Financial Participation by Employees in Co-operatives in Italy

Antonio Fici

Part I. Financial participation by employees in Enterprises

1. Introduction. The various significant profiles involved in financial participation by employees in Enterprises

The idea of financial (or economic) participation by employees in Enterprises, in the form of profit-sharing and share ownership, is not new.

The first example of this profit-sharing dates back to 1795 in the United States, while forms of profit-sharing were widespread in the nineteenth century in the United States, France, and the United Kingdom, where bodies to support this practice were also set up[1]. In 1819, French economist, de Sismondi, maintained that profit-sharing was a way of reducing the inequality and favouring social mobility[2]. After having been overlooked for a certain period of time due to the establishment of the neo-classical theory axioms, the interest in this question among economists was revived, especially in the 1980s, thanks to Meade and Weizman and their studies on enterprises and participation economy[3]. On the legal front, in 1917 a law was passed in France on the "limited company with participation by employees", based on which a famous Italian lawyer, Cesare Vivante, drew up a very interesting legal project on shareholdings by employees in joint stock companies[4]. For the whole of the last century, laws and practices related to financial participation multiplied in France, the United Kingdom, and the United States.

In more recent times, starting from the early 1990s, the debate has been significantly fuelled by the particular institutional interest that the community bodies have shown towards this question, especially in terms of the recommendation by the Council, first in July 1992[5], and then a memo from the European Commission in July 2002, in which financial participation is seen as "a *political priority* throughout the EU"[6]. At a community level there is a strong conviction that has also been expressed, as we shall see in greater detail later, that in addition to financial participation by employees being useful to the European economy, it may also contribute towards attaining the goals of the Treaty, especially as far as employment and social policies are concerned.

Here, we are looking at a 'political' priority that comes as no surprise. There is no doubt that there is a strong link between the fact that giving employees ownership of some of the enterprise profits and the setting up of a specific model for an enterprise is a remedy for the structural incapacity of the market to bring about a cohesive society, that is, to act as an instrument for economic democracy[7], if, as authoritative thinkers on the subject maintain, it is true that financial participation by employees may (where put together in a certain way) constitute an important technique for counter-balancing the more negative effects of capitalism at a company level.

This gives rise to the link between the question (only apparently) of prevalent economic relevance and the European economic-social model that is taking shape step by step.

The social-political profile of financial participation by employees per se, is sufficient to make this topic rather delicate. To this one must add the inevitable effect on the system of industrial relations and the role of trade unions, which have always taken up a position of extreme caution if not outright hostility in some cases, when it comes to financial participation. This caution and hostility may be put down to various factors, but most importantly to the fact that financial participation is considered as calling their traditional role of representing and defending the collective interests of employees into question, by means of a poorly recommendable blend of capital and work, resulting in a lessening of the tendency to assert claims.

There is, however, a widespread opinion in the most recent labour doctrine and within the community, that it would not necessarily follow that carrying out financial participation processes would result in a lessening of the importance of the trade unions, as there are forms of the former that rather than diminish actually elevate the role of the trade unions[8].

In fact, for both of these aspects, that is the

positive social relevance of financial participation and its possible negative effect on the trade unions function and the collective interests of employees, no single conclusion can be reached, and the answer varies in relation to the form and means of financial participation. Financial participation is a concept that is too broad to allow an opinion to be expressed, without first examining its contents. Whether on a political, social, or economic level, financial participation lays itself open to positive and negative evaluations, which are nevertheless legitimate. One needs to be aware of the fact that the correctness of any evaluation depends on the financial participation model considered in each case. In fact, one should speak of 'financial participations' rather than 'financial participation'. There is a plurality of models therefore, each of which corresponds to a different general 'philosophy' and different objectives, which may give rise to different, if not conflicting, effects[9].

In addition to being delicate for the reasons given above, the subject of financial participation is also technically complex, both from a financial analysis and from a legal point of view, and this document will deal mainly with the latter point of view.

In terms of economic analysis, the potential micro-economic and macro-economic effects of financial participation were evaluated, with conflicting results. There is however the deep conviction, which is also found in the European bodies, that financial participation results in improved productivity of an enterprise, due to co-operation among the employees. There is no lack of critics of financial participation, with the potential negative effects on both a micro-economic and a macro-economic level being highlighted. In our opinion, even when dealing with this aspect, any judgement as to the usefulness or otherwise of the practice, depends on the manner in which it is carried out.

From a technical-legal point of view, the complexity of the subject is due to the inevitable involvement of a number of disciplines. It involves labour laws, especially when implemented in the form of profit-sharing. It affects commercial law, especially where it is achieved in the form of holding a stake in the capital of the employer companies. As to this last point, since it affects the financial instruments (and perhaps companies listed on the stock exchange as well), in also touches on financial market law.

1.1. Subject and objectives of the report

The CONFIDENCE project intends dealing with the subject of financial participation in co-operatives by employees. It therefore aims to give a general picture of the topic of financial participation by employees, before analysing this topic in particular within the ambit of a specific type of legal format for running an enterprise, that is, a co-operative enterprise. The final goal in all of this is to promote an awareness of financial participation within the co-operative movement, and to suggest ways in which financial participation schemes can be put into effect, in line with the objectives and structure of a co-operative, as well as with the history and culture of the co-operative movement.

In addition, as can be seen in the official description of the project, the principal objective of this research is to be found in a wider cultural context, the nature and goals of a co-operative, especially in relation to its aspects of solidarity (particularly at a time when Italian company law is being reformed), corporate social responsibility, and in relation to the various stakeholders (employees, as well as users, suppliers, community, etc). More generally, it also looks at the means by which financial participation schemes can be put together that are able to simultaneously fulfil various ends other than simply economic ends, taking in social and employment factors as well: Increasing an enterprise productivity and contributing to economic development, increasing profitability and the quality of work (satisfying both the financial and personal interests of the employee), and favouring social cohesion.

A good part of this report will deal with financial participation by employees in co-operatives from a company law point of view, in order to determine what possibilities laws for Italian co-operatives (as reformed by the recent Legislative Decree no 6 of 2003) offer in terms of the diffusion and correct application of financial participation regimes for employees. In fact, while a good deal of reflection, both in terms of doctrine and by the European institutions, has gone into the potential economic and social advantages of financial participation, less attention has been given to analysing and comparing financial participation models from an organisational point of view, as well as the limitations, resulting from national discipline of the legal form of

companies, in which such participation is to take place. For these reasons, the form of financial participation that will be mainly looked at here is a stake in the capital (or, as we will see, the 'quasi' capital) of co-operatives.

2. Notions and models for financial participation by employees

2.1. General notions and models for financial participation

In its more general sense, the expression "financial (or economic) participation by employees" takes in all the possible scenarios in which employees are involved in various ways in the enterprise financial results[10], due to their being employees and in relation to the work done.

More specifically, the following normally fall within the notion of financial participation:

a) Those circumstances in which participation in benefits is 'direct', which means that the employee is given a sum of money that varies and is based on the profit made by the company (*profit-sharing*), or based on other profitability and/or productivity indices (*gain-sharing*).

b) Situations in which participation in the benefits is 'indirect', because the employees are allowed to hold a share in the enterprise capital (or quasi-capital), thereby allowing them to gain ownership of the economic benefits related to shareholdings, that is dividends, capital gains, etc (*share-ownership* by employees)[11].

The opinion generally held is that there are far-reaching structural differences between these two models of financial participation that show up in the objectives of the financial participation they produce[12]. Nevertheless, the two models are proposed and looked at together in the various analytical studies on the subject, and are promoted together in community documents on financial participation.

In the case of *profit-sharing* the employee receives a payment that varies in addition to a fixed salary. This is therefore a particular form of remuneration[13], a 'share' component of his entire remuneration package[14], a salary type financial participation that is linked to and takes place within the working relationship[15]. This is a form of financial participation that can easily be fully incorporated into the employment contract and thus becomes a fixed income that, for all these reasons, ends up being related exclusively to labour law and does not per se, have any consequences at an organisational level[16].

The possibility of employees being remunerated by being given part of an enterprise profits is covered by the Italian civil code in articles 2099, paragraph 3 ("The employee may also be remunerated in full or in part in the form of a share of the profits …") and 2102 (which deals with the notion of profit figures used for the purposes of calculating remuneration). Jurisprudence and doctrine also maintain that the participation form of remuneration is also subject to article 36 of the Constitution, that is, that in any event, the employee has "the right to remuneration that is sufficient to ensure that both he and his family are able to live a free, dignified life"[17].

The country taken as a point of reference for profit-sharing is France (which does not ignore forms of share-ownership)[18], where this is particularly developed in two forms, namely of '*intéressement*' (*aux resultants* or *à l'accroissement de la productivité*) and of *'participation'*, with the latter being obligatory for all companies that have more than 50 employees[19].

In the case of *share-ownership* among employees, it would not be possible to set up a link between financial participation and remuneration (except at the genetic moment, as we will see shortly)[20]. Here participation is only an occasion and not a cause in working and in the employment contract, from which it is kept separate and is based (not on the contract, but) on the (holding of rights to) ownership, within the area of company law[21]. Unlike the former type of participation, this form per se has clear consequences at an organisational level.

The Italian civil code contains some provisions related to joint stock companies that deal with share-ownership among employees. The new article 2349 of the civil code, dealing with the assigning of profits to employees by issuing special types of shares, which are to be assigned individually to employees, or financial instruments other than shares. The third paragraph of article 2358 of the civil code, allows an exception to the prohibition on companies to provide others with loans or give guarantees for the purchase or subscription to their shares, in favour of share-ownership among employees. The last paragraph of article 2441 that (with a view to favouring

share-ownership among employees) deals with the possibility of a certain number of newly issued shares (agreed upon by the majority foreseen for the extraordinary shareholders' meeting) being offered on a subscription basis to employees, excluding the members' rights to first option.

In terms of the Italian Constitution, there is some doubt as to whether article 46 (which recognises the right of employees to be involved in the management of companies, in the manner and within the limits laid down by law), includes share-ownership by the employees it refers to[22]. The provision in article 44, paragraph 2, is certainly more far-reaching, and for this very reason it also covers share-ownership by employees, in terms of which the Italian Republic favours access to public savings (including, obviously, those by employees) in the form of direct and indirect investment in the large production companies in the Country. Article 43 alludes to another phenomenon (that of the company belonging to the employees), and provides for certain companies or categories of companies to be reserved or transferred by law to communities made up of employees or users, (in addition to the State and public bodies)[23].

The *share-ownership* participation model is particularly widespread in the United States (especially in the form of ESOP, or *Employee Stock Ownership Plans*) and the United Kingdom (with a mutated form of the American ESOP, and now the more original AESOP or *All Employee Stock Ownership Plans*)[24]. In these countries *profit-sharing* is also widespread.

These two phenomena, *profit-sharing* and *share-ownership*, come into contact when the institution of a *profit-sharing* scheme provides for assigning the profits 'in kind' rather than in a monetary form (see art 2099, paragraph 3, civil code). This involves allocating shares or stakes in the employer company (given free of charge in relation to a partnership rights plan, but in practice constituting contractual or labour remuneration). In such a case, one talks about "profit-sharing on a share-ownership basis" (also see the terminology used in the PEPPER II report).

In fact, while from the point of view of its origins, participation can certainly be associated with a *profit-sharing* type of participation (also taking in the technical/legal problem of qualifying such allocations in terms of whether they constitute remuneration or not[25]), at the point of operating and functioning, in this case participation is certainly of a share-ownership type (giving rise to financial investment). Besides, in terms of a systematic analysis of the overall phenomenon of financial participation, this hypothesis should not be dealt with as a case of participation ("on a share-ownership basis") of a *profit-sharing* type, but rather as a case of *share-ownership* ("by means of allocating profits"), which is achieved in a particular way, that is, in virtue of the allocating of shares or stakes by the company. Being attained in this way, financial participation takes place in the form of a stake in the capital, and is thus examined in this light.

It seems more correct to come to the same conclusions when dealing with hypotheses in which the payment of sums of money to employees is deferred (*deferred profit-sharing*), and such sums (before they are finally acquired by the employee), are used for subscribing to shares in the employer company on behalf of the employee, and therefore carry with them the bearing of the investment risk on the part of the employee. This is the case in terms of Legislative Decree no 299 of 17 August 1999 on *"transforming severance pay into securities"*[26]. (If, however, the risk is assumed by the subject or fund making the investment towards which the employee enjoys a right of credit, the nature of the financial participation does not change). The situation is different where the deferment is only intended to set aside sums of money for the purposes not of financial investment, but of conservative management (savings) on behalf of the employees, who at the end of the term will have a right to having such monies paid out to them.

In the PEPPER II report – *"Promotion of Participation by Employed Persons in Profits and Enterprise Results* (*including participation in the Enterprise capital)"* - by the European Commission, one finds various forms of financial participation[27].

PS	profit-sharing
SPS	share-based profit-sharing
BPS	bond-based profit-sharing
CPS	cash-based profit-sharing
DPS	deferred profit-sharing
ESO	employee share-ownership
SO	stock options
DSO	discretionary stock options
ESO	employee share-ownership schemes
EBO	employee buy-outs

However, we do not believe that this classification is fully acceptable in terms of the support it can provide in correctly understanding and spreading the debate among member countries. In fact, it combines aspects that are located at different levels (forms of financial participation and the manner in which they are put into practice), and is not convincing in terms of the inclusion of the SPS model among the forms of financial participation, as well as not fully covering the DPS model.

Thus, it seems more appropriate to use a simplified scheme of the following type:

1) PS à (CPS; DPS; BPS)
   Profit-sharing (PS) can be practised in the form of cash payments (CPS), which may be deferred (DPS), or in the form of bonds (BPS). The issuing of bonds instead of cash, does not change the nature of the participation (excepting that instead of a payment, the employee becomes the owner of a credit that is incorporated in the bond).
2) (SPS; DPS; SO; DSO; ESO) à ESO
   Share-based profit-sharing (SPS), or deferred profit-sharing (DPS), stock options (SO), and discretionary share options (DSO) investments, and employee share-ownership (ESO) schemes, are all different ways of achieving the same result, that is, share-ownership by employees.
3) ESO à EBO
   The buy-out of a majority shareholding by the employees should be kept outside the scheme of general models for financial participation, since the matter of ownership of the company by employees differs from that of financial participation by employees, provided it presupposes a subjective difference between the owners of the company and the employees. The connection with the PEPPER system can only be justified inasmuch as financial participation by employees can be a forerunner (with the willingness of the previous owners or due to the natural results of events brought about by legislation) to forms of transferral of ownership to employees[28].

Subsequently, (see paragraph 2.2) the two main forms of financial participation described thus far, will be analysed in greater detail, taking the various variables that affect the way they are carried out into account.

2.2. Analytical tools and setting up forms of financial participation

This paragraph deals with and comments on the principal variables to be considered when examining and coming up with forms of financial participation by employees, in the form of both *profit-sharing* and *share-ownership*. In doing so, the general principles for financial participation identified by the European Commission with the intention of orienting the actions of member States, social parties, and companies in promoting and developing financial participation practices[29] must be taken into account, as well as the current rules and principles of Italian law, and examples taken from procedures and foreign legislation.

We must also accept that there are a multiplicity of models that could be put together and that this variety is seen favourably by the European Commission, who believes it is "indispensable in order to be able to adapt financial participation to the specific needs and objectives of individual employees", to the point that "the possibility of a choice offered to the companies and to employees by the vast array of systems available, is a precious resource that must be extended"[30]. There is no doubt that the financial participation model has an effect on the way financial participation is put into effect and may serve to achieve a specific objective, and so the choice of the model to be promoted depends on a number of factors, but first and foremost the goal one sets oneself when drawing up schemes for financial participation by employees.

In addition, although some variables can be identified and separated (as will be done later), any model for financial participation, including an original one, may be the result of a combination of two or more variables, while changing an element in the model may not substantially change its structure and aim.

2.2.1. The promotion of financial participation regimes

First of all we need to look at the role of the political and social institutions in promoting and putting together financial participation practices.

2.2.1.1. The role of national governments

The European Union has taken a 'soft' approach to financial participation. First they issued a recommendation, which is therefore not binding on the member States, and then they issued a memo, which is even less binding

and that was simply aimed at indicating the policy intentions of the European bodies. This was therefore a different approach from that taken in relation to the more general subject of participation by employees, which was dealt with by the issuing of directives[31]. This approach is explained by the fact that the subject of financial participation is strongly linked to the degree of remuneration, and the Union's competence in this regard is open to discussion[32]. Then, probably, it was affected by the varied approaches to the question in the various countries, legislative differences, various levels of diffusion of such practices, and distinct models of industrial relations in each member State, which make intervention from the top rather difficult until a shared culture, interest and predisposition has been created in this regard[33]. In addition, the Commission seems to favour diffusion of the phenomenon 'from the bottom', that is, by means of free participation by companies and employees, as well as the respective social parties, within a basic legislative framework laid down by each member State.

The European Commission particularly insists on the role of national governments in spreading and creating forms of financial participation by employees[34].

Basically, according to the Commission, the national governments should contribute towards setting up a favourable legal and fiscal environment, putting together a clear, detailed legal framework and providing fiscal incentives for financial participation.

A number of European countries already have a legal framework in this regard, as is the case in France for example, and there is no lack of fiscal legislation to support this, as in France and the United Kingdom that, by no mere coincidence, are the countries in which financial participation is most widespread. Recent studies have shown that there is a positive link between the introduction of a legal framework and the development of financial participation[35]. However, delays in certain national governments may not be due to a culpable lack of interest, but rather due to the climate and form of industrial relations in place, and the willingness to leave certain choices to the collective autonomy, as is the case in Italy where the contractual model of industrial relations is traditionally found (thus making it antagonistic/conflictual), and where the legal system leaves determination of the level and means of remuneration up to collective bargaining. It is widely known that it is difficult for financial participation to come about in a situation of non-co-operation in industrial relations.

In Italy, therefore, there is a need for a general law on financial participation by employees in companies, although interest in this subject is growing, especially (if not exclusively) towards *share-ownership* among employees.

