

**Certification of labour contracts:  
a legal instrument for labour market regulation in Italy**

by

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*Summary: Part 1 - The legal context. 1.1- Certification of labour contracts: the way it works. 1.2- Certification: micro-level and macro-level labour market regulation. 1.3 - Certification as an instrument for business organization. Part 2 - The experience of the Commission for Certification of the University of Modena and Reggio Emilia. 2.1.- Number of applications received. 2.2.- Number of applications received divided by type. 2.3.- Number of applying enterprises by Region. 2.4.- Number of statements of certification issued. 2.5.- Reasons for non-certification.*

**Abstract:**

The paper analyses, through a perspective of indirect regulation on the labour market, the Italian legal procedure called ‘Certification of labour contracts’ (from now on ‘certification’). It is a certification of lawfulness applying to labour and supply chain contracts. Contracts are submitted to a board of qualified experts in labour law (civil servants, professionals, academics) who undertake the document review, perform advisory functions and decide whether to award or deny certification. The board decides taking into account the pivotal principles laying the foundation for certification: fairness, true nature of the agreement entered into by the parties and compliance of the contract to objective organizational and productive requirements.

Certification seeks to enforce labour standards through a proper use of contractual models, as to manifest the true intention of the parties and fully suit their interests.

Certification is addressed from a regulatory perspective. Firstly, all labour and supply chain contracts are eligible for certification. Although apparently different, these contracts share a common origin: the global process of ‘vertical disintegration’ of the firm. Secondly, certification is a form of labour market regulation, which doesn’t fall among compulsory provisions nor is the expression of pure self-regulation. It rather represents an enforced self-regulation, or better a ‘co-regulation’ willingly undertaken by the parties, availing of and relying on the competence and expertise of the members of the board of certification, who act impartially. Employers are not compelled by law to defer their contracts to the board of certification, but if they do so and receive positive feedback, ‘certification’ gives the contract a legal presumption of fairness, certifying its conformity to the principles of law as to prevent future disputes.

The theoretical framework of the paper views certification as a tool to promote regulatory compliance and responsibility, along with a more conscious use of contractual models.

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## ***Part 1 - The legal context.***

### ***1.1- Certification of labour contracts: the way it works***

Certification of labour contracts (from now on Certification) is an Italian legal procedure whose main function is to reduce legal disputes concerning the qualification of labour contracts.

With reference to the Italian labour law system, the correct qualification of a labour contract is a process of great importance, as different contracts provide considerably different levels of protection to the worker; in other words, the qualification has direct impact on the worker's salary. This explains why, within the Italian labour law system, contractual qualification continually gives rise to a considerable amount of litigation.

As a matter of fact, qualification is excluded, by law, from the contractual terms under the power of variation of the parties and, therefore, may not be waived or altered by agreement. This is because qualification is mandatory and expressly established by law.

The question can be briefly explained by two fundamental judicial decisions. In 1994, the Constitutional Court ruled: "the principles, the protections and the rights established by the Constitution for the safeguard of employees, are not negotiable between the parties of the contract. Not even ordinary law courts are competent to qualify as self-employed contracts those contracts which are objectively ascertained to be employment contracts (2)". The freedom of the parties to qualify their contractual labour relation is thus restricted, as they are required to fit into the abstract models provided by the law: employment contracts, quasi-subordinate employment contracts, or even self-employed contracts. The correct distinction between employment and self-employed contracts is essential, as the protections provided by the law for employment contracts are a matter of Constitutional law.

In 1999 the Supreme Court (in it.: "Corte di Cassazione") stated that "any economically relevant human activity, even the humblest one, can be either carried out by employment contracts or by self-employed contracts (3)". Hence, within the limits of the contractual qualification provided by the law, the parties are free to choose the type of contract underlying the performed activity or work.

Following from this, not even Certification is entitled to endorse variations of mandatory provisions, pursued or introduced by the agreement of the parties. Nonetheless, Certification, by attesting the lawfulness and the correct qualification of the labour contract, is the institutional and legal means available to the parties to reduce uncertainty and ensure compliance with the regulatory framework. In legal literature this concept is widely expressed: Certification, in fact, is exclusively regarded as a form of "assisted consensus *ad idem*", and is therefore not viewed in terms of "assisted variation" to mandatory rules.

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(2) The quotation is taken from the case: Corte Cost., 29 marzo 1993, n. 121, in *Foro Italiano* 1993, I, page 2423. The translation is by the authors.

(3) The quotation is taken from the case: Cass., 28 luglio 1999, in *Rivista Italiana di Diritto del Lavoro* 2000, II, page 280. The translation is by the author.

Thus, Certification meets the need for certainty felt and expressed by interested parties who seek to perform flexible labour relations or to externalize stages of the production process by means of supply chain contracts (independent contractors).

The subjects in charge of Certification are appointed by law. These certifying bodies are called “Commissions/Boards for Certification” (article 76, D.Lgs. 276/2003). Commissions for Certification (from now on: “Commissions”) shall be set up:

- ❖ by each territorial body of Ministry of Labour (Direzione Provinciale del Lavoro, Provincial Labour Direction (4);
- ❖ by the Ministry of Labour;
- ❖ by Provinces, as expression of the local and territorial autonomies;
- ❖ by Universities and University Foundations, under the supervision of a professor of labour law;
- ❖ by Bilateral Bodies (Unions and Employers Associations);
- ❖ by the Professional Association of the Labour Advisors;

Each Commission has to approve an Internal Regulation which is a self-organizational instrument establishing the procedure the Commission is required to follow once the parties apply for Certification. Each Internal Regulation has to comply with the provisions of law pertaining to certification (art. 78.2 D.Lgs. 276/2003, and article 2 and 3, L. 241/1990) in accordance with the principles set forth below:

1.- free determination of both parties: the contract shall be willingly submitted by the parties to the procedure of Certification;

2.- duty of disclosure (*dovere di informazione*): as regards the beginning of the procedure, notice has to be given to the Provincial Labour Direction, to the Social Security Administrations and to the State Taxation for all the applications for certification;

3.- duty of motivation. The issuance of Certification (or of the Denial of Certification in case of noncompliance) has to be supported by an adequate and complete motivation, which sets out the grounds of the decision. Motivation has to be consistent with the terms of the contract and with the organizational framework of the employer (5).

