

**The “Leggi Provvedimento” and EU Law.  
The Disappearing Bulwark**

(Matteo Corti)

1. First of all, I want to thank Enrico Gragnoli for having invited me to give a speech at this prestigious International Conference on the “Leggi Provvedimento” with particular reference, obviously, to Labour Law. The subject is really challenging, and also quite new for Labour Law scholars: I am not ashamed to confess that I had some difficulties in conceptualising it at the beginning. And in fact, constitutional scholars are usually more concerned with pieces of legislation of this kind. Classical “Leggi Provvedimento” contain provisions focused on one or on a very small number of cases, and we have a certain number of examples in the field of Labour Law as well: think about the legislative interventions to save the national flag carrier (Alitalia, recently reborn as ITA), or to secure the continuity of the Steel Plant in Taranto, or again the third subsection of sect. 8, decree law n. 138 of 2011, which specifically aimed at granting juridical support (namely the general effect) to the FIAT plant level agreements signed before the intersectoral agreement of 28 June 2011. This last case is very interesting, because the name of FIAT was not mentioned, but it was clear for everybody that the provision had been specifically introduced for this purpose.

As far as I know, the phenomenon is not limited to Italy. In my studies on codetermination, I bumped into the “Volkswagen Law”, which dates back to 1960 and still contains some provisions actually conferring employee representatives in the supervisory board a right to veto in case of setting up, relocation or closure of plants. All these decisions must be made through a qualified majority of the body (two thirds), which is not required by the usual legislation on codetermination (according to which the simple majority is sufficient). Since the body is composed of an even number of employee and shareholder representatives, this provision actually amounts to a veto right in favour of employee reps.

Actually, in Germany codetermination seems to be the kingdom of “Leggi Provvedimento”. The peculiar, and very favourable for employees, regime introduced in 1951 only for the enterprises in the coal, iron and steel industry was extended to their holding companies, albeit in a slightly watered-down version, already in 1956. In the

following years, the share of coal, iron and steel business of the group which triggered the special regime of codetermination was lowered many times, with “Leggi Provvedimento” aimed at contrasting the strategies of the holdings trying to circumvent it by reducing the activity in the aforementioned sectors. One of these pieces of legislation was brought before the Constitutional Court in 1999. The Court decided that its provisions respected section 3 of the German Fundamental Law, that is the equality principle. In particular, the Court, given the circumstances of the case, held that the legislator, while shaping that piece of legislation, was neither simply bound by the loose test of non-arbitrariness, nor by the strict test of proportionality: so, something in the middle.

In this hypothesis of “Leggi Provvedimento” the main problems are basically two: the arbitrary choice of the persons or enterprises targeted, and the impact on the possibility of applying to a Tribunal, because the piece of legislation issued for a special case could obviously change the rules of the game for the person or the enterprise concerned, or for their competitors. Put it in legal terms, the “Legge Provvedimento” could infringe either the equality principle, enshrined in section 3 of our Constitution, or the right to bring action before a Court, stipulated by sect. 24 of the same Fundamental Act, or even both.

Anyway, the subject of my speech is not limited to the “Leggi Provvedimento” in this narrow meaning. Actually, in his introductory paper to the Conference Enrico Gragnoli invited speakers to broaden their horizons and to encompass also pieces of legislation not exclusively targeted to single cases, but simply special, sectoral or local.

From a historical point of view, middle age, with its rooted stratification of society, was the realm of personal, special, and local laws. Specific provisions existed for people living in different cities, for people performing different professions (artisans were organised through guilds according to their craft, and peasants very often were not free, just servants), for people belonging to different classes (clergy, nobility and the third estate, the commoners) or religious confessions. The French Revolution, having done away with the “*ancien régime*”, established for the first time the principle of equality of all citizens in front of the law. And an obvious consequence of this principle was the general nature of the legislation, which as a general rule must encompass the citizens, without any exception. This idea of legislation was clearly conducive to the new liberal society of the XIX century, which aimed at creating a regime of free market and

competition to promote the interests of the bourgeoisie, the class which had actually won the battle of the French Revolution.