In fact, a white paper on the labour market presented by the Ministry of Labour and Social Policy in October 2003, contains a section (III.3) (significantly bearing the title "economic democracy") in which the Government indicates its intention to check means of financial participation and to support these instruments with suitable incentives of a financial and fiscal nature, having become aware of the cultural deficit in Italy when it comes to this subject, and the lack of a single discipline.

No legislation has thus far followed, based on the intentions indicated in the white paper. There are however, various bills dealing with share-ownership by employees currently before the chambers, as well as a consolidation act that was recently presented to Commissions VI and IX of the House of Deputies on 23 March 2004, with the significant title: "Statute for participation in company management by employees" (which will be taken into account in the analysis that follows). Other bills have been proposed by scholars in this field[36].

Of substantial legislation already in force, we can therefore refer to the parts of the civil code on remuneration already referred to (articles 2099 paragraph 3, and 2102) and the allocation of shares in joint stock companies to employees (articles 2349, 2358, paragraph 3, and 2441, last paragraph), which allow financial participation practices without regulating them in terms of a single framework, or disciplining the more problematic aspects[37]. Then there are articles 132, paragraph 3, and 137 paragraph 3, of Legislative Decree no 58 of 24 February 1998[38], which only relate to companies listed on the stock exchange. The former excludes purchasing one's own shares by means of a public purchase offer or exchange, or on the market where the shares are owned by employees of the issuing company, subsidiaries, or principals. The latter allows the by-laws to provide for provisions aimed at facilitating the gathering of voting delegations among employee shareholders.

A bit more is to be found when it comes to support legislation.

Article 51 [ex art 48] paragraph 2, of the Consolidation Act on Income Tax provides an incentive for share-ownership among employees, in terms of which such remuneration is not taken into account in calculating income from employment.

> The value of the shares offered to employees in general, for an overall amount in the tax year not exceeding € 2,065.83 [is not counted] on condition that they are not bought back by the issuing company or the employer, and that they are not sold within at least three years of receipt of the same.

(letter g), as well as (with clear reference to the stock-options mechanism):

> The difference between the value of the shares at the time of allocation and the amount paid to the employee, provided the amount is at least equal to the value of the shares themselves, on the date they are offered [is also excluded].

However, it also provides that

> If the stake, shares, or options held by the employee represent a percentage of voting rights that can be exercised in an ordinary shareholders' meeting, or if the stake in the capital or assets exceeds 10 percent, the difference referred to before is taken in its entirety as part of the person's income (letter g-*bis*).

The Italian fiscal legislator therefore promotes financial participation by employees in the form of share-ownership among employees (which may also be in the form of stock-options), within certain quantitative limits. (However, no limit is set for acquisition by exercising an option). All of this is provided the shares are kept for a certain period of time (which does not apply to those acquired by exercising an option), and provided such financial participation does not give the employee excessive participatory powers (which only applies in the case of share-ownership acquired by exercising an option).

As to the other incentives, there is a special fund for encouraging employee participation in companies, recently instituted in terms of article 4, paragraph 112, of Law no 350 of 24 December 2003 (Financial Law 2004)[39]. This fund had an initial endowment of Euro 30 million, and is managed by a joint committee made up of ten members, two representing the Ministry of Labour and eight who represent the employers' associations and trade unions that are most representative countrywide (paragraph 113). This fund is used to support programmes set up to bring about union agreements or company by-laws, aimed at valorising the participation by workers in the results achieved or management choices made in their companies. As can be seen, this fund is aimed at promoting not only financial participation, but also the participation by employees in a wider sense. It therefore also deals with the company's management choices, which demonstrates the fact that the two concepts are more and more often looked at together on an institutional level[40]. Secondly, the reference to a collective ("setting up agreements with trade unions") and an individual ("setting up company by-laws") dimension should be highlighted.

Despite the fact that this matter has aroused greater interest in recent years at an institutional level, to date, due to the lack of an adequate reference legal framework, even if general, and systematic financial and fiscal support, Italy's major experiences of share-ownership have taken place either in particular cases, such as the privatisation of public companies, or in exceptional cases, in response to a company crisis, without any 'ordinary' approach to this instrument[41].

In the absence of a legal framework for setting up financial participation practices, it is left up to the exercising of private and collective autonomy, and comes up against the traditional lack of trust between the social parties. This negative predisposition cannot be overcome unless a general law resolves the thorny questions at its roots[42].

2.2.1.2. The role of social parties

As has already been stressed, financial participation is not a subject that is particularly appreciated by the social parties, be they entrepreneurs' organisations or trade unions, although more openness has been found in recent years[43].

There are obviously various potential reasons for disagreement that reflect one another. The first of these groups fear that financial participation may increase the decision-making power of employees, thereby

limiting the management autonomy of entrepreneurs. The second, on the other hand, fear that direct involvement of employees will change the system of industrial relations in terms of individualism and contrary to conflict, thereby diminishing the protective role they play. This implies not so much maintaining that they will have to give up their position, but rather that there is a potential risk for employees to whom part of the company's risk will be transferred, as well as the potential damage that involvement limited to financial figures without any positive effect on the participation/ decision-making process may bring[44].

In fact, both of these positions, each in its own right, are understandable, but only inasmuch as they look at the two opposite poles in financial participation, forgetting that particular (intermediate) forms of this phenomenon could well take the interests of both employers and employees into account, as well as their organisations, and not only make financial participation less prejudicial to the role of the latter group, but even reinforcing it.

If one reads the documents coming from trade unions carefully, one notes that their contrary stance is not absolute and aprioristic, but is based on a certain way of putting financial participation into practice[45]. If anything, a greater lack of trust towards financial participation is to be found in recent comments by the bodies that represent companies[46].

This caution is also naturally to be found in relation to legislation. Here again, however, account is not taken of the fact that legislation in this regard could be 'soft', supportive (rather than binding), cognitive of collective autonomy as a source for instituting and regulating participation practices, stopping at laying down certain points, and overcoming those thorny questions that impede the development of a positive attitude towards the subject.

In its memo on financial participation, the Commission warns that the benefits of financial participation would be greater if brought about "by a strategy of partnership, and when included in an overall approach of shared management"[47]. And that's not all, according to the Commission, the parties could also contribute towards respecting the principles of financial participation identified by the commission, especially as regards informing employees and clarity and transparency of procedures. Social dialogue should contribute to spreading this debate throughout Europe as well as overcoming any obstacles that impede its expansion, even on a transnational level.

Despite this, the Commission's words do show that they are aware of the possible lack of trust that the development of financial participation will be met with, especially on the part of trade unions. The Commission takes care to point out that

> ... there is no systematic test that demonstrates the existence of any relationship between financial participation by employees and low salaries or negative effects on collective bargaining,

and, referring to the results of a study on this subject[48], that financial participation

> does not weaken the role of trade unions or company committees, and that, in fact, there is a positive correlation with other forms of direct or representative participation[49].

Here again, however, we believe that the initial claim, which is probably correct, must be evaluated bearing in mind the variety of forms a financial participation regime can take on in concrete terms. In any case, the Commission's position can be shared, where it clarifies the fact that the participation by the social parties is fundamentally important, given that a measure such as profit-sharing presupposes participatory industrial relations. Besides, it is not impossible to come up with models for financial participation that ensure involvement of the social parties both in the way they are instituted and in their regulation and implementation in practice.

2.2.2. Voluntary or obligatory nature of the regime

This point does not require going into in any great depth since the opinions of the social parties, foreign experiences (though the French *participation* regime is obligatory for all companies with more than 50 employees), and the principles of the European Commission[50], all point towards maintaining that financial participation regimes cannot be made obligatory by law, but must be instituted (within a framework of legal provisions) by free choice and agreement among employers and employees and their representatives, making it possible for individual employees to participate (without making this obligatory).

Likewise, article 2 of the Italian bill referred to, *"Statute for the participation by employees in management of the company"* states that "… the companies … may … set up financial participation schemes", and article 4 paragraph 1, letter *b)* states that the scheme must ensure "voluntary participation by employees".

It states, naturally, that once the employers decide to institute a financial participation scheme and the employees choose to take part in it, the financial participation scheme becomes binding for both parties.

2.2.3. Means of assignment. Against payment or gratuitous

Participation can be free of charge or against payment for the employee, depending on whether it is done by allocation (of money, shares, or other financial instruments) by the employer, who relates such allocation to the employee's work performance, or by using part of his remuneration, even where deferred (for example, severance pay)[51].

Clearly the choice between participation against payment or free of charge only makes sense for share-ownership, and not for profit-sharing. In the latter case, as already stated, the performance of the employer results in remuneration (which may vary in relation to the company's results, thereby making it 'participation') for the employee's work performance.

The European Commission also set out the general principle that financial participation may not replace salary and any income derived in this manner must be in addition to a fixed salary (excepting for some specific cases – senior management or companies being launched – where, according to the Commission, income form financial participation may make up part of the person's total remuneration).

Article 9 of the Italian bill states that

> the measures and instruments for financial participation in companies must in no way affect the salary level and wages of the employees that participate.

However, participation against payment or free of charge can exist side by side. For example, in the case of the British AESOP, both free shares and partnership shares purchased by the employee can flow into the investment fund.

It seems to us that, as far as the share-ownership model is concerned, the mixed against payment/gratuitous model (shares purchased by the employee are followed by shares issued free of charge by the company, as in the case of matching shares in the AESOP model), is the most suitable for ensuring continuity over time in financial participation systems, as well as the pursuance of the various objectives they set themselves. In this regard there may be some value in the theory of employees breaking into share-ownership via profit-sharing schemes, with provision being made for deferred payments and temporary investment in the capital belonging to the employer company.

While, on the one hand, the cost of participation provides the employee with greater incentive and may guarantee higher productivity in the company, it is excessively risky for the employee unless there are immediate, direct returns. Along with the risk of remuneration, the employee would also have to bear part of the company's risk, without receiving any related financial advantage for taking on this risk. We must remember that one of the general principles of financial participation according to the European Commission must be "avoiding excessive risks for employees", and that the trade unions have traditionally opposed financial participation, on the very basis of the claim that it is a technique created by employers, simply to transfer part of the company's risk on to the employees.

On the other hand, systems that are entirely free of charge for employees, reduce their incentive to work and therefore have no positive effect on the company's productivity, and are based only on 'social responsibility' of companies, therefore giving them little chance for continuity and for survival over time, even though the fiscal lever could contribute to their success (as happened with the ESOP programmes in the United States)[52]. Among other things, due to their capacity to set up a direct relationship between the company and the employee, and being able to be set up outside of collective agreements, gratuitous participation systems could paradoxically cause dissent among employees' organisations[53].

Then it should be borne in mind that the purchase of shares by employees could be encouraged economically, in various ways:

- By granting loans under special terms to employees and setting up and promoting

institutions for this purpose (something similar takes place in *Leveraged ESOPs*, although in that case financing is granted to the company who can then pass on shares to the trust manager free of charge).

- Allowing the company to finance or give guarantees for purchases (as is already possible in Italy, by way of an exception to the general discipline, due to article 2358, paragraph 3, of the civil code). Fiscal incentives can also be given in relation to the loans granted (the Italian bill (art 12, paragraph 2, letter *a*) moves in this direction, allowing both interest and part of the capital for loans granted to employees for subscribing to or purchasing financial instruments to be deducted from the company's taxable income).
- Allowing employees to use part of their deferred remuneration for this purpose, which can be seen as integrating salaries with a profit-sharing scheme (as in the French participation model, where deferred remuneration can be used to buy shares in the company), or a forced saving, like severance pay (Legislative decree no 299 of 17 August 1999, already referred to goes in this direction, and allows pension funds to subscribe to the employer company's capital, with the approval of the employee, by tying up severance pay. The Italian bill goes further as it allows the individual employee to use their severance pay accrued for this purpose, within certain quantitative limits: see article 10).

2.2.4. Object assigned. Money or bonds, shares/stakes or other instruments of financial participation

A second aspect relates to the nature of the allocation to the employee in actuating a financial participation scheme. The items that can be allocated (against payment or free of charge, in the sense indicated above), based on financial participation schemes include:

- A sum of money or a credit that may be embodied in some instrument (bond or some other debt security), or
- A share, stake, or other type of participation in the employer company.

i) The allocation of a sum of money may be a prelude to a pure profit-sharing system or a share-ownership system, as happens when payment is deferred and the sums of money are used in the meantime for purchasing shares in the company on the employee's behalf.

ii) The issuing of a bond (or some other debt instrument) for the benefit of the employee (except in the case in which the bond can be exchanged for shares) gives rise to a system of profit-sharing ('participation' bonds of the type referred to in article 2411, paragraph 2, civil code), with deferred allocation of the related financial profit at the time when the bond becomes payable.

iii) Allocating shares or stakes results in the application of a share-ownership system. Whether these are shares or stakes depends on how the company capital is broken down legally, whether into shares (as in joint stock companies) or in stakes (as in limited liability companies or co-operatives).

In relation to subscribing to the employer company's capital (and therefore in relation to the share-ownership participation model), two important aspects must be stressed.

First of all, the participatory model can be set up by not yet allocating shares or stakes, but rather "other financial participation instruments", as indicated in section V, chapter V of the company code discipline.

Briefly, (this matter will be dealt with again in part II of this work), the new company law provides for participation in a company's assets in two ways. By subscribing to shares or stakes, and by subscribing to financial participation instruments other than shares or stakes. These financial participation instruments obviously differ from shares or stakes, and the difference may be related either to the part of the company's assets they relate to and the status they confer (shares or stakes are instruments of participation in the capital and those subscribing to them are partners, whereas financial instruments are instruments of participation in quasi-capital, and those subscribing to them are not partners), or to the particular discipline (with relation to shares or stakes) in terms of financial and/or administrative law (in joint stock companies for example, financial participation instruments other than shares do not confer any right to vote at the general shareholders' meeting - see

art 2346 paragraph 6 of the civil code, but this is the logical consequence of the fact that the holder of such an instrument does not acquire the status of shareholder).

The new company law looks at the possibility of employees being allocated financial instruments other than shares, with asset or administrative rights, but excluding the right to vote at the annual shareholders' meeting (art 2349, paragraph 2, civil code). This is not the place to discuss whether or not financial participation by employees without the right to vote is advisable or not (even though, obviously, all the critics of financial participation could easily find support for their arguments, in dealing with participation already formally deprived of the right to vote at the annual shareholders' meeting). This is also due to the fact that, as far as co-operatives are concerned, there is no strong link between the financial instrument and the absence of the right to vote, which is different in joint stock companies. As we will see later, the financial instruments issued by co-operative may well carry with them the right to vote in a general meeting of members.

Secondly, the share-ownership participation model raises the question as to how the participation by employee shareholders is to be regulated, from a financial, administrative, and circulation point of view. And therefore, the general question as to whether this participation is to be fully equal to that of other shareholders, that is, 'ordinary', or if it should be treated differently and made 'special', by upgrading economic and administrative rights, only the former or only the latter, or upgrading economic rights and diminishing administrative rights, or vice versa.

The same problems are faced when it comes to circulation, whether this should be subject to the same rules as ordinary shares, or whether it should be restricted in some way.

One finds that article 2349, paragraph 1 of the civil code maintains that it is almost natural for employees' shares to be regulated differently from those of other shareholders, by referring to "special categories of shares to be allocated individually to employees" and to "specific standards relating to the form, mode of transfer, and rights due to them". The reason for this is not clear.

The difference is structural for financial instruments other than shares, since their discipline is left up to the by-law, excepting for the exclusion (in joint stock companies) of the right to vote at the annual shareholders' meeting (art 2346, paragraph 6, civil code).

The aspect of administrative rights given to employee shareholders is central in order to be able to identify the function and philosophy of a financial participation scheme, and markedly whether it moves in view of financial participation of a participative or non-participative type, and more specifically, in the affirmative, whether a strong or weak type of participation is envisaged[54].

2.2.5. Assignment methods. Immediate or deferred assignment. Retention of stake for a minimum period

The allocation (of money or shares, against payment or gratuitous) may be immediate or deferred, with the latter choice making it possible to pursue different goals.

In any event, deferment of payment may allow the company to preserve its capital. The same is true when a company immediately pays a sum of money into a fund, which in turn, in a different way, finances the employer company, as in the case of the Italian pension fund to which a company transfers part of the severance pay in order to subscribe to financial instruments in the same company, in terms of Legislative decree 299/1999. From the employee's point of view this deferment may serve to promote savings or profiting from a financial transaction in terms of the difference between the price fixed previously and the value of the shares at the time they are purchased (as is the case with stock options).

The hypothesis that allows for financial participation schemes in which the employee is bound to hold onto his shares in the employer company for a certain period of time, is on a different plane. This limitation (set by the Italian fiscal legislator at a minimum of three years, in order to be able to take advantage of the incentives in terms of art 51, paragraph 2, letter *g*), of the tax code (TUIR), but also found in foreign legislation) is to the advantage of the companies in terms of capitalisation, and of relations between companies and employees, ensuring a minimum duration of the employee's involvement. In the Italian bill on share-ownership by employees, the restriction of holding shares for at least three years is an exclusively fiscal requirement, and today it is gaining ground as a basic requirement in financial participation schemes (see articles 2 paragraph 2, and 4 paragraph 1, letter *a*).

2.2.6. Management method. Individual and collective dimensions

What is stated below is central from the point of view of the manner in which financial participation schemes are implemented, partly because it determines the general philosophy behind them[55].

There are various factors that go together to qualifying a financial participation by employees model or scheme as being individual or collective.

First of all, it is important whether participation involves all the employees, a category, or a large number of employees, or only a few employees taken individually.

One of the general principles of financial participation identified by the European Commission is to "extend the benefits of financial participation to all employees", on the presupposition that any discrimination would be out of line with the objectives of this regime, which specifically includes greater identification of the employees with their companies and a greater sense of belonging. We are therefore dealing with a problem of coherence with the goals one is seeking to attain with financial participation.