4.- duty of deliberation: the Commission is required to decide. The procedure of Certification demands, for its completion, either the issuance of certification or, in case of noncompliance, of a duly motivated denial of certification.

The law (article 79, D.Lgs. 276/2003) establishes that the legal effects of Certification, which enforce the qualification and the regulation between the parties and toward third parties (i.e. Social Security Authorities as regards social security contributions), persist unless the judge of labour overturns Certification declaring it void.

Likewise, the actions of the public administrations, and in particular of the inspectors of labour (as a general rule, if an inspection confirms a labour law violation, inspectors are

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(4) The Provincial Labour Direction is the territorial organ of the Ministry of Labour. So, they are part of the Government, and not organs of the local administration. The province, which is the territorial partition where they have competence in, corresponds to a district, and consists of a chief town with its territory around.

(5) Being Certification an administrative act, the requirement of motivation is established by the general law for administrative acts L. 241/1990, article 2.

entitled to issue administrative orders for the re-qualification of labour contracts retrospectively to the starting date of work.), produce the same legal effects between the parties and before third parties. Certification, though, produces its legal effects also before inspectors, who cannot therefore re-qualify a certified contract. Where there is a doubt about the correctness of its qualification or of its execution, they can appeal to a judge of labour for a review of the decision handed down by the Commission. In the meanwhile, the certified contract still produces its legal effects.

In reason of that, and of the close examination already carried out by the Commissions, with the General Directive of the Sept.18 2008, the Minister of Labour has requested the inspectors of labour to focus their inspections on non-certified contracts, unless a written claim is filed by workers complaining about a violation of rightful labour protections, or where the incorrect actual execution of the contract is immediately ascertained.

Both parties of the contract have the legal right to bring a civil action against Certification, in case of:

- ❖ wrongful qualification of the contract (mistake of law in the Certification procedure);
- ❖ lack of consent;
- ❖ essential objective discrepancy between the contract object of Certification and the actual execution of the contract.

The first case of nullification requires a judgement on the lawful qualification of the contract. It can be claimed by one of the parties, or even by a third party who has a legal interest in the contract and implies a mutual mistake of law made both by the parties, for having wrongfully drawn up the contract, and by the Commission, for having incorrectly qualified the contract on the basis of a flawed evaluation of the facts. Even though, theoretically, the judge has the power to void Certification, in practice this is quite unlikely to happen. Clearly, before deciding the case, the judge needs to weigh the evidence as a whole and reach conclusions taking into account all the documents acquired and reviewed during the procedure of Certification and kept in the Archive of the Commission, as Certification is the outcome of a previous investigation.

The same considerations can be carried out about the second case of nullification: lack of consent. Even in this occurrence, the judge of labour must weigh all the documents acquired during the procedure of Certification as to ascertain the correctness of the procedure of Certification and the validity of Certification itself. Furthermore, the consultancy activity and the direct assistance given by the Commission to the parties (article 81, D.Lgs. 276/2003) during the initial phase in which the terms and conditions are laid down, makes it hard to prove in court the lack of consent, or the mistakes of fact or law.

The third case of nullification is much more likely to occur in practice. In fact, it does not concern Certification itself, which is expected to be lawfully given, but it rather refers to the implementation of the contract, and it is envisaged when the behaviour of one or both contracting parties does not comply with the obligations laid down under the terms of the contract.

However, provision is made that, for certified contracts, the parties cannot challenge certification before the court, if they fail to appeal to the Commission of Certification for the attempt to reconcile.

The Commission, in fact, is entitled to propose a settlement of the dispute before it is brought to court, but its duty is limited to an attempt to reconcile since, so far, the Commission has not been assigned the function to arbitrate.

Thus, if the parties do not reach a settlement of their dispute, the Commission cannot resolve it by arbitration, and the plaintiff has to apply to the judge of labour.

Finally, the procedure of Certification is also available for independent contracts (article 84 D.Lgs. 276/2003), which are not labour but business contracts, included into the labour law procedure of Certification for their nature of ordinary organizational legal instruments by means of which the enterprises perform outsourcing. In fact, the way independent contracts are implemented often impacts on the working conditions.

### **1.2- Certification: micro-level and macro-level labour market regulation.**

Certification is basically a procedure regulating the employment relation. However, it has significant influence also on the labour market. In fact, at a micro-level, Certification is a fair way for workers to enter the labour market.

Actually, Certification of labour contracts grants advantages to both parties of the contract. It meets the interests of the employer by providing considerable legal certainty as regards the correct qualification of the contract. And it does that “*ex ante*”, before the execution of the contract. At this preliminary stage, the employer can safely choose any organizational solution for his business, and can decide for outsourcing or flexible labour contracts, with no risk of paying damages for contractual abuse. In this regard, Certification can be correctly viewed as a valuable instrument for the employer as, in the process of organizational (or re-organizational) planning, it provides a check of lawfulness on the contracts the employer intends to draw up.

But Certification is advantageous also for the worker. In fact, in case of flexible employment contracts, Certification grants the worker the best protection established by law according to a specific type of contract. This becomes particularly evident in the case of quasi-subordinate employment contracts, often preferred by the employers because of their flexibility, but not always consistently implemented. If there is a discrepancy between the quasi-subordinate contract and the actual execution of it (by way of example: the employer acts as if dealing with a subordinate worker) the contract cannot be certified.

The form, extent and nature of flexible working and the true nature of quasi-subordinate employment contracts require a context of flexible organization.

In this respect, Certification is a test of contractual lawfulness, though intended as **substantial** (not formal) compliance to the law; therefore, Certification works also as a sort of fairness test (6) concerning the actual execution of the contract. It actually refers to the real relation between the organization of the employer and the worker, with particular regard to the way a company organization deals and complies with the rights and

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(6) Certification, as a test of substantial lawfulness for the labour contract, may be considered as one of “the modern styles of public regulation”, or better of indirect regulation, in the mainstream of the regulatory analysis carried by HUGH COLLINS, *Regulating Contracts*, Oxford University Press, 1999.

obligations deriving from flexible contracts (flexible organization for flexible labour contracts, traditional vertical organization for traditional employment contracts).

