

“Multinationality with Variable Geometry” and the EU Legal Order

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1. “Multinationality” and the EU legal order. 2. Multinationality in the EU discipline of collective redundancies. 3. Multinationality in the European Works Councils directive. 4. Transnationality and multinationality of the companies operating on digital platforms. 5. A look at the Italian legal order: relocation and multinationality in the so-called 'Dignity Decree'.

Abstract

This paper highlights that the approach to the “notion” of “multinationality” of the EU legal order is different from that adopted by the international legal order, where that notion is substantially irrelevant. For the EU legal system, it is often appropriate to define a multinational company and this system does not adopt only one definition, thus giving rise to a “variable geometry multinationality”. In this regard, the EU provisions on collective redundancies and on European works councils are very eloquent although the EU adopts a different approach in the two cases. Another notion of multinationality at the EU level is that concerning companies operating on a digital platform where it is possible to speak of a "double multinationality", the first deriving from the presence of several undertakings of a group operating according to corporate logic, and the second arising from the presence of the digital platform. The final part of the paper deals with the notion of multinationality in the Italian legal order as regards to some quite recent national provisions concerning relocation outside the European Union.

Keywords: Multinationality, formal corporate control, substantial corporate control, digital platform, relocation, workers' protection

1. “Multinationality” and the EU legal order.

The main goal of this paper is to define a quite difficult “notion”, namely that of “multinationality” in the European Union that is important to understand within the scope of some supranational provisions¹.

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¹ This debate can be found in some of the articles published in issue 2/2018 of the journal *Rivista giuridica del lavoro*. Ferrarese M.R., *Le imprese multinazionali tra finanza e transnazionalità*, underlines that the adjective multinational accounted for the fact that, in a liberalized capital market, the criteria of exclusive or clearly prevalent national identity has lost relevance, to the advantage of a geographically much more articulated and fleeting configuration (221). Scarponi S., *Imprese multinazionali e autoregolamentazione transnazionale in materia di lavoro*, on the other hand, focuses on the phenomenon of transnational framework agreements, highlighting the

As regards to this notion, it is useful to refer to what was emphasized by Edoardo Ales, although with reference to transnational collective bargaining. According to this author, in order to understand the meaning of the term 'multinational' it must be compared with the term 'supranational': 'supranational is a prescriptive notion that refers to the establishment of a legal order partly substitutive of and partly additional to the national ones at stake. Where additional it constitutes a combined jurisdiction based on the principles of competence, subsidiarity and proportionality. Multinational, on the contrary, is a descriptive notion indicating the fact that a physical or juridical person operates in and is subjected to two or more national jurisdictions that, in our case, are ... part of the EU².

It has also to be underlined that the approach to the subject of this legal order is different from that adopted by the international legal order, where the notion of multinationality is substantially irrelevant, as demonstrated by various international acts, which are mainly non-binding. Among these, there are the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights* approved in 2003, according to which the term transnational corporation 'refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form'³. And on the same wavelength there are other international documents, such as the *2011 OECD Guidelines for Multinational Enterprises*, wherein it is explained that 'a precise definition of multinational enterprises is not required for the purposes of the *Guidelines*. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed. The *Guidelines* are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the *Guidelines*⁴.

An approach of this kind is justified by the fact that the international legal order is mainly interested in recognizing a responsibility to the head company, raising a 'corporate veil' whose presence has been highlighted by some authors⁵. As a matter of fact, at the international level, the defining element of the concept of multinationality lies in the dichotomy between the uniqueness of the undertaking in an economic-corporate sense and the juridical otherness of

question of their applicability especially on the business side, where compliance with the obligations contained in them can be implemented by means of indications from the head company to the other companies belonging to the same group, accompanied by forms of pressure towards the chain of suppliers and contractors, and by adequate control systems (264).

