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Agency Work in Italy*

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1. The Italian Legal Evolution of Agency Work and the Protected Interests.

While the socio-economic phenomenon of labour supply dates back to the beginning of the Industrial Revolution, its legal regulation is quite recent.

1a) In Italy, the first legal regulation of labour supply is provided by Article 2127 of the Italian Civil Code of 1942. Article 2127 forbids a particular form of labour supply, the so-called "cottimo collettivo autonomo" (collective piecework), which is the situation in which an intermediary employee hires a group of workers, who are then supplied to his/her employer in order to perform a particular task.

Following this, Law no. 1369/1960 extends this prohibition to all the forms of labour supply, thereby implicitly repealing Article 2127.

The prohibition of labour supply introduced by Law no.1369/1960 represents a general and absolute prohibition, which bound all the economic actors (entrepreneurs, non-entrepreneurs, private and public actors) and provided tough criminal and civil sanctions for any breach.

Why did the Italian Legislator introduce this absolute and general prohibition in 1960? Because, the Italian Legislator regards labour supply as something that does not pursue any relevant interest. On one hand, it is used by the contracting parties (the labour supplier and the user firm) in order to make profit from the work and to save in labour costs, but to the detriment of employees, on the other.

Following a parliamentary inquiry (Commissione Rubinacci, 1959), it was established that the user firm asked for labour supply with the main aim of saving on overall labour costs i.e. by using workers who are paid less than the workers directly employed by them, or by avoiding their responsibility of adopting adequate health and safety measures with regard to these supplied workers.

The labour supplier often neglected to offer any collective agreement to his/her employees or would perhaps offer a collective agreement less favourable than the one applied by the user firm, in order to make profit.

Moreover, in several cases, the labour supplier did not rely on an economic and patrimonial structure. A 'corporal' who is often unable to bear the enterprise and the labour risks.

In this context, it is possible to argue that in this particular historical period, labour supply was totally unprotected from a legal point of view. For this reason, it was radically prohibited.

1b)Subsequently, the first exemption to the general and absolute prohibition of labour supply was then introduced by Italian Judges. By this, I am referring to the so-called “posting of workers”

By extending a legal tool to the private sector which had only been regulated in the public sector, Italian judges held that, in certain cases, a firm is allowed to supply employees to another firm.

This can only occur under the following conditions:

a) The provider has to be a “real” entrepreneur and not a “fake” or “artificial” one; in other words, the labour supplier has to rely on an economic organization of labour and other means of production;

b) The provider must have a specific interest in temporarily allocating the employee i.e. to provide work to a third party;

c) The worker’s post must be temporary.

In particular, Italian judges enhanced the element of the interest of the provider to post the worker. This interest is not merely an economic interest, but a technical-organizational interest. In fact, Italian judges always identify this interest in the context of the group of companies, whenever the holding sends its managers to the controlled company in order to achieve the technical-organizational interest to re-organize or direct it.

In this way, Italian judges became aware of the fact that the posting of employees can play a useful role and can be used not only for goals contrary to the Italian legal system (such as making profit from the employees of another employer). To be sure, the judicial creation of the posted worker was not consistent with the legal system, since the prohibition provided by the Law of 1960 was general and absolute and did not admit any exemption. However, the case of the posted worker shows that something is changing; it shows that in some cases the risk for workers, which is deeply considered by the Law no. 1369/1960, does not exist. Broadly speaking, Italian judges think that the prohibition can be overcome whenever, in the specific case, there are no risks for the workers involved.

1c) Notwithstanding, the Italian legal framework radically changes with the enactment of the Treu Law (Law no. 196/1997).

After a long and multifaceted debate, in 1996 the Italian Legislator then introduced “temporary agency work” or the agency work. However, this legal regulation does not overcome the general prohibition of labour supply.

In fact, this prohibition continues to exist and temporary agency work, surrounded by several restraints, is regarded as an exemption.

The Law of 1996 states that the agency work can be carried out only by economic actors provided with a specific licence of the Minister of Labour and with specific requirements (patrimonial, professional and so on). At the same time, it states that the agency work can be admitted *only* in specific cases (A "No, but" Country versus a "Yes, unless" Country, such as the UK).

In fact, Law no. 196/1997 permits only temporary agency work, whereas long-term agency work or the staff leasing is radically excluded.

Insofar as the temporary agency work is regarded as an exemption, every formal or substantial irregularity leads to the application of the sanctions (civil and criminal) provided by the Law 1369/1960 for the breach of the general prohibition of labour supply, which still remains in the background.

The requirements and precautions provided by the Treu Law are mainly set to avoid patrimonial and personal risks for agency workers on the one hand, (this goal is achieved by requiring the agencies to be solvent and reliable; by providing the principle of equality of treatment between the agency workers and the end-user's employees as well as a dual liability, or solidarity, upon both the agency and the end user). On the other hand, the Law serves as an incentive to the hiring of the worker by the end user. The latter goal represents the main rationale behind the introduction of temporary agency work in Italy. It is basically achieved by excluding long-term agency work; i.e. if the end user has a long-term exigency to use agency workers, then it has to enter into a direct employment agreement with them.

Therefore, according to the Treu Law, the radical and general prohibition of labour supply can be overcome (although within certain limits) in the light of the general public interest to increase employment.

However, it is worth noting that the Law is not intended to increase any form of employment. The goal is to increase occupancy by increasing the number of employment contracts of indeterminate duration the end user enters into.

1d) The last phase of the legal evolution of agency work in Italy is represented by the Biagi Law (Law no. 276/2003).

The Legislative Decree 276/2003 repeals the former regulation (Law 1369/1960 and Law 196/1997) and provides a new regulation which serves to achieve different aims, although without abandoning the former legal asset as a whole.

On the one hand, the supply of labour is not generally admitted; rather the legislator admits particular forms of labour supply(the professional agency work and the posting of the worker) which are regarded as exemptions to the general prohibition of labour supply.

This legal framework aims to protect the right to wages and other personal rights of the agency worker, by requiring the work agency to have particular requirements and the agency contract to have a particular content. However, in the meantime, the idea that agency work has to be temporary – an idea which represented the main feature of the former legal asset – is abandoned.

