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# Agency Work: a Comparative Analysis

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## 1. Agency Work: an Overview

A thorough overview of agency work<sup>1</sup> ought necessarily to start with an analysis of the penetration rate, which measures the ratio between the number of agency workers and the total workforce<sup>2</sup>.

In 2009, the average penetration rate of agency work in Europe amounted to 1.5% of the total workforce, down from 1.7% in the previous year and from 2% in 2007, as a consequence of the recent economic crisis. Apart from these general trends, agency work is not equally distributed among countries, with a peak in the United Kingdom (3.6%) and a low point in Greece (0.1%).

Besides the United Kingdom, the Netherlands (2.9%), France (1.7%), Belgium (1.7%) and Germany<sup>3</sup> (1.6%) report above-the-average

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<sup>1</sup> The most recent comparative analysis on the regulation of agency work in several European countries was conducted by Eurofound (European Foundation for the improvement of living and working conditions): J. Arrowsmith, *Temporary Agency Work and Collective Bargaining in the EU*, 2008. Previous research on the subject carried out by Eurofound focus on the new EU Member States: J. Arrowsmith, *Temporary Agency Work in an Enlarged European Union*, 2006 or on the EU-15: D. Storrie, *Temporary Agency Work in the European Union*, 2002. See also R. Blanpain, R. Graham (eds.), *Temporary Agency Work in the Information Society*, in *Bulletin of Comparative Labour Relations*, No. 50, 2004.

<sup>2</sup> The point of reference is the rate calculated by CIETT (International Confederation of Private Employment Agencies), which is specific for agency workers. For the purposes of the calculation, the number of agency workers (full-time equivalents) usually taken is provided by the national associations representing agency firms and members of CIETT, and the total workforce, according to the ILO. The data available at the time of writing refer to 2009. See Ciett, *The Agency Work Industry Around the World*, 2011.

penetration rates too, whereas Austria and Switzerland are just below the average with a penetration rate of 1.4%. Except for Sweden, where agency workers account for 1% of the total workforce, in all the other countries the rate is below 1%: Portugal, 0.9%, Norway and Finland, 0.8%, the Czech Republic and Italy, 0.7 %, Denmark, Slovakia, Hungary, 0.6%, Poland 0.4%, Slovenia and Romania, 0.3%, Greece 0.1%.

Gender differences among agency workers reflect the structure as well as the social and economic situation of the country. More service-oriented markets account for a larger percentage of female workers (Finland 66%, Denmark 61%, Sweden 60%, the UK 58%), whereas in manufacturing-based economies there is a prevalence of male workers (Austria 80%, Switzerland 75%, France 71%, Germany 70%). Virtually, such a disparity does not exist in Italy, with 52% of men and 48% of women, and in the Netherlands, with 53% of men and 47% of women engaged in agency work.

With regard to age distribution, it must be noted, for instance, that in France agency workers are equally distributed between those over and under 30 years old. Whereas in Italy the share of agency workers under the age of 30 is nearly 60%, under-30 agency workers in Germany make up 40% of the total labour force, with 38% of them ranging between 31 and 45 years. In the Netherlands, workers under the age of 30 account for almost 45%, but the largest cohort is represented by workers between 21 and 25 years old (32%).

Of particular interest is also the examination of data concerning the duration of the assignments, which provides an insight into how agency work is used in different countries. Leaving aside what can be observed in terms of duration of contracts concluded between the agencies and the users and those concluded between the agencies and workers<sup>4</sup>, one might note that they are mainly short assignments. Available data focus specifically on tasks with a duration of less than one month, from one to three months, and over three months. In Italy, 66% of contracts concern assignments lasting less than a month and only 12% tasks lasting more than three months. The reverse is true for Germany, due to a different evolution of agency work over the years, with only 7% of contracts that have a duration of less than one month, 29% of them from one to three months and 64% of the employment contracts issued for over three months. In the Netherlands, the distribution between the three groups is

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<sup>3</sup> With reference to the development of agency work in Germany, see A. Spermann, *The New Role of Temporary Agency Work in Germany*, IZA DP No. 6180, 2011.

<sup>4</sup> See below par. 7.

rather even, with the majority of the contracts (43%) that last more than three months. In France, where agency work is traditionally related to tasks of a temporary nature, 45% of the contracts have a duration of less than a month, and 25% of them last one to three months, with those concluded for over three months amounting to 30%.

## 2. The Definition of Agency Work

After some statistical information, the next question to be addressed regards the definition of agency work. Since this paper aims at presenting a comparative analysis, providing a shared definition of agency work is pivotal in order to determine the scope of the investigation.

Prior to the entry into force of the European Directive 2008/104/EC of 19 November 2008, there was no standard definition at international or Community level to describe the triangular relationship between an intermediary/agent, a worker and a user firm, while international literature referred to is as “temporary work in the strict sense or *travail intérimaire*”<sup>5</sup>. The essential feature of this relationship, as is well known, is that of allowing the recourse to other-directed labour without resorting to the arrangements laid down under labour law (i.e. the contract of employment), but rather by means of a contract of services under commercial law.

In the past, both the academia and the provisions set down at a Community level made use of the expression “temporary work” and “temporary worker”<sup>6</sup>. Subsequently, the enforcement of the above-mentioned Directive provided a common definition, at least at EU level. Indeed, the wording “temporary work” and “temporary worker” used in

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<sup>5</sup> “Temporary work in the strict sense” i.e. “temporary work in the sense of *travail intérimaire*”. See R. Blanpain, *Comparative Report*, in R. Blanpain, (ed.), *Temporary Work and Labour Law of the European Community and Member States*, Kluwer, Deventer-Boston, 1993, 3, 5. In the North-American literature “temporary work through agency” or “temporary work in the strict sense” is defined as “temporary help service”. For an overview of the terminology issue, see K. D. Henson, *Just a Temp*, Temple University Press, Philadelphia, 1996, 5-8, 26-28. See also, R. Blanpain, R. Graham (eds.), *Temporary Agency Work in the Information Society*, *op. cit.*, and J. Arrowsmith, *Temporary Agency Work in an Enlarged European Union*, *op. cit.*

<sup>6</sup> European Commission, *Proposal for a Directive of the European Parliament and the Council on Working Conditions for Temporary Workers*, COM(2002)149, Brussels, 20 March 2002, – European Commission – *Amended Proposal for a Directive of the European Parliament and the Council on Working Conditions for Temporary Workers*, COM(2002)701, 28 November.

the Directive proposals which stress the temporary nature of the employment relationship were removed from the final version of the European Directive.

In the English version of the document, the definition of “temporary worker” has been changed into “*temporary agency workers*”. This label does not identify workers by considering the temporary nature of the employment relationship, but rather the relationship with the agency. Yet the notion of “temporariness” has not disappeared. The agency itself is defined as a temporary-work agency, that is temporary employment agency, and the definitions<sup>7</sup> emphasise the temporary nature of assignments performed by workers sent by the agency to the user undertaking. On close inspection, however, regarding an assignment – rather than an employment relationship or a worker – as temporary can make a significant difference. This is also consistent with national regulations, where employment relationships between workers and agencies are not necessarily temporary, but could well be permanent, and agency employees must not be necessarily temporary workers. For these reasons, it seems more appropriate to resort to “agency work” and “agency worker” to determine this relationship<sup>8</sup>.

The brief – though conceptually precise – definition of agency work should contribute to describe a relationship marked by a complex structure more properly, as being based on a combination of two types of contracts: the commercial contract between the agency and the user firm, on the one hand, and the employment contract or employment relationship between the worker and the agency, on the other hand. This formulation makes it possible to point out the mediated nature of the work carried out by workers assigned to various user firms, but in particular the special contractual interdependence lying at the basis of a tripartite employment relationship that is made possible only by the presence of an “agency” supplying workers to the user undertakings<sup>9</sup>.

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<sup>7</sup> See Directive 2008/104/EC of 19 November 2008, Art. 3, par. 1.

<sup>8</sup> See Department of Business Innovation & Skills, *Agency workers Regulations*, 2011, 6-7.

<sup>9</sup> The use of the term “agency” to refer to the firm providing temporary labour is purely conventional, since, in its everyday meaning, this term would merely indicate the task of recruiting workers, whereas in this case the agency formally becomes to all intents and purposes an employer. In addition, the agency, as specified in the European Directive (Art. 3, par. 1, letter. b), can be both a legal or a natural person.



### 3. Community Regulation: the European Directive on Agency Work

At the international level, the adoption of the ILO Convention No. 181 of 1997<sup>10</sup> and Recommendation No. 188 of 1997<sup>11</sup> allowed to overcome the stringent regulation on employment agencies laid down by Convention No. 96, 1949 and introduced some minimum forms of protection for workers.

The Directive on agency work<sup>12</sup> was adopted only in 2008 as a result of a lively debate at the Community level<sup>13</sup>, which began in the 1980s but then stalled, for, unlike the ILO Convention, concerned issues on which Member States had a very different stand.

Negotiations among the Member States were locked in stalemate until a turning point was reached through the joint statements of Eurociett and Uni-Europa<sup>14</sup> and an agreement between the TUC (Trades Union Congress) and CBI (Confederation of British Industry) in May 2008, with the British Government that finally forewent opposing the Directive<sup>15</sup>.

The Directive takes into account all the different approaches adopted by European as well as British social partners in pursuing the protection of

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<sup>10</sup> See ILO, *Private Employment Agencies, Temporary Agency Workers and their Contribution to the Labour Market*, Geneva, 2009, paper prepared as a basis for discussions at the Tripartite Workshop to Promote Ratification of the Private Employment Agencies Convention, 1997 (No. 181).

<sup>11</sup> On the relevant literature, see E. Salsi, *Pubblico e privato nella gestione del collocamento: la convenzione OIL n. 181/97*, in *Diritto delle Relazioni Industriali*, 1998, No. 2, 161-167. See, also, J. Nakayama, A. Samorodov, *Public and Private Employment Services: from Co-existence to Co-operation*, in R. Blanpain, R. Graham (eds.), *Temporary Agency Work in the Information Society*, *op. cit.*, 26-28.

<sup>12</sup> For an analysis see N. Countouris, R. Horton, *The Temporary Agency Work Directive: Another Broken Promise*, in *Industrial Law Journal*, 2009, 329; B. Waas, *Die Richtlinie des Europäischen Parlaments und des Rates über Leiharbeit*, in *Zeitschrift für Europäisches Sozial- und Arbeitsrecht*, 2009, 207 and T. Vaes, T. Vandenbrance, *Implementing the New Temporary Agency Work Directive*, 2009.

