

# Glancing at the Past: An Agreement for the Markets of the XXI<sup>st</sup> Century

## 1. Introduction

The European Framework Agreement on Fixed-term Work (herein after 'the framework agreement') signed by ETUC-UNICE-CEEP on 18 March 1999, represents a significant example of how European Governments and social parties are trying to regulate the new phenomena that are continuously evolving by using a juridical instrumentation which in many aspects is antiquated. Efforts are being made to govern the logic of the so called 'new economy'<sup>1</sup> with rules and juridical principles which have been shaped by looking at the reality of the models of organisation in the fordist taylorist vein, when the confines of the State and those of the market still coincided.

From this point of view, taking into consideration the radical changes that are characterising all the western economies, the difficulties that face the supra-national actors are not so different from those that face the actors at the national or local level. At the European level, in reality, the task of the institutions called to regulate the labour markets of the XXI<sup>st</sup> Century is made even more complicated, not to mention, uncertain by the often denounced fragility of the European decision making process as regards the topic of labour; a fragility that, even if we wanted to de-mythicise the traditional opposition between common law and civil law,<sup>2</sup> in any case adds to the complication of conciliating the juridical logic and national praxis of fifteen legal systems which are profoundly different.

As we already know the contents of the 'framework agreement', the aim of this critical comment is, indeed, that of demonstrating how the social parties have reached an accord that is not only marginal for most Member States, but above all in clear antithesis to the more recent lines of labour law evolution.

Despite being carried out by using the comparative method, our analysis will develop from the angle of observation offered by the Italian legal system. It is nevertheless im-

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<sup>1</sup> See H.W. Arthurs, 'Labour Law Without the State', in *University of Taranto Law Journal*, 1996, spec. pp. 4-20, regarding well-known phenomena such as globalization, the incongruent spaces and diminished roles of the national state, the reorganization of production, management, and work.

<sup>2</sup> Among the first to point out that the traditional counterposition between civil law and common law tends to historically vanish, O. Kahn-Freund, *Labour and the Law*, London: Stevens, 1983 (3<sup>a</sup> ed.).

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portant to specify immediately that such a critical judgement is, only in part, given to the consideration that the framework agreement will certainly have a marginal impact on Italian legislation, as will be shown, similar to that of the majority of other Member States. Instead, it is the real normative processes governing the dynamic of temporary work that lead us to the conclusion of the agreement's inadequacy regarding the modernisation demands of labour law which have emerged over the past decades. Stipulated to regulate a contractual scheme, certainly not new but with a different role and continuously expanding in the modern labour markets, the European framework agreement on fixed-term work came into being while still glancing at the past rather than seizing the juridical logic of the work of the future.

## 2. An appreciable result for its symbolic value but lacking in substance

Indeed, the first commentators have rightly highlighted the symbolic importance of the framework agreement<sup>3</sup> and it could not have been otherwise. As pointed out by the Social Affairs Commissioner, Pdraig Flynn, regulating fixed-term contract was 'by far the most politically sensitive and technically difficult issue that the social partners have tackled in formal negotiations at European level as yet, and that the successful outcome of the negotiations shows that they are ready to shoulder their new responsibilities under the Amsterdam Treaty'. A further symbolic value of the framework agreement, also underlined by Commissioner Flynn, relates to the circumstance 'that social partners signed the agreement in Warsaw at a major conference on social dialogue and enlargement, marking the importance agreed by all actors to promote the social dialogue in the applicant countries.'<sup>4</sup>

Analysed in the context of the co-ordination of employment policies at the European level (the so-called 'Luxembourg process'), the agreement of course represents an undeniable sign of vitality in the European bargaining process – the results of which are significant, especially if we think about the representative weakness of the social parties and above all the failure of the recent past. The institutional spaces for a European collective agreement – disclosed by the social chapter in the Treaty of Maastricht and consolidated by the Treaty of Amsterdam – have in effect revealed themselves to be sufficient enough to allow the Euro-actors to experiment a praxis which represents a step forward with respect to the traditional conception of social dialogue.<sup>5</sup> Nevertheless, examined in the wider context of the trends of labour law development in the era of globalisation, a deeper reading of the contents of the agreement induces some perplexities both on the technique of regulation of this contractual scheme as well as on the goals of the policy of the law pursued by the social parties.

