

1. Introduction: the current scenario.

One of the major challenges to be faced by OECD countries over the coming years consists in the rapid aging of the population, which is not accompanied by an adequate birthrate to mitigate the effects.

According to the forecast, by 2060, Europe will have a ratio between *Over65* (beneficiaries of pensions) and people aged 18 through 64 years (and therefore working age) of 50% ⁽¹⁾.

This troubling ratio derives from the interaction between opposing factors: the aging of the so-called "*baby-boom*" generation, the increase in life expectancy and a fertility rate in steady decline ⁽²⁾.

Analyzing the data from a perspective of their impact on the welfare system, it is clear that the aging of the population will bring a rise in costs and a decline in revenues, and will not be adequately counterbalanced by an increase in the number of active workers, who are a source of essential tax revenues and social security contributions ⁽³⁾.

The indicators are alarming: as things currently stand in OECD countries, by year 2050, the ratio between inactive *Elders* and people of working age will double from 38% in year 2000 to 70%. We will have, at that point, one inactive person for every 1.4 active persons.

In Europe, this rate will be one to one: one worker for every *Over65* ⁽⁴⁾.

An additional consequence will be a 15% decline in the average employment rate in EU countries by 2050 ⁽⁵⁾.

The situation will be further aggravated by positive data such as the expected steady growth in life expectancy: for instance, in the case of Italy, over the period between 2010 and 2050, life expectancy is expected to rise by 5.9 years for men and 5.4 for women ⁽⁶⁾; with the former reaching an average life expectancy of 84.5 years and the latter 89.5.

We will, therefore, witness a rise in what is referred to as "*dependency*" ⁽⁷⁾: the imminent rise in the number of people benefitting from health care and social security spending, and the long duration of these forms of *welfare*, will not be supported by growth in the number of working people who constitute the source of essential social security contributions. ⁽⁸⁾.

1 Eurostat, EUROPOP2008, Convergence Scenario, 2008 <http://ec.europa.eu/eurostat>.

2 OECD, *Live longer, work longer*, 2006, page 18.

3 Vodopivec M and Dolenc P., "*Live longer, work longer: making it happen in the labor market*", SP Discussion Paper no. 0803, February 2008, p. 2.

4 OECD, *Live longer, work longer*, 2006

5 OECD, *Live longer, work longer*, 2006

6 ISTAT, Demographic Indicators 2010, Rome, 24 January 2011.

7 This is the statistic that is calculated by dividing the population in active age (0-14 years and 65 years and older) to the working age (15-64 years) and multiplying this ratio by 100. The index is the total sum of juvenile and adult dependency ratios.

8 See the observation of Capacci G. ("*The demographic window of opportunity in Italy, why not exploit it?*", in European Papers on the New Welfare, 3, 2006, p. 202): "*Over the last fifty years, the proportion of people over 65 has doubled while the number of children was almost halved. Instead, the working-age population remained stable, mainly thanks to the baby boomers. This phenomenon - which is a period in which a greater number of people of working age keeps a lower relative number of elderly and young people as dependents - should be ruled as the positive phase, in which many pay contributions, followed by a negative phase, in which many pensions must be paid and this obviously will generate a dynamic financial meltdown because of the inability to cope with the exponential growth in pension expenditure ...*"

The situation is such that “...In the next twenty to thirty years, the demographic problem will dominate policies of all developed countries; and there will be inevitable phases of serious turbulence. No country is ready to face this. There are no countries in which political parties are equipped to deal with dilemmas raised by this demographic trend ⁽⁹⁾).

2. In particular: the aging of the population in Italy.

Analyzing the data for our own country, the forecasts are even worse than the already dim forecasts concerning OECD countries in general.

The *Over65* population, as compared with the rest of the population, is not only rising, but it is rising at a faster rate as compared with the average for OECD countries, principally due to natural replacement rate ⁽¹⁰⁾ that is insufficient since it has been, on average, 1.3 per couple since 1990.

