THE WORKING PARTNER IN FAMILY ENTERPRISE. EUROPEAN AND NATIONAL ISSUES

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ABSTRACT: The essay focuses on the discipline of the work done by one partner in the company of the other in cross-border couples and on the problems involved in this case. More specifically the focus is on the hermeneutical problems that arise both at the level of European legislation and at the level of Italian national discipline which is applicable according to European conflict criteria, showing the ambiguities and wide areas of shadow left uncovered by the latter.

KEY WORDS: Worker; family; cross-border couple; registered partnership; de facto cohabitation.

RESUMEN: *El ensayo se centra en la disciplina del trabajo realizado por un socio en compañía del otro en parejas transfronterizas y en los problemas que conlleva este caso. Más concretamente, la atención se centra en los problemas hermenéuticos que surgen tanto a nivel de la legislación europea como a nivel de la disciplina nacional italiana que es aplicable según los criterios de conflicto europeos, mostrando las ambigüedades y amplias áreas de sombra dejadas al descubierto por esta última.*

PALABRAS CLAVE: *Trabajador; familia; pareja transfronteriza; sociedad registrada; convivencia de hecho.*

I. FAMILY WORK AND CROSS-BORDER COUPLES.

The increasing mobility of individuals within the territory of the European Union and beyond imposes the need of having a legal framework as clear and uniform as possible to apply in all cases where a relationship is characterized by elements of internationality (such as couples of different nationality living in the country of origin of one of the partners or in a third State, or couples of the same nationality living in a foreign country and so on). From this point of view the harmonization of private international law has become a primary objective of the Union, in order "to maintain and develop an area of freedom, security and justice in which the free movement of persons is ensured"[1]. A process, this one, which may be defined as "communitarisation" of conventional sources of private international law and was made possible by the powers conferred on the Union by Art. 81 TFEU[2].

In this respect the family work (*i.e.* that particular type of employment relationship in which the member of a family carries out his activity in favour of another member of the same family) shows, when occurring in couples marked by international elements, particularly critical profiles, as it stands on that thin line of border that divides family bonds from the working ones.

In fact family employment, and that of the partner *in primis*, seems to brand itself with speciality compared to the normal ideal of the working relationship. Speciality given by the particular bond that ties the employee to his/her employer, and that should take place in a climate of solidarity, mutual benevolence and community of interests[3], while the "normal" working relationship would highlight itself for the extraneousness, if not the opposition, of the interests pursued by the parties.

1 Signes De Mesa, J.I.: "Introduction", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, p. 6.

2 Orlandini, G.: "Il rapporto di lavoro con elementi di internazionalità", *Working Papers CSDLE "Massimo D'Antona"*, 2012, no. 137, p. 4.

3 Scognamiglio, R.: *Diritto del lavoro. Parte generale*, Bari, 1972, p. 198.

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This, in its turn, produces the risk of framing the working relationship of the partner in the services rendered *affectionis vel benevolentiae causa*, marked by the element of gratuity[4], and the risk to leave him/her in a position of extreme precariousness and weakness, practically abandoned to the will and generosity of the family's employer and without a real legal protection[5].

It is therefore necessary to figure out which, between the regulatory instruments for the harmonisation of private international law developed by the Union, would be applicable to this type of legal relationship for the protection of the working partner, that risks – for the particularity of the work carried out – to find himself in a doubly unfavourable situation, both as family member and as employee.

On the point the choice seems to be between the Regulation Rome I, no. 593/2008 of 17th June 2008 on the law applicable to contractual obligations, or the Regulations n. 2016/1103 and n. 2016/1104, respectively on matrimonial property regimes and registered partnerships' ones (so called Twin Regulations), with the consequence that, at first, it will be essential to see if the work is carried out for the benefit of the undertaking of the spouse, the one of the civil partner or the *de facto* partner's one.

II. THE *DE FACTO* COHABITING WORKER IN CROSS-BORDER COUPLES.

Reversing the order, the less controversial issue would appear to be the third one, that is the one of the work done by the *de facto* partner in the firm of his/her partner. Excluded definitely the application of Reg. 1103/2016 that concerns married couples, some doubt may arise over the notion of "registered partnership" provided by Reg. 1104/2016, *i.e.* "the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation".

