

## Editorial

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This volume contains a selection of papers from the Thirteenth International Conference in commemoration of Marco Biagi, held at the Marco Biagi Foundation in Modena, Italy on 19-20 March 2015, entitled *Employment Relations and Transformation of the Enterprise in the Global Economy*.<sup>1</sup> The Conference brought together insights from labour law, economics, organisation theory and sociology, focusing on the relationship between the rapidly evolving structure of the enterprise, in terms of form and function, and the main pressures on labour relations arising from socio-economic processes, technological development and the global crisis.

The framework of analysis examined the linkage between interests and regulatory structures. It is widely acknowledged in this respect that the intensification of competition and the diversification of productive systems and business strategies are leading to a fragmentation of interests in employment relations, with the focus increasingly shifting to company level. As a result, the enterprise becomes the site of engagement for the application of provisions of various kinds at different levels, including legislative provisions.

In the global scenario, this process tends to free businesses from formal constraints and from any commitment to a particular location, modifying the traditional employment relationship and leading to a progressive erosion of employment standards. The destabilising effects of the transformation of the enterprise are to be seen in particular in the sphere of collective relations. Traditional forms of collective representation encounter increasing difficulty in a multicentre network of legal and economic relations cutting across national borders. At the same time, the search for new forms of solidarity and

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<sup>1</sup> The Conference programme is available at: <http://www.fmb.unimore.it/on-line/home/international-conference/xiii-international-conference-in-commemoration-of-professor-marco-biagi/programme.html>.

mutual support is increasingly problematic in a context of strong competition and the progressive individualisation of interests.

The adaptation of regulatory sources and instruments to the new social and economic environment has so far been fragmentary, with the measures adopted proving to be inadequate to meet systemic regulatory needs, above all in response to processes with a transnational dimension.

The papers in this volume address these issues by means of three strands of analysis. The papers in the **first part** examine the problem of identifying the exact nature of the employment relationship and the corresponding legal rights and responsibilities in an increasingly complex legal framework. The problems arising from the identification of the employer in arrangements involving a plurality of actors (temporary agency work, contracting out, posted workers, company groups and networks) are of a dual nature: on the one hand there is a need to define the legal position of the actors involved in this plurality of relations; on the other hand, there is a tendency to go beyond traditional criteria, including the definition of the employer, to identify parameters for employment protection more in keeping with present-day productive systems.

**Silvia Borelli's** paper adopts the concept of "complex economic organisations" to refer to cases in which several legal entities are linked by various forms of interdependence in order to collaborate in the production or exchange of goods or services. In this connection, the author analyses several cases in which EU antidiscrimination law has been applied to complex economic organisations. **Borelli** argues that the actors within complex economic organisations cannot act in a way that results in (potential) discrimination against the employees of the organisation on the ground of sex, ethnic origin or both. Despite the limitations that the EU approach still presents, the author concludes that the principles of non-discrimination can be used to monitor any form of exercise of power within complex economic organisations. In these cases, the effectiveness of such principles can be ensured only if the courts reconstruct the chain of decisions and identify the real source of discrimination.

**Richard Michael Fischl** addresses the case of in-home care workers in the USA, examining the forms of legal protection available to these workers. In the author's view, the web of relations among the actors in this framework (individual workers; organisations representing them; institutions representing care recipients; private third-party placement firms; state and national governments funding and regulating the sector) gives rise to the need to identify the "employer", especially in cases in which the state provides funding for care services whereas the beneficiary of the services is responsi-

ble for supervising the work of the individual provider. **Fischl** explores recent initiatives taken at both state and federal levels to extend in-home care workers' rights, such as the enactment of a Bill of Rights for Domestic Workers and the provision of public funding. Extending the discussion beyond the US setting, Fischl also argues that the design of an effective collective bargaining framework is an important public policy issue, since the provision of high quality elder-care services in the home can greatly reduce the need for institutional care. This brings to mind the expert advice that Marco Biagi was providing for the Social Services both in Milan and Modena immediately prior to his untimely demise in March 2002. Over a decade later, Marco Biagi's insights are clearly still highly relevant in today's labour market.

