Outsourcing of Labour and Promotion of Human Capital: Two Irreconcilable Models? Reflections on the Italian Case*

1. Framing the Issue

Starting from the initial reactions to Legislative decree No. 276/2003 (the Biagi law) as supplemented and amended by Legislative decree No. 251/2004[1] it has been rightly pointed out that the regulation of labour intermediation and the outsourcing of labour[2] constitutes one of the most significant innovations of the reform of the labour market.

At times, however, this observation is associated with a highly critical stance towards this particular section of the reform, consisting of Title III and IV of the decree, and of the many innovative measures deriving from it.[3] It has been argued that the new measures dealing with agency work, contracting out, secondment and the transfer of undertakings are aimed solely at increasing the

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* *The present contribution was previously published in Blanpain, R., M. Tiraboschi. 2008.* Global Labor Market: From Globalization to Flexicurity. The Netherlands*: Kluwer Law International BV, pp. 185-208.*

[1] See bollettinoADAPT.it, A-Z index, under the heading *Riforma Biagi*.

[2] The term "outsourcing" is used here in the strict sense, to refer to the practices of subcontracting, contracting out, agency work, and the transfer of undertakings. In this paper it will not be used in the sense of delocalization of offshoring, which is often considered to be a form of outsourcing.

[3] On the new legal framework for agency work, reference may be made to the bibliography and analysis in Tiraboschi, M. "The Italian Labour Market after the Biagi Reform", *The International Journal of Comparative Labour Law and Industrial Relations* 21, No. 2, pp. 149-192.

already considerable opportunities for the segmentation of productive processes and for companies to be divided up, "with a view to achieving more advantageous (and legitimate) conditions for the enterprise, in the exchange between labour and economic and normative provisions".[4]

Even legal scholars who are acutely aware of the need for profound change in the regulations governing outsourcing[5] have spoken of a neo-liberal model of organization of the system of production. Such a model is clearly not as strongly connotated as "US neo-liberalism, to some extent taking account of the protection traditionally afforded by Italian labour law" but it still aims at dismantling existing restrictions on the decentralization of production and contracting out, safeguarding the organizational choices and economic interests of business, while restricting the area of illicit activity to "processes based on fraudulent intent and anti-labour practices".[6]

It is hardly surprising that the new legal framework dealing with outsourcing and contracting out has been portrayed as a detonator that in a short period of time could set off a reaction leading to the fragmentation of the organizational structure of companies. The recent legislation would therefore appear to promote management strategies leading to a race to the bottom in terms of wages and legal provisions,[7] rather than the long overdue modernization of productive processes in Italy.[8] The processes of specialization and organizational innovation which, in the intention of the legislator as outlined

[4] In connection with the extensive debate on the new provisions laid down by Legislative Decree No. 276/2003, see Chieco, P. "Somministrazione, comando, appalto. Le nuove forme di prestazione di lavoro a favore del terzo", *Lavoro e diritti dopo il decreto legislativo 276/2003*, ed. Curzio, P., (Bari: Cacucci), esp. p. 92.

[5] See De Luca Tamajo, R. 2004. "Tra le righe del d.lgs. n. 276/2003 (e del decreto correttivo n. 251/2004): tendenze e ideologie", *Rivista italiana di diritto del lavoro (RIDL)*, I, esp. p. 539.

[6] Again De Luca Tamajo, R. *op. ult. cit.*, esp. p. 531.

[7] See Chieco, P. *op. loc. ult. cit.*; see also Romagnoli, U. "Radiografia di una riforma", *Lavoro e diritto (LD)*, 2004, esp. p. 39-38 and Mariucci, L. 2004. "I molti dubbi sulla c.d. riforma del mercato del lavoro", *Lavoro e diritto (LD)*, 11.

[8] Among the legal scholars advocating reform of the legal framework for outsourcing, with a view to providing modern regulations capable of supporting new models of production and labour organisation, see, in particular, Biagi, M. 2003. "Competitività e risorse umane: modernizzare la regolazione dei rapporti di lavoro", *Marco Biagi: un giurista progettuale*, eds. Montuschi, L., M. Tiraboschi, and T. Treu, Milano: Giuffrè, p. 141 ff.; Ichino, P. 2000. "La disciplina della segmentazione del processo produttivo", AIDLASS, *Diritto del lavoro e nuove forme di decentramento produttivo*. Milano: Giuffrè, p. 3 ff. and 361 ff.

in the technical report accompanying Legislative decree No. 276/2003,[9] should go some way towards combating various forms of speculation on the work of others associated with intermediation in the labour market.

This perspective is not supported by any scientific and objective data and taking this position to the extreme, there have even been critical observations arguing that the new legal framework is not particularly useful for the system of production and for business. It has been claimed, also by those who criticize the Biagi reform due to what they consider to be an excessive degree of flexibility and liberalization of the labour market, that Legislative decree No. 276/2003 not only works to the detriment of labour protection and collective solidarity, but also of the needs for competitiveness of the system and the organizational and managerial efficiency of enterprises.[10]

The overall picture that emerges is decidedly gloomy. In the scenario depicted, not only employees and trade unions, but also employers, human resources managers and company directors are in difficulty due to a pointless reform that is also ill-conceived in technical terms. In support of this argument, reference is made to the exorbitant cost of "what the implementing decree, with a vaguely medical terminology, calls the *somministrazione del lavoro*".[11]

At the same time critics speak of "organizational and managerial chaos" arising from "the co-presence in the same workplace, whether it be a manufacturing facility or an office building, of workers hired on dozens of different contracts" including those classified as "subcontractors, who come into the workplace or office to work alongside employees of the company".[12]

This rhetoric is not only outdated but also in contrast with the findings of historical and legal research,[13] in that it takes the view that modern employment agencies are the *nouveaux marchands d'hommes* – while at the same time, not without a touch of cynicism, reference is made to the

[9] Available at bollettinoADAPT.it, A-Z index, under the heading *Riforma Biagi*. The *White Paper on the Labour Market*, October 2001, includes several references to the need for specialisation and innovation in productive processes and work organisation.

[10] See Alleva, P. 2004. "La nuova disciplina degli appalti di lavoro", *Il lavoro tra progresso e mercificazione – Commento critico al decreto legislativo n. 276/2003*, ed. Ghezzi G., Roma: Ediesse, p. 166.

[11] Gallino, L. 2004. "Il lavoro atipico che fa male alle aziende", *La Repubblica*, 5 June.

[12] Ibid.

[13] However, this rhetoric is widespread in Italy. Reference may be made of the debate in Parliament on Act No. 30/2003, and Legislative Decree No. 276/2003, in which temporary agency work is still compared in simplistic terms with the exploitation of the work of others, or even with the illegal activity of gangmasters (*caporalato* in Italian). The Parliamentary debates are available at bollettinoADAPT.it, A-Z index, under the heading *Riforma Biagi*. Similar remarks were made when Act No. 196/1997 was approved.

commodification of labour in Marxist terms.[14] A further line of criticism, in its most extreme version, seems intent on negating the effects of the reform. However, this is not to be achieved through trade union or industrial action, or by labour policy, but rather on the basis of a simplistic economic rationale casting doubt on the utility for enterprises of the recent labour legislation while at the same time it is said to be excessively neo-liberal – a line of argument that seems to be self-contradictory.

Interacting with hundreds of workers employed by dozens of different enterprises on dozens of different contracts, in the view of those who appear to favour a Fordist model of work organization:[15]

> means having to deal with an infinite variety of interests and approaches, with conflict between interests and groups, and processes associated with a continuous comparison between the terms and conditions of employment of co-workers. In this situation governing company organization and productive processes becomes a task that even Sisyphus would reject.[16]

It becomes difficult, if not impossible, for employers to manage human and material resources in an enterprise undergoing such radical change – as if by magic, it might be said – simply as a result of legislative reform. All this is due to legislation reportedly aiming solely at providing incentives for maximizing the "volatility of those in employment" and not at all due to economic and social processes that have been under way for some time (see below, section 3).