<sup>13</sup> On the various Directive proposals and on the ensuing long-standing debate, see L. Zappalà, *The Temporary Agency Workers' Directive: an Impossibile Political Agreement?*, in *Industrial Law Journal*, 2003, 18; R. Blanpain, *Introductory Remarks: the Evolving Attitude Towards Temporary Agency Work*, in R. Blanpain, R. Graham (eds.), *Temporary Agency Work in the Information Society*, *op. cit.*, No. 50.

<sup>14</sup> See Eurociett, Uni-Europa, *Joint Declaration within the Framework of the Flexicurity Debate*, 27 February 2007, and Eurociett, Uni-Europa, *Joint Declaration on the Draft Directive on Working Conditions for Temporary Agency Workers*, 29 May 2008.

<sup>15</sup> N. Countouris, R. Horton, *The Temporary Agency Work Directive: Another Broken Promise*, in *Industrial Law Journal*, 2009, 329.

agency workers and in safeguarding the reliability of this category of workers, in particular by applying the principle of equal treatment and considering agencies as employers.

### *3.1. Regulatory Approach and Scope of Application*

The Directive particularly emphasises the working and employment conditions of agency workers. Its scope is limited to agency work, with special reference to the protection of workers<sup>16</sup>.

The Directive does not set down specific rules in terms of market structure, i.e. there are no provisions indicating the special administrative procedures to obtain a license and operate as an employment agency. However, attempts have been made also in terms of structural regulation of the market, in particular by means of Art. 4, which requires the Member States to review bans and restrictions on the use of agency work and to assess whether its use is justified on the grounds of specific circumstances.

The Directive introduces minimum requirements for agency work (Art. 9), and Member States retain the right to apply or introduce legislative provisions or conclude collective agreements which are more favourable to agency workers. The Directive does not justify a reduction in the level of protection of workers in the different Member States.

Art. 1 of the Directive narrows down the scope of application to workers employed by an agency (as defined in Art. 3) and sent *temporarily* to perform an assignment to user undertakings under the supervision and direction of the latter. However, no limitations are placed on the maximum duration and extension of single assignments.

### *3.2. Equal Treatment*

The debate on the principle of equal treatment constituted a hindrance to the approval of the Directive. Some European countries, particularly Ireland and the UK, opposed the idea of introducing this principle into their national legal systems, as regarded as moving away from the flexible nature of agency work, and potentially leading to a deterioration of the

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<sup>16</sup> See W. Warneck, *Temporary Agency Work – Guide for Transposition at National Level*, Etui, Report 117, 2011, 9.



market in the employment agencies' sector.

On the contrary, many Member States have already conformed with this principle, especially in relation to pay, training, living and working conditions. In some cases, these provisions were laid down in national legislation, whereas in other cases they were envisaged in collective agreements.

The principle was eventually included in the Directive<sup>17</sup>, even if exceptions are possible under special circumstances and provided that they are agreed upon by social partners, or included in national collective agreements (Art. 5, par. 3 and 4). With reference to remuneration, it is possible to derogate from the principle of equal treatment in case agency workers hired on an open-ended contract of employment with an agency and are paid also for the time between two different assignments. (Art. 5, par. 2).

The principle of equal treatment has a wide scope and is not limited to economic aspects, as it refers to “the basic working and employment conditions” which should be “at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job”<sup>18</sup>. The Directive also includes two specific clauses on the rules in force in user undertakings to protect pregnant or nursing mothers, children or young people (Art. 5, par. 1, letter a) and on the rules intended to ensure equal treatment between men and women and to tackle “all forms of discrimination based on sex, race, ethnic origin, religion or beliefs, disabilities, age or sexual orientation” (Art. 5, par. 1, letter b). User companies must comply with these obligations and in accordance with relevant legislation, regulations and administrative provisions, collective agreements and/or some other general provisions.

Accordingly, it can be assumed that the principle of equal treatment is also applicable to the right of agency workers to have access to amenities or collective facilities (Art. 6, par. 4). The Directive specifically refers “to canteens, child-care facilities and transport services”. Agency workers should be given access to these services under the same conditions as workers employed directly by the undertaking, unless “the difference in treatment is justified by objective reasons”.

The principle of equal treatment is particularly important in that it contributes to guaranteeing the reliability of agencies, for competition

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<sup>17</sup> See T. Vaes, T. Vandenbrance, *Implementing the New Temporary Agency Work Directive*, HIVA-K.U. Leuven, 2009, 23-26.

<sup>18</sup> See W. Nienhäuser, W. Matiske, *Effects of the “Principle of non Discrimination” on Temporary Agency Work: Compensation and Working Conditions of Temporary Agency Work in 15 European Countries*, *Industrial Relations Journal*, 2006, 64.

based on differences at economic or regulatory level – viz. on lower labour costs – is not allowed. Given equal labour costs, competition should be based on the quality of services and on the ability of agencies to meet the needs of the user companies.

### *3.3. Employability of Agency Workers*

To ensure agency workers' protection, the European Directive adopted a promotional approach, as it does not limit itself to merely supplying equal income and adequate working conditions, but it is also intended to improve access to employment and fostering employability.

Agency work can serve as a stepping stone towards stable employment, and the Directive thus provides that agency workers should be informed on the vacancies available at the user undertaking (Art. 6, par. 1), also encouraging the direct hiring of workers by the user enterprises. In a similar vein, Member States shall take the necessary step to ensure that any clause “prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker after his assignment” is null and void or may be ruled null and void (Art. 6, par. 2).

With a view to further protecting workers as well as promoting permanent employment, agencies are not allowed to charge workers any fees in exchange for arranging for them to be recruited by a user undertaking, or for concluding a contract of employment or entering into an employment relationship with a user undertaking after an assignment.

Since training is seen as the most effective tool to strengthen the position of agency workers in the labour market and increase their levels of employability, the Directive promotes access to education and training. In particular, Member States shall implement appropriate measures to ensure the same access to training offered to the employees of the user enterprise (Art. 6, par. 5, letter *b*), as well as to facilitate access to training for agency workers even in the intervals of time between assignments, in order to enhance their career development (Article 6, paragraph 5, letter. *a*).

### *3.4. Restrictions and Bans on the Use of Agency Work*

Besides the principle of equal treatment, equally controversial was the idea to repeal restrictions and bans on the use of agency work. Belgium, France, Luxemburg and Finland opposed the stance of most market-

oriented countries as they considered the Directive proposal too unbalanced on the side of a market opening approach, which might be detrimental to workers.

There are profound differences in the Member States' legislation in terms of restrictions or bans on the use of agency work, chiefly if one looks at specific work activities and sectors, at the percentage of agency workers allowed to be hired by the user undertaking, duration and number of assignments permitted, reasons or conditions required to resort to agency work, provisions on replacement of workers on strike and compliance with health and safety rules.

For this reason, policy-makers could not completely remove all the limitations on the use of agency work, and opted for a win-win solution as laid down in Art. 4. Certain restrictions apply only if justified as a result of some common interests and "regarding, in particular the protection of workers, the requirements of safety and health at work and the need to ensure that the labour market functions properly and that abuses are prevented". However, in order to repeal at least some of the major restrictions, the Directive provides for a review of all bans and restrictions in the different countries. By 5 December 2011, Member States had to communicate to the Commission the results of the review (Art. 4, par. 5) conducted also in consultation with the social partners (Art. 4, par. 2) or carried out directly by the social partners in case such limitations were established by collective agreements (Art. 4, par. 3).

It should also be noted that the such a review is not related to the access of agencies to the agency work sector, as it is explained that the review is without prejudice to national requirements related to registration, licensing, certification, financial safeguards or monitoring of temporary work agencies.

### *3.5. Collective Rights*

The Directive also deals with collective rights of agency workers with particular reference to bodies representing workers (Art. 7) in both work agencies and user companies, and provides for the right to information of workers' representatives (Art. 8).

Agency workers shall be included "for the purposes of calculating the threshold above which bodies representing workers provided for under Community and national law and collective agreements are to be formed at the temporary-work agency" (Art. 7, par.1). Furthermore, Member States may provide that agency workers be counted when calculating the

threshold above which bodies representing workers are to be set up in the user undertaking, in the same way as if they were employed directly by the user undertaking.

Concurrently, the Directive lays down provisions concerning (Art. 8) information obligations the user undertakings on the use of agency workers. The user company must supply information to workers' representatives at the time of presenting data on the employment situation within the firm.

#### 4. National Regulations and Varied Regulatory Models

Even before the enforcement of the Directive, agency work in almost all Member States was governed by special provisions or by a more general regulation on private employment agencies (both temporary-work agencies as well as recruitment agencies)<sup>19</sup>. The only exceptions in this sense were Bulgaria and Lithuania.

However, these regulations on agency work have been introduced at different times at an international level. Some Member States have laid down a first set of rules on agency work during the 1960s and 1970s. This is particularly the case of the Netherlands (1965), Denmark (1968)<sup>20</sup>, Ireland (1971), France and Germany (1972), the United Kingdom (1973), Belgium (1976), and Norway (1977). Other countries have regulated agency work between the end of the 1980s and the end of the 1990s: Austria (1988), Portugal (1989), Sweden (1993), Luxembourg and Spain (1994), Italy<sup>21</sup> (1997), with Cyprus (1997) and Malta (1990) which envisaged specific legislation on private employment agencies. Other countries regulated agency work only after 2000: Finland, Greece and Hungary (2001), Poland, Romania and Slovenia (2003), the Czech Republic and Slovakia (2004), and also Estonia (2000) and Latvia (2002) laid down provisions on private employment agencies. Lithuania passed a law on agency work in May 2011, that entered into force on 1 December

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<sup>19</sup> See S. Clauwaert, *Survey of Legislation on Temporary Agency Work*, ETUI, Brussels, 2000.

<sup>20</sup> Denmark has abolished the relevant legislation in 1990, leaving the regulation of the sector to collective bargaining, see J. Arrowsmith, *Temporary Agency Work in an Enlarged European Union*, *op. cit.*

<sup>21</sup> For an evolution of agency work and its legalisation in a comparative perspective, see M. Tiraboschi, *Lavoro temporaneo e somministrazione di manodopera*, Giappichelli, Torino, 1999.

