Andreas Bücker/Wiebke Warneck (eds.)

Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert

ISBN 978-3-8329-5987-6

Nomos

Collective action in Italy: conceptualising the right to strike.

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Abstract

According to a long-standing tradition in Italian industrial relations, collective action and strikes can be basically understood as synonyms from an employee point of view. This finds confirmation in Article 40 Const. which refers directly to strikes when it comes to naming the instrument which workers can rely on to protect their interests and rights. Lacking any statutory definition of what constitutes a strike from a juridical point of view, for thirty and more years highly differentiated views on how to balance workers' social rights and employers' economic freedoms have clashed in case law and legal doctrine in a spirit of reciprocal and fruitful interaction. International instruments have never had a significant impact on the Italian legal framework with regard to the definition and the regulation of collective action. On the other hand, with Article 40 Const. not being underpinned by legislation until 1990, collective action, or better the right to strike, has been conceptualised through the already mentioned fruitful dialogue between legal doctrine and case law, while collective bargaining has been more focused on setting procedural requirements like no-strike clauses and cooling-off periods. From the first half of the 60s onwards, the right to strike has been regarded as an absolute fundamental right of workers (*diritto assoluto/libertà fondamentale*), to be also exercised *vis-à-vis* a third party (another employer, the Government, etc.) for non-contractual reasons. These include, among others, political and solidarity strikes within the bounds set by Article 40 Const. As taking strike action is a right (Article 40 Const.), any strike-related withdrawal of labour has no other effect on the employment relationship than a proportionate loss of pay for the workers concerned. Any other employer action or behaviour against strikers is explicitly prohibited and regarded as null and void by the law. In the tradition of Italian industrial relations, no-strike clauses are supposed to only have an effect on the signatory parties who, in their turn, undertake not to call members out on strike, and to dissuade them from spontaneously organising any kind of collective action. An interesting example of no-strike/no-lock-out clause, binding only the signatory parties yet having a significant effect on individual employment contracts, is the one contained in the so-called "Framework Agreement on income and employment policy" (*Protocollo sulla politica dei redditi e dell'occu-*

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pazione), signed on 23 July 1993 between the Government and the social partners. This Framework Agreement has effectively regulated the Italian collective bargaining system on a voluntary basis for more than fifteen years, and was recently modified without the assent of CGIL, Italy's largest trade union, on 22 January 2009.

Leaving aside the domain of essential services, *ex ante* and *ex post* administrative control on collective action, including strikes, is totally unknown to the Italian legal system. Constitutional Court case law and results acquired during the 'season of self-restraint' constitute the sound theoretical background of Act 146/1990. This statute, which currently has no equivalent in Europe, is aimed at balancing the exercise of the constitutional right to strike with the exercise of human rights enshrined in the Constitution by defining rules and procedures aimed at guaranteeing the execution of certain core functions related to such rights.

For Italy as well, the *Viking* and *Laval* cases underline the issue of the "direct horizontal effect" of Community laws granting economic freedoms. The effect these principles have on the domestic labour market is that the more flexible and decentralized the bargaining structure and the greater the role of bargaining vis-à-vis the law are, the weaker the State's possibilities of defending workers from social dumping become.

There is a *de facto* cooperative approach between the CJEU and Italian courts with regard to the above, especially in cases where certain statutory provisions conflict with each other.

The Posted Workers' Directive (96/71/EC) was transposed into Italian law as Legislative Decree 72/2000. In the latter all Italian labour legislation previously applying solely to domestic workers was also made binding for foreign workers posted to Italy. In its decision of 19 April 2005, the Bolzano TAR (*Tribunale Amministrativo Regionale*), ruling on a case involving Italian social security contributions demanded from an Austrian company posting workers to Italy, stated that LD 72/2000 infringed Art 49 of the Treaty by applying the same working conditions to foreign posted workers as those applied to Italian workers. The ruling, confirmed by the *Consiglio di Stato*, is also in line with ILO Convention 94.

The *Commission vs. Luxembourg* ruling has similar significance with respect to the regulations arising from harmonized law (e.g. Directive 91/533/EC on an employer's obligation to provide contractual information, Directive 97/81/EC on part-time work, and Directive 99/70/EC on fixed-term work).

It is now time to evoke "plural" solidarity in Europe. The idea of "solidarities" in the plural is intended to mean that while the role of industrial action needs to be safeguarded, the eradication of social dumping must also be addressed at a policy-making level. Strikes aimed at protecting jobs that would otherwise be endangered by social dumping should not be deemed illegal under the proportionality principle. Nonetheless, a challenging proportionality test arises whenever economic freedoms are at stake.

Such plural solidarity must form the basis for procedural rules at European and national levels.

1. Collective action: what are we talking about?

1.1 Historical background.

The first statutory regulation of collective action in Italy dates back to the second half of the 19th century, a time when the country was not yet unified. The Penal Code of the Kingdom of Sardinia, enacted in 1859 and extended to the entire country with the exception of Tuscany in 1870, regarded "any agreement among workers aimed at suspending, impeding, or increasing the cost of labour without reasonable cause" as a crime. Since case law greatly restricted the notion of reasonable cause, freedom of association for trade dispute purposes was similarly put at risk.

It took three decades (1889) for the Italian Parliament to pass a less restrictive Penal Code, the so-called *Codice Zanardelli*, named after the Minister of Justice responsible. Worker alliances for trade dispute purposes, and the abstention from or the impediment of work, were no longer regarded as crimes, as long as no violence or threats were made against an employer or third party (Article 166 Penal Code 1889). However, by keeping the notion of violence and threat as broad as possible, case law permitted the prosecution of strikers at any time (Neppi Modona 1969).

The fact that collective action – i.e. worker alliances and strikes – was no longer regarded as a criminal offence did not mean that abstention from work was automatically exempted as a breach of an employment contract. On the contrary, employers remained free to decide whether workers were to be sanctioned or even dismissed when they took collective action.

This was part of the non-interference policy of successive Liberal Governments in the first two decades of the 20th century with respect to private sector labour relations, and resulted in the development of a free collective bargaining system mainly focused on wages and supported, when needed, by strikes and lock-outs (Romagnoli 1995).

During this period, legislation restricting collective action in the public sector (targeting civil servants) and for essential services (mainly the railways) was adopted.

Immediately after the end of World War I, a period of profound economic and political crisis, industrial relations became more and more conflict-ridden, characterised by massive factory occupations predominantly in North Italy (Vallauri 1974). Liberal governments were unable to cope with this situation of social unrest, heralding the takeover of the Fascist Party in 1922.

Fascist-corporatist ideology saw markets, including the labour market, coming under political control, in the form of the Fascist party and its "corporations". These were public bodies, established by statutory provisions for each sector with the task of organising production along government guidelines. A Fascist employers' association and a Fascist trade union operated under the umbrella of each corporation, collectively bargaining working conditions which were then applied to all workers employed within the branch concerned. Lock-outs and strikes, as well as any other kind of collective action, were regarded as criminal offences, with any collective labour disputes over interests and rights to be resolved by specialised Employment Tribunals (Act 563/1926; Article 502 et seq. Penal Code 1931 for the private sector; Articles 330, 333 and 340 for the public sector) (Romagnoli 2003; Ballestrero 2004, 27 et seq.).

After the fall of the Fascist regime in 1943, freedom of association and collective action were *de facto* restored. The 1948 Constitution eventually provided the juridical framework for a new legal order firmly rejecting the fascist-corporatist ideology and also eliminating liberal "collective laissez-faire" (Giugni 2001, 215). Workers and employers were free to organise themselves collectively (Article 39 Const.); the right to strike was exercised within the framework of the statutory provisions regulating it (Article 40 Const.), and nothing was said about lock-outs.

However, the lack of any statutory instruments for enforcing the principle set forth in Article 40 Const.,[1] together with the decision not to repeal the provisions contained in Article 502 ff. of the Fascist Penal Code, soon led to questions arising on the effectiveness of the right to strike and what it actually involved. The *Corte di Cassazione* and, above all, the Constitutional Court were called upon to answer these questions by establishing a set of principles which still stand.

Back in 1952, the *Corte di Cassazione* had already clearly stated that, within the framework of the new constitutional order, the right to strike protected participants from being accused of breach of contract, with the only consequence being loss of pay.[2] In 1953, it went on to affirm that a lock-out was no longer to be considered a criminal offence.[3] In 1960, the Constitutional Court was called upon to rule on the role still played by Article 502 Penal Code (lock-out and strike as criminal offences) following the fall of the fascist-corporatist regime.[4] In a landmark decision, the Court assessed Article 502 as being incompatible with the new constitutional order in which freedom of association (Article 39 Const.) was strongly linked with the right to strike

1 Statutory regulations restricting the right to strike have been explicitly provided only in the case of workers employed in nuclear sites (Decree of the P.R. no. 185 of 1964, Article 49 and 129), air traffic controllers (Act no. 42 of 1980, Article 4), and for so-called essential services (Act no. 146 of 1990).
2 Corte di Cassazione, v 7 June 1952, no. 1682, in *MGL*, 1952, p. 124.
3 Corte di Cassazione, 18 June 1952, no. 1841, in *MGL*, 1953, p. 203.
4 Constitutional Court, 4 May 1960, no. 29, in *Gcost*, 1960, p. 497.

(Article 40 Const.) and with employers' freedom to lock workers out - the only consequence of the latter being that workers could claim their wages (according to the principle of *mora credendi* – Article 1206 Civil Code), except in cases of illegal strikes.

In 1962 the Constitutional Court was once again confronted with a similar question of compatibility, this time in relation to Articles 330 and 504 Penal Code, according to which a strike against a public authority and the abandonment of a public post in the case of a strike were regarded as criminal offences. The conclusion reached by the Court was to declare the incompatibility of both provisions with the new constitutional order in the case of the strike (or the abandonment) being related to working conditions or, in a broader context, to economic issues covered by Title III, Part I of the Constitution. Strike (or abandonment) remained a criminal offence if aimed at putting pressure on a public authority to reach or cancel a decision adopted according to the rule of law. This gave civil servants and workers employed in essential services the right to strike, although restrictive conditions applied to the latter.

1.2 Concept of collective action.

According to a long-standing tradition in Italian industrial relations, collective action and strike can be basically understood as synonyms from an employee point of view. This finds confirmation in Article 40 Const. which refers directly to strikes when it comes to naming the instrument which workers can rely on to protect their interests and rights. Lacking any statutory definition of what constitutes a strike from a juridical point of view, for thirty and more years highly differentiated views on how to balance workers' social rights and employers' economic freedoms have clashed in case law and legal doctrine in a spirit of reciprocal and fruitful interaction (Borgogelli 1998; Romei 1999).

The *Corte di Cassazione* defined strike in the 1950s as a collective, complete and continuous withdrawal of labour by the whole workforce for the entire working day(s), with advance notice being given, taking place outside the place of work, causing proportionate damage to the employer and to the employee, and aimed at concluding a collective agreement.[5] In the 1980s, the *Corte di Cassazione*, buttressed by legal doctrine (Ghezzi 1968; Tarello 1972), retrenched its position, now concluding that the very notion of strike was to be found in what is *de facto* understood as such by common sense.[6]

5 See, for example, Corte di Cassazione, 4 marzo 1952, n. 584, in *FI*, 1952, I, c. 420; Corte di Cassazione, 3 March 1967, n. 512, in *MGL*, 1967, p. 363.
6 Corte di Cassazione, 30 January 1980, n. 711, in *FI*, 1980, I, c. 25.

