him.

[5] On this judgment, see MUTARELLI M. M., *Protezione del lavoro vs. protezione della concorrenza della sentenza della Corte di Giustizia sui servizi aeroportuali: una decisione di grande rilievo motivata in modo insoddisfacente*, in *RIDL*, 2005, II, 275 ss; PALLINI M., *Il diritto del lavoro e libertà di concorrenza: il caso dei servizi aeroportuali,* in *RGL*, 2006, 44 ss; BRINO V., *Le clausole sociali a tutela dell'impiego e i vincoli di compatibilità con il mercato*, in CARINCI M. T. (a cura di), *Dall'impresa a rete alle reti di impresa. Scelte organizzative e diritto del lavoro*, cit., 326 ss; ORLANDINI G., *Mercato unico dei servizi e tutela del lavoro*, cit., 161 ss; AIMO M., *Stabilità del lavoro e tutela della concorrenza. Le vicende circolatorie dell'impresa alla luce del diritto comunitario*, cit., 103 ss.

to fill the regulatory gap created[6]. Art. 25 of national collective agreement for air transport sector, stipulated on 2 August 2013, provides that, in the event of a transfer of the activity, the staff of the supplier who is transferring the service will be employed by the subsequent supplier in proportion to the volume of traffic transferred, in agreement with the trade unions.

Another interesting provision is art. 1, paragraph 10, law n. 11/2016 on the turnover of supplier for the same activity in the call centre sector, which is also affected by frequent contractors' turnover. This provision introduces a "genuine" social clause. It states: «the employment relationship continues with the succeeding contractor, according to the conditions provided for by the national collective labour agreements in force at the moment of the transfer, stipulated by the more representative trade unions at national level»[7]. It introduces a strong protection for the workers affected by the turnover in the contract, even more intense than the protection usually ensured by social clauses in collective agreements, as we will see in the following paragraphs: in fact, it provides for the continuation of the employment relationship with the succeeding contractor in all cases in which a new contractor takes over the same contract with the same client. A condition is identified for the applicability of this protection: it is limited to changes of contract «for the same call centre activity». The generic nature of the provision leaves room for collective bargaining to delimit its scope of application[8]. In the implementation of this provision, SLC CIGL, FISTEL CISL, UILCOM UIL and Assotelecomunicazioni - Asstel stipulated an agreement on 30 May 2016: it provides for the continuation of the employment relationships in the turnover companies carrying out the same activity in the contract with the same client; moreover, it identifies a series of procedural obligations for the client and the contractors. First, to enter into a new contract, the client is required to provide the stipulating territorial and company-level trade unions with information on the terms of the contract, at least 60 days before. Even the previous contractor and the subsequent one, after the award and within 30 days from the start of the activities, are required to provide the unions with a notice concerning the number of workers involved, the staff that can be employed in other activities, and their weekly timetable; they must also specify the conditions and the timing of the taking on of the personnel. Only workers who were assigned to the same call centre activities on an ongoing and exclusive basis for at least 6 months can be rehired. Where the takeover of the contract isn't at the same contractual terms and there are changes in the conditions and in the management of the employment relationship, the obligation consist only in the requirement to inform and consult social partners: in 5 days after the communication, the trade unions may request a meeting to identify the most appropriate solutions to

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[6] See BRINO V., *Le clausole sociali a tutela dell'impiego e i vincoli di compatibilità con il mercato*, cit., 317 ss; AIMO M., *Stabilità del lavoro e tutela della concorrenza. Le vicende circolatorie dell'impresa alla luce del diritto comunitario*, cit., 119.

[7] It also regulates the succession of several contractors in the service in the event that a specific national collective regulation is not present: in this case, the Ministry of Labour defines it with its own decree, after hearing the most representative employers' associations and trade unions at national level. See CHIETERA F., *Appalti e call center*, in GAROFALO D. (a cura di), *Appalti e lavoro. disciplina lavoristica*, cit., 263 ss.

[8] CHIETERA F., *Appalti e call center*, cit., 265.

balance the interests of the new contractor and the need for protection of the employees, as well as to define the timing of the taking on of the personnel.

Doubts arise about the compatibility with the fundamental freedoms protected by the EU Treaties, as well as with the protection of competition, of such legislation, which brings to mind the provisions on groundhandling services.

Undoubtedly, as many scholars highlighted, rehiring social clauses can offer some advantages for the entrepreneurs involved in the turnover. Under these clauses, the previous contractor shouldn't dismiss the workers employed in the contract when the contract terminates, thus not having to justify the reduction of personnel. Also the new contractor can benefit from the experience of workers who has already performed the activity[9]. However, the obligation to rehire the employees of the previous contractor may generate many difficulties for the company taking over the contract. It is quite evident that there is a plurality of conflicting interests to be considered in the turnover of contractors: social clauses may restrict the freedom of economic initiative of the succeeding contractor, who cannot freely determine the organizational structure of his economic activity. Therefore, also concerning this type of social clauses, it is an issue reconciling the protection of workers, with respect to the negative effects of the turnover of contractors, first of all, the job loss, on the one hand, and the freedom to conduct a business and the protection of competition, on the other hand.

The turnover of different contractors in carrying out an activity or a service is a widespread phenomenon both in the private sector and in the public sector. For this reason, as for the equal treatment social clauses, the different scope of application must be taken into account in the analysis of this type of clauses: in fact, there are many differences, such as the source, legal in the public sector and mainly negotiated in the private sector, or the needs underlying the change of contractors, consisting in the necessary temporary nature of the contract itself, in the first, and in reducing the costs and in searching for competitive organizational solutions, in the second[10].

2. Rehiring social clauses and transfer of undertakings: the notion of economic entity in the light of the Court of Justice case law

The employers' turnover in the execution of procurement contracts and rehiring social clauses are widespread, particularly in the so-called labour-intensive sectors. In this field, in which the workforce plays a crucial role in the business activity[11], rehiring the employees of the previous contractor may be sufficient to integrate a transfer of undertaking under certain conditions. Therefore, it is necessary to outline the boundaries of these two cases, namely the turnover of contractors and the transfer of undertakings,

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[9] MUTARELLI M. M., *Contrattazione collettiva e tutela dell'occupazione negli appalti*, cit., 304; AIMO M., *Stabilità del lavoro e tutela della concorrenza. Le vicende circolatorie dell'impresa alla luce del diritto comunitario*, cit., 419.

[10] GAROFALO D., *Il cambio di appalto tra disciplina legale e disciplina autonoma*, in GAROFALO D., *Appalti e lavoro, vol. II. Disciplina lavoristica*, Torino, 2017, 205.

[11] CARINCI M. T., *Il concetto di appalto rilevante ai fini delle tutele giuslavoristiche e la distinzione da fattispecie limitrofe*, cit., 11.

to identify the applicable regulation and the levels of protections granted to workers involved in outsourcing processes. In fact, if these two cases, from an economic point of view, can be easily identified, from a juridical point of view those practices have some essential characteristics in common and, thus, are more difficult to distinguish[12]. Although not completely overlapping, it is unquestionable that they are aimed at protecting similar needs, so much that some scholars assert that social clauses cover the lack of protection in such cases not falling within the scope of application of the transfer of undertakings regulation[13]. This issue has a significant importance, due to their different effects: only in the event of a transfer on undertaking, there is the transfer of the employment relationships and the employees maintain their rights, as set out in the previous relationship; moreover, only in this case, there is a joint liability for all the credits that the employee had at the time of the transfer.

At national level, a debate has developed in Italian case law and among Italian scholars on the applicability of art. 2112 of the Civil Code to the turnover of contractors in the execution of a procurement contract or a service provision and on the interaction between the regulation of the transfer of undertaking and social clauses[14]. According to art. 2112 (5) of the Italian Civil Code, there is transfer of undertaking where there is a transfer of the ownership of an economic entity which retains its identity in the transfer, regardless of the type of contract.

In the past, the application of the regulation on the transfer of undertaking to the turnover of contractors in the performance of a contract has been debated for a long time, due to the lack of a direct translative deal between the new contractor and the previous one[15]. It has long been controversial the meaning of "economic entity which retains its identity" in the transfer; furthermore, it is not clear if there is transfer of undertaking, even though no tangible assets are transferred.

This topic is interesting even at supranational level, since even in the legal systems of other EU Member States it is not clear which protections are laid down in the case in which a new contractor takes over the management of an activity or service, as proved by the large number of preliminary ruling referred to the Court of Justice of the European Union[16]. In these cases, the issue concerns the identification of the conditions under

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[12] See Trib. Trento 5 febbraio 2019, n. 29. RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, cit., 99 ss; CARINCI M. T., *Il concetto di appalto rilevante ai fini delle tutele giuslavoristiche e la distinzione da fattispecie limitrofe*, cit. 25.

[13] ARIOLA L., *Subentro nell'appalto* labour intensive *e trasferimento d'azienda*, cit., 211; BASENGHI F., *Decentramento organizzativo e autonomia collettiva*, cit., 29; RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, cit., 23.

[14] AIMO M., *Stabilità del lavoro e tutela della concorrenza. Le vicende circolatorie dell'impresa alla luce del diritto comunitario*, cit., 417 ss.

[15] Cass. 18 marzo 1996, n. 2254; Cass. 20 settembre 2003, n. 13949; Cass. 15 luglio 2002, n. 10262; Cass. 19 gennaio 2002, n. 572; Cass. 20 novembre 1997, n. 11575; Cass. 17 marzo 1993, n. 3148; Cass. 26 febbraio 2003, n. 2936.

[16] See, for example, Court of Justice 9 September 2015, C-160/14, *Ferreira da Silva e Brito* e a., para. 25; Court of Justice 7 August 2018, C-472/16, *Jorge Luìs Colino Sigüenza c. Ayuntamiento de Valladolid*, para. 29; Court of Justice 6 March 2014, C-458/12, *Amatori c. Telecom Italia,* para 30; Court of Justice 6 September 2011, C-108/10, *Scattolon*, para. 60; Court of Justice 11 March 1997, C-13/95, *Suzen,* para.

which the turnover of contractors in a procurement contract or a service provision and the subsequent transfer of employees from the previous to the incoming contractor constitute a transfer of undertaking or of a part of undertaking, since there is no general statutory regulation on the turnover in the contract or the service provision change; in fact, only collective agreements' provisions protect the rights of employees involved in those events.

To clearly identify the distinguishing features of the two cases and understand the protection ensured to employees, it is crucial to study the notion of transfer and economic activity developed in the Court of Justice case law. Originally, the Court has adopted broader interpretative solutions compared to the Italian case law, which then aligned itself with these guidelines, especially since the 2000s[17].

Concerning the notion of transfer, according to the Court of Justice, the scope of application of Directive 2001/23 extends to all cases in which, «in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the undertaking and who by virtue of that fact incurs the obligations of an employer vis-à-vis the employees of the undertaking, regardless of whether or not ownership of the tangible assets is transferred»[18].

10; Court of Justice 11 March 1997, *C-232/04 e C-233/*04, *Güney-Görres e Demir*, para. 31; Court of Justice 11 luglio 2018, C-60/17*, Ángel Somoza Hermo, Ilunión Seguridad SA c. Esabe Vigilancia SA*, para 27 - 29; Court of Justice 19 October 2017, C-200/16, *Securitas-Serviços e Tecnologia de Segurança SA c. ICTS Portugal*, para. 25; Court of Justice 20 July 2017, C-416/16, *Luís Manuel Piscarreta Ricardo*, para. 40, 43-44. See also case C-664/17, *Ellinika Nafpigeia AE c. Panagiotis Anagnostopoulos e al.*, which is still pending. In its opinion, the Advocate General Szpunar stated that the Directive 2001/23 is applicable «in a situation where the part of the undertaking or business transferred does not retain its organisational autonomy, provided that the operational link between the various factors of production transferred is maintained and allows the transferee to use them for the purpose of carrying out in a stable manner an identical or similar economic activity, a matter which it is for the referring court to verify».

[17] See Cass. 13 gennaio 2005, n. 493; Cass. 30 dicembre 2003, n. 19842; Cass. 6 dicembre 2016, n. 24972; Cass. 12 aprile 2016, n. 7121; Cass. 16 maggio 2013, n. 119118; Cass. 2 marzo 2012, n. 3301; Cass. 15 ottobre 2010, n. 21278; Cass. 25 marzo 2017, n. 6770; Cass. 19 gennaio 2017, n. 1316, in *RIDL*, 2017, II, 613; Cass. 6 dicembre 2016, n. 24973, in *Foro It.*, 2017, I, 140; Cass. 16 marzo 2013, n. 11918, in *Guida al dir.*, 2013, 26, 60; Cass. 15 ottobre 2010, n. 21278, in *Giust. Civ. Mass.*, 2010, 1329. On this issue, see ROMEI R., *Cessione di ramo di azienda e appalti*, in AA.VV. *Diritto del lavoro e nuove forme di decentramento produttivo. Atti delle giornate di studio di diritto del lavoro Trento, 4-5- giugno 1999*, Giuffrè, Milano, 2000, 149 ss; CARINCI M. T., AVOGARO M.*, Appalto, somministrazione di lavoro e trasferimento di ramo d'azienda tra giurisprudenza e prassi delle commissioni di certificazione,* cit., 412. On the evolution of Italian regulation on transfer of undertaking, see CESTER C., *Il trasferimento d'azienda e di parte di azienda fra garanzie per i lavoratori e nuove forme organizzative dell'impresa: l'attuazione delle direttive comunitarie è conclusa?*, in CARINCI M. T., CESTER C. (a cura di), *Commentario al decreto legislativo 10 settembre 2003, n. 276*, cit., 238 ss; CARINCI M. T.*, Utilizzazione e acquisizione indiretta del lavoro: somministrazione e distacco, appalto e subappalto, trasferimento d'azienda e di ramo,* cit., 115 ss.

[18] Court of Justice 7 agosto 2018, C-472/16, *Jorge Luìs Colino Sigüenza c. Ayuntamiento de Valladolid*, p. 28; Court of Justice 26 November 2015, *Aira Pascual e Algeposa Terminales Ferroviarios*, C-509/14, p. 28; Court of Justice 20 November 2003, C-340/01, *Abler e altri c. Sanrest Großküchen Betriebsgesellschaft mbH*, p. 41, in *RIDL*, 2004, II, 463 ss, BORZAGA M., *Trasferimento d'azienda e successione di contratti d'appalto, prima e dopo il d.lgs. n. 276/03, tra diritto comunitario scritto e giurisprudenza della Corte di Giustizia*; Court of Justice 20 January 2011, C-463/09, *CLECE*, p, 30; Court of Justice 9 September 2015, C-160/14, *Ferreira da Silva,* p. 24; Court of Justice *6* March *2014, C-458/12, Amatori e altri c. Telecom Italia SpA e Telecom Italia Information Technology Srl,* p. 29 ss, in *RIDL,* 2014, II, 461 ss*,* CESTER *C., Il trasferimento del ramo d'azienda ancora alla prova della Corte di Giustizia*

Concerning the object of the transfer, there is a transfer within the meaning of this Directive where there is «a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary»[19]. The decisive criterion for establishing the existence of a transfer within the meaning of that directive is «the fact that the entity in question retains its identity». In order to determine whether this condition is met, an important element is the fact that its operation is actually continued or resumed by the new owner[20]; conversely, the mere fact that a company takes over the same economic activity of another one isn't a ground for concluding that there is a transfer of an economic: an economic entity «cannot be reduced to the activity entrusted to it». To determine if the entity retained its economic identity, it is necessary to consider other elements, such as «its workforce, its management staff, the way in which its work is organized, its operating methods»[21]. As stated in *Klarenberg*, the key element for determining if the identity of economic entity has been preserved isn't «the retention of the specific organisation imposed by the employer on the various elements of production which are transferred», but the preservation of the «functional link of interdependence and complementarity between those elements»[22]. In order to determine whether that condition is met, it is necessary to consider all the facts characterising the transaction concerned: the type of undertaking or business, whether or not its tangible assets are transferred, the value of its intangible assets at the time of the transfer, the taking over of the majority of its employees by the new employer, the transfer of its

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fra uso capovolto della normativa di tutela e disciplina di maggior favore; Court of Justice 20 July 2017, C-416/16, *Luís Manuel Piscarreta Ricardo*, p. 29 ss.

[19] Art. 1 (1), lett. b), Directive 2001/23/CE 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. On this issue, the Court has made clear that «the notion of economic activity encompasses any activity consisting in offering goods or services on a given market. Activities which fall within the exercise of public powers are excluded as a matter of principle from classification as economic activity». See Court of Justice 20 July 2017, C-416/16, *Luís Manuel Piscarreta Ricardo*, para. 34. Also Italian case law has accepted this notion. See, for example, Cass. 19 agosto 2009, n. 18385; Cass. 8 giugno 2009, n. 13171.

[20] In the judgement 14 aprile 1994, C-392/92, *Schmidt*, the Court held that the directve doesn't cover a situation, in which «an undertaking entrusts by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee». See Court of Justice 9 September 2015, C-160/14, *Ferreira da Silva e Brito* e a., p. 25; Court of Justice 7 August 2018, C-472/16, *Jorge Luìs Colino Sigüenza c. Ayuntamiento de Valladolid*, punto 29; Court of Justice 6 March 2014, C-458/12, *Amatori c. Telecom Italia,* p .30; Court of Justice 11 July 2018, C-60/17*, Ángel Somoza Hermo, Ilunión Seguridad SA c. Esabe Vigilancia SA*, p. 27; Court of Justice 11 July 2018, C-60/17*, Ángel Somoza Hermo, Ilunión Seguridad SA c. Esabe Vigilancia SA*, p. 29; Court of Justice 19 October 2017, C-200/16, *Securitas-Serviços e Tecnologia de Segurança SA c. ICTS Portugal*, p. 25; Court of Justice 20 July 2017, C-416/16, *Luís Manuel Piscarreta Ricardo*, p. 40, 43-44.

[21] Court of Justice 11 March 1997, C-13/95, *Suzen,* para. 15.

[22] Court of Justice 12 February 2009, C-466/07, *Klarenberg*. See also Court of Justice 9 September 2015, C-160/14, *Ferreira da Silva*, p. 33; Court of Justice 12 February 2009, C-466/07, p. 46 – 48; Court of Justice 20 July 2017, C-416/16, *Luís Manuel Piscarreta Ricardo*, p. 29, 4; Court of Justice 9 September, 2015, C-160/14, *Ferreira da Silva*, CAVALLINI G., *Trasferimento d'azienda, "effetto Lazzaro" e ruolo giocato dalla continuazione dell'attività nel sistema della direttiva 2001/23/CE*, nota a in *DRI*, 2016, 3, 888 ss. See COUNTOURIS N., NJOYA W., *Transfer of Undertakings*, in SCHLACHTER M. (a cura di), *EU Labour Law. A commentary*, Alphen aan den Rijn, 2015, 421 ss.

customers, the degree of similarity between the activities carried on before and after the transfer, and the period of suspension of those activities. Such single factors may have a different weight, according to the type of undertaking or its operating methods. All these circumstances are «merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation»[23].

Considering the most interesting case, at least concerning this study, several times preliminary rulings request have been referred to the Court of Justice of the European Union about the applicability of the regulation on the transfer of undertakings to the change of ownership of the economic entity in the case of succession in the procurement contract or service provision change.

In the most recent rulings, the Court confirmed the settled case law[24], according to which, there is no need «for there to be any direct contractual relationship between the transferor and the transferee». It overcomes the Italian case law, which for long time require as necessary a direct contractual relationship between the parties, in order bear the consequences of the transfer to the new contractor[25]. Since the transfer may take place through the intermediary of a third party, it follows that Directive 2001/23 may apply in the case in which a contracting entity has successively entrusted the provision of the same service to two undertakings.

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[23] Court of Justice 7 August 2018, C-472/16, *Jorge Luìs Colino Sigüenza c. Ayuntamiento de Valladolid*, p. 30-31; Court of Justice 9 September 2015, C-160/14, *Ferreira da Silva e Brito e a.,* p. 26-27; Court of Justice 7 March 1996, C-171/94, *Merckx*, p.17; Court of Justice 11 March 1997, C-13/95, *Suzen p.* 14 e 21; Court of Justice 18 March 1986, C-24/85, Spijkers, p. 13; Court of Justice 9 September 2015, C-160/14, *Ferreira da Silva;* Court of Justice 11 July 2018, C-60/17*, Ángel Somoza Hermo, Ilunión Seguridad SA c. Esabe Vigilancia SA*, p. 30 -33; Court of Justice 19 October 2017, C-200/16, *Securitas-Serviços e Tecnologia de Segurança SA c. ICTS Portugal*, p. 26-28. In Italian case law, see Cass. 12 aprile 2016, n. 7121.

[24] Court of Justice 11 March 1997, C-13/95, *Süzen,* p. 11 e 12*;* Court of Justice 7 March 1996, C-171/94, *Merckx*, p. 30; Court of Justice 11 July 2018, C-60/17*, Ángel Somoza Hermo, Ilunión Seguridad SA c. Esabe Vigilancia SA*, p. 27 e 28; Court of Justice 19 October 2017, C-200/16, *Securitas-Serviços e Tecnologia de Segurança SA c. ICTS Portugal*, p. 23 e 24. See SHRUBSALL V., *Competitive Tendering, Out-sourcing and the Acquired Rights Directive*, in *Modern Law Rev*., 1998, 85 ss; BRAMHALL P., *Application of the acquired rights directive to contracting out of services: the decision of the European Court of Justice in the case of Süzen*, in *Public procurement law review*, 1997, 6, 179 ss; SCHOLZ C., *Employees' rights in transfers of undertakings in the European Union: the Süzen case,* in *European business law review*, 1997, 170 ss.

[25] See Court of Justice 11 March 1997, C-13/95, *Süzen,* p. 11 e 12*;* Court of Justice 7 March 1996, C-171/94, *Merckx*, p. 30; Court of Justice 11 July 2018, C-60/17*, Ángel Somoza Hermo, Ilunión Seguridad SA c. Esabe Vigilancia SA*, p. 27 e 28; Court of Justice 19 October 2017, C-200/16, *Securitas-Serviços e Tecnologia de Segurança SA c. ICTS Portugal*, p. 23 e 24. In Italian case law, see Cass. 20 settembre 2003, n. 13949, SENATORI I., *Successione in appalto di servizi e trasferimento di azienda tra ratio comunitaria e riforma del mercato del lavoro italiano*, in *RIDL*, 2004, 2, 404 ss; Cass. 16 maggio 2013, n. 11918; Cass. 13 aprile 2011, n. 8460; Cass. 10 marzo 2009, n. 5708; Cass. 8 ottobre 2007, n. 2102; Cass. 06 dicembre 2016, n. 24972. In relation to the notion of transfer, it has long been debated the need for a transfer. See GRAGNOLI E., *Contratti di appalto di servizi e trasferimento d'azienda*, in *Trasferimento di ramo d'azienda e rapporto di lavoro*, in *Dialoghi fra dottrina e giurisprudenza*, Milano, 2004, 195 ss; NOVELLA M., VALLAURI M.L., *Il nuovo art. 2112 c.c. e i vincoli del diritto europeo*, in *DLRI*, 2005, 177 ss; CHIECO P., *Somministrazione, comando, appalto. Le nuove forme di protezione del lavoro a favore del terzo*, in CURZIO (a cura di), *Lavoro e diritti dopo il decreto legislativo n. 276/20003*, Bari, 2004, 91 ss; CESTER C., *Il trasferimento d'azienda e di parte di azienda fra garanzie per i lavoratori e nuove forme organizzative dell'impresa: l'attuazione delle direttive comunitarie è conclusa?*, in CARINCI M. T., CESTER C. (a cura di), *Commentario al decreto legislativo 10 settembre 2003*, n. 276, cit., 249.

Specifically, according to the Court of Justice case law, «the mere loss of a service contract to a competitor cannot therefore by itself indicate the existence of a transfer» within the meaning of the Directive 2001/23[26]. Often, the Court has held that in those sectors where the activity is based essentially on manpower, the identity of an economic entity may be retained, if the majority of its employees are taken on by the alleged transferee[27]. For the purpose of the application of directive on the transfer of undertaking, the economic entity concerned must have a «sufficient degree of functional autonomy, the concept of autonomy». As stated in *Amatori*, it means that «the powers granted to those in charge of the group of workers concerned, to organise, relatively freely and independently, the work within that group and, more particularly, to give instructions and allocate tasks to subordinates within the group, without direct intervention from other organisational structures of the employer» must be clearly identifiable[28].

So, in labour-intensive sectors it isn't sufficient taking on the employees of the previous contractor engaged in a joint activity. What matters is the transfer of an organized group of workers, including their knowledge and know-how, and the fact that the taking over enables him to carry on the activities of the transferor undertaking or different activities. In this case, according to the Court of Justice, the fact that he takes on the workers because it is imposed by a collective agreement or by the law is irrelevant[29].

It seems appropriate to make a further consideration concerning the purposes of the transfer of undertaking regulations. According to Recital 3 of Directive 2001/23, the purpose of the Directive is to ensure the protection of employees in the event of a change of employer, in particular, to safeguard their rights, regardless the ownership of the undertaking[30]. To be honest, it isn't clear how the Court of Justice carry out this goal:

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[26] Court of Justice 11 March 1997, C-13/95, *Süzen*, p. 16; Court of Justice 19 October 2017, C-200/16, *Securitas-Serviços e Tecnologia de Segurança SA c. ICTS Portugal*, p. 36 – 38.

[27] Court of Justice 13 September 2007, C-458/05, *Jouini*; Court of Justice 18 November 2004, C-284/03, *Temco*; Court of Justice 12 February 2009, C-466/07, *Klarenberg;* Court of Justice 26 November 2015, C-509/14, *Aira Pascual*, p. 35; Court of Justice, 20 January 2011, C-463/09, *CLECE*, p. 41. In labour-intensive sectors, the identity is not preserved if the majority of the staff is not rehired by the transferee. On the contrary, in a sector in which the activity is essentially based on the equipment and other assets, the failure by the new company to take on the personnel employed in the same activity by its predecessor is not sufficient to exclude the existence of a transfer of an entity retaining its identity pursuant to Directive 2001/23. See Court of Justice 7 Agosto 2018, C-472/16, *Jorge Luìs Colino Sigüenza c. Ayuntamiento de Valladolid*, p. 28 – 33; Court of Justice 11 July 2018, C-60/17*, Ángel Somoza Hermo, Ilunión Seguridad SA c. Esabe Vigilancia SA*, p. 34 ss; Court of Justice 19 October 2017, C-200/16, *Securitas-Serviços e Tecnologia de Segurança SA c. ICTS Portugal*, p. 29; Court of Justice 26 November 2015, *Aira Pascual e Algeposa Terminales Ferroviarios*, C-509/14, p. 35.

[28] Court of Justice 6 March 2014, C-458/12, *Amatori c. Telecom Italia,* para. 32*;* Court of Justice 6 September 2011, C-108/10, *Scattolon*, para. 51.

[29] Court of Justice 11 July 2018, C-60/17, *Ángel Somoza Hermo, Ilunión Seguridad SA c. Esabe Vigilancia SA*; Court of Justice 6 September 2011, C-108/10, *Scattolon*; C. giust., 24.1.2002, C-51/00, *Temco*. See COSTANTINI S., *Limiti all'iniziativa economica privata e tutela del lavoratore subordinato: il ruolo delle c.d. "clausole sociali"*, cit., 238.

[30] Court of Justice 7 August 2018, C-472/16, *Jorge Luìs Colino Sigüenza c. Ayuntamiento de Valladolid*, p. 29; Court of Justice 11 March 1997, C-13/95, *Suzen p. 10*; Court of Justice 14 April 1994, C-392/92, *Schmidt*, p. 16; Court of Justice 18 March 1986, C-24/85, *Spijkers*, p. 12; Court of Justice 9 September 2015, C-160/14, *Ferreira da Silva,* p. 25; Court of Justice 11 July 2018, C-60/17*, Ángel*

the Court only stated that the purpose of the Directive is to prevent workers subject to a restructuring of the company from being placed in a less favourable position solely as a result of the transfer[31]. As the Court held in *Somoza Hermo*, concerning the application of the directive in the turnover of two contractors pursuant to a Spanish collective agreement, conversely, the objective pursued should not be the stability of the job, but the stability of employment of workers in this sector[32]. As stated by the Court in *Alemo-Herron*, this aim of protecting employment of workers in this sector finds a limit in the fundamental rights referred to in art. 16 of the Charter of fundamental rights of the European Union on the freedom to conduct a business: indeed, the provisions of Directive 2001/23 must be interpreted in a manner consistent with the Charter. Indeed, art. 16 protect, in any circumstances, the right of the transferee to «assert its interests effectively in a contractual process or negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity»[33]. Directive 2001/23 aims to achieve a balance between the interests of workers and the interests of the transferee[34]. In this way, the Court reiterates that in the protection of the employment of workers affected by transfer of undertakings, such as other outsourcing processes, the fundamental economic freedoms referred to in the Treaties and in the Charter of Fundamental Rights cannot be seriously reduced for the benefit of safeguarding social rights.

Somoza Hermo, Ilunión Seguridad SA c. Esabe Vigilancia SA, p. 26. Recital 4 points out another goal of this directive: the reduction of the differences in the Member States concerning the level of protection of employees. See NOVELLA M., VALLAURI L., *Il nuovo art. 2112 c.c. e i vincoli del diritto europeo*, in *DLRI*, 2005, 2, 181.

[31] Court of Justice 7 Februry 1985, C-135/83, *Abels*; Court of Justice 11 July 1985, C-104/85, *Danmols Inventar*; Court of Justice 6 September 2011, C-108/10, *Scattolon*, para. 75; Court of Justice 11 September 2014, C-328/13, *Österreichischer Gewerkschaftsbund*, para. 27.

[32] Art. 14 of the *Convenio colectivo estatal de las empresas de seguridad* provides that the social clause «seeks to ensure the stability of employment of employees in this sector, but not the stability of the job». The Court emphasised that the objective pursued by the collective agreement for security firms is the same as that pursued by Directive 2001/23. See Court of Justice 11 July 2018, C-60/17*, Ángel Somoza Hermo, Ilunión Seguridad SA c. Esabe Vigilancia SA*, para. 37 – 39. In this judgement, the Court ruled that «Article 1(1) of Directive 2001/23 must be interpreted as meaning that that directive applies to a situation in which a contracting entity has terminated the contract for the provision of services relating to the security of buildings concluded with one undertaking and has, for the purposes of the provision of those services, concluded a new contract with another undertaking, which takes on, pursuant to a collective agreement, the majority, in terms of their number and skills, of the staff whom the first undertaking had assigned to the performance of those services, in so far as the operation is accompanied by the transfer of an economic entity between the two undertakings concerned».

[33] Court of Justice 18 July 2013, C-426/11, *Alemo-Herron*, p. 30 – 37; Court of Justice 27 September 2012, C-179/11, *Cimade e GISTI*, p. 42. See ZAHN R., *The Court of Justice of the European Union and transfers of undertakings. Implication for collective labour rights*, in *European labour law journal*, 2015, 1, 72 ss; BRAMESHUBER E., *Balancing vs. preservation of rights under the acquired rights directive*, in *ILJ*, 2016, 3, 455 ss; ROMEI R., Ce*ssione di ramo d'azienda e appalto*, in *DLRI*, 1999, 379; GRAGNOLI E., *Contratti di appalto di servizi e trasferimento d'azienda,* cit., 206.

[34] Court of Justice 11 September 2014, C-328/13, *Österreichischer Gewerkschaftsbund*, para. 29.

3. Employers' turnover in service provision and transfer of undertaking: art. 29, co. 3, Legislative Decree no. 276/2003

In the Italian legal order, the applicability of the regulation on the transfer undertaking to the turnover of contractors in service provision is still unsolved, due to the problematic coordination between art. 2112 of Civil Code, Italian and EU case law and art. 29 of Legislative Decree n. 276/03[35]. As previously anticipated, these cases, namely transfer of undertaking and turnover of contractors, albeit non-identical[36], are similar, at least because of the same purpose to protect employment of the workers involved in the transfer[37].

In the original version, art. 29 (3) of Legislative Decree n. 276/03 stated that, when an employer takeover a service or a procurement, under law, national collective agreements, or a clause of the procurement contract, taking on the personnel previously employed in the contract doesn't constitute a transfer of undertaking or of a or part of an undertaking. A broad and complex debate has developed about this provision. Some scholars, according to which it was necessary a direct contractual relationship between the transferor and transferee to identify the turnover as a transfer of undertaking, opted for a restrictive interpretation of the provision and excluded *a priori* that art. 2112 c.c. applies to the turnover in the contract[38]. Some others came to the same conclusion on

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[35] On this topic, see ARIOLA L., *Subentro nell'appalto* labour intensive *e trasferimento d'azienda*, cit., 209 ss; MARINELLI F., *La tutela del posto di lavoro in caso di cessazione dell'appalto*, in CARINCI M.T., CESTER C., MATTAROLO M.G., SCARPELLI F. (a cura di), *Tutela e sicurezza del lavoro negli appalti privati e pubblici: inquadramento giuridico ed effettività*, Torino, 2011, 222 ss; CARINCI M. T., *Gli appalti nel settore privato. La distinzione tra appalto e trasferimento d'azienda ed il trattamento dei lavoratori impiegati negli appalti*, in MONTUSCHI L. (a cura di), *Un diritto in evoluzione. Studi in onore di Yasuo Suwa*, Milano, 2007; SPEZIALE V., *Appalti e trasferimento d'azienda*, in GAROFALO D., RICCI M. (a cura di), *Percorsi di diritto del lavoro*, Bari, 2006, 535 ss; CESTER C., *Il trasferimento d'azienda e di parte d'azienda tra garanzie per i lavoratori e nuove forme organizzative dell'impresa: l'attuazione delle direttive comunitarie è conclusa?*, in CARINCI M. T., CESTER C. (a cura di), *Somministrazione, comando, appalto, trasferimento d'azienda*, in F. CARINCI (coordinato da), *Commentario al d. lgs. 10 settembre 2003, n. 276*, Milano, 2004, 238 ss; SENATORI I., *Successione in appalto di servizi e trasferimento d'azienda tra ratio comunitaria e riforma del mercato del lavoro italiano*, in *Riv. It. Dir. Lav*., 2004, II, 404 ss; SCARPELLI F., *Appalto. Commento all'art. 29 del d.lgs. 276/2003*, cit., 275 ss; ROMEI R., *Azienda, impresa, trasferimento*, in *Giorn. Dir. Lav. Rel. Ind*., 2003, 51 ss; PASSALACQUA P., *Successione nell'appalto, trasferimento d'azienda e definizione legale della fattispecie*, in *Mass. giur. lav.*, 2001, 5, 406 ss.

