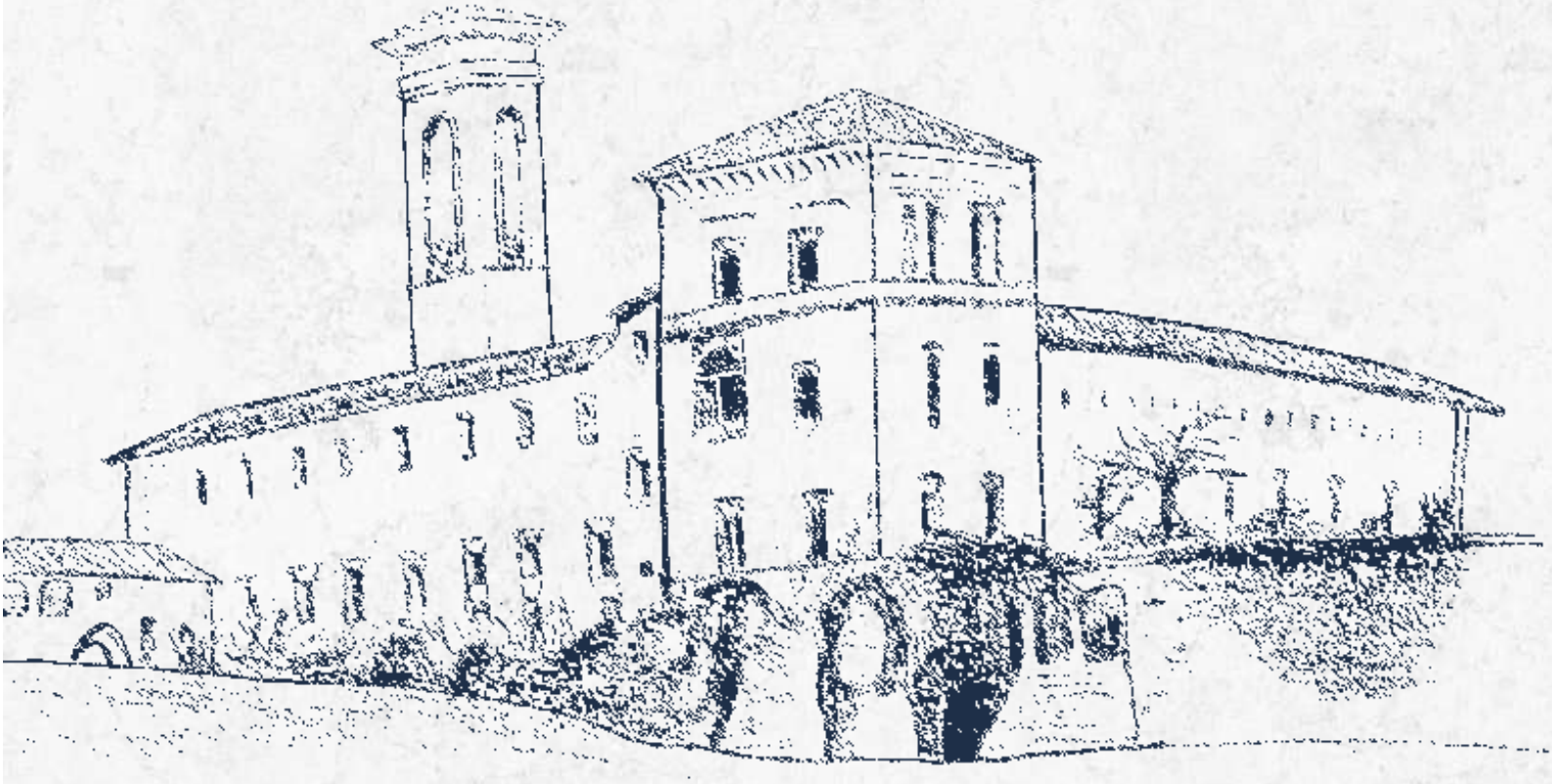
OPEN ACCESS
ISSN 2280-4056

E-Journal of International and Comparative

LABOUR STUDIES

Joint Issue (Vol 10 No. 03/2021 - Vol. 11 No. 01/2022)



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E-Journal of International and Comparative **LABOUR STUDIES**

ADAPT *International School of Higher Education in Labour and Industrial Relations*

E-Journal of International and Comparative

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ADAPT www.adapt.it UNIVERSITY PRESS

Online Publication of the ADAPT Series
Registration No. 1609, 11 November 2001, Court of Modena
www.adaptbulletin.eu

The Agreements for Access to Employment of Persons with a Disability: a Genuine Tool to Promote People and Work

Massimiliano De Falco [*]

Abstract

The inclusion of persons with a disability has always been a sensitive issue in the mechanisms of protection and (equal) access in the labor market. Due to allegedly reduced performance, persons with a disability are often considered "second-class workers" (rather than resources) and, as a result, they have been relegated to tasks of secondary importance compared to the core business. In addition, large companies prefer paying sanctions for not having employed persons with a disability instead of hiring them under the mandatory quotas. An attempt will be made here to provide the key to understanding the phenomenon, leading the companies towards the model of the agreement under Art. 14, legislative decree no. 276/2003, which can include persons with a disability in the production processes and the value chain creation.

Keywords: *Value of Work; Inclusion; Persons with a disability; Access to Employment; Framework Agreements; Reasonable Accommodations.*

[*] Research Fellow at the University of Udine (Italy). Email address: massimiliano.defalco@uniud.it or massimiliano.defalco@unimore.it. This paper is dedicated to Stefano Slataper (1964-2021). As a lawyer, he devoted a large part of his scholarly work to the social and labor inclusion of persons with disability. The ambition to promote a shared value model must be achieved for his memory as well.

