Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 14 July 2022 [1]

Case C-311/21

CM
v
TimePartner Personalmanagement GmbH

(Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany))

(Reference for a preliminary ruling – Temporary agency work – Directive 2008/104/EC – Article 5 – Principle of equal treatment – Equal pay – Derogation by the social partners – Respect for the overall protection of temporary agency workers – Collective agreement establishing lower pay than that of workers recruited by the user undertaking)

I. Introduction

1. Under what conditions can a collective agreement entered into by the social partners derogate from the principle of equal treatment of temporary agency workers? The Bundesarbeitsgericht (Federal Labour Court, Germany) seeks guidance from the Court with respect to two aspects of that question in particular. First, the relationship between the principle of equal treatment in Article 5(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work [2] and the concept of 'the overall protection of temporary agency workers' that collective agreements must respect by virtue of Article 5(3) thereof. Second, the extent to which such collective agreements may be subject to judicial review so as to verify that they respect the overall protection of temporary agency workers.

[1] Original language: English.

[2] OJ 2008 L 327, p. 9.

II. Relevant legal provisions

A. European Union law

2. The preamble of Directive 2008/104 sets out, inter alia, the following objectives:

'(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.

…

(14) The basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job.

…

(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.

(17) Furthermore, in certain limited circumstances, Member States should, on the basis of an agreement concluded by the social partners at national level, be able to derogate within limits from the principle of equal treatment, so long as an adequate level of protection is provided.

…

(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.'

3. Article 1(1) of Directive 2008/104 defines its scope as follows:

'This Directive applies to 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.'

4. According to Article 2, Directive 2008/104 has the aim:

'… 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. For the purposes of Directive 2008/104, Article 3(1)(f) defines 'basic working and employment conditions' as:

'… 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. Under Article 5 of Directive 2008/104, entitled 'The principle of equal treatment':

'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.

…

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.

…'

7. Article 9(1) of Directive 2008/104, bearing the heading 'Minimum requirements', provides that:

'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.'

8. Under Article 11(1) of Directive 2008/104:

'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.'

B. German law

9. Paragraph 9 of the Arbeitnehmerüberlassungsgesetz of 3 February 1995 ('the Law on Temporary Agency Work'), in the version in force until 31 March 2017, provided that:

'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 that 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 Law on Temporary Agency Work, in the version in force until 31 March 2017, stated:

'The temporary-work agency shall be required to 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 a 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. Those provisions were subsequently amended.

12. Paragraph 8 of the Law on Temporary Agency Work, in the version in force since 1 April 2017, entitled 'Principle of equal treatment', provides that:

'(1) The temporary-work agency is required to 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 euros 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 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.

(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 Aktiengesetz [(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 that 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.’

III. The dispute in the main proceedings and the request for a preliminary ruling

13. Between January and April 2017, TimePartner Personalmanagement GmbH ('TimePartner'), a temporary-work agency, employed CM as a temporary agency worker under a fixed-term contract. In the course of that contract, CM was assigned as an order handler to a user undertaking in the retail distribution sector.

14. Under the terms of a collective agreement for retail workers in Bavaria (Germany), comparable workers directly recruited by a user undertaking were to receive a gross salary of EUR 13.64 per hour. However, a collective agreement for temporary agency workers concluded between the Interessenverband Deutscher Zeitarbeitsunternehmen (German Association of Temporary-Work Agencies), of which TimePartner is a member, and the Deutscher Gewerkschaftsbund (German Trade Union Confederation), to which Vereinte Dienstleistungsgewerkschaft (United Services Union) belongs, derogated from the principle of equal treatment as regards pay contained in Paragraph 10 of the Law on Temporary Agency Work (in force until 31 March 2017) and Paragraph 8 of the Law on Temporary Agency Work (in force since 1 April 2017). As a consequence, CM, who was a member of United Services Union, received a gross salary of EUR 9.23 per hour.

15. CM initiated legal proceedings before the Arbeitsgericht Würzburg (Labour Court of Wurzburg, Germany), seeking EUR 1 296.72 as compensation for the difference in salary between temporary agency workers and comparable workers directly recruited by the user undertaking. CM argued that the relevant provisions of the Law on Temporary Agency Work and the collective agreement concerning temporary agency workers were contrary to Article 5 of Directive 2008/104.

16. Following the dismissal of her action by the Arbeitsgericht Würzburg (Labour Court of Wurzburg), CM lodged an appeal with the Landesarbeitsgericht Nürnberg (Higher Labour Court of Nuremberg, Germany), which dismissed that appeal.

