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Multi-Stakeholders approach to Corporate Governance and Labor Law: a note on Corporate Social Responsibility.

Although workplace safety and health issues run comparatively low on the list of economic and societal priorities that dominate the new century, they remain a major concern for all those researchers – in the fields of law, economics and theory of organization – who study labor market regulations, access to employment or day-to-day management of corporate organization.

The tragic accident that occurred at the Turin-based plant of the German conglomerate *ThyssenKrupp Acciai Speciali Terni*, at the end of 2007, and which led to the death of 7 workers caught in a blaze, will hopefully prove anomalous and will never happen again. However, it should not conceal the steady trickle of workplace fatalities which does not get the same kind of sensational media coverage and, therefore, does not affect the awareness of the people. In Italy, occupational fatalities caused by non-compliance with workplace safety regulations run at an annual average of several hundreds, and in both 2006 and 2007 they went well over 1000, though slipping down somewhat in 2007. Those figures are only the tip of the iceberg and do not include the hundreds of thousands of workplace injuries which may cause serious and/or permanent disability and the ensuing consequences also in terms of cost for society.

Such figures differ only slightly from the European average, although they stand in sharp contrast with the perception we have of the economic and social model

we live in, and to the preservation of which the European Union is solemnly committed, in this age of progressive and unstoppable expansion of the market and of the circuits of production of wealth.

No legal scholar will dispute the point that in Italy and in advanced and industrialized Europe there has existed, for some time now, no shortage of proper workplace hazard legislation implemented to ensure reasonable safety standards and, at any rate, to prevent hazards which do not even remotely compare with the tragic accident that took place in late 2007. As regards Italy itself, safety regulations have recently undergone a substantial overhaul and with a view to entrenching compliance, in particular, some significant changes have been introduced, with Act 3/8/2007 #123 enacted by government decree on March 7, 2008. It is fair to say that the precedent legislation already met to a fault all the standards laid down at EU level.

To some degree, what happened in Turin is even more inconceivable because the plant is run by a company with an in-house Code of Ethics that solemnly proclaims in its preamble the "ethical commitments and responsibilities in the conduct of corporate affairs and activities undertaken by the employees of all the Companies of the Group, whether they be directors or contract employees (...); commitments and responsibilities in line with those of *ThyssenKrupp A.G.*, owner of *ThyssenKrupp Acciai Speciali Terni* and an industrial group at international level which, owing to its dimension and to the importance of its activities, plays a significant role with respect to the market, to economic development and the well-being of the community where it is present".

Sections 2.7 (health and safety), 3.6 (health, safety and environment) and 4.3 (safety and health) of this Code, in particular, drive home the solemn pledge of the company towards workplace safety. Business must be conducted, first and foremost, "in full conformance with extant standards pertaining to prevention and protection of persons and preservation of the environment", and must pursue "advanced criteria of environment protection and energy efficiency (in pursuit of) improvement of workplace health and safety conditions". The pledge includes commitment to adopt

and maintain "management systems designed to identify, prevent and react to possible hazardous situations, in order to safeguard the health and safety of all the personnel". The pledge ends (section 4.3) on an unambiguous commitment "to consolidate and further disseminate safety culture, developing hazard awareness, promoting responsible comportments among all the employees for the scope of preserving the health and safety of the same".

From time out of mind, workplace safety has been integral part of the structural conflict between workers and employers and has been at the centre of the earliest battles of organized labor. It has also prompted the first pieces of legislation designed to regulate relations between labor and management. So much so that, in Italy, mandatory insurance against workplace injuries contributed to the foundation upon which the modern edifice of industrial relations legislation was erected.

Moreover, concern about the safety of production facilities is an issue that brings more directly to the fore the diversity of interests potentially involved in corporate management. In addition to employees and employers, i.e., the parties who entered into contract, the issue involves laterally the people of the community where the plant is located and who may be directly affected by environmental damage caused by an industry conducting hazardous operations, and also the community at large concerned by the social costs that may be incurred as a consequence of serious incidents.

It should be pointed out, in that respect, that the prerequisite to an informed examination of the problem of the plurality of interests at stake in corporate management is a thorough and careful valuation of the specific positions of the respective stakeholders. Indeed, a clear line should be drawn between those who are structurally involved in corporate organization and those who may be affected by its operations.

To some extent, the thrust of the commitments unilaterally laid down in *ThyssenKrupp's* Code of Ethics, in conformity with the type of culture prevalent in

Germany, where the holding of the Group is headquartered, testifies to a clear grasp of the issue in its complexity.

What, then, went wrong in Turin and, more generally speaking, how to account for what has become in Italy a problem of national proportion?