It is in fact necessary to understand what the European legislator means by registration "of which is mandatory under" the law, given that in *de facto* cohabitation provided by law 20th May 2016, n. 76 (from now on Cirinnà law) the records registration seems not foreseen for the purpose of establishing the relationship, but only for purposes of evidence. On the issue it could help the Court of Justice case law, according to which priority should be given to the textual data[6], thus arguing for the exclusion of the *de facto* cohabiter from the scope of Reg. 1104/2016.

4 Amoroso, G.: *L'impresa familiare*, 1998, Padova, 1998, p. 5; Balestra, L.: *L'impresa familiare*, Milano, 1996, p. 9.

5 Cottrau, G.: *Il lavoro familiare*, Milano, 1984, p. 13; Balestra, L.: "Art. 230 *bis*", in Sesta, M. (ed.): *Codice della Famiglia*, 3rd ed., Milano 2015, p. 928.

6 Corte giust., 20th December 2017, c. 372/2016, Soha Sahyouni c. Raja Mamisch, *Foro it.*, 2018, IV, cc. 280-281, with note by Di Meo, R.: *Il diritto europeo e il divorzio privato islamico*.

However according to a part of the doctrine one should not only stop at the literal datum, but there should be an exegesis that takes into account the *ratio* of the norm. In other words, one should think that the registration must be created only in accordance with the legal rules required for its creation, with the consequent irrelevance of the constitutive or declarative function of the same. If to this fact one joints that the registration would also perform advertising functions, in order to make the union and the following effects recognisable to third parties, the thesis at hand assumes the *de facto* union that is based on a cohabitation contract, such as the one provided by Art. 1, paragraphs from 50 to 52, of law 76/2016, to fall under the scope of Reg. 1104/2016[7].

On the contrary, it has been suggested that accessing the *de facto* cohabitation the couple voices its will not to join in marriage nor civilly, with the consequence that the necessary bond with the wedlock or the registered partnership that is given by the registration seems to break[8].

Argument, this latter, which also seems strengthened by Art. 26 of Reg. 1104/2016, in the case of applicable law in the absence of choice of partners, that would be identified in the law of the State under whose law the registered partnership was created. In fact, if it's missing the registration as the instrument establishing the *de facto* cohabitation – which is indeed "*de facto*" and not "*de iure*" – you wonder what would be the law to apply in case the partners have not exercised their negotiating autonomy.

It therefore seems more correct including the employment relationship between *de facto* partners in the scope of Art. 8 of Rome I Regulation on contractual obligations, which covers every employment contract with international profiles.

In fact the "individual employment contract" pursuant to that Article should cover – according to the Court of Justice's teachings[9] - not only the standard employment contract, but also every relationship characterized by a personal performance, the subjection to the power of the other party and the payment in any form of compensation for the service rendered. Relationship in which what matters, rather than the legal subordination, are the economic dependence and the functional link between the worker's activity and the activity of the beneficiary that integrates the employee's performance in his/her organization. It follows, therefore, that the concept of "individual employment contract" includes also

7 Garetto, R., Giobbi, M., Viterbo, F.G. and Ruggeri, L.: "Registered partnerships and property consequences", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property relations*, cit., p. 49 f.

8 Bruno, P.: *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Milano, 2019, p. 29.

9 Cfr. *ex multis* Corte giust. CE, 31th May 1989, c. 344/87, Bettray, *Foro it.*, 1991, IV, c. 204.

employment relationships known as "parasubordinated"[10], in which can be counted even the work given by the *de facto* cohabiting in the company managed by his/her partner.

In this case, the main criterion for applying the Italian rules becomes the choice of the parties, as long as, in accordance with the principle of *favor laboratoris*, the very choice doesn't imply "the waiver of the protection granted by the mandatory rules of the law which would be applied without the choice"[11], namely in the order, the mandatory rules of the law of the country in which or, failing that, from which the employee habitually carries out his work, or in the alternative, the one of the country where the place of business through which the employee was engaged is situated or, at last, the law of the country with which, regarding the circumstances as a whole, the contract is more closely connected.

III. CROSS-BORDER COUPLES AND SPOUSE/CIVIL PARTNER WORKING IN THE PARTNER'S ENTERPRISE.

More complicated is instead – paradoxically – the case where the family employee is the spouse or the civil partner. In such an event there is a relationship that, even if falling within the working category of the parasubordination, presents nevertheless clear profiles of family bonds. In other words, it is necessary to verify whether the profiles of specialities regarding the employment relationship are prevalent – in which case you can enter the employment relationship carried out by the spouse or the civil partner within the scope of the Rome I Regulation -, or, on the contrary, the prevalence regards the family relationship, with the application of the Twin Regulations.

