

Low-Income Workers' Financial Participation in Italy: A Proposal *de iure condendo*

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Abstract

Following the acknowledgment of empirical evidence supporting the implementation of financial participation among all classes of workers, the Author assesses the Italian context and concludes that such systems have been poorly implemented, especially among low-income workers. By looking at the experience of other EU countries and taking into account the recommendations provided by the European Commission, the Author then argues for the implementation of a regulated dialogue between workers, employers and trade unions. The aim of such dialogue would be to boost the development of financial participation systems among low-income workers without endangering their income.

I. The Reasons Behind the Essay: A Premise

The primary objective of this work is to encourage a dialogue on financial participation with special reference to those groups of low-income workers who are usually affected by a lack of bargaining power and not sufficiently involved in the company's results.

While there are several ways in which employees may link a portion of their salary to the company performance and share part of the corporate risk, this paper follows the approach adopted at the EU level and takes into account a wide concept of 'workers' financial participation', which includes a broad variety of schemes very different from each other.¹

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¹ One of the first example where the term 'workers' financial participation' was used in a wide sense (including profit sharing schemes, gain sharing and employee ownership) can be identified with the Council Recommendation 27 July 1992 no 443, concerning the promotion of participation of employed persons in profits and enterprise results (including equity participation) available at <https://tinyurl.com/y2fr6wdq> (last visited 28 May 2019). The same concept has been used in other European documents: eg M. Uvalic, *The Report Pepper IN*,

Notwithstanding some differences amongst the Member States, generally the diffusion of financial participation among these types of employees is underdeveloped. Due to their weak position and the lack of local collective bargaining (for example in Italy it covers only thirty-five percent of firms), companies do not offer an opportunity to trade unions to bargain for employee participation in firms' profits.

In this introduction, it is important to clarify the utility of participative capitalism among the vast majority of employees. The aim is not to defend the effectiveness of this type of workers' participation. The article proceeds on the premise that the empirical evidence indicating the effectiveness of workers' financial participation is correct insofar as that it not yet been refuted even by those who are critical towards participative capitalism.

In order to frame respond to those criticisms, it seems to be appropriate to mention a recent paper by the National Bureau of Economic Research entitled 'Who has a better idea? Innovation, shared capitalism, and HR policies'.² The authors of the research, despite highlighting the difficulties of obtaining clear and consistent results, found significant positive empirical evidence in support of financial participation practices, when properly implemented or supported by appropriate human resources management practices.³

As a matter of fact, since these employees lack bargaining power, there is a greater need for specific regulations allowing variable pay in the form of participation plans to be an essential part of the wage. This applies even more to the Italian framework, where low-income workers are given fewer participation opportunities.⁴

Promotion of Employee Participation in Profits and Enterprise Results (Social Europe) (Luxembourg, Commission of the European Communities, 1991); Pepper II Promotion of participation by employed person and enterprise results, Report from the Commission of European Communities 8 January 1997 COM(96)697; Commission Staff Working Paper, Financial participation of employees in the European Union, 26 July 2001, SEC (2001)1308; Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on a framework for the promotion of employee financial participation' (COM(2002) 364 final) available at <http://eur-lex.europa.eu/homepage.html>; Report Pepper III, Promotion of Employee Participation in Profits and Enterprise Results in the New Member and Candidate Countries of the European Union see <https://tinyurl.com/y3433rlc> (last visited 28 May 2019); Report Pepper IV, Benchmarking of Employee Participation in Profits and Enterprise Results in the Member and Candidate Countries of European Union, 2008/2009 see www.adapt.it, indice A-Z, Partecipazione dei lavoratori; European Parliament Report on financial participation of employees in companies' proceeds (2013/2127(INI)).

² E. Harden and D.L. Kurse, 'Who Has a Better Idea? Innovation, Shared Capitalism, and HR Policies' *National Bureau of Economic Research Working Paper no 14234*, 2008 available at <https://tinyurl.com/y5wb4dlj> (last visited 28 May 2019).

³ D.L. Kurse, 'Research evidence on prevalence and effects of employee ownership, testimony before the subcommittee and employer-employee relations', Committee on Education and the Workforce, US, House of Representatives, 13 February 2002, available at <https://tinyurl.com/yxfwgvbw> (last visited 28 May 2019).

⁴ In Italy, variable pay in the form of workers' financial participation, if any, is under five-

In fact, in the Italian context there are several reasons that explain the underdevelopment of participative capitalism, especially among low-skilled workers. Firstly, trade unions are sceptical towards linking a part of the wages to the firm's performance. Secondly, the unions' representatives are ineffective at negotiating financial participation schemes, especially at the local level. Thirdly, at the government level, there are no policies aiming at efficiently addressing the public incentive (tax break) to support participation schemes.

So far, in the Italian framework, the main actors in charge of implementing financial participation schemes (mainly in the form of variable pay) have been trade unions through collective bargaining agreements at national and local level. In Italy, collective bargaining is structured in a 'dual channel' system: i) national collective bargaining that sets the minimum wage and is organized into sectors, each with designated general regulations and ii) local collective bargaining, which takes place at the company (if unionized), or local level, and is provided with specific regulations with particular attention to financial participation schemes.⁵ As will be considered later in this paper, the second level collective agreements generally do not work as the legislator expects, which, along with other factors, has caused the under-development of workers' financial participation.

II. The Importance of Cultural Aspects: Public Policies and Trade Unions' Approach

As already observed, the role played by unions is fundamental for the implementation of financial participation, especially among low-income workers. In general, it is not only in Italy where unions have demonstrated hostility on the topic. However, the views of trade unions towards financial participation, and the ways in which they conceptualise it may differ between confederations.

Depending on the case, the presence of trade unions has been associated with both increasing and decreasing the chance of firms having financial participation. This may be related to the fact that the unions' positions have varied significantly across countries and throughout time. In some European countries, unions have been increasingly involved with financial participation schemes.⁶

six percent, lower if compared with a European average of seven-twelve percent. The situation is different in the US where variable wage covers the twenty five-forty percent of total wages, source C. Lucifora and L. Murphy, *Executive and Employees Compensations: Productivity, Profits, and Pay* (Oxford: Oxford University Press, 2013).

⁵ Furthermore, national level agreements between employers and unions have been used to implement initiatives at the EU level. There are also national level discussions between unions, employers and the government, which sometimes lead to agreements. In recent years, the most important of these was the agreement between employers, unions and the government at national level that was signed on July 1993 and that radically reformed the system of collective bargaining in Italy. It restructured the links between industry and company level bargaining, and drew up new bargaining timetables.

⁶ V. Pérotin and A. Robinson, 'Employee Participation in Profit and Ownership: A Review

It is possible to observe different approaches also between unions in the same confederation, such as in Germany.⁷ Overall, at least in France and Italy, socialist and communist confederations tend to be more hostile to financial participation than do liberal, social democrat, or Catholic confederations, and those that represent mainly manual workers tend to be less enthusiastic about financial participation than those representing non-manual and professional employees.⁸

Focusing on the Italian framework, it is possible to find three main trade unions (so-called Cgil, Cisl, Uil) with different views on employees' financial participation. Generally, socialist and communist confederations tend to be more hostile to workers' financial participation than liberal, social democrat or catholic confederations. Union Confederations have opposed financial participation in the past in cases where employers explicitly coupled it with greater salary flexibility. In particular, the 'Cgil' (*Confederazione Generale Italiana del Lavoro*) (which is the biggest) adopts a more critical attitude towards financial participation schemes than the 'Uil' (*Unione Italiana del Lavoro*) and 'Cisl' (*Confederazione Italiana Sindacati Lavoratori*) (which is more supportive of worker involvement in company profits).

In Italy trade unions seem to have missed an opportunity, since the Italian employers are keen to engage proactively in the debate of financial participation.⁹

Taking into account the unions' hostility¹⁰ towards participative capitalism, which exists at various intensities in each Member State,¹¹ it is necessary to improve the alternatives through which employees may link their wage to the company's performance.

We could enhance low-income workers' bargaining power and financial participation by creating legal and cultural instruments to promote such results. In doing so, it would be important to recognize part of the State incentives in favour of low-income workers and to increase communication between them and local unions. Local (company or territorial) unions' representatives should be the ones in charge of reducing the lack of information that affect participative schemes in addition to supervising the whole bargaining process between firms and employees.

From this perspective, there is a greater need to train local unions' representatives who currently do not have the knowledge to understand the risks

of the Issues and Evidence', 3 (2002), available at <https://tinyurl.com/y6ywwrdq> (last visited 28 May 2019).

⁷ C. Weltz and E.F. Macias, 'Financial Participation of Employees in the European Union: Much to Do About Nothing' 14 *European Journal of Industrial Relations*, 479-496 (2008).

⁸ For an overview on the unions approach in Italy and in Europe see *ibid* 479-496.

⁹ C. Weltz and E.F. Macias, n 7 above.

¹⁰ For the recent hesitant change of approach of the union see § 7.

