

THE EFFECT OF THE GLOBAL CRISIS ON THE LABOR MARKET: REPORT ON ITALY

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I. INTRODUCTION: THE DRAMATIC CONSEQUENCES OF THE GLOBAL CRISIS IN ITALY

As is well known, the recent economic crisis has had a severe impact on the Italian economy and labor market, as well as on the country's political system. In fact, with regard to the job market, it should be immediately noted that unemployment rates in Italy have increased dramatically since 2008, and the use of flexible contracts has become even more widespread.¹ At the same time, the rigidity of permanent employment relationships and the discretionary power of the courts made dismissal cases uncertain for workers and companies, in addition to being very expensive for the latter. Companies consider the protective norms a burden in view of their restructuring processes and as an incentive to use temporary employment contracts.

Therefore, the Italian job market was characterized, at the same time, by a high level of “incoming flexibility”² and a high level of “outgoing rigidity.”³ Accordingly, this situation generated a “dualism” between overprotection of the so-called insiders (permanent employees) and weak protection of the so-called outsiders (those hired with flexible and temporary contracts).⁴ Moreover, the productivity of labor did not reach satisfactory levels, which significantly affected the competitiveness of Italian firms in both global and national markets.⁵

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1. In October 2013, the unemployment rate in Italy was around 12.5%, while it was around 6.1% in January 2007, and around 8.4% in January 2011. See ISTAT, www.istat.it/lavoro (last visited Apr. 7, 2014) (It.).

2. I.e., a widespread use of flexible forms of hiring.

3. I.e., a strong protection against dismissal.

4. PIETRO ICHINO, *INCHIESTA SUL LAVORO: PERCHÉ NON DOBBIAMO AVERE PAURA DI UNA GRANDE RIFORMA* [INVESTIGATION ON WORK: WHY WE MUST NOT BE AFRAID OF A GREAT REFORM] 56–86 (2011) (It.).

5. In October 2013, according to recent data on labor productivity (i.e., gross domestic product per hour of work), Italy ranked thirteenth among E.U. countries with €32.1 GDP per hour of work below the European average of €32.2. ISTAT, *supra* note 1.

In this context, the letter addressed by the European Central Bank (ECB) to the Italian Government in August 2011 played the role of a “trigger event.” This communication, whose contents were made public and were widely discussed in the national Press,⁶ provoked—or, at least, preceded—an “earthquake” in the national political framework, such as the early resignation of Prime Minister Silvio Berlusconi and his Government, and the subsequent appointment of a “technical Government” led by Prime Minister Mario Monti.⁷

However, the letter from the ECB also had a considerable impact on the internal debate about labor and industrial relations, pointing out some elements and strategies that, according to its authors—Jean-Claude Trichet and Mario Draghi⁸—could have a positive outcome and could improve the negative situation of the country. Among others, these elements included the following:

- (1) Modernizing the industrial relations system;
- (2) Increasing flexibility and reducing the uncertainties relating to dismissal and redundancy procedures;
- (3) Boosting growth potential through new rules and tax incentives aimed at stimulating the efficiency of firms and the job market as a whole;
- (4) Reforming the collective bargaining system and empowering plant-level arrangements; and
- (5) Balancing “outgoing flexibility” with a more effective unemployment protection system aimed at providing the jobless with professional qualifications, job opportunities, and a new income support system.

In line with these suggestions, in April 2012, the Monti Government presented the Italian Parliament with a Bill setting out *Provisions Concerning Labor Market Reform in a Perspective of Growth*.⁹ After a lengthy debate, the text was approved in June 2012, and it became Act in June 28, 2012.¹⁰ The new normative dispositions included substantial modifications mainly concerning labor law discipline and, to a certain

6. See *Il testo della lettera della Bce al Governo italiano [The Text of the Letter from the ECB to the Italian Government]*, ITALIA & MONDO [IT. & WORLD], Sept. 29, 2011, www.ilsole24ore.com/art/notizie/2011-09-29/testo-lettera-governo-italiano-091227.shtml?uuid=Aad8ZT8D (It.).

7. The letter is commonly deemed to have influenced the change of government in Italy, although this did not take place in August 2011, but only in November 2011, when Italy was facing severe default risks and had nonpolitically oriented government.

8. They are the former (Jean-Claude Trichet) and the current (Mario Draghi) Presidents of the European Central Bank.

9. Disegno di legge 18 aprile 2012, n. 3249 (It.).

10. Legge 28 giugno 2012, n. 92 (It.). Also known as *Legge Fornero* (Fornero Act), after Elsa Fornero, who was the Minister of Welfare in the Monti Government.

extent, the industrial relations system that—as it is further discussed below—has undergone significant changes in the last few years.

This Article concentrates on the main areas of intervention of the Legislator, as summed up in Article 1, paragraph 1 of the Act, with the purpose of underlining the most significant changes and the potential outcomes of the new provisions, as well as the consistency of the latter with the aims of the Reform. According to Article 1, paragraph 1 of the Act 92/2012, the Legislator’s fundamental goals were¹¹:

- (1) To support stable employment relationships, underlining the role of the permanent employment contract as the dominant and most common form of hiring;
- (2) To increase the use of apprenticeships as the “prevalent form of access of young workers to the labor market”;
- (3) To balance worker protection, preventing abuses of “ingoing flexibility” and, at the same time, mitigating “outgoing rigidity” through a reform of dismissal rules;
- (4) To modify and renew the unemployment protection system;
- (5) To prevent the misuse of pension and tax incentives through existing contractual forms;
- (6) To promote gender equality in working relations;
- (7) To defend the occupation of senior workers (i.e., those over fifty years of age); and
- (8) To develop “worker participation” in line with E.U. principles.

After the conclusion of the experience of the Monti Government—which resigned in December 2012—the same path toward flexibility and adaptation to the “labor law crisis” was taken by the no longer “technical” but “coalition Government” led by Prime Minister Enrico Letta, who took office on April 28, 2013.¹² The new Government had to face worsening of the economic crisis and finally approved “Letta Reform” in summer 2013, entailing slight modifications to the “Fornero Act” and tax and social security incentives for new recruitments.¹³

II. A FOCUS ON “OUTGOING” FLEXIBILITY

Leaving aside industrial relations, the main scope of the recent reforms may be found in the balance between an excessive “outgoing” rigidity and

11. Franco Carinci, *Finalità, monitoraggio, oneri finanziari [Purpose, Monitoring, Financial Charges]*, in COMMENTARIO ALLA RIFORMA FORNERO [COMMENTARY TO FORNERO REFORM] 5 (Franco Carinci & Michele Miscione eds., 2012) (It.) [hereinafter COMMENTARY TO REFORM].

12. The coalition supporting Prime Minister Letta was formed by both left-wing (PD) and right-wing (PDL) parties.

13. In addition to a dramatic unemployment emergency (especially among young people). See Decreto Legge 28 giugno 2013, n. 76 (It.), converted into Legge 9 agosto 2013, n. 99 (It.).

an excessive “ingoing” flexibility (or “flexibility at the margin”), which were both deemed to prevent employers from using permanent employment contracts.

The Article starts by focusing on the theme that attracted most attention from both the mass media and law scholars – the reform of dismissal rules. For a long time the topic was regarded as a “sacred cow” (or taboo), which the Legislator did not dare to touch.¹⁴ Starting with the last decade, it became the subject of intense debate and, more recently, with the above-mentioned letter by the ECB and the subsequent appointment of the Monti Government, the issue apparently became crucial, not only in a labor market perspective, but also as a fundamental area of intervention in order to overcome the country’s overall economic difficulties.¹⁵

A. *Historic Development*

The previous Italian dismissal rules were the result of four main statutory regulations. While Article 2118 of the 1942 Civil Code granted the right of both parties to end the employment relationship with notice,¹⁶ Article 1 of Act 604/1966 introduced the basic principle of “mandatory justification” in any case of termination of a permanent contract on the part of the employer.¹⁷ The above-mentioned justification required the presence of either a just cause or a justified reason to validly terminate the employment relationship.¹⁸

In an event of unjustified dismissal, the remedy was a monetary compensation varying from 2.5 up to 6 months’ wages, or, alternatively, of the employer’s volition, the reengagement of the employee.¹⁹ According to the fundamental Article 18 of Act 300/1970—the so-called “*Workers’ Statute*”—in establishments exceeding the threshold of fifteen workers, the

14. The expression is taken from Otto Kahn-Freund, *Trade Unions, Law and Society*, 33 MOD. L. REV. 245 (1970), which was referring to the issue of union admission. Bruno Caruso, *Per un ragionevole, e apparentemente paradossale, compromesso sull’art. 18: riformarlo senza cambiarlo [For a Reasonable and Apparently Paradoxical Compromise on Article 18: Reforming It Without Changing It]*, 2 C.S.D.L.E. 140 (2011) (It.).

15. In 2000, two political Parties (Radicali and Forza Italia) promoted a referendum with the aim to repeal Article 18 of the Workers’ Statute, but the referendum did not reach the mandatory threshold.

16. According to Art. 2119 Codice civile [C.c.] (It.), both dismissal and resignation may be given with immediate effect (without any notice period) in the case of just cause (i.e., “any cause that does not allow even a temporary prosecution of the employment relationship”).

17. The regime of resignation still falls under Arts. 2118 & 2119 Codice civile [C.c.] (It.).

18. See *supra* note 17. According to Art. 3 Legge 15 luglio 1966, n. 604 (It.), there are two different types of justified reason allowing employers to dismiss the employee with notice: (1) a serious breach of contract by the employee (the so-called “subjective justified reason”); (2) reasons concerning the activity of production, work organization and the correct functioning of the latter (the so-called “objective justified reason”).

19. Art. 8 L. n. 604/1966 (It.).

compensatory remedy set out by Article 8 of Act 604/1966 was replaced by a reinstatement sanction.²⁰

Accordingly, any unfair dismissal occurring in establishments or businesses exceeding the mentioned thresholds gives the employee the right to be reinstated in his/her former workplace and to receive an indemnity (or back pay) corresponding to the monthly wages from the time of dismissal to reinstatement, with the deduction of the amount of money the worker may have earned from any other employer after the original dismissal (the so-called “*aliunde perceptum*”).²¹ Moreover, the worker was permitted by law to replace his/her reinstatement right with a monetary indemnity of fifteen months wages—also known as the worker’s option—in addition to the previously mentioned back pay.