1. The Origins of Disability: the Medical Model

The inclusion of persons with a disability in the working context is an ongoing challenge that needs to be overcome both in the access phase and in the pursuance of the employment relationship.
While the expression "job insertion" evokes the idea of a series of actions aimed at persons with a disability so that they are helped to achieve a profile of characteristics compatible with a given context of employment, the term "inclusion" recalls the need that the context itself must be structurally and systematically modified (to allow full and continuous accessibility)[1].
Before any reconstruction of disability at work, is the correct identification of the meaning that needs to be given to the term.
In the national legal system, the meaning assigned to the notion of disability has acquired different shades depending on the context in which it has been used[2]. In the "medical model" developed by WHO in 1980[3], it was understood as a synonym of impairment: following this approach, the definitions accepted by the *corpus* of legislation have, for a long time, placed the emphasis only on the elements that negatively affect the life of the person (i.e. the psychophysical limitations and social disadvantage that results from this perspective), without ever taking into account the influence of the environment in which it is inserted.
This restrictive interpretation of the disability factor seems to go alongside the uncertainty surrounding the definition at the European level, insofar as both the Charter of Fundamental Rights of the European Union (Art. 21 and 26[4]) and the Directive 2000/78/EC on «equal treatment in

[1] C. M. MARCHISIO, N. CURTO, *Diritto al lavoro e disabilità. Progettare pratiche efficaci*, Carocci, 2019, 21.
[2] The reference is to the concepts of «inability» (Art. 2, Law no. 118/1971), «handicap» (Art. 3, par. 1, Law no. 104/1992), «disability» (Art. 1, par. 1, Law no. 68/1999) and «unsuitability» (Art. 41, par. 6, legislative decree no. 81/2008). During the SARS-CoV-2 Emergency (which persists), a further case emerged that can be ascribed to disability *latu sensu*, namely «frailty» (legislative decree no. 18/2020), which identifies workers, who are most exposed to the risk of contagion.
[3] In the «International Classification of Functioning, Disability, and Health» (1980), disability was considered equivalent to physiological or psychological abnormalities, such as «limitations [...] of the ability to perform an activity of daily living in the manner considered normal for a human being». On this topic, see R. MEDEGHINI, E. VALTELLINA, *Quale disabilità? Culture, modelli e processi di inclusione*, Franco Angeli, 2006, 87.
[4] The Charter of Fundamental Rights of the European Union – in Chapter III, dedicated to «Equality» – prohibits «any discrimination based on any ground such as [...] disability» (Art. 21) and recognizes «the right of persons with disabilities to benefit from measures

employment and occupation» did not explicitly and unequivocally define the perimeter of disability, thus leaving it up to the member states to identify its extremes on a case-by-case basis[5].
The absence of a definition among the sources of primary and secondary law of the European Union had made necessary the exegetical activity of the Court of Justice[6]. As is well known, in 2006, the judges of Luxembourg – called upon to pronounce for the first time the question of qualification – had interpreted the notion of «disability» (Art. 1, Dir. 2000/78/EC) «as a limitation resulting in particular from physical, mental or psychic impairments and which prevents the participation of the person in question in the occupational life»[7]. It was also pointed out that the effects on the abilities of the person had to last in time[8].
In this perspective, the relevance of the impairments alone (and the obstacles they entail) was confirmed, omitting the importance of adapting the environment to the concrete needs of the person[9].

2. The Biopsychosocial Model

The criticism of the 1980 classification system[10] led the WHO to develop the «biopsychosocial model»[11], marking a decisive reversal in the way

designed to ensure their independence, social, and occupational integration and participation in the life of the community» (Art. 26).

[5] G. LOY, *La disabilità nelle fonti internazionali*, C. LA MACCHIA (ed.), *Disabilità e lavoro*, Ediesse, 2009, 35 and Y. VASINI, *Discriminazione per disabilità: la normativa italiana è in linea con la normativa europea? LG*, 2017, 226.

[6] For an in-depth reconstruction of the orientation of the Court of Justice, see W. CHIAROMONTE, *L'inclusione sociale dei lavoratori disabili fra diritto dell'Unione europea e orientamenti della Corte di giustizia*, *VTDL*, 2020, 4, 897.

[7] ECJ July 11, 2006, C-13/05, *Chacòn Navas*, p. 43. Furthermore, «a pure and simple assimilation of the notions of handicap and illness was excluded» (p. 44), thus removing from the sphere of anti-discriminatory protection those persons whose penalization originated from the latter.

[8] By ECJ July 11, 2006, *cit.*, p. 45, see ECJ December 1, 2016, C-395/15, *Daouidi*, p. 44 which has clarified that anti-discrimination protection also covers impairments of short or uncertain duration, provided that their effects continue over an extended period.

[9] This interpretation also implied the exclusion of caregivers from the sphere of anti-discrimination protections. Subsequently, however, the Court of Justice – on the second occasion in which it was asked to define the problem (July 17, 2008, C-303/06, *Coleman*, p. 50-51) – retraced its steps, extending protection to workers who conduct care and assistance tasks for persons with disability.

[10] On the limits of the classification system of 1980, see M. PASTORE, *Disabilità e lavoro: prospettive recenti della Corte di giustizia dell'Unione europea*, *RDSS*, 2016, 1, 199.

disability is conceived. Having overcome the individual perspective, in which the solution is medical therapy alone, we have come to a collective and universal interpretation of the phenomenon, in which intervention lies in action and social inclusion[12].

The definitive paradigm shift was recorded in the UN Convention «on the Rights of Persons with Disabilities»[13] – adopted on December 13, 2006, and in force since May 3, 2008 – which has determined a shift of the concept of equality from the formal to the substantial level[14]. After having actively participated in the negotiation phase, the European Union has acceded to the Convention[15], which, being a "mixed agreement"[16], constitutes «an integral part [...] of the legal system of the Union»[17]. Nevertheless, the Court of Justice has stated that the Convention does not have direct effect, but «has a programmatic nature» and, consequently, the provisions contained therein «are subordinate, as to execution or effects, to the intervention of further acts which are the responsibility of the contracting parties»[18], since «they are not, from the point of view of the content, unconditional and sufficiently precise»[19].

