THE ROLE OF COLLECTIVE BARGAINING IN THE 2012 ITALIAN LABOUR MARKET REFORM

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1. Introduction. The Monti administration took office in November 2011, following the resignation of Prime Minister Silvio Berlusconi, under strong political pressure by the European Union in the face of a worsening economic crisis that highlighted new and old critical issues in the Italian economy: a high level of government debt and rising unemployment (Deakin 2012). Not surprisingly, the two most important reforms enacted by the Government concerned labour. A pension reform was enacted first, with the aim of cutting public spending by means of a generalized increase of the retirement age; then, a labour market reform was approved (Act no. 92/12), aimed at implementing the EU flexicurity guidelines, tackling "bad" and promoting the "good" flexibility, in the words of the Minister of Labour, Elsa Fornero (Ales 2012, M. T. Carinci 2012).

It has been argued that the labour market reform represents a break from the established patterns of Italian industrial relations, as far as the relationship between the State and the social partners is concerned. According to some commentators, the Government engaged in a kind of score-settling against trade unions and business associations, by refusing to negotiate the contents of the reform with them (F. Carinci 2012). Others maintained that the reform represented a defeat for the method of industrial relations, since it arguably left too much room for State regulation, while limiting the scope for self-regulation via collective bargaining (Tiraboschi 2012).

In this paper a different argument is put forward. It seems from the references in the Act that the legislator paid considerable attention to collective bargaining, in both functional and structural terms, based on a clear vision about the role the social partners needed to play in the labour market, and in the implementation of the reform. Arguably, on the other hand, the role envisaged goes beyond the boundaries of a normal dialectic relationship between social partners and the State, with the State adopting a functionalist approach which tends at times to consider the social partners simply as agents of Government policy instead of autonomous actors.

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The following Section provides an outline of the main features of Italian industrial relations as far as the relationship between law and collective bargaining is concerned. In Sections 3 and 4 the references in the Act to collective bargaining will be classified and analyzed. Some brief remarks about the issues left unresolved and the challenges for the future conclude.

2. The relationship between law and collective bargaining in Italian industrial relations.

In the decades following the promulgation of the 1948 Constitution, the relationship between public and private actors in the Italian industrial relations system developed along a linear and fairly consistent pathway, giving rise to several interconnections between the two principal sources of regulation: law and collective bargaining.

Three analytical strands can be identified in this regard. The first strand, symbolized by the 1970 *Workers' Statute*, consists in the support provided by the State for the bargaining power of the three main inter-sectoral confederations, which have traditionally made up the pluralistic landscape of labour representation (Bellocchi 2011). This was pursued by granting these trade unions a privileged form of representation in the workplace (such as the right to call for an employee consultation in the form of a ballot, or to receive financial contributions from the workers), on the grounds of their undisputed representativeness, that was taken as an established fact. These rights were meant to empower the three confederations, enabling them to function as bargaining agents in the workplace, i.e. at company or plant level. In this way a sort of monopoly of contractual representation was established, linking the two principal bargaining levels of the Italian system: the national/sectoral and the company/plant level. This legislation was meant to promote a union movement based on solidarity with primacy given to national bargaining at sectoral or industry level, in coordination with the decentralized level (thanks to the power of the national level to delineate the scope of company agreements), within an inter-sectoral framework dedicated to the regulation of issues deemed to be of interest to the workforce as a whole.

The second strand is represented by the delegation of regulatory power from the legal system to collective bargaining, which has become the established pattern of labour regulation since the beginning of the 1980s. This form of delegation allowed collective bargaining to integrate, substitute, or even waive the standard legal regulation of certain aspects of the employment relationship, for instance in relation to atypical jobs or redundancies. The main beneficiaries of this normative subsidiarity were the actors favoured by the promotional legislation referred to above, i.e. the most representative trade unions at the national level, that were assumed to be (and in most cases actually were) joint signatories of the sectoral collective agreements in force, hence setting aside any question about their effective representativeness. This kind of interconnection represents a sort of upgrade of the support promoted by the Workers' Statute as mentioned above.

However, this kind of delegation became more and more sophisticated as time went by, due to the decline in the representativeness of the traditional actors and the supposed decline in their ability to respond to the needs of workers and employers. Hence, the customary reference to the national

bargaining level as a subsidiary source of regulation gradually changed into a more general reference to either the central or the decentralized levels, thus enabling the company level to supplement legal regulations on certain conditions.

