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Italian Labour Law after the so-called Monti-Fornero Reform (Law No. 92/2012)

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1. The Reform of the Labour Market in Italy: Main Reasons and General Framework

Prompted by the main European and international financial institutions, and in response to a particular – and in many respects unique – institutional and political scenario, the technocratic government led by Mario Monti carried forward an impressive reform of the Italian labour market just a few months after its appointment.

This state of affairs gave rise to an array of interventions across all economic and social sectors which – albeit long-awaited¹ – previous administrations have been unable to put in place. Law No. 92 of 28 June 2012 was preceded by an even more substantial and widely debated overhaul of the pension system² and was intended to amend the regulatory framework of the Italian labour market. Once the newly-installed government took office, and straight from the inaugural address, the measure was presented for public opinion as a matter of urgency. In

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¹ See *The White Paper on The Labour Market*, which was drafted by Marco Biagi on 3 October 2001 under the Berlusconi Government. Significantly, most of the objectives set down by Mr. Monti and the Minister of Labour Elsa Fornero were already outlined by Prof Biagi ten years ago. An English version of the document is available in R. Blanpain (eds.), *White Paper on The Labour Market In Italy, The Quality of European Industrial Relations and Changing Industrial Relations*, *Bulletin of Comparative Labour Relations*, August 2002.

² For an overview of the reform of the pension system in the context of the so-called “Decree to Save Italy” see *Monti’s £30 billion survival plan*, on www.eurofound.europa.eu (Last accessed 1 October 2012).

discussing the current macro-economic context, the reform of the national labour market was portrayed as an inevitable move to secure the future of younger generations – most notably in terms of job opportunities and pension entitlement – as they have been hit the hardest by the crisis that was caused by the collapse of the financial markets³.

This is consistent with the view – not prevailing, although well-established among European commentators and decision-makers – that high unemployment rates, chiefly among young people, coupled with the steady increase in atypical and precarious employment, have been brought about by the high levels of protection for workers in salaried employment. An authoritative indication of this line of reasoning is the move made during the financial downturn by the President of the European Central Bank, Mario Draghi.

In order to safeguard the future of the youngest generations, Mr. Draghi openly questioned the long-term sustainability of the European social model. In this sense, he prodded European law-makers into reviewing national labour laws, deemed to be unbalanced in favour of adult workers (the insiders), particularly in the current recession.

The Italian Government followed Mr. Draghi's advice carefully, fuelling a polemical discussion concerning the European Central Bank and some other European bodies allegedly placing Italy under "special administration". This state of play *de facto* impinged on the effort – to date successful – on the part of both trade unions and pro-labour political parties, to counter the decisions made unilaterally by the Government⁴.

As will be discussed further, Law No. 92/2012 (hereafter the Monti-Fornero Reform) has introduced numerous innovative measures. This aspect could be observed, as this substantial piece of legislation consists of

³ For an in-depth analysis on the reasons for the reform, particularly to offset the level of protection offered to young people against those supplied to their adult counterparts, see M. Tiraboschi, *Young Workers in Recessionary Times: a Caveat (to Continental Europe) to Reconstruct its Labour Law?*, in this Journal, 1, No. 1-2, March - June 2012.

⁴ At the time of Silvio Berlusconi's last term in office, trade unions were definitely given more room to manoeuvre following the passing of Article 8 of Legislative Decree No. 138/2012 on the reform of the labour market. Then as now, the Government was prompted by the European institutions to take action. It thus empowered collective bargaining at company and territorial level to implement certain employment safeguards by way of derogation from national bargaining, in order to cope with the crisis and favor economic growth. Of course the levels of protection set down by the international Conventions, Community legislation, as well as certain limitations concerning labour issues imposed upon by the Italian Constitution were still valid. On that occasion, social partners succeeded in challenging the measures put forward by the Government. See various comments in *Diritto delle Relazioni Industriali*, Giuffrè, 2012 (under *Ricerche*).

270 controversial paragraphs, yet grouped into 4 articles to expedite the approval process. For different reasons, the reform was hailed with outright hostility by the social partners (see par. 6). Such a reaction pressured the Legislator to promptly amend the provision, with a number of changes that were already foreseen by the Parliament and took place one month after its enforcement⁵.

The reform greatly impacted the main aspects of Italian labour law, namely the legal procedures to establish and terminate the employment relationship. It also deals with the sources of labour law, this is because of the preference that has been given to norms of a compulsory character, which narrows down the role of trade union law, particularly company customs. In addition, social concertation – once pivotal in the evolution of labour law in Italy – played a peripheral role while the provision was being devised.

In contrast to what occurred in some other European countries – most notably in Spain⁶ – the reform does not touch upon internal flexibility, that is the set of legal provisions governing the employment relationship (personnel and job classification, working hours, job description, absence from work, and so forth). These aspects – which are clearly of great importance – still fall within the province of collective bargaining or are subject to mandatory forms of regulation that date back to the 1970s, such as Law No. 300/1970 (the Workers' Statute).

This approach further upholds the trend towards legal abstentionism in labour relations, all the more so if the drafters of the reform also refrain from amending the structure and the functioning of collective bargaining⁷. Indeed, the Parliament just delegated to the Government the power to deal with issues concerning economic democracy and workers'

⁵ See Law No. 134 of 7 August 2012.

⁶ Ley No. 3/2012, *de 6 de julio, de medidas urgentes para la reforma del mercado laboral*. For a reconstruction of the provisions laid down by the reform of the labour market in Spain, see M. L. Martín Hernández, *La última fase de la evolución del derecho del trabajo español: las reformas laborales del bienio 2010-2012*, in *Bollettino Speciale Adapt* No. 17, 2012; F. Navarro Nieto, *Spagna - La riforma del quadro giuridico della contrattazione collettiva*, in *Diritto delle Relazioni Industriali*, Giuffrè, No. 3, 2012; A. Baylos, *Crisi del diritto del lavoro o diritto del lavoro in crisi: la riforma del lavoro spagnola del 2012*, *Diritto delle Relazioni Industriali*, Giuffrè, No. 2, 2012; J. García Viña, *Il sistema di relazioni industriali in Spagna dopo la riforma della contrattazione collettiva. L'impegno per il contratto d'azienda*, *Diritto delle Relazioni Industriali*, Giuffrè No. 1, 2012.

⁷ As a result, and in line with the Italian experience, collective agreements in the private sector are regarded within the common-law framework still governed by the Civil Code of 1942 which, and at least in formal terms, they are binding on the contracting parties only if they are members of employers' associations and trade unions.

participation. Drawing on the German model of co-determination (*Mitbestimmung*), and by means of special provisions that introduced certain participation schemes, the attempt of Italian law-makers has been to move away from the current industrial relations model – which is of a more adversarial nature – to a more cooperative and collaborative approach. The proposal was met with approval by the most reformist unions (the Italian Confederation of Workers' Union – CISL – and the Union of Italian Workers – UIL), whereas both the more antagonist General Confederation of Italian Workers (CGIL) – and the most influential employers' associations (e.g. Confindustria) firmly opposed this approach. As far as the overall structure of the reform is concerned, the Government's original intentions were to favour more flexibility in hiring by way of open-ended contracts which make the dismissal easier – mainly for economic reasons – concurrently scaling back the scope of atypical and temporary work, either in salaried and quasi-subordinate employment. One might note, however, that the give-and-take accompanying the approval of the Monti-Fornero Reform and subsequent amendments – e.g. Law No. 134/2012 – prejudiced the foregoing plan⁸.

In fact, just few weeks after the passing of the reform, a number of amendments were made to the provisions on contractual schemes and on the remedies put in place in the event of failing to comply with provisions regulating dismissals for economic reasons. In some respects, the amendments to the reform made it more complicated to conceive the overall structure of the proposal put forward by the Government, as well as the guiding principles underlying the reform process.

The same holds for the reform of the labour market safety-net measures, which, based on the model of Danish flexicurity, could play a key role in enhancing the transition between occupations, as well as leading to a more adequate balance between flexibility in hiring and flexibility in dismissals. However, a watered-down compromise was eventually reached, since the early proposals made by the Minister of Labour to introduce the guaranteed minimum wage and, above all, to repeal traditional forms of income support were firmly opposed by both social actors and the governing parties.

⁸ In actual terms, such a proposal would concern only large-sized enterprises, for the vast majority of small and medium-sized companies in Italy already enjoy higher levels of flexibility in dismissals. This is a further explanation of the strong opposition to the proposal on the part of several representative associations (artisans and small employers in the commercial and tertiary sectors), for it reduces the levels of flexibility in hiring without any gains in terms of flexibility in dismissals.

The review of the safety-net measures also introduces a number of significant amendments (see par. 5), yet representing a case of “old wine in a new bottle”. In other words, the provision of unemployment benefits funded by social contributions – and not by the general system of taxation, as hoped for – is already a well-established practice in Italy. On top of that, this system will only be fully implemented in the years to come, for its effective sustainability – alongside macroeconomic compatibility – will be monitored by the social partners, and dependent upon the development of the crisis.