Finally, Article 3 of Act 108/1990 stated that discriminatory dismissals—no matter what the size of the establishment or the business (i.e., regardless of any threshold)—fell under the discipline of Article 18 of Act 300/1970, ensuring the worker the right to be reinstated (or, in alternative, to exercise the worker’s option), plus the entire back pay.²² In addition to what has been explained so far about individual dismissals, the same remedy (reinstatement plus compensation) was granted in cases of breach of the rules concerning collective redundancies, in cases concerning both disrespect of procedural rules and erroneous selection of redundant workers.²³

B. *The “Fornero Reform” on Dismissal*

The whole statutory dismissal discipline, based on the reinstatement sanction plus the back pay became, as anticipated, the subject of highly controversial discussions after the letter from the ECB. In particular, the ideas at the basis of the new “Reform wave” were that the whole discipline was characterized by excessive rigidity, due to the presence of both the employee’s right to be reinstated and the right to receive monetary compensation whose amount could not be predetermined or foreseen,

20. According to Art. 1 L. n. 108/1990 (It.), Article 18 of the Workers’ Statute was applied also to businesses employing more than sixty workers.

21. I.e., any dismissals given without a just cause or a justified reason, or null and void for procedural or discriminatory reasons.

22. Under Art. 4 L. n. 604/1966 (It.), discriminatory dismissals were originally those motivated by political, religious, or union-related reasons; subsequently, Art. 13 L. n. 903/1977 (It.) included reasons related to race, language, or gender. Art. 4 D.Lgs. n. 216/2003 (It.) added to the list of discriminatory reasons those related to disability, age, sexual orientation, and personal beliefs.

23. See L. n. 223/1991 (It.).

because it depended entirely on the length of the hearing.²⁴ The previous regulation was then criticized as leading to:

- (1) Serious limits to firm productivity;
- (2) Absence of foreign investments in national businesses;
- (3) Reluctance of national firms to hire with permanent employment contracts;
- (4) Widespread use of flexible forms of hiring;
- (5) A brake to firm growth above the fifteen-worker threshold (i.e., the “reinstatement threshold”); and
- (6) High unemployment rates.

What is most interesting to point out—in a comparative perspective—is that similar arguments were made in the past, (in times of economic hardship) in Germany, to promote changes to a rather protective dismissal discipline, despite the lack of any empirical evidence—either in Germany or Italy—of a correlation between higher rigidity of dismissal rules and higher unemployment rates/lower firm productivity.²⁵

Tackling a balance between “ingoing” and “outgoing” flexibility, the recent Act 92/2012 did not intervene on the conditions of dismissal fairness, but rather focused on the consequences—as well as the remedial system—in cases of unfair dismissals occurring in establishments and businesses exceeding the same “old” thresholds.²⁶ In fact, the reform of Article 18 of

24. Pietro Ichino, *La riforma dei licenziamenti e i diritti fondamentali dei lavoratori [The Reform of Dismissal and Fundamental Rights of Workers]*, www.pietroichino.it/?p=21020 (last visited Apr. 7, 2014) (It.). In fact, the indemnity due to the worker according to Art. 18 L. n. 300/1970 (It.) covered the period between dismissal and reinstatement. In case of upholding a worker’s claim on appeal (or even in the third stage of trial, before the Supreme Labor Court), the employer could be ordered to pay extremely high monetary damages and, with the exception of the worker’s option, even to reinstate a worker who was dismissed many years before.

25. Robert Rebhahn, *Der Kündigungsschutz des Arbeitnehmers in den Staaten der EU [The Dismissal Protection of the Worker in the E.U. States]*, 34 ZEITSCHRIFT FÜR ARBEITSRECHT [J. LAB.] 163 (2003) (Ger.); Curt Wolfgang Hergenröder, *Kündigung und Kündigungsschutz im Lichte der Verfassung [Notice and Protection in Dismissals]*, 33 ZEITSCHRIFT FÜR ARBEITSRECHT [J. LAB.] 358 (2002) (Ger.). On this point, Achim Seifert & Elke Funken-Hoetzel, *Wrongful Dismissals in the Federal Republic of Germany*, 25 COMP. LAB. L. & POL’Y J. 496 (2003), reporting accurately the historical process that conducted from a mere compensatory system (during the Weimar Republic) to the protection of the “social justification” of dismissals by means of a reinstatement remedy. With reference to the Italian debate, see Franco Carinci, *Complimenti, dottor Frankenstein: Il disegno di legge governativo in materia di riforma del mercato del lavoro [Congratulations, Dr. Frankenstein: The Government Bill Proposal on the Reform of the Labor Market]*, 6 LG 538 (2012); Adalberto Perulli & Valerio Speciale, *L’articolo 8 della legge 14 settembre 2011, n. 148 e la “rivoluzione di agosto” del Diritto del lavoro [Article 8 of the Act of 14 September 2011 n. 148 and the “Revolution of August” of the Labor Law]*, 139 WP C.S.D.L.E. 132 (2012) (It.); Valerio De Stefano, *A Tale of Oversimplification and Deregulation: The Mainstream Approach to Labour Market Segmentation and the Recent Responses to the Crisis in European Countries*, 102 WP C.S.D.L.E. 30 (2013) (It.). It may also be added that German firms and workers are currently considered as a “benchmark” of productivity, despite the fact that the German Legislator has not altered the traditional “rigid” dismissal protection scheme.

26. With the exception of a new pre-dismissal procedural stage, starting with the employer’s communication of the intention to dismiss an employee for an objective reason, followed by a meeting before an administrative body, with the main aim to encourage the parties to reach an agreement. See Stefano Liebman & Elena Gramano, *La nuova disciplina delle tutele in caso di licenziamento*

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Act 300/1970 by Act 92/2012 set up a new four-tier remedial system where the consequences of dismissal unfairness depend on the gravity of the violation of dismissal rules by the employer.²⁷ In particular, according to the wording of the new version of Article 18 of Act 300/1970, the consequences arising from the dismissal unfairness may be the following:

- (1) “Full Reinstatement”: in a case of discriminatory dismissal, dismissal affecting special categories of workers (due to maternity, paternity, marriage, etc.), dismissal determined by an “illicit reason,” or in the case of oral notice of dismissal, the employee, regardless of any threshold, is granted the right to be reinstated (or to exercise the worker’s option), plus back pay with the deduction of the *aliunde perceptum*.
- (2) “Weak Reinstatement”: it involves cases of disciplinary dismissals (i.e., based on a just cause or on a subjective reason), when the contested fact did not occur or when, according to collective agreements, the contested fact should have been punished with milder disciplinary sanctions (suspension, fine, or reprimand). Moreover, “Weak Reinstatement” is granted to the employee in cases of dismissal for an objective reason: (a) when the alleged physical or mental inability of the worker was inconsistent; (b) in the eventuality of breach by the employer of the rules protecting employment stability in case of worker illness; (c) lastly when the fact at the basis of the objective dismissal is “clearly absent,” as well as in cases of erroneous selection of workers in collective redundancies. In all those cases, the worker enjoys the right to be reinstated (or to exercise the worker’s option), plus the right to receive a monetary compensation capped at a maximum of twelve months’ wages, with the deduction of the *aliunde perceptum* and the so-called *aliunde percipiendum*, which is the amount of money the worker may have earned by actively seeking another occupation after dismissal.

illegittimo: il licenziamento per ragioni oggettive [The New Rules of Protection in the Event of Unfair Dismissal: Dismissal for Objective Reasons], in IL NUOVO DIRITTO DEL MERCATO DEL LAVORO [THE NEW LAW OF THE LABOR MARKET] 351–63 (Mattia Persiani & Stefano Liebman eds., 2013) (It.) [hereinafter THE NEW LAW OF THE LABOR MARKET].

27. Arturo Maresca, *Il nuovo regime sanzionatorio del licenziamento illegittimo: le modifiche dell’art. 18 Statuto dei Lavoratori [The New Sanction Regime], I R.I.D.L. 447 (2012) (It.)*; Fabrizia Santini, *Il licenziamento per giusta causa e giustificato motive soggettivo [The Dismissal for Just Cause and Justified Subjective Motive], in LA NUOVA RIFORMA DEL LAVORO [THE NEW REFORM OF WORK] 238–39 (Mariella Magnani & Michele Tiraboschi eds., 2012) (It.)*.

- (3) “Strong Monetary Compensation”: in all residual cases of unfair dismissal (when inconsistency of the just cause, subjective, or objective reasons provided), the employee is entitled to receive only monetary compensation set between twelve and twenty months wages, to be quantified by the Judge according to the worker’s age and seniority.
- (4) “Weak Monetary Compensation”: in cases of procedural or formal violations, the employee enjoys the right to monetary compensation between six to twelve months wages, to be determined by the Judge according to the gravity of the procedural violation and in consideration of the worker’s age, seniority, business dimension, behavior, and condition of the two parties.²⁸

In brief, it is clear that the choice of the Legislator to intervene on the consequences of unfair dismissals and not on the conditions of dismissal fairness was aimed at reducing outgoing flexibility and achieved by the reversal of the traditional role of reinstatement and back pay as general remedies in any case of unfair dismissal occurring in firms exceeding the previously mentioned thresholds. The reform regime produced a shift from reinstatement to monetary compensation as general remedy in cases of unfair dismissal. As pointed out by Pietro Ichino, there was a change of perspective from the previous “property rule” view—where the employment relationship was treated as a property right of the employee—to the current “liability rule” view—where the employee’s right to work is protected by a compensatory system aimed at covering the worker’s monetary damages suffered due to the unjustified job loss.²⁹

In this sense, it has been observed that the employment relationship is still protected by the reinstatement sanction in cases involving violations of the fundamental rights of the employee (discrimination, violation of maternity/paternity protection, clear absence of the disciplinary or objective reasons), whilst in cases of “simple” unfairness, the protection of the employee’s interest may be effectively achieved by recovering monetary losses (more easily predictable by the employers).³⁰

28. I.e., incomplete written motivation of the dismissal, absence of a preliminary formal charge or violation of an employee’s right to defense in case of disciplinary dismissal, violation of collective redundancy procedures.

