

THE SPECIFICITY OF SOME ASPECTS OF TEMPORARY AGENCY WORK IN ITALY AND CROATIA

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UDK: 331.53 (450)(497.5)
<https://doi.org/10.30925/zpfsr.39.4.16>
Ur.: 13. kolovoza 2018.
Pr.: 15. listopada 2018.
Stručni rad

Summary

The paper offers a short introduction into the legal framework of the Croatian and Italian labour law system with respect to agency work. The European Union legal framework, some of the most important cases of the Court of Justice of the European Union as well as common issues in both countries are also elaborated upon. More importantly, the paper also addresses some specificities which could be used de lege ferenda in both countries.

Keywords: *agency work; European Union; Italy; Croatia.*

1. INTRODUCTION

Agency work is a model of new forms of employment which substitute the standard, full time employment relationship of indefinite duration in the employer's workplace. Employment agencies have become real employers, instead of ordinary intermediaries.¹ Agency work opens a lot of questions regarding the status of agency workers and sometimes also raises fears of strong abuses of such an employment and service relationship. We may conclude that it is an important tool not only for preventing unemployment but also as an important form of a flexible employment, which in order to gain the security suffix in the light of flexicurity needs to have much stronger workers protection mechanism. This is the reason why this paper focuses on the legal framework of two countries, Italy and Croatia, and analyses them for the purpose of providing some examples of good practice which could be implemented in both legal systems.

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This paper has been supported in part by the Croatian Science Foundation – Project UIP-2014-09-9377 “Flexicurity and New Forms of Employment (Challenges regarding Modernization of Croatian Labour Law)”.

1 Raday, Francis, *The Insider-Outsider Politics of Labour-Only Contracting*, *Comparative Labour Law and Policy Journal*, Vol. 20, No. 413, 1999, p. 414 in Laleta, Sandra, Križanović, Anamarija, *Rad putem agencija za privremeno zapošljavanje u hrvatskom, europskom i usporednom pravu*, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 36, No. 1, 2015, p. 306.

Firstly, as a general introduction we will provide some of the definitions of employment of work agencies in the international and European Union (hereinafter: EU) context.

The International Labour Organisation (hereinafter: ILO) Convention No. 181² suggests that the term ‘private employment agency’ includes any natural or legal person, independent from the public authorities, which provides one or more of the following labour market services:

- services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom,
- services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as the “user enterprise”) which assigns their tasks and supervises the execution of these tasks,
- other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment.³

It needs to be pointed out that Italy has ratified the ILO No. 181 Convention, while Croatia is not a party to it. The author is of the opinion that there are no reasons why Croatia should not ratify it since there are 33 countries which have ratified it, 12 of which are EU Member States.⁴

Directive 2008/104/EC⁵ on temporary agency work, on the other hand, defines ‘temporary-work agency’ as any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction, while a ‘temporary agency worker’ is defined as a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction.

Since special attention is given to Italy and Croatia as EU Member States, in the next part of the paper the author will give a short overview of the EU legal framework on agency work.

2 ILO Convention No. 181 (1997) Convention concerning Private Employment Agencies, available: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326 (20 April 2018).

3 ILO Convention No. 181, Article 1(1).

4 Belgium, Bulgaria, Czech Republic, Finland, France, Hungary, Italy, Lithuania, Netherlands, Poland, Portugal, Slovakia, Spain. See, ILO official webpage, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312326 (12 June 2018).

5 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5 December 2008, Article 3.

2. EU LEGAL FRAMEWORK ON TEMPORARY AGENCY WORK

As has already been mentioned above, temporary agency work in the EU is primarily regulated by a specific directive, which represents a minimum standard measure.⁶ Directive 2008/104/EC on temporary agency work (hereinafter: Directive 2008/104/EC) was adopted by the European Parliament and the Council under Art. 137(2) of the EC Treaty (now Art. 153(2) TFEU).

The purpose of Directive 2008/104/EC is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to job creation and to the development of flexible forms of working. In particular, Directive 2008/104/EC establishes the principle of equal treatment in user undertakings, while allowing for certain limited derogations under strict conditions; it provides for a review by the Member States, during the transposition period, of restrictions and prohibitions on the use of agency work; it improves agency workers' access to permanent employment, to collective facilities in user undertakings and to training and it includes provisions on the representation of agency workers.

Under Art. 11(1) of Directive 2008/104/EC, Member States had an obligation to transpose the Directive into national law by 5 December 2011, either by adopting and publishing laws, regulations and administrative provisions necessary to comply with it, or by ensuring that their social partners introduce the necessary provisions by way of an agreement. All Member States have transposed the Directive 2008/104/EC, including Italy and Croatia.

In a number of cases, the transposition occurred late and only after the European Commission had launched infringement proceedings. In early 2012, the European Commission sent letters of formal notice for the non-communication of transposition measures to 15 Member States. Later that year, reasoned opinions were sent to three Member States. In the Member State that was the last to transpose Directive 2008/104/EC, the implementing legislation entered into force on 1 July 2013. Three Member States (France, Luxembourg and Poland) were of the opinion that their national provisions already comply with the Directive and those three Member States did not require any amendment upon its entry into force.⁷

6 For agency work in the EU please consult Barnard, Catherine, *EU Employment Law*, 4th Edition, Oxford University Press, Oxford, 2012, pp. 446-453 and Smith, Ian, Baker, Aaron, Smith & Wood's *Employment Law*, 11th Edition, Oxford University Press, Oxford, 2013, pp. 61-64.

