Financial Participation of Employees: The Italian Case*

1. Deep Roots

Employee financial participation has rightly been compared to "a seemingly underground stream of the Italian industrial culture".[1] Yet it reveals deep – although controversial – roots in the history and experience of Italian industrial relations.[2]

The notion of "economic democracy" became the subject of a lively economic and legal debate at the turn of the last century, even before the emerging of the harmonious and non-conflictual perspective underpinning capital and labour relations, which was typical of corporatism and Catholic social teaching. This aspect clearly emerged for the first time in the Italian political arena in the late 1920s, when a number of bills – which were never converted into laws – were put forward concerning employee share ownership and profit sharing.

This aspect was again considered – although not too enthusiastically – by the Civil Code, first, and by the Constitutional Charter, afterwards (cf. next §).

---

* *The present contribution was produced in 2002 in collaboration with Marco Biagi and was previously published in Quality of Work and Employee Involvement in Europe. The Hague: Kluwer Law International.*

[1] On this subject, see cf. Pessi, R. 1996. "L'azionariato dei dipendenti ed il sistema italiano delle relazioni industriali", *Le azioni del futuro. Privatizzazione partecipazione responsabilità*, Various Authors, (Rome: Ufficio Studi delle Relazioni Industriali e Amministrazione, Telecom Italia), p. 237.

[2] A similar consideration holds true also at a European scale. In Germany and the United Kingdom, in particular, the first bills date from the mid-19th century. Cf., Gabaglio, E. 2001. *Foreword. Lavoratori e capitale d'impresa in Europa.* Roma: Edizioni Lavoro, p. 11.

Therefore, this issue has undergone different phases, periodically surfacing in the academic, union and political debate, yet without so far becoming a well-established law discipline.

In spite of a significant number of tests and experiences – which undoubtedly point to a revived interest towards the issue – practice shows that no progress has been made,[3] at least in comparison with other national legal systems.[4] It lacks a modern statutory framework, which would be necessary to support its effective dissemination and establishment in our country, as also urged at a community level.

Council Recommendation No. 92/443/CEE of July 27th 1992, concerning the financial participation of employees in enterprise results and profits (including employee share ownership),[5] required Member States to amend their national legal frameworks in order to promote employee financial participation, also through any form of financial or tax allowances. Yet this recommendation has not been followed up by any action, save for a 1997 provision, which was not sufficient to support or to further develop the concept.[6]

Furthermore, if one considers the industrial relations actors, the recourse to employee financial participation was met with strong opposition by employers (Confindustria) and most of the trade union movements, chiefly Cgil, in spite of being backed by Cisl. The fear was that of questioning the pluralistic and conflictual rationale featuring the traditional industrial relations model, which was in place in Italy since the post-war period. This is useful to understand the ambiguous attitude on the part of trade unions towards employee financial participation, in Italy as elsewhere.[7]

[3] As recently and authoritatively stated by Schlesinger, P. 2001. "Un fenomeno con un significativo rilancio, ma senza rilevanti sviluppi,"*L'impresa al Plurale, Quaderni della partecipazione*, No. 7/8, p. 379 ff.

[4] Cf. Poutsma, E. 2001. *Recent Trends in Employee Financial Participation in the EU.* The European Foundation for the Improvement of Living and Working Conditions – European Commission. Cf. also for a brief overview, the European Foundation for the Improvement of Living and Working Conditions. 2001. *Recent Trends in Employee Financial Participation in the EU.* Dublin: Eurofound.

[5] In GUCE n. L 245 dated August 26 1992, pp. 53-55. Cf. also, at a Community level, the European Parliament Resolution dated January 15 1998 on the Commission Report on PEPPER II – The Promotion of Employee Participation in Enterprise Results and Profits (including Employee Share Ownership) in the Member States (COM(96)0687 – C4-0019/97).

[6] See Legislative Decree No. 314/1997 and *infra*.

[7] See Gabaglio, E. *Foreword*, p. 11.

2. The Legal Framework and its Limits

The main regulatory principles concerning employee financial participation are laid down in the 1948 Constitution and in the 1942 Civil Code. Article 46 of the Constitution sets forth that:

The Republic recognises the rights of workers to collaborate in the management of enterprises, in the ways and within the limits established by law.