Firstly, besides the fixed term agency work, the long-term agency work or staff leasing is also regulated.

Secondly, temporary agency work can be used only when the end user has a specific technical-organizational interest (though not necessarily a temporary interest), whereas the extension of the deadline or the reiteration of the temporary agency contract is not restrained.

These legal provisions show that the main aim of the Italian Legislator of 2003 is no longer to act as an incentive to the end user to enter into a direct employment agreement with the agency worker.

Insofar as agency work can be without time limits, both in the case of long-term agency work or of fixed term agency work (that can be continuously extended or reiterated), the goal of the Biagi Law appears to be the increasing of agency work in itself. The basic idea is that agency work, despite its double precariousness (the agency worker is in most cases a fixed term agency worker who, in the meantime, works for a dual employer, a formal and a substantial employer), is nonetheless better than unemployment.

The main aim is then to create employment, but not to create a stable employment with the end-user. To increase the percentage of workers employed in the agency work sector is enough.

In this context, it is worth investigating whether, after 2003, the number of agency workers has effectively increased (*see* para. 7).

2. The Actual Legal Framework. Professional Agency Work and the Posting of Workers as Exemptions to the General Prohibition of Labour Supply; the Sanctions (Civil, Criminal, Administrative) in case of Illicit Agency Work.

As said above, within the Biagi Law' framework, professional agency work (as well as the posting of the worker, which is not considered a this point) continues to be regarded as an exemption to the general prohibition of labour supply.

The prohibition of labour supply is still present on the basis of the following arguments.

a) Professional agency work (Articles 20-28 Legislative Decree 276/2003, Biagi Law) can be carried out only by economic actors who have been provided with a **specific licence** by the Minister of Labour. The licence is different in that the agency is entitled to fixed term agency work or to staff leasing[1].

b) Whenever agency work is carried out in breach of the legal requirements and legal restrictions, specific civil (article 27, 29 Legislative Decree 276/2003), criminal (Articles 18,28 Legislative Decree 276/2003) and administrative (Article 18, Legislative Decree 276/2003) sanctions shall be applied[2].

Therefore, it is clear that outside the strict boundaries of the exemption, the general prohibition and the relative sanctions continue to be applied.

The civil, criminal and administrative sanctions do not have the same objective field of application. The toughest sanction is the civil sanction, that represents the most relevant deterrent to the use of illicit forms of labour supply.

The civil sanction is nowadays provided by Article 27, Legislative Decree 276/2003, named “irregular agency work”. It is the same sanction provided by Law no. 1369/1960.

In other words, the Legislator states that the employee (only the employee) is entitled to ask for a legal employment relationship with the end-user to be implied from the beginning of the illicit form of labour supply.

Clearly, due to this sanction, the legal system achieves a result that the contracting parties did not want to achieve; mainly, the establishment of the employment contract between the agency worker and the end user. The result being that the end user will employ one new employee as a consequence of the illicit labour supply.

3. Professional Agency Work. The Trilateral Structure and the *ex lege* Ascription of the Power of Direction upon the End User.

The Biagi Law (Articles 20-28 Legislative Decree 276/2003) regards the agency work as a trilateral work relationship.

[1] For the posting of worker, it is different. Every employer can send his/her workers to a third party (Article 20 Biagi Law).

[2] The civil sanction (Article 30.4, Legislative Decree 276/2003) and the criminal sanction (Article 18.5 *bis*, Legislative Decree 276/2003) shall be applied also in the case of illicit posting of workers. This shows that the posting of workers can be regarded as a further exemption to the general prohibition of labour supply.

a) An agency work contract between the work agency and the end user;

b) An employment contract between the work agency and the agency worker;

c) A legal *ex lege* relationship between the end user and the agency worker. In fact, some of the employer's legal powers are allocated to the end user. First, the end user is entitled to a portion of the direction, that is the power to tell the employee what, when and how to perform the work, whilst the power to send the employee to the user remains with the work agency.

The agency work relationship as a whole is a complex one.

Notwithstanding, in the Italian legal system the core of the regulation is the commercial agency work contract between the work agency and the end user. In fact, the aforementioned sanctions shall be applied in the case of breach to the rules regulating the commercial agency contract.

Let's begin by considering the agency work contract.

The main object of the agency work contract is to assign workers with specified know-how, to the end user. Agency workers will then perform their duties, working under the direction of the end user.

As mentioned above, it is worth noting that the end user is *ex lege* entitled to direct the agency workers. If there is no direction, then, the relationship lies outside the boundaries of the licit agency work.

4. Mainly; Agency Work Contract and its Object. The Distinction Between Agency Work and Contract for Provision of Services.

As mentioned above, the object of agency work is the assignment of workers to the end user.

This is the feature that distinguishes agency work from the contract for provision of services (Article 1655, Italian Civil Code).

In the agency work, the agency sells labour; it places employees at the disposal of the end user. The agency workers then will perform their work duties according to the instructions of the end user. As a consequence, the agency does not provide any service, as it does not sell an organized economic activity, only labour. On the contrary, in the contract for the provision of services, the contractor provides a service which requires the contractor to rely on an economic organization of labour and other means of production.

In order to distinguish between agency work and a contract for the provision of services, Italian judges tend to focus on the following

question; whether or not the presumed contractor relies on its own economic organization (capital, labour, means of production).

To some extent, this investigation is easy when the performance of the services implies capital, infrastructure and means of production (e.g. the building construction which involves tracks, capital, cranes and so on).

On the contrary, the investigation is difficult when the performance of the services does not entail infrastructure or other means of production, but only labour (e.g. cleaning services). In this particular case, Italian judges must focus on the following questions; who organizes the labour factor and exercises the employer's power of direction.

Distinguishing between contract for provision of services and agency work is a very important topic, since these two hypothesis are differently regulated by the law. Particularly, the former is always licit and does not require any licence. In this case, the principle of equality of treatment will not be applied. As a result, the contract for provision of services is less expensive than the agency work. This explains why Italian judges place such great weight on this distinction. As it is frequently found that a contract for the provision of services conceals an illicit labour supply agreement, for which the supplier is not authorized by the Minister of Labour.

