ISSUES REGARDING THE WORK REGULATION THROUGH THE TEMPORARY WORK AGENCY IN EUROPEAN UNION LAW AND NATIONAL LAW

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Abstract

The present study proposes a comprehensive approach and analysis designed to highlight the evolution of regulations on work through Temporary Agency Work - from the regulations contained in the rules of the International Labour Organisation, of EU law and regulation that institution, temporary work, in Romanian labor law, once with the adoption of the Labour Code by Law 53/2003 - and the need to revise rules on temporary agency work by adopting effective measures for the protection of temporary employees, especially those posted borders. The purpose of this paper is to bring to the fore the need to develop uniform and effective regulations in the temporary employment contract and therefore the parties involved in this report, so that the transposing Directive 2008/104/EC on temporary agency work and other directives implemented in the field: Directive 96/71/EC applicable temporary employment relationships, implicitly the Directive 2014/54/EU on the enforcement of its application, and Directive 2014/67/EU, to continue the harmonization of national rules with EU, reported problems generated by the lack of a legal framework effectively to prevent abuses and misunderstandings arising in the application of legal norms by different state institutions involved in these tasks.

Keywords: *Temporary Agency Work, contract of temporary employment, European Union, Convention, The Directive, temporary workers.*

JEL Classification: K31

1. Regulations for temporary work agency and temporary employment contract

The existing economic and social context all over the world in the inter-war period, near the middle of the 19th century, marked by the great economical crisis in the years 1929-1933, reshaped labour market priorities at both international and European level. The most affected countries in this regard were the United States and Western European states (Germany, France, UK, Netherlands, Sweden, etc.), where unemployment has experienced catastrophic increases, given the increasing number of people remaining without any income and fixed salary dependent. In this situation the idea of public bodies emerged which aimed to find jobs for the unemployed labour force. However, the lack of flexibility of the public system led to the failure of these measures. As a result, more and more private agencies[2] have emerged, that through dynamism and flexibility have proven to be more effective in relation to labour market requirements. In this context, it has become imperative to develop uniform regulations in the field of employment, which led to the enactment by the International Labour Organization, from 1933 until today, of the four conventions and recommendation, demonstrating the importance of these institutions[3]: Convention. 34/1933 of ILO Convention no. 88/1948 of ILO Convention no. 96/1949 of ILO Convention no. 181/1997 of the International Labour Organisation and Recommendation no. 188/1997 of the International Labour Organisation.

On the other hand, at the European level have been adopted mainly directives that refer to temporary work, two of which are directly applicable, namely: Council Directive 91/383/EEC of 25.4.1991 on measures concerning improving safety and health of employees with fixed-term employment contract or temporary; Directive no. 96/71/EC of the European Parliament and of the

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[2] John Maynard Keynes, *The General Theory of Employment, Interest and Money* (1936). „*Teoria generală a ocupării forței de muncă, a dobânzii și a banilor*", translation by Mădălina Corina Haită, Publica Publishing House, Bucharest, 2009, p.312.

[3] Denisa-Oana PĂTRAȘCU, *Istoria reglementării agențiilor de ocupare a forței de muncă la nivelul organizației internaționale a muncii*, in „Noema" Magazine, Vol. XI, Romanian Academy Publishing House, Bucharest, p.303

Council concerning the posting of workers in the framework of services, applicable to temporary employment relationships; Council Directive no. 99/70/EC on the framework agreement on fixed-term work, which refers to temporary and seasonal work and, most importantly, the Directive 2008/104/EC on temporary agency work, the whole issue general rules of form work through temporary employment.

1.1. International Labour Organisation rules on work through temporary employment

So far we have shown, the International Labour Organization, as determined by the socio-economic situation and the state of the labour market, the number of workforce intermediaries was growing, sets the first point on the agenda of the Seventeenth General Conference of the International Labour Organisation, held on 29 June 1933 to the adoption of Convention. 34/1933 on private employment agencies labour. And so, appeared the first regulation that defined temporary employment agency called at that time private employment agency labour in the first article of the Convention which states: "a) private employment agency work performed in order to obtain profit can be any natural or legal person, institution, agency or other organization which acts as an intermediary in order to procure a job for an employee or employees to provide for an employer in order to obtain direct or indirect material benefits from employer or employee; the expression does not include newspapers or other publications except if published in part or in whole in order to act as intermediaries between employer and employee; b) private employment agency work without the for profit, placement services of any company, institution, agency or other organizations which, though not seeking to obtain pecuniary advantages or material order, levy or the employer or the employee for the services set a fee, a periodical contribution or any other charges"[4].

