

### ECJ "AKT": No statement on permanent employment of temporary agency workers

Dr. Piero Sansone

Cologne, 19 May 2015

#### Decision

The decision of the European Court of Justice in the matter of "AKT" was awaited with great anticipation (*please see our discussion on this and the reference to the court for a preliminary ruling in our Newsletter 2/2014, pp. 11-12.*). This is because the Court could have used the preliminary ruling as, among other things, an opportunity for making its views known for the first time on the permissibility of supplying temporary agency workers permanently. § 1(1) sentence 2 of the Temporary Agency Workers Act (*Arbeitnehmerüberlassungsgesetz - AÜG*, hereinafter the "Act"), which provides that the assignment of agency workers must be "temporary", prohibits this kind of permanent supply of temporary agency workers in Germany. Critics of this provision regard this limitation a violation of Article 4(1) of Directive 2008/104/EC on temporary agency work (hereinafter the "Directive"), which only permits prohibitions or restrictions on the use of temporary agency workers where this can be justified on grounds of general interest. Since the question referred for a preliminary ruling also concerned the admissibility of prohibitions and restrictions pursuant to Article 4(1) of the Directive, it was expected that the decision would also make it possible to draw inferences about the permissibility of § 1(1) sentence 2 of the Temporary Agency Workers Act under EU law.

These expectations were only satisfied in part. In its judgment of 17 March 2015 (C-533/13), the European Court of Justice decided that only national authorities are bound by Article 4(1) of the Directive, not however national courts. Accordingly, national courts are therefore not obliged to disapply legal provisions which violate Article 4(1) of the Directive. The other questions referred for a preliminary ruling: *"Can the use of temporary agency workers for a lengthy period to perform an undertaking's normal work alongside the*

*undertaking's own employees amount to an improper use of temporary agency workers"* was left unanswered by the ECJ.

#### Relevance in legal practice

Following the decision of the European Court of Justice, the question of whether temporary agency workers can be employed permanently – as provided for under German law – remains unresolved. Moreover, it remains unclear as to whether, and if so, which guidelines the Directive provides as to the meaning of "temporary" supply of temporary agency workers, which may be the only legal form of supplying workers.

Nonetheless, valuable insights can be gained from the decision on the interpretation of the Directive and, in particular, on the admissibility of prohibitions and restrictions, such as those contained, for example, in § 1(1) sentence 2 or § 1b of the Act. The ECJ made it clear that courts are not required to assess the validity of such provisions on the basis of Article 4(1) of the Directive. Accordingly, a review of such provisions under EU law will rely in particular on primary law and it is likely that restrictions and prohibitions on temporary work will be assessed first and foremost on the basis of the freedom to provide services laid down in Article 56 TFEU.

The ECJ's decision is likely to also be of significance for the legal assessment of the Grand Coalition's proposed legislation. The Coalition Agreement for the 18th legislative period provides, among other things, for the introduction of a maximum period of 18 months for the supply of temporary agency workers. Following the judgment handed down by the European Court of Justice, it will not be possible to base objections to this on Article 4(1) of the Directive.

## Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Vorname Nachname on +49 123 456789-11 or by email to [jsonnenschein@goerg.de](mailto:jsonnenschein@goerg.de). For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

## Our offices

GÖRG Partnerschaft von Rechtsanwälten mbB

### BERLIN

Klingelhöferstraße 5, 10785 Berlin  
Phone +49 30 884503-0, Fax +49 30 882715-0

### COLOGNE

Kennedyplatz 2, 50679 Köln  
Phone +49 221 33660-0, Fax +49 221 33660-80

### ESSEN

Alfredstraße 220, 45131 Essen  
Phone +49 201 38444-0, Fax +49 201 38444-20

### FRANKFURT AM MAIN

Neue Mainzer Straße 69 – 75, 60311 Frankfurt am Main  
Phone +49 69 170000-17, Fax +49 69 170000-27

### HAMBURG

Dammtorstraße 12, 20354 Hamburg  
Phone +49 40 500360-0, Fax +49 40 500360-99

### MUNICH

Prinzregentenstraße 22, 80538 München  
Phone +49 89 3090667-0, Fax +49 89 3090667-90