Looking at the process of the institutional transformation of the European Union<sup>6</sup> anyone can underestimate the political importance of the agreement, even though the re-

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<sup>3</sup> See M. Biagi, 'L'accordo quadro a livello comunitario sul lavoro a termine', in *Guida al Lavoro*, n. 16/1999, pp. 17-19.

<sup>4</sup> See the speech of Pdraig Flynn welcoming the conclusion of the new European Agreement on Fixed-term contracts in [http://www.europa.eu.int/comm/dg05/soc-dial/social/fixedpress\\_en.html](http://www.europa.eu.int/comm/dg05/soc-dial/social/fixedpress_en.html).

<sup>5</sup> See M. Biagi, *op. cit.*, p. 17.

<sup>6</sup> See B. Veneziani, 'Dal dialogo sociale alla contrattazione collettiva nella fase della trasformazione istituzionale dell'Unione Europea', in *Rivista Giuridica del Lavoro e dalla Previdenza Sociale*, 1998, p. 239 *et seqq.*

sults obtained are decidedly modest compared to the more ambitious attempts at regulating atypical/temporary work of the early Nineties.<sup>7</sup> Moreover, this is not the place to bring up the issue of the real representativeness of the signatory social parties, which is in any case not of secondary importance in giving a global judgement on the framework agreement.<sup>8</sup> Yet, it is extremely difficult to escape the feeling that the agreement has been inspired by an antiquated configuration of the relationship between capital and labour. What is missing is a strategy of regulation on the ways to utilise labour other than that established in the industrial era; completely neglected, consequently, is the logic that today governs the mechanisms of production and the circulation of wealth.

In effect, the comprehensive structure of the framework agreement provides a juridical representation of fixed-term work somewhat modest compared to the discipline in force in the majority of the Member States of the European Community.<sup>9</sup> A representation that, in any case, seems far removed from the modern logic behind the utilisation of temporary work.

No-one can deny the deep ethical and juridical meaning of the principle of job stability,<sup>10</sup> however, for reasons well-known to all and which cannot be discussed in this paper,<sup>11</sup> the labour markets that we study today and even more so the markets of the XXIst Century have changed greatly. Not only will they be characterised ever less by the hegemonic force of the contract of an indefinite period, but they appear destined to marginalise the traditional distinction between the employee and the self-employed.<sup>12</sup>

Conversely, the framework agreement confirms the centrality of subordinate work for an indefinite period,<sup>13</sup> thereby shaping fixed-term work as a mere exception. From an ideological and cultural point of view, the option followed by the social parties in favour of job stability can be shared. Presented in terms of a mere opposition between fixed-term and indefinite duration contracts, the contradiction between the legal dimension and the socio-economic reality is nevertheless evident.

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<sup>7</sup> See M. Jeffery, 'The Commission proposals on «Atypical Work»: Back to the Drawing Board ... Again', in *Industrial Law Journal*, 1995, p. 296 et seqq., id., 'Not Really Going to Work? Of the Directive on 'Part-Time Work, 'Atypical Work' and Attempts to Regulate it', in *Industrial Law Journal*, 1998 p. 193, spec. pp. 205-213. In Italian literature see M. Roccella, *Comunità Europea e rapporti di lavoro atipici*, in *Quaderni Dir. Lav. Rel. Ind.*, 1991, p. 27 c ss.; F. Santoni, 'Il lavoro atipico nelle Direttive CEE: gli effetti sulle relazioni industriali in Italia', in *Dir. Rel. Ind.*, 1991, n. 2, p. 59 et seqq.; R. Pessi, 'I rapporti di lavoro c.d. atipici tra autonomia e subordinazione nella prospettiva dell'integrazione europea'. in *Riv. It. Dir. Lav.*, 1992,1, p. 133.

<sup>8</sup> See M. Biagi, 'Le relazioni industriali nell'Unione Europea', in G.P. Cella, T. Treu, *Le nuove relazioni industriali*, Bologna: il Mulino, 1995, pp. 507-509 and, more recently, M. Schimdt, *Representativity – A Claim Not Satisfied: The social partners' role in the EC social law-making process*, in *IJCLLR*, volume 3, Issue 15/ 1999 (forthcoming).

