ECLI:EU:C:2022:983

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

15 December 2022 (*)

(Reference for a preliminary ruling – Employment and social policy – Temporary agency work – Directive 2008/104/EC – Article 5 – Principle of equal treatment – Need to respect, in the event of derogation from that principle, the overall protection of temporary agency workers – Collective agreement providing for lower pay than that of staff recruited directly by the user undertaking – Effective judicial protection – Judicial review)

In Case C-311/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 16 December 2020, received at the Court on 18 May 2021, in the proceedings

CM

v

TimePartner Personalmanagement GmbH,

THE COURT (Second Chamber),

composed of A. Prechal, President of Chamber, M.L. Arastey Sahún (Rapporteur), F. Biltgen, N. Wahl and J. Passer, Judges,

Advocate General: A.M. Collins,

Registrar: S. Beer, Administrator,

having regard to the written procedure and further to the hearing on 5 May 2022,

after considering the observations submitted on behalf of:

– CM, by R. Buschmann and T. Heller, Prozessbevollmächtigte,

– TimePartner Personalmanagement GmbH, by O. Bertram, M. Brüggemann and A. Förster, Rechtsanwälte,

– the German Government, by J. Möller and D. Klebs, acting as Agents,

– the Swedish Government, by H. Eklinder, J. Lundberg, C. Meyer-Seitz, A. Runeskjöld, M. Salborn Hodgson, R. Shahsavan Eriksson, H. Shev and O. Simonsson, acting as Agents,

– the European Commission, by B.-R. Killmann and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 July 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5 of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

2 The request has been made in proceedings between CM and TimePartner Personalmanagement GmbH ('TimePartner') concerning the amount payable by TimePartner as pay for temporary agency work carried out by CM at a user undertaking.

Legal context

European Union law

3 Recitals 10 to 12, 16 and 19 of Directive 2008/104 state:

'(10) There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union.

(11) Temporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market.

(12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.

…

(16) In order to cope in a flexible way with the diversity of labour markets and industrial relations, Member States may allow the social partners to define working and employment conditions, provided that the overall level of protection for temporary agency workers is respected.

…

(19) This Directive does not affect the autonomy of the social partners nor should it affect relations between the social partners, including the right to negotiate and conclude collective

agreements in accordance with national law and practices while respecting prevailing Community law.'

4 As set out in Article 2 of that directive, entitled 'Aim':

'The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.'

5 Under Article 3(1)(f) of the directive:

'For the purposes of this Directive:

"basic working and employment conditions" means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:

(i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;

(ii) pay.'

6 Article 5 of Directive 2008/104, entitled 'The principle of equal treatment', provides:

'1. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

For the purposes of the application of the first subparagraph, the rules in force in the user undertaking on:

(a) protection of pregnant women and nursing mothers and protection of children and young people; and

(b) equal treatment for men and women and any action to combat any discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation;

must be complied with as established by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions.

2. As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.

3. Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary

agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.

4. Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment.

The arrangements referred to in this paragraph shall be in conformity with Community legislation and shall be sufficiently precise and accessible to allow the sectors and firms concerned to identify and comply with their obligations. In particular, Member States shall specify, in application of Article 3(2), whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions referred to in paragraph 1. Such arrangements shall also be without prejudice to agreements at national, regional, local or sectoral level that are no less favourable to workers.

5. Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive. They shall inform the [European] Commission about such measures.'

7 Under Article 9 of that directive, entitled 'Minimum requirements':

'1. This Directive is without prejudice to the Member States' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers.

2. The implementation of this Directive shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by this Directive. This is without prejudice to the rights of Member States and/or management and labour to lay down, in the light of changing circumstances, different legislative, regulatory or contractual arrangements to those prevailing at the time of the adoption of this Directive, provided always that the minimum requirements laid down in this Directive are respected.'

8 Article 11 of that directive, entitled 'Implementation', provides in paragraph 1:

'Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 5 December 2011, or shall ensure that the social partners introduce the necessary provisions by way of an agreement, whereby the Member States must make all the necessary arrangements to enable them to guarantee at any time that the objectives of this Directive are being attained. They shall forthwith inform the Commission thereof.'