The risk of facing an interpretive *impasse* on the issue is great. And this because, whilst the case of family work is comparable to parasubordination, part of the doctrine highlights the text of Art. 1, para. 1, letters a) and b) of Rome I Regulation, that exempts from its scope obligations arising out of family relationships and of matrimonial property regimes, and removes – while placing the question in doubtful terms – the family work from Art. 8 of the very same Regulation[12]. It would necessarily follow the inclusion of spouse/civil partner's job performance in the scope of Twin Regulations, that in the exceptions – which, as exceptional circumstances, must be strictly interpreted[13] - include social security, but not the employment relationships between the partners.

10 Orlandini, G.: "Il rapporto", cit., p. 6; Gubboni, S.: *Diritto del lavoro europeo. Una introduzione critica*, Milano, 2017, p. 134.

11 Orlandini, G.: "Il rapporto", cit., p. 9.

12 Orlandini, G.: "Il rapporto", cit., p. 7.

13 Corte giust., 6th June 2019, c. 361/18, Ágnes Weil c. Géza Gulácsi, *Riv. dir. int. priv. proc.*, 2020, p. 197.

Moreover, this outcome does not seem to be entirely obvious.

In the first place this exclusion seems based on the belief that family work, because carried out within the family, must be free labour and so left out *per se* from Rome I Regulation[14]. But the presumption of family work as free one has been very reduced, at last in the Italian system, by the family law reforms of 1975 and 2016[15]. So today it appears incorrect to state that the job performance done inside the family is *per se* a free one.

Again, most of the labour law doctrine[16] and the case law of the Italian Supreme Court of Cassation firmly states that the family work – namely a relationship of personal, continuous and coordinated collaboration between the family members – is a form of parasubordination[17], reason why can be considered as "living law" the insertion of this situation in employment relationships rather than in family ones.

To reinforce this "living law" there is, last but not least, also the Court of Justice's jurisprudence[18], that considers as employee the worker which is – more than legally subordinated to – economically dependent on his/her employer. As already highlighted before, what matters is the personal job performance and the ongoing insertion of the person which gives this performance in the businesses organization of the one that receives it, because the European judges value the hetero-organization more than the hetero-direction, so that the employee is the worker which produces wealth in a continuous way and not simply occasional.

In the end, for the Court of Justice, European labour law – of which Art. 8 of Rome I Regulation is surely a part[19] - applies also to atypical and flexible forms of work, including the very same parasubordination.

So even the family employee (spouse or civil partner, it does not matter) generates wealth, due that his/her performance is ongoing and surely coordinated with the enterprise of family entrepreneur (unless we'd be in the different case of the self-employed person) and for this he/she must be considered "worker" according to European judge's interpretation.

14 Villani, U.: *La Convenzione di Roma sulla legge applicabile ai contratti*, 2nd ed., Bari, 2000, p. 151.

15 Amoroso, G.: *L'impresa familiare*, cit., p. 22, for which the presumption still acts outside the family law reforms.

16 Cottrau, G.: *Il lavoro familiare*, cit., p. 106; Papaleoni, M.: "Lavoro familiare", in *Enc. giur. Treccani*, XX, Roma, 1990, p. 18. For the jurisprudence see last Cass., 15th June 2020, no. 11553, *www.lavoroediritto.it. Contra* see Passalacqua, P.: "Profili lavoristici della l. n. 76 del 2016 su unioni civili e convivenze di fatto", *Working Papers CSDLE "Massimo D'Antona"*, 2017, no. 320, p. 24 f.

17 Cass., 8th April 2015, no. 7007, *Fam. dir.*, 2015, p. 1080, with note by Barillà, G.B.: *Partecipazione all'impresa familiare, sorte degli utili non ripartiti e prova della comunione*, and Cass., 15th June 2020, no. 11553, cit.

18 Corte giust. CE, 31th May 1989, c. 344/87, *Bettray*, cit.

19 Orlandini, G.: "Il rapporto", cit., p. 6.

And this is so true that, always according European case law, the fact that a person would be linked by marriage to the owner of the enterprise in which he/she works "does not preclude that person from being classified as a «worker»" within the meaning of EU labour law[20]. With the consequence that family work, more than being part of the obligations arising from the family relationship or the matrimonial property regime according to Art. 1, para. 1, letters a) and b) of Rome I Regulation, seems to flow into the "individual employment contract" provided by Art. 8 of the same Regulation.