<sup>9</sup> See R. Blanpain (ed.), *Temporary Work and Labour Law of the European Community and Member States*, Deventer-Boston: Kluwer, 1993, D. Meulders, O. Plasman, R. Plasman, *Atypical Employment in the EC*, Aldershot: Dartmouth, 1994.

<sup>10</sup> Refer F. Meyers, *Ownership of Job: A Comparative Study*, Los Angeles: 1964, R. Blanpain (ed.), 'Job security and Industrial Relations', in *Bulletin of Comparative Labour Relations*, n. 11/1980.

<sup>11</sup> See D. Méda, *Le travail. Une valeur eu voi de disparition*, Aubier, 1995; J. Rifkin, *The End of Work. The Decline of the Global Force and the Dawn of the Post-Marker Era*, New York: H.P. Putnam, 1994.

<sup>12</sup> See infra, para. 5.

<sup>13</sup> See *Preamble* of the Agreement as well as point 6 of the *General Considerations*.

In Italy, for example, in large companies the standard contractual scheme (full-time and indefinite duration) now makes up less than 50 per cent of new contracts.<sup>14</sup> In all, the number of workers employed with a fixed-term contract is still low, not exceeding 4 per cent of the work force (8 per cent if one considers not only fixed-term contracts in a strict sense, but also apprenticeship, training and labour contracts and so on: see the data indicated in the section Document of this issue); however, if one assesses the level of new hirings, the fixed-term contract reaches 25 per cent of the workers in small companies and 33 per cent in large ones. Statistics indicate, in each case, that the occupational increase which has characterised work in industrial companies must be attributed almost entirely to flexible contracts like fixed-term, temporary work through agency, part-time work, apprenticeship, labour and training contracts, job sharing, etc. These kinds of contracts affect about 45 per cent of new hirings.<sup>15</sup> In continual expansion is then the area of self-employment and associated work and, above all, the area of temporary and quasi-subordinate employment, which today affects no less than 1,480,380 workers of whom 57 per cent are men and 43 per cent women.<sup>16</sup> Going back though once again to the notion of temporary work, although not really akin to the juridical case in point of fixed-term work, there are then numerous types of contracts which operate in the margins of subordinate employment involving an ever more extensive group of workers: apprentices, training contracts, stages, etc. A phenomenon undeniably Italian, even if present in other industrialised countries in a substantial measure,<sup>17</sup> is that of the underground economy. According to the most recent estimates, undeclared or 'black' work involves approximately 5 million irregular job positions – in particular, work done on an occasional or temporary basis – out of a total work force of 20 million workers.<sup>18</sup>

The empirical data in their severity repudiate the affirmation of the principle contained in the Preamble of the agreement, and consequently, the philosophy behind it which permeates, on the basis of this presupposition, all the single clauses signed by the parties. Unless one deals with a mere petition of principle directed at exorcising the end of a myth – that of work which is stable and for a life-time – the affirmation of the purely exceptional character of fixed-term work is, today, sustainable only at the level of having to be legal, but not at the level of facts. The price of this choice is therefore high. Neglecting the subordination of the legal dimension to the rules of economy, the formal acceptance of a model of regulation of the labour and capital relationship in decline (like the employment of indefinite duration) imposes to legitimise, on the factual level, a creeping deregulation of employment relationships. The consequence is the incessant immersion of contractual schemes of *praeter* and *contra legem* labour which contributes in the long run to impoverishing, even more, the protection of both temporary and stable employment.<sup>19</sup>

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<sup>14</sup> ISTAT, 'Indagine sulla flessibilità nel mercato del lavoro. Dati preliminari', Roma, 1999. These and other statistics following are in the Italian National Plan of Employment of 1999.

<sup>15</sup> Ibid.

<sup>16</sup> Resource CNEL on INPS data.

<sup>17</sup> Refer April 1998.

<sup>18</sup> ISTAT & CNEL.