In terms of the general principles of the legal system, discrimination between employees would be illegitimate[56]. In line with these principles (and foreign legislation), the Italian legislator grants fiscal incentives to share-ownership, where this is aimed at "all employees in general" (art 51 paragraph 2, letter *g* TUIR). In practice, however, a financial participation scheme aimed at a category of employees, without any discrimination within the category, could not be considered illegitimate. There are in fact cases in which the characteristics of the company or the work do not allow it to extend the scheme to all employees, while they are able to promote schemes for particular categories of employees.

Company law does not deal with the problem of non-discrimination, and in fact allows for 'individual' allocation of shares in terms of art 2349 of the civil code.

Unfortunately, the Italian bill does not deal with this aspect, nor does it identify categories of employees that must be involved in the scheme, excepting for permanent employees and some other categories (fixed-term, part-time, etc)[57].

Secondly, it deals with the company or super-company dimension to financial participation, that is, whether financial participation schemes only relate to the employer company or whether they involve a number of companies, linked to one another by company, contractual, or other types of relationships.

The Italian bill limits application of the schemes to the employer company, which is in line with initial stances taken on a community level, but in truth not pursued in more recent utterances by the Commission, that is, favouring the closest possible ties between employees and their companies[58].

In fact, another need could be to diversify investment over a number of companies in order to grant greater security to the employee's financial interests, even though this could partly detract from the connection between financial participation and the working relationship with the company. Besides, the ultra-company dimension would be almost a necessity for small and medium sized enterprises that intend setting up financial participation schemes for their employees. In relation to this problem, Italian company law tends towards a group logic, allowing employees to be allocated shares in subsidiaries (article 2349 of the civil code) or parent companies (article 2441, last paragraph).

Thirdly, a financial participation scheme moves in a collective dimension if it is set up and governed by means of an agreement between employer and trade unions representing the employees at various levels, or at least groups of employees. This is one of the dimensions that associations for specific sectors insist on most often.

The Italian bill moves in this direction, providing for the financial participation schemes to be adopted

> as a result of a trade union agreement signed with the trade union representatives that are signatories to the collective bargaining agreements applied in the companies, and with the respective coordination bodies. Alternatively, where such an agreement is not in place, it is based on a company proposal put to the sector's provincial, approved trade union organisations at least 30 days ahead of time, to allow it to be balloted by the majority of the company's permanent employees (article 2, paragraph 1).

Last, but by no means less important, there is the situation in which participation (and therefore the administrative rights associated

with it) is managed individually by each employee or by a body that holds all the employees' shares and manages them in their best interests. Clearly, this last alternative would result in financial participation that is highly collective. This dimension may be more or less accentuated, depending on whether the body is in some form of contact with the trade unions or not (although the doctrinal proposals tend towards differentiating the role, functions, and composition of bodies managing shares from trade unions, with a view however, to collaboration especially of the latter in relation to the former[59]), whether it manages the shares of only employees form one company or those from a number of companies in an ultra-company scheme, and whether the body is autonomous, and is independent when it comes to decision-making, from individual employees in relation to exercising the administrative rights derived from participation securities given to it.

In this regard, the Italian bill provides for shareholder employees to be united in a "company financial participation association" (see article 6), based on the models for shareholders associations as per article 141 of the TUF (Consolidation Act on Finance). Thus, the collective dimension is not highly accentuated, given that despite the fact that these associations of employee shareholders enjoy greater privileges when it comes to gathering delegations compared to the shareholders associations covered by article 141, they are still bound to vote as indicated by the delegating employee. This model does not give rise to a real collective *voice*, even though the formation of the latter is possible and facilitated, but is left up to the individual's choice.

The Italian bill also provides that, as an alternative to granting delegations, employee shareholders may (see article 8) sign their shares over to a trustee company set up in terms of Law no 1966 of 1939. Where this occurs, the collective dimension is strengthened, since the trustee company casts its vote in the meeting, based on the instructions given by the association of employee shareholders, in conformity, it would seem, with decisions taken by the association bodies. Again in this case, however, attaining a collective voice is not a given, as each trustee is given the faculty to exercise its right to vote in each shareholders meeting, even on specific items on the agenda.

Obviously, it would be different (from a point of view of accentuating the collective aspect of financial participation) if, based on a legal requirement or an autonomous choice, the employee shareholders formed part of a body to the opinion of which, based on a majority principle, they entrusted the task of exercising the rights related to the shares. The same would occur, for example, if the pension funds were involved, or if the employee shareholders were partners in a company or co-operative, to which they gave their shares and thus the right to exercise the rights related to such shares. This solution (in relation to a co-operative of employee shareholders, already experienced in the case of Alitalia) is very close to the one found in the 1917 French law on limited companies with employee shareholders, and to the one presented by Cesare Vivante in his bill the following year[60].

3. Financial participation functions. From the purely financial dimension to the participation dimension

Authoritative commentators on financial participation have for some time pointed out the "numerous and extremely heterogeneous" aims of financial participation, stressing how "the ambivalence of the institution, as well as the variety of strategies that can be adopted both by the company and by the trade union", can only contribute towards furthering caution and distrust[61].

It is because of our awareness of this fact that we have preferred to first look at the models for financial participation in this report, and then their functions, since identifying the latter is strongly influenced by the way the operation is structured.

Financial participation is justified in a number of ways that can be grouped into financial, social, and industrial democracy justification factors. It goes without saying that looking at each theory on its own makes it easier to understand, but this also hides their complementary nature. When set up in a certain way, financial participation may satisfy various aims attributed to it simultaneously (since all are relevant). In fact, a financial participation model that is able to achieve various goals simultaneously should be promoted more than others and maintained, although this is not always possible to achieve in practice.

Looking over the history of these ideas, one finds a shift from a purely financial dimension to a dimension that is (also) social and participatory.

3.1. The financial function

In the initial phase, the phenomenon of financial participation among employees was explored mainly from a financial point of view, assessing the micro and macro economic benefits that this could generate[62].

The economic benefits to companies must especially be looked at in terms of:

- Productivity in companies.
- Reducing costs.
- Efficient management of human resources.
- Capacity to handle specific situations.

As to the capacity of financial participation to make a positive contribution to productivity in companies, the incentives that this gave to employees (especially in the form of profit-sharing, with immediate payouts) was stressed. Here the employees, driven by the prospect of a better income, would be induced to fulfil their obligations and work more efficiently (today more emphasis is placed on the involvement of employees in order to stimulate co-operation). This would be particularly important, especially where there were imbalances in information between employer and employee, as the former could not observe how the latter behaved, and would therefore set up an incentivising contract.

Financial participation would also make it possible to reduce supervision costs to the entrepreneur, as it would stimulate mutual supervision between employees, as the increased profit to each depends on the correct behaviour and productivity of the others.

Also in terms of cost, financial participation (in aligning the interests of employees with those of the employer, that is, contributing to the employees identifying more strongly with the companies), should bring about a reduction in the conflict between capital and labour, thereby reducing costs in these areas.

Financial participation could also be a technique (to use a rather unpleasant term) of making the employees 'more faithful', suitable for guaranteeing that the company did not lose especially its most qualified employees.

Finally, one should not lose sight of the fact that (only in its share-ownership form) by favouring capitalisation of the company, financial participation by employees can be a useful tool for resolving crises in the company or for managing restructuring, as well as for withstanding hostile take-overs. Concrete experience offers many examples in which shareholdings by employees were used for these very purposes.

From a macroeconomic point of view, according to some theories financial participation would have positive effects on employment because, in cases in which reduced employment is linked to a shrinking of demand, it makes it possible to curtail production without putting off any workers, thereby adding to a recession phase in the economy. This is due to the fact that the company risk is spread, as it is partly borne by the employees, who (it is claimed) would be more willing to accept the risk of a reduction in salary than the risk of losing their jobs.

The brief explanations of financial participation given above are, as we have seen, all of an economic-managerial type, looking at the matter from the point of view of the company. They do not look at the potential risks, both financial and otherwise, to employees individually and as a whole, in any detail. It is mainly the trade union organisations that have highlighted the fact that financial participation may certainly be risky for the employee, especially in as far as it favours the concentration of investments in a single subject, the employer. It may also harm the collective interests of employees because, since it accentuates the individual aspect of the working relationship and a mix between capital and labour, it may result in a great reduction in the employee's capacity to protest, especially when it comes to matters that are not strictly economic. It is no mere chance that financial participation started out as an entrepreneurial technique for counteracting trade union action, and where granting of such a right to any employee was on condition that the employee does not belong to any trade union[63].

3.1.1. Financial participation by employees and Corporate Social Responsibility

Expectation of financial benefits from financial participation may arise in a company due to the possibility of looking at such participation as a particular manifestation of one's social responsibility.

Financial participation by employees is closely linked with an original line of analysis (currently very much in fashion), that is, corporate social responsibility - the company's social (and environmental) responsibility as a factor in their competitiveness. In the ultimate analysis, by

adopting a stance that is socially responsible, that is, spontaneously taking initiatives that are suitable for improving society, the company gains a competitive edge over those competing with it, since it is able to convince various subjects (business partners, employees, suppliers, investors, and most importantly, consumers) to choose its products rather than others. Obviously, it is important to have this responsibility checked in some way (such as a company social balance sheet), to allow consumers to choose a social responsible or more socially responsible company, rather than to distort free competition, allowing irresponsible operators to pose as being responsible. If the attention of companies then turns to their employees, they can obtain direct advantages in the form of greater commitment and higher productivity among employees.

The economic problem involved is not a new one, it is still that of reputation as a factor of competitiveness (and therefore investment rather than a cost to the company), with reputation being based on spontaneous respect of social norms (that are not legally binding). In terms of working relations, this question looks at the aspect of good human resources management practices[64].

The promotion of corporate social responsibility (CSR) is a matter that the European Commission is particularly sensitive to, having recently dedicated a green paper to this topic[65]. The Italian Government has followed its lead, and has set up and is setting up various incentives in this regard[66]. The European Commission places particular emphasis on the economic-social usefulness of CSR and its instrumental role in terms of a model for development in Europe, as defined at the summit in Lisbon, that is, an economy with dynamic and competitive knowledge based on cohesion, a model that expects economic benefits from cohesion and social investment.

Now, the question is whether financial participation by employees can, per se, be considered an expression of the social responsibility of an enterprise in relation to their employees, as well as under what conditions.

In our opinion, the relationship between financial participation and CSR needs to be clearly defined, as it does not seem that there is always a cause and effect relationship between the two in all cases, even though the European Commission includes financial participation, without any specific requirements, among the human resources management strategies that form part of social responsible practices[67].

To us it seems that, in order to be considered as a measure with a 'social aim' for evaluating CSR, financial participation would have to be put into practice in a particular way as not all models of financial participation automatically have 'social' relevance, and that, for the purposes of measuring CSR, the social factor in some may be higher than in others. We believe that only a participation perspective (albeit 'weak'), can determine a shift from seeing financial participation as a personnel management technique (incentivised contracts) to a social technique as well, that can therefore be measured in terms of CSR[68].

Besides, since one can only talk about CSR in terms a positive attitude towards social matters adopted spontaneously by companies, without any legal obligation in this regard, any law on financial participation, which would of necessity include measures to protect and promote employees (as in the Italian bill), would obviously contribute towards raising the standards to be met for a company to be considered socially responsible from that point of view.

3.2. The social function

Although the economic profile is relevant in looking at the phenomenon of financial participation by employees in general, in the second phase (and recently thanks to the push given by the European Union), it has been assessed particularly in terms of its social function. Financial participation is seen as a positive tool for working on society. However, the economic and social aspects are still linked. Even the wording used by the European Commission indicates that financial participation is an economic tool with social aims.

The social aspect of financial participation is linked to its being an instrument for:

- Redistributing wealth.
- Sustainable economic development due to the positive effects it has on the quality of work, knowledge, and professionalism, as well as the employee's personality.
- Social cohesion, especially in terms of the quality of industrial relations and dialogue, necessary for handling changes and modernisation.

Despite the interest shown in this matter in general among [European] community bodies since the 1970s, and more decisively in the

1990s, the decisive push towards it being considered specifically from a social point of view is only to be found in the Commission's Communication of July 2002. Previously the European and other approaches dealt mainly with the economic-corporate dimension of financial participation, understood mainly as a personnel management technique, for accumulating risk capital, and developing financial markets[69].

The Commission recognises the connection that exists between the economic objectives (and benefits) of financial participation by employees and its social objectives (and benefits), from the point of view of companies and that of employees, as well as considering the relationships between these two parties and the social parties. This is partly implied in the fact that, from the European perspective, interventions in terms of work and employment are a part of European social policy, as work and employment are considered factors of social inclusion, while the Commission's considerations go beyond this aspect.

The Commission refers to concrete studies and examples in pointing out that *where set up correctly*, financial participation by employees not only increases productivity, competitiveness, and the profitability of companies, but it can also be an incentive for *involving employees*, improving the *quality of work* and contributing towards *greater social cohesion*[70].

In addition, the Commission itself highlights the connection between interest in the question of financial participation and the EU social and employment policies. This is done by relating its initiatives to the objectives declared at the summit of the European Council in Lisbon in March 2000 (financial participation is defined as an "*indispensable* element for pursuing the objectives set in Lisbon"), where the Union undertook to "become an economy based on the most competitive and dynamic knowledge in the world, capable of creating *sustainable economic growth* with *new and better jobs* and *greater social cohesion*"[71].

According to the Commission,

> the financial participation regimes can … also contribute to the attainment of the objectives of the social policy, as they promote *more widespread participation in the creation of wealth* and *greater social cohesion*", as was to be shown in various empirical studies that also showed positive effects on the employee's "*motivation* and *personal satisfaction*[72].

Finally, for the European Commission, financial participation represents

> an excellent example of policy that is able to pursue economic, social, and employment objectives simultaneously, complementing one another. Where put into practice correctly, financial participation can increase company profitability and competitiveness, increase motivation, involvement, and professional satisfaction among employees, increase the quality of employment and, last but not least, contribute to a fair distribution of income and wealth[73].

As the European Community sees it (at least, according to the latest documents on the subject), financial participation is not therefore simply an instrument that is of value in terms of productivity, efficiency, economic growth, and the development of financial markets, from only a market point of view, but also in relation to the social (and employment) wealth it is able to generate. Put in other terms, it can be used as a means for 'socialising' work activities and the relationship between the company and its employees, thereby, in the ultimate analysis, integrating the social aspects of the European economy with its development.

The basic standards adopted in the European Community's actions in this regard are the contents of the social policy Agreements, and for these purposes, this action is part of a wider range of actions (participation of employees, quality of work, corporate social responsibility, etc)[74].

If this is true, the subject of financial participation by employees can only look forward to the future (eagerly anticipated) implementation of the Charter of Basic Human Rights of the European Union dated 7 December 2000, in terms of which social rights take on a fundamental role (that is original on the European scene)[75]. In fact, once the Charter of Rights is in force, the spotlight could be shifted further towards promoting the personality (and not only the wealth and professionalism) of the employee and his dignity, in line with article 1 that states that "Human dignity is inviolable. It must be respected and protected". Supporters of financial participation can therefore also count

on a 'Humanistic argument' - Participation promotes the human dignity of the employee, contributing to his personal development and the satisfaction that results from work[76].

Although all that we have seen of the European Community approach to this subject thus far can be deemed positive in principle, we still believe that what model or models of financial participation are most coherent with these objectives must be evaluated. This must be done since the social dimension of financial participation varies significantly in relation to the type of participation involved and the actual dimension in which it is put into practice. Then there is the even more radical need not to exclude the possibility that some forms of financial participation are purely economic and do not contribute towards social goals at all.

The European Commission also makes frequent reference to 'just' or 'correct' application of financial participation as a pre-condition for the social objectives to be obtained, without explaining what 'just' or 'correct' is in this regard. In anticipation of the conclusions of analysis that is in progress, it seems to us that only the 'participation' dimension of financial participation, that is, the involvement of employees in decision-making or at least controlling management of the company, can guarantee pursuance of the planned 'social' aims (in addition to the economic-asset goals) of financial participation by employees.

3.3. The participation function

If set up in a certain way, schemes for financial participation by employees may have positive effects in terms of the participation of workers in decision-making and management of the company, and therefore on industrial democracy.

In practice, there is no one position on the relationship between financial participation by employees and industrial democracy. There is a lot of debate as to whether the former can be seen as an instrument of industrial democracy in addition to being an instrument of economic democracy, with the former being taken in the sense of being inclusive of all devices capable of setting up and constructing power bases to counterbalance management[77].

The European Union seems to consider financial participation as an aspect of the more general subject of participation, which is looked at along with informing and consulting employees and participation of employees in company bodies. Unlike the case regarding financial participation, where the Commission brought in soft law instruments, it has issued various directives for dealing with the other instruments for participation by employees.

Nevertheless, they correctly maintained that financial participation per se cannot be considered an instrument of participation and industrial democracy[78].

Besides, the very extent of the notion of 'participation' (or 'involvement') is under discussion, because it can be applied in the wider sense as "any process that allows employees to exert *some influence* over their work, and the conditions and results of their work". This therefore also includes information and consultation procedures, albeit not in a determinant manner in terms of managerial decisions[79]. Alternatively, in its strict sense it refers to "all the bodies and procedures that can be set up in companies or their organisational structures to *impose common decisions* on subjects under the heading of managerial powers"[80]. The European Union uses the notion of participation in the first of these ways, and for this reason it encounters fewer problems in inserting the subject of financial participation into that of involvement of workers[81].

It is necessary to at least clarify that participation (or involvement) by employees can be 'strong' or 'weak'. 'Weak' participation sees the duty of the employer limited to informing and consulting, with some decision-making power granted to the employees. 'Strong' participation allows employees to take part in the company decisions, and sees their (direct or representational) involvement in the company bodies. In the latter case, the strength of the participation may vary in relation to which company body the employees are involved in. One must also bear in mind that when talking about participation in decision-making one is talking about involvement, having a hand (albeit it minor, unless one wants to completely overturn the overall meaning of relations between company and work[82]) in the formulation of rules rather than absolute, autonomous decision-making powers.