[36] RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, cit., 23; VILLA E., *"Subentro" nell'appalto labour intensive e trasferimento d'azienda: un puzzle di difficile composizione*, in *LD*, 2016, 69 ss; BRINO V., *Successione di appalti e tutela della continuità dell'occupazione*, in AIMO M., IZZI D. (a cura di), *Esternalizzazioni e tutela dei lavoratori*, Torino, 2014, 111 ss; SPEZIALE V., *Appalti e trasferimento d'azienda*, in GAROFALO D., RICCI M. (a cura di), *Percorsi di diritto del lavoro*, Bari, 2006, 535 ss; CARINCI M. T., *Gli appalti nel settore privato. La distinzione tra appalto e trasferimento d'azienda ed il trattamento dei lavoratori impiegati negli appalti*, cit., 335 ss; COLOSIMO C., *Il trasferimento d'impresa: casistica giurisprudenziale*, cit., 27; MARINELLI F., *La tutela del posto di lavoro in caso di cessazione dell'appalto*, cit., 223.

[37] FALERI C., *Ciò che appalto non è. A proposito dell'intervento riformatore in materia di successione di appalti e trasferimento d'azienda*, in *Giur. comm.*, 2018, 6, 1044 ss.

[38] ICHINO P., *Artt. 20 – 29*, in PEDRAZZOLI M. (a cura di), *Il nuovo mercato del lavoro d.lgs. 10 settembre 2003, n. 276*, Bologna, 2004, 328; FALERI C., *Ciò che appalto non è. A proposito dell'intervento*

the basis of the importance of contractual autonomy: in the absence of an expression of the entrepreneur's will, it is not possible to bear the consequences of the transfer to the new contractor. It means that it is necessary a direct contractual relationship between the parties[39].

Such interpretations cannot be accepted, as they render art. 29 (3) of legislative decree n. 276/03 meaningless and infringe the provisions of the Directive. Those interpretations are in contrast with the settle case law of the Court of Justice concerning the Directive 2001/23, where they state that the protections foreseen by art. 2112 c.c. don't apply to taking over the contract pursuant to a social clause, even though there are the distinctive elements of the transfer of undertaking[40].

The opposite academic orientation is more in line with EU law: with the view of identifying an interpretation in accordance with it, this approach opts for a "conservative" interpretation. In line with settle case law[41], according to the latter orientation, it must be verified, on a case-by-case basis, whether in the labour-intensive sectors taking on the employee is sufficient to apply the regulation on the transfer of undertaking[42]. Then, also Italian case law acknowledged that the fact that the parties carried out the procedure for the contractors' turnover and the new contractor takes on all the employees pursuant to a social clause does not exclude that a turnover of contractors in the contract may be a transfer of undertaking. Art. 2112 c.c. is a mandatory rule which provides a mandatory standard of protection that the parties cannot disregard[43].

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riformatore in materia di successione di appalti e trasferimento d'azienda, cit., 1044 ss. On this issue, see also BASENGHI F., *Decentramento organizzativo e autonomia collettiva*, cit., 23.

[39] GRAGNOLI E., *Contratti di appalto di servizi e trasferimento d'azienda,* cit., 195 ss; GRAGNOLI E., *Ancora su contratti di appalto di servizi e trasferimento di azienda*, cit.; CHIECO P., *Somministrazione, comando, appalto. Le nuove forme di protezione del lavoro a favore di terzo*, cit., 91 ss.

[40] MARINELLI F., *La tutela del posto di lavoro in caso di cessazione dell'appalto*, cit., 225; SPEZIALE V., *Appalti e trasferimento d'azienda*, in WP C.S.DL.E. "Massimo D'Antona". IT – 41/2006; ROCCELLA M., AIMO M., *Trasferimento d'impresa nella normativa codicistica e comunitaria: cessione di beni materiali o anche di sola manodopera?*, in *Dialoghi fra dottrina e giurisprudenza*, 2004; SENATORI I., *Successione nell'appalto e trasferimento d'azienda: il vincolo comunitario*, in *RGL*, 2004, I, 601 ss; CESTER C., *Il trasferimento d'azienda e di parte di azienda fra garanzie per i lavoratori e nuove forme organizzative dell'impresa: l'attuazione delle direttive comunitarie è conclusa?*, cit., 250.

[41] Cass. 26 agosto 2016, n. 17366; Cass. 25 settembre 2013, n. 21917; Cass. 19 maggio 2017, n. 12720; Cass. 7 marzo 2013, n. 5678. Cfr. anche Cass. 6 dicembre 2016, n. 24972. The Court of Cassation, in fact, rules that it is configurable the transfer of a part of undertaking in the case in which the transfer concerns only a group of organized employees, with a particular "know-how"; consequently, the transfer entail the legal succession in the employment relationship of the transferee.

[42] ROMEI R., *Cessione di ramo d'azienda e appalto*, *Giorn. Dir. Lav. Rel. Ind.*, 1999, 325 ss; NOVELLA M., VALLAURI M.L., *Il nuovo art. 2112 c.c. e i vincoli del diritto europeo*, in *Giorn. Dir Lav. Rel. Ind*., 2005, 177 ss; SPEZIALE, V., L*e 'esternalizzazioni' dei processi produttivi dopo il d.lgs. n. 276 del 2003*, cit. 24; AIMO M., AIMO M., *Stabilità del lavoro e tutela della concorrenza. Le vicende circolatorie dell'impresa alla luce del diritto comunitario*, cit., 131; SCARPELLI, F., *Art. 29. Appalto*, cit., 440; CARINCI, M.T., *Gli appalti nel settore privato. La distinzione tra appalto e trasferimento d'azienda ed il trattamento dei lavoratori impiegati negli appalti*, cit., 438; ORLANDINI G., *Clausole sociali,* cit.

[43] Corte d'Appello Torino 14 giugno 2018, n. 381; Cass. 16 maggio 2013, n. 11918; Cass. 13 aprile 2011 n. 8460; Cass. 15 ottobre 2010 n. 21278; Cass. 10 marzo 2009 n. 5708; Cass. 8 ottobre 2007 n. 21023; Cass. 13 gennaio 2005 n. 493; Cass. 27 aprile 2004 n. 8054; Cass. 29 settembre 2003 n. 13949; Cass. 15 marzo 2017, n. 6770; Cass. 1 ottobre 2012, n. 16641, INGRAO A., *La nozione di trasferimento d'azienda tra giurisprudenza interna e comunitaria*, in *RIDL*, 2013, 2, 343; COLOSIMO C., *Il trasferimento d'impresa: casistica giurisprudenziale*, in *Lavoro Diritti Europa,* 2018, 2, 8.

However, the regulation on the transfer of undertaking doesn't always apply to the turnover of contractors or service provision change. If it is possible to apply the regulation on the transfer of undertaking or a part of an undertaking even in the case of turnover of contractors in the performance of the contract, however, it is necessary that in the taking over the contractor maintain a significant set of organized assets, suitable for the performance of the economic activities. The Italian Court of Cassation has ruled that in labour-intensive sectors there is a transfer of undertaking where the new contractor doesn't only continue carrying out the activity, but also rehires an essential part, in terms of number and knowledge, of the personnel employed by the former in the same tasks. In this case, a group of employees performing an activity regularly can be considered an economic entity preserving its identity in the transfer[44].

However, this Court of Cassation case law has not spared art. 29 from facing the censure of European Commission, which triggered a procedure of pre-violation against Italy. The Commission didn't considered this provision in compliance with Directive 2001/23, nor it deemed legitimate the Italian case law interpretation on art. 29 (3), where it limited the scope of application of the regulation on the transfer of undertaking referred to in art. 2112 c.c.: indeed, it excluded the change of the contractor to be regulated under the transfer of undertaking regulation in the case of taking over the contract pursuant to a social clause, whether no significant assets were transferred[45]. Art. 30 of law 7 July 2016, n. 122 (European Law 2015/2016) replaced paragraph 3 of art. 29 of Legislative Decree n. 276/03. According to the current formulation, transfer of undertaking regulation cannot apply to the rehiring of personnel already employed in the procurement contract or service provision as a result of the change of the contractor, where it takes place pursuant to law, national collective agreement or a clause of the contract, if the new contractor has «its own organizational and operational structure» and if «there are elements of discontinuity entailing a specific undertaking identity».

The current version of art. 29 (3) is imprecise, difficult to understand, due to the formulation in the negative way, and poses new issues[46]. Art. 29 (3) states that where a contractor with its own organizational and operational structure takes over the procurement and rehire a significant part of the personnel previously employed in the contract, it is a transfer of undertaking, unless there are elements of discontinuity entailing a specific business identity[47]. In this way, the application of art. 2112 c.c.

[44] Cass. 19 maggio 2017, n. 12720.

[45] Commissione Europea EU Pilot 7622/15/EMPL and Camera dei deputati - XVII Legislatura - Dossier di documentazione, Servizio Studi - Dipartimento affari comunitari, Legge europea 2015-2016 - A.C. 3821-A - Elementi per l'esame in Assemblea. See Cass. 7 dicembre 2015, n. 24804; Cass. 20 ottobre 2015, n. 21220; Cass. 16 maggio 2013, n. 11918. See also, ALVINO I., *La nozione di trasferimento di ramo di azienda alla prova del fenomeno dei "cambi di appalto": un cantiere ancora aperto?*, in *DRI*, 2018, 2, 564.

[46] *Contra*, FALERI C., *Ciò che appalto non è. A proposito dell'intervento riformatore in materia di successione di appalti e trasferimento d'azienda*, cit., 1044 ss.

[47] ARIOLA L., *Subentro nell'appalto labour intensive e trasferimento d'azienda*, cit., 228; COSIO R., *Cambio di appalto. Licenziamenti, trasferimenti di azienda e clausole sociali*, cit., 7.

depends on the organizational decisions and the structure of the incoming contractor[48]. First, the new contractor must have its own organizational and operational structure and must not use the assets of the previous contractor[49]. It isn't clear what it exactly means, since the requirement of the organization of the productive assets to carry out the business activity is already implicit in the notion of procurement contract[50]. It seems more reasonable to consider this requirement as referring to the performance of the specific contract. This excludes the application of art. 2112 c.c. whenever the new contractor can execute the contract or provide the service with its assets and doesn't use the "organizational and operational structure" of the former contractors or uses it in a non-significant manner[51]. According to the latter interpretation, art. 2112 c.c. applies where the transferred assets constitute a non-marginal part of the incoming contractor's organization: the distinctive criterion between the two cases is reduced to a quantitative assessment. In the light of EU law, on the contrary, the transfer of undertaking regulation applies where «the link, in terms of operation and objectives, between the various elements transferred» is retained and «enables the new owner to make use of those elements in order to carry on a specific economic activity, even where they are incorporated into a different organisational structure»[52].

The meaning of second part of the art. 29 (3) isn't easy to understand either[53]. The discontinuity elements entailing a specific business identity concern the organization of the business and, in the case of labour-intensive contracts, the organization of the personnel. A mere quantitative reduction in services isn't sufficient to retain a specific economic identity[54]. Therefore, this statement must be considered as a confirmation of the settle Italian and EU case law, according to which for the configurability of the transfer of undertaking the transferred economic entity must retain its identity. Retaining the link of interdependence and complementarity between the productive factors, which allows the entrepreneur to carry out the economic activity, is the decisive element[55]: it

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[48] ALVINO I., *La nozione di trasferimento di ramo di azienda alla prova del fenomeno dei "cambi di appalto": un cantiere ancora aperto?*, cit., 565; COLOSIMO C., *Il trasferimento d'impresa: casistica giurisprudenziale*, cit., 2

[49] COLOSIMO C., *Il trasferimento d'impresa: casistica giurisprudenziale*, in *Lavoro Diritti Europa,* 2018, 2, 23 ss; RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, cit., 121; ALVINO I., *La tutela del lavoro nell'appalto*, in AMOROSO G., DI CERBO V., MARESCA A., *Diritto del lavoro. Commentario*, Milano, 2017, 1778.

[50] GAROFALO D., *Lavoro, impresa e trasformazioni organizzative*, cit., 33 ss; INGLESE I., *Le clausole sociali nelle procedure di affidamento degli appalti alla luce delle novità normative*, in *DRI*, 2, 571 ss

[51] ALVINO I., *La nozione di trasferimento di ramo di azienda alla prova del fenomeno dei "cambi di appalto": un cantiere ancora aperto?*, cit., 565-566; MARAZZA M., *Contributo allo studio della fattispecie del ramo di azienda (art. 2112, comma quinto, cod. civ.)*, WP C.S.D.L.E. "Massimo D'Antona".IT – 363/2018, 27.

[52] Opinion of the advocate general Mengozzi, 6 November 2008, C-466/07, *Klarenberg*, para. 44.

[53] It clearly intends to limit the application of the transfer on undertaking regulation. See ARIOLA L., *Subentro nell'appalto labour intensive e trasferimento d'azienda*, cit., 226.

[54] Tribunale Bologna 7 luglio 2017, n. 5941.

[55] Court of Justice 9 September 2015, C-160/14, *Ferreira da Silva*, p. 33; Court of Justice 12 February 2009, C-466/07, p. 46 – 48; Court of Justice 20 July 2017, C-416/16, *Luís Manuel Piscarreta Ricardo*, p. 29, 44; Court of Justice 12 February 2009, C-466/07, *Klarenberg*.

should be considered with regard to the work or service covered by the contract[56]. However, it is difficult to identify discontinuity elements, particularly concerning labour-intensive contracts, since usually rehiring social clauses provides for the taking on of the personnel employed by the former contractor, only whether the takeover is at the same terms[57], unless in the future social clauses will provide for *ad hoc* organizational changes[58].

In conclusion, the amendments made to art. 29 (3) do not seem to have introduced any innovative element, compared to the previous version of the provision in the light of the interpretation in the case law. Indeed, it seems appropriate to interpret the provision in accordance with the case law: the reference to the «organizational and operational structure» of the entrepreneur has not an innovative meaning; the rehiring by the incoming contractor in itself is not sufficient to integrate a transfer of undertaking where he hasn't take over an organised economic entity, namely an organised group of persons and assets enabling the exercise of an economic activity which pursues a specific objective. On the other hand, the application of the art. 2112 cannot be automatically excluded; otherwise, it would be an exception to the prohibition for a contractual clause to derogate to a statutory provision. To delimit the scope of application of the protections provided for in art. 2112, in the case of succession of contractors in a contract, thus, it is necessary to verify whether there has actually been a transfer of undertaking, through the passage of a considerable amount of goods and productive factors, «in their unitary and instrumental function to the economic activity, or at least of the "know-how" or of other elements suitable to confer operational autonomy to a group of employees». Article 29, paragraph 3 of Legislative Decree no. 276/2003, in fact, as mentioned, is important for the identification the scope of application of social clauses, but it has a considerable importance also in relation to the regulatory consequences, due to the different and higher protections applicable where the change of contractors entails a transfer of undertaking, especially with regard to joint liability for employee credits and the maintenance of their rights in the employment relationship with the "new" contractor.

4. The role of collective bargaining in service provision change: varieties and effectiveness of protection techniques

In an attempt to regulate the outsourcing processes of businesses[59], the collective bargaining has often been regulating the phenomenon of the turnover of contractors in

[56] RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, cit., 122.
[57] GAROFALO D., *Lavoro, impresa e trasformazioni organizzative*, cit., 33 ss.
[58] MARRAZZA M., *Contributo allo studio della fattispecie del ramo di azienda (art. 2112, comma quinto, cod. civ.)*, cit., 28.
[59] RECCHIA G. A., *Cambio appalto, stabilità occupazionale e contrattazione collettiva*, in Garofalo D. (a cura di), *Appalti e lavoro. Disciplina lavoristica*, cit., 237; RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, cit., 4; LISO F., *Autonomia collettiva e occupazione*, in *Giorn. Dir. Lav. Rel. Ind.*, 1998, 191 ss.

the execution of the same contract, especially in labour-intensive sectors, with the aim of introducing minimum protections. These are sectoral solutions that are not present in all collective agreements[60].

An examination of the contractual clauses of collective agreements shows the varieties of contents and protection techniques used[61].

It is possible to identify different levels of protection: some collective agreements' social clauses provide for an actual obligation to rehire the employees of the former contractor, while some others require the employers to comply with information and consultation obligations.

Many collective agreements generically require the contractor to inform unions of the takeover respecting a minimum notice, e.g. according the national collective agreement for employees and working members of multi-service, cleaning and logistics cooperatives (CCNL per i lavoratori dipendenti e soci lavoratori delle imprese cooperative di multiservizi, pulizia e logistica) the information should be given with at least 15 days' notice[62]. Other contracts provide, specifically, an obligation to inform and consult the trade unions to allow the examination of the issues concerning the termination of the contract and to verify the chance for the new contractor to take on the personnel employed by the former[63].

In the presence of such social clauses, which are therefore improperly defined "rehiring" social clauses, the employers will have no other obligation than that of consultation in respect of the principles of fair dealing and good faith.

Usually, some collective agreements require that the change of the contractor involves a minimum number of workers, for the information obligation to arise[64].

Obligations to inform and consult are also provided for in collective agreements establishing a higher level of protection, as a starting point for the turnover procedure. For example, art. 4 of the national collective agreement for employees in the cleaning

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[60] GAROFALO D., *Il cambio di appalto tra disciplina legale e disciplina autonoma*, cit., 206.

[61] On this topic, see BASENGHI F., *Decentramento organizzativo e autonomia collettiva*, cit., 21; RATTI L., *Le clausole sociali di seconda generazione: inventario di questioni*, cit., 467 ss; GAROFALO D., *Lavoro, impresa e trasformazioni organizzative*, cit., 37; FALERI G., *Le clausole sociali di riassunzione nella successione di appalti quale strumento di governance per un mercato concorrenziale e socialmente responsabile*, in BORGOGELLI F. (a cura di), *Destrutturazione dell'impresa e tutela dei lavoratori: strumenti di governance*, Rapporto Prin, 19 ss; RECCHIA G. A., *Cambio appalto, stabilità occupazionale e contrattazione collettiva*, cit., 235 ss; AIMO M., *Stabilità del lavoro e tutela della concorrenza. Le vicende circolatorie dell'impresa alla luce del diritto comunitario*, cit., 420; MARINELLI F., *La tutela del posto di lavoro in caso di cessazione dell'appalto*, in CARINCI M.T., CESTER C., MATTAROLO M.G., SCARPELLI F. (a cura di), *Tutela e sicurezza del lavoro negli appalti privati e pubblici: inquadramento giuridico ed effettività*, Torino, 2011, 219 ss.

[62] Art. 38 CCNL per i lavoratori dipendenti e soci lavoratori delle imprese cooperative di multiservizi, pulizia e logistica (national collective agreement for employees and working members of multi-service, cleaning and logistics cooperatives). There are similar provisions in almost allthe collective agreements dealing with the change of contractors.

[63] Art. 106 CCNL per i dipendenti delle imprese esercenti attività del settore pulizie; art. 8 CCNL strutture socio-sanitarie Anaste; art. 73 CCNL strutture sociosanitarie Uniba; art. 3 Contratto collettivo per i dipendenti da aziende termali; art. 331 e 332 CCNL Turismo.

[64] Art. 43 CCNL Pulizie imprese artigiane require that the turnover of contractors involves at least 5 workers; the social clause laid down in art. 224 CCNL Turismo, agenzie di viaggio e pubblici esercizi, operates only where the turnover involves at least 10 workers or 8% of the workforce.

and multi-service companies (CCNL Multiservizi) stipulated on 31 May 2011 provides for an obligation on the former employer to inform within 15 days prior to the termination of the contract to the competent company-level and territorial unions. The "Multiservizi" national collective agreement specifies that this notice shall contain information on the number of employees involved in the turnover of contractors and on their weekly working time, and it indicates the workers employed in that contract for at least 4 months. Also the taking over contractor shall notify the territorial trade unions of the takeover of the contract[65]. This information is preliminary and preparatory for the next phase, consisting of a consultation with trade unions, where the contractor takes over the contract with different terms, or rehire the personnel, if the new contract has same conditions. Such clauses are called "weak" social clauses.

Some social clauses provide for a greater level of protection and consequently affect the economic activity. According to such clauses, the new contractor has to take on the workers employed by the previous contractor in the same contract. In many cases, this obligation arises only if the new contract is carried out «under the same contractual conditions»[66]. In fact, where the contractor takes over the contract «at the same terms», the succeeding company is obliged to rehire the employees without a probationary

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[65] See also art. 37 CCNL per il personale dipendente da imprese di pulizia, di disinfestazione e servizi integrati – multiservizi of 26 July 2011; art. G3 CCNL for the groundhandling sector provides that, at least 25 days before the date of the change of contractor, the companies shall communicate to trade unions representatives the information relating to the staff involved in the turnover. Within the following 7 days, trade unions can request a meeting with the employers to know the reasons for the transfer and the implications regarding the personnel. Similar information obligations are provided for in the majority of collective agreements requiring the rehiring of the previous contractor's staff: see, for example, art.173 CCNL per i dipendenti di attività operanti nel campo della formazione e orientamento della sicurezza sula lavoro, qualità e ambiente e di imprese che esercitano servizi integrativi antincendio; art. 25 CCNL applicabile ai lavoratori dipendenti dalle PMI e i soci dipendenti delle cooperative di outsourcing; art. 45 CCNL per il personale dipendente non medico da strutture sanitarie, socio-sanitarie e cooperative socio-sanitarie ed assistenziali private; art. 37 CCNL per le lavoratrici e i lavoratori delle cooperative del settore socio-sanitario assistenziale-educativo e di inserimento lavorativo; art. 7 CCNL servizi postali in appalto -15 giugno 2012; art. 31 CCNL per la categoria delle agenzie di somministrazione di lavoro ASSOLAVORO - 27 febbraio 2014; art. 6 CCNL servizi ambientali FEDERAMBIENTE - 17 giugno 2011; art. 42 - CCNL traporto, merci e logistica del 3 dicembre 2017; art. 61 CCNL industria turistica (Confindustria); art. 97 CCNL per dipendenti delle aziende del settore turismo (Confcommercio) - 20 febbraio 2010; art. 16 bis CCNL mobilità – autoferrotranvieri, 28 novembre 2015. Art. 25 CCNL per i dipendenti da istituti e imprese di vigilanza privata e servizi fiduciari poses some special conditions to start the contracotrs' turnover procedure. The former enterpreneurs «if interested» gives notice to the union representatives, to the new contractor of the personnel employed. This seems to be a suspensive condition of the obligation to rehire, as confirmed by art. 27, paragraph 6, pursuant to which the non-fulfillment of such incumbent will exempt the suceeding institution from any obligation towards workers previously employed in the contract. On the social clause in this last contract, see MUTARELLI M. M., *La clausola sociale per il cambio di appalto nel c.c.n.l. vigilanza privata*, in *Il diritto dei lavori*, 2014, 1, 59 ss.

[66] See art. 4 CCNL Multiservizi, 31 May 2011; art. 173 CCNL per i dipendenti di attività operanti nel campo della formazione e orientamento della sicurezza sula lavoro, qualità e ambiente e di imprese che esercitano servizi integrativi antincendi; art. 53 bis CCNL igiene ambientale – azienda private - 5 gennaio 2016; art.7 CCNL servizi postali in appalto; art. 45 CCNL per il personale dipendente non medico da strutture sanitarie, socio-sanitarie e cooperative socio-sanitarie ed assistenziali private; art. 37 CCNL per lavoratori delle cooperative del settore socio sanitario assistenziale-educativo e di inserimento lavorativo; art.36 bis CCNL per dipendenti da imprese esercenti autorimesse, noleggio auto. See MUTARELLI M. M., *Gli effetti delle clausole di riassunzione nell'avvicendamento di appalti privati,* cit., 341 ss.

period[67]; usually, this rule doesn't apply where there are changes in the organisation or in the object of the contract[68]. In other cases, the clauses are more generic and leave much more discretion to the employer: e.g., the National Collective Agreement for private security (Vigilanza privata) requires the succeeding contractor to rehire the personnel previously employed in the contract only if the former one has an interest in it[69].

In the case of «modification of terms, methods and contractual services», usually collective agreements only provide for an obligation to consult trade unions[70]. Certain collective agreements make the taking on obligation proportionate to the activity of new contract: in the event of a change in the contractual conditions resulting in a reduction in the number of workers for the performance of the contract or the provision of the service, the workers will be rehired in accordance with the new contractual conditions[71] or with the numbers established in the notice[72].

Some collective agreements foreseeing additional conditions for the rehiring obligation to arise, such as a minimum period of work in the contract[73] or a minimum percentage of workers involved in the take-over[74]. Sometimes, the obligation to rehire is limited to a certain percentage of the personnel previously employed in the contract[75]

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[67] Art. 4 CCNL Multiservizi requires that the workers have been employed in the contract for at least 4 months; see also art. 45 del CCNL per il personale dipendente non medico da strutture sanitarie, socio-sanitarie e cooperative socio-sanitarie ed assistenziali private.

[68] Art. 37 CCNL Cooperative sociali; art. 45 CCNL strutture sanitarie, socio-sanitarie e cooperative socio-sanitarie ed assistenziali private.

[69] This provision is peculiar of CCNL Vigilanza Privata (art. 25).

[70] Many collective agreement contain a similar provision: art. 37 CCNL cooperative sociali; art. 6 comma 7 CCNL servizi ambientali; art. 336 CCNL Turismo; art. 7 CCNL Servizi postali; art. 4 CCNL Multiservizi.

[71] Art. 31 CCNL agenzie di somministrazione di lavoro Assolavoro; art. 27 CCNL per i dipendenti da istituti e imprese di vigilanza privata e servizi fiduciari.

[72] Art. 31 CCNL Agenzie di somministrazione di lavoro ASSOLAVORO.

[73] Art. 4 CCNl Multiservizi; art. 7 CCNL servizi postali in appalto; art. 53 bis CCNL igiene ambientale – aziende private; art. 6 CCNL servizi ambientali Federambiente; art. 16 bis CCNL mobilità – trasporto ferroviario. See VALLEBONA A., *Successione nell'appalto e tutela dei posti di lavoro*, in *RIDL*, 1999, II, 218.

[74] Art. 208 CCNL amministratori di condominio e servizi immobiliari. See. RICCI G., *Subingresso nell'appalto, clausola di riassunzione "parziale" e tutela dei lavoratori pretermessi*, in *GC,* 1996, 12, 3301 ss, who defines these provisions as "partial rehiring clauses", since they require to take on only a share of the workers employed by the former companyArt. G3 CCNL personale di terra del trasporto aereo e delle attività aeroportuali states that any transfer of activity characterized by the pre-existence of an identifiable organization, which may also result from the exercise of organizational and managerial powers, involves the transfer of personnel, identified on the basis of the share of traffic acquired by the new contractor, with application of the economic and regulatory treatment referred to in the collective agreement.

[75] Art. 208 CCNL amministratori di condominio e servizi immobiliari, in the presence of the conditions identified by the same rule, requires the incoming entrepreneur to rehire at least 60% of the personnel employed in the contract.

or workers with high professional skills are excluded[76]. In other cases, the social clauses only provide for a priority in the hiring[77].

Although not frequently, some social clauses also regulate the future employment conditions of workers affected by the turnover of the contractor: they ensure the economic treatment, terms and conditions previously enjoyed by those workers[78], the periodic seniority wage increases[79], and the recognition of the length of service, determined on the basis of the period of work being employed continuously in the same contract by the employers who apply the same national collective agreement[80]. Often, those provisions specify that, in the event of taking over, the former employer is relieved from the payment in lieu of notice[81] and that it is considered a new employment contract, even if the probation period is excluded[82].

In an attempt to partially overcome the issues concerning the effectiveness of social clauses, some collective agreements require the client to include in the contract the obligation to rehire the personnel or the commitment to give priority to the workers employed by the former contractor[83]. Art. 42 of the Logistics national collective agreement, for example, provides that, where the take-over is at same contractual conditions, the client includes in the procurement contract the direct and seamless transfer to the new contractor of the personnel employed for at least 6 months and ensures the conservation of the length of service, the pay and conditions of employment[84]. The latter social clauses are similar to those provided for by the law for the public sector, where the commitment to comply with these obligations is a condition for the award of the contract. Such social clauses are much more effective. However, the national collective agreements generally limit this commitment, foreseeing a condition for the enforceability of the rehiring social clauses: there must be the same conditions and the organizational autonomy of the succeeding company must be guaranteed, also considering the technological and IT innovations intervened[85]. It is

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[76] Art. 94 CCNL per i dipendenti delle agenzie di sicurezza sussidiaria e degli istituti investigativi e di sicurezza; art. 335 CCNL Turismo, which excludes from the scope of the social clause the personnel that carries out tasks of management and coordination.

[77] Art. 201 CCNL per i dipendenti delle imprese artigiane e/o delle piccole imprese industriali. Imprese di pulizia, servizi integrati – multiservizi (FISMIC – Confsal, FILCOM – Fismic).

[78] Art. 16 CCNL mobilità – autoferrotranvieri.

[79] Art. 37 CCNL Cooperative sociali.

[80] Art. 6 CCNL servizi ambientali Federambiente. Also art. 27 CCNL vigilanza privata guarantees the workers rehired by the suceeding contractor the application of the treatment provided for in the same collective agreement and the maintenance of seniority. See Cass. 5 giugno 2012, n. 9011, *Diritto e Giustizia online 2012,* 6 giugno 2012.

[81] Art. 53 bis CCNL igiene ambientale – aziende private; art. 7 CCNL servizi postali; art. 4 CCNL Multiservizi.

[82] Art. 7 CCNL servizi postali in appalto, art. 4 CCNL Multiservizi, art. 173 CCNL per i dipendenti di attività operanti nel campo della formazione e orientamento della sicurezza sula lavoro, qualità e ambiente e di imprese che esercitano servizi integrativi antincendi, art. 6 CCNL servizi ambientali Federambiente, art. 27 CCNL vigilanza privata. See CARCHIO C., *Periodo di prova e cambio appalto*, in GAROFALO D. (a cura di), *Appalti e lavoro, II, Disciplina lavoristica*, Torino, 2017, 273 ss.

[83] Art. 16 CCNL Attività ferroviarie.

[84] Art. 42 CCNL Logistica, as amended by the agreement of December 3 2017, provides that for workers employed before March 7, 2015, the law no. 92/2012 apply.

[85] Art. 42 del CCNL Logistica.

important in order to preserve the freedom to conduct a business of the new contractor; but in this way the protection provided for by rehiring social clauses is lower[86].

The same assessments are valid also for the provision of company-level collective agreement dealing with the turnover of contractors. Even at this level, some social clauses only provide for an obligation to inform and consult the trade unions[87]; some others guarantee a priority in hiring[88] or contain genuine social clauses requiring to take on employees previously employed in the same contract[89].

The rehiring social clauses have a "mixed nature", since they combine information and consultation rights and the recognition of subjective rights for the worker, at least in the case of the so-called "strong" rehiring social clauses[90].

As for the equal treatment social clauses, the enforceability of such clauses is strictly connected to the applicability of collective agreements in Italian legal order: the condition for their functioning is that the new contractor is bound to apply the provisions of the collective agreement by virtue of the membership to the stipulating trade union or for the explicit reference to them in the procurement contract[91]. If the employer is not member of any employers' association stipulating the collective agreement that provides for such an obligation, he will not be obliged to take on the personnel. Indeed, social clauses requiring the client to include them in the procurement contract are more effective.

If the "weak" social clauses, i.e. containing information and consultation duties are infringed, only monetary compensation is admissible. According to scholars and the settle case law, as for the first-generation social clauses, with reference to the genuine rehiring social clauses, in case of turnover of contractors on equal terms, the figure of the contract in favour of third parties (1411 - 1413 cc) is applicable [92]: this entail the

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[86] See Trib. Milano, 6 settembre 2018, n. 2032.

[87] See Accordo integrativo aziendale del Gruppo Mediaset el'Accordo aziendale Grandi Salumifici italiani S.p.a. - 21 febbraio 2018; l'Accordo integrativo aziendale Società Telespazio s.p.a., in which the social partners undertake to carry out in-depth analyses in relation to the possibility of providing in the calls for tenders and in the contracts clauses requiring the contractors and subcontractors to comply with the regulations on health and safety, and social security, as well as the application of the national collective agreement stipulated by the most representative trade unions in the sector..

[88] Contratto integrativo aziendale 2018-2020 Ferretti spa.

[89] Contratto integrativo aziendale 2018 – 2020 Goldoni Spa.