Putting aside acknowledged shortcomings of the systems of control, what is so dramatically absent from our workaday life is a shared culture of safety at the workplace. This absence, in Italy, may be ascribed to a more widespread disregard for rules in general, which are, more often than not, perceived by the business community as fastidious trammels to the free expression of those *animal spirits* of capitalism that have proverbially characterized the development of market economy.

This impatience against rules in general must be contextualized, when talking about workplace safety and, more broadly, labor market regulations. Indeed, market globalization has caused an acceleration of competition which is putting at risk some of the founding principles of the polity.

The fact that market globalization has made competition between companies, between national industries and between economic and social models fiercer has by now become common wisdom. The same is true of the advantages generated by stiffer competition where the scope is to win over customers by delivering on their expectations. Efforts to map out a model of development socially sustainable, however, should focus on how such development can be smoothly calibrated to safeguard the life, health and freedom of citizens.

From that angle, workplace safety plainly comes in as a *cost* that affects the profitability of business, but also as an *asset* that cannot be dismissed on account of competitiveness.

Article 41 of the Italian Constitution entrenches the right to private business initiative provided the exercise of this right does not abridge the freedom and dignity of man or does not stand in contrast with social utility. That principle is internationally recognized by both the EU and the International Labor Organization. In particular, Conventions C119/1963 – ratified by Italy in 1971 – pertaining to safety

standards for machinery that may prove hazardous to health and C174/1963, pertaining to serious occupational injury prevention, ratified, as of 2007, by only 11 Member States in the concert of nations and from which Italy and other key European countries are conspicuously absent.

The lifting of national barriers and, subsequently, of domestic protectionism, which, for better or for worse, regulated local markets, is one of the many consequences of market globalization. As a result, the regulatory and disciplinary powers of the respective national legal systems of the major industrialized countries fall short within the process of establishing minimal and uniform standards of protection in the interest of a growing mass of employees.

Competition, indeed, is now taking place on what is known as the "market of rules". Increasingly, companies move their operations outside the confines of their state of origin and re-locate in countries where less stringent rules bring down production costs, primarily through access to cheap labor, in that *race to laxity* which has been, for quite some time now, the subject of a number of papers in *Law & Economics*.

Attempts to put a check to that phenomenon have been made, particularly where re-locating amounted practically to a violation true and proper of *human rights* universally recognized. In that respect, the views adopted by some Courts in the USA in a bid to apply to such violations committed by large corporations the principles laid down under the *Alien Torts Claim Act* (ATCA) set a precedent. Paradoxically, a principle introduced in the 18th century has been dusted off and applied to contrast, in the second half of the 20th century, this new phenomenon.

We cannot enter here into a more detailed analysis of these cases, suffice it to say that these well-meaning attempts have met with structural obstacles to the application, outside national confines of jurisdiction, of the principles invoked which, as in the case of the ATCA, are effective only within such confines and, plainly, overstep the mark when they overreach their competence.

The only practicable solution to the problem is through multilateral agreement. Europe is home to a significant number of highly industrialized countries that boast a "generous" social and economic model now under threat from emerging countries, where citizens do not benefit from the same level of social protection and where, consequently, labor is cheaper. That is why the EU has been trying so hard to hammer out a common policy where competitiveness and social cohesion would dovetail nicely (the Agenda of Lisbon hinges on this priority).

As regards work relationships, minimum uniform standards have been finally agreed upon to govern intra-market relationships in Europe, with the avowed scope of putting a check to those social dumping practices that followed the admission of new countries into the single market. Hence, anti-discrimination rules were introduced, once free movement of persons had been firmly entrenched; maximum work hours were progressively harmonized; protection standards were adopted in favor of employees subject to layoffs and redundancies or put at risk as a result of employer insolvency or transfer of undertaking.

As regards collective relationships, or what is otherwise known and referred to as Social Dialogue, discussions have long been heated over the status of that category of *stakeholders* – namely, employees – who, more than any other category, are affected by corporate organization.

After years of wrangling and deadlock the issue of participation of employees in corporate decision-making was put back on track, at least starting with community-scale undertakings. A sudden acceleration occurred between 1994 and 2002 and led to the adoption of three distinct and important EU directives. The first regards the creation of a European Works Council (EWC)¹, while the Regulation on the Statute of European public limited-liability companies (the latter referred to as

¹ Directive 94/45/EC of the Council, 22 September 1994, on the creation of a European council or a procedure for information and consultation in enterprises and community-scale companies.l

SE²) paved the ground for the directive on the creation of workers councils inside SEs³ and, lastly, the directive on workers information and consultation⁴.

