CONFERENCE:
EVALUATING APPLICATION OF THE DIRECTIVE ON THE POSTING OF WORKERS WITHIN THE FRAMEWORK OF THE PROVISION OF SERVICES

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MAIN FEATURES RELATING WITH POSTED WORKERS IN ITALY

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Foreword

Dealing with the implementation of the Posted Workers Directive (PWD) in Italy is a very difficult task because three different approaches to the issue must be taken into account. First, of course, one has to consider the law implementing PWD (D.lgs. n.72/2000[1]). This law fixes rules which are vague, unclear and not consistent with the Directive. Therefore, one must also consider how the Italian Law should be interpreted in light of the Directive, in order to give to the first a sense that is more compatible with the provisions of the latter. Finally, one has to take into account the factual situation, that means understanding how and to what extent the law on posting is "really" applied to foreign undertakings. And this is probably the most important approach, considering Italian labour market.

Part I

The substantive protection of posted workers

The 2000 Italian law on posting simply states that an undertaking posting workers in Italy shall guarantee, during the posting, the (same) terms and conditions of employment, "*laid down by law, regulation or administrative provisions and by collective agreement signed by the trade unions and employers associations which are comparatively more representative at national level",* applicable to "*national*" workers that carry out "*similar*" work in the same place where foreign workers are posted (Article 3.1). By this rule the Italian Legislator intended to refer to the second category of collective agreements listed by the second sub-paragraph of Article 3.8 of the PWD, i.e. "*collective agreements concluded by the most representative employers' and labour organisations*"[2].

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[1] Italy implemented Directive 96/71/CE with the Legislative Decree (D.Lgs.) 25 February 2000, n.72 *"Attuazione della direttiva 96/71/Ce in materia di distacco dei lavoratori nell'ambito di una prestazione di servizi" published in Gazzetta Ufficiale (G.U.) 30 March 2000, n.75 and entered into force 15 days after its official publication.*

[2] In this sense also M.Pallini, *Posted workers: Italian regulation and dilemmas*, in *Transfer* 2006, 274; S.Nadalet, *L'attuazione della direttiva 96/71 sul distacc*o, in *Lavoro e diritto* 2/2008, 48; M. Monaco, *La normativa italiana in materia di distacco alla luce della giurisprudenza europea*, in Cilento (ed.), *I percorsi della solidarietà*, Ed. Lavoro, Roma, 2008, 124. The Commission does not agree with this interpretation of Italian law, observing in its 2003 Communication that "*Since no Member State's transposing legislation makes any mention of the options offered by the second subparagraph of Article 3(8), the Commission concludes that those Member States which do not have collective agreements declared to be universally applicable within the meaning of the first subparagraph of Article 3(8) of the*

The interpretation and implementation of this provision in problematic, not only under European law, but also under Italian labour law principles on collective agreements.

1- The collective agreements to be applied

First of all, it is not clear which is the collective agreement (CA) to be considered applicable. Article 3.1 should be interpreted in a way that is consistent with the PWD: this implies that the reference should be made to the collective agreements applicable in the sector concerned and not to the collective agreement applied by the Italian undertaking where or for which the posted worker carries out the work[3].

If this interpretation is correct, a further double problem arises, from the standpoint of the internal law and of the European Law.

In the Italian legal order the CA is not universally applicable: it binds only organizations signing it and their members, on the basis of the general rules of the civil law on contracts. The Constitution (Article 39) provides for a method that make collective agreements universally applicable but the legislation implementing this method has never been approved. This makes constitutionally unlawful a law binding employers to apply collective agreements in another way. As rightly observed, Article 3.1, D.lgs.72/00 *"points out a peculiar hypothesis of erga omnes effect of the collective agreements, which is different from that provided under article 39 Const.*"[4]. For this reason its coherence with constitutional constraints is questionable.

As a consequence of the non-generally binding effect of the CA for Italian employers, the Italian law on posting risks to be in contrast with EU law from a double point of view. First, because it doesn't make any distinction between the different parts (clauses) of the CA that can be applied, as PWD imposes: the whole CA must be respected by the provider of services. Second, because it is not consistent with the principle of equal treatment among national and foreign employers. Art.3.1, D.lgs. 72/00 involves that undertakings posting workers in Italy could not be subject to the same obligations as national undertakings in a similar position. The latter are bound to respect the entire collective agreement (also territorial if existent, as in the construction sector), the former only if they are members of the signatory trade unions.

The Italian law could be considered consistent with PWD if it is interpreted in the sense that foreign undertakings must apply only the clauses of national collective agreements on minimum wage[5].

The clauses on minimum wage of the sectoral CA "in fact" bind all undertakings in Italy, thanks to the case law on Article 36 of Italian Constitution which recognises the fundamental right of workers to receive a pay "*sufficient to ensure them a decent life*" ("fair pay"). Due to the lack of a Law on minimum wage, this right is guaranteed by the Courts taking the sectoral CA as a parameter to determine the amount of the "sufficient" wage imposed by the Constitution[6]. The Courts are not unanimous regarding the elements of the payment to be taken into consideration for calculating minimum wage: in some cases judges use only the "basic" pay (minimo tabellare) as parameter[7], but in most cases also the age allowance and Christmas salary are included in the minimum wage

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Directive do not apply the terms and conditions of employment laid down in collective agreements to workers posted on their territory. In these countries, therefore, only the terms and conditions of employment laid down in legislative provisions apply to workers posted on their territory" (COM (2003) 458, 12.