Having said this, where financial participation involves profit-sharing, one can exclude this being a participation instrument, either weak or strong. On the other hand, share-ownership type financial participation can include a participation side, although it does not ensure it per se. Consequently, we need to look at this model if we wish to work within a participatory

logic of financial participation[83].

It seems to us that the opinion can be shared in terms of which financial participation by employees loses a lot of its overall meaning, and is reduced only to an economic-financial and/or salary policy dimension, unless it is introduced into a participatory setting, with the involvement of employees[84]. This is true as far as the social function is concerned, because its social benefits can only be achieved if it is participatory (which also applies to the matter of corporate social responsibility)[85]. It is also true for the economic function, because participation provides the just reward related to the bearing of risks by the employees and because some studies have shown that the economic benefits of financial participation may be achieved only if (and in any event are greater if) employees also have participatory powers[86]. Nevertheless, the participatory dimension is not very evident in the official documents of the European Union. We also believe, as is maintained by a great deal of the doctrine and the trade union organisations[87], that participation cannot be limited to information and consultation, but must be of a strong type (even if, as we will see later, it is limited to supervisory or administrative bodies).

Besides, we believe that the participatory dimension of financial participation is in line with the guidelines for relations between company and employees that are emerging on both a European Community and national level.

On a European Community level, an attempt has been made to reinforce the weight of the employees within companies, especially by means of directives on European company committees[88], on informing and consulting employees[89], and participation of employees in European companies and European co-operatives[90].

In terms of Italian legislation, in addition to referring once again to article 46 of the Constitution dealing with the right of employees to collaborate in managing the company, in the manner and within the limits laid down by law, and the legal provisions already promulgated to implement Community standards, the desire to further the participatory approach emerges both in view of the 2004 financial law for the special fund for providing incentives for participation by employees in companies, and the overall tenor of the bill on shareholding, with this being considered and disciplined in a generally participatory context.

When projected into a participatory dimension, financial participation becomes an important instrument for corporate governance, and is able to contribute towards improving the quality of management of companies and the capital markets[91].

However, participation must be guaranteed in practical terms and not just theoretically. What is known is that shareholding among employees can be merely economic without any participatory substance unless the employees are given the possibility of participating effectively[92], which normally only affects a small minority (not even big enough to cause the protection of minorities allowed by the Consolidation Act on Finance to be invoked). This gives rise to the need to somehow guarantee some form of participation by employees that take part in financial participation schemes, either by law, by-laws, or contract (thereby limiting the freedom of the shareholders' meeting to choose the company directors). In this regard, the Italian bill states that financial participation schemes are to provide and ensure "suitable representation of employees in administrative, audit, supervisory or management organs". The employees would enjoy greater guarantees of effective participation by choosing to set up a common fund or collective body that could be entrusted with their shares to allow it to act in their interests[93].

As to the degree of 'strength' of participation, this depends on whether representation occurs at the level of the management body (board of directors for ordinary and monistic systems, or works council for dual systems) or of the supervisory body (board of auditors in the ordinary system, supervisory board in a dual system, and a management control committee for a monistic system). No single position is taken by the trade unions as, for various reasons, some organisations (CGIL) discard the notion of participation in the management body in favour of participation in the supervisory body, while others (CISL) state that they are prepared to accept participation by employee shareholders in the management bodies. One must also point out that the dual system offers an intermediate solution in this regard (it is not by mere chance that this body is found in the more classical model of participation by employees, that is, the German co-determination system), because the supervisory board that can include employee shareholders can both check the legitimacy of the way the

managers operate and (where the by-laws provide) it can have 'top management' duties, that is, it can decide on strategic, industrial, and financial plans for the company, put forward by the works council (see article 2409 *terdecies*, paragraph 1, letter *f-bis* of the civil code).

It seems to us that being part of the board of auditors (or, in some senses, even better, the supervisory board) may be a preferable solution, as it is more in line with the different roles of entrepreneur and employee, and is better able to strike a balance between the interests of employees and those of entrepreneurs, while still guaranteeing the participatory dimension of financial participation[94].

4. Partial conclusions

"Financial participation by employees" covers all situations by means of which employees at a company are linked to the company financial results. This can be done in the following ways:

- By giving the employee an extra source of income that varies in relation to the company financial results or productivity indices (profit-sharing), or,
- By allowing the employee to become the owner of shares or stakes in the company, in order to be able to receive dividends and capital gains (share-ownership).

During the analysis done thus far we have seen that:

- Despite the fact that profit-sharing and share-ownership falling under the common notion of financial participation and normally being looked at together, the two forms include profound structural differences that are reflected in the goals that are pursued and that can be pursued.
- Profit-sharing is mainly a (more flexible) salary-based technique that involves adding variable 'participatory' income to the employee's fixed income, as it is related to the company financial results.
- Share-ownership by employees, even when this takes the form of allocating profits, is a technique that can allow various objectives to be pursued, depending on how it is put into practice in practical terms.
- The attention of scholars, legislators, and the institutions seems to concentrate mainly on share-ownership, which in effect, is the most interesting form of financial participation from various points of view.

Subsequently, it was possible to analyse some of the main variables in order to create financial participation schemes. In this regard, the following conclusions were reached:

- It is best if the financial participation schemes are introduced on a voluntary basis, both for the companies and for employees.
- It is best if financial participation is both free of charge and against payment by the employee. This can be done for example, by providing for a certain number of shares bought by the employee being matched by the employer company giving him one or more shares free of charge.
- In the case of share-ownership, it is necessary to evaluate how the employee's position in dealing with the company and other shareholders is to be regulated, in terms of property rights, administrative rights, and the circulation of shares. In addition, even before this is done, one must look at whether participation is to be carried out by subscribing to shares or financial instruments other than shares.
- It is necessary to assess whether the benefits must be paid out to the employee immediately, as soon as they mature, or if this can be deferred.
- It is useful to set up financial participation schemes that work in a collective dimension, involving all, a large part, or categories of employees, favouring the ultra-company dimension, setting up schemes based on agreements with employees or their representatives, creating forms of collective management of the shares of all the employees that are able to give consistency to a collective voice.
- Finally, it is best if financial participation schemes are of a 'strong participation' type, guaranteeing employee shareholders involvement in the company decisions by means of involvement in the company bodies. In this regard, it seems that preference should be given to involvement in a board of auditors or a supervisory board. It is only where this is done that financial participation can be an instrument for pursuing economic, social, and industrial democracy objectives simultaneously.

Part II. Co-operatives and financial participation by employees

5. Co-operatives in the Italian legal system

In relation to the other principal point of reference for this research, the co-operative society, according to the new Italian company law[95], this is a type of enterprise basically characterised by:

a) Variable capital.
b) Goal of setting up mutual exchanges among the members (prevalently or not).
c) Non-profit, or rather only partially profit oriented (which only applies to co-operatives with a prevalent mutuality).
d) Democracy and the greater importance placed on people rather than on capital.
e) Social function.

5.1. Variable and 'open door' capital

According to the new article 2511 of the civil code "co-operatives are enterprises with a variable capital [run] for co-operative purposes".

As to the variable capital, this is due to the fact that the capital of a co-operative is not determined in terms of a preset amount (article 2524, paragraph 1, civil code), and can be automatically reduced or increased due to the withdrawal or admission of members, without this requiring an amendment to its articles of association (article 2524, paragraph 2, civil code)[96]. The rule corresponds to the European rule for a European Co-operative Society (SCE), laid down in Council Regulation (EC) no 1435/ 2003 dated 22 July 2003, in which article 1, paragraph 2 states that "the number of members and the capital of an SCE shall be variable".[97]

The variability of the capital in co-operatives is connected to the so-called 'open door' principle, that is, the 'openness' of the society to new members. In terms of this principle, co-operatives are not allowed to refuse requests for admission to the association, by external subjects wishing to become members[98]. This would, in itself, be an element of sociality in the co-operative society (compared to other legal forms for running enterprises), since the benefits it manages to generate cannot be reserved for those that set up the co-operative at a given point in time or for those that are part of the co-operative, but must also be extended to all outsiders who ask to be admitted to the society.

In practice, however, in the light of current legislation (and although the new company law has provided greater protection in this regard), the interest of others to be admitted to a co-operative is not guaranteed unconditionally (like some perfect subjective law for co-operatives), but only on condition that it is not in the society appreciable interests not to admit them (and directors therefore have to motivate refusal of admission, based on the reasonable interests of the society not to increase the society base at that particular point in time). There is, however, a 'procedural' guarantee (any aspirant member who has his request turned down by the directors that are legally competent to evaluate requests for admission, may appeal to the general meeting)[99]. The Statute for a SCE does not provide for the right of others to become members either; Acquisition of membership is subject to the approval of the administrative organ and refusal may be contested by such outside party before a general meeting (article 4, paragraph 1, Council Regulation (EC) 1435/ 2003).

5.2. Co-operative purpose

As we have said before, the other element that typifies co-operative enterprises according to Italian law is the purpose (not profit-oriented but co-operative)[100]. This is a causal element in the sense that it involves the institutional goals of co-operatives, the objectives that this type of enterprise is bound to achieve.

The new company law, that has settled a debate that has been behind the legal doctrine[101] for some time, has also undoubtedly identified the co-operative purpose in the so-called "management of the service by members"[102], that is, the duty of the co-operative to carry out co-operative exchanges with and on behalf of their members[103]. These co-operative exchanges/ contracts/relations can relate to the supplying of a service or goods to the members (consumer co-operative), the carrying out of work by the members in the co-operative (labour co-operative), the purchasing of goods or services provided by the members by the co-operative (production co-operative) (see article 2512, paragraph 1, no 1, 2, 3 of the civil code).

In practice, the management of the service need not necessarily be exclusive, but at least prevalent, in the sense that, in each case:

a) In consumer co-operatives, income from the sale of goods or providing of services to

members must exceed 50% of all income from sales and services.

b) In labour co-operatives the cost of labour provided by members must exceed 50% of the total labour cost.

c) In production co-operatives, the production costs for services received from members or for goods supplied by members must both be higher than 50% of the total cost of services or the costs of goods or raw materials purchased or sold (see article 2523, paragraph 1, civil code)[104].

Thus, while respecting the criterion of prevalence (and provided their by-laws allow[105]), co-operatives can always work with non-members, and may sell goods or services to such non-members, buy goods or services from them, or use them to provide labour.

What we have just stated applies most of all to a sub-category of co-operative society, that is, the 'prevalently co-operative'. The Italian legislator has allowed for a co-operative company to be set up that is not bound to respect the management of services prevalently by its members. However, doctrine currently maintains that even "co-operatives other than prevalently co-operative cases" must manage the service in dealing with their members, despite not being bound by the rigid prevalence parameters laid down in articles 2512 and 2513 of the civil code.

Similarly, the European co-operative society

> shall have as its principal object the satisfaction of its members' needs and/or the development of their economic and social activities, in particular through the conclusion of agreements with them to supply goods or services or to execute work of the kind that the SCE carries out or commissions. (Article 1, paragraph 3, Council Regulation (EC) no 1435/2003).

5.3. The non-profit limitation

Another principle that is characteristic of Italian co-operatives and that is closely connected to the co-operative nature of the society purpose, and a necessary corollary to the same, is the absence of a profit goal (limited profitability). The law sets precise (rigid) limits on the return on capital contributed by members, both during the lifespan of the society (by paying out dividends, sharing out reserves) and when it is wound up (by allocating the residual assets in case of dissolution).[106] However, these limits only apply to prevalently co-operative enterprises, which are the only type that can therefore be termed non-profit (or with limited profit) in terms of the Italian legal system (see article 2514, civil code)[107]. The absence of the rights of members to a large part of the co-operative assets may lead one to claim that ownership is 'collective', in fact, one should specify that such assets are held in common among the members as a group for the lifespan of the society, and held in common by the co-operative system as a whole once the society has been wound up (in virtue of the 'co-operation system' limitations which we shall look at shortly).

In virtue of not only the prevalence of the management of the service provided to the members but also the non-profit goal, the Italian legislator deems these co-operative enterprises more virtuous than others (as is also the case in article 45 of the Italian Constitution in which reference is made to the co-operative character and the absence of private speculation goals), and only allows prevalently co-operative enterprises access to the fiscal incentives[108].

No limits in relation to return on capital were laid down in regulating SCEs in terms of Council Regulation (EC) no 1435/2003, where the profits available for distribution are calculated by deducting from the balance of the surplus the allocation to the legal reserve, any sums paid out in dividends and any losses carried over, with the addition of any surpluses carried over and of any sums drawn from the reserves (see article 67, paragraphs 1 and 2).

5.4. Democracy

Other principles and rules found in Italian co-operative law (especially those dealing with financial structure and internal organisation) will be looked at more closely later, when and in as much as a study of the main subject of this research makes this desirable. Of these, we wish to immediately deal with the principle of democracy and/or the greater importance placed on people rather than on capital, which is expressed mainly in the rule of 'one member, one vote' as per article 2528, paragraph 2 of the civil code (rule also included in article 59, paragraph 1 of the EC Statute for a European Co-operative Society. In terms of this, each member of a co-operative society shall have one vote at the general meeting regardless of the number of shares he holds[109]. As a result the co-operative society can never be an

'investor-driven' legal form of enterprise (although the 'one member, one vote' rule may also partly be left up to the by-laws, this can never be done completely). This is also true because it is not structurally suitable for attracting large quantities of capital as it cannot give a return on the same without any limits, nor can it fall under the control of a single member or a minority of members.

5. 5. The social function

The social function of a co-operative society, recognised in article 45 of the Italian Constitution, is based on various factors, legal requirements, historical and cultural factors, and the nature of the institutional objectives and internal organisational rules.

One characteristic of the Italian co-operative society[110], or rather the Italian co-operatives taken as a whole, is the so-called 'co-operation system', that is, the obligation on the co-operatives to contribute (in a spirit of mutual assistance and solidarity among co-operatives) to the co-operative sector as a whole, by allocating certain assets to particular funds (so-called 'co-operative funds'), managed by sectoral organisations and destined for promoting and developing co-operation[111]. The social function is implicit in this obligation. This is especially the case where the co-operative movement is widespread (such as in the Trentino – Alto Adige Region) and by favouring other co-operatives indirect advantages indirectly ensue to all their members, employees, suppliers, and users.

Although there is no legal obligation in this regard, the attention the co-operative movement gives to the interests of the community is well known (and is done by virtue of their spontaneous social calling). This interest in the community is based on business ethicality which, for historical and ideological reasons has become part of the very DNA of co-operatives if it is true that "co-operatives work for sustainable development of their communities by applying policies approved by their members", as stated in the seventh principle of the International Co-operative Alliance. The ethical codes for Italian co-operatives, currently being circulated, contain provisions on sustainable development, and interest in the environment and the community.

Thirdly, the social aim of co-operatives is a direct consequence of their co-operative purpose and internal democracy. In practice, co-operatives allow any citizen direct participation (by-passing middle-men and therefore the market) in the economic organisation of the country, irrespective of their wealth[112].

6. Co-operatives in European Union policies

The social and economic democracy elements of the co-operative manner of running an enterprise have also been recognised at an EC level, where the co-operative is a legal form of running a business that enjoys particular attention within the European Community. Reference is not made to the regulation already referred to concerning SCEs, since a prior similar legislative measure dealt with European joint stock companies[113], as much as to the very recent Communication of 23 February 2004, no COM (2004) 18 *on the promotion of co-operative enterprises in Europe.* Here the Commission identifies a series of steps to be taken to improve knowledge of and to promote development and diffusion of this form of enterprise, and invites member states (those most competent in this regard) to take an active role in achieving this objective[114].

In broad outline, the reason for which co-operatives are deemed to be worthy of promotion lies in the fact that the Commission sees them as a

> means for attaining many EC objectives in sectors such as employment policy, social integration, regional and rural development, agriculture, etc[115].

There are passages in this Communication that are closely linked to the main theme of this work that praise the social aims of co-operatives, such as when it shows how co-operatives are often able to satisfy needs that are not met by private (or public) *'for profit'* means "where the services are of no interest to enterprises that are working to make a profit"[116], as is the case in the so-called close services (health, social services, etc). The same is true when one sees co-operatives contributing towards building up a society based on knowledge, as these are enterprises in which users can have a real influence on management decisions, therefore making them "schools of entrepreneurship and management for those who would otherwise not have access to positions of responsibility"[117]. This is also the case when (focusing on the

non-profit objectives of this type of enterprise) one stresses the important role of co-operatives (like other forms of enterprise based on people rather than capital, such as mutual aid societies, associations, and foundations) in favouring employment in the so-called social economy sector[118]. Then again, this is seen when one considers that the co-operative has been taken as a legal form of enterprise by member states typically used to run 'social enterprises' (the main reference being Italian social co-operatives and the more recent French *Société Coopérative d'Intérêt Collectif*[119])[120].

In the end, according to the Commission,

> given the many advantages they offer the European economy, co-operatives are an indispensable element for attaining the Lisbon objectives. In fact, co-operatives are an excellent example of a company that is able to pursue entrepreneurial and social goals simultaneously, in such a way that they mutually reinforce one another[121].

We have seen before that the same reference to the Lisbon objectives and the capacity to combine entrepreneurial and social objectives is also to be found in the words used by the Commission to justify its action to support financial participation by employees. This could immediately (and perhaps correctly) lead any reader to believe that financial participation set up in a co-operative could, from the point of view of the social aims to be pursued, constitute the best possible combination of financial participation and legal form of running a company (although it still has to be seen on the ground, how this participation should be set up from the many options available).

The Commission also deals with what kind of national legislation framework is required in relation to co-operatives, in order to promote this legal form of enterprise. We will not dwell on this other than to look at the passage on the need to guarantee co-operatives suitable forms of financing, in order to allow for their structural incapacity to attract investment capital. According to the Commission, co-operatives could, for example,

> be authorised to issue shares to non-user investors that can be exchanged and that produce interest, provided participation by these non-user shareholders is limited, in order to avoid compromising the co-operative nature of these enterprises[122].