2011<sup>22</sup>, and so did Bulgaria and Estonia in January 2012. Furthermore, all countries have revised their legislation during the 2000s, especially in most recent years, in order to ensure the transposition of the European Directive.

In a number of legal systems agency work is extensively governed through collective agreements (Denmark, the Netherlands, Sweden), as well as through codes of conduct and even mechanisms of self-regulation<sup>23</sup> (Finland, Norway, Ireland, the United Kingdom, Sweden, but also Australia and the United States).

Agency work regulations can be more or less stringent depending on whether certain criteria are counted, such as the type of license required to agencies, the obligation for agencies to have an exclusive business purpose, the ban on the use of agency workers to replace workers on strike or in some specific industries, the scope to resort to agency work solely in the case of temporary or occasional tasks, or in specific cases laid down in legislation, limitations to the duration of contracts of employment or assignments at a user undertaking, compliance with the principle of equal treatment, obligation to inform the relevant authorities.

On the basis of these criteria, countries are classed as “liberal” if they do not have any (or only a few) of the above mentioned restrictions and prohibitions, and if no extensive regulation has been set down on the subject, which means resting more on collective bargaining and/or self-regulation codes. This category includes Ireland and the United Kingdom<sup>24</sup>, as here no State intervention in the labour market is supplied, the Nordic countries<sup>25</sup> (Denmark, Finland<sup>26</sup>, Sweden<sup>27</sup>, and, outside the EU, Norway), and the Netherlands<sup>28</sup>, which, despite being traditionally

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<sup>22</sup> See T. Bagdanskis, *Implementation of EC Directive on Temporary Agency Work into Lithuania Legislation*, in *Jurisprudence*, 18, No. 3, 2011, 1035–1053.

<sup>23</sup> As for the of codes of practice and other self-regulation, see ILO, *Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement*, Geneva, 2007, 39 ff.

<sup>24</sup> See C. Forde, G. Slater, *Agency Working in Britain: Character, Consequences and Regulation*, *British Journal of Labour Relations*, 2005, 249.

<sup>25</sup> As for the origins and development of agency work in Nordic countries, see R. Eklund, *Temporary Employment Agencies in the Nordic Countries*, in *Scandinavian Studies in Law*, 2002, Vol. 43, 311–333.

<sup>26</sup> See Ministry of Employment and the Economy, *Guidebook for Temporary Agency Work*, Helsinki, 2011.

<sup>27</sup> See B. Nyström, *Sweden*, in R. Blanpain, R. Graham (eds.), *Temporary Agency Work in the Information Society*, *op. cit.*, 191–223.

<sup>28</sup> See D. Visser, W. Plessen, A. Jacobs, *The Netherlands*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 225–245.

oriented towards market intervention, have not introduced specific legal constraints, leaving social partners free to regulate the subject. The majority of regulations in continental and Southern Europe, including Austria, Belgium<sup>29</sup>, Bulgaria, Cyprus, Czech Republic, Estonia, France<sup>30</sup>, Germany<sup>31</sup>, Greece, Hungary, Italy<sup>32</sup>, Latvia, Luxembourg, Malta, Poland<sup>33</sup>, Portugal<sup>34</sup>, Romania, Slovakia, Slovenia, and Spain<sup>35</sup>, can be classified as being restrictive or of a rather restrictive character, for they introduced a certain number of the foregoing limitations to the use of agency work.

<sup>29</sup> See F. Hendrickx, *A General Overview*, in R. Blanpain, R. Graham (eds.), *Temporary Agency Work in the Information Society*, *op. cit.*, 47-62.

<sup>30</sup> See C. Vigneau, *Temporary Agency Work in France*, *Comparative Labor Law and Policy Journal*, 2002, 45; S. Smith-Vidal, *France*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 115-125.

<sup>31</sup> See P. Schüren, *Employee Leasing in Germany: the Hiring Out of an Employee as a Temporary Worker*, *Comparative Labor Law and Policy Journal*, 2002, 67; B. Waas, *Temporary Agency Work in Germany: Reflections on Recent developments*, *Journal of Comparative Labour Law and Industrial Relations*, 2003, 387; M. Weiss, *Germany*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 127-142. P. Schüren, *Leiharbeit in Deutschland*, in *Recht der Arbeit*, 2007, 231;

<sup>32</sup> See M.T. Carinci, *Agency Work in Italy*, WP C.S.D.L.E. “Massimo D’Antona”.IT – 136, 2011; R. Del Punta, *La nuova disciplina degli appalti e della somministrazione di lavoro*, in Various Authors, *Come cambia il mercato del lavoro*, Ipsoa, Milano, 2004; M. Magnani, *Le esternalizzazioni e il nuovo diritto del lavoro*, in M. Magnani, P. A.Varesi (eds.), *Organizzazione del mercato del lavoro e tipologie contrattuali*, Giappichelli, Torino, 2005; P. Chieco, *Somministrazione, comando, appalto. Le nuove forme di prestazione di lavoro a favore del terzo*, in P. Curzio (eds.), *Lavoro e diritti dopo il decreto legislativo 276/2003*, Cacucci, Bari, 2004; See V. Speziale, *Somministrazione di lavoro*, in E. Gragnoli, A. Perulli (eds.), *La riforma del mercato del lavoro e i nuovi modelli contrattuali*, Cedam, Padova, 2004.

<sup>33</sup> K. Håkansson, T. Isidorsson, R. Pond, E. Sol, C. Teissier, J. Unterschütz, F. Warneck, *Representation of Agency Workers*, Department for Work Science, University of Gothenburg, Sweden, 2009, 53-67.

<sup>34</sup> See R. Boheim, A. Cardoso, *Temporary Agency Work in Portugal 1995-2000*, IZA Discussion Papers, No. 3144, 2007.

<sup>35</sup> See M. C. Rodriguez Piñero Royo, *Spain*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 171-190.



## 5. Restrictions on Market Entry: the Licensing Systems

### 5.1. The Licensing Systems

Agencies are granted authorisation following an administrative procedure consisting of a preliminary control which assesses compliance with the statutory requirements.

This authorisation represents a barrier to market entry, as it places a limit to the number of firms that can operate in the sector. In those countries where an authorisation is required, the labour supply is generally prohibited unless agencies have obtained the relevant license<sup>36</sup>.

The presence of a licensing system is one of the indices typical of restrictive jurisdictions.

The majority of the European countries envisage a licensing system. These include Austria, Belgium, Cyprus, Czech Republic, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain. They have all carried out controls on agencies before issuing the foregoing authorisation. However, the licensing systems vary in strictness, as different countries have set different requirements that agencies must comply with.

A special case is France, where no authorisation is required, yet agencies must submit a special statement to the labour inspector<sup>37</sup>. The same holds true for Lithuania. In Bulgaria, agencies must notify the local Directorate of the National Revenue Agency of their activities.

In more liberal countries (Denmark, Finland, the Netherlands, Sweden, the United Kingdom) and Estonia no authorisation is required, the only exception being Ireland, where agencies must register to the relevant authority for administrative and tax purposes, and not because there are special procedures they have to comply with in terms of monitoring.

Drawing on the results of the analysis of the different licensing systems, it emerges that agencies are often required to:

- provide financial guarantees to ensure solvency;
- have acquired expertise in the field;
- hold a secondary education qualification;

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<sup>36</sup> With reference to registration and licensing, see ILO, *Guide to Private Employment Agencies - Regulation, Monitoring and Enforcement*, *op. cit.*, 13-15.

<sup>37</sup> See below par. 4.2.

- have adequate equipment and premises, show evidence of good repute of owners and/or managers<sup>38</sup>.

In the case of France, for instance, a half-way solution was adopted. No authorisation is required to agencies, yet the sector has not been completely liberalised. Agencies must provide a “statement on the commencement of activities” to the relevant authority (the Labour Inspectorate)<sup>39</sup>, which however does not carry out any control that is preventative in nature<sup>40</sup>. Agencies can start operating in the sector only after having received confirmation from the Labour Inspectorate. The same procedure is required to agencies willing to open, move or close a branch.

Alongside this statement, agencies must provide financial guarantees<sup>41</sup> to ensure their solvency, which is arrived at as a percentage of their annual revenues, on the basis of a specific rate which is contained in a special decree issued every year.

Agencies must also submit a report to the employment service (now *Pole-emploi*) providing information on the employment contracts concluded with agency workers<sup>42</sup>.

In Germany, agencies must apply for authorisation to the Federal Employment Agency (*Bundesagentur für Arbeit*), which is in charge of issuing licenses and carrying out controls. The fee that agencies pay for administrative procedures cannot exceed 2,500 Euros.

Licences are first granted for one year on a provisional basis and subsequently renewed<sup>43</sup>. A permanent licence is provided after three years of continued activity.

Agencies do not have to meet special requirements to be granted authorisation, yet there are a number of cases which are statutorily singled out in which authorisation is denied or revoked, viz. violation of social security laws, safety in the workplace and non-compliance with the obligations laid down in labour legislation.

Agencies are also required to inform the Federal Labour Agency on each assignment, notify name, address, place and date of birth of the employee sent to a user undertaking, list the tasks performed, and the beginning and

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<sup>38</sup> See ILO, *Guide to Private Employment Agencies - Regulation, Monitoring and Enforcement*, *op. cit.*, p. 16-20.

<sup>39</sup> See S. Smith-Vidal, *France*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 117.

<sup>40</sup> Art. L1251-45, c. trav.

<sup>41</sup> Art. L1251-49, c. trav.

<sup>42</sup> Art. L1251-46, c. trav.

<sup>43</sup> par. 2, *AÜG*.

duration of the assignment. Moreover, they must also deliver a biennial report on the number of workers, types of jobs, assignments and user undertakings.

In the Netherlands, the licensing system was repealed in 1998 in the attempt to liberalise the sector<sup>44</sup>, with a view to promoting and increasing workers' opportunities to access the labour market.

In a similar vein, in the UK, the authorisation procedure introduced in 1973 was repealed in 1995<sup>45</sup>. At present, agencies must simply notify the tax authority and enter the Register of Companies. No control of a preventative nature as in the traditional licensing systems are conducted here, but the Employment Agency Standards Inspectorate supervises the activities of employment agencies.

On the contrary, in Spain, authorisation<sup>46</sup> is granted upon compliance with specific requirements concerning organisation, financial guarantees, exclusive business purpose, wages and social security contributions. The authorisation is issued for one year and subsequently renewed, and becomes permanent after three years<sup>47</sup>.