17. CM then lodged an appeal against that ruling with the Bundesarbeitsgericht (Federal Labour Court). In order to rule on the appeal, that court decided to stay the proceedings and to refer five 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 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 Arbeitnehmerüberlassungsgesetz (Law on Temporary Agency Work) in force since 1 April 2017, provide for a minimum wage floor for temporary 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 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 Aktiengesetz (Law on Public Limited Companies) and for an obligation of the user undertaking to grant temporary 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 Law on Temporary Agency Work 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 ("the Charter")] 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?'

18. CM, TimePartner, the German Government and the European Commission submitted written observations. At the hearing of 5 May 2022, CM, TimePartner and the German and Swedish Governments, as well as the Commission, presented oral argument and replied to the Court's questions.

IV. Assessment

A. Admissibility

19. CM submits that a response to all of the questions, notably the first, does not appear necessary to enable the referring court to deliver judgment in the dispute before it. In that respect, CM points out that the relevant provisions of the Law on Temporary Agency Work do not refer to the concept of 'overall protection of temporary agency workers'.

20. It is settled case-law that, in proceedings under Article 267 TFEU, 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 by the national court concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling. [3]

21. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite clear 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. [4] The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute. [5]

22. The Bundesarbeitsgericht (Federal Labour Court) has pending before it a dispute in which CM, a temporary agency worker, seeks compensation for an alleged breach of the principle of equal treatment with regard to pay. By reference to Article 1 of Directive 2008/104, the facts, as described in point 13 of the present Opinion, establish that Directive 2008/104 is capable of applying to that dispute.

23. In so far as the Bundesarbeitsgericht (Federal Labour Court) asks the Court to define the concept of 'overall protection of temporary agency workers', a term which, as CM rightly points out, does not appear in the Law on Temporary Agency Work, it is apparent from the order for reference that the Court is asked to interpret Article 5(1) and (3) of Directive 2008/104 so as to

[3] Judgment of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraph 36 and the case-law cited).

[4] Ibid., paragraph 37.

[5] Ibid., paragraph 38.

enable the referring court to determine the extent to which a collective agreement may derogate from the principle of equal treatment with regard to pay whilst respecting the overall protection of temporary agency workers.

24. Having regard to the foregoing, I propose that the Court answer the questions asked by the Bundesarbeitsgericht (Federal Labour Court) in the order for reference.

B. The first question

25. By its first question, the Bundesarbeitsgericht (Federal Labour Court) asks how the concept of 'overall protection of temporary agency workers' in Article 5(3) of Directive 2008/104 is to be defined, and, in particular, whether that concept encompasses more than the mandatory provisions on protection for workers in general under national and EU law.

26. The referring court observes that, while Article 5(3) of Directive 2008/104 allows collective agreements to derogate from the principle of equal treatment laid down in Article 5(1) thereof, provided that the overall protection of temporary agency workers is respected, the directive does not indicate the conditions under which that latter requirement may be satisfied. The order for reference discloses the existence of two lines of thought among German legal scholars as to the interpretation of those conditions. Some authors take the view that 'overall protection' refers to the general statutory requirements applicable to all workers, regardless of whether they are directly recruited by a user undertaking or are temporary agency workers. Other authors consider that Directive 2008/104 grants temporary agency workers a specific form of protection.

27. CM argues that the Law on Temporary Agency Work is contrary to Article 5(3) of Directive 2008/104 in so far as it does not require collective agreements to respect the overall protection of temporary agency workers. She submits, moreover, that while Article 5(3) of Directive 2008/104 allows collective agreements to establish alternative arrangements concerning basic working and employment conditions, it does not permit derogations from the principle of equal treatment.

28. TimePartner observes that recital 19 of Directive 2008/104 recognises that the social partners enjoy a wide margin of discretion. Article 5(3) of that directive thus allows collective agreements to derogate from the principle of equal treatment both to the advantage, and to the disadvantage, of temporary agency workers.

29. The German Government submits that Directive 2008/104 seeks to ensure respect for the principle of equal treatment between temporary agency workers and comparable workers directly recruited by user undertakings. It does not establish a specific form of protection for temporary agency workers.

30. The Commission submits that the term 'overall protection of temporary agency workers' in Article 5(3) of Directive 2008/104 relates to the basic working and employment conditions referred to in Article 5(1) thereof. That directive seeks to ensure respect for the principle of equal treatment; it does not seek to afford temporary workers conditions better than those applicable to comparable workers recruited directly by user undertakings. The social partners may provide, by collective agreement, that temporary agency workers receive lower remuneration than comparable workers recruited directly by user undertakings. In those circumstances, respect for the overall protection of temporary workers requires that the social partners grant other advantages to temporary agency workers that are not afforded to workers directly recruited by user undertakings.