29. Pietro Ichino, *Nuova disciplina dei licenziamenti [New Discipline of Dismissal]*, 2012 DPL 1545 (It.) (on property and liability rules). On property and liability rules in general, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

30. Please note that the idea of establishing an all-encompassing predetermined indemnity with the different function of “severance cost” for any economic dismissal was entailed by Legge Proposta n. 1481/2009 (It.) presented by Senator Pietro Ichino. On this point, see Franco Carinci, “*Provaci ancora*,

C. *The Main Issues of the New Discipline*

A few words ought to be dedicated to the consistency of the summarized new norms with the principles and targets tackled by the Legislator. As pointed out by many scholars, the new dismissal rules do not seem to solve the previous issues, in particular with regard to the uncertain outcome of dismissal cases before Courts and the related unpredictability of dismissal costs by the employers. The rules also appear to generate the following new issues:

- (1) Legal uncertainty: The presence of new tricky, or even obscure, statutory dispositions seems to increase, rather than reduce, uncertainties on the effects and consequences (and even costs) of dismissals due to the new judicial duty and power to choose between a four-tier remedial regime.³¹ New doubts arise because of the following uncertainties:
 - (a) Dismissal for illicit reason and a discriminatory dismissal are uncommon concepts in previous Italian dismissal cases.³² In addition, there is the uncertain border between a sheer lack of justification and a discrimination hypothesis.³³
 - (b) The extension of judicial control in cases of disciplinary dismissals: when is it possible to state that the contested fact did not occur? I.e., is a fact a sole material action,³⁴ or does it include a judicial evaluation of minimum severity?³⁵ Moreover, is a low

Sam": *Ripartendo dall'art. 18 dello Statuto* ["*Play It Again, Sam*": *Back to art. 18 of the Statute*], 138 WP C.S.D.L.E 7 (2012) (It.).

31. CLAUDIO CONSOLO & DORA RIZZARDO, *VERE E PRESUNTE NOVITÀ, SOSTANZIALI E PROCESSUALI, SUI LICENZIAMENTI INDIVIDUALI* [TRUE AND ALLEGED, SUBSTANTIVE, AND PROCEDURAL, NEWS ON INDIVIDUAL DISMISSALS] 729–37 (2012) (It.).

32. Because the remedy in cases of both discriminatory and unjustified dismissal could previously be only reinstatement plus back pay (punitive damages could not, and still cannot, be admitted in discrimination cases in Italy), the dismissed worker had the tendency to contest the sole lack of justification of the dismissal (leaving on the employer's side the burden of proof of the dismissal justification, in accordance with Art. 5 L. n. 604/1966 (It.)), thus avoiding to face the burden of proof of the discriminatory nature of the dismissal.

33. Maria Teresa Carinci, *Il rapporto di lavoro al tempo della crisi: modelli europei e flexicurity "all'italiana" a confronto* [*The Employment Relationship at the Time of the Crisis: European Models and "Italian" Flexicurity in Comparison*], 4 DLRI 553 (2012) (It.).

34. Arturo Maresca, *Il nuovo regime sanzionatorio del licenziamento illegittimo: le modifiche dell'art. 18 Statuto dei Lavoratori* [*The New Dismissal Regime: The Amendments to Art. 18 Statute of Workers*], 1 RIDL 436 (2012) (It.); Mattia Persiani, *Il fatto rilevante per la reintegrazione del lavoratore illegittimamente licenziato* [*The Relevant Fact for the Reinstatement of Unfairly Fired Workers*], 1 ADL 6–11 (2013) (It.); Marco Tremolada, *Licenziamento disciplinare nell'art. 18 St. Lav.* [*Disciplinary Dismissal in Art. 18*], in COMMENTARY TO REFORM, *supra* note 11, at 53, according to whom, not only the "fact" should have materially happened, but it should be necessarily proved to have been committed by the employee.

35. ANTONIO VALLEBONA, *LA RIFORMA DEL LAVORO 2012* [THE LABOR REFORM 2012] 57 (2012) (It.).

working performance a mere—i.e., empirically verifiable—fact, or does it necessarily imply a judicial evaluation in order to assess that what the worker did or did not do could be qualified as a more or less serious breach of contractual duties?³⁶ In criminal law, the main elements under scrutiny regard the material commission of the “fact” with which the defendant is charged (homicide, robbery, etc.). In questions of contractual obligations and related liabilities the “fact” with which the employee is charged (delay, inadequate working performance, etc.) cannot possibly be a mere “fact.” In order to reach a decision regarding liability of the employee, it requires an evaluation beyond its mere “existence.”³⁷

- (c) The distinction between mere absence and clear absence of the fact at the basis of dismissal due to an objective reason.³⁸ On the one hand, the clear absence could be a sign of a hidden discriminatory or illicit nature of the employer’s decision or illicit reason that is at the basis of the dismissal. On the other hand, the hypotheses of clear absence could be those where the lack of justification appears, according to the Judge’s view and—above all—discretion, truly “evident” or “plain” (plausibly, on the basis of the sole evidence,

36. Franco Carinci, *Ripensando il “nuovo” art. 18 dello Statuto dei lavoratori [Rethinking the “New” Art. 18 of the Workers’ Statute]*, 2 DRI 292–94 (2013) (It.); Oronzo Mazzotta, *I molti nodi irrisolti del nuovo art. 18 St. Lav. [The Many Unresolved Issues of the New Art. 18]*, in *IL NUOVO MERCATO DEL LAVORO: DALLA RIFORMA FORNERO ALLA LEGGE DI STABILITÀ 2013*, at 248 (Maurizio Cinelli, Giuseppe Ferraro & Oronzo Mazzotta eds., 2013) (It.); Adaberto Perulli, *Fatto e valutazione giuridica del fatto nella nuova disciplina dell’art. 18 St.Lav. Ratio ed aporie dei concetti normativi [Legal Assessment of the New Discipline of Art. 18]*, ADL, 4-5, 792 (2012) (It.); Patrizia Tullini, *Riforma della disciplina dei licenziamenti e nuovo modello giudiziale di controllo [Reform of the Rules Governing Layoffs and New Model of Judicial Control]*, I RIDL 159 (2013) (It.); Trib. Bologna 15-10-2012, 4–5 ADL 907 (2012) (It.); Trib. Ancona 26-11-2012, BOLL. SPEC. ADAPT 21 (2013) (It.); Trib. Ravenna 18-3-2013, 6 LG 567 (2013) (It.).

37. This evaluation seems to embed a logical step from “conduct” to “misconduct,” or, in other terms, from mere “fact” to “breach of contract.”

38. Sergio Magrini, *Quer pasticciaccio brutto (dell’art. 18) [That Awful Mess (Art. 18)]*, 3 ADL 535–38 (2012) (It.); Luca Nogler, *La nuova disciplina dei licenziamenti ingiustificati alla prova del diritto comparato [The New Discipline of Unfair Dismissal to the Test of Comparative Law]*, 4 DLRI 685 (2012) (It.); Carla Ponterio, *Il licenziamento per motivi economici [The Redundancy]*, 1 ADL 81 (2013) (It.); Franco Scarpelli, *Il licenziamento individuale per motivi economici [The Individual Dismissals for Economic Reasons]*, in GUIDA ALLA RIFORMA FORNERO, I QUADERNI DI WIKILABOUR [FORNERO GUIDE TO REFORM, THE NOTEBOOK OF WIKILABOR] 88 (Mario Fezzi & Franco Scarpelli eds., 2012) (It.).

documents, and circumstances presented by the parties).³⁹

- (2) The discretionary power of the Courts: The goal to reduce the space for judicial discretion on the consequences of unfair dismissals does not appear to have been achieved (at least not fully) by the new norms. The already-mentioned unclarity of the text of the law and the introduction of new judicial prerogatives provided the Courts with even more extensive discretionary powers.⁴⁰ For instance, the evaluation of the so-called *aliunde percipiendum* gave Courts the power to determine whether it was possible for the worker to find a new job after the original dismissal, and which amount could be reasonably deduced from the back pay to the worker in case of “Weak Reinstatement.”⁴¹ Moreover, the new power of the Courts to fix the compensatory indemnity between twelve and twenty-four months wages does not allow the parties (especially not the employer) to predict the dismissal costs, considering the wide range.
- (3) The “degree” of flexibility: Is the new remedy of “Strong Monetary Compensation”—an alternative to the previous mandatory reinstatement rule—more “flexible” from the employer’s point of view? The maximum amount of the monetary compensation, which depends only in part on an employee’s seniority, may be deemed by employers and foreign investors to be a severe sanction or even a burden⁴² in

39. In this sense, the cases of “clear absence” of the “alleged objective reason” are limited to those where the documents allow the judge to immediately (i.e., without any further evidence investigation) ascertain the total lack of the reason adduced, like in the hypothesis of dismissal motivated by the closing of a shop where a seller operated, in the eventuality that the shop was proved to be still open for business. See Marco Biasi, *Il nuovo articolo 18 dopo un anno di applicazione giurisprudenziale: un bilancio provvisorio* [The New Art. 18, After a Year of Judicial Application: A Provisional Review], 181 WP C.S.D.L.E. 36–37 (2013) (It.); Trib. Reggio Calabria 3-6-2013 (It.).

40. Adriana Topo, *Le regole in materia di giustificato motivo di licenziamento* [The Rules on Dismissal for Objective Reasons], in COMMENTARY TO REFORM, *supra* note 11, at 68; Paolo Tosi, *L'improbabile equilibrio tra rigidità “in entrata” e flessibilità “in uscita” nella legge n. 92/2012 di riforma del mercato del lavoro* [The Unlikely Balance Between Rigidity in Flexibility and Outgoing in Law n. 92/2012 on the Reform of the Labor Market], 5 ADL 834 (2012) (It.); Pierluigi Rausei & Maria Tuttobene, *Il nuovo quadro regolatorio tra incertezze e maggior potere ad libitum dei giudici* [The New Regulatory Framework Between Uncertainty and Greater Power of Judges Ad Libitum], in LAVORO: UNA RIFORMA SBAGLIATA [LABOR: A WRONG REFORM] 129 (Pierluigi Rausei & Michele Tiraboschi eds., 2012) (It.) [hereinafter LABOR: A WRONG REFORM]; see Pasqualino Albi, *Il licenziamento individuale per giustificato motivo oggettivo dopo la riforma Monti-Fornero* [The Individual Dismissal for Just Cause After the Reform Monti-Fornero], 4 WP C.S.D.L.E. 160 (2012) (It.).

