JUDGMENT NO. 231 YEAR 2013

In this case the Court heard a referral order challenging legislation which provided that company trade union representation units may only be established by unions that have signed the collective labour agreement applicable within the facility, and not also by unions that participated in negotiations, but chose not to sign the agreement. The Court considered that, given the changes in trade union relations in recent years, it was necessary to revisit this issue. The Court held that the legislation was unconstitutional on the grounds that the requirement to sign the agreement "impinges upon the freedom of the trade union to choose the forms of protection deemed to be most appropriate for its members", and hence must be construed as allowing trade unions that participated in the collective bargaining process, but did not sign the agreement, to establish company trade union representation units.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 19(1)(b) of Law no. 300 of 20 May 1970 (Provisions to protect the freedom and dignity of workers, freedoms relating to trade unions and trade union activity in the workplace and provisions on placement), initiated by the *Tribunale di Modena* (Modena District Court) by the referral order of 4 June 2012, by the *Tribunale di Vercelli* (Vercelli District Court) by the referral order of 25 September 2012 and by the *Tribunale di Torino* (Turin District Court) by the referral order of 12 December 2012, registered respectively as no. 202 and no. 287 in the Register of Referral Orders 2012 and no. 46 in the Register of Referral Orders 2013, published in the Official Journal of the Republic no. 40 and no. 51, first special series 2012, and no. 11, first special series 2013.

Considering the entries of appearance by the FIOM [Federation of Metalworkers] – Provisional Federations of Modena, Vercelli and Valsesia and Torino, Case New Holland Italia s.p.a., Maserati s.p.a., Ferrari s.p.a., Fiat Group Automobiles s.p.a. and Abarth & C. s.p.a. and others, and the interventions by the CGIL [Italian General

Confederation of Labour], Filcams-CGIL Italian Federation of Workers in the Trade and Commerce, Hotels, Canteens and Services Sectors and Filcams-CGIL for Milan and province, FNSI [National Federation of Italian Press Workers], the Industrial Union for the Province of Turin and the President of the Council of Ministers (out of time in the proceedings initiated pursuant to referral order no. 287 of 2012);

having heard the judge rapporteur Mario Rosario Morelli at the public hearing of 2 July 2013;

having heard Counsel Franco Scarpelli and Counsel Amos Andreoni for the CGIL [Italian General Confederation of Labour], for Filcams-Cgil – Italian Federation of Workers in the Trade and Commerce, Hotels, Canteens and Services Sectors, and for Filcams-CGIL for Milan and province, Counsel Bruno Del Vecchio for the FNSI [National Federation of Italian Press Workers], Counsel Paolo Tosi for the Industrial Union for the Province of Turin, Counsel Vittorio Angiolini, Counsel Piergiovanni Alleva and Counsel Franco Focareta for the FIOM [Federation of Metalworkers] – Provisional Federations of Modena, Vercelli and Valsesia and Torino, Counsel Roberto Nania, Counsel Raffaele De Luca Tamajo and Counsel Diego Dirutigliano for Case New Holland Italia s.p.a., Maserati s.p.a. and Ferrari s.p.a., for Fiat Group Automobiles s.p.a. and for Abarth & C. Italia s.p.a. and others and the State Counsel [*Avvocato dello Stato*] Giustina Noviello for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– The *Tribunale di Modena* has raised, with reference to Articles 2, 3 and 39 of the Constitution, a question concerning the constitutionality of Article 19(1)(b) of Law no. 300 of 20 May 1970 (Provisions to protect the freedom and dignity of workers, freedoms relating to trade unions and trade union activity in the workplace and provisions on placement), in the version in force following the partial repeal provided for – following the result of the referendum called by Decree of the President of the Republic of 5 April 1995, published in Official Journal no. 85 of 11 April 1995 – by Presidential Decree no. 312 of 28 July 1995 (Repeal following a popular referendum of letter (a) and part of letter (b) of Article 19(1) of Law no. 300 of 20 May 1970 on the establishment of company trade union representation units and deferral of the entry into

force of the repeal), insofar as it enables company trade union representation units to be established only by "trade union associations that have signed collective agreements applied within the production facility", and not also by those that have otherwise participated in the relative negotiations, whilst having chosen not to sign them.