Article 47 continues:

The Republic encourages and safeguards savings in all forms. It regulates, coordinates and oversees the operation of credit. The Republic promotes the access through citizens' mutual savings to the
ownership of housing and of directly cultivated land, as well as to direct and indirect investment in the equity of the large production complexes of the country.

Although these two articles are generally referred to when it comes to employee financial participation in the enterprise profits, no specific indication is found in the rules and regulations that have been enforced.
No follow-up can be tracked on Art. 46, where only the employees' support to the running of the enterprise is dealt with. Similarly, Art. 47, paragraph 2, refers to *favouring direct or indirect share investments in the country main sectors* concerning *people's savings as a whole*, therefore without specifying if we are dealing with employees' savings only, or with an investment in the company's capital made by employees individually".[8]
It is also true that the Constitutional bills are too vague and do not contribute to solve the practical and theoretical moot points regarding employee shareholding. They mirror a deeply rooted disagreement among the main schools of thought over the way in which employee participation in the enterprise results works, as well as how the notion of "capital" should be conceived. This controversy has not been settled so far, and even though it was never turned into open opposition, it characterised the perspective of the major political parties and trade unions. As a result, the issue of economic

[8] Schlesinger, P. 2001. *Un fenomeno con un significativo rilancio, ma senza rilevanti sviluppi*, in *L'impresa al Plurale, Quaderni della partecipazione*, No. 7/8, pp. 380-381.

democracy is now one of the most controversial and ambiguous subjects among the Italian industrial relations actors.

Hence, the backbone of the regulatory framework lies in the Civil Code. Pursuant to Article 2349, *"*In the event of an employee who participates in profit-sharing on an off-and-on basis, special forms of share schemes can be issued, the value of which corresponds to the profits themselves, to be distributed directly among the workers, according to special rules regulating their rights and the way shares are transferred".

§ 8 of Article 2441 provides that: "employees' right to share options is not to be applied when concerning a quarter of the newly- issued shares, if they are made available to employees by way of subscription, upon the decision made by the majority of shareholders, as required for extraordinary meetings. If the exclusion from share option schemes concerns more than a quarter of the newly issued shares, it must be approved by a majority vote as set out in the fifth paragraph".

Yet these provisions may not provide for the development of employee financial participation. The insufficient ground provided by Article 2349 and § 8 of Articles 2441 of the Civil Code has often been pointed out by legal opinion – either by chartered accountants and labour law experts. It is commonly held that, although allowed by the regulatory provisions, any employee participation in a company share scheme requires both incentives (tax and credit allowances) and sound and transparent legal rules, in order to help it become more and more established, socially relevant and "significant for the improvement of the participatory dimension of industrial relations".[9]

It is also true that complex draft reforms concerning the legal framework have been put forward recently, an aspect that fuels the doctrinal debate and points to the diverse but renewed interest in the issue of financial involvement of employees and shareholding.

Lawmakers have also tried to re-launch the idea of large-scale employee share ownership plans. The new wording of § 2 of Article 48, of the Consolidated Act on income tax, as amended by § 1, article 3 of Legislative Decree No. 314/1997, introduced a provision which in fiscal terms is particularly favourable to those companies issuing new shares for their own employees.[10]

[9] See, Treu, T. 1993. "L'accordo del 23 luglio 1993: assetto contrattuale e struttura della retribuzione," *RGL*, p. 232.

[10] This article provides that, in the event of a subscription for new shares pursuant to the last paragraph of articles 2349 and 2441 of the Civil Code, even if issued by controlled and controlling companies, the value of the foregoing shares does not contribute to make up the holder's income. Furthermore, article 6 of Legislative Decree No. 314/1997 provides that the

This addition was confirmed with the enforcement of a rule supporting listed enterprises, in order to promote the recourse to stock option plans, i.e. employees' rights to buy new shares.
Legislation on pension schemes is likewise important in order to promote the notion of "economic democracy". Long overdue, recent legislation on complementary social security[11] now provides new perspectives, allowing employees to opt for new institutional forms of "collective" investment, which might have an impact on the financial market and their savings, with important repercussions also on the Italian industrial relations system.
However, no structured rules and regulations have been put in place so far, as recommended by the European Union, to support and untangle this knot.
It is not therefore surprising that employee shareholding in Italy has not fully developed to date, as lacking modern regulatory basis providing the kind of support already supplied in many other countries.[12]
This is one of the reasons why, along with the traditional distrust expressed by trade unions and employers, and save for a few exceptions, the recourse to employee shareholding has to be considered limited.