**Orsola Razzolini** elaborates on the developing concept of the employer in labour law, making reference to a new contractual model recently adopted in the Italian legislation, the "inter-firm network agreement". The author presents the results of two case studies, focusing on the implementation of inter-firm network agreements in the garment and biomedical sectors. The paper addresses a number of research questions: What is the extent to which network agreements respond to new market challenges and the strategic needs of firms? What is the economic reality behind the network agreement? Is this pattern of business integration really horizontal rather than hierarchical? The answers vary case by case, as **Razzolini** shows in examining how the participants in the different networks use legal provisions such as the posting of workers and "joint employership". The author concludes that network agreements can contribute to increasing the transparency of the production chain and improving responsible supply chain management, by casting light on unfair competition by subcontractors who adopt unfair pricing policies or make use of undocumented labour.

The **second part** focuses, in a labour law perspective, on transnational business practices characterised by certain actors and organisational patterns, in particular multinational companies and global supply chains. Such practices are often characterised by a significant power imbalance between the economic actors, a lack of accountability on the part of the most powerful actors, and in the end the uneven distribution of workers' protections along the supply chain. The papers presented in this part emphasise the pressure exerted by transnational practices on regulatory systems that come under strain due to the hybridisation of sources and the multiplicity of regulatory agents.

**Vania Brino**'s paper develops a reflection on whether, and on what terms, hard- and soft-law tools can lead to positive forms of interaction with the aim

of enforcing labour protection and fundamental social rights in the global scenario. According to **Brino**, the relationship between the different regulatory instruments seems to favour approaches that are integrative and inclusive, rather than exclusive and hostile. Soft-law standards, enacted by means of a plurality of sources such as business codes, codes of conduct and transnational collective agreements, can help to plug the legal loopholes by becoming a factor that promotes hard-law instruments. On the other hand, hard law can intervene in an attempt to deal with the lack of enforceability and effectiveness of soft law. In this perspective, the author stresses the role played by the courts in enforcing the law against unfair competition to sanction companies that fail to comply with the undertakings laid down in the codes of conduct.

The contribution by **Ronald C. Brown** focuses on the growing phenomenon of Free Trade Agreements (FTAs). In a policy perspective, the author argues that the inclusion of a social dimension in FTAs could increase the accountability of multinational companies that would otherwise avoid any legal responsibility for the labour standards of their supply chain workers, who often lack even the most basic labour protections. The paper examines current international social dimension provisions under model FTA protocols that are tied to trade and investment agreements intended to promote the ILO core labour standards, affecting partner countries and the multinational corporations operating within them. Following on from the overview of current approaches and recent innovations, **Brown** advocates a reinforcement of the social dimension obligations in FTAs by including internationally-mandated provisions of corporate social responsibility, possibly implemented through International Framework Agreements.

Still with reference to the sources of regulation of economic and organisational practices with a transnational impact, **Valentina Cagnin** examines the posting of workers within the EU. Legal provisions in this connection reflect the need to strike a (difficult) balance between the economic freedom to provide services and the posted workers' social rights, while providing a level playing field for domestic and international companies. Responding to a number of shortcomings encountered in the implementation of previous legislation, the Directive 2014/67/EU, also known as the Posted Workers Enforcement Directive (PWED), was adopted with the aim of improving the implementation and functioning of the original Posted Workers Directive. The objective is to increase monitoring and compliance and to improve the way existing rules on posted workers are applied in practice, defining the limits to the transnational posting of workers and upholding the principle of the primacy of fact. **Cagnin** describes the new

provisions in some detail, concluding that it could represent a means to facilitate the posting of workers, to the benefit of both companies and employees. However, this does not change the sense of disappointment in the face of the extremely limited action of the European Union in the sphere of labour law in recent times.