Yet, we must never forget that the one of the family worker is a doubly weak position, having regard to the particular working environment and the ever-incumbent presumption of gratuitousness that goes with the *affectionis causae* relationships[21], and for this particularly at risk of exploitation.

It follows that a teleological and axiological interpretation[22] should favour the application, to family work with international profiles, of Rome I Regulation's Art. 8, which saves the principle of *favor laboratoris*, thanks to the rules of protection which cannot be derogated by private autonomy and the overriding mandatory provisions stated in the following Art. 9[23]. Twin Regulations instead do not seem to provide safeguard clauses of the same type.

IV. THE CASE OF ART. 230 *BIS* OF ITALIAN CIVIL CODE.

If, as a result of the Rome I Regulation's criteria, Italian law was to apply, the referenced standard, both for the spouse and the civil partner that works in favour of his/her partner, will be the one provided by the family law reform of 1975, namely Art. 230 *bis* of Italian civil code (from now on c.c.)[24].

According to its text, the family member, who provides, on a continuous basis, work in the family or the family enterprise, is entitled to maintenance and share in the profits of the enterprise according to the quantity and quality of the work done, provided that a different type of relationship was not configurable. The

20 Corte giust., 8th June 1999, c. 337/97, Meeusen c. Hoofddirectie van Informatie Beheer Groep, *Not. giurispr. lav.*, 1999, p. 572.

21 The presumption that family work performances are free of charge, because "normally given «*affectionis vel benevolentiae causae*»", has been recently reaffirmed by Cass. (ord.), 22th February 2018, no. 4345, ined. On the threat of gratuitousness' presumption, since it may result "much penalizing for the family member", that does not see economically valued his/her work, see Dogliotti, M. and Figone, A.: "L'impresa familiare", in Auletta, T. (ed.): *I rapporti patrimoniali fra i coniugi*, III, in *Tratt. dir. priv.*, directed by Bessone, Torino, 2011, p. 709.

22 Cfr. Perlingieri, P.: *Il diritto civile nella legalità costituzionale nel sistema italo-comunitario delle fonti*, 3rd ed., II, Napoli, 2006, p. 440 f., according to which it is necessary to exercise also on the family a control aimed at protecting the inalienable and fundamental rights of the person.

23 Orlandini, G.: "Il rapporto", cit., p. 9 ff.

24 Colussi, V.: "Impresa familiare", *Dig. disc. priv., Sez. comm.*, VII, Torino, 1992, p. 174.

family worker is also entitled to participate in the management of the enterprise on certain decisions provided for in the law (use of profits and increases, extraordinary management, production addresses and end of the enterprise) and finally has a pre-emptive right on the undertaking in case of its transferring or hereditary division.

Art. 230 *bis* identifies the only case that, in our legal system, can be really defined as "family work" in the proper sense, seen its residual nature stated precisely by the rule's *incipit*, in which can be read that the provisions it contains must be applied only if "a different type of relationship was not configurable"[25].

In other words, the work of a family member for the benefit of another family member's enterprise, where there was not a case of normal employment – having the kinship no relevance for the purposes of subordination –, of self-employment, or of any associative or corporate relationship, must necessarily merge in the special case provided by Art. 230 *bis.*

This, in turn, means that the rule in question is both special and imperative, at last *in peius*, since the possible discipline provided by the autonomy of the negotiations cannot be less favourable - for the family worker - of the one provided by Art. 230 *bis*[26].

In order to have family work it is therefore necessary that the spouse, a relative within the third grade or a kindred within the second would provide his or her working activity in favour of the entrepreneur. This working activity must be done directly inside an enterprise managed by another family member or can take the form of domestic work, as long as the enterprise itself would receive a benefit from it.

There will be no family work if the company is not an individual one[27] – it's impossible to have marriage, degree of kinship or affinity with an association or a society[28] – neither when the working activity isn't continuous, where "continuous"

25 Papaleoni, M.: "Lavoro familiare", cit., p. 18. About the residual nature of the case referred to in Art. 230 *bis* see Balestra, L.: *L'impresa familiare*, cit., p. 25; Amoroso, G.: *L'impresa familiare*, cit., p. 9; Nunin, R.: "Lavoro familiare e lavoro nell'impresa familiare", in Cester, C. (ed.): *Il rapporto di lavoro subordinato. Costituzione e svolgimento*, in *Comm. dir. lav.,* directed by Carinci, 2nd ed., II, Torino, 2007, p. 129 f.