Agencies must also inform the relevant authority on the contracts concluded with agencies and the reasons for resorting to agency work<sup>48</sup>.

## 6. Conditions and Restrictions on the Use of Agency Work

### 6.1. Conditions on the Use of Agency Work

The recognition of the legal status of agency work has not resulted in a complete liberalisation of the sector<sup>49</sup>. In many countries, the law expressly specifies activities, geographical areas, sectors, types of jobs and/or tasks, and reasons for which agency work is allowed<sup>50</sup>.

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<sup>44</sup> See K. Tijdens, M. van Klaveren, H. Houwing, M. van der Meer, M. van Essen, *Temporary Agency Work in The Netherlands*, Amsterdam Institute for Advanced Labour Studie, Working Paper No. 54, 2006, 3.

<sup>45</sup> See G. Morris, *England*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 106.

<sup>46</sup> See M. C. Rodriguez Piñero Royo, *Spain*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 186.

<sup>47</sup> Art. 2, Ley 14/1994.

<sup>48</sup> Art. 5, Ley 14/1994.

<sup>49</sup> See Policy Department Economic and Scientific Policy, *The Impact of New Forms of Labour on Industrial Relations and the Evolution of Labour Law in the European Union*, European Parliament, Brussels, 2008, 44-46.

<sup>50</sup> See J. Arrowsmith, *Temporary Agency Work in an Enlarged European Union*, *op. cit.*, 20-21.

An example is provided by the criteria adopted to evaluate the nature of liberalisation. As a rule, liberal or quite liberal countries do not provide the cases in which agency work is permitted, but only the special circumstances under which it is not, in particular to replace workers on strike. Less liberalised countries, instead, tend to list the cases in which agency work is allowed. These include in particular France, Italy, Poland, Romania, and Spain, where restrictions on the use of agency work include the following:

- Replacing one or more workers in the user undertaking when absent;
- Performing jobs, which, by their own nature, have a limited duration;
- Facing a temporary peak in the working activity;
- Carrying out tasks of a special or urgent nature that cannot be performed by employees operating in the employer's premises;
- Filling a permanent position for the time necessary to select a suitable candidate;
- Performing seasonal work for which, in some sectors, no open-ended contract is provided due to the nature of the activity.

A case in point is Italy where national legislation combines two different approaches. In the case of assignments of an indefinite duration, the Italian law provides an exhaustive list of cases which can be further detailed in collective agreements. For assignments of a definite duration, the law merely requires the indication in the employment contract of a technical, production, or organisational reason that justifies the recourse to agency work, which is also admitted for substitute work.

In France, the use of agency work is only possible to perform a "specific and temporary task defined as an 'assignment' "<sup>51</sup>, and is limited to the cases specified in the Labour Code. Most notably:

- Replacement of a worker in the event of: absence, temporary shift to part-time work, suspension of the employment relationship, departure of a worker before the removal of his/her position, or during the recruitment procedures of a permanent worker;
- Temporary peaks in workload;
- Seasonal jobs or activities in certain sectors for which the recourse to permanent workers is not widespread;
- Performing jobs which are considered urgent because of safety reasons<sup>52</sup>;
- Replacement of the management in a craft business, industrial or commercial undertaking, of a chartered professional or a relative who effectively participated in the business activity on a regular and

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<sup>51</sup> Art. L1251-6, c. trav.

<sup>52</sup> Art. L1251-11, c. trav.

professional basis or of an associate of a professional company;

- Replacement of the head of a farm, a sea-fish farm, of family helpers, a partner of the company or of a family member who participates in agricultural or other activities of the enterprise.

In addition, agency work is permitted when it allows for:

- The inclusion in the labour market of unemployed people facing difficulty in social and occupational terms;

- The completion of vocational training on the part of a worker;

- Vocational training within the framework of an apprenticeship scheme leading to a degree or vocational qualification (included in the national directory of vocational certifications).

Unlike France, German law does not narrow down the use of agency work to specific situations or reasons, although a number of cases in which agency work is prohibited are singled out<sup>53</sup>.

Also in the Netherlands there are no indications concerning limitations on the recourse to agency work, but there are cases in which agency work is not permitted<sup>54</sup>.

The same holds true for the United Kingdom, which has maintained a liberal approach, not providing specific limitations to the use of agency work. Restrictions can however be laid down in collective agreements, for the most part concluded at the local level.

As for Spain, in the past agency work was permitted only in the cases specifically envisaged in legislation, as is typical of restrictive systems<sup>55</sup>. More recently, legislation was amended and agency work is now permitted in the same cases for which fixed-term work is allowed<sup>56</sup>, according to Article 15 of the Workers' Statute (*Estatuto de los Trabajadores*), i.e. manufacturing of special goods or provision of specific services; temporary needs (increase in workload and orders), replacement of absent workers who have the right to retain the job. These cases, however, are in practice the same as those previously detailed for agency work. In addition, following the recent changes introduced by Law No. 3/2012 to reform the labour market, it is also possible to resort to agency work in the cases laid down in collective bargaining, also at a company-level.

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<sup>53</sup> AÜG.

<sup>54</sup> WAADI.

<sup>55</sup> See M. C. Rodríguez Piñero Royo, *Spain*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 174.

<sup>56</sup> Art. 6, Ley 14/1994.

### *6.2. Bans on the Use of Agency Work*

Statutory restrictions and bans on the use of agency workers are due to the persistence of a certain mistrust towards this form of employment, even though over time the significant increase in the recourse to agency work improved the general feeling towards this type of employment, and produced a winding down of such restrictions.

In the past, bans mainly concerned the recourse to agency work in specific industries. These limitations have progressively been removed and now exist only in a few countries. Restrictions regard the construction sector (Germany), the maritime sector (Belgium, Portugal) and the transport sector (Belgium).

Limitations are also provided in the case of particularly dangerous jobs or occupations requiring special medical surveillance (Belgium, France, Poland, Portugal, Slovenia, Spain), or in the event of employers that have not complied with the legislative provisions on health and safety (Italy).

Some other limitations might be placed for reasons related to public order or to the protection of workers. These include bans on the use of agency workers in the months following dismissals for economic reasons (Belgium, France, Greece, Italy, Luxembourg, Poland, Portugal, Slovenia, Spain, Sweden) in the event that the positions that have been suppressed are the same to which agency workers would be assigned (France, Italy) or if agency workers have to perform tasks for which employees are temporarily suspended or experience a reduction in working hours or are entitled to some forms of income support (France, Italy).

The recourse to agency work to replace workers on strike is usually prohibited also in more liberal legal systems. In those countries where this is not allowed by law, the ban is generally established in collective agreements or self-regulation codes (the Czech Republic, Finland, the United Kingdom).

Only in a few countries can agency workers replace workers on strike. In some cases, this is the result of some very liberal policies (Ireland), or of the lack of an ad-hoc regulation (Cyprus, Estonia, Malta, where the existing regulation refers to employment and recruitment agencies of all types).

In France, a number of restrictions on the use of agency work are statutorily laid down, and almost all the above-mentioned limitations are included. In this sense, the labour code prohibits the recourse to agency work to replace workers on strike, and further prohibitions concern particularly dangerous jobs or jobs requiring special medical controls. It is



also forbidden to resort to agency work to replace medical practitioners who are in charge of carrying out the medical surveillance of workers<sup>57</sup>.

A further ban on the use of agency work is placed during the six months following layoffs for economic reasons, in the case of temporary peaks in workload, including occasional orders of a defined duration which do not fall within the ordinary business activities. However, the use of agency work is possible if the assignment does not last more than three months and cannot be extended, or in the case of an exceptional export order that requires a special effort both in qualitative and quantitative terms on the part of the employer. If the latter, the recourse to agency work is subject to information and consultation of works councils<sup>58</sup>.

In the case of Germany, although the law on agency work is restrictive, no particulars are provided to indicate the cases in which agency work is permitted or prohibited. Restrictions on the use of agency work are limited to the construction sector. Apart from that, it is not even forbidden to resort to agency workers to replace workers on strike, although agency workers may refuse to work in a user undertaking where collective action is taking place<sup>59</sup>. Whereas in the Netherlands, pursuant to Dutch legislation, the use of agency workers is prohibited only to replace workers on strike<sup>60</sup>.

In the UK, there are no particular restrictions on agency work. It is only forbidden to resort to agency workers to replace workers on strike and when a worker has been directly employed for the previous six months by the user undertaking, unless the worker gives his consent in writing<sup>61</sup>.

Spanish legislation prohibits agency workers to replace workers on strike or to carry out activities that can be particularly dangerous in terms of health and safety. Agency work is also prohibited in the 12 months following the dismissal of employees in equivalent positions, in the case of unfair dismissals or dismissals taken place pursuant to Art. No. 50, 51 and 52, letter. c, of the Workers' Statute. It is also forbidden to provide agency workers to other agencies<sup>62</sup>.

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<sup>57</sup> Prohibitions are indicated in Art. L1251-10 c. trav.

<sup>58</sup> See Art. L1251-9 c. trav.

<sup>59</sup> Art. 11, par. 5, AÜG.

<sup>60</sup> Art. 10, WAADI. See K. Tijdens, M. van Klaveren, H. Houwing, M. van der Meer, M. van Essen, *op. cit.*, 28.

<sup>61</sup> Regulation 7, S.I. 2003/3319.

<sup>62</sup> Art. 8, Ley 14/1994.

## 7. Contractual Arrangements in Agency Work

In regulating agency work, the contractual form to be implemented constitutes a contentious issue. This is particularly true at the time of conducting labour inspections, as a tool to monitor and verify compliance with the restrictions imposed by law, and not only as a means to protect workers and their contractual freedom.

### 7.1. *The Contract between the Agency and the User and its Duration*

As a rule, more restrictive countries often require the contract to be in writing, whereas in liberal countries, as well as in those in which agency work is not regulated by special provisions, the law kept silent on the matter. With regard to the commercial contract between the agencies and the users<sup>63</sup>, the written form is mandatory in Belgium, the Czech Republic, France, Germany, Greece, Hungary, Italy<sup>64</sup>, Luxembourg, Poland, Romania, and Spain.

The same considerations hold true with reference to the duration of the contract. Indubitably, it is the most restrictive countries which require assignments to be exclusively on a fixed-term basis (Belgium, Brazil, the Czech Republic, France, Greece, Japan, Luxembourg, Poland, Portugal, Romania, Slovenia, and Spain). This approach is once again illustrative of the mistrust characterising this form of employment. A shift towards open-ended contracts would contribute to overcoming the idea that agency work can merely respond to the temporary needs of the employers, gradually becoming an effective tool of work organisation through in-sourcing.