[3] See P. Chieco, *Lavoratore comparabile e modello sociale nella legislazione sulla flessibilità del contratto e dell'impresa*, in *Rivista giuridica di diritto del lavoro*, 2002, 4, p. 797.

[4] D. Venturi, *Gli obblighi in materia di lavoro e contribuzione delle aziende comunitarie operanti in Italia. In particolare il distacco comunitario*, Collana Adapt-Working Paper n.49/2008, 6

[5] In this sense see also M.Pallini, *Il caso Laval-Vaxholm: il diritto del lavoro comunitario ha già la sua Bolkestein?,* in *Rivista italiana di diritto del lavoro*, II, 2006, 239.

[6] Since Cassazione 21 February 1952, n.461 in *Giurisprudenza Italiana* 1953, I, 1, 154

[7] Cassazione 13 February 1990, n.2021, in *Repertorio del Foro Italiano*, 1990.

"constitutionally" binding, considering that this part of the remuneration is generally provided by all sectoral collective agreements[8].
Whereby, the application of these clauses of the CA to undertakings established in another Member State would not infringe the equal treatment principle. But this is a "creative" interpretation of the law implementing PWD (constitutionally oriented and conform to the Directive), not easily deducible from the letter of the law.

Another problem derives from the relationship between different levels of CAs, because in the Italian legal order CA at plant level can depart from the higher levels. Sometimes this is expressly provided by the law referring to collective agreement as a source of integration of its rules. For instance, from the Italian law on working time *(D.lgs. n.66/03)* emerges a regulatory framework that does not in fact identify minimum standards on "*maximum work periods and minimum rest periods*" common to all the undertakings of the same sector. Some employer can apply the maximum work period fixed by the sectoral CA; some other can apply a plant CA with other rules on working time; some other can ignore the rules fixed by the sectoral CA because it is not a member of the association that signed it and, as a consequence, it must respect only the rules fixed by the law. Since working time law in Italy (the host country) enables national undertakings to "escape" the constraints posed by the law itself or by a CA, it becomes questionable to impose these constraints on undertakings whose place of establishment is located in other Member States.

To conclude, on the basis of Italian Law, foreign providers of services should respect the whole sectoral CA (and local, if existent); but this rule creates problems of coherence both with PWD and with the legal principles on which the Italian industrial relations system is based. A situation of uncertainty follows about the clauses of the CA the provider is due to respect.
Considering this, the Italian case could be similar to the Swedish one: trade unions (theoretically), in such an uncertain framework, could take industrial actions to impose on a foreign provider of services the application of a non-generally binding CA. This collective action would be legal for Italian law and questionable under Laval rule.

2- The Special Rule on 'internal contracts'(appalti interni)

Workers which are posted under a contract and that have to carry out their work inside the Italian receiving undertaking (so-called '*appalti interni*') have the right to the same treatment regarding terms and conditions of employment as «comparable» workers employed by the 'national' employer (Article 3 par.3, D.lgs.72/00).
The contract is intended to be carried out "inside" the contracting undertaking, when there is a precise integration between its production cycle and that of the contractor undertaking or when the workers of the two employers have to perform their work coordinating each other in the same establishment[9]. In this case it is not sufficient for the posting employer to respect the collective agreement of its sector, if it provides minimum pays and labour conditions lower than those provided by the collective agreements applied in the receiving undertaking. In other words, the principle of equal treatment applies between posted workers and workers of the national undertaking where the posting is executed (as it happens with Agency workers: see par.5).
This norm is understandable considering the law in force when D.lgs.72/00 was adopted (Law 23 October 1960, n.1369) that imposed, as a general rule, the principle of equal treatment in case of "internal" contract. For this reason the same rule was stated in case of transnational provision of services by D.lgs. 72/00. Law n.1369/60 was abrogated in 2003 (by the D.lgs. n.276/03), but the rule on transnational posting stated by D.lgs. 72/00

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8 Cassazione 8 August 2000, n.10465 in *Rivista italiana di diritto del lavoro* 2001, II, p.658

9 On the concept of "internal contract", between others, Cassazione Sezioni Unite 20 January 1996, n.446 in *Rivista italiana di diritto del lavoro*, 1996, II, 705 ff.

remained, and it still remains, in force.
On my opinion, also this provision creates a discrimination between national and posting undertakings and it is, therefore, in contrast with the PWD and Article 49 ECT[10].