7 Report from the Commission to the European parliament, the Council, the European economic and social committee and the Committee of the regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014) 176 final, 21 Mar 2014, p. 3.

3. EU CASE LAW ON AGENCY WORK

In this section of the paper the author will give a short overview of some judgments/cases of the Court of Justice of the European Union' (hereinafter: the Court) with respect to agency work.

In Case C-290/12, *Oreste Della Rocca v Poste Italiane SpA*,⁸ the Court dealt with the issue of the limits on the duration of the fixed-term employment relationship of the agency worker in line with Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP⁹ and especially the Framework agreement's Clause 5, which determines the measures which should be taken by the Member States in order to prevent abuses of successive fixed-term employment contracts. The Court ruled that Directive 1999/70/EC and the Framework Agreement must be interpreted as not applying either to the fixed-term employment relationship between a temporary worker and a temporary employment business or to the employment relationship between such a worker and a user undertaking.¹⁰

In Case C-533/13, *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry and Shell Aviation Finland Oy*,¹¹ on the other hand, the Court ruled on the issue of "Review of Restrictions or prohibitions" of the use of temporary work.¹² The Court declared that Art. 4(1) of Directive 2008/104/EC must be interpreted as addressing only

8 CJEU Case C-290/12, *Oreste Della Rocca v Poste Italiane SpA*, ECLI:EU:C:2013:235.

9 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10 July 1999, pp. 43 – 48.

10 CJEU Case C-290/12, *Oreste Della Rocca v Poste Italiane SpA*, para. 42-45.

11 CJEU Case C-533/13, *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry and Shell Aviation Finland Oy*, ECLI:EU:C:2015:173.

12 Article 4 of Directive 2008/104/EC, entitled 'Review of restrictions or prohibitions', which forms part of Chapter I, entitled 'General Provisions', states:

"1. Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the 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.

2. By 5 December 2011, Member States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.

3. If such restrictions or prohibitions are laid down by collective agreements, the review referred to in paragraph 2 may be carried out by the social partners who have negotiated the relevant agreement.

4. Paragraphs 1, 2 and 3 shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies.

5. The Member States shall inform the Commission of the results of the review referred to in paragraphs 2 and 3 by 5 December 2011."

In accordance with Article 11(1) of Directive 2008/104, the Member States were required to adopt and publish the laws, regulations and administrative provisions necessary to comply with the directive by 5 December 2011, or to ensure that the social partners introduce the necessary provisions by way of an agreement.

the competent authorities of Member States, and imposing on them the obligation to review the restrictions or prohibitions, so, as to ensure that any potential prohibitions or restrictions on the use of temporary agency work are justified. Therefore, the provision does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on the grounds of general interest within the meaning of Art. 4(1).¹³

In Case C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*,¹⁴ the Court¹⁵ ruled that the concept of ‘worker’ as referred to in Directive 2008/104/EC must be interpreted as covering any person who carries out work, that is to say, who, for a certain period of time, performs services for and under the direction of another person, in return for which he receives remuneration (as determined in the Court’s Case C-232/09 *Danosa*,¹⁶ para. 39 and 40), and who is protected on that basis in the Member State concerned, irrespective of the legal characterisation of his employment relationship under national law, the nature of legal relationship between those two persons and the form of that relationship. Art. 1(1) and (2) of Directive 2008/104/EC on temporary agency work must be interpreted so as to cover the assignment by a not-for-profit association, in return for financial compensation, of one of its members to a user undertaking for the purposes of that member carrying out, as his main occupation and under the direction of that user undertaking, work in return for remuneration, where that member is protected on that basis in the Member State concerned, this being a matter for the referring court to determine, even if that member does not have the status of worker under national law on the ground that he has not concluded a contract of employment with that association.¹⁷

In the next section of the paper the author will focus on the legal framework of the Italian and Croatian labour law system concerning agency work, while paying special attention to the examples of good practice noted in both countries which could be implemented *de lege ferenda*.

4. THE LEGAL FRAMEWORK OF THE REPUBLIC OF CROATIA WITH RESPECT TO AGENCY WORK

The Labour Act (hereinafter: LA) defines¹⁸ temporary employment agency (hereinafter: the agency) as an employer who, based on worker assignment contract,

13 CJEU Case C 533/13, *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry and Shell Aviation Finland Oy*, op. cit., para. 22-32.

14 CJEU Case C 216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, ECLI:EU:C:2016:883.

15 For a general picture on the case consult Laleta, Sandra, Križanović, Anamarija, *Rad putem agencija za privremeno zapošljavanje u hrvatskom, europskom i usporednom pravu*, op. cit., pp. 332-335.