Starting with these binding rules, but well aware that market globalization calls for policies that cannot remain confined to Europe, the Commission and the European Parliament have extended their scrutiny beyond the specific issue of bilateral relationships between capital and labor. The bid is now to bolster *Corporate Social Responsibility* (CSR), intended as a means to pursuing the same objectives by a two-pronged approach.

At the cultural level, the scope is to disseminate a revamped awareness of the multiplicity of interests at stake and of the inevitability of their reciprocal meshing in the conduction of private corporate operations.

At practical level, the aim is to progressively create a framework of rules generally accepted by all parties involved that might lay the foundation to a new set of more advanced social protection standards.

The first thing to be said is that the issue, alluded to early on, of the respective positions occupied by the different categories of stakeholders raises problems of identification of the agents vested with the right to invoke interests which are at times in contrast with each other. The interests of employees, for instance, do not always coincide with those of consumers, nor does, in some instances, protection of employment, that is the interest of employees, with the interest of the community where the company is located, when hazardous corporate operations put the environment at risk.

If, as a rule, representation of workers is entrusted to unions, representation of other groups of stakeholders proves more complex, owing to the multiplicity of loose

² EC Regulation 2157/2001 of the Council, 8 October 2001 on Statute of European public limited-liability companies (SE)

³, Directive 2001/86/EC of the Council, 8 October 2001, completing Statute of SEs with respect to involvement of employees.

⁴ Directive 2002/14/EC of the Council and European Parliament of 11 March 2002, with respect to general framework for information and consultation of employees in the European Union.

groupings of all shapes and forms that claim to be interlocutors: consumer associations, local agencies, citizen committees, etc.

This multi-faceted and fluid situation has inevitably contributed to leaving corporations and, more particularly, management sole masters of the ground, left, right and center. As a result, the notion of Corporate Social Responsibility has narrowed down to a mere issue of corporate governance. What is at risk is the crucial relation between politics and the economy – or, between "the market" and "regulations" – and what is at stake is the principle of the primacy of politics, which has long since been recognized as the cornerstone of modern democracy⁵.

Considering the limited effects, noted earlier, of State regulations, this principle may only be preserved by a careful balance between legal rules – flowing from different sources or from accords but, in any event, subject to enforcement by the appropriate authority vested to that effect - and commitments unilaterally undertaken by enterprises on a strictly voluntary basis and typically expressed in codes of ethics of various contents and inspirations.

These voluntary commitments are undertaken by enterprises not for the scope of mere philanthropy, but on the assumption – profusely documented by a vast literature on the topic - of gaining specific returns in terms of corporate reputation and, consequently, business performance.

Granted due compliance with legal standards, the policy to encourage and develop *Corporate Social Responsibility* places the emphasis on the steady furtherance of voluntary commitments undertaken by enterprises to improve protection of those subjects who, because of their peculiar position in respect of the enterprise, are more likely to be adversely affected by its operations, lawful as they may be and to the extent that they are not in contrast with legislation in force at the given time.

⁵ R. REICH, *Supercapitalism. The transformation of Business, Democracy and Everyday Life*, Knopf, NY 2007.

A survey of the evolution of the respective national legal systems shows quite conclusively how lawmakers oftentimes adopt specific pieces of legislation by riding forcibly on the wave of public outrage and in answer to petitions of interests long neglected as not worth the bother.

In Italy, the first pieces of legislation on workplace safety were prompted by public outcry over dramatic cases of workplace fatalities. Likewise, in the USA, public outrage over fraud perpetrated in financial markets and leading to severe losses for small investors brought about the passage of the *Sarbanes-Oxley Act* in 2002.

The *Companies Act* passed by the British Parliament in 2006, however, was not prompted by the kind of severe malfunctioning that led the US Congress to adopt the provisions mentioned above. Nevertheless the *Companies Act* expressly entrenches the principle whereby rights of employees, suppliers and clients, as well as potential impact of corporate operations on the community and the environment must be held in due contemplation, within the overall frame of corporate management, by all managers at every level of decision-making (section 172, §1).

Yet, in both cases one of the salient features associated with the notion of social responsibility of enterprises is, with regards to some substantial aspects of ethical standards of conduct by managers, the non-compulsory nature of the adoption by enterprises of a specific code of ethics and, conversely, in case of adoption of such a code, the obligation to publicize it and apply sanctions for non-observance of its standards.

France embarked on a similar policy designed to encourage social responsibility of enterprises with the passage, in 2001, of the *Nouvelles réglementations économiques* (Act # 2001-420, 15 May 2001). This substantial body of provisions aims to overhaul commercial and corporate law in France and to ensure a form of accountability by obliging enterprises to issue social and environmental assessments and audits (Decree #2002-221, 20 February 2002).