¹¹ For an overview of trade unions position among European countries see 'worker-participation.eu' available at <https://tinyurl.com/yydkfchr> (last visited 28 May 2019).

and benefits of different participation schemes. It is interesting to note what occurred in the United States, the country where financial participation was first introduced and where it has slowly become an institutionalized phenomenon, a point partially proven by the presence of many training courses that aim to provide a recognized qualification for expertise in employees' financial participation.¹²

Switching the attention to Public policies, it is possible to observe, as stated in 1996, the Pepper II report,¹³ that in many Member States there was very little activity in terms of financial participation. Currently, that situation is partially changed; in nearly every European Member States, financial participation is actively pursued. This can be partly attributed to the copious incentive activities of EU institutions.¹⁴ Nevertheless, despite these incentives, currently about sixty-eight percent of the companies within the EU do not provide for any type of employees' financial participation.¹⁵

Analysing the different incentive policies implemented among various Member States, it is possible to explain, at least partially, the gaps in the development and quality of participation amongst various European States.¹⁶

Recognizing the crucial role that governmental incentives play, a better allocation of public resources is required. To promote this end, it is important to encourage the dialogue between law scholars' jurists and economists to ensure that legal schemes to promote employee financial participation achieve the desired results.

In other words, economic and legal theory must work together: i) to help

¹² For an example of this kind of course see the program in *Compensation, Benefits, and Job Analysis Specialists*, implemented by Certified Equity Professional Institute (CEPI) available at <https://tinyurl.com/y45kgzqg> (last visited 28 May 2019).

¹³ Pepper II, n 1 above.

¹⁴ C. Wetz and E.F. Macias, n 7 above; since 1983 the European Parliament made a resolution with the aim of stimulating the European Commission to intervene on the topic. In the 1992 the EU Council published the European Council Recommendation 92/443/CEE, which contains the promotion of financial participation showing the potential positive effects available at <https://tinyurl.com/yxobnagl> (last visited 28 May 2019). Beside such recommendation the most important documents are the report Pepper I which contains some proposal in order to implement workers' financial participation, see Pepper I and Pepper II, n 1 above. To move the issue forward, in 2002, the European Commission published a communication titled 'Framework for promoting employee financial participation' available at <https://tinyurl.com/y6svulrq> (last visited 28 May 2019). There is also an important opinion made by the European Economic Social Committee (in 2010) as well as reports and studies made by the European Parliament, and a 2014 resolution focused, in particular, on employee financial participation with respect to small firms. See J. Lowitzsch et al, 'The Promotion of Employee Ownership and Participation' *Inter-University Centre for European Commission's DG MARKT* (2014) available at <https://preview.tinyurl.com/y5nyzsxe> (last visited 28 May 2019).

¹⁵ J. Lowitzsch et al, *ibid*: in the report, the authors also observed that three hundred thousand enterprises around the EU-28 could be eligible candidates for the implementation of employee financial participation schemes.

¹⁶ For an overview of similarities, differences and trends see the report prepared by K. Wilke, P. Maack and Partner 'Financial Participation in Europe: Overview of Similarities, Differences and Trends' (2014) available at <https://tinyurl.com/y3nh8lq7> (last visited 28 May 2019).

legislature to direct incentives more profitably; ii) to provide laws that are effective at improving financial participation among low-income middle-class workers and iii) to enable the social parties to converge in their interests and to reach more cooperative relations by working on the social and cultural issues.

III. How Communication Between Economists and Jurists Can Improve Public Funds Allocation and Understanding of the Benefits of Workers' Financial Participation

The pay system transformation in the last thirty years has coincided with the transition from a strong union control structure (rigidly egalitarian and very oriented to the defence against wage inflation), to a control structure in which flexibility has gained importance, together with individual and collective bargaining. Attention has shifted from the defence against inflation to the enhancement of employees' professionalism and the firm's productivity.¹⁷

Despite the growing attention to increasing employee financial participation, the European trend, especially in Italy, is still fluctuating.¹⁸ In recent years, the percentage of middle-class workers and the quantity of wages involved in participation schemes (already characterized by low development) have actually decreased further.¹⁹ Low-income middle-class workers are sporadically, and only marginally, involved in financial participation schemes.²⁰

To break the stalemate afflicting Italian companies, it can prove useful to involve workers in the firm's profitability, renewing the common 'alliance' between employer and employees.²¹ The connection of salary to participation plans (gain sharing, profit sharing, employee ownership) should be implemented in a transparent way and focused on local collective agreements,²² which, if properly

¹⁷ A significant rise in EFP in the EU-27 in last decade. See I. Hashi and A. Hashani, 'Determination of Financial Participation in the EU Employers' and Employees' Prospective', in D. Kurse ed, *Sharing Ownership, Profits, and Decision Making in the 21st Century* (United Kingdom: Emerald Group Publishing Limited, 2013), 192.

¹⁸ As noted it is not easy to pinpoint the spread of financial participation in countries like Italy where these types of schemes do not have a real tradition, see A. Pendleton, 'Politica e pratiche di partecipazione finanziaria in Europa' *Diritto Relazioni Industriali*, XII, 361 (2002).

¹⁹ This happens for all categories, but the trend is higher at the clerical level. The loss, however, is a special characteristic of the Italian labor market, as the European trend, at least from 2009-2013, has been to increase variable remuneration arrangements, see J. Lowitzsch et al, n 14 above.

²⁰ This is the general trend, but in Italy it is even more pronounced. See I. Hashi and A. Hashani, n 17 above, 208.

²¹ L. Lusinyan and M. Dirk, 'Assessing the Macroeconomic Impact of Structural Reforms The Case of Italy' *International Monetary Fund Working Paper no 13/22* (2013) available at <https://tinyurl.com/y4m4jtrw> (last visited 28 May 2019). The authors highlight the greater necessity to more involve the workers in the firms' capital.

²² V. Maio, 'Struttura ed articolazione della contrattazione collettiva', in G. Proia ed, *Organizzazione sindacale e contrattazione collettiva* (Padova: CEDAM, 2014), 112: the author observed how it would be opportune to limit the possibility by the employer to supply the

used, are always ‘fertile ground’ for experiments related to productivity.²³

Financial participation in this context becomes a useful tool to enhance organizational efficiency, competitiveness, and equality, as well as the development of individual firms and the economy as a whole.²⁴

Thus, it is only by focusing on empirical evidence, obtained through economic theory, that there is the means to find the legal tools to enhance the diffusion of such schemes among the vast majority of low-income workers.

It is necessary to improve the workers’ performance by involving them more in the fortunes of the company.²⁵ For this to occur, there is a need to stimulate a closer dialogue between economists and lawyers, even if it is particularly complicated in the field of law,²⁶ where traditional approaches seem to separate law and economics more than other the other branches of the social sciences.²⁷

Economic approach can help the legal doctrine to better address its researches. This is even truer on the topic of workers’ financial participation where law and economics are strictly linked. The combination between juridical²⁸ and economic²⁹ approach would play a fundamental role: i) in ensuring correct juridical schemes, suitable for optimizing all the benefits emerging from participation practices, without leaving the lower-income employees at the mercy of employers; ii) in

variable wage linked to the company performance unilaterally.

²³ G.P. Cella and T. Treu, *Relazioni Industriali e contrattazione collettiva* (Bologna: il Mulino, 2009), 135.

²⁴ M. Tiraboschi, ‘Partecipazione finanziaria: caso italiano e prospettiva comparata’, in I. Senatori ed, *Teoria e prassi delle relazioni industriali* (Milano: Giuffrè, 2008), 370; for the benefits that financial participation can apport to the firms see J. Lowitzsch and I. Hashi, n 14 above, 9.

²⁵ L. Zoppoli, ‘Modelli partecipativi e tecniche di regolazione’ *Diritto delle relazioni industriali*, I, 19 (2010); G. Proia, ‘La partecipazione dei lavoratori tra realtà e prospettive. Analisi della normativa interna’ *Diritto delle relazioni industriali*, I, 60 (2010): who observed that, until now, companies have preferred awards of profitability which did not lead to the spread of participation rights. This can still be justified only in light of the reduced size of the variable pay that has not eliminated the different role played by the employee and employer.

²⁶ Looking at the Italian framework there are not many researches which take into account empirical evidence concerning the implementation of workers’ financial participation. On this subject see M. Biagioli and S. Curatolo, ‘Microeconomic Determinants and Effects of Financial Participation Agreements: An Empirical Analysis of the Large Italian Firms of the Engineering Sector in the Eighties and Early Nineties’ *2 Economic Analysis*, 99-130 (1999): they found that profit-sharing firms are more productive than non-profit sharing firms.

²⁷ P. Ichino, ‘Il dialogo tra economia e diritto del lavoro’ *Rivista Italiana Diritto del Lavoro*, 165-201 (2001) and B. Luchino, *Manuale di economia del lavoro* (Bologna: il Mulino, 2003), chapter XXII.

²⁸ In most cases, jurists only study the *law* in a strict juridical sense, thus assessing the provision in an abstract framework and irrespective of the effects that it may cause. G. Alpa et al, *Analisi economica del diritto privato* (Milano: Giuffrè, 1998); R. Del Punta, ‘L’economia e le ragioni del diritto del lavoro’ *Giornale di Diritto Lavoro Relazioni Industriali*, 3-45 (2001).