The subject of financing co-operatives will make up a good part of the rest of this work, to which we wish to refer you. For the time being, we wish to simply look at how Italian legislation on co-operatives is 'advanced' in that it not only already offers the solutions hoped for by the Commission, including when it comes to financing co-operatives, but that it can also be taken as a reference model for member countries that do not have any specific legislation or insufficient legislation on co-operatives to allow them to pursue the objectives for promoting co-operatives laid down by the European Commission.

7. Specific profiles in financial participation by employees in co-operatives

7.1. Financial participation by employees and enterprises owned by employees. Financial participation in co-operatives and workers' co-operatives

Based on what has been seen in the first part of this work, one point that requires further clarification for the purposes of proceeding with research, is that of the relationship between the concept of financial participation by employees in an enterprise, and that of an enterprise that is owned (and managed) by the employees. This clarification is necessary in order to understand why the subject of financial participation has its own relevance, even within the ambit of co-operatives, though it has some peculiar characteristics here.

These two concepts are poles apart from a point of view of logic. In fact, talking about 'participation' only makes sense inasmuch as there is something separate in which 'one participates' or is given the opportunity of participating. The doctrine stressed this point in relation to self-management as an industrial democracy technique, excluding any question of participation by employees when there was no decision-making power to be opposed to[123]. This reasoning is also extended to financial participation.

One can only talk about financial participation therefore, when the employees are involved in the financial results, which can be allowed by the owners (and managers) of the enterprise, with the fact of the enterprise being capitalistic or a co-operative being of little

importance (as we will see immediately). However, when it comes to self-management, in enterprises owned by the employees, the appropriation of the financial benefits by employees is not due to 'financial participation' but simply due to the fact that they own (and therefore control) the company.

Given that the Italian system indicates that the model par excellence for enterprises managed by employees is the workers' co-operative, in the light of the above we are able to state the following:

a) Looking at financial participation by employees in co-operatives is not out of place since not all co-operatives are workers' co-operatives, but there are also consumers' and producers' co-operatives, which are companies that belong to consumers of goods supplied by the co-operative or by producers of the goods sold, finished, etc by the co-operative.

b) Talking about financial participation by employees in co-operatives is not out of place when dealing with workers' co-operatives, since according to the Italian legal system ('spurious' or 'not prevalently co-operative') workers' co-operatives can also employ non-member employees. It is true that in co-operatives the members are not capitalists interested in return on capital, and so the 'conflict' is not between workers and profit interests but between workers and co-operative interests. In abstract terms, this does not prevent hypothesising about financial participation by employees practices in these types of enterprise.

c) The subject of financial participation by employees in workers' co-operatives involves significant problems, since the implementation of financial participation schemes in these co-operatives would give rise to nothing other than an increase in the social base of the workers' co-operative by the admission of new worker members (where employees are admitted as co-operative members), or (where non-member employees are admitted as investor members and not as 'co-operator' members) a combination of member employees and employees allowed to participate financially, which right away appears problematic.

Thus, the subject of financial participation by employees is also valid in the area of co-operatives both due to the fact that not all co-operatives are enterprises owned and run by the employees (which is only the case with workers' co-operatives, but not for consumers' or producers' co-operatives), and because a workers' co-operative can also employ non-member employees.

More generally, in the end as we have already seen, it is best if the difference between financial participation in and self-management of the company is recognised in statistical, legal, and economic analyses. The thing that can be most clearly shown is that a tendency towards financial participation can be seen as an effective way of transferring ownership of the company to the employees, thereby guaranteeing its survival. This is stressed by the European Commission in some passages of its very recent Communication on the promotion of co-operatives in Europe, where, referring back to its previous Communication on financial participation by employees, it shows favour towards future transfers of ownership of family businesses (a third of the enterprises in Europe over the next decade, according to Commission estimates) to workers' co-operatives. (This favouring is due to the fact that, unlike outside parties, employees know the dynamics of the enterprise well and are particularly interested in its survival). It also identifies prior financial participation in such companies as an instrument for acquiring this ownership. Participation by employees would form the financial base for the future transfer of ownership and control of the enterprise, and would contribute towards improving the survival rate[124].

The point must also be made very strongly that if benefits of an economic, social, or political type can be put down to financial participation by employees, these benefits must be ascribed to enterprises managed by the employees as well, since in this case financial participation is at its highest level (an enterprise fully owned and run by the employees). It is no mere coincidence that article 45 of the Italian Constitution recognises the social function of co-operatives and calls on the legislator to promote the same[125].

7.2. Financial participation by employees and financing the co-operatives

One of the main problems traditionally faced by co-operative enterprises is that of finding

financial resources, hence their under-capitalisation. This question is also recognised by the European Commission that offers a few reflections in this regard in its Communication on promoting co-operatives.

This form of company is structurally unsuitable for attracting risk capital. This is due to the limitations set on the amount of capital each co-operative society member[126] may hold and the return on capital allocated, which makes investing in co-operatives less attractive that investing in 'for profit' companies. It is also due to the principle of democracy and the greater importance placed on people, so that the position of member and administrative rights do not change in relation to the amount of capital owned.

The situation is a bit better when it comes to finding debt capital, since whereas it is true that creditors cannot count on the capital stock/ partnership's capital (which, as we have seen, is not fixed in co-operatives), it is also true that co-operatives tend to have sufficient assets in virtue of compliance with their legal obligations to allocate to their legal reserves a large part of their net annual profits[127].

Attempts have been made to avoid problems of this kind in various ways, with particular investors being identified by law that are given particularly favourable treatment (such as funding members and shareholders in co-operatives, according to law no 59/92), by means of systematic mutuality (and therefore the intervention of mutual funds, also as per law no 59/92), loans, and therefore debt capital, both on the part of members and banks that are part of the co-operative system.

As we will see later, the new company law has attempted to increase the financial capacity of co-operatives in a number of ways. For now, it may be important to point out that in the area of co-operatives, in addition to the advantages it may hold for employees, financial participation by employees provides an excellent opportunity for co-operatives to gain access to financial resources in the form of risk capital. In this regard, the preferable form of financial participation is share-ownership.

It is therefore important that the co-operative movement (and especially small and medium-sized co-operative enterprises and co-operatives in the process of being launched) look at schemes for financial participation by employees as a strategy to adopt in order to help with financing the sector as well. On the other hand, financial investment in co-operatives (or the co-operative system) can also go some way to reducing the risk borne by the employees, both because the aim, structure, and rules of co-operatives theoretically constitute obstructions and disincentives for directors to take risks, which means that investment in co-operatives is safer, even if the return is lower than that from companies, and because participation in the system by employees allows them direct control over the security of their investment.

7.3. Financial participation, small size, and co-operative system

In its Communication on financial participation, the European Commission deals with relationships between financial participation and small and medium-sized enterprises.

The Commission stresses the advantages (once it has been shown that financial participation is a practice mainly adopted in large 'for profit' companies) of extending this practice of financial participation to small and medium-sized enterprises, public bodies, and non-profit bodies. According to the Commission, especially in the case of small and medium-sized enterprises, there should be special ways of setting up financial participation schemes in the light of the limited size of these enterprises, which results in potentially higher costs compared to the benefits that are still significant and should therefore be grasped[128]. This invitation is clearly particularly relevant to the co-operative sector, and especially to the (broad) section of it that fits the organisational formula for 'small size' (or that is limited by it for various reasons), as happens in the co-operative sector in the Trento province.

Consequently, in putting together financial participation schemes for co-operatives, the fact must be borne in mind that the small size of some of these may require particular solutions in order to avoid excessive costs or to preserve a balance that is much more delicate than in larger enterprises. This calls for adaptation of the basic model dealt with in the first part of this work, due to the fact that otherwise financial participation would become impracticable in co-operatives (or rather, it would only be practicable in larger co-operatives), because it would either prejudice the position of members and the pursuance of the co-operative purpose, or it would be too costly.

7.4. Financial participation functions and function of co-operatives. Preference given to a participation model for financial participation. Financial participation by employees and safeguarding the co-operative purpose

As we have seen before, both the Italian Constitution and Italian Laws, and the European Commission recognise the social function of co-operatives. For various reasons, it is seen as a legal-economic tool capable of achieving social ends, and as such is fully in line with the European economic-social model.

Similarly, financial participation by employees in enterprises is seen as a socially relevant economic measure, both implicitly by the Italian legislator that favours it both fiscally and economically, and explicitly on a European level as is clearly stated in European Commission memos on this matter.

Having said this, it seems that creating forms of financial participation by employees in co-operatives may give rise to a combination with a large social impact, if it is true that, in this case, the social benefits of financial participation in enterprises are added to the social benefits of co-operatives.

One could also foresee that the possibility of success of financial participation by employees is much higher when set up within a co-operative society, due to the natural positive disposition of these enterprises towards their stakeholders, which includes their workers. This would be even more true when one considers that co-operatives are not isolated but work within a movement that supports and contributes towards reinforcing them.

Based on these comments, one can only maintain that a 'participatory' model of financial participation must be adopted in co-operatives, in the sense indicated earlier[129], while not losing sight of the generally small size of co-operatives, and therefore imagining particular 'participatory' models for small and medium-sized co-operatives.

A non-participatory model of financial participation, which as such is only suitable for taking advantage of the potential economic advantages of financial participation (and not even fully), would be contradictory to the nature of the purposes of a co-operative society, its democratic and participatory organisation, and the culture of a co-operative society in overall terms (just like, more generally, it would in our opinion, have a negative impact on the evaluation of any enterprise in terms of being a socially responsible company).

Having said that, however, the need should be stressed for carefully regulating the position of investor workers or any collective body that unites them, within the co-operative. Compared to what occurs in companies, a particular problem arises in relation to financial participation by employees in co-operatives. This relates to the safeguarding (of pursuance) of the co-operative purpose compared to a 'for profit' basis, which could be favoured by the presence of a large number of investors in the company base[130].

8. Models for financial participation by employees in co-operatives

On the basis of the analysis conducted thus far, the conclusions reached in the first part, and the particular nature of financial participation in co-operatives indicated in the second part, we will now attempt to identify what model or models of financial participation may be the most suitable for co-operatives.

8.1. *Profit-sharing* and *share-ownership*

The basic form of financial participation for co-operatives should be share-ownership, although this does not exclude either the possibility of introducing profit-sharing[131] as a first step towards share-ownership or that some co-operatives may, under particular circumstances, decide that profit-sharing is the only way to go.

Workers' co-operatives could reach different conclusions. In this case, as was stated earlier, the share-ownership model is difficult to put into practice because it would give rise to the contradiction of a non-member employee becoming an investor member of the co-operative he works for, without being admitted as a member on an even footing with the other member employees. Thus, either the non-member employee must be admitted as a full member, which would result in nothing other than a widening of the company base (and therefore not financial participation in the strict sense), or some other form of financial participation by non-member employees will have to be devised, resulting in recourse to profit-sharing model or a weaker share-ownership model, by subscribing to participatory financial instruments other than shares.

Note must be taken, however, of the fact that

the share-ownership form may present various application variables that are able to meet particular needs, one of which, as we shall see, is particularly interesting for small and medium-sized co-operatives (and for workers' co-operatives). This is quasi-capital participation, which involves subscribing to participatory financial instruments other than stakes.

The main reasons for the preference for the share-ownership form lies in the fact that this makes it possible to create 'participatory' and 'collective' models of financial participation that, as we have said before, should be considered as being more coherent with the nature of co-operatives. Then there is also the fact that under these circumstances the co-operative is able to access risk capital that it is normally not able to gain access to.

8.2. Voluntary or obligatory nature. Against payment or gratuitous

As to the variables to be considered when drawing up schemes for financial participation by employees in co-operatives, the considerations involved do not differ from those carried out in general in the first part, as regards the voluntary or obligatory nature of the systems and the 'against payment' or 'free' issuing to the employee allowed for in the scheme.

For co-operatives financial participation schemes must be put into practice on a voluntary basis, even if the bodies in the co-operative movement seek to provide incentives for their adoption.

The 'against payment – free of charge' mix also seems best for participation in co-operatives.

8.3. Form and subject of assignment

As to the immediate or deferred form of allocation, the profile does not present any peculiar characteristics where financial participation by employees involves co-operatives. We therefore refer you to the comments made in sub paragraph 2.2.4.

In the case of a share-ownership form of financial participation, the subject of allocation may be 'profit-making' shares or participatory financial instruments other than shares. We will look at this point in paragraph 8.5.1.

8.4. Individual and collective dimensions

In co-operatives, and even more so, schemes for financial participation by employees must be put into practice in a collective dimension.

This relates to extending the schemes to the greatest possible number of employees, setting up the same following agreement with the employees or their representatives, and most of all in relation to the ultra-company dimension of the scheme and the combining of stakes into a single collective subject that looks after the collective interests of the employees.

As to the first aspect, that is, the ultra-company dimension, this is somewhat imposed by the small and medium-size of many co-operatives, where, to prevent financial participation schemes being excessively onerous or upsetting the balance inside the company base, they must relate to the employees in a number of co-operatives. In other ways it is facilitated by the natural aptitude of co-operatives to work together both at an entrepreneurial and a political/trade union level.

As to the second aspect, related to allocating stakes to a collective subject rather than individually to each employee taking part in the scheme, unlike what was stated for joint stock companies (especially those quoted on the stock exchange), this is not due to the need to guarantee a collective voice for the employees (where the organisational rules for co-operatives guarantee each member the possibility of effective participation irrespective of the amount of capital owned), but due to some characteristics of co-operatives that make this strategy advisable. First of all, there is a need to link financial participation schemes with the ultra-company dimension. Secondly, there is a need, especially in the case of small and medium-sized co-operatives, to bear in mind that financial participation by employees taken individually, would excessively alter the internal balance, due to the co-operative rules and 'one member, one vote' principle. This would be to the detriment of co-operative members and consequently the co-operation purpose, which, as we have said before, should be safeguarded against corruption by profit motives, which is made possible by the adoption of extended financial participation schemes[132].

This collective subject, should not be a shareholders' association type of association as per article 141 of Consolidation Act on Finance and article 6 of the Italian bill on shareholding by employees, because this association does not represent a single stake at a members' meeting, and therefore one vote, but rather a number of stakes and a number of votes, which must be given in compliance with

the instructions of the delegating party[133].

One should rather think about a holding company, which may take the form of a non-prevalent co-operation co-operative, set up at the initiative of the co-operative(s) setting up a financial participation scheme with the employees as members. This company would hold onto the capital paid in by the individual co-operatives for setting up the scheme, and would therefore exercise the administrative rights resulting from ownership of the stakes. The employees that take part in the schemes would, each in their own right, hold shares or stakes in the holding company and would enjoy the financial benefits (dividends or capital gains) of this participation.

8.5. Regulation of financial participation

Having said this, we need to establish what the position (of investor employees or) the holding company would be in relation to each co-operative, the nature of its participation, its status in relation to the co-operatives and their members, its property and administrative rights, and the conditions for circulation of the stakes it holds. In order to do so, we need to deal with the subjects that follow.

8.5.1. The financial structure of co-operatives. 'Co-operative' stakes/ shares. 'Profit-making' shares. Various financial participation tools

The financial structure of co-operatives has changed significantly in the light of the reform of company law[134]. Due to the co-operation purpose involved in co-operatives, their financial structure differs partially from that of traditionally capitalised (investor-driven) firms.

The assets held by co-operatives may be broken down into:

a) 'Co-operation' stakes or shares, subscribed to by 'co-operator' members.
b) 'Profit-making' shares, subscribed to by investor (non-user) members.
c) Financial participation instruments other than shares.

The stakes or shares we have identified as 'co-operative' are those subscribed to and held by 'co-operator' members of co-operatives, that is, members that are involved in co-operative exchanges with the co-operative enterprise, users, suppliers, and employees. Any equity contribution by 'co-operator' members following subscription to co-operation stakes/shares, are taken as part of the capital stock. We have already indicated the reasons for the returns on these stakes being limited (especially in prevalently co-operative co-operatives). This results in the lack of attractiveness for investment in the co-operative by co-operative members, and the problem of its under-capitalisation structure.

Clearly, since they are reserved to 'co-operator' members, co-operation stakes/ shares cannot be subscribed to by employees that are involved in a financial participation scheme (or the collective body that acts in their interests).

The shares we have referred to as 'profit-making' are those that can be subscribed to and held by investor members of the co-operative enterprise.

The new company law has provided for subjects only interested in return on invested capital and that therefore only take part for profit-making purposes, to be admitted as co-operative members.

Unlike the situation with joint stock companies (where amounts paid in by subscribers to financial instruments other than shares are not deemed technically 'contribution of capital', and so do not affect the capital stock[135]), in co-operatives the investors may take on the role of 'members' (investor members), with a right to vote (which is sometimes limited to *ratione materiae*) at general meetings and, unless barred by contrary provisions, they have the same property and administrative rights as 'co-operator' members. It should also be remembered that in overall terms, investor members cannot express more than a third of the votes held by the members present or represented at any general meeting (article 2526, paragraph 2, civil code). The contributions by investor members would therefore be 'contributions of capital' in a technical sense and should therefore be put down as stock capital and subjected to the relevant discipline[136].

In their reform the legislator has generalised what law no 59/92 had already foreseen by regulating the case of the 'backer member' (see article 4), who is now one of the possible types of investor members of a co-operative.

Employees taking part in financial participation schemes (or the collective subject acting on their behalf) could therefore take on the status of investor members.

Provision is made for the by-laws of the co-operative to allow for the issuing of participatory financial instruments other than 'profit-making' shares. These financial instruments are issued in relation to contributions that do not form part of the capital stock (one talks about quasi-capital contributions, albeit still risk capital) and do not carry with them the status of member (thereby making subscribers to them non-member investors). Those subscribing to these instruments will have the property and administrative rights identified in the co-operative by-laws (article 2526, paragraph 2), excluding the right to vote in a general meeting which, by definition, is a right held by members, within the limits laid down by law. Something similar occurred in legislation before the reform, with the co-operative participation shares referred to in law no 59/92, which did not give the holder any right to vote in general meetings (see article 4, paragraph 2). These shares now form one of the possible types of participatory financial instruments that the by-laws may create.