The Italian labor force have experienced a progressive aging, over the past few years.

The average age of the labor force in 2012 totaled 41.8 years on average (it was 39.8 years in 2005). Young people now represent less than 7 % of the assets, while the mature are now more than 12% ⁽¹¹⁾.

The basis of this phenomenon, are demographic trends: there is a progressive thinning of the more recent cohorts, compared to cohorts much more numerous among workers who have entered the market between the seventies and the nineties.

In particular, over the past few years, the *baby boomers*, the generation born between the beginning of the fifties and the first half of the sixties, have aged.

In addition to demographic changes, there have been some important trends in behavior. On the one hand the reduction of the participation of the younger classes, the effect of schooling grow, which has resulted in a tendency to postpone entry into the labor market to pursue a course of study (secondary or tertiary) .

On the other hand, a progressive increase in the rate of activity of more mature workers - in particular in the class 55-59 years old - who have an increasing tendency to postpone the exit from the labor market.

This in turn derives from several factors: first, the education of the masses, of which the baby boomers were the first recipients, which has resulted in a late entrance than average in the

9 **Druker P.**, “*Le sfide di management del XXI Secolo*”, Franco Angeli, Milan, 1999, pp. 52 and 53. It is impressive to see the ability with which the author was able to forecast many years in advance what now is one of the most important challenges that all European countries and especially Italy have to face.

10 The replacement rate is the one that measures the ability of a population to maintain its stable number the minimum rate is equal to 2.1. for each couple.

11 **CNEL**, *Report on the labor market 2012 - 2013*, the Special Committee of Information (III), 1 October 2013, p. 112

labor market and therefore the need to remain up to older age in order to gain their pension rights.

Italy is comparatively speaking not equipped with age management strategies, since “...unlike the countries of northern Europe, companies with personnel management policies based upon active aging concepts are much rarer ... the system of retirement due to old age, coupled with the system of unemployment indemnities, have given rise to, over the last decade, a continuation of the practices of early retirement for many older people who were still in their fifties, at least in the medium and large firms (and, in particular, in the banking sector). This has had a profound impact on corporate behavior; indeed, generally speaking, companies tend to adopt policies for active aging only to the extent that they cannot circumvent the issue using other instruments ...”⁽¹²⁾.

3. The various forms of Flexicurity: the inexistence of a unique model.

The changes introduced in our country with the reform of the system, coupled with the above-mentioned extension in average life expectancy and the consequent need for a balance in the welfare systems, make it urgently necessary to change the approach to the working lives of persons falling within the *Over50* segment.

To achieve this objective, the *Flexicurity* strategies suggested by the EU have become available, and yet it has been found that there is no single model of *Flexicurity* (but various different forms of *Flexicurity*), such that it is not possible to import to Italy an existing and successful model, such as the Danish one.

Each country has, based on the so-called *Flexicurity Matrix*, its peculiarities and lines of action: Italy, which has adopted a model with a poor level of *Flexicurity* (the so-called “*Mediterranean model*”), has identified as the main guidelines for modernization for *Flexicurity* greater flexibility (through a simplification of contractual instruments) and enhanced security through the adoption of *Life Long Learning* policies that would facilitate the individual worker keeping his job and maintaining his employability.

The latter course of action was found to be particularly beneficial for *Over50* workers who experience greater difficulties in relocating or in keeping their job, due to a number of factors, including, most importantly, a real or presumed professional obsolescence or poor adaptability to changes in the process or the product.

Indeed, “... Italy has a relatively high percentage of elderly population and an increasingly aging workforce. And even among the EU countries with the lowest employment rate of older workers, well below the EU average. One explanation is the lack of participation of adults

12 CNEL, *Report on the labor market 2011 - 2012*, the Special Committee of Information (III), 18 September 2012, p. 319.

(compared to the EU average) in *Life Long Learning* and, in particular, for low-skilled workers, who would, however, reap the greatest benefits” (13).