<sup>19</sup> See M. Tiraboschi, *Lavoro temporaneo e somministrazione di manodopera. Contributo allo studio della fattispecie lavoro intermittente tramite agenzia*, Torino: Giappichelli, 1999. See J. Visser, *Globalization and Informalization of Labour: Is There an Organized Response?*, in the Congress Proceedings of the 11th World Congress of ILRA, Bologna: Sinnea International, 1998.

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### 3. An Italian perspective

For an Italian observer used to working with juridical tools that are not exactly modern and, in any case, certainly not up to the challenges of the next century, it is surprising that the social parties at the European level have confirmed, at the threshold of the XXIst Century, a juridical principle which was already sanctioned by the Italian legislator at the beginning of the XXth Century and further sanctioned in the specific discipline devoted to fixed-term work in the Sixties.<sup>20</sup>

According to the basic rule, originally expressed in article 2097 of the Civil Code and now in article 1 Act No. 230 of 18 April 1962, a labour contract is assumed to be for an indefinite period; the parties can resort to a contract for a fixed-term only in exceptional cases and under conditions strictly determined by the law. Case law has strengthened this regime, especially once the first legislation protecting against unfair dismissals was approved in 1966,<sup>21</sup> thereby giving a very strict interpretation of the cases in which it is possible to sign a fixed-term contract—for example: a) in case of the seasonal character of the activity; b) when a worker is hired to replace an employee temporarily absent from work, whose job security is guaranteed by law (military service, illness, work accidents, maternity, other guaranteed reasons for leave of absence, but not strike); c) when the worker is hired for a specific job, predetermined in duration, and having an extraordinary or occasional nature; d) for activities done in various stages, for work or stages that are complementary to the principal activity and of an occasional nature, which require employees having skills which are different from those normally employed in the enterprise; e) when employing technical and artistic employees necessary for artistic performances; etc.<sup>22</sup>

At the beginning of the Eighties dramatic changes in the labour market (economic recession, mass unemployment, etc.) induced the Italian legislator to experiment a technique of de-legification in the area of temporary employment in order to answer, in the most rapid and efficient way, the needs of the different sectors of the economy. Article 23 of Act No. 56 of 28 February 1987 endows collective bargaining with the power to define new types of fixed-term contracts apart from those expressly provided for by the legislation currently in force. In this case, collective agreements must also establish the maximum number of workers in terms of percentage that may be hired on fixed-term contracts with respect to the number of workers on contracts of indefinite duration.

In contrast to the position adopted by the European social parties in the framework agreement, the philosophy now adopted by the Italian legislator is not to marginalise fixed-term contracts, but rather to guarantee trade union control on the forms and the terms of a more flexible utilisation of this contractual scheme.

As an alternative to the inviolable norm of the legislator (that cannot be deviated from neither by collective bargaining nor individual agreement), the valorisation of collective bargaining has granted, case by case (at national, sectorial and company level), a better harmonisation between competitiveness and job stability. However, also in this case the solution adopted by the Italian legislator presents some relevant side effects. Empiri-

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<sup>20</sup> See M. Tiraboschi, *Lavoro temporaneo e somministrazione di manodopera ecc. cit.*

<sup>21</sup> Refer Act no. 604/1966, now modified as Act no. 108/1990, which is applied exclusively to indefinite term employment contracts.

<sup>22</sup> Treu, 'Italy', in R. Blanpain (ed.), *The International Encyclopaedia for Labour Law and Industrial Relations*, Kluwer, 1998.

cal analysis of collective agreements already agreed upon show, in fact, that trade union control has been more instrumental in the protection of core employees than in the protection of the legal rights of temporary workers.<sup>23</sup> Only in very few cases has the intervention of collective bargaining directly constructed a juridical statute of temporary workers.

From this point of view, the Italian case shows how the implementation of the principle of job stability does not depend as much on the grade and kind of juridification of the employment relationship as on the precise boundaries of economic compatibility in the long run. In other words, it is the changes that have taken place in the economy and society that are now requiring an alternative model of juridical representation of the modern way of working – a modern way of working to which the centrality of subordinate employment for indefinite duration is foreign.