In France, the contract concluded between the agency and user (*Contrat de mise à disposition*) must be in writing and signed up to two working days after the agency worker has started working at the user undertaking<sup>65</sup>. The contract must include: the reason to resort to agency work, worker's name and qualifications who is being replaced, the duration of the assignment, the express provision of the scope to change the initial date of the assignment, the job description, terms and conditions (qualifications, working hours, place of work), type of personal protective equipment,

<sup>63</sup> See S. Clauwaert, *op. cit.*, 9-10.

<sup>64</sup> See L. Zappalà, *La forma nel contratto di somministrazione*, WP C.S.D.L.E. Massimo D'Antona, No. 77, 2005.

<sup>65</sup> Art. L1251-42 c. trav.

total remuneration considering the wage that a worker with the same qualifications and directly employed at the user undertaking would be entitled to<sup>66</sup>.

The Labour Code specifies that the assignment can last up to a maximum of 18 months (including extensions), save for two cases. The duration is limited to nine months in the case the employer is waiting for an employee hired on a permanent basis to start working, or in the case of urgent work for safety reasons. The maximum duration is thus extended to 24 months in the case of replacement of a worker who left the company because of his/her position being suppressed, assignments carried out in a foreign country and for exceptional export orders that require special efforts both in quantitative and qualitative terms<sup>67</sup>. Furthermore, the duration of the contract can be 36 months for apprenticeships, so that the contract has the same duration of the training period.

The replacement of an employee on leave constitutes one of the situations under which establishing a definite term is not required. In this case the termination of the contract can be postponed until the person on leave returns to work, still within the time limit set by the Civil Code.

According to the German regulation, the contract concluded between the agency and the user undertaking must be in writing<sup>68</sup>. The agency must specify in the contract its authorisation number, the tasks that agency workers will have to perform for the user company and the qualifications required, as well as the working conditions and pay that would be in place if workers were hired directly by the user undertaking.

In the past, agency work was allowed only on a temporary basis. Over the years, the maximum duration has progressively increased from 3 to 24 months (since 1 January 2002) until a complete removal of the time-limit (since 1 January 2003), allowing for the conclusion of contracts of indefinite duration.

Unlike Germany, in the Netherlands, no written form is required for the contract concluded between the agency and the user enterprise, and no limit is provided to the duration of the assignments.

In the same vein, the UK legislation does not require the written form for the contract between the agency and the user, in line with the approach adopted by most liberal countries.

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<sup>66</sup> Art. L1251-43 c. trav.

<sup>67</sup> Art. L1251-12 c. trav.

<sup>68</sup> Art. 12, par. 1, AÜG.

There are also no statutory limits to the duration of the contracts, but restrictions are sometimes set by collective agreements mainly concluded at a local level.

In Spain, instead, the contract between the agency and the user company (*Contrato de puesta a disposición*) must be made in writing<sup>69</sup> and include some basic information, such as details on the agency and on the user enterprise, the reason for resorting to agency work, the job descriptions, specific risks, the estimated duration of the contract, place and time of work, and pay.

Assignments must necessarily be of a fixed-term, and their maximum duration depends on the reasons justifying the recourse to agency work on the basis of legislation on fixed-term work. If agency workers are employed for the manufacturing of goods or the provision of specific services, the maximum duration is set at three years, extendable for a further twelve months through collective agreements, and limited to six months in the event of temporary production needs<sup>70</sup>.

Whereas agency workers are employed to replace workers who have the right to retain their job, the assignment will terminate when the employee returns to work, and in no case will it exceed the maximum period for which employees have the right to retain their position.

### *7.2. The Employment Contract in Agency Work*

From the analysis of the various legal systems, it emerges that in the case of employment contracts between agency and workers the written form is not as frequently required as in the case of contracts between agencies and users. This may depend on the fact that this contract is a traditional employment contract – usually fixed-termed – regulated by national labour legislation whereas no further specified. Consequently, the need to provide the written form rests on the type of contract concluded between workers and the agency. In many jurisdictions, only fixed-term employment contracts must be in writing, whereas open-ended contracts do not require the written form<sup>71</sup>.

A written contract of employment is explicitly required in Belgium, the Czech Republic, France, Germany (if provided by the relevant sectoral collective agreement), Greece, Japan, Luxembourg, Romania, Slovakia,

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<sup>69</sup> Art. 6, Ley 14/1994.

<sup>70</sup> Art. 7, Ley 14/1994.

<sup>71</sup> See S. Clauwaert, *op. cit.*, 7.

and Spain. In other jurisdictions, such as Italy, the written form is required, as mentioned above, only for some contracts and pursuant to labour laws.

If no written form is required, in some countries (Austria and Germany), the agency must produce a document containing its name and address, license number; amount of availability pay, name, address and date of birth of the worker; job; starting date and duration of the employment contract, period of notice for terminating the contract, pay levels and amount of remuneration; obligations on the part of the employer (agency) in the event of sickness, holidays or in periods between assignments, date and place in which the contract is concluded, and duration of holidays during the year.

With regard to the type of contract concluded between the agency and workers, in almost all jurisdictions it is a contract of employment. This aspect is further from being taken for granted, as in the United Kingdom, for example, the contract between the worker and the agency can also be a contract for services on a self-employed basis<sup>72</sup>.

Since the contract of employment falls under contractual law and ad-hoc agency work contracts do not exist, its duration, as well as its form, depend on the contractual arrangement agreed upon by the parties. The employment contract can be temporary or permanent. Unlike the past, when, for example in France it was specifically used for very short-term employment assignments, while in Germany it was mainly used for permanent positions, opting for one rather than another is a matter of preference. Today, in a few countries (Belgium, France, Poland, Romania), agency work is allowed only on a fixed-term basis.

In France, for instance, the employment contract between the agency and workers must be made in writing<sup>73</sup> and given to the employee within two days from the start of the assignment<sup>74</sup>. The Labour Code also specifies that some information must be detailed in the contract, namely terms and conditions of the contract, qualifications, remuneration and a special allowance provided to workers at the end of their assignment, the duration of the probation period and a clause of repatriation in the event of tasks carried out abroad – the latter does not apply in the case of

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<sup>72</sup> See *The Agency Workers Regulations 2010* (S.I. 2010/93), that specifies that the contract between the agency worker and the agency can be “(i) a contract of employment with the agency, or (ii) any other contract with the agency to perform work or services personally”.

<sup>73</sup> Art. L1251-16 c. trav.

<sup>74</sup> Art. L1251-17 c. trav.

resignation handed in by the agency worker – as well as the name of the relevant supplementary pension fund and of the welfare fund.

With a view to promoting stable employment in the labour market, it is possible to expressly indicate in the contract of employment the scope of the user undertaking to directly hire agency workers at the end of the assignment.

The employment contract may indicate a probation period considering sectoral or company-level collective agreements. In the absence of any agreement, the statutory probation period is 2 days for contracts up to one month, three days for contracts lasting one to two months, 5 days for contracts concluded for more than 2 months<sup>75</sup>.

The employment contract may be renewed only once for a specified period, without exceeding the maximum legal duration<sup>76</sup>.

The duration of the contract can be extended to 36 months in the case of apprenticeships.

As for Germany, the law does not provide any formal obligation regarding employment contracts between the agency and workers. However, the Law on Notification of Conditions Governing an Employment Relationship requires employers to produce a document containing the name and the address of the contracting parties, date of beginning and duration of the employment relationship, place of work, job description, total amount of the remuneration, working hours, holidays, and notice, indication of applicable national or company-level collective agreements<sup>77</sup> to be delivered to agency workers by the end of the first working month. The contract of employment must also include: the name and the address of the agency, the date and the place of issuing of the authorisation, the name of the granting institution, and the amount of availability pay.

In years gone-by, the employment contract had to be of indefinite duration, although the first contract concluded between the agency and the worker could also be of fixed-term and renewable. Since 1 January 2003, these limits have been removed and workers can be hired also for a fixed-term period according to the duration of the assignments at the user undertaking.

The employment contract between agency and workers is considered a standard contract of employment in the Netherlands, and the written form is therefore not compulsory. Usually agency work contracts are temporary, but the Civil Code establishes that after three years or after

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<sup>75</sup> Art. L1251-14 c. trav.

<sup>76</sup> Art. L1251-35 c. trav.

<sup>77</sup> Art. 2, NachwG.



three consecutive fixed-term contracts, these are transformed into permanent contracts<sup>78</sup>. In addition, contract law provides that after 18 months spent at the service of the same user undertaking, or after 36 months operating for different user companies, the contract becomes open-ended<sup>79</sup>.

According to the UK regulation, Agency and workers can conclude a contract of employment or establishing other contractual arrangements, including agreements to work on a self-employed basis, in order to perform work and services personally for the agency<sup>80</sup>. Contracts by virtue of which the agency or the user undertaking acquire the status of a client or customer of a profession or business are excluded<sup>81</sup>.

The contract of employment does not require the written form, although the worker must be informed in writing of the terms and conditions of the contract, minimum wage, the qualifications, the job to be performed, and must also be apprised of the activities carried out by the user undertaking and working hours.

In Spain, the employment contract between the agency and the worker may be of a permanent or a temporary nature, for a period equal to the duration of the task. It must be made in writing and sent to the Employment Office within 10 days after its conclusion<sup>82</sup>.

It is also expressly prohibited to conclude a contract of apprenticeship with an agency worker.

## 8. Rights and Obligations of Agencies and User Undertakings

The main difficulties in ensuring effective protection to agency workers arise not so much from the temporary or intermittent nature of the assignments carried out in various user enterprises, but from the breakdown of the figure of the employer into two subjects, thus making it difficult to determine the exact allocation of rights, duties, powers and responsibilities<sup>83</sup>. This situation necessarily requires special legislative

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<sup>78</sup> Art. 7: 668a, Dutch Civil Code.

<sup>79</sup> See K. Tijdens, M. van Klaveren, H. Houwing, M. van der Meer, M. van Essen, *op. cit.*, 28.

<sup>80</sup> Regulation 3(1), S.I. 2010/93.

<sup>81</sup> Regulation 3(2), S.I. 2010/93.

<sup>82</sup> Art. 10, Ley 14/1994.