16 CJEU Case C-232/09, *Dita Danosa v LKB Līzings SIA*, ECR 2010 I-11405.

17 CJEU Case C 216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, para. 43 and 49.

18 Labour Act (*Zakon o radu*), Official Gazette No. 93/14, 127/17 (hereinafter: LA), Article 44.

assigns workers to another employer (hereinafter: the user undertaking) to work there temporarily. The agency may also perform economic activities pertaining to employment, provided that it holds an appropriate license under specific provisions. An assigned worker is the worker employed by the agency and assigned to the user undertaking. The agency may perform the activity of assigning workers to the user undertakings provided that it is established in accordance with specific provisions and registered with the ministry responsible for labour¹⁹ and may not perform such activities prior to the registration with the appropriate ministry responsible for labour.²⁰

While performing activities of assigning workers to user undertakings, the agency is not allowed to charge the worker a fee for being assigned to the user undertaking or a fee for the entry into an employment contract between the assigned worker and the user undertaking. The agency must deliver to the ministry responsible for labour the statistical data on the activities with regard to the assignment of workers²¹, while a ministerial ordinance²² should stipulate the contents and the method of and time limits for the submission of such data.

A worker assignment contract²³ between the agency and the user undertaking must be in written form. In addition to the agency's general terms of operations, the elements of the contract referred include: the number of assigned workers required by the user undertaking, the period of assignment, the place of work, the works to be performed by assigned workers, the method and period during which the user undertaking must deliver to the agency the calculation for remuneration to be paid and the regulations applied at the user undertaking for the purpose of determining the remuneration, and the person authorised to represent the user undertaking before the assigned workers.

If workers are assigned to the user undertaking located abroad, the contract must, in addition to the previously mentioned data contain the information concerning: the legislation applicable to the assigned worker's employment relationship, the assigned worker's rights, which the user undertaking must ensure to the worker and which

19 Ministry of Labour and Pension System (*Ministarstvo rada i mirovinskog sustava Republike Hrvatske*).

20 Currently there are 92 temporary employment agencies registered before the ministry responsible for labour, available at: <http://www.mrms.hr/ministarstvo-rada-i-mirovinskoga-sustava/trziste-rada-i-zaposljavanje/popis-agencija-za-privremeno-zaposljavanje/> (10 April 2018). It is interesting that the number is increasing since in 2014 there were 75 agencies, compared to 45 agencies in 2013. Laleta, Sandra, Križanović, Anamarija, Rad putem agencija za privremeno zapošljavanje u hrvatskom, europskom i usporednom pravu, op. cit. p. 315.

21 In 2014-15 only 0,3%-0,4% of employed persons in Croatia were agency workers, hence, around 8.000 persons according to the data by the Croatian Employers Association. Laleta, Sandra, Križanović, Anamarija Rad putem agencija za privremeno zapošljavanje u hrvatskom, europskom i usporednom pravu, op. cit., p. 305. In 2016 according to the ministry responsible for labour, 19.327 activities of assigning workers were recorded, but that does not mean that these figures represent the real number of persons since one person may be assigned more than just once in a year. The official webpage of the ministry responsible for labour, available at: <http://www.mrms.hr/ministarstvo-rada-i-mirovinskoga-sustava/rad/> (11 June 2018).

22 Pravilnik o sadržaju, načinu i roku dostave statističkih podataka o privremenom obavljanju poslova, Official Gazette No. 125/15.

23 LA, Article 45.

are exercised pursuant to the LA and other laws and regulations of the Republic of Croatia, and the obligation to bear the costs of repatriation. The worker's assignment contract shouldn't be concluded for the purpose of replacing the workers in strike at the user undertaking, performing works that were performed by workers subject to the collective redundancy procedure effected by the user undertaking in a previous period of six months, works that were performed by the workers whose employment contracts were terminated by the user undertaking due to business reasons in a previous period of six months, works that are, under the regulations on safety protection at work, regarded as works under special working conditions, while the assigned worker does not meet the particular requirements, and in case of assigning workers to another agency. By virtue of the worker assignment contract the agency and the user undertaking may agree that the user undertaking must keep record of the assigned worker's working time during the assignment period as well as specify the time limits and method for the delivery of that record to the agency.

The temporary assignment contract is defined by Art. 46 of the LA in more specific detail. Such a contract stipulated between the agency and the worker may be concluded as a temporary assignment contract of fixed or indefinite duration. In addition to the information determining the content of every employment contract²⁴ or, in the case of assignment of worker by the agency to the user undertaking located abroad,²⁵ the contract must contain the information concerning: the contract concluded for the purpose of assigning a worker for temporary work at the user undertaking, a reference to works that the worker will perform, and obligations of the agency towards the worker during the period of the assignment. In the period during which the assigned worker with an employment contract of indefinite duration is not assigned to the user undertaking, he/she is entitled to the remuneration determined by the LA.²⁶ The contract concluded for an indefinite period equal to the period of the worker's assignment to the user undertaking must contain the information concerning: the names of contracting parties and their residence or registered place of business, the expected duration of the contract, the registered place of business of the user undertaking, the place of work, the works to be performed by the assigned worker, the date of the beginning and the end of employment, remuneration, bonuses and pay periods and finally the duration of a regular working day or week.