**Lukasz Pisarczyk**'s paper reports on the cross-border transfer of undertakings. The author investigates whether and to what extent Council Directive 2001/23/EC is applicable to cross-border transfers, especially those entailing a change in the place of work. In addition he considers whether it is possible in such cases to achieve the goals of the Directive intended to mitigate the negative consequences of the transfer by enabling employees to perform their duties within the transferred establishment on the basis of existing contractual conditions. According to **Pisarczyk**, significant legal problems arise in the application of Directive 2001/23/EC to cross-border transfers, due to the fact that, although transnational restructuring is not excluded from the application of the Directive, protective standards are applied via domestic systems and no common rules apply that would be binding irrespective of the relocation of the entity. As a result, in the author's view, it would be reasonable to adopt a set of rules designed to deal with this type of restructuring.

The last two papers in this part examine the role of collective bargaining as a regulatory source of transnational labour practices. **Carla Spinelli** focuses on collective agreements in the context of transnational company restructuring. She adopts the concept of "corporatisation" to indicate the increasingly central role of private actors as rule-makers in a multi-level system of governance. The paper analyses recent agreements intended to anticipate change, with a particular emphasis on negotiating parties, administration clauses and the implementation and impact of such agreements. **Spinelli** argues that they have made a significant contribution to the socially responsible management of the employment implications of corporate restructuring, and as a result they should receive further support from European policy-makers. However, for traditional information and consultation procedures to evolve into an effective bargaining process at EU level, it is necessary for all the actors involved, especially on the labour side – EWCs, ETUFs and national trade unions – to demonstrate a willingness and capacity to co-operate and coordinate their actions.

**Volker Telljohann**'s paper addresses the decentralisation of collective bargaining in the framework of the European Commission's recommendations supporting the introduction of a wider scope for opportunities to derogate from industry-level agreements at company level. The emphasis is

placed on derogation and opening clauses in defensive agreements, i.e. those agreements that, in the light of unfavourable changes in the balance of power, result in a deterioration of the results of distributive bargaining processes from the employees' perspective. Presenting the results of ten case studies in six EU Member States, the author analyses the topics dealt with in these agreements as well as the procedures they lay down, including co-ordination rules and the role of information, consultation and participation arrangements, pointing out the risks and opportunities linked to these processes of decentralisation. **Telljohann** concludes that, in order to prevent defensive agreements and opening clauses from contributing to a race to the bottom, the role of information, consultation and participation rights in supporting trade unions in these negotiations should be acknowledged and enhanced.

The **third part** addresses the specific problems arising in small and medium-sized enterprises, that are characterised by an organisational structure which, in a context of dematerialisation, tends to accentuate the personalisation inherent in the labour market, often making it difficult to distinguish between small business owners and self-employed workers. In particular, cases involving the asymmetrical relationship, in terms of power and bargaining, between the parties tend to give rise to relations that are comparable to those in salaried employment. This results in the need to identify regulatory provisions and techniques providing adequate protection for workers in SMEs in relations with powerful companies, while at the same time taking care to avoid placing unnecessary burdens on the weakest actors.

The paper by **Paul Copeland and Beryl ter Haar** investigates the impact of EU employment policy on employees in different-sized employment units, making reference to aggregate data from the European Labour Force Survey (ELFS) in three different EU employment policy areas: health and safety; education and training; and the reconciliation of work and family life. The authors' aim is twofold: to ascertain the existence of differences or similarities in implementation and compliance across the Member States that may be linked to company size, and to address the limitations of the EU's emerging industrial policy with regard to its strategy to promote the growth of small and medium-sized enterprises. **Copeland and ter Haar** find that policy areas where legally non-binding modes of governance are used and more individualised measures are required, such as education and training and the reconciliation of work and family life, are those that present the most pronounced bias against the employees of small and medium enterprises. However, as the authors argue, it is not clear that the extension

of hard law measures, e.g. Directives, to such areas would represent a suitable solution. Other ways to widen the reach of EU policy provisions to employees of small and medium enterprises could consist in gaining the support of employers' associations, industry-specific networks, the social partners and governments.