5. Is the Agency Worker an Employee, According to Article 2094 of Italian Civil Code?

The employment contract between the work agency and the agency worker is now considered. This contract is an employment contract. As a result, it is possible to argue that the supply of self-employed workers is by all means free in Italy.

As said above, in agency work, the employer's power of direction is allocated to the end user.

One of the most investigated topics by Italian scholars is whether the structure of agency work and, mainly, the particular allocation of the power of direction, is consistent with the classical employment contract, provided by Article 2094 of the Italian civil code.

According to one line of thought, the indivisibility of the employer's prerogatives, rights and obligations represent one main feature of the employment contract. Therefore, the agency work contract is a special employment contract, since it involves the allocation of the employer's power of direction to a third party.

One could ask why should the indivisibility of the employer's prerogatives be a main feature of the employment contract? The answer lies in the fact that the employment contract is turned to allow the

entrepreneur to create an economic organization, in order to achieve a productive goal. Insofar as in the agency work is concerned, the employer's power of direction remains with a third party, who has a different productive goal, which means that agency work is necessarily a special employment contract.

In my opinion, however, the answer should be different.

Insofar as the end user exercises the power of direction in order to pursue both the interest of its own economic organization and the interest of the agency, then the agency worker can be regarded as an ordinary employee.

We cannot deny that in agency work, the employer's power of direction, which is upon the end user, is separated from the employer's position as a whole. Credits, duties and responsibilities remain with the agency).

However, it is worth noting that the main duty of the agency worker (the duty to work) has the same content as the duty that the agency owes to the end user (the duty to provide labour).

In this perspective, the separation between the employer's position and the employer's power of direction becomes clear: while the agency fulfils its obligation to provide labour to the end user, in the meantime, the agency worker fulfils his/her obligation (the duty to work). In other words, by exercising the employer's power of direction, the end user pursues its own economic goal and, in the meantime, allows both the agency worker to fulfil his/her duty to work and the agency to pursue its productive goal.

According to this interpretation, the agency worker can be regarded by all means as an ordinary employee.

Notwithstanding, in the light of the absence of a specific prohibition (the general prohibition of labour supply provided by the Legislative Decree 276/2003), it is possible to apply to the classical employment contract legal rules – such as the transfer of the credit or the contract in favour of third parties – that imply the channelling upon a third party not only of the power of direction, but of the employer's rights and duties, as a whole.

6. The Positive and Negative Limits of the Licit Agency Work.

In the Italian legal system, the agency work contract is surrounded by limits. There are two different general constraints:

a) The work agency must be provided with a specific licence of the Minister of Labour that is granted in the presence of specific requirements (Articles 4,5 Legislative Decree 276/2003).

b) The agency work contract must be provided with specific requirements of form and content. Mainly, it is provided when the agency work is permitted and when it is forbidden (positive and negative limits).

The breach of these rules and restrictions leads to consider the agency work illicit and to apply the aforementioned sanctions (particularly, the civil sanction provided by Article 27, Legislative Decree 276/2003).

The analysis of the positive and negative limits will allow us to appreciate the consistency of the Italian regulation with the EU Directive of 2008.

The positive limits are different due to the fact that agency work is either fixed term agency work or a long term agency work. On the contrary, the negative limits are always the same.

a) Positive limits to fixed term agency work.

With regard to fixed term agency work (which is the most used by economic actors), there are two positive limits; the first one is the *causa*; the second one is a quantitative limit.

A1) The causa.

According to Article 20.4, Legislative Decree 276/2003, the contracting parties can enter into a fixed term agency work contract only in the light of "technical, productive, organizational, substitutive reasons, also related to the ordinary economic activity carried on by the end user".

The legal definition is the same as the one used to define the objective reasons of the fair dismissal (Article 3, Law 604/1966). It is then possible to rely on the judicial debate that has progressively identified the boundaries of this concept, with regard to the individual dismissal.

According to Italian judges, the limit of the objective reasons aims to underline the fact that an act or, in this case, the agency work contract has to be adopted in order to achieve a technical-organizational interest of the end user.

However, this limit does not seem to be a sharp limit. Indeed, nobody would enter into an expensive agency work arrangement without a technical-organizational interest to do so. The real problem is the actual interpretation of the following legal provision; technical organizational reasons can be also related to "the ordinary economic activity carried out by the end user".

According to Italian scholars, this legal provision has to be meant as allowing all the economic activities, either ordinary or extraordinary, to be carried out by the end user by means of the agency work. In this perspective, the limit of the objective reasons is in itself useless.

At the same time, this interpretation is consistent with the legal introduction of the staff leasing. Mainly, within the new legal framework, the agency work contract represents a functional equivalent of the classical employment contract (the end user is free to decide to enter into a direct employment agreement with the worker(s) or to enter into an agency work contract, on the basis of a cost and benefit analysis).

Notwithstanding, it is worth noting that Italian judges hold that the end user can enter into an agency work contract only in the light of temporary structural needs that will last for a short period of time (e.g. the temporary need to substitute a sick employee; the temporary need to hire more workers because there is a particular exhibition or because it is Christmas).

According to this interpretation, a fixed term agency work contract can be concluded only when the end user has temporary structural needs to hire workers; in all the other cases, the end user has to enter into a direct employment agreement with the workers.

As a result, fixed-term agency work turns out to be a temporary agency work.

Insofar as we agree with this judicial interpretation, the Italian legal system shows once more its preference for the standard employment contract. Moreover, whenever the end user appears to have ordinary and not temporary needs to hire workers (and beyond the particular case of the staff leasing), the aim of Italian Legislator is, once more, to increase standard occupancy (by implying the existence of employment contracts of indeterminate duration with the end user). The agency work contract is a “bridge”, a legal tool by which promoting standard occupancy.

A2) Quantitative Limits

According to Article 20.4, Legislative Decree 276/2003, there is a quantitative limit. Particularly, to the collective bargaining and to the ‘comparatively most representatives’ Trade Unions the prerogative is conferred to identify quantitative limits to the use of fixed term agency workers. However, this limit is merely eventual. It remains at the discretion of the Trade Unions.

The collective agreements signed by the user firms have largely regulated this topic. Usually, collective agreements provide numeric thresholds, determined by means of fixed numbers or by means of percentages related to the firm’s size and number of ordinary employees employed.