31. In accordance with settled case-law, in interpreting provisions of EU law, it is necessary to consider the text of those provisions, the context in which they appear and the objectives pursued by the rules of which they form part. [6]

32. First, Article 5(3) of Directive 2008/104 expressly provides that Member States may give the social partners the option to conclude collective agreements that contain arrangements for the working and employment conditions of temporary agency workers that may differ from the principle of equal treatment, provided that those collective agreements respect the overall protection of those workers.

33. Second, the context in which Article 5(3) of Directive 2008/104 appears is one where the basic working and employment conditions to which the principle of equal treatment applies include pay. [7] Article 9 of Directive 2008/104 also deems that directive to be without prejudice to the Member States' right to promote or to permit collective agreements between the social partners that are more favourable to workers.

34. Third, by reference to recitals 10 and 12 and Article 2 of Directive 2008/104, the Court has observed that the directive is intended to establish a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations. [8]

35. It results from the foregoing that, in order to ensure the protection of temporary agency workers and to improve the quality of their work, Directive 2008/104 establishes a principle of equal treatment applicable to the pay of temporary agency workers and workers directly recruited by the user undertaking. However, recitals 16 and 17 of Directive 2008/104 envisage that Member States may allow the social partners to define working and employment conditions that derogate, within limits, from that principle. In that context, while Article 9 of Directive 2008/104 envisages that the social partners may conclude collective agreements that contain conditions that are more favourable to temporary agency workers, [9] Article 5(3) of Directive 2008/104 also permits collective agreements that derogate from the principle of equal treatment, subject to the requirement that any such agreement respects the overall protection of temporary agency workers.

36. The concept of 'the overall protection of temporary agency workers' in Article 5(3) of Directive 2008/104 thus consists in an option to derogate from a general principle, namely that of equal treatment. Provisions of that nature are to be interpreted strictly. [10]

6 Judgments of 18 December 2008, *Ruben Andersen* (C-306/07, EU:C:2008:743, paragraph 40), and of 17 March 2022, *Daimler* (C-232/20, EU:C:2022:196, paragraph 29 and the case-law cited).

7 Article 3(1)(f)(ii) of Directive 2008/104.

8 Judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraph 40).

9 See, to that effect, judgments of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraph 41), and of 17 March 2022, *Daimler* (C-232/20, EU:C:2022:196, paragraphs 33 and 106).

10 See, by analogy, judgments of 9 September 2003, *Jaeger* (C-151/02, EU:C:2003:437, paragraph 89); of 21 October 2010, *Accardo and Others* (C-227/09, EU:C:2010:624, paragraph 58); and of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraphs 56 and 72). See also Opinion of Advocate General Pitruzzella in *Luso Temp* (C-426/20, EU:C:2021:995, point 62).

37. In the light of the foregoing, I suggest that the first question be understood as seeking to ascertain the conditions under which the social partners may derogate from the principle of equal treatment as regards pay, to the detriment of temporary agency workers by way of a collective agreement made under Article 5(3) of Directive 2008/104, while respecting their overall protection.

38. The Commission annexed to its written observations a report from the Expert Group on the transposition of Directive 2008/104 dated August 2011.[11] According to that report, when social partners derogate from the principle of equal treatment, to the detriment of temporary agency workers by way of a collective agreement made under Article 5(3) of Directive 2008/104, that collective agreement cannot limit itself to setting a lower rate of pay, but must counterbalance that lower rate of pay by other provisions favourable to temporary agency workers.[12] It is the requirement to strike such a balance that serves to ensure 'the overall protection of temporary agency workers'. An interpretation of Article 5(3) of Directive 2008/104 whereby the social partners may derogate from the principle of equal treatment without providing appropriate countervailing benefits for the temporary agency workers concerned is capable of emptying that principle of any practical effect.[13] It would also undermine the *effet utile* of Article 9 of Directive 2008/104, which recognises that the directive lays down minimum requirements.[14]

39. It follows that any derogation from the principle of equal treatment, to the detriment of the basic working and employment conditions of temporary agency workers, that may appear in a collective agreement must be counterbalanced by the grant of advantages as regards other basic working and employment conditions, as defined by Article 3(1)(f) of Directive 2008/104. In that context, it may be observed that pay is such a fundamental condition of employment that any derogation from the principle of equal treatment must be justified by reference to the strictest standards. Moreover, a derogation concerning basic working and employment conditions cannot be counterbalanced through advantages of an ancillary character. By way of illustration, a derogation from the principle of equal treatment with regard to pay could not be validly compensated for by a gift of company merchandising.