In a comparative analysis, the substantial qualification of contract provided by Certification is apparently quite similar to the Australian **“no disadvantage test”** (7).

The Commission carries out consultancy functions and actively assist the parties, helping them to fulfil all the requirements of lawfulness and fairness while reaching their organizational goals (8). Hence, the contract is evaluated in terms of a “no disadvantage” approach: a substantial test of lawfulness and fairness of the terms of the contract, in accordance with the organization of the employer.

On account of the peculiar function of enforcement of contractual self-regulation, Certification becomes an instrument of regulation of the labour market, both from a micro- and macro-level perspective.

In fact, Certification bears a positive influence on the labour market, in quantitative and in qualitative terms.

It produces a quantitative expansion of the labour market, as it grants market participants access to rightful (and therefore not conflicting) contracts. And it produces qualitative effects on the labour market, as certified contracts are fair contracts, truly respectful of the workers’ rights established by each type of contract.

As a legal instrument positively impacting on the labour market, Certification may be viewed as an expression of *“legal pluralism”*: in modern democracies State-regulation and self-regulation tend to coexist. Hence Certification, as an expression of enforced self-regulation, is part of a more complex system of labour market regulation, which relies on private self-regulation, and partly is reserved to State direct regulation.

Why is Certification a model of **enforced self-regulation**?

Certification is a “self-regulatory” instrument, as it is issued on the basis of the contract the parties intend to draw up. Certification is a voluntary procedure, and the parties of the contract are completely free to apply for Certification or not. If they choose not to, their contract still produces its effects as granted by ordinary contractual law.

Being issued by a third party (the Commission), Certification -as a legal procedure establishing a system of rules for market participants- provides “enforcement” to contractual self-regulation. Through certification, the legal effects of the contract are binding not only for the parties, but also before third parties. Thus, the Commission basically acts, in the labour market, as a specialized agency. That is why certification can be considered as a form of indirect regulation.

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(7) In Australia, the “no disadvantage test” regards the correspondence to the law of a company collective contract. It is awarded by the Australian Industrial Relations Commission on the basis of the Workplace Relations Act 1996, amended by the Workplace Relations Amendment Act 2008. For an analysis of the “no disadvantage test” in terms of regulation, see ANDREW FRAZER, *Industrial Tribunals and the Regulation of Bargaining*, in *Labour Law and Labour Market Regulation*, The Federation Press, 2006, p. 223 and p. 241.

(8) The **“Fairness Test”** is a very interesting Australian legal instrument for a possible legal reform (“de jure condendo”) of Certification. Particularly in the direction of enforcing it (“assisted variation by agreement of mandatory rules”). The Australian “Fairness Test”, is regulated by the Workplace Relations Act 1996, Division 5A, Part 8. The “Fairness Test” has been introduced to ensure employees receive fair compensation if they negotiate an agreement which excludes protected conditions of employment. In Australia the Government is in charge of this function, which is provided by the Australian Government Workplace Authority.

The authority and reliability of the Commission, along with the expertise of its members and their ability to render a correct and fair judgement, grant effectiveness to Certification. The legal effects of Certification are to stand between the parties and before third parties and can only be voided by a definitive ruling handed down by a judge of labour in cases initiated by either of the parties or by a third party. Clearly, the effectiveness acknowledged to Certification is in inverse proportion to the number of annulments received.

Under this perspective, the know-how of the Commission is a guarantee of reliability for the parties, but it proves to be also the true added value of Certification: there are no grounds for jurisdictional annulments if certification is issued abiding by principles of fairness, correctness and transparency.

### **1.3 - Certification as an instrument for business organization.**

As the qualification of labour and/or independent contracts is not an abstract test of lawfulness, yet an actual and substantial process which relates to business organization, Certification might be viewed as a useful instrument for employers.

In fact, labour contracts (or independent contracts) and business organization are reciprocally interlocked with another. Thus, traditional vertical business organizations need to substantially redefine their organizational structure if they mean either to externalise their production (independent contracts, supply chains) or to employ flexible workers (quasi-subordinate employment contracts). Flexible labour contracts require, by nature, a flexible business organization.

That is why Certification turns out to be an instrument of business organization. The Certification process, in fact, is a sort of **“audit”** to which enterprises submit their operational organization in order to check its consistency -in terms of flexibility- to the strategies devised by the top management for the company.

The process of the organizational use of Certification normally works as follows:

1.- the top management decides for a flexible strategy. The business organization has to comply with it;

2.- very often, though, the re-organising of the business process is not quick enough. It follows that the employer decides for flexible contracts without being able to provide for a substantial redefinition of an adequate business organization;

3.- the company finds workers willing to work with flexible contracts (or other companies willing to carry out stages of the production process) but, being the organization unprepared to act in a more flexible context, the workers actually risk to lose the protections they would have had with ordinary employment contracts, without gaining benefits in terms of self-organization of their work;

4.- the parties submit their contract for Certification;

5.- where the correct qualification of the contract has been ascertained but the organization is deemed inadequate, the Commission asks the employer to act consequently. Normally this is a sort of “soft push” towards the enhancement of the organization.

All the proposed changes of business organization, at a very operational level, make organization itself more flexible and consistent with the business strategies the top

management wants it to perform. Gaining flexibility in terms of use of the resources, means granting flexibility in terms of organization.

Thus, Certification can be a very useful instrument for the Management of Human Resources, and for business management in general.