41. Carlo Cester, *Licenziamenti: la Metamorfosi della Tutela Reale* [Layoffs: The Metamorphosis of the Reinstatement Protection], in COMMENTARY TO REFORM, *supra* note 11, at 36.

42. Marco Marazza, *L'art. 18, nuovo testo, dello Statuto dei lavoratori* [The New Text of Art. 18 of the Workers' Statute], 3 ADL 612–16 (2012) (It.).

the light of the lower caps to monetary compensation in other countries.⁴³

III. "INGOING" FLEXIBILITY AND THE PERMANENT EMPLOYMENT CONTRACT AS "*DOMINANT*" FORM OF HIRING

As mentioned above, among the goals of Act 92/2012 a relevant position was ascribed to the support of the permanent and standard contract of employment, expressly labelled by the Legislator as the dominant form of hiring.⁴⁴ Besides the reform of the dismissal discipline, the Legislator aimed at preventing the misuse of flexible forms of hiring, such as fixed-term contracts and other employee-like contractual forms, including the so-called project-based contract.

A. *The Support for Apprenticeship*

Flexible forms of hiring have spread uncontrollably over the last decade, becoming the prevalent form of access of young workers to the labor market. The intention of the Legislator, the main channel of access to the labor market for young workers should be an apprenticeship,⁴⁵ which was recently the subject of a statutory modification by means of a "Unified Code."⁴⁶

On the one hand, employers have significant incentives to hire apprentices, such as lower salary costs and social contributions, in addition to tax deductions. On the other hand, young workers have been given the chance to receive a qualifying training and, ultimately, be confirmed as permanent employees at the end of their training period.⁴⁷ However, the reformed norms—aiming to the misuse of apprenticeships and promote a virtuous use of the same—combined factors of flexibility with elements of

43. For instance, the cap to monetary compensation in case of dismissal unfairness in Germany is normally up to twelve months' wages. MANFRED WEISS & MARLENE SCHMIDT, *LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY* 132 (4th ed. 2008). In Spain, thirty-three days of pay for each year of service with a cap of twenty-four months. Jesús Cruz Villalón, *Los cambios en materia de extinciones [Changes on Individual Labor Dismissal]*, 2012 INDIVIDUALES EN LA RIFORMA LABORAL [J. CRITICAL THEORY & PRACTICAL] 121–47 (Spain). In Portugal, twenty days of pay for each year of service with a cap of twelve months. De Stefano, *supra* note 25, at 12.

44. Art. 1 Legge 27 giugno 2012, n. 92 (It.).

45. *Id.* Art. 1, ¶ 1(b). Apprenticeship was defined under Art. 1, ¶ 1(b) Decreto Legge 14 settembre 2011, n. 167 (It.) ("Unified Code on Apprenticeship" as a "permanent employment contract aimed at the formation and occupation of young workers.").

46. On D.L. n. 167/2011 (It.), see IL TESTO UNICO DELL'APPRENDISTATO E LE NUOVE REGOLE SUI TIROCINI [THE CONSOLIDATED APPRENTICESHIP AND THE NEW RULES ON TRAINING] (Michele Tiraboschi ed., 2011) (It.); Franco Carinci, *E tu lavorerai come apprendista: L'apprendistato da contratto "speciale" a contratto "quasi unico" [You Will Work As an Apprentice: The Apprenticeship Contract From "Special" Contract To "Almost Unique" Contract]*, WP C.S.D.L.E. 145 (2012) (It.).

47. Laura Foglia, *Sull'attuazione della componente formativa nel contratto di apprendistato [Implementation of the Training Component in the Contract of Apprenticeship]*, 12 MGL 894 (2012).

rigidity, thus raising doubts over the effectiveness of the Reform and its consistency with the declared targets.

With regard to the new “rigidities,” the statutory modifications implied⁴⁸:

- (1) A stricter numerical proportion between apprentices and skilled workers in service.⁴⁹
- (2) The confirmation in service, after the training period, of the majority of previous apprentices as a condition for hiring new apprentices.⁵⁰
- (3) A mandatory minimum duration of the apprenticeship relationship of at least six months.⁵¹
- (4) The exclusion of the possibility to hire fixed-time apprentices through agency work.⁵²

In summer 2013, the “Letta Reform,” while confirming the role of apprenticeship as the standard access of young workers to the labor market,⁵³ provided for further tax and social security incentives to employers hiring—among others⁵⁴—apprentices up to the age of twenty-nine.⁵⁵

B. *The New Role of the Fixed-Term Employment Contract*

If these rules do not seem to have a strong impact on the use of apprenticeships, a different evaluation ought to be expressed on the new regulation of fixed-term employment contracts.⁵⁶ Besides a couple of new small rigidities—a limited increase in social security costs of fixed-term contracts and the initial expansion of the time-break between two

48. Art. 1, ¶¶ 16–19 L. n. 92/2012 (It.).

49. At most three apprentices for every two skilled workers; in companies hiring up to ten workers, one skilled worker for every apprentice; finally, in companies hiring up to three workers, three apprentices at most.

50. Despite the alleged nature of apprenticeship as a “permanent contract,” at the end of formation period the employer is entitled to dismiss the apprentice in accordance with Art. 2118 Codice civile [C.c.] (It.). Therefore, the protection of the apprentice is limited to the notice period. On this point, Giuseppe Maccarone, *Il contratto di apprendistato nel testo unico [The Apprenticeship Contract in the Unified Code]*, 12 MGL 923–24 (2011) (It.).

51. The maximum duration of the formation period was already established by D.L. n. 167/2001 (It.) for the so-called “professional apprenticeship” in six years.

52. Enrica Carminati & Michele Tiraboschi, *Apprendistato: novità e conferme [Apprenticeship: News and Confirmation]*, in LABOR: A WRONG REFORM, *supra* note 40, at 73.

53. Art. 2, ¶ 2 Decreto Legge 28 giugno 2013, n. 76 (It.).

54. More specifically, the tax and social security incentives provided by Art. 1 D.L. n. 76/2013 (It.) were applied both to the “standard” permanent employment contracts and to apprenticeship.

55. Lisa Rustico, *La nuova disciplina dell'apprendistato [The New Discipline of Apprenticeship]*, in THE NEW LAW OF THE LABOR MARKET, *supra* note 25, at 141.

56. Franco Carinci, *L'apprendistato [The Apprenticeship]*, in COMMENTARY TO REFORM, *supra* note 11, at 114.

consecutive fixed-term contracts, the so-called “stop and go”⁵⁷—the Legislator allowed employers to hire an employee with a first, initial fixed-term contract for up to twelve months, regardless of any legal requirements. The latter has been an extremely important change, because, according to Article 1 of Legislative Decree 368/2001, the basic rule is that any fixed-term employment contract requires the presence of “technical, organizational, productive, or substitutive reasons” at the basis of the temporary hiring. Although this “open clause” had the effect of increasing the role of labor courts in the evaluation of the “temporary reasons” adduced by the employer, the Italian Supreme Court and the ECJ stated that the use of fixed-term employment contracts has to be considered as an exception to permanent hiring, so that the fixed-term clause has to be justified by the presence of an objective reason for the temporary hiring.⁵⁸

Moreover, the above-mentioned idea was recently shared by the Italian Legislator, which confirmed the role of permanent employment contract as the dominant or most common hiring form.⁵⁹ Accordingly, some scholars criticized the introduction of the initial unjustified fixed-term contract that, at worst, may allow employers to arrange a constant turnover of the workforce, replacing fixed-term workers every twelve months,⁶⁰ or, at best, to use the twelve-month period of fixed-term hiring as a probation period.⁶¹ In this perspective, the new normative solution may appear in contrast with the basic idea of promoting stable occupation and, above all, with the purpose of reducing “ingoing flexibility.”⁶²

57. From ten days to sixty days in case of up to six-month duration of the fixed-term contract, and from twenty to ninety days in case of more than six-month duration of the fixed-term contract. See Art. 1, ¶ 9(g) L. n. 92/2012 (It.). However, as already noted, the original terms were reestablished by D.L. n. 76/2013 (It.), enacted by the Letta Government. On this point, see Michele Miscione, *I contratti di lavoro a termine 2013 [The Fixed-term Employment Contracts of 2013]*, 12 LG (2013) (It.).

58. Giuseppe Pera, *Sulla nuova disciplina del contratto a termine e sul regime sanzionatorio del licenziamento ingiustificato [On the New Discipline of the Fixed-term Contract and the Sanctions Regime on Unjustified Dismissal]*, I RIDL 18 (2002) (It.); Cass. 21 maggio 2008, n. 12985, RIDL 2008, II, 891 (It.); Cost. 14 luglio 2009, n. 214, RIDL 2009, II, 870 (It.); Case C-212/04, Adeneler and Others, 2006 E.C.R. I-06057; Case C-378/07, Angelidaki and Others, 2009 E.C.R. I-03071; Case C-20/10, Vino, 2010 E.C.R. I-00148. Although these decisions dealt with a repetitive use of fixed-term employment contracts and not with a single fixed-term contract.

59. Art. 1, ¶¶ 1(a) & 9(a) L. n. 92/2012 (It.).

60. Davide Costa & Michele Tiraboschi, *La revisione del contratto a termine tra nuove rigidità e flessibilità incontrollate [The Revision of the Fixed-term Contract Between new Rigidity and Uncontrolled Flexibility]*, in LABOR: A WRONG REFORM, *supra* note 40, at 58–59; Maria Teresa Carinci, *Il rapporto di lavoro al tempo della crisi [The Employment Relationship at the Time of the Crisis]*, RELAZIONE GIORNATE DI STUDIO AIDLASS [REPORT: STUDY DAYS] 16 (2012) (It.).