This limit is turned to avoid the risk that ordinary employee will be replaced by agency workers or, at least, to guarantee the involvement of the Trade Unions in these choices.

b) Positive Limits to the long term agency work contract (staff leasing).

According to Article 20.3, Legislative Decree 276/2003, it is possible to enter into a long term agency work contract (staff leasing) only in specific cases. E.g.: a) IT consultant services; b) cleaning, porter's lodge services; c) transport services and so on.

The Law lists a number of economic activities which do not constitute the core business of the user firm concerned. In these cases, long term agency work is permitted.

Once more, the main aim is not to dismantle the standard employment contract.

The choice to replace the standard employment contract with the agency work is possible, but only with the involvement of Trade Unions that enjoy a right to information (Article 24.4, Legislative Decree 276/2003) and within the quantitative limits eventually established (Article 20.4, Legislative Decree 276/2003).

b) The negative limits which shall be applied to both fixed term agency work and long term agency work.

As said above, the negative limits which bind both the fixed term agency work and the long term agency work are the same.

Particularly, agency work is prohibited:

a) When it is used to substitute employees on strike. This limit is set out to avoid the risk that agency work is used in order to pursue an unfair labour practice.

b) When it is used within business units in which there has been a collective dismissal or a redundancy payment in the last six months. This limit is turned to avoid the risk that agency work is used to replace standard employment.

c) When the end user does not respect the Health and Safety Protection regulations. This limit is clearly turned to strengthen the protection of the employees' and agency workers health and safety.

7. Requirements of Form and Content in the Agency Work Contract.

The Italian legal regulation provides the agency work contract with requirements of form and content.

a) First, it is provided that the agency work contract must be concluded in writing, otherwise it is null and void (Article 21, Legislative Decree 276/2003).

b) Second, an agency work contract must be provided with all necessary requirements such as:

1) The essential data of the licence of the agency; 2) the number of agency workers to be supplied; 3) the technical, organizational, productive and substitutive reasons; 4) the risks for the health and safety of the agency workers; 5) the beginning and the duration of the work.

In case of breach of these requirements, the civil sanction provided for the illicit agency work shall be applied (Article 27, Legislative Decree 276/2003).

8. The rules for Agency Workers.

The Italian legal regulation places a great weight on the agency work contract, so as to strike the balance between the need of protection of workers and the need to increase occupancy. As said above, the breach of provisions regulating the agency work contract leads to the application of the sanctions and, mainly, of the aforementioned sharp civil sanction.

In fact, with regard to the agency worker – who has to be considered an ordinary employee – the ordinary legal protection of the employee and of the employment contract (fixed term employment contract or employment contract of indeterminate duration) shall be generally applied.

However, with regard to the employment contract there are particular rules which are mainly turned to avoid the risk of exploitation, on the one hand; and to favour the end user's standard occupancy, on the other.

a) The deferment to the standard employment contract's regulation and the choice between fixed term contract and contract of indeterminate duration

The employment contract can be either a fixed term contract or a contract of indeterminate duration. In the latter case, the fixed term employment contract's regulation shall be applied (Legislative Decree 368/2001).

As a matter of fact, in most cases, the agencies enter into fixed term employment agreements with the agency workers. The question is whether agencies are allowed to do that or whether, on the contrary, these contracts should be considered in breach of the general fixed term contracts' regulation.

According to Italian regulation (Legislative Decree 368/2001), the fixed term employment contract can be concluded only in the light of technical-organizational reasons, *objectively temporary*.

Is it possible to argue that the agency, in most cases, has an objectively temporary need to enter into a fixed term contract with the agency worker? In most cases, the answer is no. It is true that the

agency work contract is often a fixed term agency work contract. However, the agency has a stable and ordinary need to supply workers to the user firms.

Hence, in the Italian legal system the employment contract between the agency and the agency worker should be, in most cases, a contract of indeterminate duration.

In some decisions, Italian judges uphold this interpretation. As a consequence, a contract of indeterminate duration should be implied between the agency worker and the agency. The advantage is the guaranteeing to the agency worker of a stable standard employment in the agency. Particularly, it is worth noting that in between one assignment and the other, an indemnity is paid to the agency worker.

b) The principle of equality of treatment between the agency workers and the end user's employees and the exemptions.

Agency workers enjoy the right to equality of treatment (economic and normative) to be assessed with regard to the end user's employees performing the same jobs and tasks. The principle of equality of treatment is different to the principle of non discrimination. It confers to the agency worker a right vis-à-vis the agency. The principle of equality of treatment is mainly turned to avoid the risk that agency work is used to achieve 'race to the bottom' goals rather than real organizational needs (labour flexibility).

However, the principle of equality of treatment raises questions and doubts:

1) The economic and normative treatment of the agency worker as a whole should not be lower than that one accorded by the user to his/her employees. It is however difficult to compare and evaluate different economic (e.g. the amount of an element of the wage) and normative (e.g. the duration of the notice) treatments.

2) The comparison must take into consideration the agency workers and the end user's employees who perform the same tasks and jobs, but it is possible that no existing staff of the end user actually perform these specific tasks and activities. Here, it is necessary to refer to the job description provided by the end user's collective agreements. However, it could happen that the collective agreement does not stipulate anything about a specific job.

Besides, there are some exemptions to the principle of equality of treatment.

Firstly, the element of the wage which is linked to the result is not considered in the agency worker's ordinary wage. The criteria to be used in the determination are conferred to the end user's collective agreements. It could be argued that the Trade Unions, in determining the

elements of wages, are bound by the principle of equality of treatment (Article 23.4)

Secondly, agency workers enjoy the right to the same social and welfare services accorded to the end user's employees, with the exclusion of those services which require the worker to be part of associations or cooperatives or to have a certain seniority.

Third, the principle of equality of treatment must not be applied in the case of agency work contracts concluded with private actors in the light of specific programmes of training, retraining, integration of disadvantaged workers (Article 23.3).

c) The principle of equality of treatment and the indeterminate duration employment contract.