The striking back of the “Leggi Provvedimento”, in the broader meaning suggested by Enrico Gragnoli, takes place in the XX century, when the new European democracies built on the ruins of the World War II start the edification of their respective Welfare States. Actually, it seems to me that the Welfare State is the new realm of the “Leggi Provvedimento”: and this does not happen by chance. The goal of the Welfare State is not only to guarantee the basic liberal freedoms (such as: personal liberty; freedom of thought, religion, expression, assembly, association, movement; right to privacy, property; freedom of enterprise), but also to promote social rights (such as rights to: trade union association, strike, minimum wage, limited working time, social security; and basic working conditions). In other words, under Welfare State, public powers are not simple arbitrators between equals any longer. They are called to intervene in the economic and social life in order to improve the situation of the labour class and of the less fortunate people in the society, so that they can have a larger portion of the collective wealth and opportunities. This specific mission of the State is enshrined, for instance, in section 3, subsection 2 of our Constitution: the so-called principle of substantial equality, whilst the principle of formal equality (*«all citizens are [...] equal under the law»*) is contained in the first subsection of that section. In order to accomplish that mission, the State is likely to make a more extensive use of private, special and local laws, of “Leggi Provvedimento”, in fact. It goes without saying that also in cases of provisions covering just a section of possible addressees, even without being a “Legge Provvedimento” in the narrower meaning, the possibility of abuse exists. Again, the section of our Constitution which could be violated is section 3, that is the equality principle. Here, the scrutiny should be conducted in light of the principle of reasonableness.

So, to conclude on this point, in my opinion, the “Leggi Provvedimento” are not automatically a bad phenomenon, something to fight against without any exceptions. In the broader meaning seen above, they are something more or less entailed by the same nature of our State, which is a Welfare State and has the goal of actively promoting the common prosperity and the substantial equality among the citizens. So, basically, the problem is not the “Leggi Provvedimento” themselves, but the check and balance which a legal order can oppose against the abuse of these kinds of legal instruments.

2. And now it is time to examine one of these limits to the “Leggi Provvedimento”, which is provided by the law of the European Union. In particular, my contribution to this debate will be devoted to the competition law of the European Union.

In general, it must be said that section 101 and the following ones of the Treaty on the Functioning of the European Union (hereafter: TFEU) aim at putting all the European enterprises on equal foot, by doing away with all the artificial obstacles which can fetter the competition, be they of private nature or created by the Member States. As far as the “Leggi Provvedimento” are concerned, provisions on the national monopolies and on state aids are for sure the most relevant.

Let’s start from provisions on monopolies created by the Member States. Section 106 of the TFEU does not prevent Member States from setting up and maintaining monopolies, but it obliges them to respect all rules of the treaty, comprising antitrust ones. In particular, national monopolies charged with providing services of general economic interest have to respect antitrust rules only to the extent where such rules do not hinder them from fulfilling their specific mission (subsection 2). In the 90’s of the last century social monopolies started to be scrutinised in light of these provisions, with very interesting results. Indeed, in those years the case-law of the European Court of Justice contributed to the dismantling of national monopolies in the field of workers placement (public employment services).

The first important decision was the *Macrotron* case, which involved the German public placement of managers. In 1991 the European Court of Justice found that it ran against section 106 of the Treaty. The second decision, made in 1997, was much more important, because it did not refer to a partial monopoly on the labour market, but to the most comprehensive and powerful monopoly ever built in Western Europe: The Italian one. In its golden age, it did not only prevent any other actor, be it private or public, from the placement of workers, but it also prevented employers from hiring directly unemployed people. In other words, employers were obliged to ask the Public Employment Service to send them the unemployed workers registered on its lists, according to the priorities established by the law. Actually, it must be said that this monopoly had been already weakened at the beginning of the 90’s, and its complete abolition had already been planned in the legislative decree n. 469 of 1997, the so called

“Decreto Montecchi”. But anyway, the decision of the European Court of Justice came almost totally unexpected for the majority of Italian scholars, who still paid little attention to the possible impact of EU antitrust law on national Labour Law structures and institutions. As in *Macrotron* case, also in *Jobcentre II* the European Court of Justice stated that the Italian monopoly of placement services infringed on section 106 of the TFEU. So, owing to the direct applicability of that section of the Treaty, that monopoly had to be removed.