This meant that forms of strike previously regarded as atypical and illegitimate, such as intermittent strikes (*scioperi a singhiozzo*), rotating or back-to-back strikes - i.e. strikes by groups or shifts (*scioperi a scacchiera o articolati*),[7] strikes without leaving premises for a limited period of time (*scioperi bianchi*) and bans of overtime[8] now indisputably fell under the scope of Article 40 Const.

On the other hand, there was no convergence in *Corte di Cassazione* case law regarding the legality of a worker's refusal to perform his duties in full or in part because of a strike (the so-called *sciopero delle mansioni*). This has been regarded both as legitimate[9] and as in breach of contract[10] (Giugni 2001, 263; Vallebona 2005, 243) - in the latter case permitting the employer to refuse to pay for work only partially carried out. Working to rule, go-slows and non-cooperation are on the other hand clearly considered to be breaches of contract[11] (Giugni 2001, 262; Vallebona 2005, 244).

In a more general perspective, case law unanimously states that employers facing the above-mentioned forms of 'atypical' strikes shall not be obliged to accept and pay for any labour offered by workers during an intermittent strike or by non-strikers during a strike carried out by a specific group or shift, if such work can be proved (Article 1256 and 1464 Civil Code) to be absolutely in conflict with the existing structure of the enterprise[12] (for a critical review cf. Borgogelli 1998, 171 ff; Ballestrero 2004, p. 307).

Furthermore, one has to bear in mind that the decision not to repeal the relevant provisions set down by the fascist Penal Code in this field still left open the question whether boycotts (Article 507 Penal Code), sit-ins (Article 508 § 1 Penal Code) and sabotage (Article 508 § 2 Penal Code) were to be seen as criminal offences. The Constitutional Court, again called upon to answer this question, came to the conclusion that all these forms of collective action, as they affected employers' freedom to carry out their business and were not essentially connected to the withdrawal of labour,

7 Corte di Cassazione, 28 October 1991, n. 11477, in *RIDL*, 1992, II, p. 854.
8 Corte di Cassazione, 25 November 2003, n. 17995, in *MGL*, 2004, p. 232.
9 See, for example, Corte di Cassazione, 9 May 1984, n. 2840, in *GC*, 1984, I, p. 2070; Corte di Cassazione, 6 October 1999, n. 11147, in *MGL*, 1999, p. 1286.
10 See, for example, Corte di Cassazione, 28 March 1986, n. 2214, in *MGL*, 1986, p. 472; Corte di Cassazione, 10 January 1994, n. 162, in *DPL*, 1994, p. 893.
11 See, for example, Corte di Cassazione, 3 March 1967, n. 512, in *MGL*, 1967, p. 363.
12 See, for example, Corte di Cassazione, 13 February 1978, no. 688, in *FI*, 1978, I, c. 1196; Corte di Cassazione, 13 January 1988, no. 150, in *OGL*, 1988, p. 13; Corte di Cassazione, 1 September 1997, no. 8273, in *MGL*, 1997, p. 800; Corte di Cassazione, 4 March 2000, no. 2446, in *MGC*, 1986, p. 3.

should be regarded as criminal offences, even within the democratic legal framework.[13]

Since picketing and blockades of goods entering or leaving factories were not explicitly referred to in the provisions set forth in the fascist Penal Code, no compatibility test had ever applied to them by the Constitutional Court. It has been up to the *Corte di Cassazione* to decide whether they fall within the scope and context of a strike, with the consequence that they would enjoy the protection accorded by Article 40 Const. According to the *Corte di Cassazione*, any blockade of goods entering or leaving factories was to be regarded as a criminal offence under Article 610 Penal Code,[14] while picketing was to be considered as such only if it involved the violent[15] and/or physical impediment[16] of non-strikers reaching their workplaces. On the other hand, a moral suasion campaign, also seen as a blockade of goods, is not subject to prosecution.[17] This is to protect, on the one hand, non-strikers' right to work, as guaranteed by Article 4 Const. and, on the other, employers' economic freedoms, as recognised by Article 41 § 1 Const.

A major problem, at least in our view, for the effectiveness of the right to strike is the hiring of external workers on an open-ended basis (so called *crumiri esterni*) or the employment of non-strikers (so called *crumiri interni*) in order to keep operations going. This is permitted in case law, on the grounds that it allows an employer to mitigate the impact of a strike.[18] On the other hand, the hiring of fixed-term or on-call workers or using the services of a temporary agency to substitute strikers is explicitly prohibited by the law.[19]

13 With regard to boycotts carried out without violence and threats, see Constitutional Court, 17 April 1969, no. 84, in *MGL*, 1969, p. 177; with regard to sit-ins, only if workers' intent to impede or disturb work has been proved by the public prosecutor, see Constitutional Court, 17 July 1975, no. 220, in *MGL*, 1975, p. 282; with regard to sabotage, see Constitutional Court, 17 July 1975, no. 220.
14 Corte di Cassazione, Penal Chamber, 7 October 1980, no. 10676 (Ferretti), in *FI. Repertorio*, *ad vocem* Violenza privata, n. 5.
15 See, for example, Corte di Cassazione, 3 November 1992, no. 11905, in *DPL*, 1993, p. 54.
16 Corte di Cassazione, Penal Chamber, 25 June 1979, no. 5828 (Filippi), in *MGL*, 1980, p. 304.
17 See, for example, Corte di Cassazione, Penal Chamber, 26 March 1975, no. 516 (Vanzo), in *MGL*, 1976, p. 787.
18 See, for example, Corte di Cassazione, 4 July 2002, no. 9709, in *FI*, 2003, I, c. 205.
19 Respectively by Article 3§ 1 Legislative Decree 368/2001; Article 34 § 3.a) Legislative Decree 276/2003; Article 20 § 5.a).

2. *Collective action: juridical status.*

2.1 Sources of definition and regulation of collective action.

International instruments have never had a significant impact on the Italian legal framework concerning the definition and the regulation of collective action.

This is also true if one looks at the restrictive principles adopted by the ILO's Committee on Freedom of Association in relation to the (allegedly too tight) limitations on the right to strike in essential services (ILO 2006, §§. 572 – 627) and at the conclusions reached by the European Committee of Social Rights on the non-conformity of the situation in Italy with regard to Article 6 § 4 of the (Revised) European Social Charter [20] (ECSR 2006, 11; Novitz 2003). None of these have been seriously taken into account by the Italian legislator. Furthermore they have been largely ignored by national trade unions.

On the other hand, without the backing of any legislative implementation of Art. 40 Const. in the years before 1990, collective action or, better, the right to strike, had been conceptualised through the already mentioned fruitful dialogue between legal doctrine and case law, with collective bargaining being focused more on establishing procedural requirements such as no-strike clauses and cooling-off periods.

In this view, the right to strike was initially (F. Santoro Passarelli 1950), considered as a worker's right to unilaterally intervene in an employment relationship without breaching it, withdrawing his labour against his employer's will (*diritto potestativo relativo*). This led, however, to the conclusion that strike action could only be regarded as legal when directly targeting the worker's employer for contractual reasons. This consequently excluded political and solidarity strikes *inter alia* from the scope of application of Article 40 Const.

From the first half of the 1960s onwards (Giugni 1960; Mengoni 1964), a more convincing definition of the right to strike gained currency in Italy, becoming regarded as an absolute and fundamental right (*diritto assoluto/libertà fondamentale*) to be enjoyed also *vis-à-vis* a third party (another employer, the Government, etc.) for non-contractual reasons. This led to political and solidarity strikes coming within the scope of application of Article 40 Const. By conceptualising the right to strike in this way, it became possible – and remains so - to consider it as instrumental in "removing social and economic hurdles which may impede the full participation of workers in the political life of the country", one of the Italian Republic's main objectives set forth in Article 3 Const.

20 "On the ground that – [the Committee] is not able to assess whether the Government's right to issue ordinances restricting strikes in essential public services falls within the limits of Article G of the Revised Charter; - the requirement to notify the duration of strikes concerning essential public services to the employer prior to strike action is excessive".

2.2 (Legal) definition of the main features of collective action.

As already stated, the lack of statutory definitions or restrictions was the main characteristic of the Italian legal framework on collective action for more than four decades. Even when drafting the statutory strike restrictions for essential services (Act 146/1990, substantially amended by Act 83/2000), the legislator was reticent about giving any definition of what exactly was meant by collective action in general and by strike in particular. Indeed, the main aim of the above-mentioned legislative provisions is more regulation than definition.

Consequently, strikes – the main manifestation of collective action in Italy - have been conceptualised through the productive dialogue between legal doctrine and case law. Indeed, according to a widely accepted definition already proposed in the late 1940's (F. Santoro Passarelli 1949), a strike is first and foremost the withdrawal of work by a single worker. A coalition of workers ("collectivity") is needed, on the other hand, to call out a strike. However, as stated by the *Corte di Cassazione* in its already mentioned 1980 landmark decision, the very notion of a strike is to be found in what is understood in practice by common social sense, i.e. "a collective abstention from work decided by a group of workers and aimed at reaching a common goal".

No limitation can be imposed on this broad notion either with regard to the duration of the abstention (continuous, not intermittent), or to its comprehensiveness (affecting the whole and not just part of productive activity) or, at the end of the day, to its damage factor ('too high' for the employer, according to the last resort principle).

2.3 Entitlement

Entitlement to the right to strike, and above all whether it is an individual or collective entitlement, has been a matter of debate ever since Article 40 Const. came into force (Gaeta 1990; Zoppoli 2006; Loffredo 2008). What is really at stake is the role trade unions and/or spontaneous coalitions can play when it comes to calling workers out on strike. More precisely, by advocating the individual entitlement of a worker to go on strike, without having to be called out by an established trade union, part of the doctrine has aimed at avoiding strikes being termed as 'official' or 'unofficial', thereby opening the door to spontaneous coalitions organising legal strikes (Gallo 1981).

On the other hand, both those scholars supporting - though with different nuances - the collective entitlement solution (Sica 1950; Calamandrei 1952; Mortati 1954) and the ones advocating the now prevailing solution according to which the right to strike is regarded as an individual right with regard to entitlement but a collective right with regard to its exercise (*inter alia* Simi 1956), emphasised the role to be played solely by 'official' – i.e. most representative - trade unions in calling workers out on a legal strike. In the view of some scholars, this has to be defined as a kind of 'political' control that 'official' trade unions may exercise over the right to strike (Carinci, De Luca Tamajo, Tosi and Treu 2002, 246).

In such a perspective, the so-called autonomous trade unions (*sindacati autonomi*) - most of which are linked to a specific professional group and/or are more aggressive than 'official' ones - used to be seen as a threat to the stability of the trilateral Italian industrial relation system which developed within a constitutional framework rudimentarily outlined by Article 39 § 1 (freedom of association) and Article 40 Const (the right to strike). Both the above-mentioned solutions would allow employers' associations and the government to be confronted by reliable and 'responsible' partners rather than by unpredictable and aggressive counterparts.

