Provisional text

OPINION OF ADVOCATE GENERAL

TANCHEV

delivered on 9 September 2021(1)

**Case C‑232/20**

**NP**

**v**

**Daimler AG, Mercedes-Benz Werk Berlin**

(Request for a preliminary ruling from the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin-Brandenburg, Germany))

(Reference for a preliminary ruling – Social policy – Meaning of ‘temporarily’ under Article 1 of Directive 2008/104/EC – Article 5(5) of Directive 2008/104 – Transitional provision precluding reliance, prior to a specified date, on periods of assignment of a temporary agency worker to a user undertaking – Introduction under the law of a Member State of a maximum assignment period for temporary agency workers to user undertakings – Right of a temporary agency worker to a permanent contract of employment with a user undertaking in the event of misuse of temporary agency work)

1. This reference for a preliminary ruling from the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin-Brandenburg, Germany; ‘the referring court’), concerns the interpretation of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work. (2) The referring court seeks, in essence, clarification of the following four issues.

2. First, does the word ‘temporarily’ in Article 1 of Directive 2008/104 relate only to the time period of the assignment of a temporary agency worker to a user undertaking, or is the word ‘temporarily’ also tied to the nature of the work to be performed, so that neither permanent jobs nor jobs that are not performed to provide cover for absent employees (‘cover’) can ever take place ‘temporarily’?

3. Second, is it consistent with EU law for the legislature of a Member State, here Germany, to introduce a maximum period beyond which the assignment of a temporary agency worker can no longer be considered to be temporary, but at the same time preclude temporary agency workers from relying on assignment periods prior to a specified date in the determination of whether that maximum period has been exceeded, particularly when exclusion of such periods results in the maximum assignment period having been respected by the user undertaking?

4. Third, the referring court seeks guidance on whether a declaration of a permanent contract of employment between a user undertaking and a temporary agency worker is a remedy guaranteed by EU law in the event of a finding that a temporary agency worker has been the subject of successive assignments to the same user undertaking in order to circumvent the provisions of Directive 2008/104, in a manner inconsistent with Article 5(5) of Directive 2008/104 (‘misuse of temporary agency work’).

5. Fourth, the referring court asks whether, pursuant to Directive 2008/104, the extension of the maximum assignment period otherwise provided for by the law of Germany can equally be left to the discretion of the parties to a collective agreement? If so, does this also apply to parties to a collective agreement who exercise competence not over the employment relationship of the temporary agency worker concerned, but over the sector in which the user undertaking is active?

6. I have reached the conclusion that, while the word 'temporarily' in Article 1 (1) of Directive 2008/104 means 'lasting for only a limited period of time' and 'not permanent', (3) it relates only to the period of assignment of the temporary agency worker in question, rather than the post to which he or she is assigned, so that permanent jobs and jobs that are not performed to provide cover are not automatically precluded from the scope of Directive 2008/104. The nature of the work, however, including whether or not it is a permanent post, is to be taken into account in determining whether the successive assignment of temporary agency workers to the same user undertaking can be objectively explained, (4) so as not to amount to the misuse of temporary agency work in a manner inconsistent with Article 5(5) of Directive 2008/104. (5)

7. Further, a Member State law which expressly excludes the taking into account of periods of assignment prior to a specific date, but which take place after the date for implementation of Directive 2008/104, such exclusion being relevant to the determination of whether misuse of temporary agency work has taken place, is inconsistent with Article 5(5) of Directive 2008/104, when it contracts the length of an assignment period on which a temporary agency worker would otherwise be able to rely. However, in a horizontal action between two private parties, Member State laws providing for such exclusion are to be disapplied only if this does not compel *contra legem* interpretation of the Member State law concerned, which is for the referring court to decide. (6)

8. That said, declaration of a permanent employment contract between a user undertaking and a temporary agency worker is not required in EU law to remedy a finding of misuse of temporary agency work. (7)

9. Finally, given the established rule that provisions of EU directives in the field of employment law may be implemented not only by legislative means, but also by means of generally applicable collective agreements, (8) the extension of the individual maximum assignment period, provided under the law of Germany, can be left to the discretion of the parties to a collective agreement who exercise competence only over the sector in which the user undertaking is active. However, the limitation described in point 7 applies equally to such agreements.

## I. Legal framework

### *A. EU Law*

10. Article 1 of Directive 2008/104 is headed 'Scope'. It states as follows in Article 1(1):

'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.'