German law

9 Paragraph 9(2) of the Arbeitnehmerüberlassungsgesetz (Law on temporary agency work) of 3 February 1995 (BGBl. 1995 I, p. 158; 'the AÜG'), in the version applicable until 31 March 2017, was worded as follows:

'The following shall be invalid:

…

(2) agreements providing for working conditions, including remuneration, for the temporary agency worker, for the period of assignment to a user undertaking, that are less favourable as compared to the basic working conditions applicable at the user undertaking to a comparable worker of the user undertaking; a collective agreement may authorise derogations, in so far as it does not provide for remuneration that is below the minimum hourly pay laid down by a regulation pursuant to Paragraph 3a(2); within the scope of such a collective agreement, employers and workers not bound by the collective agreement may agree to the application of the provisions of the collective agreement; any derogation by collective agreement shall not apply to temporary agency workers who, in the six months preceding the assignment to the user undertaking, have ceased to have an employment relationship with that undertaking or with an employer forming part of the same group of undertakings as the user undertaking within the meaning of Paragraph 18 of the Aktiengesetz [(Law on public limited companies)],

…'

10 Paragraph 10(4) of the AÜG, in the version applicable until 31 March 2017, stated:

'The temporary-work agency must grant the temporary agency worker, for the period of assignment to the user undertaking, the basic working conditions, including remuneration, applicable at the user undertaking to a comparable worker of the user undertaking. To the extent that a collective agreement applicable to the employment relationship lays down derogations (Paragraph 3(1)(3) and Paragraph 9(2)), the temporary-work agency must grant the temporary agency worker the working conditions applicable under that collective agreement. To the extent that such a collective agreement provides for remuneration below the minimum hourly pay laid down by a regulation pursuant to Paragraph 3a(2), the temporary-work agency must grant the temporary agency worker, for each hour of work, the remuneration due at the user undertaking to a comparable worker of the user undertaking for one hour of work. In the event of invalidity of the agreement between the temporary-work agency and the temporary agency worker by virtue of Paragraph 9(2), the temporary-work agency must grant the temporary agency worker the basic working conditions, including remuneration, applicable at the user undertaking to a comparable worker of the user undertaking.'

11 Paragraph 8 of the AÜG, as amended by the Law of 21 February 2017 (BGBl. 2017 I, p. 258), which entered into force on 1 April 2017, provides:

'1. The temporary-work agency must grant the temporary agency worker, for the period of assignment to the user undertaking, the basic working conditions, including remuneration, applicable at the user undertaking to a comparable worker of the user undertaking (principle of equal treatment). If the temporary agency worker receives the remuneration due under a collective agreement applicable to a comparable worker of the user undertaking or, failing that, the remuneration due under a collective agreement to comparable workers in the sector of work, the temporary agency worker shall be presumed to receive equal treatment as regards remuneration

within the meaning of the first sentence. If remuneration in kind is granted at the user undertaking, compensation in euro may be provided.

2. A collective agreement may derogate from the principle of equal treatment, in so far as it does not provide for remuneration that is below the minimum hourly pay laid down by a regulation pursuant to Paragraph 3a(2). To the extent that such a collective agreement derogates from the principle of equal treatment, the temporary-work agency must grant the temporary agency worker the working conditions applicable under that collective agreement. Within the scope of such a collective agreement, employers and workers not bound by the collective agreement may agree to the application of the provisions of that agreement. To the extent that such a collective agreement provides for remuneration below the minimum hourly pay laid down by a regulation pursuant to Paragraph 3a(2), the temporary-work agency must grant the temporary agency worker, for each hour of work, the remuneration due at the user undertaking to a comparable worker of the user undertaking for one hour of work.

3. A derogation by collective agreement within the meaning of subparagraph 2 shall not apply to temporary agency workers who, in the six months preceding the assignment to the user undertaking, have ceased to have an employment relationship with that undertaking or with an employer forming part of the same group of undertakings as the user undertaking within the meaning of Paragraph 18 of the [Law on public limited companies].

4. A collective agreement within the meaning of subparagraph 2 may derogate, as regards remuneration, from the principle of equal treatment for the first nine months of assignment to a user undertaking. A longer derogation by collective agreement shall be allowed only if:

(1) no later than 15 months after an assignment to a user undertaking, a remuneration is attained that is at least the remuneration laid down by the collective agreement as being equivalent to the collective agreement remuneration of comparable workers in the sector, and

(2) after a period of adaptation to the working methods of a maximum of six weeks, the remuneration paid is gradually aligned with the abovementioned remuneration.

Within the scope of such a collective agreement, employers and workers not bound by the collective agreement may agree to the application of the provisions of the collective agreement. The period of previous assignments by the same or by a different temporary-work agency to the same user undertaking shall be taken into account in full if the respective period between the assignments does not exceed three months.

5. The temporary-work agency shall be required to pay to the temporary agency worker at least the minimum hourly pay laid down by a regulation pursuant to Paragraph 3a(2) for the period of the assignment and for periods without assignment.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 Between January and April 2017, TimePartner, a temporary-work agency, employed CM as a temporary agency worker under a fixed-term contract of employment. In that context, CM was assigned to a retail undertaking as an order handler.

13 Comparable workers of the user undertaking, to whom the collective agreement for retail workers in the Land of Bavaria (Germany) applies, received a gross hourly wage of EUR 13.64.