² Ales E., *Transnational Collective Bargaining and European Works Councils: From Hurdle to Stepping stone?*, in Casale G., Treu T. (eds.), *Transformation of Work: Challenges for the National Systems of Labour Law and Social Security. XXII Congress of the International Society for Labour Law and Social Security Law, Turin, 4-7 September 2018*, Giappichelli, 59.

³ U.N., Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003): italics added by the author. See also *OECD Guidelines for Multinational Enterprise*, 2011, I.3; *ILO Tripartite declaration of principles concerning multinational enterprises and social policy*, 2017, 6. On these profiles, see Brino V., *Imprese multinazionali e diritti dei lavoratori tra profili di criticità e nuovi "esperimenti" regolativi*, in *Diritto delle relazioni industriali*, 2018, 171 ff.

⁴ OECD Guidelines, Part I, Concepts and Principles, n° 4.

⁵ On this topic, see Brino V., *Imprese multinazionali*, according to whom multinationals hold economic power within the entire value chain. Nevertheless, because of the 'corporate veil', someone else's responsibilities cannot be assigned to them (174).

the units operating in the different states⁶, which often prevents the recognition of responsibilities and risks for the head company and sometimes does not go beyond the application to the companies of the group of national rules differentiated on a territorial basis.

2. Multinationality in the EU discipline of collective redundancies.

On the contrary, for the EU legal system it is often appropriate or necessary to define a multinational company. In carrying out such an investigation, it is possible to realize that this system does not adopt only one definition, thus giving rise to what can be defined as a “variable geometry multinationality”. In this regard, the EU provisions on collective redundancies and on European works councils are very eloquent.

With reference to the first topic, it is appropriate to start from a judgment of the Court of Justice of 7 August 2018 concerning a German case (*Bichat, Chlubna, Walkner C Aviation Passage Service Berlin*), which deals with directive 98/59 on collective redundancies and in particular with the right of information and consultation due to workers or their representatives in the event that the decision to dismiss is taken by a company that controls the employer (Article 2, paragraph 4, Directive 98/59). The judges therefore had to rule on the nature of an enterprise's control over another company and had two alternatives, namely to interpret that control in either a formal or a substantial sense. The Court opted for the second route by fully accepting the Opinion of the Advocate General, according to which “the question of control for the purposes of Article 2(4) of Directive 98/59 is not “which undertaking is the ultimate holding company of the employer?” but “which undertaking can provide the necessary information to enable consultations to take place in the meaningful way which the directive contemplates?”. In that context, the company law-based test may have the merit of legal certainty. In all other respects, it seems to me that it is too narrow and fails to reflect the overall scheme of Directive 98/59. Moreover, such an approach could not by definition take account of the divergences in company law existing at the Member State level and the need for the expression “undertaking controlling the employer” to be given an autonomous interpretation throughout the European Union⁷. Moreover, the Advocate General suggested to the Court that “it is necessary for the controlling undertaking to have an influence on the employer as regards the manner in which the collective redundancies that are contemplated are to be carried out. Such an influence need not be a “dominant” one in the sense that the controlling undertaking has to enjoy a higher position in the structural hierarchy than the employer, since there is nothing that requires that the decisions that may lead to the collective redundancies be taken at an organisationally superior level⁸”.

Such an interpretation was fully accepted by the Court, according to which “the concept of “control” for the purposes of Directive 98/59 refers ... to a situation in which an undertaking may adopt a strategic or commercial decision compelling the employer to

⁶ Bonfanti A., *Imprese multinazionali, diritti umani e ambiente*, Giuffrè, 2012.

⁷ AG Opinion, CJEU – Joined Case-61/17; C-62/17; C-72/17, *Miriam Bichat and Others v APSB - Aviation Passage Service Berlin GmbH & Co. KG* [2018], para 47.

