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1. *The two ways of regulating individual dismissals in EU law. A) The incidental regulation*

The European Union has interested in the individual dismissals in two different ways. The first one is what it can be defined as the incidental or indirect regulation of the individual dismissals, i.e. the regulation deriving from the sources of EU law which do not have dismissal as their principal interest. There are many examples of it, even if the most interesting ones are in the field of antidiscrimination law. As a matter of fact, almost all the directives concerning the fight against discrimination contain a provision according to which the prohibition of discrimination is also related to employment and working conditions, including dismissals: see Article 14, para. 1.c, Directive 2006/54. In addition, Article 16 of the same Directive provides that "*Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment*". With reference to the protection of employees' representatives, one of the provisions of the Directive on information and consultation of the workers (2002/14) is very interesting. Article 7 provides that "*Member States shall ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to*

perform properly the duties which have been assigned to them". The European Court of Justice in a judgment of 11 February 2010 (C-405/08, *Ingeniørforeningen i Danmark v Dansk Arbejdsgiverforening*) declared that the protection against dismissals can be, if the Member States decide in this way, one of the adequate protections provided (for) by the mentioned article of the Directive of 2002. As a result, according to the Court's decision, "*it appears ... that dismissal on grounds of status or functions as an employees' representative could be regarded as constituting unfair dismissal under ... [the national] law and therefore give rise to sanctions for the employer, as provided for by Article 8 of Directive 2002/14*"[1].

Similar protection to that contained in Article 14 of Directive 2006/54 is declared in Directive 2000/43 (Article 3) implementing the principle of equal treatment for persons irrespective of racial or ethnic origin, with respect to '*employment and working conditions, including dismissals*', and in identical terms with regard to '*discrimination on the grounds of religion or belief, disability, age or sexual orientation*' in Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. In addition, apart from the derogations differently provided for by the various Directives, the protection of the individual dismissals basically falls within the field of application of the principle of non discrimination and/or equal treatment of part-time workers, fixed-term workers and temporary agency workers in comparison with, respectively, full-time workers, permanent workers and workers recruited by the user undertakings[2].

Procedures to be followed in the event of dismissals in the course of restructuring of enterprises are covered by a number of directives, even if they concern the collective dismissals[3]. On the contrary, Directive 1977/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, as amended by Directive 1998/50/EC of 29 June 1998, consolidated in Directive 2001/23, refers also to individual dismissals. In fact, it provides in Article 4(1): '*The transfer of the undertaking, business or part of*

[1] Case C-405/08, point 63.

[2] See, respectively, Clause 4 of Directive 1997/81, Clause 4 of Directive 1999/70 and Article 5 of Directive 2008/104.

[3] Council Directive 75/129 of 17 February 1975 on the approximation of the laws of the Member States relating to collective dismissals, as amended by Directive 92/56 of 24 June 1992, consolidated in Council Directive 98/59/EC of 20 July 1998, prescribes mandatory procedures for collective '*dismissals effected by an employer for one or more reasons not related to the individual workers concerned*'. In the case of multinational undertakings covered by Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Councils (recast by Directive 2009/38/EC of 6 May 2009) or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing employees and consulting with them, the subsidiary requirements in the Annex to the Directive provide for the EWC to be informed and consulted, among other matters, about '*cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies*'. Council Directive No. 2002/14 establishing a framework for informing employees and consulting with them in the European Community specifies that: '*Information and consultation shall cover:… the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment*'.

the undertaking or business shall not of itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce'.

Another kind of indirect regulation of the individual dismissals is that contained in the documents concerning the so-called flexicurity policies. Some of those documents (especially the Commission Communication of June 2006) seemed to be very critical against the strict Employment Protection Legislation, guilty to reduce numbers of dismissals and to decrease the entry rate from unemployment to work. These documents, at least apparently, could be able to influence the national policies about dismissals and to have an effect on the domestic laws in the sense of inducing to make easier the dismissals. This is indeed a very complicated matter and I have no time to make an in depth reflection in this context. I can just say that the documents concerning flexicurity have to be interpreted in a more careful and organic way by taking into consideration the relationship between those policies and the EU legal system as a whole.

2. B) *The direct regulation. Article 10 of Directive 1992/85, Article 33, para. 2, and Article 30 of the Charter of Fundamental Rights*

As I anticipated before, the European Union has regulated individual dismissals also in a direct way. The first example of this is the '*prohibition of dismissal*' referred to in Article 10 of Directive 1992/85 on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth. It is worthy of note that this provision has been strengthened by the Charter of Fundamental Rights, whose Article 33, para 2, recognises to everyone with the right to protection from dismissal for a reason connected with maternity in order to reconcile family and professional life. It is less than a prohibition of dismissal, even if both the provision of the Directive of 1992 and that of the Charter recognise a high level of protection of the worker-mother.