### *B. German law*

11. The second sentence of Paragraph 1(1) of the Gesetz zur Regelung der Arbeitnehmerüberlassung (German Law regulating temporary agency work, 'the AÜG'), in the version in force from 1 December 2011 to 31 March 2017, provided that the 'assignment of workers to user undertakings shall be temporary'.

12. According to the order for reference, until April 2017 there was no specific penalty for infringing that provision, (9) but Paragraph 9 of the AÜG declared contracts concluded between temporary-work agencies and user undertakings and between temporary-work agencies and temporary agency workers, among others, to be invalid if the temporary-work agency did not possess the authorisation required under the AÜG. Paragraph 10 of the AÜG added that, in that event, an employment relationship was deemed to have come into being between the user undertaking and the temporary agency worker.

13. The Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze (Law amending the Law regulating temporary agency work and other laws) of 21 February 2017 amended the AÜG with effect from 1 April 2017. A new subparagraph 1b was inserted into Paragraph 1 of the AÜG as follows:

> 'The temporary-work agency may not assign the same temporary agency worker to the same user undertaking for more than 18 consecutive months; the user undertaking may not employ the same temporary agency worker for longer than 18 consecutive months. Any previous assignments by the same or another temporary-work agency to the same user undertaking counts as a single period where any two such assignments are separated by no more than 3 months. A collective agreement entered into by parties from the sector in which the assignment takes place may prescribe a maximum assignment period different from that laid down in the first sentence hereof. … A private- or public-sector works council agreement concluded with the employer on the basis of a collective agreement entered into by parties from the sector in which the assignment takes place may prescribe a maximum assignment period different from that laid down in the first sentence hereof. …'

14. A point 1b was inserted into Paragraph 9(1) of the AÜG:

> 'The following shall be invalid:
>
> 1b. employment contracts between temporary-work agencies and temporary agency workers which exceed the maximum permissible assignment period laid down in Paragraph 1(1b), unless the temporary agency worker informs the temporary-work agency or the user undertaking in writing, no later than one month after the maximum permissible assignment period has been exceeded, that he is maintaining his employment contract with the temporary-work agency,
>
> …'

15. In the first sentence of Paragraph 10(1) of the AÜG, the legal consequence of invalidity is now provided for:

> 'Where the contract concluded between a temporary-work agency and a temporary agency worker is invalid under Paragraph 9, an employment relationship between the user undertaking and the temporary agency worker shall be deemed to have come into being on the date of commencement of employment agreed between the user undertaking and the temporary-work agency; where that contract does not become invalid until after the commencement of employment with the user undertaking, the employment relationship between the user undertaking and the temporary agency worker shall be deemed to have come into being at the time when the contract became invalid …'

16. Paragraph 19(2) of the AÜG contains a transitional provision ('the transitional provision'):

> 'Assignment periods predating 1 April 2017 shall not be taken into account in the calculation of the maximum assignment period laid down in Paragraph 1(1b) …'

17. The 'Tarifvertrag zur Leih-/Zeitarbeit in der Metall- und Elektroindustrie in Berlin und Brandenburg vom 01.06.2017' (Collective Agreement of 1 June 2017 on temporary agency work in the metal and electrical industries in Berlin and Brandenburg), makes express reference to the derogation clause of Paragraph 1(1b) of the AÜG. Under its transitional provision, in the case of underakings without a works agreement, the employer and the works council must agree on a maximum assignment period. Where no such agreement has been reached, a maximum assignment period of 36 months is to apply as from 1 June 2017.

18. The defendant's plant in Berlin does not have a works agreement. A supplementary company-level central works council agreement (concluded between the defendant and the central works council) of 20 September 2017 provides that in manufacturing, the assignment of temporary workers is not to exceed 36 months. For temporary workers who were already employed on 1 April 2017, only periods postdating 1 April 2017 are to count towards that period.

## II. Facts, procedure and the questions referred for a preliminary ruling

19. The applicant NP ('the applicant') has been employed by a temporary-work agency since 1 September 2014, at a salary of EUR 9.36 per hour. (10) In the beginning the employment relationship was twice limited to a period of one year, and was thereafter open-ended. The applicant's assignments have been subject to 18 extensions over a period of 56 months.

20. An agreement supplementing the employment contract between the applicant and the temporary-work agency stated that the applicant was to work as a metal worker for the user undertaking D. ('the defendant') at the latter's automotive plant in Berlin. The tasks to be performed on the engine production line were described in that agreement. Under the applicant's employment contract with the temporary-work agency, his employment relationship was subject to certain collective agreements applicable to the temporary agency work sector.

