TELEWORKING AND LABOR CONDITIONS IN ITALY

Emanuele Dagnino
PhD Candidate, University of Bergamo - ADAPT

Introduction

While studied since the Eighties in different fields of studies (and in labour law among them) and promoted by public bodies and the legislator, telework in Italy has traditionally presented low rates of implementation. Scholars and commentators have brought back the low rate of diffusion of telework in Italy to two main causes: on the one hand, the old and rigid organizational culture of Italian management; on the other, the regulatory rigidity of the Italian legal system.

However, Italian companies seem to be more interested in flexibility in the management, in line with what occurs in other countries and new forms of flexible work have raised in the recent years.

Notwithstanding the above, statistics presented in a recent ILO-Eurofound report show that the diffusion of telework and other forms of remote working in Italy is still very limited (7% of workers according to the data reported with reference to 2015), relegating Italy to the last position among the 28 members of UE.

1. Is there any regulation on teleworking in your legal system?

The regulation of teleworking in Italy differs between the public and the private sector.

The public sector is characterized by a complete regulation by law. The regulation has been introduced by the d.P.R. 8 March 1999, n. 70[47] according to article 4, paragraph 3 of the Law 16 June 1998, n. 191[48]. The regulation provided by the d.P.R. is complemented by collective agreements of different level relevant for the public sector (whole public sector, some branches or a single Public Administration).

Conversely, the law does not provide a full regulation of teleworking in the private sector. Some provisions specifically referred to teleworking are disseminated in the legal system

[47] Editor's note: a d.P.R. (Decreto del Presidente della Repubblica) is a decree issued by the President of the Republic.

[48] The d.P.R. 8 March 1999, n. 70 and the Law 16 June 1998, n. 191 are available at www.normattiva.it. The website collects all the relevant regulations quoted in this report.

in different statutes (i.e. in privacy law, occupational health and safety regulation and working time regulation).

Absent a general regulation, teleworking in the private sector is mainly regulated by collective agreements. A general framework is provided by an *Accordo Interconfederale* (Interconfederal Agreement) concluded the 9th of June 2004[49] by the major employers' organizations and trade unions. The Interconfederal Agreement must be considered as mere transposition of the European Framework Agreement on Telework stipulated the 16th July 2002. Furthermore, several sectoral collective agreements implement and specify the regulation of teleworking in different sectors of the economy.

2. What is the legal or judicial concept of teleworking often used in your country?

According to article 2 of the d.P.R. n. 70/1999, teleworking is: «*la prestazione di lavoro eseguita dal dipendente di una delle amministrazioni pubbliche di cui all'articolo 1, comma 2, del decreto legislativo 3 febbraio 1993, n. 29, in qualsiasi luogo ritenuto idoneo, collocato al di fuori della sede di lavoro, dove la prestazione sia tecnicamente possibile, con il prevalente supporto di tecnologie dell'informazione e della comunicazione, che consentano il collegamento con l'amministrazione cui la prestazione stessa inerisce*». Paraphrasing, to the aims of the d.P.R., teleworking is a work performance, provided by a public employee in any suitable place outside the workplace, where the performance is technically possible, thanks to the prevailing use of ICTs, which enable the contact with the public body.

Even if some pieces of legislation regarding teleworking are disseminated in the Italian legal system, there is not a definition of teleworking (except for the one provided for the public sector).

Therefore, in the private sector, the relevant definition is the one contained in the above-mentioned Interconfederal Agreement. The applicable definition of teleworking (with regard to the private sector) is found in article 1 of the Agreement which states that: *"Il telelavoro costituisce una forma di organizzazione e/o di svolgimento del lavoro che si avvale delle tecnologie dell'informazione nell'ambito di un contratto o di un rapporto di lavoro, in cui l'attività lavorativa, che potrebbe anche essere svolta nei locali dell'impresa, viene regolarmente svolta al di fuori dei locali della stessa*". It substantially translates in Italian the definition provided by the European Framework Agreement on Telework which states: "Telework is a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where

[49] The Interconfederal Agreement is available at https://www.cliclavoro.gov.it/Aziende/Documents/accordo_interconfederale_telelavoro_9_6_2004.pdf

work, which could also be performed at the employers premises, is carried out away from those premises on a regular basis".