In a similar vein, some of the subjective requirements have become less restrictive as far as employee representation is concerned: on the one hand, by not requiring the joint signature of collective agreements by all of the representative unions, hence allowing collective agreements that had been rejected by one or more unions to be adopted as regulatory sources; on the other hand, by shifting from the notion of "most representative union(s)" to a vaguer term such as "comparatively representative union" (Lambertucci 2009).

Finally, the third strand is related to the political role, strictly speaking, that the social partners have played in the framework of tripartite relations with the Government, normally referred to as *concertazione*. This framework is made up of a complex web of mutual contractual and political obligations, which includes the Government's commitment to negotiate with the social partners before enacting bills in the field of labour law (Giugni 2003).

Since 1983, when they first emerged according to the conventional view, tripartite relations have been present to a varying extent in the Italian system, coming to the fore especially in periods of weak parliamentary consensus for the Government, thus operating as a functional substitute for popular support. Not surprisingly, tripartite relations have been called into question by Governments with strong electoral legitimacy, leading to a shift towards a softer consultation procedure ("social dialogue") in order to reduce the influence of the unions over the legislative process, an influence that in some cases amounted to a veto (Biagi 2001, Italian Ministry of Labour 2001).

One of the most significant features of the relationship between law and collective bargaining, under the terms summarized above, has been the reference made by the law to a *de facto* trade union representation system. This means that the law refrains from directly regulating the actors and the sources of the system (as it might do, for instance, by providing for the terms and conditions of a collective agreement to be extended to the entire workforce: the *erga omnes* effect). Rather, it takes the outcomes of the spontaneous actions of the players as a given fact, at most trying to achieve certain outcomes from the outside (for instance, by empowering certain trade unions at the expense of other unions, as in the case of the Workers' Statute mentioned above).

This characteristic feature of Italian industrial relations underwent a major change in 2011, under the Berlusconi administration, when Article 8 of Act no. 148 introduced decentralized or "proximity bargaining" *(contrattazione di prossimità).* For the first time the law introduced a specific regulation of the legal effects of collective agreements in the private sector. This regulation is twofold: on the one hand, on certain conditions it allowed collective agreements at company or local level to have an *erga omnes* effect; on the other hand, those proximity agreements are allowed to derogate both from collective agreements at national level and from legal provisions.

Proximity agreements are not of general application. In fact, they are subject to restrictions as regards the goals that can be pursued, the matters that can be dealt with and the norms for which no exemptions are allowed.

First, in order to benefit from the special discipline laid down in Article 8, an agreement need to be designed to achieve one of the following aims: increasing employment rates or the quality of employment; establishing some form of employee involvement; regulating informal employment; improving competitiveness and wages; dealing with redundancies; promoting investment and company start-ups.

Furthermore, agreements can only concern work organization, with particular reference to one or more of the matters in the following (fairly extensive) list: surveillance of workers and new technologies; job rotation; fixed-term contracts and other atypical forms of employment; working time; hiring procedures; consequences of dismissals.

Finally, the extensive derogatory power of such agreements is limited by the self-evident need to respect the Constitution and EU and international law.

The special regulation of proximity agreements has been criticized for several reasons. Apart from the objections based on policy grounds raised by the opponents of decentralized collective bargaining, and focusing just on purely technical issues, it should be noted that the poor drafting of the Act, which is evident in the vague definitions of aims and topics referred to above, has given rise to serious problems of interpretation, in some cases resulting in misleading or opportunistic implementation (Leccese 2012). Indeed, the legitimacy of certain landmark agreements has been called into question even by some of the most vociferous advocates of proximity bargaining, on the grounds of a failure to comply with the limits laid down in the legislation (Tiraboschi 2012).

Second, since Article 8 does not require any formal connection between the company/local and the national bargaining levels, it has been interpreted as an attempt to support the establishment of a system of decentralized collective bargaining that lacks coordination, in contrast (or, as some have argued, in deliberate antagonism) with a coordinated system of opt-out clauses autonomously adopted by the social partners in an inter-sectoral agreement signed on 28 June 2011.