The agreed conditions concerning remuneration and other matters (including working time, breaks and rest periods, safety at work protection measures, protection of pregnant workers, parents, adoptive parents and youth, and non-discrimination, in accordance with specific anti-discrimination regulations) applicable to the assigned workers may not be lower or less favourable when compared to the remuneration or working conditions applicable to the worker employed with the user undertaking for the performance of the same tasks, which would be applicable to the assigned worker

24 LA, Article 15(1).

25 LA, Article 18(1).

26 LA, Article 95(5): "Unless otherwise provided for by the LA or another law, regulations or administrative provisions, collective agreement, working regulations or employment contract, the worker shall be entitled to compensation amounting to the average remuneration he received over the preceding three months."

should he have concluded an employment contract with the user undertaking. By way of derogation from such a guarantee, less favourable working conditions applicable to the worker assigned to the user undertaking as compared to those applicable to the worker employed at the user undertaking may be agreed upon by a collective agreement concluded between the agency or an association of agencies and trade unions.²⁷ Where the remuneration and other working conditions cannot be determined in accordance with the above mentioned provisions, they must be determined in the worker's assignment contract. This research suggests that there are no collective agreements in Croatia applicable to agency workers. Without a strong 'state run campaign', hence, through the social dialogue in the context of the Economic and Social Council, it seems unlikely that employers will be willing to sign collective agreements, which would grant more rights (both economic and non-economic) to that category of workers.

The issue of termination of temporary assignment contracts is defined in Art. 47 of the LA. It specifies that the provisions of the LA on collective redundancies do not apply to the termination of temporary assignment contracts. The agency may in extraordinary circumstances terminate a temporary assignment contract if such circumstances result in the extraordinary notice of termination where the continuation of employment relationship is regarded as impossible due to a severe breach of obligations from the employment relationship or due to any other fact of critical importance,²⁸ and if the user undertaking informs the agency thereof in writing within fifteen days of the date of discovery of the fact providing for the grounds for an extraordinary notice of dismissal. The extraordinary notice of dismissal takes effect as of the day of the written notification to the agency. On the other hand, the fact that the need for assigned worker at the user undertaking ceased to exist prior to the expiration of assignment period may not constitute a ground for the termination of temporary assignment contract. Where an assigned worker finds that during his assignment at the user undertaking any of his/her rights arising from the employment relationship were violated, he/she must seek protection from the court of the violated right with the employer.²⁹

Regarding the length of the assignment, the LA³⁰ specifies that the user undertaking may not use the work of the assigned worker for the performance of the same works for an uninterrupted period exceeding three years unless this is necessary for the purpose of replacing a temporarily absent worker or where it is allowed by collective agreement on the grounds of some other objective reasons. An interruption of less than two months is not regarded as the interruption of the three-year period.

27 The specific provision suggests that such standard may be derogated only through collective agreements. See, in this regard, the Opinions of the ministry responsible for labour, Opinion as of 15 July 2015, available at: http://www.iusinfo.hr/OfficialPosition/Content.aspx?SOPI=MMIN201D20150715N443&Doc=MMIN_HR (22 April 2018) and Opinion on 11 September 2014, available at: http://www.iusinfo.hr/OfficialPosition/Content.aspx?SOPI=MMIN201D20140911N442&Doc=MMIN_HR (22 April 2018)

28 LA, Article 116(1).

29 LA, Article 133.

30 LA, Article 48.

The agency's obligations towards the assigned workers are determined by Art. 49 of the LA. Before assigning the worker to the user undertaking, the agency must submit an assignment letter to the worker, which must contain all pieces of information discussed above. Before assigning the worker to the user undertaking, the agency must inform the worker about any specific professional qualifications or skills required for the performance of works at the user undertaking, and about any work-related risks regarding health and safety protection at work. Furthermore, the agency must ensure training for the assigned worker in accordance with the regulations on health and safety protection at work, unless the worker assignment contract imposes this obligation upon the user undertaking. The agency must also train the assigned worker with respect to new technologies applicable to the work to be performed by the assigned worker, unless the user undertaking is obliged to provide the training according to the worker assignment contract. The agency must pay the assigned worker the remuneration for the work performed at the user undertaking as defined by contractual provisions even if the user undertaking fails to deliver to the agency the calculation of remuneration to be paid.

Art. 50 of the LA lays down the obligations of the user undertaking. According to the provisions of this article, the user undertaking is regarded as the employer of the assigned worker, within the meaning of the obligation of implementing the provisions of the LA and other laws and regulations governing the safety and health protection at work and a special protection of particular categories of workers. In case of entering into the worker assignment contract, the user undertaking must fully and truthfully and in writing inform the agency about the working conditions applicable to its permanent workers performing the same work which the assigned worker will be required to perform. The user undertaking is obliged at least once a year notify the works council about the number of assigned workers and the reasons for such assignments. In addition, it must inform the assigned workers about vacancies for which they meet the requirements.