A scheme for financial participation by employees may therefore provide, as an alternative, for participating workers (or the collective subject acting on their behalf) to be allocated participatory financial instruments other than shares, resulting in them (or the collective body) not becoming members of the co-operative (making them non-member risk capital contributors), and so not being able to exercise any right to vote at general meetings.

One may ask whether the latter system is compatible with a financial participation system that is looking to be 'participatory', that is, that gives an adequate voice to employees in a co-operative[137]. Naturally, the lack of the right to vote at meetings would limit the position of employees (or collective body uniting them), and so this model of financial participation would be weaker from a 'participatory' point of view than that actuated by allocating 'profit-making' shares. Nevertheless, one should note that:

- First of all, the by-laws may give holders of participatory financial instruments the right to vote on matters specifically indicated (article 2351, paragraph 5 civil code), which partially reduces the weight of the objection dealt with above.
- Secondly, the by-laws may give certain privileges to those holding financial instruments, including the right to appoint an independent member of the board of directors or supervisory board (in a dual system), or an auditor (article 2351, paragraph 5, civil code)[138].
- Thus, in certain cases, this weaker participatory model may be the only one that can be put into practice, such as happens in small and medium-sized co-operatives and workers' co-operatives, for the reasons given before.
- Finally, the absence of the right to vote at general meetings, when this is necessary or preferable in order to regulate the position of the investor employee, may be adequately compensated for by financial privileges (as provided for in article 5, paragraph 2, of law no 59/92, for co-operative participation shares). In this regard, one should remember that the limits to returns on capital laid down for prevalently co-operative co-operatives do not apply to returns on financial instruments[139].

Ultimately, employees taking part in financial participation schemes, or the collective body acting on their behalf, take on the status of investor members, or holders of participatory financial instruments (non-member investors). From the employees' point of view, the basic difference between these two hypotheses is that they only always have a voice at general meetings in the former case. As we have said, however, this does not mean that the second hypothesis falls outside a 'participatory' perspective, because the holders of financial instruments may be given important administrative rights in the by-laws, as well as the right to vote on certain topics. Where admission of new members is too costly or impracticable for co-operatives, there is the possibility of making use of an alternative instrument, that is, the participatory financial instrument. Besides, one should also finally refer to a further possibility where, in order to create specific schemes, the participatory financial instrument is combined with the setting up of assets for a specific deal in terms of article 2447 bis of the civil code[140].

8.5.2. Financial participation and organisational profiles

The creation of 'participatory' financial participation schemes in a co-operative also makes it necessary to deal with how the

co-operative is organised internally, that is, what administrative and supervisory system it adopts, and therefore, where participation by employees is to take place. This question can be turned upside down when one considers how the adoption of financial participation schemes affects or may affect governance of co-operatives, and whether this has or may have an effect on the choice of the administrative and supervisory system.

This question can now be dealt with because, in line with what happened for investor-driven companies, the reform of company law increased the number of models for the internal organisation of co-operatives, having set some firm, unchangeable rules related to the type of co-operative, the choice between organising the co-operative based on a joint stock company type of enterprise or a limited liability company (although, in practice, larger co-operatives cannot but follow the joint stock company model[141]), and the choice on whether being organised based on the ordinary administrative and supervisory system, a dual system, or a monistic system.

Let us immediately say that, over and above the doubts generally voiced as to the use of a joint stock company model for co-operatives[142], we believe that there is a great deal of incompatibility between co-operatives governed on a limited liability basis and the adoption of schemes for financial participation by employees. This is because this type of co-operative is too strongly centred on the person of the partner (one normally hears that the new limited liability company is somewhere between stock companies, with which it shares full asset autonomy, and partnerships, with which it shares a strongly contractual basis, that is, centre stage is occupied by the member, and his interests in relation to the institutional purpose of the enterprise[143]). This is done to allow adequate pursuance and adequate protection of the various interests, such as the profit-making interests of the investor employee. The conflict between the co-operative interests of members and the profit-making interests of employees could make share-ownership type financial participation too costly (even, probably, in the weak form of subscription to participatory financial instruments). Consequently, co-operatives that are obliged to adopt the limited-liability model (that is, those made up of between three and eight individual persons: article 2522, paragraph 2, civil code), only have the profit-sharing model of financial participation available to them.

Co-operatives that adopt joint stock company standards can organise themselves according to the ordinary system, or, where expressly opted for in the by-laws, on a dual or monistic system.

The ordinary system (which is applied unless otherwise indicated in the by-laws) is the more traditional type for us, as it is the Latin model (article 2380 et seq, civil code). In addition to the general meeting with its traditional competence, it also has a board of directors (that may have an executive committee or managing director, appointed by the board) and a board of auditors (supervisory body set up in compliance with rules laid down in article 2397 et seq of the civil code, therefore allowing for the independence and professionalism of members) elected by the general meeting. The appointment of a board of auditors is not obligatory in all cases (see article 2543, paragraph 1, civil code).

The dual system (article 2409 *acties* et seq, civil code) is based on the German and French system and is allowed for in the Statute for a European Co-operative Society. It has a works council and a supervisory board. The former is made up of at least two members that need not be members of the co-operative, and that are nominated by the supervisory board, with purely managerial responsibilities. The second is made up of at least three members, appointed by the general meeting. In addition to fulfilling the functions of the board of auditors, the supervisory board also fulfils some of the general meeting tasks in the ordinary system (appointment of managers, revoking of such appointments, fixing remuneration, approving annual reports, bringing social responsibility action against the managers). The by-laws can also give it 'top management' duties, that is, taking decisions on the company strategic, industrial, and financial plans submitted to it by the works council. The general meeting appoints the supervisory board and only decides on the company purpose and structure (stock capital changes, mergers, etc). The general meeting powers are therefore significantly curtailed compared to an ordinary administrative and supervisory system. The general meeting powers are concentrated higher up in the supervisory board that, as we have said, can also be involved in top

management tasks. It is therefore not surprising that, in the words of the ministerial report, the dual system would be the most suitable for dissociating ownership (by members) from management of the company.

The monistic system (article 2409 *sexiesdecies et seq,* civil code) is based on the Anglo-Saxon model and is dealt with in the Statute for a European Co-operative Society. It differs from the ordinary model in that it does not include a board of auditors, with this body's tasks being carried out by a management control committee appointed by the board of directors (which also lays down how many members this committee will have, which must not be fewer than three for companies resorting to risk capital) from its own members, and made up of non-executive directors, one of which must be an auditor. The non-administrative directors that make up the management control committee must fulfil the independence requirements laid down for auditors. At least a third of the directors must be independent, in terms of article 2399 of the civil code (article 2409 *septiesdecies*, paragraph 2). This system is intended to simplify internal management of the company, as well as making the relationship between managers and supervisors more transparent, promoting the production and circulation of information. On the other hand, it does give rise to some perplexity due to the fact that the controllers are appointed by those they control, especially in a co-operative, where control over implementation of the co-operation goal plays a central role. Other than that, the monistic system does not differ greatly from the ordinary system, of which it is only a specific form.

As shown in the first part of this work, involving employees (or the collective body acting on their behalf) in decision-making in companies in which they participate financially must be carried out in the form of supervisory bodies (although the possibility of minor participation in the company management body is not ruled out for certain situations). This may therefore be done via the board of auditors, supervisory board, or management control committee, depending on the administrative and supervisory system adopted by the co-operative. Obviously, participation (which must always be as a minority) would be more effective when exercised in a supervisory board, especially where the by-laws of the co-operative reserve the power to decide on strategic, industrial, and financial plans put forward by the directors to this body, as allowed for in the law. On the other hand, even participating in the management control committee could have positive results, since the employees' representatives (or collective body uniting them) would be in close contact with the company executive directors, and could therefore count on greater access to relevant information.

As to the needs laid down for creating schemes for financial participation in co-operatives with certain characteristics, it does not seem possible to express any absolute preference in terms of one administrative system as opposed to another.

As to the choice of administrative and supervisory system, company law provides through adequate choices to be made in the by-laws (which are to be indicated in the schemes for financial participation by employees) for reserving one or two places on the body that controls the company to the investor member employee category or to employees holding participatory financial instruments[144].

9. Conclusions

On the basis of a complete analysis of the matter and an evaluation of the nature and purposes of co-operatives, the following final comments can be made on the subject of financial participation by employees in co-operatives:

- Financial participation by employees is a technique that, despite being more suitable for consumers' and producers' co-operatives, can also be applied to workers' co-operatives, even though, in truth, this can only be done with great difficulty.
- In addition to the general benefits that it brings to any enterprise, and therefore also to co-operatives, financial participation by employees is a particular important means for co-operatives (especially small and medium-sized co-operatives and those being launched) to acquire risk capital.
- With a view to protecting employees, it seems that one can say that financial participation in co-operatives is less risky, albeit also less profitable, than it is for capital companies.
- Financial participation by employees is particularly important for small and medium-sized co-operatives, although it must be applied in a particular manner in these cases.
- Financial participation by employees in

co-operatives is an economic instrument with a particular social relevance, because it takes place in a type of company that per se has a social function.

- The financial participation model that should act as a point of reference for co-operatives is share-ownership. Nevertheless, the profit-making model can be applied to some small and medium-sized co-operatives, and especially to workers' co-operatives.
- By virtue of their nature and purpose, co-operatives must set up 'participatory' models of financial participation, thereby making it possible for them to allow effective involvement of employees in the management of the co-operative. This can be done by (minority) participation in the company's bodies, especially the controlling body (board of auditors, supervisory board, or controlling committee, depending on the system adopted).
- Schemes for financial participation must be put into practice in co-operatives in such a way as to protect the co-operation purpose against contamination of profit-making variations.
- For various reasons, in co-operatives financial participation schemes must have a collective dimension. More specifically, they must have an ultra-company dimension and be set up via a collective subject that holds and manages the employees stakes and looks after their interests.
- Despite their being some differences, the position of employees (or the collective body acting on their behalf) can either be that of investor member or that of subscriber to participatory financial instruments. The latter appears to be particularly preferable in the case of small and medium-sized co-operatives and workers' co-operatives.
- It is unlikely that financial participation schemes would be successful or could be set up according to the principles identified, in co-operatives governed by rules for limited liability companies.
- In co-operatives governed by the rules for joint stock companies, it does not seem that the choice of administration and control (ordinary, dualistic, or monistic) is particularly relevant for the purposes of correctly implementing schemes for financial participation, provided the employees or collective body that unites them is guaranteed effective participation (albeit as a minority) in the company's bodies, that is, the controlling body for the co-operative (although, in some cases, participation in the management body can be agreed).

This paper constitutes the final scientific report of the CONFIDENCE research project – Creating Open Networks for Financial Instruments to Develop Engagement by Co-operative Employees. This research was financed by the European Commission GD Employment and Social Affairs while the Federazione Trentina delle Cooperative (Trentino Federation of Co-operatives) and the Dipartimento di Scienze Giuridiche (Law Department) of the University of Trento acted as promoter-organiser and partner charged with the drawing up of the final scientific report respectively. Other important organisations within the co-operative movement took also part in the research such as the Co-operative College Trust of Manchester, United Kingdom, the Spanish Mondragon Corporaciòn Cooperativa (MCC), CECOP aisbl (European Confederation of Workers' Co-operatives, Social Co-operatives and Participative Enterprises), ELABORA scarl with office in Rome and also FABI (Autonomous Bankers'Federation).

The author charged by the Law Department of the University of Trento with the drawing up of this report is a tenured research worker at the Jurisprudence Department of the 'Tor Vergata' University in Rome and supply professor of Private Law at the Economics Department of the University of Trento.

Notes

1 Cf M Biagioli, Partecipazione agli utili, in Enciclopedia delle scienze sociali, VI, Rome, 1996, pp493-4.
2 Cf A Roncaglia, La ricchezza delle idee. Storia del pensiero economico, Rome-Bari, 2001, p185.
3 Cf J E Meade, The theory of labour-managed firms and of profit-sharing, in Economic Journal, vol 82, 1972, pp402-428; M L Weitzman, The share economy: conquering inflation, Cambridge, Mass, 1984.
4 Cf C Vivante, *La partecipazione dei lavoratori agli utili delle società per azioni*, in *Riv dir comm*, 1918, I, p258 on.

5 Council Recommendation of 27July 1992 concerning the promotion of employee participation in profits and enterprise results (including equity participation) in OJ, 26 August 1992, no L 245.
6 Commission Communication, On a Framework for the promotion of employee participation, 5 July 2002, no COM (2002) 364, par 1 [italics added].
7 Especially cf D M Nuti, *Cosa intendiamo per democrazia economica*, in *Politica ed economia*, 1991, no 7-8, p49 on; M D'Antona, *Diritto del lavoro di fine secolo: una crisi di identità?*, in *Riv giur lav prev soc*, 1998, p324: "Share-ownership participation by employees is a factor in the deconcentration of economic power by socialising ownership in favour of the non-capitalistic component of the enterprise".
8 Cf *infra* par 2.2.1.2.
9 Cf *infra* especially par 2.1. and 2.2.2.-2.2.6.
10 The functional connection between financial participation and the working relationship excludes forms of financial participation not directly linked to the working relationship for the purposes of this discussion. (Such as, for example an employee acting spontaneously on his own individual initiative and outside of any agreement with his employer, who decides to invest his savings in buying a stake or shares in the enterprise he works for). Similarly, the functional link between further financial benefits for the employee and the enterprise financial results (or more generally, its productivity) obviously also removes form the discussion any financial advantages not granted to the employee due to the enterprise results, but rather on the basis of other reasons (eg on a special occasion or some particular celebration).
11 The distinction between 'direct' and 'indirect' financial participation, which is also rather commonly found in doctrine, is to be found in Communication no COM (2002) 364, cit, para 1. This profile should not be confused with direct or indirect participation that takes place directly between company and employee, or indirectly by mediation by its representatives respectively.
12 As will be pointed out a number of times in the text, this is a crucial aspect in this regard, which is also highlighted by the European Economic and Social Committee in its Opinion on Communication from the Commission on a framework for the promoting of employee financial participation of 26 February 2003, para 4, in which it states that "the two principal forms of this [financial participation], that is, profit-sharing and share-ownership, can have very different characteristics not only in terms of practical implementing arrangements, but also of their purpose and applicability". In doctrine, cf, among others, E Ghera, L'azionariato dei lavoratori dipendenti, in ADL, 1997, no 6, p4: "From an economic and legal point of view there is a clear difference between profit-sharing and share-ownership by employees".
13 Cf E Ghera, L'azionariato dei lavoratori dipendenti, loc cit.
14 On this point, cf L Angiello, La retribuzione, second ed, in Il codice civile. Commentario (Art 2099-2102), founded and previously directed by P Schlesinger, and continued by F D Busnelli, Milan, 2003, p229 on.
15 Cf A Pendleton et al, Employee share ownership and profit-sharing in the European Union, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2001, p10: "profit-sharing, as a form of wages, occurs within the 'employment channel' of the company and may be defined in the employment contract".
16 Cf E Poutsma, Recent trends in employee financial participation in the European Union, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2001, pp15, 17.
17 Cf L Angiello, La retribuzione, cit, p246, and the legal references it contains.
18 The proportion of profit-sharing schemes in France is 87% according to data from a wide-ranging survey quoted in A Pendleton et al, Employee share ownership and profit-sharing in the European Union, cit, p33-4.
19 On the French experience, see briefly, N. Miranda, Il sistema francese, in A V Izar (edited by), La partecipazione azionaria dei dipendenti, Turin, 2003, chap. I, p27 on.
20 Cf E Ghera, L'azionariato dei lavoratori dipendenti, cit, p5, p11, that observes that the allocation of shares is not included in remuneration, as it constitutes an onerous disbursement of a fringe benefit type. See also C Angelici, Le azioni, in Il codice civile. Commentario (Art 2346-2356), directed by P Schlesinger, Milan, 1992, p89, no 13. A Alaimo's, Retribuzione e azionariato dei lavoratori, in Giornale dir lav e relaz ind, 1996, p569 on stands out.
21 Cf A Pendleton et al, Employee share ownership and profit-sharing in the European Union, loc cit: "share ownership occurs in the 'employment channel' of the company and is distinct from remuneration arising from employment".
22 In an affirmative sense, T Treu, La partecipazione dei lavoratori alla economia delle imprese, in Giur comm, 1988, I, pp786-7, based on the (voluntary) indeterminate nature of the constitutional formula. L Guaglianone, Individuale e collettivo nell'azionariato dei dipendenti, Turin, 2003, pp26-7.
23 On this point cf infra para 7.1.
24 In the United Kingdom this occurs in 45% of cases according to the data given in A Pendleton et al, Employee share ownership and profit-sharing in the European Union, cit, p31.
25 On this point, Alaimo, Retribuzione e azionariato dei lavoratori, cit.
26 In Official Gazette, 28 August 1999, no 202.
27 COM (96) 697, of 8 January 1997, para 2. The PEPPER II report was preceded by the PEPPER report of 1991 (in Europa sociale, no 3/91 suppl).
28 See amplius para 7.1.
29 Cf Communication no COM (2002)364, cit, para 3, which identifies the following general principles of financial participation, with the relevant motivations:
- Voluntary participation: Financial participation schemes should be voluntary (and therefore not imposed

by law), for both enterprises and employees. The law should be limited to promoting participation and providing a clear legal framework.

- Extending the benefits of financial participation to all employees: Financial participation schemes should involve all or at least the majority of employees, all of which should be treated equally. Any discrimination would run counter to the objectives of the scheme, which particularly includes increased identification of employees with the enterprise and a feeling of belonging.
- Clarity and transparency: Financial participation schemes should be set up and managed in a clear and transparent way, in order to allow employees to assess fully the possible risks and benefits involved.
- Predefined formula: For the purposes of transparency, the extent of financial participation should be determined beforehand.
- Regularity: Financial participation systems should be applied on a regular basis, and should not be an one-off exercise.
- Avoiding unreasonable risks for employees: Putting employees at excessive risk must be avoided, because they tend to be more exposed to adverse developments affecting their enterprise as, for them, it is not only their investment that is at stake but also their income and their job itself.
- Distinction between remuneration and income from financial participation: In general, financial participation should not replace salary and any income derived from it should be in addition to a fixed salary (excepting for some specific cases – top executives or start-up firms – where income from financial participation could form part of the overall remuneration package).
- Compatibility with worker mobility: Financial participation by employees should not constitute an obstacle to worker mobility, both internationally and between enterprises, but must be compatible with this objective.

