Community and National Provisions for Temporary Work Agencies. Trends in the Evolution of Temporary Work Agencies and Temporary Workers

Maria-Cristina ICHIM (BĂLĂNEASA)¹

¹ Ph.D. candidate, The Bucharest University of Economic Studies, Romania. ichimmaria21@stud.ase.ro

Abstract: The temporary work agent is an important player in the EU labor market from the perspective of labor flexibility. The evolution of the national legal framework on the regulation of the establishment and operation of the temporary work agent in accordance with the European provisions - Directive 2008/104 / EC - is an important issue to consider in this article because the national legal frameworks had to be adapted after 2008 in accordance with the Community law, in order to ensure the protection of temporary workers. Last but not least, the trends on the European labor market are also interesting from the point of view of the employment degree based on the services of temporary work agents.

This paper aims to analyze the evolution of the Romanian legal provisions regarding temporary work agencies since the entry into force of the 2003 Labor Code to present day, emphasizing on the debate regarding the licensing, registration and the withdrawal of license procedure for a temporary work agent in our country. At the end of the article, we will present the number of temporary work agencies licensed in Romania, but also the percentage of employees recruited through temporary work agents in EU countries during the period 2011-2020, in order to highlight the degree of use of this type of workforce.

Keywords: *temporary work, temporary work agent, licensing and operation*

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1. The development of the national legal framework for the regulation of the licensing and operation of the temporary work agencies in accordance with Community law - Directive 2008/104 / EC. The concept of temporary work agent

By adopting Directive 2008/104 / EC, the European Parliament and the Council of the European Union wanted to create a harmonized framework regulating the activity of temporary workers recruited through temporary work agencies in the European Union (European Parliament & European Council, 2008). The Directive provides that the temporary work agency is “any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction”. The labor contracts can be concluded for an indefinite or a determined duration, and for each mission there is the possibility to conclude a separate fixed-term employment contract (Ștefănescu & Beligrădeanu, 2011).

Therefore, in Europe, temporary work is regulated by Directive 2008/104/EC which “governs a triangular legal relationship, in which the worker carries out their activity not for the benefit of their employer, but for the benefit of a beneficiary, for whom they are sent to work” (Dimitriu, 2018).

According to article 87 paragraph 3 of the 2003 Labor Code, in its unamended version (Romanian Parliament, 2003), the temporary work agent is defined by the legislator as a “legal person that is licensed by the Labor and Social Solidarity Ministry to temporarily provide the user with qualified and/or unqualified staff, that the user undertaking hires and pays for this purpose” (Dimitriu, 2008).

By regulating temporary work, the Romanian legislator was inspired by the law of other states, especially by the French legislation, which, in its turn, was inspired by the English and the American provisions (Țiclea, 2010).

In order to make the labor market more flexible, the labor legislation in Romania has undergone multiple changes. Thus, by Law 40/2011 (Romanian Parliament, 2011) the institution of the temporary work agent was almost completely revised, in accordance with the European Directive 2008/104/EC, in order to remove any restrictions or prohibitions on the use of temporary work.

The 2003 Labor Code, which has been in force for 7 years (until 2011), failed to impose temporary work as an alternative employment (Cărtianu et al., 2011). Consequently, by art. 88 paragraph 3 of Law no. 40/2011, a series of amendments

were introduced, which also aimed at redefining the notion of temporary work agent as follows: “The temporary work agent is a legal person, authorized by the Ministry of Labor, Family and Social Protection, which concludes temporary employment contracts with temporary employees, to make them available to the user, to work for the period established by the provision contract under their supervision and management. The operating framework of the temporary work agent, as well as the licensing procedure are established by a decision of the Government” (Romanian Parliament, 2011; Pătrașcu, 2012a, 2012b).