Nevertheless, the core of dismissals' protection in the Charter of FRs is Article 30: "*Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices*".

Such a provision, like Article 33, has been binding since 2009 - when Article 6 TEU gave the provisions of the Charter the same legal value as the provisions of the Treaties - and has to be combined with Article 153, para. 1.a, TFEU, according to which the EU is competent in passing directives concerning the protection of workers in case of termination of employment. Being the

European Commission bound by the Charter of fundamental rights, Article 30 could incentivise the Commission to initiate a proposal in the matter of individual dismissal, since, as it is well known, no directive on individual dismissal has ever passed.

It is worthy to remind that the Commission, in the *2010 Report on the Application of the EU Charter of Fundamental Rights* said that 'the Charter must be respected at each stage of law-making in the EU – from the day the European Commission starts preparing its proposals, throughout their amendments in the legislative process and up to the day they enter into force once adopted by the European Parliament and by the Council, and to their implementation by Member States'[4]. The influence of the Charter on the power of Commission to initiate proposals is underlined also by the European Committee B of the British Parliament during its meeting of 14 March 2011: "the Commission ... will be bound by the charter of fundamental rights in all that it does, particularly in initiating proposals and conducting its side of business in the European Union". These words were pronounced during one of the meetings of the European Committee by the then Lord Chancellor and Secretary of State for Justice (Mr. Kenneth Clarke) in order to convince the members of the Committee (and also the Members of Parliament) that the Charter of FRs did not change anything in the British system of law also because the UK is one of the Member States that decided to limit the application of the Charter. These words are very important since they show that also in the British Government's opinion the Charter could incentivise the Commission to initiate some proposals, such as one in the field of individual dismissal.

Nevertheless, Article 153, par. 2.b, TFEU has not been amended by the Treaty of Lisbon so that in the field of the protection of workers in case of termination of employment, "the Council shall act unanimously, in accordance with a special legislative procedure (after consulting the European Parliament" and the Economic and Social Committee and the Committee of the Regions). And the 'unanimity rule' makes it difficult to pass a Directive in that field, even if, according to the same Article, "the Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable". However, that is not a sufficient incentive to pass a Directive in the field of individual dismissal.

3. *Article 30 and the Chinese box*

[4] In addition, 'for its part, the Commission has reinforced the evaluation of the impact on fundamental rights of its legislative proposals by establishing a "Fundamental Rights Check-List" to check systematically the compliance of its proposals with the Charter'.

Coming back to Article 30 of the Charter of fundamental rights, some interpretations concentrate on the importance of the link between that provision and Article 24 of the revised European Social Charter adopted by the Council of Europe, which is much more detailed than Article 30: "*the Parties undertake to recognise: a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service; b. the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief*"[5].

The very point of that interpretation resides on the explanation to the Charter of fundamental rights concerning Article 30: "*this Article draws on Article 24 of the revised Social Charter*". This wording would produce an "extensive effect of Article 24, by projecting its scope on the EU legal system as a whole"[6]. According to this opinion, Article 30 is like a Chinese box where inside a box (Article 30) stands another one (Article 24), containing the most 'precious' jewellery[7]. The basis of that interpretation is mostly in the Judgment of the Civil service Tribunal of 26 October 2006, *Pia Langdren* v *European Training Foundation (ETF)*, F-1/05. The judgment reminds that the principal aim of the Nice Charter, as is apparent from its preamble, is to reaffirm 'the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice … and of the European Court of Human Rights'[8].

However, in my opinion, the reaffirmation of those rights does not mean that the rights must have the same scope and the same field of application, being possible that the EU legal system can 'adapt' those rights. In addition, I said that the explanation to the Charter concerning Article 30 declares that the last-mentioned provision *draws on* Article 24 of the Social Charter but in that context to 'draw on' means to 'approach', to 'come near', to 'inspire', all operations that make possible the adaptation/adaptability of the provision of the Charter revised in 1996.

Moreover, the Nice Charter constructs a 'privileged route' just for the European Convention for the Protection of Human Rights and not for the European Social Charter. As a matter of fact,

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[5] "To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body". As far as Article 30 is concerned, see L. CALCATERRA, *Diritto al lavoro e diritto contro il licenziamento ingiustificato. Carta di Nizza e Costituzione italiana a confronto*, WP C.S.D.L.E. 'Massimo D'Antona.INT, 58/2008, in www.lex.unict.it . From a comparative point of view, see M. PEDRAZZOLI, *Licenziamenti in comparazione. La 'flessibilità in uscita' nei Paesi europei e la recente riforma italiana*, 2013, paper still unpublished.