In an awareness of the foregoing issues, the Legislator outlined the reasons and the purposes of the reform, reasserting the central role played by full-time open-ended subordinate employment, also with regard to the apprenticeship contract, which remains the most widespread contractual scheme for those who enter the labour market for the first time. Indeed, the preference for this contractual arrangement is not to be ascribed to a decrease in the labour costs for open-ended contracts, nor to certain simplified procedures which favour their implementation. Rather, there has been a concurrent, and in some respects radical, dwindling of the regulatory mechanisms and contributions to be borne by employers for contractual arrangements in temporary work, self-employment, and quasi-salaried employment (continuous and coordinated collaboration contracts).

The explicit intention here is to overcome the duality between insiders and outsiders – e.g. stable workers and precarious workers – of the Italian labour market. Nevertheless, the issue is dealt with in a contradictory manner. In fact, the introductory paragraphs of the document clearly state that – pending a future and uncertain harmonisation process – the reform only concerns the private sector. Accordingly, the public sector does not fall within the scope of the provision, primarily because of higher rates of trade union representation that ensure protection in terms of stability of employment.

Yet early commentators⁹ have pointed out another contentious issue, which has been acknowledged by the Minister of Labour in a number of public statements. The move on the part of the Government aimed at narrowing down the use of flexible and atypical work – especially in recessionary times – might foster another dualism that is peculiar to the Italian labour market, viz. that between regular and irregular employment.

⁹ See the contributions in M. Magnani, M. Tiraboschi (eds.), *La nuova riforma del lavoro – Commentario alla legge 28 giugno 2012, n. 92*, Giuffrè, 2012.

This is particularly the case if one considers the telling arguments put forward at an international level¹⁰, according to which the extensive hidden economy in Italy – amounting to between 23% and 27% of Gross Domestic Product (GDP), twice or three times that reported in France and Germany – alongside a sound set of safety-net measures¹¹ – now called into question (see par. 5) – helped Italy tackle the crisis originated in 2007 following the economic turmoil.

The creation of a regular monitoring system to assess the impact of the reform on the labour market on the part of the Legislator should be deemed of particular significance. The development of a system for monitoring purposes should be the domain of the Minister of Labour and Social Policies¹², who should also oversee the evaluation of the implementing stage of the reform programme, its effects in terms of efficiency and employability, and the mechanisms for entering and exiting the labour market. The results of this monitoring activity might be useful to take cognizance of the amendments to be made to the provisions laid down by the reform.

2. Flexibility in Hiring: the Tightening Up of Atypical and Flexible Work and the Revival of Apprenticeships

2.1. Fixed-term Contracts

Following the reform of 2001 which implemented the EU Directive No. 1999/70/CE, Italian legislation allows for the issuing of employment contracts of a definite duration, although this must be linked to the presence of technical, productive or organisational reasons, even in relation to the everyday activity of the employer.

¹⁰ See F. Monteforte, *The Paradox of Italy's Informal Economy*, Stratfor, August 2012.

¹¹ For a reconstruction – from an international and comparative perspective – of the system of safety-net measures which traditionally consists in a scaling back of working hours through various forms of income support, see M. Tiraboschi, S. Spattini, *Anti-crisis Labour Market Measures and their Effectiveness between Flexibility and Security*, in T. Davulis, D. Petrylaité (eds.) *Labour Regulation in the 21st Century: in Search of Flexibility and Security*, ADAPT Labour Studies Book-Series, No. 2, Cambridge Scholars Publishing, 2012, 163 ff.

¹² Article 17 of Legislative Decree No. 276/2003 (the Biagi Reform) already made provisions for a careful monitoring system that evaluates the effectiveness of the legislative measures put in place. Regrettably, this system was never implemented.

Although questioned by a number of case law rulings on matters of fact, the aim of the Legislator was to normalise the recourse to fixed-term contracts, which up until then could be used only on a temporary basis and under special circumstances.

In an attempt to stress the pivotal role played by open-ended salaried employment, the document of the reform states that “full-time open-ended subordinate employment is the standard form of employment”. In the aftermath of the reform, this contractual arrangement was widely used, whereas fixed-terms contracts were once again seen as being entered into only in certain circumstances, while still regulated by Law No. 230/1962 and, before that, the Civil Code of 1942.

With a view to moving beyond this hard-and-fast distinction, the Monti-Fornero Reform opens the possibility of two additional forms of temporary employment.

In the first case, fixed-term contracts without indicating the justifying reason can be issued, that is irrespective of the temporary nature of the assignment or the organisational needs of the employer. This employment contract can be concluded between an employer (or a user-company) and a jobseeker who is hired for the first time and for a limited time up to a period of twelve months, in order to perform any kind of task. Unlike the past, an employment relationship of this kind can thus be established for the first time regardless of the tasks to be carried out by the employee and without the obligation upon the employer to provide technical and organisational reasons, even in cases of substitute work. The only requirement is that the employment relationship lasts for less than twelve months.

Alternatively, the reform specifies that workers can be hired under fixed-terms contracts for an indefinite period without the need on the part of the employer to give details about the reasons for hiring, provided that the following conditions are met:

- this clause must be agreed upon in collective agreements;
- it must involve not less than 6% of the workers of each production unit;
- it must be carried out in certain organisational processes (start-ups, the launch of new products, technological changes, further stages of a research project, renewal or extension of a job assignment).

It must be said that this route can be pursued only if agreed upon during collective bargaining, with the opportunity to resort to this flexible form of work in the relevant industry that might be taken into account.

As far as the first option is concerned, the Legislator appears to run into a contradiction. This is because after reasserting the major role played by full-time open-ended subordinate employment, a major exception is

introduced to this proposition that impinges on the logic of national labour law, although limited to the first employment contract that is entered into.

In the second case, and save for a few exceptions, employers' associations will be loath to enter into agreements of this kind, as employers are now allowed to wait twelve months before recruiting a worker for the first time, also taking account of limitations posed by collective bargaining. In addition, the reform reveals a tendency to move away from a decentralised industrial relations system which marked earlier provisions at a national level. This is because only company-wide and interconfederal (national multi-industry) agreements are regarded as valid in this case, with decentralisation that takes place in the presence of delegation from national collective bargaining.

The unwillingness to make use of regulated forms of temporary employment is further exhibited by another aspect. Starting from 2013, the employer who decides to recruit a worker on a fixed-term contract will be required to pay an additional contribution amounting to 1.4% of pension-qualifying income, in order to finance an occupational fund (*Assicurazione Sociale per l'Impiego*, see par. 5). Employers will be reimbursed this contribution – up to a maximum of the last six months' pay – provided that the employment relationship will be converted into full-time open-ended employment, or that the worker will be hired within six months of the termination of the limited-term employment relationship. Due to the particular nature of this form of employment, this additional contribution is not to be paid in the event of workers taken on under fixed-term contracts for seasonal and substitute work.

Still on limited-term employment contracts, further interventions concern the continuation of the employment relationship after the expiration of the terms, the procedures to dispute its validity, and the forms of compensation in the event of transformation into salaried employment.

With reference to the first point, employees can provide their service for the employers up to a maximum of 30 days – and not 20 days as previously set – from the date of the expiration of the employment contract, if the employment relationship has a duration of less than six months. For employment contracts lasting more than six months, this threshold has been raised from 30 to 50 days. Contracts which are extended longer than these terms will be converted into an open-ended employment relationship.

The Legislator also regulates the interval between fixed-term contracts to re-employ the same worker. If the previous employment relationship had a duration of less than six months, the lapse of time between the two

employment contracts should be of 60 days, and not 10 days, as in the past. However, 90 days rather than 20 days should have elapsed between one employment contract and the other in cases in which the first employment contract lasted more than six months. Nevertheless, collective agreements concluded by the most representative trade unions and employers' associations at a national level, are allowed to reduce these intervals. More specifically:

- up to 20 days if the first employment contract has a duration of less than six months;
- up to 30 days if the first employment contract has a duration exceeding six months, particularly in the event of hiring resulting from certain organisational processes (start-ups, the launch of new products, technological changes, further stages of research projects, renewal or extension of a job assignment).

The scaling back of the minimum period between the two employment contracts applies for seasonal work and in all cases laid down in collective agreements concluded at a national level by the most representative trade unions.

The reform also introduces a statute of limitations for disputing the termination of the fixed-term contracts. Workers can appeal against the termination that is null and void for reasons related to the date of expiry after appraising the employers, also by means of out-of-court procedures, within 120 days of the termination of employment, thus raising the previous 60-day time limit. After lodging the complaint, workers should initiate legal proceedings within the following 180 days and not 270 days as originally set down.

As for employment cases, the law now reviews compensation to be paid by the employer in the event of a ruling in favour of the worker and the resulting conversion of the fixed-term employment contract into an open-ended one. Statutorily, the sum to be paid by the employer amounts to 2.5 to 12 months' pay, considering the last salary. The novelty lies in the fact that this sum of money is now regarded as full compensation for any loss suffered by the worker, thus including entitlement in terms of pay and social contributions from the termination of the employment contract and the decision made by the tribunal. Therefore, following the ruling on the part of the courts, the employer – whether or not fulfilling the obligation to re-engage the worker – is required to provide arrears of pay and relevant contributions.

2.2. Temporary Agency Work

The intentions on the part of the Legislator to stress the pivotal role played by full-time and open-ended subordinate employment as the most widespread form of employment in Italy is patent if one looks at the interventions made to the provisions regulating temporary agency work.