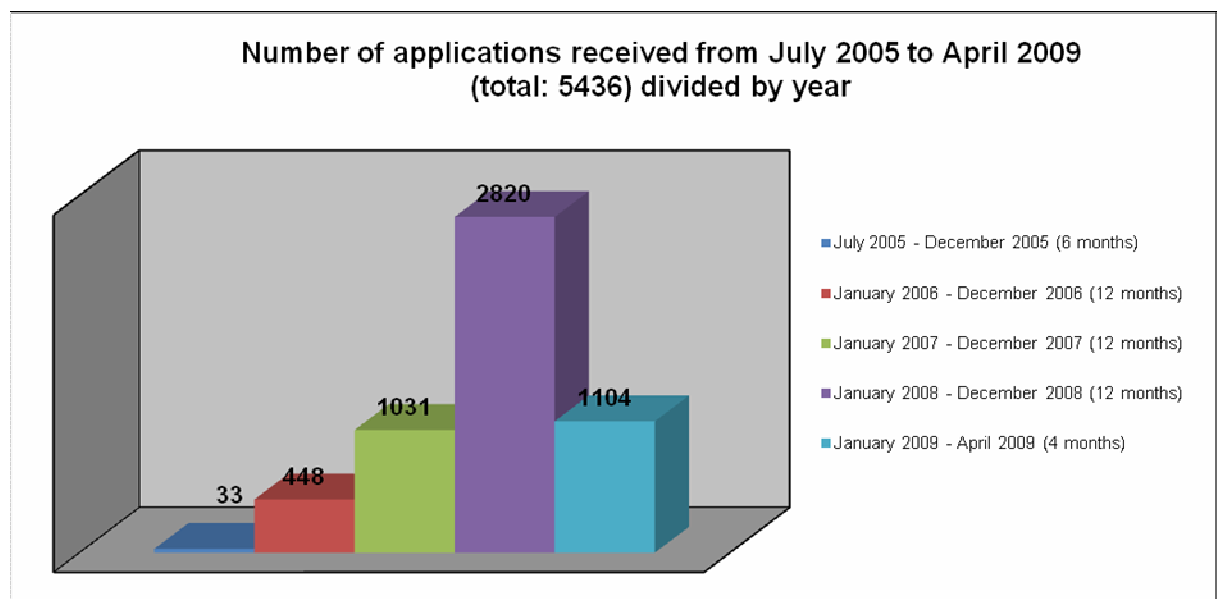
From a regulatory point of view, companies are free to decide flexible strategies. But, if they do so, their contracts (quasi-subordinate employment contracts or supply chain contracts) need to be implemented in a context of flexible business organization.

In this respect, as already underlined, Certification is a sort of “audit”, a test of consistency between strategies and operational organization, between business vision and business practice. Even the denial of Certification is a result of an “auditing” process, though highlighting lack of coherence between strategies of flexibility and actual business organization.

### ***Part 2 - The experience of the Commission for Certification of the University of Modena and Reggio Emilia.***

The following data take into account the cases analyzed by the Commission for Certification of the Marco Biagi Centre for International and Comparative Studies at the University of Modena and Reggio Emilia during the first few years of its activity. These statistics are of great interest, revealing how the certification scheme has been applied by experts at the centre which, since its establishment, has received the highest number of applications in the country. Besides shedding new light on the issue, this data will also lay the foundation for assessing future developments in this field.

#### **2.1.- Number of applications received**

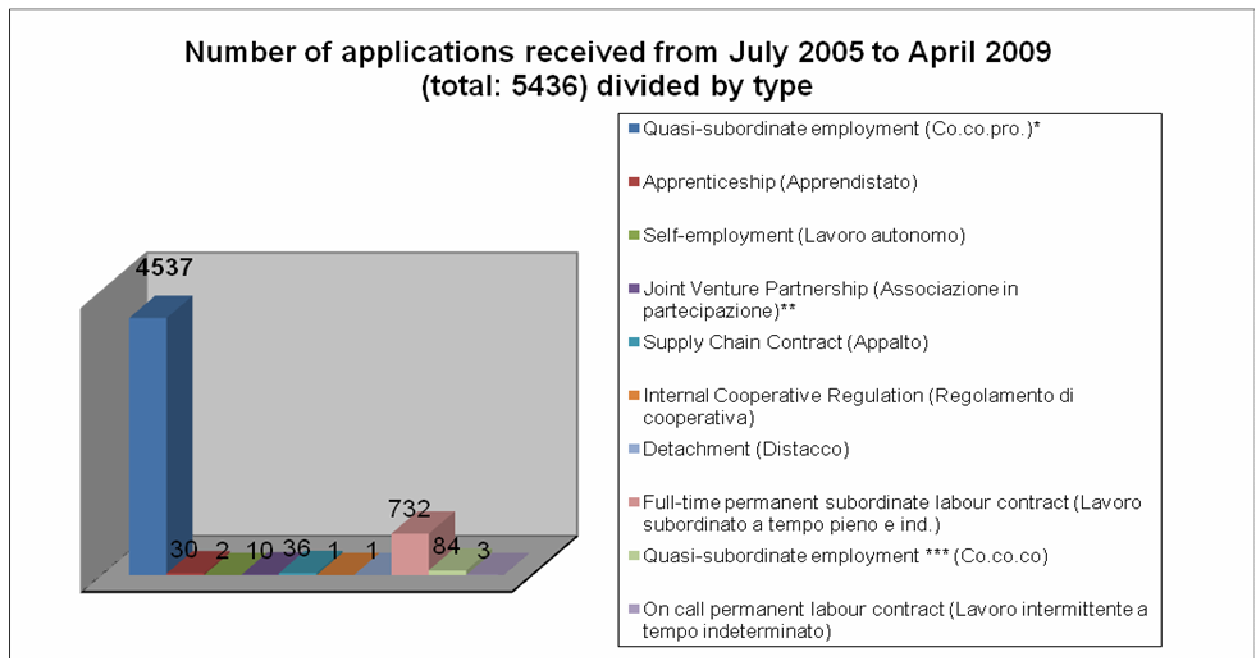


Particularly noteworthy for this analysis is the number of applications received by the Commission, which is equal to 5,436 from July 2005 (the year the Commission was set up)



to April 2009. As clearly shown in the chart above, during the first year employers were not very interested in certification (only 33 applications were received), while after the first year, more consideration was given to the procedure, as confirmed by the number of applications (448, 1,031, and 2, 820 applications in the second, third, and fourth year.). The trend is likely to grow in the fifth year, as shown by the number of applications received in the first four months of 2009 (1,104). It should also be noted that the Commission does not perform any certification during August, as administrative courts are suspended in this period.