30 Communication no COM (2002) 364, cit, para 2.1.

31 See infra par. 3.3.

32 In the European Social Charter (cf Part II, art 4) only Member States are bound to guarantee employees a fair wage. The remuneration level is not one of the steps taken to promote the free circulation of employees in terms of ex heading III, or those dealing with employment in ex Heading VIII of the EC Treaty.

33 The survey by A Pendleton et al, Employee share ownership and profit-sharing in the European Union, cit, clearly shows that there are countries (especially France, for the profit-sharing form, and the United Kingdom and Holland for the share-ownership form) in which financial participation is widespread, and others (like Italy) in which the practice is very limited, where the legislator has not taken steps to respond to prompting by the European Union.

34 Cf Communication no COM (2002) 364, cit, para 5.1.

35 Cf A Pendleton et al, Employee share ownership and profit-sharing in the European Union, cit, p30 on. On this subject also see A Pendleton & E Poutsma, Financial participation: The role of governments and social partners, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2004.

36 See among others, the proposal by Cesare Vivante, in La partecipazione dei lavoratori agli utili delle società per azioni, cit, and that edited by Marco Biagi in collaboration with Michele Tiraboschi for the Ministry of Transport, implementing what was laid down in the "Patto sulle politiche di concertazione e sulle nuove regole delle relazioni sindacali per la trasformazione e l'integrazione europea del sistema dei trasporti" of December 1998, in DRI, 2000, no 1, p109 on.

37 These articles are quoted here to make them easily accessible to the reader.

- Art 2099, paragraph 3, civil code: "Any one employee may be remunerated fully or in part in the form of profit-sharing ...".
- Art 2102, civil code: "Unless conventions provide for otherwise, the share in the profits payable to the employee is determined on the basis of the company net profit and, for companies obliged to publish an annual report, on the basis of the net profits shown in the balance sheet duly approved and published".
- Art 2349, civil code: "Where provided for in the by-laws, the extraordinary shareholders' meeting can decide on allocating profits to the company employees or to those working for subsidiaries by issuing special categories of shares which are allocated individually to employees, for an amount equal to the profits, in terms of specific norms as to the form, mode of transfer, and rights enjoyed by the shareholders. The capital stock must be increased to correspond with such share amounts (paragraph 1). An ordinary shareholders' meeting may also decide to allocate to employees of the company or its subsidiaries financial instruments other than shares, bearing property or administrative rights, with the exclusion of the right to vote at ordinary shareholders' meetings. In this case specific norms must be drawn up as to the conditions for exercising the rights afforded, the possibility of transferring such rights, and anything that causes cancellation or withdrawal of such rights (paragraph 2)".
- Art 2358: "The company may not grant loans, nor provide guarantees for the purchase of or subscription to its own shares (paragraph 1). The company may not either, be it directly or via trustee companies or middle men, accept its own shares as guarantees (paragraph 2). The provisions of the previous two paragraphs do not apply to operations carried out to promote the purchasing of shares by employees of the company, its holdings, or subsidiaries. In these cases, however, the amounts involved and the guarantees given are to be within the limits set by the profits normally distributed and the reserves indicated as being available in the latest regularly approved balance sheet (paragraph 3)".
- Art 2441, last paragraph: "In terms of a decision taken at a shareholders' meeting, with the required majority for extraordinary meetings, the right of option [to shareholders] may be excluded for up to a quarter of newly issued shares, if these are offered for subscription to employees of the company, its

holdings, or subsidiaries. Exclusion of the option for more than a quarter must be approved by the majority indicated in paragraph five [as many shareholders as represent more than half the capital stock]".

38 TUF – *Consolidation Act on Finance*.

39 In *Official Gazette*, 27 December 2003, no 299, ord suppl.

40 On this point, see other parts of the text, especially para 3.3.

41 The cases of the privatisation of Telecom (in *LI*, 1997, no 21, p75 on), and reorganisation of Alitalia (in *LI*, 1996, no 13, p43 on) are the most significant examples of this claim.

42 On this point, cf M Biagi, La partecipazione azionaria dei dipendenti tra intervento legislativo e autonomia collettiva, in Riv it dir lav, 1999, I, p283 on.

43 This is indicated by the fact that this report is couched within the setting of a survey organised by an association representing enterprises, namely the Federazione Trentina delle Cooperative, although the co-operative nature of these enterprises makes this view less surprising.

44 On this point, see S Rodotà, Il terribile diritto. Studi sulla proprietà privata, second ed, Bologna, 1990, p24, that deals with the incapacity of models of (widespread share-ownership: public company, and) share-ownership by workers to make substantial changes to the ownership scene, and therefore to make any substantial difference to the distribution of power and company set up.

45 In the document by W Cerveda (CISL) of 16 February 2001, on share-ownership by employees, despite identifying the risks connected with share-ownership by employees, especially in terms of the characteristics of the Italian financial market, some plans of action are outlined for achieving a collective type of financial participation, via pension funds, in order to diversify and lessen the risks faced by the employees. It also deals with recognition of the role of the trade union in defining the degree of participation by employees, agreeing the prices of the shares offered to employees, and identifying the resources necessary for buying the shares, as well as drawing up a statute for associations for shareholder employees, and recognition of the role of the employees in a company body that supervises the actions of managers. UIL point of departure is very different, as, at its hearing in the Chamber on 22 January 2004, dealing with the proposed laws on share-ownership by employees, it maintained that this subject was "basic to a correct and fruitful development of industrial relations". It then dealt with the management aspect and the importance of providing for representation of employees in supervisory boards of companies (but not in the board of directors) and/or the possibility of appointing an auditor. It showed its agreement with 'collective' participation via associations of shareholder employees or investment companies, and the role of trade unions in negotiating financial participation practices. CISL favourable approach is well known and emerges clearly in a document issued in October 2001, La partecipazione dei lavoratori alla attività e alla gestione delle imprese. Here, we need simply to draw attention to the positive effects of financial participation on dialogue and social peace, and its capacity to create co-operative industrial relations. More specifically, we wish to point out the favourable attitude shown towards 'participatory' financial participation, even at the level of administrative and management bodies in the employer company.
For the position and role of social parties on a European level, that more or less reflect those in Italy, see A Pendleton & E Poutsma, Financial participation: The role of governments and social partners, cit, as well as the various essays in DRI, 2002, no 2.

46 See the second session of Confindustria on 12 February 2004 in the House of Deputies, dealing with schemes regarding share-ownership by employees, which shows general disapproval of organic regulation and especially as regards forms of in-house involvement of employees, particularly via their trade unions.

47 Communication no COM (2002) 364, cit, para 5.2.

48 A Pendleton et al, Employee share-ownership and profit-sharing in the EU, cit.

49 Communication no COM (2002) 364, loc cit.

50 See note 29 above.

51 The 'against payment' or 'free issue' question is looked at from a contractual and labour point of view rather than from the company side, where free issuing of shares is neutral in relation to the reasons it is practised. This merely signifies that no contribution of capital is due from the subscriber since the corresponding increase in the stock capital is reached through other means (profits not distributed, reserves, etc).

52 Art 12, paragraph 2, lett c), of the Italian bill allows the deduction of the entire value of shares allocated free of charge from the company taxable profit, within certain quantitative limits (that is, € 5,000.00 per annum), determined on the basis of the company net worth indicated in the latest approved balance sheet.

53 The Italian bill does not give any definite indication in this regard, and implicitly provides for free issue financial participation schemes to be set up in agreement with trade unions, as provided for in art. 2, paragraph 1.

54 On this point, cf infra para 3.3.

55 Cf M Tiraboschi, Partecipazione finanziaria, qualità del lavoro e nuove relazioni industriali: il caso italiano in una prospettiva comparata, in DIR, 2002, pp218-219, that talks about a "decisive political question" in this regard, and maintains that schemes carried out on a purely individual level would take the subject of financial participation out of the realm of economic democracy and could give rise to serious discussion on the role of trade unions. The alternative between the individual and collective dimension is the key to approaching the question of share-ownership by employees - L Guaglianone, Individuale e collettivo nell'azionariato dei dipendenti, cit.

56 Cf M Biagi, La partecipazione azionaria dei dipendenti tra intervento legislativo e autonomia collettiva, cit, p296.

57 By way of contrast, the project designed by M Biagi referred to, lays down a specific obligation of equal treatment and a prohibition of discrimination (art 2, paragraph 1), and extends financial participation schemes to all employees, even those on part-time or fixed-term contracts.
58 Cf Council Recommendation of 27 July 1992, cit, part II, point 6.
59 On this point, cf L Guaglianone, Individuale e collettivo nell'azionariato dei dipendenti, cit, pp153-8.
60 Cf C Vivante, La partecipazione dei lavoratori agli utili delle società per azioni, cit.
61 In this regard, M Biagi, La partecipazione azionaria dei dipendenti tra intervento legislativo e autonomia collettiva, cit, p293. In similar terms, M Tiraboschi, Partecipazione finanziaria, qualità del lavoro e nuove relazioni industriali: il caso italiano in una prospettiva comparata, cit p217, who claims that financial participation can at times be an instrument for raising risk capital, a privileged path towards privatisation and/or restructuring to promote renewal of the enterprise, an alternative to collective lay-offs, a form making remuneration more flexible and reducing the exit risk of employees involved, and is only seldom a way of extending participation by employees in decision-making processes.
62 For an economic analysis of financial participation, see D M Nuti, Codetermination and profit-sharing in general, in The new Palgrave. A Dictionary of Economics, vol 1, London-New York-Tokyo, 1987, p465 on; M Biagioli, Partecipazione agli utili, cit; H Hansmann, Employee ownership of firms, in The new Palgrave. Dictionary of Economics and the Law, vol. 2, London-New York, 1998, p43 on.
63 Cf M Biagioli, Partecipazione agli utili, cit, p494, that states that in the 1800s, participation contracts for the mines in Cornwall often included clauses requiring employees not to belong to any trade union.
64 On this point, briefly see S Zamagni, Impresa e responsabilità sociale, in Riv coop, 2003, heading 2, p43 on.
65 Promoting an European framework for corporate social responsibility, COM (2001) 366.
66 Cf Un framework europeo per la CSR, declaration by the Italian Presidency on Corporate Social Responsibility, Brussels 1 December 2003.
67 Cf COM (2001) 366, para 2.1. and 2.1.1., no 27 and 28.
68 Cf infra para 3.3.
69 On the evolution of the approach by EC bodies to this question see E Avanzi, La partecipazione azionaria dei dipendenti: gli indirizzi dell'Unione Europea, in Izar A V (edited by), *La partecipazione azionaria dei dipendenti*, cit, p53 on; L Guaglianone, *Individuale e collettivo nell'azionariato dei dipendenti*, cit, p165 on.
70 Communication no COM (2002) 364, cit, para 1 [italics added].
71 Communication no COM (2002) 364, cit, para 1 [italics added]. For formalisation of the Lisbon objectives see the Commission Communication Social Policy Agenda, 28 June 2000, no COM (2000) 379; cf also the Commission Communication, Employment and social policies: a framework for investing in quality, 20 June 2001, no COM (2001) 313, where the quality of employment is seen as an instrument for pursuing two goals simultaneously – competitiveness and cohesion, as well as a theory that shows the possibility of producing economic advantages by investing in human resources and putting solid, effective systems in place.
72 Communication no COM (2002) 364, cit, para 2.2. [italics added].
73 Communication no COM (2002) 364, cit, para 2.4.
74 See art 136, para 1, EC Treaty: "The Community and member States … shall have as their objectives the promotion of employment, improved living and working conditions, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion". In the next art 137, para 1, the fields involved in pursuing the goals laid down in art 136 include improving the working environment and conditions, informing and consulting employees, integration of persons excluded from the labour market, equality between men and women with regard to labour market opportunities and treatment at work. Note, however, that para 6 of art 137 excludes pay from the sphere in which this article is to be applied (as well as the right to association, strike, and impose lockouts). Art 2, para 1, of the EU Treaty includes "promoting economic and social progress and a high degree of employment, and bringing about balanced, sustainable development", as some of the Union objectives.
75 Cf art 34, para 1-3, Charter of Fundamental Rights of the European Union of 7/12/00, in Official Journal, 18 December 2000, no C 364: "The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age and in the case of loss of employment. In order to combat social exclusion and poverty the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources…". This Charter of rights is already the subject of specific references by European bodies – see, for example, para 4.2.4.1. of the European Commission Communication of 28/6/00 on the agenda in terms of social policy, where the objectives of the social policy include "guaranteeing the development and respect of fundamental social rights as a central component in a just society and in respect of human dignity".
76 For this argument supporting participation, see E Poutsma, Recent trends in employee financial participation in the European Union, cit, p6.
77 But cf M Pedrazzoli, Democrazia industriale, in Dig comm, IV, Turin, 1989, p245, that limits the extent of the notion to include "any procedure or method for allocating regulatory powers, in any setting and for any of the subjects foreseen, by virtue of which employees or their representatives agree in the setting up of rules (decisions) aimed at regulating the conditions for employees".
78 Cf, in this regard, M Pedrazzoli, Democrazia industriale, cit, p244, according to which it is necessary to check "whether the phenomena being studied result in the co-determination of rules in some aspects or not". M D'Antona, Partecipazione dei lavoratori alla gestione delle imprese, in *Enc giur*, XXII, Rome,

1990, p9, warns however, that there are "definite connections" between the two types of participation, that is, participation to the capital and decision-making participation, since "incisive forms of participation in the enterprise economy imply a certain degree of participation in decision-making on management".

79 Thus E Poutsma, Recent trends in employee financial participation in the European Union, cit, p5.

80 Thus M D'Antona, Partecipazione dei lavoratori alla gestione delle imprese, cit, p1.

81 Cf, for example, Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Co-operative Society with regard to the involvement of employees, in Official Journal, 18 August 2003, no L 207, p25 on., where "involvement of employees" is taken as meaning "any mechanism, including information, consultation, and participation, thorough which employees' representatives may exercise an influence on decisions to be taken within an undertaking" (art 2, lett h).

82 Thus M Pedrazzoli, Democrazia industriale, cit, p251, that talks about an intimate contradiction of equal participation in the company bodies.

83 Cf in this regard L Guaglianone, Individuale e collettivo nell'azionariato dei dipendenti, cit, pp134-5.

84 In doctrine, cf Baglioni, Partecipazione finanziaria e azionariato dei dipendenti, in L'impresa al plurale. Quaderni della partecipazione, no 7-8, 2001, p11 on. The entrepreneurs' associations are of a different opinion, as they favour financial participation provided it does not have any participatory spin-offs. Cf G Guidi, Per un azionariato come incentivo individuale, ibidem, p347 on. On UNICE's position see M Tiraboschi, Partecipazione finanziaria, qualità del lavoro e nuove relazioni industriali: il caso italiano in una prospettiva comparata, cit, p213. Some authors, aware that participation is a public good to be pursued, propose introducing certification and denomination of "participatory enterprises": cf G Baglioni et al, Oltre la soglia dello scambio, CESOS, typewritten.

85 Cf, in relation to the development of the competence of employees, P Pini, Retribuzioni, partecipazione finanziaria e gestionale all'impresa nell'analisi economica, typewritten, p3: "the development of competence, therefore, must not overlook interaction between the organisational system and the employee, and must elicit involvement of the latter in managing the organisation. From a wider point of view, the means of participation required make redefinition of the instruments of democracy inside the company necessary, in order to avoid risking being translated into managerial techniques for involving employees in pre-determined company objectives, giving rise to collaboration only on a micro-organisational level". See also M Tiraboschi, *Partecipazione finanziaria, qualità del lavoro e nuove relazioni industriali: il caso italiano in una prospettiva comparata*, cit, p220: "It is true that the social basis for participation may be applied provided it is integrated with a functional basis, which consists of making a positive contribution to the running of the company".

86 Cf D M Nuti, Cosa intendiamo per democrazia economica, cit, p54: "mere profit-sharing without prior participation in decision-making is a passive and ineffective form of incentivisation, as well as denial of economic democracy". Id, Codetermination and profit-sharing, cit, p466, and its bibliographical references. V Troiano, I dipendenti azionisti, in Riv soc, 2000, p299 on. In relation to the North American system, cf T Treu, La partecipazione dei lavoratori alla economia delle imprese, cit, p811, with bibliographical references in note 55, and R Russo, Il sistema statunitense, in Izar A V (edited by), La partecipazione azionaria dei dipendenti, cit, chap. I, p13, which points out how "increased enterprise performance has been the fruit of forms of share-ownership that have not become mere means of gathering financial resources, and a good investment for the employee, but that have rather been accompanied by effective involvement of employees in supervision and management of the company". This is because the latter is what makes effective reduction of conflict and the creation of a participatory climate possible. In general, in order to survey the positive effects of participation by employees, see K Sisson, Direct participation and the modernisation of work organisation, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2000.

87 For the ETUC position see M Tiraboschi, Partecipazione finanziaria, qualità del lavoro e nuove relazioni industriali: il caso italiano in una prospettiva comparata, cit, p214.

88 Implemented in Italy by Legislative decree no 74 of 2 April 2002, Off Gaz no 96 of 24 April 2002.

89 Dir 2002/14/EC, 11 March 2002, laying down the general fromework for informing and consulting employees, in Official Journal, 23 March 2002, no L 80, not yet promulgated in Italy.

90 Dir 2003/72/EC, 22 July 2003, supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, in Official Journal, 18 August 2003, no L 207, not yet implemented in Italy. However, in doctrine some have already indicated failure in the participatory model of companies: cf A Pizzoferrato, La fine annunciata del modello partecipativo nello statuto della società europea, in Riv it dir lav, 2004, I, p35 on.

