Information and consultation obligations for employers according to Legislative Decree no. 25/2007

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1. Introduction

Legislative decree no. 25 dated February 6, 2007 (hereinafter, the "Decree"), issued on the Official Gazette no. 67 dated March 21, 2007, implementing the EC directive no. 2002/14, introduces within the Italian legal system a general right to information and consultation of employees, and of their representatives, formerly ruled in a limited and fragmentary way for some specific hypotheses such as the request for the admittance to the wage guarantee fund, the redundancy procedures as well as the transfer of undertakings.

The information and consultation obligations for employers, after a transition phase, are definitively effective - as for the identification of the involved companies - from March 24, 2008.

2. Scope

The Decree applies to all public and private companies located in Italy, carrying out an economic activity, also non-profit, hiring at least 50 employees. The numerical threshold must be calculated on the *"monthly weighed average number"* of individuals employed in the last two years (also including employees hired on a fixed – term basis for a period higher than nine months) being *"employed and under the direction of the employer"*, with consequent exclusion of self-employed and semi-employed (parasubordinated) workers.

For companies carrying out their activity on a seasonal basis, the aforesaid period of nine months of the fixed - term contract is calculated on the basis of the corresponding effective working days, even if not on a continuous basis.

3. Information and consultation arrangements

The law provides for the collective bargaining agreements to identify locations, timing, subjects, terms and content of the information and consultation rights granted to the employees.

Information and consultation cover:

a. the company's recent and predictable trend, as well as its economic situation;

b. the situation, structure and predictable trend of the employment within the company, as well as, in case of threat to the employment, any anticipatory measures envisaged;

c. the company's decisions likely to lead to substantial changes within the work organization or the work contracts.

The information by the employer must occur according to timing and in such fashion appropriate to the aim and in order to enable the employees' representatives to conduct an adequate study and prepare, where necessary, a consultation.

The Decree identifies, among the employees' representatives, the ones provided for by the Inter-confederal Agreements dated December 23, 1993 (Internal Work Councils – "RSU" - Confindustria) and July 27, 1994 (Internal Work Councils – "RSU" - Confcommercio) and subsequent amendments, or by the applicable national collective bargaining agreements, should the aforesaid Inter-confederal Agreements not apply (see article 2, paragraph 1, letter d).

4. Confidential information

The employees' representatives, and any experts who assist them, are not authorized to reveal to employees or third parties information expressly provided to them on a confidential basis, and identified as such by the employer or its representatives, in the legitimate interest of the undertaking. This obligation shall continue to apply for the period of three years following the expiration of the term of their office, wherever the said representatives or expert are. However, the Decree provides that the national collective bargaining agreements can authorize the employees' representatives and their consultants, if any, to pass on confidential information to employees or third parties bound by an obligation of confidentiality.

Failure to comply with the confidentiality obligation leads, in addition to incurring civil liability, the application of the disciplinary measures provided by the applicable national collective bargaining agreements.

In any case, pursuant to article 5 paragraph 2 of the Decree, the employer is not obliged to undertake consultation or communicate information having such a nature that, in light of proved technical, organizational and productive reasons, it would seriously harm the functioning of the undertaking or would be prejudicial to it.

Once again the Decree gives to the national collective bargaining agreements the task of ruling on the establishment, functioning and members of a board (*Commissione di conciliazione*) in charge of handling the disputes on the confidential nature of the information provided and identified as such, as well as in charge of identifying those technical, organizational and productive reasons based on which information capable of harming the functioning of the undertaking or being prejudicial to it are identified in turn

The confidentiality obligation set forth for by the Decree is in addition to the ones ordinarily provided by Legislative Decree no. 196 dated June 30, 2003 ("Data Protection Code").

5. Sanctions

In case of violation, by the employer, of the obligation to communicate information or undertake consultation according to the Decree, an administrative fine ranging from a minimum of Euro 3,000.00 up to a maximum of Euro 18,000.00 per breach shall apply, while in case of violation, by the experts assisting the employees' representatives, of the confidentiality obligation, an administrative fine ranging from a minimum of Euro 1,033.00 up to a maximum of Euro 6,198.00 shall be applicable.

The Provincial Labour Office is the office in charge of receiving notice on any possible breach of the Decree and applying the relevant sanctions accordingly. In this respect, the Decree makes a specific reference to Law no. 689 dated November 24, 1981, regarding the regime governing application of administrative fines, and Legislative Decree no. 124 dated April 23, 2004, ruling on the inspecting and investigating tasks of the Ministry of Labor.

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6. Critical aspects

The Decree, which establishes a general framework for the right to information and consultation of the employees, is without prejudice to the specific information and consultation procedures set forth by other laws (such as Law no. 428 dated December 29, 1990 and no. 223 dated July 23, 1991), and broadens the cases where the employer is subject to information and consultation obligations.

Although one year has expired from the coming into force of the Decree, significant concerns still exist with respect to, among others (i) when the employer is actually subject to the information and consultation obligations; (ii) the actual role to be performed by the national collective bargaining agreements which, according to the Decree, are supposed to identify locations, timing, subjects, terms and content of the information and consultation obligations; and (iii) the consequences arising from the violation of such obligations.

As for the first issue, it is worth noting that the adoption of the Decree may imply that certain transactions which, before the issuance of the Decree, did not require the implementation of information and consultation procedures with trade unions, may start triggering such procedures. For example, a stock transfer transaction - that, according to case law, does not qualify as a transfer of undertaking pursuant to article 2112 of the Civil Code and, therefore, does not trigger the information and consultation procedure required by article 47 of Law 428/90 - could fall within the scope of the Decree if the transaction has an impact on the company's trend, its economic situation, the work organisation or the work contracts.

As regards the second issue, only a few national collective bargaining agreements (for example, the recently amended national collective bargaining agreement for the metal-mechanical sector) have already introduced specific provisions on the information and consultation obligations set forth by the Decree.

Based on a strict interpretation of the provisions of the Decree, arguments might be found in support of the position that the Decree does not apply if the relevant collective bargaining agreement applicable to the case at issue does not contain any provisions ruling on the information and consultation obligations set forth by the Decree. However, at this stage, lacking specific case law, a different interpretation might be sustained as well, according to which the Decree applies even if no specific collective provisions exist.

Finally, with respect to the sanctions, as already said the Decree establishes administrative fines applicable to employers and experts assisting the employees' representatives and, further, it provides for civil liability and the application of the disciplinary measures provided by the applicable national collective bargaining agreements in case of breach of the confidentiality obligation.

Besides such sanctions, it is not clear whether the violation by the employer of the information and consultation obligations established by the Decree may qualify, also, as an anti-union behaviour pursuant to (and with the consequences established by) article 28 of Law no. 300/70 (the so-called Workers' Statute).

In light of such risk and until the issuance of clear guidelines from case law, it is advisable for employers falling under the scope of the Decree to give prior information to the employees' representatives of those decisions which may have an impact on the employment, on the work organization, on the work contracts, regardless of whether specific collective provisions exist in this respect.