To be honest, the juridical reasoning of the Court in both cases was not really convincing. It may be summarised in this way. The monopoly was not effective, because it was not able to duly satisfy customers’ (the unemployed) demands. As a consequence, an abuse of dominant position had arisen, which is contrary to section 102 of the TFEU. Actually, this provision applied to monopolies in the field of public employment services as well, because its application did not obstruct the specific mission of the monopoly. On the contrary, the application of section 102 and the elimination of the monopoly could only improve the service offered to the unemployed. This is the quite well-known theory of «abuse by ineffectiveness». In my opinion, the argument is quite stretched: in silence of anything else, specific social purposes of public employment services were totally ignored by the European Court of Justice.

But the core of the reasoning is not disputable. Both public employment monopolies, the German one for managers and the general one in Italy, were ineffective, and in the case of Italian public placement the situation was even embarrassing. In his introductory remarks Enrico Gragnoli reminds us of the article by Luigi Mariucci of 1979, called «Impossible dismissals», but in 1982 Pietro Ichino wrote a book on the Public Employment Service in Italy, whose title was: «The impossible placement». I think that this ineffectiveness sentenced to death the monopolies of placement. They had become basically unreasonable and irrational, exactly as the “Leggi Provvedimento” on which they were based, because they were totally and structurally unable to achieve the goals they were supposed to pursue.

In the following years, there were other examples of social monopolies whose compatibility with the antitrust provisions of the Treaty was scrutinised by the European Court of Justice. They mainly belonged to the social security system, such as the following cases: *Poucet et Pistre* (French mandatory social security scheme - 1993),

*FFSA* (French occupational pension fund - 1995), *Albany* (Dutch occupational pension fund - 1999), *INAIL* (Italian social insurance against industrial accidents - 2000). Only in *FFSA* the Court decided that the organisation managing the French occupational pension fund was an undertaking, opening for the possible violation of antitrust rules of the Treaty: in reasoning like that, the Court was influenced by the circumstance that the regime was not compulsory, and so there existed a market dominated by *FFSA*.

In all the other cases the Court concluded for the non-violation of the antitrust provisions of the Treaty, for different reasons: no abuse by ineffectiveness in *Albany* case, no undertakings, and so no applicability of the antitrust provisions of the Treaty, in *Poucet et Pistre* and *INAIL* cases. But, in comparison with *Macrotron* and *Job Centre II* cases one can observe the good functioning of these monopolies in pursuing their social security goals. This argument is even explicit in the reasoning of the Court in the *Albany* case. So, we could say that their respective “Leggi Provvedimento” were, in a way, reasonably constructed. In general, one can also note the development over time of a more positive attitude by the European Commission in relation to services of economic general interest, comprising the social ones. In general, the sector has been massively regulated through the secondary legislation, leaving less room for manoeuvre to the European Court of Justice in the direct application of the provisions of the Treaty.

**3.** The TFEU contains no absolute ban on State aids. According to section 107 State aids are divided into two categories: those which are automatically compatible with the internal market, such as aids to consumers which do not make differences according to the origin of the products; and those which are not automatically compatible, and must be preliminarily approved by the European Commission, such as aids aimed at easing the development of certain activities or economic regions, provided that they do not alter the competition in a way, inconsistent with the common interest. It is interesting to note that the notion of State aid contained in the Treaty is quite vague. State aids are «granted by a Member State or through State resources in any form whatsoever», are aimed at «favouring certain undertakings or the production of certain goods», and distort or threaten «to distort competition», while affecting «trade between Member States» (section 107, subsection 1). This vagueness has left considerable room for manoeuvre both to the Commission and to the Court of Justice on the subject. Moreover, the

discretionary power conferred by the Treaty to the Commission on the approval of State aids has allowed it to develop a comprehensive European policy. In the beginning the Commission set down its orientation in Guidelines, and then started involving the Council in laying down regulations on sectoral State aids which do not require the preliminary approval by the Commission.

