postcare
Posting of third country nationals in care services
the current state of play and scenarios for the future

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POSTCARE

Posting of Third Country Nationals in Care Services: Current State of Play and Scenarios for the Future

Report – Confsal

1. Introduction

The subject of the POSTCARE project is particularly complex from various points of view.

Firstly, we are in front of a legislative framework especially irregular and nonuniform, in which the institution of posting is regulated differently by the countries affected by the phenomenon (both EU Member States and non-EU countries), without effective instruments for legislative connection or for the homogenisation of the rules implied in the postings.

Although such gap is more lateral in the relations among the Member States – due to the effect, even if not decisive, of the EU Directives on the topic – it absolutely represents a main aspect when it comes to third countries.

Secondly, the complexity of the analysis of the postings of third country nationals is particularly felt in respect of analysis of a specific care sector and especially when it comes to the labour relations frequently characterised by the forms of mild protection and scarce attention given to the conditions of the worker.

In such context, one cannot do without taking into consideration that the progressive growth of the sector and the central position it will occupy in the following years (in the first line, through the increase of life expectancy and due to the ever-growing need for care by the elderly people) render necessary the preparation of the instruments and the approaches that guarantee a uniformity of treatment and less approximative regulations, on one side, and reaching of higher protection standards, on the other side.

In light of the above, it is intended herewith to enhance the institution of posting in the care sector within the Italian legislation, by drawing a picture of the peculiarities and critical issues observed, even by gathering the questionnaires intended for the subjects operating in the abovementioned sector, and by trying to provide practical solutions that could be useful for overcoming the critical issues.

2. Legislative Framework

3. Results of the Questionnaires

4. Critical Issues

5. Hypothesis for Solving the Observed Problems

The economic environment in which the companies operate is, in fact, dynamic and constantly changing. The economic operators, in order to be progressive and competitive, feel the need to adapt to the emerging requirements: the new market forms, therefore, impose the modifications of the structures of the companies, which have to increase in order to be able to expand to various markets.

From that point of view, the extraordinary operations at the company level are characterised by the negotiation power recognized to the physical persons who perform the company activity in order to be able to change their company organisation. Such changes can be reflected in changing the original organisation type or in "blending" the latter in another pre-existing organisation, even in dividing the original company structure into various organisations of different character[1].

In that regard, the company structure may suffer changes that take shape through particular and specific company operations[2].

Such operations imply, therefore, changes to the company structure, and initially find their legal connotation in the operation of "transformation", outlining the passage from one company type to another.

On the contrary, by means of the operation of "splitting", the division of the company organisation into more distinctive company realities may or may not be realised. However, through the opposite operation of "merging", several different organisations are joined in one company.

Merger represents a form of the most complete company aggregation, with both legal and economic unification of the subjects that participate in it. It, therefore, consists in the concentration of two or more companies in one which may generate a newco (own merger or merger of equals) or in the incorporation in the pre-existing company (merger by incorporation).

The function of the merger is to allow the concentration of the companies, thus increasing their size and competitivity on the market, by avoiding the double passage of the liquidation of the original companies followed by the foundation of a new company among the same subjects (or by the increase of the subscribed capital by the partners of the closed companies), with significant advantages at the level of continuity of the company activity.

The cross-border merger operations, like the other operations of transformation of the companies, meet the needs for cooperation e grouping of the companies founded in different Member States. These represent particular ways of exercising the freedom of foundation, important for good functioning of the internal market, and therefore make part of the economic activities for which the Member States are obligated to respect the freedom of foundation under art. 43 EC.

Besides the merger, the possibility for exercising the cross-border transformation has a fundamental importance for the companies that intend to expand to other EU Member States.

A peculiarity of a case of cross-border transformations consists in being able to transform a legal personality of the company through its transformation into another company form envisaged by the legal regulations in the State of destination. Such transformation becomes particularly useful for the small enterprises, considering that these by rule don't have at their disposal sufficient economic resources for financing a cross-border merger.

While the EU legislation dealt more than once with the question of cross-border transformations, the Dir. 82/891/EEC regards exclusively the division of the joint-stock companies of the same EU State and the relative protection of the shareholders, creditors and employees; in addition, such directive does not obligate the Member States to allow the divisions to take place, but finds its application only in the States in which such extraordinary operation has already been allowed.