3. The Modest Italian Experience

The importance and, in some cases, the uniqueness of the Italian experience – especially after the recent privatisation process of a number of public bodies shifting from State-owned companies to joint stock companies[13] – cannot be overlooked, at least from an industrial relations perspective. It should be highlighted how employee shareholding does not deserve the name actually, even in those cases where this financial participation formula has been put in

amount paid for the shares should be deducted from the social contributions. On this subject, see cf. Artina, V. 1999. "*L'emissione di stock options*," *Amministrazione & Finanza*, No. 3, spec. 5-9.

[11] See Legislative Decree No. 124/1993 and, especially, the changes introduced by Law No. 335/1995. In this regard, it should be recalled that § 15, article 2 of this provision excluded from taxable remuneration for contribution purposes «the difference between the market price and the privileged price granted to employees for the allotment of shares of their enterprise, the controlling or controlled enterprises, according to the law in force».

[12] A comparative review has been provided by the authors of this paper, in the framework of a research project funded by the European Commission during the first semester of 2001, aimed at the creation of a *forum* on the financial participation of employees. See the website: http://www.financialparticipation.org.

[13] Cf. Pedersini, R. 2001. "L'azionariato dei dipendenti nelle privatizzazioni italiane", *L'impresa al Plurale, Quaderni della partecipazione,* No. 7/8, p. 257 ff.

place.[14] The only significant exceptions that might be mentioned in such a complex and heterogeneous framework are the recent cases of Telecom and Alitalia.
After being privatised, employees at Telecom purchased shares amounting to more than 3 per cent of the company's share capital, thus becoming the majority shareholder. In the case of Alitalia, instead, employee shareholding was not less than 20% of share capital.

4. The Little Impetus of Trade Unions and the Clear Indications of the *White Paper*

As already mentioned, social partners took up different stances with reference to the issue of the financial participation of employees. Apart from Cisl, all the other trade unions expressed a lack of interest, if not their hostility, towards this issue.
A feeble attempt towards the systematic regulation was nevertheless made in 1998, with the conclusion between the Government and the social partners of the "Agreement on Concertation and New Trade Relations Policies for the European Integration and Transformation of the Transport System", on 23 December 1998.
As laid down by clause 4.6, the signatories agreed to "allow trade relations to evolve towards new participatory models in the ways envisaged by collective bargaining, aimed at involving all the workers' representatives in business decision-making". To support this initiative, "the Ministry of Transport *was supposed to submit* a specific bill to the National Transport and Logistics Council to promote and foster employee shareholding in transport firms".
What apparently seemed just a timely initiative at a sectoral level in order to help a critical and yet very active sector, was instead a major effort to re-launch the whole employee shareholding project.
By undertaking this commitment, social partners proved for the first time to be willing to overcome their traditional disregard towards this issue, if the following conditions were met:
– the development of a reference legal framework;
– employee involvement in the setting down of the objectives and the management of the economic strategies.

[14] Cfr. the cases presented in the review under note 12 are also available at: *www.financialparticipation.org*.

As far as industrial relations is concerned, two closely interrelated issues have to be taken into account: the amendment of the legal framework concerning the involvement of employees in business shareholding is not an end to itself, but in the views of the social partners and the Government, it was the juridical and institutional precondition for increasing the involvement of trade unions at the time of devising guidelines for the enterprises, while redistributing and widening the scope of share ownership.

From a methodological point of view, the perspectives referred to by the foregoing agreement implicitly contained some major indications that were already included in Council Recommendation No. 92/443/Cee of 27 July 1992, which admittedly urged Member States to "acknowledge the potential advantages deriving from a greater individual and collective use of a wide variety of employee participation in enterprise results and profits, such as profit sharing, share ownership, or a combination of different formulas".

It is true that the instrument adopted by the Council soon proved to be ineffective, if one considers the legally binding character of the provisions in different Member States.

