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Even if not provided for by internal legislation temporariness is a mandatory requirement for the lawfulness of agency work in accordance with Directive 2008/104/EC (IT)

CONTRIBUTOR Ornella Patané*

Summary

The Italian Supreme Court has held in three different decisions of 2022 that, even if not provided for by Italian legislation, temporariness is a mandatory requirement for the lawfulness of agency work in accordance with Directive 2008/104/EC. Italian courts must therefore define, on a case-by-case basis, if the reiteration of agency work assignments at the same user undertaking can be considered in violation of the Italian legislation and the EU rules.

Legal background

Italian legislation on agency work provides for detailed regulation of the assignment of an agency worker at a user undertaking, which can be either open-ended or fixed-term.

Regarding fixed-term agency work, Italian legislation provides that the lawfulness of such work is not subject to (1) the existence of any reasons to justify its use, (2) a maximum duration of the different agency work assignments at the same user undertaking, or (3) a limitation on the number of renewals or extensions of the same fixed-term contract. Italian legislation provides only for quantitative limits of use as indicated by national collective bargaining agreements applied by the user undertaking.

Directive 2008/104/EC (the 'Directive') on temporary agency work defines agency workers as workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and direction. The term 'temporary' is used also in the definition of work agency, to underline the temporariness of the work carried out at the user undertaking.

In two decisions (*JH – v – KG*, C-681/18 and *NP – v – Daimler AG, Mercedes-Benz Werk Berlin*, C-232/20), the ECJ held that the term 'temporary' used in the Directive has the purpose of defining the way to put a worker at the disposal of a user undertaking: therefore, it is apparent from the definitions used in the Directive that the employment relationship with a user undertaking is, by its very nature, temporary.

In accordance with the above, Article 5(5) of the Directive provides that Member States take appropriate measures to prevent misuse in the application of Article 5 of the Directive concerning the principle of equal treatment and, in particular, to preventing successive assignments of temporary agency work designed to circumvent the provisions of the Directive.

In *JH – v – KG*, the ECJ held that Article 5(5) of the Directive must be interpreted as not precluding national legislation which does not limit the number of successive assignments that the same agency worker may fulfil at the same user undertaking and does not make the lawfulness of the use of temporary agency work subject to the prerequisite that it must be justified by technical, production, organisation or replacement-related reasons. On the other hand, that provision must be interpreted as precluding a Member State from taking no measures at all to *preserve the temporary nature of temporary agency work* and as precluding national legislation which does not lay down any measure to prevent successive assignments of the same temporary agency worker to the same user undertaking to circumvent the provisions of the Directive as a whole.

The ECJ's judgment in *Daimler AG* confirmed that the duration of the assignments through a work agency at the same user undertaking must be temporary, meaning limited in time. Therefore, where Member States did not establish the maximum duration of successive assignments, national courts must provide this maximum duration on a case-by-case basis, according to all the circumstances of the case such as the industry con-

* Ornella Patané is a partner at Toffoletto De Luca Tamajo, Milan.

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cerned, and ensure that successive assignments at the same user undertaking do not represent a circumvention of the Directive.

Facts and initial proceedings

The three decisions concern the challenge by three different agency workers of successive assignments at the same user undertaking.
In two decisions (nos. 23494/2022 and 23499/2022), the challenge was considered valid by the courts of first instance only for the latest contract while claims regarding previous contracts were time-barred and thus were no longer challengeable. On that basis and considering that Italian legislation does not provide for limitations (in terms of technical, production, organisation or replacement-related reasons to be put to justify the fixed-term, nor in terms of maximum duration of the different agency work contracts with the same user undertaking, nor of the number of renewals or extensions of the same fixed-term contract) the courts of first instance held that the most recent fixed-term agency work was perfectly valid.
In the third decision (no. 23497/2022) the agency worker challenged the use of multiple contracts as there were no reasons supporting the duration of the temporary assignment. In this decision as well, the court of first instance found the use of successive agency work contracts valid since the claimant never actually challenged the reasons put to justify the temporariness and there was no specific rule in the Italian legislation forbidding multiple fixed-term agency contracts at the same user undertaking.

Judgment of the Supreme Court

Based on the Directive, the Italian Supreme Court held that even if the Italian legislation on agency work does not provide for a maximum duration of an assignment or successive assignments at the same user undertaking, the national court must verify if, according to the concrete circumstances of the case, the successive assignments can be considered in violation of the Directive's principle of temporariness.
According to the three decisions of the Supreme Court, the Directive must be applied in the national jurisdiction even if it cannot have direct effect allowing individuals to invoke an EU law provision before a national court. This is because of the general obligation on Italian courts to apply national laws in accordance with the Directive, coming directly from the Italian Constitution (see the decisions of the ECJ expressing this principle in decisions C-397/01 and C-403/01, as well as C-467/18).
In the light of this principle of interpretation, the fact that Italian legislation on work agency does not provide explicitly for the temporary duration of the assignments does not exclude the possibility to consider the temporariness as a mandatory requirement that must exist also in the Italian legal framework, in accordance with EU Directives.
It is a specific duty of the national courts to establish on a case-by-case basis and in the light of concrete circumstances if the successive assignments of an agency worker at the same user undertaking can be reasonably considered temporary. The violation of this rule coming from the Directive can lead to the nullity of multiple work agency contracts.
To complete this assessment the Italian courts must follow the principles indicated by the ECJ in the above-mentioned decision *JH – v – KG*, according to which the court must verify if the multiple assignments of the same agency worker at the same user undertaking lead to a duration of his/her activity longer than what can be reasonably considered temporary: this can be considered as an abuse of the temporary agency work in accordance with Article 5(5) of the Directive. Indeed, multiple agency work assignments at the same user undertaking can compromise the balance realized by the Directive between the flexibility in favour of the employer and safety of the workers, at the expense of the latter.
Furthermore, the national court must verify if no reason is supplied by the user undertaking to use the same agency worker for multiple successive assignments.
The Supreme Court therefore concluded that the courts of first instances had not assessed the concrete circumstances of the cases as indicated by not considering the structural temporariness of the agency work even in the absence of national limitations provided for in the law.
The above conclusion applies also where, according to Italian law, in a case of multiple contracts, the previous agency contracts could not be considered because they were not challenged in time. Indeed, the Supreme Court held that the sequence of multiple contracts can be considered by the court in order to assess if the reiteration of those contracts with the same worker at the same user undertaking can be considered in breach of the temporary nature of the agency work, even if the previous contracts can no longer be examined in themselves because the challenge of them is time barred.