Nevertheless, the freedom to execute cross-border divisions (*freedom to divide*) is protected as an aspect pertinent to the freedom of foundation.

In this treatise, the intention has been to use a dynamic and protected approach to draw the attention of the operators in the sector to the unresolved critical issues, from the point of view of the respondents (unions, employers, experts).

In this regard, the people consulted belong to various categories which are protagonists of the company activity:

- Respondent No. 1
- Age: 42
- Profession: entrepreneur
- Member of a category association: yes

- Respondent No. 2
- Age: 29
- Profession: employee
- Member of a category association: no

- Respondent No. 3
- Age: 45
- Profession: employee
- Member of a category association: yes

- Respondent No. 4
- Age: 37
- Profession: freelancer
- Member of a category association: no

- Respondent No. 5
- Age: 32
- Profession: entrepreneur
- Member of a category association: no

- Respondent No. 6
- Age: 28
- Profession: freelancer
- Member of a category association: no

2. Legal Overview

For the scope of this treatise, it seems useful to outline a short presentation in the area of cross-border company reorganisation, paying attention to the area outside the national borders, and, particularly, to the EU law.

As previously said, the operations of cross-border company reorganisation meet the needs for cooperation and grouping of the companies founded in various Member States, and represent an expression of freedom of foundation under art. 43 EC.

However, the exercising of the freedom of foundation in the form of extraordinary cross-border operations could be prevented by the diversity of the legal systems of the EU Member States. In order to overcome the difficulties deriving from various national rules and procedures and to promote the economic integration, the EU legislator has resorted to the harmonisation, or to the ''alignment of the national legislations to the extent required for functioning of the joint market" (as per art. 3, letter h) of the Treaty of EEC) in the field of company law.

In that regard, it should be taken into consideration that the regulations regarding cross-border company reorganisation (and, particularly, above all, regarding the mergers which the companies regulated by the legislation from various systems participate in) have been subject of numerous studies and interventions by the EU institutions.

In 2005, the EU legislator passed the so-called tenth directive (45) regulating cross-border mergers among corporations. That document was later repealed and replaced by the Dir. 2017/1132 that contains the regulation from the abovementioned directive from the year 2005 (as modified by the subsequent legislative interventions).

Last, on 12 December 2019, the Directive (EU) 2019/2121 of 27 November 2019, the subject of which were cross-border transformations, mergers and divisions, was published in the Official Journal of the EU.

This recent Directive (which has not been implemented yet by the Italian legislator) introduces modifications into the directive (EU) 2017/1132 which regulates the cross-border mergers of the corporations, as well as the operations of cross-border transformation and division, that have never been subject to a specific regulation, in order to promote the economic growth through better harmonisation of the legislation applicable to the companies that intend to pursue the mobility in the European context. Consequently, the Directive has introduced a systematic and complete legislation for all cross-border extraordinary operations, including transformations and divisions, putting a stop on the application uncertainties observed in the practice pursuant to a non-systematic regulation of these matters.

Among the innovations of the directive, the following should be briefly presented:

- The new provisions introduce full procedures for the cross-border transformations and divisions and envisage additional regulations of the cross-border mergers of the corporations founded in an EU Member State;
- Simplifications envisaged for all the three operations, such as the possibility to accelerate the procedure by means of waiving the submission of the reports for the partners and the workers in case the shareholders agree on that or the company or one of its subsidiaries does not have any employees;
- Implementation of an obligatory procedure against the abuse in order to verify the legality of the cross-border operations in relation to the pertinent national legislation, by allowing the state authorities to block a cross-border operation when it is conducted for wrong or fraudulent purposes;
- Regulations for protection of the workers that ensure the respect of the obligations of information and consultation and better guarantees if one of the companies resulting from the cross-border merger is managed in the regime of the workers' participation.

Therefore, a particular attention is paid even to the **employees** of the companies involved in the cross-border operations: the directive guarantees, in fact, that they are adequately informed and consulted in respect of the envisaged impact of the operation. A better protection is reserved for the rights of the minority shareholders or the shareholders without voting rights, while more clear and reliable guarantees are granted to the creditors of the company involved.

Last, the use of digital instruments during the entire operation is promoted, with a view to execution of many formalities online, such as the issuance of the preliminary certificate for the operation. All the relative information will be exchanged through the existing company registers interconnected in digital format.

