SUMMARY

2014/17 Italian law on facilities for unions discriminatory and unconstitutional (IT)

<p>When the car manufacturer Fiat terminated the national collective agreements to which it was a party and entered into a new, company-level collective agreement for one of its factories, a large trade union, FIOM, refused to sign up to it. Fiat applied section 19 of the Workers’ Statute to deny FIOM certain benefits, such as the right to call meetings with staff during working hours and the right to use company facilities. The Constitutional Court declared the section unconstitutional on the basis that it discriminated unreasonably against unions that are not a party to a collective agreement despite representing a large segment of the workforce.</p>

Summary

When the car manufacturer Fiat terminated the national collective agreements to which it was a party and entered into a new, company-level collective agreement for one of its factories, a large trade union, FIOM, refused to sign up to it. Fiat applied section 19 of the Workers' Statute to deny FIOM certain benefits, such as the right to call meetings with staff during working hours and the right to use company facilities. The Constitutional Court declared the section unconstitutional on the basis that it discriminated unreasonably against unions that are not a party to a collective agreement despite representing a large segment of the workforce.

Background

A *Rappresentanza Sindacale Aziendale* (RSA) is a company-level employee-representative

body. The law does not specify how many members an RSA should have, nor how the members are appointed by their unions, nor what the duties of an RSA are, nor how it is to function. Basically, all the law does is to confer certain rights on RSAs and their members, such as:

special protection against dismissal or other detrimental actions by the employer;
the right to a certain amount of time off work in order to perform union activities;
the right to call meetings with the staff during working hours;
the right to use company facilities, such as conference rooms;
the right to post messages on the employer's (physical or digital) bulletin board.

Obviously, these rights can be burdensome for the employer. For this reason, not every union has the right to establish an RSA. Only unions that have signed a collective agreement applied within the company have this right. This is provided in section 19 of the Workers' Statute (Law 300/1970) ("section 19"). Thus, within one company, there can be some unions that benefit from these rights and unions that do not. Those that do not, of course, do have constitutional rights concerning freedom of industrial action.

Facts

In 2010 Fiat decided to invest hundreds of millions of euros in its car factory in the Naples suburb of Pomigliano. The decision was conditional on the willingness of the unions to agree to certain changes that Fiat considered necessary to achieve an adequate return on its investment. The changes concerned matters such as overtime, breaks and the ability to go on strike. These changes were not possible under the existing collective agreements to which Fiat was bound. These were collective agreements at the national level that had been negotiated between, on the one hand, Federmeccania, the employer's association of which Fiat was a member, and, on the other, the largest unions active in the industrial sector belonging to national confederations of unions, FIOM, UILM and FILM, as well as two other unions, FISMIC and UGL.

In order to introduce the changes, Fiat needed to free itself from the existing national collective agreements to which it was bound and to enter into a collective agreement specifically for its Pomigliano plant. It did this in two steps. The first was to resign from Federmeccanica and to terminate the existing collective agreements. The second consisted of (i) establishing a new legal entity (FIP) that took over the management of the Pomigliano plant from Fiat and (ii) negotiating a new company-specific collective agreement for FIP.

FIP reached agreement with four out of the five unions. It failed to reach agreement with one

of the largest, and definitely the most combative and least flexible union in the industrial sector, FIOM. The agreement paved the way for the investment to go ahead, and now the new factory is in operation and the employees are bound only by the new collective agreement. The same agreement has meanwhile been extended to many different production plants within the Fiat group.

As already mentioned, section 19 bestows rights on unions that are a party to a collective agreement that is applied in the company in question. Thus, the four unions UILM, FILM, FISMIC and UGL had the right to establish an RSA, with all the rights associated with that, whereas FIOM, one of the largest and most representative unions, did not have those rights. FIOM did not accept this state of affairs. This led to a large number of court cases throughout Italy between FIOM as plaintiff and Fiat subsidiary companies as defendants.