21. From 1 September 2014 to 31 May 2019, the applicant was assigned exclusively to the defendant user undertaking. He worked continuously on the engine production line. He was not providing cover. That period was interrupted for only two months (from 21 April 2016 to 20 June 2016), during which the applicant was on parental leave.

22. By the action brought before the Arbeitsgericht Berlin (Labour Court, Berlin, Germany) on 27 June 2019, the applicant sought a declaration that an employment relationship has existed between the parties on one of a number of alternative dates. (11)

23. The order for reference states that, at first instance, the applicant claimed, inter alia, that the assignment to the defendant could no longer be classified as 'temporary' and the transitional provision laid down in Paragraph 19(2) of the AÜG, are contrary to EU law.

24. The defendant took the view that a clarification by the legislature of the 'temporary' criterion had been in place since 1 April 2017. After that date, derogations from the maximum assignment period of 18 months are permissible under the relevant collective agreements. Further, the maximum assignment period of 36 months laid down in the central works council agreement of 20 September 2017 was not exceeded, since only periods after 1 April 2017 can be taken into account.

25. In its judgment of 8 October 2019, the Arbeitsgericht Berlin (Labour Court, Berlin) concurred with the view taken by the defendant.

26. An appeal was lodged with the referring court on 22 November 2019. It referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the assignment of a temporary agency worker to a user undertaking no longer to be regarded as "temporary" for the purposes of Article 1 of [Directive 2008/104] as soon as the employment takes place in a job which is permanent and not performed [to provide] cover?

(2) Is the assignment of a temporary agency worker for a period of less than 55 months no longer to be regarded as "temporary" for the purposes of Article 1 of [Directive 2008/104]?

If the answer to Question 1 and/or Question 2 is in the affirmative, the following additional questions arise.

(3.1) Does the temporary agency worker have an entitlement to the establishment of an employment relationship with the user undertaking even if the national law does not provide for such a penalty before 1 April 2017?

(3.2) Does a national provision such as Paragraph 19(2) of the [AÜG] infringe Article 1 of [Directive 2008/104] where it prescribes an individual maximum assignment period of 18 months for the first time as from 1 April 2017, but expressly excludes the taking into account of prior periods of assignment, although the assignment could no longer be classified as temporary if the prior periods of assignment were taken into account?

(3.3) Can the extension of the individual maximum assignment period be left to the discretion of the parties to a collective agreement? If so, does this also apply to parties to a collective agreement who exercise competence not over the employment relationship of the temporary agency worker concerned, but over the sector in which the user undertaking is active?'

27. Written observations were filed at the Court by the applicant, the defendant, the Federal Republic of Germany, the French Republic, and the European Commission. There was no hearing.

**III. Preliminary observations**

28. It must be noted, first, that the questions referred make reference to the interpretation of the word 'temporary' in Article 1 of Directive 2008/104, when in fact Article 1 of that directive refers to assignment 'to user undertakings to work *temporarily*' (emphasis added). (12) For the reasons set out below, I proposed to reformulate the questions referred. Therein the adjective 'temporary' will also be replaced with the adverb 'temporarily'.

29. Second, it is also to be noted that the order for reference was sent by the referring court on 13 May 2020, before the Court issued its judgment of 14 October 2020in *KG (Successive assignments in the context of temporary agency work)* ('*KG*'). (13) It concerned the very issues with which the referring court is dealing in the present case; namely (i) the legal consequences following from multiple and successive assignments of a temporary agency worker to a single user undertaking with respect to a post which did not entail providing cover, and (ii) whether the applicant temporary agency worker was entitled, pursuant to Directive 2008/104, to a declaration of a permanent contract of employment with a user undertaking in the event of misuse of temporary agency work?

30. However, the dispute in *KG* was apprehended as a dispute concerning Article 5(5) of Directive 2008/104, rather than Article 1 of that directive; arguments concerning Article 5(5) of Directive 2008/104 having featured in the written observations, even though the questions referred do not seek interpretation of that provision. Given the similarities between the dispute in the main proceedings and that considered by the Court in *KG*, the issues arising in this case have, to some degree, either been resolved by that ruling, or that ruling has at least provided the foundations on which the dispute in the main proceedings can be resolved. Thus, this Opinion draws substantially from the findings of the Court in *KG*.