40. Moreover, in accordance with the principle of proportionality, recognised in recital 12 of Directive 2008/104, any derogations from the principle of equal treatment, to the detriment of basic working and employment conditions, must be commensurate with such countervailing advantages as may be conferred.[15] For instance, a 50% reduction in the rate of annual pay could not be compensated for by the grant of an additional day of annual leave. Although pay and holidays are basic conditions of employment, such a pay-related derogation would appear to be disproportionate in comparison to the value of the countervailing advantage.

[11] Published on the Commission's website at https://ec.europa.eu/social/BlobServlet?docId= 6998&langId=en.

[12] Ibid., p. 24.

[13] According to the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work of 21 March 2014 (COM(2014) 176 final, p. 19), the extent of the reliance upon certain derogations from the principle of equal treatment may have led to a situation where the application of Directive 2008/104 has not had any real effect in improving the protection of temporary agency workers.

[14] See, to that effect, judgments of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraph 41), and of 17 March 2022, *Daimler* (C-232/20, EU:C:2022:196, paragraph 33).

[15] See, to that effect, judgment of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraphs 70 and 72).

41. By reference to the foregoing it may, in practice, be difficult for the social partners to be able to rely upon the derogations facilitated by Article 5(3) of Directive 2008/104. I would simply observe that such an outcome is the logical consequence of establishing a broad principle of equal treatment by way of legislation, together with a necessarily limited number of exceptions.

42. I therefore propose that the Court's reply to the first question be that Article 5(3) of Directive 2008/104 is to be interpreted so that the social partners may, by way of a collective agreement, derogate from the principle of equal treatment as regards pay, to the detriment of temporary agency workers, provided that such collective agreements confer proportionate countervailing benefits as regards the basic working and employment conditions of temporary agency workers with a view to respecting their overall protection.

C. The second question

43. By the first part of the second question, the referring court asks whether Article 5(3) of Directive 2008/104 is to be interpreted to mean that compliance with the overall protection of temporary agency workers is to be assessed by reference to a collective agreement in the abstract or by a concrete comparison of the basic working and employment conditions applicable to comparable workers directly recruited by user undertakings. By the second part of the second question, the referring court asks whether Article 5(3) of Directive 2008/104 is to be interpreted to mean that it allows Member States to give the social partners the possibility to conclude collective agreements concerning temporary agency workers who have a fixed-term contract of employment with a temporary-work agency.

44. As regards the first part of the second question, CM, supported by the Commission, submits that respect for the overall protection of temporary agency workers is to be assessed by comparing the working and employment conditions of those workers with those applicable to comparable workers who are directly recruited by the user undertaking.

45. TimePartner, supported by the German Government, considers that the overall protection of temporary agency workers should be assessed on the basis of a general examination of the terms of the collective agreement in question.

46. Article 5(1) of Directive 2008/104 provides that, in principle, the basic working and employment conditions of temporary 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'. The principle of equal treatment laid down therein gives expression to the intention of the EU legislature to bring the conditions of temporary agency workers closer to those governing 'normal' employment relationships. [16]

47. It is in that context that Article 5(3) of Directive 2008/104 provides that, if and when the social partners conclude collective agreements establishing working and employment conditions which 'differ from those referred to in paragraph 1' of the same article, they must respect the overall protection of temporary agency workers.

[16] See, to that effect, judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraphs 51 and 52).

48. It results from the text, objective and context of Article 5(1) and (3) of Directive 2008/104 that temporary agency workers are entitled to the same basic working and employment conditions that would apply had the user undertaking recruited them directly. That requires a comparison of the conditions applicable to the temporary agency worker on the basis of the collective agreement, including remuneration, with those applicable at the user undertaking.[17] That comparison must be carried out by reference to the working and employment conditions applicable to each of those two categories of worker. If the social partners make use of the possibility granted by national law to derogate from the conditions applicable to workers at the user undertaking pursuant to Article 5(3) of Directive 2008/104, that collective agreement must confer other countervailing benefits upon those temporary agency workers that are unavailable to workers directly recruited by the user undertaking, thereby respecting the overall protection of temporary agency workers.

