1. Italy: New Guidelines and Increased Scrutiny over continual Extension of Prohibition on Dismissals due to COVID-19

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The so-called "Sostegni Decree" provided for an extension of the ban on dismissals, stating that until next 30 June the ban remains in force for all kinds of employers. However, as from 1 July to 31 October 2021 the ban will remain in place only for those companies entitled to receive the so-called "Ordinary Allowance" and "Cassa in Deroga" types of contribution, which are generally dedicated to smaller companies (e.g. companies active in the instance services, commerce, food & beverage and tourism sectors, among others).

As of 17 March 2020, Art. 46 of Legislative Decree n. 18/2020 introduced a dismissal ban for objective reasons aimed at facing the economic consequences of COVID-19 spread. This provision has been lastly prorogated by a new legislative decree (called "Sostegni") n. 41 of 22 March 2020, which introduced two different deadlines for the ban: on one side, for companies entitled to receive the so-called "Cassa Integrazione Ordinaria", generally belonging to the industrial sector, the deadline is 30 June 2021, while for companies excluded from the ambit of the "Cassa Integrazione Ordinaria", and so entitled either to the Ordinary Allowance or the "Cassa in Deroga" (different kinds of subsidies) the deadline is 31 October 2021.

Legislative Decree n. 41/2021 (Art. 8, paragraphs 9, 10 and 11) states that, until next 30 June, all employers are precluded from conducting or continuing collective redundancy procedures and from executing individual dismissals pursuant to Art. 3 of Law no. 604/1966. Starting from 1 July, the ban is going to remain only for those sectors benefiting from the COVID-19 social shock absorbers mentioned above.

The reason for the split of the cited deadline is likely to be identified in the smaller average size of the companies benefiting from the Ordinary Allowance or the "Cassa in Deroga" that belong to economic sectors that have been affected more by the COVID-19 pandemic and which have suffered a greater reduction of business (e.g. companies active in the instance services, commerce, food & beverage and tourism sectors, among others).

In particular, without prejudice to new legislation that might in the meantime be introduced, the employers that will be entitled to dismiss again starting from 1 July are those which fall under the protection of the "Cassa Integrazione Guadagni Ordinaria" as listed in Art. 10 of Legislative Decree number 148/2015:

1. manufacturing, transport, mining, plant installation, energy, water and gas production and distribution companies;
2. production and work cooperatives carrying out work activities similar to those of workers in industrial enterprises, with the exception of cooperatives under Presidential Decree No 602/1970, for which Art. 1 of the Presidential Decree does not provide for CIG contributions;
3. forestry and tobacco companies;
4. agricultural and zootechnical cooperatives and their consortia engaged in processing, handling and marketing their own agricultural products;
5. enterprises engaged in the rental and distribution of film developing and printing films;
6. industrial enterprises for olive pressing on behalf of third parties;
7. ready-mixed concrete producers;
8. telephone and electrical installation companies;
9. railway construction companies;
10. industrial enterprises of public bodies, unless their capital is wholly owned by the State;
11. industrial and craft undertakings in the building trade;
12. industrial enterprises engaged in quarrying and/or stone quarrying;
13. artisanal enterprises carrying out quarrying and processing of stone materials.

It must be observed that the subsequent prorogations of first introduction of the dismissal ban in comment, in Italy dating back to more than a year ago, and then prorogated by subsequent decrees to date and on until the mentioned deadlines, has been hugely criticised under a Constitutional point of view, as restricting the employer's freedom of economic initiative provided for by Art. 41 of the Constitution, which allows the employer to determine its own organisational structure. It is true that the fundamental constitutional value of freedom of private economic initiative must be balanced with other constitutional principles such as the right to work and health protection and that such a balance is hard to find during a pandemic; moreover, it must be observed that in such a time suspending or freezing some rights in favor of others cannot be held clearly unconstitutional.

However, the initial provision of Art. 46 of Legislative Decree n. 18/2020 intended to introduce a limitation on employer's freedom to organise its own business (Art. 41 of the Italian Constitution) which was temporarily (up to 17 May 2020) and passed in a context of deep health crisis hugely impacting and stopping almost all productive activities. Later on, as far as the successive acts prorogating the dismissals ban – lastly the Financial Act 2021, Law n. 178 on 30 December 2020 and the Legislative Decree n. 41/2020 – are concerned, the exceptionality of the circumstances had ceased to exist, or had reduced, as the lockdown had ended and the government's aim was, at that stage, to restart production activities.

In order to avoid doubts of constitutionality, the extension of the ban should therefore, have been contained in a temporary and exceptional provision and there should not have been costs occurred by the interested companies, thanks to public incentives schemes fully covering salaries costs of suspended workers.

Italian Courts have so far been reluctant to challenge the dismissal ban of unconstitutionality or hold it in contrast with higher legislative sources of European level. However, an important contribution to this debate recently came from Spain, where the Court of Barcelona, with respect to analogous legislative dismissal ban in force in Italy and contrarily to Italian Courts orientations (for instance, see Court of Mantova that by judgment number 112 of 11 November 2020 held the nullity of a dismissal for economic reasons executed pending the prohibition and upholding the relative banning legislation as a temporary protection to safeguard the stability of the market and the economic system), on 15 December 2020, ruled that the continued reiteration of the prohibition on dismissal, by limiting unconditionally the employer's power to reorganise the company, ends up being contrary to the right to freedom of enterprise as provided for by European legislation.

In the Court's view, the continual repetition of the prohibition on dismissal and the resulting stability of that measure not only meant that it was not aimed at facing emergency circumstances, but also that it was contrary to Spanish and European law which, respectively in Art. 38 of the Constitution and Art. 16 of the European Charter of Fundamental Rights, recognise the freedom to conduct a business. Therefore, the Spanish court disapplied the emergency national law as contrary to European law, declaring the legitimacy of the dismissal ordered by the Spanish company for economic reasons.

Certainly, the Spanish precedent, which represents an important and courageous contribution, is destined to be followed up in the ongoing debates playing out across Europe and in the EU Member States, whose courts will likely continue to assert their respective opinions on this matter.