<sup>83</sup> For an overview of the issue, see G. Davidov, *Joint Employer Status in Triangular Employment Relationships*, in *British Journal of Industrial Relations*, 2004, 727-746, who

action or case law, with a view to understanding how responsibilities are distributed, often as a joint and several liability, among “employers” (the agency and the user company), in order to establish the so-called “co-employment” situation<sup>84</sup>.

In almost every country, the agency is considered as the employer in charge of social security contributions and wages, often under joint and several forms of liability with the user undertaking. With regard to health and safety in the workplace, again it is the agency that bears liability, with the user undertaking that becomes liable for health and safety measures only in relation to specific activities (Austria, France, Italy).

In addition to these obligations in terms of safety, wages and social security, the user undertaking always exerts control over agency workers as well as has the powers to direct and to organise work.

French agencies, for instance, are regarded as the employer and therefore pays wages and social security contributions. It is also responsible for damages caused to third parties by the worker, as well as for his/her health and safety protection in the workplace.

The user undertaking bears responsibility for compliance with legislation, regulations and collective agreements in terms of working conditions, with particular reference to: working time, night work, weekly rest, vacations, health and safety at work, work of women and children<sup>85</sup>. In addition, even though a general obligation to protect workers is placed on the agency, the host company must provide individual protection equipment<sup>86</sup>, and it is liable in the case where agency workers carry out tasks requiring special medical surveillance<sup>87</sup>.

The user company is liable jointly and severally with the agency for the payment of wages due to workers as well as of contributions to the social security system.

In Germany, the agency is under the obligation to inform the user undertaking of the expiry date of its license and of the main contractual terms and requirements laid down in relevant legislation, as well as of its right to refuse to provide workers in the case union action is taking place

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addresses the question of who should be considered the employer: the agency or the user undertaking.

<sup>84</sup> See G. Davidov, *Joint Employer Status in the Triangular Employment Relationships*, *op. cit.*; L. Ratti, *Agency Work and the Idea of Dual Employership: a Comparative Perspective*, *Comparative Labor Law and Policy Journal*, 2009, 835.

<sup>85</sup> Art. L1251-21 c. trav.

<sup>86</sup> Art. L1251-23 c. trav.

<sup>87</sup> Art. L1251-22 c. trav.

at the user undertaking.

The user undertaking is required to notify the agency of any task carried out by workers during assignments, of qualifications that may be necessary, of the main working conditions, including remuneration. It is also responsible for workers' protection in terms of health and safety at work and must inform workers of job-related hazards as well as of all the preventive measures taken by the company, including personal protection devices.

Agencies and user undertakings are jointly and severally liable for the payment of wages due to workers as well as of contributions to the social security system.

Dutch agencies are considered employers and are therefore obliged to pay wages as well as social security contributions and taxes.

The user company has the power to direct the work of agency workers and bears liability for health and safety in the workplace. It must also inform workers of risks as well as safety regulations in force at the user undertaking. It is also jointly and severally liable with the agency for the payment of social security contributions and taxes.

In this respect, British legislation is very different from almost all those of other countries. Workers can enter an employment relationship with the agency not only through a contract of employment, but also as self-employed. In the past, this made it particularly difficult to allocate liability between agency and user company. The entry into force of The Agency Workers Regulations 2010 (SI 2010/93), following the European Directive, has significantly reduced the levels of uncertainty in terms of agency workers' rights and, consequently, in terms of obligations on the part of the agency and the user undertaking.

The agency is in charge of remuneration and social security contributions, while the user enterprise has the power to direct the work of agency workers and deals with health and safety in the workplace.

In particular, agencies and user undertakings are liable in the case of a breach of the law on minimum contractual conditions proportionally to the violation committed<sup>88</sup>. The user must ensure equal treatment and is responsible for any breach of this obligation, as the agency cannot verify workers' access to facilities during their assignment.

In Spain, agencies are considered to be employers pursuant to Art. 1, par. 2 of the Workers' Statute that specifically includes among "employers" those who hire workers to make them available to user companies. The

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<sup>88</sup> Regulation 14, S.I. 2010/93.

agency is directly responsible for the obligations established by labour legislation. The user undertaking is held liable only in the cases expressly laid down by law. It is also required to comply with social security obligations and to pay 1% of workers' remuneration to a specific fund aimed at financing training.

The user undertaking oversees the work activity of agency workers during assignments. In the case of breach of contractual obligations on the part of the worker, the user undertaking should inform the agency that can impose disciplinary sanctions<sup>89</sup>.

The user company is also responsible for compliance with health and safety obligations. It must inform employees of job-related risks, as well as provide them with the necessary protection equipment<sup>90</sup>.

The agency and the user undertaking are jointly and severally liable for the obligations related to workers' remuneration. Joint and several liability also extends to unlawful termination of employment and unlawful supply of labour: in these cases the law provides that user and agency pay compensations for damages.

## 9. The Legal Status of Agency Workers

### 9.1. Remuneration and Equal Treatment

Following the passing of European Directive No. 104 of 2008, pay levels of agency workers, a very controversial issue in the past, are now set according to the principle of equal treatment laid down in the Directive. Securing equality in terms of basic working and employment conditions between agency workers and employees directly hired by user undertakings represents a fundamental step towards increasing social recognition of agency work, thus enhancing its role in the labour market<sup>91</sup>. With particular reference to equal pay, the implementation of the principle of equal treatment makes it possible to prevent competition to be based on the exploitation of workers.

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<sup>89</sup> Art. 15, Ley 14/1994.

<sup>90</sup> Art. 16, Ley 14/1994.

<sup>91</sup> See E. Jahn, *The Structure of the Temp Wage Gap in Slack Labor Markets*, Aarhus University, 2009; E. Jahn, *Reassessing the Wage Penalty for Temps in Germany*, IZA Discussion Papers, No. 3663, 2008.

Most Member States have introduced this principle through legislative provisions, but in some cases compliance is ensured by collective agreements. The countries that have laid down the principle of equal treatment in national legislation include Austria, Belgium, Bulgaria, the Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain. Also the UK conformed to the EU Directive, although equal treatment entitlement comes into effect only after a 12-week qualifying period in the same job and with the same employer on the part of the agency workers.

In Denmark and Sweden<sup>92</sup>, the principle is not provided by law but rather by virtue of collective agreements for agency workers are employed under the same collective agreements applying to direct employees of the user undertaking.

The same holds for those countries that have not yet adopted any regulation on agency work, and that still have to transpose the EU Directive (Cyprus, Malta).

As for France, the standard of reference in terms of agency workers' pay is the remuneration of direct employees of the user undertaking performing the same job. Agency workers are thus treated the same as user companies' employees.

In addition, agency workers are entitled to two different allowances at the end of each assignment. In the first case, severance pay is intended to offset the temporary and precarious nature of their position and corresponds to at least 10% (or more if provided by collective agreements) of the gross salary. In addition, workers receive a sum of money for the holidays accrued but not taken, on the basis of the duration of the assignment and in no case lower than 10% of gross remuneration<sup>93</sup>.

Equal treatment between agency workers and employees relates not only to pay but to workers' rights in general. Agency workers are therefore entitled to access the same collective facilities of employees, such as public transport, canteen or restaurant tickets, and work clothes.

Also in Germany, subsequent to the adoption of the so-called Hartz Law of 23 December 2003, agency workers must be granted the same pay and working conditions of direct employees. In the past, however, a number of exceptions were introduced. For instance, entitlements to equal pay used to come into effect only after the six-week qualifying period.

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<sup>92</sup> About wage gap see P. Andersson Joona, E. Wadensjö, *A Price for Flexibility? The Temp Agency Wage Gap in Sweden 1998-2008*, IZA DP No. 6587, 2012.

<sup>93</sup> Art. L1251-19 c. trav.

Following the enforcement of the European Directive, amendments were made to relevant legislation and equal treatment is now granted since the very beginning of the assignment. There remains, however, the scope for collective bargaining to derogate.

Agency workers are entitled to a availability allowance for the periods between different assignments.

Since 1 January 2012, a national minimum wage has been introduced also for agency work. In addition, user undertakings must make sure that agency workers have access to collective facilities, such as canteens, childcare facilities and transport services, under the same conditions as those of workers employed directly by the user undertaking.

Dutch law on agency work expressly formulates the principle of equal treatment, although derogations are possible through collective agreements. In particular, a collective agreement signed by the ABU<sup>94</sup> sets forth that rights in terms of equal pay come into effect after 26 weeks of work with the same employer<sup>95</sup>.

In the UK, the principle of equal treatment was not established statutorily until the Agency Workers Regulations 2010 (SI 2010/93) was approved, following the European Directive on agency work. By virtue of this provision, agency workers are entitled to minimum working conditions (pay, working time, night work, rest periods, breaks and holidays) equal to those they would have received if hired directly by the user undertaking. However, the principle of equal treatment is applied only after a qualifying period, i.e. only after an agency worker completes 12 weeks in the same job with the same employer, within the framework of one or more assignments<sup>96</sup>.

There is also a further exception to the implementation of the principle of equal pay. It relates to the case of workers hired on a permanent employment contract and for which contractual terms (pay, place of work, working hours, minimum and maximum number of hours per week, type of work), as well as the non-implementation of clause 5 of The Agency Workers Regulations 2010 are set out in writing. A further condition for the non-application of the principle of equal pay is the payout on the part of the agency of a minimum amount of the wage (not less than 50%), even during periods between assignments<sup>97</sup>.

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<sup>94</sup> See below par. 10.3.

<sup>95</sup> E. Sol, S. Engelsman, *The Netherlands: Temporary Agency Work and Collective Bargaining*, EIRO, 2009.

<sup>96</sup> Regulation 5, S.I. 2010/93.

<sup>97</sup> Regulation 10, S.I. 2010/93.

Agency workers are also entitled to access collective facilities including those for direct employees, such as canteens, public transports, and childcare facilities<sup>98</sup>. Finally, agency workers are entitled to availability pay in the time between assignments provided they have been working for at least 4 weeks prior to termination of the contract.

Agency workers in Spain enjoy the same basic working and employment conditions (remuneration, working hours, overtime, daily rest periods, night work, and holidays) they would receive if they had been directly recruited by the user company for the same position<sup>99</sup>. Equal treatment is also granted in cases of parental leave and work of minors.

If workers are hired on a fixed-term contract, they are entitled to an allowance at the end of the assignment, corresponding to the remuneration due for twelve days of work for each year of service. It is also expressly provided that agency workers have the right to be protected from gender discrimination in the workplace (in particular, agency workers are also specifically included in the so-called *planes de igualdad* set up by companies).