⁸ AG Opinion, CJEU – Joined Case-61/17; C-62/17; C-72/17, *Miriam Bichat and Others v APSB - Aviation Passage Service Berlin GmbH & Co. KG* [2018], para 49.

contemplate or to plan for collective redundancies⁹. Moreover, the same concept ‘covers all undertakings which, by virtue of belonging to the same group or having a shareholding that gives it the majority of votes in the general meeting and/or the decision-making bodies within the employer, are able to require the latter to adopt a decision contemplating or planning for collective redundancies’¹⁰. Nevertheless, such a concept also covers ‘situations in which an undertaking, while not having the majority of votes referred to in the preceding paragraph, is able to exercise decisive influence within the meaning’¹¹ given before by this judgement. In summary, belonging to a group of undertakings is established not only by the formal corporate control of one undertaking over another but also by any other type of control or even by the absence of control (formal or substantial: the so-called group of equal undertakings), provided that there is an influence on the decision of the second company to proceed with collective dismissals.

As it can be seen, this interpretation allows the extension of the scope of the directive since it disregards the national statutory provisions and fully guarantees the multinationality of the legislation on collective redundancies. In this way, the Court of Justice has adopted a substantive attitude by skipping the formalistic schemes to make the substance of the phenomena prevail and has achieved the goal of protecting the worker who offers his/her services at a dependent (controlled) company. In addition, the Court has not taken into consideration the legal instrument permitting such dependence but the *de facto* situation that allows an entrepreneur to organize the factors of production (workers included) of another undertaking¹². Finally, the Court seems to distance itself from the commercial law approach, by leaving aside corporate control in the strict sense and this approach, as will be clear shortly, was not at all obvious.

3. Multinationality in the European Works Councils directive.

It has been anticipated above that this is not the only model of control or influence of an undertaking on another one established in a different country (and therefore of multinationality) existing in EU law. As a matter of fact, according to Article 3, paragraph 2, Directive 2009/38, ‘the ability to exercise a dominant influence shall be presumed, without prejudice to proof to the contrary, when an undertaking, in relation to another undertaking directly or indirectly: a) holds a majority of that undertaking’s subscribed capital; b) controls a majority of the votes attached to that undertaking’s issued share capital; c) can appoint more than half of the members of that undertaking’s administrative, management or supervisory body’. Such provision defines this concept as being founded upon the exercise of a dominant influence as a result, for instance, of ownership, financial participation or the rules governing this influence. The Court of Justice, in the case of the directive on collective

⁹ CJEU – Joined Case-61/17; C-62/17; C-72/17, *Miriam Bichat and Others v APSB - Aviation Passage Service Berlin GmbH & Co. KG* [2018], ECLI:EU:C:2018:653, para 31.

¹⁰ CJEU – Joined Case-61/17; C-62/17; C-72/17, *Miriam Bichat and Others v APSB - Aviation Passage Service Berlin GmbH & Co. KG* [2018], ECLI:EU:C:2018:653, para 40.

¹¹ CJEU – Joined Case-61/17; C-62/17; C-72/17, *Miriam Bichat and Others v APSB - Aviation Passage Service Berlin GmbH & Co. KG* [2018], ECLI:EU:C:2018:653, para 41.

¹² This is what Loffredo A., *Democrazia aziendale, imprese transnazionali e dumping sociale*, Editoriale scientifica, 2018, 95 hoped for.

redundancies, could have accepted this notion by analogy. Nonetheless, Advocate General Sharpston, in her Opinion delivered in the *Bichat* case, agrees with the Commission ‘that that definition is too narrowly drawn to fit all the circumstances which Directive 98/59 contemplates. It reflects the context in which Directive 2009/38 was adopted, namely the setting up of works councils in larger undertakings (there defined as ‘Community-scale undertakings’ and ‘Community-scale group[s] of undertakings’), to be informed and consulted in respect of a wide range of matters affecting the workforce generally’¹³.

Therefore, in the case of the EWCs, to define the control of one undertaking over another, it is necessary to apply the formal requirements specified by the directive, while in the hypothesis of consultation and information in collective redundancies in the absence of such a provision the Court applies a notion of control of one company over another, which is more extensive than that provided for EWCs and is not linked to the formal data of ownership. Therefore, the interpretation in the case of collective redundancies is more favourable for workers than in the case of the EWCs. In the latter circumstance, it is unavoidable to refer to the wording of the provision. On the contrary, it was not at all obvious that the Court decided in that way about collective redundancies, thus showing more attention for information and consultation in case of termination of the contract of employment than for the ‘general’ participation rights deriving from the establishment of a EWC.