Nevertheless, this does not mean that the foregoing recommendation was not right in highlighting two essential prerequisites for the effective implementation of employee shareholding in Europe.

In this connection, it is essential to review the existing regulations and ensure the involvement of social partners. These prerequisites had been made clear in the 1988 Agreement on the transport system. At a further stage of the project carried out at an experimental level, they could be extended to all the other sectors.

The amendments in legislation were not followed by any practical action. What remains is a draft project set up by the authors of this paper on behalf of the pro-tempore Minister of Labour Tiziano Treu.[15] It might now provide the basis for further discussion concerning any initiative carried out by lawmakers in the field.

Employee participation was given fresh momentum in the Government White Paper on the Italian labour market in October 2001. The European Commission itself has recently launched a new initiative, by submitting a working paper to the Member States, with the Italian Government that has also been urged to express its opinion on it.[16]

[15] See *Diritto delle Relazioni Industriali*, 2000, No. 1.

[16] European Commission. 2001. *Financial Participation of Employees in the European Union,* SEC(2001) 1308. Brussels: European Commission.

The issue should be taken into due account. From this point of view, an awareness-raising campaign is necessary to tackle what the Community paper defines a "cultural issue" and a "cultural deficit", in the sense that employees and their representatives feel excluded from financially participate in the company they operate.
In particular, in the White Paper, the Government has highlighted the importance to

verify financial participation formulas aimed at enhancing key workers' loyalty within small and small-sized enterprises, including tourism businesses and the artisan sector. From this point of view, it is necessary to re-establish joint venture partnerships, namely to resort to other forms of profit sharing, supporting these schemes also through adequate economic and fiscal incentives (item III.3).

5. Key Theoretical and Legal Issues

The issues associated with employee participation illustrated in the previous paragraphs, confirm once again the difficulties related to this question from the industrial relations point of view, rather than from the legal and the institutional one.
There are several and different objectives concerning employee shareholding. Arguably, profit sharing may be seen: as a tool to collect risk capital, as a privileged channel during privatisation and/or restructuring to foster the renewal of the company (also from a cultural point of view), as an alternative to collective dismissals, as a flexible wage system, as a way to reduce the risks associated with employees exiting the business, and as a means to strengthen workers' involvement in decision-making. Similarly, there may be several and different ways to resort to employee shareholding. The ambivalent nature of this instrument, as well as the variety of strategies that can be put in place both by the enterprise and trade unions, cannot but increase the feeling of distrust on the part of social partners, which run the risk of being circumvented by financial participation schemes, which are unilaterally defined by the enterprise and developed on an individual basis.

6. A Possible Hypothesis

It is precisely this aspect that confirms the need for a regulatory intervention to support employee shareholding. It is not to be intended as a means to stiffen employee participation in profit sharing, nor to predict the choice of both stakeholders and social partners. Here, a set of rules would be desirable only if aimed at stimulating the dialogue among social partners within the industrial relations arena, which would also encourage the setting up of experimental schemes.

Undoubtedly, legislative action, now and in the years ahead, shall concern the traditional tools intended to promote employee shareholding – such as tax allowances – as well as the adoption of innovative and farsighted policies, like those that have recently been enforced by the French and British governments.

From this point of view, the scope for tax-deductible expenses might be taken into account within the framework of the financial participation plan at the time of purchasing convertible bonds and shares according to set annual thresholds, as already experienced in some major foreign companies.[17] Like the allocation of bonus issues, public offerings or sale of shares in view of the implementation of a financial participation scheme, the employer overseeing this plan should be allowed to deduct the following items from taxable income:

– the interests, as well as the capital shares, accrued on loans granted to employees to buy or subscribe for shares;
– the difference between the share value, calculated on the basis of the enterprise net worth resulting from the last balance sheet duly approved, and the price at which shares have been offered to the employees for sale or for subscription;
– in the case of an offer of free additional shares (bonus issue), the whole share value shall be reckoned on the basis of the enterprise net worth resulting from the last balance sheet duly approved;
– the amount paid to financial institutions, credit institutions or pension funds to reimburse employee's expenses concerning the purchase or the subscription for shares;

[17] In some European countries, such as Denmark, France, and the UK, there are limits set for the amount of the annual allocation of bonus shares and the total amount of shares that can be bought by the employees. On the provisions regulating this issue, see cf. the EU Commission Report on Pepper II, *La promozione della partecipazione op. cit.* and also Poutsma, E. *Recent Trends in Employee Financial Participation in the EU, op. cit*.