The enterprise therefore loses its innate identity as a "grand construction with sturdy foundations" and turns into a kind of "enormous aviary".[17] It also becomes difficult to pursue the objectives of growth, productivity and

[14] See Marx, K. 1954. *Il capitale. Critica dell'economia politica*, I. Torino: Einaudi, first ed. 1867, esp. p. 172, with reference to rapacious parasites who position themselves between the real employer and the worker.

[15] On the connection between outsourcing and the decline of Fordist factories that carry out 'all the functions required to manufacture their products' see, Supiot, A. 2001. *Beyond Employment: Changes in Work and the Future of Labour Law in Europe – A Report Prepared for the European Commission*. Oxford: Oxford University Press.

[16] See Gallino, L. "Il lavoro atipico che fa male alle aziende", cit.

[17] Romagnoli, U. "Radiografia di una riforma", cit., esp. pp. 35 and 37 where he adds that the volatility of the personnel leads, in the case of temporary agency work, to their invisibility, since workers on an assignment are not calculated as part of the workforce of the user undertaking. It must be pointed out, however, that these workers are already calculated as part of the workforce of the employment agency, so it is difficult to see why they should be counted twice. This was the position adopted also in Act No. 196/1997.

competitiveness in the Italian economy, although it must be admitted that it is impossible to do without "the specialist contribution of suppliers or subcontractors that are highly qualified, in the productive cycle of the parent company".[18]

In this view the Biagi law embodies labour law and economic policy of limited value since it aims only at the reduction of labour costs. This is to be achieved by means of measures making it possible to "worsen the economic and normative conditions of the workforce, with the material or legal fragmentation of the work-place making it difficult to bring about the aggregation of opposing interests, enabling employers to walk away from their responsibilities towards both individual workers and the trade unions".[19]

Even without taking into account the strong ideological connotation of this position, which loses sight of the innovative potential of the reform, this line of interpretation seems to play a primary role in the study of the legal regulation of the outsourcing of labour. It should however be noted that the official figures,[20] three or more years after the entry into force of Legislative Decree No. 276/2003, reported an increase in stable employment of good quality and a reduction in labour in the hidden economy, thus providing a convincing response to the view that the labour market is undergoing de-structuring, and to the rhetoric of precarious employment.[21]

Rather, it may be argued that the recent labour market reforms, starting from the Treu measures in 1997, have contributed to reining in and governing the insidious forms of flexibility outside the legal framework and devoid of any trade union protection which, in comparative terms, make Italian labour law one of the most ineffective and deregulated systems in terms of practical application, though on paper Italian legal provisions are among the most rigid. This is the picture that emerges from the shocking estimates of labour in the hidden economy, amounting to some four million undeclared workers, with

[18] Alleva, P. "La nuova disciplina degli appalti di lavoro", cit., p. 166.

[19] Alleva, P. op. loc. ult. cit.

[20] See *ISTAT labour force survey*, available at bollettinoADAPT.it. See also ISFOL, *Rapporto 2006*, CNEL, *Rapporto sul mercato del lavoro 2006*.

[21] On this point see the well documented analysis by Reyneri, E. 2004. Qualità del lavoro e flessibilità sostenibile, in 1983-2003: la politica locale del lavoro in provincia di Trento compie vent'anni, suppl. a OrientaLavoro, No. 1, pp. 111-118 (available at bollettinoADAPT.it, A-Z index, under the heading *Mercato del lavoro*).

the result that black market labour is two to three times higher than in other countries.[22]

A more balanced assessment appears to be made by those who, although with some reservations, argue that the Biagi reform of labour protection, at company level, "is left more to the employer than, as was the case in the past, to normative provisions, thus relying more heavily on the employer and at the same time on an increase in the bargaining power of the employees".[23]

In other words it may be said that enterprises now work within a legal framework that is more favourable to organizational innovation and investment in human capital. What may be lacking is a capacity on the part of human resources managers and company directors to implement processes of innovation that appear to be increasingly important to meet the challenges arising from the globalization of markets.

2. The Separation of Labour from the Enterprise: The Sign of a Modern Economy?

In order to carry out a balanced assessment of the new legal framework for outplacement and labour market intermediation there is a need to consider this original and thought-provoking line of reasoning that it is particularly useful in responding to allegations of a de-structuring impact on the Italian labour market of Legislative decree No. 276/2003.[24]

In this analytical perspective the legislator drafting the reform made a more far-reaching attempt than in the past to understand the practical problems of company organization and workforce management.[25] It is significant that the

[22] See ISTAT. 2004. La misura dell'occupazione non regolare nelle stime di contabilità nazionale: un'analisi a livello nazionale, regionale e retrospettiva a partire dal 1980. Rome: ISTAT, in bollettinoADAPT.it, index A-Z, under the heading *Lavoro irregolare*.

[23] See Rebaudengo, P. A. 2004. "La separazione del lavoro dall'impresa: alcune significative novità", cit., p. 171. In the same perspective see also Russo, A. 2004. *Problemi e prospettive nelle politiche di fidelizzazione del personale – Profili giuridici*. Milano: Giuffrè, esp. Chap. III, sec. II.

[24] The line taken by Perulli, A. 2004. "Introduzione", *Impiego flessibile e mercato del lavoro*, ed. Tiraboschi, M., Torino: Giappichelli, esp. XIII-XIV, who discusses the stated and presumed intentions of the legislator. Considering that this comment appeared a year after the entry into force of the reform, it would have been more useful to examine the early stages of application of the new measures to provide empirical and objective evidence in support of the arguments put forward.

[25] This is hardly surprising, since the reform was subject to intense debate by the social partners and business leaders, in an attempt to identify proposals that were not based simply

Biagi reform has been favourable reviewed by those who reject the conception of law as a dogmatic and technical body of knowledge as an end in itself:[26] according to this conception, it is the concern of a select group of experts, with scant regard to whether it is effective or enforceable. Today the effectiveness of labour law in Italy is limited in that it fails to meet the needs it is intended to address in terms of the protection of the worker in flesh and blood, though this aim is often stressed by critics of the reform.[27] This lack of effectiveness and enforceability, reflecting the inaccessibility and complexity of legal provisions, works in favour of what Pietro Ichino has quite rightly defined as "the labour law business".[28]

However, turning to the criticism that at first sight is the most penetrating and most effectively presented, it has been suggested that the legislator is at fault for underestimating the consequences of a "rough and ready solution"[29] to the main legal problems concerning work organization. The risk is that Italy will end up with a legal framework that in overall terms is "more oriented towards overcoming critical management issues, hopefully with positive outcomes for enterprises and workers, than towards modernizing labour law with a view to promoting human resources; a task that is naturally left entirely to enterprises to perform".[30]

The legal framework for outsourcing should undoubtedly facilitate the transformation of production in the company and also the structural use, within networks of companies increasingly characterized by fragmentation, of employees of other companies, either by means of subcontracting, or by means of staff leasing or the posting of workers. In this way it is possible to deal with

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on legal reasoning, but rather a response to problems at the level of practical application. On this point see D'Oronzo, V. 2004. "La riforma del mercato del lavoro tra concertazione e dialogo sociale", *La riforma Biagi del mercato del lavoro*, ed. Tiraboschi, M., Milano: Giuffrè, pp. 747-771, including the views of the social partners, largely favourable to the reform, in Part II, section C, "La riforma del mercato del lavoro tra concertazione e dialogo sociale: la posizione del governo e il giudizio delle parti sociali".

[26] A different view is taken by Pedrazzoli, M. "La correzione della c.d. riforma Biagi", cit., who defends a static legal system with its own internal logic rather than proposing ways of governing a dynamic situation in continual flux.