Previously, the restriction only concerned companies. By defining the temporary work agency as an authorized legal person, the scope of the legal provision became wider, without reaching the full spectrum of cases covered by Article 3 (b) of the Directive 2008/104/EC, according to which a "temporary work agency" is any natural or legal person who, in accordance with national law, concludes employment contracts or employment relationships with temporary workers in order to make them available to user undertakings, to temporarily work under their supervision and management. Thus, any legal person whose main object of activity is “Activities of contracting workers on a temporary basis, according to the NACE code” - amendment 7820, can get licensed as a temporary work agent. Considering the existence a commercial contract in this triangular relation, finalized with obtaining a profit, we can exclude from the sphere of legal persons those with a non-profit purpose. Thus, civil societies, commercial companies and economic groups can become temporary work agencies (Pătrașcu, 2012a, 2012b; Ticlea & Georgescu, 2019).

Regarding the provisions on the licensing, operation and authorization procedure of the temporary work agency in Romania, the first regulation was Government Decision No. 938/2004, repealed by Government Decision. no. 1256/2011 (Government of Romania, 2011). Thus, neither the normative act from 2004, nor the Labor Code, in its unamended version from 2003, allowed other categories of legal persons (or even natural persons who, according to the Labor Code, can become employers) to carry out these activities (Anescu & Anescu, 92).

Following the entry into force of the Government Decision no. 1256/2011 (Government of Romania, 2011), but also of the Order of the Minister of Labor, Family and Social Protection no. 208 / 08.02.2012 (Ministry of Labor, Family and Social Protection, 2012) for the approval of the Instructions regarding the authorization procedure of the temporary work agent, in order to apply the Government Decision no. 1256/2011, both the authorization procedure and the operating conditions for the temporary work agent have undergone important

changes, including those relating to the establishment, licensing and the withdrawal of the license. Moreover, the Government Decision no. 1256/2011 expressly speaks to us about the legal persons operating under the rule of public or private law, that are authorized to be temporary work agents.

Therefore, the regulation of temporary work and the contracts based on which it is performed can be found in Romanian law in the following texts: the Labor Code (art. 88-102); the Government Decision no. 1256/2011 on the conditions for the establishment, operation and authorization procedure of the temporary work agent; the Order of the Minister of Labor, Family and Social Protection no. 208/2012 (Dimitriu, 2018).

The current national provisions on temporary work do not fully meet the current needs of the parties involved in the triangular employment relationship, with some shortcomings and inaccuracies in relation to Directive 2008/104/EC of the European Parliament and of the Council of November 19th, 2008 on temporary agency work. According to some experts (Naubauer, 2011), it would be necessary for the national legislation (the Labor Code, but also the licensing and authorization provisions) to be adapted according to Directive 2008/104/EC, in the sense that a temporary work agent can be any natural or legal person (Marica, 2019).

The legislation and the doctrine mention that both natural and legal persons can be user undertakings (Dimitriu, 2016). Regarding the use of temporary workers, employed through temporary labor contracts, other doctrinal opinions can be considered (Vartolomei, 2016).

2. The licensing of the temporary work agent in Romania: conditions

The licensing of the applicants is made by the Ministry of Labor and Social Justice at the proposal of the territorial agencies for social benefits in whose territorial area they have their headquarters (Vieriu, 2019).

In order to obtain this license, the temporary work agent must meet the conditions provided by the Government Decision no. 1256/2011 on the operating conditions and the authorization procedure for temporary work agents. The conditions of establishment and operation, as well as the licensing procedure of the temporary work agent are established by a Government decision.

Given the triangular relationship resulted from making the temporary worker available to the user by the temporary work agent, the legislator sought to create safety elements that would ensure the legal rights of temporary worker are not circumvented (Pătrașcu, 2012a, 2012b).

In order to obtain the operating license as a temporary work agent, the legal person has to meet a series of conditions, according to the Government Decision no. 1256/2011 (Bălăneasa, 2021): to be established as a legal person; the activity of hiring temporary workers must represent its basic activity; the legal person has no unpaid tax obligations; the analysis of the documents presented for licensing must not reveal any contravention sanctioned issued with regard to the financial or customs legislation, or concerning the financial discipline, or any contravention sanctions received in the last two years for deeds related to the labor, financial or customs legislation. Another condition is to set up a financial guarantee by depositing a sum of money in a Romanian bank account, a guarantee that covers the equivalent of 25 gross minimum basic salaries per country, to which will be added the contributions for risky conditions and work related accidents in the amount of 2.25%, according to the current legislation. A final legal condition is not to be in the course of bankruptcy or liquidation proceedings.