However, in the EWCs there was also the problem of the groups of “peer” companies, where it is not possible to identify a controlling undertaking. In these circumstances there is no control (neither formal nor substantial) but in any case the protection coming from the directive has to be applied. Then, according to a judgment of the Court of Justice decided almost twenty years ago (the *Bofrost* case of 2001¹⁴), in a proper construction of the EWC Directive, ‘an undertaking which is part of a group of undertakings is required to supply information to the internal workers’ representative bodies, even where it has not yet been established that the management to which the workers’ request is addressed is the management of a controlling undertaking within a group of undertakings’¹⁵ and even where it has been established that a controlling company does not exist. As one can see, also in this case, the Court proposes an extensive interpretation aimed at recognizing the fulfilment of the fundamental right to information for workers and/or their representatives underlying the EWC directive.

¹³ AG Opinion, CJEU – Joined Case-61/17; C-62/17; C-72/17, *Miriam Bichat and Others v APSB - Aviation Passage Service Berlin GmbH & Co. KG* [2018], para 46.

¹⁴ CJEU – Case-62/99, *Betriebsrat der bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG v Bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG* [2001]; see Guarriello F., *La “prima volta” della direttiva sui Cae (n. 94/45) davanti alla Corte di giustizia: Bofrost o della latitudine dei diritti di informazione riconosciuti alle rappresentanze dei lavoratori ai fini della costituzione del comitato aziendale europeo*, in *Il diritto del lavoro*, 2001, 12.

¹⁵ CJEU – Case-62/99, *Betriebsrat der bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG v Bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG* [2001], para 36.

4. Transnationality and multinationality of the companies operating on digital platforms.

In the EU legal order, another notion of multinationality seems to have space to develop, i.e. that concerning companies operating on a digital platform. The *Uber* judgement of the Court of Justice of 20 December 2017 is eloquent in this regard. As it is well known, and as reiterated by Advocate General in this case, ‘Uber is the name of an electronic platform developed by Uber Technologies Inc., a company having its principal place of business in San Francisco (United States). In the European Union, the Uber platform is managed by Uber BV, a company governed by Netherlands law and a subsidiary of Uber Technologies’¹⁶. However, in addition to the type of control (formal or substantial) that links the various undertakings of the group, for the Court of Justice it is necessary to keep in mind the kind of activity carried out: ‘although Uber Systems Spain carries out its activity in Spain, *that activity is linked to an international platform, thus justifying the assessment at EU level of the actions of that company*’¹⁷. In other words, the connection of an undertaking operating in the collaborative economy to an international digital platform realizes the multinationality of the company itself in the sense described above. And the application of EU law, i.e. of the common transport policy, derives from it. This means that, beside the issue of corporate control, it is also necessary to take into consideration the existence of a digital platform that ensures the multinationality of the undertaking concerned. In short, it is possible to speak of a "double multinationality", the first deriving from the presence of several undertakings of a group operating according to corporate logic, and the second arising from the presence of the digital platform which is multinational in the sense indicated above. This naturally applies to certain areas of EU law, such as the common transport policy. In the *Uber* case, as well as in the *Bichat* judgment, the Court of Justice - since it is free from the constraints of the secondary sources of law characterizing, for example, the EWCs - has adopted a substantialist, albeit diversified, approach in the qualification of the multinational companies.