61. Valerio Speziale, *La riforma del contratto a termine nella legge 28 giugno 2012, n. 92 [The Reform of the Forward Contract in Law of June 28, 2012]*, 2 WP C.S.D.L.E. 153 (2012) (It.); Gaetano Zilio Grandi & Mauro Sferrazza, *Il termine nel contratto di lavoro: riflessioni a margine della Riforma Fornero [The Term Clause in the Employment Contract: Reflections on the Sidelines of the Reformation Fornero]*, 3 ADL 562–68 (2013) (It.).

62. Luigi Menghini, *Contratto a termine: nuove regole [Fixed-term Contract: New Rules]*, in COMMENTARY TO REFORM, *supra* note 11, at 93–94.

A. *The “Project-Based Contract” and the New
“Minimum Wage” Provision*

New rigidities seem to have a strong impact on self-employment and, in particular, on the project-based contracts, with the aim of limiting the misuses of this contractual form.⁶³ In fact, special attention should be given to the new version of Article 63 of Legislative Decree 276/2003.⁶⁴ This provision states that, despite the self-employment nature of the project-based relationship, the payment due to the project-based worker should not be inferior to the minimum wage due to employees operating in the same industry branch and performing the same tasks, in the amount determined by collective agreements. The new provision deals with two complementary aims:

- (1) It prevents employers from using project-based contracts in place of employment contracts with the sole aim of saving labor costs.
- (2) It grants project-based workers a minimum wage, or, as it was observed during the discussion on Act 92/2012 in Parliament, a basic income.⁶⁵

With regard to the second argument—despite the normal reference to basic income to designate State assistance measures in favor of all citizens or special categories of needy people within a community—the new disposition seems to share similar goals.⁶⁶ Considering that the guarantee of decent living conditions requires the availability of a minimum income in order to satisfy primary needs, the protection of project-based workers “*ius*

63. The project-based contract, regulated by Arts. 61–69 D.L. n. 276/2003 (It.) (the so-called “Biagi Act”), is a self-employment contract featuring a peculiar form of “coordinated, continuative and personal collaboration” between the principal and the independent contractor. Therefore, according to Art. 61 D.L. n. 276/2003 (It.), this contractual relationship was based on a temporary project that ought to be determined in advance by the principal and then executed autonomously by the independent contractor “in view of a predetermined target.” On this point, see Orsola Razzolini, *La nuova disciplina del lavoro a progetto [The New Discipline of Project Work]*, in *THE NEW LAW OF THE LABOR MARKET*, *supra* note 25, at 195–222.

64. Art. 63 D.L. n. 276/2003, as modified by Art. 1, ¶ 23(c) L. n. 92/2012 (It.).

65. Giuseppe Bronzini, *Basic Income*, in *I LESSICO GIUSLAVORISTICO [LABOR LAW]* 49–60 (Marcello Pedrazzoli ed., 2010) (It.).

66. Antonella Durante, *Il reddito di cittadinanza: verso un nuovo modello di protezione sociale? [Basic Income: Toward a New Model of Social Protection?]*, II RGL 411 (2006) (It.). Accordingly, on the idea of a stricto sensu “basic income,” see Charter of Fundamental Rights of the European Union, art. 34, ¶ 4, 2000 O.J. (C 364) (so-called “Nice Chart”, which states “in order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices”); Lorenzo Zoppoli, *Reddito di cittadinanza, inclusione sociale e lavoro di qualità: profili giuridico-istituzionali [Basic Income, Social Inclusion, and Quality of Work: Legal and Institutional Profiles]*, I DLM 76 (2007) (It.).

existentiae” is achieved by means of a mandatory minimum wage obligation on the principal/employer.⁶⁷

Moreover, the new provision seems particularly innovative in view of the lack of a minimum wage statute in Italy.⁶⁸ Italian courts have traditionally referred to Article 36 of the Italian Constitution—which ensures all workers a proportionate and sufficient wage—as the legal basis for the extension of the minimum salary rates determined by collective agreements to all employees falling outside the coverage of the latter.⁶⁹ The new provision appears particularly challenging because it addresses a self-employment relationship, i.e., a space where the worker was traditionally deemed to have the same contractual power as the counterpart and to be free to determine the contents of a contract.⁷⁰ Previous version of Article 63 of Legislative Decree 276/2003 requires that the payment due to the project-based worker has to be proportionate to the quantity and quality of the work performed.⁷¹

Nonetheless, any evaluation of payment proportionality had to be conducted by the Judge in accordance with the payment normally due for the same self-employment working performances and according to collective agreements, providing an adequate economic measurement of working performance.⁷² There was no statutory disposition granting the sufficiency of the payment to the project-based worker and worker’s right to lead a decent existence.⁷³ On the contrary, with Act 92/2012, the

67. Paola Bozzao, *Reddito minimo e welfare multilivello: percorsi normativi e giurisprudenziali* [Minimum Income and Welfare Multilevel Regulatory and Jurisprudential Pathways], 4 DLRI 598 (2011) (It.); Giuseppe Bronzini, *Il reddito minimo garantito nell’Unione Europea: dalla Carta di Nizza alle politiche di attuazione* [The Guaranteed Minimum Income in the European Union: The Charter of Nice Implementation of Policies], 2 DLRI 230 (2011) (It.).

68. However, the lack of legislative provisions in the matter of “Minimum Wage” in Italy is entirely due to the will of the Legislator’s. Pietro Ichino, *La “giusta retribuzione” tra diritto ed economia* [The “Fair Wage” Between Law and Economics], 2 DRI 171 (2002) (It.).

69. Traditionally, the Labor Courts related the term worker in Article 36 of the Italian Constitution only to employees and not to self-employed workers or independent contractors. Cass. 1 settembre 2004 n. 17564, Giust.Civ. 2005, I, 1257 (It.); Cass. 3 dicembre 2008, n. 28718, Giust.Civ. 2009, I, 304 (It.); Cass. 23 marzo 2004, n. 5807, GCM 2004, 677 (It.); Cass. 25 ottobre 2003, n. 16059, Rep. 2003, 3830, 4 (It.).

70. Art. 2225 Codice civile [C.c.] (It.) (In the matter of “standard” self-employment: only if the payments have not been determined by the parties, they have to be quantified by the Judge “in accordance with professional fees or customs, or in relation to the result effectively achieved and the quantity of work normally required to realize it.”)

71. NICOLA DI LEO, *LAVORO A PROGETTO. INTERPRETAZIONE TELEOLOGICA DELLE NORME E RASSEGNA COMMENTATE DI GIURISPRUDENZA E PRASSI AMMINISTRATIVA* [PROJECT-BASED CONTRACT: TELEOLOGICAL INTERPRETATION OF NORMS AND COMMENTED REVIEW OF CASE LAW AND ADMINISTRATIVE PRACTICE] 147–49 (2008) (It.).

72. Art. 1, ¶ 772 L. n. 296/2006 (It.); Arturo Maresca, *La determinazione del corrispettivo dovuto al collaboratore a progetto* [The Determination of the Amount Due to the Employee in the Project-Based Contract], in *SUBORDINAZIONE E LAVORO A PROGETTO* [SUBORDINATION AND PROJECT-BASED CONTRACT] at 99 (Giuseppe Santoro-Passarelli & Giuseppe Pellacani eds., 2009) (It.).

73. Giuseppe Pellacani, *Lavoro a progetto e fonti collettive* [Project-Based Contract and Collective Sources], in *SUBORDINAZIONE E LAVORO A PROGETTO* [SUBORDINATION AND PROJECT-

Legislator recognized the modified conditions and bargaining power of self-employed workers in the current job market.⁷⁴ The Legislator, therefore, decided to grant self-employed workers a minimum wage protection. In other terms, the statutory modification seems to produce a significant shift toward standard employment protection, resulting from the reference to collective agreements of standard employees as monetary parameter or as a mandatory benchmark for the determination of the sufficient wage due to project-based workers.⁷⁵

Accordingly, the new rules appear consistent with the purpose of limiting any use of project-based contract with the sole aim of labor cost savings, or, in other terms, in a “social dumping” perspective.

IV. THE MOST RECENT TRENDS IN ITALIAN INDUSTRIAL RELATIONS

A. Article 39 of the Italian Constitution and Its Partial Implementation

With regard to industrial relations in Italy, the main and longstanding issue of interest is the partial implementation of Article 39 of the Italian Constitution. This provision, which granted under paragraph 1 the basic principle of Freedom of Union Association, was aimed at drawing up a system of collective labor law, where the unions had to provide themselves with a democratic Statute and to enroll on a State register.⁷⁶ Under these two conditions, the unions—acting by means of a sole bargaining unit with proportional representation of workers—could conclude collective agreements with general (*erga omnes*) effects and bind all workers and businesses operating in the related branch of the industry.

However, due to the union opposition to excessive State control of both their activities and instruments (e.g., strikes) and toward any measurement of their own “numbers” or rates of consensus among workers, Italian industrial relations developed a pluralistic and adversarial system, different from the Constitutional scheme.⁷⁷ According to the provisions of

BASED WORK] 280 (Giuseppe Santoro-Passarelli & Giuseppe Pellacani, eds. 2009) (It.) [hereinafter SUBORDINATION AND PROJECT-BASED WORK]; Marcello Pedrazzoli, *La disciplina delle collaborazioni ricondotte a progetto e dei contratti di lavoro a progetto*, in SUBORDINATION AND PROJECT-BASED WORK, *supra*.

74. Adalberto Perulli, *Riflessioni sul contratto di lavoro a progetto*, in SUBORDINATION AND PROJECT-BASED WORK, *supra* note 73, at 132.

75. Marco Marazza, *Il lavoro autonomo dopo la riforma del Governo Monti [Self-Employment After the Reform of the Monti Government]*, 5 ADL 875 (2012) (It.); Adalberto Perulli, *Il lavoro autonomo e parasubordinato nella riforma Monti [Self-Employment and Employee-Like Relationships in Monti Reform]*, 4 LD 560 (2012) (It.); Vito Pinto, *Prime chiose sulla nuova disciplina delle collaborazioni a progetto [Early Comment on the New Discipline of Project-Based Contract]*, 27 WP C.S.D.L.E. 151 (2012) (It.).