3- Extension of the protection (article 3.10)

On the basis of art.3, par.1, D.lgs.72/00, no distinction is made between matters listed in Article 3.1 of PWD and "*public policy provisions*" of Article 3.10: all Italian labour law provisions fixed by law and by CA seem to be considered "public policy provisions", therefore any undertaking established in another Member State has to respect them.
This rule is clearly deducible from the letter of the law implementing PWD, and in this sense the law is interpreted by the scholars commenting on it[11] and in the only Judgement on the matter (see par.4.1).
The Minister of Labour seems to have a different opinion, at least considering the official fiches on the website of the EU, where it's said that Italy hasn't made use of the possibility provided for in Article 3.10 of the PWD and only matters listed in Art. 3.1 are pointed out (working time, holidays, minimum rates of pay, health and safety, protective measures for pregnant women, equality of treatment between men and women). The same opinion comes out from a note of the Ministry of Labour[12], in which the Italian law is interpreted (even if only indirectly and with some ambiguity) as imposing the application of the statutes and the clauses of CA to posted workers only on the matters listed in Article 3.1 of the PWD.
This interpretation of the law is based on the argument that the implementing statute doesn't directly quote art.3, par.10 nor lists "public policy" provisions. Therefore, this would testify that the Italian legislator doesn't want to extend the protection of posted workers beyond the core protection provided for in the PWD and that art. 3, par. 1, D.lgs. 72/2000 must be interpreted according to the PWD[13]. Such an interpretation has the merit to comply with PWD, but it is hardly derivable from the law as it stands.

4- Public procurements *contracts*

A general obligation exists in the Italian legal order for contracting authorities in public procurement, and it is to designate only contractors that apply the terms and conditions of employment fixed by the CA (national or local). For this reason the impact of the Rüffert case in the Italian legal system is potentially even more relevant than the Laval case.
This general rule (s.c. social clause) is fixed by the '70 *Statuto dei lavoratori* (Article 36, Law n.300/70): in all public procurement contracts a clause requiring the contractor "*to apply or make apply to employees working conditions that aren't lower than those fixed in*

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[10] For a different opinion see P.Chieco, *Le nuove esternalizzazioni tra prestazioni lavorative e appalti labour intensive*, in P.Curzio (ed.), *Lavoro e diritti a tre anni dalla legge 30/03*, Cacucci ed. Bari, 2006, p.105 ff., that does not consider D.lgs.72/00 but, on the contrary, the Italian 2003 Law (D.lgs. n.276/03) in contrast with PWD, because the discrimination is casued by the abrogation of the rules of equal treatment for national "internal" contracts.

[11] M.Roccella-T.Treu, *Diritto del lavoro della Comunità Europea*, Cedam, Padova, 2009, 162; G.Orlandini, *Considerazioni sulla disciplina del distacco dei lavoratori in Italia*, in *Rivista italiana di diritto del lavoro* 2008, 70; S. Maretti, *Il recepimento della direttiva Cee sul distacco dei lavoratori*, in *Massimario di Giurisprudenza del lavoro*, 2000, 1156; M. Pallini, *Posted workers: italian regulation and dilemmas*, in *Transfer* 2/06, 2006, 273; M. Monaco, *La normativa italiana in materia di distacco alla luce della giurisprudenza europea*, in Cilento (ed.), *I percorsi della solidarietà*, Ed. lavoro, Roma, 2008, p.120; L.De Marco *(2007), Distacco internazionale*, in *Digesto discipline privatistiche-sez. comm., Aggiornamento*, Utet, Torino, 362.

[12] Note of the Ministry of Labour- DG Inspective Activities 6 february 2009, n.6/2009 available on http://www.lavoro.gov.t/Lavoro/Strumenti/interpello.

[13] This approach is suggested, between scholars, by S. Nadalet, *L'attuazione della direttiva 97/71 sul distacco*, in *Lavoro e diritto* 1/2008, p.45 and (implicitly) by S. Di Biase, *Il distacco transnazionale di lavoratori in UE*, in *Diritto e Pratica del Lavoro, Inserto* n.11/2005, XXXII.

sectoral or national collective agreements" must be inserted. The obligation was reinforced by the "Code on public procurement" of 2006, which directly imposes on he contractor of a public procurement and eventual sub-contractors the obligation "*to comply entirely the economic and regulatory treatments fixed by national and local collective agreements applicable to the sector and to the area of work performances*" (art. 118, par. 6, D.lgs. 163/2006, as last modified by D.lgs. 152/2008). This obligation is also extended to contract clauses concerning the registration to local construction funds, registration to be proved by means of a special document regulated by the law ("Documento unico di regolarità contributiva"). If this document, testifying regular contributions (whereby it's possible to know the applied economic treatment), isn't submitted, the payment of progress reports by the public administration is suspended.

Both the Code of Public Procurement (D.lgs.163/06) and the Consolidation Safety at Work Act (D.lgs.81/08) provide for another mechanism aimed at avoiding that the adjudication of a public procurement favours contractors who makes more favourable tenders thanks to a reduction of labour costs. The public contracting (s.c. contracting station) has to assess that the economic value of the tender is "*adequate and sufficient to the labours and safety measures costs*" and that it's "*reasonable compared with the size and characteristics of works, services and supplies*". The "*adequate and sufficient*" labour cost is calculated on the basis of tables that are periodically compiled by the Ministry of Labour "*based on economic values of welfare and social security rules provided for by collective agreements signed by the most representative trade unions*" (Article 26, par. 6, of Consolidated Safety at Work and similarly Article 86, par. 3-*bis* of the Code of Public Procurement, concerning additional documentation required in case of "*abnormally low tenders*"). The Italian law doesn't govern the case of tenders made by undertakings established in another Member State and it doesn't state if and how lower contributions required for the registration to the social security system in the country of origin impact on labour cost's assessment.