**Roberta Nunin and Francisco Barba-Ramos** highlight the possible impact of decentralisation of collective bargaining on small and medium-sized enterprises, by means of the analysis of the similar pathways recently taken by the Italian and the Spanish systems. A key role in this respect may be played by territorial bargaining, as this level of negotiation represents the ideal forum for companies that, because of the limited number of employees, are traditionally prevented from taking part in collective bargaining at the company level. Suitable topics for negotiation at local level include organisational flexibility, welfare measures to be implemented at company level, and training. Furthermore, **Nunin and Barba-Ramos** emphasise the importance of the activities of bilateral bodies, from which the smaller actors could certainly benefit. However, the authors argue that territorial bargaining is still underdeveloped and needs support from local administrations and policy-makers, as well as action aimed at raising the awareness about the goals it can achieve. The reluctance of many employers to take part in negotiations at this level should also be addressed.

**Ana Teresa Ribeiro's** paper investigates the benefits and drawbacks that the mechanisms for the extension of collective agreements under Portuguese law can present for small and medium-sized enterprises. Whereas on the one hand extension clauses are capable of preventing social dumping and protecting the most vulnerable employees who would otherwise be excluded from collective bargaining, on the other hand they may be deemed to benefit free-riders, reduce the appeal of union membership and conflict with negative freedom of association. The author notes that the recent reform of the conditions laid down for extension clauses, that was introduced following the Memorandum of Understanding on Specific Economic Policy Conditionality agreed in May 2011 between Portugal and the European Commission, the European Central Bank, and the International Monetary Fund, resulted in a sharp decline in the number of extension clauses granted. Furthermore, according to **Ribeiro**, the changes resulted in a fall in the overall number of new agreements concluded between the social partners, leading to a decline in the Portuguese collective bargaining system as a whole. In the light of these drawbacks, the author advocates a reform of extension mechanisms, whereby the representativeness of trade unions should be given adequate consideration, or alternatively a return to the previous regime.

In concluding this Editorial, we wish to thank the Marco Biagi Foundation for the opportunity to edit this volume, the authors who submitted papers for publication, and Ksenia Myasnykh, PhD candidate in Labour, Development and Innovation at the Marco Biagi Foundation, for editorial assistance.

*Edoardo Ales  
Francesco Basenghi  
William Bromwich  
Iacopo Senatori*

**Part I**

***Enforcement of Labour Law Under the New Organisational  
Settings of the Company***

## Principles of Non-Discrimination in Complex Economic Organizations

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*Silvia Borelli*

SUMMARY: 1. Introduction. – 2. How the principles of non-discrimination work. – 3. The scope of EU antidiscrimination law. – 4. Liability for discrimination. – 5. Comparison. – 6. Conclusion. – 7. References.

### 1. Introduction

In recent decades, scholars in sociology, economics and management have produced a considerable amount of work about the “network organization”<sup>1</sup> (Powell, 1990; Miles, Snow, 1992) or “entreprise-réseau” (Rorive, 2006; Sobczak, 2002; Peskine, 2008) but these concepts have no legal meaning (Buxbaum, 1993; Teubner, 2006). Labour law considers different types of interdependency between legal entities, without providing a definition of the term “network”.

In this paper, we will use the concept of “complex economic organisation” to indicate cases in which several legal entities<sup>2</sup> are linked by various forms of interdependence<sup>3</sup> in order to collaborate in the production or exchange of goods or services. In all these cases, one entity or body created by the complex

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<sup>1</sup> The term has been used by leading jurists such as Teubner, 2011; see as well the contributions in Cafaggi, 2011.

<sup>2</sup> Legal entity means an entity that has legal capacity to enter into agreements or contracts, assume obligations, to sue and to be sued in its own right, and to be held responsible for its actions. A juridical person is a legal entity other than a natural person that has legal personality separate from its members. A juridical person can have limited liability, so that financial liability of each shareholder for the company’s debts and obligations is limited to the value of his or her fully paid-up shares.

<sup>3</sup> The types of interdependence were first classified by Thompson, 1967.

organisation exerts the power to coordinate and direct the common economic activity (Mariotti, 2005).