At the outset it should be noted that the proposals laid down seem to be insufficient. Most importantly, they show a tendency away from the efforts made since 2003 – and in line with international experience – to single out agency work as a form of work facilitating the matching of supply and demand for labour, especially if compared to atypical and temporary employment.

Within the Italian legal system, agency work was originally regarded as particularly useful in organisational and managerial terms, benefitting labour flexibility and contributing to the modernisation of the productive system. This is also because certain mechanisms of contractual integration between undertakings and certain processes – namely staff-leasing, and in-sourcing, co-sourcing, net-sourcing, selective sourcing, multi-sourcing, back-sourcing, co-specialisation and value added outsourcing – to be overseen by high-qualified operators within the labour market, as is (presumably) the case of work agencies.

However, the Monti-Fornero Reform puts fixed-term employment on the same footing as agency work, thus taking a step back in time of at least ten years, as the proposals detailed in the reform programme scale back the scope of application of this form of employment. Further, according to the reform, the recourse to agency work is possible by providing a justifying reason, save for two cases.

In the first case, the employer and the agency worker can conclude an employment contract for the first time and with a maximum duration of 12 months, without specifying technical, productive, organizational reasons, nor whether the worker will be engaged in substitution work, which, as a rule, should be included in the particulars of the employment contract. It seems worth pointing out that the wording “the very first employment relationship between the employer/the user company and the employee” used in the text of the reform attempts implicitly, yet in an ambiguous manner, to confine this exception to the first employment contract entered into, and not to the relationship between the employment agency and the worker.

Alternatively, the conclusion of the employment contract between the employer and the agency worker does not require any justification, nor do

the contracts have limitations in terms of number and duration, whereas the following conditions are met:

- a) this exception is agreed upon during collective bargaining;
- b) it must involve at most 6% of the workers of each production unit;
- c) in the event of hiring resulting from certain organisational processes (start-ups, the launch of new products, technological changes, further stages of research projects, renewal or extension of a job assignment).

None of the exceptions allows for an extension of the employment contract, once ended.

In the author's view, the recourse to agency work devoid of a justifying reason might on first approximation facilitate the task of temporary work agencies and reduce the rate of employment disputes, particularly if compared to that of the previous years. However, in the long- and medium-time frame this state of play will debase the role of temporary work agencies as qualified operators in the labour market in terms of improvement of human capital and specialization of production, limiting their function to the mere provision of workers on the basis of the employer's needs.

The reform also specifies that, for the purposes of calculating the maximum duration of fixed-term contracts – in any case not exceeding 36 months – it is necessary to count towards the time needed to perform the same task – e.g. with the same job description – carried out by workers with the same qualification. Agency work is thus once again likened to fixed-term employment, with this provision that is far from securing stable employment. In addition, it acts as a disincentive for the work agency, which is therefore loath to provide training and special skills for agency workers. As already discussed above, this aspect is further confirmation of the marginal role allocated to this form of employment.

In addition to this, the reform regulates employment agency apprenticeships. Employers are still prohibited to hire apprentices on a temporary basis. However, it is possible to utilise the services of apprentices who are employed by an agency work for an unlimited period (staff leasing) in all the productive sectors, that is when a commercial contract of an indefinite term between the user company and the employment agency is concluded. An obstacle to the implementation of this provision might arise from the fact that the reform repealed certain norms laid down by the Biagi Reform in 2003. In particular, in compliance with European Directive No. 2008/104/CE, the Biagi Law set forth a derogation from the principle of equal treatment between agency workers and other employees, if the recourse to agency work is made for training purposes or aims at easing access to labour market. This aspect might

affect the procedures to determine remuneration for apprentices hired by the employment agency, as it usually equal to pay for employees of a lower grade, or to a certain percentage of remuneration provided to more trained and qualified workers.

Distinct from what was laid down in previous interventions, the Monti-Fornero Reform also makes provisions for a longer interval between fixed-term employment contracts at the time of rehiring the same workers. In this connection, the lapse of time to issue a new limited-term contract should be of 60 days if the previous employment contract has a duration of less than six months, or 90 days for fixed-term contracts lasting longer than six months. A literal interpretation of the norm suggests that the relationship between the work agency and the worker falls outside the scope of application of the provision, while doubts arise in reference to the relation between the work agency and the user company. Perhaps this can be explained by the attempt on the part of the Legislator to prevent the abuse or the repetitive use of fixed-term contractual arrangements (“chains” of contracts). Should this be, the work agency is either allowed to send the same worker to different user-companies on a permanent basis, or to the last user-company the worker provided his/her services to, for the latter upon compliance with terms of renewal statutorily laid down.

After an inspection of the reform, one might also note a shrinking of the funding allocated to employment agencies to promote active labour market policies, training, and retraining of temporary workers. In this sense, the law provides that starting from 1 January 2013, employers have to pay an additional contribution corresponding to 1.4% of pension-qualifying income for salaried workers hired on a temporary basis. As for the employment agencies, this sum is partly offset by a reduction in the contribution paid to a training fund for agency workers, that is equal to 4% of aggregate salary.

2.3. Apprenticeship, Access-to-Work Contracts, and Placements

The Monti-Fornero Reform sets much store by the apprenticeship contracts, regarded as a privileged channel for helping young people to enter the labour market. In the context of this paper, it might be useful to point out that a comprehensive reform of apprenticeship already took place in September 2011, which included a number of agreements

concluded over the two years prior to the reform between the Government, the Regions, and the social partners¹³.

The reform reasserts the pivotal role carried out by apprenticeship as the main contractual arrangement for first-time entrants to the labour market. This approach stands in line with the proposal of many academics – particularly economists – for a “single employment contract” for people starting their first job. One might note, however, that some critical aspects of apprenticeship – e.g. the training content – still remain unsolved. Accordingly, the widespread use of apprenticeship for first-time entrants into the labour market is to be attributed mainly to provisions which scaled back the recourse to other contractual schemes for this category of workers. This is particularly the case of access-to-work contracts – introduced by the Biagi Law in 2003 and now repealed – project work and placements.

In consequence, although welcomed in principle, the proposal of apprenticeship as the main contractual scheme to enter the labour market is, in general terms, far from being realistic. In fact, nearly one year after the enforcement of legislation regulating apprenticeship, the devising of a system which considers the needs of productive sectors and the differences at regional level has not yet been fully envisaged. The setting-up of a national system of vocational standards to validate and certify one’s vocational skills as laid down by the relevant provisions in 2011 has never been implemented either. Therefore, only in formal terms can the apprenticeship contracts be classified as full-time open-ended subordinate employment and be freely terminated at its end. In practice, it is to be considered a fixed-term contract devoid of the training content and not in line with the German dual model system to which the Legislator claimed to have referred to¹⁴.

Of significance is the innovation concerning the increase of the number of apprentices that can be recruited by the employer, which is determined by the number of qualified workers in employment. Starting from 1 January 2013, the ratio of apprentices – to be hired either directly or through open-ended employment agency contracts – to qualified employees will be 2 to 3. Notwithstanding specific more favourable conditions laid down for the artisan sector, the ratio is set at 1 to 1 for employers with less than ten workers, while employers with no qualified

¹³ See M. Tiraboschi (ed.) *Il Testo Unico dell'apprendistato e la nuova disciplina dei tirocini formativi*, Giuffrè, Milan, 2011.

¹⁴ *Supra*, par. 3.

staff or with less than three specialized workers will be allowed to take on up to three apprentices.

In addition, for the purposes of the reform, employers with at least ten employees are allowed to hire apprentices on the condition that they had recruited at least 50% of apprentices whose contract ended in the past 36 months. This percentage has been reduced to 30% in relation to the 36 months subsequent to the enforcement of the reform. As the provision expressly laid down, the employment relationships terminated over the probationary period, or due to resignation or just cause dismissal are not to be included in the foregoing calculation. Apprentices recruited in violation of these conditions are to be considered salaried employees hired on open-ended contracts entered into force since the employment relationship was established. In the event of non-compliance with this ceiling, it is possible to recruit another apprentice who adds to those already employed. The same goes in cases in which no apprentice has already been hired upon termination of the apprenticeship contract. The statutory 50% is a minimum threshold and applies to all productive sectors. For this reason, it might be amended upward, depending on the applicable collective agreements.

In order to ensure adequate training, the reform also sets forth that apprenticeship contracts should have a minimum duration of 6 months, with the sole exception of seasonal work, for which it is only possible to issue vocational apprenticeship contracts.

Also in consideration of the widespread recourse to apprenticeship, the Monti-Fornero Reform provides a delegation of certain tasks to the Government, also with a view to narrow down the recourse to placements and prevent their improper use. This can be done only upon an agreement concluded between the parties involved (the State and the Regions) which sets down guidelines on training and placements for career guidance purposes, to be implemented at regional level. In this connection, the reform programme also lays down a number of criteria that foresee more stringent rules to regulate this contractual scheme. An example is the obligation on the part of employer to provide remuneration to the trainees for the work performed.

2.4. Part-time and On-call Work

The reform introduces a number of major changes to part-time work which concern certain clauses (*clausole flessibili ed elastiche*) allowing the

employer to either modify the time and increase the hours agreed upon in the employment contract to perform a given task.

The conditions and the specifics to carry out the working activity are not determined by the employer and the employee directly, but they should be set down during collective bargaining.