Even if some differences should be outlined between the two definitions – as for the use of ICTs, which should be prevailing in the public sector as well as the location of the work performance (outside the workplace, in the public sector, and outside employer's premises, in the private one) – they do not appear to have any systematic influence over the notion of teleworking.

Many concerns are raised by the feature of "regularity" required by the definition contained in the Interconfederal Agreement, since, absent judicial interpretations on the issue, scholars have intended it in different ways (regularity as prevalence of the work provided outside employer's premises or just as the continuity for an amount of time of the external performance, excluding the work performance provided outside employer's premises which are only occasional).

3.Are there differences in the national legal system between teleworkers and flexible workers?

A new form of work, the so called "*lavoro agile*"(also known as "smart working") has been recently introduced in the Italian legal system (Law 22 May 2017, n. 81). This new form of work is intended as different from traditional telework, but the definition provided by the law leaves many doubts and some criticisms have already been raised by Italian scholars.

According to article 18 paragraph 1 of the law, *lavoro agile* is a "*modalità di esecuzione del rapporto di lavoro subordinato stabilita mediante accordo tra le parti, anche con forme di organizzazione per fasi, cicli e obiettivi e senza precisi vincoli di orario o di luogo di lavoro, con il possibile utilizzo di strumenti tecnologici per lo svolgimento dell'attività lavorativa. La prestazione lavorativa viene eseguita, in parte all'interno di locali aziendali e in parte all'esterno senza una postazione fissa, entro i soli limiti di durata massima dell'orario di lavoro giornaliero e settimanale, derivanti dalla legge e dalla contrattazione collettiva*". The definition provides three main features involved by this new form of work: 1) a part of the work performance is provided outside employer's premises respecting the maximum daily and weekly working hours, 2) the potential use of ICTs and 3) the absence of a fixed work station for the performance provided outside employer's premises.

The legislator introduced *lavoro agile* in the legal system after this form of work have reached a limited diffusion through collective agreements or unilateral trials put into place

spontaneously by the employers (diffusion that, in a circular way, has been encouraged by a first draft bill presented to Italian Parliament in 2014). It is aimed to promote the use of this form of work, that is intended as a good way to a better work-life balance and productivity gains, through economic incentives and more lenient rules than the one concerning teleworking, especially with regards – but not limited – to the duties, and the related costs, raising from health and safety regulation.

Since the law has come into force only last June, while we are writing, judicial and administrative interpretations that could help differentiate *lavoro agile* and teleworking are still lacking.

4. Does the implementation of telework require consent of workers? Can the employer (or the parties via collective agreement/collective bargaining), impose (temporary or definitely) telework on workers upon certain entrepreneurial causes? In such case, pllease specify them)?

In the public sector, while the d.P.R. n. 70/1999 does not specifically regulate the voluntary nature of the implementation of telework, this requirement is clearly stated in the "Accordo Quadro ARAN" on teleworking concluded the 24th March 2000[50] and applied to the whole public sector. The Framework Agreement at article 4 specifies that only the workers who have communicated their availability are involved in the project of teleworking of each administrative body.

In the private sector, the relevant provision is the one contained in article 2, which clearly states that telework is implemented according to a voluntary choice by employer and worker and the refusal to agree to the implementation of telework is not a cause of just dismissal of the worker.

Employers cannot unilaterally impose teleworking to their workers.

5. Can a teleworker or an entrepreneur unilaterally decide to return to a position within the enterprise's premises?

The d.P.R. n. 70/1999 at article 4 paragraph 3 states that the public employee can make a written request to the Public Administration to be reintegrated at the workplace, after an adequate period provided by the project of telework defined by the Administration. More

[50] The Framework Agreement on telework, signed by ARAN (Agenzia per la Rappresentanza Negoziale delle Pubbliche Amministrazioni) and the public sector trade unions the 24th March 2000 is available at https://www.aranagenzia.it/contrattazione/contratti-quadro/altro/telelavoro/contratti/1832-accordo-quadro-sul-telelavoro.html

precisely, the Framework Agreement on telework in the public sector (article 4 paragraph 4) provides a regulation on the issue, stating that telework "*è revocabile a richiesta del lavoratore, quando sia trascorso il periodo di tempo indicato nel progetto e nel rispetto di ulteriori condizioni eventualmente previste nello stesso progetto (ad es.: che vi sia un sostituto), o d'ufficio da parte dell'amministrazione*". Both the employee and the Administration can unilaterally decide for the return of the employee to the former position and the workplace previously attended. The employee can revoke the consent to be involved in the project of telework after an adequate period; the Administration should respect the needs of the worker in the implementation of the return to the workplace.