#### **4. An inadequate technique of the regulation of fixed-term work**

In reality, also from a formal point of view, the text of the agreement presents serious limits and some clear contradictions.<sup>24</sup> A precise statement of the gaps in the framework agreement is contained in the recent Report on the Commission proposal for a Council Directive concerning the framework agreement on fixed-term work concluded by UNICE, CEEP and the ETUC of 12 March 1999.<sup>25</sup>

The position of the European Parliament,<sup>26</sup> which is nevertheless in favour of the choice directed at marginalising fixed-term work, is shared fully especially where it:

‘notes that the agreement allows fixed-term employees to be placed at a disadvantage compared with permanent employees on objective grounds without defining those grounds and insists that such discrimination must be restricted to an absolute minimum;<sup>27</sup>

‘notes that the agreement concluded by the social partners is confined to fixed-term employment, and calls on the Commission to submit forthwith proposals for directives that will place the forms of atypical employment relationships that have not yet been regulated, in particular temporary work (through agencies) and telework, on the same footing as indefinite full-time working relationships’;

‘points out that the agreement only covers employment relationships and excludes social security questions, which are in need of legal regulation (...);’

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<sup>23</sup> See M. Biagi and M. Tiraboschi, *Gli strumenti di flessibilità nella contrattazione collettiva di secondo livello per i dipendenti delle imprese della distribuzione cooperativa*, Bologna: Sinnea International, 1999.

<sup>24</sup> It is worthy to note that similar criticism has been made by the doctrine referring to the European agreement (and the related Directive of the Council) on part-time work. See M. Jeffery, ‘Not Really Going to Work? Of the Directive on ‘Part-Time Work, ‘Atypical Work’ and Attempts to Regulate it’, cit., spec. 195-205.

<sup>25</sup> See this Report in the section *Documentation* of this issue [*The International Journal of Comparative Labour Law and Industrial Relations*, vol. 15, 1999, n. 2].

<sup>26</sup> It is significant to note that the Preliminary Draft of the Report was more critical. Instead of soft expression like ‘The Parliament ... notes’, ‘... point’s out’, ‘... regrets’ and so on, the Preliminary Draft was often more direct in criticising the framework agreement. For example, in all the points quoted in the text the incipit was ‘The Parliament ... criticises ...’.

<sup>27</sup> Refer clause 4, comma I, of the Agreement.

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‘criticises the fact that the agreement only establishes provisions for successive fixed-term employment relationships;

‘regrets the non-binding nature of the provisions that are supposed to prevent abuse arising from the use of successive fixed-term employment, because they do not comprise any qualitative or quantitative standards, so that the agreement itself will not automatically ensure that the situation of fixed-term employees really does improve, which will then have to be achieved by transposing the agreement into national rules’;

‘points out that the agreement does not set a uniform European minimum standard for successive fixed-term employment contracts (...)’.

The need to make the present discipline fit in the fifteen Member States has brought about a compromise that is particularly fragile and full of gaps. In fact, as pointed out by the European Parliament itself, the framework agreement is destined to require the introduction of new legislation on the use of successive fixed-term employment contracts in two Member States only.<sup>28</sup> Too little for the Continental European legislation, with regard to which the framework agreement limits itself to sharing the anti-fraudulent soul without however adopting rules coherent with this objective (substantial limits on the stipulation of this kind of contract, automatic conversion of an irregular fixed-term contract into an indefinite duration one, etc.). But too much also for countries like the UK and Ireland, on whom the framework agreement imposes the adoption of a discipline capable of unhinging the traditional logic of the regulation of the employment relationship. It is worthy of note that in those two countries no substantial limits presently exist on the stipulation or renewal of employment relationships of an occasional, temporary or intermittent nature.

It is also questionable the choice of regulating, on separate negotiating tables, first part-time work<sup>29</sup> then fixed-term work and, in the future, temporary work through agency.<sup>30</sup> In this way, ETUC, UNICE and CEEP not only precluded themselves from a broad table of negotiation on flexibility and job security, which would have undoubtedly assured wider margins of mediation, but above all they have impeded a comprehensive regulation of all the different types of atypical/temporary work. In this respect, the social parties seem to have therefore neglected that in a given juridical context the discipline of a singular contractual scheme depends on the regulation and functioning of all the other schemes.