49. As for the second part of the second question, CM argues that Article 5(3) of Directive 2008/104 does not permit collective agreements that derogate from the principle of equal treatment as regards the pay of temporary agency workers who have a fixed-term contract of employment with a temporary-work agency. CM contends that derogations from the principle of equal treatment with regard to pay can be adopted on the basis of Article 5(2) of Directive 2008/104 only, which requires the existence of a contract of employment of indefinite duration with a temporary-work agency.

50. TimePartner, supported by the German Government and the Commission, submits that Article 5(3) of Directive 2008/104 allows Member States to give the social partners the possibility to conclude collective agreements concerning temporary agency workers regardless of whether they have a fixed-term contract or a contract of indefinite duration with a temporary-work agency.

51. The second part of the second question inspires three observations on my part.

52. First, unlike Article 5(2) of Directive 2008/104, Article 5(3) thereof does not state that the possibility to derogate from the principle of equal treatment is limited to temporary agency workers who have a contract of employment of indefinite duration with a temporary-work agency.

53. Second, while Article 5(2) of Directive 2008/104 allows Member States to provide for certain derogations from the principle of equal treatment, Article 5(3) thereof gives Member States permission to allow the social partners to conclude collective agreements containing provisions that derogate from that principle.

54. Third, Article 5(2) of Directive 2008/104 appears to rest on the premiss that derogations from the principle of equal treatment as regards pay may be justified in the case of temporary agency workers who have a contract of indefinite duration with a temporary-work agency in so far as they continue to be paid in the period between assignments. In contrast, Article 5(3) of Directive 2008/104 requires that collective agreements respect the overall protection of temporary agency workers. As points 38 to 40 of the present Opinion explain, such collective agreements must afford countervailing advantages to temporary agency workers to compensate for the disadvantages they suffer as a consequence of any derogations from the principle of equal treatment. The logic underlying Article 5(3) of Directive 2008/104, which is different from that of Article 5(2) thereof, can apply to workers irrespective of the nature of their contract of

[17] See, by analogy, judgment of 12 May 2022, *Luso Temp* (C-426/20, EU:C:2022:373, paragraph 50).

employment with a temporary-work agency. There is therefore no reason to exclude workers having a fixed-term contract with a temporary-work agency from the scope of Article 5(3) of Directive 2008/104.

55. In the light of the foregoing, I propose that the Court reply to the referring court's second question by interpreting Article 5(3) of Directive 2008/104 to mean that:

– compliance with the overall protection of temporary agency workers is to be assessed by a comparison of the basic working and employment conditions of temporary agency workers with those applicable to comparable workers recruited directly by the user undertaking;

– Member States may give the social partners the possibility to conclude collective agreements which derogate from the principle of equal treatment concerning temporary agency workers who have a fixed-term contract of employment with a temporary-work agency.

D. The third and fourth questions

56. The third and fourth questions both concern the obligation on Member States to transpose the requirements of Article 5(3) of Directive 2008/104 into national law when they make use of the possibility to allow the social partners to conclude collective agreements concerning temporary agency workers that derogate from the principle of equal treatment set out in Article 5(1) thereof. Since the answer to the fourth question depends upon the response to the third, I propose to address those two questions together.

57. The referring court asks whether, in the event a Member State makes use of the option provided by Article 5(3) of Directive 2008/104, national legislation must set out detailed criteria or conditions with which collective agreements made thereunder must comply in order to respect the overall protection of temporary agency workers. If that question is answered in the affirmative, the Bundesarbeitsgericht (Federal Labour Court) seeks guidance to enable it to assess whether the Law on Temporary Agency Work ensures sufficient overall protection for temporary agency workers. It asks, in particular, whether Article 5(3) of Directive 2008/104 is to be interpreted to the effect that respect for the overall protection of temporary agency workers is ensured by national legislation that establishes the following: minimum pay for temporary agency workers; a maximum period of assignment to the same user undertaking; a time limit for the derogation from the principle of equal treatment as regards pay; the non-application of collective agreements to temporary agency workers who had been directly employed by the user undertaking or by an undertaking forming part of the same group in the six months preceding the assignment; the obligation to grant temporary agency workers access to facilities or services (childcare, catering, transport) offered to workers directly employed by the user undertaking; and the requirement that the assignment be 'temporary' without further specification.

58. CM submits that Article 5(3) of Directive 2008/104 requires that national legislation set out detailed criteria or conditions with which collective agreements must comply in order to respect the overall protection of temporary agency workers. She suggests that the national legislation described in the order for reference does not fulfil those requirements.