It is specified that the Directive envisages that the Member States adapt to its provisions by 31 January 2023.

The implementation of the European legislation by the Republic of Italy has been carried out, first of all, through the adoption of the Leg. d. 108 from the year 2008, which, in order to implement the directive 2005/56/EC, has substantially modified the relevant codes in the area of mergers. It should be emphasized that, before the implementation of the directive 2005/56/EC, the only provision that contemplated explicitly the cross-border mergers in the Italian legislation (21) was article 25(III) of the Law No. 218 of 31 May 1995, pursuant to which it was set forth that "the transfers of the

registered seat to another State and the mergers of the entities in various States have effect only if carried out in accordance with the laws in the said involved States"

The provisions contained in the Leg. d. No. 108 of 30 May 2008, which implements the directive 2005/56/EC of the European Parliament and of the Council, of 26 October 2005, have, therefore, drafted a systematic legislation of the cross-border mergers of the corporations in the national system, which was not influenced by the subsequent intervention from the year 2014 in a relevant manner.

In that regard, it is of use to point out that art. 1 (1), lett. d) defines the cross-border merger as an "*operation under article 2501(1) of the Civil Code, realised among one or more Italian companies and one or more companies of another Member State, the result of which is an Italian company or a company of another Member State, with the exclusion of the partial company transfers*".

The Italian legislator gives a definition considered to be "essential" by numerous experts. In fact, referring to art. 2501 of the Civil Code, the regulation that strictly and exclusively regards the merger, the Leg. d. No. 108 of 30 May 2008, excludes the application thereof to the divisions as well.

When it comes to the field of application, the Leg. d. No. 108/2008 «is applied» (art. 2(1)), by rule, «to the cross-border mergers among one or more Italian corporations and one or more corporations of another Member State, the registered seat or the central administration or the core activity centre of which is situated in the European Community».

Therefore, the application presumptions of the Leg. d. No. 108/2008 are: a) that the «corporations» participate in the operation; b) that the merger takes place among one or more «Italian companies» and one or more «companies of another Member State».

Implementing what was indicated in the directive from the year 2005 (according to which each company participating in the merger remains, in general, subject to the regulations in force in its country of origin), the leg. d. No. 108/2008, in art. 4(1), specifies that – notwithstanding what was otherwise set forth in the same legal measure – the forecasts from "title V, chapter X, section II of the Book V of the Civil Code" apply to the Italian companies that participate in the merger. In addition, it is set forth that, to the company resulting from the merger, the lex societatis from the legal system of the State in which it will have its registered seat after the operation will be applied.

In the implementation of article 16 of the Directive 2005/56/EC, it is expressly envisaged that *the workers of the participating companies should be absolutely involved* in the cross-border merger

operations; such involvement may be realised according to the rules of the legislation applicable to the company resulting from the merger. The EU regulations, as resulting from art. 16 of the Directive on the cross-border mergers and from the entire Directive 2001/86/EC, have been formulated with the intention to guarantee that the workers' rights to participate will not be violated, in case a subsidiary participates in the merger operation.

In addition, when it comes to the rules contained in the Leg. d. 108/2008, art. 19 contemplates the criteria inherent to the forms of participation and to the average number of workers, envisaging that, if in the six months preceding the publication of the merger project at least one of the involved companies has a number of employees that exceeds five hundred and is managed in the regime of the workers' participation, the same participation in the Italian company resulting from the cross-border merger and the involvement of the workers in defining the relative rights will be regulated based on the procedures, criteria and ways set forth in the agreements among the parties that conclude the national collective labour agreements applied to the company itself (art.19(I)).

In the absence of the agreement among the concluding parties, the decree envisages the application of art. 12(2, 3 and 4) of the regulation 2157/2001 and of the determined provisions contained in the Leg. d. 188/2005. If a company managed in the regime of the workers' participation takes part in the process of a cross-border merger, the Italian company resulting from the cross-border merger which is obligated to apply a participating regime will have to assume a legal form that envisages the exercising of the rights to participation (art. 19(IV)).

As we know, the European legislator has recently intervened with the Directive EU 2019/2121 in the area of cross-border company reorganisation, tackling and regulating the shortcomings that had been observed in the application of the previous legislation. Particularly, he has envisaged a reinforcement, by means of the regulations *ad hoc*, of the protection offered to the creditors, partners and employees.