In order to encourage the proper use of part-time work as a flexible form of employment, the Monti-Fornero Reform specified that it is for collective agreements to envisage the procedures enabling workers to repeal or amend these clauses. Therefore collective agreements will detail the cases in which workers might opt for a review of the employment contract in relation to the foregoing clauses.

Furthermore, the reform also provides the opportunity for some categories of workers who already agreed on these clauses to reverse their position, most notably working students, workers with oncological conditions, and the category of workers listed in collective agreements.

More radical changes have been made to on-call work (zero-hours contracts), that is the employment relationship – either of a definite or indefinite duration – in which the workers agree to provide their services to the employers, who in turn make use of their performance on the basis of what has been laid down by the law or collective agreements.

The reform made provisions particularly in relation to its scope of application. In this sense, it sets forth that – without prejudice to the cases specified in the collective agreement – work on an intermittent basis can be performed by workers over the age of 55 – thus raising the 44-year-old threshold set by the Biagi Law in 2003 – and by workers up to the age of 24, provided that the tasks are carried out before attaining the age of 25.

The reform also repeals the clause allowing the carrying out of on-call work in certain times of the week, month or year agreed in advance in collective bargaining, and sets down some measures to raise the levels of transparency.

More specifically, it places an obligation upon the employer to notify relevant authorities (*Direzione Territoriale del Lavoro*) before the embarking on a job task – or a series of job tasks totalling less than 30 days – on the part of on-call workers. The notification can be made by text (Short Message System), fax, or simply by email. Upon fulfilment of this obligation, the employment relationship can be concluded, with the employer who is required to notify the relevant authority every time the worker is called out to work.

2.5. Coordinated and Continuous Collaborations (Quasi-subordinate Employment)

The Monti-Fornero Reform made profound amendments to quasi-subordinate employment. This is particularly the case with regards to project work, that can be loosely defined as an employment relationship between the employer and the employee which takes place on a coordinated and continuous basis, characterised by an absence of subordination relating to the completion of project.

Unlike what was laid down by the Biagi Law in 2003, the employer is relieved from the obligation to provide a work schedule of the project – or project phases – to be implemented. As a result, the existence of an employment relationship of this kind will only be determined for specific projects.

The project to be carried out needs to be related to a given end result, which cannot consist in the mere employer's company purpose and cannot include repetitive tasks.

The reform clarifies the meaning of the provision laid down in the Biagi Law in 2003 according to which professions for which enrolment in special registers (*albo professionale*) is required are excluded for the scope of application of project work. It seems important to point out that this exception is limited to quasi-salaried employment in the form of intellectual work, the nature of which is the same as that performed by professionals who need to comply with registration procedures.

In consequence, professionals who are enrolled in these special registers, operate for one client and carry out tasks which are not related to their trade will be regarded as engaged in project work. This applies also in cases in which professionals operate simultaneously for more than one client.

However, whereas the employment tribunal ascertains that there exists a relationship between the work performed and the trade carried out, the employment relationship is converted into salaried employment, as a project justifying the recourse to project work has not been provided.

These measures are intended to prevent the fraudulent use of project work, particularly to mask salaried employment. One might note, however, that this goal has not been achieved through a set of repressive measures to combat fraudulent practices, but rather because of the unwillingness on the part of employers to make use of project work. This is exhibited by an increase in the labour costs for project work – that will be the same as that for salaried employment by 2018 – and by the provision of more stringent regulations to assess whether project workers are hired on salaried employment contracts.

The reform also posits that there is a legal presumption in favour of the existence of salaried employment without the opportunity to provide rebuttal evidence in cases in which the lack of the project to be implemented on either formal and substantial levels has been ascertained by the courts.

On the contrary, there shall be a presumption of salaried employment with the opportunity to supply rebuttal evidence in cases in which the working activity is performed along the same lines of that carried out by salaried employees, thus not taken into account tasks which require high levels of skills on an exclusive basis.

As for the termination of the employment relationship, it is still possible to discontinue the contract for just cause before it ends, yet pursuant to the reform the parties are not allowed to freely terminate the employment relationship. The employment contract can be brought to an end by the employer only when there is an objective lack of fitness of workers which endangers the fulfilment of the project. For their part, workers hired on project work contracts can discontinue the employment relationship by giving notice, only if this clause is expressly laid down in the contract.

The reform introduced major amendments also with regard to remuneration. Notwithstanding that the amount paid should be proportional to the quality and quantity of the work performed, it also specified that workers should be remunerated at a rate which is not less than the minimum wage set on a sectoral basis. Further, the system of remuneration should also consider the employment grading methods set up for each sector and taking account minimum wage levels set down for similar tasks for salaried employees. Wage setting is agreed upon in collective agreements concluded by the most representative trade unions and employers' associations at national, inter-sectoral, and sectoral levels, also by means of decentralisation by way of derogation clauses. In the absence of specific collective agreements, reference should be made to the minimum wage provisions specified in the national collective agreements for workers operating in the same sector and with the same employment grade as project workers.

2.6. Self-employment

The Monti-Fornero Reform narrows down the scope of application of self-employment in a considerable manner. This is due to the prevailing legal presumption that autonomous workers are hired on salaried employment contracts, to be applied in the cases provided by the law.

There are three criteria to establish whether an individual claiming to be self-employed is actually presumed to perform salaried employment on an open-ended contract. For the sake of clarity, it should be noted that the provision makes use of the wording “continuous and coordinated collaboration”. Nonetheless, pursuant to Italian labour law, a contractual arrangement of this kind lacking a specific project is reclassified as open-ended salaried employment. For an individual to be regarded as a salaried employee on an open-ended contract, at least two out of three of the criteria listed below must be met.

The criteria laid down by the law are factual situations pertinent to the running of the employment relationship which, besides its classification at a formal level, help determine the coordinating and continuing nature of the work performed. The criteria laid down by the Legislator are:

- 1) the duration of the employment relationship, whereas lasting for more than eight months for two consecutive years;
- 2) the provision of services to one client on an exclusive basis, provided that the turnover of the self-employed earned while operating for the same client – or for a permanent business establishment – over a period of two consecutive years amounts to 80% of his/her total earnings.
- 3) the presence of a fixed workstation at the client’s premises, where “fixed” means that it is non-movable or temporary.

The legal presumption of open-ended salaried employment does not apply in cases in which the tasks to be performed require high skill levels or “practical skills acquired through experience”. This is conditional on the fact that the average annual earnings of autonomous workers are equal to or higher than a certain sum statutorily determined. Another exception – which works as an alternative to the foregoing – concerns, for instance, a professional self-employed individual performing his/her job upon membership to professional association (special registers, professional bodies, and so forth).

2.7. Special Forms of Joint Ventures

The reform also makes provisions for special forms of joint ventures, whereby an associating party grants an associated party a share in the profits of his/her business or of one or more transactions on the basis of an agreed upon contribution. This is known in Italy as *associazione in partecipazione* (literally a sharing-profit agreement with contribution of labour). Over the years, an increase in the misuse of this contractual

scheme has been reported, particularly in clerical work or manual labour in the building industry.

The Monti-Fornero Reform amends previous legislation governing this contractual arrangement, and specifies that it is possible to have up to a maximum of three associated parties engaged in the same activity if the contribution provided also includes work performance. This applies regardless of the number of associating parties, with the sole exception of an associated party being a spouse, a family member up to the third-degree of kinship or a second-degree ascendant. In the event of non-compliance with this clause, the associated parties who provide a contribution in the form of work performance will be considered as salaried employees on an open-ended contract. The legal presumption in favour of salaried employment thus does not allow for rebuttal evidence to demonstrate the genuine nature of the employment relationship. Prior to the enforcement of the reform, the setting-up of a number of joint ventures to deal with the same business or transaction did not impinge on the validity of the contract, save for cases in which at least one of them is established at a later stage (unlike otherwise agreed, the associating party cannot grant other individuals a share in the profits of a business or a transaction without the consent of the former associated parties).

As already pointed out, the reform tightens up the regulation for this special form of joint venture. For the contract to be valid, it is possible to have up to a maximum of three associated parties engaged in the same activity, except in cases of family members or ascendants. The reform also sets down certain cases of legal presumptions of salaried employment, against which evidence can however be provided. A contractual arrangement concluded to set up a joint venture is presumed to be salaried employment in the following cases:

- if the associated party does not have a share in the profits of the business run by the associating party;
- in the event of failing to report the associated party on the activity carried out (by way of a report on the annual management if the activity has been performed for more than 12 months);
- in the event that the agreed upon contribution on the part of the associated party corresponds to “unqualified” labour, that is neither characterized by theoretical knowledge acquired by specific training nor by practical skills acquired on the same job.

In addition, in order to restrain the recourse to this form of joint venture, the reform sets forth an increase in the social contributions for the associated parties. In this sense, the cost of labour will rise at 1% every

year until 2018, totalling a contribution rate of 33% for those who are not covered by any other form of public retirement schemes.

2.8. Occasional Work of an Accessory Nature

The reform foresees a thorough review of regulations governing occasional work, that is work provided without concluding and employment contract and by means of a particular payment system, namely vouchers for an amount of 10 euro per hour.

Already in 2003, the Biagi Law made provisions for workers on this contractual arrangements on the basis of remuneration. In this sense, the Biagi Law also detailed the category of workers who can engage in occasional work (young people, housewives, and retired people) as well as its scope of application (domestic and agricultural work, and light housework).