14 During her assignment at that undertaking, CM received a gross hourly wage of EUR 9.23, in accordance with the collective agreement applicable to temporary agency workers concluded between the Interessenverband Deutscher Zeitarbeitsunternehmen eV (German association of temporary-work agencies), of which TimePartner was a member, and the Deutscher Gewerkschaftsbund (German trade union confederation), which included the Vereinte Dienstleistungsgewerkschaft (United Services Union), of which CM was a member.

15 The latter collective agreement derogated from the principle of equal treatment laid down, for the period from January to March 2017, in the first sentence of Paragraph 10(4) of the AÜG in the version applicable until 31 March 2017 and, for April 2017, in Paragraph 8(1) of the AÜG in the version applicable from 1 April 2017, by providing for lower pay for temporary agency workers than that granted to the workers of the user undertaking.

16 CM brought a claim before the Arbeitsgericht Würzburg (Labour Court, Würzburg, Germany) seeking additional pay of EUR 1 296.72, an amount equivalent to the difference which she would have received if she had been paid under the collective agreement for retail workers in Bavaria. She claimed that the relevant provisions of the AÜG and of the collective agreement applicable to temporary agency workers did not comply with Article 5 of Directive 2008/104. TimePartner denied that it was required to pay any remuneration other than that provided for in the collective agreements applicable to temporary agency workers.

17 Following the dismissal of that claim, CM appealed to the Landesarbeitsgericht Nürnberg (Higher Labour Court, Nuremberg, Germany). After her appeal was dismissed by the latter court, CM brought an appeal on a point of law before the referring court, the Bundesarbeitsgericht (Federal Labour Court, Germany).

18 That court considers that the outcome of the appeal on a point of law turns on the interpretation of Article 5 of Directive 2008/104.

19 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) How is the concept of “overall protection of temporary agency workers” in Article 5(3) of Directive [2008/104] to be defined, and, in particular, does it encompass more than what is provided for in the mandatory provisions on protection for all workers under national and EU law?

(2) What conditions and criteria must be met for the presumption that arrangements concerning the working and employment conditions of temporary agency workers in a collective agreement which derogate from the principle of equal treatment laid down in Article 5(1) of Directive 2008/104 have been established while respecting the overall protection of temporary agency workers?

(a) Is the assessment of respect for overall protection to be based – in the abstract – on the collectively agreed working conditions of the temporary agency workers covered by such a collective agreement or is it necessary to carry out an evaluative analysis comparing the collectively agreed working conditions with the working conditions existing in the undertaking to which the temporary agency workers are assigned (user undertaking)?

(b) In the case of a derogation from the principle of equal treatment with regard to pay, does the respect for overall protection prescribed in Article 5(3) of Directive 2008/104 require the existence

of an employment relationship of indefinite duration between the temporary employment agency and the temporary [agency] worker?

(3) Must the national legislature prescribe the conditions and criteria under which the social partners must respect the overall protection of temporary agency workers within the meaning of Article 5(3) of Directive 2008/104 where the national legislature gives the social partners the option of concluding collective agreements which establish arrangements concerning the working and employment conditions of temporary agency workers which derogate from the principle of equal treatment, and the national collective bargaining system provides for requirements which can be presumed to ensure an appropriate balance of interests between the parties to collective agreements ("presumption of fairness of collective agreements")?

(4) If the third question is answered in the affirmative:

(a) Is respect for the overall protection of temporary agency workers within the meaning of Article 5(3) of Directive 2008/104 ensured by statutory rules which, like the version of the [AÜG] in force since 1 April 2017, provide for a minimum wage floor for temporary [agency] workers, for a maximum duration of assignment to the same user undertaking, for a time limit on the derogation from the principle of equal treatment with regard to pay, for the non-application of a collectively agreed arrangement derogating from the principle of equal treatment to temporary [agency] workers who, in the six months preceding the assignment to the user undertaking, left the employ of that user undertaking or an employer forming a group with that user undertaking within the meaning of Paragraph 18 of the [Law on public limited companies] and for an obligation of the user undertaking to grant temporary [agency] workers access to collective facilities or services (such as, in particular, childcare facilities, collective catering and transport) in principle under the same conditions as those applicable to permanent workers?

(b) If that question is answered in the affirmative:

Does this also apply if the relevant statutory rules, such as those in the version of the [AÜG] in force until 31 March 2017, do not provide for a time limit on derogations from the principle of equal treatment with regard to pay or a specific time frame for the requirement that the assignment may only be "temporary"?