[27] On the relations between the Biagi reform and the effectiveness of labour law, see the arguments put forward in Tiraboschi, M. 2004. "Riorganizzazione dei servizi ispettivi e riforma del mercato del lavoro", *La riforma dei servizi ispettivi in materia di lavoro e previdenza sociale*, Monticelli, C. L., and M. Tiraboschi, Milano: Giuffrè, esp. pp. 15-18.

[28] See Ichino, P. *Il lavoro e il mercato – Per un diritto del lavoro maggiorenne*, Mondadori, Milan, 1996, esp. pp. 164-166.

[29] Rebaudengo, P. A. *op. loc. ult. cit.*

[30] Ibid.

the "obsolescence" of the Italian labour law system (in the words of Marco Biagi)[31] which for a long time, due to provisions that were not capable of promoting or even governing outsourcing, resulted in outsourcing being considered not so much an opportunity as "a risk and therefore a constraint".

However, at the same time, the new legal provisions might lead to a worsening of conditions for workers and for their employers. The reason for this, at least in the medium to long-term, is that an employer relying on workers employed by third parties (contractors or staff leasing agencies), instead of the traditional employment contract pursuant to Article 2094 of the Civil Code, has no interest in investing in vocational training, i.e. in identifying suitable training and career plans, taking account of the employees' potential for growth by means of horizontal moves in order to enhance their skills, and providing incentives for them to participate in processes of change and quality schemes in the company. This has a negative impact on management and motivational initiatives that tend to foster a sense of "belonging", "company culture" and "participation".[32]

This line of critical reasoning is directed at the generally recognized principle that has tended to make outsourcing attractive, not only in the eyes of employers: that outsourcing is an essential characteristic of modern economies, favouring organizational and managerial innovation in the employment of labour.[33]

This is the crucial issue for ascertaining the effectiveness or otherwise of the system of outsourcing introduced by the Biagi Law, both in terms of labour protection measures and in terms of regaining the competitiveness and organizational effectiveness of the Italian economy.

[31] Biagi, M. "L'outsourcing: una strategia priva di rischi?", *Marco Biagi: un giurista progettuale*, cit., esp. p. 271. For Biagi, "such are the difficulties, and the numerous risks of a legal kind, that the strategic value of outsourcing may at times be called into question".

[32] See Rebaudengo, P.A. *op. cit;* in the international literature, Autor, D. H. 2003. "Outsourcing at Will: The Contribution of Unjust Dismissal Doctrine to the Growth of Employment Out-sourcing", *Journal of Labor Economics*, esp. p. 9.

[33] On this point see Biagi, M. "L'outsourcing: una strategia priva di rischi?" cit., esp. pp. 284-285.

3. Outsourcing of Labour Relations and Organizational Innovation in the New Economy

The issue to be examined is the relation between the competitiveness of the system, labour outsourcing strategies and policies for the promotion of human capital.

In this connection, there is not much to be gained from the rhetoric of the commodification of labour in the examination of outsourcing, staff leasing and employment agency work. This rhetoric, although still firmly rooted in certain academic circles and trade unions, has been defeated by history – as shown not only by the position taken by the International Labour Organization, but also by the developments of the international sources relating to labour issues, and in Italy by Articles 1–11, Act No. 196, 24 June 1997, by which, last of all the European nations, Italy recognized the legitimacy of the use of temporary agency work, on certain conditions and within certain clearly defined limits laid down by law and collective bargaining.

It can also be argued that the early years of implementation of Act No. 196, 24 June 1997 (so called Treu package), showed that the legislator managed to distinguish effectively, in a normative and conceptual framework that was to inform Legislative decree No. 276/2003,[34] between on the one hand fraudulent and parasitic forms of intermediation in labour relations, and on the other hand, highly specialized professional services with a particularly significant role to play in facilitating access to (or a return to) the labour market.[35] In creating additional opportunities for regular and quality employment, these services are useful both for the market and for the workers, who have a better chance of finding stable employment at the end of their assignment.

Mention should also be made of the fact that, according to a survey carried out by the Ministry of Labour and Social Policy,[36] "workers on a temporary work

[34] The view taken by Ichino, P. 2004. *Lezioni di diritto del lavoro – Un approccio di labour law and economics*. Milano: Giuffrè, esp. p. 242, note 15.

[35] As indicated in Part III (labour policy) of the Giugni protocol of 1993 on labour costs, thus paving the way for the social legitimization of temporary work agencies in Italy (available at bollettinoADAPT.it, A-Z index, under the heading *Concertazione*). This aspect is highlighted, among others, by Accornero, A. 2005. "Rappresentanza e nuovi lavori", *Diritto delle relazioni industriali (DRI)*, No. 1 "temporary agency work in Italy is characterised by proper regulation, the certainty of costs, protection of the employee, good quality intermediation, and the chance of a trial period, renewal and hiring for the worker and for the employer".

[36] Ichino, A., F. Mealli, and T. Nannicini. 2003. *Il lavoro interinale in Italia – Trappola del precariato o trampolino verso un impiego stabile?*, University of Pisa: Edizioni Plus, esp. pp.

assignment have a reasonable expectation that their chances of gaining permanent employment a year and a half after the assignment will be twice as high, compared to those who have not been placed on an assignment, increasing from 14 per cent to 28 per cent".

Moreover, "some 51 per cent of temporary workers are offered the chance of being hired directly by the user company at the end of their assignment. For 32 per cent of these workers, this becomes a reality. In addition, some 20 per cent of those who are not initially offered the chance of hiring are then hired by the user company".

It is also the case that in many instances, especially in the case of staff leasing on open-ended contracts, the worker may prefer to continue working with the employment agency – that is often a large multinational company – rather than for the user company, due to the terms and conditions of employment and the prospects of continuity of employment and continuing training.[37] This is why the legislator provided incentives, in Article 23(8) and (9) of Legislative decree No. 276/2003, promoting continuity of employment of the worker with the employment agency, permitting the inclusion in the labour supply contract of clauses limiting the hiring of the worker by the user undertaking on completion of the assignment. This is allowed not only in the case of workers hired on open-ended contracts but also, provided the worker receives an adequate salary, in the case of fixed-term contracts.

Empirical research has shown that in any case from the point of view of the undertaking, in labour supply contracts there is a need, over and above the provisions of law, for flexibility of employment and the selection of employees in a perspective of investment in human capital. In addition, the application of the rule of equality of treatment between workers on an assignment and workers hired directly by the user company[38] confirms unequivocally that the net earnings of the employment agency do not represent parasitical income based on the commodification of labour, i.e. simply on the difference between the amount received from the user company for the labour supplied and the amount paid to the worker.

Rather, it may be said that the earnings of the employment agency are justified as they are associated with a typical business risk since the employment agency is obliged to supply a service on the market – research, selection, training of the employee and administration of the employment relationship –

57-59, available at bollettinoADAPT.it, A-Z index, under the heading *Somministrazione di lavoro*.

[37] As pointed out by Ichino, P. *Lezioni di diritto del lavoro*, cit., p. 229.

[38] Art. 23 (1), Legislative Decree No. 276/2003.

which, from the point of view of the price of the labour supplied, results in a higher cost than that which the user company would have paid if the workers had been hired directly. This fact undermines the argument of those who see staff leasing and temporary labour supplied by agencies that are expressly authorized by the law, provided they meet certain strict legal and financial criteria, as the embodiment of a policy aimed at the commodification of labour and at promoting precarious employment conditions.