Contrary to what was laid down in 2003, the Monti-Fornero Reform now specifies that occasional work only includes work performed on an occasional basis which generates a total income of €5,000 in a calendar year. Significantly, this sum corresponds to the sum earned from the services provided to all the client firms, marking an important difference with the past. Occasional workers can still carry out working activities up to a maximum of 2,000 Euros per annum to be paid by different client firms, provided that their services are rendered to entrepreneurs and professionals.

Another relevant measure – which will certainly facilitate the recourse to ancillary work without any consequence in legal terms – is that the resort to this form of employment is allowed for all working activities and irrespective of the workers' personal characteristics.

Some special regulations have been laid down which scale back the recourse to occasional work in the agricultural sector to the following cases:

- agricultural work of an occasional nature performed by retired people and by young people who are less than 25;
- agricultural work provided to farmers which generates a turnover of 7,000 Euros per annum, with the exception of farmers enrolled in special registers for the previous year.

Public bodies are still allowed to make use of occasional work, as long as they comply with regulations to contain personnel costs and, whereas in force, budgetary stability pacts. In the same vein, recipients of social security benefits who are entitled to a maximum of 3,000 Euros for the

year 2013, can perform occasional work in both private and public bodies and in all productive sectors to supplement their monthly wage or any other form of social aid.

3. Flexibility in Dismissals. Remedies for Unfair Dismissals and New Rules on Collective Dismissals

In the Italian legal system, the termination of open-ended and salaried employment contracts can only take place for just cause – thus not allowing for the continuation of the employment relationship – or for justified reasons. If the latter, the employment contract can be discontinued because of a serious violation of the worker’s contractual obligations (that is for “subjective reasons”) or justified by needs related to production and its functioning, or organizational choices made by the employer (that is for objective reasons). In the event of unjustified dismissal, Italian legislation provides a set of remedial measures traditionally consisting in the worker’s reinstatement – in the event of large and medium-sized companies – or a compensation award – if concerning small-sized companies.

Reinstatement takes place in cases of unfair dismissals, in businesses employing more than 15 employees in the productive unit where the unfair dismissal occurred – or more than 5 for employers who run a farm – or in businesses with more than 60 workers altogether, whether operating in the same productive unit or not. By virtue of this remedy the employment contract is not regarded as interrupted, thus the employee can ask to return to the same job and to demand unpaid salary. With regard to remedies in the form of compensation, it concerns the productive units and the employers not falling within the foregoing cases. It does not invalidate the effects of unfair dismissal, but places an obligation upon the employer to choose between re-hiring the workers and granting them a sum of money ranging from 2.5 and 6 months’ pay. By regarding as unfair the dismissal delivered without a reason, the reform amends the Italian remedial framework, seen as “anomalous” if compared to that of other countries, as producing discouraging effects on foreign investors in our country and penalising local employers at an international level.

As a result, extant legislation now regulates unfair dismissals taking account of the underlying reasons and the employers’ liability. In this sense, there are different employment safeguards that apply in accordance with the reasons and depending of the type of dismissal, viz.

discriminatory dismissals, disciplinary dismissals and dismissals for justified objective reasons.

3.1. Discriminatory Dismissals. Remedies including Reinstatement and Compensation

Discriminatory dismissals take place when employees are removed from their position – irrespective of the employer’s will – on the grounds of religion, political, and personal belief, age, disability, gender, sexual orientation, race, language, and trade union affiliation. The reform does not make significant changes to the regulation of discriminatory dismissals. Regardless of the reasons provided and the number of workers employed, the ruling handed down by the employment tribunal making the dismissal of employees or executives null and void places an obligation upon the employer to re-hire the workers.

This remedy now also includes dismissals nullified because in violation of the rule which prohibits one to discharge workers who are on maternity or parental leave or on the grounds of marriage. In addition, dismissals that are statutorily regarded as null and void are also considered discriminatory dismissals. By way of example, this includes workers who are removed from their position after being given training leave, or leave for particular circumstances. The same holds for dismissal resulting from illegal practice, such as the so-called “retaliatory” termination, that is illegal and arbitrary action taken against an employee who did not commit any misconduct.

Workers are entitled to reinstatement also in the event of a dismissal that is null and void because notified orally and not in writing, regardless of the number of employees.

As a result of the order of reinstatement ruled by the tribunal, the employee should return to work within 30 days from the employer’s communication. Alternatively, and without prejudice to the employee’s right to compensation for any loss suffered, the dismissed workers might ask for payment of up to 15 months’ pay, considering their last salary.

The judge might also order the employer to pay compensation for the damage suffered from unfair loss of job, the amount of which is arrived at by calculating the last salary paid to the worker – e.g. to which he would have been entitled if not discharged – from the date of dismissal up to the date of effective reinstatement. The earnings resulting from working activities performed during the dismissal period should be deducted (*aliunde perceptum*).

Under any circumstances compensation for unfair dismissal can be less than 5 months' pay, with the employer also obliged to pay social contributions and compulsory insurance for the entire period the worker has been away, including premiums for occupational injuries and diseases. It is also implied – the law remained silent on this point – that the employer is obligated to pay a fine for non-payment or delayed payment of social contributions.

3.2. Dismissal for Disciplinary Reasons

The reform also makes provisions for dismissals for disciplinary reasons, that is termination of employment due to a breach of contractual duties or serious violations on the part of the worker. These specifics are also grounds for dismissal for justified “subjective” reasons and just-cause dismissal, respectively. There are three remedies following a finding of unfair dismissals and they depend on the seriousness of the circumstances.

The first case occurs when the employment tribunal ascertains that the dismissal is null and void for a lack of a justified “subjective” reason or just cause, because there is no case to answer, or because the violation falls within those for which measures short of dismissal can be imposed on the employee, in line with what is laid down by collective agreements or codes of conduct.

In this case, the judge nullifies the unfair dismissal, ruling that the employer should reinstate the employee – or alternatively and on the employee's request, pay a compensation award amounting to 15 months' pay. The judge also specifies that the employment contract is terminated whereas the workers fail to return to work within 30 days from the employer's communication, or they do not claim for compensation.

It is also implied – the law kept silent on this point, too – that the employer is obligated to pay a fine for non-payment or delayed payment of social contributions.

The employee is also entitled to the payment of compensation which is equal to remuneration accrued from the date of dismissal to the date of effective reinstatement - which cannot exceed 12 months' pay – from which earnings resulting from working activities performed during the dismissal period should be deducted (*aliunde perceptum*), as well as potential wages earned if he had found a new occupation. The ruling that the dismissal is unfair also places an obligation upon the employer to pay social contributions and compulsory insurance for the period the worker

has been away, including premiums for occupational injuries and diseases. Distinct from what happens in the event of discriminatory dismissal, social contributions must include the interests legally accrued without taking into account sanctions for non-payment or a delay in the payment on the part of the employer.

The second case concerns the event when the employer tribunal rules in favour of a lack of the justified “subjective” reasons or just cause put forward by the employer. Under these circumstances, the dismissal, if unjustified, is not regarded as null and void and the judge orders the termination of the employment contract from the date of dismissal. If this is the case, the worker is entitled to full compensation – in the sense that it also includes social security contributions – ranging from 12 to 24 months’ pay considering the last salary, and some other criteria (length of service, number of employees, the size of the business – as well as the conduct and the conditions laid down by the parties, the latter requiring a written statement explaining the reasons for such conduct). The last case refers to the discriminatory dismissal that is null and void because of a violation of the requirement to provide justification or because of a procedural defect, which is typical of disciplinary dismissal. Under these circumstances, the dismissal is null and void and the employer is bound to pay full compensation – including social security contributions – ranging from 12 to 24 months’ pay considering the last salary, depending on the seriousness of the violation of the employer, with a duty to provide motivation in writing.

3.3. Dismissal for Justified Objective Reasons

The other case of dismissal is that taking place for justified objective reasons. In this respect, a review of extant legislation redesigned the remedial framework and introduced two new measures in procedural terms.

The reform specifies that in notifying the worker of the dismissal, the employer must also provide the reasons causing the decision. This requirement marks a difference with the past, as previous legislation only specifies that such justification could be provided upon the ex-worker’s request within 15 days from being given notice.

A further innovation concerns the discontinuation of the employment relationship for economic reasons. More specifically, the requirement to attempt conciliation has been introduced as a pre-requisite to further action to be taken with regard to the dismissal. This initiative, which is of

an experimental nature, does not apply to small-sized enterprises as previously defined.

The notification to be filed by the employer must specify the intention to terminate the employment contract for objective reasons, the justification for the dismissal and the measures to be taken to help the dismissed worker find alternative work. Once notification has been handed in, a special body appointed by the Ministry of Labour (*Direzione Territoriale del lavoro* – Provincial Labour Direction), summons the employer and the dismissed worker to a hearing before the local conciliation board within 7 days from the delivery of the communication. If members of a union, both parties can appoint or mandate a union delegate, a lawyer or an employment consultant to represent them at the hearing, which can be postponed for a maximum of 15 days only in the event of a serious and certified impediment.