(5) If the third question is answered in the negative:

In the case of arrangements concerning the working and employment conditions of temporary agency workers which derogate from the principle of equal treatment through collective agreements in accordance with Article 5(3) of Directive 2008/104, may the national courts review such collective agreements without restriction with a view to determining whether the derogations have been established while respecting the overall protection of temporary agency workers, or does Article 28 of the Charter of Fundamental Rights [of the European Union] and/or the reference to the "autonomy of the social partners" in recital 19 of Directive 2008/104 grant the parties to collective agreements a margin of assessment with regard to respect for the overall protection of temporary agency workers that is subject to only limited judicial review and – if so – how far does that margin extend?'

The request seeking the reopening of the oral part of the procedure

20 By letter lodged at the Court Registry on 11 October 2022, TimePartner requested that the oral part of the procedure be reopened. In support of its request, that party submits that an aspect

which is of such a nature as to be a decisive factor for the Court's decision has not yet been addressed, namely the existence of different systems of temporary agency work within the European Union, with the result that the social protection of temporary agency workers incumbent on the temporary-work agency, particularly during periods of inactivity, differs considerably between the Member States, which is why the Court does not have sufficient information to give a ruling.

21 Pursuant to Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the Court's decision, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

22 In the present case, the Court considers, after hearing the Advocate General, that having regard to the matters of fact and law provided by the referring court, on the one hand, and, on the other, by TimePartner and the other interested parties which participated in both the written and the oral part of the procedure, it has all the information necessary to give a ruling.

23 Consequently, TimePartner's request seeking the reopening of the oral part of the procedure must be rejected.

Admissibility of the request for a preliminary ruling

24 CM claims that the reference for a preliminary ruling is inadmissible. In particular, the first and second questions, by which the referring court asks the Court to define the concept of 'overall protection of temporary agency workers' within the meaning of Article 5(3) of Directive 2008/104, are not necessary to give a ruling on the dispute in the main proceedings, since that concept is unknown in German law.

25 In that regard, it should be borne in mind that, in accordance with the Court's settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling (judgment of 7 July 2022, *Coca-Cola European Partners Deutschland*, C-257/21 and C-258/21, EU:C:2022:529, paragraph 34 and the case-law cited).

26 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 7 July 2022, *Coca-Cola European Partners Deutschland*, C-257/21 and C-258/21, EU:C:2022:529, paragraph 35 and the case-law cited).

27 It is true that the first question, which concerns the interpretation of the concept of 'overall protection of temporary agency workers' within the meaning of Article 5(3) of Directive 2008/104 is drafted in general terms.

28 However, it is clear from the order for reference that the referring court is asking the Court to define that concept first in order to be able to determine subsequently, by means of the second question, the extent to which a collective agreement may derogate from the principle of equal treatment with regard to pay while respecting the overall protection of temporary agency workers, in accordance with Article 5(3) of Directive 2008/104. If the collective agreement applicable to temporary agency workers were to be contrary to that provision, CM could be entitled to additional remuneration as sought by her. The first and second questions are therefore not manifestly irrelevant for the purpose of resolving the dispute in the main proceedings.

29 Consequently, the request for a preliminary ruling is admissible.

Consideration of the questions referred

The first question

30 By its first question, the referring court asks, in essence, whether Article 5(3) of Directive 2008/104 must be interpreted as requiring, by its reference to the concept of 'overall protection of temporary agency workers', that account be taken of a level of protection specific to temporary agency workers that is greater than that laid down for workers in general by provisions on basic working and employment conditions under national and EU law.

31 Under Article 5(3) of Directive 2008/104, Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1 of that article, that is to say, arrangements under which the basic working and employment conditions of temporary agency workers are at least those that would apply to them if they had been recruited directly by the undertaking in which they are carrying out their temporary assignment to occupy the same job.

32 The concept of 'basic working and employment conditions' is defined in Article 3(1)(f) of Directive 2008/104 and refers to the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay.

33 It thus follows from the wording of Article 5(3) of Directive 2008/104 that the power conferred on Member States to allow the social partners to uphold or conclude collective agreements which authorise differences in treatment with regard to the basic working and employment conditions of temporary agency workers is counterbalanced by the obligation to respect those workers' 'overall protection', although the directive does not define the content of the latter concept.

34 According to the Court's settled case-law, in interpreting provisions of EU law, it is important to consider not only the terms of those provisions in accordance with their usual meaning in everyday language, but also their context and the objectives pursued by the rules of which they form part (judgment of 17 March 2022, *Daimler*, C-232/20, EU:C:2022:196, paragraph 29 and the case-law cited).

35 As regards the objectives pursued by Directive 2008/104, it is apparent from recitals 10 to 12 of that directive that there are considerable differences in the legal situation, status and working conditions of temporary agency workers within the European Union, that temporary agency work

meets not only undertakings' need for flexibility but also the need of employees to reconcile their working and private lives, thereby contributing to job creation and to participation and integration in the labour market, and that that directive seeks to establish a protective framework for those workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.