[90] MARINELLI M., *Decentramento produttivo e tutela dei lavoratori*, cit., 226; LOZITO M., *Tutele e sottotutele del lavoro negli appalti privati*, cit., 129; RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, cit., 46; LAMBERTUCCI P., *Area contrattuale e autonomia collettiva*, in *Diritto del lavoro e nuove forme di decentramento produttivo*, Atti delle giornate di studio di diritto del lavoro, Trento, 4-5 giugno 1999, Milano, 2000, 113-114; MARIUCCI L., *Il lavoro decentrato. Discipline legali e contrattuali*, cit., 256 ss; BELLOCCHI P., *sub. Art. 2071* c.c., in AMOROSO G., DI CERBO V., MARESCA A. (a cura di), *Diritto del lavoro. La Costituzione, il Codice civile e le leggi speciali*, Milano, 2013, 675-676. See Cass. 17 febbraio 1993, n. 1963; Cass.8 ottobre 1991, n. 10560; Cass. 24 maggio 1985, n. 3162.

[91] See Interpello 1 agosto 2012, n. 22 del Ministero del lavoro. see MUTARELLI M. M., *Gli effetti delle clausole di riassunzione nell'avvicendamento di appalti privati*, cit., 339; RECCHIA G. A., *Cambio appalto, stabilità occupazionale e contrattazione collettiva*, cit., 247 ss; MUTARELLI M. M., *Riassunzione nell'avvicendamento di appalti e jobs act*, cit., 296 ss; GAROFALO D., *Il cambio di appalto tra disciplina legale e disciplina autonoma*, cit., 206; VALLEBONA A., *Successione nell'appalto e tutela dei posti di lavoro*, cit., 218.

[92] MARINELLI F., *La tutela del posto di lavoro in caso di cessazione dell'appalto*, cit., 220. See Cass. 8 ottobre 1991, n. 10560; Cass. 28 agosto 2013, n. 19579; Cass. 8 settembre 2014, n. 18860. An opposite

recognition of the right of the employees to be rehired and the enforceability of such clauses. On the contrary, some scholars apply the scheme of preliminary contract[93], since the second-generation social clauses oblige the employer to enter into an employment contract with the employees of the previous contractor, or to the scheme of the obligation to contract[94]. In any case, workers are entitled to be hired by the new employer only if the workers are determined or, at least, determinable. Art. 2932 of the Civil Code, which aims at giving specific performance to the obligation to contract, is applicable only if all the elements of the contract can be identified, so that it is possible to start the execution of the contract without any further specification on the subject of the contract[95]. Where the workers aren't identified, in the case in which the obligation is unfulfilled, the workers will not be able to ask for the execution of the contract pursuant to art. 2932 c.c.: they can only ask for full compensation for damages[96]. Therefore, non-specific social clauses, not identifying the workers entitled to be rehired, aren't enforceable. In this case, such workers haven't a right, but they only have an expectation to be hired by the new contractor[97].

Similarly, art. 2932 c.c. doesn't apply when subject of the new procurement contract is not determined or determinable[98] or if the contractors don't respect information and consultation procedures. For these reasons, workers will have no entitlement to be hired, whether the terms, methods or subject of the contract change.

In conclusion, the right of workers to be re-hired by the succeeding contractor is anything but "perfect" and it is difficult to enforce: in fact, there are only few contractual clauses providing for an unconditional obligation for the contractor to take on the personnel of the previous one in the takeover. In many cases, the only protection for the workers is the compensation for damages from non-compliance with the social clauses[99]; in addition, trade unions may take a legal action for the repression of the anti-union conduct and ask for compensation of the damage[100].

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opininon is espressed by RICCI G., *Subingresso nell'appalto, clausola di riassunzione "parziale" e tutela dei lavoratori pretermessi*, in *Giust. Civ*., 1996, 3301 ss; RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, cit., 61 ss.

[93] MARINELLI M., *Decentramento produttivo e tutela dei lavoratori*, Torino, 2002, 217 ss. See, for example, Cass. 26 agosto 2003, n. 12516.

[94] RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, cit., 78; RECCHIA G. A., *Cambio appalto, stabilità occupazionale e contrattazione collettiva*, cit., 250.

[95] Cass. 26 luglio 2003, n. 12516; Cass. 5 agosto 2010, n. 18277; Cass. 26 agosto 2003, n. 12516. See MUTARELLI M. M., *Riassunzione nell'avvicendamento di appalti e jobs act*, cit., 300; DI BONO F., *Cambio di appalto e mancata assunzione*, in GAROFALO D., *Appalti e lavoro*, *II, Disciplina lavoristica*, Torino, 2017, 326.

[96] See Cass. 5 agosto 2010, n. 18277, in *Giust. civ. Mass*. 2010, 9, 1186.

[97] RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, cit., 40.

[98] Cass. 13 giugno 2003, n. 8489, in *Not. Giur. Lav.*, 2003, 33; Cass. 16 maggio 1998, n. 4953, in *Giust. Civ.*, 1999, I, 1501; Cass. 4 maggio 2004, n. 8568.

[99] MUTARELLI M. M., *Gli effetti delle clausole di riassunzione nell'avvicendamento di appalti privati*, in CARINCI M.T. (a cura di), *Dall'impresa a rete alle reti di impresa*, Milano, 2015, 337 ss.

[100] MUTARELLI M. M., *Riassunzione nell'avvicendamento di appalti e jobs act*, cit., 302; MUTARELLI M. M., *Contrattazione collettiva e tutela dell'occupazione negli appalti*, cit., 310.

5. The consequences of the application of rehiring social clauses on redundancy legislation: dismissals, exemptions from redundancy benefits and length of service

Statutory provisions concerning rehiring social clauses have been few and sectorial; on the contrary, many provisions have regulated the consequences of the turnover of contractors and the application of rehiring social clauses provided for by collective agreements[101]. Reference is made to the regulations concerning dismissal in the event of a take-over of the contract, calculation of length of service in the employment relationship with new contractor, and the incentives to foster employers rehiring the employees of the previous contractor.

Concerning the dismissals in the event of the change of contractor, for a long time according to the scholars and the case law, the regulations on collective redundancies were not considered to be applicable, even if there were numerical, dimensional and timing requirements provided for in Law n. 223/1991: such dismissals were considered as multiple individual dismissals justified by objective reason[102]. This interpretation did not consider that the turnover of contractors could integrate the requirement of reduction or transformation of the activity or work referred to in art. 24, paragraph 1, l. n. 223/1991: according to this approach, it seemed more appropriate to exclude the applicability of this regulations since the change of contractor is a "physiological" event for companies[103]. According to an opposite approach, this exclusion may be justified by the application in analogic way of paragraph 4 of art. 24, which excludes from the scope of application of law n. 223/1991 the closure of construction sites and fixed-term contracts. As in these cases, when employment relationships are connected to procurement contracts, they are linked to the duration of the contract[104].

According to an opposite and more convincing approach, law n. 223/1991 overcomes the "so-called ontological notion of collective redundancies": it means that only dimensional, numerical, and timing requirements shall be considered[105]. Furthermore, the exclusion from the scope of application of the collective redundancies' regulations would be in conflict with Directive 98/59 on collective redundancies, since it would lead to an undue reduction of the scope of application of the directive[106]. This thesis is confirmed by art. 7, paragraph 4 bis, of Legislative Decree 248/2007, converted into

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[101] See GAROFALO D., *Lavoro, impresa e trasformazioni organizzative*, cit., 33.

[102] RONDO, A., *Scadenza d'appalto nel settore delle pulizie, licenziamento e legge n. 223 del 1991*, in *MGL*, 1998, 703 ss. See Circolare Ministero del lavoro 29 novembre 1991, n. 155 e Circ. L/01 28 maggio 2001. For a critical view, see SCARPELLI F., *Cessazione degli appalti di servizi e licenziamenti collettivi*, in *DPL*, 2001, 31, 2063 ss.

[103] Interpello ministero lavoro 22/2012. See SCOLASTICI R., *Le clausole sociali sul cambio di appalto: quali tutele per i lavoratori,* in www.bollettinoadapt.it, 3 giugno 2013.

[104] See Cass. 22 novembre 2016, n. 23732. *Contra*, COSIO R., *Cambio di appalto. Licenziamenti, trasferimenti di azienda e clausole sociali*, in *LavoroDirittiEuropa*, 2018, 2,4.

[105] SCARPELLI F., *Cessazione degli appalti di servizi e licenziamenti collettivi*, in *Dir. Prat. Lav*., 2001, 2066. See also Cass. 21 maggio 1998, n. 5104, in *RIDL*, 1999, II, 206 ss., con nota di LAZZARI C., *Appalti di servizi e licenziamenti collettivi*, e di VALLEBONA A., *Successione nell'appalto e tutela dei posti di lavoro*.

[106] SCARPELLI F., *Cessazione degli appalti di servizi e licenziamenti collettivi*, cit., 2063 ss.

Law n. 31/2008, which states that in the event of a takeover of a new contractor, the taking on of the personnel previously employed in the same contract does not entail the application of art. 24 of law of n. 223/1991 to the workers rehired by the succeeding company at the same economic and regulatory conditions, pursuant to social clauses established in national collective agreements stipulated by comparatively more representative trade unions. In fact, excluding the applicability of the regulation on collective redundancies only where the workers are rehired at the same terms and conditions, this provision indirectly asserts that this regulation is applicable to this situation in all other cases[107].

Regarding the regulations on individual dismissals, some issues arise concerning the relationship between the turnover of contractors, the individual dismissal, and the conditions for the applicability of social clauses. According to case law, the termination of the procurement contract does not entail the dismissal nor does it constitute in itself a justified objective reason for dismissal[108]. Therefore, it is necessary that the employers comply with the statutory provision on dismissal, which cannot under any circumstances be waived by contractual provisions[109].

For example, it is still unresolved the case in which the previous contractor takes over another contract and takes on new employees, even in compliance with a social clause, thus causing a breach of the *repêchage* obligation[110]. The case in which the worker opposes the transfer to the new contractor is also problematic.

Concerning the first case, with regard to the relationship between the previous contractor and the workers, come scholars think that, where the rehiring social clauses work correctly, the taking on of the workers by the new contractor involves an implicit surrender of the worker to challenge the dismissal[111].

According to a different approach, the communication of the end of the contract and the subsequent application of social clauses constitute a proposal for a consensual resolution of the employment contract, which the workers can accept also for conclusive facts: the acceptance of the new job entails the acceptance of this proposal and the

[107] See MUTARELLI M. M., *Gli effetti delle clausole di riassunzione nell'avvicendamento di appalti privati,* cit., 345 ss; MUTARELLI M. M., *Riassunzione nell'avvicendamento di appalti e jobs act*, cit., 312; LAZZARI C., *Appalti di servizi e licenziamenti collettivi*, cit., 207 ss; SITZIA A., CORDELLA C., *I fenomeni di esternalizzazione e l'apparato sanzionatorio/dissuasivo*, in BROLLO M., CESTER C., MENGHINI L., *Legalità e rapporti di lavoro. Incentivi e sanzioni*, Trieste, 2016, 393.

[108] Cass. 14 luglio 2000, n. 9398; Cass., Sez. Lav., 9 giugno 2005, 12136. *Contra* Cass., Sez. Lav., 12 aprile 2006, n. 8531; Trib. Lamezia Terme 19 gennaio 2011.

[109] Cass. 9 giugno 2005, 12136; Cass. 29 maggio 2007, n. 12613; Cass. 28 settembre 2010, n. 19842; Cass. 20 novembre 2018, n. 29922.

[110] Cass. 12 aprile 2006, n. 8531. See CARINCI M.T., *Gli appalti nel settore privato. La distinzione tra appalto e trasferimento d'azienda ed il trattamento dei lavoratori impiegati negli appalti*, cit., 443; BUONCRISTIANI D., F*orme di tutela del lavoratore "ereditato" nel cambio di gestione di appalti labour intensive*, cit.,169 ss; LIMA A., *La successione negli appalti e le possibili conseguenze per i lavoratori: prosecuzione del rapporto, licenziamento, risoluzione consensuale, nuova assunzione. Riflessioni dopo la c.d. riforma Fornero*, cit., 635 ss.

[111] Cass. 18 ottobre 2002, n. 14824. See BUONCRISTIANI D., *Forme di tutela del lavoratore "ereditato" nel cambio di gestione di appalti labour intensive*, in *RIDL*, 2007, 179; MARINELLI M., *Decentramento produttivo e tutela dei lavoratori*, cit., 227 ss.

impossibility of challenging the dismissal[112]. This approach circumvents the procedural and operational complexities associated with dismissal regulations[113]; however, this opinion cannot be shared, since it would imply a breach of the statutory regulation on dismissal, which, as already highlighted, cannot in any case be waived by contractual provisions. In addition, it would undermine the right of workers to challenge the dismissal in the presence of an effective interest of protection, as in the case of recruitment by the new contractor at lower conditions compared to those enjoyed in the previous relationship[114].

According to a settled case law, on the contrary, the renunciation of challenging the dismissal cannot be inferred implicitly from the behaviour of the worker or, for example, from finding of a new job, since such choice does not reveal in a univocal way, even if implicit, the intention of the worker to accept the dismissal[115]. In any case, since they are different employment relationships, with different obligations and employer duties, the protection provided for by a rehiring social clause does not exclude, but it is added to, the protection provided for the employee against the employer who dismissed him[116].

Another relevant statutory provision is art. 2, paragraph 34, lett. a), of Law no. 92/2012. This provision, aimed at making the rehiring of the personnel more convenient in the event of turnover of contractors, establishes an exemption from the tax due for the termination of the employment relationship in the event of dismissals caused by the change of contractor, where the employees have been rehired by the new contractor, in the implementation of social clauses guaranteeing the employment stability provided for

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[112] VALLEBONA A., *Successione nell'appalto e tutela dei posti di lavoro*, in *RIDL*, 1999, II, 219; MARINELLI F., *La tutela del posto di lavoro in caso di cessazione dell'appalto*, cit., 226. La giurisprudenza è tendenzialmente contraria a tale impostazione. Cfr. Cass. 16 aprile 2008, n. 9990; Cass. 29 maggio 2007, n. 12613, Cass. 24 febbraio 2006, n. 4166; Cass. 13 ottobre 2015, n. 20523. *Contra*, cfr. MARIMPIETRI I., *Cambio appalto e licenziamento per giustificato motivo oggettivo*, in GAROFALO D., *Appalti e lavoro*, *II, Disciplina lavoristica*, Torino, 2017, 334; MUTARELLI M. M., *Riassunzione nell'avvicendamento di appalti e jobs act*, cit., 308 ss; LIMA A., *La successione negli appalti e le possibili conseguenze per i lavoratori: prosecuzione del rapporto, licenziamento, risoluzione consensuale, nuova assunzione. Riflessioni dopo la c.d. riforma Fornero*, cit., 635 ss; SCHIAVONE E. C., *Cambio di appalto e assunzione da parte del subentrante: licenziamento o risoluzione consensuale*?, in GAROFALO D. (a cura di), *Appalti e lavoro, II, Disciplina lavoristica*, Torino, 2017, 341 ss.

[113] MUTARELLI M. M., *Riassunzione nell'avvicendamento di appalti e jobs act*, cit., 308.

[114] VENDITTI L, *La riduzione di personale per fine dell'appalto*, in *Il diritto dei lavori*, 2010, 499; PETRACCI F., *Il rapporto di lavoro nell'appalto*, cit., 273.

[115] Cass. 20 novembre 2018, n. 29922; Cass. 2 novembre 2016, n. 22121; Cass 24 febbraio 2006, n. 4166; Cass. 2 novembre 2016, n. 22121; Cass., Sez. Lav., 29 maggio 2007, n. 12613; Cass., Sez. Lav., 24 febbraio 2006, n. 4166; Cass. 29 maggio 2007, n. 12613; Cass. 24 febbraio 2006, n. 4166, in *RIDL*, 2006, II, 918 ss.; Cass. 22 novembre 2016, n. 23732; Cass. 12 aprile 2006, n. 8531, *Mass giust civ.* 2006, 770; Cass. 18 marzo 2005, n. 5918, in *MGC*, 2005, 3. See BRINO V., *Successione di appalti e tutela della continuità dell'occupazione*, in AIMO M., IZZI D., *Esternalizzazioni e tutela dei lavoratori*, Torino, 2014, 119; MARINELLI F., *La tutela del posto di lavoro in caso di cessazione dell'appalto*, cit., 226; LIMA A., *La successione negli appalti e le possibili conseguenze per i lavoratori: prosecuzione del rapporto, licenziamento, risoluzione consensuale, nuova assunzione. Riflessioni dopo la c.d. riforma Fornero*, cit., 635 ss; MUTARELLI M. M., *Riassunzione nell'avvicendamento di appalti e jobs act*, cit., 311.

[116] Cass. 2 novembre 2016, n. 22121, con nota di SCHIAVONE E. C., *Cessazione di appalto di servizi e licenziamento collettivo. Quando è legittima la deroga alla l. N. 223/1991? - Il commento*, in *LG*, 2017, 4, 355 ss; Cass. 29 maggio 2007, n. 12613; Cass. 20 novembre 2018, n. 29922. See BUONCRISTIANI D., *Forme di tutela del lavoratore "ereditato" nel cambio di gestione di appalti labour intensive*, cit., 179. See also Interpello ministero lavoro n. 22/2012.

by the national collective agreements stipulated by comparatively more representative trade unions and employers associations at national level[117].

The same aim is pursued by art. 1, paragraph 181, of l. n. 208/2015 (Legge di Stabilità 2016). Originally, workers employed under a permanent employment contract who were taken on by the succeeding contractor in the event of the change of contractors, pursuant to rehiring social clauses provided for by collective agreements, were excluded from such incentive[118]. Art. 1, paragraph 181, of l. n. 208/2015 extended the tax exemption also to the employer who takes over the contract and, even if provided for by a statutory provision or a collective agreement, rehire a worker with an open-ended contract, even if the previous contractor already benefited from the tax exemption[119].

Art. 7 of legislative decree n. 23/2015 limits the negative consequences deriving from the application of the dismissal's regulation introduced by Legislative Decree no. 23/2015 to workers involved in the frequent turnover of contractors in the same contract[120]. Because of the considerable importance that the length of service was intended to have in the original layout of the regulation introduced by Legislative Decree no. 23/2015, the legislator introduced a specific rule concerning the calculation of the seniority of the workers employed in the procurement contracts: for the purposes of the calculation of the redundancy payments due in case of unlawful dismissal, the length of service of the worker who is rehired by the succeeding contractor is calculated taking into account the entire period in which the worker was employed in the procurement contract activity[121].

Despite the aim of ensuring a higher level of protection for these workers and its anti-dumping rationale, the provision risked leading to the paradoxical result of discouraging the application of social clauses and the taking on of workers employed by the previous contractor, due to the higher cost caused by their seniority[122]. To overcome the weakness of the workers employed in the procurement contracts, some national and territorial collective agreements, shortly after the decree entered into force, have introduced a higher level of protection, guaranteeing the application of protections provided for by art. 18 of Worker's Statute to workers involved by a change of contractor and taken on

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[117] Art. 1, Par. 164, of l. n. 232/2016 (Legge finanziaria 2017) extended the exemption. See GAROFALO D., *Lavoro, impresa e trasformazioni organizzative*, cit., 33 ss; NOTARNICOLA B., *Cambio appalto e diritto di precedenza*, in GAROFALO D., *Appalti e lavoro, vol. II. Disciplina lavoristica*, Torino, 2017, 259.

[118] Circolare Inps 3 novembre 2015, n. 178.

[119] NOTARNICOLA B., *Cambio appalto e diritto di precedenza*, in GAROFALO D., *Appalti e lavoro, vol. II. Disciplina lavoristica*, Torino, 2017, 259.

[120] MUTARELLI M. M., *Riassunzione nell'avvicendamento di appalti e jobs act*, cit., 318 ss; ARIOLA L., *Subentro nell'appalto* labour intensive *e trasferimento d'azienda*, cit., 224.

[121] The same rule was laid down also for wage supplementary treatment by art. 1, co. 1, of Legislative Decree 148/2015.

[122] FILÌ V., *Il computo dell'anzianità di servizio nel cambio di appalto*, in GAROFALO D., *Appalti e lavoro, vol. II. Disciplina lavoristica*, Torino, 2017, 271; BASENGHI F., *Decentramento organizzativo e autonomia collettiva*, cit., 23. See SITZIA A., *Il "subentro" di nuovo appaltatore dopo la "legge europea" 2015-2016*, in *LG*, 2017, 6, 537 ss; TULLINI P., *Concorrenza ed equità nel mercato europeo: una scommessa difficile (ma necessaria) per il diritto del lavoro,* cit., 199 ss.

by the previous company before 7 March 2015[123]. However, the importance of art. 7 of Legislative Decree no. 23/2015 may be reduced as a result of the judgment of the Constitutional Court n. 194/2018[124], which judged art. 3 of Legislative Decree no. 23/2015 to be illegitimate where it established that the amount of the indemnity due in the event of illegitimate dismissal were fixed exclusively on the basis of the length of service. In fact, even with reference to those hired after 7 March 2015, in determining the amount of compensation for unjustified dismissal, the judge will have to take into account several factors, such as the number of employees, the size of the company, the behaviour, and the conditions of the parties, as well as the length of service.

6. Employers' turnover in public procurement contracts

The rehiring social clauses have gained a pivotal role also in the field of public procurement contracts, where the turnover of contractors in the execution of the work or in the provision of service is quite common: it doesn't depend on the organizational decisions made by the clients, but it is a choice determined by the necessary temporary nature of the contracts in this field[125].

Often, even under the previous version of the Code of public contracts, the contracting authorities used to provide, as a condition for awarding the contract, for an obligation to rehire the workforce employed by the former contractor or service provider. Although the turnover in the tender wasn't expressly regulated, this practice was based on art. 69 of Legislative Decree no. 163/2006, according to which the contracting authorities may lay down special conditions for the performance of the contract, including environmental and social considerations, provided that they are indicated in the tender documents[126]. The decision of inserting a social clause in the

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[123] Art. 36 bis CCNL autorimesse; art. 42 del CCNL Logistica; art. 3 CCNL del gruppo Anas; Accordo aziendale Novartis Farma del 20 marzo 2015. See TIRABOSCHI M., *L'art. 18 come benefit? A proposito del caso Novartis e della applicazione in via pattizia del regime di stabilità del contratto di lavoro*, in *DLRI*, 2015, 459 ss. LOZITO M., *Cambio-appalto e tutele (de)crescenti*, in *RGL*, 2015, 4, 857 ss, refers to further agreement, such as Oropan spa complay-level agreement of 27 March 2015 and Ati srl complay-level agreement of 19 June 2015.

[124] On this judgement, see CARINCI M. T., *La Corte costituzionale n. 194/2018 ridisegna le tutele economiche per il licenziamento individuale ingiustificato nel "Jobs Act", e oltre*, in WP C.S.D.L.E. "Massimo D'Antona".IT -378/2018; FONTANA G., *La Corte costituzionale e il decreto n. 23/2915: on step forward two step back*, in WP C.S.D.L.E. "Massimo D'Antona".IT - 382/2018; GIUBBONI S., *Il licenziamento del lavoratore con contatto "a tutele crescenti" dopo l'intervento della Corte costituzionale,* in WP C.S.D.L.E. "Massimo D'Antona".IT -379/2018; DE ANGELIS L., *Sentenza n. 194/2018 della Corte Costituzionae e giudizi pendenti: prime riflessioni*, in WP C.S.D.L.E. "Massimo D'Antona".IT -387/2019; BOLLANI A., *le tutele avverso il licenziamento ingiustificato e la sentenza n. 194 della Corte costituzionale: dopo le scosse, l'assestamento?*, in *DRI*, 2019, 1, 214 ss; MARESCA A., *Licenziamento ingiustificato e indennizzo del lavoratore dopo la sentenza della Corte costituzionale n. 194/2018 (alla ricerca della norma che non c'è*, in *DRI*, 2019, 1, 228 ss; TOSI P., *La sentenza n. 194/2018 della Corte costituzionale e il suo "dopo"*, in *DRI*, 2019, 1, 244 ss ; TURSI A., *Il diritto stocastico. La disciplina italiana dei licenziamenti dopo la sentenza della Corte costituzionale n. 194/2018 (e "decreto dignità")*, in *DRI*, 2019, 1, 256 ss; ZOPPOLI A., *Il licenziamento "de-costituzionalizzato": con la sentenza n. 194/2018 la Consulta argina, ma non architetta*, in *DRI*, 2019, 1, 277 ss.

[125] GAROFALO D., *Il cambio di appalto tra disciplina legale e disciplina autonoma*, cit., 205.

[126] Implementing art. 26 of Directive 2004/28, under art. 69, those conditions should be in conpliance with Union law and with the principle of equal treatment, non-discrimination, transparency and

tender notice and its contents were therefore left to the discretion of the contracting administration[127]. Even in the absence of a specific provision, in any case, there was an obligation to rehire employees whether the collective agreement for the sector and for the area where the contract is performed provided for a social clause and the contractor was obliged to observe this collective agreement pursuant to art. 118 (6) of Legislative Decree n. 163/2006[128]. In this case, the protection of employment was limited because the non-applicability and the lack of effectiveness of the collective agreements in Italian legal order.

Due to the importance of the phenomenon, art. 50 of legislative decree n. 50/2016 lays down a specific provision concerning social clauses aimed at promoting the employment stability of the workforce employed in the procurement contract[129]. In the light of its placement in the Code, the provision applies only to the awarding of contract, while art. 30 concerns the principles for the awarding and execution of procurements and concessions and has a wider scope of application.

Art. 50, as amended by legislative decree n. 56/2017[130], provides that, in compliance with the principles of the European Union, the contracting authority shall include in the calls for tender social clauses aimed at promoting the employment stability of the personnel employed, foreseeing the application by the contractor of the collective agreements referred to in Article 51 of Legislative Decree 15 June 2015, n. 81.

The scope of application of the social clause is limited to concession and procurement awarding procedures, "particularly" in labour-intensive contracts where labour cost is at least 50 per cent of the total costs[131]. As established by the Guidelines of the National Anti-Corruption Authority, this reference to labour-intensive contracts doesn't exclude that in other cases contracting authorities can insert a social clause: it means that in further cases it is a discretionary decision of the awarding authorities[132]. Instead, intellectual services, supply contracts and occasional contracts are completely excluded from the scope of application of the provision. In other cases, the workers are entitled to enjoy only the protection established in social clause referred to in collective agreements

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proportionality. See COSTANTINI S., *La finalizzazione sociale degli appalti pubblici. Le "clausole sociali" fra tutela del lavoro e tutela della concorrenza*, *WP C.S.D.L.E.* "Massimo D'Antona".IT-196/2014, 45.

[127] MARIMPIETRI I., *La clausola sociale di stabilità nel nuovo codice degli appalti pubblici*, in GAROFALO D. (a cura di), *Appalti e lavoro. Disciplina pubblicistica*, vol. I, Giappichelli, 2017, 937 ss.

[128] COSTANTINI S., *La finalizzazione sociale degli appalti pubblici. Le "clausole sociali" fra tutela del lavoro e tutela della concorrenza*, cit., 52.

[129] FERRANTE V., *Re-internalizzazione e successione di appalto nella gestione dei servizi pubblici*, *WP C.S.D.L.E.* "Massimo D'Antona".IT-385/2019; MARIMPIETRI I., *La clausola sociale di stabilità nel nuovo codice degli appalti pubblici*, cit., 937 ss.

[130] Art. 33 (1), lett. (a) of legislative decree n. 56/2017 amended the original version of art. 50, which provide that the public administration "can include" social clauses in the call for tender: this provision trasform a discretionary power into a proper obligation. See RATTI L., VILLA E., *The protection of employment in European public procurement and the role of the domestic implementation*, in *CritiQ*, 2018, 4, 369.

[131] Art. 50 of legislative decree n. 50/2016.

[132] See Linee guida n. 13 "*La disciplina delle clausole sociali*", of 13/02/2019. On the efficacy of these guidelines, see Cons. Stato, sez. affari normativi, comm. spec. 1° aprile 2016 n. 855; Cons. St., sez. affari normativi, comm. spec. 2 agosto 2016 n. 1767; Cons. Stato, sez. affari normativi, comm. spec. 13 settembre 2016 n. 1903; Cons. Stato 21 novembre 2018, n. 2703 (numero affare 1747/2018).

that, according to art. 30, must be applied to the personnel employed in the procurement or in the provision of services[133].

When the concession or procurement contract falls within the scope of application of art. 50, the contracting authority is obliged to insert the social clause in tender documents.

Concerning the content of the obligation, it must be borne in mind that the rationale of the provision is to protect the employment stability of the personnel employed by the former contractor in the performance of the contract. On the other hand, as Directive 2014/24, art. 50 requires that the principles of the European Union are respected: regardless of the legal or contractual nature of the obligation, the social clauses must comply with the principle of proportionality, free competition and freedom to conduct a business, provided for in art. 41 of the Constitution at national level and in art. 16 of the Charter of Fundamental Rights of the European Union. Concerning the latter, several issues have arisen: social clauses and the obligation to rehire the workforce may constitute a significant restriction on the freedom to conduct a business and the freedom of the entrepreneur to decide the way in which the work is organized.

Rehiring social clauses shall also provide for the application of sectoral collective agreements referred to in art. 51 of legislative decree 15 June 2015, n. 81[134]. Therefore, the rehiring obligation is a statutory obligation, while the content of the social clause and the ways of implementing such obligation are established by collective agreements. In this way, the law determines the content of the rehiring social clause "*per relationem*"[135], with a reference to the provisions of collective agreements, as provided for in art. 36 of Workers' Statute[136].

The issue of the selection of collective agreements in the case in which a plurality of collective agreements applies to the contract or concession has not been resolved. The statutory provision seeks to answer the doubts raised in the past on this issue by referring to the «collective agreements referred to in article 51 of legislative decree 15 June 2015, n. 81», namely national and company-level collective agreements stipulated by the comparatively most representative national trade unions. However, in many sectors, it is difficult to identify which trade union is more representative is rather problematic[137] and it is often difficult to select the contract for a sector rather than another[138]. Due to the large number of collective agreements for each sector, some scholars have stressed that the difficulties in identifying the social obligations that contractors must comply with can cause the inapplicability of such regulations to companies from other EU Member States, due to the violation of the obligation of improving access to information,

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[133] See TAR Genova, sez. II, 21 luglio 2017, n.640, in *Foro Amm.*, 2017, 7-08, 1670.

[134] MISCIONE M., *Trasferimento o subentri negli appalti e affidamenti delle società a controllo pubblico*, in *Lav. giur.*, 2018, 1, 5 ss.

[135] MARIMPIETRI I., *La clausola sociale di stabilità nel nuovo codice degli appalti pubblici*, cit., 941.

[136] With regard to art. 36 of Workers' Statute, see CENTOFANTI S., *Art. 36*, cit., 1194 ss; GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, cit., 134; MANCINI F., *Sub art. 36*, cit., 546; BORTONE R., *Commento all'art. 36*, cit.

[137] RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, cit., 137.

[138] On this issue, see Cass. 1° marzo 2019, n. 6143.

according to art. 5 of Directive 2014/67/EU. To overcome these risks and the doubts concerning the selection of the collective agreement, in line with the National Anti-Corruption Authority, scholars emphasises the need for the explicit indication in the tender documents of the collective agreement, that is applicable because it is linked to the subject-matter of the contract[139]. This provision is also laid down in art. 30 (4) of the Code of public procurement contracts, according to which the incoming economic operator is required to observe the treatment provided for in the applicable collective agreement referred to in the tender documents by the contracting authority. Thus, where the rehiring social clause provided for in the national collective agreement are more favourable than the one provided for in the call for tenders, the first applies.

In the tender documents, the contracting authorities should also expressly indicate all the elements relevant to the proposition of the tender in compliance with the social clause, in particular the data concerning to the personnel employed in the contract, taking into account that for the application of the social clause only the employees representing the average of the personnel employed in the six months preceding the date of call of tenders are considered[140].

In an attempt to overcome the concerns regarding this provision, the guidelines of the National Anti-Corruption Authority also address the complex issue of non-compliance with the social clause and define the consequences of non-compliance. Regarding this question, it is necessary to distinguish between the non-acceptance of the social clause, which is equivalent to propose a conditional tender, and the non-fulfilment of the obligations established in the social clause after the award of the contract. In the first case, concerning the awarding procedure, the violation causes the exclusion from the awarding procedure, since in the absence of the conditions required in the call for tender the bid is inadmissible. The second hypothesis, instead, concerns the performance of the contract and the compliance with the social clauses as a condition in the execution of the contract. In this case, pursuant to art. 100 of the legislative decree n. 50/2016[141], it is considered as a contractual breach and, consequently, the remedies provided for by the contract itself apply; only in the case of a serious breach of the contractual obligations by the contractor, such as to threaten the procurement of the provision of services, the contracting authority may decide to terminate the contract, pursuant to art. 108 (3).

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[139] PALLINI M., *Diritto europeo e limiti di ammissibilità delle clausole sociali nella regolazione nazionale degli appalti pubblici di opere e servizi*, in *DLRI*, 2016, 3, 538.

[140] See Autorità nazionale anticorruzione, Linee guida n. 13 recanti "*La disciplina delle clausole sociali*".

[141] The provision deals with the requirements for the execution of the contract: the contracting authorities may require special requirements for the execution of the contract, provided they are compatible with the EU law and with the principles of equal treatment, non-discrimination, transparency, proportionality, innovation, and that are specified in the tender notice. These conditions may concern, in particular, social and environmental considerations. In the offer, the economic operators shall accept to comply with these particular requirements.

CHAPTER IV

COMPATIBILITY ISSUES BETWEEN SOCIAL CLAUSES AND ECONOMIC FREEDOMS IN THE ITALIAN LEGAL ORDER

SUMMARY: 1. Right to work and private economic initiative. - 2. The social clauses to the test of the constitutional principles. - 2.1. The pursuit of public interest and the protection of employees in the award of public procurement contracts. - 2.2. Rehiring clauses and free economic initiative in the Code of public procurement contracts. - 2.3. The reference to collective agreements and the entrepreneurs' freedom of association. - 2.4. Consequences of failure to apply the collective agreement and effects on social dumping.