31. Third, and following on from this, Article 5(5) of Directive 2008/104 must be read in conjunction with Article 1 when answering the first two questions referred. As the French Government pointed out in its written observations, the case file shows that the referring court does not seek to ascertain, by asking for an interpretation of the word 'temporarily' in Article 1 of Directive 2008/104, whether the applicant falls within the scope of that directive. Rather, the referring court asks, in essence, whether recourse to successive temporary contracts within the same user undertaking constitutes an abuse of the temporary work situation, the applicant having argued that 18 prolongations of his contract over a period of 56 months constituted abuse.

32. As further pointed out by the French Government in its written observations, according to settled case-law, 'in order to provide a useful reply to the court which has referred to it a question for a preliminary ruling, the Court may be required to take into consideration rules of European Union law to which the national court did not refer in its questions'. (14) Thus, the Court may have to reformulate the questions. (15)

33. That being so, I suggest that the first and second questions should be reformulated into the following single question:

'(1) Is the first sentence of Article 5(5) of Directive 2008/104, read in conjunction with the word 'temporarily' in Article 1 of Directive 2008/104, to be read as precluding assignment of a temporary agency worker to the same user undertaking, over a period in excess of 55 months, to a job which is permanent and not performed for cover, as a successive assignment designed to circumvent the provisions of Directive 2008/104?'

34. Questions 3.1 and 3.2 both concern amendments to German law which took effect from 1 April 2017. One amendment concerns the imposition of a maximum assignment period after which misuse of temporary

agency work is deemed to have taken place (see point 13 above), while the other concerns the remedy following such a breach (points 14 and 15 above). It may be more logical, therefore, for the order of the questions to be reversed, and the wording simplified, as follows:

> '(2) Is a law of a Member State which prescribes a maximum assignment period to a single user undertaking of 18 months from 1 April 2017, but which expressly excludes the taking into account of periods of assignment prior to this date for the purposes of determining whether misuse of temporary agency work has taken place, consistent with Article 5(5) of Directive 2008/104, when the assignment could no longer be classified as temporary if the periods of assignment prior to 1 April 2017 were taken into account?
>
> (3) If the answer to Question 2 is in the negative, does a temporary agency worker have an entitlement under Directive 2008/104 to the establishment of a permanent employment relationship with the user undertaking in the event of a finding of misuse of temporary agency work under Article 5(5) of Directive 2008/104?' (16)

35. Question 3.3 could remain the same, recast as Question 4.

## IV. Answers to questions as reformulated

### *A. The answer to the first question*

36. Question 1 should be answered as follows:

'In determining whether the first sentence of Article 5(5) of Directive 2008/104, read in conjunction with the word 'temporarily' in Article 1 of Directive 2008/104, precludes the assignment of a temporary agency worker to the same user undertaking, over a period in excess of 55 months, to a job which is permanent and not performed for cover, a Member State court is required, as a matter of EU law, to undertake the following analysis;

(i) Has the successive assignment of a temporary agency worker to the same user undertaking resulted in a period of service that is no longer than what can reasonably be regarded as assignment to a user undertaking 'to work temporarily' under Article 1(1) of Directive 2008/104?

(ii) Has any objective explanation been given for the decision of the user undertaking to have recourse to a series of successive temporary agency contracts?

(iii) Have any of the provisions of Directive 2008/104 been circumvented?

(iv) Weighing all these factors, and taking all the circumstances into account, was a (permanent) employment relationship concealed behind successive temporary agency contracts, in a manner inconsistent with Article 5(5) of Directive 2008/104?'

#### *1. Meaning of 'temporarily'*

37. As pointed out by Advocate General Szpunar in his Opinion in *AKT*, Directive 2008/104 'does not define temporary agency work, nor does it list the cases in which the use of this form of work may be justified. Recital 12 in its preamble does, however, state that the directive is intended to respect the diversity of labour markets'. (17) Member States retain broad discretion to determine situations in which the use of temporary agency work is justified, (18) Directive 2008/104 providing 'only for the introduction of minimum requirements'. (19)

38. While the term 'temporarily' in Article 1 of Directive 2008/104 is to be interpreted broadly, in order not to jeopardise the attainment of its objectives or undermine its effectiveness, by inordinately and unjustifiably restricting the directive's scope, (20) on its literal interpretation, Article 1(1) of Directive 2008/104 refers to the duration of the assignment of temporary agency worker, not to the post occupied.