26 Amoroso, G.: *L'impresa familiare*, cit., p. 9; Balestra, L.: *L'impresa familiare*, cit., p. 32 and Id., "Art. 230 *bis*", cit., p. 930; Dogliotti, M. and Figone, A.: "L'impresa familiare", cit., p. 703 f.

27 Papaleoni, M.: "Lavoro familiare. Postilla di aggiornamento 2006", in *Enc. giur.* Treccani, XX, Roma, 1990, p. 2; Balestra, L.: "Art. 230 *bis*", cit., p. 930 f.; Nunin, R.: "Lavoro familiare", cit., p. 133; Oppo, G.: "Impresa familiare", in *Comm. dir. it. fam.*, directed by Cian, Oppo and Trabucchi, III, Padova, 1992, p. 487. *Contra* Cottrau, G.: *Il lavoro familiare*, cit., p. 39 and Amoroso, G.: *L'impresa familiare*, cit., p. 52 s. For jurisprudence see Corte cost., 10th December 1987, no. 476, *Foro it.*, 1989, I, c. 375 and Corte Cost., 25th November 1993, no. 419, *ivi*, 1994, I, c. 693; Cass., 18th January 2005, no. 874, *Giust. civ.*, 2005, I, p. 1811, but *contra* seems Cass., 23th September 2004, no. 19116, *ibidem*, p. 1244.

28 Colussi, V.: "Impresa familiare", cit., pp. 175 and 179.

means "regularity" and "constancy in time" – necessary is, in fact, the continuous working contribution, not the continuous presence in the company[29] -, nor, lastly, when there is a domestic work that configures a simple satisfaction of the duties provided by Artt. 143 and 147 c.c., without any further and effective contribution to the family undertaking[30].

Do not count neither the type of work – manual or intellectual work – done by the family member, nor the tasks performed, due that it is undisputable that he or she can perform for the entrepreneur the same task provided by an employee, or – difficult but not impossible – a self-employed. What matters is the fact that there is a collaboration in the enterprise and not a co-management of it[31].

Once established the presence of a "family enterprise" and of the "family work", the family worker will be entitled *in primis* to the patrimonial rights of maintenance and share in the profits and increases. Moreover, these rights do not configure an actual remuneration and to the family work cannot be applied Art. 36, para. 1, of Italian Constitution[32].

The right of maintenance represents the fixed and periodic part, disconnected from the company's performance – and so claimable even in the event of loss by the family company – which ensures the life needs of the entitled person. Life needs must not be intended as mere subsistence, but as a free and dignified existence[33], in clear subrogating function of what is provided for the retribution just by Art. 36 of Constitution.

Despite not being remuneration in the technical-legal sense[34], maintenance can anyway constitute a compensation – and be of a remuneration nature in the broad sense – of the work done[35], and for this reason it has not the care requirement which is instead proper of the maintenance claims. In fact maintenance is neither linked to the state of need, nor Art. 2751, no. 4, c.c. is applicable to it[36].

Still, precisely because it is released from the economic trend of the enterprise, this right must be linked to the "economic condition of the family", namely the

29 Dogliotti, M. and Figone, A.: "L'impresa familiare", cit., p. 720.

30 Amoroso, G.: *L'impresa familiare*, cit., p. 59 s.; Colussi, V.: "Impresa familiare", cit., p. 178. *Contra* seems Oppo, G.: "Impresa familiare", cit., p. 474 f. For the jurisprudence see above all Cass., Sez. un., 4th January 1995, no. 89, *Foro it.*, 1995, I, c. 105.

31 Colussi, V.: "Impresa familiare", cit., p. 178.

32 Dogliotti, M. and Figone, A.:"L'impresa familiare", cit., p. 725; Cottrau, G.: *Il lavoro familiare*, cit., p. 82.

33 Balestra, L.: *L'impresa familiare*, cit., p. 242; Amoroso, G.: *L'impresa familiare*, cit., p. 87 ff.

34 Cass., 18th December 1992, no. 13390, *Nuova giur. civ. comm.*, 1993, I, p. 609, with note by Bontempi, P.: *Impresa familiare e retribuzione*.

35 Papaleoni, M.: "Lavoro familiare", cit., p. 17.

36 Amoroso, G.: *L'impresa familiare*, cit., p. 88.

patrimonial conditions of the "entrepreneur's family", even if, naturally, the trend of the company hardly will not affect these patrimonial conditions[37]. It also follows that the contractor could fulfil his/her maintenance obligation even with different incomes from the ones obtained by the undertaking[38].