It is, however, the case that the higher cost for the user undertaking making use of temporary employment agencies, together with the fact that not all the normal liabilities of those hiring labour are transferred to the agency, should mean that companies make use of temporary agency work – also in the absence of legal measures and anachronistic constraints, as shown in the case of the United States[39] – only in the presence of objective causes and not simply with a view to reducing labour costs (see below, section 5). In the legal framework put in place by Legislative decree No. 276/2003, thanks to a revised system of sanctions, these technical, organizational and productive reasons, including the substitution of personnel, also in relation to the day-to-day business of the user undertaking, are now intended to govern more effectively the processes of outsourcing and/or insourcing of labour.[40]

As pointed out by the influential *Supiot Report* in 1998 on the transformation of employment and the future of labour law in Europe,[41] the tendency to reduce costs and make the employment of the workforce more flexible has certainly played an important role and can contribute to explaining the outsourcing of functions and tasks that require a low level of skill (cleaning, gardening, deliveries, facility maintenance, catering, transport, etc.). But those who are familiar with recent developments in the system of production and

[39] The U.S. case shows that even in the absence of limits laid down by law, as in the Italian system, the recourse to staff leasing and temporary agency work tends to be limited to specialized and niche services, or to labour intensive activities that make it possible to take advantage of economies of scale and external organizational and managerial know-how. In the U.S., it does not involve more than two per cent of the workforce.

[40] For an in-depth treatment see my chapter on Somministrazione di lavoro, appalto di servizi, distacco, in Tiraboschi, M., ed. *La riforma Biagi del mercato del lavoro*, cit., pp. 205-229 and Ichino, P. "Somministrazione di lavoro, appalto di servizi, distacco", *Il nuovo mercato del lavoro – Inserto sulla correzione d.lgs. 6 ottobre 2004, n. 251*, Various Authors, (Bologna: Zanichelli),VII-X.

[41] Tranformation of Labour and the Future of Labour Law in Europe – Final Report, 1998, esp. p. 17, available at bollettinoADAPT.it, A-Z index, under the heading *Statuto dei lavori*. See also Supiot, A. Beyond Employment etc., cit., esp. p. 18.

work organization are aware that the outsourcing of functions requiring a high degree of skill is the result of two different factors:

[O]n the one hand technological progress (particularly the role of new information and communications technology), which has increased the level of skills required for certain functions and encouraged the use of outsourcing, while on the other hand there have been significant developments in contracting out techniques, enabling clients to obtain more information about their suppliers, eliminating the risks associated with the outsourcing of crucial phases of the productive cycle (in particular quality standards and ISO 9000 certification).[42]

Moreover, recent empirical studies carried out on behalf of the European Foundation for the Improvement in Living and Working Conditions in Dublin[43] provide evidence that it is misleading to claim, as is often the case in Italy, that the outsourcing of labour is dictated solely by the search for lower labour costs and an attempt to get round labour protection laws.

The reality is decidedly more complex and various factors, not necessarily linked to labour costs and competition between different systems of labour regulation, need to be taken into account in explaining outsourcing, a complex phenomenon that is characteristic of new labour organization processes.[44]

The new economy may be said to be the product of a combination of the increase in technological capital, human capital and organizational capital.[45] Innovation gives rise to the need for investment in technology providing an adequate return thanks to competent and adaptable human resources and organizational models enabling them to fulfil their potential.[46] In particular,

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[42] Supiot, A. *op. loc. ult. cit.* See also Purcell, K., and J. Purcell. 1998. "In-sourcing, out-sourcing e lavoro temporaneo", *DRI*, No. 3, pp. 343-356.

[43] See in particular Huws, U., S. Dahlmann, and J. Flecker. 2004. *Outsourcing of ICT and related services in the EU*. Dublin: European Foundation for the Improvement of Living and Working Conditions, (available at bollettinoADAPT.it, A-Z index, under the heading *Esternalizzazioni*).

[44] To quote from the Director of the Dublin Foundation, in the preface to the study carried out by Huws, U., S. Dahlmann, and J. Flecker, *Outsourcing of ICT and related services in the EU*, cit.

[45] See the reported presented to the European Commission, edited by Alasoini, T. 2001. *Challenges of Work Organization Development in the Knowledge-Based Economy*. Thematic Paper Presented to DG Employment and Social Affairs by the European Work Organization Network, available at bollettinoADAPT.it, A-Z index, under the heading *Lavoro (organizzazione del)*.

[46] The connection between work organization and the promotion of human capital is clearly shown in the *Green Paper* of the European Commission on *Partnership for a New Organisations of Work*, document drawn up on the basis of COM(97) 128 final, *Bulletin of the*

information and communication technologies have resulted in production moving forward from a "vertical" model with an integrated productive cycle in which all the workers carried out rigidly and hierarchically predetermined tasks and were all employed by the same entity, though working in different departments. The digital revolution has made it possible for enterprises to work together as a network – based on a series of contractual relations that are normally stable and standardized[47] – thus favouring the specialization and interdependence of each enterprise.[48]

It thus becomes economically rational for each undertaking to concentrate on its core business and to purchase supplies and services from third parties – often endowed with their own valuable organizational know-how – not only with regard to logistics, facility management, administration, the selection and management of employees, information systems, and the marketing of products, but also, in recent times, with regard to central and highly specialized functions close to the core activities of the company.

This is particularly the case for small and medium-sized enterprises, for which a network approach and the use of organizational and managerial know-how supplied by specialized firms is becoming decisive for survival, in the medium-and long-term, in an economic and social context in continual evolution.[49] This is all the more so in countries like Italy, where it is the particular structure of the productive system – and certainly not the new legal framework introduced by the Biagi law – that makes investment in human resources decidedly problematic, especially in the field of new technology, with a drift into the hidden economy and informal labour, resulting in what has been termed "the low road to development".[50]

All the changes outlined above have clearly had a strong impact not only on the functioning of national industrial relations systems, but above all on the quality of employment and work organization methods.[51] Labour is

European Union, suppl. 4/97 (available at bollettinoADAPT.it, A-Z index, under the heading *Lavoro (organizzazione del)*).

[47] See again Supiot, A. *op. cit.*

[48] See Castells, M. 1996. The Rise of the Network Society. London: Blackwell, Alasoini, T., ed. Challenges of Work Organization Development in the Knowledge-Based Economy, cit.

[49] See the report for the European Commission, Ennals, R. 2002. *The Existing Policy Framework to Promote Modernisation of Work: Its Weaknesses*, October, available at bollettinoADAPT.it, A-Z index, under the heading *Lavoro (organizzazione del)*.

[50] See the report of the Work and Technology Consortium on *Work Organisation, Competitiveness, Employment: the European Approach*, CE-V/8-98-001-EN-C, 1998.

[51] See the papers in Blair, M. B., and T. A. Kochan, ed. 2000. *The New Relationship. Human Capital in the American Corporation*, Washington D.C.: Brookings Institution Press.

characterized not only by greater creativity, initiative taking and specialization – resulting in an increasing demand for services in all sectors but also in a trend towards the distribution of employment across a wider network of companies.
In this perspective, outsourcing becomes the standard approach to the production of goods and services with a view to achieving economies of scale; a relation of reciprocal interest (at a horizontal level) replaces the previous (vertical) hierarchical relations bringing together the various functions. Moving beyond the Fordist model of production enables enterprises to consolidate contractual relations, both with their own employees and with the network of companies operating in the market, which allows them to create added value.[52]

4. More on the Outsourcing of Labour and the Promotion of Human Capital in a Perspective of Competitiveness

The Continental European countries, Italy in particular, present a series of cultural and organizational barriers to the process of change.[53] They are reluctant to face up to uncomfortable facts, also due to the lack of appropriate institutions[54] and in many cases fail to adopt a cooperative approach to the management of industrial relations.[55] In the presence of an evident expansion in the global economy, their actual rates of growth are below their potential rates. They find themselves under pressure of competition from the Asian economies on the one hand, and the dynamic economies of the English-speaking countries on the other. As a result, the sluggish economies of continental Europe are facing the choice not so much between the high road

[52] *Human Resources – Outsourcing in Europe*, ADP Dossier, available at bollettinoADAPT.it, A-Z index, under the heading *Esternalizzazioni*, esp. p. 9.
[53] See the extensive analysis by the European Commission. 2002. *New Forms of Work Organisation – The Obstacle to Wider Diffusion*, available at bollettinoADAPT.it, A-Z index, under the heading *Lavoro (organizzazione del)*.
[54] As rightly pointed out by Ennals, R. *The Existing Policy Framework to Promote Modernisation of Work: Its Weaknesses*, cit., esp. pp. 6-7 and also p. 5 where he argues that the European Commission has underestimated the capacity of the social partners to respond to the call (in the *Green Paper on Partnership for a New Organization of Work*) to take responsibility for the modernization of work organization.
[55] Cfr. The European Work Organisation Network. 2001. *New Forms of Work Organisation – The Benefits and Impact on Performance*, esp. p. 2, available at bollettinoADAPT.it, A-Z index, under the heading *Lavoro (organizzazione del)*.

and the low road to innovation, "but rather between innovation of any kind and no innovation at all".[56]

Supporting those who introduce innovation in the enterprise by making use of the services of human resources professionals that the legislator refers to as "employment agencies",[57] does not mean downgrading the human capital of Italian enterprises and opting for the low road to growth.