As said above, the agency workers, working on the basis of a contract of indeterminate duration enjoy the right to equality of treatment during the assignment as well as the right to a special indemnity of "availability" between one assignment and another, (Article 22.3, Legislative Decree 276/2003), the amount of which is determined by the agency's collective agreement (roughly, 700 Euros per month).

The amount of the indemnity must be at least equivalent to the one determined in a Decree from the Minster of Labour (According the DM March 10, 2004, the minimum indemnity is about 350 Euros per month).

9. Contractual Clauses About the Restriction of the End User's Prerogative to Hire the Agency Worker.

In the Italian legal system, it is provided that, in the case of fixed term agency work, every contractual clause which limits, directly or indirectly, the end user's prerogative to hire the agency worker is null and void (Article 23.8, Legislative Decree 276/2003).

In this perspective, contractual clauses that either prohibit the hiring of the agency worker or provide several limits and restrictions are null and void.

In my opinion, in the fixed term agency work, the final deadline must be connected with the final deadline of the assignment.

On the contrary, it is worth noting that only the fixed term agency work is mentioned in the legal provision.

a) The Fixed Term Agency Worker

In spite of the fixed term employment contract's regulation (Legislative Decree 368/2001), according to some Italian scholars, the fixed term agency worker should enjoy the right to terminate, without notice, the contract whenever he/she has the possibility to be hired by the end user.

However, there are no explicit exemptions to the classical legal regulation of the fixed term employment contract. Only, according to article 23.8, contractual clauses that render excessively difficult for the end user to hire agency workers after the assignment has finished, are regarded as null and void.

The Agencies' collective agreement of 2008 (Article 31) consequently states the agency worker's prerogative to terminate the assignment *ante tempus*, in front of the agency's payment of a penalty equal to the days of assignment which have been lost.

b) The agency worker with a contract of indeterminate duration.

With regard to the agency worker with a contract of indeterminate duration, the duty to give notice which lasts for an excessively long period of time, according to the job performed by the worker, should be considered null and void.

On the contrary, the general duty to give notice, provided by Article 2118 of the Italian Civil Code, shall be applied. Whenever the worker does not fulfil the duty to work during the period of notice, he/she will be required to pay a penalty.

Finally, it's worth noting that the legal prohibition to insert contractual clauses that render excessively difficult for the end user to hire the agency worker after the assignment has been terminated, can be overcome in the case in which to the agency worker is paid an "adequate" indemnity, according to the agency's collective agreement.

10. Collective Protections.

There is only one rule that outlines the collective protection of agency workers (Article 24, Legislative Decree 276/2003). It is by all means a mere outline.

This legal provision has been then completed by collective bargaining (CCNL for the work agencies of July 24, 2008).

How can agency workers exercise their collective rights?

a) Collective Rights

First, it is worth noting that insofar as agency workers are treated as ordinary employees, they are entitled to all the employment collective rights individually exercised. They enjoy the freedom of association (Article 39 of Italian Constitution), the right to strike (Article 40) and all the other rights and freedom provided by the Italian Statute of Workers (Law 300/1970). The agency worker is provided with these rights and freedom *vis-à-vis* the Agency, which is the formal employer. E.g. the right to strike suspends the employment contract between the agency worker and the agency.

b) The right to Assembly exercised both in the agency and in the end user's undertaking.

However, agency workers, while working within the end user's undertaking, suffer of a real problem of integration and participation to the workplace.

Hence, agency workers enjoy the right to assembly both in the agency and in the end user's undertaking (Article 24.2, Legislative Decree 276/2003)[3].

c) Participation to the Constitution of Plant Level Forms of Workers' Representation in both the Agency and the End User's Undertakings.

In the Regulation of agency work, there is nothing about the constitution of Agency Workers' forms of representation.

c1) Agency Workers' Forms of Representation in the Work Agency.

The agency worker, as are all the other employees, is entitled to take the initiative to constitute agency workers' forms of representation within the agency's undertaking, according to the general rules provided by the Law (r.s.a. Article 19, Statute of Workers) and by collective agreements (r.s.u. 1993 Protocol). Indeed, the national collective agreement of July 24, 2008 (Article 16) establishes the "agency's delegated", charged to sign the collective agreement; it also establishes the "territorial delegated" (appointed by single Trade Unions at Regional or Provincial level) charged to monitor the correct application of collective agreements and of the other labour law rules by the agencies.

c2) Agency Workers' Forms of Representation in the End User's undertaking.

The collective agreements can also provide forms of agency workers' representation in the end user's undertaking. These forms can be either integrated into the other existing forms of workers' representation or independent. The latter solution is upheld by the collective bargaining.

The collective agreement of 2008 (Article 16) establishes the workers' representative at the end user's plant level (appointed or elected by Trade Unions) whenever the end user "employs at least 20 agency workers, even coming from different agencies, within a period which is longer than three months".

[3] In this respect, collective bargaining (Article 18, Collective Agreement July 24, 2008) has to be considered. Here, it is provided both the right to assembly in the agency and the right to take part to the assemblies in the end user's undertaking.

The company representative has responsibilities to work agencies and operates with local union representatives in its territory and with the national delegates.

11. Liberalization of Agency Work and Increase Occupancy. Statistical Data.

In this section, I ask whether the progressive liberalization of agency work has led to positive results and, mainly, to increase occupancy.

I looked for some statistical data to answer.

Here, I will provide some statistical data elaborated by the EDITEMP National Observatory. This is the most updated data existing.

In the following tables you can find some data with regard to what kind of workers and to what kind of economic sectors is agency work more requested.

But you will not find any answer to the question is if the Agency Work Increased in Relation to the Economic Crisis and Following Unemployment.

This crucial question is still unanswered, since I was not able to find any data concerning the end users' effective hiring of agency workers after the assignment has been terminated.

Only in one inquiry of 2006, a researcher[4] has underlined that in the agency work the agency worker does not appear to have more chance of being employed than in all the other atypical forms of work (e.g. the fixed term contract).

[4] Tommaso Nannicini, *Il decollo del lavoro interinale in Italia*, March 2006, in http://www.tommasonannicini.eu/Portals/0/decollo.pdf.