Then, followed the Convention 88/1948 regarding employment agency work and was revised by Convention 96/1949 and Convention 181/1997 of the International Labour Organisation. Of these four conventions are in force Convention 181/1997 - unratified by Romania - and Recommendation 188/1997 on private employment agencies labour.

According to art. 1 of the Convention 181/1997, the private employment agency is any natural or legal person independent of public authorities, which provides one or more of the following labour market services:

„a) private employment agency work carried out for gain, can be any natural or legal person, institution, agency or other organization which acts as an intermediary in order to procure a job for an employee or to provide employees for an employer in order to obtain direct or indirect material benefits from the employer or employee; expression does not include newspapers or other publications except if published in part or in whole in order to act as intermediaries between employer and employee;

b) services consisting of employing workers in order to provide a third individual or entity (the user enterprise), which sets them tasks and work they supervise their execution."

Of the ILO Conventions in employment Romania has ratified just the Convention No. 122 only/1964 on employment policy work, to June 6, 1973.

1.2. EU rules on temporary employment agency work

Regulations in European law refer to temporary work agency, nothing that the Member States of the European Union of a work is frequently used. Convention 181 of 1997 on private employment agencies employment adopted by the International Labour Organization provides that the notion of agency employment jobs means, among other things, any person or entity, independent of public authorities, which providing services consisting of employing workers with the aim of putting to third natural or legal persons, called "user undertaking" that define their tasks and supervises their execution.

[4] Idem, p.304

European Union rules are primarily directives that refer to temporary work, two of which are directly applicable to this type of work, as follows:

- Council Directive 91/383/EEC of 25.4.1991 on measures on improving the safety and health at work of workers with fixed-term employment contract or temporary;

- Directive no. 96/71/Parliament and of the Council concerning the posting of workers to provide services[5], directly applicable and temporary employment relationships as the wording of Article 1, which governs the scope stipulated: "(3) This Directive shall apply to the extent that the undertakings referred to in paragraph (1) shall take one of the following transnational measures:

(a) post workers in the company or under their direction, the territory of a Member State under a contract concluded between the undertaking making the posting and for whom the services operating in that Member State, if a report work between the undertaking making the posting and the worker during the period of secondment or

(b) post workers to the territory of a Member State to an establishment or undertaking owned by the group, if there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

(c) post workers, as temporary employment enterprise or organization has provided a worker, a worker to a user undertaking established or operating in the territory of a Member State, if there is an employment relationship between with temporary employment company or organization that has made and the worker while deployed."

- Council Directive no. 99/70/EC on the framework agreement on fixed-term work, which refers to temporary and seasonal work and, most importantly:

- Directive no. 2008/104/EC[6] on temporary agency work, is the whole issue general rules of this form of work. As stated in the preamble to the Directive, it establishes fundamental rights and principles recognized by the Charter of Fundamental Rights of the European Union[7]. Directive is especially designed to ensure full compliance with Article 31 of the Charter, which states that every worker has the right to working conditions which respect health, safety and dignity, and to limitation of maximum working hours, periods daily and weekly rest periods and to an annual period of paid leave.

Also, in the preamble, the Directive 2008/104/EC refers to the Community Charter of Fundamental Social Rights of Workers[8] adopted at the European Council in Strasbourg on 9 December 1989 by the Heads of State and Government of 11 Member States in particular para. (7), first subparagraph, par. (8) and para. (19) thereof, which states inter alia that the internal market must lead to improved living and working conditions of workers in the European Community; this process will be achieved by harmonizing progress on these conditions, mainly in respect of forms of work such as under a fixed-term employment contract, part-time work, temporary work agency (hereinafter "temporary employment ") and seasonal work.