Rather, it is a strategy that can make it possible to intervene in a significant manner, at a structural level, to deal with some of the underlying problems of the system of production in Italy "in particular, to provide for continual technological upgrading, to reduce costs by means of increased productivity and more flexible management processes, and to improve the quality of services. In other words, to become more competitive".

This can be the case also when outsourcing takes place by means of the transfer of a part of the undertaking. Not only because, as rightly noted,[58] the transfer of employees to a company providing specialist services can enhance the career prospects of the employees, "offering them opportunities for acquiring new vocational qualifications, thus providing them with a higher degree of job satisfaction than they would have enjoyed in the company of origin". Outsourcing in the form of the transfer of a part of the undertaking can also play an important role in safeguarding employment levels and the quality of employment: "the down-sizing of the workforce in the company can lead to an increase in efficiency and competitiveness with the result that the employment of those who continue to work in the company becomes more secure. At the same time, the setting up of a new company, potentially allowing wider margins of flexibility in the management of the personnel (provided it does not take the form of small or extremely small companies) can be a useful measure to save jobs that are at risk".[59] The same may be said of the secondment of workers which, especially within the same group of companies, responds to the needs of the company, contributing to the balanced development of all the companies in the group.

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[56] Alasoini, T. ed., Challanges of Work Organization Development in the Knowledge-Based Economy, cit., esp. p. 8.

[57] On the provisions for temporary work agencies in Legislative Decree No. 276/2003 see Olivelli, P., M. Tiraboschi. 2005. *Il diritto del mercato del lavoro dopo la riforma Biagi.* Milano: Giuffrè, esp. Part I, section B.

[58] Purcell, K., J. Purcell, "In-sourcing, out-sourcing e lavoro temporaneo", *cit.*, p. 351.

[59] See on this point the authoritative comment of Biagi, M. "L'outsourcing: una strategia priva di rischi?" *cit.*, esp. p. 274. See also Schuler, R. S., S. E. Jackson. 2004. "Human Resource Management in Context", *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, ed. Blanpain, R., The Hague: Kluwer Law International, esp. pp. 112-116.

It is also true that the techniques for making use of the labour of others that come under the generic term of "outsourcing of labour", are less and less associated with an irresponsible approach to personnel management.

Temporary agency work gives rise to complex contractual obligations, with an allocation of risks, powers, obligations and responsibilities relating to the employment of salaried employees. This allocation is on the one hand rigorously predetermined by the legislator, with a series of obligations on the part of the enterprise (the obligation to take safety measures, obligations concerning remuneration, social insurance and pensions contributions, the exercise of management and disciplinary rights, civil liability for the actions of the employee, and so on) and which, in the absence of specific legal provisions, are subject to agreement between the parties, in compliance with the principle of equal treatment for temporary workers and permanent employees in the user enterprise[60] and with the general provisions of economic policy.

In relation to traditional salaried employment, in the case of temporary agency work the overall legal position of the worker remains substantially unchanged, both in terms of rights and obligations,[61] and such employees carry out "their work in the interest and under the management and control of the user enterprise".[62] However, the legal position of the employer, although unchanged if considered in its entirety, is divided between two separate entities – the temporary work agency and the user undertaking – giving rise to a duality of employers compared to a traditional employment relationship.

In the perspective of promoting human capital, it should also be noted that employees benefit from a significant allocation of resources in terms of the funding for bilateral bodies provided under Article 12 of Legislative Decree No. 276/2003 – aimed at supporting vocational training and retraining initiatives. The objective is to promote continuity of employment and, in the case of employees hired on open-ended contracts, to provide income support in the event of termination. A further aim is to support initiatives aimed at monitoring the use of temporary agency work and its effectiveness also in

[60] In the same way as Act No. 196/1997, Legislative Decree No. 276/2003 makes no provision, for example, in relation to sickness, maternity, postnatal leave, injury, incapacity, unexpected circumstances, or in general the other events that may lead to the interruption of the assignment. In these cases, the allocation of risks and liabilities is left to individual negotiation, or more plausibly, to collective bargaining.

[61] In the sense that the division of risks and liabilities can be taking place only between the temporary work agency and the user undertaking, whereas the transfer of risks and liabilities that are typically the employer's may not be transferred to the temporary agency worker.

[62] Article 20 (2), Legislative Decree No. 276/2003.

promoting the emergence of labour in the hidden economy and combating irregular labour contracts.

The employees involved in this kind of insourcing of labour therefore enjoy a higher degree of protection than in the case of the contracting out of services. Only in a very broad and general sense – and in terms that in no way correspond to the majority of atypical employment contracts – can it be argued that temporary agency work makes it possible to transfer a share of the business risk to the employees, in particular "the risk that is intrinsic to every expansion of the workforce carried out with standard open-ended employment contracts".[63]

At least in the framework adopted by the Italian legislator, temporary agency work does not result in the transfer of the risks, obligations and liability associated with salaried employment to entities other than the user enterprise. Rather, it introduces a different arrangement, in keeping with general legal principles, by which the employer can make legitimate use of the goods and services produced by the employee. With temporary agency work, there are two entities benefiting from the labour of the employee, with a type of contract in which two entities share the rights and duties of one contractual party. This type of arrangement may be compared to the practice laid down in US case law,[64] which conceives of the trilateral relation in terms of "co-employment".

This accounts for the fact that in the literature there is a conceptual distinction, that more closely reflects the nature of this phenomenon, between outsourcing and insourcing, differentiating between respectively between the use of services supplied on contract or on a subcontract, and the use of agency staff working on the instructions and in the interests of the user undertaking.[65] In practical terms there is an increasing use of forms of co-sourcing, net-sourcing, selective-sourcing, multi-sourcing, back-sourcing, co-specialization

[63] D'Antona, M. 1990. "Contrattazione collettiva e autonomia individuale nei rapporti di lavoro atipici", *Diritto del lavoro e delle relazioni industriali (DLRI)*, esp. p. 543.

[64] For a definition of co-employment in the United States, see Lenz, E. A. 1994. "Co-Employment – A Review of Customer Liability Issues in the Staffing Services Industry", *Labor Lawyer*, pp. 195-216. See also Linder, J. 1989. "The Joint Employment Doctrine: Clarifying Legislative – Judicial Confusion", *Hamline Journal of Public Policy*, pp. 321-330; Cooper, S. F. 1995. "The Expanding Use of the Contingent Workforce in the American Economy: New Opportunities and Dangers for Employers", *Employee Relations Law Journal*, p. 525; Siebert, W.V., and N. D. Webber. 1987. "Joint Employer, Single Employer, and Alter Ego", *Labor Lawyer*, pp. 880-883. See also the extensive bibliography in Axelrod J. G. 1987. "Who's the Boss? Employee Leasing and the Joint Employer Relationship", *Labor Lawyer*, pp. 857-871.