In that regard, it is specified that, regarding the protection of the employees, it is the obligation of the administrative authority to prepare a report *ad hoc* with a view to illustrating the implications of the merger for the future activity of the company and for the safeguarding of the labour relations and the relevant possible modifications of the employment conditions and of the location of the centres of activity.

The objective of the new EU directive on cross-border transformations, mergers and divisions is to modernise the EU company law, introducing the simplifications for cross-border transformations,

mergers and divisions, thanks to the use of wide-ranging digital instruments; everything, however, without waiving the needs for speed of the interests of the workers, minority shareholders and creditors.

A special attention should be paid to the recital (12) of the EU Directive 2019/2121 which sets forth the following: "In order to be possible to take into account legitimate interests of all stakeholders in the procedure applicable to the cross-border operation, the company should elaborate and publish the project of the proposed operation that contains the most relevant information thereof. The administrative or management body should include, if envisaged by the national legislation or in accordance with the national practice, or both, the workers' representatives in the administrative bodies in the decision-making on the project of the cross-border operation. Such information should include at least the proposed type of the company or companies, the articles of association, if applicable, the charter, the indicative timeline proposed for the operation, and the details of any guarantee offered to the partners and creditors. In the company register there should be a notice that informs the partners, creditors and workers' representatives or, in the absence of these representatives, the employees themselves, of the possibility for submitting the observations on the proposed operations. The Member States should also decide whether the report of the independent expert envisaged by this directive is to be published".

In respect of the obligations of information, the recital (13) of the abovementioned directive envisages that "the company that performs a cross-border operation should draft a report in order to inform the partners and the employees. The report should illustrate and explain the legal and economic aspects of the cross-border operation proposed, and its implications for the employees. In particular, the report should explain the implications of the cross-border operation in terms of the future activity of the company, including its subsidiaries. When it comes to the partners, the report should indicate the remedies at their disposal, in particular the information of their right to withdraw from the company. When it comes to the employees, the report should illustrate the implications of the cross-border operation proposed on the employment situation. It should illustrate, particularly, the possibility for substantial changes of the employment conditions envisaged by the law, of the collective agreements and of the transnational business agreements and of the location of the centres of activity of the companies, such as the location of the administrative seat. In addition, it should provide the information of the administrative body and, if applicable, of the personnel, of the equipment, of the premises and of the goods before and after the cross-border operation, of the

probable modifications of the organisation of work, of the salary, of the location of specific workplaces and of the consequences envisaged for the employees that occupy them, as well as of the social dialogue at the company level, within which, if applicable, of the representation of the employees in the management bodies.".

3. Evaluation by the Respondents

In order to identify the point of view of the operators in the sector, the subjects belonging to various categories involved in the business reorganisation processes have been questioned. In that regard, it has been shown that, in order to improve the legislation on the cross-border business reorganisation of the companies, it would be necessary to intensify and facilitate the mobility of the companies and to develop a better coordination among the involved subjects.

With a view to increase the workers' participation in the cross-border reorganisation process, an opportunity has arisen to involve the workers in the decision-making procedures as well, allowing them to collaborate on problem solving from the planning stage. Thus the workers could contribute to finding practical solutions, useful for the entire reorganisation process.

In addition, in order to improve the legislation on the cross-border business reorganisation of the companies, a respondent (freelancer) has pointed out that it would require: providing that field with a clear and uniform legislation, at least in the European context, avoiding as much as possible the useless bureaucratic delays; giving more importance to the workers' requests, above all via the intermediary bodies, guaranteeing them the possibility to maintain their job at the main place of performing the tasks (in the absence of such possibility, it would be convenient to offer an appropriate indemnification and, possibly, a salary increase to the person forced to move to another State in order to do his/her job).

In this regard, according to the respondents, a bigger participation of the workers in the cross-border reorganisation could improve the efficiency of the procedure: «the fact that they feel as they belong to an organisation could generate more interest and therefore improve the result». In addition, it would be fundamental to know the workers' point of view and to guarantee a close contact with them, reaching the compromises and maintaining a transparent relation in all and for all. In that regard, a respondent has emphasized that «anyway, without the (satisfied) employees, the companies could never carry on with their business».