The principles set out in Directive 2008/104/EC shall be designed to ensure protection of temporary workers of the non-discriminatory, transparent and proportionate treatment to respect the diversity of labour markets and equitable relations between the social partners[9].

The most important principle, which has born controversy both in literature and in the interpretation of certain national courts, because of the way the law transposing Directive Member States is that of equal treatment. In the contents of Article 5 para.(1) Directive establishes temporary

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[5] Directive 96/71 / EC, published in OJ L 18 of 21.1.1997 and entered into force 10.02.1997, the deadline for transposition in the Member States until 12.16.1999, available online at: http://europa.eu/legislation_summaries/employment_and_social_policy /employment_rights_and_work_organisation/c10508_ro.htm#amendingacts

[6] Directive 2008/104/EC, published in OJ L 69 of 13 March 2003, available online at: http://eur-lex.europa.eu/legal-content/RO /TXT/?qid=1447164953343&uri=CELEX:32008L0104

[7] Charter of Fundamental Rights of the European Union, available online at; http://www.refworld.org/docid/3ae6b3b70.html

[8] Community Charter of Fundamental Social Rights of Workers adopted at the European Council in Strasbourg on 9 December 1989, Luxembourg published by the Office for Official Publications of the European Communities, May 1990, available online at: http:www.aedh.eu/plugins/fckeditor/userfiles/file/Conventions%20internationales/Community/Charter_of_the_Fundamental_Social_ Rights_of_Workers.pdf

[9] Nicolae Voiculescu, *Drept social european*, Universul Juridic Publishing House, Bucharest, 2014, p. 211-213

workers employment and working conditions applicable during their assignment at a user undertaking, as at least those that would apply if they had been recruited directly by the company user to occupy the same job. In our opinion, the conditions referred to as art. 1 corroborate those contained in Directive 96/71/EC on the posting in the provision of services, in terms of remuneration of temporary workers during the mission because, for them to establish remuneration levels below those of similar employees of the user contravenes the principle of equal treatment and those established by Directive 96/71/EC. More than that, the main objective of Directive 2008/104/EC is to secure protection and equal treatment of workers performing work in temporary employment, to help create jobs and flexible labor relations.

The principle that temporary workers must be provided with access to employment, collective facilities and vocational training is designed to give temporary workers the same opportunities and following the same rights as workers in the user undertaking, since the provisions of the Directive requires temporary workers to be informed of the existence of any vacancy in the user undertaking to give them the same opportunity to occupy a permanent job as other workers in that undertaking and Member States are required to ensure that any clause prohibiting or preventing a contract of employment or an employment relationship between the user undertaking and the temporary worker after the end of its mission, is null and void or may be declared null and void [para.(2)].

The obligation to inform laid down in article 8 is imposed on user enterprise without prejudice to national and Community provisions on information and consultation which are more stringent and/or more specific and in particular Directive 2002/14/EC the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (1), the user undertaking must provide suitable information on the use of temporary workers when providing information on the employment situation personnel undertaking to bodies representing workers set up in accordance with national and Community legislation. Also, the representation of temporary workers (art.7) must be considered when calculating the threshold above which formed bodies representing workers provided for by Community and national legislation and collective agreements in the user undertaking, in the same way as if they were workers employed directly by the user undertaking for the same period. Therefore, the Directive 2008/104/EC provides in the article 10 that Member States must provide for appropriate remedies for breaches of the Directive by the temporary employment agency or the user undertaking. They shall ensure in particular that administrative or judicial procedures are available to enable proper enforcement of obligations arising from its provisions and shall also determine penalties applicable to infringements of national provisions implementing Directive and shall take all measures necessary to ensure their implementation. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify the Commission of any subsequent amendments to those provisions in a reasonable time. They shall in particular ensure that workers and/or their representatives have adequate means of enforcing the obligations under the Directive.