²⁹ The economist studies not only the economic relationships that are the subject of ‘positive analysis’ but also the effects of possible policy measures which are the subject of so-called, ‘normative analysis’. The idea behind this analysis is that, since the implementation of any law will produce specific effects, we should look at past experiences and draft law provisions on the basis of pursued outcomes.

more efficient allocations of public funds through the implementation of economic analysis of law (given that any such analysis is implemented in Italy).³⁰

In general, for the purposes of economic modelling, laws were generally assumed to be self-executing, and issues concerning the incompleteness and imperfect operation of legal rules were left unexplored.

Over the course of the past decade the situation has changed. The role of legal systems in shaping the nature of regulation and, as a result, economic outcomes, has been placed centre stage by the highly influential legal origins hypothesis³¹ which has applications to labour law. Established practices and systematic evaluation of labour policies' effects can now be found in Anglo-Saxon and north European countries, as well as in many other European countries, most notably Germany.³²

In particular, looking at Italian labour laws, it is hard not to agree on the fact that there is a greater need for 'experimental' laws (ie, laws implemented on a temporary basis in order to assess the actual costs and benefits of the provisions). This is particularly true in times of 'ideological uncertainty', where different legislative paths have been tried but none led to satisfactory outcomes.³³ In fact, if we focus the attention on the public incentives that Italian Governments have provided (over the last twenty years) to promote participative capitalism, it is clear to certify the absence of any results. There are several studies which show the consequences of employees' involvement in a company's profit.³⁴

On the contrary, there is still a greater need to provide more funds and to incentivise research, at institutional level, focusing on laws that provide tools to improve participative capitalism. In this regard, it is necessary to agree with scholars that show that there is a need to provide for a different allocation of public funds and, in particular, that there is the need to invest more in cultural instruments as they represent a fundamental tool to implement workers' financial

³⁰ In Italy, governments have often provided incentives by provisions called 'experimental' but in the end none checked the result in term of costs/benefits.

³¹ R. La Porta et al, 'The Economic Consequences of Legal Origins' 46 *Journal of Economic Literature*, 285-332 (2008).

³² On 22 February 2002, the Federal Government of Germany created the Committee for Modern Services in the Labour Market, (better known as the Hartz Committee, named after the head of commission Peter Hartz). Proposals to improve the efficiency of the Labour Market policy and suggestions to reform the Federal Labour Office were required due to the persistently high unemployment in Germany. The committee formulated thirteen 'innovation modules'; a set of recommendations that have been eventually put into practice by 1 January 2005. For further comments see M. Akiol and M. Neugart, 'Were the Hartz Reforms Responsible for the Improved Performance of the German Labour Market?' 33(1) *Economic Affairs*, 34-47 (2013); L. Jacobi and J.Kluve, 'Before and After the Hartz Reforms: The Performance of Active Labour Market Policy' *Journal for Labour Market Research/Zeitschrift für Arbeitsmarktforschung*, 40, 45-64 (2007).

³³ U. Trivellato, 'La valutazione degli effetti di politiche pubbliche: paradigma e politiche' *Istituto per la Ricerca Valutativa sulle Politiche Pubbliche Working Paper no 2009-01*, 1-53 (2009).

³⁴ For empirical evidences see n 2, 3 and 4 above.

participation among the vast majority of employees.³⁵

Despite the Italian Legislator often qualifying a certain labour law provision as ‘experimental’ (even when it would not be appropriate to do so), usually that provision enters into force and no resources are allocated to further verify the effects. The testing of the effects of legislative measures often remains only an intention of the legislature that never occurs in practice.³⁶

So far, the incentive policies made by governments have not produced the expected results. The sources provided by law to implement workers’ financial participation plans are instead used to reduce the cost of labour for employers.³⁷

This is what has been observed by OECD (Organisation for Economic Co-operation and Development) in 2013 in relation to the *linee programmatiche per la crescita e la competitività in Italia* (signed by the social parties in 2012 to obtain the refinancing of the incentives). The OECD underlined the fact that the measures taken were only of little use in increasing productivity and that they intervened on labor costs rather than on rewarding results.

IV. Why Use Financial Participation Among Lower-Income Middle Class Workers

As consistent empirical evidence shows, the workers who benefit of incentive paid in the form of financial participation are more likely to be males, highly educated, and to have longer tenure; the financial involvement is more common for high-skilled professional employees and less common in service jobs.³⁸ The employees who are not involved in a participation scheme have lower wage levels than those employees that are covered by (any) incentive pay.³⁹

One of the main reasons for the current economic crisis could be found in the excessive concentration of incentives and financial participation at the top of firms, in finance and elsewhere, ‘that generated huge risk-taking and spread toxic assets around the world’. Increasing normal employees’ performance-related

³⁵ S. Mainardi, ‘Le relazioni collettive nel “nuovo” diritto del lavoro’, speech given at the *Aidlass days on Legge e contrattazione collettiva nel diritto del lavoro post-statutario*, Naples 16-17 June 2016, 52 available at www.aidlass.it.

³⁶ It is necessary to focus on the monitoring and evaluation of the effects arising from the introduction of new laws concerning labor relations because they could be essential for i) the comparison of the various parties involved in promulgating the laws; ii) attributing responsibilities to parties involved; iii) *learning* from the operation of the interventions made and to recognize the directions to take; iv) finding the incentive to start implementing structural reforms in the field of labour law.

³⁷ P. Campanella, ‘Decentramento contrattuale e incentivi retributivi nel quadro delle politiche di sostegno alla produttività del lavoro’ *PRISMA Economia - Società - Lavoro*, 53-78 (2014).

³⁸ A. Bryson et al, ‘Paying for performance, incentive pay schemes and employees financial participation’, in T. Boeri et al eds, *Executive Remuneration and Employee Performance-Related Pay* (Oxford: Oxford University Press, 2013), 5.

³⁹ *ibid* 7.

pay and ownership share, rather than allocating corporate profits only into the hands of top managers, might help prevent the reoccurrence of the distorted incentives focused on short-term gains, which led to the financial disaster. The implementation of policies that give workers in start-up organizations incentives in the form of financial participation could be essential in increasing the rate of growth of small firms, thus helping with the recovery from future crises.⁴⁰

Some critics of *participative capitalism* sustain that what is beneficial for the company necessarily has to be negative for the employees. Furthermore, they affirm that the incentives based on such practices are measures of disguised *speed up*. They also try to undervalue financial participation schemes, arguing that these would cause: i) the free riding phenomenon; ii) confusion among the roles fulfilled in the enterprise and iii) excessive risk for the employees' income, especially among lower-income workers. Nevertheless, all of the above arguments have only been theorized and seem to lack support from the available empirical evidence.⁴¹

On the contrary, numerous results obtained at a global level through multivariable analysis show positive outcomes from having workers' wage involved in financial participation schemes.⁴² Even though there is a possibility that the analysis did not take into consideration some variables, the overall framework still shows positive effects,⁴³ especially when financial participation practices are properly implemented, or supported by practices of human resources management.⁴⁴

Certainly, it is undeniable that, sometimes, financial participation can have different aims, rather than producing shared goals and thus improving company's performance. Both profit-sharing and employees' ownership plans can aim at a more *neo-liberal* perspective⁴⁵ financial involvement, occasionally, in extreme scenarios; they can represent a tool to reduce the workers' rights protections provided by the law and collective agreements. For example, this is what happens

⁴⁰ *ibid* 5.

⁴¹ E. Kaarsemaker, 'Employee Ownership and Human Resources Management. A Theoretical and Empirical Treatise with a Digression on the Dutch Context. Doctoral Dissertation', Radboud University Nijmegen, 2006, available at <https://tinyurl.com/y5bpof6j> (last visited 28 May 2019).

⁴² The bulk of the empirical evidence on workers' financial participation in a variety of countries and variety of settings has concluded that financial participation has a positive influence on the performance of companies. For a review, R. Freeman et al, *Shared Capitalism at Work: Employee Ownership, Profit and Gain Sharing, and Broad-Based Stock Options* (Chicago and London: Chicago University Press, 2010). For more empirical evidences in the European framework that show positive results on workers' wages, M.M. Andrews et al, 'The Impact of Financial Participation on Workers' Compensation' available at <https://tinyurl.com/yxq8n8mz> (last visited 28 May 2019).

⁴³ R. Freeman, 'Il ruolo dei lavoratori nella partecipazione agli utili aziendali: iniziative e misure contro lo shirking' *Rivista di Politica Economica*, 22 (2007).

⁴⁴ D.L. Kurse, 'Research Evidence on Prevalence and Effects of Employee Ownership' *Committee on Education and the Workforce, US House of Representatives* (2013), available at <https://tinyurl.com/yxfwgvbw> (last visited 28 May 2019).