The financial guarantee is to be used in the payment of the salary for the temporary workers, but also of the other monetary rights, negotiated at the conclusion of the temporary employment contract and of the tax contributions due by the temporary workers to the state budget. Thus, the financial guarantee will be used only if the temporary work agent does not have sufficient funds to pay these debts resulting from wages or taxes. If the agent does not have the entire amount of the financial guarantee in their bank account, will be obliged, according to art. 5 paragraph 6 of Government Decision no. 1256/2011, to reconstitute it in full in 5 days from the date of reduction (Government of Romania, 2011).

3.The procedure for making the application and issuing the temporary work agent's operating license

Art. 6 of the Government Decision no. 1256/2011 provides for the procedure to be followed for issuing the operating license (Government of Romania, 2011).

Thus, according to this normative act, the applicant will have to submit a file that must contain the documentation showing the fulfillment of the legal conditions for licensing to the registry of the County Agency for Payments and Social Inspection in whose territorial area they have their headquarters. The Agency will verify the documentation within 10 days of the registration of the application for licensing, requesting, if necessary, the completion of the file. The Agency will draw up a Report on the verification of the submitted application and, together with the

documentation, will submit them to the Ministry of Labor, in order to be analyzed and for the license to operate as a temporary work agent to be issued.

The Employment and Payroll Directorate, through the Employment Service within the Ministry of Labor, evaluates the fulfillment of the licensing conditions, based on the documentation submitted by the County Agency for Payments and Social Inspection and can propose: issuing the license to operate as a temporary work agent, completing the documentation by depositing the missing documents to the County Agency for Payments and Social Inspection. If the completion is not been made within the time limit mentioned above, the application for licensing will be rejected. This preliminary procedure is necessary in case of appeal to the contentious court for administrative disputes (Pătrașcu, 2012a, 2012b).

The applications for licensing as a temporary work agent shall be resolved by the Ministry of Labor, Family and Social Protection within 30 days from the date of their registration or within an appropriate extended period, in case of allowing an extended term of 7 working days for completing the file. Following the settlement of the appeal to the administrative body who was supposed to issue the license, the applicant will be able to file a lawsuit according to the Law on Administrative Litigation no. 554/2004 within 30 days from the date when the decision was communicated to them (Romanian Parliament, 2004).

According to art. 9 paragraph 2 of Government Decision no.1256 / 2011 and Order no. 208/2012, the license is issued for a period of 2 years, and can be extended by another 2 years if the necessary documentation is submitted to the initial authorization no later than 3 months before the expiration of the 2-year term. The procedure for extending the operating license by another 2 years will be identical to the original licensing procedure. According to the Military Ordinance no. 3 / 24.03.2020 on measures preventing the spread of Covid-19, "The documents issued by public authorities that expire during the state of emergency, may be extended within 90 days from the date of cessation of the state of emergency".

The provisions in force also speak of the withdrawal of the operating license if the conditions necessary for operation are no longer met.

4. Trends in the evolution of the number of licensed temporary work agencies and the use of temporary work in Romania and in the European Union

The Ministry of Labor, through the specialized directorate, completes the Register of licenses issued nationwide and publishes it by updating the data on its

website (Ministry of Labor, Family and Social Protection, 2021). Within 15 days after licensing, the temporary work agent will be registered in the register according to the Government Decision no. 1256/2011 and Order no. 208/2012. The registry will contain the following data: the current number, the name of the temporary work agencies (the denunciation of the legal entity), the headquarters, the tax code/unique registration code, the telephone/fax number, the number/series/date of the license, the date of extension for the license and the date of withdrawal for the license (Minister of Labor, Family and Social Protection, 2021).