However, this did not prevent the Court of Justice from appreciating the content of the Agreement, starting from the concept of disability

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[11] In the «International Classification of Functioning, Disability, and Health» of 2001, disability is defined as «the consequence (...) of a complex relationship between an individual health condition and the personal and environmental factors that represent the circumstances in which [the person] lives».

[12] Even the Supreme Court of Cassation (October 25, 2012, no. 18334, *GC*, 2012, 2549) has noted that this shift has led to «a radical change in perspective concerning the way [...] to address the problems of persons with disability, now considered not only as individual problems but such as to be assumed by the entire community».

[13] On this topic, see N. FOGGETTI, *Diritti umani e tutela delle persone con disabilità: la Convenzione delle Nazioni Unite del 13 dicembre 2006*, *RCGI*, 2009, 98.

[14] D. GAROFALO, *La tutela del lavoratore disabile nel prisma degli accomodamenti ragionevoli*, *ADL*, 2019, 6, 21-57, 35.

[15] The ratification of the UN Convention – which represents the first international Treaty to which the European Union has been a signatory – took place with Council Decision no. 2020/48/EC of November 26, 2009.

[16] There are agreements that the European Union negotiates with third parties and whose subject matter does not fall within its exclusive competence, but within that shared with member states under Art. 4 TFEU, thus making it necessary for the latter to sign them as well. On this topic, see M. CREMONA, *External Relations of the EU, and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, EUI Working Paper Law, 2006, 22.

[17] From last, see ECJ September 11, 2019, C-379/18, *DW*, p. 39.

[18] ECJ March 14, 2014, C-363/12, *Z.*, p. 88-89.

[19] ECJ May 22, 2014, C-356/12, *Gatzel*, p. 69.

contained therein, following the principle of conforming interpretation enshrined in Art. 216, par. 2, TFEU[20]. Going beyond the state of health of the person, the UN has produced a definition in relative terms [Preamble, let. e)], that is, concerning the «interaction» between «long-term physical, mental, intellectual or sensory impairments» and the «various barriers»[21] that hinder the person's «full and effective participation in society on an equal basis with others» (Art. 1, par. 2).

In this way, (first) the United Nations and (later) the European Union embraced the biopsychosocial model: for anti-discrimination protection, the notion of disability is not medical, but relational, that is, considers processes of exclusion determined by economic and social barriers[22]. Therefore, this personal characteristic can no longer be measured *ex-ante*, but exclusively *ex-post* concerning the relationship with the environment where the person with functional impairments will be placed.

Concerning the European jurisprudence, this approach reflects the orientation, consolidated since 2013[23], that still characterizes the position of the Court of Justice. In this way, disability is now interpreted as a dynamic process, which escapes from a markedly welfarist (and passive) approach and which values, instead, the instances of dignity and social recognition of the person through an interventionist (and active) approach.

The UN Convention, ratified and put into effect even in Italy by Law no. 18/2009[24], affirms the right of every person to achieve the highest degree of autonomy and independence within any relational and working

[20] According to which «the agreements concluded by the European Union are binding on the institutions of the Union and the Member States». Therefore, due to the ratification of the UN Convention, Dir. 2000/78/EC must be interpreted in the same direction (B. DE MOZZI, *Sopravvenuta inidoneità alle mansioni, disabilità, licenziamento*, *LDE*, 2020, no. 2).

[21] V. DI GREGORIO, *Il principio di non discriminazione nella tutela dei diritti delle persone con disabilità*, in *Riv. crit. dir. priv.*, 2019, 549, underlines how «disability studies have helped to change the point of view usually taken to look at the disability, identifying the cause of constraints and limitations to the freedom and autonomy of persons with disability, not so much in the disability itself, but [...] in the environmental, cultural, social, economic and political barriers present in the external environment».

[22] F. MALZANI, *Inidoneità alla mansione e soluzioni ragionevoli, oltre il repêchage*, *ADL*, 2020, 966.

[23] ECJ April 11, 2013, C-335/11 e C-337/11, *HK Danmark*, p. 38, where disability (in working contexts) is defined as «a limitation, resulting in particular from physical, mental or psychological impairments, which in interaction with various barriers may hinder the full and effective participation of the person concerned in working life on an equal basis with other workers».

[24] A. DE AMICIS, *La l. 3 marzo 2009, n. 81 di ratifica della convenzione delle nazioni unite sui diritti delle persone con disabilità: i principi e le procedure*, *GM*, 2009, 2375.

environment[25]. Even in the presence of a disease[26] or an impairment, there is no disability if the conditions of the context allow the person to carry out normal activities on an equal basis with others; vice versa, there is a disability when the barriers encountered therein limit the accessibility and, therefore, the full realization of the person in the multiple dimensions of the daily life (including work[27]).

Far from representing a mere petition of principle, this shift seals the fundamental element of disability, linked to the inability of the structures to adapt to the needs of the disadvantaged person[28]. What emerges, then, is the need to create goods, services, and, more generally, spaces from an inclusive point of view[29], to ensure that everyone (worker) can enter accessible (work) places in response to the «collective duty to remove, in advance, any kind of even potential obstacle to exercise the fundamental rights of persons with a disability »[30].

However, it has been noted that the «Action Plans for the promotion of the rights and integration of persons with a disability » following the entry into force of the Law no. 18/2009[31] have not taken into consideration the

[25] M. L. VALLAURI, *Disabilità e lavoro. Il multiforme contemperamento di libertà di iniziativa economica, diritto al lavoro e dignità (professionale) della persona disabile*, V. BOFFO, S. FALCONI, T. ZAPPATERRA (ed.), *Per una formazione al lavoro. Le sfide della disabilità adulta*, Firenze University Press, 2012, 60.

[26] Without prejudice to the exclusion of the assimilation of the notions of disability and disease (already sanctioned in 2006), the ECJ April 11, 2013, *cit*., p. 39 and 41 also admitted that «at the origin of the limitation there may also be a [curable or chronic] illness, provided that the impairments produced by it are lasting».

