

***Title: The law-provision no. 128/2019 (art. 11 paragraphs 1 and 2) and the Whirpool case in Naples: between labour market weaknesses and the emptying of trade union struggles***

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*Summary* : 1. Preamble. 2. The Whirpool case and the delocalization. 3. The law-provision no. 128/2019 – art. 11 paragraphs 1 and 2 (as a conversion of the law decree of 3 September 2019 no. 101); 4. Conclusions.

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1. This essay analyses the Whirpool case in Naples through the filter of the legislative measure no. 128/2019, and mainly the Art. 11 paragraphs 1 and 2.

This measure of the Legislator that uses money and incentives addressed to Multinational companies without giving real tangible improvements to the actual labour market both in short and long term, was approved to indirectly save workers from collective layoffs.

Actually, these policies did not reach the settled target, since Whirpool Emea confirmed the definitive closure of the Whirpool plant in Naples in via Argine, on the 31<sup>st</sup> of December 2020, even though an agreement between the Italian Government and the company exists, and the company has received, directly or indirectly, millions of euros as public subsidies, because of the delocalization of activities once carried out in Naples.

Currently, the detrimental influence of these management policies used to solve the companies' crises has not been amplified for workers, because of the additional crisis of Covid-19 which, making worse an already severely damaged work-related and wage framework, has had the immediate consequence of suspending all the collective layoffs. The suspension of layoffs is now no longer in force, which

in practice will lead to the sending of so-called "dismissal letters" to the three hundred and forty workers of Whirlpool Naples by the employer as from September 2021. Despite the trade union struggles of the workers, who in recent months have blocked goods traffic at the Port of Naples, occupied Capodichino Airport and blocked motorways in order to draw the government's attention to the need to convene a technical meeting on the matter, which is due to end in September 2021, the multinational company, on the other hand, has not even used the thirteen-week payroll subsidies for the three hundred and fifty Whirlpool workers to help smooth relations between the trade unions and the employer.

The concerned case, among the several and immediate effects, has produced a priority question with answer request to the European Commission (P- 5218/2020), where some questions focused on the analysis of the difficult balance between the Whirlpool case, and the social responsibility of companies are asked to be answered. It seems that the Italian State has a key role in this analysis, in the welfare State dynamics, since it directly assumes social tasks using the so-called "provision-laws" considered as an appropriate instrument for the effective management of the associated needs (mainly the ones of workers and their families), for the new distribution of economic resources.

2. Since the Maytag Corporation (the main competitor on the United States market) acquisition in 2006, Whirlpool became the leader on the domestic appliances market. The conditions and dynamics reported in the Via Argine (Naples) plant were like the ones which caused the closure of the American plant of Evansville in Indiana (opened since 1956) – specialized in the production of fridges – and which suffered the delocalization and transfer of the plant in Mexico, where the costs for the workforce and the workers are lower.

Some regulations aimed at avoiding delocalization were introduced into the law "Dignity decree" – Law Decree 12<sup>th</sup> July 2018, no. 87, in the section "antidelocalizations", and among these regulations there is the obligation of the reimbursement of the national funds already received for companies who decide to delocalize their activities [Chapter II – art. 5 and following. Dignity Decree].

The provision of Article 5, paragraph 1 of the D.L. no. 87/2018 aimed at contrasting the delocalization of Italian or foreign companies on the national territory and which have received funds for production investments from the Republic of Italy. The provision states that in case these companies should decide to delocalise their activities in a country outside the European Community and the European Economic Space, in five years from the reception of these funds, they have not the right to take advantage from them.

The initial revolutionary scope of this provision has been significantly reduced following the complaints of the Community Institutions that have revealed the subjective illegitimacy of the so-called Dignity Decree for the so-named inter-community delocalizations due to violations of the rules on the free movement of goods, persons, and capital in Europe.