4.1. The administrative case law on public procurement

In the only Judgement published related to posted workers, the Italian Administrative Courts (Regional Administrative Tribunal, confirmed by the Supreme Administrative Tribunal[14]) evaluated the legitimacy of the term of a public contract that (implementing a local legislation[15] and in line with the national law) imposes the contribution in the local construction fund (Cassa edile) as a condition for the adjudication of a public procurement.

The Court didn't apply to the case the D.lgs.72/00, but simply ignored it, considering it clearly in contrast with Article 49 ECT because of the applicability of the entire system of Italian Labour Law to posted workers it provides[16].

The local law was opposed by an Austrian construction undertaking excluded from a public call for tenders. The Administrative Court analyzed all kind of services provided by the fund in order to compare them with services already offered to posted Austrian workers on the basis of the home State legislation. Then, it considered the local rules in contrast with Internal Market principle (Article 49 TCE) since the fund provides workers with the same or similar services guaranteed under Austrian Law.

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[14] Consiglio di Stato, Sez. IV, 1 March 2006, n.928 (http://www.giustizia-amministrativa.it/webcds/ElencoSentenze.asp) confirming T.A.R Bolzano 19 April 2005, n.140 in *Massimario di giurisprudenza del lavoro* 2005, 658.

[15] Article 47 of the Law of the Autonomous Province of Bolzano 17 June 1998, n.6, in *Bollettino Ufficiale* 30 June 1998, n. 27.

[16] The Administrative Regional Tribunal (TAR) Bolzano 19 April 2005, n.140 (see note 75 below) states that D.Lgs.72/00 "*is in contrast with the community principle of free movement of services.....in fact making possible the application to posted worker of the entire Italian labour law*"."

The Court didn't take account of the application of the collective agreement instituting and governing the construction fund. In principle, the Court ruled the duty imposed by the local law on public procurements to respect the territorial non *erga-omnes* collective agreement compatible with art.49 ECT; so, the arguments of the Italian Court was not totally consistent with Rüffert judgement. It should be noticed that, anyhow, in the construction sector, all the companies in fact obey the duty to register to local funds, even if it is established in collective agreements. It should also be noticed that the law was evaluated by the Court under Art. 49 TCE, but not under the PWD.

5- Agency posted workers

A special regime exists on temporary work (Articles. 4-5- and 2-28, D.lgs. 276/2003)[17]. Temporary work Agencies established in Italy have to obtain the enrolment with a special registry, subject to a previous authorization of the Ministry of Labour. Also temporary agencies established in other Member States and having requirements provided for obtaining the ministerial authorization can be enrolled with the registry. The ministerial authorization is made conditional to possession of specific legal and financial requirements. The temporary agency must be capitalized at almost 600.000,00 Euros in order to guarantee workers' claims and corresponding contributory claims by social security institutions. In the course of the first two years of activity, the agency must deposit a 350.000,00-euro caution in Italian bank or in a bank established in another Member State. The caution money can be replaced by a banking fidejussion during the third year.

The temporary agency having already fulfilled similar obligations in another Member State (Art. 5, par. 2, letters a) and c)) can be dispensed with the guarantee. The temporary agency must carry out its activity in almost four Regions and regularly pay contributions to special Bilateral Funds instituted by the national collective agreement applicable (Art. 12).

If the temporary agency proves that it's "*working by virtue of an equivalent authorization delivered by the competent Authority of another EU Member State*", the enrolment with the registry and the previous ministerial authorization aren't required to post workers in Italy (art. 4, par. 2 of D.lgs. 72/2000). In 2003, the rule stating a special procedure for the Minister to assess the "equivalence" of the foreign provisions was abrogated (Art. 85, par. 1, letter g, D.lgs.276/03 abrogating art. 4, par. 3 of D.lgs. 72/2000). Therefore, the equivalence is actually assessed by inspectors according to their discretionary power. The law seems to exclude the legitimacy of postings carried out by temporary agencies located in Member States whose legislations don't demand any prior authorization.

The same conditions of employment, which apply to agency workers in Italy, are to be guaranteed to workers posted by a foreign agency (Art. 4 of D.lgs.72/00, in line with Art. 3, par. 9 of PWD). This means that equality of treatment must be guaranteed between agency posted workers and "comparable" workers employed by the user undertaking established in Italy (on the basis of Art. 23 of D.lgs.276/03, that states the equal treatment rule for "national" agency workers). And this also means that the other provisions on agency work in Italy are applied: on reasons of posting, on formal requirements, on sanctions.

Concerning Italian workers, however, the principle of equivalence is derogated when the agency provides "disadvantaged" workers (ex: Regulation CE n.2204/2002, Article 2.f) who benefit from social security treatments for unemployment, within projects oriented to their work placement (Art. 13, D.lgs. 276/2003). This derogation can't be applied to workers posted by agencies that aren't established in Italy, because of its subjective requirements and purposes.