[27] Concerning the issue of accessibility – identified by the UN Convention as a «general principle» (Art. 3, let. f), to «enable persons with disabilities to live independently and participate fully in all aspects of life» (Art. 9) – please refer to M. DE FALCO, *Accomodamenti ragionevoli: sovvenzioni nel settore privato, accessibilità ovunque*, *RIDL*, 2021, 4, 429-452.

[28] A. RICCARDI, *La "ridefinizione" del concetto di persona disabile nell'ordinamento sovranazionale*, R. PAGANO (ed.) *La persona tra tutela, valorizzazione e promozione. Linee tematiche per una soggettività globalizzata*, *DJSGE*, 2019, 298.

[29] The reference is to the «universal design» (Art. 2, UN Convention), which must be understood as a «systematic effort to prevent all forms of unequal treatment» (R. P. MALLOY, *Inclusion by design: accessible housing and mobility impairment*, *Hast Law J. Hastings Law Journal*, 2009, 699). This provision stands alongside Art. 63, par. 2, legislative decree no. 81/2008, which underlines that «workplaces must be structured considering, where appropriate, disabled workers».

[30] Constitutional Court April 29, 1999, no. 167, *Riv. Not.*, 1999, 973.

[31] See D.P.R. October 4, 2013 (approved on February 12, 2013) and D.P.R. October 12, 2017 (approved on October 19, 2016).

cultural changes produced by a new way of conceiving the liveability of environments[32].

3. The Occupational Conditions of Persons with a Disability

If it is true that, on a legal level, work identifies every human activity susceptible to economic evaluation[33], it is equally true that any person, regardless of his or her health condition, can conduct an activity capable of creating value for the company. Discarded the conception of work as a mere commodity of exchange[34], the dignity of the worker becomes central, beyond the traditional references to wages to which the value of work has long been anchored from the labor law point of view.
In this regard, it has been noted that economic studies have highlighted the ontological differences between the realization of profit and the creation (and dissemination) of value[35]. In this second hypothesis, the roles of corporate social responsibility, circular economy, and sustainability are exalted, following the development objectives set by the 2030 Agenda[36].
In practice, these theories have been fully accepted in the model of Benefit Companies (Art. 1, par. 376-384, Law no. 208/2015)[37], i.e. in those companies that add, in their social object, to the typical lucrative purposes (Art. 2247 c.c.) one or more purposes of «common benefit», to produce a positive effect – or to reduce a negative one – towards the subjects that interact with the company itself.

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[32] Supreme Court of Cassation, February 13, 2020, no. 3691, *RCP*, 2021, 227. In this regard, it should be noted that last October 27, a Draft of the Delegated Law on disability was approved. In absolute synergy with the objectives of the National Plan for Recovery and Resilience, it aspires to «a reform consisting of the creation of a framework law on disability, [...] which will simplify access to services, the mechanisms for ascertaining disability and strengthen the instruments aimed at defining the individualized intervention project».
[33] M. BIAGI, *Istituzioni di diritto del lavoro*, Giuffrè, 2001, 1.
[34] M. TIRABOSCHI, *Persona e lavoro tra tutele e mercato. Per una nuova ontologia del lavoro nel discorso giuslavoristico*, ADAPT University Press, 2019, 48.
[35] See P. M. FERRANDO, *Teoria della creazione del valore e responsabilità sociale dell'impresa*, *Impresa Progetto. Electronic Journal of Management*, 2010, 1 and his bibliographical references.
[36] B. CARUSO, R. DEL PUNTA, T. TREU, *Manifesto per un diritto del lavoro sostenibile*, *CSDLE, It.*, 2020, 15.
[37] On this topic, see M. SQUEGLIA, *Le società benefit e il welfare aziendale. Verso una nuova dimensione della responsabilità sociale delle imprese*, *DRI*, 2020, 61-85.

Nevertheless, more than twenty years after the Dir. 2000/78/EC[38], the employment inclusion of persons with a disability is still far from being achieved. Not even the hiring obligation identified in Art. 3, par. 1 of the (almost) coeval Law no. 68/1999 and the relative sanctions system[39] seem to have succeeded in undermining the prejudices – and discrimination – that, even today, surround the world of disability[40].
Subsequent modifications to the employment system have also come to the same unsatisfactory conclusions[41], failing to reverse the tendential reticence of employers to recruit persons with a disability. The effect of these measures has been controversial: if, on the one hand, they have ensured a widening of the range of subjects to be considered for the correct computation[42] and the relative methods of recruitment[43], on the other hand, they have generated critical application issues capable of slowing down the processes of inclusion[44].

[38] On the social justice model promoted by the Dir. 2000/78/EC to protect persons with a disability, please refer to M. DE FALCO, *L'accomodamento per i lavoratori disabili: una proposta per misurare ragionevolezza e proporzionalità attraverso l'INAIL*, *LDE*, 2021, no. 3.
[39] If the employer does not comply with the obligation to recruit, Art. 15, Law no. 68/1999 establishes the infliction of administrative sanctions for each working day of non-employment of the person with a disability, setting up the amount at five times the expected contribution exemption provided for by Art. 5. Recently, the Minister of Work has decreed the adjustment of this contribution exemption to 39.21 euros, thus tightening up the sanctions system: in this way, the sanction becomes 196.05 euros per day for each missed employment, and (if multiplied by 260 working days) it reaches 50,973.00 euros per year.
[40] M. J. JOHNSTONE, *Stigma, Social Justice, and the rights of the mentally ill: challenging the status quo*, *Australian and New Zealand Journal of Mental Health Nursing*, 2001, 10, 200-209.
[41] The reference is to Law no. 92/2012 [see M. GIOVANNONE, A. INNESTI, *L'attuazione del diritto al lavoro dei disabili*, M. MAGNANI, M. TIRABOSCHI (ed.), *La nuova riforma del lavoro. Commentario alla legge 28 giugno 2012, n. 92 recante disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita*, Giuffrè, 2012, 431] and to legislative decree no. 151/2015 [see D. GAROFALO, *Le modifiche alla l. n. 68/1999: semplificazione, correttivi, competenze*, E. GHERA, D. GAROFALO (ed.), *Semplificazioni sanzioni ispezioni nel Jobs Act 2. Commento ai d.lgs. 14 settembre 2015, nn. 149 e 151*, Cacucci, 2016, 23].
[42] See Art. 4, legislative decree no. 151/2015, which also includes workers who were already disabled before the establishment of the relationship, if they reported a reduction in a working capacity greater than the threshold provided for entry.
[43] See Art. 4, par. 27, let. a), Law no. 92/2012, which provided for the inclusion also of workers hired on a fixed-term basis, who, until then, had been excluded.
[44] M. GIOVANNONE, *Il collocamento dei disabili nel mercato del lavoro post-emergenziale: criticità e prospettive*, *Federalismi*, 2021, 10, 100-124.