Lower court judgments

Some local tribunals, applying section 19 strictly, ruled in favour of Fiat. Other tribunals reasoned that a strict interpretation of section 19 would be unfair and illogical, seeing as it would exclude one of the most representative of the unions from the statutory protection of union representation. These tribunals interpreted section 19 as bestowing rights, not only on unions that are a party to a relevant collective agreement, but also to unions that, although they are not a party to such an agreement, have been "active in the bargaining process".

Three tribunals – those in Turin, Modena and Vercelli – took an intermediate view. They reasoned that the wording of section 19 is clear and that it stands in the way of a broad interpretation. However, they also noted that a strict interpretation of section 19 could be at odds with the constitutional principles of equality, freedom of association and freedom of industrial action, given that:

it effectively allows employers (who can choose with which unions to enter into a collective agreement) to determine which unions benefit from the statutory rights relating to RSAs;
it could more or less force unions to accept terms with which they disagree, for fear of losing their RSA facilities;
the criterion "party to a collective agreement" does not reflect the degree to which a union represents the staff and is therefore not a reasonable criterion.

For this reason, these three tribunals applied to the Constitutional Court for guidance.

Judgment

The Constitutional Court agreed with the view of the said three tribunals that the wording of section 19 is clear and does not allow for a broad interpretation. However, it also held that section 19 is unconstitutional. Article 3 of the constitution enshrines the principle of equal treatment. Unequal treatment can be lawful, but only if it is reasonable. The criterion of being a party to a collective agreement is not a reasonable criterion, seeing that it does not in any way reflect how representative a union is within a company. Therefore, treating a union less favourably than other unions that are active in a company violates the principle of equal treatment.

Article 39 of the constitution guarantees freedom of union association. The criterion of being a party to an applicable collective agreement interferes with this freedom, given that it provides an incentive to accept employers' demands, or rather, a disincentive to resist those demands.

On these grounds, the court held section 19 to be unconstitutional and held that it is sufficient for a union to have actively participated in the bargaining process (with respect to the terms and conditions applying to the workforce) to benefit from the statutory rights relating to RSAs.

This means that FIOM, which strongly challenges the new collective agreement, will have the right to establish an RSA within each single company of the Fiat group with all the facilities provided by the Worker's Statute.

Commentary

The Italian system for the representation of employees in the workplace is based on a model which provides different levels of protection.

The basic level of protection, which is an expression of the constitutional principle of freedom of union association (Article 39), includes the right to establish organisations of workers and to perform union activity in the workplace. This level of protection is conferred to any kind of association.

The second level of protection concerns not only freedom of association and activity, but confers specific rights obliging the employer to 'cooperate' with and help its traditional and institutional antagonists (unions) by conferring on them several additional powers and protections, which are: the right to organise assemblies during working hours; the right for its members to perform union activity during working hours; special protection for union members against transfers and dismissals, the right to post messages of union interest on the company's bulletin boards and the right to have a room within the company for union meetings (all rights provided under section III of the Workers' Statute).

This second level of protection – which, from a practical point of view, is extremely important – is not conferred on all unions, but only to those selected by means of section 19 of the Worker's Statute. The reason for this is to restrict access to such rights to well-established and genuinely representative unions, given the burden on employers.

At the time the Worker's Statute came into force, section 19 provided that the higher level of protection was to be conferred to associations (a) affiliated with the most representative confederative trade unions and b) which have signed collective bargaining agreements applied within the company at the national or local level, but not to associations that have signed collective bargaining agreements only at company level. These rules changed after a national referendum in 1995. After the referendum, requirement a) was cancelled and requirement b) was extended to all associations that had signed any kind of collective agreement (including agreements at company level).

The model resulting from the referendum, therefore, was entirely centred on the signing of at least one collective bargaining agreement applied within the company. The logic behind this model was that the signing of a collective bargaining agreement was the key way to distinguish between a union that was 'strong' and representative (and, therefore, had the power to impose its views on the employer), and one which was not. Only a strong association would have the power to sit at the negotiation table and to force the employer (or employers' association) to come up with an agreement - that was the idea.