1. Right to work and private economic initiative

The analysis carried out in the previous chapters shows that social clauses are one of the "paradigmatic fields" where the contrast between social rights and economic freedoms emerges[1]: first- and second-generation social clauses may limit the freedom to conduct a business and free competition.

In the attempt to identify to what extent they are legitimate, the following paragraphs will identify the content and scope of relevant rights and freedoms in Italian legal system.

The right to work and the respect for the employee, as person carrying out his work, are recognized in some constitutional provisions that considerably limit the contractual autonomy[2]. The importance that work has in Italian legal order emerges in art. 1 of the Constitution, which identifies it as the founding principle of the Republic, and in art. 4 and 35 of the Constitution, which are a direct implementation of this principle[3]. These provisions identify work as means, on the one hand, to the affirmation and development of the personality, and, on the other hand, to the material and spiritual progress of society. Those provisions are closely related to the right to the full development of the human person, referred to in art. 3 of the Constitution, which is mainly implemented through the work; therefore, the right to work should be guaranteed[4]. In the right to work

[1] TULLINI P., *Concorrenza ed equità nel mercato europeo: una scommessa difficile (ma necessaria) per il diritto del lavoro*, cit. 199 ss.

[2] MORTATI C., *Sub art. 1*, in BRANCA G., *Commentario della Costituzione. Principi fondamentali. Art. 1-12*, Zanichelli-Foro Italiano, 1975, 16; MORTATI C., *Il lavoro nella Costituzione*, in *Problemi di diritto pubblico nell'attuale esperienza repubblicana. Raccolte di scritti III*, Giuffrè, Milano, 1972, 227 ss.

[3] MORTATI C., *Il diritto al lavoro secondo la Costituzione della Repubblica,* in *Problemi di diritto pubblico nell'attuale esperienza repubblicana. Raccolte di scritti III*, cit., 144 ss.

[4] Corte Cost. 2 giugno 1983, n. 163. See SCOGNAMIGLIO R., *La Costituzione repubblicana*, in PERSIANI M. (a cura di), *Le fonti del diritto del lavoro*, in *Trattato di diritto del lavoro* diretto da PERSIANI M., CARINCI F., 124 ss; D'ANDREA, *I principi costituzionali in materia economica*, in *Consulta online*, 7; GIUBBONI S., *Il primo dei diritti sociali. Riflessioni sul diritto al lavoro tra Costituzione italiana e ordinamento europeo*, in WP C.S.D.L.E. "Massimo D'Antona".INT – 46/2006.

a "synthesis" between the personalistic principle - which implies the claim to engage in work- and the solidarity- which indicates this activity as a duty - is realised[5].

The inclusion of the right to work among the fundamental principles of the Constitution, as a funding principle of the legal order[6], entails the recognition of its pre-eminence with respect to the other production factors, as a necessary means for the development of the human person; in this sense, it is a criterion for interpreting other constitutional provisions, including those concerning to economic rights[7]. As stated by the Constitutional Court, art. 1 of the Constitution introduces a guiding principle for the protection of work and art. 4 of the Constitution «highlights» the social importance of the right to work[8].

Such provisions don't protect job security, but, according to the interpretation given by the scholars, they are aimed at protecting the citizens' entitlement to demand the public authorities to achieve «full employment»[9]. More precisely, according to the Constitutional Court, the right to work referred to in art. 4 of Constitution doesn't entail a legal entitlement of individuals to get a specific job, but the opportunity of engaging in work and the obligation of the legislator to make this right effective by adopting concrete and appropriate measures promoting employment[10]. Therefore, they introduce a constraint to the discretion of the legislator that will have to consider this interest of the citizens[11], which is, according to the Constitutional Court, a fundamental freedom of the human person[12].

Since the right to work is included among the fundamental principles of the Italian legal system, the freedom to conduct a business isn't unconditional, but there is the need to reconcile this freedom and the rights described above. Art. 41 of the Constitution, according to which private economic enterprise is free, gives constitutional value to the freedom of private individuals to freely dispose of resources, to organize productive

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[5] MORTATI C., *Sub art. 1*, cit., 11 ss. Cfr. anche AMOROSO G., *Art. 1*, in AMOROSO G., DI CERBO V., MARESCA A., *Diritto del lavoro. La Costituzione, il codice civile e le leggi speciali. Vol. I*, Giuffrè, 2017, 4.

[6] TREU T., *Sub art. 35, 1° comma*, in BRANCA G., *Commentario della Costituzione. Rapporti Economici. Tomo I. Art. 35 - 40*, Zanichelli-Foro Italiano, 1975, 1 ss; CRISAFULLI V., PALADIN L. (a cura di), *Commentario breve alla Costituzione*, CEDAM, 1990, 34.

[7] MORTATI C., *Sub art. 1*, cit., 13.

[8] Corte Cost. 15 febbraio 1980, n. 16, in *Giur. cost*. 1980, I,137; Corte Cost. 26 luglio 1979, n. 83, in *Giust. civ*. 1979, III, 133; Corte Cost. 9 marzo 1967, n. 22.

[9] MANCINI F., *Sub art. 4*, in BRANCA G., *Commentario della Costituzione. Principi fondamentali. Art. 1-12*, Zanichelli-Foro Italiano, 1975, 209; MORTATI C., *Il lavoro nella Costituzione*, in GAETA L. (a cura di) *Costantio Mortati e "Il lavoro nella costituzione": una rilettura*, Giuffrè, 2005, 27 ss; CIRILLO F. M.., *Art. 4*, in AMOROSO G., DI CERBO V., MARESCA A., *Diritto del lavoro. La Costituzione, il codice civile e le leggi speciali. Vol. I*, cit., 63 ss. See Corte cost. 14 aprile 1969, n. 81.

[10] Corte Cost. 28 luglio 1976, n. 194; Corte Cost. 28 novembre 1986, n. 248, in *Giur. it.* 1989, I, 1, 247; Corte Cost. 20 febbraio 1973, n. 9. On the meaning of "right to work" in art. 4 Constitution, PESSI R., *Il diritto del lavoro e la Costituzione: identità e criticità*, Cacucci, 2019, 11.

[11] CRISAFULLI V., PALADIN L. (a cura di), *Commentario breve alla Costituzione*, cit., 35.

[12] On art. 4, see also Corte Cost. n. 194/2018. Concerning the idea of social right sas fundamental rights, MENGONI L., *I diritti sociali*, in NAPOLI M. (a cura di), *Il contratto di lavoro*, Vita e Pensiero, Milano, 2004, 135; GIUBBONI S., *Il primo dei diritti sociali. Riflessioni sul diritto al lavoro tra Costituzione italiana e ordinamento europeo*, cit.

activity and, therefore, to decide what, how, and where to produce[13]. The freedom of private economic enterprise is not guaranteed in an absolute and unconditional way: the right referred to in the first paragraph of art. 41 is protected within the limits outlined by the second paragraph[14], according to which the economic enterprise is free only as long as it isn't carried out against the common good or in such a manner that could damage safety, freedom and human dignity. In this way, by establishing that it may not be carried out against such elements, the constitutional provision prevents this freedom from damaging these important social values[15]. Finally, the third paragraph of the provision refers to the law providing for appropriate programs and controls so that public and private-sector economic activity may be oriented and coordinated for social purposes.

The meaning of the terms adopted in this provision has long been debated by academics and in the case law and it is still controversial[16]. It is not clear, in particular, what "common good" means. According to some scholars, it hasn't a precise meaning[17]; the reference to this concept may be aimed at making the compression of this freedom legitimate: according to paragraph 2 of art. 41, the freedom of private economic enterprise is intended to satisfy a plurality of interests which are constitutionally protected[18]. According to other academics, instead, it should be understood as common economic well-being[19], general and public interest[20] or, more precisely, it must be defined in the light of other «constitutionally protected interests», such as the protection of health, the personal freedom, the freedom of expression, the protection of the weaker party, or the pursuit of full employment[21].

According to settled interpretation, the common good or "social utility" and other limits identified by paragraph 2 of art. 41 of the Constitution don't represent a purpose that the economic enterprise should pursue, but they are «external» limits[22]. The "social utility" may justify the legislator to limit the organizational choices of the business, but

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[13] GALGANO F., *Sub art. 41*, cit., 4; SPAGNUOLO VIGORITA V., *L'iniziativa economica privata nel diritto pubblico*, Jovene, Napoli, 1959, 234 – 235. See Corte Cost. 22 novembre 1991, n. 420. *Contra*, BALDASSARRE, voce *Iniziativa economica privata*, in *Enc. Dir.*, 1971, Giuffrè, 599; LUCIANI M., *La produzione economica privata nel sistema costituzionale*, Cedam, Padova, 1983, 16; NIRO R., *Art. 41*, in BIFULCO R., CELOTTO A., OLIVETTI M. (a cura di), *Commentario alla Costituzione. Volume primo. Artt. 1*-54, Utet, Torino, 2006, 851 ss.

[14] Therefore, according to LUCIANI M., *La produzione economica privata nel sistema costituzionale*, cit., 45, freedom to conduct a business is "of lower rank" and less protected compared to the fundamental and inviolable freedoms.

[15] GALGANO F., *Sub art. 41,* cit., 15; SALAZAR C., *La Costituzione, i diritti fondamentali, la crisi: "qualcosa di nuovo, anzi d'antico"?*, in CARUSO B., FONTANA G. (a cura di), *Lavoro e diritti sociali nella crisi europea. Un confronto fra costituzionalisti e giuslavoristi*, Il Mulino, 2015, 98. See Corte Cost. 29 maggio 2009, n. 167, *Giur. Cost.,* 2009, 3, 1870; Corte cost. 29 aprile 2010, n. 152, in *Consulta online*; Corte Cost. 19 dicembre 1990, n. 584, in *Consulta online*.

[16] See CRISAFULLI V., PALADIN L. (a cura di), *Commentario breve alla Costituzione*, cit., 41.

[17] MORTATI C., *Il diritto al lavoro secondo la Costituzione*, cit., 166.

[18] Corte cost. 7 luglio 2006, n. 279, in *Consulta online*; Corte cost. 19 dicembre 1990, n. 584.

[19] SPAGNUOLO VIGORITA, *L'iniziativa economica privata nel diritto pubblico*, cit., 246 ss.

[20] LUCIANI M., *La produzione economica privata nel sistema costituzionale*, cit., 125 -126.

[21] NIRO R., *Sub art. 41 Cost.*, cit., 854 ss; LUCIANI M., *La produzione economica privata nel sistema costituzionale*, cit., 138 – 139.

[22] SANTORO PASSARELLI G., *Le "ragioni" dell'impresa e la tutela dei diritti del lavoro nell'orizzonte della normativa europea*, in *Eur. Dir. Priv.*, 2005, 65; COSTANTINI S., *Limiti all'iniziativa economica privata e tutela del lavoratore subordinato*, cit., 206.

entrepreneurs' freedom can be limited only on condition that such restrictions don't restricting beyond measure such freedom[23]. In fact, this provision does not introduce internal limits orienting the prerogatives of the entrepreneur in order to the realization of the interests of other individuals[24]. Therefore, the protection of common good is the "frontier of private enterprise", which the State can conditionate, reducing the powers and freedoms of the entrepreneurs, but it cannot eliminate it[25]. It means that it is legitimate to limits the freedom to conduct a business because of "social utility", provided that such limitations are the only measures to ensure the protection of the different interests[26], are respectful of the criteria of reasonableness and proportionality, and that common good is not pursued through incongruous measures[27]. According to art. 41 of the Constitution, in the relationship between freedom to conduct a business and other constitutionally protected rights, potentially contrasting with the former, there must be a fair balance between rights: on the one hand, social rights, which are fundamental rights of workers[28], as rights of the person in the particular context, in which, for cultural, social, physical or sociological reasons, he/she lives[29]; on the other hand, the freedom of private economic enterprise, which appear to be a freedom, but creates rights and has nature of a fundamental right[30]. Due to this qualification in terms of fundamental freedom, the individual may legitimately demand for the protection of this freedom.

However, with a view to balancing conflicting rights, it has been observed that, since the freedom of private economic enterprise isn't included among the fundamental principles of the Constitution, it is less guaranteed among the freedoms protected by Italian Constitution[31].

Art. 41 of the Constitution is also the basis of the principle of free competition. According to reliable scholars, the legal source of freedom of competition can be found in the same constitutional provision protecting the freedom of private economic

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[23] Corte cost. 19 dicembre 1990, n. 584; Corte Cost. 11 luglio 2018, n. 151, in *Foro it.,* 2019, 2, I, 396; Corte Cost. 24 gennaio 2017, n. 16; Corte Cost. 21 luglio 2016, n. 203; Corte Cost. 22 luglio 2010, n. 270. See VINCENTI E., *Art. 41 Cost.*, in AMOROSO G., DI CERBO V., MARESCA A. (a cura di), *Diritto del lavoro. La Costituzione, il Codice civile e le leggi speciali*, cit., 385; CARINCI M. T., *Il giustificato motivo oggettivo nel rapporto di lavoro subordinato. Ragioni tecniche, organizzative, produttive (e sostitutive) come limite a poteri e libertà del datore di lavoro*, Cedam, 2005, 128.

[24] CARINCI M. T., *Il giustificato motivo oggettivo nel rapporto di lavoro subordinato. Ragioni tecniche, organizzative, produttive (e sostitutive) come limite a poteri e libertà del datore di lavoro*, Cedam, 2005, 129.

[25] MANCINI F., *Sub art. 4*, cit., 217; MENGONI L., *I diritti sociali*, cit.,135.

[26] Corte Cost. 22 luglio 2010, n. 270.

[27] TAR Napoli, sez. I, 22 ottobre 2018, n. 6127, in *DJ*; Corte cost. 2 marzo 2018, n. 47.

[28] MENGONI L., *I diritti sociali*, cit., 129 ss; BALLESTRERO, *Brevi osservazioni su costituzione europea e diritto del lavoro italiano*, in *LD*, 2000, 557 ss.

[29] BALLESTRERO, *Brevi osservazioni su costituzione europea e diritto del lavoro italiano*, cit, 559; M., *Sui diritti sociali*, in *Studi in onore di Manlio Mazziotti di Celso*, vol. II, Cedam, Padova, 1995, 117.

[30] GALGANO F., *Sub Art. 41*, cit., 4; SPAGNUOLO VIGORITA V., *L'iniziativa economica privata nel diritto pubblico*, cit., 229; COSTANTINI S., *Limiti all'iniziativa economica privata e tutela del lavoratore subordinato. Il ruolo delle c.d. "clausole sociali*, cit., 211 ss. *Contra*, BALDASSARRE, voce *Iniziativa economica privata*, cit., 596 ss; LUCIANI M., *La produzione economica*, cit., 42; BALLESTRERO, *Europa dei mercati e promozione dei diritti*, WP C.S.D.L.E. "Massimo D'Antona".INT – 55/2007, 4.

[31] GALGANO F., *Sub Art. 41*, cit.

enterprise: indeed, the freedom of economic enterprise of the individual, in relation to the economic initiative of others, takes the form of the freedom of competition[32]. The latter, which also constitutes a basic element of the freedom to conduct a business, is subject to the same limits given by the contrast with social utility and controls necessary to ensure that the economic activity is oriented for social purposes.

Some scholars have interpreted in an innovative way the notion of common good and the relationship between economic freedom and social rights within the Italian legal system, in the prism of the multilevel regulation in the EU law. In order to explain the meaning of "social market economy", whose establishment falls within the objectives of the European Union pursuant to art. 3 (3) TEU, these academics highlight that competition is a means to guarantee the economic well-being of the economic activities and that the freedom to conduct a business and the sound functioning of businesses is a tool to guarantee the right to work referred to in art. 4 on Constitution. On this basis, the reference to the "social" market economy should be interpreted as a recognition that the freedom of competition is «the driving force of the freedom to conduct a business»: in this sense, competition falls within the concept of common good[33].

2. The social clauses to the test of the constitutional principles

In order to establish to what extent social clauses may be compatible with the constitutional principles described above, the following paragraphs will deal with the main compatibility issues, in particular concerning the field of public procurement, which is undoubtedly an emblematic area as regards the different interests involved and the necessary balancing of such interests. First of all, paragraph 2.1. will focus on the legitimacy of the equal treatment social clause referred to in art. 30 (4) of the Public Procurement Code and of the determination of minimum labour costs for the procurement contract in the ministerial tables as a criterion for the award of the contract, in relation to freedom of conduct a business and free competition. The second paragraph will address the topic of the compatibility of the constraints established in the rehiring social clause referred to in art. 50 of legislative decree n. 50/2016 with regard to free economic enterprise. Finally, the analysis will focus on the role of collective bargaining, on the level of protection that shall be guaranteed to workers employed in public procurements, on the important anti-dumping function of the selection of the comparatively most representative collective agreements in this field and on the doubts about the legitimacy of such social clauses in relation to art. 39 of Constitution.

[32] GALGANO F., *Sub art. 41,* cit. 11; NIRO R., *Art. 41 Cost.*, cit., 857.

[33] BAVARO V., *Lineamenti sulla costituzione materiale dei diritti soviali del lavoro,* in *LD*, 2018, 2, 249-250.

2.1. The pursuit of public interest and the protection of employees in the award of public procurement contract

Since the first social clauses, scholars have stressed that such provisions may affect the dynamics of competition between companies, as well as limit private economic enterprise.

With the view of justifying these limitations, it should be considered the importance of ensuring, on the one hand, the protection of the worker as the weaker party in the search for a fair balance in the employment relationship[34], and, on the other hand, the equal treatment for businesses. The Italian Constitutional Court confirmed this idea in judgment n. 226/1998 concerning art. 36 of Workers' Statute. In this case, the Court implicitly has deemed legitimate this provision and its purpose. Since the selection of the contractor is aimed at achieving the public interest, in the cases in which in the public administration has to grant financial benefits or to award a contract, a minimum standard of protection must be ensured for the employees involved. Only in this way, an effective competition and the equal treatment of competitors in the tender procedure is guaranteed; indeed, these requirements also ensure the regularity of the tender procedure and that the public administration identifies the most suitable contractor at the best terms. The introduction of an "equal treatment requirement", in this field, is closely linked to the pursuit of the public interest and, since it is aimed at ensuring the equal treatment of competitors in the tender, it is an expression of the principle of impartiality referred to in art. 97 of Constitution[35].

It has been expressly accepted that social clauses pursue constitutional social values: in fact, they pursue the aim of protection of the right to work, established in articles 1, 4, and 35 of Constitution, in compliance with the principles of impartiality and sound administration pursuant to art. 97 of Constitution.

In the field of public procurement, a problematic issue concerns the setting of labour costs and the assessment of the tenders, since such elements, more than others, may negatively affect the freedom of economic enterprise and hinder an effective competition. The provisions of Legislative Decree n. 50/2016 require the economic operators participating in the tender to indicate the labour costs, which cannot be lower than those provided for in the ministerial tables[36], under penalty of exclusion; the rates set in the ministerial tables are established on the basis of the minimum rates referred to in national collective agreements stipulated by the comparatively most representative trade unions and employers' organizations[37]. It is debated whether the wages set on the basis of the ministerial rates can be waived and, therefore, to what extent the freedom to conduct a business and the competition can be limited in this context.

On this issue, the settle case law concerning the former Public procurement code seems to be confirmed by the latest judgements. According to such case law, the rates

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[34] NAPOLETANO D., *Appalto di opere pubbliche e tutela dei diritti del lavoratore*, cit., 267 ss; GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, cit., 134.

[35] Corte cost. 19 giugno 1998, n. 226, in *GC*, 2423.

[36] Art. 97(5) of legislative decree n. 50/2016.

[37] Art. 23, comma 16, d.lgs. 50/2016.

set in the ministerial tables do not constitute a mandatory limit, but simply a parameter for assessing the adequacy of the offer: they are merely indicative and not binding. Thus, any deviation from these parameters doesn't involve that the offer is abnormally low: economic operators can deviate from these rates on the basis of a precise and accurate proof, such as statistical analyses, demonstrating a particular organization justifying the sustainability of lower costs, bearing in mind the limits deriving from of mandatory minimum wages[38]. Therefore, an offer isn't abnormal and cannot be excluded, because the labour costs were calculated according to values lower than those resulting from the ministerial tables or collective agreements; only whether the deviations are considerable and clearly unjustified it is possible to doubt its congruity[39].

On the contrary, according to some judgements in administrative case law, which is more in line with the rationale of the regulation, the argument that ministerial tables constitute exclusively a comparative parameter and not a mandatory limit cannot be accepted: setting the costs on the basis of rates below the minimum levels established for workers in the same sector, for this reason only, is indicative of economic unreliability of the tender, since it jeopardizes the equal treatment of competitors and undermines other economic operators participating in the tender that have correctly assessed the labour costs. Even according to this case law, however, a difference in labour costs may be concretely justified by the different particular corporate and territorial situations and by the organizational capacity of the business that, in particularly virtuous circumstances, can make a reduction in labour costs possible[40].

In this way, administrative case law has identified a rule that in fact allows deviations from the "fair" treatment according to ministerial tables, leaving to the contracting authorities a certain degree of discretion, on condition that the deviation is not disproportionate and the minimum wages set in the collective bargaining are safeguarded[41]. Only if these limits are respected, deviations comply with the provisions of art. 30, paragraph 3, according to which the economic operators, in order to enter in the competitive procedure for the award of the contract or the concession, are required

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[38] TAR Napoli, sez. V, 04 febbraio 2019, n. 562; Cons. di Stato, sez. V, 20 febbraio 2017, n. 756.

[39] Cfr. Cons. Stato, sez. V, 18 febbraio 2019, n.1099; Cons. di Stato, sez. III, 21 luglio 2017, n. 3623; Cons. Stato, sez. III, 15 aggio 2017, n. 2252; Cons. di Stato, sez. III, 13 ottobre 2015, n. 4699; Cons. di Stato., sez. III, 9 dicembre 2015, n. 5597; Cons. di Stato, sez. V, 18 giugno 2015, n. 3105; Cons. Stato, sez. III, 2 aprile 2015, n. 1743; Cons. Stato, sez. V, 24 luglio 2014, n. 3937; Cons. Stato, sez. V, 18 febbraio 2019, n.1099; Cons. Stato, sez. III, 23 marzo 2018, n. 1609; Cons. di Stato, sez. V 30 ottobre 2017 n. 4978. See FRAIOLI A. L., *Appalti pubblici e contrattazione collettiva: spunti ricostruttivi*, cit., 922 ss.

[40] Cons. di Stato, sez. III, 15 maggio 2017, n.2252, in *RIDL*, 2017, II, 678 ss, con nota di FORLIVESI M., S*ulle clausole sociali di equo trattamento nel nuovo codice degli appalti pubblici*, on the legitimacy of the award of a public service contract according to the criterion of the most economically advantageous tender, pursuant to art. 83, legislative decree n. 163/2006, in the case of submission of an offer containing an hourly labour costs which were 30% lower than the rates established in the ministerial tables and in the National collective agreement of the sector.

[41] Cons. Stato, sez. III, 13 ottobre 2015, n. 4699, in *RGL*, 2016, II, 20, con nota di CALDERARA D., *Quali sono i contratti collettivi applicabili nelle gare di appalto?*. See BORGOGELLI F., *Modelli organizzativi e tutele dei lavoratori nei servizi di interesse pubblico*, cit., 390 ss.

to meet the environmental, social and labour requirements referred to by collective agreements, UE and national legislation or international provisions[42].

As regards art. 30, paragraph 4, which guarantees the personnel employed in the public procurement contracts and concessions an equal treatment, ensuring the compliance with the employment conditions provided for in collective agreements, the case law has substantially recognised the legitimacy of social clauses, which aim to guarantee, through the general application of collective agreements, that the staff employed is adequately protected and receive a salary proportionate with respect to the activity carried out[43]. Regarding this provision, the principles laid down by the case law with reference to art. 36 of Workers' Statute are valid: the inclusion of social concerns in the regulations on the awarding and the execution of the procurement contracts contributes to the better identification of the suitable contractors, in accordance with the principles of competition and equal treatment of the competing entrepreneurs, and, in this sense, to the pursuit of the public interest, which consist in contrasting unfair competition based on the cost of labour. As stressed also by scholars, in fact, only by introducing such limits the fair competition is ensured[44].

2.2. Rehiring clauses and free economic initiative in the Code of public procurement contracts

As for first-generation social clauses, rehiring social clauses may constitute a limit to market access and contrast with art. 41 of Constitution. The inclusion in the calls for tenders of rehiring requirements may condition the competition between the enterprises, significantly reducing the benefits of competition, discouraging participation in the tender and unduly restricting the numbers of participants[45]. The obligation of the new contractor to rehire the workers previously employed in the contract may influence the decisions of employers with regard to the size of the business and the selection of the personnel, limiting the freedom of organizing the economic activity and, therefore, the freedom to conduct a business laid down in art. 41 of Constitution[46].

In relation to the legitimacy of rehiring social clauses with respect to this constitutional provision, the scholars usually refer to the Constitutional Court case law concerning the requirements to take on workers, which have some common elements with social clauses, at least with reference to the interests at stake.

The Constitutional Court in judgment n. 78/1958 stated the constitutional illegitimacy of a provision establishing the obligation for employers to hire unemployed agricultural workers, due to contrast with art. 41 of Constitution. In this case, the Court deemed that

[42] Cons. Stato, sez. V, 24 gennaio 2019, n. 586.

[43] Cons. di Stato, sez. III, 12 marzo 2018, n. 1574.

[44] COSTANTINI S., *Limiti all'iniziativa economica privata e tutela del lavoratore subordinato. Il ruolo delle c.d. "clausole sociali"*, cit., 218; FORLIVESI M., *Le clausole sociali negli appalti pubblici: il bilanciamento possibile tra tutela del lavoro e ragioni del mercato*, cit., 29 ss; ORLANDINI *G., Mercato unico dei servizi e tutela del lavoro,* cit., 175. See also WEBB S., *The economics of direct employment, with an account of the fair wages policy*, Fabian Tract. N. 84, 1898, 5 ss.

[45] Opinion of Autorità Garante della Concorrenza e del Mercato 11/12/2015 (prot. N. 722361).

[46] GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, 149.

the freedom of economic enterprise implies that the company can hire the workers which, in terms of number, skills, specialization and industriousness, the entrepreneur considers necessary and suitable for achieving its economic goals. Forcing an entrepreneur to hire workers affects the initiative of the economic operator itself. Nor such interference can be justified by virtue of the limits identified by the same art. 41, in paragraphs 2 and 3: in any case, «such a pervasive compression of the private economic initiative» is not acceptable. In that case, the Court acknowledged that, pursuant art. 41 (3) of Constitution, «suitable provisions to outline, from the point of view of common good, programs aimed at stimulating, directing, coordinating the economic activity in order to effectively increase the production» and to foster the hiring of the manpower are legitimate; however, the Court ruled that this purpose cannot justify the legitimacy of provisions interfering in the economic activity of individual operators and limiting the private economic initiative[47].

In accordance with this ruling, in judgment n. 356/1993, the Constitutional Court stated the illegitimacy of art. 67 of Law n. 15/1993 of the Region of Sicily, which had imposed on companies engaged on procurement contract concerning inventory of cultural assets an obligation to hire young people. This provision, despite pursuing the laudable aim of dealing with the employment problems of young people, was an unreasonable limit to the freedom of the entrepreneurs to take decisions concerning the size of the company, the selection of the employees, and the organization of company, which is the essential core of freedom of private economic initiative, guaranteed by art. 41 of Constitution[48].

The Constitutional Court ruled on rehiring social clauses in case n. 68/2011, concerning the constitutional legitimacy of art. 25 of the law of the Region of Puglia n. 25/2007. This provision, originally, introduced a legitimate rehiring social clause[49], similar to other national statutory provisions, such as art. 69 of Legislative Decree 12 April 2006, n. 163, as stressed by the Court; the provision was amended by art. 30 of the law of the Region of Puglia n. 4/2010, on the other hand, introduced a measure other than a social clause; as amended, it didn't provide only the requirement to rehire personnel already employed by the previous contractor, but it established an unconditional and general obligation to hire with open-ended contract workers already employed by the previous contractor, without providing for any selective examination. Such provision, according to the Court, infringed art. 97 of Constitution and the principles of the impartiality and sound administration, for the failure to comply with the criteria of transparency and impartiality in the recruitment of personnel[50].

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[47] Corte Cost. 16 dicembre 1958, n. 78. See ICHINO *P., Diritto al lavoro e collocamento nella giurisprudenza costituzionale, in DLRI, 1988, 24;* FLAMMIA, *Sui limiti contenuti nell'art. 41 Cost.*, in *MGL*, 1958, 3; PERA G., *Assunzioni obbligatorie e contratto di lavoro*, Giuffrè, Milano, 1965, 124 ss.

[48] Corte Cost. 28 luglio 1993, n. 356, in *GI*, 1994, I, 281.

[49] In the original formulation, the rule stated that the Region, the institutions, and the shall require in the calls for tenders and among the conditions of service contracts the rehiring of personnel already employed by the previous contractor company, as well as the application of economic and contractual conditions already in place.

[50] Corte Cost., 3 marzo 2011, n. 68.

According to scholars, in this ruling the Court has implicitly recognized the legitimacy of social clauses in public procurement contracts with respect to art. 41 of Constitution, provided that principles of equal treatment, non-discrimination, transparency, and proportionality are respected[51].

However, it doesn't mean that the social clause pursuant to art. 50 of Legislative Decree 50/2016 is legitimate. This rule imposes on contracting authorities the obligation to insert specific social clauses aimed at promoting the employment stability of the personnel; but it cannot limit the freedom to conduct a business without any condition. This freedom shall be balanced with the needs for social protection[52] and, in this case, according to administrative case law, with the job stability of the workers[53]. Thus, it is necessary to understand to what extent the general interest in safeguarding employment levels pursuant to art. 4 and 41, paragraph 2 of Constitution may justify a limitation of this freedom.

The issue is of considerable importance, as evidenced by the case law. In an attempt to resolve the doubts raised in relation to art. 50, the National Anti-Corruption Authority gives its opinion in the guidelines n. 13/2019 concerning "The regulation of social clauses". The Authority, in line with the settled case law of the Council of State, stated that a "flexible" application of the social clause is more suitable, since the social clause shall be applied in compliance with the freedom to conduct a business referred to in art. 41 of Italian Constitution and in art. 16 of the Charter of Fundamental Rights of the European Union, the principle of proportionality and free competition[54]. It means that the rehiring obligation must be harmonized with the business organization chosen by the succeeding economic operator[55]. As argued by the Council of State, the social clause must be interpreted in accordance with national and EU principles regarding freedom to conduct a business and competition, otherwise it would jeopardize competition and discourage participation in the tender[56].

Since the free private economic enterprise implies that, within the limits set by the law, every entrepreneur can organise its economic activity[57], the application of the social clause cannot therefore involve an indiscriminate and general duty to take on the personnel employed by the former contractor. Otherwise, it causes an unjustified

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[51] FORLIVESI M.*, Le clausole sociali negli appalti pubblici: il bilanciamento possibile tra tutela del lavoro e ragioni del mercato*, cit., 30 ss; BORGOGELLI F., *Modelli organizzativi e tutele dei lavoratori nei servizi di interesse pubblico*, cit., 388 ss.

[52] ORLANDINI G., *Clausole sociali*, cit.

[53] Cons. St., sez. V, 7 giugno 2016, n. 2433, in *FA*, 2016, 6, 1498; Cons. Stato sez. III, 30 marzo 2016, n. 1255, in *FA*, 2016, 3, 561; Cons. Stato, sez. V, 25 gennaio 2016, n. 242, in *DJ*; Cons. Stato, sez. III, 9 dicembre 2015, n. 5598, in *FA*, 2015, 12, 3061; Cons. Stato, sez. VI, 27 novembre 2014, n. 5890, in *FA*, 2014, 11, 2816; Cons. Stato, sez. III, 5 aprile 2013, n. 1896, in *FA*, 2013, 4, 904.

[54] On this opinion, see ORLANDINI, Nihil novi sub sole? *Le linee guida dell'ANAC in materia di clausole sociali e la lettura "continuista" degli obblighi di riassunzione*, in *Diritti&Lavoro Flash*, 2018, 4, 4 ss.

[55] ANAC, Linee guida n. 13/2019.

[56] Consiglio. Stato, sez. III, 27 settembre 2018, n. 5551, in *DJ*; Consiglio di Stato sez. III, 30 marzo 2016, n. 1255, cit.; Cons. Stato, Sez. III, 5 maggio 2017, n. 2078, in *FA*, 2017, 5, 1026.

[57] Cons. di Stato, sez. V, 17 gennaio 2018, n. 272, in *DJ.*

limitation of the prerogatives pursuant to art. 41[58]. In the light of these considerations, the obligation to rehire the employees of the former contractor for the same activity and in the same contract can be imposed only whether compatible with the requirements to perform the new contract and it must be balanced and harmonised with the business organization of the succeeding entrepreneur[59]. Therefore, the tender notice cannot determine the content of such obligation in a strict and specific way. On the opposite, arguing the unconditional applicability of the social clause even in the case of different procurement contracts would imply exceeding the limits of the necessary balance between different interests[60].

In conclusion, the requirement laid down in the social clause may consist only in the obligation for the succeeding contractor to give a priority in the recruitment for the employees of the former contractor, as long as their number and qualification fit for the organization of the business of the new entrepreneur[61].