39. Article 1(1) concerns temporary agency workers who are *assigned* to a user undertaking 'to *work* temporarily'. (21) In other words, and as the Commission contends in its written observations, this wording suggests that it is the employment relationship between the temporary agency worker and the user undertaking that is temporary, and not the post to which the temporary agency worker is assigned, there being no mention in the directive of the nature of the work and thus nothing to suggest that the post to which the temporary agency worker is assigned cannot be permanent. The same conclusions can be drawn from a literal interpretation of Article 3(1)(a), (b), (c), and (e) of Directive 2008/104, concerning, respectively, the definitions of worker, temporary-work agency, temporary agency worker, and assignment. (22) Indeed, the Court in *KG* referred to these provisions in concluding that it is the 'employment relationship' with a user undertaking which is, 'by its very nature, temporary'. (23)

40. As Germany pointed out in its written observations, the wording of the directive shows that Member States are to be given a broad margin of discretion in the transposition of the word 'temporarily', subject to a requirement that a temporary assignment should not become an assignment of excessive duration, equivalent to a permanent assignment.

41. Arguments made in the written observations of the applicant to the effect that the context of the word 'temporarily' in Article 1(1), and the purpose of Directive 2008/104, suggest its attribution to the post occupied, as well as the assignment of the temporary agency worker, cannot be accepted. Recital 12 of Directive 2008/104 refers to respecting 'diversity of labour markets and industrial relation', (24) an aim which would be jeopardised if the concept of 'temporarily' were tied to the post to which a temporary agency worker is assigned, thereby impacting on the discretion of the Member States to permit assignment of temporary agency workers to permanent jobs which do not provide cover. Further, as pointed out in *KG*, the directive refers, in recital 15, to employment 'contracts of an indefinite duration', with this provision, along with Article 6(1) and (2) of Directive 2008/104 establishing 'permanent employment relationships', as the general form of employment relationship. (25) The opposite of this is an employment relationship, or assignment, that is limited in time.

42. The core objectives of Directive 2008/104, are set out in Article 2 thereof, and concern the creation of flexible forms of working, the creation of jobs, and the protection of temporary agency workers. (26) There is no clear link between any of these aims and the act of tying the concept of 'temporarily' to the post to which the temporary agency worker is assigned. The same applies to the objective inherent in Directive 2008/104 that recourse to temporary work should not become a permanent situation. (27) As pointed out by the defendant in its written observations, the aims of job creation and integration of workers into the job market (see recital 11) cannot lead to the conclusion that *permanent jobs* are per se precluded from being assigned to workers on a temporary basis.

43. Finally, I am inclined to accept arguments made by the Commission and Germany to the effect that the origins of Article 1(1) of Directive 2008/104 do not tie the concept of 'temporarily' to the nature of the post to which a temporary agency worker is assigned, (28) notwithstanding the applicant's arguments to the contrary. (29)

44. Thus, 'temporarily' refers exclusively to the assignment of the temporary agency worker, and means 'lasting for only a limited period of time' and 'not permanent' (30) and relates only to the period of assignment of the temporary agency worker in question.

### *2. Misuse of temporary agency work*

45. That said, and contrary to suggestions made in the written observations of the applicant, what is here suggested does not lead to a green-lighting of indefinite assignment of temporary workers to permanent posts or posts not performed to provide cover. While it was established in *KG* that Article 5(5) of Directive 2008/104 'does not require Member States to limit the number of successive assignments of the same worker to the same user undertaking or to make the use of that form of fixed-term work subject to the prerequisite that the technical, production, organisational or replacement-related reasons be *stated*', (31) it was equally established in *KG* that Article 5(5) of Directive 2008/104 aims at obliging Member States to take appropriate measures with a view to preventing the misuse (i) of the derogations from the principle of equal treatment permitted under that provision, *and* (ii) of successive temporary assignments designed to circumvent the provisions of the directive as a whole; (32) the latter obligation being widely set. (33)

46. Thus, it was held in *KG* that the referring court must review the legal classification of the employment relationship, with due regard to both Directive 2008/104 itself and the Member State law transposing it, in such a way as to determine whether a permanent employment relationship was *concealed* behind successive temporary agency contracts *designed to circumvent* the objectives of Directive 2008/104, and in particular the temporary nature of temporary agency work. (34)