Apart from this kind of consideration, it is also important to discuss whether the principle of equal treatment<sup>31</sup> represents – always and necessarily – a desirable objective of policy of law able to guarantee the effectiveness of the protection of temporary workers. The question is only apparently rhetorical. Obviously, it is out of the question that the principles of equal treatment and non-discrimination represent a first step towards the defence of the juridical statute of this kind of worker. However, the homologation of the juridical statute of temporary workers to that of permanent workers is misleading.

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<sup>28</sup> Refer point 5 of the Preliminary Draft of the Report of the European Parliament.

<sup>29</sup> Refer the European Agreement on Part-time Work of 1997.

<sup>30</sup> In the *Preamble* of the Agreement on Fixed-term Work the parties specify that ‘it is the intention of the parties to consider the need for a similar agreement relating to temporary agency work’.

<sup>31</sup> Refer clause 1, lett. a) and para. 1 of clause 4.

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Once again the logic of the modern ways of working is sacrificed on the altar of juridical formalism, given that they are no longer explainable through a uniform and monolithic legislative technique like that of the indefinite employment contract.

First of all, the evaluation of equal treatment is abstractly conducted by means of a simple formalistic comparison between working terms and conditions of a temporary worker and those of a comparable permanent one, without any consideration of the psychological and material conditions of a worker at risk of losing his/her job at the end of the contract. Secondly, a rigid and automatic application of the equal treatment principle could, in many cases, actually turn out to be counterproductive and irrational if applied to workers who perform their job in a very specific way compared to those who are permanent. From this point of view, particularly significant is the profile of health and safety at work. Numerous empirical studies demonstrate that in general these kinds of workers are more exposed, in certain sectors, to the risk of work related injuries and occupational diseases in comparison to permanent workers. These risks are two or three times higher than those for workers with a stable relationship.<sup>32</sup> Furthermore, the wide sense of alienation, frustration and estrangement from work of temporary workers is well documented. The execution of those dangerous, dirty and repetitive tasks which are in general refused by core-employees, markedly increase the risk of accidents due to stress, inattention, negligence, loss of control of the working environment, isolation from the community of the workers, etc.<sup>33</sup> It goes without saying that, for those kinds of workers, the guarantee of health and safety at work cannot be assured through the pure and simple application of the principles of equal treatment or non-discrimination, but requires an *ad hoc* discipline aimed at taking into account the specific working conditions of temporary workers.

As far as concerns the second goal pursued by the social parties-‘to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships’<sup>34</sup> – it is enough for the aims of this paper to limit ourselves to highlighting the reply of Italian employers on the legal restrictions on the use of temporary and fixed-term contracts: the circumvention of the legal framework through the use of temporary forms of work shaped in the legal scheme of self-employed and/or quasi subordinate work (the so called *collaborazioni coordinate* i.e. *lavoro para subordinato*). These forms of temporary work, which are a legal or at least tolerated way to escape the rules of labour law, now affect more or less one and a half million workers. The consequences are paradoxical. Through these kinds of contracts a real army of temporary workers not only slip out from the legal rules on the renewal of fixed-term work, but also from all the protective discipline of labour law.<sup>35</sup>

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<sup>32</sup> Refer. research on which the Council Directive no. 91/383/CEE is derived, to be found in M. Fernández Ramirez, ‘Tratamiento de la seguridad e higiene en la nueva regulacion sobre las empresas de trabajo temporal’, in *Revista Espanola de Derecho de Trabajo*, 1996, 131, nt. 16, p. 132; M. Tiraboschi, ‘Lavoro atipico e ambiente di lavoro: la trasposizione in Italia della Direttiva n. 91/383/CEE’, in *Dir. Rel. Ind.*, 1996, n. 3, pp. 51-81 and L. Casaux, ‘La medicine du travail des salariés temporaires’, in *Droit Social*, 1994, pp. 943-944.

<sup>33</sup> See J.K. Rogers, ‘Experience and Structure of Alienation in Temporary Clerical Employment’, in *Work and Occupation*, 1995, spec. 142-166.

<sup>34</sup> See clause 1, lett. h).