Making a "positive step forward" in reconciling the need for flexibility in the application of the social clause and the interest of the workers[62], the Council of State also stated that, notwithstanding the obligation to rehire workers, the new contractor can employ some of them in other contracts, if they are superfluous for the activities carried out it the contract in dispute[63]. According to this case law, as argued by academics, the issue of the "profitable use" of such workers concern the phase after their passage to the new contractor: it entails that the assessment of their employability shouldn't refer to the specific contract, in which the entrepreneur can legitimately employ less workers, but to the whole business activity of the new contractor[64].

When the concession or the procurement contract falls within the scope of application of art. 50, which apply to the award of concession and procurement contracts for works and services other than those of an intellectual nature, with particular regard to those relating to labour-intensive contracts, the contracting authority, pursuant to this rule, is obliged to insert the social clause in the tender notice. In the absence of further specifications, art. 50 seems to be applicable in any case of change of the contractor, regardless of any modification of terms or contractual conditions. The ANAC guidelines have intervened also on this point to limit the rehiring obligation, so as to ensure that it is posed in the limits of the new contractual requirements and that it does not excessively condition the freedom to conduct a business. According to ANAC, a further requirement

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[58] Cons. Stato, sez. V, 17 gennaio 2018, n. 272, cit.; Cons. Stato, Sez. V, 28 agosto 2017, n. 4079, in *DJ*.

[59] ANAC, Linee guida n. 13/2019 recanti "*La disciplina delle clausole sociali*".

[60] Cons. Stato, sez. III, 27 settembre 2018, n. 5551, cit.; Cons. Stato, sez. III, 5 maggio 2017, n. 2078, in *FA,* 2017, 5, 1026; TAR Toscana, sez. III, 13 febbraio 2017, n. 231, in *FA*, 2017, 2, 370; Cons. di Stato sez. III, 30/03/2016, n. 1255, cit; Consiglio di Stato, Parere del 21 novembre 2018, n. 2703.

[61] Cons. Stato, sez. III, 27 settembre 2018, n. 5551, in *DJ.*

[62] BORGOGELLI F., *Modelli organizzativi e tutele dei lavoratori nei servzi di interesse pubblico*, cit., 416.

[63] Cons. Stato, sez. V, 07 giugno 2016, n.2433, in *FA*, 2016, 6, 1498; Cons. Stato, sez. III, 30 marzo 2016, n. 1255; Cons. Stato, sez., 9 dicembre 2015, n. 5598; Cons. Stato, sez.III, 5 aprile 2013, n. 1896; Cons. Stato, sez. V, 25 gennaio 2016, n. 242; Cons. Stato, sez. VI, 27 novembre 2014, n. 5890.

[64] BORGOGELLI F., *Modelli organizzativi e tutele dei lavoratori nei servizi di interesse pubblico*, cit., 416. Many doubts arise concerning the compatibility of this interpretation with art. 41 of Constitution.

is necessary for such obligation to exist: the contract to which the tender notice refers must be "objectively similar" to the previous contract and must not have new or incompatible elements compared to the activities covered by the contract itself. It means that where the activities or the services contracted or the notice requirements concerning the economic operators are different, the obligation to take on the personnel cannot be imposed; however, it is not sufficient to exclude this obligation the fact that the tender notice or the contract provide for additional services with respect to the previous one, except that, due to the extent of the changes and the consequent effects on the services contracted, the subject of the contract is different[65]. This solution evokes a common practice in many collective agreements, which, as seen above, are used to differentiate the levels of protection, depending on whether the new contract is characterized by equal terms, contractual methods and services, case in which they generally require to rehire the employees of the previous contractor, or there are modifications of terms, methods and contractual services, hypotheses in which they impose an obligation to only inform and consult the union representatives[66]. In line with this position of ANAC, according to the Council of State, although for the application of social clauses it is not required the absolute and indistinct identity between all the innumerable aspects of the former and the new contract, social clauses don't apply when there are objective and relevant elements of distinction between the previous and new activities covered by the contract[67]. The compliance with the social clause, in fact, cannot oblige the entrepreneur to adopt a different business organization or impede the use of new technical or IT tools, which could justify the staff reduction[68].

2.3. The reference to collective agreements and the entrepreneurs' freedom of association

First- and second-generation social clauses, by posing on the contractors the obligation to comply with the provisions of collective agreements, raise a further issue concerning the role of collective autonomy and the interaction between law and collective bargaining in the regulation of employment relationship[69]. Art. 30 and art. 50 of Legislative Decree 50/2016, in fact, make a reference to collective agreements.

Art. 50 of Legislative Decree n. 50/2016, in identifying the content of the social clause to be included in the tender notice, makes a reference to the collective agreements

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[65] Par. 3 of ANAC guidelines concerning social clauses.

[66] E.g. art. 4 CCNL Multiservizi; art. 37 CCNL cooperative sociali; art. 6 (7) CCNL servizi ambientali; art. 336 CCNL Turismo; art. 7 CCNL Servizi postali; art. 37 CCNL Cooperative sociali. See RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, cit., 29 ss; RECCHIA G. A., *Cambio appalto, stabilità occupazionale e contrattazione collettiva*, cit., 235 ss; MUTARELLI M. M., *Contrattazione collettiva e tutela dell'occupazione negli appalti*, cit., 303 ss.

[67] Cons. Stato, sez. V, 28 agosto, 2017, n. 4079, in *DJ*.

[68] Cons. Stato, sez. III, 10 maggio 2013, n.2533. See also ADINOLFI A., *Subentro di nuovo appaltatore e garanzie per i lavoratori occupati*, in *DPL*, 2015, 15, 937 ss.

[69] Pursuant to ANAC guidelines, the purpose of this provision is to ensure, through the general application of collective agreements, the protection of workers and that they receive a fair wage, commensurate to the quantity and quality of their work.

applicable in the sector and in the geographical area: the source of the obligation is the call for tenders or the contract, but, in the light of the reference to collective agreements, the content of the rehiring social clause and the concrete way for implementing the obligation to take on the employees are determined by collective bargaining. In this way the contractual social clauses are applicable regardless the affiliation of the succeeding entrepreneur to the employers' association stipulating the collective agreement. The rule only refers to collective agreements as parameters for determining the minimum working conditions that must be guaranteed to employees of the contractor, without extending the applicability of collective agreements. The considerations made in relation to art. 36 of Workers' Statute are valid: the contractor is required to ensure conditions that are not lower to those provided for in collective agreements, not in accordance with the law, but as a consequence of the conclusion of the procurement contract with the public administration. Therefore, the rule doesn't infringe the contractor's freedom of association and the doubts concerning the legitimacy of this provision with respect to art. 39 of Constitution can be considered dispelled[70].

Art. 30 (4), unlike art. 50, introduces a statutory social constraint which is directly applicable to the employer and not to the contracting authority. Because of this structure of the provision, doubts have been raised about the legitimacy of art. 30 (4) in relation to art. 39 of Constitution[71].

The principles stated by the Constitutional Court in relation to art. 36 of Workers' Statute in judgement n. 266/1998 are relevant also regarding this issue. The constitutional importance of the objectives pursued by the provision may legitimise this regulation: it would be incongruous that the implementation of art. 39 of Constitution contrast with the fundamental principles of Constitution[72]. Despite the different structure of the provision compared to art. 36 of Workers' Statute, it is reasonable to assume that the same approach is valid: art. 30 should be interpreted as a rule that only indirectly extends the applicability of collective agreements and the entrepreneurs who intend to participate in the tender for the award of a public contract have to comply with the economic and regulatory conditions provided for in collective agreements, because of the reference made to them by the provisions of the public procurement Code[73].

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[70] On the reference to collective agreements, in relation to art 36 of Workers' Statute, see BALANDI G. G., *Le «clausole a favore dei lavoratori» e l'estensione dell'applicazione del contratto collettivo*, cit., 710; TULLINI P., *Finanziamenti pubblici alle imprese e "clausole sociali",* cit., 43 ss; GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, cit., 135 ss; BORTONE R., *Commento all'art. 36*, cit., 650; MANCINI F., *Sub art. 36,* cit., 555; LUCIANI V., *La clausola sociale di equo trattamento nell'art. 36*, cit., 909 ss; CENTOFANTI S., *Art. 36*, cit., 1204; GHERA E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, cit., 135 ss. In senso conforme, cfr. Cass. 21 dicembre 1991, n. 13834; Cass. 23. Aprile 1999, n. 4070.

[71] See Cons. Stato, sez. III, 12 marzo 2018, n. 1574. See also FRAIOLI A. L., *Appalti pubblici e contrattazione collettiva: spunti ricostruttivi*, cit., 923; VARVA S., *Il lavoro negli appalti pubblici,* cit., 214.

[72] Corte Cost. 9 luglio 1963, n. 120, concerning art. 3, law n. 1369/1960.

[73] FRAIOLI A. L., *Appalti pubblici e contrattazione collettiva: spunti ricostruttivi*, cit., 925-926; ORLANDINI G., *Mercato unico dei servizi e tutela del lavoro*, cit., 179.

2.4. Consequences of failure to apply the collective agreement and effects on social dumping

A further issue emerging in case law concerns the selection of the collective agreement. The provisions of the Code of public contracts select collective agreements by using the criterion of "comparatively more representative" collective agreement. The assessment of representativeness is problematic in many sectors; moreover, it must be kept in mind that often it is difficult to establish whether it is appropriate to refer to the contract relating to one sector rather than another[74].

Art. 30 (4) provides for the application of national and territorial collective agreements applicable for the sector and the area in which the works are performed and stipulated by comparatively more representative employers' associations and trade unions at national level. The provision adds a further clarification: it requires that the scope of collective agreements is closely related to the subject matter of the contract or concession. By excluding the possibility of applying a contract applicable to a sector not related to the activity of the contract, in order to avoid that an agreement is chosen only on the basis of economic convenience, the law intends to solve the problems on the identification of the contract that is actually applicable in the case of a plurality of collective agreements stipulated by different trade unions. In this way, it aims at tackling the issue of the so-called "pirate" collective agreements, stipulated by labour organisations which aren't actually representative of workers and that usually agrees lower wages and worst employment conditions compared to the ones agrees by more representative trade unions[75]. However, this is not sufficient to identify precisely the applicable collective agreement, unless it is expressly indicated in the tender notice. It is an issue of considerable importance if we consider the purpose of social clauses to prevent wage dumping and unfair competition in the field of public contracts.

The issue of the selection of the collective agreement to be taken as reference, in the case in which a plurality of collective agreements is applicable, isn't solved in a sufficiently clear manner also in relation to art. 50 of the Code of public procurement

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[74] RATTI, *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole di riassunzione nell'ordinamento multilivello*, cit., 137. Per un commento sull'art. 51 del d.lgs. 81/2015, cfr., *ex multis*, DE LUCA TAMAJO R., *Incertezze e contraddizioni del diritto sindacale italiano: è tempo di regolamentazione legislativa*, in *RIDL*, 2018, 1, 273 ss; ALVINO I., *I rinvii legislativi al contratto collettivo. Tecniche e interazioni con la dinamica delle relazioni sindacali*, Jovene, Napoli, 2018, in particolare 126 ss; ALVINO I., *Il micro-sistema dei rinvii al contratto collettivo nel d.lgs. n. 81 del 2015: il nuovo modello della competizione fra i livelli della contrattazione collettiva*, in *RIDL*, 2016, 1, 657 ss; PASSALACQUA P., *L'equiordinazione tra i livelli della contrattazione quale modello di rinvio legale all'autonomia collettiva ex art 51 d.lgs. 81 del 2015*, in *DLM*, 2016, 2, 275 ss; ZOPPOLI L., *Le fonti (dopo il Jobs Act): autonomia ed eteronomia a confronto*, in *Labor*, 2016, 50 ss; MAINARDI S., *Le relazioni collettive nel «nuovo» diritto del lavoro*, Relazione alle Giornate Studio Aidlass, Napoli 16-17 giugno 2016; TOMASSETTI P., *La nozione di sindacato comparativamente più rappresentativo nel decreto legislativo n. 81/2015*, in *DRI*, 2016, 367 ss.

[75] LOZITO M., *Tutele e sottotutele del lavoro negli appalti privati*, cit., 126; MATTEI A., *Scomposizione dell'impresa, lavoro esternalizzato e inclusione sociale: azioni della negoziazione collettiva*, cit., 773. In relazione alla questione della pluralità dei contratti collettivi pirata, cfr. LASSANDARI A., *Pluralità di contratti collettivi nazionali per la medesima categoria*, cit., 261 ss; PERA G., *Note sui contratti collettivi "pirata"*, cit., 381 ss.

contracts. In order to give an answer to the criticisms and doubts raised in the past on this point, this provision refers to sectoral collective agreements referred to in art. 51 of Legislative Decree 15 June 2015, n. 81, namely national and company-level collective agreements stipulated by comparatively more representative national trade unions.

The reference to collective agreements is present also in art. 23 (16), according to which the cost of labour must be annually determined in specific tables prepared by the Ministry of Labour, on the basis of the economic rates established by national collective agreements agreed between comparatively more representative trade unions and employers' organizations. It is intended to guarantee to workers employed in the procurement contract a salary not lower than the wage which is considered as a parameter for a fair and sufficient remuneration in the case law.

The issues relating to the discretion of contracting authorities in the selection of a collective agreement, the freedom of economic operators to choose the collective agreement to be applied, and the consequences of the violation of these obligations are still debated.

According to some rulings, the infringement of the obligation to apply a specific collective agreement may cause the exclusion of the economic operators from the procedure for the awarding of the contract[76]: a contracting station cannot admit to participate in the tender for the awarding of a contract an undertaking which declares to apply to its staff an agreement other than the one indicated in the tender notice[77]. In a similar way, in some rulings, the determination of the cost of labour on the basis of collective agreements stipulated by non-representative trade unions has been considered an indicator of unreliability of the offer: the admission of bids based on very low labour costs, laid down in collective agreements stipulated by non-representative unions, cause social dumping practices, since only some undertakings can benefit from provisions justifying lower labour costs. An overall determination of costs based on a labour cost lower than the minimum rates established by law or collective agreements for workers in the same sector may constitute an index of economic unreliability of the offer» and may violate the principle of the level playing field for competing undertakings, determining a «prejudice for other companies participating in the tender that have correctly assessed the costs of the wages to be paid[78].

Concerning the reference to collective agreements in art. 30 (4), the Council of State in the judgment of 12 March 2018, n. 1574, in accordance with the case law described above, stated that the rationale of such provision is to guarantee, through «the general application of collective agreements», an adequate protection of the staff employed and a remuneration commensurate with respect to the activity actually carried out.

This case law recognises the importance of contractual provisions even in the phase of setting the economic conditions for the tender notice on the auction. The contracting

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[76] MELI G., *Procedure di affidamento dei contratti pubblici, obbligo di applicazione dei contratti collettivi di lavoro e diritto comunitario: il caso Ruffert e la sindrome (italiana) dello struzzo*, nota a TAR Veneto, sez. I, 9 gennaio 2012, n. 4, in *LPA*, 2012, 3-4, 570 ss.

[77] TAR Veneto, sez. I, 9 gennaio 2012, n. 4, in *LPA*, 2012, 3-4, 570 ss; TAR Lazio, sez. III, 7 aprile 2010, n. 5759; TAR Piemonte, sez. I, 25 ottobre 2008, n. 2687.

[78] Cons. Stato, sez. III, 13.10.2015, n. 4699, cit.

authority is required to ensure compliance with the labour costs resulting from the collective agreements and applicable to the employers that ordinarily carry out the same activities of the contract: indeed, the obligation to ensure a level playing field for all participants prevents call for tenders that leave competitors free to formulate their offers by choosing the more convenient collective agreement. Consequently, even the public administrations, in setting the offer to be placed at the base of the tender, must take into consideration the cost of labour deriving from the collective agreements applicable to the employers that ordinarily carry out the activity deducted of the contract and that are potentially participating in the tender procedure[79].

According to a different approach, even though it is within the discretion of the contracting authorities to arrange the works or services to be performed under the procurement contract and to establish the requirements for the award of the contract, the obligation to apply a specific contract may be indicated in the tender notice, even under penalty of exclusion, only on condition that such requirement is logically related to the services be provided. Otherwise, the principle of "*favor partecipationis*" would be seriously weakened and the principle of competition would be infringed[80]. Only if the decision of the contracting station meets these requirements, it can be considered a reasonable expression of the discretion of the public administration and any claim of unreasonableness can be excluded[81]. This interpretation is consistent with art. 83, paragraph 8, of Legislative Decree 50/2016, with regard to the compulsory reasons for the exclusion from the tender procedure, as argued in a pre-litigation opinion by ANAC in 2018[82].

A different opinion excludes the possibility to force the entrepreneurs to apply a specific collective agreement: otherwise the competing entrepreneurs' freedom of association would be limited. By virtue of this principle, the selection of a specific collective agreement, different from that indicated in the tender notice, cannot constitute a reason for the rejection of the offer[83]. The selection of the collective agreement to be applied falls within the prerogatives of the entrepreneur's organization and the freedom to negotiate, with the exclusive limitation that it has to be consistent with the subject matter of the contract[84]. Sometimes, administrative courts has ruled that workers cannot demand the application of a different collective agreement, if the employer is not obliged to because his membership in the stipulating association, even in the event that the individual employment contract has been regulated on the basis of a collective

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[79] TAR Roma, sez. III, 07 aprile 2010, n. 5759; TAR Torino, sez. I, 25 ottobre 2008, n. 2687; TAR Milano, Sez. III, 6 novembre 2006, n. 2102; T.A.R. Torino, sez. I, 25 ottobre 2008, n.2687, in *FA;* TAR 2008, 10, 2680.

[80] Cons. Stato, sez., 5 ottobre 2016, n. 4109:

[81] BORGOGELLI F., *Modelli organizzativi e tutele dei lavoratori nei servizi di interesse pubblico*, cit., 388 ss.

[82] ANAC, Parere precontenzioso, n. 816 of 26 September 2018 which refers to Cons. Stato, sez. III, 3 luglio 2015 n. 3329.

[83] Cons. Stato, sez. V, 14 febbbraio 2012, n. 727.

[84] Cons. Stato, sez. V, 1° marzo 2017, n. 932, in *DJ*; Cons. Stato, V, 12 maggio 2016, n. 1901; Cons. St., III, 10 febbraio 2016, n. 589; Cons. Stato, sez. V, 5 ottobre 2016, n. 4109; TAR Firenze, sez. I, 2 gennaio 2018, n. 18; Cass. 26 marzo 1997, n. 2665, in in *GC*, 1997, 1203, con nota di PERA, *La contrattazione collettiva di diritto comune e l'art. 2070 c.c*; Cass. 1° marzo 2019, n. 6143.

agreement applicable to a sector that does not correspond to the activity carried out by the entrepreneur and even if it is not properly pertinent to the type of job performed by the worker. The only limit to the freedom of association of the entrepreneur is the necessary conformity of the pay established in the CCNL with respect to the principle of proportionate and sufficient remuneration under art 36 of Constitution[85].

This opinion is confirmed by the case law of the Court of Cassation which, in the judgment of 26 March 1997, n. 266, restated the principle according to which the constitutionally guaranteed freedom of association entails the impossibility of applying a collective agreement not universally applicable to workers who are not member of the stipulating trade union.

However, this interpretation, excluding that the contracting authority may impose on the competing entrepreneurs the application of a specific collective agreement as a participation requirement and that it can sanction the non-application of this agreement rejecting the tender, risks legitimizing a downward competition, even if within the limit of the minimum pay to be guaranteed to workers employed in the contract[86].

The National Anti-Corruption Authority, in the Guidelines relating to the social clause pursuant to art. 50, confirms the latter case law opinion. In the report attached to the guidelines, it explicitly states that art. 50 and art. 30 (4) must be interpreted in terms of minimum protection standards to be guaranteed to the worker. To prevent and resolve the more common issues in the awarding procedures and to avoid the compatibility issues with art. 39 of Constitution, the Authority rejects the approach according to which the contractor has to comply with the "leader" national collective agreement applicable for activity to be performed under the contract: this approach confer a real mandatory and innovative effect to art. 30 (4) and 50. Accepting this approach, the freedom of trade union association would be restricted to the point that only in the absence of the applicable national collective agreement, or in the presence of several collective agreement, the contractor can select a collective agreement, within the limits of its applicability with respect to the subject matter of the contract[87].

The Authority opts, instead, for an approach more protective of the freedom of trade union association, in accordance with the prevalent case law: stating that art. 30 (4) and 50 identify the minimum protection standards means that the "leader" collective agreement does not entirely apply to the competing enterprise, but it only pretends to ensure to workers the minimum standard provided for in it. Obviously, the application of the social clause provided for in the national collective agreement usually applied by the economic operator is legitimate, where this clause is more favourable[88]. ANAC's opinion, according to which the "leader" collective agreement is a parameter for the protection of workers, finds support in art. 1, (1), lett. (fff) of the decree law n. 11/2016,

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[85] TAR Torino 22 gennaio 2015, n. 144. Cfr. anche Cass. 23 giugno 2003, n. 9964.

[86] TAR Lazio 11 febbraio 2016, n. 1969. *Contra*, TAR Veneto 9 gennaio 2012, n. 4, in *LPA*, 2012, n. 3-4, II, 565. See MELI G., *Procedure di affidamento dei contratti pubblici, obbligo di applicazione dei contratti collettivi di lavoro e diritto comunitario: il caso Rüffert e la sindrome italiana dello struzzo*, cit., 570 ss.; INGLESE I., *Le clausole sociali nelle procedure di affidamento degli appalti alla luce delle novità normative*, cit., 571 ss.

[87] See "Relazione illustrativa allegata alle Linee Guida sulle clausole sociali dell'ANAC".

[88] See par. 4 of ANAC Guidelines n. 13 on "La disciplina delle clausole sociali".

which states that it is necessary to provide for «social clauses aimed at promoting the employment stability of the staff employed, *taking as reference*, for each industry or sector, the national collective agreement which provide the most favourable terms and conditions for workers»[89].

This interpretation makes it possible to solve issues and doubts concerning the legitimacy of such clauses in relation to art. 39, paragraph 4, of Constitution.

Italian scholars, also with regard to social clauses[90], are used to evoke the ruling of the Constitutional Court n. 51/2015 on the issue of the interaction between law and collective agreements in the determination of employment conditions[91]. The Court had to rule on the constitutional legitimacy of art. 7 (4) of legislative decree n. 248 of 2007, converted with modifications by art. 1 (1) of law 28 February 2008, n. 31, with respect to art. 39 of Constitution. When many collective agreements are applicable to the same sector, in determining the overall economic treatment of the working-members of cooperatives, this provision refers to terms and conditions provided for by collective agreements stipulated by the comparatively more representative employers' organizations and trade unions at national level[92]. The Court ruled that such a provision doesn't attributes *erga omnes* applicability to collective agreements stipulated by comparatively more representative trade unions: the economic treatments established in these agreements are parameters for assessing the proportionality and adequacy of the pay to be ensured to working members of cooperatives, in accordance with art. 36 of Constitution. According to the Court, by referring to the collective source which, better than others, takes account of the salary dynamics in the sectors in which cooperatives operate, this provision intends «to tackle downward wage competition»; in this sense, it is consistent with the case law, which states that the wage rates agreed in the collective agreement stipulated by comparatively more representative trade union comply with the requirements of proportionality and adequacy under art. 36 of Constitution. With reference to art. 39 of Constitution, it is important to specify that the aim pursued by the law is to guarantee the minimum wages to the members of a specific category, ensuring equal treatment among employers and among workers[93].

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[89] See "Relazione illustrativa annessa alle Linee guida n. 13 recanti La disciplina delle clausole sociali".

[90] TULLINI, *Concorrenza ed equità nel mercato europeo: una scommessa difficile (ma necessaria) per il diritto del lavoro,* cit., 199 ss; BORGOGELLI, *Modelli organizzativi e tutele dei lavoratori nei servizi di interesse pubblico*, cit., 388 ss.

[91] Corte cost. 26 marzo 2015, n. 51, in *RGL*, 2015, 3, 493 ss, con nota di BARBIERI M., *In tema di legittimità costituzionale del rinvio al Ccnl delle organizzazioni più rappresentative nel settore cooperativo per la determinazione della retribuzione proporzionata e sufficiente*. Cfr. anche i commenti di SCHIUMA D., *Il trattamento economico del socio subordinato di cooperativa: la Corte costituzionale e il bilanciamento fra libertà sindacale e il principio di giusta ed equa retribuzione* in *DRI*, 2015, 3, 823 ss; LAFORGIA S., *La giusta retribuzione del socio di cooperativa: un'altra occasione per la corte costituzionale per difendere i diritti dei lavoratori ai tempi della crisi*, in *ADL*, 2015, 4-5, 928 ss.

[92] The question of constitutionality had already been proposed in the past, but the Court had rejected it as inadmissible. See Corte Cost. 29 marzo 2013, n. 59, IMBERTI L., *La Corte costituzionale (non) si pronuncia sul trattamento economico del socio lavoratore in cooperativa: perdura il conflitto tra i CCNL* UNCI/CONFSAL e i CCNL LEGACOOP, CONFCOPERATIVE AGCI/CGIL, CISL e UIL, in *DRI*, 2013, 779 ss.

[93] ORLANDINI G., *Legge, contrattazione collettiva e giusta retribuzione dopo le sentenze 51/2015 e 178/2015 della Corte costituzionale*, in *LD*, 2018, 1, 6 ss.

It recognises the relevance of the aim pursued and the legitimacy of the provisions which, by selecting the collective agreement stipulated by the comparatively most representative unions, are aimed at protecting workers, preventing wage dumping, and guaranteeing fair and correct competition[94].

The principle stated in this ruling was reiterated by the Court of Cassation in the judgment of 20 February 2019, n. 4951, which also concerned the selection of the collective agreement and minimum wages rates that must be guaranteed to working members of cooperatives[95]. In this case, the Court stated that the implementation by law of art. 36 of Constitution does not imply the the universal applicability of collective agreements, but the use of the such agreements as external binding parameters. It can therefore be considered legitimate the provision applicable to working members of cooperative, which, in the case of a plurality of national collective agreements applicable in the same sector, gives legal recognition to the general economic treatments that are not lower than those provided for in national collective agreements stipulated by comparatively more representative employers' associations and trade unions in the sector and, therefore, can identify collective interests in a way more consistent with the criterion of art. 36 of Constitution, compared to collective agreement stipulated by less representative associations in the sector. This interpretation prevent the risks of damaging the freedom of trade union association and union pluralism: the choice of the legislator to implement art. 36 of Constitution by establishing minimum mandatory standards, generalizing the obligation to respect the minimum conditions established by collective agreements stipulated by comparatively more representative employers' associations and trade unions in the sector, does not limit the right of other organizations to exercise trade union freedom by stipulating collective agreements, but it limits this freedom, since wage rates at least equal to the minimum level established by the law have to be guaranteed[96].

Thus, according to many scholars, the reference to these collective agreements in statutory social clauses, such as the provisions of the Code of public contracts, is legitimate, if interpreted, as done by ANAC and from the prevailing case law as a «material referral to collective bargaining»: identifying only an external parameter, they do not damage the principle of trade union freedom[97].

Therefore, the provisions of the Code of public contracts impose the application of the collective agreements stipulated by comparatively more representative trade unions

[94] TULLINI P., *Concorrenza ed equità nel mercato europeo: una scommessa difficile (ma necessaria) per il diritto del lavoro,* cit.å, 199 ss.

[95]In this case, the Court according to the Court, this contract, even if stipulated by the confederal trade unions of workers (Cgil, Cisl and Uil), is signed, for employers, by a single trade union organization, the Italian Confederation of building ownership (Confedilizia), which makes clear the narrow scope of application of the same agreements and, at the same time, does not satisfy the requirement set by art. 7, of the l. n. 31 of 2008, which refers to the collective agreement signed, also for the employers, by the comparatively more representative employers' associations and trade unions at national level in the sector.

[96] Cass. 20 febbraio 2019, n. 4951, in *DJ.*

[97] BORGOGELLI F., *Modelli organizzativi e tutele dei lavoratori nei servizi di interesse pubblico*, cit., 385; ORLANDINI G., *Legge, contrattazione collettiva e giusta retribuzione dopo le sentenze 51/2015 e 178/2015 della Corte*, cit., 6 ss; LAFORGIA S., *La giusta retribuzione del socio di cooperativa: un'altra occasione per la corte costituzionale per difendere i diritti dei lavoratori ai tempi della crisi,* cit., 928 ss.

«as the minimum standard of protection to be guaranteed to the worker». Only in this way the social clause does not violate the freedom of the entrepreneur to conduct his business and at the same time guarantees the worker a fair treatment, as identified in collective agreement stipulated by the comparatively more representative trade unions. For this reason, in order to contrast wage dumping in the field of public procurement, some scholars highlight the need for a statutory intervention giving *erga omnes* applicability to collective agreements[98].

In conclusion, in the light of the interpretation proposed by the ANAC, by virtue of this reference to art. 51 of Legislative Decree 15 June 2015, n. 81 in art. 50 of Legislative Decree 50/2016, as well as pursuant to art. 30 (4) of the Code of public contracts, the contracting authorities must explicitly and precisely indicate in the tender notice the collective agreement applicable on the basis of its consistency to the subject matter of the contract. Under art. 30 (4), if the applicable collective agreement isn't indicated in the tender notice, as well as whether the selected collective contract does not comply with the criteria established in art. 30 (4), it is to be considered "*contra legem*"[99]; nor the contracting authorities can decide at their discretion in relation to the application of the conditions provided for in the indicated collective agreements. The economic operators taking over are required to apply the provisions concerning the social clause referred to in the collective agreement indicated by the contracting authority, excepting the application of more favourable social clauses provided for by the national collective agreement applied by the economic operator.

The interpretation of ANAC regarding social clauses in public contracts is valid also in the field of private procurement contracts, with reference to statutory social clauses. As the former, first- and second-generation social clauses contained in statutory provisions pose compatibility issues with regard to the freedom to conduct a business due to the limits to free access to the market, as well as to the employer's freedom of association, since he has to comply with the provisions of a specific collective agreement without having joined the stipulating association.

On the contrary, the issues arising concerning contractual social clauses where there is no reference to them in the law are quite different. With reference to these, there are not compatibility issues with the entrepreneur's freedom of trade union association or with art. 41 of Constitution, but problems related to the concrete enforceability of the rights provided for in such clauses, due to the limited applicability of collective agreements in Italian legal order and the structure of such clauses, which in many cases attribute rights to workers that are very difficult to be implemented.

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[98] INGLESE I., *Sull'opportunità di una disciplina dell'efficacia del contratto collettivo*, in *DRI*, 2007, 2, 463.

[99] CAFFIO S., *Appalto, costo del lavoro e contratto collettivo di riferimento*, cit., 867.

CHAPTER V

COMPATIBILITY ISSUES WITH THE EU LEGAL ORDER: PROBLEMS AND CONFLICTS

SUMMARY: 1. Economic freedoms and social protection in EU law: a difficult balance. - 1.1. Art. 9 TFEU and the protection of social rights: the so-called horizontal social clause. - 1.2. Social policies and the EU common commercial policy. - 1.3. Freedom to provide services: justifications for restrictions to fundamental freedoms and the principle of proportionality. - 1.4. The protection of competition in the internal market and the collective bargaining. - 1.5. The freedom to conduct a business in Article 16 of EU Charter of Fundamental Rights. - 2. In search of a balance between competition and social objectives. - 2.1. Minimum wages and restrictions on the freedom to provide services: from Rüffert to Regiopost. - 2.2. The protection of employment in the light of the principle of market access.

1. Economic freedoms and social protection in EU law: a difficult balance

Further compatibility issues concern the legitimacy of social clauses in the procurement contracts, both public and private procurement, with respect to EU law. Such provisions, pursuing social objectives, limit the competition between companies and the fundamental economic freedoms protected by EU Treaties, especially the freedom to provide services. The social clauses are aimed at preventing and limiting precisely the social dumping effects that the full expression of such freedoms is likely to determine.

The recognition that the European Union is based on a free market economy «implies that undertakings must have the freedom to conduct their business as they see fit. As stated by Advocate General Wahl in the opening of its opinion in the *AGET Iraklis* case, it paves the way to some issues and doubts: «what are the limits, then, to Member State intervention in order to ensure the job security of workers?»[1]. As correctly highlighted by scholars, this is equivalent to asking what is the place of labour law in a free market economy[2], reversing the question compared to the point of view adopted to address the dispute of the balance between social rights and economic freedoms in relation to the Italian legal order, where art. 41 of Constitution protect the freedom of economic initiative only as far as it does not take place in contrast with social utility.

The consideration of the problem from this perspective reflects the ever-increasing attention to the protection of competition and to the enhancement of the freedom to conduct a business in the case law of the Court of Justice. In fact, in the EU, the notions of market access restrictions, free competition and freedom to provide services have

[1] Opinion of Advocate General Wahl, case C-201/15, *AGET Iraklis*, para. 1.

[2] GIUBBONI S., *Diritto del lavoro europeo*, Cedam-Wolters Kluwer, 2017, 55 ss.

been extensively interpreted; on the contrary, every limitation of these freedoms shall be interpreted strictly.

In the EU legal order, the same attention has not been paid, at least until the Lisbon Treaty, to employment and labour protection or market regulation aimed at preventing and tackling social dumping practices[3]. For this reason, according to scholars there is an "unequal balance" between social and economic dimension in the European Union[4].

In the EU law, the need to balance these interests is stated in art. 3 TEU, which, in addition to the establishment of an internal market, includes among the objectives that the EU shall pursue in its internal and external action also some social objectives: pursuant to art. 3 (3), the EU «works for the sustainable development of Europe based on balanced economic growth and price stability, on a highly competitive social market economy, aiming at full employment and social progress», and shall promote economic, social and territorial cohesion, and solidarity between Member States[5].