47. The Court added that, for the purposes of making that assessment, the referring court may take into account: (a) whether successive assignments of the same temporary agency worker to the same user undertaking resulted in a period of service with that undertaking that was longer than what can *reasonably be regarded* as 'temporary', that could be indicative of misuse of successive assignments, for the purpose of the first sentence of Article 5(5) of Directive 2008/104. This finding was made in the light of the fact, inter alia, that successive assignments of the same temporary agency worker to the same user undertaking upset the balance struck by that directive between flexibility for employers and security for workers by undermining the latter; (b) where, in a given case, *no objective explanation* is given for the decision of the user undertaking concerned to have recourse to a series of successive temporary agency contracts, it is for the national court to examine, in the context of the national legislative framework and taking account of the circumstances of each case, whether any of the provisions of Directive 2008/104 have been *circumvented*, especially where the series of contracts in question has assigned the same temporary agency worker to the user undertaking. (35)

48. Thus, and as pointed out in the written observations of the French Government, the duration of a temporary work assignment is only one element to take into account in determining whether misuse of temporary agency work has taken place. As can be seen from the elements of the ruling in *KG* reproduced above, a Member State court is obliged, by virtue of Article 5(5) of Directive 2008/104, read in conjunction Article 1(1) thereof, to make the following assessment:

(i) Has the successive assignment to the same user undertaking resulted in a period of service that is no longer than what can reasonably be regarded as assignment to a user undertaking 'to work temporarily' under Article 1(1) of Directive 2008/104?

(ii) Has any objective explanation been given for the decision of the user undertaking to have recourse to a series of successive temporary agency contracts?

(iii) Have any of the provisions of Directive 2008/104 been circumvented?

(iv) Weighing all these factors, and taking all the circumstances into account, was a permanent employment relationship concealed behind successive temporary agency contracts, in a manner inconsistent with Article 5(5) of Directive 2008/104?

49. It is at point (ii) that the nature of the work to which a temporary agency worker is assigned becomes pertinent, including whether it is permanent and not provided for cover. The ruling in *KG* does not prevent 'technical, production, organisational or replacement-related' reasons from being taking into account in this context, given that it was merely held in *KG* that these did not have to be 'stated', with nothing mentioned as to their exclusion from objective explanation. (36)

50. For example, an undertaking involved in on-going research and development may need to expand its team of workers engaged in a given trade in which it normally employs only permanent workers. The need for temporary agency workers may result from the preliminary outcomes of a research and development programme. Such expansion can take place, initially, by recourse to temporary agency workers, either because investors have not yet been attracted to develop the results of that research, or because the research process itself has not yet been completed. This is the type of explanation that a national judge may conclude, taking all the circumstances into account, amounts to objective explanation for successive recourse to temporary agency workers, even though the posts concerned were not performed to provide cover, and were otherwise performed on a permanent basis within that user undertaking.

51. It is perhaps not clear from the ruling in *KG* whether the misuse of temporary agency work is dependent on a finding of circumvention of provisions of Directive 2008/104 aside from Article 5(5) itself. (37)

52. I am inclined, however, to the view that it does not, given that the Court held in *KG* that successive assignments of the same temporary agency worker to the same user undertaking circumvented the very essence of the provisions of Directive 2008/104. (38) The Court further held in *KG* that one of the *obligations* imposed on Member States by Article 5(5) was the requirement to take appropriate measures to prevent successive assignments designed to circumvent the provisions of Directive 2008/104 as a whole, (39) and that Directive 2008/104 'seeks to have Member States ensure that temporary agency work at the same user undertaking does not become a permanent situation …'. (40)

53. In consequence, the ruling in *KG* supports the interpretation that any breach of the obligations imposed by Directive 2008/104 additional to those of Article 5(5) thereof, such as, for example, the guarantee of equal pay between temporary agency workers and those directly recruited by the user undertaking to occupy the same job (see Article 5(1) of Directive 2008/104 combined with Article 3(1)(f) of that directive), (41) is relevant to the decision ultimately made by the referring court, at step (iv) (see point 48 above) as to whether, taking all the circumstances of the case into account, a permanent employment relationship was concealed behind successive temporary agency contracts, in a manner inconsistent with Article 5(5) of Directive 2008/104. It is to be recalled that the situation at issue in the main proceedings involved 18 extensions over a period of 56 months.