76. Art. 39, ¶¶ 2–4 Costituzione [Cost.] (It.).

77. In particular, the three main Unions: the left-wing and most widespread among workers CGIL, the Catholic Union CISL, and the moderate Union UIL.

the Workers' Statute, the condition for a union to establish worker representation bodies at plant level (the so-called RSA—and, therefore, to exercise union rights in the workplace—was initially devolved for both civil law instruments (agency or mandate) and sociological concepts such as representativeness (*Rappresentatività*).⁷⁸ On the bargaining side, the capacity to conclude collective agreements depended on the dynamics of intergroup relations and on the union capacity to aggregate workers' consensus and represent their interests.⁷⁹

B. The Dynamic Relationship Between Different Levels of Bargaining

As a further consequence of the lack of full implementation of Article 39 of the Italian Constitution, it was difficult to find a clear solution concerning the relationship between the different levels of collective bargaining. According to the fundamental Cross-Industry Agreement of July 23, 1993, the system was based on the national-level bargaining, which had to guarantee common “minimum” standards of normative and economic protection. Cross-Industry Agreements are also different from the plant-level agreements, which could discipline only those matters left “open” or unregulated at the national level with the purpose of integrating the “minimum” standards with company arrangements.

Furthermore, the 1993 Cross-Industry Agreement replaced the RSA with a new representative body, named RSU, whose members—two thirds—were appointed by the workers on an electoral (universal) basis, whilst the remaining one third were appointed by the main National Union Confederations.⁸⁰ However, this picture has been harshly challenged in the last decade. Starting in 2001, the Italian Government's White Paper endorsed new ideas of reform, dedicating the third Chapter to industrial relations, where the following three topics were addressed: (1) the contractual system; (2) worker participation; (3) economic democracy.⁸¹ With reference to point (1), it was stated that centralized collective bargaining creates obstacles to the growth of salaries by denying wage adjustments, and it increases the unemployment rate. Therefore, it was

78. This happened at least until the 1995 referendum that repealed the requisite of the highest degree of “Representativeness” at national level as one of the two conditions to exercise union prerogatives at shop-floor level. Therefore, the sole lasting requisite to appoint one member of RSA was the conclusion of the collective agreement applied in the plant. See Pietro Ichino, *Le rappresentanze sindacali in azienda dopo i referendum [The Trade Union Representatives at the Workplace After the Referendum]*, 1 RIDL 113 (1996) (It.).

79. Stefano Liebman, *Il nodo della rappresentanza e della rappresentatività [The Crux of Representation and Representativeness]*, 1 DRI 40–46 (2003) (It.).

80. TIZIANO TREU, *LABOUR LAW IN ITALY* 141–209 (3d ed. 2011).

81. ROGER BLAINPAIN, *THE QUALITY OF EUROPEAN INDUSTRIAL RELATIONS, AND CHANGING INDUSTRIAL RELATIONS: IN MEMORIAM MARCO BIAGI*, BULLETIN OF COMPARATIVE LABOR RELATIONS 44 (2002).

deemed necessary to turn the national-level collective agreements into a sort of “general framework entailing minimum wage determination and standards of protection,” and to strengthen plant-level collective bargaining, where the collective parties could reach company-oriented solutions.

Moreover, the White Paper also encouraged a shift toward Worker Participation in management, and it was announced that a main target of the Italian Government was to give full implementation to the “elements of collaboration and participation endorsed at European level.”⁸²

C. The Effect of the Global Crisis on the Italian Industrial Relations System

The above-mentioned proposals, however, became difficult to realize with the advent of the economic crisis, which had profound effects, not only on the Italian labor market, but also on the whole industrial relations system, bringing once again to general attention the long-lasting (or even chronic) issue of the lack of stable rules with regard to employee representation. The dilemma related to the partial implementation of Article 39 of the Italian Constitution was perceived in times of economic growth, when consecutive collective agreements led to improvements in working conditions and better standards, so that no general issue of possible “derogation” or “hardship clause” could be raised.

On the contrary, in times of severe crisis, when employers and their associations started insisting that bargaining could imply less favorable terms and conditions, the following three main topics became crucial:

- (1) The possibility and the limits for unions to conclude valid and binding collective agreements without the approval of all three main Union Confederations (CGIL, CISL, and UIL).
- (2) The effects of the collective agreements concluded without the consent of one or more of the other main union(s), in terms of exercise of union prerogatives at the workplace, in addition, the questionable extension of the standards set out in the “Separate Agreements” to workers represented by the opposing union or to nonunionized workers.⁸³
- (3) The relationship between different levels of bargaining, considering the current trend toward decentralization in most industrialized countries.⁸⁴

82. On the contrary, Financial Participation fell under point (c) of “Economic Democracy.”

83. I.e., concluded without the approval/consent of all three main Unions; the Union that did not take part into the negotiation nor gave its approval to the signed agreement.

84. DECENTRALIZING INDUSTRIAL RELATIONS AND THE ROLE OF LABOR UNIONS AND EMPLOYEE REPRESENTATIVES (Roger Blanpain ed., 2007).

These issues were raised or, at least, amplified by the conclusion of the so-called “Separate Agreements” in 2009.⁸⁵ They featured the opposition of the most widespread Italian Union (CGIL) and thus generated questions—answered differently by the Courts⁸⁶—over the binding force of these agreements upon workers represented by the CGIL.

D. The “Fiat Case”

The above-mentioned issues were (and still are) at the basis of the highly disputed *Fiat Case*, which concerns the industrial relations strategy of the Italian-based Automotive Group “FIAT.” As of June 2010, the company entered into an Agreement with only two of the major Unions (CISL and UIL), regarding the working conditions in the FIAT plant in Pomigliano d’Arco.⁸⁷ Subsequently—after the conclusion of another “Separate” national-level agreement for the metalworking industry in September 2010 that entailed several clauses derogating the 2008 National-level Collective Agreement (signed jointly with CGIL)⁸⁸—the FIAT Group

85. See Cross-Industry Agreement by CISL, UIL, and Confindustria (the main Employers’ Association in the Italian Industry) of April 15, 2009 and following “Separate Agreement” for the metalworking Industry, concluded without the approval of CGIL on October 15, 2009. Franco Carinci, *Una dichiarazione di intenti: l’Accordo Quadro 22 gennaio 2009 sulla riforma degli assetti contrattuali [A Statement of Intent: January 22, 2009 Framework Agreement on the Reform of Contractual Structure]*, 2 RIDL 179 (2009) (It.); Marco Esposito & Giuseppe Gentile, *Costo del lavoro, competitività delle imprese e nuova struttura della contrattazione collettiva [Labor Costs, Competitiveness of Enterprises, and the New Structure of Collective Bargaining]*, 2 DLM 273 (2009) (It.); Riccardo Del Punta, *Gli accordi “separati” sono antisindacali? Il sistema sindacale “di fatto” nell’era della disunità sindacale [Are “Separate” Agreements Antiunion? The “in Fact” Union System in an Era of Union Disagreement?]*, RIDL 690 (2011) (It.); Maurizio Ricci, *L’accordo quadro e l’accordo interconfederale del 2009: contenuti, criticità e modelli di relazioni industriali [The Framework Agreement and the Cross-Industry Agreement of 2009: Content, Critical, and Industrial Relations Models]*, 3 RIDL 352 (2009) (It.).

86. Stefano Liebman, *Sistema sindacale “di fatto”, crisi dell’unità sindacale e rinnovi separati [Union System “In Fact,” the Crisis of Trade Union Unity and Separate Agreements]*, ADL, 2011, 6, 484 (It.).

87. The Pomigliano Agreement of June 15, 2010 was approved by the workers of the Pomigliano plant with the ballot of June 22, 2010 (by a majority of 63.3%). Roberto Pessi, *La contrattazione in deroga: il caso Pomigliano [Bargaining in Derogation: The Case of Pomigliano]*, 6 ADL 119–33 (2010) (It.).

88. Also the September 29, 2010 Agreement was reached without the CGIL, and it was mainly an integration of the previous Separate Agreement of October 15, 2009. See DA POMIGLIANO A MIRAFIORI: LA CRONACA SI FA STORIA [FROM POMIGLIANO MIRAFIORI: A CHRONICLED HISTORY] (Franco Carinci ed., 2011) (It.). On the so-called “Fiat case” see Iacopo Senatori, *Multinationals and National Industrial Relations in Times of Crisis: The Case of FIAT*, 28 INT’L J. COMP. LAB. L. & INDUS. REL. 169 (2012); Il caso “Fiat” una crisi di sistema [The Case “Fiat”—A Crisis of System], 2 LD (2011) (It.); Bruno Caruso, *La rappresentazione negoziale irrisolta – il caso “Fiat” tra teoria, ideologia, tecnica e . . . cronaca [The Representation of Unresolved Negotiation – the Case of “Fiat”]: Theory, Ideology, Technology. . . Record*, II RIDL 265 (2011) (It.). Mainly, in the matter of working hours and limits to the right to strike. Pasquale Chieco, *Accordi Fiat, clausola di pace sindacale e limiti al diritto di sciopero [Fiat Agreements, Union, and Peace Clause Limits the Right to Strike]*, WP C.S.D.L.E. 117 (2012) (It.); Luisa Corazza, *Tregua sindacale, governo del conflitto collettivo e competitività internazionale [Industrial Peace, the Government of Collective Conflict, and International Competitiveness]*, RIDL 617 (2011) (It.).

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entered into two additional “Separate” Agreements, in December 2010 and February 2011.⁸⁹

Furthermore, the first of the latter agreements was labelled by the contracting parties as a “National-level Collective Agreement,” despite the fact that the agreement was related only to FIAT workers, and that it was concluded without the presence of Italy’s largest and most widespread union (CGIL) and the main employers’ association (Confindustria). In this sense, one of the hallmarks of the “FIAT Case” in Italy was the attempt by the company to develop an independent—or alternative—contractual system and to apply similar contractual regulations throughout the whole, expanding the FIAT Group.⁹⁰

In relation to this strategy, it is possible to explain the decision by FIAT, on the one hand, to quit “Confindustria,” and, at the same time, to establish a new company (“NewCo”) in view of the application to the whole workforce of the *sole* collective agreements concluded for the FIAT Group.⁹¹ Moreover, as a consequence of the conclusion of “FIAT Agreements” without CGIL, the union, strongly opposing FIAT’s strategy, was not entitled to exercise union prerogatives in the workplace, because Article 19 of Act 300/1970 granted the presence of union representatives (RSA) and the exercise of union rights only to unions that “have concluded the agreement that is applied in the plant.”⁹²

89. The two Agreements are dated December 29, 2010 and February 17, 2011. Another separate “National Level Collective Agreement” was signed on December 23, 2010 (without CGIL and Confindustria) in relation to working conditions in the Mirafiori Plant. The latter Agreement was approved on January 13–14, 2011 by workers with a ballot (54% majority). Raffaele De Luca Tamajo, *I quattro accordi collettivi del Gruppo Fiat: una prima ricognizione* [*The Four Collective Agreements of the Fiat Group: A Preliminary Survey*], III RIDL 113 (2011) (It.); Giuseppe Santoro Passarelli, *I contratti collettivi della Fiat di Mirafiori e Pomigliano* [*Collective Agreements of Fiat in Mirafiori and Pomigliano*], III RIDL 161 (2011) (It.).