Regarding the issue of indemnity,³¹ it must be pointed out that any damage to a third party caused by the assigned worker during his/her work at the user undertaking or the work related thereto must be indemnified by the user undertaking, which is regarded as the employer considering the recourse liability of the assigned worker. The agency is held responsible for any damage caused by the assigned worker to the user undertaking during his/her work or the work related thereto, pursuant to the general provisions of the law of civil obligations.³² If the assigned worker suffers any damage at work or in relation to the work at the user undertaking, he/she may file a claim against the agency or the user undertaking, in accordance with the LA provisions on employer's liability for damages caused to the worker.³³

31 LA, Article 51.

32 Civil Obligations Act (*Zakon o obveznim odnosima*), Official Gazette No. 35/05, 41/08, 125/11, 78/15, 29/18.

33 LA, Article 111, Employer's liability for damages caused to the worker: "(1) In the case of any damage caused to the worker at the workplace or in relation to his work, the employer shall be obliged to indemnify the worker in accordance with the general provisions of the law of civil obligations. (2) The indemnification right referred to in paragraph 1 of this Article shall also

The final provision of the LA deals with the obligation on record keeping.³⁴ The agency must submit a written application for the registration with the ministry responsible for labour. The agency is also required to send a supporting documentation, which proves that the agency was established in accordance with specific provisions. The ministry issues a registration certificate containing the agency's registration number and the date of registration. The agency is thus obliged to indicate its registration number in its legal transactions, business documents, letters and contracts.

5. THE LEGAL FRAMEWORK OF THE REPUBLIC OF ITALY WITH RESPECT TO AGENCY WORK

In Italy the employment agencies were introduced by D. Lgs. No. 276 of 2003 and are regulated by Art. 4 and subsequent articles.³⁵ Currently, the issue of providing employment is regulated by Art. 30 and subsequent articles of D. Lgs. No. 81 of 2015, known as the *Jobs Act*.³⁶ In this section, we will point out some of the most important elements of the Italian legal framework concerning agency work.

The dual purposes, one aiming at the prevention of abuses and the other aiming at the prevention of overusing that institute have made the Italian legislator opt for a compromised approach in order to achieve balance between the two opposite interests.³⁷

According to Art. 30, the on-supply agreement, which could be of permanent³⁸ or temporary duration, is “*an agreement by which a supply agency places at the disposal of the user one or more of its employees, who, for the entire duration of the assignment, perform his/her activity in the interest and under the direction and control of the user*”. Here we must point out, that the agency worker is in a subordinate employment relationship. If it is a permanent one, it is subject to the rules stipulated for indefinite employment relationships, and if it is a fixed-term contract, it is subject to the regulations governing fixed-term employment, without prejudice to the application of the rules on the maximum duration of the single agreement or the maximum duration of consecutive contracts, with the exception of the stipulation of

apply to any damage caused by the employer to the worker on the grounds of violation of his rights arising from employment relationship.”

34 LA, Article 52.

35 Decreto Legislativo 10 settembre 2003, No. 276, “Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui alla legge 14 febbraio 2003, No. 30”, Official Gazette No. 235, 9 October 2003 (hereinafter: D. Lgs. no. 276 of 2003).

36 Decreto Legislativo 15 giugno 2015, No. 81, “Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell’articolo 1, comma 7, della legge 10 dicembre 2014, No. 183, Official Gazette No. 144, 24 June 2015 (hereinafter: D. Lgs. No. 81 of 2015).

37 Fili, Valeria, Riccardi, Angelica, *La somministrazione di lavoro*, pp. 293-336, pp. 295-296, in Ghera, Edoardo, Garofalo, Domenico, *Contratti di lavoro, mansioni e misure di conciliazione vita-lavoro nel Jobs Act 2*, Cacucci Editore, Bari, 2015.

38 Introduced in the Italian labour law system in 2003 with the D.Lgs. 276. of 2003. It is important to note that only workers who have a permanent contract of employment with their agency could be assigned for an indefinite period (Article 31 D.Lgs. No. 81 of 2015).

the last contract (Art. 19), the renewal of the contract (Art. 21), the quantitative limits (Art. 23), and the right of first choice (Art. 24).³⁹

The employment agencies not only carry out brokering activities, but can also perform various functions, such as administrative activities, human resources selection and research and support for staff 're-collocation'. Similarly as in Croatia, the agencies in Italy must also register with the ministry responsible for labour.⁴⁰ The register is divided into five sections.⁴¹

This registration requires that specific financial and judicial requisites be met, such as, that the agency is established as a corporation or a cooperative (with the exception of human resources research, selection and 're-collocation' support agencies, which may also be organised as partnerships), that it has a registered office or a branch office in Italy or another EU Member State, that it possesses suitable premises as well as adequate professional skills, that it is part of the National Labour Exchange network, etc. It must be pointed out that different types of agencies must meet different conditions. The ministry responsible for labour issues a temporary authorization to exercise the activities specified in the registration application and puts the agency on the list of registered agencies. Naturally, this depends upon the fulfilment of judicial and financial requisites stipulated by law. After two years, this temporary authorisation can be turned into an indefinite one. The reason for such rigorous regime is the protection of workers who make use of the services offered by such agencies.⁴²

The Table below shows the number of agency workers and their percentage compared to the number of employed persons in Italy according to INPS⁴³ data.⁴⁴ Based on the figures below, we can conclude that agency work is twice as much used in Italy as in Croatia.