36 As regards the objective of Article 5(3) of Directive 2008/104 specifically, it is apparent from recital 16 of that directive that, in order to cope in a flexible way with the diversity of labour markets and industrial relations, Member States may allow the social partners to define working and employment conditions, provided that the overall level of protection for temporary agency workers is respected.

37 In line with what is set out in these recitals, Article 2 of that directive states that the purpose of that directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to those workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of that type of work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.

38 That dual objective is reflected in the structure of Article 5 of Directive 2008/104, paragraph 1 of which lays down the rule that the basic working and employment conditions of temporary agency workers, as defined in Article 3(1)(f) of that directive, are at least those of the user undertaking's own workers. A derogation from that rule is, inter alia, the provision laid down in Article 5(3). That derogation must however remain within the limits of the overall protection of temporary agency workers. Its scope is, moreover, limited to what is strictly necessary in order to safeguard the interest which derogation from the principle of equal treatment adopted on the basis of that provision enables to be protected, namely the interest in the need to cope in a flexible way with the diversity of labour markets and industrial relations (judgment of 21 October 2010, *Accardo and Others*, C-227/09, EU:C:2010:624, paragraph 58 and the case-law cited).

39 In order thus to reconcile the objective of ensuring the protection of temporary agency workers, set out in Article 2 of Directive 2008/104, and respect for the diversity of labour markets, it must be held that, where a collective agreement authorises, on the basis of Article 5(3) of that directive, by way of derogation from Article 5(1), a difference in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers as compared with those enjoyed by the user undertaking's own workers, the 'overall protection' of those temporary agency workers is respected only if they are afforded, in return, advantages intended to compensate for the effects of that difference in treatment. If such an agreement serves only to weaken one or more of those basic conditions with regard to temporary agency workers, the overall protection of those workers would necessarily be diminished.

40 However, in view of the scope of Article 5(1) of Directive 2008/104, which consists in granting temporary agency workers the same basic conditions as those of the user undertaking's own workers, respect for their overall protection, within the meaning of Article 5(3), does not require any account to be taken of a level of protection specific to temporary agency workers that is greater as regards those conditions than that provided for in the mandatory provisions on protection of workers in general under national and EU law.

41 The advantages that compensate for the effects of a difference in treatment to the detriment of temporary agency workers, as referred to in paragraph 39 of this judgment, must relate to the basic working and employment conditions defined in Article 3(1)(f) of Directive 2008/104, namely those

concerning the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay.

42 Such an interpretation of Article 5(3) of Directive 2008/104 is borne out by its context. Article 5(2) of that directive allows, in essence, Member States, after consulting the social partners, to derogate, as regards pay, from the principle of equal treatment provided for in Article 5(1) of the directive, where, inter alia, those workers continue to be paid in the time between assignments. Thus, if Member States may set the rate of pay for temporary agency workers at a lower level than would be required by the principle of equal treatment only if that disadvantage is counterbalanced by granting an advantage relating, in that case, to the same basic working and employment conditions, namely pay, it would be paradoxical to accept that the social partners, who are required to respect the overall protection of those workers, could do so without being obliged, in turn, to provide in the relevant collective agreement for an advantage to be granted with regard to those basic conditions.

43 This is all the more true for temporary agency workers with a fixed-term contract only who, running the risk of rarely getting paid between assignments, must be afforded a significant countervailing benefit as regards those basic conditions, which must be of a level in essence at least equivalent to that afforded to temporary agency workers with a permanent contract.

44 In the light of the foregoing considerations, the answer to the first question is that Article 5(3) of Directive 2008/104 must be interpreted as not requiring, by its reference to the concept of 'overall protection of temporary agency workers', any account to be taken of a level of protection specific to temporary agency workers that is greater than that laid down for workers in general by provisions on basic working and employment conditions under national and EU law. However, where the social partners, by means of a collective agreement, authorise differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers, that collective agreement must, in order to respect the overall protection of the temporary agency workers concerned, afford them advantages in terms of basic working and employment conditions which are such as to compensate for the difference in treatment they suffer.

The second question

45 By its second question, which is subdivided into two sub-questions, the referring court asks, in essence, under what conditions a collective agreement which authorises differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers may nevertheless be deemed to respect the overall protection of the temporary agency workers concerned, in accordance with Article 5(3) of Directive 2008/104.

Question 2(a)

46 By question 2(a) the referring court asks, in essence, whether Article 5(3) of Directive 2008/104 must be interpreted as meaning that compliance with the obligation to respect the overall protection of temporary agency workers must be assessed in abstract terms, in the light of a collective agreement authorising a difference in treatment, or in concrete terms, by comparing the basic working and employment conditions applicable to comparable workers recruited directly by the user undertaking.