⁴⁵ A. Alaimo, 'L'eterno ritorno della partecipazione: il coinvolgimento dei lavoratori al tempo delle nuove regole sindacali' *Working Paper "Massimo D'Antona" CSDLE It, no 219/2014*, 27 (2014).

today in the UK,⁴⁶ (which has a long history in the field of financial participation) following the introduction of the ‘*Employee Shareholder Status*’ (*Growth and Infrastructure Act 2013*).⁴⁷ Section 31 of the *Growth and Infrastructure Act 2013* allows employers to buy out workers’ rights in exchange for tax-free shares in their company. In particular, under this law, employers are entitled to provide workers with tax-free shares, in exchange for giving up their important rights to: i) make claims against unfair dismissals (apart from the discriminatory ones); ii) request flexible working and training; iii) receive statutory redundancy pay.⁴⁸

For all of the above reasons, when we attempt to implement juridical solutions in order to improve financial participation among *vulnerable* employees we have to consider many factors and the way in which those kinds of schemes can be misappropriated.

V. Some Issues Underlying the Involvement of Low-Income Workers: The Exchange Between Organizational Flexibility and Financial Participation to Implement *Upward* Financial Participation

Whenever more low-income middle class workers are involved in companies’ financial results, it is necessary to take into account the extent of their income. From this perspective, it is preferable, and more realistic, to focus on the upward side of financial workers’ participation (or in terms of ‘flexibility upwards’), rather than on the *defensive declination* (‘flexibility downwards’).⁴⁹

In this vision, which is also sponsored by the European Commission,⁵⁰ the variable part of the salary linked to the company’s performance is added to the fixed pay amount, which must be guaranteed in any case. Interpreted in this way, financial participation schemes can represent an important stimulus to the entire production system and not only an instrument to limit the cost of labour.

⁴⁶ See para 8.

⁴⁷ The *status* of ‘employee shareholder’ has been provided by Section 31, ‘Growth and Infrastructure Act 2013. J. Prassl, ‘Employee Shareholder ‘Status’: Dismantling the Contract of Employment’ 4 *International Labour Journal*, 307 (2013).

⁴⁸ M. Biasi, ‘On the Uses and Misuses of Worker Participation: Different Forms for Different Aims of Employee Involvement’ 4 *International Journal of Comparative Labor Law and Industrial Relations*, 459-481 (2014).

⁴⁹ B. Bercusson and B. Ryan, ‘The British Case: Before and After the Decline of Collective Wage Formation’, in R. Blanpain ed, *Collective Bargaining and Wages in Comparative Perspective* (The Hague: Kluwer Law, 2005), 83.

⁵⁰ The European Commission adopted the opinion on Financial Participation of Workers in Europe, resuming the debate on the issue in order to give it new impetus. The basic principle states that participation must be voluntary and must necessarily be added to the fixed wage and not replace it. See European Economic Social Committee, *Opinion* n 1 above. More recently (resolution 2014), the European Parliament recommended the dissemination of tools for implementing variable pay systems. For a reconstruction of all the interventions in the field of financial participation in Europe, see J. Lowitzsch et al, n 14 above, fn 12.

In fact, considering the Italian framework, workers' financial participation schemes are often implemented in times of crisis to further reduce the workers' income. On the contrary, efficient schemes have to be implemented as a structural tool, and must be present especially at times when the company performance is improving.

To make this happen, a great effort from all the social forces is necessary. The State must provide incentives properly. Additionally, the full cooperation of the unions in this context is required. They must play the role of supervisors and guarantors in financial participation schemes for low-income workers. Finally, also the employers, mainly Italian, have to be able to understand the medium-to-long-run benefits of participation practices.

As previously mentioned, government intervention can play a fundamental role in the implementation of participation schemes among lower-income workers. However, public intervention in this area is complicated. While, in general, firms which link the wage to the result perform better than others in terms of productivity and profits,

‘the large heterogeneity observed, across firms and institutional contexts, suggests that not all firms in all circumstances are going to benefit from incentive pay’.⁵¹

Some legislative incentives are used to reach different goals, such as reducing the cost of labour.⁵²

According to the European Commission, the only realistic path to take involves this category of employees, so as to create schemes in terms of flexibility upwards. The question arises as to what can stimulate the employer to connect the workers' wages to financial upside, if low-income workers are not willing to risk their wages in the event of loss. In other words, what can employers gain by sharing part of their profits with the employees if they do not share the risk in term of salary reduction in case of negative performance? To answer this question we have to take into account that the majority of European Member States have highly regulated labour markets⁵³ (such as the Italian one) and, in those contexts, employers always strive for more organisational flexibility. In this scenario, it could be hypothesised to allow workers, through a specific juridical mechanism, to veer from mandatory regulations provided by law and collective agreements and provide the flexibility desired by the company in exchange for an effective portion of financial participation.⁵⁴ In this way the employees would share the company's fortune without risking their salary (that is already

⁵¹ A. Bryson et al, n 38 above, 163.

⁵² P. Campanella, n 37 above, 1.

⁵³ In those contexts, the employee is protected from a rigid law discipline mainly composed from mandatory rules.

⁵⁴ Not only symbolic as happened so far, see para 6.

minimal).⁵⁵ In other words, they would spend their *human-capital*, providing organizational flexibility to the company⁵⁶ in the same way in which the employer risks his money.

However, any such system needs to carefully consider appropriate safeguards to protect workers from employer's opportunistic behaviour. This should be taken into account to prevent events such as the ones that happened in the United Kingdom.⁵⁷

Furthermore, given the importance of the rights protected by labour law mandatory rules, it is appropriate to emphasize once again the need for serious experimentation following the introduction of such legal mechanisms.

VI. The Presence of Financial Participation Schemes Among Low-Income Middle-Class Workers in the Italian Context

Starting in the late 1990s, with the decentralization of collective bargaining, a continuous debate ensued over the topic of employees' financial participation. The argument also started to include the two different practices of financial participation⁵⁸ that were traditionally used by Italian enterprises as tools for incentivizing individual performance and not collective share management.⁵⁹

Accordingly, workers' financial participation was one of the main goals of the legislature since 1993 when the so-called '*Protocollo Ciampi*' agreement that was signed by the social parties.⁶⁰ Furthermore, the increased sharing of companies' profits (especially among low-income workers) was also one of the main objectives of the 2012 Italian labour market reforms,⁶¹ in the field of industrial relations. With the goal of 'promoting workers' participation and thus improving the competitiveness of Italian firms',⁶² the afore-mentioned act

⁵⁵ With reference to the 2007-2013 period, the average wage has decreased by six percent and the average the productivity per employee by 5 percent, see 'lo global report 14/1' available at www.ilo.org.

⁵⁶ S. Sonnati, 'Lo stallo del salario variabile: le reti di impresa ed il recupero dell'autonomia individuale in forma assistita come tecniche di implementazione della retribuzione di risultato' *Rivista Italiana Diritto del Lavoro*, 617 (2015)

⁵⁷ Section 31 of the *Growth and Infrastructure Act 2013* allows employers to buy out workers' rights in exchange for tax-free shares in their company.

⁵⁸ Employees share ownership and the multiple profit/productivity-related wage arrangements.

⁵⁹ Also considering the *private nature* of Italian firms, G.G. Balandi, 'Governance e diritto del lavoro' *Quaderno Rivista Trimestrale di Diritto e Procedura Civile*, 124 (2011), in comparison with American public companies, where the '*ESOPs*' developed: H. Hansmann, 'When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination and Economic Democracy' 99 *The Yale Law Journal*, 1749 (1990).

⁶⁰ A. Cristini and R. Leoni, 'The '93 July Agreement in Italy: Bargaining Power, Efficiency Wages or Both?', in N. Acocella and R. Leoni eds, *Social Pacts, Employment and Growth* (Heidelberg: Physica-Verlag, 2007), 97-119.

⁶¹ Legge 28 June 2012 no 92, known as *Fornero Act*.

⁶² M. Biasi, n 48 above, 459.

required the Government to 'enact one or more legislative decrees aimed at favouring forms of employees' involvement' to be, eventually, introduced through *totally facultative* plant-level collective agreements.⁶³

Nevertheless, efforts towards the development of financial participation schemes were unsatisfactory, especially in comparison to the average European Member States.⁶⁴

Many factors contributed to the unsatisfactory development of workers' financial participation in Italy, both at quantitative and qualitative levels. One factor, as just mentioned, is the inappropriate payment of incentives by the State. Moreover, the Unions' hostility towards the involvement of low-income workers in firms' capital is of even greater importance (they ignored the positive results of empirical evidence). The second level collective bargaining (when present) has been characterized by an insufficient level of performance pay.⁶⁵ The bargaining practices, except for the experiences of some interesting companies, continue to represent a *barren land* in the search for innovative and efficient solutions for workers' financial participation, especially among lower-income workers.⁶⁶ Unions tend to resist profit sharing due to concerns that management can manipulate profit figures, and that such pay can create inequality among workers.⁶⁷

The trend has been the conclusion of agreements at the local collective bargaining level based on productivity or profitability that seek the redistribution of economic resources aimed at pursuing an egalitarian policy.⁶⁸ Companies do not reward employees taking into account the different levels of workers' professionalism; the consequence is the hindrance of the realization of the planned productivity objectives.⁶⁹ In fact, the Italian unions utilized the government

⁶³ Art 4, para 62 legge 28 June 2012 no 92.