This model worked without difficulty for as long as the major Italian unions (the three confederative ones and the associations affiliated with them) worked together, pursued the same interests and agreed together on the signing of collective bargaining agreements. All collective bargaining agreements in Italy had, historically, been signed by all the unions affiliated to the three major confederations. The problems began when this unity of action ceased, and they reached their zenith in the Fiat case described in this case report. In this case, as explained, FIOM (a union of the industrial sector affiliated to CGIL), refused to sign the agreement although it was signed by all the other unions involved. The result was that FIOM, which is one of the most major and representative unions in the industrial sector, was left without access to the rights provided by the Worker's Statute. Until, that is, the Constitutional Court ruled in its favour.

Although the decision has logic to it in some ways, in others it is not entirely convincing, firstly because the Constitutional Court did not merely state that the provision contravened the Constitution, but it also invented a new criterion (i.e. active participation in the bargaining process) for qualifying for the higher level of protection. Secondly, this new criterion introduces more uncertainty than the previous one (the signing of a collective bargaining

agreement) and this means it will be hard to determine what level of participation in the bargaining process is required to confer access to the special protection.

Thirdly, the ruling does not solve a particular legal problem that arose in the case, in that the employer was not only refusing to sign a collective bargaining agreement with one of the relevant unions, but also refused to negotiate with it – yet there is no legal obligation on it to negotiate, other than in specific circumstances (i.e. collective dismissals and transfers of undertakings).

Finally, the criterion set out by the court does not incentivise the conclusion of bargaining agreements, and this is likely to increase social conflict. In the past, collective bargaining agreements often served not to acquire better working conditions for employees, but to distribute the pain as fairly as possible so as to secure the survival of the enterprise. The old criterion worked in this context as a form of stimulus to the unions to find consensus, often in the face of conflicting workers' interests. The new criterion totally removes this effect.

Beyond that, what is really interesting about this decision is that in ruling as it did, the Constitutional Court reversed its previous decisions. Before this case, the Court had already ruled several times on the legitimacy of section 19, and twice since the referendum. In those decisions, the Court had stated that the criteria (i.e. the signing of a collective bargaining agreement) pursuant to which section 19 guaranteed the rights provided under section III of the Workers' Statute was entirely in line with the Constitution. However, these rulings were given at a time when the most important and representative unions used to cooperate and tended to agree to the signing of collective bargaining agreements. Thus, in practice, all of the most representative unions had access to the second level of protection.

The court based its reversal on changes in the dynamics of industrial relations and their practical consequences, notably the different approaches taken by some of the major unions. These had the effect of excluding a highly representative union from the protection granted by the Worker's Statute and this, in the court's opinion, was in conflict with the spirit of the law. In the court's view, section 19 was not unlawful in itself, but had become untenable in the context of the new industrial relations in which it had come to operate.

Comments from other jurisdictions

Germany (Paul Schreiner): Germany does not have a legal framework comparable to the Italian one. Trade unions have strong rights resulting directly from the German Constitution. Until now there has been no legislation at state level that grants different trade unions different rights and obligations. Therefore, in principle, all trade unions still have the same rights with regard to the workforce of a certain employer, regardless whether or not they have concluded a

collective bargaining agreement.

However, as in the Netherlands, there are certain issues that are comparable to the situation in Italy. In Germany, traditionally, the case law of the federal employment court for labour and employment matters stated that there can be no more than one collective agreement for any one organisation. Once a collective bargaining agreement had been concluded, it was almost impossible for a different trade union to conclude a different collective agreement. In consequence, it was very hard for new trade unions to gain new members and increase their influence.

Newer case law, however, points in a different direction. Now, the federal court holds that an unlimited number of collective agreements can be concluded within one organisation. The reason behind this is that every trade union has the constitutional right to conclude collective agreements and must not be hindered in doing so. With that new framework, new German trade unions have risen to the occasion and concluded lots of collective bargaining agreements. To force an employer to conclude such an agreement, they are allowed to go on strike. Therefore, every larger German employer runs the risk that different unions in different parts of the workforce will go on strike at different times of year.