Nevertheless, case law has never recognised the monopoly of 'official' trade unions to call out strikes.[21] The result is that the Italian legal framework on collective action does not provide for 'wildcat' or illegal strikes, at least with regard to who is entitled to call them – be it a spontaneous coalition or an autonomous trade union (Ballestrero 2004, 299 ff.). On the other hand, one has to admit that the procedural requirements set down by the legislative with respect to essential services are likely to make it extremely difficult for spontaneous coalitions to call workers out on a legal strike in this sector (Ales 2004; Rusciano 2003).

As far as the public sector is concerned, the juridical status of the employer has no effect on workers' entitlement to the right to strike. From an employer perspective, Article 5 of Legislative Decree 165/2001 puts public administrations on a par with private-sector employers with respect to employment relationships (Ales 2007). From an employee perspective, the consolidated jurisprudence of the Constitutional Court[22] puts civil servants – i.e. workers who serve the public authority under an administrative prerogative – on the same footing as private-sector employees when it comes to the right to strike.

Irrespective of the juridical status of their labour relationships, workers involved in the provision of essential services must however respect the requirements set by the above-mentioned Act 146/1990.

21 See, for example, Corte di Cassazione, 21 July 1984, no. 4288, in *Notiziario di Giurisprudenza del Lavoro*, 1984, p. 431.

22 Constitutional Court, 28 December 1962, no. 123, in *Gcost*, 1962, p. 1506.

Members of the police and the military (see, respectively, Act 121/1981 and 382/1978), as well as autonomous workers (*lavoratori autonomi*), have no explicit entitlement to the right to strike. Nevertheless, case law[23] has recognised that the right to strike is to be extended to people working under conditions similar to those of employees – i.e. working mostly if not exclusively for one employer although under an autonomous labour contract (Passalacqua 2009) – on the grounds of their economic and contractual vulnerability (Ballestrero 2004, 298 ff.).

2.4 Consequences for those organizing or participating in a collective action.

As taking strike action is a legal right (Article 40 Const.), any strike-related withdrawal of labour has no other effect on a worker's employment relationship than a proportionate loss of wages. Any other employer action or behaviour against strikers is explicitly prohibited and regarded as null and void by law (Articles 15 and 16 Act 300/1970). This includes dismissal (Article 4 Act 604/1966; Article 3 Act 108/1990).

According to Article 28 of Act 300/1970, in the case of any action being taken against strikers, trade unions may ask the labour judge for a summary injunction against the employer in question. Should the employer not comply with the ensuing court order, a penal sanction will be applied.

In the view of some scholars (Carinci, De Luca Tamajo, Tosi and Treu 2002, 246), the fact that "local representatives of a national trade union" (and not individual workers) are the only ones entitled to lodge the claim under Article 28 corroborates the collective/trade union entitlement concept of the right to strike.

As we have seen before, case law unanimously states that employers facing the above-mentioned forms of 'atypical' strikes shall not be obliged to accept and pay for labour offered by workers during an intermittent strike or by non-strikers during a strike carried out by a specific group or shift, if such work can be proved (Article 1256 and 1464 Civil Code) to be absolutely in conflict with the existing structure of the enterprise. This is, of course, a very critical issue, since the employer, by refusing to accept the work offered by the worker, may, for all intents and purposes, circumvent the proportionality principle which should prevail when calculating strike-related wage losses. For that reason, case law[24] has provided a very strict interpretation of the concept of mismatching work, thus restraining employers' subjectivity.

Generally speaking, the actions and behaviour of strike organisers should not lead to any negative consequences. This is due to the fact that, in order to make the freedom

23 Constitutional Court, 17 July 1975, no. 222, in *MGL*, 1975, p. 281; Corte di Cassazione, 29 June 1978, no. 3278, in *MGL*, 1979, p. 8.

24 Corte di Cassazione, 1 September 1997, n. 8273, in *MGL*, 1997, p. 800.

of association principle (Article 39 Const.) effective, the Constitutional Court[25] associated it with the exercise of the right to strike (Article 40 Const.), thus confirming that any kind of workers' coalition – whether 'official' trade union, autonomous trade union or spontaneous coalition - can legally organise collective action.

Needless to say, organisers of any strike hitting essential services and called in violation of the rules set by Act 146/1990 will be sanctioned accordingly. Furthermore, disciplinary measures – though excluding dismissal - will be applied to the participants in such an illegal strike.

Last but not least, according to a one-off and controversial decision of the *Corte di Cassazione*,[26] trade unions organising a strike can be found liable in tort vis-à-vis the relevant employer if they have signed a collective agreement including a no-strike clause breached by the action taken. What has been found to be controversial is the statement according to which strikers themselves can be held responsible for damages and also be sanctioned by their employer on grounds of withdrawal of labour (in favour of this view, cf. F. Santoro Passarelli 1971; Vallebona 2005, 241; and for a critical view, cf. Ghezzi 1963). The point in dispute here is whether a no-strike clause binds only its signatory parties (so called *effetto obbligatorio* – a "horizontal effect", so to speak) or whether it also affects the individual employment contracts of trade union members, thus opening up the way for disciplinary measures (so called *effetto normativo* - a "vertical effect", so to speak).

There is no convincing clear-cut answer to this question from a purely theoretical point of view. One can share the prevailing opinion (Giugni 1973; Tosi 1988; Magnani 1990) which advocates a case-by-case interpretation of parties' intended objectives when signing the no-strike clause. Indeed, in the tradition of Italian industrial relations, no-strike clauses are supposed to only have effect on signatory parties, with these in turn undertaking not to call members out on strike and to dissuade them from spontaneously organising any kind of collective action (Treu 2001, 229).

An interesting example of no-strike/no-lock-out clause, binding only the signatory parties yet having a significant effect on individual employment contracts, is the one contained in the so-called "Framework Agreement on income and employment policy" (*Protocollo sulla politica dei redditi e dell'occupazione*), signed on 23 July 1993 between the Government and the social partners. This Framework Agreement has effectively regulated the Italian collective bargaining system on a voluntary basis for more than fifteen years, and was recently modified without the assent of CGIL, Italy's largest trade union, on 22 January 2009.

25 Constitutional Court, 4 May 1960, no. 29, in *Gcost*, 1960, p. 497.
26 Corte di Cassazione, 10 February 1971, no. 357, in *MGL*, p. 371.

The above-mentioned clause stipulates that, within a period beginning three months before and ending one month after the expiry of a national collective agreement, the parties concerned undertake to negotiate and not to take any unilateral action, including collective action. Any violation of this clause would produce, depending on the party held responsible, the bringing forward (in the case of a lock-out) or the postponement (in the case of a strike) of the payment of a special contractual allowance due to workers if the collective agreement is not renewed on expiry. As a result, the clause had a joint horizontal (on signatory parties) and vertical (on workers) effect, avoiding at the same time any strike or lock-out being judged as legal or illegal by a third party – above all, the judiciary (Ales 1993).

In the reworded Intersectoral Agreement (*Accordo interconfederale*) signed on 16 April 2009 by the social partners (excluding the CGIL) and implementing the above-mentioned Framework Agreement of January 2009, the no-strike/no-lock out clause now stipulates a longer cooling-off period (extended from 3 to 6 months). In the case of any conflict the new version of the clause also recognises that the other party has the right to ask for the termination or suspension of any action taken in violation of the clause, allowing the courts to decide *ex ante* on the legitimacy of such action.

Furthermore, it is not specified to whom any request for termination or suspension of any action is to be addressed. Since no bipartite or independent review body is designated for this specific purpose by either the Framework Agreement or the Intersectoral Agreement, the judiciary would seem to be the only realistic, although out-of-line, addressee (see Section IV below).

3. *Collective action: limitations related to its objectives and content.*

In Italy, there are no real limitations on the objectives and content of collective action, including strike action. This can be seen as the result of more than two decades of case law of the Constitutional Court (1960 – 1983) and of one recent but controversial decision of the *Corte di Cassazione*.

As we have seen before, the Constitutional Court has been called upon several times by the judiciary to check whether the provisions relating to collective action in the Fascist Penal Code of 1930 were compatible with the new legal order outlined by the 1948 Constitution.

The Court began in 1960 by declaring Article 502 § 2 Penal Code unconstitutional.[27] This defined strikes aimed at modifying or defending pre-existing working conditions as criminal offences. In annulling this Article, the Court seemed to share the

27 Constitutional Court, 4 May 1960, no. 29, in *Gcost*, 1960, p. 497 et seq.

view of the prevailing doctrine advocating that only strikes aimed at achieving the above-mentioned goals (modifying or defending pre-existing working conditions) be considered legal. At that time, it seemed also to suggest that a link could be established between legal strikes and the conclusion or the renewal of a collective agreement, thus indirectly recognising the existence of a peace obligation originating from a collective agreement.

This was not however the case, and only two years later[28] the Court recognised as falling under the scope of application of Article 40 Const. strikes aimed at realising those interests of workers related to provisions contained in Title III Part I of the Constitution, i.e. regarding economic matters which can influence their well-being even though not obtainable from the relevant employer. Such an understanding can be termed "economic/political": economic because of its contents, political due to subject matters falling within the exclusive competence of political/legislative power (a pension reform, for instance).

The fact that a strike can legally affect an employer even though aimed at putting pressure on a third party was confirmed by the Constitutional Court in its same 1962 decision with reference to a solidarity strike (secondary action), stating that this type of action would not be treated as illegal under Article 505 Penal Code if called in support of a primary action conducted by workers employed in the same sector for economic purposes which can be proved to be shared by the workers engaged in the secondary action, and which are not likely to be realised without their support. This is a very narrow notion of solidarity and needs to be subjected to a case-by-case assessment of the judiciary. It leaves the door open for strikes called 'in support' of other workers' actions being considered as criminal offences.

Political strikes have been treated differently by the Constitutional Court.[29] On the one hand, if a strike is regarded as instrumental to the "removal of social and economic hurdles which may impede the full participation of workers in the political life of the country" (Article 3 § 2 Const.), it can be considered legal, falling fully under the scope of application of Article 40 Const. If, on the other hand, it concerns purely political matters (for instance, the participation of the Italian army in a foreign peace-keeping mission) it cannot be considered as falling under such scope, i.e. workers taking part in such a political strike shall be seen as exercising a political freedom, but not their right to strike. Therefore, even though they will not be prosecuted (as was the case under the Fascist regime when Article 503 Penal Code was applied), their action can be considered in breach of contract by an employer who is not obliged to bear the economic burden of the exercise of that freedom. Moreover, strikers may be prosecuted

28 Constitutional Court, 28 December 1962, no. 123, in *FI*, 1963, I, c. 5.
29 Constitutional Court, 27 December 1974, no. 290, in *Gcost*, 1974, p. 3388; Constitutional Court, 10 June 1993, no. 276, in *FI*, 1993, I, c. 2401.

under Article 503 Penal Code if the strike is aimed at subverting the existing democratically elected government or institutions.

More recently, the *Corte di Cassazione*[30] decided in favour of considering participation in a political strike as falling under the scope of application of Article 40 Const., arguing that it would be contradictory from a juridical point of view for the exercise of a constitutionally recognised freedom to lead to a worker committing an illegal act, even though only in terms of contractual liability.

According to the *Corte di Cassazione*, any sanctions adopted by an employer against participants in a political strike should be considered as anti-trade union behaviour or action, and therefore regarded as null and void in accordance with Article 15 of Act 300/1970. This would enable local representatives of a national trade union to lodge a claim under Article 28 of the same Act.