<sup>35</sup> The phenomenon has been appropriately defined as the ‘escape from subordinate work’. Refer P. Ichino, *La fuga dal lavoro subordinato*, in *Dem. Dir.*, 1990, p. 69 et seq.



## 5. Fixed-Term employment and employment of indefinite duration: a counterposition overcome

In truth, the European framework agreement is vitiated by a mistake of perspective, which consists in the belief that the legal restrictions on the use of temporary work is coessential with the protection of the juridical statute of the workers and, especially, with the effectiveness of the dismissal law. Historical analysis and the use of the comparative method attend to belie this assumption. As for Italy, in particular, it is easy to demonstrate how the choice of the legal system in favour of the indefinite employment contract was made at the beginning of the XXth Century,<sup>36</sup> successively codificated in the Civil Code of 1942 (articles 2097 and 2120) and finally drastically reconfirmed with Act No. 230/1962. Thus, well before the edification of the juridical statute of dependent workers and the approval of dismissal law (see, in particular, Act No. 604/1966 against unfair dismissal and Act No. 300/1970 known as 'Statuto dei lavoratori').

It is not possible to follow in this piece the complicated historical events that accompanied the process of the juridification of employment relationships through the codification of the archetype of stable and lifelong work (i.e. the indefinite employment contract).<sup>37</sup> Nevertheless, one cannot forget the fact that, though for a brief period, the option originally pursued by the different legal systems was in favour of fixed-term contracts. As the general rule of the exchange 'labour against pay', the apposition of a final term of the duration of the work relationship constituted a structural and typical element of the employment contract.<sup>38</sup> In effect, as much as it may seem paradoxical today, on the basis of ideological conceptions and juridical rules that accompanied the first phase of the juridification process of the employment relationship, only the presence of a temporary limit on the use of the work-force was able to guarantee the stability of the contractual relationship without recalling the status of servitude typical of the pre-industrial system of production and of the circulation of wealth.

Only later, through the refining of the breach of contract, was it possible to demonstrate how the spread of the indefinite employment contract was not in contrast with the general principle forbidding perpetual contractual boundaries.<sup>39</sup> From this moment, the indefinite employment contract will therefore be legalised by the legislator as a contract with an uncertain final term, freely rescindable by both parties by means of, if necessary, a given period of notice.

These remarks<sup>40</sup> are enough to highlight the historically relative character of the archetype of the indefinite employment contract. This model has been able to function, in a

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<sup>36</sup> Refer D.Lgt. n. 112/1919, and R.D.L. n. 1825/1924 on private sector employment. See L. Riva Sanseverino, 'Rapporti tra contratto di lavoro a termine e contratto di lavoro a tempo indeterminato', in *Massimario di Giurisprudenza del Lavoro*, 1938, p. 185 et seqq. See also G. Balzarini, *La disciplina del contratto di lavoro a tempo determinato*, Milano: Giuffrè. 1966.

<sup>37</sup> See M. Tiraboschi, *Lavoro temporaneo e somministrazione di manodopera ecc.*, cit., spec. Cap. III. See also M. Tiraboschi, *Deregulation and Labor Law in Italy*, in chapter I of this volume (and previously published in R. Blanpain (ed.), *Deregulation and Labor Law. In search of a Labor Law Concept for the 21st Century*, Bulletin of Comparative Labour Relations, Kluwer Law International, 2000, 69-96).

<sup>38</sup> Authoritative studies have demonstrated how the free fixed-term contract represents one of the fundamentals of modern capitalism. Refer W. Sombart, *Il capitalismo moderno*, Torino, 1967 but 1916 and 1927, spec. 379-380.

<sup>39</sup> See F. Duràn López, *El trabajo temporal. La duración del contrato de trabajo*, Madrid; Instituto de Estudios Sociales, 1980.

<sup>40</sup> For a deeper analysis of this point, which is not possible to develop herein, see M. Tiraboschi, *op. cit.*

context of full employment, to the point that it has proved itself to be adequate not only as concerns the instances of work-force protection but also regarding the need for a fordist-taylorist system of production which necessitated a massive and stable work-force.