The following paragraphs will analyse the elements to be taken into consideration in the balance between social rights and economic freedoms. As for the Italian legal system, in the study of the European Union legal order, it is necessary to examine the provisions influencing the reasoning on the compatibility of social clauses with EU law, those aimed at protecting work and pursuing social objectives, as well as those intended to avoid restrictions and limitations of economic freedoms. The interpretations concerning these norms and the guidelines of the Court of Justice will be necessarily considered. Afterwards, the research will focus on the concrete balance in the Court of Justice case law with respect to social clauses and on the scenarios opening up in the search for a balance between the various interests at stake.

1.1. Art. 9 TFEU and the protection of social rights: the so-called horizontal social clause

The amendments to the Treaties made by the Treaty of Lisbon introduced some interesting elements to be taken into consideration in the reasoning on the reconciliation between economic freedoms and social rights.

Undoubtedly, art. 3 TEU has brought important elements, whose relevance is also emphasized in art. 120 TFEU, according to which Member States shall conduct their

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[3] VIDIRI G., *Il trasferimento d'azienda: un istituto sempre in bilico tra libertà d'impresa (art. 41 cost.) e diritto al lavoro (artt. 1 e 4 Cost.)*, in *Il corriere giuridico*, 2018, 7, 965 ss; SANTORO PASSARELLI G., *Le «ragioni» dell'impresa e la tutela dei diritti del lavoro nell'orizzonte della normativa europea*, in *Euroea e diritto privato*, 2005, 1, 63 ss. Cfr. anche ROCCELLA M., TREU T., *Diritto del lavoro dell'Unione Europea*, Wolters Kluwer- Cedam, 2016, 3; DUKES R., *The constitutional function of labour law in the European Union*, in WALKER N., SHAW J., TIERNEY S., *Europe's constitutional mosaic*, Hart, 2011, 340.

[4] SPADARO A., *La crisi, i diritti sociali e le risposte dell'Europa*, in CARUSO B., FONTATA G. (a cura di), *Lavoro e diritti sociali nella crisi europea. Un confronto tra costituzionalisti e giuslavoristi*, Il Mulino, 2015, 25.

[5] FUMAGALLI L., *Art. 3 TUE*, TIZZANO A., *Trattato sull'Unione Europea*, Giuffrè, Milano, 2014, 15 ss. Per un commento a tale disposizioni, cfr. anche GEIGER R., *Art. 3(Aims of the Union),* in GEIGER R., KHAN D.E., KOTZUR M., *Europeam Union Treaties,* Hart. 2015, 17 ss; DORSSEMONT F., *Values and objectives*, in BRUUN N., LORCHER K., SCHOMANN I. (a cura di), *The Lisbon treaty and social Europe,* 2012*,* Hart, Oxford-Portland, 48 ss.

economic policies with a view to contributing to the achievement of the objectives of the Union, as identified art. 3 of the Treaty on European Union[6].

An important step towards "a more social EU" was made by introducing into EU primary law of art. 9 TFEU, among the principles of general application[7]. Article 9 contains the so-called horizontal social clause, according to which the Union, in defining and implementing its policies and activities, shall consider «requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health».

As argued by scholars, it is a "balancing provision", imposing a procedural obligation on the institutions of the European Union and on Member States: according to this provision they cannot disregard the social objectives of the Union in their own policies and activities. This article cannot be considered the legal basis for the adoption of legislative acts or for individual rights, but it can be the driver for policies or legislative acts; moreover, it ensures that the economic and social dimension are equally taken into consideration in all these activities[8]. Its main function is precisely to reconcile the social and economic dimensions of the Union[9], which, as emerges in art. 3 TUE, are closely related. Some scholars highlight the importance of the "adaptive effects" of this provision[10] and consider this social clause as a parameter to assess the legitimacy of the activities of the institutions[11]: the horizontal social clause may be important in stating reasons for the acts, in the control of the legitimacy, and in the judgements of the Court

[6] FERRARA M. D., *L'integrazione europea attraverso il «social test»: la clausola sociale orizzontale e le sue possibili applicazioni*, in *RGL*, 2013, I, 299.

[7] Opinion of the European Economic and Social Committee on 'Strengthening EU cohesion and EU social policy coordination through the new horizontal social clause in Article 9 TFEU' , 2012/C 24/06. On anticle 9 TFUE, see DIMMEL N., *A study on Art. 9 TFEU*: *Horizontal social clause*, in *EASPD.eu*, 2014; KOTZUR M., *Article 9 (Horizontal clause: social protection)*, in GEIGER R., KHAN D.-E., KOTZUR M., *European Union Treaties*, Hart, 2015, 217 ss; VIELLE P., *How the horizontal social clause can be mande to work: the lessons of gender mainstreaming*, in BRUUN N., LORCHER K., SCHOMANN I., (a cura di), *The Lisbon Treaty and social Europe*, cit., 105 ss; DE BAERE G., GUTMAN K., *The basis in EU constitutional law for further social integration*, inVANDENBROUCKE F., BARNARD C., DE BAERE G. (a cura di), *A Europena social Union after the crisis,* Cambridge university press, 2017, 379 ss; FERRARA M. D., *The horizontal social clause and social and economic mainstreaming: a new approach for social integration?*, in *European journal of social law*, 2013, 4, 288 ss. See also BERCUSSON B., *The Lisbon treaty and social Europe*, in *ERA Forum*, 2009, 10, 99, who define this article as an example of *«mainstreaming social policy».*

[8] KENNER J., *Article 9 TFEU*, in ALES E., BELL M., DEINERT O., ROBIN-OLIVIER S. (a cura di), *International and European labour law*, Hart, 2018, 14.

[9] KENNER J., *Article 9 TFEU*, cit., 21; RAVO L. M., *Art. 9*, in TIZZANO T., *Trattato sul funzionamento dell'Unione Europea*, Giuffrè, 2014, 401 ss. According to VIELLE P., *How the horizontal social clause can be mande to work: the lessons of gender mainstreaming*, cit., 105 ss., art. 9 «*may contribute to a fundamental reorientation of EU legislation and jurisprudence towards social aims*». Also Recital 3 of Directive 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services refers to art. 9 TFEU. Recital 10 states that «ensuring greater protection for workers is necessary to safeguard the freedom to provide, in both the short and the long term, services on a fair basis, in particular by preventing abuse of the rights guaranteed by the Treaties».

[10] ALAIMO A., *Presente e futuro del modello sociale europeo. Lavoro, investimenti sociali e politiche di coesione*, in *RGL,* 2013, I, 262; DORSSEMONT F., *Values and objectives*, cit., 50.

[11] FERRARA M. D., *L'integrazione europea attraverso il «social test»: la clausola sociale orizzontale e le sue possibili applicazioni*, cit., 318.

of Justice[12], even if, at least for the moment, few references to this provision have been made by the Court, which referred to art. 9 especially in judgments concerning the protection of health[13].

Concerning social objectives, the normative value of the horizontal social clause has been recognized for the first time in the opinion of Advocate General Cruz Villalón in *Santos Palhota* case[14]. Concerning the legitimacy of the limitations on the freedom to provide services, he stressed that, in interpreting the notion of imperative reasons of overriding public interest capable of justifying such restriction and in the strict review of proportionality operated by the Court of Justice[15], since the Lisbon Treaty had entered into force, «it has been necessary to take into account a number of provisions of primary social law which affect the framework of the fundamental freedoms». Also concerning the posting of workers, «in so far as it may alter the amplitude of the freedom to provide services, must be interpreted in the light of the social provisions introduced by that Treaty». He evokes art. 9 TFEU, which «lays down a "cross-cutting" social protection clause obliging the institutions to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion», and the declaration in art. 3 (3) TEU that «the construction of the internal market is to be realised by means of policies based on "a highly competitive social market economy, aiming at full employment and social progress"». According to the Advocate General, this "social obligation" is reflected in in art. 31 of the Charter of Fundamental Rights «of every employee's right to healthy, safe and dignified working conditions».

A reference to art. 9 TFEU is also laid down in the *AGET Iraklis* judgement. In an *obiter dictum* in this ruling, the Court of Justice gives interesting insights in favour of a "more social Europe". After recognizing that the European Union «has not only an economic purpose but also a social purpose», the Court states that «the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 151 TFEU, the promotion of employment,

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[12] ALAIMO A., *Presente e futuro del modello sociale europeo. Lavoro, investimenti sociali e politiche di coesione*, cit., 262; VILLANI U., *La politica sociale mel trattato di Lisbona*, in *RGL,* 2012, I, 47.

[13] Court of Justice 4 May 2016, C-547/14, *Philip Morris*, p. 153; Court of Justice 4 May 2016, C-477/14, *Pillbox 38 (UK)* Ltd, p. 116; Court of Justice 6 September 2012, C-544/19, *Deutsches Weintor eG*, p. 46-47, 49, e 54. See BARTOLONI M. E., *The EU social integration clause in a legal perspective*, in *Italian Journal of public law*, 2018, 1, 97 ss.

[14] CAGNIN V., *The potential role of the horizontal social clause (Art. 9 TFEU) on social rights protection*, in *European yearbook on human rights*, Cambridge, 2015, 143 ss.

[15] Opionion of the Advocate General Cruz Villalon 5 May 2010, Case C- 515/08, *Santos Palhota*, para 50: «according to the wording of Article 52 (1) TFEU, applicable to the freedom to provide services through the reference made therein to Article 62 TFEU, restrictions of that freedom may be justified on grounds of public policy, public security or public health. However, when a restriction is a measure which applies without distinction and does not give rise to direct discrimination, the Court has accepted that such a measure may also be justified "by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established". That justification must be interpreted strictly, and by means of a review of proportionality»

improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion». In support of this need for balancing, thus, the Court refers to the purpose of achieving a high level of employment, which the Union must pursue under art. 9 and 147 TFEU[16].

1.2. Social policies and the EU common commercial policy

A greater attention has been paid by the European Union to the protection of social rights in its international actions, in particular in the last decade, as well as in relation to the stipulation of international free trade agreements; actually, for a long time, there has been a considerable attention to the protection of human rights and social rights in commercial agreements stipulated by the European Union and third countries. In particular since the 1990s, more and more often, in bilateral trade agreements between the EU and third countries the parties have inserted social clauses requiring to respect the principles and rights referred to in the fundamental ILO Conventions or, in some cases, even higher levels of protection[17].

Originally, the focus on social cohesion was primarily aimed at avoiding social dumping practices and distortions of competition based on the diverging domestic regulations and at ensuring a harmonious development of the internal market; since the Lisbon Treaty a greater attention for social issues has emerged, also in the field of the common commercial policy. In the conclusion of international tariff and trade agreements, pursuant to art. 207 (1) TFEU, the EU shall conduct the commercial policy in the context of the principles and objectives of the Union's external action. These principles of the common commercial policy are established in other provisions of the Treaties. First of all, under art. 21 (1) TEU, the EU action shall be guided by «the principle which have inspired its own creation»: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, and principles of equality and solidarity. Furthermore, art. 3 (5)

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[16] Court of Justice 21 Deceber 2016, C-201/15, *AGET Iraklis*, para. 77-78. On this judgement, see RATTI L., *Le tecniche di bilanciamento fra tutela del lavoro e libertà d'impresa alla prova del diritto europeo*, cit., 433 ss.

[17] Usually, the EU requires the parties to ensure the protection of principles and rights refereed to by the *Decent work agenda.* See BARTELS L., *Human rights and sustainable development obligations in EU free trade agreement*, in *Legal issues of economic integration*, 2013, vol 40, n 4, 297 ss; BARTELS L., *Human rights and sustainable development obligations in EU free trade agreements*, in WOUTERS J., MARX A., GERAETS D., NATENS B. (eds.), *Global governance through trade Eu policies and approaches*, Elgar, 2015, 73 ss; YOTOVA R., *Balancing economic objectives and social considerations in the new EU investment agreements: commitments versus realities*, in VANDENBROUCKE F., BARNARD C., DE BAERE G. (eds.), *A European social union after crisi*, Cambridge university press, 2017, 286 ss; VAN DE PUTTE L., ORBIE J., *EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions*, *The International Journal of Comparative Labour Law and Industrial Relations*, 2015, 31, 3, 263 ss; MELO ARAUJO B., *Labour provisions in EU and US mega-regional trade agreements: rhetoric and reality*, cit., 239 ss. A certain attention to the protection of social rights has been paid within the Generalized system of preference (GSP). On thi issue, see PERULLI A., *Fundamental social rights, market regulation and EU external action,* cit., 42 ss; HEPPLE B., *Labour laws and global trade,* cit., 101 ss.

stipulates that the Union shall also promote «its values and interests» even in its relations with the wider world, contributing to sustainable development, solidarity, free and fair trade, poverty eradication and protection of human rights[18]. In line with these provisions, the European Parliament Resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements called for «the European Union's future trade strategy not to envisage trade as an end in itself, but as a tool for the promotion of European values and commercial interests and as an instrument for fair trade that can bring into general practice the effective inclusion and implementation of social and environmental standards with all EU trade partners»[19].

Despite the difficulties concerning the effectiveness of social clauses[20], these principles have been implemented by inserting social and environmental chapters or clauses in commercial agreements with third countries.

Even though some scholars have interpreted conservatively these provisions, it seems that they can play an important role in the balance between social rights and economic freedoms, since the principles established in such clauses shall guide the action of the EU, both internal and external[21].

The Court of Justice ruled on the balance between social rights and economic freedoms in relation to EU's common commercial policy[22]. On 16 May 2017, the Court of Justice delivered its opinion n. 2/15 on the competence of the European Union to sign and conclude the free trade agreement with Singapore. In particular, the request presented by the Commission was aimed at identifying which provisions fall within the

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[18] Under art. 21 (2) (d) TEU, the Union shall define and pursue common policies and actions, in order to «foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty».

[19] It also recalls that, pursuant to article 207 TFEU «the EU common commercial policy must be conducted "in the context of the principles and objectives of the Union's external action"».

[20] YOTOVA R., *Balancing economic objectives and social considerations in the new EU investment agreements: commitments versus realities*, cit., 278.

[21] According the Communication from the Commission Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union – COM (2010) 573, «The Union's work in the area of fundamental rights extends beyond its internal policies. The Charter also applies to its external action. In accordance with Article 21 TEU, the Union's action on the international scene is designed to advance in the wider world democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and the respect for the principles of the United Nations Charter and international law».

[22] GRUNI G., *Towards a sustainable Wolrd trade law? The commercial policy of the Europian Union after Opinion 2/15 CJEU,* in *Global trade and customs journal,* 2018, 13, 1, 4 – 6; LARIK J., *Trade and sustainable development: opinion 2/15 and the EU's foreign policy objectives*, in *BlogActive.EU*, 8 June 2017; CELLERINO C., *Il parere 2/15 della Corte di Giustizia sull'accordo di libero scambio UE-Singapore: luci e ombre*, in *Eurojus.it*, 25 luglio 2017; ASEEVA A., *Retour vers le future: la politique étrangère de l'Union Européenne, le commerce international et le développement durable après l'avis 2/15*, in *Revue juridique de l'inveronnement,* 2017, 4, 785 ss; KLEIMANN D., KÜBEK G., *The future of Eu external trade policy – Opinion 2/15: report from the hearing*, *EU law analysis, http://eulawanalysis.blogspot.lu/2016/10/the-future-of-eu-external-trade-policy.html;* KLEIMANN D., KÜBEK G., *The signing, provisional application, and conclusion of trade and investment agreements in the Eu: the case of CETA and Opinion 2/15*, in *Legal issues of economic integration*, 2018, 45, 1, 13; MONTANARO F., *Il parere 2/15 della Corte di Giustizia dell'Unione Europea e il futuro della politica commerciale commune dell'Unione*, in *Osservatorio Costituzionale*, 2017, 3; CREMONA M., *Shaping EU trade policy post-Lisbon: opinion 2/15 of 16 May 2017,* in *European constitutional law review*, 2018, 14, 231 ss; HAINBACH P., *The CJEU'opinion 2/15 and the future of the EU investment policy and law making*, in *Legal issue of economic integration*, 2018, 2, 199 ss.

Union's exclusive competence and which fall within the Union's shared competence, to establish whether the EU "alone" can conclude an international free trade agreement or whether it has to be a "mixed agreement"[23]. According the Opinion of the Court of Justice, the conclusion of the free trade agreement falls within the exclusive competence of the EU. Without analysing the complex issues relating to the Union's commercial competences, the Court, referring to art. 205 and 207 TFEU, 21 TEU, 9 and 11 TFEU, stated that the objective of sustainable development is closely linked to international trade and is «an integral part of the common commercial policy» of the European Union[24]. According to the Court, the notion of sustainable development comprises the social protection of workers and the protection of the environment, as declared in the preamble to the agreement. In paragraph 142 of the Opinion, the Court refers to art. 207 (1) TFEU, according to which «the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action», which include, pursuant to art. 21 (1) and (2) TUE, sustainable development. It follows that «account must, furthermore, be taken of Articles 9 and 11 TFEU, which respectively provide that, "in defining and implementing its policies and activities, the Union shall take into account requirements linked to … the guarantee of adequate social protection" and "environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development"». The Court highlights the importance of the chapter on sustainable development[25] and its close connection with trade: this link «is also specific in nature because a breach of the provisions concerning social protection of workers and environmental protection (…), authorises the other Party — in accordance with the rule of customary international law codified in Article 60(1) of the Convention on the law of treaties, signed in Vienna on 23 May 1969 (…) — to terminate or suspend the liberalisation, provided for in the other provisions of the envisaged agreement, of that trade»[26]. It would not be coherent «to hold that the provisions liberalising trade between the European Union and a third State fall within the common commercial policy and that those which are designed to ensure that the requirements of sustainable development are met when that liberalisation of trade takes place fall outside it», since the conduct of trade in accordance with the objective of sustainable development is an integral part of the aforementioned common commercial policy[27].

Advocate General Sharpston in her conclusions had excluded that articles 3 (5) TEU, 21 TEU, 9 and 11 TFEU could affect the extent of EU competence in relation to the common commercial policy; on the contrary[28], the Court states that, under the aforementioned art. 207 and 205 TFEU, 21 TEU, and art. 9 and 11 TFEU, in its external action, the Union is required to pursue the objective of sustainable development, since

[23] Paragraph 29, Opinion 2/15.

[24] P. 147, Opinion 2/15. See CREMONA M., *Shaping EU trade policy post-Lisbon: opinion 2/15 of 16 May 2017*, cit., 242.

[25] P. 162, Opinion 2/15.

[26] P. 161, Opinion 2/15.

[27] P. 163, Opinion 2/15.

[28] Opinion of the Advocate General Eleanor Sharpston delivered on 2 December 2016, in Opinion procedure, p. 495.

it is a founding principle of the Union itself[29]. Finally, the Court of Justice states, that, in the light of the objectives established in the Lisbon Treaty, the inclusion of the social chapters is justified by reasons that are not only protectionist, since the protection of social rights constitutes in all respects one of the objectives that the EU must pursue in its action, including at international level[30].

Thus, it confirmed, albeit indirectly, the importance of social considerations and the principles of sustainable development[31].

Although art. 9 TFEU does not have a preceptive nature, the inclusion of the horizontal social clause within the primary legislation that define the economic constitution of the European Union[32] and the attention to the social dimension of the European integration are getting increasingly important as it emerges from the references to this provision in the Court of Justice case law[33].

1.3. Freedom to provide services: justifications for restrictions to fundamental freedoms and the principle of proportionality

The issue of reconciliating social rights and economic freedoms arises especially when the social clauses, both statutory and contractual ones, encounter the freedom to provide services, the regulations on posting of workers in the field of transnational provision of services or the public procurement contracts.

The national laws aimed at protecting workers may constitute a restriction of the freedom to provide services prohibited pursuant to art. 56 TFEU. These restrictions arise «as a result of the fact that national laws are aimed at any person who is in national territory, while also applying to providers of services who, established in other Member States, are temporarily in national territory»[34].

Asked to rule on the legitimacy of national laws requiring contractors established in a Member States to respect certain working conditions provided for in the law or collective agreements, the Court of Justice observed that the freedom laid down in art. 56 TFEU entails that «the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided "under the same conditions as are imposed by that State on its own nationals"». In other words, imposing such

[29] Opinion n. 2/15, p. 142 -147. See GRUNI G., T*owards a sustainable Wolrd trade law? The commercial policy of the European Union after Opinion 2/15 CJEU*, cit., 5.

[30] VAN DE PUTTE L., ORBIE J., *EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions,* in *The International Journal of Comparative Labour Law and Industrial Relations*, 2015, 31, 3, 263 ss.

[31] CELLERINO C., *Il parere 2/15 della Corte di Giustizia sull'accordo di libero scambio UE-Singapore: luci e ombre,* cit.

[32] CISOTTA R., *Art. 9*, in CURTI GUALDINO C., *Codice dell'Unione Europea operative. TUE e TFUE commentate articolo per articolo*, Simone, 2012, 458.

[33] See RATTI L., *Autonomia collettiva e tutela dell'occupazione. Elementi per un inquadramento delle clausole sociali di riassunzione nell'ordinamento giuridico multilivello,* cit., 192 ss; SCHIECK D., *The EU's socio-economic model(s) and the crisi(e)s – any perspectives?*, in SCHIECK D. (a cura di), *The EU economic and social model in the global crisis*, Ashgate, 2013, 3 ss.

[34] Opinion of Advocate General Cruz Villalon delivered on 5 May 2010, case C-515/08, *Santos Palhota e alt*, p. 48.

condition on the service provider established in another Member State should not be discriminatory «against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions»; otherwise, it affects his ability to provide the service[35].

Although in *Rush Portuguesa* the Court ruled that Community law «does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established»[36], as noted in the Court's settled case law since the *Säger* case, art. 56 TFEU requires «not only the elimination of all discrimination against service provider on grounds of nationality or the fact that they are established in a Member State other than that in which the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national service providers and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where he lawfully provides similar services»[37].

Opting for market access approach instead of an anti-discrimination one[38] entails that the freedom to provide services, as a fundamental principle of the EU law, may be restricted only «by rules justified by overriding requirements relating to the public interest and applicable to all persons or businesses operating in the territory of the State where the service is provided» and only «in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established»[39]. In light of this interpretation, a Member State may introduce limitations to fundamental freedoms, such as the freedom to provide services, but the

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[35] Court of Justice 27 March 1990, C-113/89, *Rush Portuguesa Lda*, p. 11 -12. Under art. 57 TFEU, «the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals».

[36] Court of Justice 27 March 1990, C-113/89, *Rush Portuguesa Lda*, p. 18. See GIUBBONI S., *Libertà d'impresa e diritto del lavoro nell'Unione* europea, in *Costituzionalismo.*it, 2016, 3, 105, and GIUBBONI S., *Freedom to conduct a business and EU labour law,* in *European constitutional law review, The Displacement of Social Europe – Special* section, 2018, 14, 179: in the Author's opinion, *Rush Portuguesa* «marks a turning point in bridging the original gap between the spheres of economic and social integration, as it tears down the wall between national labour law and internal market rules in the crucial field of the free movement of services».

[37] Court of Justice 3 December 2014, C-315/13, *De Clercq*, p. 53; Court of Justice 11 December 2014, C-91/13, *Essebt Enercie Productie,* p. 44; Court of Justice 7 October 2010, C-515/08, *Santon Palhota e al.*, p. 29; Corte di Giustizia 19 dicembre 2012, C- 577/10, *Commissione c. Belgio,* p. 28; Court of Justice 25 October 2001, C-49/98, C-50/98, da C-52/98 a C-54/98 e da C-68/98 a C-71/98, *Finalarte e al.*, p. 28; Court of Justice 15 March 2001, C-165/98, *Mazzoleni*, p. 22; Court of Justice 23 November 1999, C-369/96 e C-376/96, *Arblade e al.*, p. 33; Court of Justice 25 July 1991, C-76/90, *Säger*, p. 12.

[38] The *market access test* is aimed at eliminating restrictions impeding or prohibiting the activities of a service provider, even if it applies without distinction to national service providers and those of other member states». See IZZI D., *Lavoro negli appalti e dumping salariale*, cit., 20; GIUBBONI S., *Libertà economiche fondamentali, circolazione dei servizi e diritto del lavoro*, in MEZZANOTTE F. (a cura di)*, Le «libertà fondamentali» dell'Unione Europea e il diritto* privato, RomaTre Press, 2016, 184; ORLANDINI G., *Mercato unico dei servizi e tutela del lavoro*, cit., 15 ss; BARNARD C., DEAKIN S., *Social policy and labour market regulation*, in *The Oxford yearbook of the European Union,* 2012, 549 ss.

[39] Court of Justice 25 October 2001, C-49/98, C-50/98, da C-52/98 a C-54/98 e da C-68/98 a C-71/98, *Finalarte e al.*, p. 31; Court of Justice 15 March 2001, C-165/98, *Mazzoleni e ISA*, p. 25; Court of Justice 23 November 1999, C-376/96, *Arblade e al.*, p. 36; Court of Justice 25 July 1991, C-76/90, *Säger*, p. 15.

justifications of such limitations shall be interpreted strictly and by means of a strict review of necessity and proportionality[40]. It means that the application of national rules to services providers established in other Member States, since they may limit economic freedoms, must effectively pursue a legitimate aim, must be appropriate for securing the achievement of the objective that they pursue, and must not go beyond what is necessary in order to attain it[41].

Even the national labour law rules aimed at protecting workers can be considered as an overriding reason of public interest capable of justifying a restriction of this freedom[42]: they are in fact an expression of an imperative requirement, as evidenced by the rules defining the European social model[43]. Sometimes the Court expressly stated that the prevention of unfair competition, in so far as the protection of workers, may be an aim pursued by the national legislator that may be considered as a reason of public interest. In *Wolff & Muller*, for example, it was stated that the purpose of preventing «unfair competition on the part of undertakings paying their workers at a rate less than the minimum rate of pay» may be taken into consideration as an overriding requirement capable of justifying a restriction on freedom to provide services. In line with recital 5 of Directive 96/71, according to which the transnational provision of services «requires a climate of fair competition and measures guaranteeing respect for the rights of workers», the Court reiterates that «there is not necessarily any contradiction between the objective of upholding fair competition on the one hand and ensuring workers protection, on the other»[44]. Also in *Laval*, the Court incidentally stated that the right to take collective action «for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest», potentially capable of justifying a restriction of one of the fundamental freedoms guaranteed by the Treaty[45].

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[40] Opinion of Adovcate General Cruz Villalon, delivered on 5 May 2010, case C-515/08, *Santos Palhota e al*, p. 49-50.

[41] Court of Justice 23 November 1999, C-369/96 e C-376/96, *Arblade e al.*, p. 35; Court of Justice 25 July 1991, C-76/90, *Säger*, p. 15; Court of Justice 30 November 1995, C-55/94, *Gebhard*, p. 37.

[42] Court of Justice 3 December 2014, C-315/13, *De Clercq*, p. 65; Court of Justice 7 October 2010, C-515/08, *Santos Palhota*, p. 47; Court of Justice 12 October 2004, C-60/03, *Wolff e Muller GmbH & Co. KG*, p. 35; Court of Justice 15 March 2001, causa C-165/98, *Mazzoleni e ISA*, p. 27; Court of Justice 23 November 1999, C-376/96, *Arblade e al.*, p. 36.

[43] FORLIVESI M., *Le clausole sociali negli appalti pubblici tra novità legislative e vincoli di compatibilità nel mercato europeo,* cit., 80; CARABELLI U., LECCESE V., *Libertà di concorrenza e protezione sociale a confronto. Le clausole di favor e non regresso nelle direttive sociali*, in *Contr. Impr. Eur.*, 2005, 552 ss.

[44] Court of Justice 12 October 2004, C-60/03, *Wolff & Müller GmbH & Co. KG*, 41 – 42: «inasmuch as one of the objectives pursued by the national legislature is to prevent unfair competition on the part of undertakings paying their workers at a rate less than the minimum rate of pay, a matter which it is for the referring court to determine, such an objective may be taken into consideration as an overriding requirement capable of justifying a restriction on freedom to provide services provided». See also cfr. anche Court of Justice 3 December 2014, C-315/13, *De Clercq*, p. 65.

[45] Court of Justice 18 Dcember 2007, C- 341/05, *Laval un Partneri Ltd*, 103; Court of Justice 15 March 2001, C-165/98, *Mazzoleni e ISA*, p. 27; Court of Justice 25 October 2001, C-49/98, C-50/98, da C-52/98 a C-54/98 e da C-68/98 a C-71/98, *Finalarte e a.*, p. 33. See ORLANDINI G., *Mercato Unico dei servizi e tutela del lavoro*, cit., 20.

The balancing made by the Court of Justice has changed since the *Laval quartet*. In the *Viking*, *Laval*, *Commission c. The Grand Duchy of Luxembourg* and *Rüffert*[46], in fact, the Court of Justice in interpreting the provisions of Directive 96/71 on the transnational posting of workers adopts a more restrictive approach than the previous one[47]. In these judgments, the Court consider the reasons that can justify an exemption to the freedom to provide services and the application of national rules that may constitute a restriction to the provision of services, no longer in the light of the public interest that they pursue, but it applies a strict proportionality test based on the provisions of art. 3 of the Directive 96/71.

In particular, it proposes a very strict interpretation of the concept of public policy provisions which, under art. 3 (10), allow member states to impose on national undertakings and those of other states, in compliance with non-discrimination principles, terms and conditions of employment on matters other than those referred to in paragraph 1 of art. 3[48]. In the *Commission c. Grand Duchy of Luxembourg*, concerning the compatibility of the Luxembourgish legislation implementing Directive 96/71, the Court of Justice recalls that «the classification of national provisions by a Member State as public-order legislation applies to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State». Since art. 3 (10) constitutes «a derogation from the principle that the matters with respect to which the host Member State may apply its legislation to undertakings which post workers to its territory are set out in an exhaustive list in the first subparagraph of

[46] Court of Justice 11 December 2007, C-438/05, *International Transports Workers' Federation v. Viking Line ABP;* Court of Justice 18 December 2007, C- 341/05, *Laval un Partneri Ltd*; Court of Justice 19 June 2008, C-319/06, *Commissione c. Granducato di Lussemburgo*; Court of Justice 3 April 2008, C-346/06, *Rüffert*. See ANDREONI A., VENEZIANI B. (A CURA DI), *Libertà economiche e diritti sociali nell'Unione Europea. Dopo le sentenze* Laval, Viking, Ruffert *e* Lussemburgo, Ediesse; BARNARD C., *The calm after the storm: timo to reflect on EU (labour) law scholarship following ght decisions in* Viking *and* Laval, in BOGG A., COSTELLO C., DAVIES A. C.L., *Research handbook on EU labour law*, Elgar, 2016, 337 ss; BARNARD C., *EU employment law*, 2012, fourth ed., Oxford, 200 ss.

[47] «The freedom to provide services includes the right of undertakings to provide services in the territory of another Member State and to post their own workers temporarily to the territory of that Member State for that purpose». See Recital 2 of Direttiva 2018/957/EU.

[48] Art. 3 (10), as amended by Directive 2018/957/EU, states: «This Directive shall not preclude the application by Member States, in compliance with the Treaties, to national undertakings and to the undertakings of other Member States, on the basis of equality of treatment, of terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions». This principle has already been stressed in the Court of Justice case law. For example, in *Laval*, the Court stated that «Member States may apply terms and conditions of employment on matters other than those specifically referred to in Article 3(1), first subparagraph, (a) to (g), in compliance with the Treaty and, in the case of public policy provisions, on a basis of equality of treatment, to national undertakings and to the undertakings of other Member States». On this issue, see GIUBBONI S., *Diritto del lavoro europeo*, cit., 103 ss; ORLANDINI G., *Mercato unico dei servizi e tutela del lavoro*, cit., 28. Sulla nozione di ordine pubblico, cfr. anche CARABELLI U., *Una sfida determinante per il futuro dei diritti sociali in Europa: la tutela dei lavoratori di fronte alla libertà di prestazione dei servizi nella CE,* WP C.S.D.L.E. "Massimo D'Antona" .INT - 49/2006, 54; PALLINI M., *La tutela dell'«ordine pubblico sociale» quale limite alla libertà di circolazione dei servizi nel mercato UE*, in ANDREONI A., VENEZIANI B., (a cura di), *Libertà economiche e diritti sociali nell'Unione Europea. Dopo le sentenze* Laval, Viking, Ruffert *e* Lussemburgo, cit., 191 ss.

Article 3(1)» and a derogation from the fundamental principle of freedom to provide services on which the directive is based, the Court interpreted strictly the notion of public-order legislation and ruled that its scope «cannot be determined unilaterally by the Member States»[49]. Therefore, public policy exemption cannot be invoked by the Member State to impose on undertakings posting their workers on its territory requirements whose objective is the protection of workers[50]. This concept may be relied on «only if there is a genuine and sufficiently serious threat to a fundamental interest of society»[51].

In *Viking* and *Laval* a more restrictive approach had emerged in relation to the justifications for restrictions on fundamental economic freedoms[52]. Called to assess, in the first case, the legitimacy of the collective action of a Finnish trade union in order to prevent Viking from relying, only for convenience and for economic reasons, on the freedom of establishment and, on the other, the legitimacy of the strike called by a Swedish union to obtain the application of the Swedish collective agreement to employees of the Latvian company Laval seconded to Sweden, the Court stated that to both collective actions and the right to strike should be applied a strict proportionality test. It ruled that a restriction to the freedom of establishment or to provide services may only be justified whether it pursues a legitimate aim compatible with the Treaty, it is justified by overriding reasons of public interest, it is necessary and adequate to guarantee the achievement of the objective pursued, it does not go beyond what is necessary in order to attain it, and it requires that the referring court examines whether the objective pursued by the collective action at issue cannot be achieved by other means less restrictive of fundamental economic freedoms[53]. It means that, although the protection of fundamental rights is a legitimate interest capable of justifying a limitation of the obligations imposed by EU law, even under a fundamental freedom, the exercise of fundamental rights, such as the right to take collective action, doesn't fall outside the scope of the provisions of the Treaty, but must «be reconciled with the requirements relating to the rights protected under the Treaty and in accordance with the principle of

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[49] Court of Justice 19 June 2008, C-319/06, *Commissione c. Granducato di Lussemburgo*, p. 29 – 31 e 49.