As stated by Morin, labour law has always taken into account different scopes corresponding to different levels of the firm's organisation in which labour law has been interested in identifying the real centre of power to ensure worker protection (Morin, 2005). In dealing with the different forms of complex economic organisation, labour law should thus readapt its frame of reference and consider the allocation of power among the actors within the organisation. In particular, complex economic organisations force labour lawyers to reconsider both a) the scope of labour regulation and b) the rules for assigning duties and responsibilities to each actor within the organisation.<sup>4</sup>

The study of complex economic organisations obliges labour lawyers to identify the allocation of power beyond the contract of employment. We adopt here a factual approach according to which power is not assigned but simply recognised by law (Lokiec, 2004). "*Si le régime du pouvoir s'applique à un rapport de fait,*" – argues Pascal Lokiec – "*il doit régir le pouvoir là où il se trouve en fait. Cette mise en adéquation s'opère, d'une part par le dépassement des frontières normatives susceptibles de masquer la réalité du rapport du pouvoir, d'autre part par la prise en compte des différents lieux d'exercice du pouvoir. La frontière normative, notamment celles tracées par le contrat, empêchent dans certaines situations de saisir le pouvoir. C'est en particulier le cas lorsqu'existe un rapport factuel de pouvoir en l'absence de rapport contractuel*" (Lokiec, 2004). This approach is partially shared by Freedland and Kountouris, who suggest developing a "*personal work analysis*" – "*The personal work analysis asserts that the internal structure of the personal work relation is typically a far more complex one, which may have more than two participants and which may involve several legal connections each with its own nature and duration rather than just one such connection, the nature and duration of which identifies and defines the personal work relation as a whole*" (Freedland, Kountouris 2011, 320). In this paper, we seek to demonstrate why the principles of non-discrimination should be considered among the techniques that allow monitoring of the exercise of power and are therefore suitable to regulate complex economic organisations. We will focus on EU antidiscrimination law and consider case law of the Court of Justice of the European Union (CJEU) and in the Member States.

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<sup>4</sup> On this distinction see Peskine, 2012.

## 2. How the principles of non-discrimination work

The principles of non-discrimination are binding rules that forbid treating an individual or a group characterised by one or more factors listed by anti-discrimination law in a way that produces or can produce a disadvantage. In dealing with an alleged case of discrimination, the court has to verify a) whether the provision, criterion or practice has produced or can produce a disparate impact and b) whether the unequal treatment is objectively justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary (in the case of direct discrimination, the judge should verify whether one of the exceptions laid down by antidiscrimination law applies). A provision, criterion or practice can be considered as a form of exercise of power, no matter whether it is a private or public power, legal or factual power. As a result, through the principles of non-discrimination, the judge can examine any form of exercise of power in relation to the effects that it can produce or has produced (Barbera, 1991).

It must be underlined that “any infringement of the prohibition of discrimination suffices in itself to make the person guilty of it fully liable”. As stated by the CJEU, if liability for infringement of the principle of equal treatment were made subject to proof of a fault attributable to the alleged discriminator, the practical effect of those principles would be weakened considerably (CJEU, 8 November 1990, C-177/88, *Dekker*, par. 24 and 26).

According to EU law, “*direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation*” on grounds of one or more listed factors (art. 2, par. 2(a), Directive 2000/43/EC; art. 2, par. 2(a), Directive 2000/78/EC; art. 2, par. 1(a), Directive 2006/54/EC; emphasis added). Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice *would put* persons characterised by one or more listed factors at a particular disadvantage compared with other persons (art. 2, par. 2(b), Directive 2000/43/EC; art. 2, par. 2(b), Directive 2000/78/EC; art. 2, par. 1(b), Directive 2006/54/EC; emphasis added). As a result, the prohibitions apply both when unequal treatment has really arisen and to potential cases. Furthermore, the CJEU has clarified that the existence of discrimination “*is not dependent on the identification of a complainant who claims to have been the victim*” (CJEU, 10 July 2008, C-54/07, *Feryn*, par. 25).

Finally, it must be noted that the principles of non-discrimination are expressions of the general principle of equal treatment (*rectius*, general principle of equality), recognised by the CJEU as a general principle of EU law (CJEU, 22 November 2005, C-144/04, *Mangold*, par. 75).