Following the international experience, the entitlement to tax allowances might be dependent upon the inalienability of those shares sold within a financial participation scheme for a certain number of years starting from the actual transfer, as decided by the ordinary assembly meetings. Prior to the agreement with the employees' representatives, the financial participation schemes might provide for longer periods for the inalienability of shares to take place.

Furthermore, by means of an *ad hoc* rule, the legislator, in agreement with the stakeholders involved in collective bargaining, might also laid down the conditions to purchase or subscribe for shares within the framework of a financial participation scheme, also envisaging an advance on severance pay, the use of wage quotas or portions, the use of credit mechanisms and pension funds, derogating from the provisions set forth in article 6, paragraph 5, letters a) and b) of Legislative Decree No. 124/1993.

Taking into account the major changes occurred in the organisation of work, the involvement of all employees in financial participation schemes, including those working in controlling, controlled or associated enterprises, should not be underestimated. The same might be said also of the former employees who still have shares in the company as well as of those employed in quasi-subordinate employment.

From this point of view, and as implied by the statutory general principles, a specific provision might be useful to explicitly rule out any form of discrimination when taking part in forms of participation, in compliance with the principle of equal opportunities, based on the employees' status, assignment or length of service.

7. A Matter of Choice

It is clear that given a *de iure condendo* perspective, the actual question to be tackled is that of an alternative between individual and collective shareholding, as it is often pointed out by legal opinion. This alternative is a "political moot point for the future development of the financial participation of employees in profit sharing".[18]

If this objective was pursued by the employer on a merely individual basis, the financial participation schemes would not only have little to do with the issue

[18] Ghera, E. 1997. "L'azionariato dei lavoratori dipendenti,"*ADL*, 20.

of economic democracy, but indeed the role of trade unions, as well as their ability to represent, would be called into question.

Yet this question should necessarily be tackled by lawmakers rather than by social partners from an industrial relations perspective.

In defining its scope of action, any future legislative intervention should indeed restrict itself to recognise the legitimacy of a wide range of financial participation schemes, either unilaterally defined by the enterprise or agreed upon with trade unions. Once this broad definition of "financial participation schemes" has been approved, lawmakers should regulate the forms of representation of the employee shareholders, as well as the rights to information and control.

If this perspective is taken, the features of the associations consisting of both employees and shareholders should be redefined, in order to:

– pursue the exclusive goal of representing their members, by promoting information concerning the enterprise, the shareholders, the rights deriving from financial participation schemes and any other relevant information;
– explicitly set out in the memorandum of association and in the articles of association that the right to vote and those related to participate in the association of each member should be based on the *per capita* principle rather than on the capital shares within the association;
– include the employee shareholders of the enterprise, either in employment or retired, as well as former employees still possessing company shares;
– establish a minimum number of employee shareholders, each of whom owning a certain number of shares up to a maximum percentage of the share capital, including shares granting them the right to vote and represent themselves in the assembly meetings.

In compliance with the provisions set forth by article 141 of Legislative Decree No. 58/1998, these associations of employee shareholders would be entitled to enjoy the rights enshrined in articles 20-27 of the Workers' Statute, once the necessary adjustments have been made. The ways in which these rights should be enforced might be laid down trough collective bargaining.

However, the real knot to unravel is that concerning forms of representation in decision-making and/or regulatory bodies. From this point of view, we fully agree with the assumption that "such a legal change – far from having disruptive effects on the company governance – would be consistent with the transformation process of the large joint stock companies started up by

Legislative Decree No. 58/1998, which is aimed at empowering shareholders *without control* so that they have their *voice* heard within the enterprise".[19]
From a *de iure condendo* perspective, the point would rather be that of deciding whether to support a form of representation within the board of directors or the board of auditors, through a specific piece of legislation, that might have either a promotional if not a legally binding effect.

[19] Alaimo, A. 1998. *La partecipazione azionaria dei lavoratori. Retribuzione, rischio e controllo*. Milano: Giuffrè, pp. 210-211.