To limit this risk, there have been various attempts at providing a legal basis for re-establishing the principle of one collective agreement per organisation. But this raises a question that is analogous to the Italian situation: which trade union should be the one that is allowed to conclude a collective agreement? Representation of workforce could be one answer to that question. Probably the majority of German legal authority currently tends to favour that option. But if a new law were to follow that path, would it be necessary, for constitutional reasons, to allow a second trade union also to conclude a collective agreement, if it represented a significant minority of the workforce? These questions are as yet unanswered.

Ireland (Orla O'Leary): Irish industrial relations law is based on a voluntarist tradition. According to latest official statistics, 31% of workers in Ireland are members of trade unions. Trade union membership in the public sector is significantly higher at 68.7%, than the private sector at 24.9%. Although workers have a constitutional right to join a trade union, employers are not obliged to negotiate with the union, nor is there any legislative equivalent to the secondary rights afforded under section 19 of the Italian Workers Statute.

A ruling of the Irish Supreme Court in May 2013 declared a legislative scheme for setting minimum terms of employment within certain industries unconstitutional. The ruling bears similarities to the Italian Constitutional Court's ruling in *FIOM v Fiat*.

In *McGowan v Labour Court 2013* IESC 21 the Irish Supreme Court ruled that Registered

Employment Agreements, which are legally-binding agreements setting minimum wages and terms of employment in certain industries, were unconstitutional. The abolition of Registered Employment Agreements has affected workers in the construction, electrical contracting and retail sectors, amongst others. Trade unions had previously been heavily involved in negotiating Registered Employment Agreements, which were generally regarded as an important means of providing improved terms and conditions for workers in those industries. The ruling has parallels to the *FIOM* ruling in Italy – both the Irish and Italian courts' views were that the respective legislative schemes were seen as untenable in the context of modern industrial relations in the two jurisdictions.

The Netherlands (Peter Vas Nunes): In Dutch practice, trade unions play a less dominant role than in countries like Italy. The strong position of works councils (whose members are elected by and from all employees in an organisation, not merely union members) may have something to do with this. Union membership has declined over the years to the present level of just over 20%. In many companies, no more than a handful of employees are members of a union and sometimes none at all. Despite this, the legislator continues to reserve important prerogatives for unions. As a result, the vast majority of Dutch employees are covered by a collective agreement setting out their salary and many other terms of employment. This can be either an industry-wide agreement (e.g. one for hospitals, restaurants or metallurgical companies) or an agreement specifically for one company (e.g. Philips or KLM). Most industry-wide collective agreements have been declared *erga omnes*, meaning that all companies within the relevant sector must apply them, regardless whether they are a member of an employers' association.

Remarkably, there is no statutory requirement for a union to be 'representative'. A union with no more than a small minority of its members being employees within a company, or even none at all, may enter into a collective agreement with that company and that agreement will, in principle, be binding on all of its employees. There have even been cases where the union doing so was a bogus or "yellow" union (although the courts have invalidated such agreements). This has occasionally led to an employer negotiating a collective agreement with one small union against the wishes of one or more other larger unions. Thus, although the Dutch and Italian systems differ markedly, some of the issues raised in the dispute reported above, such as competition between unions and the changing nature of collective agreements in economically challenging times, seem familiar.

Subject: Other forms of discrimination

Parties: FIOM - v – Fiat and others

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Court: Corte Costituzionale (Constitutional Court)

Date: 23 July 2013

Case Number: 231/2013

Publication: www.cortecostituzionale.it|*Giurisprudenza*|*Ricerca sulle Pronunce* |*Anno+Numero*

Creator: Corte Costituzionale (Constitutional Court)
Verdict at: 2013-07-23
Case number: 231/2013