⁶⁴ For an overview on the European framework see J. Lowitzsch et al, n 14 above.

⁶⁵ The offensive function of financial participation; 'Osservatorio sulla contrattazione di 2° livello - Dipartimento Industria CISL' available at <https://tinyurl.com/y369wbp3> (last visited 28 May 2019).

⁶⁶ Most of the local agreements do not use sophisticated indicators to provide the additional part of the salary linked to financial data, fixing only an equal goal for all workers, which does not allow the valuation of the contribution made by the individual or group of workers to achieve it. E. Gargnoli, 'La retribuzione ad incentivo e principi costituzionali' *Argomenti di Diritto del Lavoro*, 221 (1995).

⁶⁷ In the US union members are less likely than non-union employees to be part of profit sharing and gain-sharing plans. J. Zalusky, 'Labor-Management Relations: Unions View Profit Sharing', in A. Blinder ed, *Paying for Productivity: A look at the Evidence* (Washington DC: Brookings Institution, 2011).

⁶⁸ So far, the local collective bargaining (when present) has worked to ensure that the part of the wage connected to the company performance was supplied to every employee without distinction. Furthermore, the local collective agreements have tried also reduce the frequency in which financial participation schemes are implemented in occasion of companies' crisis, frustrating the main function of such plan (that is to stimulate productivity and above all in times of economic crisis). E. Villa, 'La retribuzione di risultato nel lavoro pubblico e privato' *Rivista Italiana Diritto del Lavoro*, 451 (2013).

⁶⁹ Some contracts differ in the quantum of the award based solely on the employment level, see G. Bianchi, 'I premi di produttività in Lombardia: Limiti e nuove opportunità' *Istituto di*

incentives to concede a small share of wages in a fixed form to all workers, deceiving the government's real incentive goals.⁷⁰ So far, unions have proven unsuitable for negotiations that are less egalitarian and more differentiated among workers, such as variable pay arising from financial participation. In this context, it is difficult to avoid the risk of compromising the collective variable wage bargaining (the unions could be excluded from the financial participation schemes bargaining), with all the consequences of possible opportunistic behaviour by employers.⁷¹

The unions should change their attitude and try to be more willing to plan and sign second level collective agreements, with the aim of *real* financial participation. In doing so, the companies' collective bargaining would be able to coordinate its bargaining power with the autonomy of the individual workers. Given the employees' vulnerability and their absence of competence on the topic it is important to not leave the workers without expert assistance and advice in making decisions about whether and how to join participation schemes.

In this framework, it is useful to highlight the experiences of other European Member States.⁷² In this perspective it should be noted, mainly as a warning,⁷³ a criticized legislative action implemented by the UK Parliament, which, in the name of enterprises' productivity, has legitimized the exchange between forms of financial participation and the waiver of some important rights in the regulation and termination of employment.⁷⁴

In such situations, the shift in the balance of bargaining (derived from the

studi sulle relazioni industriali e di lavoro, 5, 1 (2013) available at <https://tinyurl.com/y43czc9f> (last visited 28 May 2019).

⁷⁰ The fifty percent of collective agreements provide as *variable salary* an equal bonus for all workers, data OCSEL consulted on 'Observatory bargaining 2nd level - Industry Department Cisl, table no 17 Distribution of the 'performance bonus'', available at <https://tinyurl.com/y2yds9oc> (last visited 28 May 2019).

⁷¹ The alternative is not between individual bargaining and collective bargaining, but between a union variable wage bargaining and a salary unilaterally established by the employer. See M. D'Antona, 'Intervento', in Associazione Italiana di Diritto del Lavoro e della Sicurezza Sociale ed, *Autonomia individuale e rapporto di lavoro: Atti del X Congresso nazionale di diritto del lavoro, Udine, 10-11 maggio 1991* (Milano: Giuffrè, 1994), 192.

⁷² As an example, we can highlight the experience of the UK, where the discipline of *variable pay* is the result of a gradual loss of power caused by the *anti-union* politics of conservative governments. For the historical evolution of labor relations and the role of collective agreement in Britain, see H. Clegg, *The Changing System of Industrial Relations in Great Britain* (Oxford: Basil Blackwell, 1979); B. Bercusson and B. Ryan, n 49 above, 49.

⁷³ M. Biasi, 'Retribuzione di produttività. Flessibilità e nuove prospettive partecipative' *Rivista Italiana Diritto Lavoro*, 362 (2014).

⁷⁴ 'Employee Shareholder Status', introduced by clause 31 Growth and Infrastructure Bill of 1 September 2013. This provision drew heavy criticism from the British doctrine, which censured the iniquity of the exchange between a limited number of actions and some fundamental rights of workers, with possible repercussions on the structure of the employment contract. J. Prassi, 'Employee Shareholder 'Status': Dismantling the Contract of Employment' 4 *International Labour Journal*, 313-314 (2013); R. Jeary, 'Employee Owner Status - Business Democracy or Beecroft by the Back Door?', available at www.ier.org.uk; N. Countouris et al, 'Turning Employees into 'Owners'? The Falsest Promise yet', available at www.ier.org.uk; for the whole discipline see M. Biasi, n 48 above, 459.

unions' exclusion) has not achieved an enhancement of negotiating power for individual workers. Rather, given the lack of *bargaining power* among lower-income middle class workers, it has resulted in unilateral determination of financial participation schemes by employers.⁷⁵

VII. The Measures Taken by the Italian Legislator in the Latest Years and the *Hesitant* Change of Approach of the Unions. Are We Going Towards a More Effective and Conscious Workers' Financial Participation System?

As described above, the public contribution to support workers' financial participation has been limited to the granting of a favourable tax treatment to firms willing to sign second-level collective agreements with local unions (no matter if signed at a company level or at territorial level). Italian legislator has never intervened on the structure and elements of workers' remuneration, since the regulation of those aspects has always been left to collective bargaining.

The approach of the social parties, as previously observed, wiped out all the effort carried out by various governments in order to find resources to incentivise the development of structured workers' financial participation systems.

Unions aimed to reduce the competition between employees instead of rewarding their effective performance. Indeed, in this matter, second-level collective bargaining has so far pursued an egalitarian and not very rewarding policy characterized by great stillness. Companies preferred to spread the provided public resources in order to reduce the labour cost, rather than to pursue the declared objective of increased productivity.

The above mentioned approaches are the main elements that can explain the reason why public incentives have not so far led to the expected results.⁷⁶

Nonetheless, the necessity to incentivize workers' financial participation is still considered an essential element by public players. To this extent the Italian legislator seems to be more conscious of the need to rationalize and make more effective public funds intended to enhance workers' financial participation. In fact, the most recent legislative measures appear to constitute a serious brake in the fight against distorted use of economic incentive.

In particular, a gear shift was initiated starting from 2015. Through the enactment of the Law 28 December 2015 no 208 (the so-called the Economic Stability Law 2016), and through the successive finance acts enacted in 2017 (Law 11 December 2016 no 232) and in 2018 (Law 27 December 2017 no 205), the

⁷⁵ M. D'Antona, n 70 above, 445; in a comparative view see B. Bercusson and B. Ryan, n 49 above, 78: they observe that in UK it is not realistic to talk of negotiating the salary at the individual level because only for a very residual categories of workers can you actually speak of bargaining at the individual level.

⁷⁶ P. Campanella, n 37 above, 20.

Italian legislator finally seemed to invest in an effective system supporting workers' financial participation which is not (only) aimed at the reduction of labour costs.

The regulation appears radically changed. Firstly, under certain circumstances, it relieves from taxes also the sums perceived by workers with a medium salary (up to eighty thousand euro gross) expanding the number of workers benefited by the incentive.

According to the new regulation, the variable wage that an employer intends to provide to his employees (benefiting of public incentives) must now alternately (i) be linked to measurable and verifiable increases in productivity, profitability, quality, efficiency and innovation, or (ii) be provided in the context of profit-sharing plans with the explicit exclusion of all sums negotiated as consideration for the working activity (for example the sums paid for overtime work in the past were deemed to be relieved from taxes under certain conditions, therefore hindering the achievement of the objectives behind the incentive).

Nevertheless, the act expressly still requires the involvement of local labour unions (by the signing of a collective agreement at company or provincial/regional level). This will probably continue to be one of the main obstacles to the diffusion of workers' financial participation in Italy.⁷⁷

However, also the unions' attitude regarding workers' financial participation is now gradually changing. Unions are now relinquishing their scepticism to embrace a more cooperative approach aimed at the enhancement of the latest economic incentives provided by Italian law.

In this regard, it must also be highlighted the symbolic importance of the July 2016 agreement signed by and between Confindustria (the most important employer union in Italy) and the most important Italian trade unions

This agreement can also be seen as an indicator of the resumption of the industrial relations with Confindustria on a fundamental matter which could have a significant impact on the qualitative and quantitative expansion of a new type of second-level collective bargaining.