The aim of conciliation is to find an alternative route to the termination of the employment contract. However, this procedure cannot last more than 20 days from the date the parties were called on to meet, unless they agree to further discuss the issue until a settlement is achieved. Whereas the recourse to conciliation is not effective, or the Provincial Labour Direction fails to convene a meeting with the parties within 7 days of the delivery of the communication, the employer can dismiss the worker by giving notice. Conversely, if the attempt at conciliation is successful and the contract of employment comes to an end by mutual agreement, the law provides for the implementation of safety-net measures, as will be seen further on. It could also be the case that employment agencies are in charge of helping the worker re-enter the labour market.

In order to encourage conciliation, it is also specified that in the event of a further appeal, the attitude of the parties will be taken into account – as resulting from the minutes of the hearing – as well as the proposal put forward by the local conciliation board to settle the issue. On the basis of these elements, the judge will rule in favour of the prevailing party to be awarded the court costs, and decide the amount of compensation resulting from the dismissal that is null and void as devoid of an economic or productive reason claimed by the employer.

There are four circumstances which, in turn, give rise to four types of remedies. The forms of compensation laid down are thus related to the seriousness of the flaws at the time of terminating an employment contract.

3.3.1. Remedies including Reinstatement and Compensation

This remedy concerns the situations in which the dismissal for objective reasons is unfair as justified on the grounds of physical or mental unfitness of the workers. This case also refers to an employment contract that is discontinued before expiration of the time granted to workers on sick or parental leave to maintain their post, or when the organizational and productive reasons claimed by employer are not grounded.

In all these cases the dismissal is null and void and the employer is obliged to reinstate the dismissed worker, who is also entitled to a sum of money corresponding to a maximum of twelve months' pay considering the last salary, deduced from what was earned from the workers when they were dismissed and what should hypothetically be paid to them if still in employment in that period, including social contributions and interests. In essence, remedies are the same as those laid down in the event of disciplinary dismissals that are held unfair.

3.3.2. Reinstatement in the form of Compensation without Reintegration

This remedy refers to all those cases not falling under the label of dismissal for justified objective reasons. Like the previous case, the reason justifying the dismissal is not grounded, or not in a patent manner. Accordingly, the dismissed worker is not entitled to reinstatement, but simply to a sum of money amounting to 12 to 24 months' pay considering the last salary and arrived at by taking into account a number of factors (length of service, number of employees, size of the business, the attitude and the conditions set by the parties). The judge here acts as if they had to deal with unfair dismissal for just cause or justified objective reasons.

3.3.3. Dismissals for Justified Objective Reasons. The Case of Discriminatory and Disciplinary Dismissals

Another case is when the dismissed employee claims that the dismissal for justified objective reasons is the result of discrimination or unfair disciplinary action. If the employment tribunal find the complaint well founded, remedies for unfair discriminatory or disciplinary dismissals apply.

3.3.4. Dismissals for Justified Objective Reasons and Non-Compliance with Formal Requirements

Dismissals for justified objective reasons must be initiated in accordance with certain formal requirements. Failing to provide justification for the dismissal or to comply with the obligation to seek conciliation will make the dismissal null and void. Being characterized by a procedural defect, they stand upon an equal footing with unfair dismissals resulting from disciplinary action. Accordingly, relevant legislation provides for termination of the employment contract, along with the supplying of an award amounting to six to twelve months' pay to be granted to the dismissed workers, depending on the seriousness of the procedural defect.

3.4. New Rules on Collective Dismissals

Besides making amendments to existing rules on individual dismissals, the Legislator also put forward some new legislative measures concerning the regulation of collective redundancy.

One aspect concerns the obligation to give early notice placed upon the employer who decides to dismiss employees for reasons of redundancy. The innovation lies in the opportunity to overcome the non-compliance of this requirement by signing an agreement concluded with trade unions during the redundancy procedures.

Amendments have also been made to the obligation to communicate to relevant authorities or trade unions the list of workers made redundant or on mobility schemes. Information for each worker should include personal details, employment grade, as well as a detailed explanation of the criteria adopted to identify the workers to be made redundant. As for the time requirements, such communication should take place within 7 days from – and no longer concurrently to – the notice of dismissal delivered to the employees. With regard to remedies in the event of collective dismissals that took place in breach of agreed procedures, they rest upon the seriousness of the breach, which might give rise to the inefficacy of collective dismissals (in the event of failing to notify in writing or to comply to statutorily procedures) – or make them void – in cases of violations of the eligibility criteria to dismiss the workers.

3.4.1. Remedies in the form of Compensation and Reinstatement

In the event of collective dismissals not notified in writing, the worker is entitled to reinstatement and to a compensation award. The employment tribunal nullifies the dismissal and, concurrently, orders that the employees return to the same job, entitling them to a sum of money for the damage suffered. The amount of money to be paid is arrived at by calculating the wages and the social contributions from the date of the dismissal to the ruling of the courts – in any case not less than 5 months' pay – which should be reduced by what has been earned by the employer whereas performing another working activity over the same period.

3.4.2. Remedies in the form of Compensation without Reinstatement

If collective dismissals have been found to be unfair because of a violation of collective agreements, the tribunal orders the discontinuation of the employment contract, that is effective from the date of the dismissal. It also entitles the employee to a sum of money amounting to 12 to 24 months' pay considering the last salary and arrived at by taking into account the worker's length of service, the number of employees and the size of the business, the attitude and the conditions set by the parties, with an obligation to specify the reasons in this connection.

3.4.3. Remedies including Reinstatement and Special Forms of Compensation

In the event of non-compliance with the criteria laid down to identify the workers to be made redundant, the most comprehensive forms of remedy apply. In other words, the employment tribunal nullifies the unfair dismissal and the employer is obliged to reinstate the dismissed workers and to grant them a sum of money amounting to a maximum of twelve months' pay considering the last salary from the date of dismissal to the date of reinstatement. The total sum should be reduced by the earnings resulting from other working activities performed by the workers while dismissed, as well as what was earned if they had been committed to seeking a new occupation. The employer is also under the obligation to pay social contributions for the same period, increased by the interests accrued until the date of reinstatement and without including penalties from non-payment or delayed payment of the amount due. This sum – yet lower than what entitled to the worker if not dismissed – is equal to the

difference between contributions accrued following the dismissal and those paid to the employer as a result of other working activities performed by the workers during the time they were dismissed.

4. Undated Letter of Resignation and Termination by Mutual Consent

The reform makes provision also with regard to the dismissal procedures. More specifically, special sanctions have been put in place for employers who ask workers to sign an undated letter of resignation and use them at a later stage, further dismissing the workers but claiming that they have resigned or freely terminated the employment contract.

To combat this illegal practice, the law provides that resignation handed in by some categories of workers has to be validated by special bodies. This concerns women workers during pregnancy or workers who are fathers of children – by birth, custody, or national or international adoption – up to three years of age, thus extending the previous age limit of one year.

Another innovation lies in the requirement to assess whether the resignation was really intended, which now applies to cases of voluntary resignation in a strict sense and to all cases of consensual termination other than those resulting from maternity or paternity. The genuine nature of both voluntary resignation and termination by mutual consent will be assessed through two distinct procedures, and their validity is thus conditional upon the outcome of this review process.

Validation of resignation is not required in cases in which the discontinuation of the employment contract is the result of a reduction of staffing levels agreed upon by unions or relevant bodies, which are assumed to take all necessary steps to assess whether the workers consented to the discontinuation of the employment relationship.

Procedures for validating workers' resignation or termination of the employment contract can be carried out by the Provincial Labour Direction (*Direzione Territoriale del lavoro*), the local employment services, or by any other body listed in collective agreements and agreed upon by the most representative trade unions at a national level.

Alternatively, the parties might issue a written statement to be appended to the notification of the termination of the employment relationship that has been sent to the employment services. Simplified criteria to ascertain the accuracy of the date and workers' statement are to be detailed in a Ministerial Decree.

There are also certain obligations placed upon the employer in the event of non-compliance with the requirement of validation or the issuing of the foregoing statement. The employer has to send the worker a formal request to report to the evaluating bodies or produce a statement to be added to the notification sent to the employment services that the employment relationship has been brought to an end. This must be done within 30 days of the date of resignation or termination by mutual consent.

Within seven days from the request and in the event of failing to satisfy these two conditions, the employment contract is dissolved in cases in which workers:

- did not report to the Provincial Labour Direction or the local employment services in charge of ascertaining the voluntary nature of resignation;
- did not produce the foregoing statement in writing;
- did not revoke their resignation or intention to end the employment contract.

The last aspect concerns the tightening up of the sanctioning mechanism and the devising of administrative fines – ranging from 5,000 to 30,000 Euros – that apply in the event of employers making use of undated letters of resignation, without prejudice to their criminal liability, if any. It is the Provincial Labour Direction that has to determine the employers' liability and the statutory amount to be paid.

5. Reforming the System of Safety-Net Measures

A key aspect of the Monti-Fornero Reform concerns the safeguards provided to workers in cases of loss of employment, as a means to strike a more effective balance between flexibility in hiring and flexibility in dismissals. Although the ambitious proposals originally put forward by the Minister of Labour, the reform does not impact on the system of safety-net measures, which does not distance itself from the protection supplied to the worker in cases of partial or total unemployment.