However, it is self-evident that the approach can be different in other fields, as some recent studies on workers participation in companies of the collaborative economy show¹⁸. As a matter of fact, the 2018 report highlights that ‘*good practice as regards workers participation — such as joint initiatives with employers at sectoral or company level, and company-wide change or framework agreements on the introduction of new technologies — are largely concentrated in Northern and Western European countries, as well as in large multinational companies headquartered in Western Europe*’. Moreover, ‘*agreements reached in multinational companies at the cross-border level are an important source of support for local level consultation and respective agreements in countries where workers participation bodies and trade unions are in a weaker position*’. In other words, the mentioned report suggests the centrality of digital multinationals in spreading good practices of information, consultation and workers participation, thus implying that the notion of multinationality that seems to prevail in this case is the formal corporate one (the report often refers to the EWCs). However, again reading the 2018 report, it is undeniable that the presence of the digital

¹⁶ Opinion of Advocate General Szpunar, CJEU – Case-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*, [2017].

¹⁷ CJEU – Case-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*, [2017], para 14.

¹⁸ The reference is to the report written by Voss E., Riede H., *Digitalisation and workers participation: what trade unions, company level workers and online platforms workers in Europe think*, ETUC, 2018.

platform is seen as an extraordinary means of spreading good practices in the field of multinational companies. Therefore, in this case there is a different approach as compared to that adopted by the Court of Justice as regards to collective dismissals. However, this dissimilar approach does not contrast with the previous one, since the notion of multinationality is determined differently depending on the topic to which it refers and, obviously, on whether a legal definition is present or not.

5. A look at the Italian legal order: relocation and multinationality in the so-called 'Dignity Decree'.

It is time to move on to the national perspective, although with reference to a profile closely linked to the EU dimension. As far as relocation is concerned, the Italian 'Dignity Decree' (Law Decree 87/2018 converted with Law 96/2018) provides that national and foreign companies that have received state aid cannot relocate to non-EU countries, with the exception of States belonging to the European Economic Area, within five years by the end of the subsidized investments. For those who do not respect these limits, the decree provides for penalties that can go from one to four times the benefit received. Moreover, the benefit shall be repaid, with interest of up to 5% (Article 5). In short, this is a protectionist measure aimed at avoiding relocation outside the European Union¹⁹.

The Dignity Decree then provides a specific but unclear notion of relocation, i.e. 'the transfer of the specifically incentivized economic activity or of a part of it from the promoted production site to another site, by the company receiving the aid or by another company that has a control over the first company or a connection relationship with it pursuant to Article 2359 of the Civil Code' (Article 5, paragraph 6, Decree Law 87/2018). Therefore, on the one hand, relocation can be seen as an operation that has in itself the "germ" of multinationality, since the 2018 provision aims at fighting the transfer of the economic activity from Italy to non-EU countries. On the other hand, this provision can also apply to undertakings that are multinational from the beginning: the incentives shall be recovered even when the transfer of the economic activity is carried out by a company (both Italian and foreign) controlled by or linked to another one. For this purpose, the Italian legal system opts for a formal notion of control (and of connection) similar to that provided, in the EU legal order, for the EWCs. In fact, the reference to Article 2359, para 1, of the Civil Code implies that controlled companies shall be: '1) companies in which another company holds the majority of the votes that can be exercised in the ordinary shareholders' meeting; 2) companies in which another company has sufficient votes to exercise a dominant influence in the ordinary shareholders' meeting; 3) companies that are under the dominant influence of another company by virtue of particular contractual obligations'. Finally, according to Article 2359, paragraph 3, of the Civil Code, 'companies over which another company exercises significant influence are considered to be connected. Influence is presumed when at least one fifth of the votes or one tenth of the votes can be exercised at the ordinary shareholders' meeting if the company has shares listed on regulated markets'.

¹⁹ For further details see Tebano L., *Delocalizzazioni, occupazione e aiuti di Stato nel "Decreto dignità"*, in *Diritti lavori mercati*, 2019, 63 ff.

The option for a test of formal corporate control and connection, on the one hand, derives from the presence in the Italian legal system of the above-mentioned concepts; on the other hand, it is probably due to the choice of only fighting the relocations outside the Union carried out by the multinationals in a direct and clear way in order to not to be excessively protectionist.

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