It's the opposite story for the second patrimonial right payable to the family worker, *i.e.* the right to participate in profits (including the goods purchased with them) and increases (also with regard to start-up). This right is in fact variable – because directly linked to the performed work's "quantity and quality" – and possible, because strictly tied to the presence of profits and/or increases as results of enterprise's trend[39].

Furthermore, the terms "quantity and quality of the work" must not make one thinks that Art. 230 *bis* spreads the proportionality principle stated by Art. 36 of Constitution even to family work. For, as it has been noted, from one hand, the words "in proportions" used by this article in the civil code cannot have the meaning of "equivalence", cause there is always the risk of the missing or limited production of profits[40], while, on the other hand, performed work's quantity and quality set up only simple allocation parameters of these profits, although in the constitutional provision these elements represent "the value of the service in absolute", so much so that they are completely unbound from the trend of the employer's activity[41].

Not all profits and increases must be divided, due that other factors, additional and different from family work, contribute to their formation. Accordingly, family worker must be entitled only to those profits and/or increases directly linked to his/her job performance.

On the issue a part of the doctrine considered to use as measures both the normal payment which would be paid to an employee performing the same tasks, and the global valour of the enterprise[42]. Against this opinion seems the case law of the Supreme Court of Cassation, according to which the amount of remuneration paid to the employee for the same tasks cannot be considered as parameter, because the ontological difference between the participation to profits

37 Balestra, L.: *L'impresa familiare*, cit., p. 242.

38 Cass., 23th June 2008, no. 17057, *Fam. dir.*, no. 3, 2009, p. 229, with note by Delmonte, C.: *Sulla maturazione del diritto agli utili nell'impresa familiare: la discutibile soluzione della suprema corte*.

39 Colussi, V.: "Impresa familiare", cit., p. 180.

40 Papaleoni, M.: "Lavoro familiare", cit., p. 17; Oppo, G.: "Impresa familiare", cit., p. 481.

41 Balestra, L.: *L'impresa familiare*, cit., p. 249.

42 Colussi, V.: "Impresa familiare", cit., p. 180 s.; Dogliotti, M. and Figone, A.: "L'impresa familiare", cit., p. 725.

and increases and the retribution, which is – this last one – not linked to the results of employer's activity[43].

Then right to profits and increases should arise, as rule, only at the time of undertaking's end or of the end of the job performance by the family member, unless otherwise decided by the parties[44].

The other part of rights provided in favour of family worker by Art. 230 *bis* is the one of participation to the enterprise's management. However, this participation does not concern the ordinary management, which is sole of the one that assumes businesses risk – practically the family contractor -, but only the strict cases provided by the rule, *i.e.* the decisions on the use of profits and increases and the ones about acts of extraordinary administration and/or related to the end of the undertaking. In any case these decisions – made by a majority of the voters – will affect only the internal relationships between the family entrepreneur/employer and his/her family workers. They will not be enforceable against third parties, nor could be imposed on the family entrepreneur which will not decide to fulfil them. Anyway, this last conduct will be considered as defaulting on the obligations to his/her family workers and will require, in the absence of a just cause, to compensate for any damage caused[45].

V. FAMILY WORK AND *DE FACTO* FAMILIES.

The first of the subjects protected by the regulation of family work is the spouse. Moreover, even if on paper the discipline seems free from problems, in practice it proves not so simply to apply.

In fact, excluded the cases of divorce or nullity of marriage, which imply the loss of the spouse *status* and so automatically cause the end of family work[46], doubts could arise regarding the legal separation. On the issue it should be noted that with the legal separation the family relationships loosen, but do not dissolve themselves. For this reason it is considered that legal separation do not cause the end of spouse's family work[47].

43 Cass., 29th July 2008, no. 20574, *Mass. Foro it.*, 2008, 1137.

44 Colussi, V.: "Impresa familiare", cit., p. 181 f.; Oppo, G.: "Impresa familiare", cit., p. 482. *Contra* Balestra, L.: *L'impresa familiare*, cit., p. 253. For jurisprudence see Cass., 29th July 2008, no. 20574, cit.

45 Dogliotti, M. and Figone, A.: "L'impresa familiare", cit., p. 729.

46 Colussi V.: "Impresa familiare", cit., p. 179.

47 Balestra, L.: "Art. 230 *bis*", cit., p. 939; Amoroso, G.: *L'impresa familiare*, cit., p. 74; Dogliotti, M. and Figone, A.: "L'impresa familiare", cit., p. 708. About jurisprudence cfr. Cass., 22th May 1991, no. 5741, *Foro it.*, 1993, I, c. 942.