We now focus on three key aspects: 1) the scope of EU antidiscrimination law; 2) the subject or the subjects to whom the discrimination can be ascribed (i.e. the liability for discrimination); 3) how to determine the comparator.

### 3. *The scope of EU antidiscrimination law*

The scope of Directives 2000/43, 2000/78 and 2006/54 is similarly shaped. According to art. 3, par. 1 Directive 2000/43/EC, as well as art. 3 par. 1 Directive 2000/78/EC, the Directives “*shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to [...]*”. Art. 14, par. 1 Directive 2006/54 affirms that “*There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to [...]*”.

The Directives do not state who should be held liable for discrimination: whoever exerts power in the scope of the Directives is required to respect the prohibition of discrimination established therein.

Clause no. 4 of the Framework Agreement on part-time work annexed to Directive 97/81/EC states: “*In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds*”. A similar provision is laid down in clause no. 4 of the Framework Agreement on fixed-term work annexed to Directive 99/70/EC. Art. 5, par. 1 of Directive 2008/104/EC states that: “*The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job*”.

In this case as well, the legislation does not indicate the actors who are bound by the principles of non-discrimination, but just mentions the scope of these principles, meaning that every provision, criterion or practice that falls within the scope of the Directives must respect the prohibition on discrimination.

Consequently, the actor discriminating against an employee or a group of employees is not necessary their employer. According to CJEU case law, the effectiveness of art. 157 TFEU “*would be considerably diminished and the legal protection required to ensure real equality would be seriously impaired if an employee or an employee’s dependants could rely on that provision only as against the employer, and not as against those who are expressly charged with performing the employer’s obligations [...] For Article 119 [now art. 157] of the*

*Treaty to be effective, any person who has to pay benefits falling within the scope of that provision must comply with it*" (CJEU, 9 October 2001, C-379/99, *Menauer*, par. 29 and 30).

In the Italian case, *Il Sole delle Alpi*,<sup>5</sup> the tribunal of Brescia ruled that discrimination had taken place against teachers working in Adro (a small town in the province of Brescia) due to the actions of the Municipality and the Ministry of Education.<sup>6</sup> The Municipality had materially placed the Lega Nord symbol in the classrooms, and so violated the prohibition on discrimination on the ground of belief. The Ministry of Education was the employer of the teachers, and had illegally tolerated the discriminatory practice against its employees. According to the Tribunal, "*in forbidding harassment and discrimination, the Italian legislation deliberately does not specify where they need to be ascribed to the employer or to anyone who can interact in the work place*".

#### 4. Liability for discrimination

Discrimination is normally ascribed to the person responsible, i.e. the person who has exerted the power that has produced or can produce the discriminatory effect. However, EU antidiscrimination law does not provide that only the person (natural or juridical) who has acted in a discriminatory way is liable (Chopin, Germaine-Sahl, 2013, 58).

First of all, the discriminatory effect can be the result of a plurality of decisions.<sup>7</sup> EU antidiscrimination law regulates, for example, the case in which an instruction is given to discriminate (art. 2, par. 4 Directive 2000/43/EC; art. 2, par. 4 Directive 2000/78/EC; art. 2, par. 2 Directive 2006/54/EC). If the instruction is acted upon, both the person who has given the instruction and the person acting upon it are responsible for discrimination. If the instruction is not acted upon, only the person who has given it is liable. In any case, an instruction to discriminate is deemed to constitute discrimination even if it is non-binding (Ellis, Watson, 2012, 176).

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<sup>5</sup> The "Sun of the Alps" is the unofficial flag of Padania (Padania is an alternative name for the Po Valley). The flag was designed in the 1990s and adopted by Lega Nord upon their declaration of independence of "Padania".

<sup>6</sup> Tribunal of Brescia, Orders, 29 November 2010 and 7 February 2011. See Guariso, 2012, 288; Protopapa, 2011.

<sup>7</sup> A decision is any exercise of power: "Détenir du pouvoir, c'est disposer de la faculté de décider" Lokiec, 2004, 225.