The definition of State aid contained in the Treaty makes it clear that it is individual or sectoral, and it comes from the State: but neither of the two features is unequivocal. Starting from the second one, the meaning is now quite uncontested: economic resources come directly or indirectly from the State. But in the past, there had been an attempt to interpret the phrasing of Treaty as referred to any economic advantage coming from a State regulation. It is evident that such an interpretation would have given the European Commission the possibility of checking almost every “Legge Provvedimento” in light of the common interest of the Union.

And it comes as no surprise that the European Court of Justice was called to decide three cases related to Labour Law: two from Germany and one from Italy. In *Sloman Neptun* case of 1993 the German law allowed ships registered in Germany not to apply German Labour Law to foreign seamen. In *Kirshammer-Hack* case of the same year German legislation on dismissals was under scrutiny, and namely because it exempted small enterprises (those with less than 5 employees) from its application, leaving workers basically without any protection against unlawful dismissals. In *Ente Poste* case of 1998, an Italian law prevented the fixed-term contracts signed by the Post Office before 1997 from being turned into permanent contracts when concluded in violation of the conditions laid down in the general legislation (Act n. 230 of 1962): the opposite was actually the rule for all the other enterprises, be they private or public. In all three cases the Court decided that the different treatment, even though more favourable for some enterprises (or even for one in the Italian case), could not amount to State aid, because no transfer of State resources was involved, even indirectly.

Going on to the second feature of State aids, the individual or sectoral nature, there is consensus amongst scholars that general measures are not State aid, but it is not very simple to determine when a State aid is sectoral, because it favours certain productions. Reasoning by contrast with subsection 3 of section 107 of the Treaty, it is quite clear that measures targeted at some portions of the national territory or at certain

economic activities are State aids. So, for instance, Italy was ordered by the Court of Justice to remove cuts in social security contributions three times. In the first case, which dates back to the '70s (the decision of the European Court of Justice was made in 1974), the reduction was addressed to the textile industry only, and so it was clearly sectoral. In the second case, the selectivity was indirect, because the cuts in contributions were targeted at female workers only. Nonetheless, the European Court of Justice ruled in 1983 against Italy, because the effect of the measure was to favour specific productions which employed mostly women, such as textile, apparel, and leather and shoe industries. In the third case, perhaps the most famous, the contribution-based incentives accorded to work and training contracts («contratti di formazione e lavoro») were considered by the European Court of Justice in violation of the Community provisions on State aids because they were different across the national territory, and so selective and not general. The decision was made in 2002 and eventually led to the abolition of work and training contracts by the Biagi reform of 2003.

In another quite well-known case of 1996, this time from France (the FNE – National Fund of Employment – case), a public fund helped enterprises carrying out restructuring to adopt social plans aimed at minimising the number of dismissed workers and at assisting them to find another job. The fund was considered by the European Court of Justice as a tool to provide State aids, because it was granted a wide range of discretionary power in deciding what companies should be financed. This feature made it impossible to classify the scheme as a general measure.

Also, economic measures aimed at favouring employment are State aid, unless generalised. But in this field since 2002, secondary legislation has intervened, by rationalising the framework. So, State aids for employment, which satisfy requirements set down in Section six of the EU regulation declaring certain categories of aid compatible with the internal market (regulation n. 651 of 2014), must be notified to the Commission, but do not need its approval. The aids are limited to disadvantaged and disabled people, and they vary according to the difficulties these persons encounter when entering the labour market. It is possible to create schemes of State aids for employment which are not in line with the European regulation, but they will need the previous approval by the European Commission.

Individual economic measures aimed at saving enterprises in difficulty are clearly State aids, since they lack any generality. With regards to this kind of State aids, the Commission has not proposed any regulation to the Council, so that the framework for the admissibility is still contained in the Guidelines of the Commission Communication of 2014. This way the Commission has the possibility of scrutinising and approving any single aid, because there is no automatic compatibility (except for the very small financial aids permitted by the *de minimis* regulation). The Guidelines requirements for rescue and restructuring aids are apparently very strict. Among others, the measure must pursue a common interest (for example remedying a market failure or avoiding social hardship), and must be necessary, appropriate, and proportional (limited to the minimum).