59. In contrast, TimePartner, supported by the German Government, takes the view that Article 5(3) of Directive 2008/104 does not require Member States to lay down any specific criteria or conditions with which collective agreements must comply in order to respect the

overall protection of temporary workers. TimePartner considers that Member States may leave a margin of discretion to the social partners in line with the latter's autonomy to conclude collective agreements.

60. The German Government submits that Article 5(3) of Directive 2008/104 implicitly recognises a presumption that collective agreements concluded by the social partners that have collective bargaining power are fair. The German Government also contends that Article 5(3) of Directive 2008/104 requires that collective agreements concluded by the social partners must respect the overall protection of temporary agency workers. In any event, the provisions of German law set out in the order for reference ensure the overall protection of temporary agency workers.

61. The Commission considers that, when affording the social partners the possibility under Article 5(3) of Directive 2008/104 to conclude collective agreements that derogate from the principle of equal treatment, Member States must transpose a requirement whereby such collective agreements must respect the overall protection of temporary agency workers. The Commission observes that, since the German legislation does not require that derogations from the principle of equal treatment be compensated for by other advantages granted to temporary agency workers, it is for the referring court to verify whether the overall protection of temporary agency workers can be ensured by interpreting national law in conformity with EU law.

62. According to the third paragraph of Article 288 TFEU, a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall 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. [18]

63. In accordance with the case-law of the Court, Member States may leave the implementation of social policy objectives envisaged by a directive in the area of social policy to management and labour in the first instance. [19] That possibility does not discharge Member States from the obligation of ensuring, by appropriate laws, regulations or administrative measures, that all workers are afforded the full extent of the protection provided by the directive in question. [20]

64. The Court has held that the nature of measures taken by means of collective agreements differs from that of those adopted by way of national legislation or regulation in that the social partners, when exercising their fundamental right to collective bargaining recognised in Article 28 of the Charter, are assumed to have taken care to strike a balance between their respective interests. [21]

[18] Judgments of 10 April 1984, *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 15), and of 17 March 2022, *Daimler* (C-232/20, EU:C:2022:196, paragraph 94).

[19] Judgments of 18 December 2008, *Ruben Andersen* (C-306/07, EU:C:2008:743, paragraph 25); of 11 February 2010, *Ingeniørforeningen i Danmark* (C-405/08, EU:C:2010:69, paragraph 39); and of 17 March 2022, *Daimler* (C-232/20, EU:C:2022:196, paragraph 108).

[20] Judgments of 11 February 2010, *Ingeniørforeningen i Danmark* (C-405/08, EU:C:2010:69, paragraph 40), and of 17 March 2022, *Daimler* (C-232/20, EU:C:2022:196, paragraph 109). See also Article 11 of Directive 2008/104, which provides that Member States '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'.

[21] Judgment of 19 September 2018, *Bedi* (C-312/17, EU:C:2018:734, paragraph 68).

65. Where the exercise of the right to collective negotiation proclaimed in Article 28 of the Charter is governed by EU law, that exercise must comply with its provisions.[22] Therefore, when national legislation authorises the negotiation of a collective agreement in a field covered by a directive, the collective agreement that results therefrom must accord with EU law in general and with that directive in particular.[23] It follows that when the social partners conclude collective agreements that come within the scope of Directive 2008/104, they must respect the provisions of that directive.[24]

66. When Member States give the social partners an option to conclude collective agreements that may derogate from the principle of equal treatment, Article 5(3) of Directive 2008/104 requires the former to ensure the latter respect the overall protection of temporary agency workers. It follows that, whilst the concept of 'the overall protection of temporary agency workers' ought to be transposed into national law, that obligation does not necessarily require the Member States to adopt detailed provisions laying down the criteria or conditions to which such collective agreements must subscribe. That approach finds support in both the third paragraph of Article 288 TFEU and the Court's case-law.[25]

67. The referring court must thus interpret national law, in particular the Law on Temporary Agency Work, in the light of the text of Article 5(3) of Directive 2008/104 and its purpose in order to achieve an outcome that is consistent with the objective that provision pursues,[26] namely respect for the overall protection of temporary agency workers. That interpretation is subject to compliance with the recognised limits on the interpretation of national law in conformity with EU law, notably not interpreting national law *contra legem*.[27]

68. It appears from the order for reference that the applicable German legislation includes provisions, described in point 57 of the present Opinion, which limit the ability of the social partners to derogate from the principle of equal treatment. Whilst it is a matter for the referring court to verify, and even if those provisions do not explicitly require the social partners to ensure that any derogations are compensated for by other advantages granted to temporary agency workers, the Law on Temporary Agency Work does not, on the face of it, appear to be an obstacle to entering into collective agreements that are capable of containing an appropriate balance.