[65] Purcell, K. J. Purcell, *op. cit.*, esp., pp. 350 and 351.

and value-added outsourcing[66] providing for an allocation between the parties of risks, obligations and liabilities, in line with general legal principles, as part of a contract of co-employment that is advantageous also to the employee.
As shown by the most highly developed and mature markets[67] there is an evident trend, in outsourcing and insourcing, towards the development of a work-force that is highly qualified and adaptable, which is utilized to cover strategic positions in contractual relations between networks of companies.[68] This confirms the trend, highlighted by the European Commission in the *Green Paper* in 1997, towards a partnership for a new type of work organization,[69] in which the contribution of human capital in the productive process is of key importance, so that the employee becomes the critical factor in creating added value in the network of contractual relations between undertakings.[70]

5. The New Framework for Outsourcing: From the Distinction between Core and Peripheral Employees, to Contractual Integration

The recent changes in the system of production and the organization of labour, with new human resources management strategies, gave rise to the need not only for a radical rethinking at a conceptual level of the model theorized in the literature by Atkinson[71] – with a distinction between core and peripheral employees,[72] but also and above all for the updating of the legal framework. This is particularly the case for a country such as Italy, where outsourcing

[66] Extensive case studies are examined in Millar, J. 2002. *Outsourcing Practices in Europe*, Star Project, No. 27, esp. p. 12 (available at bollettinoADAPT.it, A-Z index, under the heading *Esternalizzazioni*).
[67] Millar, J. *Outsourcing Practices in Europe*, cit., pp. 28-29, and p. 35.
[68] Huws, U., S. Dahlmann, and J. Flecker. *Outsourcing of ICT and Related Services in the EU*, cit., 3-4, pp.17-18.
[69] European Commission on *Partnership for a New Organisations of Work*, cit.
[70] For an in-depth examination see Golzio, L. 2005. "L'evoluzione dei modelli organizzativi d'impresa", *La riforma del mercato del lavoro: deregolazione o riregolazione? – La 'Legge Biagi' nel confronto comparato*, ed. Serra, C., Milano: Giuffrè.
[71] Atkinson, J. 1984. "Manpower Strategies for Flexible Organisations", *Personnel Management (PM)*, 28-31. See also Atkinson, J. 1985. *Flexibility, Uncertainty and Manpower Management. Institute of Manpower Studies*. Brighton: University of Sussex; and Atkinson, J., and N. Meager. 1986. *New Forms of Work Organisation*, IMS Report 121, IMS.
[72] Purcell, K., and J. Purcell. "In-sourcing, Out-sourcing e Lavoro Temporaneo", *cit.*, 344. On the same point, see also Russo, A. *Problemi e prospettive nelle politiche di fidelizzazione del personale*, *cit.*, esp. pp. 260-264.

processes were governed[73] by provisions that were extremely rigid in practical terms but quite ineffective in terms of enforcement. The result was the expansion of unregulated outsourcing,[74] by means of the extensive use of the contracting out of services, but also quasi-salaried or para-subordinate contracts such as *collaborazioni coordinate e continuative* that may be seen as an extreme and individualized form of outsourcing with serious consequences for human capital in the Italian economy.

The core-peripheral employee distinction appears to have been the basis of Act No. 196/1997, serving to overcome the rigid ban on temporary agency work.

Under the terms of Article 1 (1), Act No. 196/1997, agency work was permitted only to satisfy "needs of a temporary nature", and therefore only for the exceptional cases laid down by law or by collective bargaining. The consequence of this provision, along with the ban on temporary agency work for low-skilled occupations, was that only a small proportion of the new forms of outsourcing emerged from the hidden economy to become regular employment. Certain legal scholars pointed to the hypocrisy of this Italian form of agency work, describing it as "a new practice totally useless as currently regulated. The harsh truth is that it is simply a duplication of fixed-term contracts, marketed as an important new flexibility measure".[75]

The effect of the measures introduced by Act No. 196/1997 was the reaffirmation of the inderogable abstract norm "coupled with subsequent scrutiny of the courts that has so gravely undermined the certainty of the law and planning by companies in relation to fixed-term contracts".[76]

Moreover, in this perspective temporary agency workers, though covered by far-reaching legislative provisions with the highest degree of rigidity and labour protection in Europe,[77] inevitably ended up in the area of precarious

[73] See, among others, Ichino, P. "Spazi attuali e prospettive del leasing di manodopera", *Rivista italiana di diritto del lavoro (RIDL)*, 1992, III, p. 119 et seq.; see also Id., *La disciplina della segmentazione del processo produttivo. Introduction and conclusions*. Giornate di studio Aidlass di Trento del 4-5 giugno 1999, available in AA.VV. 1996. *Diritto del lavoro e nuove forme di decentramento produttivo*, Milano: Giuffrè, p. 3 et seq. and p. 361 et seq.

[74] I attempted to argue this point in 1992. "Il lavoro temporaneo in Italia", *Diritto delle Relazioni Industriali (DRI)*, No. 1. On the risks of outsourcing of poor quality, in the absence of an adequate legal framework, see the European Commission. 1993. *White Paper on Growth, Competitiveness and Employment*, esp. Chap. 9.2.

[75] See Vallebona, A. 1997. "L'ipocrisia del lavoro interinale all'italiana", *Argomenti di diritto del lavoro (ADL)*, pp. 135-136.

[76] *Ibid.*, pp. 137-138.

[77] For a comparative overview, see my: 1999. *Lavoro temporaneo e somministrazione di manodopera*. Torino: Giappichelli, Chap. V.

employment.[78] This was the case even when they had been hired on open-ended contracts by a multinational company in the sector, in line with standard employment practice, so that in terms of trade-union representation, they were quite unjustifiably grouped together with para-subordinate workers.[79] This was the case even though Italy, which is characterized by what is usually known as "horizontal" trade unionism, was not characterized by the sharp decline in the Fordist model in the same way as countries in which unionism is mainly or entirely of the "vertical" type.[80]

The framework adopted in Legislative Decree No. 276/2003 moves beyond the core-peripheral worker model in which temporary agency work was seen as a form of precarious and marginal employment, to be permitted only in exceptional cases. Temporary agency work becomes the driving force – in the presence of technical, organizational or productive reasons – for the outsourcing and insourcing of labour in connection with the specialization of production and the organization of work as a network that is the hallmark of the new economy.

In such an economy, Italian companies have more opportunities to legally make use of external labour markets, so that their organizational strategies no longer depend exclusively on the consideration of labour costs, but rather on transaction costs or the cost associated with the various types of labour contracts available.[81]

In the light of the variation in transaction costs in each company and productive sector – i.e. the costs of taking decisions and gaining experience, administrative costs (with regard to the management of contracts and labour relations) the cost of change, and of moving from one contract to another – agency work cannot simply be considered to be equivalent to fixed-term employment. Rather, in the framework of Legislative decree No. 276/2003, it provides a kind of organizational and managerial specialization promoting flexibility in employment but also, and above all, the modernization of the system of production by means of models of contractual integration between enterprises coordinated by qualified employment professional providing a range of services, in employment agencies.

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[78] In this perspective, see Vallebona, A. 1996. *La riforma dei lavori*. Padua: Cedam.

[79] The statutes of NIDIL, ALAI. CPO group together parasubordinate workers, temporary agency workers, and those taking part in socially useful work schemes.

[80] On this point, see Supiot, A. *Beyond Employment etc.*, cit., esp. p. 17.

[81] Williamson, O. E. 1975. *Markets and Hierarchies: Analysis and Antitrust Implications*. New York: Free Press; see also Golzio, L. "L'evoluzione dei modelli organizzativi d'impresa", cit.

It is in this perspective that it is possible to explain, first of all, the introduction of open-ended agency work (staff leasing). In an attempt to govern and regularize forms of labour which took place in dubious conditions and without any form of protection for the workers, Legislative decree No. 286/2003, laid down a series of reasons relating to technical, productive and organizational matters, which, in competition with the present system of contracting out of services, and quasi subordinate contracts, make it possible *ex lege*, without having to specify particular conditions, to make use of staff leasing. In general it is used for specialized services that can be carried out in a more effective manner, exploiting economies of scale, supplied by those with the technical and vocational requisites laid down by law: cleaning services, storage, facility management; transport services to and from the workplace, and the transport of machinery and goods; the management of libraries, parks, museums, archives, warehouses, as well as general supplies; construction work within the workplace, the installation and dismantling of plant and machinery for particular productive activities, with specific reference to building sites and shipyards, requiring further stages of production; and personnel with different skills from regular employees.