Last but not least, until the 1980s no major distinction was made between disputes over interests and disputes over rights when limiting the exercise of the right to strike. This was due to the lack of a collectively bargained or established statutory machinery aimed at avoiding the interpretation or application of disputed clauses of a collective agreement directly leading to collective action. From 1983 onwards, repeated attempts have been unsuccessfully made by the Government and the social partners to provide such a regulatory framework (Bellardi 1999).

In the context of the above-mentioned Intersectoral Agreement (*Accordo interconfederale*) signed on 16 April 2009, the social partners are once again trying to establish a machinery, to be specified in national sector agreements, to submit to conciliation and arbitration (if needed) disputes arising from the interpretation and the application of the same sector and/or company agreements. Results are not yet available for evaluation.

4. Ex ante or ex post judiciary/administrative control.

Leaving aside the domain of essential services, *ex ante* and *ex post* administrative control of collective action, including strikes, is totally unknown in the Italian legal system.

By contrast, as clearly seen from the aforesaid, judicial control has played a crucial role in defining the current regulatory framework of the right to strike. Such control is usually provided on an *ex post* basis. When facing what they suspect to be an illegal strike, employers do not generally resort to *ex ante* judiciary control to have any such action cancelled or suspended by injunction, even though this is available under Article

30 Corte di Cassazione, 21 August 2004, n. 16515, in *OGL*, 2005, p. 509.

700 Civil Procedure Code. This is probably due to the fact that the very notion of an "illegal strike" is practically unknown within the Italian legal system, with the exception of essential services.

For this reason, the consequences arising from the application of the above-mentioned no-strike/no-lock-out clause, according to which it is recognised that the other party in the conflict has the right to ask the judiciary to terminate or suspend any action taken in violation of it, are unpredictable and potentially disruptive to the stability of the whole industrial relation system.

5. *Procedural requirements/preconditions for collective action to be considered legal.*

Procedural requirements/preconditions for collective action to be considered legal only exist in the essential services domain.

6. *Balancing collective action with other rights and freedoms (national level)*

6.1 Preliminary remarks

For a better understanding of the complex subject matter dealt with in this section, some preliminary remarks are deemed necessary. They relate to the juridical status of an employment relationship. This links the person going on strike with his employer and with any consequences deriving from applicable legislation. Such remarks also explain why, in Italy at present, it is not correct – although common among prominent scholars - to talk about a specific regulation of strikes in the *public* services but instead in *essential services*.

For many years, commentators tried to derive a different treatment of abstention from work from the different juridical status of the employment relationship, i.e. whether public or private. A person working in public administration was theoretically and for the most part practically involved in, and consequently responsible for, the delivery of a service of 'public interest'. This meant that any abstention from work on his or her part was seen as causing harm to the community.

This is why it is important to first distinguish between an *employee*, as someone employed by a private employer under an employment contract governed by labour law, and a *civil servant* as someone working for a public authority in a juridical relationship governed by administrative law, i.e. subject to unilateral decisions of the administration, without any chance to negotiate working conditions, and under the jurisdiction of administrative tribunals (Ales 1996). For a long time this distinction meant

that a sizeable group of public workers were excluded from the application of Labour Law, creating what has been called *Pubblico impiego*, a separate system of labour relationships within the public administration (Rusciano 1978). Furthermore, it helped to affirm the notion of the existence of a public sector exclusively charged with promoting the public interest, thus justifying a regulation of employment relationships different to that in force in the private sector.

Even before 1993, when this distinction was annulled for the majority of civil servants, there was no 100% correspondence between being employed by the public administration and being involved in the delivery of services of public interest. We now therefore use the term *employee* for someone employed either by a private employer or by a public administration under an employment contract governed by Labour Law.

Another significant distinction, based on the nature of tasks performed by the worker, is that the one between a *public officer* and a *person charged with a public service*. The first is defined as a person working within the public administration and charged with duties connected to the exercise of legislative, judicial or administrative powers (so-called *public offices*); the second is a person, whether an employee or a civil servant, who is responsible for the delivery of a service aimed at ensuring basic needs of the population (*public service*). Until 1990, this distinction was considered relevant for evaluating the consequences of any abstention from work.

6.2 The right to strike, abstention of law, and strikes in essential services.

As already stressed before, the choice not to abolish or amend Articles 330 and 333 Penal Code emphasised the role of judges who, in doubt about the constitutionality of such provisions after Article 40 Const. came into force, repeatedly asked the Constitutional Court to provide guidance.

In the period between 1958 and 1977[31] the Constitutional Court undertook a number of attempts at defining the conditions under which Articles 330 and 333 Penal Code could be considered as not being in conflict with Article 40 Const. In so doing, the Court took the opportunity to outline, on a new and sound theoretical basis, the distinction between strikes in general and strikes in essential services, starting out from the notion of public office and public service as defined by the above-mentioned Penal Code articles. This case law is worth summarising, due to its influence on legislation in force.

31 Constitutional Court, 2 July 1958, no. 46, in *FI*, 1958, I c. 1050; Constitutional Court, 17 March 1969, no. 31, *ibidem*, 1969, I, c. 795; Constitutional Court, 28 December 1962, no. 123, in *MGL*, 1962, I, p. 416; Constitutional Court, 3 August 1976, no. 222, in *RGL*, IV, 1976, p. 55.

First of all, according to the Constitutional Court, no penal sanction could be applied if the abandonment or interruption of work (service) was motivated by participation in a legal strike, i.e. a strike which did not endanger the exercise of human rights enshrined in the Constitution.

This consideration led the Court to define as *essential* those services which were aimed at guaranteeing the exercise of such rights, whether they are delivered by a private enterprise or by a public body. The Court did not go as far as completely prohibiting strikes in essential services, but did state that the right to strike had to be exercised in such a way as to take into account the particular 'environment' in which it was taking place.

For this purpose, the Constitutional Court affirmed the principle of *balancing* the constitutionally recognised right to strike and constitutionally recognised human rights. To allow the above-mentioned constitutional rights to be exercised in cases of collective action, a balance had to be reached, with certain core functions being guaranteed. In the view of the Constitutional Court, within each essential service it was possible to identify certain indispensable ("core") functions that had to be guaranteed.

Notwithstanding the clarity of the principles laid down by the Constitutional Court, it soon became evident - as underlined by the Court itself in its last ruling in 1977 - that legislative intervention was needed in order to make them effective, above all with respect to the way core functions were to be defined. But even this authoritative 'call to order' was not sufficient to motivate the legislative to provide any regulation of the matter. One of the reasons for this was the trade union decision to directly regulate the matter, thereby avoiding statutory intervention. The ensuing commitment to self-restraint led to the adoption of sectoral Codes of Practice by the major union confederations (CGIL – CISL – UIL), at first for the transport service sector, and subsequently, in the period 1967 – 1982, for many other essential services (healthcare, education, etc.).

It is interesting to summarise the most relevant and common contents of these Codes of Practices, since they greatly influenced legislation now in force, providing in particular a practical definition of an indispensable function.

First of all, notice of a strike had to be given 10 days in advance to the relevant service provider; second, a strike could not be conducted during certain periods of the year (Christmas, Easter and the summer holidays); third, part of the services had to be guaranteed, although under different terms and conditions (for instance, trains in rush hours, first aid in hospitals, or final exams in schools). In this way, a set of rules defining indispensable functions began to be established, though still on a voluntary basis.

Efforts made by the major union confederations to regulate the exercise of the right to strike through self-restraint were welcomed by the legislator, and when, in 1983, Act 93 introduced a kind of collective bargaining for civil servants, the adoption of a

Code of Practice was considered a condition for trade unions to take part in negotiations.

However, such codes did not produce the expected results, due to their limited 'internal' and 'external' binding effect.

First, there were difficulties relating to the hardly discouraging effect of the sanctions that could be imposed on trade union members violating provisions laid down by the Code. With union shop clauses being illegal in the Italian legal system, even the exclusion of a member from a union has no major consequences for the person as far as the application of a collective agreement is concerned.

Secondly, the Codes of Practices obviously had no effect on autonomous trade unions, which in most cases represent groups of skilled workers employed in key roles within the delivery of essential services (e. g. train drivers, medical doctors, school teachers etc.).

These two points meant that the principle of balancing was not enforced, with the union confederations experiencing a major loss of members due to their self-restraint approach.

The failure of what has been called the 'season of self-regulation', at a time when (1980 – 1990) the number of strikes in essential services was rising rapidly, gave right-wing parties the opportunity to call for drastic statutory intervention aimed at prohibiting collective action in this domain. This led the same confederations to appoint a committee of experts to draft a legislative proposal based on the principle of balancing constitutional rights, while also taking the basic contents of the Codes into account. With support from the Government and merged with two proposals coming from the Socialist and the Communist parties, it took just a few months to become Act 146/1990 (Carinci 1990).

6.3 The end of the abstention of law: Act 146/1990.

Constitutional Court case law and experience gained during the 'season of self-restraint' represented the sound theoretical background for Act 146/1990. This statute, which currently has no equivalent in Europe (Ales 1995; Ales 2002; Orlandini 2005), is aimed at balancing the exercise of the constitutional right to strike with the exercise of human rights enshrined in the Constitution by defining rules and procedures aimed at guaranteeing the execution of certain core functions related to such rights (Persiani 1992). In such a perspective, balancing can be considered as both a goal and a method for guaranteeing the above-mentioned constitutional rights in the case of a strike.

Essential services are defined as ones aimed at guaranteeing the exercise of human rights enshrined in the Constitution, independent of the legal status of the provider and of the employment relationship of workers involved (Article 1, § 1).

Articles 330 and 333 Penal Code have since been repealed.

6.3.1 Definition of essential services.

Human rights enshrined in the Constitution are exhaustively listed in the law: the right to life, healthcare, freedom and security, freedom of movement, social security, justice, education, and freedom of communication (Article 1 § 1). On the other hand, the same Act 146/1990 also provides a non-exhaustive list of services considered as essential (Article 1 § 2). This leaves the door open for technical/technological developments which may, in the future, provide new ways (and, consequently, new services) of exercising the above-mentioned rights (Ales 2000). The legislator has thus opted for a dynamic definition of essential services and the way they are performed in relation to their aptitude to guarantee the exercise of human rights enshrined in the Constitution (Ales 1995).

6.3.2 Procedural requirements/preconditions for strike action being legal.

The preconditions for strikes in essential services being legal are laid down in Article 2, §§ 1 and 2 of Act 146/1990. The first procedural requirement is for written notice of the strike to be given at least 10 days in advance. It is to be addressed to the service provider by the trade union calling the strike. This gives the provider adequate time to make arrangements to reorganise the service. The second requirement is the indication of the duration of the strike. This has to be given together with the notice, precisely stating when the action is to begin and end, thereby allowing the provider to communicate to users the duration of any inconvenience. The third requirement is an indication of the way the strike will be organised. This must also to be contained in the same notice. The fourth requirement, the most important and also the most difficult to be fulfil, is the guarantee that core functions will be maintained during the strike (Treu 1992).

One of the critical aspects for any effective balancing between the right to strike and human rights enshrined in the Constitution is that a legal strike cannot lead to a complete stoppage of the service in question. The issue at stake is therefore how and by whom core functions shall be defined. In line with the principle of an open and dynamic definition of essential services described above, the Act does not specifically

and statically define key functions, instead entrusting their individual specification to collective bargaining conducted between a service provider and the trade unions representing the workers involved in the delivery of the service.