69. I thus propose that the Court respond to the third and fourth questions that Article 5(3) of Directive 2008/104 is to be interpreted to mean that where a Member State gives the social partners the option of concluding collective agreements that establish arrangements concerning

[22] See, to that effect, judgments of 8 September 2011, *Hennigs and Mai* (C-297/10 and C-298/10, EU:C:2011:560, paragraph 67); of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 47); of 28 June 2012, *Erny* (C-172/11, EU:C:2012:399, paragraph 50); and of 19 September 2018, *Bedi* (C-312/17, EU:C:2018:734, paragraph 69).

[23] Judgment of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 46).

[24] See, to that effect, judgments of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 48); of 12 December 2013, *Hay* (C-267/12, EU:C:2013:823, paragraph 27); and of 19 September 2018, *Bedi* (C-312/17, EU:C:2018:734, paragraph 70). See also recital 19 of Directive 2008/104, which states that, although that directive does not affect the autonomy of the social partners, the right to negotiate and conclude collective agreements is to be exercised 'while respecting prevailing [EU] law'.

[25] See, by analogy, judgment of 17 March 2022, *Daimler* (C-232/20, EU:C:2022:196, paragraphs 55 to 57), where the Court ruled that, even though the assignment must be temporary by its nature, Member States are not required to set out in legislation a maximum duration for the assignment of temporary agency workers to user undertakings under Article 5(5) of Directive 2008/104. National courts may provide for such a maximum duration in the absence of national legislation to that effect. See also judgment of 18 December 2008, *Ruben Andersen* (C-306/07, EU:C:2008:743, paragraphs 52 to 54).

[26] See, to that effect, judgments of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraph 65), and of 17 March 2022, *Daimler* (C-232/20, EU:C:2022:196, paragraph 76).

[27] See, to that effect, judgments of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraph 66), and of 17 March 2022, *Daimler* (C-232/20, EU:C:2022:196, paragraph 77).

the working and employment conditions of temporary agency workers that derogate from the principle of equal treatment, national legislation is not required to prescribe detailed conditions and criteria with which the social partners must comply, provided that respect for the overall protection of temporary agency workers is ensured.

E. The fifth question

70. By its fifth question, the referring court asks, in essence, whether collective agreements concluded by the social partners may be subject to judicial review by national courts and, if so, the extent to which those courts may exercise that jurisdiction to ensure that those collective agreements respect the overall protection of temporary agency workers required by Article 5(3) of Directive 2008/104.

71. CM submits that that question should receive an affirmative response.

72. TimePartner and the German Government point out that, under German law, collective agreements enjoy a presumption of fairness by reason of which they are subject to limited judicial review. That approach finds support in recital 19 of Directive 2008/104 and in Article 28 of the Charter.

73. The Commission submits that, by interpreting national law in conformity with EU law, the referring court may reach the conclusion that the Law on Temporary Agency Work requires that collective agreements respect the overall protection of temporary agency workers. In that event, the referring court has jurisdiction to review the question as to whether a collective agreement meets that requirement.

74. In accordance with settled case-law, the social partners enjoy a broad discretion in choosing to pursue a particular aim in the field of social and employment policy and to adopt measures capable of achieving it.[28] However, as point 65 of the present Opinion states, where the exercise of the right of collective bargaining proclaimed in Article 28 of the Charter is governed by EU law, that exercise must comply with those provisions.[29] Consequently, when the social partners adopt measures that come within the scope of Directive 2008/104, they must respect the provisions of that directive.

75. In several instances, the Court has held a clause included in a collective agreement to be contrary to provisions of EU directives.[30] According to the case-law, it would be incompatible with the very nature of EU law if a court having jurisdiction to apply that law were to be precluded at the time it sought to do so from being able to take all necessary steps to set aside the provisions of a collective agreement that might constitute an obstacle to the full effectiveness of EU law.[31]

[28] See judgment of 8 September 2011, *Hennigs and Mai* (C-297/10 and C-298/10, EU:C:2011:560, paragraph 65 and the case-law cited).

[29] The Court has ruled that the fact that EU law may preclude a clause included in a collective agreement is not in itself contrary to the right to negotiate and conclude collective agreements recognised in Article 28 of the Charter (judgment of 8 September 2011, *Hennigs and Mai*, C-297/10 and C-298/10, EU:C:2011:560, paragraph 78).