## 2.2.- Number of applications received divided by type

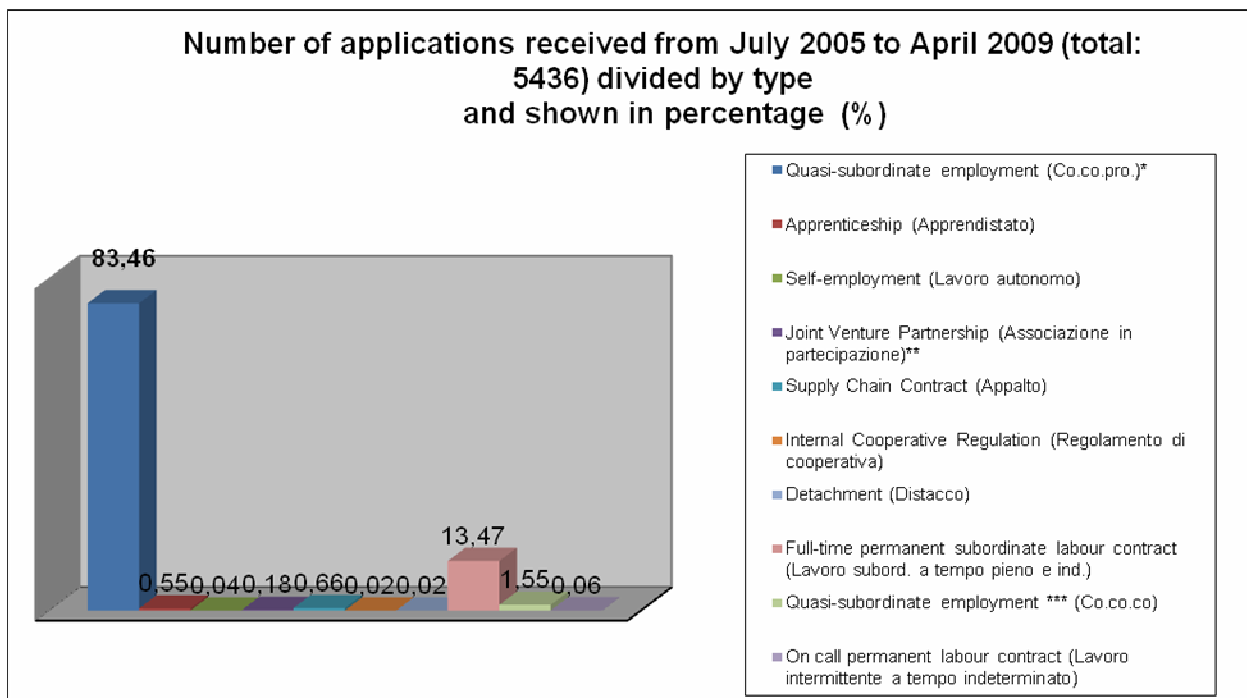


\* work performed personally, on a project basis, with continuity and coordination

\*\* short term partnership in which the persons (individuals or businesses) jointly undertake a transaction for mutual profit.

Generally each person contributes work or assets and shares risks.

\*\*\* work performed personally with continuity and coordination



\* work performed personally, on a project basis, with continuity and coordination

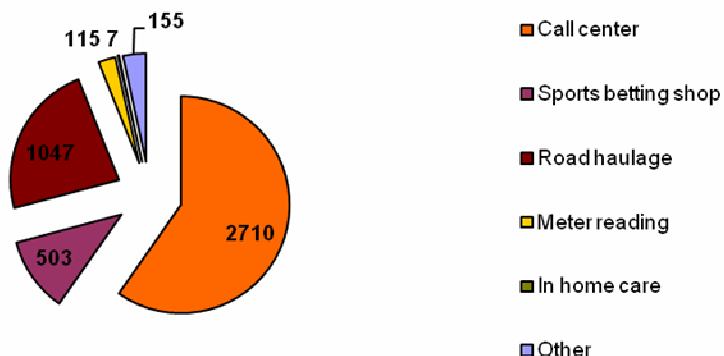
\*\* short term partnership in which the persons (individuals or businesses) jointly undertake a transaction for mutual profit.

Generally each person contributes work or assets and shares risks.

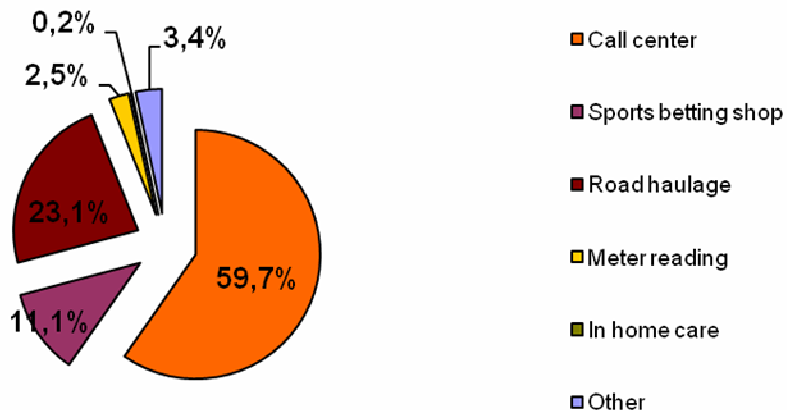
\*\*\* work performed personally with continuity and coordination

With reference to the type of labour contracts submitted for certification, 4,537 (corresponding to 83.46% of the total amount) are those classified as quasi-subordinate employment contracts (project-based employment relationships), confirming that these agreements are the most likely to raise questions in terms of implementation. The rest of the applications received consists of 30 apprenticeship contracts (0.55%), 1 self-employment contract (0.04%), 10 joint venture partnerships (0.18%), 36 supply chain contracts (0.66%), 1 internal cooperative regulation (0.02%), 1 detachment (0.02%), 3 on call permanent labour contracts (0.66%) , 84 quasi-subordinate employment contracts (1.55%), 732 full-time permanent subordinate labour contracts (13.47%). It is also important to consider the differences in the activities of the employers filing applications for quasi-subordinate employment contracts:

Number of applications received for quasi-subordinate employment (co.co.pro) (total: 4537) divided by applicant