TABLE 1

INCIDENCE OF AGENCY WORK ON TOTAL EMPLOYMENT

FROM 1998 TO 2011

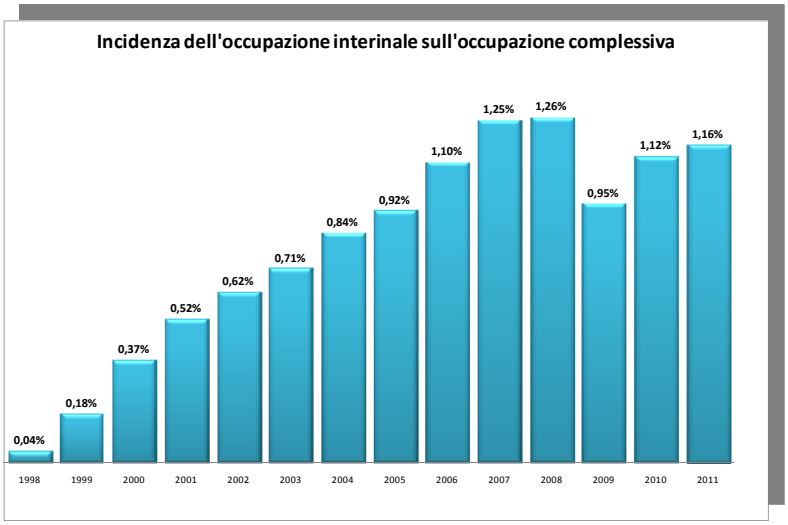


TABLE 2

DAYS PAID PER AGENCY WORKER

FROM 2003 TO 2010

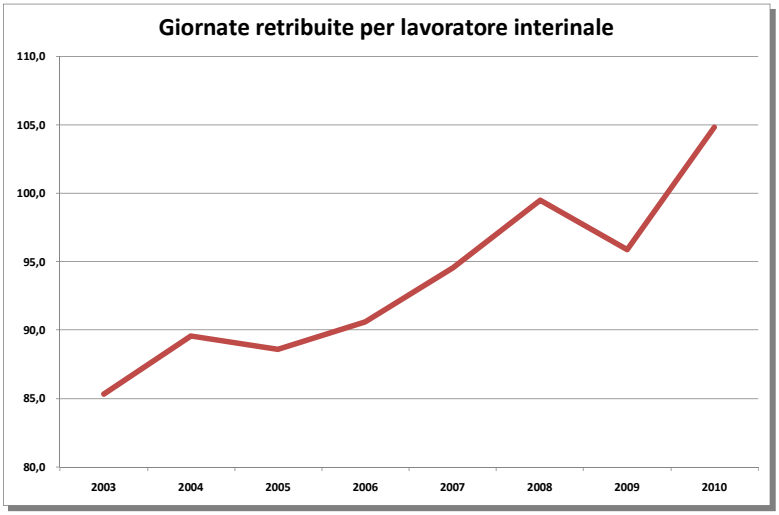


TABLE 3

DISTIBUTION OF ASSIGNMENT BETWEEN 30 AND 90 DAYS

FROM 2007 TO 2010

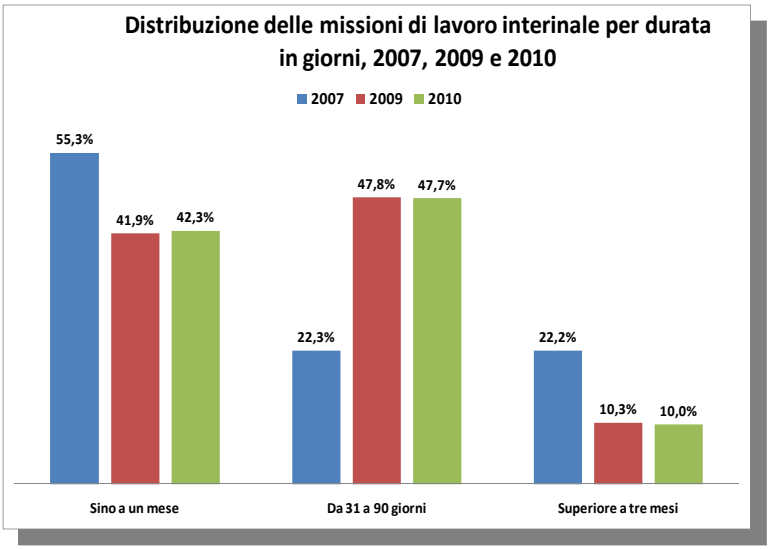
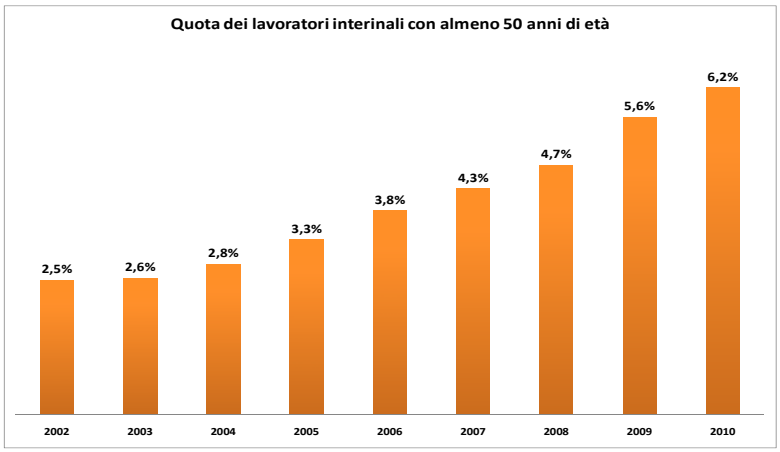