This involves the principle of horizontal subsidiarity being applied, with the legislator delegating to the parties daily involved in the organisation and delivery of the service the task of defining those functions that have to be considered indispensable for guaranteeing the core functionality of the constitutional right concerned.

This also means that the content of *core functions* may vary from service to service, according to the nature of each right. For instance, in the railways sector it has been decided that a train that has already left its original departure station has to arrive at its final destination, that train services at certain periods of the day have to be always guaranteed, and that a minimum number of trains have to connect major cities within the country on any one day. A similar quantitative interpretation of core functions may not suit other services and rights, as seen in the healthcare sector where first aid has always to be guaranteed without any restriction in working hours and numbers of practitioners and nursing staff.

This solution, which has the tremendous advantage of directly leveraging the organisational and operational know-how and competences of the parties involved in the definition of core functions, does however pose certain problems. Firstly, even if a responsibility to bargain fairly can be derived from Act 146/1990, this does not mean that agreement will always be reached. And even when agreement is reached, there may be doubt whether the functions singled out as being indispensable really achieve the balance. Secondly, due to the fact that the Italian trade union movement, above all in essential services, is highly fragmented, an agreement, though signed by the most important trade unions, will hardly cover all workers involved in the delivery of the service. If we add the fact that in Italy collective agreements only apply to the signatory parties and their members, the problem of the effectiveness of any guarantee to maintain core functions becomes evident.

This problem has been solved by a highly controversial decision of the Constitutional Court,[32] followed by a further one of the *Corte di Cassazione*,[33] according to which a core function defined in a collective agreement shall be applied to all workers by incorporating it into the general terms of employment.

32 Constitutional Court, 18 October 1996, no. 344, in *ADL*, 1997, p. 249.
33 Corte di Cassazione, 5 October 1998, no. 9876, in *OGL*, 1998, I, p. 837.

6.3.3 The Guarantee Body.

Act 146/1990 provides for an independent Guarantee Body composed of nine experts in labour law, constitutional law and industrial relations re-appointed every three years by the Presidents of the Chambers of Parliament. Its task is to evaluate the suitability of agreed core functions for achieving the balancing objective. If the agreement is considered unsuitable or if the parties are not able to reach agreement, the Guarantee Body issues a provisional proposal which is considered binding until a suitable agreement is reached. Such a solution, though not directly foreseen in the Act, was elaborated by the same Guarantee Body and underpinned by case law, before eventually being adopted by Act 83/2000 (under the name of *provisional regulation*). This Act, as we will see below, substantially modified Act 146/1990 (Ghezzi 2001). From 1991 onwards the Guarantee Body has played a major role in promoting the conclusion of suitable agreements in all sectors in which essential services are delivered, with the result that provisional regulations issued by the Guarantee Body remain in force in only an insignificant number of sectors (Loffredo 2005).

6.3.4 Sanctions.

To make the machinery described above effective, a comprehensive system of sanctions was provided by Act 146/1990. It affects all parties involved in the delivery of essential services, i.e. individual workers, trade unions and providers. The provision of legal sanctions must be considered crucial and innovative, since before 1990 it was practically impossible to speak of illegal strikes in Italy. Nowadays, any strike conducted in violation of the above-mentioned requirements/preconditions, can be considered as illegal. Due to the fact that the parties involved act in greatly differing capacities, sanctions obviously differ in content and in nature (Pascucci 1999).

Individual workers who take part in an illegal strike are subject to disciplinary measures (though not dismissal), as provided in the disciplinary codes usually adopted by an employer.

Trade unions (either 'official' or autonomous) and spontaneous coalitions calling a strike in violation of the above-mentioned requirements are subject either to monetary sanctions (the cancellation of paid leave due to their officers) or to a union's exclusion from collective bargaining for a certain period of time. The application of sanctions to trade unions has given rise to a number of problems, as Act 146/1990 assigned this task to the employer concerned, thus giving him the authority to assess trade union behaviour. This led the legislator to modify such provisions in Act 83/2000. Before any sanctions are now imposed by the employer, trade union behaviour must have been negatively assessed by the Guarantee Body.

Last but not least, service providers not cooperating in guaranteeing respect of the above-mentioned requirements or in restoring services immediately after the strike ends are subject to administrative monetary sanctions.

6.3.5 The power to issue decrees to restrict strikes.

Apart from the sanctioning system, Article 8 of Act 146/1990 gives the Government, relevant ministers, mayors and prefects the power to issue decrees restricting strikes. It has to be said that well before the Act 146/1990 came into force, such powers were widely used by the executive to avoid any inconvenience emanating from the unregulated exercise of the right to strike in essential services. Due to the abstention of law discussed above, for many years they were the only instrument of intervention the executive had available. During the preliminary debate on the drafting of Act 146/1990, it was proposed to abolish such a power to restrict strikes. However, at the end of the day, the decision was taken to uphold it, though only for cases of an impending and serious threat to the very core of the human rights enshrined in the Constitution. When issuing a decree, authorities have to take into account, whenever possible, the Guarantee Body's proposals and regulations. Article 8 was also modified by Act 83/2000, with its use becoming limited to emergency situations.

6.4 A change of perspective: Act 83/2000 and its effect on conflicts in essential services .

10 years after coming into force, Act 146/1990 was profoundly modified by Act 83/2000, primarily for two reasons.

Firstly, as clearly seen from the analysis of requirements for strikes to be considered legal, Act 146/1990 only provided for *ex post* intervention. This meant that a dispute had already degenerated into a conflict and that the conflict was inevitably leading to a strike (Grandi 1999). Act 146/1990 was therefore not doing anything to actually prevent strikes in essential services, only regulating them once they had started in accordance with the principle of balancing.

Secondly, the delivery of essential services was becoming increasingly endangered by the abstention of the self-employed (for instance, barristers) or small entrepreneurs (for instance, chemists), as Act 146/1990 only applied to employees. Even though it was possible to affirm that Act 146/1990 was achieving its objective, users of essential

services were calling for more effective legislative intervention in the face of an increasing number of legal strikes conducted in accordance with the requirements laid down by Act 146/1990, and interruptions of services due to non-employees abstaining from providing their services.

In response to these concerns, Act 83/2000 intervened in two main areas, in addition to the already-mentioned modifications. First of all, it introduced preventive measures minimising the risk of a dispute degenerating into conflict and strikes; secondly, it addressed the problem of non-employees' abstention (Pascucci 2000; Santoni 2001).

In the first area, Act 83/2000 established rules and procedures for looking for a solution to the dispute or conflict prior to strike action being taken. It imposes an obligation on the parties to undergo a conciliation procedure, either established by collective agreement or provided by the Labour Office (Ales 2001, 2004; Bavaro 2000). Furthermore, it imposes on trade unions the duty to declare the reasons for the strike within the written notice. Finally, it empowers the Guarantee Body to intervene in the dispute or conflict as a mediator.

In the second area, Act 83/2000 extends the provisions governing strikes to all abstentions endangering the very core of essential services, irrespective of the status of the actor involved. The system of core functions is applied here as well, not through collective agreements but through a unilateral Code of Practice issued by self-employed and entrepreneur associations and subject to Guarantee Body evaluation.

7. *(Potential) impact of CJEU case law (on fundamental freedoms) on the national regulation concerning collective action.*

7.1. Economic freedoms as constraints on industrial disputes.

Viking and *Laval* do not say much about strikes themselves. Apart from a formal reference to Article 28 of the Charter of Nice and to other international sources,[34] the CJEU does not adopt any Community 'notion' supplementing those already existing in national legal systems (possibly enhancing or strengthening them). But they do say a lot about market freedoms, their content and their subsequent place in the hierarchy of constitutional values. The issue of the "direct horizontal effect" of Community laws granting economic freedoms is crucial in this context (see, *inter alia*, Ballestrero 2008, 374 ff. and Lo Faro 2008, 77 ff.). Market freedoms are not only fundamental freedoms whose exercise must be guaranteed by the state but, indeed, 'rights' that must be protected also from any harm arising from acts of private individuals.

34 ECJ, C-438/05, *Viking*, paragraph 44 and C-341/05, *Laval*, paragraph 91.

A fundamental economic right previously unknown in the Italian constitutional traditions is introduced into national legislation. The new principle that can be inferred from *Viking* and *Laval* does not, however, consist of acknowledging that industrial action can be restricted in order to protect the other party's interest. What is new is the type of restriction that has been identified, leading to a major upgrading of the content of freedom of enterprise acknowledged by all European constitutional systems.

In Italy, an employer's economic freedom is protected against industrial action. In this respect *Viking* and *Laval* therefore represent no surprise. The *Corte di Cassazione* has specified that any restrictions on exercising the right to strike stem from the requirement that such a right, in whatever form or way exercised, should not infringe upon other constitutionally protected rights ("external limits" of the right to strike), including the right of employers to resume productive activities once the strike is over (so-called "business productivity" protected by Article 41 Const.).[35]

There is, however, a substantial difference between the restriction inferred by Italian courts on the basis of Art. 41 Const. and that inferred by Community judges on the basis of EC Treaty Art. 43 and 49. To use Natalino Irti's words (2001, 19), Art. 41 Const. enables courts to establish an employer's interest (which cannot be restricted by the right to strike) to protect his company in its "static" or vertical dimension, while under Community law a company must be considered in its "dynamic" and horizontal dimension.

The first "national" restriction concerns the pathological stage of a company's life-cycle, protecting its survival and its ability to "remain" on the market once the industrial dispute is over; hence, the restriction also protects workers' interests, as demonstrated by the reference that the *Corte di Cassazione* makes to the duality of the provisions contained in Art. 4 Const. (on the right to work) and in Art. 41 Const. (Garofalo 1991, 285).

The second "EU" restriction concerns the physiology of a company's life-cycle, involving the protection of its business and its freedom to move and act on the market; hence, the assertion that this interest cannot be restricted by a collective agreement (the merits of which thereby become open to review), whose function is precisely to regulate the exercise of the economic freedom of the employer. Such an assertion undoubtedly clashes with the "voluntaristic" principle upon which modern collective labour law has developed (including contributions from Italian scholars (Carabelli 2008, 162 recalling Giugni's and Mancini's teachings)), yet it must be borne in mind that this principle was developed in the context of another legal system not "contaminated" by Community market principles and therefore characterised by a different scale of "constitutional" values.

35 Corte di Cassazione, 30 January 1980, no. 711, in *FI*, 1980, I, c. 25.

7.2 The principle of last resort and the purpose of the strike.

In *Viking* the CJEU considers the right to strike as a last resort to settle collective disputes, i.e. as an instrument that, on the basis of the proportionality principle, is justified only when all the other options to settle a dispute have been exhausted (*Viking*, paragraph 87).

The principle of "last resort" expressed by the CJEU in *Viking* testifies to a preference for institutionalised and participatory industrial relation systems. The infringement of arbitration or conciliation procedures provided for by the national legal system may give rise to unprecedented liabilities directly based on internal market law.

In the Italian private sector there is no legally binding procedural restriction on collective action.

In the light of what the Court of Justice has stated in *Viking*, trade unions and workers involved in essential public services who go on strike without complying with the conciliation procedures provided for in Act 146/1990 and in collective agreements the former refers to, risk not only having the sanctions laid down by the law imposed, but also being held liable for any damage incurred by the company, insofar as the strike affects the employer's freedom of movement.