In truth, the analysis of the employment conditions of persons with a disability[45] gives a clear picture of the disadvantage they suffer in the job market. Only 35,8% of people with functional limitations, who can work, are employed (compared with the 57,8% of people without limitations). Among these, only 20,7% are seeking employment, while the remaining 43.5% are inactive (among the people without limitations, this percentage is 27.5%)[46].

These prejudices are even sharper for the female component of the labor force, emphasizing historical gender differences in occupational levels[47]: 29,4% of women (versus 43,3% of men) are working, 16,6% (versus 43,3%) are seeking employment and 53,9% (versus the 31,6%) are inactive. At the same time, there is also a strong imbalance in employment rates towards the older age brackets of the population: only 17,5% of workers with a disability are under forty[48], while 68% are over fifty. In the 25-44-year-old cohort, the quota of persons with a disability seeking employment (31,2%) is almost double the quota of persons with a disability between 45 and 64 years old (16,8%).

The statistical evidence described above seems to reflect the phenomena – still too little investigated in the literature – of «multiple (or intersectional) discrimination»[49], for which the concomitant membership of two or more disadvantaged social groups multiplies the risk that a person will be a

[45] For further analysis, see the restatements of the latest available data (Istat and Inapp, 2019) made by FONDAZIONE STUDI CONSULENTI DEL LAVORO, *L'inclusione lavorativa delle persone con disabilità in Italia*, 2019.

[46] S. L. OVERTON, S. L. MEDINA, *The Stigma of Mental Illness*, *Journal of Counseling and Development*, 2008, 86, 143-151 trace the issue of inactivity to the conviction of the persons with a disability that are not suitable for work, which leads them to abandon the idea of looking for one.

[47] On this topic, see A. ZILLI, *EU Strategy against gender pay gap through wage transparency: the best is yet to come*, *Italian Labor Law e-Journal*, 2021.

[48] Among workers with a disability under 40 years old, there is a growing recourse to fixed-term employment contracts (11,5%), which considerably exceeds the derisory percentages of those over 50 years old. Moreover, although the incidence of part-time work is generally high among those workers with a disability (34,3%), it reaches record volumes among those under 40 years old (40,7%).

[49] See S. FREDMAN, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law*, 2016, who uses the term to express «the interaction of discrimination based on multiple factors in a synergistic manner such that they are no longer separable», resulting in «a specific form of qualitatively different discrimination» that is captured «in situations where there would have been no discrimination if the factors had been considered separately».

victim of events affecting his or her dignity[50]. The reference to the product of multiplication, to indicate the result of the interweaving of potential factors of exclusion, is illustrative of the fact that personal characteristics (such as disability, gender, and age, but also ethnic origin, political, religious, or sexual orientation) tend to feed on themselves cumulatively, giving rise to new forms of inequality, the result of their combination[51].

In addition, within profit-oriented organizations (such as, legitimately, companies), persons with a disability are often considered "second-class workers" (rather than resources) because of their presumed reduced performance. Frequently, they are relegated to tasks of secondary importance concerning the core business of the company: while 36,2% of workers with a disability occupy a white-collar role, only 19,8% of them are at the top of the pyramid, conducting intellectual or managerial activities (5,3%) or highly specialized technical professions (14,5%).

To complete the (sad) framework described, it should be noted that the occupational discomfort suffered by persons with a disability involves a redundancy that falls overwhelmingly not only on their economic condition but also on the family sphere, already weighed down by the burdens of care and assistance[52].

These evaluations, both on the phenomenological and on the legislative front, converge in outlining a scenario with "few lights and many shadows"[53], oppressed by the epidemiological emergency of Covid-19 and by the measures to contain the contagion, which ended up stopping (or

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[50] Regarding the issue of multiple discrimination to which persons with a disability are subjected, on a practical level, it seems appropriate to point out the ambitious project *Disabilità: la discriminazione non si somma, si moltiplica. Azioni e strumenti innovativi per riconoscere e contrastare le discriminazioni multiple*, promoted by Federazione Italiana per il Superamento dell' Handicap (FISH) and financed by the Ministry of Labor and Social Policies with the Fund for the financing of projects and activities of general interest in the third sector (*https://www.fishonlus.it/progetti/multidiscriminazione/azioni/digital-talk.html*).

[51] This is what, at least on paper, was anticipated by the UN Convention of 2006, in Art. 6 (under the heading «Women with disabilities», where there is an express reference to «multiple discrimination») and 7 (under the heading «Children with disabilities», although, in this second case, there is no reference to the possible accumulation of risk factors).

[52] M. TIRABOSCHI, *Occupabilità, lavoro e tutele delle persone con malattie croniche*, ADAPT Labour Studies e-book no. 36, 2015, 682, who – although referring specifically to «chronic diseases», highlights how «non-reversible pathological changes [...] require special rehabilitation and an extended period of supervision, observation, care», often at the expense of the family members of the person with a disability.

[53] G. GRIFFO, *La l. n. 68/1999 un bilancio dopo vent'anni*, S. BRUZZONE (ed.), *Salute e persona nella formazione, nel lavoro e nel* welfare, ADAPT University Press, 2017, 19.

slowing down) the already complicated access to the labor market of persons with a disability [54].