1.3. National rules on temporary employment agency work

In doctrine, in the specialty literature has been devoted to the idea that labour market could not exist without some legal provisions to regulate, to establish and organize the supply and demand of jobs and labour relations, which implies clearly intervention of state power, legislative and executive, both in terms of normative regulation of these relations and the coercive force designed to ensure compliance with those rules. Generally, state intervention in the labour market and labour relations are reflected in the general regulation stemming from international conventions of which can be mentioned Universal Declaration of Human Rights, International Labour Organisation Conventions - ILO (e.g. Convention. 122/1964 on employment policy labour), EU documents, and the Constitution, translated into legal rules adopted by national legislators. These rules form the legal framework in the field, generically called labour law. It should be emphasized that labour law is obviously a character of protection for employees, establishing a legal minimum mandatory for

employers, except public sector, where the whole system of rights and obligations is specifically regulated by the adoption of special legislation.

Romania's national rules which regulates the temporary employment agency work are as follows:

- Labour Code - Law no. 53/2003, republished, Cap. III, Title III, art. 88-120, the provisions set as amended by Law no. 40/2011, in order to transpose into national law Directive no. 2008/104/EC of the European Parliament and of the Council on temporary agency work;

- Government Decision no. 1256/2011 on the operating conditions and the procedure for authorizing of temporary labour agent.

- The Order nr.208 / 08.02.2012 approving the Instructions on the procedure for authorizing the temporary labour agent, the application of GD nr.1256 / 2011 on operating conditions and the procedure for authorizing temporary labour agent; Annex to the Order nr.208 / 2012 - Instructions and Annex 1, Annex 2, Annex 3, Annex 4, Annex 5, Annex 6 to the instructions approved by Order nr.208 / 2012;

2. Issues concerning the transposition of European law into national law

Trying to find solutions "flexible" labour relations led to the emergence of Law No.40/2011 on the amendment of Law 53/2003 Labor Code, as amended, and it subsequently came to the attention of Romanian employers. Differences in historical and economical context to other economies based flexible working relationships still a reluctance to determine atypical employment contracts. Not only are reluctant employers and employees but the whole society, because this uncertainty provided for work for the unemployed. Short-term employment (fixed-term, part-time employment) are solutions that some employers already use. Another hand will seek other solutions, one of which was hiring through temporary employment.

Temporary employment contract is a species of the individual employment contract[10], specificity derived from a triangular relationship, involving employer, which is temporary employment, the employee - the temporary worker and his labor beneficiary - the user. As legal temporary work resembles posting institution, but for its employees to receive additional rights in cash and in kind, but is not the only difference, so the two institutions should not be confused as often happens even in according to legal practitioners.

The obligation established in Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work, to the Member States by the end of 2011 to adopt regulations to implement the provisions contained in the Directive and after consultation with social partners in accordance with national law, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify wether they are justified reasons, with the adoption by the legislature Romanian Government Decision no. 1256/2011 on the operating conditions and the procedure for the authorization of temporary labour agent and amendments to the Law 53/2003 - Labour Code, work on temporary agency work.

But changes in provisions regarding the work through temporary work agency by themselves did not fully take account of the changes after the entry into force of Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work employment, for example the possibility for a private individual to be temporary work agency. Although it is a form of fixed-term employment, a contract must be entered into on 24 months, although for the latter there is the possibility of extension up to 36 months, the same regulations should be applied and the temporary work agency contract; although it is noted that the temporary employee is available to temporary

[10] Alexandru Țiclea, *Tratat de dreptul muncii – Legislație. Doctrină. Jurisprudență*, IX-th edition, updated, Universul Juridic Publishing House, Bucharest, 2015, p.365; Idem, *Tratat de dreptul muncii*, V edition revised, Universul Juridic Publishing House, Bucharest, 2011, p.351; Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, Universul Juridic Publishing House, Bucharest, 2014, p.529.

labor agent, no specific legal basis, the contract was signed during a mission, and salries and other rights in this range.

It is noteworthy that the Directive stresses in Article 3 paragraph. (2) that "as regards pay, Member States, in consultation with the social partners may provide that it may be an exception to the principle established in paragraph (1) when temporary workers who have entered into an employment contract indefinite with a temporary work agency continue to be paid in between assignments". What does not regulate the Romanian legislator, in this view, is what happens to the temporary employee who enters into a contract of indefinite duration of temporary employment, such as paid? They shall be set in the contract of employment as a undetermined period, being a constituent part of its binding. Between the two missions temporary employee is *ex lege* to the temporary labour agent so he doesn't provide activities but only is at its disposal. Nothing opposes that, over the period of between missions, temporary employee working for temporary employment in one of the forms accepted by the Labour Code, however, consistent with the agreement of the parties, and for it to receive salary[11].