4. Proposals for action in the field of Italian Flexi(curity):

Contractual simplification and *Life Long Learning* policies constituted, in fact, the objectives underlying various draft laws related to the inclusion and the fight against segmentation of the labor market.

The reform of the labor market (Law 92/2012) has followed these guidelines only partially.

With reference to mature workers (*i.e.* one of the segments at risk of exclusion) the reform merely envisages forms of contribution incentives for their hiring, without in any way considering the need for updating and upgrading that is normally related to such hiring, repealing the job entry contract referred to under articles 54 through 59 of Legislative Decree No. 276/2003.

Thus, not only has the number of people affected by possible forms of hiring incentives decreased, but the training activities (albeit limited) associated with the abrogated job entry contract have also been suppressed (even though they were already limited).

The reform, then, introduced a framework for *Life Long Learning* (Article 4, paragraphs 51 through 68 of Law 92/2012) - in relation to which our assessment must be postponed since they lack the fundamental implementing provisions - in relation to which the indication of lines of activation at the individual and private law level as was suggested by the draft law 1079, and 2418 is totally lacking.

What rights does the individual worker have to the full implementation of *Life Long Learning* policies and against whom can he enforce these rights (the employer or the State)?

No clear answer emerges from a reading of Law 92/2012.

In this framework, we try to identify the instruments and policies that are currently available – pending the possible implementation of Law 92/2012 – for the application of *Life Long Learning*.

Considering the actual situation, we envisaged the possibility of, in future legislative reforms, using the apprenticeship contract as a job entry contract for the disadvantaged, including *Over50* workers who have been unemployed for over 12 months, and whether this would be fully legitimate both with respect to the EC legal framework and the internal legal framework on anti-age discrimination (Legislative Decree No. 216/2003 and Directive 2000/78/EC of 27

13 See *Position Paper* p. 14

November 2000), both with regard to Regulation (EC) No. 68/2001, of 12 January 2001 ⁽¹⁴⁾ and Regulation (EC) No. 2204/2002 of 12 December 2002 ⁽¹⁵⁾.

Starting, then, from an analysis of the concept of cause ⁽¹⁶⁾ of the employment contract, we propose an interpretation that allows for continuous adaptation to the social-economic and regulatory situation over time, introducing *Life Long Learning* to the causal structure of the employment contract.

In this manner, it would be possible to attain – with reference to older workers– the so-called “*Welfare of opportunities*” ⁽¹⁷⁾: the continuous updating of knowledge and skills, throughout all life stages, will enable workers *Over50* to evolve along with changes in the economy and with the features of the labor market “... where the nature of jobs changes very quickly, as certain jobs disappear while new ones are created” ⁽¹⁸⁾.

5. The cause in the employment contract.

Abandoning, therefore, the traditional idea of the cause as “*economic-social function*” of the contract ⁽¹⁹⁾, we have speculated – in line with the minority view (which is authoritative) in the scholarly doctrine - that the same represents the individual economic function pursued by the parties in the specific context in which they entered into the exchange.

14 Regulation 68/2001 establishes an exemption from the obligation to notify aid granted to companies that provide training to their employees. A distinction is made between “*training*” and “*general training*”: the first refers to a type of training involving teachings that are directly and principally applicable to the position occupied by the employee of the business aided and providing qualifications that are non-transferable (or transferable to a limited extent) to other companies; “*general training*” means training based on teachings is not applicable only or principally to the employee's present or future position in the assisted firm, but which provides qualifications that are transferable to other firms. The eligible costs of a training aid project are: the costs of teaching staff, travel expenses of the teaching staff and recipients of training, current expenses (materials, supplies, etc.), Depreciation of tangible assets, costs of consulting services, personnel costs for participants in the training project. The exemption does not apply if the amount of aid granted to an undertaking for a single training project exceeds the sum of 1 million euro.