[6] G. ORLANDINI, *La tutela contro il licenziamento ingiustificato nell'ordinamento dell'Unione europea*, in *Il Giornale di diritto del lavoro e di relazioni industriali*, 2012, no. 136, page 623.

[7] *Ibidem*, page 624.

[8] Pt. 71.

Article 52.3 of the Charter of FRs provides that "in so far as this Charter contains rights which correspond to rights guaranteed" by the ECHR "the meaning and scope of those rights shall be the same of those laid down by the said Convention". And this formula is completely different from that used in the preamble of the Charter, which, as I said before, refers to the rights resulting from all the above-mentioned national, international and EU sources of the law. Therefore, it is a pity that the Convention on Human Rights does not contain any provision concerning dismissals!

For the same reason it is not completely true what Kenneth Clarke, the former British Secretary of State for Justice, said in 2011: "not everything in the charter comes out of the convention on human rights, including some of the socio-economic clauses, *but they were all found in EU law before then*". As I have demonstrated, this last reassuring statement is not valid for dismissals, since the right contained in Article 30 is completely new in the legal scenery of EU law[9].

4. *Article 30: a 'real tiger' or a 'paper tiger'?*

Another topic with reference to Article 30 is trying to understand its "legal strength" (or enforceability).

First of all, I would like to focus the attention again on the fact that Article 24 of the Social Charter cannot be considered as a piece of EU legislation, being a document of international law which needs to be ratified in the different member states of the Council of Europe. For that reason, the level of supranational protection in case of unjustified dismissals is different in the various countries and is higher in the EU Member States that ratified the Social Charter, even if some important states, such as Germany, United Kingdom, Denmark, Poland and Spain did not ratify the Charter, while some others (Austria, Belgium, Hungary and Sweden) exercised the power to opt out Article 24 from the ratification process. All that considered, it does not exist a unique level of supranational protection of individual dismissals but (at least) two different levels, one for the EU countries that ratified the Social Charter and the other for the countries that did not ratify it. In other words, there is a level of supranational protection of individual dismissals characterised by a

[9] I have to disagree again with Mr. Clarke when he said that the article "restates the protection in the event of unjustified dismissal" and "simply reflects existing EU legislation and leaves it entirely to member states to decide whether to give any rights going beyond that legislation". The questions are: where is contained the EU protection in the event of unjustified dismissal? Is there a minimum standard of protection in that field? The answer to these questions is that in the EU system, apart from Article 30, there is no source of the law protecting in general in the event of unjustified individual dismissal and no minimum standard of protection except the cases of dismissal during the maternity leave.

'variable geometry'[10]. And the only institution that could make uniform the level is the European Court of Justice, by affirming the connection between Article 30 of the Charter of FRs and Article 24 of the Social Charter, and the consequent 'entrance' of the latter provision in the *acquis communautaire*.

In order to understand if Article 30 is a 'real tiger', i.e. a provision able to affect the national regulations on individual dismissal, or a 'paper tiger', i.e. a manifesto provision with no concrete effects on the national systems, some other aspects are important.

Edoardo Ales more than ten years ago underlined that Article 30 is a quite prescriptive provision since it refers to the unjustified dismissal and not to the invalid or unmotivated dismissal. That formula demonstrates that "it is necessary a qualified reason of legitimacy and is not sufficient a whatsoever motivation of the dismissal"[11]. Therefore, the regulation of dismissal must provide motivations founded on subjective or objective elements that meet relevant requirements on the social basis. It would derive from what I have just said, that the free termination of employment, or using the Latin expression, the termination of employment *ad nutum* should not be legitimate according to Article 30.

This statement leads to deal with the question of the operational limits to Article 30 that are contained in Article 51, para. 1 of the Charter: "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and *to the Member States only when they are implementing Union law*". Therefore, the national provisions concerning the free dismissal (*ad nutum*), like those in the Italian system, could be not in contrast with Article 30, since there is no implementation of Union law in the field of individual dismissals.