1.1.– The referring court argues that the question is relevant on the grounds that, in the (joined) proceedings pending before it, the applicant trade union (FIOM) had objected to the anti-trade union behaviour by the defendant businesses (various companies from the FIAT group), which had revoked its entitlement to establish trade union representation units at the respective production facilities as a consequence of the failure, by the trade union, to sign the collective agreement applied therein, notwithstanding that the union had actively participated in the negotiations which led to its conclusion.

1.2.– In relation to the non-manifest groundlessness of the question as raised, the lower court, on the basis of the observation that participation in negotiations is a fact which highlights the effective contractual force, and by extension the representative capacity, of the trade union, infers that the selective criterion of signature of the contract laid down by the contested provision is "inherently unreasonable", "in that, when applied to specific situations, it leads to a result which is at odds with the premise, as a manifestation of which the criterion was devised". It is stated that this result is arrived at in the proceedings before the lower court in which, in the light of that criterion, "the signatory trade unions are to be recognised as having greater representative force […] than the FIOM [which did not sign it], whereas as a matter of fact the opposite is indisputably the case".

1.3.– As a preliminary matter, the referring court considers that the solution of a broad reading of the expression "signatory trade unions", whereby it is construed as referring also to organisations that participated in the contractual bargaining process – reached in similar disputes by other merits courts on the basis of an interpretation which "adapts" the provision under examination to the requirements of the Constitution – cannot be endorsed due to the unequivocal nature of the wording, which would inevitably be raised in opposition against this.

It is thus concluded that the *reductio ad legitimitatem* of the contested provision in the same manner as that broad reading can only occur through intervention (which must evidently supplement the wording of the provision) by this Court.

1.4.– However, the referring court does not disregard Judgment no. 244 of 1996 and Order no. 345 of 1996 by this Court, which respectively ruled that identical questions concerning the constitutionality of Article 19(1)(b) of the Workers' Statute of Rights [i.e. Law no. 300 of 1970] were respectively groundless and manifestly unfounded with reference to the same principles (Articles 3 and 39 of the Constitution) which have now been invoked once again. However, it considers that those rulings – which related to a different context, characterised by unitary action by the trade unions and unitary signature of the collective agreements applied in the relevant company, in which "signature could reasonably be regarded as a measure of the trade union's force and its representative status" – must now be "revisited in the light of the changes that have occurred within trade union relations in recent years", involving the end of unity of action by the most representative trade unions and the conclusion of "separate" collective agreements.

Moreover, the scenario of current trade union relations is claimed to have been additionally – and profoundly – changed by the new contractual system created by companies from the FIAT Group, which is defined as "self-established and self-sufficient". Having withdrawn from the Confindustria system and the National Collective Labour Agreement for steelworkers, these companies each concluded a specific separate first level agreement, which has been signed only by trade unions other than the applicant.

The legislative reference framework is also claimed to have changed in view of the copious legislation which has enhanced the status of collective contracts to an instrument that supplements or creates exceptions from legislation, having regard in all cases to the requirement of the effective and comparatively enhanced representativeness of the trade unions concluding the contracts.

In the light of these new systemic and contextual facts, the selective criterion laid down by the contested Article 19(1)(b) now ends up "undermining the very rationale of the Statute of Workers, which seeks to promote and encourage the activity of the trade unions as representatives of the interests of the largest possible number of workers,

which is directly inferred from constitutional law via the principle of solidarity laid down by Article 2 of the Constitution along with the principle of substantive equality under Article 3 of the Constitution".