In the private sector as well uncertainties arise, should collective agreements make the conduct of a strike dependent upon compliance with procedural obligations. Under Italian law, only the signatories of such an agreement are bound by such. In theory, their infringement could however render a strike illegal under Community law, similarly with 'civil law' liability incurred by the organisations and their members.

Even more uncertain are issues pertaining to industrial action for reasons other than the bargaining of a collective agreement, for example for political reasons or protests, all of which represent legitimate expressions of industrial dispute under Italian case law. This case law may be overturned if applied to internal market issues, since strikes outside the framework of collective bargaining are potentially illegal under Community law in the light of necessity and proportionality tests. In such cases it is difficult to rely on the objective of "*protection of workers*" and, more generally, the existence of any "*overriding reasons of public interest*" on which the action may be grounded (*Viking*, paragraph 77).

Last but not least, the need to demonstrate that "*the jobs and conditions of employment*" are "*jeopardised or under serious threat*" (*Viking*, paragraph 81) acts as a deterrent against any trade union action taken to prevent the exercise of market freedom (and not to regulate it, as in the *Viking* case) and founded on fears attributable for example to the "indirect" effects of any off-shoring. Looked at more closely, this is the most outstanding direct effect of *Viking*: to cast doubts on the legality of any strike whose aim is to oppose off-shoring.

7.3 Freedom to provide services and collective agreements.

As a consequence of the liberal (Reich 2008, 156) interpretation of the Posted Workers Directive (PWD), collective agreements only play a marginal role among instruments regulating the services market. A Member State needs to assess carefully which collective agreements it can require companies providing services in its territory to comply with. Such collective agreements must be generally applicable and be binding for all companies operating in the sector affected by the provision of services. The general application of the agreements may stem from their having *erga omnes* effects or having acquired them "in practice" in the ways indicated by Article 3(8) of the Directive.

Compliance with a collective agreement may be imposed on foreign service companies only with reference to clauses that set minimum 'mandatory' standards throughout the national territory in the matters indicated by the Directive in Article 3(1). The necessarily mandatory nature of a national collective agreement as against any lower level contracts, stems from the fact that, as already clarified in *Portugaia Construções* of 2002 (CJEU C-164/99, paragraph 34), the ability of employers of the host state to deviate from a collective agreement when bargaining at company level would amount to a competitive advantage prohibited under Article 49 TEC.

In Italy, collective agreements are not universally applicable, thereby greatly reducing the possibility of requiring compliance with them from foreign services companies. Even if an employer is not a member of the employers' association signatory to the industry-wide agreement, he is nonetheless bound to comply with the minimum wage levels provided for in the collective agreement. This partial extension of the subjective enforceability of collective agreements has been recognised by the *Corte di Cassazione*'s case law, which, since the 1950s, has sanctioned the mandatory nature of Article 36 Const. This Article recognises the right of workers to a wage proportionate to the quantity and quality of the work performed and sufficient in any case to ensure a free and decent life for workers and their families; all lower courts (under Article 2099(2) of the Civil Code) have to define the wage level imposed by the Constitution by specifically referring to the minimum pay provided for in industry-wide collective agreements.

Given these effects of collective agreements, compliance with the clauses on minimum rates of pay, the only ones that in fact have general effect, is all that can be imposed on foreign service companies in Italy.

This exposes the Italian law implementing Directive 96/71 to attacks or at least to an interpretation conforming to Community law, since it does not draw a distinction between clauses that are generally applicable and clauses that are only binding for the signatories of a collective agreement (Article 3(1), Legislative Decree 72/2000) (Orlandini 2008, 65 ff.).

It is worth reflecting on the implications of the enforcement of such market regulation principles for those cases and matters which (though included in the list of Article 3(1) of the Directive) are regulated by collective agreements deviating from the law. Such regulation can hardly be applied to foreign companies.

If one considers, for instance, the Italian regulation on working time, the Directive lays down that the law and (possibly) collective agreements on "*maximum work periods and minimum rest periods*" are to be applied. Legislative Decree 66/03 (that has implemented Directives 93/104/EC and 2000/34/EC) merely sets (in Article 3) 40 hours as the regular weekly working time (an issue that does not fall under Article 3(1) of Directive 96/71) and 48 hours as the maximum weekly working time (Article 4(2)), always to be calculated as an average (a matter that theoretically falls under the list of the Directive). Though the decree does not stipulate anything else, it does refer to collective bargaining at all levels both for the identification of possible weekly limits (Article 4(1)) and for the definition of the reference period in the case of a multi-period calculation (Article 4(3, 4)). The same regulation applies to minimum daily (Articles 7 and 17) and weekly (Article 9) rest periods.

There emerges a regulatory framework that does not in fact set minimum standards on "*maximum work periods and minimum rest periods*" common to all companies of a sector, and therefore the relevant national regulation is not applicable to foreign companies. Since the law of the host country enables national companies to "escape" the constraints imposed by the law or a national agreement, these constraints cannot be imposed on companies whose place of establishment is located in other Member States. In short, the 'liberal' interpretation of Directive 96/71 ends up producing the contradictory, if not paradoxical effect, of rendering the Directive inapplicable in practice.

The marginal role played by collective agreements in terms of standard-setting has an impact on the feasibility of any industrial dispute. The Court, in fact, considers the principles restricting the State's power to be also applicable even when compliance with a collective agreement is imposed through industrial action. In this respect, *Laval* is indeed rather ambiguous. It is not clear whether the Luxembourg Court does or does not envisage the possibility of taking industrial action in order to impose compliance with a collective agreement, as an alternative to the methods laid down in Article 3(8) of the Directive. Even if this possibility is acknowledged, trade unions cannot rely on the public policy clause under Article 3(10) (for a critical assessment, see Ales 2008, 12 and Giubboni 2008).

Laval (paragraph 84) does not seem to completely rule out the possibility of public policy provisions being included in collective agreement clauses, but it does rule out the possibility that such a 'qualification' be carried out in the context of negotiations between management and labour, as these are not "*bodies governed by public law*".

This seems to be confirmed by the judgment delivered in *Commission vs. Luxembourg*, Case C-319/06, which, by stating that provisions of collective agreements "*which in their entirety and for the simple reason that they derive from that type of measure, cannot fall under that definition either*" (paragraph 66), implicitly admits that some of them may be considered as "public policy provisions".

On a closer look, this latter aspect is hardly relevant in the Italian legal system because the constraints on the use of collective agreements due to their effects and contractual structure are such that the issue of public policy provisions cannot be raised. If collective action can only be used to force foreign companies to apply the minimum contract level imposable by the state using the implementation law, the only strike that can be conducted legally in Italy on the internal service market is one with the aim of enforcing compliance with the minimum rates of pay established by the national collective agreement in force.

The effect of these principles on the domestic labour market is that the more flexible and decentralized the bargaining structure and the greater the role of bargaining vis-à-vis the law are, the weaker the state's possibilities are for defending workers against social dumping. If a 'flexible' model is adopted, with a 'weak' national collective agreement that can be deviated from at lower levels, then the possibility of imposing 'rigid' constraints on foreign companies temporarily operating on the national market disappears, since these constraints do not exist for 'national' companies (Sciarra 2008, 264). It is also worthwhile reflecting on the consequences for cross-border competition dynamics when, as is the case for Italy, a new collective bargaining structure is going to be adopted at national level.

7.4 Compensation claims from companies hit by an illegal strike.

The recognition of the direct horizontal effects the EC Treaty norms have on economic freedoms acknowledges the possibility of an employer to sue the other party for damages. This is similar to what is provided for in the case of infringements of Community competition law.

The type of action that can be brought and the liability that can be claimed are left to the state's discretion. However, under Community law "*effective remedies*" that can provide real relief to the victim, including compensating an actual loss and a loss of profit, must be granted (CJEU C-295/04, *Manfredi*). Interwoven problems thereby emerge between "Community" strike-related liability and national regulations, with liability potentially being incurred even though a strike is fully legal under national law.

Since in any conflict between domestic and Community law, the *primacy* of the latter implies that the former should not be applied, one could maintain that, in the Italian legal order, collective action is no longer protected by Article 40 Const., as this can no longer be relied on because the 'new' external provision redefining its scope is being infringed. A worker engaged in a strike that is in conflict with internal market rules would in that case run the risk of having disciplinary sanctions imposed or even of being dismissed for breach of contract. In our opinion, such a threat should be avoided, as it is not required under Community law, which on the contrary stipulates that "effective remedies" are to be granted to the victim without mentioning anything on the contractual aspects of the employment relationship.

If workers are to be protected from disciplinary measures, then it becomes mandatory to envisage a tort liability (in Italian civil law, *responsabilità extra-contrattuale*) related to a legal strike under the "internal" aspect of an employment relationship (Ghera 1970, and in particular 403 et seq.). A strike imposing "unjustified" obstacles on "fundamental" economic freedoms would justify tort liability stemming from an event that occurs legally under a contract. Though not stopping the right to strike under Article 40 Const. being legitimately exercised and thereby potentially discontinuing mutual contractual obligations, it would however expose strikers to liability for the damage incurred by holders of legitimate interests that are 'external' to the employment relationship.

The picture becomes even more complex if one considers that in the main proceedings of *Viking* and *Laval,* it was the trade unions and not the workers who were being sued for damages, reflecting the organisation-related nature of the right to strike typical of the Swedish and Finnish systems (Wedderburn 1998, 168 et seq.). In systems such as the Italian one, in which every individual is entitled to strike, there emerges the problem of unions' liability. This can be incremental to or replace that of individual workers. The solution to this problem is by no means easy, since it would entail recognizing the existence of the tort liability of an association without a legal personality (as is the case with trade unions) due to actions of their members or even of third parties who are not members. Under Italian civil law, an association is responsible in terms of direct (under Article 2043 c.c.) or indirect (under Article 2049 c.c.) liability for tort obligations stemming from illegal acts committed by its managers or employees (*inter alia*, Basile 2000, 538). Workers on strike cannot be qualified as such. The calling of a strike could be interpreted as a kind of inducement to commit a tort on the part of the association; but it is difficult to predict whether Italian labour courts will adopt such an unusual interpretation of the civil law principles in this sector.

8. *Cooperative approach: the "ground-breaking case" (Consiglio di Stato, March 1, 2006, no. 928) and the concept of "geo-diritto".*

The question now is whether a "cooperative" structure including European and national labour law can be defined, with the industrial relations system at its core. The Italian industrial relations system would be able to support such a structure, and a first sign of such cooperativeness has come from case law.

A *de facto* cooperative approach between the CJEU and the Italian courts already exists with regard to the above matters, applying when certain legal provisions conflict with each other. The key question governing such a cooperative approach is which law should be applied to the case at hand?

The process by which a national court determines applicable law involves a "classification" of rights. As a consequence, any "cooperative approach" means that national courts should, without any specific procedure, be able to define the scope of law. This is a significant problem within the European legal system, going under the term "*geo-diritto*" on Italy (Irti 2006, Faioli 2009). *Geo-diritto* explains the relations between law and territory, law and mobility, law and workers moving across Europe. The issues related to a cooperative approach and the concept of *geo-diritto* need to be analyzed in relation to a significant trend in Italian jurisprudence.