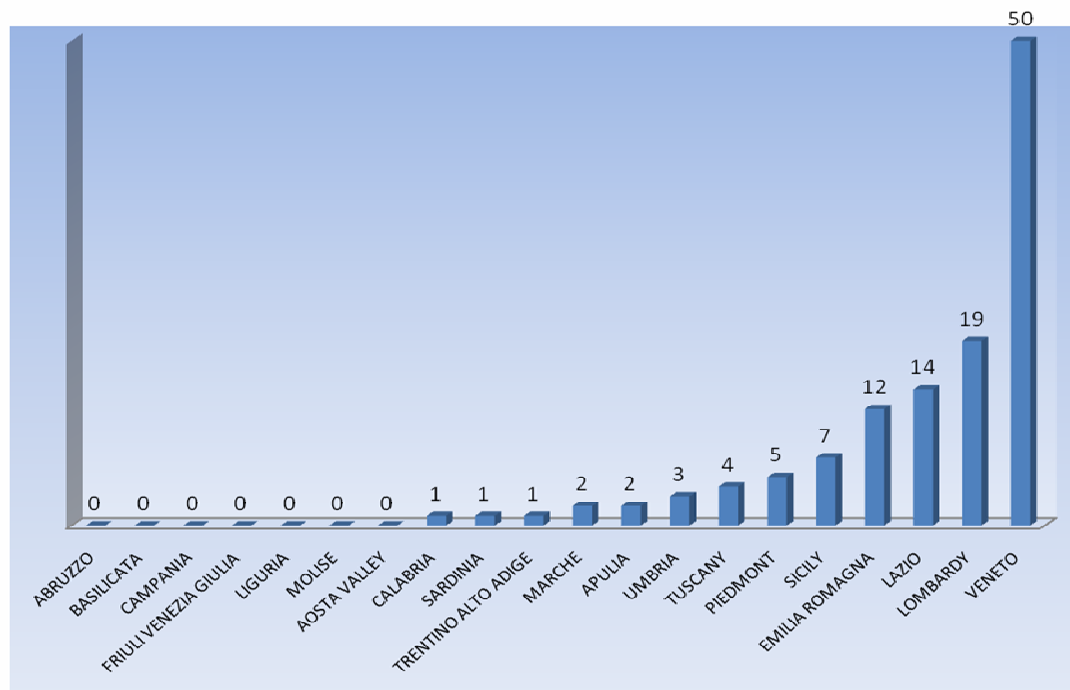


Number of applications received for quasi-subordinate employment (co.co.pro) (total: 4537) divided by applicant and shown in percentage (%)