In the event of partial unemployment, that is suspension or reduction of the working time, workers might rely on certain forms of income support, with the reform that has widened their scope of application also by means

of the setting-up of bilateral funds, which might also include ad-hoc funds for lifelong learning for employees of small-sized companies not covered by income support schemes. This money is made available by sectoral employers' associations and unions with the purpose of promoting workers' further education, and is usually used to devise training schemes organized by the employers subsidising the fund. At present, income support measures only cover workers operating in the manufacturing sector, or those in some other industries with a certain number of employees. By way of example, in the commercial sector only businesses with more than 50 employees can apply to such funds.

A wide-ranging reform was put forward in relation to the employment safeguards in case of total unemployment. In this connection, provisions have been introduced to supply protection to workers in a more thoughtful manner by means of Social Insurance for Employment (*Assicurazione Sociale per l'Impiego*, ASpI) – now regarded as the only form of income support in the event of loss of unemployment. The Social Insurance for Employment will be implemented in place of the unemployment benefits – granted to workers at the end of the employment contract, in cases of dismissal and special instances of resignation – and mobility allowances – income support provided to workers who have been made redundant or are registered as unemployed in special lists – previously supplied. Finally, the scope of application of traditional forms of income support measures has been widened, with the sole exception of those allocated to workers in the agricultural sector who are enrolled in special registers.

In the event of total and involuntary unemployment, income support measures are envisioned through the Social Insurance for Employment starting from 1 January 2013 to all those eligible after that date. The eligibility criteria are similar to those laid down to access the unemployment benefits currently in place. Most notably, only workers who lose their occupation are entitled to these benefits, with inactive people or those who want to re-enter the labour market following a period of inactivity excluded from them.

This aspect is noteworthy as it shows that this set of safety-net measures is not universal in scope, pointing out that long-overdue equality in the provision of welfare is not yet ensured.

The system will be fully implemented starting from 2016, subsequent to a round of consultation between the Government and the social partners to assess its sustainability in relation to public expenditure and the transition period between the old and the new system. From 1 January 2014 and throughout the transitional phase, unemployment benefits will gradually

increase in duration, whereas redundancy schemes will decrease until their depletion, yet not later than 31 December 2016. In order to fund the Social Insurance for Employment, the reform imposes an obligation upon the employer to pay a certain amount of money in cases of termination of the employment relationship other than resignation (Article 2, par. 31 of Law No. 92/2012). Payment to the fund in the event of the foregoing conditions will take effect from 1 January 2013 and the sum is arrived at by calculating 50% of the monthly unemployment benefits for each 12 months' seniority over the last three years.

Besides the Social Insurance for Employment, the reform also introduces another type of unemployment benefit, addressing those workers who meet only some of the social security requirements to fully enjoy these forms of income support, which is known as partial unemployment benefits (*Mini ASpl*).

Similarly to the redundancy schemes previously in place for this category of workers, in order to be entitled to partial unemployment benefits, workers must have paid social contributions amounting to only 13 weeks (78 days) in the 12 months preceding redundancy. However, the difference lies in the fact one of the eligibility criteria – e.g. 2 years' seniority – has been removed, fulfilling the goal of further widening the number of prospective recipients of the employment safeguards. Partial unemployment benefits are supplied for a time frame amounting to half the number of weeks for which contributions have been paid in the last year, deduced by previous benefits, if any.

5.1. The Conditionality of the Unemployment Benefits

With a view to help jobless people to adequately re-enter the labour market – most notably those who are in receipt of unemployment benefits – the Legislator has long since laid down a number of conditions that need to be satisfied in order to gain or maintain the status of unemployed, and thus being granted unemployment entitlements. These conditions mainly concern the attitude of recipients of benefits in relation to active labour policies – taking part in interviews, training, active job-search – or their status at the time of accepting an offer of work. In reality, this system has never been implemented, nor have there been any reported cases in which unemployment benefits have been suspended or terminated.

An attempt to make this conditionality more effective is that of raising the eligibility requirements. In this sense, recipients of unemployment benefits lose such entitlement if they perform a working activity resulting in annual earnings that are higher than the individual minimum income excluded from taxation. In a similar vein, the duration of contracts in salaried employment causing the termination of the unemployment benefits has been reduced to 6 to 8 months. Furthermore, unemployment benefits might be terminated on the grounds of a refusal to respond to an offer of work, either open-ended or fixed-term and irrespective of the duration of the employment contract.

Along the same lines, with a view to encourage benefit recipients to actively seek work, help them to re-enter the labour market and make the conditions to supply income support more stringent, unemployment benefits – provided to both unemployed and inactive people – are terminated as a result of an unjustified refusal to take part in initiatives in the area of social policies or those promoted by relevant services. The same applies in cases of individuals occasionally taking part in such initiatives, or job-seekers who forgo job offers for which they are paid at least 20% of the gross amount of the benefit granted.

If still in employment, the provision of unemployment benefits is terminated in the event of a refusal to attend training or retraining courses or even to taking part in them on an irregular basis without a justified reason. In this sense, only working activities, training and retraining courses carried out within 50 Km of the individual's residence – or that can be reached in at most 80 minutes by means of public transport – pertain.

5.2. Lump Sum Benefits for Workers in Quasi-Salaried Employment

The government has committed to provide income support to workers in quasi-salaried employment (continuous and coordinated collaborators). This category of workers is regarded as distinct from autonomous workers – as they operate in absence of financial risks and without making use of site machinery and equipment – and salaried employees – for differences arising in terms of organisational autonomy, and no rights to exercise managerial and disciplinary power on the part of the user-company. This move is intended to supply forms of income protection to all economically dependent workers, irrespective of the degree of autonomy or subordination.

Indeed, the Legislator of 2008 moved along the same lines – although on an experimental basis – envisioning a lump-sum allowance for workers on quasi-salaried employment who operate for one client in the event of a shortage of work.

The reform programme is intended to safeguard this category of workers as they do not fall within the scope of application of Social Insurance for Employment, which only addresses salaried employees. Accordingly, starting from 2013, a lump-sum allowance will be granted to workers on quasi-salaried employment who have only operated for one employer in the previous year, provided that they pay contributions to the National Social Insurance Fund on an exclusive basis and in accordance to a special scheme (*Gestione Separata*).

In order to be eligible, workers on quasi-salaried employment contracts must meet certain conditions in terms of income and contributions. The lump sum benefit amounts to 5% of the minimum taxable income paid for social security purposes, multiplied by the lowest remuneration received on a monthly basis in the previous year – at least four months' pay – and remuneration not subject to contributions. The lump sum allowance is granted in a single payment whereas lower than 1,000 Euros, or in monthly rates amounting to 1000 Euros or less if lower than 1,000 Euros.

6. A Preliminary Assessment of the Reform. The Omnipotence of the Law, the Demise of Concertation, and the Debased Role of Collective Bargaining

Reviewing the legal framework of the employment relationship has never been an easy task, in Italy more so than elsewhere. This is exhibited by the wave of terrorist attacks against drafters and practitioners who have engaged in the reform of labour law in our country. Accordingly, the efforts of those who undertake this task which is as complex as crucial for the Italian labour market should be acknowledged. All the more so as this is done in an awareness of the delicacy of the matter and the political, economic, and social implications that entail. Indeed, innovative and forward-looking ideas have never been lacking in Italy. As recalled by Prof Marco Biagi ten years ago – the last victim of terroristic attacks linked to labour issues – there is a need to move beyond ideological blinkers and social tensions that prevent the devising of reforms necessary to keep up with the changes currently underway. His teachings are still relevant today, and the passing of Law No. 92 of 2012 on the part of the Monti's

Government demonstrates for the first time that it is possible to overcome legal constraints and limitations that for long have penalized Italy in the international and comparative context. On close examination, this is the most relevant aspect the Government and Elsa Fornero – the tenacious Minister of Labour – should be credited for this.

Nevertheless, the reform came under heavy criticism for a number of reasons, even prior to the amendments made by the Government and the Parliament approval. This might be ascribed also to the fact that Italy is lacking of an *ex ante* evaluation system that foresees the economic and social impact of newly-issued provisions. This state of affairs of course acts as a hindrance to the reform process and gives rise to a number of objections devoid of solid grounds.

Indubitably, the reform drafted by the technocrats currently in office does not appeal to labour lawyers nor to operators in the labour market. The few proponents of the reform programme are mainly experts in the field who perform a dual role – they are both academics and members of the Parliament – and contributed to issue and approve the reform. Employers' associations and trade unions are likewise discontent, albeit for opposite reasons. From where the employers stand, the narrowing down in the use of atypical and fixed-term contracts is unacceptable, especially for small-sized enterprises which, unlike large and medium-sized companies, did not benefit from provisions concerning flexibility in dismissals¹⁵.

Trade unions for their part oppose the deregulation of provisions on dismissals for economic reasons in open-ended employment. The remedy of reinstatement in the event of unfair dismissal, (rightly or wrongly) perceived as peculiar to Italy within the international context, has been limited only to certain cases (see par. 3.4.3.). As for compensation, it has been extended also to large-sized enterprises, yet the relevant procedures remain unclear.

Trade unions leaders, yet this view is also shared by most academics, signal that the shift from property rule to liability rule with regard to dismissals will undermine the position of workers who, primarily during an economic crisis, will be forced to take jobs with low levels of protection and remuneration.