15 This is a regulation on employment aid which applies only to aid aimed at the creation of new jobs. Its aim is to encourage businesses to employ disadvantaged and disabled people who would otherwise be excluded from the labor market. The jobs created must represent a net increase in the number of employees of the company and must be maintained for a minimum period of three years

16 The cause is one of the essential requisites of the contract and not the only one: it must therefore be coordinated with the presence of the parties' agreement, with the subject matter, with the form and with the fact that the will of the parties pursues interests that are worthy of protection.

In this attempt to coordinate itself with the other essential elements of the contract, the cause serves as a synthesis between the will and the subject matter of the contract. It represents the tendency of the consensus reached between the parties to produce a particular economic structure, which since it aims to achieve interests worthy of protection, becomes relevant for the legal system, producing rights and obligations under such legal system.

17 Which expressly mentions the “*White Paper*”, presented in May 2009 by the Minister of Labor Maurizio Sacconi found at: http://www.lavoro.gov.it/Lavoro/PrimoPiano/20090505_Presentazione_LibroBianco.htm

18 Let us see the White Paper cited in preceding footnote.

19 It is that approach which, on the basis of the German doctrine held that, in contrast to the French subjectivist theories, dating back to **Domat** and **Pothier** (who see the cause as the reason why one party undertakes, emphasizing the moment of strong will of the individual contracting party) believe that the cause is the objectification of the result that the parties, stipulating that particular contract, or transaction, intended to achieve. For a complete analysis of the historical evolution of the concept of cause, see: **Giorgianni**, *Cause (Dir. Priv.)*, In Enc. Dir, Milan, 1960, VI, p. 554-655 and **Sacco**, *The cause, in the Treaty of private law* directed by Rescigno, X, p. 322 et seq. Among the first supporters of the cause in the subjective sense while the repealed Civil Code 1865 was in force: **Giorgi**, *Theory of Italian bonds in modern law*, III, Florence, 1885, p. 43 et seq.; pages. 717 et seq. It 'was stated that “*In fact the cause, the interest in the objective sense (to the change of the status quo) and then functions through the tool of the contract, as it normally coincides with the interests of individual private will in determining the actual cause*” (**Betti**, *Cause of legal transactions in Novissimo Digest Italian*, III, Turin, 1957, p. 36). The cause in general, in addition to the authors cited below, see also: **Paolini**, *The cause of the contract*, Padua, 1999

Thus, according to Galantino ⁽²⁰⁾ training is “*part of the causal structure of the employment contract*” amounting to a right and duty of the worker ⁽²¹⁾, which corresponds to a clear obligation on the part of the employer, arising from the application of principles of fairness and good faith *in executives*, and specifically from the provisions of art. 1206 of the Civil Code (*mora credendi*) ⁽²²⁾ and 2087 of the Italian Civil Code ⁽²³⁾.

By following this structure, the cause becomes a dynamic element (and not a static elements determined in advance) which must consider the interest effectively and jointly pursued by the parties, which is quite distinct from subjective reasons (which would be, as such, irrelevant to the legal system).

Therefore, through the employment contract viewed in the current socioeconomic context, the parties aim not only to enter into an exchange of work and compensation, but also to acquire the professional skills that can be used in performing the work tasks and responsibilities referred to in the contract (so as to satisfy the employer’s need for adaptability and innovation of process and product) or on the labor market, if the worker were to face work transitions ⁽²⁴⁾.

The repercussion of such an approach is the emergence of a specific duty imposed upon the employer (hence a corresponding right on the part of the worker) to ensure that the worker is properly trained at the start of the work activities and whenever a process-related or product-related innovation is introduced, thereby ensuring the maintenance and updating of professional skills. To conclude otherwise would give rise to a clear breach of articles 1175 and 1375 of the Italian Civil Code.

Likewise, the same obligation is imposed on the employer if, in the legitimate exercise of its *ius variandi* (right to change), it assigns to the worker functions or roles that, in order to be fully carried out, require professional updating or adaptation.