However although the motivation of the bill states that it aims to introduce more flexible working relationships, ensuring the creation of conditions for business development while ensuring the level of protection of employees. The need to promote regulation is motivated by the fact that it was found that the latest amendments to the Labour Code have created a certain rigidity of labour relations, which had negative repercussions on business performance and its ability to grow through investments. Many of the old regulations were offering better protection to employees from those forcing European directives in force so that the new regulations appear to generate reduced to the minimum standards of protection required.

Regulatory differences arising from limitations on temporary labour agent activity by its very good define of the two acts, in the sense that lays in art. 3, paragraph 1 (b) temporary employment as "any natural or legal person in con accordance with national law, concludes contracts of employment or employment relationships with temporary workers in order to provide the user undertakings to work temporarily under their supervision and direction." Romanian legislator refers to temporary employment only at legal person, both by definition within Law 53/2003 Labour Code, republished, under Article 88 para.(3) where "temporary employment is the legal entity authorized the Ministry of Labour, Family and Social Protection, the temporary employment contracts with temporary employees, to provide the user to work on the contract period established by making available under its supervision and direction "and the text GD. 1256/2011 on the operating conditions and the procedure for the authorization of temporary labour agent, published in Official Gazette No. 5 of 4 January 2012, whose article 1, para. (3) states: ,,This decision applies to all legal entities, public or private, authorized as temporary work agencies ..... " and although according to art. 2 para. (1) expressly provides that "people can engage the purpose of making assignments for the benefit and at the request of a user, as defined in Art. 88 para. (4) of Law no. 53/2003 - Labour Code, republished, under its supervision and direction, only legal persons authorized under this decision. "

Due to inconsistencies and ambiguities arising in practice and reiterated in previous sections of this study, in January this year was published Law 12/2015 amending the Labour Code which clarifies some aspects of temporary labor, in terms of how wage temporary workers. Thus, Law 12/2015 provides: "(3) Salary received temporary employee for each mission can not be lower than that which the employee receives user who perform the same job or one similar to the temporary employee. (4) If the user does not have committed such an employee, the salary of the temporary employee will be determined taking into account the salary of a person employed by individual labor contract and providing the same or similar work as established by collective agreement applicable to the user. "Therefore, the temporary employee will be paid at least a permanent employee who performs the same work. The article 3 of the Law 12/2015 complements article 92 of

[11] Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii,* Universul Juridic Publishing House, Bucharest, 2014, p.531.

the Labour Code, which summarizes user obligations on temporary workers: that is, to provide access to all the services and facilities under the same conditions as their employees and ensure provision of PPE protection and working conditions, if the latter is not in charge of the temporary labour agent established by the contract for the provision.

3. Conclusions

The issue of remuneration of temporary employee who enters into a contract of indefinite duration with temporary employment remains, salary is set at termination of employment on indefinite period, being a constituent element of its binding. As shown, between the two missions, the temporary employee is *ex lege* to the temporary employment at its disposal, so it not provide any activities. It is true that nothing precludes that, on the duration between two mission, the temporary employee working for temporary employment, in one of the forms permitted by the Labour Code and in accordance with the parties consent, and for this to receive wages, however, seen in practice, this is only theoretical, in fact, between the two missions of the employee often does not work and is not paid, and here we return to the same idea, that the legislature does not capture all aspects of temporary work.

It would also be desirable that the transposition of European legislation into national law to operate with utmost responsibility and be subject to constant analysis, consistent with the practical realities, so as to avoid inequities and disruption in the social and economic environment. We mean by this statement, both the provisions of Directive 2008/104/EC on temporary agency work and other directives in the field application, Directive no. 96/71/EC applicable to temporary employment relationships - implicitly Directive 2014/54/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), and Directive 2014/67 / EU, harmonization of national rules with EU norms so that they are reported the problems that the lack of an effective legal framework can generate, preventing misuse and confusion arising in the application of legal norms by different state institutions involved in these tasks.

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