Italy was no less keen to pass a new set of legislation spanning the more recent provisions designed to protect small investors and adopted in the wake of headline-grabbing financial scandals, to workplace safety regulations (Act #123/2007 and its Decree of enactment) which refer for the first time to the principles of CSR and uphold the notion of *best practices* laid down at European level.

What is sorely lacking in the Italian legal system, though, is a comprehensive and coherent approach to the issue of multi-stakeholders and to the resulting framework of duties of corporate directors. This absence, compounded by the haphazard piling up of piecemeal regulations – protection of small investors, workplace safety, corporate criminal liability pursuant to the principles of Act #231/2001 – paves the way to a process of overregulation which is in itself, paradoxically, a prime source of ineffectiveness.

In addition to legislation adopted by the respective sovereign states, the European Union, by way of its Commission, came up, first in 2001, with its Green Paper (*Promoting a European Framework for Corporate Social Responsibility*) and subsequently, in 2003, with its communication to the Council and the European Parliament (*Modernizing Company Law and Enhancing Corporate Governance in the European Union – A plan to Move Forward*), followed by a new communication in 2006 (*Implementing the Partnership For Growth And Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*). Without going into details, the thrust of these documents is firmly underpinned by the notion of *Corporate Social Responsibility* as the drive to strengthen the tools of *corporate governance*.

In its Resolution dated 13 March 2007 (A6-0471/2006 – Rapporteur: R. Howitt), the European Parliament expressly endorsed this policy, stating that "increasing social and environmental responsibility by business, linked to the principle of corporate accountability, represents an essential element of the European Social Model, of Europe's strategy for Sustainable Development and in meeting the social challenges of economic globalization (point 1).

It is worth noting how a concern over an excessively generic definition of CSR runs throughout specifications from points 3) to 7) of the Resolution.

This generic definition, in light of the strictly voluntary nature of the initiatives business may take - "beyond legal prescriptions and contractual obligations" – may encourage opportunistic conducts and incite "some companies to claim social responsibility whilst at the same time not respecting local or international laws" (point 3).

This concern moves the Resolution to declare under point 6) that "the credibility of voluntary CSR initiatives is further dependent on a commitment to incorporating existing internationally agreed standards and principles (...) as well as on the application of independent monitoring and verification". The affirmation is accompanied by an express reference to the recommendations adopted by the "European Multilateral Forum on CSR" of 29 June 2004 about the opportunity for "actions aimed at creating a proper legal framework for Corporate Social Responsibility".

CSR, defined at point 7) of the Howitt Resolution as "measurable and transparent contribution from business in combating social exclusion and environmental degradation in Europe and around the world" finds itself walking on a tightrope between the *voluntary* nature of socially responsible initiatives and the *accountability* (at law?) of the commitments assumed.

This highly sensitive issue has been dramatically highlighted by the tragedy at *ThyssenKrupp*, though a host of other less sensational workplace fatalities would illustrate no less clearly the case for the protection of a range of stakeholders: employees, small investors, consumers, etc.

The voluntary nature of the commitments cannot boil down to a mere form of self-proclaimed righteousness that could smack of shallow posturing and would strike as marketing under another guise, with the attendant risks of misleading publicity should deeds and comportments not rise up to high-sounding statements. For it is quite evident that the free play of market forces is unable to prevent such risks, if

only because of the inevitable time lag intervening between corporate conducts in contrast with stated principles and the backlash in terms of reputation.

Neither can such commitments create at all times and in any event legally binding obligations, leaving aside the fact of the individual and company-specific nature of such commitments. All the more so since the risk is great of seeing binding guidelines stretched by regulators, riding on the crest of popular outrage fuelled by media coverage, to such undue point as to prove counter-productive, over the long term, to a proper regulatory framework, as seen in the sensational cases of *Enron* in the USA or *Parmalat* in Italy.

There is no clear and easy solution to the dilemma at present. The proper avenue to pursue is experimentation, in search of mechanisms that are best conducive to a progressive dissemination – and subsequent stabilization – of a culture of social responsibility taking roots among the players of the global market and growing as shared and informed awareness in the pursuit of socially sustainable development.

From that standpoint, and with regards more specifically to labor issues, the widespread acceptance of the notion of *Social Dialogue* has usefully contributed to the advancement of CSR initiatives and the European Works Council (EWC) have, likewise, played a constructive role in the development of *best practices* in the interest of the protection of large numbers of employees in transnational corporations.