In particular, the parties are starting to discuss again in order to reach second-level agreements able to implement effective workers' financial participation mechanism and, consequently, to enhance productivity and competitiveness between firms.

To this end, in order to provide small companies with the possibility to benefit

⁷⁷ Indeed, it should be noted that empirical evidence is not able to prove the existence of a positive link between incentives and the spread of second level collective bargaining. Moreover, the diffusion of the latter, during the last years has decrees notwithstanding the measures implemented to enhance it. P. Pini, *Salario di produttività o di redditività nell'agenda Monti, non ancora di partecipazione*, 13, available at <https://tinyurl.com/y34nn6ge> (2012) (last visited 28 May 2019); T. Treu, 'Le forme retributive incentivanti' 1 *Rivista Italiana di Diritto del Lavoro*, 661 (2010); G. Ferraro, 'Sgravi per incentivare la produttività', in M. Cinelli and G. Ferraro eds, *Lavoro, competitività, welfare, Commentario alla legge 24 dicembre 2007, n. 247 e riforme correlate* (Torino: UTET, 2008), 245- 251.

from public incentives, an active role has been given to local social parties with the aim of encouraging, also in such small firms, the application of mechanisms of variable pay linked to the firm's performances. The objective is to give the chance to benefit from the more favourable tax treatment (eg the tax relief from productivity bonuses provided by the latest legislation on the matter) also to small firms that do not want to directly bind themselves through agreements with unions.

The same reasoning has been resumed and promoted by the same unions also in the document signed on 9 March 2018 and titled *Patto per la Fabbrica* (Agreement for plants) in which unions shows to be aware of the need to identify alternative paths to benefit from tax incentives related to variable salary.

In this perspective, in order to find a solution to the low take-up of second level collective bargaining among small companies and optimize the effectiveness of recent legislative measures, the Italian Revenue Agency issued a circular concerning tax breaks in favour of companies implementing workers' financial participation schemes.⁷⁸ According to this last document it is now possible for companies not implementing any second-level collective agreement to benefit from public incentives though the application of all the provisions of a collective bargaining agreement (either regional or provincial) notwithstanding which category it refers to.

The aim is to allow also small employers (which do not intend tend to be directly bound by collective agreements), to benefit from the tax exemption provided for by the last regulation. In fact, in order to get the incentives, the collective agreement, even if referred to other category, has to be fully applied.

The above perspective, although very interesting, is hindered by the deep-rooted belief (still present among little employers) which, in most cases, identifies local collective bargaining as a mere cost for firms, not balanced by any advantage.

This is the reason why, in the opinion of the Author, there is a greater need to provide the parties with the cultural means which are necessary to understand the benefits potentially deriving from an effective implementation of financial participation schemes also among the small-medium size companies. From this point of view, a cultural approach can be considered even more important than the granting of tax incentive in favour of workers' financial involvement. This could even justify a different use of public funds reserved to workers' financial participation not limited to the grant of tax incentives in favour of firms applying second level collective bargaining agreements.

VIII. Learning from Some European Experiences. The Importance of a Dialogue with the Unions in the Structure of Financial Participation Schemes

⁷⁸ This possibility was expressly provided by Circolare of 29 March 2018 no 5/E of the Italian Revenue Agencies related to bonuses and welfare.

To better understand the risks connected to the unions' lack of support for financial participation, it is important to highlight what happened in UK and in Germany,⁷⁹ as a result of the unions' marginalized role in determining the lower-income workers' wages in light of the firms' financial performance. This critical observation is justified since the German and British frameworks respectively may represent a warning for Italian social parties, urging them to show more willingness to bargain effective forms of financial participation and to understand that pay systems managed unilaterally by companies can result in such undesirable outcomes also in Italy. In fact, financial participation schemes, both in UK and Germany, are mainly implemented unilaterally by employers, especially in the case of lower-income middle class workers.⁸⁰

The German framework highlights the problems for workers and the countless benefits for firms of a financial participation system heavily focused on financing unilaterally granted by employers. While companies are able to adapt quickly workers' wages to market trends, the employees do not have a solid expectation of income because their salaries are under intense economic fluctuations based on the companies' performance. They do not have the unions' protection and supervision for the part of the salary linked to profit sharing and employee ownership schemes.⁸¹

In Germany, the workers' wage structure is provided mainly by the contract of the district.⁸² The variable pay (in the form of profit sharing or gain sharing) is unilaterally added by the employer to the base salary (set in the contract of the district) and covers approximately twenty percent of the total wages. Employers have no legal obligation to give that variable pay and they are also free to decide its reduction, or even its elimination. The lack of unions' supervision in this process lead to sharp fluctuations in wages during periods of market uncertainty, because employers tend to cut or suppress the variable part of the wage as soon as the firm's performance diminishes.

Focusing on the British framework, it is possible to observe that minimum wages are set by law, while the rest of the salary is paid partially by enterprises as a fixed sum and partially based on variable pay systems (linked to financial data).⁸³ This discipline is the result of a progressive loss of unions' power and

⁷⁹ Both of them are countries with an important development in the field.

⁸⁰ C. Wetz and E.F. Macias, n 7 above.

⁸¹ E. Villa, 'Retribuzione flessibile e contrattazione collettiva', available at <https://tinyurl.com/y2y8p9ln>, 73 (last visited 28 May 2019).

⁸² M. Borzaga, 'I più recenti sviluppi della contrattazione collettiva in Germania: clausole di apertura, orario di lavoro e retribuzione', in M. Rusciano et al eds, *Istituzioni e regole del lavoro flessibile* (Napoli: Editoriale scientifica, 2006), 579.

⁸³ In the past, even in UK, collective agreements had a central role in setting the employees' wages. When collective agreements lost that role, firms, at least initially, have found themselves in difficulties in setting the wage level. See A. Bryson and D. Wilkinson, *Collective bargaining and workplace performance an investigation using the workplace employee relations*, available at <https://tinyurl.com/y39ocsaj>, 3 (1998) (last visited 28 May 2019).

collective bargaining caused by *anti-union* politics promoted by *conservative* governments.⁸⁴

In the past (something that still occurs in Italy), the unions determined the employees' financial participation schemes pursuing an egalitarian policy. They favoured equal wage increases for all workers, rather than experimenting with true forms of participation. Consequently, the sums linked to participative schemes covered a marginal part of the overall wage, causing a lack of positive results.

Nowadays, the *variable pay* is mostly managed unilaterally by the management of the companies and takes different forms depending on the interest that each company intends to pursue.⁸⁵ In the UK there has been a growth in the pay disparity between workers, because individual bargaining plays a positive role in determining the salary only with high-level employees, who are in strong demand in the market.

Individual bargaining on the topic of financial participation resulted in the British case in employers' unilaterally establishing the salary available to low-skilled workers.⁸⁶ This is evidenced from the British experience where the *variable pay* increased inequality among employees, since high-skilled employees are able to assert their individuality and the weakest workers are *crushed* by the individual contract.

Most of the financial participation schemes, unlike those regulated with the intervention of the unions, have shown a lack of transparency, a lack of monitoring mechanisms in the course of exercise, and a lack of verification systems of the correspondence between the results achieved and the incentives granted.⁸⁷

IX. A Proposal for an Increase in the Financial Participation Among Low-Income Workers in Italy: Redraw the Boundaries Between Collective and Individual Bargaining in Order to Achieve Agreements Essentially Respondent to Each Employee's Needs

⁸⁴ For historical evolution of labour relations and the role of the collective agreement in Britain see H. Clegg, n 73 above; see also A.C. Neal and P. Lorber, 'Financial Participation Worker and the Role of Social Partners: United Kingdom Experience', in M. Biagi, *Quality of Work and Employee Involvement in Europe*, 195-218 (The Hague: Kluwer Law International 2002); B. Bercusson and B. Ryan, n 49 above, 49.

⁸⁵ For a general view of different forms of *variable pay* implemented see A. Bryson et al, 'CEP Discussion Paper No 1112', available at <https://tinyurl.com/7ff6p2c>, 1 (last visited 28 May 2019); P. Marginson et al, 'Undermining or Reframing Collective Bargaining? Variable Pay in Two Sectors Compared' 18 *Human Resource Management Journal*, 327 (2008); J. Arrosmith and E.P. Marginson, 'The Decline of Incentive Pay in British Manufacturing' 41(4) *Industrial Relations Journal*, 291 (2010).

⁸⁶ B. Bercusson and B. Ryan, n 49 above, 78.

⁸⁷ W. Brown et al, 'The Management of Pay as the Influence of Collective Bargaining Diminishes', in P.K. Edwards ed, *Industrial Relations: Theory and Practice in Britain* (Oxford: Blackwell, 2003), 197; J. Arrosmith and E.P. Marginson, n 85 above, 303.

The aim of this paper is not to argue for any specific financial participation scheme, but rather to suggest an appropriate juridical mechanism to support the diffusion of financial participation schemes among low-income middle-class workers, without impact on their already vulnerable position.