As a reaction to a new organisation of production methods and circulation of wealth, the employment relations regulation was not, in fact, simply able to turn into a unilateral technique of protection and emancipation of a party characterised by social under-protection and economic dependence. Despite not always being supported by values and/or homogenic political, economic and social objectives, right from the very beginning the State's regulatory intervention as regards the process of industrialisation has never assumed any unidirectional aspect. Beyond the contingent motivation (declared or real) of each single given normative, the discipline of employment, as a matter of fact, assumes importance right from the start, not only under the traditional framework of worker protection, but also under those concurrent and certainly no less important contexts of the conservation of social peace and existing order, of the rationalisation of the productive system, of the regulation of the forms of competition among entrepreneurs, etc. The product of the juridification of employment relations is therefore, undoubtedly, a *distributive* right of protection and resources, but also, at the same time, a right of *production* i.e. a discipline of roles and of the ways of producing in an industrial society.

Unless one accepts a perspective of a progressive deregulation of employment relationships – a perspective that nevertheless appears not only inadequate as regards the tradition of the majority of European countries, but also insufficient in fulfilling the requirements of the market of the XXIst Century<sup>41</sup> – the most recent transformation processes of the socio-economic good order, together with a situation of jobless growth, are asking for a new juridification model of employment relationships able to conciliate competitiveness with social justice.<sup>42</sup> In this regard the rules and logic of the 'new economy' not only make a technique of regulations of employment relationship based on a monolithic paradigm like the indefinite duration contract inadequate, but on top of that require the recognition and valorisation of the 'diversity' of the modern ways of working. As rightly pointed out by Roger Blanpain 'rules, practices and expectations of yesterday are less and less relevant for tackling problems of today and tomorrow in the new world of work. In a sense, we need to start from scratch'.<sup>43</sup>

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<sup>41</sup> T. Treu, 'Politiche del lavoro e strumenti di promozione dell'occupazione: il caso italiano in una prospettiva europea', in Biagi M. (a cura di),  *Mercati e rapporti di lavoro. Commenzario alla legge 24 giugno 1997 n. 196*, Milano: Giuffrè, 1997, p. 3. More recently see M. D'Antona, *Diritto del lavoro di fine secolo: una crisi di identità*, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 1998, p. 318.

<sup>42</sup> This theme was discussed at the 11th World Congress of the International Industrial Relations Association. See IIRA, *Developing Competitiveness and Social Justice: the Relationship between Institutions and Social Partners*, Bologna, Sinnea International, 1998.

<sup>43</sup> R. Blanpain, 'The World of Work and Industrial Relations in Developed Market Economics of the XXIst Century. The Age of the Creative Portfolio Worker', in Blanpain R., Biagi M. (eds.), 'Non-Standard Work and Industrial Relations', in *Bulletin of Comparative Labour Relations*, n. 35/1999, p. 3 et seqq, here p. 41. In the Italian literature see among others especially P. Ichino, 'The Labour Market: A Lawyer's View of Economic Arguments' in *International Labour Review*, 1998, pp. 299-341.

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A step forward in this direction appears to be the definite overtaking of the pillars of Hercules represented by the concept of subordination,<sup>44</sup> and to proceed to a corresponding normative realignment of employment related protection in such a way as to insure all work (beyond the contractual scheme which regulate their relationship) a minimum core labour standard (regular income from their work, decent working conditions, health and accident insurance, retirement benefits, etc). The national and supra-national actors are now called to confront this issue if they do not want to be stepped over by the spontaneous logic of the markets.

In Europe since 1993 the *White Paper on growth, competitiveness, and employment (the challenges and ways forward into the 21st century)*<sup>45</sup> has required a global rethinking on the way in which the national system of labour law and social security could be adapted in order to guarantee an enlargement of the notion of labour that includes all forms of work paid or partially paid, in a common framework including all forms of temporary work and jobs performed in the underground economy.

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<sup>44</sup> P. Ichino, *Il lavoro e il mercato*, cit. M. Biagi, M. Tirahoschi, The Transformation of Italian Employment Law Between Experimentation and Social Concertation: from the Legalisation of Temporary Work to a Statute of the New Works?, in *Bulletin of Comparative Labour Relations*, n. 35.

<sup>45</sup> COM(93) 700 final – Brussels, 5 December 1993.

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