TABLE 4

AGENCY WORKERS 50 YEARS OLD OR OLDER FROM 2002 TO 2010



AGENCY WORKERS 40 YEARS OLD OR OLDER FROM 2002 TO 2010

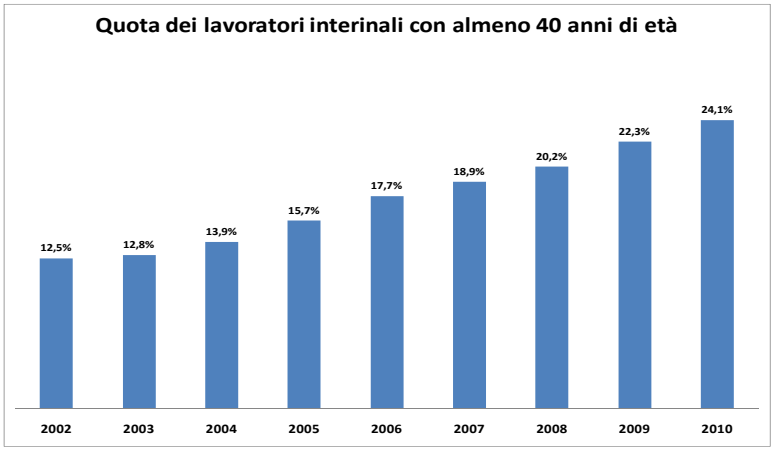


TABLE 5

IMMIGRANT AGENCY WORKERS FROM 1998 TO 2010

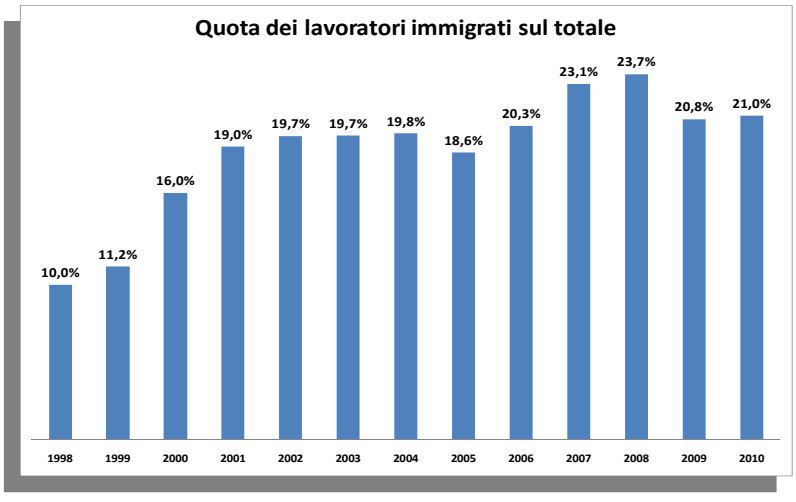


TABLE 6

FEMALE AGENCY WORKERS FROM 2002 TO 2010

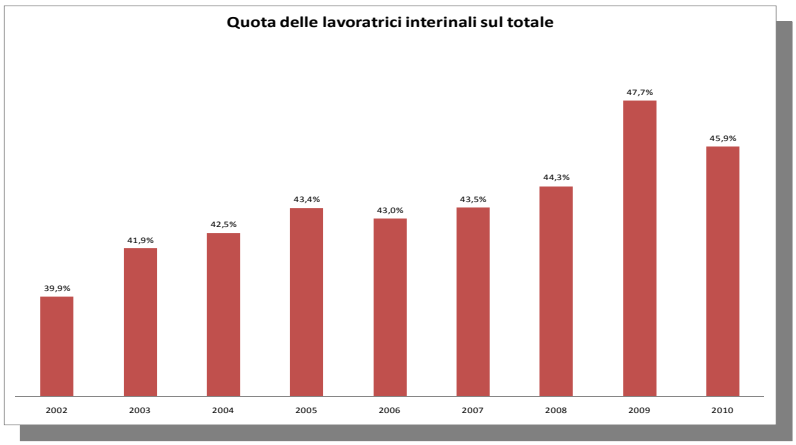


TABLE 7

AGENCY WORKERS BY PRODUCTIVE SECTOR FROM 2007 TO 2010

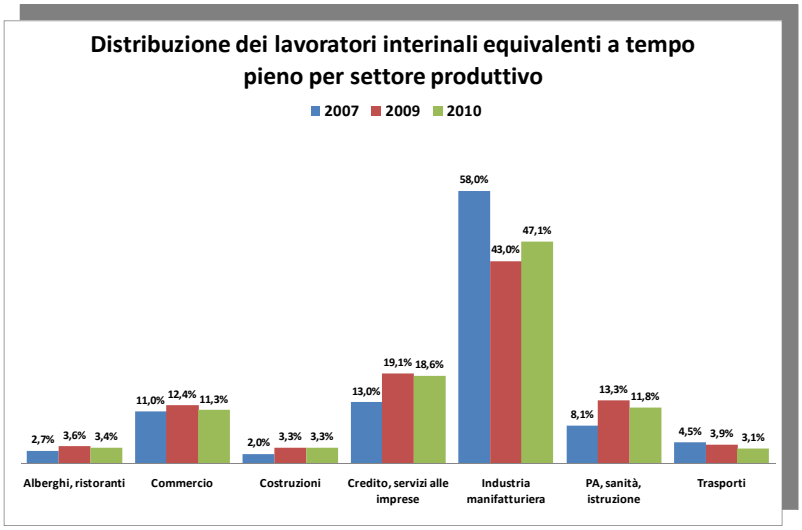
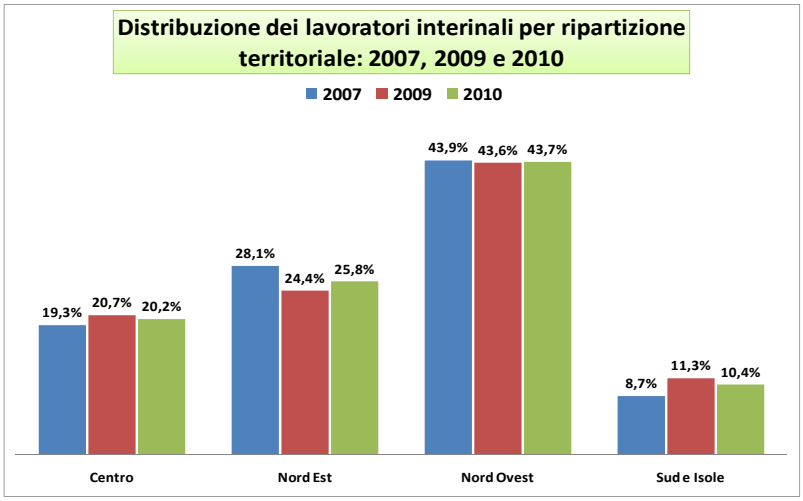