Considering the recall made by art. 4 D.lgs.72/00, temporary agency workers employed by

[17] See also the Circular of the Ministry of Labour 22 February 2005, n.6 "*Disciplina della somministrazione di lavoro*", in G.U. 14 March 2005, n.60

foreign Agencies should be subjected to general rules fixed by Article 23, par. 3, D.lgs.276/03 providing for joint liability of the user undertaking limited to retribution and social security contribution.

6- Unlawful posting

The provisions of the implementing statute must be interpreted in the light of the internal law concerning the three type of 'posting' listed in the Directive, which lays down for each hypothesis different conditions of legitimacy (D.lgs 276/03).

a) Posting within a group

The posting within a group of companies (so-called "proper" posting) is laid down by art. 30 of the D.lgs 276/03, which marks the conditions of its legitimacy: posting is legal if it has a 'temporary' duration and it is implemented to pursue the interest of the posting employer. As a consequence, if the user pay a remuneration to the provider, the posting is unlawful. Case law tends to give a prevailing importance to the 'persistence of the interest' requirement, in absence of which the worker has the right to be considered as an employee of the user; the duration of the posting is an index of decrease of the interest of the posting employer[18].

In case of unlawful posting the worker can ask before the labour court the founding of an employment relationship with the user (Art. 30, par. 4 bis). Penal fines are also imposed to the user and to the posting employer (Articles 18 and 28, D.lgs.276/03)[19].

This rule (presumably) makes illegitimate, for example, the posting made by a firm of a group within the main undertaking, if the prevailing interest in using the worker is of the latter. Also the hypothesis treated in the Laval Case should be considered (in my opinion) as an unlawful posting under the Italian law, since in this case the workers were posted by an undertaking into a 'branch' in order to carry out a contract in the interest of a third party: thus, the posting does not occur in the (sole or prevailing) interest of the posting employer, but in the interest of the 'contractor' branch and of the third contracting party.

b) Posting under a contract

The second type considered by the D.lgs. 72/00 is the posting under a contract between the provider and the recipient. The internal law which identifies the conditions of legitimacy of this kind of posting (so-called improper posting) is Article 29 of the D.Lgs. 276/03. The contract is considered genuine (therefore lawful) if the contractor has an '*organization of necessary means*', in other words if the provider of services is owner of a real undertaking and he does not provide only manpower[20]. The undertaking organization can also consist in '*exercise of organizing and managing the workers*', if it is justifiable according to the kind of '*work and services deduced in contract*' (Art. 29, par. 1). This means that, if the contract of services does not involve the usage of a significant "hard means" of the undertaking (for instance in case of labour-intensive activities or in case of computer services), the contract

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[18] Cassazione 7 June 2000, n.7743, in *Notiziario di giurisprudenza del lavoro* 2000, 769. The Ministry of Labour in a circular ("circolare") proposes a different interpretation of the law in order to consider as lawful the posting made for the global interest of the group as such (circular of the Ministry of Labour 17 January 2004, n.3, in G.U. 22 January 2004, n.17); briefly, it would be the existence itself of a group of undertakings to legitimate the posting, with the consequent decrease of importance of the need to prove the lasting interest of the posting employer. Case law does not seem to share this interpretation: the legitimacy of the posting within a group can't be presumed (Cassazione 16 February 2000, n.1733 in Massimario di giurisprudenza italiana 2000).

[19] A fine of 50 euros a worker and a working day is imposed to the user and to the posting employer (Art. 18, par. 5 bis). Another fine of 20 euros a worker is imposed if the posting is made to evade mandatory labour law rules (Art. 28 which imposes a penalty in case of a "fraudulent" provision of workers, that normally occurs in case of transnational posting). In case of posting of minors, the penalty is the arrest till 18 months and the fine is increased till 6 times (art. 18, par. 5 bis).

[20] Among the first decisions of the labour courts after the 2003 Reform see Tribunal of Roma 7 March 2007, in *Rivista giuridica del lavoro* 2008, II, 187

is legitimate even if the contractor manages only the employment relationship with the posting workers. In the absence of these assumptions the postings is considered an unlawful form of manpower and as such it is punished: the worker can require a founding of an employment relationship with the user, who, like the posting employer (pseudo-contractor), pays the penalty provided for the illegitimate posting (ex Art. 18 par.1 bis and, eventually, ex Art. 28, D.lgs.276/03).

c) Posting by an Agency (temporary work)

The provision of manpower can be operated only by an authorized agency enrolled in a relevant registry with the Ministry of Labour. The foreign agencies, established in another MS, can post workers into Italy if they demonstrate to '*operate in accordace with an equivalent act adopted by the competent authorities'* of the home state (see par.5 above). Who provides workers without an authorization is penally punished (ex: Articles 18 and 28 D.lgs 276/03) and the posted workers can require the founding of an employment relationship with the user (Art. 27)

The law on temporary agency work subordinates the legitimacy of posting to other requirements. The posting has to satisfy "*technical, productive, organizing and substitutive*" exigencies. These reasons must be quoted in the contract between the agency and the user; they can be related with the ordinary activity of the user, but they must be "temporary" as well[21] (Art. 21 of D.lgs. 276/2003). This means that the user can't resort to temporary work in place of an open-ended contract. It's prohibited to engage temporary agency workers to replace workers on strike or workers dismissed or laid off in last six months (Article 20, par. 5) and the employer can't use temporary workers if he hasn't already implemented the risk evaluation imposed by the Consolidation Safety at Work Act (D.lgs.81/08). If the contract between agency and user is void, the posting of workers is void too and the consequences are the same provided for the other cases of unlawful posting.