4. Inclusion through Agreements

In the light of what has been described before, it can be affirmed that the system of obligations, incentives, facilities, and sanctions introduced by the Law no. 68/1999 is still affected by cultural resistance, which does not allow diversity to be accepted as a resource, capable of generating value. At this point, it should be asked which instrument best meets the needs of companies and workers in making effective the «right to work of the person with a disability».

The difficulty of employing a person with a disability through direct recruitment[55] is well known to the legislator, who has also imagined other channels for achieving inclusion, in ways that are functional to the productive needs of the employer[56]. These alternative paths correspond to multiple articulations of the agreement, which, for various purposes and with different methods of integration, contribute to satisfying the progressive coverage of the mandatory quota, or a part of it.

It seems particularly interesting to deal with the subject of the agreements provided for by art. 14, legislative decree no. 276/2003[57], which flank those provided by Law no. 68/1999[58], differing from them by the

[54] M. GIOVANNONE, *cit.*, 113.

[55] On this issue, it is useful to recall that Art. 6, legislative decree no. 151/2015 amended Art. 7, par. 1, Law no. 68/1999, providing that, to fulfill the recruitment obligation, «employers [...] employ workers utilizing a nominative request to the competent offices».

[56] It is about achieving «a sort of exchange between the easing of certain regulatory constraints (as an incentive means) and the employment of persons with a disability (as the final goal) ». In this way, see S. SLATAPER, *Le convenzioni con le cooperative sociali per favorire l'inserimento dei soggetti svantaggiati*, M. MISCIONE, M. RICCI (ed.), *Organizzazione e disciplina del mercato del lavoro*, in F. CARINCI (coord.), *Commentario al d. lgs. 10 settembre 2003, n. 276*, I, Ipsoa, 2004, 290-305, 291.

[57] N. ROSATO, *Nuove opportunità di inclusione per i "diversamente abili": l'articolo 14 del decreto legislativo 10 settembre 2003, n. 276*, M. TIRABOSCHI (ed.), *La riforma Biagi del mercato del lavoro*, Collana Adapt – Fondazione "Marco Biagi", Giuffré, 2004, 601, according to which Art. 14, legislative decree no. 276/2003, constitutes an additional opportunity to promote the employment of persons with disability.

[58] The system provided by Law no. 68/1999 allows three types of agreement, which differ depending on whether the employer: *i)* hires and uses the person with a disability within their organization (Art. 11); *ii)* hires the person with a disability, but assigns him/her to a third party for a certain period and formative purposes (Art. 12); *iii)* postpones the employment of the person with a disability until the expiry of the agreement since at the same time he/she is hired and used by a third party (Art. 12-*bis*).

centrality of the public actor[59] and by the (exclusive) involvement of social cooperatives as host entity[60]. In particular, the article – abrogated in 2007 and restored the following year[61] – entrusts the promotion of work inclusion to the instrument of the «framework agreement on a territorial basis», whose effectiveness is conditioned by the validation granted by the Regions. Through the stipulation of the agreement[62], it is provided that the «social cooperative for the employment of disadvantaged people»[63] recruits the worker in place of the obligated company and that the latter, in return, assigns to the cooperative work orders, proportionate to the cost of staff included therein[64], for the entire duration of the contract.
Even from its title («Social cooperatives – social enterprises[65] – and job integration of disadvantaged people»), it is clear that Art. 14, legislative

For a detailed recognition of the discipline, see D. GAROFALO, *L'inserimento e l'integrazione lavorativa dei disabili tramite convenzione*, *RDSS*, 2010, 2, 231-280.

59 L. NOGLER, V. BEGHINI, *La lenta marcia verso le convenzioni per l'inserimento lavorativo dei disabili*, *Impresa Sociale*, 2006, 1, 130.

60 On this topic, C. TIMELLINI, *La tutela dei lavoratori svantaggiati: il raccordo pubblico-privato e le cooperative sociali*, L. GALATINO (ed.), *La riforma del mercato del lavoro*, Giappichelli, 2004, 148 interprets Art. 14, legislative decree no. 276/2003 as «a bet on social cooperatives, as operative and dynamic entities capable of self-promotion and self-management».

61 The Art. 14, legislative decree no. 276/2003 was abrogated by Art. 1, par. 37, let. a), Law no. 247/2007, but was subsequently restored by deletion of the abrogating provision [under Art. 39, par. 10, let. m), Law no. 133/2008]. The 2007 legislator intended to replace, through the introduction of Art. 12-*bis* in Law no. 68/1999, the model of the framework agreement, as this allowed employers to meet their hiring obligation without including the person with a disability in their organization. However, from this point of view, the agreement is established by Art. 12-*bis* appear to be worse than the instrument they were intended to replace (on this issue and for a complete comparison of the two agreements, see D. GAROFALO, *L'inserimento e l'integrazione lavorativa* cit., 261).

62 The stipulation of framework agreements is entrusted to the employment services, after consultation with the technical committee and the «trade unions representing the most representative employers and service providers at the national level», as well as the «associations representing, assisting and protecting cooperatives» [Art. 1, par. 1, let. b), Law no. 381/1991] and the related consortia (Art. 8, Law no. 381/1991).

63 The «social cooperatives for the employment of disadvantaged persons» [Art. 1, let. b), Law no. 381/1991] – as a *species* of the cooperative *genus* – are those cooperatives that are obliged by statute to include in their membership at least 30% of persons in a particular situation of the disadvantage under Art. 4, law no. 381/1991. For an overview of the discipline, see L. FERLUGA, *Il lavoro nelle cooperative sociali*, *VTDL*, 2019, 5, 1711.