39 Article 34(2-3), D.Lgs, No. 81 of 2015.

40 Ministry of Labour and Social Policy (*Ministero del Lavoro e delle Politiche Sociali*).

41 Article 4(1), D.Lgs. No. 276 of 2003: "Five sections of the Register are: 1) administration agencies authorised to perform all the activities indicated in Art. 20 as "general" employment administration agencies because they are permitted to carry out multiple activities; 2) permanent duration employment administration as "specialist" administration agencies; 3) brokering agencies; 4) human resources research and selection agencies; 5) support for professional re-collocation agencies."

42 Cataudella, Maria Cristina, *The Regulation of the Labour Market*, pp. 41-57, pp. 45-46 in *Labour Law and Industrial Relations in Italy* (Eds. Franco Carinci, Emanuele Menegatti), IPSOA, Wolters Kluwer, Milano, 2015.

43 Istituto nazionale della previdenza sociale.

44 INPS official page with data base statistics on employed persons in Italy, available at: <https://www.inps.it/webidentity/banchedatistatistiche/menu/dipendenti/main.html> (10 May 2018). See also: <http://www.bollettinoadapt.it/trend-di-sviluppo-della-somministrazione-italia-alcune-riflessioni-alla-luce-dei-dati-inps/> (10 May 2018).

Year	No. of agency workers	No. of employed persons	Percentage of agency workers
2012	210.000	22.570.000	0,93%
2015	275.100	22.470.000	1,22%
2016	294.867	22.760.000	1,29%

Source: INPS data base, 2018.

The number of workers in Italy hired permanently on the basis of an on-supply agreement (agency workers agreements) may not exceed 20% of the number of workers employed on the basis of the contract of indefinite duration, who have already been working for the user as of the first of January of the year in which the on-supply agreement was concluded.⁴⁵ This limit may be higher if this is specified in the collective agreements of companies.⁴⁶ If the percentage limit is exceeded, the worker may request the establishment of the employment relationship as the user's employee.⁴⁷ For the agency workers employed on a fixed term, however, the limits can be regulated only through a collective agreements.⁴⁸

Similarly as in Croatia, in Italy the worker employed on the basis of a permanent agreement has the right, unless he/she performs his/her service at the user's enterprise but remains at the disposal of the supply agency, to an available indemnity determined by the employment contract, whose sum is foreseen by the collective agreement applicable to the user and, which in any case, may not be lower than the amount foreseen by the decree of the ministry responsible for labour.⁴⁹ The purpose of the indemnity is, of course, to compensate the worker for his/her availability guaranteed to the supply agency in those periods when he/she was not engaged by the user.⁵⁰

If the user decides to entrust the agency higher-profile workers or the ones performing non-equivalent tasks, the user must immediately inform the agency in writing in this regard. If the user fails to do so, he/she is exclusively liable to compensate the worker for the differences in the amount of remuneration.⁵¹

Regarding the right to an equal treatment and non-discrimination, the supplied worker has the right to the basic working and occupational conditions, which are altogether not inferior to those applied to same-level workers employed by the user. In other words, no comparison should be made between the single elements of the relationship, but only based on the overall treatment.⁵² The worker has the right "*when with the user, for the entire duration of the assignment, to exercise the right*

45 In case of a "start-up" the percentage is calculated on the day when the contract for providing the agency worker was concluded between the agency and the user. Fili, Valeria, Riccardi, Angelica, *La somministrazione di lavoro*, op. cit., p. 300.

46 Article 31(2-3), D. Lgs, No. 81 of 2015.

47 Article 38(2), D. Lgs, No. 81 of 2015.

48 Fili, Valeria, Riccardi, Angelica, *La somministrazione di lavoro*, op. cit., p. 312.

49 Article 34(1), D. Lgs, No. 81 of 2015.

50 Cataudella, Maria Cristina, *The Regulation of the Labour Market*, op. cit., p. 49.

51 Article 33(5) and Article 35(5), D. Lgs, No. 81 of 2015.

52 Article 35(1), D. Lgs, No. 81 of 2015.

to freedom and trade-union activities as well as to participate in meetings of human resources employed by the user".⁵³ This means that the right to participate in trade union activities is guaranteed twice, once before the agency and once before the user.⁵⁴

Similarly as in Croatia, in Italy it is prohibited for employment agencies to demand or receive payment from the worker, directly or indirectly.⁵⁵ This rule is also enacted in the ILO Convention No. 181 Art. 7(1) and in Directive 2008/104/EC Art. 6(3). In Italy, on the other hand, it is determined that collective agreements stipulated by workers and employers' associations, comparatively more representative on a national or territorial level, may foresee derogations from this rule for specific categories of high-profile, professional workers.⁵⁶

6. GOOD PRACTICE EXAMPLES

In this section of the paper, the author will give a short summary of some of the good practices of both countries regarding the regulation of agency work.

With respect to Croatia, the author points out that the LA:

1. defines the obligation to issue data to the Ministry (with a specific ministerial regulation in this regard),
2. forbids the payment of a fee by a worker,
3. sets the total length of the loan of agency workers to 3 years (with a few exceptions),
4. determines the content of the contract if supplying the work is supplied in a foreign country,
5. foresees high penalties for not respecting the rules on agency work (€4.133 to € 13.333 as compared to €250 to €1.250 in Italy).