Part II

Procedural provisions

Italian law provides PW with a very high level of protection (even too high), but if one considers the procedural aspects of the law (on information system, on administrative formalities and on monitoring and controlling activities), some doubts come out on the effectiveness of Italian provisions on posting. No duty of information is imposed to undertaking posting EU workers and the system on control and penalties is (widely) ineffective. The general problems, linked with the weakness of Italian system of labour inspectorates, are increased in case of transnational posting because of the lack of provisions in the Italian legislation related with control measures on posted workers terms and conditions of employment and on penalties to be applied in case of non-compliance with Italian law.

As a consequence of this the main problem of the Italian system is that, "*de facto*", not even the minimum standards, imposed by the PWD, are often applied to the foreign workers. The situation becomes more dramatic in some regions of Italy (above all in the South) where the access of foreign workers to the local labour market can be controlled by criminal organizations.

1-Administrative formalities and information procedures

Duties of communication to public authorities exist only in case of posting of non-EU workers. For this reason, data on posting of third country workers are available from public

[21] In this sense, among the firts judgements after the 2003 Reform, Tribunale Brescia 30 April 2008 in *Argomenti di diritto del lavoro* 2009, p.510 and Tribunale Bergamo 19 December 2008 ibidem 512.

authorities (of course about legal cases of posting) whereas the data on the phenomenon of intra-European posting is random and uncertain.
The procedure is regulated by a provision of the Immigration Consolidation Act (art. 27, par. 1-bis D.lsg 286/98), that has been recently amended (art. 5, par.1.b) of the Law 6 April 2007, n. 46), in order to make it consistent with the EU rules. The new procedure is simplier compared to the precedent, but it implies nevertheless the issue of a 'resident permit' by the competent authority.
The recipient must give prior information to the Immigration Office about the contract with the provider, submitting also a declaration of the latter, mentioning that TCPW are in a lawful situation in the home state, including regards to visa requirements and conditions of employment. In accordance with the communication made by the recipient to the Immigration Office, the competent Authority (Questura) issues to the worker the permit to stay in Italy for the posting duration.
The law on EU-posted workers neither provides any administrative authorization or information procedure on posting of workers nor imposes on the provider to lodge an advance declaration with the public authorities.
Duties of information by the recipient in the constructions sector can be inferred from the Consolidation Safety at Work Act (D.lgs.81/08). In construction sites and mobile workplaces the recipient must submit a communication to the Local Authority (Municipality) before the activities start (or when building permission claim is submitted), sending also the documents that the contractor must hand in, certifying and endorsing both the lawful situation of his employees regarding social security and the application of the collective agreement signed by the more representative trade unions (art. 90, comma 9 lett. c), D.lgs. 81/08; see below par.2). This provision has general application and, even if nothing is stated by the law, it should also be applied in case of contract with a foreign undertaking.
There are no provisions on the right of workers representatives to be informed, excepting the case of temporary work. The Italian law on temporary Agency imposes to the user to inform workers representatives (or local most representative trade unions) on the number of workers to be posted and on the reason of posting; the information must be given within no more than 5 days after the contract with the Agency has been signed. Every 12 months workers representatives have the right to be informed on the number, the reason, the length and the qualification of workers that have been posted in the framework of contracts with Agencies (art.24, comma 5, D.lgs. 276/03). These provisions also apply to Agencies established in other MS.
Construction Industry Sectoral Collective Agreement (Art.14) provides the duty of both the recipient and the contractor to inform workers representatives about contracting and subcontracting. This allows trade unions to gain knowledge of the presence of foreign contractor companies. However, the duty is often eluded since its breach doesn't involve sanctions.

2-Employment Documents

The Italian rules on social documents (payslip and *Libro Unico del Lavoro-LUL,* regulated by Article 39, Law 133/08) are not applicable to undertakings established in another Member States. The law implementing PWD traces no provisions imposing on the service provider the designation of a representative, or to hold and keep social documents in Italy.
From the "general" Italian legislation on labour inspectorates activities, it can be inferred that, in case of lack of documents proving the condition of employment of a PW, the competent authority can ask the provider to produce documents equivalent to LUL (and to payslip) translated in Italian, kept in the State of origin (ex: Article 14, D.lgs. 124/04). In case these documents aren't produced or are not satisfactory, the inspector should impose administrative sanctions to the foreign employer (fines range from 515 to 2.600 Euro, ex