The case that is considered the most difficult to solve in the application of Italian law is however the one of *more uxorio* cohabitation and, more generally, of the *de facto* family.

On the problem an important detail must be made. If before 2016 the issue concerned the opposite sex couples that decided not to get married – namely *more uxorio* cohabitants properly said – and same sex couples, which were legally incapacitated to access to marriage, with the entry into force of Cirinnà law, a part of the problems appears to be resolved. In fact, same sex partners can now access to civil union, *i.e.* a legal institution that, due to the recall operated by Art. 1, para. 20, of law 76/2016, equalises – apart from some exceptions – for all legal purposes the civil partner to the spouse and, most of all, states at Art. 1, para. 13, the enforcement of the rule provided for the family enterprise – and so for the family work – in favour of the civil partnerships.

And yet we still have unresolved problems on the issue. First, Cirinnà law has not recalled the rules about affinity relationships – namely the tie which according Art. 78 c.c. exists between the spouse and the relatives of the other one – regarding the civil partner[48], with the consequence that this one does not seem to become a kindred of his/her partner's relatives. So a doubt remains on the issue if the civil partner could or could not benefit, through the affinity relationship, of protection provided by Art. 230 *bis*.

To solve this problem one must start from the speciality of Art. 230 *bis*. If in fact this article identifies a special type of work relationship, different from the normal employment, then the list of persons that it contains should be considered as exhaustive, with the inability of its analogic extent to different subjects[49].

Others instead have decided to do an extensive/analogical interpretation of Art. 230 *bis* and considering its *ratio*, aimed to the protection of the work provided by especially weak subjects and to avoid situations of abuse and/or exploitation inside the family, have opted to spread the recipient subjects of this protection, including even *more uxorio* cohabitants and in general *de facto* family's members[50].

Acceding to this last theory should mean the extent of Art. 230 *bis* to the civil partner when the family enterprise is managed by a relative of his/her partner. In

48 Ghidoni, L.: "Unione civile e impresa familiare: la disarmonia di una mera estensione normativa", *Fam. dir.*, 2017, p. 701.

49 Cottrau, G., *Il lavoro familiare*, cit., p. 64 ff.; Colussi, V.: "Impresa familiare", cit., p. 179; Oppo G., "Impresa familiare", cit., p. 466 ff. For case law see Cass., 2th May 1994, no. 4204, *Foro it.*, 1995, I, c. 1935.

50 Balestra, L.: *L'impresa familiare*, cit., p. 205; Amoroso, G.: *L'impresa familiare*, cit., p. 82; Nunin, R: "Lavoro familiare", cit., p. 136; Dogliotti, M. and Figone, A.: "L'impresa familiare", cit., p. 709. For case law see Cass., 15th March 2006, no. 5632, *Fam. pers. e succ.*, 2006, p. 995, with note by Stoppioni, L.: *Rapporto d'impresa familiare e convivenza more uxorio*.

fact, from one hand, the missing of the recall to Art. 78 c.c. inside Cirinnà law seems mainly a mere slip[51], while, on the other hand, it should be quite the protection scheme provided by Art. 230 *bis*, identified in the risk of exploitation inside the relationship of "family closeness" following the marriage, to play in favour of the family work discipline's extension to the civil partner, because this "closeness" and the resultant risk arise inside the civil union too[52].

More critical aspects are instead providing by the rules about family work in the *de facto* cohabitation. On the point, Cirinnà law inserted a new article in civil code, the 230 *ter*, which provides to *de facto* cohabitant that works in favour of his/her partner the right to participate to profits and increases, commensurate with the work done, unless there is a company or employment relationship between them. So this article spreads only a part of the protection offered by Art. 230 *bis* – and only the variable one of the participation to profits and increases on the basis of work done, not the minimum one of maintenance, let alone the rights of enterprise's management – to the *de facto* cohabitant that works inside his/her partner's undertaking, leaving outside the rule even the work done inside the family, but in favour of the enterprise.

It follows a discipline missing and difficult to read, that leaves the interpreter whit more questions than answers and that does not seem at all having composed the *querelle* about the spread of Art. 230 *bis* protection to the *de facto* couples[53], but only having switch the borders of the issue[54].

First, it doesn't appear that the lexical differences between the two articles, as far as possible cause for ambiguity, should represent also differences of concepts[55].