According to this inter-sectoral agreement, collective agreements at company (but not local) level are allowed to waive bargaining provisions laid down at national level, and they can be extended to cover the entire workforce concerned, but their material scope is narrow and the bargaining process is controlled by sectoral agreements, thus upholding the prevalent role of the national level. On the other hand, those entitled to sign these agreements are identified as the majority of the union representatives elected by the employees or appointed by the national unions (in this case with the subsequent approval of the workforce by means of a ballot), whereas the actors permitted to take part in proximity bargaining under Article 8 are selected on the basis of vague criteria, thus raising doubts about their ability to represent the workforce.

The outcome of the inter-sectoral agreement is that demand for greater decentralization is taken into account without giving up the traditional safeguards of solidarity within the workforce and the coordination of collective bargaining. In addition, the case for collective agreements not necessarily signed by all the main trade unions is taken into account, without setting aside the need to ascertain the representative status of the signatory parties (Perulli, Speziale 2011).

Indeed, the short period of time between the inter-sectoral agreement and the enactment of Act no. 148 (in August 2011), in addition to the substantial differences between the two provisions, may suggest that the intention was to boycott rather than enhance the action of the social partners (Senatori 2012). In any case, it gave rise to one of the most significant breakdowns in decades in the Italian industrial relations system, which, as noted above, was generally characterized by self-restraint in State intervention.

3. Actors and bargaining levels under Act n. 92/12.

The 2012 labour market reform seems at first sight to represent a return to the established patterns in the Italian industrial relations system and a rejection of the measures promoted by Article 8. In fact, the numerous references to actors and levels of collective bargaining, for instance with regard to the delegation of normative powers, appear to take for granted the effectiveness of the above-mentioned inter-sectoral agreement, and at times explicitly overrule the provisions of Article 8.

It should be pointed out first of all that, as for the selection of bargaining agents that can benefit from the delegation of powers, the most recent legislation adopts the established criterion of "comparative representativeness". The same holds for the selection of players to be involved in tripartite processes, although in this case more general references to "the social partners" can also be found, indicating the involvement of a wider range of actors (for instance, for the purpose of the recognition of activities that are exempted from the new legal presumptions of salaried employment, intended to tackle pseudo self-employment). It is not clear, however, from the matters indicated, exactly what the selection criteria are, and where the reason for such a differentiation lies.

A further significant feature of the reform is the support granted by the legislation to contractual arrangements jointly signed by all of the representative unions. This measure to promote agreements with broad trade union support represents a break from the general trend of the last decade. In fact, in recent years, in response to the increasing lack of harmony on the trade union front, the delegation of powers was permitted regardless of whether collective agreements had been signed by all the representative unions.

The delegation of powers conditioned to a joint agreement has been allowed to amend the standard rules on atypical contracts, such as fixed-term or project work, and for the purposes of setting up solidarity funds aimed at providing income support in the case of discontinuity of employment. The only exception to this normative trend is to be found for contract work, where an exemption is allowed

to the standard rule on the mutual liability of contractor and client by collective agreements signed by one or more of the comparatively representative unions.

Even clearer evidence of continuity between the inter-sectoral agreement of 28 June 2011 and the labour market reform of 2012 is to be found in the central role granted to the national bargaining level, both as the geographic frame of reference for establishing trade union representativeness and as the privileged beneficiary of the delegation of powers from the State.

The labour market reform of 2012 is unambiguous except in the case of the rules that delegate to collective agreements signed by the most representative unions at company level the determination of social benefits for older workers who are made redundant, and the rules that define company-level collective agreements as the main source for setting up employee participation. Such exceptions can be easily explained by the very nature of the contractual arrangements, and as a result they do not lead to the law becoming inconsistent.

The bias towards national bargaining is to be seen in the rules that enable national collective agreements to make exceptions to the standard regulation of fixed-term contracts and project work, or to appoint the bodies in charge of validating the resignation of employees.

Certain rules, such as Article 1(9)(b), are particularly noteworthy in this regard. This provision lays down that exemptions from the legal discipline of intervals between two successive fixed-term employment contracts may be negotiated in national agreements or, only in the case of a delegation of powers in such agreements, to the decentralized level. The requirement for a delegation of powers from the national to the decentralized bargaining level, enabling the decentralized level to regulate the matter, implicitly abrogates the provisions of Article 8 enabling proximity agreements to regulate fixed-term contracts without any prior delegation, with the only constraints laid down by Constitutional, EU and international norms.