Moreover, that criterion is claimed to contrast irredeemably with the principle laid down by Article 39 of the Constitution in that it has a negative impact on the freedom of action of trade unions, the decision by which to sign or not to sign a collective agreement would be inevitably "conditioned not only by the goal of protecting the interests of workers, according to the regulatory function inherent within collective bargaining, but rather also the prospect of obtaining (through signature) or losing (by refusing to sign) the rights under Title III, which are vested directly in the trade union. This is because in situations such as the case under examination, the two requirements may conflict with one another and it is also necessary to take into account the fact that signature is only possible with the consent and cooperation of the employer". This has the further consequence that, "in extreme cases, where the employer decides not to sign any collective agreement, there would be no trade union representation within the production facility".

2.– The *Tribunale di Vercelli* and the *Tribunale di Torino* have essentially raised the same question on the basis of identical arguments.

3.– Since the proceedings initiated pursuant to the three referral orders concern the same object, they must be joined and settled by a single judgment.

4.– As a preliminary order, it is necessary to confirm the order made during the public hearing, which is annexed to this judgment, ruling inadmissible the interventions by CGIL, FILCAMS Milan and Province and the National Federation of Italian Press Workers in the proceedings commenced respectively pursuant to the referral orders from the *Tribunale di Modena* and the *Tribunale di Vercelli*, and the intervention in opposition by the Industrial Union for the Province of Turin in the proceedings relating to the referral order from the *Tribunale di Torino*.

5.– It is also necessary as a preliminary matter to examine the admissibility of the question raised by all respondent companies in the proceedings before the lower courts and by the President of the Council of Ministers.

5.1.– In the opinion of the respondents, the present question is in fact inadmissible on the grounds that it is identical to that already ruled groundless by Judgment no. 244

of 1996 of this Court, specifically due to the uncertainty of and perplexity within the remedy sought, which in any case, if it was to have expansive effect, "failed to state in a sufficiently circumstantiated manner the 'sense' of the expansive remedy sought" and, if it was to have abrogative effect, would render the question irrelevant.

This argument was also invoked by the State Counsel, according to whom "any ruling that Article 19(b) of the Statute of Workers was unconstitutional would result in the removal of the prerequisite of signature of the contract as a selective criterion for establishing eligibility to the rights under Title III of the Statute; however, absent a different selection criterion, it would not entitle the trade union to exercise those rights".

With regard solely to the referral orders from the *Tribunale di Vercelli* and the *Tribunale di Torino*, in the respective proceedings initiated pursuant to Article 28 of Law no. 300 of 1970, the respondent companies also averred the "failure to give reasons concerning the (alleged) non-manifest groundlessness of the question of constitutionality with regard to the issues raised", on the grounds that the said courts had limited themselves to stating reasons with reference to the referral order from the *Tribunale di Modena*.

5.2.– None of the objections raised can be accepted.

In the first place, it is not exact to assert that the existence of a previous ruling that an (albeit) identical question to that raised once again by the lower court was groundless (and even manifestly groundless) precludes – as is averred – the admissibility of the later question, as that precedent can by contrast be relevant solely during the subsequent stage involving an examination of the merits of the question, in the light of any new supporting arguments offered by the referring court.

Moreover, it is not tenable to assert that the remedy sought by the present question is uncertain or perplexing, since the lower courts are not requesting this Court – in view of the asserted unconstitutionality of Article 19(1)(b) of Law no. 300 of 1970 – to give a decision which simply eliminates the provision, effectively giving rise to a gap within the law which could only be filled by legislation, but rather unequivocally an "additive" ruling, which (as other merits courts have considered possible to infer directly through interpretation that is systematic, takes account of social evolution or is in any case compliant with constitutional law) would enable the entitlement for trade unions to establish representation units to be extended also to unions that actively participated in

negotiations leading to the conclusion of collective agreements applied within the production facility, notwithstanding that they did not subsequently sign them (having concluded that they were not capable of satisfying the interests of workers).