In this perspective, it is worthy considering the following elements: i) firms always claim the need for more flexibility at work (especially in highly regulated labour markets, such as the Italian case); ii) collective agreements that provide more flexibility are not easily accepted by workers because they cannot see any advantages, since in general unions tend to concede flexibility (by the derogating to law and collective bargaining), justifying the decision to do so in the name of safeguarding jobs; iii) recent surveys show that workers are, in general, more inclined to be involved in companies' results.

In light of the above, a question arises as to whether it would be possible to go one step forward and allow the second level collective bargaining the use of all instruments at its disposal,⁸⁸ in order to entertain a productive dialogue with each individual worker. Thus, financial participation may act as an incentive to enable workers to regulate the discipline of the contract of employment in a different manner than what it is provided under the national collective bargaining agreements and, in some cases, in the labour legislations.⁸⁹ In this way, employers would gain greater flexibility with its workforce.

The primary goal is to establish a mechanism that would allow the single employee to decide, for a different modulation of his own rights provided in the employment contract.⁹⁰ This does not mean disregarding the importance of collective bargaining (on the contrary, the supervisory role of the unions will be crucial in the prospective enhancement of individual autonomies), but it requires a redrafting of the role of trade unions, which is already underway.⁹¹

One solution could be the enhancement of the role played by the unions (especially in second level collective bargaining) as a mediator and supervisor, of the employees that, in the name of effective financial participation, voluntarily choose to join a different rights' settlement instead of the one provided by law and collective bargaining.⁹² In this case, a law that guarantee this possibility would be required.⁹³

Labour Law Scholars have been long pursuing this alternative, by interrogating as to whether the pursuance of mandatory regulation might end up denying,

⁸⁸ To which Art 8 Law no 148/2011 has been also recently added.

⁸⁹ Art 8 Law no 148/2011 provides the possibility to derogate from the mandatory labor law discipline.

⁹⁰ Under Italian law, the main provisions of the employment contract are provided by law and national collective agreements and cannot be modified by the parties.

⁹¹ R. Del Punta, 'Ragioni economiche, tutela dei lavoratori, e libertà del soggetto' *Rivista Italiana Diritto Lavoro*, IV, 420 (2002).

⁹² S. Sonnati, n 56 above.

⁹³ In Italy there is a much-criticized rule that can be used as a tool for implementing this type of dialogue see Art 8 legge 2011 no 148.

instead of favouring worker's protection.⁹⁴ The current legal framework is composed mainly of mandatory rules that can sometimes create inefficiencies due to their unavailability for the single employees that,⁹⁵ in some cases, can have different needs from the rest of the employees' pool.⁹⁶ This *inefficiency* can be represented in terms of *sacrificing* some workers' preferences for supporting the preferences of others (in theory the majority of them).⁹⁷

Under civil law, so-called mandatory rules (*norme imperative*) pursue interests considered by the legislator as generally superior and prevailing. These interests cannot thus be derogated by personal ones. As a matter of fact, whenever discrepancies between such mandatory rules and the recipients' preferences arise, a *cost* is also produced.

In order to provide suitable alternatives and, thus, improve the techniques for regulating workers' financial participation, a theoretical solution could be the introduction of a technique known as 'multiple choice connection'.⁹⁸ This

⁹⁴ On the role played by mandatory discipline in the Italian labour law see R. De Luca Tamajo, *La norma inderogabile nel diritto del lavoro* (Napoli: Jovene, 1976); recently see A. Zoppoli, 'Il declino dell'inderogabilità' *Diritto Lavoro Mercato*, 1, 53 (2013); M. Novella, *L'inderogabilità nel diritto del lavoro. Norme imperative e autonomia individuale* (Milano: Giuffrè, 2009). See the papers discussed during the 'Giornate di studio dell'Associazione Italiana di Diritto del Lavoro e della Sicurezza Sociale' held in 2008 in Modena (C. Cester, 'La norma inderogabile: fondamento e problema del diritto del lavoro' *Giornale di diritto del lavoro e di relazioni industriali*, 341 (2008) and P. Tullini, 'Indisponibilità dei diritti dei lavoratori: dalla tecnica al principio e ritorno' *Giornale di diritto del lavoro e di relazioni industriali*, 423 (2008)); in-depth analysis, M. Napoli, 'Introduzione. Interrogativi sull'inderogabilità' *Rivista Giuridica Lavoro*, 157 (2008); A. Albanese, 'La norma inderogabile nel Diritto civile e nel Diritto del lavoro tra efficienza del mercato e tutela della persona' *Rivista Giuridica Lavoro*, 165 (2008); A. Occhino, 'La norma inderogabile nel diritto del lavoro' *Rivista Giuridica Lavoro*, 183 (2008).

⁹⁵ The application of mandatory rules lead to a restriction of the competition among employees with employer since it limits the possibility for an employee to negotiate their rights. It is important to specify that, despite such restriction of competition is an instrument (often irreplaceable) to implement the constitutional principles of protection of *individual* and *work*, it may also increase the risk of unjustified privileges and parasitical incomes, A. Okun, *Eguaglianza ed efficienza* (Napoli: Liguori, 1990), 22.

⁹⁶ In Italy, Labour law experts generally agree on the fact that the distinctive feature of labour law, as opposed to civil law, is the restriction of individual independent negotiations through mandatory regulations which take into consideration the imbalance of bargaining power between the contractual parties. For an overview on the role played by the individual workers' bargaining in Italy see M. Novella, n 94 above.

⁹⁷ The same *cost* is also attributable to *half-mandatory* techniques implemented by local collective agreements, so that flexibility in the mandatory rule has been implemented via a collective bargaining. The issue is that the collective agreement remains mandatory for the individual employee bargaining. On one side, this technique prevents strong parties from taking advantage of weaker ones; on the other, it also generates a cost, translated in terms of efficiency. M. Novella, n 94 above, 431.

⁹⁸ The theoretical debate around the issue stems from the release, by the Ministry of Labour and Social Policies, of a White Paper on the Labor Market in Italy in 2001, which favored its introduction in the Italian jurisdiction, after considering its experimentation in the Netherlands. Cases of pre-defined individual derogation by *multiple choice* have been already acknowledged by the labor legislation, for instance, in the legislator's flexible clauses provided in the old discipline on part-time work. For a critical review of this technique see R. Del Punta, n 91 above, 415; G.

would entail interdependence between local collective agreements and individual employment contracts. It is supposed to redraw the boundaries between collective and individual bargaining in order to achieve agreements essentially respondent to each employee's needs.⁹⁹ The employee would be given choices, upon agreement with the employer, out of several aspects previously bargained by local collective negotiations.¹⁰⁰

These different bargained packages stem from mixed levels of protection and economic conditions of work performance. All options (left to the workers' choice) would be linked to a different level of financial participation. In such a way, it would be avoid the possibility that the restoration of employees' bargaining power could, in fact, turn into an overall loss of their rights, since *equivalence* between the proposed alternative packages would already result from local collective bargaining.¹⁰¹

In this sense, a first step should be towards a desirable re-definition of the lines between collective and individual bargaining, which would allow for the establishment of regulatory frameworks effectively complying with both the interests of individual workers and the specific expectations placed upon them by employers.

As we can see, the Italian labour legislation already acknowledges limited and predefined cases of individual derogations by the 'multiple choice technique'.¹⁰² However, these cases are regulated by the legislator and not by the collective bargaining. It would be sufficient to consider the legislation on *part-time (work)*¹⁰³ that allows for an exchange between alternative protection packages, or the flexibility with regard to maternity leave.¹⁰⁴

Proia, 'Flessibilità e tutela nel contratto di lavoro subordinato' *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 411-461 (2002); M. Novella, 'Considerazioni sul regime giuridico della norma inderogabile' *Argomenti di Diritto del Lavoro*, 545 (2003); U. Carabelli and V. Leccese, 'Una riflessione sul sofferto rapporto tra legge e autonomia collettiva: spunti dalla nuova disciplina dell'orario di lavoro' *Working Paper no 44/2004 Centro Studi di Diritto del Lavoro Europeo Massimo D'Antona*, 39 (2004), available at <https://tinyurl.com/y3aks4tb> (last visited 28 May 2019).

⁹⁹ Since 2001, the Netherlands has been testing this link between collective agreement and individual autonomy which our country was an early proponent of and considered an interesting instrument to introduce, M. Biagi, 'Competitività e risorse umane: modernizzare la regolazione dei rapporti di lavoro' *Rivista Italiana Diritto Lavoro*, 257 (2001).

¹⁰⁰ For example, a lower wage level in exchange for higher employment security, a better compensation in exchange for longer working hours, the renunciation of Christmas allowance in exchange of shares of the company, see *ibid*, n 99 above, 257.

¹⁰¹ M. Novella, n 98 above, 432.

¹⁰² *ibid* 433, according to whom also the discipline contained in the outdated Art 18, by which the employee may opt for an indemnity of fifteen months of his global salary and give up reinstatement, was inspired by a logic similar to the model under survey.