Another significant feature is the lack of any explicit reference to local (territorial) bargaining. It seems that the only kind of decentralized bargaining foreseen in the 2012 reform is the company level. This represents a further element of differentiation from Article 8, making provision for special regulatory powers at both the company and local levels.

Whereas the general framework of Act. no. 92/12 appears to overturn the provisions of Article 8, it should be pointed out that an amendment in Act no. 134/12 resulted in a contradictory provision by which special rules on intervals between two successive fixed-term employment contracts can be laid down also by collective agreements signed "at any level" by the most representative unions. Apart from resulting in a return to uncoordinated bargaining as laid down by Article 8, this provision leads to a confusing situation, as the same matter (i.e. the intervals between two successive fixed-term employment contracts) is governed by two contradictory rules: one enabling national-level agreements and, upon their delegation, the decentralized level to deviate from the standard rule, and another directly enabling "any level" to allow such an exemption. It is likely that if this matter is referred to the

the Constitutional Court, the combination of the two provisions will be found to be unlawful on the grounds of irrationality. This matter, however, has not yet been referred to the Court.

It should also be acknowledged that the 2012 reform, although favourable to national collective bargaining, does not rule out autonomous intervention by means of decentralized agreements. In fact, whereas some rules, as mentioned above, explicitly delegate regulatory powers only to national agreements, others take into account the national level only as the geographic frame of reference for establishing trade union representativeness, while not otherwise addressing the issue of the identification of the bargaining agents. For instance, Article 1(23)(a) of Act no. 92/12 grants to any "collective agreements" signed by the most representative unions at the national level the power to identify tasks and jobs that cannot be the subject of a project work contract (a type of non salaried, fixed-term employment contract). It seems beyond doubt that in such cases the constitutional right to trade union freedom (Article 39 of the Italian Constitution) provides decentralized collective agreements with the power to operate even without prior authorization or delegation from the national level, as well as to freely select the operational level including the company/plant but also the local territorial level.

4. The functions of collective bargaining in the 2012 labour market reform.

The functions envisaged for collective bargaining in Act no. 92/12 can be seen as a compendium of the most important roles the social partners can play in the implementation of a set of legal provisions. Four roles can be identified in this regard: the integration of or amendment to standard rules; involvement in the management of crises at the level of the undertaking (known as *contrattazione gestionale*, a particular kind of management/concession bargaining); tripartite relations; and quasi-public functions.

As for the first category, the reform does not introduce any major changes to standard regulatory techniques. The scope of the powers granted to collective bargaining is limited, as usual, to the regulation of certain aspects of atypical employment. To give just one example, collective agreements at national level (or, upon delegation from that level, decentralized agreements) are allowed to supplement the legal provisions that determine the conditions on which a fixed-term employment contract can be signed without the need for a particular justification.

The rules of this type have the same purpose, attempting to strike a balance between flexibility and rigidity in the employment relationship: hence collective agreements are expected to loosen or tighten regulation in line with the legislative approach. For instance, with regard to apprenticeship contracts, collective agreements are required to establish the minimum duration of the contract, whereas agreements that provide for flexible working time arrangements in part-time contracts are required to include opt-out clauses enabling the employee to amend or terminate such arrangements.

As for "management bargaining" as mentioned above, the law supports the joint management of crises at the level of the undertaking by means of collective agreements (e.g. in connection with the

anticipation of change, employee dismissal and the like). The machinery set up in this regard consists of an economic disincentive, in the form of an increase of the amount of the social contributions paid by the employer, in the case of a redundancy implemented without the prior consent of the trade unions. In addition, collective agreements have the power to rectify the formal defects that might reduce the legal effectiveness of collective dismissal procedures.