But the fact remains that the new rule, while applying to *de facto* cohabitants – same or opposites sex it doesn't matter -, provides both a really minimal protective discipline in front of the very same needs of protection from exploitation which could arise from family relationship, and that in the case of marriage or civil union find the far more substantial protection of Art. 230 *bis*, and leaves completely uncovered numerous other scenarios. Most of all the one in which the stable

51 Cipriani, N.: "La disciplina delle unioni civili: un punto d'arrivo o un punto di partenza?", *Foro it.*, 2017, I, c. 2174.

52 Ghidoni, L.: "Unione civile", cit., p. 704.

53 Ricci, G.: "Il lavoro associato (associazione in partecipazione; lavoro nell'impresa familiare; lavoro nelle cooperative)", in Amoroso, G., Di Cerbo, V. and Maresca, A. (ed.): *Diritto del lavoro. La Costituzione, il Codice Civile e le leggi speciali*, 5th ed., I, Milano, 2017, p. 1884; Quadri, G.: "Le prestazioni di lavoro del convivente alla luce del nuovo art. 230 *ter* c.c.", *Nuove leggi civ. comm.*, 2017, p. 590.

54 Albanese, A.: "La partecipazione all'impresa familiare", in Id. (ed.): *Le nuove famiglie*, Pisa, 2019, p. 702.

55 Butturini, P.: "L'art. 230-ter c.c. e i diritti del convivente che collabora nell'impresa", in Ferrando, G., Fortino, M. and Ruscello, F. (ed.): *Legami di coppia e modelli familiari*, I, Milano, 2019, p. 208; Albanese, A.: "La partecipazione", cit., p. 698; Bona, C.: "La disciplina delle convivenze nella l. 20 maggio 2016 n. 76", *Foro it.*, 2016, I, c. 2097.

cohabitation is missing, or the *de facto* partner doesn't work inside the enterprise, but inside the family, even if this work will be in favour of the very same undertaking.

The doctrine is very divided on the point. In response of which, although already stating the impossibility to extend Art. 230 *bis*, thinks – perhaps not too consistently – to give anyway an extensive reading to Art. 230 *ter*[56], there are those who instead consider that in the cases not covered by the reform of 2016 the use of the "living law" will be needed, and so the rules provided by Art. 230 *bis* will be extended whenever there will be a cohabitation which is outside the provision of Cirinnà law[57].

Lastly, there is also those which seem to have excluded the application of both Artt. 230 *bis* and *ter* to the *more uxorio* cohabitant not falling inside law 76 of 2016. This last one would, therefore, remain with no protection at all, other than the normal rules of restitutory type, with all the problems on the level of constitutional legality about Art. 230 *ter*, that from this theory would follow[58].

VI. SHORT CONCLUSIONS.

The need to protect the work of the partner in favour of the other one does not yet seem perfectly fulfilled.

If the couple presents cross-border elements, there is firstly the problem to consider the obligations coming from family work as obligations arising from family relationships or from employment ones, with the following choice if applying the rules provided by Twin Regulations or the ones stated in the Rome I Regulation. This last one seems however to be preferred because it shows a more protecting system of worker's position.

Other than this, once the main hermeneutical doubt – namely the one on the European harmonisation instrument to be applied in the specific case - is dissolved, will always remain the doubts and, most of all, the numerous gaps that Italian law – eventually identified in accordance with the conflict rules of Rome I Regulation – shows in governing the specific case of the work done by the partner in favour of the other one.

56 Quadri, G.: "Le prestazioni", cit., p. 604.

57 Balestra, L.: "La convivenza di fatto. Nozione, presupposti, costituzione e cessazione", *Fam. dir.*, 2016, p. 924; Romeo, F.: "Dal diritto vivente al diritto vigente: la nuova disciplina delle convivenze. Prime riflessioni a margine della l. 20 maggio 2016 n. 76", *Nuove leggi civ. comm.*, 2016, p. 682; Butturini, P.: "L'art. 230-ter", cit., p. 207 f.

58 Albanese, A.: "La partecipazione", cit., p. 703.

But the fact remains that the needs of work protection in all its forms – a protection that inspires both national and European law and which takes the form of *favor laboratoris* principle -, should suggest to the interpreter, also on the basis of the lessons of both the Court of Justice and the Court of Cassation, the implementation – if in doubt – of the law most favourable to the worker that, inside a cross-border couple, decides to give up other professional opportunities to fully dedicate his/her working energies to the partner's business.

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