Art.11 D.P.R 520/55 and art.1 comma 1177, L.296/06). But this is merely a deduction from the Law on labour inspectorates[22] and nothing is provided for by the law relating with transnational posting. This creates of course a situation of uncertainty about the formalities to respect, both for the provider and for the recipient.
Otherwise the inspector could ask the employer for a self-executed affidavit (ex Art.1, par. 1, lett. h) DPR 445/2000), which brings penalty if such declaration is not accurate and complete.
Other documents regulated by Italian law could be relevant in order to control the terms and conditions of employment of PW and the nature of the undertaking posting them.
It is not clear whether the recipient should register the workers posted from another State in the LUL, considering that this obligation binds the recipient of Italian posted workers. However, the duty is limited to posting from Agencies and to posting outside the framework of a provision of services; therefore posting under contract is excepted. The recipient has to register the name and the qualification of the posted worker, the level of payment and (in case of temporary agency work) the name of the Agency. Although this procedure is not provided for by law, it's enforced by Ministry Circulars and it can be gather from *ratio legis*[23]. Since breaches are not sanctioned, it is rather ineffective.

It can be argued that this obligation exists also in case of provision of services within a contract when the provider is established in another Member State, for the function of this social document is to give information and permit transparency on the respect of labour law mandatory rules. In fact, as far as a contract with an Italian contractor is concerned, omitted registration in the LUL of recipient is justified since the employee is registered in the LUL of contractor, on the contrary if the provider is based in another Member State the employee wouldn't be recorded in any LUL. But, again, these are a merely "creative" interpretation and nothing is provided for by the law relating with PW.
On the basis of the Consolidation Act on Health and Safety of 2008 (D.lgs.81/08), when the activities subject to contract are performed in the recipient's plant, the latter must ask the provider to produce the document proving his registration in the undertaking local public register (in Italy *Camere di Commercio*), and to testify through auto-certification the technical-professional requirement necessary to carry out the contract. Registration in the undertaking local public register is not necessary when an equivalent document certifies that the contractor is regarded as an undertaking in its home country. The recipient, the contractor and, possibly, the subcontractor must also write down the "Document on the evaluation of risks" which are related with the contract (s.c. Interferential risks) (Article 26, D.lgs. n.81/08). All these documents can be supervised by Labour Inspectors and they should be binding also in case of transnational provision of services.
In case of mobile workplace, controls on necessary technical and professional qualifications involves each sub- contractor involved in the contract (Article90, par. 9, a); Art.97 e Annex XVII D.lgs. 81/08). The contractors must also give the recipient a declaration on the yearly personnel, divided according to qualifications, the document testifying the lawful social security situation of posted workers (*Documento Unico di Regolarità Contribuitiva-DURC*) and the collective agreement applied (Art.90, par., lett. b). Foreign contractors have the obligation to keep the DURC in relation with the duty to contribution in the local construction funds, if equivalent obligations are not imposed by the

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[22] In this sense also D.Venturi, *Gli obblighi in materia di lavoro e contribuzione delle aziende comunitarie operanti in Italia. In particolare il distacco comunitario,* in *Working paper Adapt n.49/2008*, p.9 and M. Monaco, *La normativa italian in materia di distacco alla luce della giurisprudenza europea,* in Cilento (ed.), *I percorsi della solidarietà,* Ed. Lavoro, Roma, 2008, 128.

[23] Circular of the Ministry of Labour 21 August 2008, n.20, "*Modalità di tenuta e conservazione del libro unico del lavoro e disciplina del relativo regime transitorio*", in G.U. 27 August 2008, n.200 and Circular 9 April 2009, n.13, "*Gestione dei rapporti di lavoro in somministrazione*", in http://www.lavoro.gov.it/Lavoro/Notizie/20090427_Circolare13.htm.

law of the home State, as clarified by the Ministry of Labour in its interpreting notes[24]. In this case too, the labour law inspectors can ask for these documents to the recipient. If they shouldn't be produced the competent Authority (Municipality) suspends building permission (Art. 90, par. 9 lett. c.).

3- Joint liability

Joint liability is provided both by the law implementing PWD and by the Law regulating the conditions of employment of workers posted within contracts (Art.29, D.lgs.276/03).

The Law implementing PWD provides for joint liability of the recipient in case of contract executed inside the receiver's undertaking (Article 3, par.3) (see above part.I par.2). Posted workers can act against him within one year after the end of posting in defence of their rights (Article 3, par.4).

Nevertheless, the "general" regulation on joint and several liability in case of contract (referred to "national" contracts) has been reformed in 2003 (by D.lgs.276/03), extending the liability of the principal contractor also to all the "subcontractors" (covering the chain of contracts), within 2 year after the end of the contract, but referring the joint liability only to remuneration and contribution to Social Security System.

It is not clear whether these provisions should also apply to transnational contracts and, in this case, whether it substitutes the 2000 rule. If the rule fixed by the Law of 2000 is regarded as still applicable, inasmuch it's a special rule, in case of "internal" contract the joint liability of the recipient should be limited to the "first" contractor and it shouldn't be extended to the whole chain of contracts. Posted workers can act against the recipient within one year after the end of the contract, instead of two years, as the general rule states.