In that regard, the "sense" of the expansive ruling requested –which, having regard to the principles invoked, appears to be mandatory – evidently avoids the objection that it has not been indicated in a sufficiently circumstantiated manner.

Finally, the question cannot be considered inadmissible with reference solely to the referral orders from the *Tribunale di Vercelli* and the *Tribunale di Torino*. Far from being motivated solely with reference to the previous referral order by the *Tribunale di Modena*, these referral orders seek the same remedy, both referring to in detail and further developing the arguments underlying that referral order.

6.– On the merits, the questions are well founded.

6.1.– Article 19(1)(b) of the Statute of Workers has been repeatedly placed before this Court for examination.

The first rulings concerned the original version of that article, prior to the 1995 referendum, which provided that "Company trade union representation units may be established on the initiative of the workers in any production facility by: a) associations that are members of the most representative confederations on national level; b) trade unions not affiliated to the said confederations that have signed national or provincial collective labour agreements applied within the production facility".

Within that context, the questions of constitutionality concerned the failure to grant each trade union within the workplace the right to establish company trade union representation units.

Ruling that the system under the Statute of Workers involving two levels of protection granted to trade union organisations (freedom of association on the one hand and the choice of collective bodies based on the principle of their effective representativeness on the other) was rational, the Court also focused on the criterion of "most representative status" which, whilst privileging the "established", confederations, did not preclude company trade union representation to trade unions not affiliated to the most representative confederations, provided that they demonstrated their capacity to express a degree of representativeness that was capable of translating into effective contractual power outside the company by signing national or provincial

collective labour agreements applied within the production facility (see Judgments no. 334 of 1988 and no. 54 of 1974).

6.2.– However, from the second half of the 1980s onwards, a critical debate started concerning to the need to review the selective criterion of "most representative status" for the purposes of establishing representation offices in the workplace.

It was precisely this Court which issued a warning to the legislator, intimating the now unavoidable need to draft new rules that could expand the class of subjects eligible for the privileged support offered under Title III of the Statute of Workers beyond the most representative trade unions (Judgment no. 30 of 1990).

The legislator's invitation was repeated in Judgment no. 1 of 1994, which declared admissible the two referendum questions brought before the Court in that case: the first "maximalist" question, which sought "the repeal of all criteria of most representative status adopted by Article 19 in letters (a) and (b)", and the second "minimalist" question, which sought to repeal the presumption of representative status provided for under letter (a) and to reduce to company level the minimum threshold for ascertaining effective representative status under letter (b).

In that decision, mindful of the critical issues which could have arisen out of the text in the event of a yes vote in the referendum, this Court once again stressed that, in any case, "the legislator may intervene by enacting legislation substantively different from that repealed, which is inspired by models of trade union representation that are compatible with constitutional law, whilst at the same time keeping pace with changes in the manufacturing industry and the new tendencies to aggregate the collective interests of workers".

6.3.– When the referendum called by the Presidential Decree of 5 April 1995 was held on 11 June 1995, only "the minimalist question" achieved the necessary quorum, thus resulting in the current version of Article 19, which allocates the power to establish trade union representation units only to the trade unions that have signed the collective agreements applied in the production facility on any level whatsoever, thus including those concluded on company level.

Discussion of the "resulting" legislation did not fail to stress that – whilst it was consistent with the rationale of the referendum to expand as far as possible the scope of trade union action also to new subjects, which were genuinely present and active on the

trade union scene – within its literal meaning, it risked leaving itself open to an imbalanced application: on the one hand, it could be applied to excess by interpreting the expression "signatory trade unions" in the sense that the mere signature of the agreement, including by way of adherence, was sufficient in order to establish entitlement to trade union rights within the company (thus leaving the way open to "trade unions of convenience"); on the other hand, it could be applied in an excessively weak sense were that expression to be interpreted as precluding the grant of the rights in question to trade unions which, whilst their action is supported by a broad consensus amongst workers, have decided not to sign the agreement applied within the company. This would result, in both cases, in an axiological and functional alteration of the provision itself as regards the link – which was certainly not severed by the result of the referendum – between the enjoyment of trade union rights and the effective representative status of the subject vested with such rights.