64 On the value of the work order and the relative methods of quantification, see S. SLATAPER, *cit*., 300.

65 The Law no. 76/2020 (of conversion of decree-law no. 137/2020) has modified the heading of Art. 14, legislative decree no. 276/2003, extending also to the social enterprises referred to in legislative decree no. 112/2017 the possibility of concluding

decree no. 276/2003 intends to address a wider audience than that identified by Art. 1, par. 1, Law no. 68/1999[66], with the intention, at least in theory, of incorporating the requests made within the definition of the bio-psychosocial model of disability (see above, Paragraph 2). In practice, however, in the absence of an obligation expressly provided for disadvantaged workers, they could be included only if their recruitment was encouraged, especially by the Regions[67].

Regarding, on the other hand, persons with a disability who have «particular characteristics and difficulties in entering the ordinary cycle of work», integration into the social cooperatives «is considered useful for the coverage of the reserved quota» (Art. 14, par. 3).

Anyhow, the idea is to determine additional mechanisms to achieve the inclusion of people who, blamelessly, are in a condition of objective difficulty, especially in the employment search. The tension is towards the preparation of individual plans to implement the framework agreements[68], within which the connections between public and private actors are favored, to create integrated territorial networks. Therefore, it is a sustainable model with shared value, which stimulates partnership processes between companies and supports the role of social cooperation as a vector of inclusion.

For this reason, the alarmism of those who see in the institute a ghettoizing attitude, such as isolating workers with low-quality tasks, does not seem to be shareable[69]. On the contrary, social cooperatives are

framework agreements on a territorial basis, to facilitate the integration into the employment of disadvantaged workers and workers with disability.

[66] The Art. 2, let. k), legislative decree no. 276/2003 [referring to Art. 2, let. f), EC Regulation no. 2204/2002] clarifies that «disadvantaged workers» – as well as «disabled workers», potential recipients of the contractual instrument in question – must be understood as «any person [...] who has difficulty entering the labor market without assistance».

[67] On the other hand, framework agreements for «workers with a disability» require an indication of the maximum percentage limit of the reserved quota that may be covered by the agreement [Art. 14, par. 2, let. g), par. 3 and par. 4], to ensure that the recruitment obligation under Law no. 68/1999 is met.

[68] Regarding the minimum contents that must be identified in the framework agreements, see Art. 14, par. 2, legislative decree no. 276/2003.

[69] S. SLATAPER, *cit.*, 298; M. GARATTONI, *L'inserimento dei lavoratori svantaggiati nel sistema comunitario degli aiuti di Stato*, *RGL*, 2006, 650. instead, it is believed to adhere to the thesis of L. NOGLER, *Cooperative sociali e inserimento lavorativo dei lavoratori svantaggiati*, M. PEDRAZZOLI (ed.) *Il nuovo mercato del lavoro*, Zanichelli, 2004, 192, which qualifies as «unfounded risks of "ghettoisation" of workers with disability», as the result of mere prejudices against the world of cooperation.

organizational contexts that are more sensitive and attentive to the needs of the people[70], able to value them, even on the regulatory side, as working partners. This system of participatory governance is evocative of the aims of the social economy[71], incorporating a solidaristic and mutualistic spirit, able to transform people from "objects of assistance" into "products generating value," for themselves and others[72].
In such a perspective, social cooperatives represent the highest expression of the Benefit Societies[73], where the common benefit is substantiated, on the one hand, in the neutralization of the negative effects produced by the failure to employ (both on the person and the company obliged) and, on the other hand, the positive impact that this model produces on the whole community, in terms of inclusion and sustainability. Thus, the social cooperative translates the value of the agreement into the wider value of the person and of their work.

5. Concluding Remarks

In practice, the mechanism introduced by Art. 14, legislative decree no. 276/2003 has been particularly appreciated[74], as it has been recognized as appropriate for satisfying the interests of the parties involved. First, it allows the employer with the obligation to recruit to fulfill it regularly, saving the greater burdens connected with direct recruitment or the payment of sanctions. Moreover, even if the employment in the social cooperative concerns non-disabled disadvantaged workers, the company can take advantage of goods and services that are currently produced in-house or bought from external suppliers, at the same – or lower – cost.
Secondly, Art. 14, legislative decree no. 276/2003 permits social cooperatives to emancipate themselves from a purely welfarist vision and to insert themselves in the value chain as active members of the production cycle, generating economic prosperity and social reinvestment.

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[70] In this way, see E. MASSI, *Il nuovo collocamento obbligatorio*, Ipsoa, 2000, 64, whose position is supported by the results of the empirical study conducted by E. CHIAF, *Il valore creato dalle imprese sociali di inserimento lavorativo*, *Impresa sociale*, 2013.
[71] E. DAGNINO, *Diritto del lavoro ed economia sociale. Appunti per una ricerca*, in *DRI*, 2021, 4, 1058-1086.
[72] F. SCALVINI, *La cooperazione sociale di inserimento lavorativo*, *Impresa sociale*, 2006, 22.
[73] M. SQUEGLIA, *cit.*, 71.
[74] The latest Report to Parliament on the state of implementation of Law no. 68/1999, relating to the years 2016, 2017, and 2018, attests to the fact that employers prefer to make use of the agreements under Art. 14, Legislative Decree no. 276/2003 rather than those under Art. 12 and 12-*bis*, Law no. 68/1999 (in particular, see Tab. 46, p. 100).

In fact, through the stipulation of the framework agreement, the cooperative guarantees work orders itself, that are functional to maintaining financial equilibrium, and pursues its social objective, ensuring work opportunities for people who would otherwise risk being excluded from the market.
Finally (and above all), workers can recover satisfaction, professionality, and, more generally, dignity through work, in a context supervised by the public administration. In this way, the inclusion of persons with a disability (or, more generally, disadvantaged people) in the social cooperative gives the possibility to appreciate their value, as (partner) workers and not as merely passive persons of care and assistance.
The legal system, both European (Art. 5, Dir. 2000/78/EC) and national (Art. 3, par. 3-*bis*, legislative decree no. 216/2003[75]), is looking for «reasonable accommodation», i.e. the «appropriate measure, where needed in a particular case, to enable a person with a disability to have access to, to participate in, or advance in employment, or to undergo training» on an equal basis with others[76]. Whether the reasonableness of the solution is measured by the economic sustainability of the cost necessary for its implementation[77], also considering «the possibility of obtaining public funds or other subsidies» (Whereas 21, Dir. 2000/78/EC)[78], it should be noted that the agreement described does not lead to a «disproportionate financial burden», but, rather, an increase in value for the organization.