Otherwise, where the Interconfederal Agreement is applied, the return to employer's premises is subject to the stipulation of an individual or collective agreement (article 3 paragraph 2). The return to a position within the employer's premises cannot be unilaterally decided by the employee or the employer.

6. What provisions on labor conditions (privacy, working time, *inter alia*) are established regarding teleworkers and not for regular workers?

Specific provisions regarding working conditions are provided by the d.P.R. n. 70/1999 and the Framework Agreement in the public sector as well as by the Interconfederal Agreement of 2004 relevant for the private sector. The provisions regard: the implementation of telework, security and privacy issues, occupational health and safety, training, right to information, and periodic returns to the employer's premises to guarantee socialization of the worker.

In addition to the above-mentioned regulations, as has been previously said, some pieces of legislation address specific aspects of teleworking, with provisions relevant for private and public sector. This is the case of privacy law (see *infra*), working time regulation and occupational health and safety regulation (see *infra*).

As regards the working time regulation, the relevant provision is the one contained in article 17 paragraph 5 of the d.lgs. n. 66/2003. The provision, according to the derogations regulated in art. 17 paragraph 1 of the 93/104/EC Directive, states that the provisions concerning normal working hours (art. 3), maximum weekly working time (art. 4), overtime (art. 5), daily rest (art. 7), breaks (art. 8) and the length (art. 12) and organizations of night work (art. 13) do not apply when «the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves»[51]. The provision specifies that the derogation should be done, always according to the

[51] The Italian d.lgs. n. 66/2003 closely follows the linguistic formula used by the directive, translating them into Italian.

Directive, *«[w]ith due regard for the general principles of the protection of the safety and health of workers*», providing a list of examples of activities relevant in this field, teleworking explicitly included.

7. Is there any concrete regulation on training and professional promotion in regard to teleworkers?

Regarding training, the regulation provided by the d.P.R. n. 70/1999 is limited to a provision requiring that the project of telework implemented by the Administration defines the type, the duration, the didactical methodologies and the financial resources for training and upskilling intervention (article 3 paragraph 4). The Framework Agreement of 2000 specifies the duty for the public body to provide training concerning occupational health and safety and to provide general and specific training in order to guarantee the adequate professionalism and socialization for teleworkers (article 5 paragraphs 5 and 6).

The Interconfederal Agreement provides for the regulation relevant for the private sector stating, in accordance with the European Framework Agreement, that teleworkers should enjoy the same opportunities of training and professional promotion of the employee working only at the employer's premises and that the employer should supply specific training to teleworkers concerning work tools and the organization of work.

8. What provisions on work health and safety are established regarding teleworkers?

The d.P.R. n. 70/1999 only requires that an adequate protection of the health and safety of the teleworker should be guarantee to the teleworker and that collective bargaining provides the regulation concerning the access to teleworker's house (in the case telework is provided by employee's house). The Framework Agreement confirms the duty of the Administration to guarantee the health and safety of the worker according to the relevant regulation.

In the private sector, the Interconfederal Agreement contains a provision (article 7) regarding the protection of health and safety of the teleworker. This regulation has been transposed in the d.lgs. n. 81/2008 and harmonized with the regulation contained in that statute.

Article 3, paragraph 10 of the d.lgs. n. 81/2008 (also known as "Testo Unico sulla salute e sicurezza", meaning Consolidated Act on occupational health and safety) provides a specific regulation for employees working remotely in a continuous way and using

communication and information technologies. The article then specifies that teleworkers, as defined by the d. P. R. 8 March 1999, n. 70 (public sector) and by the European Framework agreement of 2002 (private sector) falls within the definition provided. The use of a broader definition, than those regarding teleworking in the public and private relevant regulations is due, according to the majority of the scholars, to the willingness to encompass possible future ways of remote working arising after the entry into force of the decree.