Commentary

The three decisions are very important at least for the following two reasons: (1) they confirm the principle according to which Italian courts are obliged to construe Italian legislation in accordance with EU rules, and (2) they introduce in our legislative system the requirement of temporariness for agency work contracts even if this requirement is not specifically and explicitly provided for in the system.
However, it worth mentioning that in the absence of a specific rule in our system, the requirement of temporariness is left to the interpretation of the courts who can assess the temporary nature of an agency work contract

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in different ways. This is detrimental for companies in that they do not have the certainty to use agency work in a proper and legal way.

Comments from other jurisdictions

Austria (Dominik Stella, Burgstaller & Preyer Rechtsanwälte GmbH): Like Italian law, the Austrian Act on Temporary Agency Work ('AÜG') does not provide for a limit on the duration of temporary agency work nor for a limit on the number of successive assignments. On the contrary, the AÜG expressly states that assignments lasting several years – even more than four years – are permissible. Of course, the Austrian legislator and Austrian courts are bound by the requirements of Directive 2008/104. Should the Directive, therefore, contain a prohibition of certain forms of temporary agency work, this would have to be respected in Austria. According to the ECJ, national law violates the requirements of EU law (and must therefore be adapted) if it allows the abusive use of temporary agency work. Conversely, this means that there is no need for adaptation if the law can be interpreted in a way that effectively prevents the abusive use of temporary agency work within the meaning of Article 5(5) of Directive 2008/104. There is no need for explicit regulations because, according to the ECJ, the Member States are not obliged to adopt specific measures. They are only prevented from providing for no measures at all.

According to the ECJ, the instrument of temporary agency work is abused when successive assignments result in a period of employment that is not merely temporary and the user undertaking has no objective justification for it. To date, there have been no proceedings in Austria comparable to the Italian cases. However, should Austrian courts decide a similar case, it is most likely that Austrian law would be interpreted in such a way as to effectively prevent successive assignments without justification. The starting point could, for example, be Section 8(2) AÜG, according to which agreements between the temporary work agency and the user undertaking that serve to circumvent statutory provisions protecting the employees are prohibited. Violations of this provision are not only subject to administrative fines. The temporary work agency also risks the revocation of its business licence for agency work. From a civil law perspective, such agreements between the temporary work agency and the user undertaking would be null and void. These public law and civil law sanctions would most likely be considered 'effective, proportionate and dissuasive' within the meaning of Directive 2008/104. As in the Italian cases, Austrian courts would, therefore, verify if according to the concrete circumstances of the case the successive assignments can be considered in violation of the Directive's principle of temporariness. In doing so, they would also refer to the criteria established by the ECJ in the *JH – v – KG* and *Daimler AG* cases for an abusive use.

Germany (Rebekka Barthold, Luther Rechtsanwaltsgesellschaft mbH): Unlike in Italy, in Germany there is national legislation that deals with the requirement of temporariness of agency work. In particular, the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*, 'AÜG') provides for a maximum temporary employment period for agency workers of 18 months (Section 1(1b) AÜG). Furthermore, the period of previous assignments by the same or another temporary work agency to the same user undertaking is to be counted in full if the period between individual assignments does not exceed three months. Thus, under German law, so-called 'chain-assignments' of agency workers are explicitly forbidden. These national legal requirements are fully in line with the requirements of Directive 2008/104 and decisions of the ECJ and specify them on a national level.

However, in Germany, the legal situation regarding the requirement of temporariness of agency work is not quite as clear-cut as it may seem at first glance. This is due in particular to the fact that the aforementioned maximum duration of 18 months can be waived by collective agreements. This option has been used almost unrestrainedly – many collective agreements contain a maximum duration of many more years; for example a current collective agreement contains a maximum transfer period of even 45 years. The German Federal Labour Court recently ruled that a duration of 48 months is permissible (BAG, 8 November 2022, 9 AZR 486/21).

Thus, German legislation allows the long-term use of agency workers via the back door if a collective agreement of the user industry permits this – in favour of collective bargaining autonomy. This is why there are also discussions in Germany about the temporariness of agency work.

While it is clear that temporariness itself is a requirement for the lawfulness of agency work, the question that arises above all is up to which duration agency work can still be considered as 'temporary'.

Ultimately, the German legal situation – despite existing statutory regulations – leads, just as in Italy, to the situation that the requirement of temporariness of agency work, or the potential circumvention of this principle, must be reviewed by the courts on a case-by-case basis.

Since there is the danger of a great heterogeneity in jurisdiction and legal uncertainty – also in international comparison – it is to be assumed that the ECJ will not be able to avoid the specification of the term 'temporary' in the sense of the Directive in the long run. Until then, in the German legal system, at least when there is a bargaining agreement, the interpretation is left to the national courts, which have to interpret the requirement of temporariness for agency work contracts in the light of Directive 2008/104 – as it is the case in Italy.

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