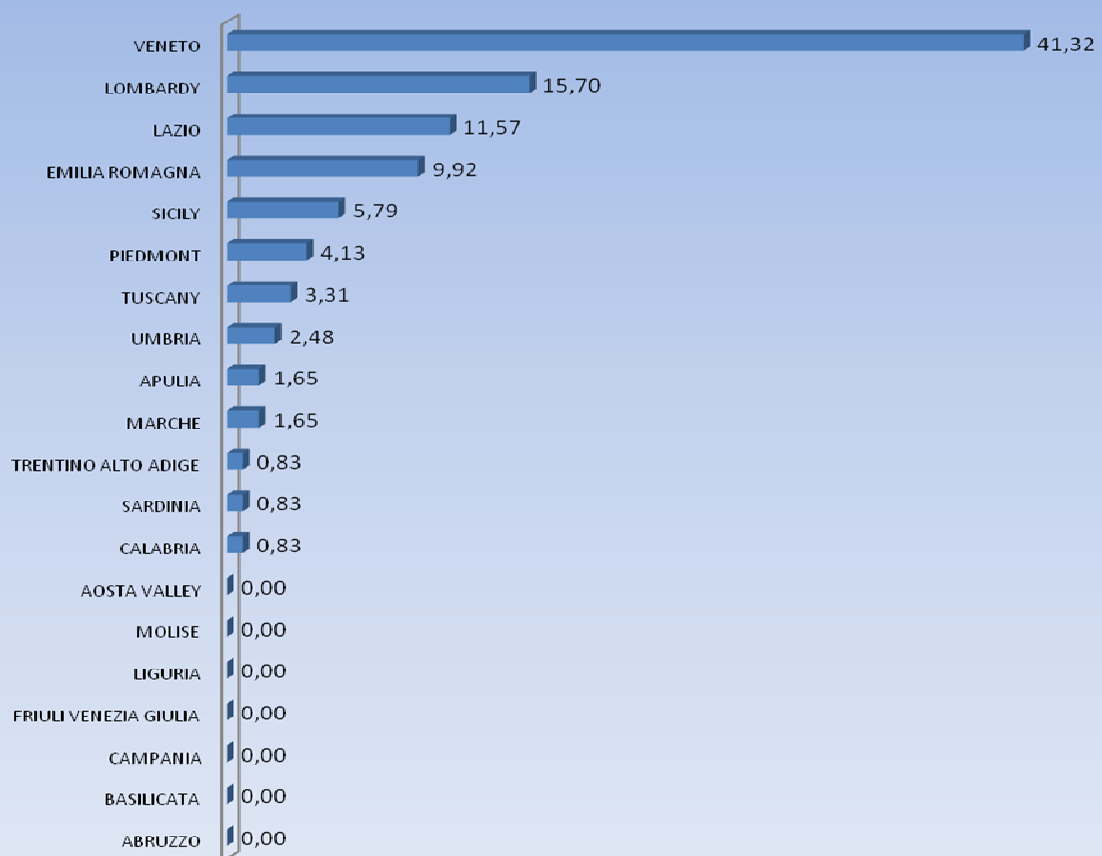


### 2.3.- Number of applying enterprises by Region

**Number of applying enterprises by Region  
from February 2005 to April 2009**

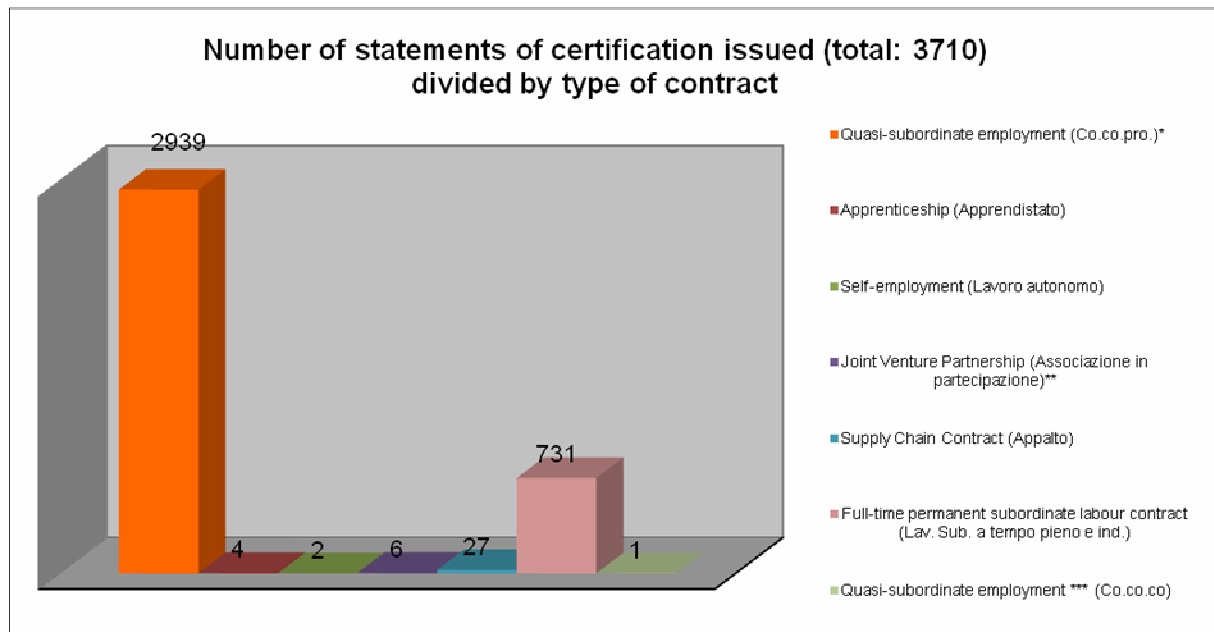


**Number of applying enterprises by Region  
from February 2005 to April 2009 shown in percentage (%)**



Regional data on the issue are also of great significance. According to the chart below, most of the companies that filed the application are based in Veneto (50 applications, corresponding to 41.32% of the total amount), Lombardy (19, 15.7%), Lazio (14, 11.57%), Emilia-Romagna (12, 9.92%), Sicily (7, 5.79%), Piedmont (5, 4.13%), Tuscany (4, 3.31%), Umbria (3, 2.48%), Apulia and Marche (2 companies each, 1.65%), Trentino Alto Adige, Sardinia, and Calabria (1 company each, 0.83%).

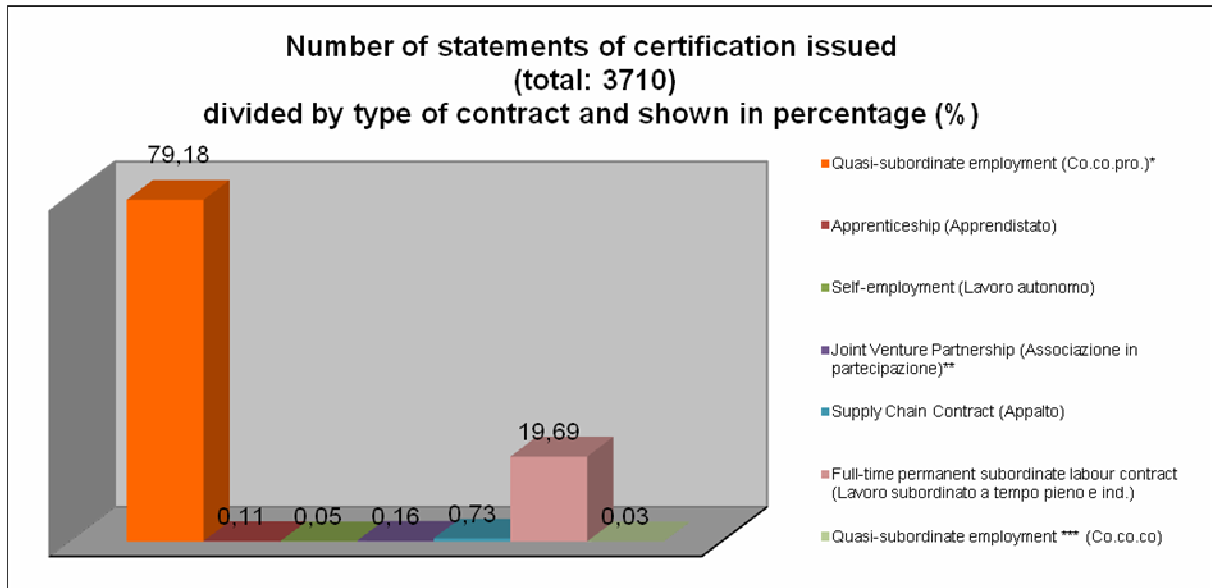
#### 2.4.- Number of statements of certification issued



\* work performed personally, on a project basis, with continuity and coordination

\*\* short term partnership in which the persons (individuals or businesses) jointly undertake a transaction for mutual profit. Generally each person contributes work or assets and shares risks.