Academics also maintain that the reform is inadequate in technical terms and much groundwork is needed. Nevertheless, there is a need to avoid the tendency, which is peculiar to Italy, to reject any attempt to change *a*

¹⁵ *Supra*, note 7.

priori, that is without carefully entering into the merits of the proposals that are put forward. Arguing against the mechanics and the underlying principles of a proposal – as is the case of the Italian reform – is often done in support of ideologies and lines of thought arguing in favour of the relationship between capital and labour.

Indeed, the Treu and the Biagi Reforms¹⁶ have shown that substantial pieces of legislation can be appreciated only after a relatively long time frame, that is after an implementation period and an harmonisation process with the extant legal framework¹⁷. As a result, Mr Monti is absolutely right in telling the *Wall Street Journal* that the reform deserves “a serious analysis rather than snap judgments”¹⁸.

However, the lack of an adequate evaluation system in Italy that helps to predict the impact of the provisions put in place questions the unfaltering assertion made by the Italian Prime Minister and reported by the same newspaper, according to which the reform “will have a major and positive impact on the Italian economy”.

The major problem of the Italian labour market is not the (vast) amount of provisions enacted nor their technical content, but their full implementation and effectiveness.

Past experience clearly indicates that many legislative measures remain only on paper. This is the case of a number of proposals envisioned in the reform of the labour market of 2003 (the Biagi Reform), among others the national employment information service, the access-to-work contracts addressing women living in the South of Italy, the apprenticeship contracts providing an alternation between school and work and modelled after the German system, forms of cooperation between public and private operators, the accreditation system of employment agencies, the suspension of the unemployment benefit for those who refuse training or an adequate offer of work underpinning an innovative system of safety-net measures.

These institutions have gained momentum, or have been amended by the newly-issued reform, yet they are bound to remain unenforced without

¹⁶ See M. Tiraboschi, *The Italian Labour Market after the Biagi Reform*, *The International Journal of Comparative Labour Law and Industrial Relations*, 21, No. 2, 2005, 149-192.

¹⁷ In a similar vein, see M. Tiraboschi, *The Reform of the Italian Labor Market over the Past Ten Years: a Process of Liberalization?*, *Comparative Labor Law and Policy Journal*, 29 No. 4, 2008, 427-458.

¹⁸ M. Monti, *Italy's Labor Reforms Are Serious and Will Be Effective*, in *The Wall Street Journal*, April 7, 2012, A14. See also in Adapt International Bulletin, No. 14, 2012, in www.adaptbulletin.eu, (Last accessed 13 October 2012).

the involvement of social and political parties, operators of the labour market and actors of industrial relations.

Accordingly, if one considers the two principles underpinning the reform – higher flexibility in dismissals and lower flexibility in hiring – the amendments made to the contractual arrangements appear to be inappropriate (*supra par. 2*). Paradoxically, unfulfilled promises of stable employment and the limitations placed upon project and temporary work come to penalise not only compliant employers, but also precarious workers who are not offered stable occupations at the end of the 36-month period until which fixed-term contracts can be extended. This aspect contributes to raise the rate of undeclared work, which is another major problem of the Italian labour market which, in turn, might bring about a tightening up of the sanctioning system, as well as an increase in the cost of labour and bureaucracy. This state of play will jeopardise the successful effort made in the last twenty years with the Biagi and Treu Reforms to regulate jobs performed in the hidden economy, restoring the recourse to undeclared work, and encouraging precarious employment and processes of delocalisation.

Neither telling are the arguments put forward to modify Article 18 of the Workers' Statute (Law No. 300/1970), a cornerstone of Italian labour law. According to this provision, employers with less than 15 employees are under the obligation to reinstate workers who are found to be unfairly dismissed. The issue has attracted wide media coverage at both national and international level but produced a result that goes in the opposite direction to that expected by those who argued in favour of its repeal or a narrowing down of its scope of application. Once again, it would have been sufficient to refer to the teachings of Marco Biagi, who always argued for the need to resort to common sense in envisaging interventions that would not affect the modernisation of the labour market or jeopardize the dialogue between law-makers and social partners. He used to say "Why didn't I make reference to Article No. 18? The reason is quite simple. The White Paper made a passing reference to Article 18, but it was not regarded as a key aspect, even though it shows a bias towards its amendments. I think that re-instatement is no longer applicable. It is just a sort of symbol, a deterrent measure with no power of discouraging dismissals. Indeed, its deterrent nature lies in the fact that it promotes fraudulent practices. Worldwide, unfairly dismissed workers are entitled to compensation. This is done under civil law, pursuant to which the only way to deal with the damage suffered by workers is to grant them the payment of a compensation award – regardless of the amount and the waiting time. Notwithstanding its marginal role, one

might ask why we still discuss Article 18. Actually, I do not think that this topic should be discussed. We had better focus on some other, and far more relevant, issues”¹⁹. The struggle over Article 18 of the Workers’ Statute allowed the Government to repeatedly (and naively?) assert the effectiveness of the reform, on the assumption that, if the reform is criticized by everyone, it means that a balance has been stricken between different interests. This is the position of the Minister of Labour Elsa Fornero prior to the passing of the reform, while from the *Wall Street Journal* a rather confident Prime Minister Mario Monti maintained that “the fact that it has been attacked by both the main employers association and the metalworkers union, part of the leading trade union confederation, indicates that we have got the balance right”. In the author’s view, this is the heart of the problem. The idea that a reform is balanced because it makes everyone unhappy is paradoxical.

The assumption that changes to the existing legal framework are necessary to keep up with “new needs arising from a different context” – as reported in the report accompanying the legislative text – was not followed up with a careful reading of the new conditions, leading the reform to promote once again the same pattern of open-ended employment relationships which characterized Taylorism and Fordism over the last century²⁰.

The peripheral role allocated to the consultation process with social partners on the part of the Government led some to talk of the demise of concertation. However, there is more than meets the eye. Aside from the marginal role carried out by employers’ associations, and above all trade unions, in devising the reform, it is beyond dispute that mandatory provisions play a major role whereas limited room to manoeuvre is left to collective bargaining and social partners.

Accordingly, rather than the method of concertation, it is the principle of subsidiarity and the role of decentralized collective bargaining that are penalised the most, along with the trust placed in an autonomous model of industrial relations and a bilateral approach, so far the privileged channel for the regulation of the labour market.

¹⁹ M. Biagi, *Non fissiamoci sul 18*, intervention made to CNEL, November 2001, in *L’Espresso* del 18 April 2002, p 56.

²⁰ Some critical remarks on the central role of open-ended salaried employment in relation to the transposition of the 1999 Directive on fixed-term work, of a more general nature, can be found in M. Tiraboschi, *Glancing at the Past: an Agreement for the Markets of XXI Century*, *The International Journal of Comparative Labour Law and Industrial Relations*, 15, No. 2, 1999, 105-120.

The truth is that the Monti-Fornero Reform is not poorly made or technically inadequate, as maintained by some labour law scholars, but simply conceptually wrong because it draws on the assumption that it is possible to deal with diversified production and work processes by way of a single (or prevailing) and open-ended employment relationship, which for Mr. Monti himself no longer exists and is labelled as “boring”.

In practical terms, this will act as a hindrance to the recourse of quasi-salaried employment (coordinated and continuative work) or autonomous work. In addition, temporary work is limited to exceptional cases and to temporary needs, and incentives for access-to-work contracts for disadvantaged workers will be repealed. Further, the use of part-time work and other forms of employment relationships (including the use of the voucher system and on-call work) will also be limited, although over the years, they contributed to legalize undeclared work.

On reflection, however, the ongoing change of the economic context provides for a major overhaul of flexible, quasi-salaried, and temporary employment only on the condition that flexibility in dismissals is increased, and if accompanied by a review of the safety-net measures.

A half-way solution, as the one put forward in the reform would end up penalizing employers, but above all workers. Younger workers and those currently forced out of the labour market will bear the brunt of the reform and, accordingly, they will no longer be pushed towards precarious employment but rather towards illegal and undeclared work.

For the most part, workers feel more insecure and precarious than in the past. Employers believe that the regulatory framework is unsuitable to face the challenges posed by globalisation and new markets.

There is profound dissatisfaction with a very complex body of law, that does not provide workers with the necessary protection, hampering the dynamism of production processes and labour organization. Against this background, it would be foolish to push for a radical reform of the labour market that will probably just remain on paper.

Overindulging in reforms is certainly a lesser evil than partisanship and ideological blinkers that marked the last ten years in Italy, yet at the end of the day it is perhaps just as damaging and counterproductive. Today workers and businesses need a very simple regulatory framework, with effective rather than formal rules, to be complied with by everyone as contributing to foster mutual trust and active collaboration at the workplaces. A competitive economy must rely on highly-motivated workers that give their best, invest in their skills and adaptability, rather than on a overly-rigid protection system. This is what stability of

employment really means, a kind of stability based on mutual advantage rather than on norms that are statutorily imposed.

The fact that the reform of the labour market leaves everyone unsatisfied should not be regarded as a positive feedback, rather as a serious weakness of a provision imposed by the Government which reduces the role of the social partners and moves away from an autonomous system of industrial relations to regulate employment relationships at all levels.

The attempt to strike a balance between flexibility and security caused this reform to be incomplete, a half-way reform that oscillates between a dangerous past and a future that is still to be planned.

The risk that “growth” would only be a word in the title of the legislative text is thus far from being unlikely.

ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Marco Biagi Centre for International and Comparative Studies, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at www.adapt.it.

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