In Italy, on the other hand, the Act (D. Lg/L.), determines the following:

1. the conditions to be registered as an agency are determined by the Act, not a ministerial regulation
2. the authorisation for employment agencies providing services is temporary, but may after a two-year period of monitoring become permanent,
3. trade union rights are guaranteed both before the agency and before the user,
4. there are quantitative restriction on the number of agency workers:
 - more than 20% of workers employed for an indefinite period,
 - only the workers employed by the agency for an indefinite period may be employed,
 - the collective agreement defines the number of agency workers with a fixed-term employment contract.

Italy, however, unlike Croatia, has the *National Collective Agreement for the category of agency work*.⁵⁷ Although the collective agreement was concluded on 1

53 Article 36(2), D. Lgs, no. 81 of 2015. Cataudella, Maria Cristina, *The Regulation of the Labour Market*, op. cit., p. 49.

54 Fili, Valeria, Riccardi, Angelica, *La somministrazione di lavoro*, op. cit., p. 329.

55 Article 11, D. Lgs. No. 276 of 2003.

56 Cataudella, Maria Cristina, *The Regulation of the Labour Market*, op. cit., p. 46.

57 *Contratto Collettivo Nazionale di Lavoro per la categoria delle Agenzie di Somministrazione*

January 2014 for a three-year period, it remains in force until a new collective contract is concluded. This collective agreement applies to the whole national territory and to all agency workers. The agreement specifies that agencies must provide education and vocational training to their workers, safety and work protection, but it also determines their trade union rights, protection of their labour rights in general, the content of the written contract of employment, the length of the trial period and notice period both in a fixed-term employment contract and in the one of an indefinite duration. Furthermore, some of the rules determined by the collective agreement demonstrate a higher level of labour and social protection of agency workers. These include the following:

1. female workers have the priority in being supplied to the user after their maternity leave (if they are not allowed the maternity leave allowance – they have the right to receive the amount of €2.250 from EBITEMP – a national bilateral body),
2. detailed determination of contractual clauses,
3. determination of apprenticeship,
4. monthly fee of €750,00 paid to the agency if the worker is employed permanently (after the first 12 months and until the expiration of 36 months), whereby it is forbidden to dismiss the relationship in the next 12 months, thus granting security to the worker.

7. CONCLUSION

To sum up, we can claim that both in Croatia and in Italy agency work is fairly well regulated, although, as shown in this paper, there are some good practice examples from Croatia which could be implemented in Italy and *vice versa*.

The paper thus suggests that Croatia should introduce some *de lege ferenda* regulations which are present in the Italian labour law system.

For instance, temporary authorisation, which after a two-year period of monitoring may become permanent, is a very good example of how the State can ensure that the agency provides more quality, given the fact that two years is a long enough period to see how the agency is performing its activity. Quantitative restrictions on the use of agency workers also seem a very good tool for preventing abuses, but the general number of employees by the user should also be taken into consideration, especially concerning ‘small employers’. Additionally, trade union rights, which may be exercised both before the agency as the main employer but also before the user represent a big step forward in providing more security to agency workers.

Finally, the national collective agreement for agency workers is a great achievement for Italy. The social dialogue in Croatia, supported by the State through the Economic and Social Council, on the other hand, could represent an excellent tool which could give the part of the notion ‘security’ to the notion ‘flexible’ meaning that agency work could become a good ‘flexicurity’ model.

LITERATURE

Books and articles

1. Barnard, Catherine, *EU Employment Law*, 4th Edition, Oxford University Press, Oxford, 2012.
2. Cataudella, Maria Cristina, *The Regulation of the Labour Market*, pp. 41-57, pp 45-46 in *Labour Law and Industrial Relations in Italy* (Eds. Franco Carinci, Emanuele Menegatti), IPSOA, Wolters Kluwer, Milano, 2015.
3. Fili, Valeria, Riccardi, Angelica, *La somministrazione di lavoro*, pp. 293-336, pp. 295-296, in Ghera, Edoardo, Garofalo, Domenico, *Contratti di lavoro, mansioni e misure di conciliazione vita-lavoro nel Jobs Act 2*, Cacucci Editore, Bari, 2015.
4. Laleta, S., Križanović, A., *Rad putem agencija za privremeno zapošljavanje u hrvatskom, europskom i usporednom pravu*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 36, No. 1, 2015, pp. 305-340.
5. Raday, Francis, *The Insider-Outsider Politics of Labour-Only Contracting*, *Comparative Labour Law and Policy Journal*, Vol. 20, No. 413, 1999, p. 414 in Laleta, Sandra, Križanović, Anamarija, *Rad putem agencija za privremeno zapošljavanje u hrvatskom, europskom i usporednom pravu*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 36, No. 1, 2015, pp. 305-340, p. 306.
6. Smith, Ian, Baker, Aaron, *Smith&Wood's Employment Law*, 11th Edition, Oxford University Press, Oxford, 2013.