91 In the direction expected in the Commission Communication, Modernising company law and enhancing corporate governance in the European Union – A plan to move forward, 21 May 2003, no COM (2003) 284, where reference is made to the social responsibility of companies but not the positive role of shareholder employees in corporate governance. On this point, cf E Avanzi, La partecipazione azionaria dei dipendenti: gli indirizzi dell'Unione Europea, cit, pp91-2.

92 On this point, cf Pedersini, L'azionariato dei dipendenti nelle privatizzazioni italiane, in L'impresa al plurale. Quaderni della partecipazione, no 7-8, 2001, p257 on.

93 In this regard, L Spagnuolo Vigorita, Azionariato dei dipendenti: nozione e profili di diritto del lavoro, in DRI, 2001, no 1, p7; Y Franciosi, Partecipazione azionaria dei dipendenti: le ragioni di una regolamentazione, ibidem, p16.

94 In this regard also see M Biagi, La partecipazione azionaria dei dipendenti tra intervento legislativo e

autonomia collettiva, cit, pp298-300, which shows how the employees are not as interested in direct management, and besides from a minority position in the management body, as they are in the good running and survival of the enterprise.

95 Italy is one of the member countries of EU that has a very developed law on co-operatives. Besides the regulations in the civil code (art 2511 and on) there are several special laws both of a general character (ie applicable to any co-operative) and of a special character (applicable to specific types of co-operatives: workers' co-operatives, credit co-operatives, etc). Legislative decree no 6 of 17 January 2003, Riforma organica della disciplina delle società di capitali e società cooperative, in Official Gazette, 22 January 2003, no 17, Ordinary supplement no 8, has thoroughly changed the dispositions for Italian enterprises (with the exception of partnerships) contained in articles 2325 et seq. of the civil code. The reform law for companies came into force on 1 January 2004 (art 10 of Legislative decree 366/01), and gave to existing co-operatives the authorisation to conform their statutes to the new regulations by 31 December 2004 (art 223 duodecies, paragraph 1, transitory dispositions, civil code).

96 In stock companies, however, the capital is fixed and the amount is indicated in the by-laws (see for joint stock companies art. 2328, paragraph 2, no 4, civil code). Withdrawal and/or admission of members is not a 'physiological' event, but leads to a substantial change to the social contract, with the obligation of taking particular steps to maintain and/or re-determine the capital stock (for joint stock companies, see art 2438, civil code, on increasing capital and art. 2437 quater, civil code, for withdrawal of shareholders).97 In Official Journal, 18 August 2003, no L 207.

98 According to the first principle of the ICA (International Co-operative Alliance), of 1995, repeated in the ICA Rules of September 2003 (in www.ica.coop), "Co-operatives are voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination".

99 Cf art 2528, civil code and recently in this regard, D Galletti, Ammissione e recesso nelle nuove co-operative, in A Fici & C Borzaga (by), La riforma delle società co-operative. Vincoli e opportunità nel nuovo diritto societario, Trento, 2004, p55 on.

100 The other forms of enterprise are profit-oriented, that is, their purpose is to pay out the profits from their economic activity to their shareholders/partners/members (cf art 2247, civil code).

101 On this point see extensive text in G Bonfante, Imprese co-operative, in Commentario del codice civile Scialoja-Branca, by Galgano, Bologna-Rome, 1999, p9 on.

102 This expression originated in the Civil Code Report (no 1025) of 1942 where managing services was mentioned for the first time and then described as "a prevalently co-operative goal, involving supplying goods and services and job opportunities to members of the organisation, under conditions that were more advantageous than those available on the market, whereas the purpose of social companies in the real sense, is the earning and sharing out of profits". In jurisprudence, see Cass 8 September 1999, no 9513, in Società, 2000, p43, which admits that, along with pure co-operation, there is a spurious form of cooperation, with the possibility of co-operatives working with non-members as well.

103 In this regard two points must be clarified.
The company law reform itself allows for the fact that there can be co-operatives not characterised by a co-operative purpose, understood as a service to the members (in the sense indicated later in the text), but rather intended to obtain goods and services for subjects belonging to certain categories, including non-members. However, the setting up of this latter type of co-operative enterprise must be authorised in terms of a special law (cf art 2520, paragraph 2, civil code). One example is the social co-operatives in terms of the institutional law of 8 November 1991, no 381, "Disciplina delle co-operative sociali", in Gazz uff, 3 December 1991, no 283. These act in the general interest of the community (and therefore not exclusively the members) and are set up in terms of a special law. This means that ordinary co-operatives (referred to in the Italian civil code) are characterised by the management of a service, but the legislator may set up special co-operatives for a different end (for more on this subject see A Fici, Cooperative sociali e riforma del diritto societario, in A Fici & C Borzaga (by), La riforma delle società co-operative. Vincoli e opportunità nel nuovo diritto societario, cit, p151 on, e in Riv dir priv, 2004, p75 on, as well as, more briefly, Id, La riforma del diritto societario e l'identità delle co-operative sociali, in Impresa sociale, 2003, heading 68, p7 on).
Secondly, it must be said that, if the management of a service for members is a causal element of co-operatives that are prevalently co-operative in terms of art 2512-2514, civil code, there is more doubt as to the causal element for co-operatives other than those that are prevalently co-operative, although in doctrine the majority are of the opinion that this sub-category of co-operatives is related to managing a service, albeit not prevalently (for debate on this point and doctrine references, see A Fici, La riforma delle società co-operative. Prime note esegetiche, in Impresa sociale, 2002, heading 6, p52 on, and www.judicium.it).

104 Besides, art 111 undecies, transitory dispositions, civil code, provides that the Minister for Production can, by means of his own decree, establish deviations from the prevalence requirements, as defined in art 2513, civil code, in relation to the structure of the enterprise and the market in which co-operatives operate, with specific norms the co-operatives are to comply with, and the circumstances in which the creation of the goods destined for co-operative exchange require a time that exceeds one financial year.

105 Cf art 2521, paragraph 2, civil code.

106 The situation is different for any investor members (or other non-member investors) of the co-operative, as explained more fully below.

The limits for paying out dividends, obviously do not take 'refunds' into account (but see the terms of art 3, paragraph 2, lett b, of Law No 142 of 3 April 2001, Revisione della legislazione in materia cooperativistica, con particolare riferimento alla posizione del socio lavoratore, in Off Gaz, 23 April 2001, no 94, which sets a limit of a 30% increase for refunding basic remuneration owing to employees in a workers' co-operative). These do not constitute sums paid out to members by way of return on capital and in relation to the quantity of the same, but rather amounts paid to them ex post for and to the extent of the co-operative exchanges made with the enterprise (cf art 2545 sexies, civil code; art 66, Reg 1435/2003; Cass 8 September 1999, no 9513, where refunds are defined as a technical instrument for paying members out for the co-operative advantage (cost savings or greater pay) resulting from exchanges within the co-operative. These are transformed into a reimbursement to members of part of the price paid or an addition to the remuneration paid to them, while profits constitute return on capital). Besides, the problem of the distinction between refunds and dividends only arises for 'spurious' co-operative co-operatives. Where a co-operative does not work with third parties (therefore 'pure') it could never pay out profits to be shared out in the form of dividends (the profit would result exclusively from managing a service for the members, and must therefore be paid out exclusively in the form of refunds). A different problem arises where, for civil purposes (especially as far as obligatory allocation of net annual profits is concerned, imposed on the co-operatives in terms of art 2545 quater, civil code), refunds must be considered as additional cost or lower income from the enterprise activities, which results in a lower profit, or the paying out of the profit, albeit done (unlike the case of dividends) in relation to the co-operative exchange. (On this point, and various positions, see E Cusa, La nozione civilistica di ristorno cooperativo, in Riv coop, 2003, heading 3, p21 on, A Fici & C Borzaga (by), La riforma delle società co-operative. Vincoli e opportunità nel nuovo diritto societario, cit, p47 on, and E Rocchi, La nuova disciplina dei ristorni, report to the "Gli statuti delle imprese co-operative dopo la riforma del diritto societario" Convention, Bologna, 7 February 2003, in www.associazionepreite.it.

107 Although it must be said that financial profitability of participation in a non-prevalently co-operative co-operative is limited due to the fact that the non-prevalently co-operative co-operative must also allocate a significant part (30%) of its net annual profits to reserves (art 2545 quater, paragraph 1, civil code), a small amount (3%) to mutual funds (art 2545 quater, paragraph 2), and is subject to the rule covering the maximum capital that may be held by each individual person, that is, €100,000 (art 2525, paragraph 2).

108 See art 223 duodecies, paragraph 6, transitory dispositions, civil code. This limitation is only applicable to fiscal incentives and not other types. Co-operatives considered prevalently co-operative by law are also allowed fiscal incentives (without any concrete investigation of the requirements for such prevalence), provided they comply with the special laws that govern them, such as social co-operatives (cf art 111 septies, paragraph 1, transitory dispositions, civil code) and co-operative banks (cf art 223 terdecies, paragraph 1, transitory dispositions, civil code).

109 In joint stock companies, however, each minimum unit into which the capital stock is divided, that is, each share, gives its holder the right to vote at the shareholders' meeting (art 2351, paragraph 1, civil code). However, the higher the amount of capital owned, the greater the decision-making power of the shareholder.

110 In truth, the sixth Principle of the ICA also deals with the need for each co-operative in the movement to work towards strengthening the co-operative movement: "Co-operatives serve their members most effectively and strengthen the co-operative movement by working together through local, national, regional and international structures".

111 All co-operatives (excepting for those exonerated by law – see art 13, paragraph 19, law no 326 of 24 November 2003, Conversione in legge, con modificazioni, del decreto-legge 30 settembre 2003, n 269, recante disposizioni urgenti per favorire lo sviluppo e per la correzione dell'andamento dei conti pubblici, in *Off Gaz*, 25 November 2003, no 274, ord suppl. no 181, for co-operatives that provide joint and several bond of loans) must allocate 3% of their annual net profits to mutual funds (art 2545 *quater*, paragraph 2, civil code; art 11, law no 59, 31 January 1992, *Nuove norme in materia di società co-operative*, in *Off Gaz*, 7 February 1992, no 31, ord suppl). When wound up, prevalently co-operative co-operatives devolve all enterprise assets to mutual funds, after deducting only the stock capital and dividends that are payable (art 2514, paragraph 1, lett d, civil code). Non-prevalently co-operative co-operatives that are changed into other types of enterprises pay mutual funds the actual value of their assets, minus the revaluated paid-up capital (increased where necessary to an amount equal to the minimum stock capital of the new enterprise), as well as dividends not yet paid out (art 2545 *undecies*, paragraph 1, civil code).

112 On the social function of the co-operative enterprise see A Nigro, *sub* art 45, in *Commentario della ostituzione*, by G. Branca, t III, Bologna-Rome, 1980.

113 Cf (EC) Council Regulation No 2157/2001 of 8 October 2001, *relating to the statute for European Society (SE)*, in Official Journal, 10 November 2001, no L 294/1.

114 As indicated, the Italian Constitution also has a specific article on co-operative enterprises (art 45), in which it recognises their social function and indicates the legal duty to promote and facilitate their development in the most suitable manner.

115 Communication no COM (2004) 18, cit, para 1.2.

116 Communication no COM (2004) 18, cit, para 2.1.1.

117 Communication no COM (2004) 18, cit, para 2.1.1.
118 According to Commission Communication no COM (2004) 18, cit, para 4.3.: "the fact that the co-operatives need simply balance proceeds and costs or make a profit calculated as a fixed percentage of their costs allows many of them to be set up and run by persons that would otherwise not have access to the labour market. These enterprises can therefore play a useful role in social and professional integration of excluded groups … providing entrepreneurial solutions that meet as yet unsatisfied economic and social needs. This is particularly true when there is a lack of public or private initiatives. Co-operatives can create jobs and promote long-term growth based on solidarity, without pursuing net profit to be distributed to its members (social economy)".
119 The regulations for SCIC can be read in Impresa sociale, no 58 (2001), p11 on, with a comment by G Galera.
120 The phenomenon of the 'social company' is now covered by a specific bill AS no 2595, Delega al Governo concernente la disciplina dell'impresa sociale, approved by the Chamber on 20 November 2003 and currently being debated by the Senate. As to doctrine on this matter, the social company is the principal theme in a number of essays, some of which are recent, published in the magazine, Impresa sociale. See also F Cafaggi, L'impresa a finalità sociale, in Pol dir, 2000, p595 on; A Zoppini, Relazione introduttiva ad una proposta per la disciplina dell'«impresa sociale», in Riv crit dir priv, 2000, p335 on.
121 Communication no COM (2004) 18, cit, para 4.
122 Communication no COM (2004) 18, cit, para 3.2.4.
123 Cf M Pedrazzoli, Democrazia industriale, cit, p243: "industrial democracy is not only or so much the opposition of industry to the government (on the part of enterprises, the economy, and public services), but is a type of opposition that could never take power".
124 Cf Communication no COM (2004) 18, cit, para 2.3.1. On this subject, first see Recommendation no 94/1069/Ec of 7 December 1994, in Official Journal 31 December 1994, no L 385.
125 Also see the green paper by the European Commission on corporate social responsibility, no COM (2001) 366, cit, where (para 2, no 23) states that "workers' co-operatives and participation schemes and other forms of co-operative type enterprises (co-operative or associative) have within their structure the interests of the other parties involved, and take on both social and civil responsibility immediately".
126 One hundred thousand Euro, although various exception to the rule are foreseen (cf art 2525, civil code).
127 At least 30% under art 2454 quater, paragraph 1, civil code. Even though – it must be said – the obligation to devolve to mutual funds any residual assets in case of dissolution represents a strong disincentive to increasing capitalisation.
128 According to the Commission, in addition to the general benefits, financial participation in small and medium-sized enterprises can be particularly interesting in terms of start-up capital for new enterprises, and can constitute a useful too, for attracting and keeping essential staff, to provide solutions to problems related to succession in family-run small and medium-sized enterprises.
129 Cf especially para 3.3.
130 This point is explored by A Bibby, Financial participation by employees in co-operatives in Britain, typewritten report submitted for the CONFIDENCE survey, p7.
131 Cf Para 2.1.,
132 Although it must be said that investor members could never have effective control over the co-operative enterprise, as they are subject to the rule of a third of the maximum number of votes that can be cast at a general meeting (cf art 2526, paragraph 2, civil code).
133 On top of that, this poses the problem, with no changes to the law in relation to the rule on voting delegations, that is, art 2539, paragraph 1, in terms of which only a member may be delegated, and he may only represent up to a maximum of ten members.
134 On this point, generally cf M Lamandini, Autonomia negoziale e vincoli di sistema nella emissione di strumenti finanziari da parte delle società per azioni e delle co-operative per azioni, in Banca, borsa tit cred, 2003, I, p519 on, A Zoppini, La nuova struttura finanziaria delle società co-operative, in M De Tilla-G Alpa-S Patti (by), Nuovo diritto societario, Rome, 2003, p571 on. E Tonelli, sub art 2526, in M Sandulli & V Santoro, La riforma delle società. Società co-operative, Turin, 2003, p89 on. V Farina, Società co-operative: capitale sociale, quote, azioni e strumenti finanziari, in Riv notar, 2003, p1089 on. E Cusa, Strumenti finanziari e soci finanziatori nelle co-operative, in Riv coop, 2003, heading 2, p19 on. E Rocchi, Finanziamento e profili organizzativi, in A Fici & C Borzaga (edited by), La riforma delle società co-operative. Vincoli e opportunità nel nuovo diritto societario, cit, p107 on. P Iamiceli, Patrimoni destinati e riserve: prospettive di sviluppo nel nuovo diritto delle società co-operative, ibidem, p131 on. For a general analysis prior to the reform, cf M Lamandini, Struttura finanziaria e governo nelle società di capitali, Bologna, 2001.
135 This conclusion is reached due to the fact that, in joint stock companies, holders of financial instruments other than shares do not have a right to vote at a general shareholders' meeting, and may also contribute works or services, economic utilities that are not accounted for in the capital stock (cf artt 2346, last paragraph, 2349, paragraph 2, 2351, last paragraph).
136 This point is also controversial in doctrine, but must be resolved positively in light of the rubric in art. 2526 ('investor members'), the provisions of art. 2525, paragraph 4 (which talks about limits to the 'capital' that can be held), and that in art 2526, paragraph 3 (which talks about 'withdrawal'), and art

2545 decies ('conversion' in case of transformation).

137 Contrary to the allocation of shares without the right to vote to employess, L Guaglianone, Individuale e collettivo nell'azionariato dei dipendenti, cit, pp55-6.

138 Instead, art 2542, paragraph 4, civil code, would apply to investor members, as it states that one or more directors must, where the by-laws allow, be chosen from those belonging to a category of members, which includes the category of investor member, who cannot be allowed to elect more than a third of the directors. Also art 2543, paragraph 3, according to which investor members can elect, where the by-laws allows, up to a third of the members of the supervisory body.

139 Cf art 2514, paragraph 1, lett b) and lett c), that only place limits on remuneration related to 'co-operative' shares, and, clearly to avoid by-passing this rule, to financial instruments subscribed to by 'co-operative' members.

140 On this point, cf P Iamiceli, Patrimoni destinati e riserve: prospettive di sviluppo nel nuovo diritto delle società co-operative, cit.

141 Cf art 2519, paragraph 2, civil code: "The articles of association may provide for application, where applicable, of the norms for limited liability companies, in co-operatives with fewer than twenty members, or with a credit balance on the profit and loss account of not more than one million Euro".

142 For reference to the debate see A Fici, Cooperative sociali e riforma del diritto societario, cit, and Id, La riforma delle società co-operative. Prime note esegetiche, cit.

143 The main norms that show the centrality of the member are art 2479 ter, para 1, which allows each dissenting member to contest illegitimate decisions by members and art 2476, paragraph 3, that allows each member to promote an action of responsibility on the part of the enterprise directors.

144 Cf art 2351, paragraph 5 and art 2543, paragraph 3.