47 According to the first subparagraph of Article 5(1) of Directive 2008/104, the basic working and employment conditions of temporary agency workers must, for the duration of their assignment at a user undertaking, be at least those that would apply if they had been recruited directly by that

undertaking to occupy the same job (judgment of 12 May 2022, *Luso Temp*, C-426/20, EU:C:2022:373, paragraph 49). The EU legislature thus demonstrated its intention to ensure that, in accordance with the principle of equal treatment, temporary agency workers are not, as a rule, in a less favourable situation than that of comparable workers of the user undertaking.

48 Temporary agency workers are therefore entitled, as a rule, to the same basic working and employment conditions than those that would apply if the user undertaking had recruited them directly. It thus follows from the fact that Article 5(3) constitutes a derogation, as recalled in paragraph 38 of this judgment, and from the purpose of Directive 2008/104, as recalled in paragraph 36 of this judgment, that pursuant to the derogation contained in Article 5(3) of that directive it is necessary to determine, in concrete terms, whether a collective agreement which authorises a difference in treatment with regard to basic working and employment conditions between temporary agency workers and comparable workers of the user undertaking effectively guarantees the overall protection of temporary agency workers by affording them certain advantages intended to compensate for the effects of that difference in treatment. That determination must therefore be carried out by reference to the basic working and employment conditions applicable to comparable workers of the user undertaking.

49 Accordingly, it is appropriate to determine first the basic working and employment conditions that would apply to the temporary agency worker if he or she had been recruited directly by the user undertaking to occupy the same job. Second, it is necessary to compare those basic working and employment conditions with those resulting from the collective agreement to which the temporary agency worker is actually subject (see, by analogy, judgment of 12 May 2022, *Luso Temp*, C-426/20, EU:C:2022:373, paragraph 50). Third, in order to ensure the overall protection of temporary agency workers, it must be assessed whether the countervailing benefits afforded can offset the difference in treatment suffered.

50 In the light of the foregoing, the answer to Question 2(a) is that Article 5(3) of Directive 2008/104 must be interpreted as meaning that compliance with the obligation to respect the overall protection of temporary agency workers must be assessed, in concrete terms, by comparing, for a given job, the basic working and employment conditions applicable to workers recruited directly by the user undertaking with those applicable to temporary agency workers, in order to be able to determine whether the countervailing benefits afforded in respect of those basic conditions can counterbalance the effects of the difference in treatment suffered.

Question 2(b)

51 By Question 2(b), the referring court asks, in essence, whether Article 5(3) of Directive 2008/104 must be interpreted as meaning that the obligation to respect the overall protection of temporary agency workers requires the temporary agency worker concerned to have a permanent contract of employment with a temporary-work agency.

52 Under Article 5(2) of that directive, Member States may, after consulting the social partners, provide that an exemption be made to the principle of equal treatment where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.

53 However, unlike that provision, Article 5(3) of Directive 2008/104 does not lay down any rule specific to the situation of temporary agency workers under a permanent contract.

54 As the Advocate General observed in point 54 of his Opinion, the reason for the difference between Article 5(2) of Directive 2008/104 and Article 5(3) thereof relates to the fact that temporary agency workers under a permanent contract of employment continue to be paid in the time between their assignments to user undertakings. That fact justifies the option given by Article 5(2) of that directive of providing, in respect of those workers, for a difference in treatment as regards pay. The specific nature of that rule contrasts with the general nature of Article 5(3) of that directive which, while permitting differences in treatment with regard to basic working and employment conditions, nevertheless requires respect for the overall protection of temporary agency workers.

55 It should thus be noted that Article 5(2) of Directive 2008/104 itself establishes the actual compensation – namely, pay for the time between assignments – to be afforded to temporary agency workers who have a permanent contract, in return for a derogation from the principle of equal treatment as regards pay, whereas paragraph 3 of that article allows the social partners to negotiate independently both the exact nature of the derogation from the principle of equal treatment and the advantage deemed capable of compensating for the effects of that derogation, provided that the overall protection of temporary agency workers is respected.

56 Article 5(3) of Directive 2008/104 therefore allows the conclusion of a collective agreement which derogates from the principle of equal treatment in respect of any temporary agency worker, subject to their overall protection and irrespective of whether their contract of employment with a temporary-work agency is a fixed-term contract or a contract of indefinite duration. In such a case, it cannot, moreover, be ruled out that the fact that they continue to be paid between assignments – whether under a permanent contract or under a fixed-term contract – may be taken into account for the purposes of assessing that overall protection. However, it is important that temporary agency workers with a fixed-term contract be afforded a substantial advantage capable of compensating for the difference in pay they suffer during their assignment compared to a comparable worker of the user undertaking.