Legal acts

1. *Civil Obligations Act (Zakon o obveznim odnosima)*, Official Gazette No. 35/05, 41/08, 125/11, 78/15, 29/18.
2. *Contratto Collettivo Nazionale di Lavoro per la categoria delle Agenzie di Somministrazione di lavoro*, available at: <https://www.randstad.it/ccnl-per-la-categoria-delle-agenzie-di-somministrazione-di-lavoro.pdf>.
3. Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10 July 1999, p. 43 – 48.
4. Decreto Legislativo 10 settembre 2003, No. 276, "Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui alla legge 14 febbraio 2003, No. 30", Official Gazette No. 235, 9. October 2003 (D. Lgs. no. 276 of 2003).
5. Decreto Legislativo 15.6.2015, n. 81, "Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell'articolo 1, comma 7, della legge 10 dicembre 2014, n. 183., O.G. n 144, 24.6.2015 (D. Lgs. no. 81 of 2015).
6. Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5 December 2008.
7. ILO Convention No. 181 (1997) Convention concerning Private Employment Agencies, available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326.
8. *Labour Act (Zakon o radu)*, Official Gazette No. 93/14, 127/17.
9. *Pravilnik o sadržaju, načinu i roku dostave statističkih podataka o privremenom obavljanju poslova*, Official Gazette No. 125/15.

Case law

1. CJEU Case C-232/09, *Dita Danosa v LKB Līzings SIA*, ECR 2010 I-11405.
2. CJEU Case C-290/12, *Oreste Della Rocca v Poste Italiane SpA*, ECLI:EU:C:2013:235
3. CJEU Case C-533/13, *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry and Shell Aviation Finland Oy*, ECLI:EU:C:2015:173.
4. CJEU Case C 216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, ECLI:EU:C:2016:883.

Other sources

1. Activities of assigning workers in 2016. Ministry in charge of labour official webpage: <http://www.mrms.hr/ministarstvo-rada-i-mirovinskoga-sustava/rad/>.
2. INPS official page with data base statistics on employed persons in Italy, available at: <https://www.inps.it/webidentity/banchedatistatistiche/menu/dipendenti/main.html>.
3. List of 92 temporary employment agencies registered before the Ministry in charge of labour. Available at: <http://www.mrms.hr/ministarstvo-rada-i-mirovinskoga-sustava/trziste-rada-i-zaposljavanje/popis-agencija-za-privremeno-zaposljavanje/>.
4. Opinion of the Ministry in charge of labour on 15 July 2015, available at: http://www.iusinfo.hr/OfficialPosition/Content.aspx?SOPI=MMIN201D20150715N443&Doc=MMIN_HR.
5. Opinion of the Ministry in charge of labour on 11 September 2014, available at: http://www.iusinfo.hr/OfficialPosition/Content.aspx?SOPI=MMIN201D20140911N442&Doc=MMIN_HR.
6. Ratifications of C181 - Private Employment Agencies Convention, 1997 (No. 181), ILO official webpage, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312326.
7. Report from the Commission to the European parliament, the Council, the European economic and social committee and the Committee of the regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014) 176 final, 21 March 2014.
8. Statistics on employed persons in Italy: <http://www.bollettinoadapt.it/trend-di-sviluppo-della-somministrazione-italia-alcune-riflessioni-alla-luce-dei-dati-inps/>.

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Sažetak

POSEBNOST NEKIH ASPEKATA AGENCIJSKOGA RADA U ITALIJI I HRVATSKOJ

Rad obuhvaća kratki uvod u pravni okvir hrvatskoga i talijanskog sustava radnog prava u pogledu agencijskog rada. Osim toga, u radu se daje prikaz pravnog okvira Europske unije u tom području, predstavljaju se neke od najvažnijih odluka Suda Europske unije, kao i zajednička rješenja oba pravna sustava. Zaključno, rad daje prikaz određenih posebnosti i rješenja *de lege ferenda* za obje države.

Ključne riječi: *agencijski rad; Europska unija; Italija; Hrvatska.*

Zusammenfassung

BESONDERHEITEN MANCHER ASPEKTE DER BEFRISTETEN LEIHARBEIT IN ITALIEN UND KROATIEN

In diesem Beitrag wird eine kurze Einführung in den Rechtsrahmen des kroatischen und italienischen Arbeitsrechtssystems bezüglich der Leiharbeit gegeben. Der Rechtsrahmen der Europäischen Union, die wichtigsten Rechtsprechungen des Gerichtshofs der Europäischen Union und gemeinsame Probleme beider Länder werden auch in diesem Beitrag besprochen. Insbesondere werden in diesem Beitrag manche Besonderheiten angesprochen, welche in beiden Ländern *de lege ferenda* benutzt werden können.

Schlüsselwörter: *Leiharbeit; die EU; Italien; Kroatien.*

Riassunto

LA PECULIARITÀ DI ALCUNI ASPETTI DELLA SOMMINISTRAZIONE DI LAVORO IN ITALIA ED IN CROAZIA

Il lavoro rappresenta una breve introduzione nel quadro giuridico del sistema

giuslavoristico croato ed italiano relativamente alla somministrazione di lavoro. Oltre a ciò, nel lavoro si illustra il quadro giuridico dell'Unione europea in tale ambito; si disamina la giurisprudenza più rilevante della Corte di Giustizia dell'Unione europea, come anche le soluzioni giuridiche che accomunano i due ordinamenti giuridici e, più importante ancora, si offre una rassegna delle peculiarità e di soluzioni *de lege ferenda* per entrambi i paesi.

Parole chiave: *somministrazione di lavoro; UE, Italia; Croazia.*