Therefore, this is an obligation which cannot compress, the employer’s exercise of the constitutional right provided under Article 41 of the Constitution: the latter will, indeed, be free to make the business and organizational decisions considered most appropriate, without the employer’s power to terminate the employment relationship being conditioned upon the prior and necessary attempt to adapt the professional qualifications in order to avoid dismissal.

20 Galantino, *Atypical work, vocational training and professionalism of the dynamic protection of the worker*, in *Dir Rel Ind.*, 1998, p. 317 et seq and *Employment law*, Torino, 2008, pagg. 618 e 619.

21 This is relevant under Article. 2104 of the Italian Civil Code, since the performance by a person having the necessary expertise to ensure the proper performance of the contract would be diligent.

22 The rule, therefore, requires the employer, as a creditor of job performance to do everything necessary possible to facilitate the worker’s fulfillment of his obligations.

23 A rule which requires the employer to take all necessary measures to protect the physical and psychological integrity of the worker, his moral personality, which also includes professionalism.

24 Along these lines, see also: Caruso, *Employability, training and "capability" in models of legal regulation of labor markets*, report to Congress AIDLASS of Cagliari June 2006, p. 67 and 68

Conversely, and apart from the situation described above, the employee is entitled to a personal right to ongoing training, which he exercises individually: these are training initiatives that may either arise under Law 53/2000 or under the various provisions of the collective contract applied are the company or from specific subjective choices.

It is, therefore, the worker who finds it necessary to seek professional updating or retraining, even in the absence of specific changes in work organization or in the manner of performing his work duties.

Consider, for example, courses aimed at strengthening information technologies or language skills (in which *Over50* workers show particular shortcomings), even if they are used sporadically in the performance of work duties.

In such cases, the employer's position is, contrary to the situation described above, not active: it is not under a duty to organize the training program to be followed: it is called upon to take a position of disclosure and collaboration, doing everything in its power to ensure that the worker's right is fully satisfied.

Following the proposed approach would also mean that the parties to the contract must have an active and proactive role in the training: thus, the employer will be required to provide training at the beginning of the relationship and whenever there is a change in the work organization, which has an impact on the execution of the work tasks and responsibilities ⁽²⁵⁾.

The worker, for his part, is under a duty, pursuant to a principle of social responsibility and the provisions of art. 1227 of the Italian Civil Code ⁽²⁶⁾, to proactively safeguard his professional skills by planning specific training activities and periodic of checks and balances of his skills.

Finally, according to the principles of fairness and good faith (pursuant to Articles 1175 and 1375 of the Italian Civil Code), the employer is not only under a duty to facilitate the worker's legitimate training choices, possibly by changing his work hours, but is also required to provide the worker with all information in its possession for a smooth exercise of his right to continuous training.

If the employer fails to fulfill its training duty or illegitimately refuses to allow for the individual exercise of the right by the worker, it will be under a duty to pay compensation for damages.

Similarly, if the employee refuses to follow the training organized by the employer for that "*maintenance*" and updating of his professional skills, referred to above, he will be subject to disciplinary sanctions.

25 **Pisani** *Continuous Vocational Training, equivalence of tasks, just cause for dismissal*, MGL, 2004, p. 397) has correctly stated that "... when the new tasks require skills that differ from the previous professional experience, there would be a real burden on the employer to provide vocational training for workers, and such this reclassification would justify a legitimate change of duties"

26 Along these lines, see: **Guarriello**, *op. cit.*, p. 132.

A first step in the direction indicated above, it has been done recently on the renewal of the collective agreement and Confapi Federmanager, January 31, 2014 (²⁷).

Under this agreement, annex to art. 9, letter b), it was expressly stated that "*... the company must allow for the participation of managers in courses...*" while stating that "*... the manager is obliged to participate the course*".

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²⁷ CCNL Confapi e Federmanager, 31 gennaio 2014