[50] Court of Justice 19 June 2008, C-319/06, *Commissione c. Granducato di Lussemburgo*, p. 55.

[51] Court of Justice 19 June 2008, C-319/06, *Commissione c. Granducato di Lussemburgo*, p. 36 and p. 50.

[52] On *Viking* and *Laval* judgements, see FREEDLAND M., PRASSL J. (a cura di), *Viking, Laval and Beyond*, Oxford-Portland, Hart, 2014; ANDREONI A., VENEZIANI B. (A CURA DI), *Libertà economiche e diritti sociali nell'Unione Europea. Dopo le sentenze* Laval, Viking, Ruffert *e* Lussemburgo*,* Ediesse; ROCCELLA M., TREU T., *Diritto del lavoro dell'Unione Europea,* cit., 441 ss; BALLESTRERO M. V., *Le sentenze Viking e Laval: la Corte di Giustizia 'bilancia' il diritto di sciopero*, in *LD*, 2008, 371 ss.; CARABELLI U., *Note critiche a margine delle sentenze della Corte di Giustizia nei casi Laval e Viking*, in *DLRI*, 2008, 147 ss.; ORLANDINI G., *Autonomia collettiva e libertà economiche: alla ricerca dell'equilibrio perduto in un mercato aperto e in libera concorrenza*, in *DLRI*, 2008, 237 ss.; PALLINI M.*, Law shopping e autotutela sindacale nell'Unione europea*, in *RGL*, 2008, II, 3 ss; SCIARRA S.,*Viking e Laval: diritti collettivi e mercato nel recente dibattito europeo*, in *LD*, 2008, 245 ss; LO FARO A., *Diritti sociali e libertà economiche del mercato interno:considerazioni minime in margine ai casi Laval e Viking,* in *LD*, 2008, 63 ss.

[53] Court of Justice 11 December 2007, C-438/05, *International Transports Workers' Federation v. Viking Line ABP*, 87 e 75.

proportionality»[54]. On the basis of this approach, in *Viking* and *Laval* the Court of Justice established the horizontal direct effect of the freedom of establishment and of the freedom to provide services also with respect to collective regulations, thus placing the law and collective agreements on the same level concerning the contrast with fundamental freedoms[55]. The abolition of obstacles to these fundamental freedoms would be compromised, in fact, «if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of the legal autonomy of associations or organisations not governed by public law»[56].

According to this case law, the conditions of employment to be guaranteed to workers pursuant to art. 3 (1) of Directive 96/71 constitute the maximum level of protection in the context of a posting of workers in a transnational provision of service[57]: the host Member State cannot «make the provision of a service in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection». Such a conclusion cannot be reached either under art. 3 (7) of Directive 96/71, according to which the provisions of art. 3 do not prevent the application of terms and condition of employment that are more favourable to workers: the host Member State is not allowed to make the provision of service conditional on the compliance with conditions «which go beyond the mandatory rules for minimum protection». Indeed, a different interpretation would deprive the directive of its effectiveness[58].

In this way, however, the Court offers arguments in favour of legitimacy of social dumping, rather than instruments to tackle it.

From these rulings of the EU case law concerning economic freedoms and Directive 96/71, it seems that the market reasons usually prevail on social rights and the role of national labour law is reduced[59]: the idea, proper of the so-called model of "embedded

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[54] «It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another Member State which posts workers in the framework of the transnational provision of services». See Court of Justice 18 December 2007, C- 341/05, *Laval un Partneri Ltd*, 93-95; Court of Justice 11 December 2007, C-438/05, *International Transports Workers' Federation v. Viking Line ABP*, 54.

[55] RATTI L., *Autonomia collettiva e tutela dell'occupazione,* cit., 186.

[56] Court of Justice 18 December 2007, C- 341/05, *Laval un Partneri Ltd*, 98. In *Viking*, p. 62, the Court stated that «this interpretation is also supported by the case-law on the Treaty provisions on the free movement of goods, from which it is apparent that restrictions may be the result of actions by individuals or groups of such individuals rather than caused by the State». See RLANDINI G., *Mercato unico dei servizi e tutela del lavoro*, cit., 54 ss; GIUBBONI S., *Diritto del lavoro europeo,* cit., 107 ss.

[57] Court of Justice 3 Aprile 2008, C-346/06, *Rüffert,* p. 33. See CORTI M., *Concorrenza e lavoro: incroci pericolosi in attesa di ua svolta*, in *DLRI*, 2016, 3, 507.

[58] Court of Justice 18 Dcember 2007, C- 341/05, *Laval un Partneri Ltd*, 80. On this provision, see ROCCELLA M., TREU T., *Il diritto del lavoro dell'Unione Europea*, cit., 162.

[59] BARBERA M., *L'idea di impresa. Un dialogo con la giovane dottrina giuslavoristica*, in WP C.S.D.L.E. "Massimo D'Antona".it, 293/2016, 8; INGRAVALLO I., *La Corte di giustizia tra diritto di sciopero e libertà economiche fondamentali. Quale bilanciamento?*, in VIMERCATI A. (a cura di), *Il conflitto sbilanciato. Libertà economiche e autonomia collettiva tra ordinamento comunitario e ordinamenti nazionali,* cit., 36.

liberalism", of a liberalisation of the market accompanied by the intervention of the Member States to protect the social concerns seems to be obsolete[60].

1.4. The protection of competition in the internal market and the collective bargaining

The opinion expressed in the *Laval quartet* is at the basis of this displacement of the «original constitutional balance» between the economic integration and the protection of the national labour law systems autonomy[61]: indeed, national labour law may contribute an element in the distortion of competition in the internal market[62]. As the scholars argued, in this sense, competition has gone from being an element for the regulation of the activity of the businesses to a condition for the legitimacy of the state sovereignty[63].

In EU law the competition is a pivotal element: the European Union is based on a highly competitive market economy. Although, under art. 120 TFEU, Member States are required to implement their economic policy «with a view to contributing to the achievement of the objectives of the Union», as defined in art. 3 TEU, Member States and the Union must act in compliance with the principles of an open market economy with free competition, in accordance with the principles set out in art. 119. In fact, under art. 119 TFEU, «the activities of the Member States and the Union» shall include the adoption of an economic policy «based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives» and conducted in accordance with the principle of an open market economy with free competition[64].

A limit to free competition may result from collective agreements: due to their purpose of setting minimum standards of protection and reducing the competition between workers, the collective bargaining may be a constraint for entrepreneurs, since it is a potential obstacle to market access: therefore it "necessarily" constitutes a restriction of competition[65].

In a study concerning the legitimacy of social clauses, an issue strictly related to the role of collective autonomy, therefore, it is useful to analyse the case law of the Court

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[60] GIUBBONI S., *Diritto del lavoro europeo*, cit., 57 ss; BANO F., *Sovranità regolativa e subordinazione del diritto del lavoro*, in *LD*, 2017, 1, 20; SCHIEK D., *Towards more resilience for a social EU – the constitutionally conditioned Internal Market*, in *European (legal)studie on-line papers,* 2017, 4; DEAKIN S., *The Lisbon treaty, the Viking and Laval judgements and the financial crisi: in search of new foundations for Europe's "social market economy", in* BRUUN N., LORCHER K., SCHOMANN I., *The Lisbon Treaty and social Europe*, cit., 21 ss.

[61] GIUBBONI S., *Cittadinanza, lavoro e diritti sociali nella crisi europea*, in WP CSDLE «Massimo D'Antona».INT-100/2013, 13.

[62] DEAKIN S, *The Lisbon Treaty, the* Viking *and* Laval *Judgments and the Financial Crisis: in Search of New Foundations for Europe's "Social Market Economy"*, cit., 24.

[63] PALLINI M., *Il diritto del lavoro e libertò di concorrenza: il caso dei servizi aeroportuali*, in *RGL,* 2006, II, 46.

[64] See SCHIEK D., *The EU's Socio-economic Model(s) and the Crisi(e)s – any Perspectives?*, in SCHIEK D. (eds), *The EU Economic and Social Model in the Global Crisis*, Ashgate, 2013, 6 ss.

[65] PALLINI M., *Il rapporto problematico tra diritto della concorrenza e autonomia collettiva nell'ordinamento comunitario e nazionale*, in *RIDL*, 2000, II, 209 ss.

of Justice in relation to collective bargaining and free competition. In *Albany*, the Court was asked to assess the compatibility of a domestic labour law provision, concerning the extension of a collective agreement establishing a system of compulsory affiliation to an occupational pension scheme. In this case, the Court pointed out the limits and restrictions to which competition may be subjected and its relationship between competition and social policy[66]. The Court stated that a collective agreement, such as the one at issue in the main proceeding, establishing a supplementary pension fund, does not fall within the scope of application of Article 85 TCE, today art. 101 TFEU, according to which are prohibited and void all the agreements limiting the competition[67]. Even though collective agreements may have restrictive effects on competition, it is necessary to bear in mind that «the social policy objectives pursued by such agreements would be seriously compromised», if the social partners and collective agreements were subject to competition law: «it therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside» the scope of art. 101 TFEU[68]. The Court ruled that, for a collective agreement to be excluded from the scope of this provision, it must be concluded between the organisation representing workers and employers[69] and must be aimed at improving or protecting condition of work and employment[70]. In these cases, in fact, it is not a

[66] According to BARNARD C., DEAKIN S., *In search of coherence: social policy, the single market and fundamental rights*, in *IRJ*, 2000, 31, 4, 337, «Albany *therefore reprents a useful clarification of the limits of competition policy and, conversely, of the standing of social policy within the European legal order*». See also SCHIEK D., *Self-employed workers in the sharing economy and collective bargaining rights – EU competition law as a curse or an opportunity for the European social model 4.0?,* 9.

[67] Court of Justice 21 September 1999, C-67/96, *Albany International BV*, p. 61 ss. Under art. 101 TFEU, «all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market» shall be prohibited as incompatible with the internal market.

[68] Court of Justice 21 September 1999, C-67/96, *Albany International BV*, p. 59 e 60. See BARNARD C., DEAKIN S., *In search of coherence: social policy, the single market and fundamental rights*, in *IRJ*, 2000, 31, 4, 331 ss, who argues that *Albany* is an important step «*on the road towards the recognition of a more central place for social rights within the European legal order*». See also PALLINI M., *Il rapporto problematico tra diritto della concorrenza e autonomia collettiva nell'ordinamento comunitario e nazionale*, cit., 209 ss; DI VIA L., *Sindacati, contratti collettivi e antitrust*, in *Mercato concorrenza regole*, 2000, 2, 279 ss.

[69] In fact, the collective agreements stipulated by the unions representing self-employed fall within the scope of application of art. 101 TFEU (art. 85 TEC), as states by Court of Justice del 12 September 2000, C-180/98, *Pavlov e al.* In Court of Justice 4 December 2014, C-413/13, *FNV Kunsten INformatie en Media*, the Court stated: «it is only when self-employed service providers who are members of one of the contracting employees' organisations and perform for an employer, under a works or service contract, the same activity as that employer's employed workers, are 'false self-employed', in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU».

[70] Therefore, «agreements concluded in thecontext of collective negotiations between management and labour in pursuit ofsuch objectives must, by virtue of their nature and purpose, be regarded as fallingoutside the scope of Article 85(1) of the Treaty» (art. 101 TFEU). See Court of Justice 21 September 1999, C-67/96, *Albany International BV*, p. 59; Court of Justice 4 Dcember 2014, C-413/13, *FNV Kunsten Informatie en Media*, p. 22 e 23.

question of economic agreements between private individuals that pursue their own interests: collective bargaining normally fulfils an «appreciable social function», which is confirmed by the national law and practice of the competition authorities and courts of the Member States, as stressed in his Opinion Conclusions by the AG Jacobs[71].

In this way, by excluding the collective bargaining from the application of competition law, the case law of the Court of Justice succeeded in finding a point of equilibrium of the opposing requirements, contrasting the protectionist effects of internal labour law without undermining national worker protection systems[72].

According to the Posted Workers Directive and the related case law, the balance between collective autonomy and free market is more "problematic" in Member States where collective agreements are not generally applicable[73]. The directive 96/71 identifies the level of protections that Member States can guarantee to the workers sent on the national territory by a business from another Member State, by it referring to minimum standards in a comprehensive list of subjects provided for in law or collective agreements of general application. Article 3 (8) allows Member States, in the absence of a system for declaring collective agreements to be of universal application, to base themselves on collective agreements «generally applicable» to all similar undertakings in the geographical area and in the profession or industry concerned or on collective agreements concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory. With regard to the sources that, under the Directive, may provide for the minimum level of protection that the host Member State may require the compliance with, in *Laval*, the Court of Justice established the absolute "irrelevance" of collective agreements not generally binding[74]. In *Rüffert*, the Court states that it could not be included in the concept of "generally applicable" under art. 3 (8) a collective agreement whose binding effectiveness extends only to a part of the industry. In that case, a collective agreement to which the law gave this effect only to public procurement and not to private contracts, although pertaining to the sector considered, cannot be considered a collective agreement within the meaning of art. 3(8)[75].

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[71] Opinion of AG Jacobs delivered on 28 January 1999, case C-67/96, *Albany International BV*, p. 184-185.

[72] GIUBBONI S., *Diritto del lavoro europeo,* cit., 72; NIGLIA L., *Eclipse of the Constitution*, in *European law journal*, 2016, 2, 134: «*the CJEU tended to protect individual rights (economic freedoms) in the key domains (free movement and competition law) of market integration, considering them to outweigh any conflicting collective (including governmental) interests—whilst, conversely, exercising caution in implementing any such individual rights whenever that would have entailed the sacrifice of a specific set of collective (including governmental) interests, those involving the regulation of social policy, which were considered to be, comparatively speaking, of greater importance than EU law rights (qua economic freedoms)*».

[73] INGLESE I., *Le clausole sociali nelle procedure di affidamento degli appalti alla luce delle novità normative*, cit., 572.

[74] Court of Justice 18 December 2007, C- 341/05, *Laval un Partneri Ltd*, p. 80-81. See CORTI M., *Concorrenza e lavoro: incroci pericolosi in attesa di una svolta*, cit., 507.

[75] Court of Justice 3 April 2008, C-346/06, *Rüffert*, 27-29.

1.5. The freedom to conduct a business in Article 16 of EU Charter of Fundamental Rights

The freedom to conduct a business is guaranteed also in art. 16 of the Charter of Fundamental Rights of the European Union, which delineates its scope of application, sanctioning that it is guaranteed «in accordance with Union law and national laws and practices»[76].

The freedom to conduct a business, as stated by the Explanations relating to the Charter, is «a general principle of EU law» and, as interpreted by the Court of Justice, it entails the protection of the freedom to exercise an economic or commercial activity, the freedom to contract, and the principle of free competition[77]. The reference to art. 119, paragraph (1) and (3) TFEU, ensuring the free competition is important: in this way, the interdependence between this freedom and the creation of a free market, between the protection of competition within the single market and the protection of fundamental economic freedoms, which are an expression of this freedom, as well as instruments aimed at guaranteeing its effectiveness, is emphasized[78].

Concerning the nature of art. 16, it recognises a right only whether it is considered the exercise of economic activity as a manifestation of a fundamental right of the person; academics exclude that the component of art. 16 CDFUE on the freedom to conduct a business with free competition can be considered a right, but it is a "principle"[79].

Regarding the limits identified by the case law, in *Nold* the Court of Justice stated that in safeguarding fundamental rights «the Court is bound to draw inspiration from constitutional traditions common to the Member States» and from international treaties on the protection of human rights, of which the Member States are signatories. With an interpretation consistent with the constitutional orders of the Member States, which protect the freedom to conduct a business and, at the same time, identify its limits[80], the Court recognised this economic freedom in the light of its social function in the common market integration[81]. Therefore, even within the EU legal order, it seems legitimate that

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[76] MALBERTI C., *Art. 16*, in MASTROIANNI R., POLLICINO O., ALLEGREZZA S., PAPPALARDO F., RAZZOLINI O. (a cura di), *Carta dei diritti fondalmentali dell'Unione Europea*, Giuffrè, 2017, 311; USAI A., *The freedom to conduct a business in th EU, its limitations and its role in the European legal order; a new engine for deeper and stronger economic, social, and political integration,* in *German law journal*, 2013, 14, 9, 1867 ss; BABAYEV R., *Private autonomy at Union level: on article 16 CFREU and free movement* rights, in *Common market law review*, 2016, 53, 979 ss.

[77] *Explanantion relating to the Charter of FUndamentl Rights*, in Official Journal of the European Union, C303/17 - 14.12.2007. See also Opinion of AG AG Cruz Villalon delivered on 19 February 2013, case C-426/11, *Alemo-Herron*, p. 48. On the freedom to conduct a business, the explanation refers to Court of Justice 14 May 1974, C- 4/73, *Nold,* p. 14; Court of Justice 27 September 1979, C- 230/78, *SpA Eridania e a.,* p. 20 e 31; Court of Justice, case 151/78, *Sukkerfabriken Nykøbing,* p. 19; Court of Justice 5 October 1999, C-240/97, *Spagna/Commissione*, p. 99.

[78] USAI A., *The freedom to conduct a business in th EU, its limitations and its role in the European legal order; a new engine for deeper and stronger economic, social, and political integration*, cit., 1877.

[79] MALBERTI C., *Art. 16*, cit., 317.

[80] Court of Justice 14 May 1974, C-4/73, *Nold KG v. Commissione*, p. 13 -14.

[81] GIUBBONI S., *Diritto del lavoro europeo*, cit., 61.

these freedoms are subject to certain limits justified by the overall objectives pursued by the EU, on condition that the substance of these rights is left untouched[82].

In *Sky Österreich*, with regard to the relationship between the right to property and the freedom to conduct a business, on the one hand, and the freedom of citizens to receive information, on the other, the Court explained that art. 16 of the Charter covers «the freedom to exercise an economic or commercial activity, the freedom of contract and free competition» and that the freedom of contract includes the freedom to choose with whom to do business and the freedom to determine the price of a service[83]. In accordance with the settled case law, the Court identifies the limits for the exercise of the freedom to conduct a business[84]: the freedom to conduct a business is not absolute, but must be viewed in relation to its social function[85]. Unlike the other fundamental freedoms, in consideration of the formulation of art. 16 of the Charter, «the freedom to conduct a business can be subject to a wide range of interventions by the public authorities establishing, for the public interest, limits to the exercise of the economic activity». To identify the admissible limits for this freedom, reference should be made to art. 52 (1) of the Charter of Fundamental Rights of the European Union, pursuant to which any limitation on the exercise of the rights and freedoms recognized by the Charter must be provided for by law, respect its essential content and, subjected to the principle of proportionality, «may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others»[86]. Therefore, the freedom to conduct a business can be limited, but the substance of these rights is left untouched[87].

The most interesting judgments on this topic, in which the Court considers the relationship between the freedom to conduct a business and social rights, are *Alemo-Herron* and *Aget Iraklis*[88].

In the first judgement, which concerns the interpretation of Directive 2001/23 on the transfer of undertaking and the enforceability against transferee of dynamic clauses referring to collective agreements negotiated and adopted after the date of the transfer, the Court of Justice stated the need to interpret the provisions of the directive in a manner consistent with the fundamental rights set out by the EU Charter of fundamental rights. Since the freedom of contract is included in the freedom to conduct a business laid down by art. 16 of the Charter, with which the Court's interpretation have to comply, the contractual freedom of the transferee cannot jeopardise «the very substance of the freedom to conduct a business». In this case, it means that dynamic clauses referring to

[82] Court of Justice 14 May 1974, *Nold KG v. Commissione*, p. 13 -14.

[83] Court of Justice 22 January 2013, C-283/11, *Sky Österreich GmbH c. Österreichischer Rundfunk,* par. 42 - 43.

[84] MALBERTI C., *Art. 16*, cit., 314.

[85] Court of Justice 22 January 2013, C-283/11, *Sky Österreich GmbH c. Österreichischer Rundfunk,* par. 45. See also Court of Justice 9 September 2004, C-184/02 e C-223/02, *Spagna e Finlandia/Parlamento e Consiglio*, p. 51 e 52; Court of Justice 6 September 2012, C-544/10, *Deutsches Weintor,* p. 54.

[86] Court of Justice 22 January 2013, C-283/11, *Sky Österreich GmbH c. Österreichischer Rundfunk,* par. 45 – 50; Court of Justice 4 May 2016, C-477/14, *Pillbox 38 (UK)* Ltd, p. 157 – 158.

[87] MALBERTI C., *Art. 16*, cit., 316 ss.

[88] RATTI L., *Tutela del lavoro e libertà d'impresa alla prova del diritto europeo*, cit., 433 ss.

collective agreements negotiated and adopted after the date of the transfer are not enforceable against the transferee, since he must have the possibility of effectively participating and asserting his interests in the contractual process and negotiate the aspects determining changes in the working conditions for its employees with view to its future economic activity[89]. In this ruling, the Court didn't accept the opinion of the Advocate General Cruz Villalòn, who, while acknowledging that the fact that the entrepreneur is bound «by terms and conditions of employment to which it did not agree» may be a restriction on the freedom of contract under art. 16 of the Charter, concluded that the imposition of the terms and conditions provided for in the collective agreement doesn't automatically entail a breach to the freedom to conduct a business; it is for the national court to assess whether the requirement is «unconditional and irreversible in nature» and infringed the core of this freedom[90].

According to the Court, the transfer of undertaking Directive «does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other», so that the transferee can make the adjustments and changes necessary to carry on its activities[91]. Despite this premise, in which it refers to the interests of both parties, the Court seems to take into consideration only the fundamental rights of one of the parties[92] and, in conclusion, accepts a very broad notion of freedom to conduct a business, which also protects the "profitability" of the economic activity for the entrepreneur[93].

In *AGET Iraklis*, the Court of Justice ruled that the Greek legislation transposing Directive 98/59 on collective redundancies is incompatible with art. 49 TFEU, since it precludes the choice of the Ministry of Labour to authorise or not to authorise collective redundancies on the basis of an assessment of the conditions of the labour market, the situation of the undertaking, and the interest of the national economy[94]. It recognises that the protection of workers, the encouragement of recruitment, and the maintenance of employment are legitimate aims of social policy and fall within the overriding reasons of public interest which may be legitimate justifications for restrictions to the freedom of establishment. In fact, the economic freedoms, in light of the social purposes identified in art. 3 (3) TEU and in art. 9 TFEU, shall be balanced with the objectives pursued by social policy[95]. Therefore, in this case, the Court evaluates, at least

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[89] Court of Justice 18 July 2013, C-426/11, *Alemo-Herron*, p. 30 – 36.

[90] Opinion of AG Cruz Villalon 19 February 2013, case C-426/11, *Alemo-Herron*, p. 54 ss.

[91] Court of Justice 18 July 2013, C-426/11, *Alemo-Herron*, p. 25.

[92] KARLANDER L., *The ECJ's adjudication of fundamental rights conflicts. In search of a fair balance*, Uppsala Universiteit, 2018, 107; NOVITZ T., *The paradigm of sustainability in a European social context: collective participation in protection of future interests?*, in *The international journal of comparative labour law and industrial relations*, 2015, 31, 3, 251.

[93] GIUBBONI S., *Diritto del lavoro europeo*, cit., 84.

[94] Court of Justice 21 December 2016, C-201/15, *AGET* Iraklis. See RATTI L., *Tutela del lavoro e libertà d'impresa alla prova del diritto europeo*, cit., 433 ss; MARKAKIS M., *Can governments control mass layoffs by employers? Economic freedoms vs labour rights in case C-201/15 AGET Iraklis*, in *European constitutional law review*, 2017, 13, 724 ss.

[95] Court of Justice 21 December 2016, C-201/15, *AGET* Iraklis, p. 73 - 78. In paragraph 83, the Court states that «the mere fact that a Member State provides, in its national legislation, that projected collective redundancies must, prior to any implementation, be notified to a national authority, which is endowed

apparently, the opposing interests at stake, referring to both art. 16 of the Charter and art. 9 TFEU[96]. However, in the application of proportionality test, the Court states that EU law precludes the legitimacy of the criteria identified by the Greek legislation to assess the admissibility of collective redundancies, due to the vagueness and the wide margin of discretion left to the authority: «such criteria which are not precise and are not therefore founded on objective, verifiable conditions go beyond what is necessary in order to attain the objectives stated and cannot therefore satisfy the requirements of the principle of proportionality»[97].

2. In search of a balance between competition and social objectives

The Court of Justice has usually paid a greater attention to the protection of the economic dimension rather that to social policies: this case law is confirmed in the rulings concerning both first- and second-generation social clauses.

The issue of identifying the point of equilibrium between competition and social objectives with respect to the legitimacy of social clauses is particularly relevant when these provisions interact with the regulation of posting of workers in the transnational provision of service and the EU directives on the award and the performance of public procurement contracts. In fact, the most problematic issues have emerged with reference to these regulations.

Concerning the public procurements regulation, the Court of Justice has never questioned the legitimacy of social considerations in the award and the performance of contracts. However, since the introduction of public interest objectives different from economic interests requires a reconciliation between the latter and the protection of competition, the Court imposed the condition that the criteria for the award of the contract «are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination»[98]. In accordance with these principles, in *Beentjes*, the Court of Justice ruled the compatibility with the regulations on the awarding of contracts of a social constraints, such as the condition relating to the employment of long-term unemployed persons, provided that such requirements have no direct or indirect discriminatory effect on tenderers from other Member States: in fact, such specific conditions must be qualified as supplementary, must necessarily be stated in the tender notice, and must comply with the prohibitions and principles

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with powers of review enabling it, in certain circumstances, to oppose the projected redundancies on grounds relating to the protection of workers and of employment, cannot be considered contrary to freedom of establishment as guaranteed by Article 49 TFEU or the freedom to conduct a business enshrined in Article 16 of the Charter».

[96] KARLANDER L., *The ECJ's adjudication of fundamental rights conflicts. In search of a fair balance*, cit., 282.

[97] Court of Justice 21 December 2016, C-201/15, *AGET* Iraklis, p. 100.

[98] Court of Justice 17 September 2002, C-513/99, *Concordia bus Finland*, p. 64.

provided for in the Treaties relating to the freedom of establishment and the freedom to provide services[99].

Although the Court of Justice considers collective agreements aimed at improving workers' employment conditions to be excluded from the scope of art. 101 TFEU, even if they are capable of producing restrictive effects on competition, it doesn't entail the compatibility of the social clauses in collective agreements with EU law. In relation to such clauses, in fact, there are the same problems highlighted in relation to the statutory social clauses, due to the direct horizontal effect of fundamental freedoms.

Moreover, in both cases, in relation to equal treatment and rehiring social clauses, the problem of the effectiveness of collective agreements in Italian legal order arises. Where the regulation of transnational posting of workers applies, art. 3 of the Directive 96/71, even after the amendments made by Directive 2018/957, requires Member states to guarantee posted workers the terms and conditions relating to the matters indicated in par. 1, laid down by law, regulation or administrative provisions, and/or by collective agreements which have been declared universally applicable or, in the absence of a system for declaring collective agreements to be of universal application, by collective agreements «generally applicable to all similar companies in the geographical area and in the profession or industry concerned» and/or collective agreements concluded «by the most representative employers' and labour organizations at national level and which are applied throughout the national territory». With reference to Italian law, compatibility issue of social clauses with EU law arise for the refence to collective agreements that aren't universal applicable[100], even if only where the case actually falls within the scope of application of Directive 96/71, as redefined by the amendments made by Directive 2018/957[101]. According to art. 1, paragraphs (1) and (1-bis), the directive «shall ensure the protection of posted workers during their posting in relation to the freedom to provide services, by laying down mandatory provisions regarding working conditions and the protection of the workers' health and safety that must be respected» , without affecting «the exercise of fundamental rights as recognized in the Member States and at the Union level, including the right or freedom to strike» and «the right to negotiate, to conclude and enforce collective agreements, or to take collective action in accordance with national law and/or practice».

2.1. Minimum wages and restrictions on the freedom to provide services: from Rüffert to Regiopost

The first-generation social clauses limit the freedom to conduct a business and the competition in the procurement contracts market by imposing the application of minimum standard to the workers employed in the contract: the provision of minimum

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[99] Court of Justice 20 September 1988, C-31/87, *Beentjes.* See PALLINI M., *Diritto europeo e limiti di ammissibilità delle clausole sociali nella regolazione nazionale degli appalti pubblici di opere e servizi*, cit., 525 ss.

[100] PALLINI M., *Diritto europeo e limiti di ammissibilità delle clausole sociali nella regolazione nazionale degli appalti pubblici di opere e servizi*, cit., 525 ss.

[101] RATTI L., *Autonomia collettiva e tutela dell'occupazione*, cit. 187-188.

rates of pay or of certain regulatory conditions may constitute an illegitimate "barrier" for the enterprises to enter the market of a Member State[102].

In *Rüffert*, the Court of Justice ruled on the legitimacy with respect to art. 49 EC, today art. 56 TFEU, of a legislative measure of the Land Niedersachsen concerning the award of public contracts which, in order to counteract «distortions of competition which arise in the field of construction and local public transport services resulting from the use of cheap labour», provided that contracting authorities shall award contracts only to undertakings which agree to pay the wage laid down in the collective agreements at the place where the service is provided[103].

In this case, the Court deemed the legislation of the Land to be incompatible with Directive 96/71, interpreted in the light of art. 49 EC: it is an unjustified restriction of the freedom to provide services, since the obligations for undertaking of a Member States to adapt the wage rates to the normally higher level in force where the contract is performed would «cause those undertakings to lose the competitive advantage which they enjoy by reason of their lower wage costs».

According to the Court, such provision cannot be considered to be a law «within the meaning of the first indent of the first subparagraph of Article 3(1) of Directive 96/71, which fixed a minimum rate of pay». Secondly, only a collective agreement which has been declared universally applicable, pursuant to art. 3 (1) of Directive 96/71, or generally applicable to all undertakings pursuant to art. 3, par. 8, may legitimately establish the working conditions that must be guaranteed to posted workers. In this case, there is no reference to such collective agreement. In conclusion, by requiring the contractors to apply the minimum wage established by a collective agreement not universally applicable, the law imposes on service providers established in another Member State where minimum rates of pay are lower «an additional economic burden that may prohibit, impede or render less attractive» the provision of services in the host Member State. Therefore, a measure such as that at issue in the main proceedings may constitute a restriction pursuant to art. 49 EC. This provision cannot be justified by the objective of protecting workers either, since it applies only to a part of the German market: the collective agreements apply exclusively to a part of the construction sector and only to public procurements[104]. In this case, the Court didn't consider the differences distinguishing public and private procurements and justifying the diverging regulation at national, EU and international level. Consequently, it stated that, where the regulation on the posting of workers in transnational provision of services is applicable, only the application of the minimum working conditions, that must be guaranteed pursuant to the Court case law, can be legitimately required for the award of a public procurement contract[105].

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[102] COSTANTINI S., *Limiti all'iniziativa economica privata e tutela del lavoratore subordinato: il ruolo delle c.d. "clausole sociali"*, cit., 220 ss.

[103] Court of Justice 3 April 2008, C-346/06, *Rüffert*, p. 5. See MCCRUDDEN C., *The Rüffert case and public procurement*, in CREMONA M. (a cura di), *Market integration and public services within the EU*, 2011, Oxford university press, 117 ss.

[104] Court of Justice 3 April 2008, C-346/06, *Rüffert*, p. 37 -39.

[105] Cfr. KILPATRICK C., *Internal market architecture and the accommodation of labour rights: as good as it gets*, in *EUI Working papers*, 2011/04, 15.

The Court ruled on the interpretation of art. 56 TFEU also in *Bundesdruckerei*[106], where it was requested to assess the compatibility with the provision of a Land which required the employers, to whom the contractors had subcontracted the service, to pay the workers a salary set by this law[107].

Following the *Rüffert* ruling, the Court stated that the imposition of a minimum wage on subcontractors established in a Member State other than that to which the contracting authority belongs and in which the minimum rates of pay are lower constitutes a restriction within the meaning of art. 56 TFEU, since it constitutes an additional economic burden, which impede and render less attractive the provision of services in the host State. A measure establishing the wage to be guaranteed to workers in the light of the cost of living in the Member State of the contracting authority, «but which bears no relation to the cost of living in the Member State in which the services relating to the public contract at issue are performed», prevents the subcontractor from deriving «a competitive advantage from the differences between the respective rates of pay» and constitutes a disproportionate restriction. Such a national measure may be justified «by the objective of protecting employees» and ensuring that they receive are paid «a reasonable wage in order to avoid both social dumping and the penalisation of competing undertakings which grant a reasonable wage to their employees», but as long as it is applicable only to public procurement contracts, it does not appear to be appropriate for achieving this goal, particularly if there is no information suggesting that employees working in the private sector, to whom the rules at issues don't apply, aren't in need of the same wage protection. For this reason, such a regulation goes beyond what is necessary to ensure the achievement of the objective of the protection of workers[108]. Therefore, the previous case law is confirmed as regards the relationship between economic freedoms and social rights: the Court does not take into account the aims of strengthening economic and social cohesion and adequate social protection and asserts that where national labour law constitutes a disproportionate burden to the freedom to provide services, it will be considered an unlawful restriction to this freedom, regardless of the interpretation of Directive 96/71, which are not relevant since they are considered not applicable[109].