6.4.– The rulings of this Court over the five-year period following the referendum – Judgment no. 244 of 1996, Orders no. 345 of 1996, no. 148 of 1997 and no. 76 of 1998 – provided indications, as regards the matters specifically placed before it for examination, only in relation to the former of the two critical aspects highlighted.

In this respect, Article 19 passed constitutional muster, "albeit in the version in force following the referendum", on the basis of an interpretation informed by constitutional law, and hence an interpretative judgment rejected the expansive interpretation. In that judgment, starting from the premise that "the representativeness of the trade union does not result from recognition by the employer stated by way of an agreement", but rather the "capacity of the trade union to impose its position on the employer as a contractual counterparty", the Court inferred that "however, the mere formal adherence to an agreement negotiated by other trade unions is not sufficient; on the contrary, there needs to be active participation in the process of drawing up the agreement", and that "it is not sufficient to conclude any agreement whatsoever, but rather a normative agreement laying down comprehensive regulation of employment relations, at least for an important institution or part of such regulations, including on a supplementary basis, on company level for a national or provincial agreement already applied within the same production facility" (Judgment no. 244 of 1996).

On this basis, the Court held that the selective criterion provided for under Article 19(1)(b) of the Statute of Workers "is justified in a historical and sociological sense, and hence with reference to practical reason, by the fact that this criterion corresponds to the instrument used to measure the force of a trade union, and by extension its representative status, which is typically inherent within the trade union organisation".

6.5.– Within the current scenario as described and analysed in detail by the lower courts, within which trade union relations and entrepreneurial strategies have changed, the other (countervailing) contradictory aspect (due to the excessively weak application of the provision) – which as mentioned above was already theoretically inherent within the system under Article 19(1)(b), but has until now been obscured by the practical fact of the enduring presence within companies of the principal confederated trade unions – has now however been brought to the fore. Moreover, this manifests itself in situations in which, as objected by the referring courts, the failure to sign the collective agreement has led to the denial of representative status, which exists by contrast on the ground and within the consensus of the workers employed by the production facility.

Within this new perspective, it is necessary to re-read Article 19(1)(b) of the Statute of Workers in order to realign its normative content with the underlying rationale.

6.6.– The internal contradiction created by the denial of rights within the company to trade unions that have not signed any collective agreement, but that have secured a genuine consensus amongst the workers, which enables and at the same time renders inevitable their participation in negotiations, had already moreover been noted; the discussion of this issue had also resulted in calls for the provision in question to be interpreted so as to adapt it to the requirements of constitutional law according to which, moving beyond its literal wording (which refers expressly to the "signatory" trade unions), stipulated as a necessary and sufficient condition in order to comply with the prerequisite under Article 19 the requirement that it have effectively participated in negotiations, irrespective of whether or not it signed the agreement. It has been argued that this interpretation would be consistent with the constitutional case law referred to, which has held that if the collective agreement is merely signed without having effectively participated in negotiations, this will be irrelevant for the purposes of Article 19(1)(b) of the Statute of Workers.

In contrast to the decisions reached by the other merits courts, the referring courts have however concluded that such an interpretation of the provision in line with constitutional law is not possible on the grounds that it is incompatible with the wording of Article 19, and have thus raised the questions of constitutionality now before the Court with the aim of achieving – through an expansive ruling – the same result of extending the availability of trade union rights to the organisations that have participated in negotiations, even though they have not signed the agreement, on the basis of the notion of "effectiveness of trade union action".

7.– The Court considers that this interpretative option is correct, as Article 19 is unequivocal and not amenable to any different reading, and thus does not permit the application of criteria at odds with its literal wording.