The only institution that could intervene on that point is again the European Court of Justice that could establish a wider application of Article 30. Unfortunately, the only judgment regarding that subject-matter does not seem so encouraging. Case *Rodríguez Mayor* of 2009[12] concerned the collective dismissals but also quoted Article 30. According to that judgment "the death of the employer is not classified as collective redundancy"[13] and "*does not fall within the scope of Directive 98/59, or, accordingly, within that of Community law*"[14]. In those circumstances, it is not necessary to answer "whether Article 30 of the Charter of Fundamental Rights ... can be interpreted as precluding national legislation such as that at issue in the main proceedings". In other words, in

[10] L. ZOPPOLI, *Il lavoro e i diritti fondamentali*, in M. ESPOSITO, R. SANTUCCI, A. VISCOMI, A. ZOPPOLI, L. ZOPPOLI, *Istituzioni di Diritto del lavoro e sindacale. Introduzione*, vol. I, Giappichelli, 2013.
[11] E. ALES, *Libertà e "Uguaglianza solidale": il nuovo paradigma del lavoro nella Carta dei diritti fondamentali dell'Unione europea*, in *Il Diritto del lavoro*, 2001, page 122.
[12] Case *Ovidio Rodríguez Mayor et a. v Herencia yacente de Rafael de las Heras Dávila et a.*, C-323/08, of 10 December 2009.
[13] Pt. 53.
[14] Pt. 59.

order to apply Article 30, the first element to control is whether or not the case falls within the scope of a Directive or within that of EU law. If it does not fall within the scope, as for the death of the employer, you cannot apply Article 30.

All that notwithstanding, it is too early to throw in the towel and is necessary to wait for other ECJ judgments, which, being less equivocal than the case *Rodríguez Mayor*, could possibly affirm a wider application of Article 30. In the meanwhile, this restricted interpretation cannot prevail because it would make Article 30 inapplicable to the domestic systems until the European Union does not pass a Directive on the termination of employment. Therefore, in the absence of such a Directive, the interpreter has to make sense of that provision of the Charter, by saying that every time the EU system refers, directly or indirectly, to individual dismissals, Article 30 can be applied in the national systems, such as in the above-described cases of antidiscrimination law, of atypical work and of transfer of undertaking. In addition, it is necessary to remind that the right to protection against unjustified dismissals is a social right of the European Union that cannot be limited in the sense that seems to be suggested by the Court of Justice, otherwise it would be a 'meaningless right'. And the suggested interpretation seems to go in that direction. As a matter of fact, at least one of the just-mentioned cases - antidiscrimination law - is a field of regulation whose borders are so undefined that the protection contained in Article 30 could penetrate the national systems through them. Member States, when they are implementing the prohibition of discrimination, must guarantee the application of that prohibition also to employment and working conditions, including dismissals. In this way, dismissals fall within the scope of EU law and Article 30 can be considered applicable in domestic laws. That is the reason why the case *Rodríguez Mayor* has to be interpreted in the way I suggested and a new ECJ judgment will clarify the issue definitively.

5. *The personal scope of the social right to the protection in case of unjustified dismissal. What does 'every worker' mean?*

It is time to face the question of the personal scope of the right to protection in case of unjustified dismissals and of the other social rights contained in the Charter. In fact, while considering that these legal situations refer only to the employees, taking up what is known about the freedom of movement, you have to interpret the subordination at EU level and not at the level of domestic laws. And this is a crucial step without which you are likely to weaken the prediction of Fundamental Rights that are now practically included in the Treaty.

The main road should be an appropriate (*ad hoc*) intervention by the European Union establishing the "characteristics" of the employee, but in the lack of this, an operation of such kind could be made once more by the Court of Justice, called to confirm the need for an application consistent with the principles and constitutional rights. There are valid reasons for which the Luxembourg Court should propose a definition of employee founded on criteria other than those traditionally used in the national laws, thereby applying the fundamental rights even to people who, according to the national systems, would not be classified as employees, and particularly to those who perform their activity in the context of an employment relationship that can be placed on the borders of the area of subordination. In short, this is a case where both regulation and the judicial interpretation of European standards, even if both of them are linked to the needs of the free market, may be used for extending the personal scope of the fundamental rights of workers, by acting on the EU concept of subordinate worker.

What is more, in order to ensure consistency with the case-law on the subject, the economic reasons could also be used to corroborate such an interpretation, even independently from an intervention of the Court of Justice. What I am saying is that if there were not a European notion of worker for these purposes, each Member State could choose to extend the application of the protection against unjustified dismissals and other fundamental rights of workers, so occurring a disparity between the different national systems with possible violations of free competition between businesses and the risks of social dumping .

In other words, even in the case of fundamental rights such as for the justification of dismissal, by using the economic reasons behind the free competition and the fight against social dumping, as well as consistency with the ECJ case-law, the interpreter should arrive at the result of a broad application of the fundamental rights of workers, by continuing to appeal to the European notion of subordinate worker outlined with reference to the fundamental freedom of movement.