For this reason, the provision included in the Dignity Decree applies to delocalizations that take place within the European Union Area and the European Economic Area (i.e., Norway, Iceland, and Lichtenstein in addition to the EU Member States). In respect of the objective aspects, the provision must be read in combined effect with the Article 107 of the Treaty on the Functioning of the European Union (TFEU) to correctly define the boundaries of the so-called State aid. From an exegetical point of view, State aids include all those benefits granted to companies, such as subsidies, soft loans, tax exemptions, exemptions from social security contributions, reductions in social security contributions or exemption from the payment of certain taxes or duties owed by employers. For this reason, under the Article 107 TFEU, State aid is defined as an "aid granted by a Member State or through State resources in any form whatsoever which favours certain activities or the production of specific goods".

According to the definition in the TFEU, State aid therefore seems to include any public measure able to give to the beneficiary companies - thanks to a specific or selective measure - an advantage over their competitors capable of altering the competition on the single market.

The European Commission has also carved out the boundaries of the notion of "State aid" according to the Article 87 of the EC Treaty, making an important distinction between aid that aims to preserve the status quo and aid that aims to allow the necessary adaptations to market developments in order, above all, to limit the negative effects on employment or to contribute to the creation of new jobs.

In addition, the loss of benefits and related penalties also occurs if the delocalizations take place within the European territory and, in any case, within the European Economic Area, whereas that the State aid was specifically intended for the development of a particular and specific production site.

Regarding the Whirpool case - and the aid received for the plant in Via Argine in Naples - following the planned delocalization, the sums "subjected to refund " would be only 8 million out of the 27 disbursed over the years. Anyway, on these figures there are some doubts about the retroactivity of the law no. 87/2018, which should apply to investments made after the entry into force of the Dignity Decree on 14 July 2018.

3. The use of the law - provision no. 128/2019 - art. 11, paragraphs 1 and 2, a measure tailored to the Whirpool Naples case, underlines the weakness of our labour market policies which, since the economic crisis of 1973, have used the so-called emergency labour law to support the logic of companies (and their crises) rather than the real needs of workers.

Essentially, the provision grants an exemption from the additional contribution for several companies based in Italy, which - considering the stringent and specific requirements - is explicitly referred to Whirpool Italia, following the events affecting said company in the via Argine plant in Naples - a plant specialised in the production of dishwashers. The criteria provided by the rule in Article 11, paragraphs 1 and 2 of Law 128/2019 for the purpose of exemption from the additional contribution of a substantial nature from a subjective and objective point of view are: 1) being an enterprise in the sector of the manufacturing of household appliances; 2) having production plants located on the

national territory; 3) having at least one of these enterprises operating on the territory of the Italian State in an area of complex industrial crisis identified in accordance with Art. 27 of Law No. 134/2012; 4) have entered into a solidarity contract (pursuant to Article 21, c. 1, letter c), of Legislative Decree No. 148/2015) aimed to maintaining the existing production with the stability of employment levels through the agreed reduction of working hours, started in 2019, for at least 15 months; 5) have a workforce exceeding 4,000 units.

Concerning the formal-procedural aspects, Article 11 of Law 128/2019 in paragraph 1 states that the exemption from the additional contribution to the enterprise should: 1) be authorised by the Ministry of Labour and Social Policies upon governmental agreement between the enterprise and trade union organisations; 2) the enterprise-union organisation agreement must be signed within 60 days from the entry into force of Law 128/2019. In addition, a further procedural condition for companies to access this contribution exemption is the authorisation examination by the European Commission, after notification according to Article 108(3) of the Treaty on the Functioning of the European Union, based on which the Commission verifies the compatibility of existing aid schemes in Member States with the domestic market (paragraph 3, Article 11 of Law no. 128/2019).

In paragraph 2 of Article 11, it is stated that the tax exemption is calculated at €16.9 million, out of which €10 million for 2019 and €6.9 million for 2020. In this regard, it is necessary to highlight the fact that it is the same technical report attached to the decree law which - identifying as the only beneficiaries of this tax deduction the company Whirpool Italia and Whirpool Emea - clearly makes Art. 11, paragraphs 1 and 2 of law no. 128/2019 fail to meet the requirements of generality and abstract nature, which are essential characteristics of any legal provision.