90. In fact, as it is known, this shift in the industrial relations Strategy in FIAT coincided with the takeover of the U.S. Automotive Company Chrysler by FIAT. On the relationship between the International Strategy of FIAT Group and its industrial relations System, Edoardo Ales, *Dal “caso FIAT” al “caso Italia”. Il diritto del lavoro “di prossimità”, le sue scaturigini e i suoi limiti costituzionali* [*From “FIAT” to the “Italian Case”: The Proximity Labor Law, Its Issues and Its Constitutional Limits*], WP C.S.D.L.E. 134 (2011) (It.); Giuseppe Berta, *I nuovi criteri dell’azione sindacale secondo la UAW* [*The New Criteria of Union Activity in Accordance with the UAW*], 1 DLRI 95 (2011) (It.); Adalberto Perulli, *Delocalizzazione produttiva e relazioni industriali nella globalizzazione. Note a margine del caso FIAT* [*Relocation of Production and Industrial Relations in Globalization: Notes on the Sidelines of the FIAT Event*], 2 LD 343 (2011) (It.); Silvana Sciarra, *Uno sguardo oltre la Fiat – Aspetti nazionali e transnazionali nella contrattazione collettiva della crisi* [*A Look Beyond the FIAT: National and Transnational Aspects of the Collective Bargaining of Crisis*], III RIDL 169 (2011) (It.).

91. Riccardo Del Punta, *Note su Pomigliano* [*Notes on Pomigliano*], 2 DLM 505 (2010) (It.); Giuseppe Ferraro, *Le relazioni industriali dopo “Mirafiori”* [*Industrial Relations After “Mirafiori”*], RDSS 119 (2011) (It.).

92. Enrico Gragnoli, *Il sindacato in azienda, la titolarità dei diritti sindacali e la crisi del modello dell’art. 19 St. Lav.* [*The Trade Union at the Workplace, the Legitimacy to Exercise Trade Union Rights and the Crisis of Art. 19*], 3 ADL 609–11 (2012) (It.).

However, the case recently came to the attention of the Constitutional Court, which observed that Article 19 was in contrast with Article 39 of the Italian Constitution in the matter of freedom of union association and effectiveness of union activity.⁹³ Accordingly, the Court stated that Article 19 Act should grant the right to establish workplace representatives not only to unions who concluded the agreement that is applied by the company, but also to those unions that had taken an active part in the negotiations but that did not of their own free will approve the final text.⁹⁴

E. A Revised "Unity" Between the Unions and the Subsequent State Intervention

During the course of these events and the multiple controversies pending in many Italian Labor Tribunals (upon application by CGIL⁹⁵), the social parties (i.e., all three main unions, plus the Employers' Association "Confindustria") reached a "compromise." On June 28, 2011, Cross-Industry Agreement set new rules with regard to union representation and to the relationship between different levels of bargaining.⁹⁶ The Agreement aimed to create "a regulated industrial relations system, in order to enhance," not only "legal certainty in matter of representation bodies, levels, timing, and purposes of collective bargaining," but also "future compliance of the contracting parties with the new [and] shared rules."⁹⁷ With regard to the first aspect, the Cross-Industry Agreement stated that:

Representativeness required to negotiate a national-level collective agreement was recognized to Unions reaching a minimum threshold of 5% of worker representation, to be quantified in terms of average between the percentage of total union fees collected and the preferences

93. Art. 19 Legge 20 maggio 1970, n. 300 (It.) (in its post-1995 version).

94. Cost. 23 luglio 2013, n. 231 (It.); Franco Carinci, *Il buio oltre la siepe. Corte Costituzionale 23 luglio 2013, n. 231 [The Darkness Beyond the Hedge: Constitutional Court Decision of July 23, 2013, n. 231]*, 4 DRI 899 (2013) (It.); Gaetano Zilio Grandi, *A volte ritornano: l'art. 39, cc. 2-4, Cost. dopo gli accordi interconfederali e la sentenza della Corte costituzionale sull'art. 19 Bollettino Adapt [Sometimes They Come Back: The Art. 39 of the Constitution After the Inter-Confederation Agreements and the Judgement of the Constitutional Court on Art. 19]* (July 8, 2013) (It.), http://www.bollettinoadapt.it/old/files/document/22452grandi_2013_26.pdf.

95. Veronica Papa, *L'art. 19 Stat. nell'affaire Fiat tra dissensi giurisprudenziali e sospetti di incostituzionalità [Art. 19 in the Affair Fiat Between Jurisprudential Disagreements and Suspicion of Unconstitutionality]*, WP C.S.D.L.E. 147 (2012) (It.).

96. For details of the Cross-Industry Agreement of June 28, 2011, see Franco Carinci, *L'accordo Interconfederale del 28 giugno 2011: Armistizio o pace? [The Cross-Industry Agreement of June 28, 2011: Armistice or Peace]*, WP C.S.D.L.E. 125 (2011) (It.); Giovanni Orlandini, *L'accordo interconfederale del 28 giugno 2011: molti dubbi e poche certezze [The Cross-Industry Agreement of June 28, 2011: Many Doubts and Few Certainties]*, www.dirittisocialiecittadinanza.org (last visited Apr. 7, 2014); Ricerche: *Le relazioni industriali dopo l'accordo del 28 giugno 2011 [Researches: Industrial Relations After the Agreement of June 28, 2011]*, 3 DRI 613 (2011) (It.). However, it should be noted that any Cross-Industry Agreement is binding for contracting parties and not for third parties.

97. Cross-Industry Agreement, Preamble (June 28, 2011).

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accorded in the periodic elections of worker representatives at shop-floor level.⁹⁸

With regard to the relationship between different levels of bargaining, the Parties agreed on “controlled decentralization,” declaring that “the national-level collective agreement has the function to give certain rules upon the economic and normative regulation of working relations for the whole sector and country,” whereas “plant-level agreements regulate matters that are delegated, totally or in part, by the national-level agreement.”⁹⁹ Moreover, the Parties affirmed that “plant-level collective agreements may also, “within the limits and under the conditions set out by national-level Collective Agreements” and with eventual effects upon the whole workforce, entail “provisions that modify or reduce the protections granted to workers by national-level agreements.”¹⁰⁰ Finally, the Parties encouraged the Legislator to “adopt measures, in terms of tax and social security deductions, to promote plant-level collective bargaining,” in order to “link wages to productivity targets and to the firm’s results.”¹⁰¹ Right after the mentioned “suggestion” of the Social Parties, the Legislator introduced a new discipline on the effects of plant-level collective agreements.¹⁰²

In fact, not only the new statutory dispositions provided “Decentralized Agreements” with potential *erga omnes* effects, but the Legislator also stated that the “Decentralized Agreements” may derogate, without any limitation, the provisions of National-Level Collective

98. *Id.* Point 1.

99. *Id.* Points 2 & 3; Mattia Persiani, *Osservazioni estemporanee sull'accordo interconfederale del 2011* [Extemporaneous Remarks on the Cross-Industry Agreement of 2011], 3 ADL 451 (2011) (It.); Tiziano Treu, *L'accordo 28 giugno 2011 e oltre* [The Agreement of June 28, 2011 and Beyond], 3 DRI RICERCHE 617 (2011) (It.).

100. The conditions for *erga omnes* effects according to June 28, 2011 Agreement refer to the majority of votes, under the conditions listed in Point 4 for RSU and Point 5 for RSA. However, it has to be borne in mind that the Cross-Industry Agreement has binding effects only upon the contracting Parties (workers and employers represented by the contracting Parties and these latter). Moreover, as stated in Point 7 of the Agreement, with regard to the effect of the latter dispositions upon individual workers, the Social Parties established that the effect of any “Peace Obligation Clause” could not be extended to individual workers, considering the—individual, though collectively exercised—“Right to Strike” protected by Art. 40 Costituzione [Cost.] (It.). On this point, with reference to the different regulation brought in by the “Pomigliano Agreement,” see Franco Liso, *Appunti su alcuni profili giuridici delle recenti vicende FIAT* [Notes on Certain Legal Aspects of Recent Events in FIAT], 2 DLRI 130 (2011) (It.); Raffaele De Luca Tamajo, *Accordo di Pomigliano e criticità del sistema di relazioni industriali italiane* [Pomigliano Agreement and Issues of the Italian System of Industrial Relations], III RIDL 797 (2010) (It.). See also Cross-Industry Collective Agreement, Point 7 (June 28, 2011) (It.). However, the contracting Parties stated that any less protective working conditions agreed at plant level, on the one hand, “should be introduced during company downturns or in presence of significant investment plans” and, on the other hand, it “should regard [only] working performance, working hours and organization of work.” *Id.*

101. More properly, the Social Parties recognized the necessity that the Government promoted plant-level collective bargaining. See Cross-Industry Agreement, Point 8 (June 28, 2011) (It.).

102. Art. 8 Legge 14 settembre 2011, n. 148 (It.) (“Summer 2011 Financial Act”); Art. 8 Decreto Legge 13 agosto 2011, n. 138 (It.) (converted into Legge 14 settembre 2011, n. 148 (It.)).