The principle «one time, last time» also belongs to the proportionality principle. But if we think about Alitalia case, with all the restructuring and rescuing plans approved over the last decades, this principle takes on an unconscious humoristic shade. The last straw which breaks the camel's back is the recent decision of the European Commission on the new flag carrier ITA, which actually inherited from Alitalia an important share of the aircraft fleet, routes and employees. According to the decision of 10 September 2021 of European Commission, there is a substantial discontinuity between ITA and Alitalia because they do not have the same brand (but ITA can purchase it in an open tender) and ITA is much smaller than Alitalia, having less than half of the fleet and much fewer (and less costly) workers. According to the Commission, the substantial discontinuity comes also from the fact that the new company dropped the loss-making routes and kept only the profitable ones: it is quite surprising... Anyway, the substantial discontinuity allows ITA to take-off, because in a separate decision on the same day (10 September 2021) the European Commission also decided that the 900 million Euro granted by the Italian State to Alitalia in 2017 are illegal under State aid rules of the European Union and must be paid back. But not by ITA, because no continuity between the two undertakings has been detected by the Commission...

So, to conclude on the rules on State aids. They have certainly contributed to limit the (ab)use of “Leggi Provvedimento” containing financial help for certain enterprises and productions, and they have contributed to a healthy rationalisation of the juridical framework in this field in many Member States. But the beneficial effect of these

rules has clearly faded away over time. On one hand, the Commission over time has become a less technical and a more political body. The discretionary power granted to it by the rules on State aids has been progressively used not to limit State aids, but to develop a European policy in the field of State aids. This change of perspective has also opened the way to political negotiation with Member States, which has led to questionable decisions like the Alitalia ones. On the other hand, the two dramatic crises of the last decade have pushed the Commission to approve specific Guidelines for State aids, whose conditions are actually quite loose. I am referring to the «Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis», contained in a European Commission’s communication of 2009, and to the «Temporary framework for state aid measures to support the economy in the current Covid-19 outbreak», issued by the European Commission in April 2020.

4. It is time to conclude my intervention, by summing up the preliminary results reached so far. The starting point of my speech was the evaluation of “Leggi Provvedimento”, in the broader sense of the expression. I find that these pieces of legislation, whose content is limited to individual, special, sectoral, or local cases, are a natural consequence of the transition from the classical liberal State to the Welfare State. The first pursues the formal equality of the citizens (all citizens are equal under the law), whereas the second one aims at creating the conditions for the effective, substantial equality of all citizens. And this creation requires the adoption of legislative acts targeted at specific, sectoral, local situations. There is a constant tension between the two dimensions of equality: since the “Leggi Provvedimento” may occasionally be a vehicle for abuse and unjustified preferences, it is always necessary to check their reasonableness, that is their justification in light of the general principle of formal equality.

The system of multi-level governance in which our Country is inserted helps us in many ways. We analysed the competition law of the European Union. This legislation aimed from the beginning to create a level playing field for all the enterprises in the internal market, by controlling and limiting, among other things, national monopolies and State aids. In this way, European Union law has helped to eliminate some ineffective State monopolies, like those of worker placement, and to rationalise the use of State aids, for example, in the field of: employment creation, and rescuing and restructuring enterprises

in difficulty. However, the evolution from the Community to the Union and the recurrent crises seem to have weakened the action of the European Commission, which is ever more eager to behave as a political actor which pursues specific industrial strategies rather than as an arbitrator in charge of keeping the same conditions for all competitors.

In this situation, I think that a better control of the “Leggi Provvedimento” in Italy must be ensured in the first place by the Constitutional Court, which should scrutinize these pieces of legislation in light of the reasonableness principle and of the specific goals at constitutional level pursued by legislative provisions. Since the narrower the number of those addressed by the law, the stronger the risk of abuse, the control by the Court should be much more severe in the hypotheses of “Leggi Provvedimento” targeted to single cases. Here an express motivation by the legislator, as it happens for all the legislative acts of the European Union, should be encouraged.

Our Constitutional Court has been traditionally very cautious in the application of the filter of reasonableness to the activity of the legislator, probably worried that a stronger stance could infringe on the democratic principle, enshrined in section 1 of our Constitution. But the rise of “Leggi Provvedimento”, recently boosted by the pandemic, requires in our opinion a change of attitude by our Constitutional judges.