According to the data posted on the official website (Ministry of Labor, Family and Social Protection, 2021), during 2007-September 2021, a number of 1240 temporary work agents were registered in Romania. There was an increase in the number of agents who submitted an application and whose application was approved. During May 2007 and February 2016, 822 temporary work agents were registered in Romania. It was found that, only in five years, the number of temporary work agencies increased by about 418. In 2021 (including September 2021), 72 new temporary work agencies were registered in our country (Bălăneasa, 2021).

By analyzing the platform with the data contained in the National Register of Temporary Work Agents, we find that: out of a total of 1240 temporary work agents registered in the Register, for approximately 900 temporary work agents the license has expired or they have renounced their license due to cessation of activity. Very few agents have had their operating license revoked by the competent authority. These figures show that many of the temporary work agents have not applied for an extension of their license or have renounced their license due to cessation of activity. These data should be of concern to the authorities and to encourage incentives. De lege ferenda, an improvement of the national legislation would be necessary, but also an intervention from the state in order to ensure some fiscal facilities to the temporary work agents, but also to the users, in order to encourage the work through temporary work agencies. Moreover, an awareness-raising campaign on the importance of ensuring labor flexibility and the need for labor through temporary work agencies among public and private economic agents would be appropriate.

If we analyze the trends in the use of temporary employment in Europe, it is confirmed that temporary employment (fixed-term work and temporary work) has become more widespread in most EU countries in the last 15 years, during the period 1995- 2010 (Eurofund, 2010).

By analyzing the data provided by Eurostat for the period 2011-2020, we can observe an increase in the number of temporary workers through temporary

employment agencies in the EU. In 2011, Slovenia registered the highest percentage of temporary workers (5.3%), followed by the Netherlands (2.9%) and Spain (2.7%). Romania registered a percentage of 0.9% temporary workers, close to the end of the ranking, before Poland, Montenegro, Norway and other states, as can be seen in Figures no. 1-2. Ten years later, we find that the countries who occupy the top positions are different compared to the 2011 rankings, in the sense that Malta ranks first in the number of temporary workers recruited by temporary work agencies (7.6%), followed by Germany (5.4%) and Slovakia -4.5% (Figure no. 2). These data are also confirmed by some authors, in Germany the number of temporary workers (TAWs) has increased significantly, reaching 949.000 workers in 2020 (Cardone et al, 2021).

In 2020, Romania registers a decrease in the number of workers recruited by temporary work agencies, as compared to 2011 - 0.4%.

Fig. 1. The evolution of the number of workers recruited by temporary work agencies, organized by country, in 2011 in the EU

Source: the author's own conception from data provided by Eurostat (2021)

Fig. 2. The evolution of the number of workers recruited by temporary work agencies, organized by country, in the EU (2011-2020)

Source: the author's own conception from data provided by Eurostat (2021)

5. Conclusions

The national legislation underwent significant changes in 2011 and 2012, as the 2003 Labor Code did not provide sufficient prospects for employment through temporary work agencies and could not be in line with the Directive 2008/2004 EC, which set out precisely to remove national restrictions and standardize state provisions in line with the provisions of the directive.

We found that the Government Decision no. 1256/2011 (Government of Romania, 2011) brings a substantial change regarding the quality of temporary work agents, namely the possibility to license all legal entities (public or private), and not only companies, as was stated in the unamended form of the 2003 Labor Code. At the same time, we have noticed the introduction in our country of the National Register of Licensed Temporary Work Agents, which is made public annually, in to achieve transparency on the number of licensed agents or those whose license has expired or has been withdrawn.

With regard to trends in the temporary labour market in the EU during 2011-2020, there is a growing interest in this type of employment among both workers, temporary work agents and users. The data provided in the content of our article show that in countries such as Malta, Germany and Slovakia, the actors of the triangular employment relationship have become aware through experimentation that this type of work can be an alternative to employment through atypical contracts. Unfortunately, this is not the case in Romania, which in ten years has seen a decline in temporary work, from 0.9% in 2011 to 0.4% in 2020, which means a decrease of 0.5 % of employment of temporary workers through temporary work agencies. The explanation is the outbreak of the SARS-COV 2 virus, although this should have led users whose permanent employees became ill to use the temporary workforce.

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