However, in the light of that textual interpretation, the provision concerned cannot avoid the objections raised by the referring courts.

In fact, since its function as a means for selecting subjects on the basis of their representative status no longer obtains and, through a kind of "heterogeny of purposes", is by contrast transformed into a mechanism for excluding a subject that is the most representative on company level or in any case has significant representation – and is thus unable to justify its exclusion from negotiations – the criterion of signature of the agreement applied in the company inevitably clashes with the principles laid down in Articles 2, 3 and 39 of the Constitution.

In the first place, Article 3 of the Constitution has been violated on the grounds that the criterion is inherently unreasonable and also due to the difference in treatment which it is liable to cause between trade unions. In fact, when exercising their function of self-protection of the collective interest – which, as such, evokes the guarantee under Article 2 of the Constitution – the trade unions would be either privileged or discriminated against on the basis not of the relationship with workers, which is based on the objective (and value-relevant) fact of their representativeness, thus justifying their participation in negotiations, but rather the relationship with the company due to the essential importance attributed to the contingent fact of whether or not they have consented to the conclusion of an agreement with the company.

If, as has been demonstrated above, the model sketched out by Article 19, which stipulates the conclusion of a collective agreement as the sole premise for the exercise

of trade union rights, renders the benefit conditional exclusively on a stance in harmony with the company (or which is at the very least premised on its assent to trade union involvement), it is evident that also Article 39(1) and (4) of the Constitution has been breached due to the resulting contrast, in relation to negotiations, with the values of pluralism and freedom of trade union action.

Whereas, due to its representative status acquired, the trade union is protected *ex ante* under Article 28 of the Statute of Workers against any unjustified refusal to allow it to participate in negotiations, it is confronted *ex post* with the legal effect of the denial of trade union rights, which the contested provision automatically associates with its decision not to sign the agreement. This translates first into an improper manner of punishing dissent, which undeniably conditions and thereby impinges upon the freedom of the trade union to choose the forms of protection deemed to be most appropriate for its members; secondly, it runs the risk that an equilibrium may be reached through the conclusion of an unlawful agreement to exclude a trade union.

8.– Article 19(1)(b) of Law no. 300 of 1970 must therefore be ruled unconstitutional insofar as it does not provide that company trade union representation may be comprised also of the trade unions which, whilst not having signed the collective agreements applied in the production facility, have nonetheless participated in the negotiations relating to those agreements as representatives of the company's workers.

9.– The "additive" ruling thus adopted by the Court – which remains in line with the remedy sought by the lower courts and within the limits of the relevance of the question raised – does not address the more general problem of the failure to implement Article 39 of the Constitution as a whole, and does not identify – and in fact could not identify – a criterion for establishing trade union representativeness for the purposes of granting privileged protection within a company under Title III of the Statute of Workers in the event that no collective agreement is applied within the production facility due to a failure to negotiate or to the fact that it is impossible to reach an agreement within the company.

Such a requirement may be theoretically addressed by a variety of solutions. This could entail, *inter alia*, establishing the level of representation with reference to the number of members, or by introducing an obligation to negotiate with trade unions

above a certain threshold, or construing the prerequisite laid down by Article 19 of the Statute of Workers as a general reference to the contractual system and not to the individual collective agreement applied within the production facility, or to the grant of the right to each worker to elect trade union representatives in the workplace. The choice between these solutions is a matter for the legislator.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

declares that Article 19(1)(b) of Law no. 300 of 20 May 1970 (Provisions to protect the freedom and dignity of workers, freedoms relating to trade unions and trade union activity in the workplace and provisions on placement) is unconstitutional insofar as it does not provide that company trade union representation may be comprised also of the trade unions which, whilst not having signed the collective agreements applied in the production facility, have nonetheless participated in negotiations relating to those agreements as representatives of the company's workers.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 3 July 2013.