Therefore, these are measure-laws, or better, decree-laws (converted into laws), since they are legislative measures that do not meet the requirement of generality (intended as the indeterminacy of the subjects to which the rule is addressed) and of abstraction (intended as that typical ideal situation to which it is possible to refer every hypothetical real case to be regulated since it is addressed to one or more particular subjects through the logical operation of subsumption). The

Constitutional Court itself, admitting the existence of such hybrid legislative acts (laws whose form has the requisites of a law and concretely the requisites of an act of an administrative nature) has given an important definition: "laws-measures are laws that contain provisions aimed at specific addressees, or affecting a specific and limited number of addressees, with particular and actual content" (Constitutional Court, 20 November 2013, no. 2360).

The attached technical report to the above-mentioned law further reduces the scope of Article 11 of Law no. 128/2019 showing how the burden resulting from the application of Article 11 is equal to a total of €16.9 million since the company Whirpool Emea alone has a workforce of more than 4,000 employees (as provided among the subjective application profiles to receive the deductions in question), unlike the company Whirpool Italia, which has approximately 400 employees and therefore would not fall within the scope of application of the applicable article.

The measure law no. 128/2019 (as well as many other laws similar in ratio and content - *ex multis Alitalia* affair), ontologically ignoring the characters of abstraction and generality (even inside the worker-person/multinational-employer relationship), is exclusively addressed to multinational companies, to their full and elitist benefits, totally forgetting the management of labour relations, of workers' dignity (and that of their families), thus causing a real misrepresentation and distortion of labour as interpreted from a constitutionally oriented point of view.

4. The use of the measure law no. 128/2019, which includes in its legislative sphere the regulation and discipline of subjects entrusted to the administrative authority (in this case the MISE), has negatively affected the case regarding business location and transfer.

In this regard, given the crystallised legislative precedents, multinationals can request and demand state benefits to facilitate trade union negotiations, undermining the principle of equality between the different economic players involved. This circumstance inevitably clashes with the EC Treaty's prohibition on state aid which in any way distorts or threatens to falsify competition. Measures such

as the one under analysis are part of the already complex relationship of negotiation between the stakeholders involved in the two delicate phases going from the conflict to the reaching of the agreement itself. The problem is that in this case, trade union agreements are systematically disregarded by multinational companies, which only boost corporations' coffers without bringing any benefit to the lives of the workers involved. This is because these dynamics try to interfere in the difficult balance between the free movement of capital and the clear impossibility for a State to play a leading role in the economic system, provoking malfunctions, and unclear situations with reference precisely to the sovereignty of individual States, their workers, and their families in favour of the free market.

In this context, those adversely affected by this modus operandi are mainly the trade unions, who find themselves negotiating through legislative instruments not exactly in line with the trade union struggle, such as, for example, law no. 128/2019, which actually introduced a contribution exemption for the multinational Whirpool, but which actually had the sole purpose to safeguard - or at least postpone - the termination of the employment relationships of the workers of the plant in Via Argine in Naples. I believe that the failure of the trade union struggle, the emptying of workers' rights and of the central role of the State to protect and preserve the jobs of workers who cannot thus ensure a free and dignified existence for themselves, and their families are due to the inviolable dogma existing in Italy, namely that the State does not intervene directly in the free market economy. In other words, the State can intervene indirectly through tax relief and incentives, but cannot intervene directly, as in the case of Whirpool, to protect the workers and their jobs.

Nonetheless, the hypothesis of state management through institutions such as the golden power - through the opportunity to support the company in the creation of a new legal entity or the so-called workers' buyout - by setting up a cooperative of workers who can take over the factory - could be possible solutions to be evaluated to save the workers of the Naples plant. Useful tools to give a new dignity to the Whirpool Naples workers in the plant in Via Argine, for years suspended between an unfair life - as it is - and a fair life - as it should be.