54. This approach reflects the further finding in *KG* that the guarantee of the 'basic working conditions and employment conditions' of temporary agency workers' under Article 5(1) of Directive 2008/104, read in conjunction with Article 3(1)(f) of Directive 2008/104, is to be interpreted broadly to ensure compliance with the Charter. (42)

55. For these reasons, Question 1 should be answered to the effect detailed in point 36 above.

### *B. The answer to the second question*

56. Question 2 should be answered to the effect that a Member State law which expressly excludes the taking into account of periods of assignment prior to a specific date, but which take place after the date for implementation of Directive 2008/104, such exclusion being relevant to the determination of whether misuse of temporary agency work has occurred, is inconsistent with Article 5(5) of Directive 2008/104, when it contracts the length of an assignment period on which a temporary agency worker would otherwise be able to rely. However, in a horizontal action between two private parties, inconsistent Member State laws providing for such exclusion are to be disapplied only if this does not compel *contra legem* interpretation of Member State law, which is for the referring court to decide.

57. That is so for the following reasons.

58. Germany's implementation of Article 5(5) of Directive 2008/104 was initially limited, under the second sentence of Paragraph 1(1) of the AÜG, to providing that the 'assignment of workers to user undertakings shall be temporary', (43) with the dedicated remedial regime confined to the sanctions mentioned above (see point 12). While this might be minimalist implementation, it falls short of the taking of 'no measures at all to preserve the temporary nature of temporary agency work', in a manner inconsistent with Article 5(5) of Directive 2008/104. (44)

59. If not for the law reform which took effect in Germany from 1 April 2017 (see points 13 to 16 above) and under the test set out above with respect to Question 1 (see point 36), the applicant would have been able to argue that, under EU law, an assignment of four years and nine months with the defendant, running from 1 September 2014 to 31 May 2019, amounted, in all the circumstances, to misuse of temporary agency work in a manner inconsistent with Article 5(5) of Directive 2008/104, given Germany's obligation to implement the directive by 5 December 2011. The second sentence of Paragraph 1(1) of the AÜG is to be interpreted in conformity with this. (45)

60. However, the reforms to German law entering into force on 1 April 2017 appear to have, in effect, removed this legal path from beneath the feet of the applicant. The reading of the reforms supported by the defendant obliterates the period from 1 September 2014 to 1 April 2017 for the purposes of assessing whether misuse of temporary agency work has taken place, and at the same time meant that the applicant continued to be affected by the new 18-month maximum limit on the assignment of temporary agency workers to the same user undertaking set by the legislation concerned.

61. It is argued in the written observations of Germany that the change in the law of 1 April 2017 was merely an instance of Germany passing from a flexible model for implementing Article 5(5) of Directive 2008/104 to a fixed one, by introducing the 18-month cap on the assignment of temporary agency workers to the same user undertaking.

62. However, and in the light of the analysis appertaining to Question 1, Germany has exceeded the discretion afforded to it under Article 5(5) of Directive 2008/104 to set maximum periods for the assignment of temporary agency workers to the same user undertaking, although Directive 2008/104 does not oblige it to set such limits, (46) given that, as argued in the written observations of the Commission, the reforms of 1 April 2017 actively prejudice the *effet utile* of Directive 2008/104, when compared with the legislative scheme previously in place under the law of that Member State, and are to the detriment of an applicant who has had the uncontested status throughout the period concerned of being a temporary agency worker under Article 3(1)(c) of Directive 2008/104, and who has been the subject of 'assignment', within the meaning of Article 3(1)(e) of Directive 2008/104, to the same user undertaking for a period of four years and nine months post-dating the deadline for implementation of Directive 2008/104, namely 5 December 2011. (47) Such a situation is inconsistent with Article 10 and recital 21 of Directive 2008/104, as well as with the obligation to 'ensure the protection of temporary agency workers' laid down in Article 2 of that directive, and Germany's broader good faith obligations under Article 4 TEU in carrying out tasks which flow from the Treaties, along with Article 288 TFEU with respect to the binding effect of directives.

63. Yet, it follows from the settled case-law that the interpretation obligation meets its limits when an interpretation of Member State law in conformity with EU law would result in a *contra legem* meaning of Member State law. (48) It is therefore for the referring court (49) to determine whether the transitional provision in Paragraph 19(2) of the AÜG which states that 'assignment 'periods predating 1 April 2017 shall not be taken into account in the calculation of the maximum assignment period laid down in Paragraph 1(1b) …' cannot be interpreted, account being taken of 'the whole body of domestic law' (50) in any way other than by removing from the applicant any entitlement to rely on the full assignment period of four years and nine months, which took place from 1 September 2014 to 31 May 2019, and which was provided for under German law until 1 April 2017.