Tripartite relations are arguably the weakest link of the reform. Not only because, as noted above, the Government refused to negotiate the contents of the legislation pre-emptively with the trade unions (Treu 2012). The significance of this fact should not be overestimated, as the Government's attitude may be ascribed, rather than to a deliberate intention to keep the social partners out, to the need to give a swift response to the European Union's expectations and to the widespread popular and institutional approval bestowed on the Government at that time. What is really striking due to its qualitative and qualitative weakness is the greatly reduced involvement of the social partners in the decision-making processes envisaged in the reform. It is not clear, for instance, why, according to the reform, the social partners should be consulted by the Minister of Labour in order to lay down policies in the field of lifelong learning, whereas such an involvement is not envisaged when it comes to the definition of the guidelines about vocational training programmes.

Of much greater importance in the reform, coming to the fourth and last of the roles mentioned above, is the assignment to the social partners of public policy functions with regard to income support for employees who are not covered by State benefits and safety-net measures. Article 3 of Act no. 92 stipulates that the comparatively representative unions and employers' associations are required to set up special bilateral funds by means of collective agreements aimed at providing economic support for employees in the case of a reduction or interruption of working activities. Moreover, the Act lays down several limits and conditions concerning the contents of the constitutive agreements (cases of activation, contribution fees), the subjective requirements for the signatory parties (in terms of representativeness), the administration of the funds and supervision of their management.

The prescriptive wording of the Act and the supplementary nature of the funds, that are required to perform functions or cover sectors neglected by the State, might entail a subordinate position of the social partners in respect to the public authorities, or in other words a "functionalization" of collective bargaining to address an agenda drawn up by the State. As a result, the Act might be said to infringe the constitutional right to trade union freedom (Article 39 of the Italian Constitution), which does not permit external interference in the decision-making processes of autonomous collective bodies or in the provisions of collective agreements.

However, most legal scholars reject this argument on the grounds that the action of the social partners, although defined as mandatory, is not subject to sanctions in the case of non-compliance. Indeed, the only consequence of the failure to act by the social partners is the establishment by the Ministry of Labour of a supplementary or "residual" fund. In this connection, it has been argued that the role of the social partners should not be characterized as a "public function" in a strict sense, but rather as a

"function of public interest" (Bavaro 2013). On the other hand, it has been pointed out that the degree of "functionalization" of collective autonomy entailed by this part of the reform is much more pronounced than in similar experiences in the past (Tursi 2013), and that collective agreements setting up solidarity funds, although founded on the free will of the social partners, cannot be regarded as entirely voluntary because of the constraints laid down by the law (Laforgia 2013).

5. Conclusion. The aftermath of the reform and the agenda for the incoming Government.

In an attempt to give an overall assessment, it may be said that the references to collective bargaining laid down in the 2012 labour market reform highlight the contradictory and ambivalent approach shown by the Government. On the one hand, the attempt to set aside the legislative provisions of 2011 and return to autonomous decision-making on the part of the social partners, particularly with regard to the conditions and scope of opt-out agreements, should be regarded favourably, despite the technical inconsistencies mentioned above. In fact, in the *de facto* system of trade union representation, legal support for the autonomous action of the social partners appears to be a far more effective (as well as constitutionally well-founded) means of promoting collective bargaining than the uncoordinated and intrusive measures introduced by Article 8. This observation, however, does not rule out the possibility, or even the desirability, of a legal regulation of trade union representation and collective bargaining.

On the other hand, the lack of involvement of the social partners in the preparatory phase of the legislation, at one with the "functionalization" of collective bargaining pursued by some of the above-mentioned rules, reveals the Government's intention to deal with the social partners from a position of supremacy rather than on an equal footing. One might argue whether this was due to a lack of institutional sensitivity or to the climate of "national emergency" associated with the reform. However, although the reform has by no means gone beyond the boundaries of constitutional legality, such an attitude seems contradictory compared to the supportive approach that emerges in other parts of the legislation, suggesting a superficial industrial relations policy on the part of the Government.

The period following the adoption of Act no. 92/12 was marked by a slight improvement in the relationship between the Government and the social partners. In this regard a significant development is the document entitled "Manifesto for the growth of productivity and competitiveness in Italy" (or "Pact for productivity"), signed on 21 November 2012 by the Government and the social partners (with the exception of the CGIL, which nonetheless signed the follow-up agreement of 24 April 2013). The Manifesto marks the return to a more traditional form of tripartism, despite the limited "political trade-offs" underlying the agreement. In fact, there were no formal commitments on the part of the Government but rather a number of requests put forward by the social partners, concerning for instance tax benefits for productivity-related wage arrangements, a structural reform of the fiscal system, support for vocational training, replacement programmes related to restructuring processes and active ageing. It should be pointed out, however, that the Government, by the Presidential Decree of

22 January 2013, promptly granted the most important of these requests, with a view to providing economic support by means of tax cuts for promoting decentralized bargaining relating to productivity growth objectives.