### *9.2. Collective Rights and Information of Company Union Representatives*

Due to the definite duration of contracts and/or to the poor integration of agency workers in the organisation of the host company as well as to the presence of two employer-like figures, collective rights of workers are difficult to protect and implement<sup>100</sup>.

In most national legal systems, agency workers can exercise union rights and freedoms only *vis-à-vis* the employment agency, and if they want to be represented also within the user undertaking they must join trade unions in the company. In some countries, however, in addition to trade union rights granted because of their status of agency workers, certain forms of entitlement are granted to them also within user companies. In some cases, they have the right to vote for works councils and participate in workers' meetings at the user undertaking (Germany) or even run for works councils' elections (the Netherlands).

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<sup>98</sup> Regulation 12(3), S.I. 2010/93.

<sup>99</sup> Art. 11, par. 1, Ley 14/1994.

<sup>100</sup> See D. van Jaarsveld, *Overcoming the obstacles to worker representation: Insights from the temporary agency workforce*, in *New York Law School Law Review*, 2006, 355 and K. Håkansson, *et. al., op. cit.*, 13.



In a number of jurisdictions, company union representatives in user undertakings have the right to information and/or control over the use of agency workers, and should therefore be informed of the company decision to take on agency workers. Sometimes they may be actively involved in the decision-making. In Austria, for instance, works councils may require the conclusion of a collective agreement regulating the use of agency work in the user undertaking. Generally speaking, however, in countries such as Belgium, Denmark, Finland, France, Germany, Poland, Portugal, Romania, Spain and Sweden, company union representatives must only be made aware of the decision.

In France, within agencies, workers can vote and be elected as union representatives<sup>101</sup>. They gain the right to vote after 3 months of employment and may be elected after 6 months (if they have worked 1,014 hours in the 18 months prior to the election).

Within user undertakings, agency workers are neither entitled to vote nor to be elected as representatives, but enjoy rights of expression with regard to their working conditions and may be represented for this purpose by the union representatives of the user undertaking.

Union representatives in host companies must be informed and consulted prior to resorting to agency workers in case of replacement of an absent worker, in the event of a peak in workload, for temporary increases in activity requiring workers to occupy positions that had been suppressed on economic grounds during the previous 6 months. They must also be apprised of the total number of agency workers within the company and of the reasons to resort to agency workers, as well as on any extension of the assignment.

In addition, works councils must be informed on health and safety programmes and on the training provided to agency workers carrying out hazardous activities.

In Germany, agency workers have the right to vote and to run for elections of works councils within employment agencies.

Within user undertakings, agency workers have the right to vote for works councils, after a three-month assignment at the same user company. They also have the right to attend union meetings.

As for the right of information of union representatives, German legislation provides that works councils must be informed and consulted on the use of agency workers. The council can exert its veto if the user undertaking has not complied with relevant legislation or if the recourse

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<sup>101</sup> See K. Håkansson, *et. al., op. cit.*, 22-24.

to agency workers can increase the risk for direct employees to be laid off by the host company.

The user undertaking must provide works councils with all the relevant information regarding the agency.

In the Netherlands, agency workers have the same rights granted to regular employees working at the agency's premises and have the right to information, consultation and representation, as provided by relevant legislation.

Agency workers acquire the right to vote and run for the elections of works councils after 26 weeks and 1 year of assignment at the same user undertaking respectively. Furthermore, after 24 months, provisions on works councils apply also to agency workers as if they were regular employees<sup>102</sup>.

Rights to information, consultation and representation of agency workers in the UK are associated with the recognition of trade unions. It can be assumed therefore that agency workers have limited access to information and representation in most agencies as well as in user companies<sup>103</sup>.

Generally speaking, agency workers enjoy the same rights of direct employees in the user undertaking, including the right to join unions. However, they do not have the right to strike.

Finally, works councils have also the right to be informed on the use of agency workers.

In Spain, agency workers have the right to be represented within works councils at the agency firm.

However, they cannot vote or run for elections of company representatives at the user undertaking. Agency workers can be represented by the workers' representatives of the user enterprise.

Company representatives must also be informed on the reasons justifying the recourse to agency workers within 10 days from the beginning of the assignment.

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<sup>102</sup> See K. Tijdens, *et. al., op. cit.*, 28.

<sup>103</sup> Institute for Labour and Family Research, UK, *Temporary Agency Work and Collective Bargaining in the EU*, EIRO, 2008.

### 9.3. Access to Permanent Employment and Training

Agency work is considered a stepping stone towards permanent employment<sup>104</sup>, and therefore many countries have introduced provisions aimed at not smoothing this transition.

For this purpose, many Member States prohibit legal clauses preventing user undertakings from directly hiring agency workers (Denmark, France, Germany, Italy – where, however, in order to take account of agencies' interests and ensuring companies' loyalty, exceptions are allowed in exchange of adequate compensation – Poland, Spain, Sweden the United Kingdom).

In some countries (France, Germany, Poland and Romania), there is, however, an obligation on the part of the user undertaking to inform agency workers of internal vacant positions.

Undoubtedly, the main tool to strengthen the position of agency workers on the labour market is training<sup>105</sup>. Improving knowledge and skills is a prerequisite for new employment opportunities and contributes to facilitating workers' access to stable jobs<sup>106</sup>. Moreover, only an increased employability, achieved through vocational training, can ensure an effective protection of workers, also by putting into effect the provisions laid down in the contract. Most European countries establish, therefore, that agencies must comply with specific obligations in terms of vocational training provision.

In this field, however, much has been done by bilateral bodies, which have often set up special funds to finance training activities. This is the case of Austria, Belgium, Denmark, France, Italy, Luxembourg, the Netherlands and Spain.

According to French legislation, for instance, contracts are considered null and void if they include clauses preventing workers from being hired by the user undertaking at the end of the assignment<sup>107</sup>. The Labour Code also specifies that the user company must inform agency workers of

<sup>104</sup> Ciett, *The Agency Work Industry Around the World*, 2012, 35 and C. Ehlert, J. Kluve, S. Schaff, *Training + Temp Work = Stepping Stone?*, Ruhr Economic Paper, No. 249, 2011.

<sup>105</sup> See A. Peeters, D. Valsamis, D. Sanders, *Temporary Work Agencies' Contribution to Transitions in the Labour Market: the Example of Vocational Training*, 2009; R. Belkacem, *La formation dans le travail temporaire: un bilan succinct*, Actes de Colloque, Sciences Humaines et sociales, 2006; S. Forrier, *Temporary Employment and Employability: Training Opportunities and Efforts of Temporary and Permanent Employees in Belgium*, 2003.

<sup>106</sup> See European Foundation for the Improvement of Living and Working Conditions, *Impact of Training on People's Employability*, Dublin, 2006.

<sup>107</sup> Art. L1251-44 c. trav.

internal vacancies, especially if a similar information procedure is also provided to direct employees<sup>108</sup>.

It is also possible to derogate from the general rule establishing that in case of early termination, the worker is liable for damages for breach of contract. Early withdrawal – with due notice – is permitted in the event that the worker is offered a permanent position.

Access to permanent employment is also promoted through training. Collective bargaining ensures access to vocational training funds (*Fonds d'assurance formation du travail temporaire*). Moreover, it is mandatory to provide training to those workers who perform hazardous activities. Training in the field of health and safety ensures workers' effective protection and compliance with the principle of equal treatment.

With the introduction of Decree No. 472-2012 agencies can also conclude apprenticeship contracts with agency workers, and this makes it possible to combine training in the classroom as well as on-the-job training when workers are on assignment.

Also in Germany, agreements between agencies and user undertakings aimed at preventing the hiring of agency workers at the end of assignments are regarded as null and void. In addition, in order to facilitate the transition to permanent employment, agency workers must be informed about job vacancies within the company.

However, there are no specific statutory provisions that ensure vocational training for agency workers<sup>109</sup>.

The so-called “clause of the revolving door” (*Drehtürklausel*) has recently been introduced in Germany, which prohibits companies laying off employees to take them on again as temporary workers to perform equivalent jobs but under worse working conditions.

In the Netherlands, access to permanent employment is secured by means of specific legal and contractual provisions regulating the transformation of the employment relationship from a temporary into a permanent contract after a specified period of time (18 months at the same user company or 36 months).

Collective agreements for agency workers provide incentives for training<sup>110</sup> as a way to increase, maintain and acquire additional knowledge and skills. They also establish that, after a 7-month assignment, the worker is entitled to a Personal Education Budget (PBE). Funds are set aside

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<sup>108</sup>Art. L1251-25 c. trav.

<sup>109</sup> See O. Stettes, *Germany: Temporary Agency Work and Collective Bargaining in the EU*, EIRO, 2008.

<sup>110</sup> See K. Tijdens, *et. al., op. cit.*, 42 ff.

during the first 26 weeks of work at the agency, and at the end of this period 1% of the total wages paid to workers must be invested in training. In the UK, Regulation No. 10 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319) has introduced a complex mechanism restricting the use of the so-called “transfer fee” by agencies, in the event the agency worker is hired directly by the user company or works for the same user company if being supplied by another agency firm, or is hired by any person other than the user undertaking to whom the user company has introduced him. This system is intended to prevent the agency from limiting workers’ access to stable employment. However, no reference is made to agency workers’ training rights.

With regard to the right to information, from the first day of assignment all agency workers have the right to be informed about any available job with the user. The user company may choose to advertise jobs either through the internet/intranet or through a board located in a common area. In any case, the agency worker has to be aware of where and how to access this information.

Access to job posts by agency workers does not limit the freedom of choice of the user undertaking with respect to specific requirements in terms of qualifications, experience or ability to use specific devices.

This right does not apply in the context of a headcount freeze where jobs are only aimed at reallocating internal employees in order to avoid layoffs as part of corporate restructuring.

With the aim of promoting agency workers’ access to permanent jobs, Spanish legislation provides that any clause prohibiting the user company from hiring workers at the end of assignments is considered null and void<sup>111</sup>. The Community provision on the right of agency workers to be informed by the user of internal vacancies is implemented for the same purpose, to make sure that agency workers can access permanent positions.

Training of agency workers relates in particular to risks prevention and health and safety at work.

Agencies are also required to set aside annually a sum equivalent to 1% of the total wage paid to workers to fund training, in addition to complying with all the other obligations established by law in relation to workers’ training<sup>112</sup>.