57 In the light of the foregoing considerations, the answer to Question 2(b) is that Article 5(3) of Directive 2008/104 must be interpreted as meaning that the obligation to respect the overall protection of temporary agency workers does not require the temporary agency worker concerned to have a permanent contract of employment with a temporary-work agency.

The third question

58 By its third question, the referring court asks, in essence, whether Article 5(3) of Directive 2008/104 must be interpreted as meaning that the national legislature is required to lay down the conditions and criteria designed to respect the overall protection of temporary agency workers, within the meaning of that provision, where the Member State concerned gives the social partners the option of upholding or concluding collective agreements which authorise differences in treatment with regard to basic working and employment conditions to the detriment of those workers.

59 It should be noted that, under the third paragraph of Article 288 TFEU, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but will leave to the national authorities the choice of form and methods. Whilst that provision leaves Member States to choose the ways and means to ensure that a directive is implemented, that freedom does not affect the obligation on the Member States to which the directive is addressed to adopt, in their national legal systems, all of the measures necessary to ensure that the directive is fully effective, in

accordance with the objectives pursued thereby (judgment of 17 March 2022, *Daimler*, C-232/20, EU:C:2022:196, paragraph 94 and the case-law cited).

60 As recalled in paragraph 36 of this judgment, it follows from recital 16 of Directive 2008/104 that, in order to cope in a flexible way with the diversity of labour markets and industrial relations, Member States may allow the social partners to define working and employment conditions, provided that the overall level of protection for temporary agency workers is respected.

61 In addition, it is apparent from recital 19 of Directive 2008/104 that the latter does not affect the autonomy of the social partners nor should it affect the relations between the social partners, including the right to negotiate and conclude collective agreements in accordance with national law and practices while respecting prevailing EU law.

62 Furthermore, following from Article 11(1) of Directive 2008/104, Member States may, in order to comply with the objective of protecting temporary agency workers, either adopt the laws, regulations and administrative provisions necessary in that regard or ensure that the social partners introduce the necessary provisions by way of an agreement, whereby the Member States being required to make all necessary arrangements to enable them to guarantee at any time that the objectives set by that directive are being attained.

63 Thus, the power conferred on Member States by Article 5(3) of Directive 2008/104 to allow the social partners to conclude collective agreements which derogate from the principle of equal treatment, as implemented in paragraph 1 thereof, is consistent with the Court's case-law according to which Member States may leave the implementation of social policy objectives envisaged by a directive adopted in that field to the social partners in the first instance (judgment of 17 March 2022, *Daimler*, C-232/20, EU:C:2022:196, paragraph 108 and the case-law cited).

64 That power does not discharge Member States from the obligation of ensuring, by the appropriate laws, regulations or administrative measures, that all workers are afforded the full extent of the protection provided by Directive 2008/104 (judgment of 17 March 2022, *Daimler*, C-232/20, EU:C:2022:196, paragraph 94 and the case-law cited).

65 Therefore, where the Member States give the social partners the option of concluding collective agreements which authorise, in accordance with Article 5(3) of Directive 2008/104, differences in treatment to the detriment of temporary agency workers, they are no less required to respect the overall protection of those workers.

66 In the light of the purpose of Article 5(3) of Directive 2008/104 as set out in recitals 16 and 19 thereof, which are cited in paragraphs 60 and 61 of this judgment, the obligation of the social partners to ensure the overall protection of temporary agency workers does not require the Member States to prescribe in detail the conditions and criteria with which collective agreements must comply.

67 However, as the Advocate General observed in point 65 of his Opinion, when national legislation gives the social partners the option of negotiating and concluding collective agreements falling within the scope of a directive, they must act in compliance with EU law in general and with that directive in particular. Consequently, when the social partners conclude a collective agreement that comes within the scope of Directive 2008/104, they must comply with that directive by ensuring, inter alia, the overall protection of temporary agency workers in accordance with Article 5(3) thereof (see, by analogy, judgment of 19 September 2018, *Bedi*, C-312/17, EU:C:2018:734, paragraph 70 and the case-law cited).

68 In the light of the foregoing considerations, the answer to the third question is that Article 5(3) of Directive 2008/104 must be interpreted as meaning that the national legislature is not required to lay down the conditions and criteria designed to respect the overall protection of temporary agency workers, within the meaning of that provision, where the Member State concerned gives the social partners the option of upholding or concluding collective agreements which authorise differences in treatment with regard to basic working and employment conditions to the detriment of those workers.

The fourth question

69 In the light of the answer given to the third question, there is no need to answer the fourth question.

The fifth question

70 By its fifth question, which is raised in the event that the third question is to be answered in the negative, the referring court asks, in essence, whether Article 5(3) of Directive 2008/104 must be interpreted as meaning that collective agreements which authorise, under that provision, differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers are amenable to effective judicial review in order to determine whether the social partners have complied with their obligation to respect the overall protection of those workers.