On the contrary, a different conclusion would require to review the interpretation of the personal scope of the fundamental rights and to reform the well-established case-law of the Court of Justice.

Such an approach has been strengthened with the entry into force of the Treaty of Lisbon. It is only with the new primary source, in fact, that has been definitely confirmed the equal dignity between, on one side, the rights and fundamental freedoms of the older generation, i.e. those existing from the origin of the Community, and, on the other side, the rights more recently protected by the European system, such as the most part of social rights. All these situations are placed on the same legal level, thanks to the fact that the Nice Charter is binding. The coupling of the Treaty and of the Charter ensures the existence of a wider net of fundamental rights, thus confirming the

possibility of using the interpretation of the fundamental freedoms that have long been recognized at EU level, such as, for example, the freedom of movement, even for the new situations legally protected.

6. *Waiting for (once again) the European Court of Justice: some proposals and some predictions*

I am not proposing the automatic extension of social rights for all the workers and I am not suggesting to "deprive" to the national legislations the task to qualify the employment relationship. My idea is that the Court of Justice should outline a notion of subordination for the application of social rights along the lines of freedom of movement, leaving the legal systems of the Member States the possibility of continuing to develop their own definitions.

Nevertheless, while waiting for an ECJ intervention, it would be important starting to use in this field the notion of subordination adopted for the freedom of movement. Of course, in doing so, it could happen that the concept used in the EU is different from one of the national notions. The consequences would be either the compatibility of the national definition with that of the European Union[15] or that a given case can be linked only to the notion of subordination developed by the Court of Justice and not to the notion elaborated at the domestic level, so that the EU judges could possibly not help but take note of the application of fundamental social rights to the worker holder of that relationship.

In the latter case, this would generate the recognition of those rights to individuals, who, for the national legal system, cannot be classified as employees and the extension of the protection recognized by the Charter to those workers, subordinates only according to the EU legal system. For instance, among these workers fall providers working in Italy and who are located at the borders of subordination. In fact, the tendency to extend the application of fundamental rights is confirmed by some Italian legislative interventions, whose attitude is to multiply the types of work also outside the area of subordination (through, for example, the regulation of the project work: Articles 61-69, Legislative Decree no. 276/2003), recognizing these workers some of the rights protected at the European level. According to Italian law, the prohibition of termination of project work if you are a pregnant worker (Art. 66, Para. 1, Legislative Decree no. 276/2003) is worthy of note, being inspired to the right to protection from dismissal for a reason connected with maternity in Article 33, para. 2, of the Nice Charter. The EU recognition of social rights is not complete since

[15] In the sense that, for an internal review by the court of the presence of the elements indicated by the case law, it appears that the particular employment relationship is subordinated according to both the European system, and the national one.

only the protection in the event of dismissal of the pregnant worker is guaranteed, while there is not a form of general protection for the termination of employment of the project worker's relationship as that provided for by Article 30. The way towards the recognition of all the rights protected by the Charter of fundamental rights to the workers who perform their service in the employment relationship that, according to the European legal order, is qualified as subordinate is still long and the described legislative interventions represent only a first step in that direction. It is important to remind, then, that the extension of basic social rights does not imply the recognition of the same protection provided for employees under national law: in fact, while recognizing the same rights, it is possible to differentiate the level of workers' protection.

At the end of my presentation I would like to be realistic. I do not know if the proposed interpretation to export the notion of subordination concerning the freedom of movement into the personal scope of the right not to have an unjustified dismissal will be successful. What is clear is that that interpretation is another important piece of the puzzle in order to understand whether Article 30 is a real tiger or a paper tiger in the sense I described above. And it is not possible to be satisfied with the fact that the simple existence of Article 30 could produce possibly an imitative effect in the national systems which could recognise the right to protection from unjustified dismissals to most of the workers, included some who are outside of the area of subordination.

In short, and then I finish talking, only after solving all the questions I highlighted during my presentation, you can apply Article 30 in the most uniform way in the different Member States so to compare the various legal systems. In addition, only if all of us have a clear idea about Article 30 and particularly about its scope and field of application, it is possible to analyse the effects of EU regulation of individual dismissals on the legal systems of the countries involved in this seminar. As I have underlined, Article 30 is the most important and controversial norm in the field of dismissals' protection. For that reason, as labour lawyers, we cannot just wait for an intervention of the European Court of Justice, but we have to interpret that provision trying also to suggest to the Court of Justice our point of view. And this is a task that we have to take into consideration very seriously.