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<sup>111</sup> Art. 7, Ley 14/1994.

<sup>112</sup> Art. 12, Ley 14/1994.

## 10. Collective Bargaining

Moving on to collective bargaining, some of the main differences characterising the national legal systems are not only due to different existing policies, but also to different legal traditions, histories and cultures. While in the new Member States collective bargaining plays no role in the regulation of agency work, in other countries, such as Belgium, Ireland, Poland, Spain, Sweden and the UK, cross-sectoral bargaining and social dialogue at a national level are of fundamental significance. Agreements reached by governments and social partners often have an impact on later stages of legislation.

In a number of countries (Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden), collective bargaining in the field of agency work takes place at the sectoral level.

In some of these countries (Belgium, Denmark, Finland, France, Germany, Sweden, and the United Kingdom) collective agreements are signed also at the company level especially in larger agency firms<sup>113</sup>. In particular, in Denmark, company-level agreements are very common, and together with sectoral-level bargaining, they fully regulate the agency work sector, since, as mentioned above, no statutory provisions are laid down in relevant legislation.

In France, many collective agreements have been concluded which concerns agency work. They focus in particular on social protection, vocational training, health and safety at work, and trade union rights. Moreover, in the past, Governments made use of extension procedures, consisting in the possibility to give legal effect to collective agreements.

A social fund providing guarantees for loans, contributions to finance education of agency workers' children, and a fund for training have been set up jointly by trade unions and employers' associations. Both funds are financed through contribution paid by agencies<sup>114</sup>.

There are no trade unions specifically set up to protect agency workers who are therefore represented by major trade union confederations in Germany.

Agencies, however, are now represented by a single organisation, the *Bundesarbeitgeberverband der Personaldienstleister* (BPA), originating from the merging of two previously existing associations (BZA – *Bundesverband Zeitarbeit* and AMP- *Arbeitgeberverband Mittelständischer Personaldienstleister*).

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<sup>113</sup> J. Arrowsmith, *Temporary Agency Work and Collective Bargaining in the EU*, *op. cit.*, 22.

<sup>114</sup> *Ibid.*, 19.

There are two collective agreements concluded by these organisations, one signed by BZA and DGB (*Deutsche Gewerkschaftsbund*), and the other by AMP and CGB (*Christliche Gewerkschaftsbund*) remain in force.

Moreover, the IGZ (*Interessenverband Deutscher Zeitarbeitsunternehmen*) has concluded a further collective agreement at a sectoral level with DGB.

Other sectoral collective agreements have been concluded after the relevant legislation was amended. The last agreement was signed on 22 May 2012 by the *Verhandlungsgemeinschaft Zeitarbeit* (representing agencies) and the metalworkers' union *IG Metall*, which introduced wage increases for agency workers in the electrical and metal working sector.

In the Netherlands, the agency work sector has a well established collective bargaining system<sup>115</sup>. The ABU (*Algemene Bond Uitzendondernemingen*) is the leading organisation of agencies, whereas the main trade unions representing (not only) agency workers are FNV *Bondgenoten*, CNV *Dienstenbond* and *De Unie*. These associations have signed the so-called "ABU collective agreement", which was declared generally applicable and therefore covers more than 90% of agency workers. There is also another sectoral collective agreement called the "NBBU collective agreement".

The above-mentioned contracting parties have set up a "Foundation for the implementation of collective bargaining agreements for agency workers" (SNCU), which, as the name suggests, aims at ensuring the regular enforcement of collective agreements. A mechanism typical of collective bargaining is the so-called "phase system", according to which workers' rights increase in proportion to their length of service.

Workers are in phase A if they have worked for the user undertaking for 1 to 6 months. In phase A if the end of the assignment corresponds to the end of the employment relationship with the agency. Workers can also terminate the employment relationship in case of sickness. Workers who have worked for 7 to 12 months are in phase B and have acquired the right to training. Workers in phase C have worked for 12 to 18 (36) months and enjoy some additional rights, for example, their sickness benefits amount to 100% of remuneration. Workers in phase D have worked for over 18 months (within the same undertaking) or 36 months and their employment contract becomes open-ended.

In the United Kingdom there are no trade unions specifically set up to protect agency workers, whereas agencies are represented by the

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<sup>115</sup> See ABU, *A summary of the Collective Labour Agreement for Temporary Agency Workers 2009–2014*, 2011.



Recruitment and Employment Confederation. There is no national sectoral collective agreement, but only company-level agreements in larger agencies.

In Spain, there are three different associations representing agencies: AETT (*Asociación Estatal de Trabajo Temporal*) FEDETT (*Federación de Empresas de Trabajo Temporal*), AGETT (*Asociación de Grandes Empresas de Trabajo Temporal*), all belonging to the Spanish Confederation of Business Organisations (CEOE).

There are no trade unions specifically representing agency workers.

Collective bargaining takes place mainly at the sectoral and national level, even though there are also collective agreements signed at the regional level<sup>116</sup>. The regulation of agency work at the sectoral level by means of collective agreements ensures equal treatment also for workers performing jobs for which relevant provisions do not expressly require equal treatment.

## 11. The Sanctioning System

In all national legal systems, the agency work regulation is complemented by a robust sanctioning mechanism<sup>117</sup>.

Sanctions can be imposed as a consequence of controls aimed at ensuring regular access to the sector. These include provisions intended to punish agencies that do not meet the requirements established by law or that supply workers in sectors or cases in which this is not permitted. Generally speaking, this leads to strict sanctions, either criminal or administrative.

It should be noted that in addition to the legal consequences for non-compliant agencies, this type of infringements might also affect the relationship between the agency, the worker and the user.

The contract between the agency and the user is usually considered null and void as it clashes with the norm of a compulsory character, whereas the employment contract between the worker and the agency is generally converted into a direct employment contract between the worker and the user undertaking.

In France, for instance, failure to comply with the relevant administrative requirements and to provide adequate financial guarantees is sanctioned

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<sup>116</sup> See M. C. Rodríguez Piñero Royo, *Spain*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 184-185.

<sup>117</sup> See S. Clauwaert, *op. cit.*, 7.

with the closing down of the agency. Moreover, the agency owner is banned from performing such an activity for 10 years. Agencies operating without a valid license commit a criminal offense.

Sanctions are also imposed on agencies that do not provide adequate financial guarantees, that do not comply with health and safety regulation for workers exposed to ionizing radiations, that issue contracts with incorrect or incomplete information or send workers to user undertakings without a contract.

If agency workers continue working at the user undertaking at the end of their assignments, a permanent employment relationship is established between these workers and the user company<sup>118</sup>. If, however, the user undertaking makes use of agency workers in cases other than those established by legislation, or does not comply with the provisions on the extension of the employment contract, workers can lodge a complaint and bring a procedure before the courts to claim the conversion of the contract of employment into a direct employment relationship with the user undertaking, with effect from the beginning of the assignment.

Fines up to 3,750 Euros are imposed against user undertakings that have not signed the contract within the legal time-limit, have not indicated in the contract all the details of remuneration, have taken on agency workers for permanent positions, have not complied with relevant legislation in terms of time intervals between subsequent contracts, or have resorted to agency work in cases other than those established by law.

German agencies operating without the necessary authorisation, or companies making use of agency workers supplied by an agency operating without a license can be punished with a fine of up to 30,000 Euros. If agency workers coming from abroad do not have a valid residence permit, fines of up to 500,000 Euros can be imposed on agencies for severe misconduct.

In the case of violations on the part of the agency, its contractual relationship with the worker is converted into a direct employment relationship between the worker and the user with effect from the very beginning of the assignment<sup>119</sup>. The employment relationship must be regarded as temporary if the assignment had a limited duration and if there are specific reasons justifying the temporary nature of the task. Working time remains the same according to what had been agreed by the

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<sup>118</sup> Art. L1251-39 c. trav.

<sup>119</sup> Art. 10, par. 1, AÜG.

agency and the user. In addition, workers are entitled to at least the same remuneration agreed with the agency.

Workers have also the right to claim damages to the agency.

The UK Employment Agency Standards Inspectorate is in charge of supervising the activity of the work agencies, set up by the Department of Trade and Industry. In the case of misconduct, the courts issue an order that prevents prohibited people to run or be involved in any employment agency or business. The maximum period of any prohibition order is 10 years. Agencies that adhere to requirements of the Recruitment and Employment Confederation and they must also comply with the Code of Practice.

In the Netherlands, the supervisory function is carried out by the labour inspectorate which imposes sanctions in case of non-compliance with regulations on working conditions.

Also the Foundation for compliance with the collective agreement for agency workers (SNCU) monitors the regular enforcement of collective agreements. In case of non-compliance on the part of the agency, the Foundation may take legal steps and the association of agencies can expel non-compliant members.

In Spain, the recent reform has introduced some changes in the sanctioning system. There are three types of *infracciones* according to their severity, and sanctions increase with increasing severity. In particular, Law No. 3/2012 distinguishes between *infracciones* committed by the agency or by the user, which can be minor, serious, or very serious. Minor *infracciones* committed by the agency include: failure to include some particulars in the employment contract which are legally required, failure to indicate the wording *empresa de trabajo temporal* (temporary agency work) in the advertisement of vacancies or the authorisation number, failure to send to the user company a copy of the employment contract, of the letter of assignment or of any other document required by law. Serious offences include: failure to provide a written employment contract, to report to the Ministry of Labour the number of contracts concluded with agency workers and the information required under Art. 5 of Law No. 14/1994, as well as failure to contribute to the training fund. It is also considered a serious offence to charge money to workers for the services rendered and to operate in geographical areas where agency work is not allowed. Very serious *infracciones* include: violation of the provisions on health and safety at work, engagement in unlawful activities, falsification of documents or concealment of information. With regards to *infracciones* committed by users, minor offences include failure to notify the agency of specific information concerning contractual arrangements and remuneration.

Serious *infracciones* include: failure to indicate the reasons to resort to agency work in writing, to carry out a risk assessment, to comply with the principle of equal treatment, to resort to agency work in cases prohibited by law. Very serious offences include violation of health and safety requirements in the workplace.

Sanctions in the case of non-compliance with the regulation include the imposition of fines of various amounts depending on the type of infringement.

Moreover, suspension is provided in the case of repeated misconduct.

Finally, if agency workers continue to work at the same user undertaking at the end of their assignment, they become permanent employees of the user undertaking.



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