In particular, in order to realise a bigger involvement of the workers in the business processes, it is suggested that a better education and information should be guaranteed to them, as well as an easy consultation with the competent and representative bodies in the business processes.

In order to increase the workers' participation in the cross-border reorganisation process, the respondents have suggested the holding of bigger and more frequent consultations/round tables for the union representatives, the subjects that should be capable of better representing the requests of the workers as category, and the managers of the companies involved. In addition, it is considered to be possible to have a bigger involvement of the workers in the business processes "through the activities of valid union representatives and, if necessary, also of the legal consultants capable of intermediating with the company managers and of protecting the workers' rights in the best possible way".

Indeed, the majority of the respondents have emphasized that the role attributed to the workers of the company involved in a cross-border reorganisation process would be, at present, of merely passive and executive type. That is also the opinion of the ones that think that the workers' requests are not often attributed a proper importance, that «they feel "kept on edge" for too long without minimal guarantees (security of job, of the salary, possible transfer of the registered seat, etc.) that belong to them, regardless of the fact that they have done their job for the relative company for a long time».

The main legislative gaps in the field of cross-border reorganisation have been identified in the absence of a uniform and systematic European legislation and in a fragmented and imprecise national legislation. One of the respondents has pointed out that it would be convenient that, starting from the national context, the matter is regulated by a clear, uniform legislation, understandable for everybody, not only to the persons in charge of works. In addition, bigger guarantees will be given to the workers regarding both the technical duration of the procedure and the maintaining of the job or, alternatively, regarding the various conditions that they should face in case of the transfer of the registered seat.

4. Conclusions

The Directive No. 2005/56/EC, passed as a result of the journey that lasted over 10 years, has laid down the foundations and consolidated a drive for a definitive opening of the legislation towards the cross-border mergers in various intra-Community national systems.

Undoubtedly, the "X Directive" and the consequent Leg. d. 108/2008 have filled in the legislative vacuum incompatible with the ever more felt internationalisation of the economic activities, and have allowed the companies to reach a better level of integration, sufficient for taking them outside the local markets in order to compete on the global ones.

The Directive, regardless of providing the entrepreneurs of the European Union with a ''joint'' means of integration, in the whole has not – as it was so hoped for – facilitated a shared approach to that means, given that the manner of referring to the national systems that are opposed among them reserves for them a role that those involved in the merger are forced to bear always in mind.

In this regard, the recent directive EU 2019/2121 has intervened by regulating the shortcomings that had been observed in the application of the previous legislation and, particularly, by envisaging a reinforcement, by means of the regulations *ad hoc*, of the protection offered to the employees of the companies involved as well.

In the whole, the legislation on the cross-border reorganisation seems adequate for regulating a majority of aspects of these complicated operations; however, some important questions and critical issues do not seem to have been solved at all.

The adoption of the EU legislation in the field has, in fact, left some critical issues unsolved for the operators in the sector, although it has at the same time contributed to giving a new impulse to the national economy, thus allowing the local operators to appear – in totally competitive logic – on the unified European market as well.

The numerous legislative interventions at the EU level point out, however, the importance attributed by the EU legislator to the legislation on the cross-border extraordinary operations. The latter meet the needs of the companies in the periods of development and growth of wealth, but also in case of the economic recession. The extraordinary operations are ideal instruments for the company structure reorganisation and for the improvement of the allocation of the capital and the production factors. In particular, the *cross-border* operations render possible the mobility of the economic initiatives at a transnational level, without any cessation of continuity in the company's existence.

Besides meeting the needs for growth and consolidation of the individual companies, the cross-border extraordinary operations serve also for exercising one of the four fundamental freedoms of the EU that represent legal foundations of the common market: the freedom of foundation. It is a common ground, in doctrine and case law, that the cross-border mergers, divisions and

transformations represent the manners of exercising the freedoms of foundation formulated in art. 49 of the T.F.E.U.

Regardless of a globally positive impact of the current EU regulations concerning the extraordinary operations, the evaluations performed ex post have shown some obstacles to the full efficiency of the legislation in that matter. In particular, it has been discovered that a majority of the economic operators involved think that ultimate interventions, designed to protect the involved workers, are required, and the need for introduction of accelerated (or preferential) procedures into the Directive has been emphasized as well.

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