8.1 Labour law and geo-diritto

The Posted Workers' Directive (96/71/EC) was transposed into Italian law as Legislative Decree 72/2000. In the latter all Italian labour legislation previously applying solely to domestic workers was also made binding for foreign workers posted to Italy. In its decision of 19 April 2005, the Bolzano TAR (*Tribunale Amministrativo Regionale*), ruling on a case involving Italian social security contributions demanded from an Austrian company posting workers to Italy, stated that LD 72/2000 infringed Art 49 of the Treaty by applying the same working conditions to foreign posted workers as those applied to Italian workers. The ruling is also in line with ILO Convention 94.

In its ruling no. 928 of 1 March 2006 rejecting the appeal made against the above-mentioned decision, the *Consiglio di Stato* points to three profiles: 1) there is an assumption of incompatibility between the Treaty and Italian regulations (this determines a restriction of the free provision of services by means of additional financial burdens, e.g. social security contributions) 2) by means of Directive 96/71, the application of guarantee/minimum protection provisions in force in the host Country is ensured to posted workers; 3) one must exclude the host country's application of substantially comparable (or similar) protection to posted workers.

The assessment made by the TAR and upheld by the *Consiglio di Stato* aimed at verifying whether Italian regulations infringed Art. 49 of the EU Treaty. According to the TAR, Legislative Decree 72/2000 "clashes with the Community principle of free provision of services, as defined in Art. 49 (former Art. 59) of the Treaty, by maintaining that the same labour conditions foreseen by Italian laws and collective agreements apply to posted workers.

It is worthwhile summarizing the subject matter behind the TAR ruling. This involved: a) a tender to execute certain works, b) the reply of an Austrian firm, and c) the request made to the said Austrian firm by the tender office to demonstrate payment of social security contributions to the *Cassa Edile*.

The TAR appointed an expert to inspect *Cassa Edile* services and assess the equivalence between public and private social security schemes in the Italian and Austrian systems. The TAR then "extracted" the already harmonized or coordinated Community law from the national protection regulations – using the method already used in the *Commission vs. Luxembourg* case (CJEU C-319/06).

In this verification process, the TAR left aside all provisions falling within EC Regulation 1408/71 on the application of social security schemes to employed persons and their families, as well as the harmonized law, which was seen as equivalent with respect to protection. It came to the conclusion that no payment of social security contributions to *Cassa Edile* was due, as equivalent protection was available.

In doing so, the TAR did not apply existing domestic regulations requiring proof of payment of *Cassa Edile* contributions.

8.2 Proportionality test and the 1998 ILO Declaration

The *Commission vs. Luxembourg* ruling has similar significance with respect to the regulations arising from harmonized law (e.g. Directive 91/533/EC on an employer's obligation to provide contractual information, Directive 97/81/EC on part-time work, and Directive 99/70/EC on fixed-term work). With the monitoring of compliance with such regulations in the responsibility of each Member State (§§ 40 and 59), the Court of Justice sets forth the principle under which the rights of posted workers are deemed as upheld, once they have been transposed into respective national legal systems. In light of the above, we can deem that the coordination and harmonization rule transposed into the regulations of the posted worker's country of origin is not an exception to the principle of free provision of services within the context of Art. 3 § 10 of the Posted Workers Directive.

The rule on European-level coordination and harmonization which, once transposed into the national regulations of their country of origin, is applied to posted workers,

can neither be considered as a required enforcement rule nor as a public order rule. On the contrary, the cases defined by paragraph 50 of the *Commission vs Luxembourg* ruling as a "genuine and sufficiently serious threat to a fundamental interest of society" and which have been duly verified on the basis of the so-called proportionality test (see paragraph 51 of the same ruling), have to be considered as exceptions to the principle of free provision of services, within the context of Art. 3 § 10 of the Posted Workers Directive.

The proportionality test refers to the verification of compatibility/consistency with public order regulations made by the Court of Justice in a different context, though in some cases parallel to checking compatibility/consistency with labour law. The consistency test relates to the principle of free movement of people, verifying whether and when the expulsion of a migrant worker is legal. Such proportionality would acknowledge the increasing compliance with (parts of / all of) national labour law considered as a set of required enforcement/public order rules. According to the European Commission report verifying the transposition of the Posted Workers Directive,[36] work may be protected regardless of the labour law rules of the host country, by referring to the required public order rules of the labour law of the country of origin, if such rules correspond to basic principles (Barnard 2009).

This list is consistent with the principles defined in the ILO Declaration of 1998 (i.e. union freedom, prohibition of forced labour, the principle of non-discrimination, prohibition of the worse forms of child labour). With this list also constituting the core of the decent work principle (Faioli 2009 - bis), such a principle can be deemed to be at the core of a cooperative structure better integrating economic freedoms and social rights within the Italian industrial relations system. It could be considered as the cornerstone in the restructuring process between market integration and social aspects.

8.3 Procedural rights and "plural solidarities"

This is a matter of judicial culture rather than of fundamental rights. The Italian labour courts *(Suprema Corte di Cassazione, Corte di Appello, Tribunale in funzione di giudice del lavoro)* have not yet referred to the decent work principle with regard to protecting or promoting fundamental rights.

This is because fundamental rights in the Italian labour system are not a *lingua franca* and cannot be used as arguments against European jurisdiction (Adam, Tizzano, 2010). Although fundamental rights are undergoing a revolution in Europe as the

36 European Commission COM(2003) 458 final - The implementation of Directive 96/71/EC in the Member States.

product of the complex and competitive inter-institutional dynamics characterizing the judicial arena in a more globalised legal space (Lasser 2009), Italian legislation sees employment contracts as the place for anchoring the protection of workers.

It is now time to evoke "plural" solidarity in Europe: "the idea of 'solidarities' in the plural is intended to mean that while the role of industrial action needs to be safeguarded, the eradication of social dumping must also be addressed at a policy-making level. Strikes aimed at protecting jobs that would otherwise be endangered by social dumping should not be deemed illegal under the proportionality principle. Nonetheless, a challenging proportionality test arises whenever economic freedoms are at stake." (Sciarra 2010)

Such plural solidarity must form the basis for procedural rules at European and national levels. A procedural rule facilitating the organization of a cooperative structure in the Italian labour system could be related to the principle upheld by the Canadian Supreme Court in 2007.[37] This principle is related to the right to bargain collectively being considered as "a procedural right".

In particular, given that the labour system at both European and Italian levels still does not contemplate a procedural rule on the matter, the right to collectively bargain employment conditions should be deemed as "a procedural right". Reference can also be made here to the principle enshrined in Art. 39 of the Italian Constitution (fundamental freedom of trade unions *vis-à-vis* the state and public institutions). There are at least two reasons behind this idea.

The first one is related to the ineffectiveness of litigation in most countries (U.S., Canada, etc.) seeking to promote human rights (Compa, 2002: "labour rights lawsuits are not magic bullets").

The second, more theoretical, reason is related to the fact that justice is not necessarily based on procedures (Alexy, 1998). Such values as rights, solidarity, fairness are not easily obtained. The fairness of any decision is ensured by nothing but *ratio*, the proper use of reasoning and, in this case, of collective bargaining.

The right to collectively bargain employment conditions as "a procedural right" implies the establishment of a system for genuine transnational collective bargaining.

It is difficult to find examples of such a system. Though there are a few isolated ones in Europe and in Latin America, there is no clear-cut trend toward transnational bargaining also involving the Italian system; in fact, a large number of employers try to avoid overall unionization by decentralizing bargaining and by structuring production horizontally, or by cross-subsidizing "funds between unrelated parts of the business and thus reduce[ing] the effect of a strike in any one part" (Atleson 1985).

37 Health Services and Support - Facilities Subsector Bargaining Assn v. British Columbia, 2007 SCC 27.

At stake are therefore social dumping and protectionism. But protectionist reactions are no answer to "conflicting" solidarities in Europe. Social dumping effects in Europe can be reduced by initiatives of the social partners at European and national levels. "The rationale of such initiatives should be to promote growth in the less-developed economies of the kind which leads to a narrowing of the wage gap. [..] Transnational collective bargaining should be seen as adding to the capacities of the state as regulator, rather than reducing the state's sovereignty. The designation of new bargaining agents and the identification of new competences for trade unions and employer associations are all signs of collective autonomy. Nevertheless, the definition of new collective interests, shaped around solidarities in the plural, can direct national legislatures into new frames of reference, for example into the direction of auxiliary legislation capable of supporting transnational collective autonomy" (Sciarra 2010).

9. *Conclusions*

The most significant outcomes of this research are listed below. Such outcomes regard the impact that the CJEU is having on Italian jurisprudence and the cooperative approach that the Italian labour system has *de facto* implemented.

An essentially theoretical introduction of the Italian industrial relations system is briefly commented. Collective bargaining and strikes in the Italian legal frame are summarized, allowing the results related to CJEU case law to be better understood.

1. According to a long-standing tradition in Italian industrial relations, collective action and strikes can be basically understood as synonyms from an employee point of view. This finds confirmation in Article 40 Const. which refers directly to strikes when it comes to naming the instrument which workers can rely on to protect their interests and rights. Lacking any statutory definition of what constitutes a strike from a juridical point of view, for thirty and more years highly differentiated views on how to balance workers' social rights and employers' economic freedoms have clashed in case law and legal doctrine in a spirit of reciprocal and fruitful interaction.

2. International instruments have never had a significant impact on the Italian legal framework with regard to the definition and the regulation of collective action. On the other hand, with Article 40 Const. not being underpinned by legislation until 1990, collective action, or better the right to strike, has been conceptualised through the already mentioned fruitful dialogue between doctrine and case law, while collective bargaining has been more focused on setting procedural requirements like no-strike clauses and cooling-off periods. From the first half of the 1960s onwards, the right to strike has been regarded as an absolute fundamental right of workers (*diritto assoluto/ libertà fondamentale*), to be also exercised vis-à-vis a third party (another employer,

the Government, etc.) for non-contractual reasons. These include, among others, political and solidarity strikes within the bounds set by Article 40 Const. By conceptualising the right to strike in this way, it became possible – and remains so - to consider it as instrumental in "removing social and economic hurdles which may impede the full participation of workers in the political life of the country", one of the Italian Republic's main objectives set forth in Article 3 Const.

3. Entitlement to the right to strike, and above all whether it is an individual or collective entitlement, has been a matter of debate ever since Article 40 Const. came into force. Case law has never recognised the monopoly of 'official' trade unions to call out strikes. The result is that the Italian legal framework on collective action does not provide for 'wildcat' or illegal strikes, at least with regard to who is entitled to call them – be it a spontaneous coalition or an autonomous trade union. On the other hand, one has to admit that the procedural requirements set down by the legislative with respect to essential services are likely to make it extremely difficult for spontaneous coalitions to call workers out on a legal strike in this sector.

4. As far as the public sector is concerned, the juridical status of the employer has no effect on workers' entitlement to the right to strike. From an employer perspective, Article 5 of Legislative Decree 165/2001 puts public administrations on a par with private-sector employers with respect to employment relationships From an employee perspective, the consolidated jurisprudence of the Constitutional Court puts civil servants – i.e. workers who serve the public authority under an administrative prerogative –on the same footing as private-sector employees when it comes to the right to strike. Irrespective of the juridical status of their labour relationships, workers involved in the provision of essential services must however respect the requirements set by the above-mentioned Act 146/1990.