Agreements as well as any normative disposition, with the only limit of the mandatory respect of Constitutional and European norms (plus those included in International Labor Charters).¹⁰³

The provisions were immediately criticized by scholars, who highlighted the unprecedented supremacy of Plant-Level Agreement not only with regard to national-level agreements, but even to the Law itself.¹⁰⁴ Moreover, the provisions were strictly opposed by the Social Parties, who, with a joint declaration of September 21, 2011, explicitly asserted that “the regulation in matter of industrial relations and collective bargaining has to be left to the autonomous determination by Social Parties.”¹⁰⁵

Therefore, the Parties declared that they “bind themselves to abide by the regulation by the Cross-Industry Agreement of June 28, 2011, applying entirely the content of the latter and ensuring that all Shop-floor representatives abide by the same rules.” Furthermore, in accordance with the Cross-Industry Agreement of June 28, 2011, the parties came to the approval of the Cross-Industry Agreement of May 5, 2013, with the aim of reinforcing the majority principle and the effectiveness of collective bargaining.¹⁰⁶ The parties stated the right of any union exceeding the 5%

103. According to L. n. 148/2011, the expression “Decentralized Agreements” designates not only plant-level collective agreements, but also agreements concluded at regional level by “unions with most representativeness at national or regional level or their plant-level representatives, in accordance with the Cross-Industry Agreement [of June 28, 2011],” although only in cases of “approval by the majority of workers’ representatives.” Art. 8, ¶ 2 L. n. 148/2011 (It.).

104. CONTRATTAZIONE IN DEROGA. ACCORDO INTERCONFEDERALE DEL 28 GIUGNO 2011 E ART. 8 DEL D.L. n. 138/2011 [BARGAINING IN DEROGATION: CROSS-INDUSTRY AGREEMENT AND ART. 8 OF JUNE 28, 2011 DECREE] (Franco Carinci ed., 2012) (It.); AA.VV., *Il tema: Contrattazione di prossimità e art. 8, L. n. 148/2011* [The Theme: Proximity Bargaining and Art. 8, Act no. 148/2011], 3 RGL 453–60 (2012) (It.); Francesco Liso, *Osservazioni sull'accordo interconfederale del 28 giugno 2011 e sulla legge in materia di “contrattazione collettiva di prossimità”* [Observations on Agreement of June 28, 2011 and on the Act Regarding Collective Bargaining Proximity], WP C.S.D.L.E. 157 (2012); Franco Liso, *Brevi note sull'accordo interconfederale del 28 giugno 2011 e sull'articolo 8 della legge n. 148/2011* [Brief Notes on the Cross-Industry Agreement of June 28, 2011 and Art. 8 of Act no. 148/2011], 3 DLRI 453 (2012) (It.); Mario Napoli, *Osservazioni sul sostegno legislativo alla contrattazione aziendale* [Observations on the Legislative Support to Enterprise Bargaining], 3 DLRI 467 (2012) (It.); Adelberto Perulli & Valerio Speciale, *L'articolo 8 della legge 14 settembre 2011, n. 148 e la “rivoluzione di Agosto” del Diritto del lavoro* [Art. 8 of the Act of Sept. 14, 2011, n. 148 and the “Revolution of August” of the Labor Law], WP C.S.D.L.E. 132 (2011) (It.); Franco Scarpelli, *Rappresentatività e contrattazione tra l'accordo unitario di giugno e le discutibili ingerenze del legislatore* [Representation and Bargaining Between the Unity Agreement of June and the Questionable Interference of the Legislator], WP C.S.D.L.E. 127 (2011) (It.).

105. I.e., shared by CGIL, CISL, UIL, and Confindustria.

106. On Cross-Industry Agreement of May 31, 2011 (It.), see AA.VV., *Accordo sulla rappresentanza e rappresentatività del 31 maggio 2013 tra Confindustria e sindacati* [Agreement on Representation and Representativeness of May 31, 2013 Between Confindustria and the Unions], 3 DRI 598 (2013) (It.); Valerio De Stefano & Stefano Liebman, *Le clausole che regolano la trattativa sindacale nel protocollo d'intesa del 31 maggio 2013: l'occasione per una ricostruzione diacronica* [The Clauses Governing the Union Negotiations in the Agreement of May 31, 2013: The Opportunity for a Diachronic Reconstruction], 5 ADL 737 (2013) (It.); Michele De Luca, *Rappresentatività sindacale nel protocollo d'intesa del 31 maggio 2013 ed in recente pronuncia di incostituzionalità (dell'articolo 19 dello statuto dei lavoratori): dall'ordinamento intersindacale alla rilevanza per*

threshold to take part in the negotiation of National-Level Collective Agreements and the *erga omnes* effects of any agreement concluded by unions exceeding together 50% of the overall representation.¹⁰⁷

However, as previously noted, all these statements have only private/contractual force, and they bind only unions, employers, and employer associations taking part in the agreement, lacking any effect on any third party falling outside the main “representation channel.”

IV. CONCLUDING REMARKS: IS THERE ANY SPACE FOR “EMPLOYEE INVOLVEMENT” IN SUCH A CONTEXT?

Among the targets of the Monti Government, in matters of industrial relations, there was the idea to promote “worker participation, in line with E.U. principles and with the purpose of improving the competitiveness of Italian companies.” In order to achieve this goal, Article 4 delegated the Government to “enact one or more Legislative Decrees aimed at favoring forms of employee involvement,” which could be optionally introduced by the plant-level agreements.¹⁰⁸

First of all, it has to be underlined that, in line with previous Act proposals, future Legislative Decrees were supposed to promote a variety of instruments related to worker financial and management involvement.¹⁰⁹ Subsequent debate on the adoption of the delegated Decrees was mainly focused only on the introduction of incentives to variable salary schemes. In fact, the discussions started in September 2012 had the clear purpose of

l'ordinamento giuridico dello Stato [Union Representation in the Agreement Dated May 31, 2013 and in the Recent Ruling of Unconstitutionality], WP C.S.D.L.E. 193 (2013) (It.).

107. I.e., 5% average between: (1) the percentage of members on the total unionized workforce; (2) the percentage of votes in the shop-floor representative elections.

108. Arts. 1 (f) & 4, ¶ 62, L. n. 92/2012 (It.).

109. D.L. n. 803/2008 (It.); D.L. n. 964/2008 (It.); D.L. n. 1307/2008 (It.); D.L. n. 1531/2008 (It.); see Roberta Caragnano, *La partecipazione dei lavoratori: prima analisi delle recenti proposte di legge*, n. 86 (Working Paper, Ass'n Stud. Int'l & Comp. Lab. L. & Indus. Rel., 2009), available at http://www.bollettinoadapt.it/old/files/document/879WP_09_86.pdf (It.). A “wide, all-encompassing Menu,” according to Luigi Mariucci, *E' proprio un very bad text? Note critiche sulla riforma Monti-Fornero [Is It a Very Bad Text]? Critical Notes on the Monti-Fornero Reform*, 3 LD 433 (2012) (It.). According to Art. 4, ¶ 62 L. n. 92/2012 (It.), the forms of employee involvement to be “promoted” by a future Legislative Decree were the following: (1) information and consultation duties in favor of employees or their representatives, according to European Directive 2002/14/EC; (2) development of control procedures on the enactment of joint plans or decisions; (3) introduction of joint committees aimed at controlling and participating in managing activities in matter of workplace safety, health, equal opportunities, forms of variable salary, forms of Social Welfare, other subjects of Corporate Social Responsibility; (4) workers' control on management decisions, through the workers' presence in Supervisory Bodies; (5) employees' participation in company profits or in the firm's capital, or worker involvement in the enactment of industrial plans; (6) appointment of employees' representatives in the Supervisory Board of Italian two-tiered structured companies or in European companies (Societas Europaea ex EC Regulation n. 2157/2001), in both cases only in the hypothesis of companies employing more than 300 workers; (7) employees' access to Shareholding Plans and Firm's Capital (directly or through Foundations).

finding new solutions to the productivity deficit of Italian companies by means of monetary, tax-free incentives to workers' performance in addition to tax deductions.

The Social Parties and the Government concluded the text of the "Productivity Agreement," which opened the adoption of Prime Minister's Decree of January 1, 2013 that provided only limited tax deductions in favor of variable salary forms up to maximum €2,500 for each worker earning up to €40,000 per year.¹¹⁰ In conclusion, these "weak" incentives to variable salary forms may seem rather inconsistent with the idea of promoting "employee involvement" according to Article 1. In fact, this solution appears different in scope and concerns any form of worker participation in Management.

In this sense, a clear example of the lack of consistency of the new norms is given by the intention to support board-level employee participation into the Supervisory Boards of European Companies and two-tier structured Italian companies with more than 300 employees.¹¹¹ Indeed, this purpose has to deal with the presence of only one European Company with its main office in Italy.¹¹² In addition, two-tier structured companies are not widespread in Italy, considering that their degree of diffusion is under 1% among Italian companies.¹¹³ The hypothesis of a collective agreement introducing any form of employee representation in the Supervisory Board of the latter company types seems to be very marginal.

Ultimately, while the use of variable salary forms may acquire even more relevance in the future, albeit it would always depend on the financial consistency of the monetary incentives, serious doubts influence the chances of full implementation of any form of effective "worker involvement" in the Management of Italian companies, despite the explicit reference to such involvement as one of the main goals of the most recent reform.¹¹⁴ It may be concluded that the "cultural gap" between Italy and other European countries in matter of employee involvement, as noted more than ten years ago by the 2001 "White Paper," has not yet been completely filled.

110. Productivity Agreement of Nov. 21, 2012 (It.); Marco Barbieri, *Un accordo senza respiro [An Agreement Without Breath]*, 2 DLRI 274 (2013) (It.); Piera Campanella, *Decentramento contrattuale e incentivi retributivi nel quadro delle politiche di sostegno alla produttività del lavoro [Bargaining Decentralization and Pay Incentives Within the Framework of Policies to Support Labor Productivity]*, WP C.S.D.L.E. 185 (2013) (It.).

111. See Art. 4, ¶ 62(f) L. n. 92/2012 (It.).

112. Galleria del Brennero SE, which is far below the 300-employee threshold at the moment. See <http://www.bbt-se.com/en/company/personnel> (last visited Apr. 9, 2014).

113. Carlo Bellavite Pellegrini, Laura Pellegrini & Emiliano Sironi, *Why Do Italian Joint Stock Companies Adopt One or Two-Tier Board?*, 118 RISS 3 (2010).

114. Art. 1, ¶ 1(f) L. n. 92/2012 (It.).