¹⁰³ Art 3 of the decreto legislativo 25 February 2000 no 61, as amended by Law 24 December 2007 no 247, contemplates an exchange in the part where it prescribes that the right of modification of the working time by the part-timer entitles of specific additional remunerations provided by collective bargaining.

¹⁰⁴ In the decreto legislativo 26 March 2001 no 151, notwithstanding the overall duration

In the above cases, the worker, once being informed by the local unions, is free to waive the general regulation provided by law or collective bargaining, opting for a special regulation. However, as already mentioned, any such possibility of derogation from the general regulation has to be explicitly foreseen by the law. In order to be valid, the agreements have to be first analysed and then signed in a recognized institutional context. In other words, the worker who decides to opt for a different regulation of his employment contract must physically go (with a union representative) in front of an impartial commission (usually created at the regional level or in some universities or other authorized institutions) and sign the agreement that, in order to be valid, must be reviewed and approved by the commission.¹⁰⁵ Essentially, the same process could be utilized also in the mechanism theorised above.

Once admitting the possibility that the preferences of some employees might influence the regulation of the employment contracts (through individual autonomy), the focus will be laid upon the search for instruments to encourage workers to voluntarily adhere to different regulations, while giving up some of their rights.

A valid exchange instrument for increasing individual workers' adhesion to a package of lower protections (if compared to a *standard* regulation) can be envisioned precisely in the financial participation schemes.¹⁰⁶ From this perspective, especially employees' ownership plans can be offered to ensure a benefit for the individual workers who decide to adhere to adjustments different from the standard regulations.

Unlike the UK,¹⁰⁷ where the bargaining with individual employees may implicate less ethical purposes, such as the reduction of legal protection, in this case, a trade union will be responsible for bargaining the different protection packages and monitoring the whole process. The same trade union will be responsible for instructing the worker so as to allow him to choose according to his own needs and will also monitor the supply of wages in the form of financial participation.

By the aforementioned mechanism, trade unions might bargain contractual options with fewer rights (compared to the standard regulation of employment contract) without risking critical reactions by the employees, since their adhesion would occur by individual choice.

A company would surely benefit from this: first, managers would have the possibility to increase organizational flexibility in the occurrence, for instance, of productive peaks, secondly, the company would positively benefit from a

of the maternity leave (five months) the expectant mother can decide when to take her leave.

¹⁰⁵ This system has already provided for some kinds of agreements that, in order to be valid, have to be signed by the worker in front of the so-called *Direzione Territoriale del Lavoro* which is a government office that take place at provincial level.

¹⁰⁶ S. Sonnati, n 56 above, 646.

¹⁰⁷ See para 8.

proper implementation of the participative schemes.

In this context, the government would be responsible for creating the conditions for a dialogue. This includes the proper channelling of resources expendable, for instance, for the training of trade unionists or for tax-free packets agreed by trade unions and offered to workers. It would also entail the creation of rules that might allow trade unions to derogate from mandatory disciplines provided not only by national collective agreements, but also by the law, and to contemplate an effective financial participation of the workers, as a compensation for these derogations.

A recent and highly criticized law exists in Italy,¹⁰⁸ which, if properly implemented, could be a useful tool for increasing financial participation. Trade unions use the above regulation to surreptitiously derogate from the law and the collective agreement almost (ie they sign agreements in derogation, without reference to the *criticised* law), since those agreements are unpopular among the involved employees and occur for the maintenance of employment levels.

With the implementation of the aforementioned mechanism, trade unions could also reach the same agreements, yet in the open, since workers would voluntarily participate in them.

The above raises a question as to how and where the dialogue between the involved parties could take place. As already mentioned, the collective bargaining practices already knows some positive experiences in which company level agreements created appropriate conditions (by the creation of appropriate boards) to facilitate the dialogue between unions and management with the objective of implementing and supervising financial participation schemes.¹⁰⁹ The Birra Peroni company's agreement serves as an interesting example,¹¹⁰ where contrary to what usually happens, the percentage of financial participation is not determined in advance, but rather set after a mutual evaluation and verification of the company's results and objectives achieved.

X. The Diffusion of Workers' Financial Participation Through the Dialogue Between Collective and Individual Bargaining as a Useful Instrument in the Field of Human Resources

The implementation of financial participation among lower-income middle-class workers, especially on a voluntary basis, in addition to creating the possibility

¹⁰⁸ Art 8 of law 14 September 2011 no 148, provides to the local unions the possibility to derogate from the mandatory labor law discipline.

¹⁰⁹ Interesting practices are implemented by some collective company agreements (Protocol Competitiveness signed by Finmeccanica company agreement entered into by KME) that provided specific monitoring mechanism through the introduction of a joint composition organs (commissions) with informative and consultative duties.

¹¹⁰ Art 11 company collective agreement 8 April 2015, available at <https://tinyurl.com/y4abul94> (last visited 28 May 2019).

of increasing the average workers' wage might: i) improve firms' performance ii) represent a useful mechanism for proper and careful management of human resources.

It is often ignored that performance-related salary may also help companies gain a competitive advantage by attracting and retaining the most productive employees whilst avoiding ones who are less productive and do minimal work. In contrast, fixed compensation schemes, not only have less incentive power, but they are also less able to help employers in selecting employees since they are usually implemented when it is difficult and costly to measure individual performance.¹¹¹

Recent studies have examined the dynamics of various companies involved in participation schemes based on participation rates. The results showed that the most skilled workers, if involved in the company's financial results, are more motivated to work hard in order to have incremental wages. With the mechanism suggested above, it will be easier to select workers who are more productive and skilled because the participation is made on a voluntary basis.

Economic doctrines of variable-pay schemes demonstrate that the change from a fixed to a variable compensation mechanism might increase the average output per employee because of incentive effects.¹¹² Furthermore, if there are differences with respect to ability among the workers, high skilled employees should be more attracted than low skill employees by the variable-pay (linked to the company's performance) because it would allow them (once the firms' goal is achieved) to receive a higher wage by exerting more effort in their job. Experimental evidence confirms the coexistence of the selective and incentive effects of payment schemes; low skill employees are not attracted by the variable pay scheme when firms do not offer minimum fixed wages.¹¹³

Another important effect of financial participation, until recently rather ignored, is the reduction of the shirking phenomenon (ie the shirking of duties by some workers within the same company). This is even truer if the participation is implemented in the above-proposed way since employees, through training and discussion with the unions' experts, voluntarily and collectively; decide to

¹¹¹ U. Trivellato, 'La valutazione degli effetti di politiche pubbliche: paradigma e politiche' *Istituto per la Ricerca Valutativa sulle Politiche Pubbliche Working Paper No. 2009-01*, 1-52 (2009).

¹¹² T. Eriksson and M.C. Villeval, 'Performance – Pay, Sorting and Social Motivation' 68(2) *Journal of Economic Behavior & Organization*, 21 (2007); E.P. Lazer, 'Output-based pay: incentive or sorting?', in S.W. Polachek ed, *Accounting for Worker Well-Being (Research in Labor Economics, volume 23)* (Bingley: Emerald Group Publishing Limited, 2004), 1 – 25: the author observes also that 'if this self-sorting effect is not accounted for, the higher efficiency observed when comparing a piece-rate compensation scheme relative to an hourly wage scheme may be unduly attributed to the incentive effect of the variable wage'.

¹¹³ E.P. Lazer, 'Performance Pay and Productivity' 90 *American Economic Review*, 1346 (2000); recently on the issue see T. Eriksson and M.C. Villeval, *ibid*, 1: they found a natural self-selection made by the workers.

join into different participation schemes with different modulation of participatory rights.

The incentive effects of financial participation are generally expected to be stronger when more information about performance is provided to employees and when more influence employees perceive they have over the performance indicator that determines their income.¹¹⁴ The most productive workers who have opted for financial participation plans by giving up some of their rights will certainly be more predisposed, directly and indirectly, to monitor the work performance of their colleagues.

Moreover, the choice made voluntarily by the employee, after consultation with unions' experts, can alleviate the problem of reduction of incentive effects arising from poor comprehension of the companies' goals by the workers.¹¹⁵

Employees, through training and discussion with the unions' experts, on purpose and collectively, decide to join into different plans with different modulation of participatory rights. This, in turn, facilitates an employer's classification of human resources: the firm's management would be able to immediately identify the more motivated workers willing to take part of company risks and to use them in a more profitable manner.¹¹⁶

¹¹⁴ V. Pérotin and A. Robinson, n 6 above, 18.

¹¹⁵ R. Freeman et al, n 42 above, which states that the difficulty of understanding the parameters of participative plans causes a reduction in incentive effects; to reduce the employees aversion to variable pay it is important to implement a correct communication system, see also K.K. Merriman and J.R. Deckop, 'Loss Aversion and Variable Pay: A Motivational Perspective' 18(6) *International Journal Human Resource Management*, 1026 (2007).

¹¹⁶ V. Pérotin and A. Robinson, n 6 above, 18: 'extensive, independent and regular information about firm performance and its determinants (as well as the relevant training) may help employees understand all the implications of the scheme and trust it'.