5. As taking strike action is a right (Article 40 Const.), any strike-related withdrawal of labour has no other effect on the employment relationship than a proportionate loss of pay for the workers concerned. Any other employer action or behaviour against strikers is explicitly prohibited and regarded as null and void by law (Articles 15 and 16 Act 300/1970). This includes dismissal (Article 4 Act 604/1966; Article 3 Act 108/1990). According to Article 28 of Act 300/1970, in the case of any action being taken against strikers, trade unions may ask the labour judge for a summary injunction against the employer in question. Should the employer not comply with the ensuing court order, a penal sanction will be applied.

6. In the tradition of Italian industrial relations, no-strike clauses are supposed to only have effect on the signatory parties who, in their turn, undertake not to call members out on strike, and to dissuade them from spontaneously organising any kind of collective action. An interesting example of no-strike/no-lock-out clause, binding only the signatory parties yet having a significant effect on individual employment contracts, is the one contained in the so-called "Framework Agreement on income and employment policy" (Protocollo sulla politica dei redditi e dell'occupazione), signed on 23 July 1993 between the Government and the social partners. This Framework Agreement has effectively regulated the Italian collective bargaining system on a voluntary basis for more than fifteen years, and was recently modified without the assent of CGIL, Italy's largest trade union, on 22 January 2009. The above-mentioned clause stipulates that, within a period beginning three months before and ending one month after the expiry of a national collective agreement, the parties concerned undertake to negotiate and not to take any unilateral action, including collective action. Any violation of this clause would produce, depending on the party held responsible, the bringing forward (in the case of a lock-out) or the postponement (in the case of a strike) of the payment of a special contractual allowance due to workers if the collective agreement is not renewed on its expiry date. As a result, the clause had a joint horizontal effect (on signatory parties) and vertical effect (on workers), avoiding, at the same time, any strike or lock-out being judged as legal or illegal by a third party – above all, the judiciary. In the reworded Intersectoral Agreement (*Accordo interconfederale*) signed on 16 April 2009 by the social partners (excluding the CGIL) and implementing the above-mentioned Framework Agreement of January 2009, the no-strike/no-lock out clause now stipulates a longer cooling-off period (extended from 3 to 6 months) (point. 2.4). In the case of any conflict the new version of the clause also recognises that the other party has the right to ask for the termination or suspension of any action taken in violation of the clause, allowing the courts to decide ex ante on the legitimacy of such action. Furthermore, it is not specified to whom any request for cancellation or suspension of an action is to be addressed. Since no bipartite or independent review body is designated for this specific purpose by either the Framework Agreement or the Intersectoral Agreement, the judiciary would seem to be the only realistic, although out-of-line, addressee.

7. Leaving aside the domain of essential services (see Section VI below), ex ante and ex post administrative control on collective action, including strikes, is totally unknown to the Italian legal system. Constitutional Court case law and results acquired during the 'season of self-restraint' constitute the sound theoretical background of Act 146/1990. This statute, which currently has no equivalent in Europe, is aimed at balancing the exercise of the constitutional right to strike with the exercise of human rights enshrined in the Constitution by defining rules and procedures aimed at guaranteeing the execution of certain core functions related to such rights. In such a perspective, balancing can be considered as both a goal and a method for guaranteeing the above-mentioned constitutional rights in the case of a strike. Essential services are defined as ones aimed at guaranteeing the exercise of human rights enshrined in the Constitution, independent of the legal status of the provider and of the employment relationship of

workers involved. Human rights enshrined in the Constitution are exhaustively listed in the law: the right to life, healthcare, freedom and security, freedom of movement, social security, justice, education, and freedom of communication (Article 1 § 1). The preconditions for strikes in essential services being legal are laid down in Act 146/1990. This Act also provides for an independent Guarantee Body composed of nine experts in labour law, constitutional law and industrial relations re-appointed every three years by the Presidents of the Chambers of Parliament. Its task is to evaluate the suitability of agreed core functions for achieving the balancing objective. To make the machinery described above effective, a comprehensive system of sanctions was provided by Act 146/1990.

8. *Viking* and *Laval* do not say much about strikes themselves. Apart from a formal reference to Article 28 of the Charter of Nice and to other international sources, the CJEU does not adopt any Community 'notion' supplementing those already existing in national legal systems (possibly enhancing or strengthening them). But they do say a lot about market freedoms, their content and their subsequent place in the hierarchy of constitutional values. The issue of the "direct horizontal effect" of Community laws granting economic freedoms is crucial in this context. Market freedoms are not only fundamental freedoms whose exercise must be guaranteed by the State but, indeed, 'rights' that must be protected also from any harm arising from acts of private individuals. A fundamental economic right previously unknown in the Italian constitutional traditions is introduced into national legislation. The new principle that can be inferred from *Viking* and *Laval* does not, however, consist of acknowledging that industrial action can be restricted in order to protect the other party's interest. What is new is the type of restriction that has been identified, leading to a major upgrading of the content of freedom of enterprise acknowledged by all European constitutional systems.

In Italy, an employer's economic freedom is protected against industrial action. In this respect Viking and Laval therefore represent no surprise. In Italy, collective agreements are not universally applicable, thereby greatly reducing the possibility of requiring compliance with them from foreign services companies.

Laval (paragraph 84) does not seem to completely rule out the possibility of public policy provisions being included in collective agreement clauses, but it does rule out the possibility that such a 'qualification' be carried out in the context of negotiations between management and labour, as these are not "*bodies governed by public law*". This seems to be confirmed by the judgment delivered in *Commission vs. Luxembourg*, CJEU C-319/06, which, by stating that provisions of collective agreements "*which in their entirety and for the simple reason that they derive from that type of measure, cannot fall under that definition either*" (paragraph 66), implicitly admits that some of them may be considered as "public policy provisions". On a closer look,

this latter aspect is hardly relevant in the Italian legal system because the constraints on the use of collective agreements due to their effects and contractual structure are such that the issue of public policy provisions cannot be raised. If collective action can only be used to force foreign companies to apply the minimum contract level imposable by the state using the implementation law, the only strike that can be conducted legally in Italy on the internal service market is one with the aim of enforcing compliance with the minimum rates of pay established by the national collective agreement in force. The effect of these principles on the domestic labour market is that the more flexible and decentralized the bargaining structure and the greater the role of bargaining vis-à-vis the law are, the weaker the state's possibilities are for defending workers against social dumping. If a 'flexible' model is adopted, with a 'weak' national collective agreement that can be deviated from at lower levels, then the possibility of imposing 'rigid' constraints on foreign companies temporarily operating on the national market disappears, since these constraints do not exist for 'national'.

9. There is a de facto cooperative approach between the CJEU and Italian courts with regard to the above. This approach applies when certain statutory provisions conflict with each other. The Posted Workers' Directive (96/71/EC) was transposed into Italian law as Legislative Decree 72/2000. In the latter all Italian labour legislation previously applying solely to domestic workers was also made binding for foreign workers posted to Italy. In its decision of 19 April 2005, the Bolzano TAR (*Tribunale Amministrativo Regionale*), ruling on a case involving Italian social security contributions demanded from an Austrian company posting workers to Italy, stated that LD 72/2000 infringed Art 49 of the Treaty by applying the same working conditions to foreign posted workers as those applied to Italian workers. The ruling, confirmed by the *Consiglio di Stato*, is also in line with ILO Convention 94.

10. The *Commission vs. Luxembourg* ruling has similar significance with respect to the regulations arising from harmonized law (e.g. Directive 91/533/EC on an employer's obligation to provide contractual information, Directive 97/81/EC on part-time work, and Directive 99/70/EC on fixed-term work). With the monitoring of compliance with such regulations in the responsibility of each Member State (§§ 40 and 59), the Court of Justice sets forth the principle under which the rights of posted workers are deemed as upheld, as they have been transposed into respective national legal systems. In light of the above, we can deem that the coordination and harmonization rule transposed into the regulations of the posted worker's country of origin is not an exception to the principle of free provision of services within the context of Art. 3 § 10 of the Posted Workers Directive.

11. The rule on European-level coordination and harmonization which, once transposed into the national regulations of their country of origin, is applied to posted workers, can neither be considered as a required enforcement rule nor as a public order

rule. On the contrary, the cases defined by paragraph 50 of the *Commission vs Luxembourg* ruling as a "genuine and sufficiently serious threat to a fundamental interest of society" and which have been duly verified on the basis of the so-called proportionality test (see paragraph 51 of the same ruling), have to be considered as exceptions to the principle of free provision of services, within the context of Art. 3 § 10 of the Posted Workers Directive. The rule on European-level coordination and harmonization which, once transposed into the national regulations of their country of origin, is applied to posted workers, can neither be considered as a required enforcement rule nor as a public order rule. On the contrary, the cases defined by paragraph 50 of the Commission vs Luxembourg ruling as a "genuine and sufficiently serious threat to a fundamental interest of society" and which have been duly verified on the basis of the so-called proportionality test (see paragraph 51 of the same ruling), have to be considered as exceptions to the principle of free provision of services, within the context of Art. 3 § 10 of the Posted Workers Directive

12. It is now time to evoke "plural" solidarity in Europe. Such plural solidarity must form the basis for procedural rules at European and national levels. A procedural rule facilitating the organization of a cooperative structure in the Italian labour system could be related to the right to bargain collectively being considered as "a procedural right". In particular, given that the labour system at both European and Italian levels still does not contemplate a procedural rule on the matter, the right to collectively bargain employment conditions should be deemed as "a procedural right". Reference can also be made here to the principle enshrined in Art. 39 of the Italian Constitution (fundamental freedom of trade unions *vis-à-vis* the state and public institutions).

Industrial relation within the Polish legal system – why the CJEU judgements have little effect on Poland

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Abstract

The *Viking*, *Laval* and *Rüffert* judgements had no great impact in Poland, due *inter alia* to the statutory character of labour law as well as limitations to the right to strike prescribed by law. In this section, the authors first present the normative aspect of the freedom of association and the right to strike in Poland in the light of CJEU and ECtHR jurisprudence. Next, the position of fundamental freedoms in the Polish legal system is shown. Finally the authors explore the Polish judicial system's model of courts referring legal questions to the Polish Supreme Court and Constitutional Tribunal and requesting preliminary rulings. Such referral has a long-standing tradition within Poland and is often applied by lower courts. As yet, Polish courts have however, with the exception of administrative courts, rarely decided to present requests for preliminary rulings to the CJEU.

1. Introduction

Poland is one of those countries where the recent CJEU judgments have not had any major impact. Any doctrinal reflection on the consequences is concentrated more on the European than the national dimension, with scarcely any analysis being made of potential common ground. What is also surprising is that the reaction of the legal doctrine towards CJEU judgments is, contrary to that encountered in other EU countries, not critical but instead quite approving. One of the articles that can be quoted here is by A. M Świątkowski. In it the author underlines that in both the *Viking* and *Laval* judgements the CJEU acknowledged that actions undertaken by trade unions enjoyed the guaranteed protection of the European Treaty and were regarded as fundamental rights. The balance between economic freedoms, i.e. the freedom of establishment and the freedom to provide services, and the fundamental right to bargain collectively had

1 Both authors cooperated on this topic, the chapters 2 and 3 were written in individual responsiblity, Joanna Unterschütz holds the scientific responsibility for the Chapter 2 "Fundamental rights in the Polish legal system" and Krzysztof Wozniewski for the Chapter 3 "Co-operative structures in the context of Polish constitutional law".