[75] The transposition of the norm was not immediate: only after the sentence imposed on Italy by the ECJ on July 4, 2013, C-312/11 for insufficient transposition of Art. 5, Dir. 2000/78/EC (see. M. AGILATA, *La Corte di giustizia torna a pronunciarsi sulle nozioni di "handicap" e "soluzioni ragionevoli" ai sensi della direttiva 2000/78/CE*, *DRI*, 2014, 263), paragraph 3-*bis* has been added to Art. 3, legislative decree no. 216/2003, where public and private employers are required to adopt «reasonable arrangements [...] in the workplace».

[76] Consistent with this provision, the UN Convention of 2006 – in addition to encouraging reasonable accommodation (Art. 5, par. 3) – has included in the notion of «discrimination based on disability» (Art. 2) the «denial of reasonable accommodation» by the employer.

[77] The tension is towards solutions that do not entail a «disproportionate burden» (Art. 5, Dir. 2000/78/EC), compared to «the size, resources, and state of health of the company» (Supreme Court of Cassation April 28, 2017, no. 10576, *LG*, 2017, 988).

[78] In this regard, it is necessary to assess whether the economic sacrifice is «sufficiently remedied by measures existing within the framework of the disability policy of the Member State policy concerned» (Art. 5, Dir. 2000/78/EC). For a proposal of parameterization of the limit of "non-disproportionate" through the compensatory measures presented by INAIL, please refer to M. DE FALCO, *Accomodamenti ragionevoli*, cit.

This creation of value benefits all the stakeholders involved, in a win-win perspective: if the benefit is immediately felt by the company burdened with the recruitment and by the person with a disability, the agreement mechanism also achieves the interest of the community, in a logic that generates widespread and shared wellbeing through inclusion.

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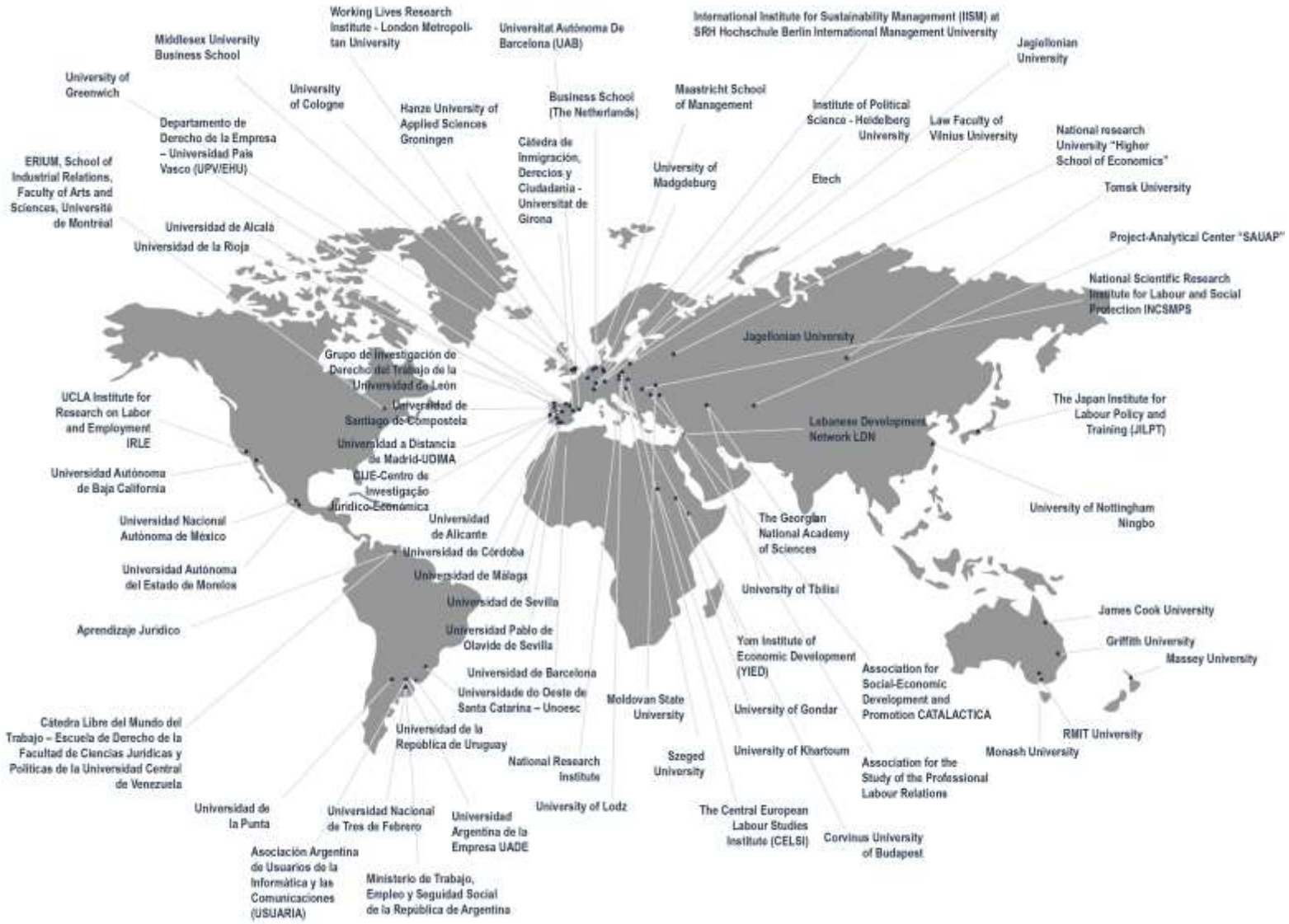

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