71 It should be borne in mind, first, that, under Article 28 of the Charter of Fundamental Rights, workers and employers, or their respective organisations, have, in accordance with EU law and national laws and practices, the right inter alia to negotiate and conclude collective agreements at the appropriate levels. Second, the first paragraph of Article 152 TFEU states that the European Union 'recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems' and that it 'facilitate[s] dialogue between the social partners, [while] respecting their autonomy', the importance of that autonomy being also noted in recital 19 of Directive 2008/104.

72 That autonomy means that, during the negotiation stage of an agreement by the social partners, which exclusively involves the latter, they may engage in dialogue and act freely without receiving any order or instruction from whomsoever and, in particular, not from the Member States or the EU institutions (judgment of 2 September 2021, *EPSU* v *Commission*, C-928/19 P, EU:C:2021:656, paragraph 61).

73 It is thus important to note that the social partners enjoy broad discretion not only in their choice to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (judgment of 19 September 2018, *Bedi*, C-312/17, EU:C:2018:734, paragraph 59 and the case-law cited).

74 Where the right of collective bargaining proclaimed in Article 28 of the Charter of Fundamental Rights is covered by provisions of EU law, it must, within the scope of that law, be exercised in compliance with that law (judgment of 19 September 2018, *Bedi*, C-312/17, EU:C:2018:734, paragraph 69 and the case-law cited).

75 While the social partners, as noted in paragraph 73 of this judgment, thus enjoy broad discretion in the negotiation and conclusion of collective agreements, that discretion is thus circumscribed by the obligation to ensure compliance with EU law.

76 It follows that, while, as has been stated in the answer to the third question, the provisions of Directive 2008/104 do not require Member States to adopt specific legislation designed to respect the overall protection of temporary agency workers, within the meaning of Article 5(3) of that directive, the fact remains that the Member States, including their courts, must ensure that collective agreements which authorise differences in treatment with regard to basic working and employment conditions ensure, inter alia, the overall protection of temporary agency workers in accordance with Article 5(3) of Directive 2008/104.

77 In order to ensure that Directive 2008/104 is fully effective, as the Advocate General observed in point 79 of his Opinion, it is for the referring court to determine whether collective agreements which, pursuant to Article 5(3) of that directive, derogate from the principle of equal treatment adequately respect the overall protection of temporary agency workers by affording them, in return, countervailing benefits for any derogation from that principle of equal treatment.

78 Notwithstanding the discretion enjoyed by the social partners in negotiating and concluding collective agreements, the national court is required to do everything within its jurisdiction to ensure that collective agreements are consistent with the requirements of Article 5(3) of Directive 2008/104.

79 In the light of the foregoing considerations, the answer to the fifth question is that Article 5(3) of Directive 2008/104 must be interpreted as meaning that collective agreements which authorise, under that provision, differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers must be amenable to effective judicial review in order to determine whether the social partners have complied with their obligation to respect the overall protection of those workers.

Costs

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 5(3) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work**

must be interpreted as meaning that that provision, by its reference to the concept of 'overall protection of temporary agency workers', does not require any account to be taken of a level of protection specific to temporary agency workers that is greater than that laid down for workers in general by provisions on basic working and employment conditions under national and EU law. However, where the social partners, by means of a collective agreement, authorise differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers, that collective agreement must, in order to respect the overall protection of the temporary agency workers concerned, afford them advantages in terms of basic working and employment conditions which are such as to compensate for the difference in treatment they suffer.

2. **Article 5(3) of Directive 2008/104**

must be interpreted as meaning that compliance with the obligation to respect the overall protection of temporary agency workers must be assessed, in concrete terms, by comparing, for a given job, the basic working and employment conditions applicable to workers recruited directly by the user undertaking with those applicable to temporary agency workers, in order to be able to determine whether the countervailing benefits afforded in respect of those basic conditions can counterbalance the effects of the difference in treatment suffered.

3. **Article 5(3) of Directive 2008/104**

must be interpreted as meaning that the obligation to respect the overall protection of temporary agency workers does not require the temporary agency worker concerned to have a permanent contract of employment with a temporary-work agency.

4. **Article 5(3) of Directive 2008/104**

must be interpreted as meaning that the national legislature is not required to lay down the conditions and criteria designed to respect the overall protection of temporary agency workers, within the meaning of that provision, where the Member State concerned gives the social partners the option of upholding or concluding collective agreements which authorise differences in treatment with regard to basic working and employment conditions to the detriment of those workers.

5. **Article 5(3) of Directive 2008/104**

must be interpreted as meaning that collective agreements which authorise, under that provision, differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers must be amenable to effective judicial review in order to determine whether the social partners have complied with their obligation to respect the overall protection of those workers.

[Signatures]

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* Language of the case: German.