These measures are accompanied by others that are particularly innovative in support of the productive system and organizational innovation of the enterprise, i.e. specialist activities such as management consultancy, certification services, resource planning, organizational development and change, personnel management, selection and recruitment of personnel, information technology consultancy services, including the planning and management of intranet and extranet systems, websites, information systems, the development of software applications, and data entry; marketing, market research, the organization of sales departments, the management of call centres, and all the activities connected with the setting up of new businesses in the Objective 1 areas under EC regulation No. 1260/1999, 19 June 1999, with general provisions on Structural Funds.

These activities can be carried out both by generic temporary work agencies and, with reference to specific activities, by specialized agencies. Compared to contracting out, the undoubtedly higher cost of the services provided by employment agencies (bearing in mind also the four per cent deduction for social insurance purposes and the rule of equal pay and conditions) is in all probability offset by the quality of the services offered, which, in many cases, consist of highly specialized services that can only be carried out by suitably qualified staff with adequate training (also thanks to the training fund under Article 12 of the Decree). Nor should it be forgotten that temporary work

agencies are exempt from the procedural requirements for collective dismissals and from the obligation to reserve a fixed number of places for workers with disabilities. Legislative Decree No. 276, 10 September 2003, also makes provision for staff assigned by a temporary work agency to a user undertaking to be excluded from the calculation of the number of staff "for the purposes of legal or collective bargaining obligations".

Also in normative terms, then, temporary agency work is encouraged as an alternative to contracting out. It seems to be paradoxical to consider staff leasing to be "an instrument that combines many of the characteristics of precarious employment"[82] when the employees, in these cases, as well as being able to rely on a dual employer, are often hired on open-ended contracts.

Alongside the different types of employment laid down by law, powers are delegated to collective bargaining, either national or territorial, to identify, also in relation to activities that are by no means marginal to the productive cycle of the user enterprise, further possible uses of agency work and staff leasing. The task of expanding this type of employment beyond the cases laid down by the legislator is therefore entrusted to the social partners, with a view to reducing the area at present covered by contracting out, that provides much less protection for the employee.

As shown above, except for the establishment of new businesses in Objective 1 areas and the management of regular salaried employment in call centres, it will not be possible, as suggested in some quarters (including those who have spoken of "Chinese boxes") to restructure or empty companies and run them entirely with agency workers. Staff leasing will be allowed only for marginal cases and for jobs that are normally contracted out; in addition to these cases, staff leasing will only be permitted in the cases provided for in collective bargaining (also in this case, as in the decree as a whole, with only the comparatively most representative trade unions able to authorize new types of temporary work).

This situation cannot then be described as an "overblown version of temporary work as provided by the Treu measures".[83] Rather, the new regime – in proposing a unified solution to the problem of labour intermediation[84] –

[82] As argued by Lamberti, M. 2004. "Ragionando di esternalizzazioni: la prestazione di lavoro nei contesti multidatoriali", *Sviluppo e occupazione nel mercato globale*, ed. Ferraro, G., Milano: Giuffrè, p. 408.

[83] Lamberti, M. "Ragionando di esternalizzazioni: la prestazione di lavoro nei contesti multidatoriali", *cit.*, p. 407.

[84] The decision to draft a consolidating act on temporary agency work is supported by Ichino, P. "Somministrazione di lavoro, appalto di servizi, distacco", cit. esp. p. 261, and Bano, F. "La somministrazione di lavoro", *Impiego flessibile e mercato del lavoro*, *cit.*, esp. pp. 13-14.

provides not only a significant opportunity for employers, in relation to outsourcing, but also a significant improvement in the protection of employees, particularly those employed by subcontracting firms, or even worse as quasi subordinate contracts, without adequate regulation.

In considering open-ended agency contracts, that normally provide more stable employment and protection for the worker in flesh and blood (and not just on paper), as "a much more dangerous form of employment than temporary agency work",[85] clearly certain legal scholars and part of the trade-union movement have agreed to the legalization of this type of employment contract only insofar as it is classified as precarious and atypical, to be drastically restricted, and allowed only in exceptional cases.

However, this highly critical position is indicative of a reluctance to design and implement new organizational and managerial models for increasing the level of protection of workers. Rather, due to ideological reasons and the presumption that the employer and the user should be one and the same entity,[86] there is a tendency to confine workers to contractual arrangements that may well be less gratifying and provide less protection.

In terms of legal provisions, from this point of view there have been significant innovations with regard to temporary agency work, in that it is specified that "temporary agency work is permitted in the presence of technical, organizational or productive factors, or for the substitution of workers, also in connection with the day-to-day business of the organization". This leaves the matter to be dealt with in a flexible manner by employers, within the framework of collective bargaining, enabling them to decide on company organization, based on the needs of the enterprise, the organizational and managerial know-how, the productive sector, and the conditions requiring the enterprise to adapt continually to the market, in line with the life-cycle theory.[87] All of this is based on the belief that in the new economy the

[85] See, among others, Bonardi, O. 2003. "La nuova disciplina della somministrazione di lavoro", *Il lavoro tra progresso e mercificazione – Commento critico al decreto legislativo n. 276/2003*, ed. Ghezzi, G. *cit.*, esp. p. 124.

[86] For a critique of the argument that the employer and the user undertaking should be one and the same entity, based on the principle of salaried employment, see Ichino, P. "La disciplina della segmentazione del processo produttivo", cit., p. 24.

[87] Schuler, R. S., and S. E. Jackson. "Human Resource Management in Context", cit., esp. p. 127.

legislator cannot decide on the models of work organization, at an abstract level, once and for all, on the basis of meticulous legal classifications.[88]

It is in this perspective that it becomes possible to explain why, subsequently, in the framework of Legislative Decree No. 276/2003 the temporary nature of business requirements[89] ceases to be a key factor, since agency workers may be employed also in relation to "the day-to-day business of the company".[90] In other words, and in line with the provisions for hiring on fixed-term contracts in Article 1 of Legislative decree No. 368/2001,[91] the Italian system once again focuses on combating fraudulent labour practices in the area of temporary work,[92] while moving beyond a rigid approach to the management of the workforce. This is in contrast with certain case law rulings handed down over the years providing an interpretation of Act No. 1369/1960, which tended to place constraints on the flexible management of the workforce.

The delegation of powers in Act No. 30/2003 reflected the anti-fraudulent aim of the new provisions, with a view to prohibiting, or suppressing fraudulent labour practices infringing the rights of workers, by means of the new definition of fraudulent labour intermediation laid down in Article 28 of Legislative decree No. 276/2003. A key objective of the decree, in compliance with the European proposals for regulating agency work, is the repeal of all those provisions aiming to place rigid constraints on the use of agency work, even where they are not required for the purposes of protecting workers' rights. Article 4 of the proposal for a European directive is categorical in stating that restrictions and prohibitions on the supply of labour are permitted only if based on the general interest and, in particular, on the need to protect workers' rights, and that as a result Member States are required to repeal all restrictions and prohibitions that are not justified on these grounds.[93]

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[88] On this point, Ichino, P. *Lezioni di diritto del lavoro, cit.,* esp. p. 241, who argues that it is not possible to establish in abstract terms, which model of company management, is preferable: the vertical model or the new network model.

[89] This matter is dealt with in Article 1 (1) of Act No. 196, 24 June 1997. On this point see Biagi M. *Mercati e rapporti di lavoro, Commentario alla legge 24 giugno 1997, n. 196*, cit.

[90] Art. 20 (4), Legislative Decree No. 276/2003.