\*\*\* work performed personally with continuity and coordination



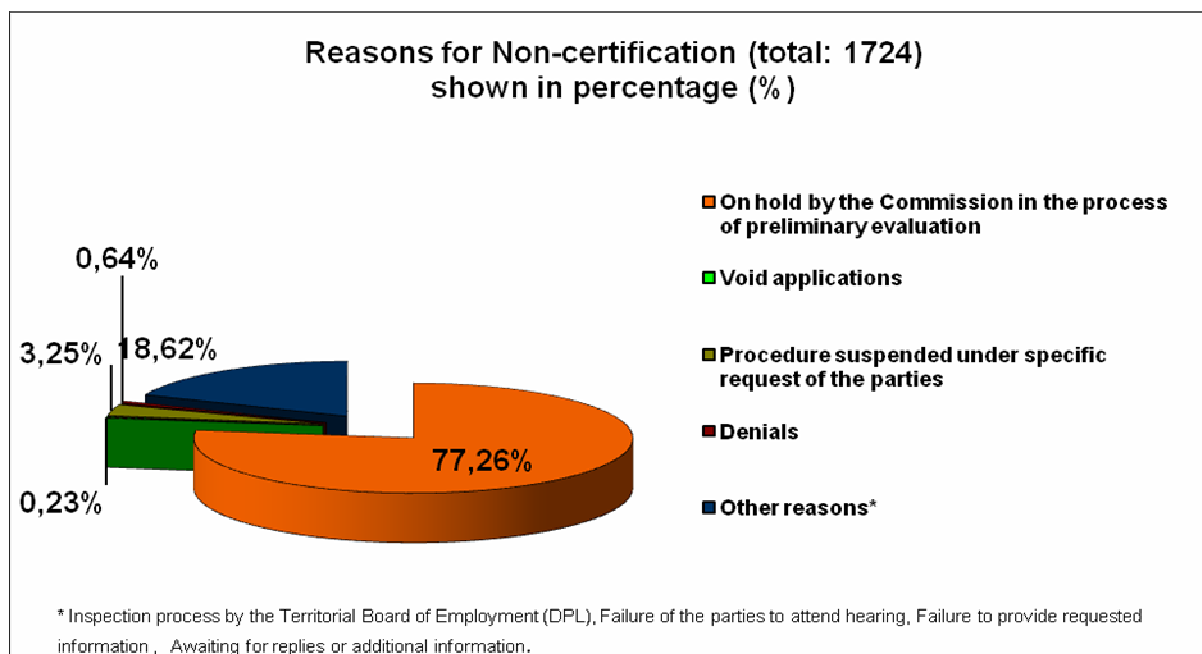
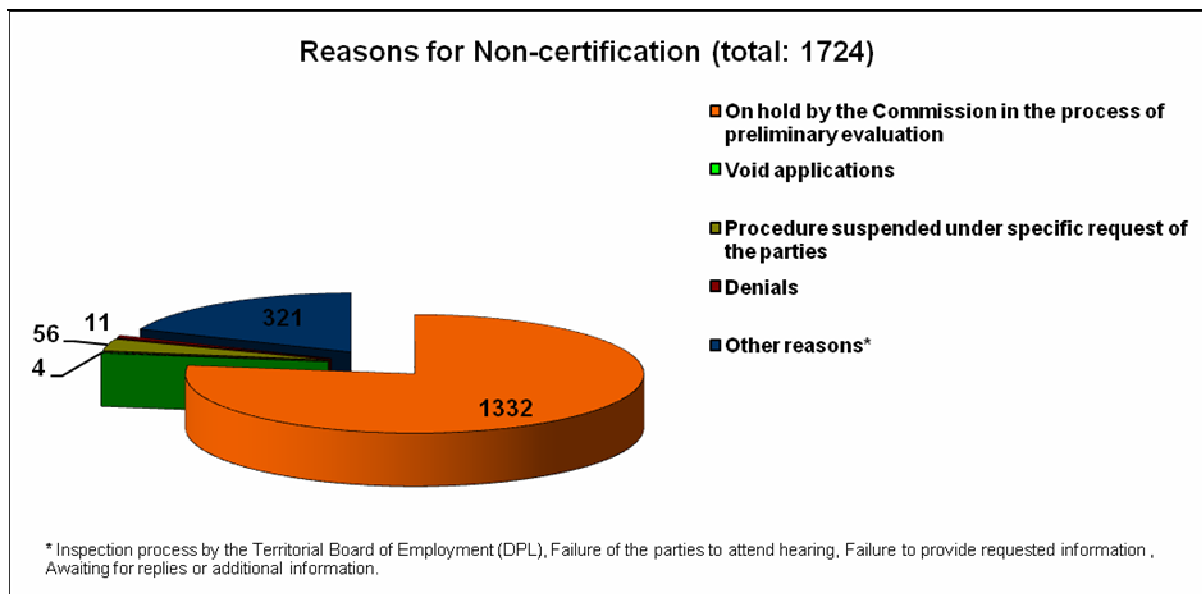
\* work performed personally, on a project basis, with continuity and coordination

\*\* short term partnership in which the persons (individuals or businesses) jointly undertake a transaction for mutual profit. Generally each person contributes work or assets and shares risks.

\*\*\* work performed personally with continuity and coordination

As for the statements of certification issued, out of a total of 3,710 applications approved, 2,393 were for project-based employment relationships (79.18%), 4 for apprenticeship contracts (0.11%), 2 for self-employment contracts (0.05%), 6 for joint venture partnerships (0.16%), 27 for supply chain contracts (0.73%), 731 for full-time permanent subordinate labour contracts (0.03%), and 1 for quasi-subordinate employment contracts (0.03%).

## 2.5.- Reasons for non-certification



With reference to the application issued for an apprenticeship contract, the procedure was suspended, because the company failed to provide requested documentation, and it is likely to be approved only for a limited number of cases. Applications for both internal cooperative regulation and detachment have been rejected. In the first case, it was due to a lack of competence, while in the second case the applicant did not meet minimum requirements to apply for certification.

There are additional reasons for non-certification. In 1332 cases (corresponding to the 77.23% of the total amount), the procedure was suspended by the Commission in the process of preliminary evaluation (mostly due to the presence of a number of clauses not complying with the type of contract chosen by the parties). In 321 cases (18.62%) there are other reasons that led to the rejection of the application (such as the inspection process by

the Territorial Board of Employment, the failure of the parties to attend hearing or to provide requested information). In 56 cases (3.25%) the procedure was suspended under specific (joint or disjoined) request of the parties, while in 4 cases (0.23%) the applications were classified as void. On the whole, there have only been 11 denials.

In conclusion, this data reveals a growing interest in certification, especially once the number of denials are considered, demonstrating that those opting for certification are aware of its high quality and of the value of this regulatory scheme.



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