Consequently, from this point of view, for user undertaking the special regulation of transnational contracts would be less onerous than the general one. Posted workers would however receive greater protection than national workers because joint responsibility would involve all their credit instead of being limited to retribution.

As a practical standard procedure, inspectors deem D.lgs. 72/2000 implicitly repealed by art.29 d.lgs. 276/03, so they consider the recipient employer jointly liable with foreign contractor and each sub-contractor, limited to the payment of the remuneration, within two years after the end of the contract.

On the basis of the general legislation applicable to Italian employers, the recipient should be liable also in case of industrial accident occurred to the workers posted within a contract of services for the damages not covered by Social Security System (Article 26, par.4, D.lgs. 81/08). Also in this case, the applicability of the provision to workers posted from another Member States is not clear-cut; it's inferred from the general applicability of health and safety regulation.

4-Measures in the events of non-compliance

No specific sanctions are provided by the Italian law implementing PWD in case of non-compliance with mandatory labour provisions. The sanctions generally applicable to national employers are to be imposed on employers providing services from another Member State. Penal (mostly fines) and administrative sanctions are established in case of breach of law on health and safety, discrimination, trade union rights (recognised by the *Statuto dei Lavoratori*), agency work, child labour, parental leave, working time, minimum rest periods and holidays.

The Health and Safety Consolidation Act provides for a considerable sanction: inspectors

[24] Notes of the Ministry of Labour- DG Inspective Activities 6 february 2009, n.6/2009; 3 September 2007, n.24/2007; 23 February 2006 (http://www.lavoro.gov.t/Lavoro/Strumenti/interpello).

have the power to suspend company activities when they ascertain that 20%, or a greater rate, of employees in the undertaking are undeclared workers, or when a serious and reiterated breach of health and safety rules has been committed. This sanction is repealed when the employer puts the situation right (Article14, D.lgs.81/08).
No sanction is provided by the law in case of non-compliance with minimum rates of pay fixed by CA. For this reason the inspectors are void of powers and legal instruments in order to contest violations of the right to minimum wage of the posted workers.
A recent reform of the system of labour inspectorates establishes that if the employer has failed to comply with payment obligations, the labour inspector can adopt a “warning act” (*diffida accertativa*) against him (Article 12, D.lgs.124/04); the employer can pay or ask to open a conciliation procedure before the Local Labour Authority (DPL) in order to find an agreement with the worker on the payment. Otherwise, after 30 days, worker can start an executive judicial procedure against the employer upon the inspector assessment. When the employer is established in another Member State enforcing this proceeding is quite difficult (and indeed rarely attempted), because the employer must be notified of the warning act in another Member State and also because worker’s credit must be certain, liquid and payable: therefore pay-sleep relating a salary lower then minimum wage established in the collective agreement is needed. Anyway, this proceeding, although it doesn’t succeed, may be useful since the worker gains a technical assessment that can be used against Italian user undertaking by virtue of joint liability.
There are significant difficulties in the practical application of sanctions, especially against employers established in the Eastern countries that haven't relevant activities nor stable interests in Italy. Sometimes the employer, in case of inspetions and consequent disputes, ceases the activity and disappeares. The effectivness of the (penal) sanction regime is further reduced by the duration of the criminal procedures. Almost always the criminal proceedings against foreign employers end with the statute of limitations (“*prescrizione*”), given the short time frames provided for the most of of penalties (two years).
For this reason the Italian user is often the only one to be sanctioned, especially when breaches of health and safety regulation occurred (D.lgs.81/08) and when the posting is unlawful (see above part I par.6).

In case of non-compliance, individual workers can complain directly to the competent Italian authorities. In order to obtain a swifter settlement of disputes, the legislation implementing PWD states that, when the Italian legal authorities are seized by posted workers, the preliminary phase relating the obligation to seek conciliation, does not apply and the case is passed directly to the labour court (Article 6, par.2, D.lgs. 72/00). But no case of action in Court by a posted worker has been registered since the Law was approved; that is a clear signal of its ineffectiveness.

Conclusions

Looking at the law implementing PWD in Italy, one could conclude that posted workers’ rights are strongly guaranteed, in a way that is not consistent with the Directive itself and, more generally, with internal market rules and principles. And from a formal point of view this is true: the Italian law clearly violates the limits fixed by the Directive, applying to PW the same terms and conditions of employment as workers employed in Italy (and even more favourable, considering the obligation to respect CA). However, such a conclusion would be superficial, not taking into account the reality of Italian labour market. First, several provisions of the 2000 Law itself are not clear and, for this reason, create possible different and contrasting opinions and interpretations, above all on the application of collective agreements. Second, the inefficient system of control and inspection on employment conditions of posted workers and on abuse of posting can't be ignored: this exposes posted workers to the risk that neither the minimum standards of protection fixed

by PWD are respected.

The framework is very complex and could bring to the conclusion that a double (and contradictory) level of contrast with the Directive exists: surely it is violated from a formal point of view because the Italian Law gives a too favourable (and therefore not proportionate) protection to posted workers; but, at the same time, it is probably also violated from a “substantial” point of view for the opposite reason, because posted workers are too often left without any effective protection in the Italian labour market.