[30] Judgments of 8 September 2011, *Hennigs and Mai* (C-297/10 and C-298/10, EU:C:2011:560, paragraph 78); of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 83); of 12 December 2013, *Hay* (C-267/12, EU:C:2013:823, paragraph 47); of 19 September 2018, *Bedi* (C-312/17, EU:C:2018:734, paragraph 79); and of 13 January 2022, *Koch Personaldienstleistungen* (C-514/20, EU:C:2022:19, paragraph 46).

[31] Judgment of 7 February 1991, *Nimz* (C-184/89, EU:C:1991:50, paragraph 20).

76. As it appears from points 66 to 68 of the present Opinion, by Article 5(3) of Directive 2008/104, when Member States give the social partners an option to conclude collective agreements that derogate from the principle of equal treatment, the former must require that the latter respect the overall protection of temporary agency workers.

77. The Law on Temporary Agency Work transposes into German law the principle of equal treatment contained in Article 5(1) of Directive 2008/104. Since lawful derogations from that principle are optional, EU law does not require Member States to transpose them into their domestic laws.[32] Moreover, where EU law gives Member States the option to derogate from provisions of a directive, that discretion is to be exercised in a manner consistent with EU law, which includes situations where those derogations are introduced by means of collective agreements.[33]

78. In the light of those considerations, in order to fulfil the obligations arising from Article 288 TFEU, the referring court is required to do everything within its power, by virtue of the principle of interpretation of national law in conformity with EU law, to ensure that Directive 2008/104 is fully effective, notwithstanding that that principle cannot serve as the basis for an interpretation of national law that is *contra legem*.[34]

79. The obligation on the referring court includes verifying whether collective agreements that introduce derogations from the principle of equal treatment ensure the overall protection of temporary agency workers by conferring certain advantages upon such workers in order to lawfully compensate for any derogations from that principle. Although the social partners have a wide margin of discretion to strike a balance between such derogations and the countervailing advantages conferred upon temporary agency workers, the referring court must be able to assess whether the social partners have in fact struck that balance. Notwithstanding the requisite respect for the margin of discretion afforded to the social partners, there is no presumption that collective agreements conform with EU law.

80. Finally, I would observe that, contrary to what the referring court seems to assume, the fifth question should be answered irrespective of the answer to the third question since, for the reasons set out in points 74 to 79 of the present Opinion, it is the role of national courts to ensure the compatibility of collective agreements with EU law and, in particular, with Directive 2008/104.

81. I thus propose that the Court respond to the referring court's fifth question that collective agreements concluded by the social partners may be subject to judicial review by national courts in order to ensure that such collective agreements respect the overall protection of temporary agency workers required by Article 5(3) of Directive 2008/104.

[32] Judgment of 21 October 2010, *Accardo and Others* (C-227/09, EU:C:2010:624, paragraph 51).

[33] See, to that effect, judgment of 21 October 2010, *Accardo and Others* (C-227/09, EU:C:2010:624, paragraph 55).

[34] See, to that effect, judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraphs 65 and 66).

V. Conclusion

82. I therefore propose that the Court answer the questions referred for a preliminary ruling by the Bundesarbeitsgericht (Federal Labour Court, Germany) as follows:

(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 is to be interpreted to mean that the social partners may, by way of collective agreement, derogate from the principle of equal treatment as regards pay, to the detriment of temporary agency workers, provided that such collective agreements confer proportionate countervailing benefits as regards the basic working and employment conditions of temporary agency workers with a view to respecting their overall protection.

(2) Article 5(3) of Directive 2008/104 is to be interpreted to mean that:

– compliance with the overall protection of temporary agency workers is to be assessed by a comparison of the basic working and employment conditions of temporary agency workers with those applicable to comparable workers recruited directly by the user undertaking;

– Member States may give the social partners the possibility to conclude collective agreements which derogate from the principle of equal treatment concerning temporary agency workers who have a fixed-term contract of employment with a temporary-work agency.

(3) Article 5(3) of Directive 2008/104 is to be interpreted to mean that where a Member State gives the social partners the option of concluding collective agreements that establish arrangements concerning the working and employment conditions of temporary agency workers that derogate from the principle of equal treatment, national legislation is not required to prescribe detailed conditions and criteria with which the social partners must comply, provided that respect for the overall protection of temporary agency workers is ensured.

(4) Collective agreements concluded by the social partners may be subject to judicial review by national courts in order to ensure that such collective agreements respect the overall protection of temporary agency workers required by Article 5(3) of Directive 2008/104.