[91] See Tiraboschi, M. "Apposizione del termine", *Il nuovo lavoro a termine. Commentario al D.Lgs. 6 settembre 2001, n. 368*, *cit*.

[92] On the original aim of labour regulations to combat fraud, see Giugni, G. 1978. "Intervento", *Il lavoro a termine, Atti delle giornate di studio di Sorrento AIDLASS,* 14-15 aprile 1978. Milano: Giuffrè, p. 125 and, with specific reference to agency work, Cessari, A. 1961. "In tema di interposizione nelle prestazioni di lavoro", *Il diritto del lavoro(DL)* 1. p.128 et seq.

[93] In general, on the need for EU institutions to provide a favourable environment for businesses, see European Commission. 2005. *Annual Report on Structural Reforms* –

This explains why for the purposes of evaluating the reasons laid down in Article 20(3)(4) of Legislative Decree No. 276/2003, that make provision for temporary agency work, judicial control is to be exercised exclusively in compliance with the general principles of the legal system, and limited to ascertaining the existence of the factors that justify the use of this kind of employment contract, and cannot be extended to the examination of the technical, organizational and productive choices of the user undertaking. Just as the legislator cannot establish, in abstract terms, how an enterprise is to be run, nor can the courts intervene in the legitimate choices of management, and they should therefore concentrate on situations in which illegal or fraudulent activity takes place.

In this connection no less importance is given to the provisions on contracting out. Under the terms of Article 29 of Legislative decree No. 276/2003, for the purposes of applying the norms relating to temporary agency work, "the contracting out agreement, drawn up and regulated under the terms of Article 1655 of the Civil Code, is to be distinguished from temporary agency work due to the organization of the necessary resources on the part of the contractor, that may also lead, in connection with the needs arising from the work or services to be supplied under the contract, to the exercise of organizational and management powers in relation to the workers employed for the contract, as well as the transfer of the business risk to the contractor". This is in line with the provisions of Article 20(2), which specifies that "for the entire duration of the assignment, the workers perform their tasks under the management and control of the user undertaking".

The framework put in place by Legislative decree No. 276/2003 does not, as some legal scholars have argued, result in radical changes to the regulatory framework. Making use of delegated powers, the legislator simply consolidates and extends certain case law rulings[94] aiming to bring the application of existing legislation into line with changes in the economic and productive system. For some time the Cassazione had recognized as legitimate the contracting out of functions which, though consisting only of labour, were considered to be services carried out under the autonomous management of a contractor.

Increasing Growth and Employment, Brussels: European Commission, ECFIN/EPC (2004)REP/50550 final.

[94] See De Luca Tamajo, R. "Le esternalizzazioni tra cessione di ramo d'azienda e rapporti d fornitura", *I processi di esternalizzazione. Opportunità e vincoli giuridici*, cit., pp. 45-46, including extensive bibliographical and case law references.

It must be pointed out that, in the light of the new legal provisions, in order not to engage in illicit intermediation, there is a need to demonstrate the genuine nature of the contract, by means of two key characteristics: the organization of the necessary resources – resources, it is important to note, that may be intangible – and the management of the contract with the contractor taking on the commercial risk.

A particularly important role, with a view to increasing the degree of certainty in outsourcing, can be played by certification bodies. Also because, pursuant to Article 84 of Legislative decree No. 276/2003, employers will soon have the option of adopting codes of good practice and indicators relating to illicit intermediation and genuine contracting out, taking account of the organization of resources and the effective transfer of the business risk from the enterprise to the contractor.

The repeal of Act No. 1369/1960, and the related prohibitions of intermediation in labour relations in Act No. 264/1949, does not in any way result in the abolition of the civil and criminal sanctions laid down in cases of violation of the regulations on private intermediation in employment relations. In support of the effectiveness of the new legal framework, specific criminal sanctions are provided in the case of the illegal exercise of private intermediation, with an even stricter set of provisions relating to the exploitation of child labour.

It must be noted that in comparison with the preceding legal framework, the principle of equality of terms and conditions of employment between the employees of the company and those of the contractor in the case of "internal" contracts has been abolished. But as noted, this was a formal provision largely disregarded in day-to-day practice, and was considered to be anachronistic in relation to developments in working methods.[95] What appears to be more effective, and useful for striking a new balance between the demands of the system of production and the need for labour protection, is the principle of joint liability between the principal and the contractor, provided in Act No. 1369/1960, for the remuneration and social insurance contributions due to the employee in all cases of contracting out.[96]

This is a simple rule, but it is of great practical value, and not only with a view to safeguarding a larger number of workers involved in outsourcing. On close

[95] De Luca Tamajo, R. "Le esternalizzazioni tra cessione etc"., *cit.*

[96] This principle, initially adopted in Legislative Decree No. 276/2003 only for the contracting out of services, was later extended to all contracting out in Article 6(1) of Legislative Decree No. 251/2004, "with the exception of provisions in national collective agreements concluded between the employers' associations and comparatively most representative trade unions".

inspection, the full implementation of the principle of joint liability, by which also the principal becomes liable for the remuneration and contributions of the employee, means that those who opt for contracting out will tend to look to well-managed, trustworthy and highly qualified companies, and this works to the advantage of the process of specialization of Italian enterprises.

6. Promoting Labour Law in a Human Resources Perspective

The implications of the Biagi reform are undoubtedly far-reaching, especially in terms of human resources management and the proper functioning of the labour market. It has been quite rightly noted in this connection that employers and legal experts are now required to become more aware of the role that they can play: only in this way will it be possible to "understand the processes set in motion by the new law and to apply the contents in a coherent and balanced way with the intention of improving the functioning of labour markets, both internal and external".[97]

The changes to the framework in place before the reform are undoubtedly numerous, and all of them are far-reaching both at a technical and at a practical and operational level. This is particularly the case with the new system for regulating labour outsourcing. In order to make labour law once again both effective and credible, the legislator chose to provide enterprises with a regulatory framework that is both flexible and enforceable in practical terms, and the implementation of this framework becomes the responsibility of human resources managers, on the basis of technical, organizational and productive factors, in negotiation with the trade unions. This results in an increase in opportunities for enterprises to make legitimate use of the external labour market and as a result to rethink their models of labour organization in the belief – shared by the Community institutions[98] – that only by governing the changes under way will it be possible to maintain and develop the human capital of a given productive system.

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[97] See Treu, T. "Riforma Biagi e nuove regole del mercato del lavoro", *Sviluppo e occupazione nel mercato globale*, Ferraro, G. *cit.*, 155, esp. p. 169, in which he states that "this objective should be shared by all those concerned, regardless of the reservations and criticisms relating to legislative choices". In a similar vein see my chapter on "Il decreto legislativo 10 settembre 2003, n. 276: alcune premesse e un percorso di lettura", *La riforma Biagi del mercato del lavoro*, ed. Tiraboschi, M., cit., pp. 3-30.

[98] European Commission. 2002. *Anticipating and Managing Change: a Dynamic Approach to the Social Aspects of Corporate Restructuring*, esp. p. 2, available at bollettinoADAPT.it, A-Z index, under the heading *Lavoro (organizzazione del)*.

From this point of view – as recognized by Tiziano Treu[99] – "the shock resulting from the new provisions may provide a good opportunity to rethink traditional human resources management techniques". What is clear is that a profound change is taking place in thinking about labour law and about the labour protection measures that characterize it.

The Biagi reform provides us with a human resources law that conceives of the employment regulations not simply as an arid set of norms, that are the prerogative of a select group of specialists, but rather as an instrument at the service of employees and enterprises in line with the most recent developments in working and production methods, that place the human factor at the centre of the competitive scenario. In the belief that only by governing real normative processes – and not by means of prohibitions and constraints that have become an excessive burden, to the point that they give rise to illegal practices – is it possible to safeguard employment quality and investment in people as the key competitive factor, and therefore as the capital of the enterprise.

[99] Treu, T. "Riforma Biagi e nuove regole del mercato del lavoro", cit., p. 156.