TABLE 8

GEOGRAPHICAL DISTRIBUTION OF AGENCY WORKERS FROM 2007 TO 2010



12. Is the Italian Regulation Consistent with the EU Directive of 2008?

In this section, I would like to briefly consider the question of the consistency of the Italian Regulation with the EU Directive of 2008.

a) First, the structure of agency work, as defined by the Italian Regulation, is by all means consistent with the structure provided by the EU Directive. In fact, as said above, according to Italian law, the employer is the agency, while the employer's power of direction is channelled upon the user.

b) The Italian regulation provides that agencies must be provided with a specific licence. This is also consistent with Article 4.4 of the EU Directive, that leaves the Member States free to maintain the national requirements with regard to registration and licensing of work agencies.

c) On the contrary, it is more difficult to assess the consistency of the positive and negative limits of agency work with the EU Directive. According to Article 4.1, "prohibitions or restrictions on the use of temporary agency work shall be justified only on ground of general interest relating in particular to protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented".

In addition, the 20th whereas of the Directive provides that "the provisions of this Directive on restrictions or prohibitions on temporary agency work are without prejudice to the national legislation or practices that prohibit workers on strike being replaced by temporary agency workers".

In my opinion, the Italian legal restrictions – objective restrictions – are consistent with the EU Directive, since they are turned to avoid the risk of dismantling standard employment and to guarantee the correct functioning of the labour market (e.g. the cause, the quantitative limits, the prohibition to replace workers who have been collectively dismissed) as well as to protect workers' health and safety and to avoid the risk that agency workers are used to replace workers on strike.

d) The EU Directive of 2008, Article 5.5, states that National States shall take appropriate measures with the view to preventing successive assignments designed to circumvent the provisions of the Directive.

Indeed, the agency worker could be restrained from exercising his/her employment rights with the view to losing the possibility to have a new assignment. Here, all the employment rights and the principle of equality of treatment are at stake.

It is clear that, insofar as we agree with the interpretation according to which the agency and the worker can enter into a fixed term contractual relationship only on the grounds of temporary needs, this risk is avoided. Particularly, this would permit agency workers to enter into an employment contract of indeterminate duration with the agency, with the following full protection of their rights.

e) The Italian principle of equality of treatment has to be now considered. Unlike the EU Directive, the Italian legislator does not provide an analytical and absolute equality of treatment between basic working conditions and job (all general conditions relating to working time, breaks, wage, *see* Article 3) which shall be applied to agency workers and the end user's employees (*see* Article 4, of the EU Directive of 2008). Rather, the Italian regulation provides a comprehensive judgement of equivalence which regards the economic and normative treatment accorded to the worker as a whole.

To collective bargaining the right is then conferred to establish the criteria used to determine the remuneration linked with productive results, thereby implicitly admitting that a part of remuneration could not be bound by the principle of equality of treatment.

The right to enjoy the same social and welfare services accorded to workers who are part of associations or cooperatives or who have a certain seniority is also excluded. However, according to Article 6.4 of the Directive "to temporary agency workers shall be given access to the amenities or collective facilities in the user undertaking, in particular any canteen, child-care facilities and transport services, under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons".

Finally, Article 23.2, Legislative Decree 276/2003, provides an exemption to the principle of equality of treatment in presence of an individual programme of integration into the labour market realized by the work agencies. This provision is not similar to Article 1.3 of the Directive, according to which 1) specific integration programmes can be defined, after consulting the social partners; 2) the programme can be public or publicly supported.

f)The provision of an exemption to the principle of equality of treatment with regard to remuneration in the case of long-term agency work is consistent with Article 5.2 of the Directive. It is nonetheless necessary to provide an indemnity. Its amount is lower than the amount of the ordinary wage established by the collective agreement (the Directive only mentions the need of consulting the social partners).

g) It is difficult to understand if the Italian provision that contractual clauses that render more difficult for the end user to hire the

agency worker after the assignment has terminated are null and void is consistent with the Directive (*see* Article 6.2 of the Directive).

In fact, unlike the Directive, the Italian provision admits an exemptions to this rule in case to the worker is paid a special indemnity.

Notwithstanding, the interpretation of the scope of the Directive requires us to admit that this particular provision shall be applied both to fixed term agency work and to long-term agency work.

h) The Directive then establishes an absolute prohibition to perceive a remuneration for the agency's activity of intermediation. In this case, the Italian regulation provides a specific prohibition which is criminally sanctioned (Article 18.3, Legislative Decree 276/2003). However, in contrast to the Directive, collective bargaining is allowed to define specific exemptions in the case of knowledge intensive and highly educated workers.

i) Training is considered by Article 6.5 of the Directive. Member States are bound to take measures in order to improve agency workers' access to training in the temporary work agencies and in the end users' undertakings. In the Italian regulation, a specific fund has been established which is financed also by the work Agencies and is held by a bilateral institution. The fund is basically turned to permit training initiatives and programmes in favour of the agency workers.

l) The Italian provisions about the bodies representing agency workers are broadly consistent with the Directive (Article 7).

The Directive states that, for the purpose of calculating the threshold above which bodies representing workers are to be formed, agency workers shall count alternatively in the temporary work agencies or in the user's undertaking (Article 7.1 and 7.2). The Italian legislator has chosen to count agency workers in the work agencies; while the count of agency workers in the user's undertaking is relevant to the health and safety protection (Article 22.5, Legislative Decree 276/2003).

One problem emerges if we consider that, according to the fixed term employment contract's regulation, a fixed term worker shall count only in the case where the contract lasts more than nine months (Article 8, Legislative Decree 368/2001).

m) Italian Legislation is consistent with Directive of 2008 (Article 8) also with regard to the duties of information (Article 8). According to Article 24.4, Legislative Decree 276/2003, the end user is bound by the duty of information about "the number of agency workers, the reasons behind the agency work" and by periodical duties of information about the number of agency workers the reasons behind the agency work, the duration, the formal qualification of workers involved.

n) Lastly, the Italian legislation provides civil, criminal, administrative sanctions for breach of the prescriptions. The civil sanction is effective, proportional, dissuasive, as required by the Directive.