Another relevant feature of the Manifesto concerns the mutual commitments between the social partners as regards the structure of collective bargaining. The coordinated two-tier system laid down in the inter-sectoral agreement of 28 June 2011 and supported by Act no. 92/12 is basically confirmed, although with a more accentuated bias in favour of decentralization, consistent with the assumed interconnection between productivity and decentralized collective bargaining that permeates the Pact.

More in particular, the Manifesto assigns to the national bargaining level the task of laying down the standard (i. e. minimum) rules for the entire workforce in a given sector. In this framework, national agreements should delegate to the decentralized level the competence to adopt tailor-made regulations on working time, in order to respond adequately to the variable productive and market-based requests. Furthermore, the national level can transfer to the decentralized level powers to make a percentage of standard wage increases conditional on the achievement of productivity and/or competitiveness targets.

On the other hand, the Pact states that decentralized bargaining should deal with productivity-oriented issues, according to the powers delegated by the law or national agreements. Such issues explicitly include job rotation, flexible working time and vacation arrangements, and the introduction of new technologies with regard to fundamental employee rights such as privacy.

The Pact does not specify the kind of decentralization the parties should put in practice, thus leaving open the choice between company and local level. This represents another turnaround in comparison with the choice made by the inter-sectoral agreement of 28 June 2011, in which only company-level agreements were taken into consideration. The reason for this change in approach probably lies in the very nature of the Italian business environment, mainly composed of small and medium-sized enterprises where company-level agreements are seldom in force. In this way, local bargaining is arguably considered by the signatory parties as a supplementary option to fill the void of company bargaining, or, more pro-actively, as an incubator of further developments at the company level.

Accordingly, on 24 April 2013 the social partners (including the CGIL, which initially refused to sign the Manifesto) signed a framework local agreement to be implemented, pursuant to the rules and procedures established by the inter-sectoral agreement of 28 June 2011, in contexts where company agreements are lacking, in order to lay down the contractual arrangements promoting the economic incentives for productivity and competitiveness provided for by the Manifesto.

This "Pact for Productivity" was one of the last acts of the Monti administration, which formally resigned on 21 December 2012, but then had to face two further issues that were included in the Pact: employee participation and trade union representation. However, both these issues were relaunched by the High Profile Advisory Board that the President of the Italian Republic, Giorgio Napolitano, appointed during the transition period, with the task of outlining the key issues for the incoming

administration. Hence it is likely that the incoming Government led by Enrico Letta, that took office on 28 April 2013, will return to them, considering that the new Minister of Labour, Enrico Giovannini, was a member of the High Profile Advisory Board.

The promotion of employee participation was in fact one of the objectives of the labour market reform in 2012, but the Government did not manage to carry out the task of providing detailed regulation of the matter within the timeframe available. The Pact reminded the Government of its commitment, but with a focus on the blandest forms of involvement, i.e. information and consultation. The High Profile Advisory Board seems to have shared such a minimalistic approach, since it considered the broadening of the scope of information and consultation rights as the necessary premise for the establishment of stronger forms of participation.

As for trade union representation, the High Profile Advisory Board advocated the need for legal regulation of the issues of effectiveness and scope of collective agreements and selection of bargaining agents on the grounds of their representativeness. Indeed, in the present legal framework, in Italy only a legislative measure can provide the players with a degree of certainty about the enforceability of bargaining arrangements. In fact, only the law has the power to allow collective agreements that are not signed by all of the trade unions present in the workplace to be extended to cover the entire workforce. However, the High Profile Advisory Board warned that such a regulation should stick to what the social partners have previously agreed upon, for instance as far as the selection criteria and the relationship between the bargaining levels are concerned. In these terms the proposal of the High Profile Advisory Board deserves careful attention, since it appears to safeguard the trade union rights laid down in the Constitution as well as to preserve the consensus of the social partners, which is a precondition for the effectiveness of legal regulation in industrial relations.

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