In *RegioPost*, the Court ruled on the legitimacy of social clauses with respect to the freedom to provide services in the light of the public procurement rules under Directive

[106] Court of Justice 18 September 2014, C-549/13, *Bundesdruckerei GmbH*. See FORLIVESI M., *La clausola sociale di garanzia del salario minimo negli appalti pubblici al valgio della Corte di giustizia dell'Unione europea: il caso Bundesdruckerei*, in *RIDL*, 2015, II, 558 ss; GUADAGNO S., *(Sub)Appalto trasnazionale e ambito di applicazione delle norme sul salario minimo*, in *RGL*, 2015, II, 33 ss.

[107] «With regard to the scope of the question referred for a preliminary ruling, it must be noted that, unlike in the situation which was at issue in other cases», such as that which gave rise to the judgment in *Rüffert*, is not applicable to the main proceedings». See Court of Justice 18 September 2014, C-549/13, *Bundesdruckerei GmbH*, p. 24 ss.

[108] Court of Justice 18 September 2014, C-549/13, *Bundesdruckerei GmbH*, 30 – 34.

[109] COSTANTINI S., *Direttive sui contratti oubblici e Corte di Giustizia: continuità e discontinuità in tema di clausole sociali*, cit., 11; MELI G., *Procedure di affidamento dei contratti pubblici, obbligo di applicazione dei contratti collettivi di lavoro e diritto comunitario: il caso Ruffert e la sindrome (italiana) dello struzzo*, cit., 570 ss.

2004/18[110]. The law of the Land Rhineland-Palatinate at issue provided that public contracts may be awarded only to undertakings which, under penalty of exclusion, undertake to pay their staff an hourly wage of art least € 8.50.

For undertaking interested in participating in the tender, the commitment to pay to the staff employed in the performance of the public contract a minimum wage established by law can be qualified as a «special condition relating to the performance of a contract» concerning social considerations», within the meaning of art. 26 of directive 2004/18[111]. In accordance with recital 34 of that directive, in examining the compatibility with EU law of the national measure at issue in the main proceedings, it is necessary to determine whether, in cross-border situations in which the workers from one Member State provide services in another Member State for the performance of a public contract, the minimum conditions laid down in Directive 96/71 are observed in respect of posted workers in the host Country. Unlike in *Rüffert*, in this case the minimum wage was set by law, which is why the condition imposed by the law of the German Law may certainly be included in the notion of minimum wage rates guaranteed by art. 3 (1) of Directive 96/71[112].

In this ruling, it is important that the Court has modified its opinion compared to the criticised decisions in *Rüffert* and in *Bundesdruckerei*, according to which such a provision cannot fall within the concept of the level of protection that must be guaranteed to workers and cannot be considered legitimate, since such national measure applies only to public contracts and not to private ones. Since the national measure falls within the scope of application of art. 26 of Directive 2004/18, which allows administrations, under certain conditions, to require compliance with particular social and environmental conditions, it cannot be required that this measure go beyond this scope, including private contracts: the limitation of the scope of application of the national measure to public procurement contracts «is the simple consequence of the fact that there are rules of EU law specific to that field, in this case, those laid down in Directive 2004/18»[113].

Although it does not change the approach according to which «the imposition, under national legislation, of a minimum wage on tenderers and their subcontractors, if any, established in a Member State other than that of the contracting authority and in which minimum rates of pay are lower constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State», thus, capable of constituting a restriction within the meaning of art. 56

[110] Court of Justice 17 Nocember 2015, C-115/14, *RegioPost*. See GUADAGNO S., *Salario minomo, distacco di lavoratori e appalti pubblici: un nuovo equilibrio per i diritti sociali?*, in *ADL*, 2016, 4-5, 832; BRINO V., *Salario minimo e appalti pubblici: il caso* RegioPost, in *RGL*, 2016, II, 135 ss; SEMPLE A., *RegioPost judgement: CJEU upholds minimum wage clause*, in *Public procurement analysis.eu*; BARBERIS G., *Appalti pubblici e obbligo di rispetto del salario minimo. La mancata garanzia di corresponsione del salario minimo e l'esclusione dell'impresa*, in *GI*, 2016, 3, 674 ss.

[111] Court of Justice 17 Nocember 2015, C-115/14, *RegioPost*, p. 54.

[112] Court of Justice 17 Nocember 2015, C-115/14, *RegioPost*, p. 60-62.

[113] Court of Justice 17 November 2015, C-115/14, *RegioPost*, 62 ss. According to paragraph 74, in the judgment in *Rüffert*, «the Court based its conclusion on the finding that what was at issue in the case that gave rise to that judgment was a collective agreement applying solely to the construction sector, which did not cover private contracts and had not been declared universally applicable».

TFEU, however, the Court excludes that, in light of art. 26 of Directive 2004/18, a legislation «which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation» infringes art. 56 TFEU[114]. This ruling is a first signal of an evolution in the Court case law: the Court itself tried to justify this "discontinuity" on the ground that in this case, compared to the previous ones, the minimum tariffs to be respected was established by law, in compliance with Directive 96/71, and not by a collective agreement not universally applicable[115].

The ruling in *Sähköalojen ammattiliitto ry* is more oriented towards tackling wage dumping. This case concerns the applicability, to employees of the Polish company ESA posted in Finland, of the minimum wage rates established by Finnish collective agreement which is universally applicable. The Court recognises the legitimacy of such legislation, in line with the aim of Directive 96/71 «to ensure that posted workers will have the rules of the host Member State for minimum protection as regards the terms and conditions of employment», on the one hand, and «to ensure a climate of fair competition between national undertakings and undertakings which provide services transnationally»[116]. In this case, the conditions set out in Directive 96/71 are met, since the judgement relates to a system, such as the Finnish one, in which there is a mechanism to ensure a universal application of collective agreements.

Even in the most recent rulings, the Court of Justice affirmed that the protection of employment and the prevention of social dumping can be considered imperative reasons of public interest capable of justifying a restriction of the freedom to provide services. The judgement in *Regiopost* and 2014/24 Directive were positively welcomed by the scholars, since they legitimise a national measure aimed at countering social dumping and confirm the idea of a socially responsible public procurement[117].

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[114] Court of Justice 17 Nocember 2015, C-115/14, *RegioPost*, p. 69 e 77.

[115] MELI G., *Appalti e clausole sociali nel diritto europeo*, in GAROFALO D., *Appalti e lavoro, Volume primo. Disciplina pubblicistica*, cit., 64; CORTI M., *Concorrenza e lavoro: incroci pericolosi in attesa di una svolta*, cit., 511.

[116] Court of Justice 12 February 2015, C-396/13, *Sähköalojen ammattiliitto ry*, p. 30. See GIUBBONI S., *Salario minimo e distacco transnazionale*, in *RGL*, 2015, 2, 221 ss; PIACENTINI F., *Lost in translation: ancora sulla sentenza Sähköalojen ammattiliitto v. ESA e sui profili di complessità della traduzione giuridica ad opera della Corte di Giustizia*, in *DRI*, 2015 II, 1206 ss; VENTURI D., *La nozione di tariffe minime saliariali nel distacco transnazionale*, in *DRI*, 2015, II, 551 ss; PECINOVSKY P., *Evolutions in the social case law of the Court of justice. The follow-up cases of the* Laval *quartet: ESA and Regiopost*, in *European labour law journal*, 2016, 2, 294 ss, who appreciates the «*more social-friendly*» approach of the Court of Justice.

[117] BORGOGELLI F., *Appalti pubblici e dumping solariale: un caso di subordinazione dell'autonomia collettiva?*, cit., 991; KAUPA C., *Public procurement, social policy and minimum wage regulation for posted workers: towards a more balanced socio-economic integration process?*, in *European papers*, 2016, 1, 138; PECINOVSKY P., *Evolutions in the social case law of the Court of Justice. The follo-up cases of the* Laval *quartet: ESA and Regiopost*, cit., 308. In Directive 2014/24, there is a greater attention to social considerations; however, some scholars argue that the competition is the founding principle of the common market and that in assessing the compatibility of social-oritented policies a strict proportionaloity test should be applied. See SANCHEZ-GRAELLS A., *Truly competitive public procurement as a* Europe 2020 *lever: what role for the principle of competition in moderating horizontal policies*, in *Europea public law*, 2016, 22, 393 ss. On the debate on the "socially responsible public procurement"; see MCCRUDDEN C., *Buying social justice*, cit; ARROWSMITH S., KUNZLIK P, *Public procurement and horizontal policies in*

It does not automatically entail the legitimacy of the Italian regulation referred to in Public procurement contract code. A problematic issue of art. 18 (2) of Directive 2014/24, from the perspective of Italian law, concerns the obligation to comply with social and labour provisions referred to in collective agreements. This provision does not specify which collective agreements should be referred to, whether universally applicable collective agreement, nor if the entire economic treatment, terms, and conditions or only the minimum wages rates should be ensured to workers. On this point, pursuant to Recital 98, the requirements concerning basic working conditions regulated by Directive 96/71 should remain «at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive». In the light of such a statement in this case, as in the application of Directive 96/71, only minimum standards of protection are applicable and the equal treatment between foreign and domestic workers is not effectively guaranteed. Under Directive 96/71 as amended Directive 2018/957, posted workers in the case of transnational provision of services are guaranteed a higher level of protection compared with the past, at least with reference to pay: pursuant to art. 3 (1), lett. c), equal pay must be guaranteed, since the concept of remuneration is determined «by the national legislation and/or practice of the Member State to whose territory the worker is posted» and includes all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, by collective agreements or by arbitration which, in that Member State, have been declared universally applicable or otherwise applicable under paragraph 8.

In relation to Italian legal order, the applicability of the employment conditions provided for in collective agreements which are not universally applicable remains problematic. Due to the limited applicability of collective agreements in the Italian legal system, the requirements posed by social clauses and the reference to the collective agreements stipulated by comparatively more representative trade union could hardly pass the proportionality test[118].

It does not even seem feasible the interpretation according to which, due to the repealing of the reference to the necessary compatibility with EU law in art. 70 of Directive 2014/24, which replaced art. 26 of Directive 2004/18 on the conditions of execution of the contract, social clauses are legitimate in the field of public procurements; nor this conclusion can be justified on the basis of the special regime for social clauses in public procurement with respect to the rules governing the posting of workers under Directive 96/71[119]. Although there is a greater consideration of social concerns in public procurement directive, a reference is still made to compliance with

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EC law: general principles, in ARROWSMITH S., KUNZLIK P. (a cura di*), Social & Environmental Policies in EC Procurement Law: New Directives, New Directions*, 2009, Cambridge University Press, Cambridge. On the contrary, according to SANCHEZ-GRAELLS A., *Public Procurement and the Eu competition rules,* 2015, Hart, Oxford-Portland, public procurement regulation is aimed at avoiding distorions of the competition.

[118] BORGOGELLI F., *Appalti pubblici e dumping solariale: un caso di subordinazione dell'autonomia collettiva?*, cit., 991 ss.

[119] FORLIVESI M., *Sulla compatibilità con l'ordinamento europeo delle clausole sociali di equo trattamento negli appalti pubblici*, in *Frammentazione organizzativa e lavoro: rapporti individuali e collettivi*, cit., 507.

the fundamental principles of EU law and Directive 96/71, in recital 37 of the directive. It means that, when the regulation on transnational posting of workers applies to the procurement contracts, the requirements of Directive 96/71 cannot be disregarded: thus, a social clause are legitimate only whether the employment conditions to be guaranteed are established by law or by collective agreements universally applicable[120].

2.2. The protection of employment in the light of the principle of market access

As observed above, in the turnover of contractors and in the application of rehiring social clauses there are different contrasting interests at stake contrast, that need to be reconciled.

The legislator, both at national and EU level, hasn't intervened on the regulation of the succession in the procurement contract, and this attitude could be seen as a symptom of the will to protect free competition and freedom to conduct a business «to the detriment of the job stability»: indeed, the introduction of a provision aimed at preserving the job stability of workers would make more difficult for new entrepreneurs to enter in the related market[121].

In addition to the assessments previously made regarding the compatibility with EU law of contractual social clauses referring to collective agreements for the determination of the terms and conditions that shall be guaranteed to workers, further considerations may be made concerning the second-generation clauses. In this regard, the rulings of the Court of Justice regarding the Italian and German legislation transposing the Directive 96/67 on access to the groundhandling market at Community airports are particularly interesting. In *Commission v. Italian Republic* and *Commission v. Federal Republic of Germany*, it clearly emerges that the requirements and constraints for entrepreneurs aimed at protecting employment and job stability may constitute an obstacle to free access to the market, as well as a limit to the free economic initiative of entrepreneurs[122].

In the first case, the Court of Justice was called to assess the legitimacy of art. 14 (1) of Legislative Decree n. 18/1999, which according to the Commission was an obstacle for service providers wishing to enter the market, since it limited the freedom to select their own staff and the way in which the services were organised, thus failing to comply with the objective of Directive 96/67 to promote the opening-up of the market for groundhandling services and encourage competition.

Even though, pursuant to art. 18 and Recital 24 of the Directive 96/67, the Member States may take the necessary measures to ensure an adequate level of protection to the workers of the enterprises providing groundhandling services, the Court of Justice stated that the national provisions cannot prejudice the effectiveness of the directive and the

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[120] COSTANTINI S. *Direttive sui contratti pubblici e Corte di Giustizia: continuità e discontinuità in tema di clausole sociali*, cit., 22 ss..

[121] Trib. Trento 5 febbraio 2019, n. 29.

[122] AIMO M., *Stabilità del lavoro e tutela della concorrenza*, cit., 103 ss; BRINO V., *Le clausole sociali a tutela dell'impiego e i vincoli di copatibilità con il mercato*, in CARINCI M. T. (a cura di), *Dall'impresa a rete alle reti d'impresa,* cit., 321 ss; COSTANTINI S., *Limiti all'iniziativa economica privata e tutela del lavoratore subordinato*, cit., 255.

objectives it pursues. For these reasons, the Court excluded the compatibility of the social clause referred to in art. 14 with respect to Directive 96/67[123]. In this case, the Court avoided to openly address the social clauses compatibility issue, but it recognised as prevalent the aim of guaranteeing the liberalisation of groundhandling services and the protection of competition with respect to the protection of workers involved in the change of contractors, thus identifying the competition as a parameter to assess the legitimacy of national law aimed at achieving the latter objective[124]. The Court left the question partially unresolved and didn't apply the proportionality test in the assessment of the compatibility of such social clauses with the principles of free competition and market access[125].

In a similar way, the Court ruled in the judgment relating to the German case, in which it reiterated that such a provision could «make it more burdensome for new suppliers of groundhandling services to enter the sector concerned and to place them at a disadvantage in relation to undertakings which are already established» and therefore it may limit the access to the groundhandling services market[126].

Apart from these Court of Justice's ruling, in the EU there are no certain elements to establish if the employment stability may justify restrictions to economic freedoms in light of the test of proportionality constantly applied by the Court. Due to the importance that social considerations have gained since the Lisbon Treaty, a partially positive response to this question can be given. Since in application of the principle of proportionality the measures adopted shall always guarantee the achievement of the objectives pursued not going beyond what is necessary to realised them, the point of equilibrium identified in the Italian case law on this regard may be considered a good reconciliation of social rights, protection of competition, and economic freedoms in the EU law. The freedom to conduct a business referred to in art. 16 of the Charter, as the freedom of economic enterprise pursuant to art. 41 of Italian Constitution, entails that entrepreneurs can organize their economic activity as their see fit. The application of the social clause can only be imposed insofar as it is compatible and it is harmonized with the incoming entrepreneur's organization, as well as with the requirements related to the performance of the new contract; it doesn't entail an indiscriminate and rigid requirement of rehiring the staff employed by the former contractor, since it would cause an unjustified limitation of the founding elements of the freedom to conduct a business and the prerogatives protected by such freedom, exceeding the limits of the necessary

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[123] More specifically, with respect to art. 18 of the Directive, according to which «without prejudice to the application of this Directive, and subject to the other provisions of Community law, Member States may take the necessary measures to ensure protection of the rights of workers and respect for the environment». However, «that power does not confer an unlimited jurisdiction and must be exercised in a manner that dos not prejudice the effectiveness of Directive 97/67 and the objectives it pursues».

[124] PALLINI M., *Il diritto del lavoro e libertà di concorrenza: il caso dei servizi aeroportuali,* cit., 46; MUTARELLI M. M., *Protezione del lavoro vs. protezione della concorrenza della sentenza della corte di giustizia sui servizi aeroportuali: una decisione di grande rilievo motivata in modo insoddisfacente*, cit., 274.

[125] AIMO M., *Stabilità del lavoro e tutela della concorrenza. Le vicende circolatorie dell'impresa alla luce del diritto comunitario*, cit., 103 ss; BRINO V., *Le clausole sociali a tutela dell'impiego e i vincoli di compatibilità con il mercato*, cit., 328 ss.

[126] Court of Justice 14 July 2005, C-386/03, *Commissione c. Germania*, p. 27 - 29.

balance of interests. In favour of such an interpretation it can be recalled the Opinion of the Advocate General Cruz Villalón in *Santos Palhota* case: according to him, as result of the amendments made to the Treaties by the Lisbon Treaty, «when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly». Since in the EU primary law the protection of workers has been recognised as «a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom»: therefore, the Member States can restrict economic freedoms. Specifically, it means that in the application of the principle of proportionality, «in order for the employment measures in issue in the host Member State to be justified (…) they must be suitable for ensuring the attainment of the objective they pursue and must not go beyond what is necessary to achieve that objective»[127].

[127] Opinion of Advocate General Cruz Villalón delivered on 5 May 2010, case C-515/08, *Santos Palhota*, p. 50-54.

CONCLUSIONS

At the end of this study on social clauses, as tools for the protection of workers in outsourcing processes, it seems appropriate to make some brief concluding remarks.

First, the limited effectiveness of the protections referred to in social clauses must be highlighted, especially as regards contractual clauses when there is no reference to them in the law: concerning such social clauses, the issues relate to the concrete enforceability of the right of workers to fair and equal treatment or the right to be rehired by the contractor who takes over the procurement contract.

Similar questions of effectiveness and applicability arise also when statutory social clauses make a reference to a collective agreement, but it is not sufficiently certain. The solution is apparently simple: it would be sufficient to specifically indicate, in the law or in the tender notice, the collective agreement to be applied; however, it is precisely due to such references to provisions of collective agreements that are not universally applicable that compatibility issues with the EU law previously discussed raise, where the regulation of transnational posting is applicable.

As highlighted, the application of social clauses is one of the fields in which the contrast between fundamental social rights and economic freedoms emerges most clearly[1] and in relation to which some differences occur in the reconciliation of interests made by the Courts at national and EU level.

Even though this study does not have the ambition to deal comprehensively with a complex issue such as the balance between fundamental rights[2], in addressing the topic of social clauses, it emerges that this subject is a "test case" in relation to the problematic reconciliation between social rights and economic freedoms in the multilevel legal order, as well as one of the more interesting issues in relation to this topic.

In this reasoning, the different levels of protection and the importance recognised to social rights and economic freedoms in the Italian and European Union legal systems, the legal framework generated by their interaction, and the type of balancing in the two orders must be considered.

In both systems, when the limitation of the freedom to conduct a business and private economic enterprise is necessary for the protection of a constitutionally relevant interest or asset, it is necessary to demonstrate that an appropriate balancing has been carried out

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[1] TULLINI P., *Concorrenza ed equità nel mercato europeo: una scommessa difficile (ma necessaria) per il diritto del lavoro*, cit., 199 ss.

[2] On the notion of balancing as a technique to reconcile contrasting interests, see MORRONE A., *Bilanciamento (giustizia costituzionale)*, in *Enciclopedia del diritto*, Annali, Milano, 2008, vol. II, tomo II, 185 ss.

between the reasons underlying those interests and the objectives that they pursue, and that such limitations do not go beyond what is necessary in order to attain them[3].

On the one hand, in Italian case law there has generally been an attempt to reconcile the opposing interests at stake so as to guarantee workers a minimum standard of protection and fair employment conditions to workers, in a way not undermining the contractors' freedom to conduct a business beyond what is necessary to achieve that objective.

On the other hand, in the reasoning of the Court of Justice of the European Union, the proportionality test was generally applied in a more rigid and rigorous manner and, despite some recent positive signals of discontinuity in this regard, greater attention was paid to the protection of the economic dimension: in the case of a conflict between a fundamental right and a fundamental freedom, a fair balance is ensured «only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right»[4]. Moreover, sometimes the Court of Justice has developed a very broad concept of freedom to conduct a business, such as the one proposed in *Alemo-Herron* judgement, according to which the protection of the profitability of the entrepreneur's economic activity shall be included in this notion.

According to scholars, one of the main differences in the balance is the different notion of competition adopted in the case law: while the Italian Constitutional Court intended the competition in its subjective meaning[5], in the sense that the right of entrepreneurs to freely conduct their economic activities on the market and a fair playing filed must be guaranteed, the Court of Justice of the European Union has more often emphasized the objective dimension of competition, from the point of view of the protection of the common market and the free access to the market[6], with a view to eliminating any discrimination in the provision of services and to eliminate any restriction to this freedom.

In Italian legal system, the right to work is placed between the fundamental principles of the Constitution and, under art. 4 of Constitution, which is expression of the principle of equality in this perspective, the legislator must promote the conditions to make the right to work effective, removing any economic and social obstacle[7]. Also art. 41

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[3] In this sense, in relation to the Italian Constitutional Court, see, LUCIANI M., *Libertà di impresa (di assicurazione) e garanzia dei livelli occupazionali. Prime osservazioni alla sent. N. 316 del 1990 della Corte Costituzionale*, in *GC*, 1990, 2036.

[4] «Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom». See Opiniopn of the Adovcate General Trstenjak, 14 April 2010, case C- 271/08, *Commissione Europea v. Repubblica federale di Germania*, p. 190. See also CARABELLI U., *Unione Europea e libertà economiche "sociofaghe" (ovvero, quando le libertà di circolazione dei servizi e di stabilimneto si alimentano del* dumping *sociale)*, in FOGLIA R., COSIO R., *Il diritto del lavoro nell'Unione Europea*, Giuffrè, Milano, 2011, 231 ss.

[5] For example, Constitutional Court n. 226/1998.

[6] COSTANTINI S., *Limiti all'iniziativa economica privata e tutela del lavoratore subordinato. Il ruolo delle c.d. "clausole sociali",*cit., 210.

[7] PINELLI C., *I rapporti economico-sociali fra Costituzione e Trattati europei*, in PINELLI C., TREU T. (a cura di), *La costituzione economica: Italia, Europa*, Il Mulino, 2010, 31.

requires to fairly balance conflicting values, such as free private economic initiative and constitutionally protected social rights[8].

As it emerges from the analysis carried out in the previous paragraphs, on the contrary, in the EU, the same emphasis was not attributed to the various interests and the balancing issue has generally been addressed in terms of identification of the tolerable limitations of economic freedoms in protecting social rights. Such a balance is an expression of the relevance, especially in the reasoning of the Court of Justice, of the economic reasons that have driven European integration.

The amendments made by the Treaty of Lisbon, aimed at overcoming the «constitutional imbalance between "the market" and "the social"»[9], towards «a more social Europe»[10], and the new elements introduced by this Treaty, which, in protecting fundamental freedoms, require an assessment of social considerations, are not adequately valued.

In particular, the importance recently acknowledged to art. 9 TFEU, a «balancing provision» requiring to take into account social concerns in EU law and activities, and the reference to the social market economy in art. 3 (3) TEU, are interesting. Precisely these references may be the founding principles for a «more genuine attempt» to balance social rights and economic freedoms[11]. Also the attention paid to social considerations in Directive 2014/24, the emergence in the European Union policies of the idea of "socially responsible public procurement" and the importance of public procurement to achieve social goals are particularly interesting[12].

The way in which the Court actually apply the proportionality test is crucial[13]. In the application of this test, in the reconciliation between a fundamental right and a fundamental freedom, all the elements previously indicated must be considered[14] and it

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[8] VIDIRI G., *Il trasferimento d'azienda: un istituto sempre in bilico tra libertà d'impresa (art. 41 Cost.) e diritto al lavoro (artt. 1 e 4 Cost),* in *Il corriere giuridico*, 2018, 7, 956 ss.

[9] GARBEN S., *The constitutional (im)balance between "the market" and "the social" in the European Union*, in *European constitutional law review*, 2017, 13, 23 ss, spec. 51, who states that «*the balance between "the market" and "the social" has been decisively struck in favour of the former*».

[10] GOTTARDI D., *Tutela del lavoro e concorrenza tra imprese nell'ordinamento dell'Unione Europea*, in *DLRI*, 2010, 4, 509 ss. The Treaty of Lisbon «*has elevated EU social and labour rights to the same normative level as the established law of the internal market*». See SCHIEK D., *EU social and labour rights and EU internal market law,* Study for the EMPL Committee, 2015, 13.

[11] BARNARD C., *The protection of fundamental social rights in Europe after Lisbon: a question of conflicts of interests*, in DE DRIES S., BERNITZ U., WEATHERIL S. (a cura di), *The protection of fundamental rights in the EU after Lisbon*, Hart, 2013, 46. The Author states that «*the inclusion of the phrase "social market economy" into Article 3(3) TEU might provide a reason for more genuine attempt at balancing social and economic rights, as Advocate General Cruz Villalon suggested in Santos Palhota*».

[12] See BARNARD C., *The protection of fundamental social rights in Europe after Lisbon: a question of conflicts of interests*, 51: «using the purchasing power of the government and other major players is a significant way of achieving social objectives». See also COMMISSIONE EUROPEA, *Buying social: a guide to taking account of social considerations in public procurements*, Publications Office of the European Union, 2010.

[13] According to BARNARD C., *The protection of fundamental social rights in Europe after Lisbon: a question of conflicts of interests*, 47, «*the proportionality principle may weel be the tool to help reconcile the competing rights*».

[14] JOERGES C., *Social justice in an ever more diverse Union*, in VANDENBROUCKE F., BARNARD C., DE BAERE G. (a cura di), *A European social union after the crisis*, CUP, 2017, 92, states: «*the law of the internal market had to take into account of a broad range of regulatory objectives and to mediate between*

must be borne in mind that, as there is no hierarchical relationship between the objectives pointed out in art. 3 TEU, so it is necessary to fairly balance the interests at stake[15]. It means that fundamental social rights and fundamental economic freedoms can and should be placed on the same level. As stated by Advocate General Trstenjak in *European Commission v. Germany*, «it must be presumed that the realisation of a fundamental freedom constitutes a legitimate objective which may limit a fundamental right. Conversely, however, the realisation of a fundamental right must be recognised also as a legitimate objective which may restrict a fundamental freedom». Therefore, economic freedoms, pursuant to the aforementioned articles 3 TUE and 9 TFEU, cannot be guaranteed in an absolute manner and without any limitation: all conflicts between them should be resolved by the Court of Justice on the basis of the principle of proportionality in the search for an adequate reconciliation between the two opposing positions, in order to ensure the effectiveness to both fundamental rights and fundamental freedoms[16].

Since such provisions aim at achieving a multilevel order based on «highly competitive social market economy, aiming at full employment and social progress» and which has not only economic but also social purposes, social clauses may be legitimate. The social clauses are an attempt to reconcile economic interests and protection of competition with social rights and ant to ensure the protection of workers from labour market distortions generated by outsourcing practices and European economic integration[17].

By countering the distortions of competition, social clauses may contribute to promoting social progress. In fact, competition is not necessarily in contrast with fundamental social rights[18], but it may be a means to guarantee their protection[19].

In this perspective, with the view to favour a "fair competition", it is considerably important to set minimum standards for the protection of workers. In a similar way, in protecting and guaranteeing the right to work, which is protected also under UE law, second-generation social clauses undoubtedly constitute a tool to prevent forms of downward competition in the award of contracts and, thus, to protect the proper functioning of the market, as well as to promote virtuous and socially responsible

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the objectives of building the internal market and the social acquis which Members States had established in a variety of forms».

[15] FUMAGALLI L., *Art. 3 TUE*, TIZZANO A., *Trattato sull'Unione Europea*, Giuffrè, Milano, 2014, 16.

[16] Court of Justice 18 December 2007, C-341/05, *Laval un Partneri Ltd,* p. 93; Court of Justice 12 June 2003, C. 112/00, *Schmidberger,* p. 74; Court of Justice 14 October 2004, C-36/02, *Omega*, p. 35.

[17] DAVIES A.C.L., *How has the Court of Justice changed its management and approach towards the social acquis?*, in *European* constitutional law *review, The Displacement of Social Europe – Special* section, 2018, 14, 155, states that «worker-productive objectives are never pursued at all costs, and there is always a balance to be struck between the interests of workers and thos of employers». Se also ICHINO P., *Contrattazione collettiva e antitrust: un problema aperto,* in *Mercato concorrenza regole,* 2000, 3, 644.

[18] GOTTARDI D., *Concorrenza e tutela del lavoro nei nuovi trattati europei*, in CIVITARESE MATTEUCCI S., GUARRIELLO F., PUOTI P., *Diritti fondamentali e politiche dell'Unione Europea dopo Lisbona*, Maggio, 2013, 238; BAVARO V., *Lineamenti sulla costituzione materiale dei diritti soviali del lavoro,* in *LD*, 2018, 2, 249-250; LUCIANI M., *La produzione della ricchezza*, in *Costituzionalismo.it*, 2008, 8.

[19] PINELLI C., TREU T., *Introduzione. La costituzione economica a sessant'anni dalla Costituzione*, in PINELLI C., TREU T. (a cura di), *La costituzione economica: Italia, Europa*, Il Mulino, 2010, 9.

behaviours of the entrepreneurs and to reduce the risk that outsourcing practices cause an unjustified and irrational reduction in employment levels.

Precisely having regard to the pivotal role of the proportionality test in the balance between social rights and economic freedoms, the protection of work and the prevention of dumping can be considered as imperative reasons of general interest, as repetitively stated by the Court of Justice.

Looking at this issue from a broader perspective, it concerns the relationship between labour law and competition law and, more specifically, the relationship between the economic constitution and the guiding principles of the EU: while in the Italian legal order the relationship between competition and social rights are regulated in the light of the hierarchy identified by the Constitution[20], in the multilevel order it is not clear how these interests should be reconciled.

In conclusion, the concrete solution to this issue may be provided only by the Court of Justice. However, since it is desirable that in this reasoning the Court always takes into greater consideration the objectives of strengthening economic and social cohesion and adequate social protection, it would be suitable to formulate the question in different terms: in fact, instead of asking to what extent the prevention of unfair competition and social dumping, the protection of workers' rights and employment stability can justify a restriction of fundamental economic freedoms, it might be more appropriate to investigate in what terms the various needs and several interests related to social clauses, insofar as they are concerned in this case, can be balanced and reconciled, since in the framework laid down by the EU Treaties social and economic goals coexist and are closely related.

Only in this way, considering competition at the same time as an objective to be pursued and as a tool to ensure the economic and social cohesion, and, therefore, placing competition and social rights on the same level, it is possible to achieve a sustainable social market economy.

In this sense, it can be shared the opinion of those scholars who stress the need for a change in dealing with this issue, especially in the Court of Justice's case law, supported by the primary law of the European Union, towards a «constitutionally conditioned internal market»[21]. For this reason, the protection of social rights and a "conditioned" protection of economic freedoms are essential elements.

As argued by AG Cruz Villalón in *Santos Palhota*, and confirmed by the AG Trstenjak in the *European Commission v. Germany*, in the European Union legal order fundamental rights «must be exercised, as far as possible, in accordance with the rights and freedoms protected by the Treaty, and, in that regard, every conflict between fundamental rights and obligations resulting from the fundamental freedoms must be

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[20] BALANDI G. G., *Diritto del lavoro e diritto della concorrenza tra conflitto e cooperazione: prima ricognizione alla periferia del tema*, in *Studi in onore di Giorgio Ghezzi*, Cedam, 2005, 107.

[21] SCHIEK D., *Towards more resilience for a social EU – the constitutionally conditioned internal market*, in *European constitutional law review*, 2017, 13, 4, 624 – 625.

resolved having regard to the specific features of the fundamental rights and fundamental freedoms concerned in accordance with the principle of proportionality»[22].

«A bi-directional proportionality test has to be conducted»: in other words, the Court should consider not only if the social right protected by law or collective bargaining may constitute a limit for the economic freedoms, but it should also assess whether the limitations of social rights are effectively indispensable to guarantee the economic freedoms, and evaluate if the protection of competition affects and undermine social rights[23].

Such a consideration of social rights would be more coherent in the context of a "reciprocal harmonization" [24], in a multilevel order in which the fundamental principles of the various legal systems and fundamental rights «as they result from the constitutional traditions common to the Member States», that, pursuant to art. 6 TEU, «constitute general principles of the of Union's law», are respected.

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[22] Opinion of AG Trstenjak delivered on 14 April 2010, case C-271/08, *Commissione Europea c. Repubblica federale di Germania*, p. 81. See CARABELLI U., *Unione Europea e libertà economiche "sociofaghe" (ovvero, quando le libertà di circolazione dei servizi e di stabilimneto si alimentano del* dumping *sociale)*, in FOGLIA R., COSIO R., *Il diritto del lavoro nell'Unione Europea*, Giuffrè, Milano, 2011, 231 ss.

[23] SCHIEK D., *Towards more resilience for a social EU – the constitutionally conditioned internal market*, in *European constitutional law review*, 2017, 13, 4, 638-639.

[24] PINELLI C., TREU T., *Introduzione. La costituzione economica a sessant'anni dalla Costituzione*, cit., 11.

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