Regarding the specific regulation that applies to these workers, the provision states that they are covered by the regulation of the statute concerning the use of visual display units and, when the tools for the performance are provided by the employer, the tools shall conform to the relevant regulation. Moreover, the employer must provide information regarding company policy about health and safety and, namely, about the use of visual display units. The article then provides the provision regarding the right to access the place of telework by employers, workers' representative and public bodies, and the right of the employee to require an inspection. The employer has the duty to implement actions to prevent isolation and guarantee socialization of the teleworkers with the colleagues.

9. Is there any concrete regulation on "data protection" as regard to work performed by teleworkers?

In addition to the regulation contained in the Inteconfederal Agreement, which impose the duty of the employer to respect worker's privacy and that the installation of monitoring systems must be proportionate to the objective, a specific provision is contained in d.lgs. n. 196/2003 (also known as Data Protection Code).

Article 115, paragraph 1 states that "[i]*n the context of home-based work and telework, employers shall be required to ensure that the employees' personality and moral freedom are respected*". Other provisions are relevant in the field of telework and should be mentioned in this context: for instance, article 4 of the Italian Worker's Statute (Law 20 May 1970, n. 300) contains the regulation and the limits concerning the technical and mechanical control over the workers' activities.

10. Is there any particular regulation concerning collective representation of teleworkers in your legal system? Are they taken into account as electors in the process of electing teleworker representatives? Can they be elected as representatives of workers?

Absent a specific provision in the d.P.R. n.70/1999, in the public sector the relevant regulation is the one contained in article 6 paragraph 5 of the Framework Agreement. It

states that the exercise of union rights is guaranteed and that the teleworker must receive the information and be able to participate to union activity taking place at the workplace. To this end, it foresees the implementation of a computing bulletin board for union use and the use of e-mails to contact workers' representatives.

In the private sector, the Interconfederal Agreement (article 10) states that teleworkers enjoy the same unions rights of the other workers and that their communication with workers' representatives cannot be hindered. Moreover, they can elect and be elected as workers' representatives and they are computed for determining the threshold for bodies with worker representation, referring to the establishment specified to this end from the outset.

11. Other relevant aspects of the regulation regarding telework

Concluding, three are the major issues to be outlined:

1) While the general regulations accounted in the previous answers provide a regulatory framework for telework in Italy, specific regulations are provided by sectorial and company level agreements. Especially at company level, the regulation of telework is detailed and takes into account the specificity of the different conditions, organizational structures and needs of the company.

2) The implementation of telework has been widely promoted by the legislator during recent years, through economic and non-economic incentives. Lastly, d.lgs. 80/2015 attempts to foster the use of telework providing that employers who introduce telework through collective agreement to promote work-life balance could exclude teleworkers from the compute of the thresholds relevant to the application of some specific regulations.

In the public sector, the promotion of telework has been recently put forward through a specific duty for the Administrations to take actions aimed to reach a 10% rate of telework or other forms of remote working (alias *lavoro agile*) among their employees.

3) The introduction of *lavoro agile* in the Italian legal system is likely to have an impact on the diffusion of telework. It is both foreseeable that these two forms of work will be in competition and it is presumable that the more lenient regulation of *lavoro agile* will be more attractive than the regulation of telework (notwithstanding the different kind of incentives in place for telework).

References and judicial decisions

GAETA L. (2015), *Telelavoro*, in Enciclopedia Treccani – Diritto Online.

MAIO V. (2010), *Il telelavoro*, in Persiani M. (Ed.), I nuovi contratti di lavoro, Utet.

LUCAFÒ F. (2007), *Il rapporto di telelavoro. Regole giuridiche e prassi contrattuali*, Giuffrè.

TOFFOLETTO F. (2006), *Nuove tecnologie informatiche e tutela del lavoratore. Il potere di controllo del datore di lavoro - Il telelavoro*, Giuffrè.