64. In other words, can the result envisaged by Directive 2008/104 only be achieved by interpreting Paragraph 1(1b) and Paragraph 19(2) of the AÜG *contra legem*? For example, once the whole body of German law has been taken into account, could these provisions be read as not displacing in its entirety the previous legal regime in place, and vesting temporary agency workers with the option of asserting misuse of temporary agency work by reference to the criteria established in *KG* and detailed in the answer to Question 1 with respect to the whole assignment period? If *contra legem* interpretation is what it takes to achieve such a result, then, under the established case-law of the Court, the remedial route left open to the applicant lies in an action for state liability against Germany, under the *Francovich* rules, (51) for breach of its obligations under Article 5(5) of Directive 2008/104 to 'take appropriate measures … 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'. (52)

65. Finally, the Court has held that provisions of the Charter that are sufficient of themselves and which not need to be made more specific by provisions of EU or national law in order to confer on individuals rights, (53) like Articles 21 and 47 (54) and Article 31(2), (55) may be relied on as such, and result in an obligation to disapply if need be *any* contrary provision of national law, even in horizontal disputes in which the prohibition on *contra legem* interpretation of Member State law would otherwise be operative. However, contrary to arguments made in the applicant's written observations, Article 31(1) of the Charter is not such a provision.

66. This is so because the Court has held that 'the national court is not required, solely on the basis of EU law, to disapply a provision of national law which is incompatible with a provision of the Charter of Fundamental Rights of the European Union which, … does not have direct effect'. (56) Given the open-ended nature of the text of Article 31(1) of the Charter, which states that every 'worker has the right to working conditions which respect his or her health, safety and dignity', that article does not meet the essential prerequisites of direct effect of being sufficiently clear, unconditional and precise. (57) That being so, it cannot be relied on to oblige the referring court, acting within its jurisdiction, (58) to disapply

Paragraph 1(1b) and Paragraph 19(2) of the AÜG should the referring court consider their texts to be *contra legem* to the guarantees derived from Article 5(5) of Directive 2008/104.

67. It is for these reasons that the second question should be answered in the sense set out in point 56 above.

### *C. The answer to the third question*

68. Question 3 should be answered to the effect that a temporary agency worker has no entitlement under Directive 2008/104 to the establishment of a permanent employment relationship with a user undertaking in the event of a finding of misuse of temporary agency work under Article 5(5) of Directive 2008/104. However, should the referring court rule, after taking the whole body of the law of the Member State concerned into account, that interpreting that law in conformity with Article 5(5) of Directive 2008/104 does not compel *contra legem* interpretation of Member State law, it is to determine whether adequate administrative or judicial procedures are available to ensure fulfilment of the obligations derived from Directive 2008/104, and guarantee that the law of the Member State concerned provides effective, proportionate, and dissuasive penalties, as required by Article 10 of that directive, subject to the limitations of the established case-law.

69. In *KG* the Court held that Article 5(5) of Directive 2008/104 cannot be interpreted in the same manner as Clause 5 of the framework agreement on fixed-term work concluded on 18 March 1999, set out in the Annex to Directive 1999/70/EC. (59) In *Sciotto* (60) it was held, inter alia, that the specific obligation to prevent abuse arising from the use of successive fixed-term employment contracts, detailed in Clause 5 of the abovementioned framework agreement, meant that the absence, even in the case of abuse, for workers in the operatic and orchestral foundations sector, of a facility for the transformation of their fixed-term employment contracts into an employment relationship of indefinite duration (in the absence of other forms of protection such as the setting of a limit to the possibility of having recourse to fixed-term contract), meant that there was no effective measure, within the meaning of the relevant case-law pertinent to the framework agreement, punishing the abuse of successive fixed-term contracts. (61)

70. However, the Court held in *KG* that Clause 5 of the framework agreement 'lays down specific obligations to prevent abuse arising from the use of successive fixed-term employment contracts, the same cannot be said of the first sentence of Article 5(5) of Directive 2008/104'. (62) The interpretation of Clause 5 of the framework agreement could not therefore be transposed to Article 5(5) of Directive 2008/104. (63) Advocate General Sharpston in *KG* made specific reference to the findings in *Sciotto* on the transformation of fixed-term contracts to contracts of indefinite duration before concluding that *Sciotto* could not be transposed to Article 5(5) of Directive 2008/104, this provision imposing no detailed and specific obligations. (64)

71. Thus, the answer to Question 3 is in the negative.

72. With regard to the obligations of the referring court under Article 10 of Directive 2008/104, the first paragraph thereof reaffirms the right to an effective remedy under Article 47 of the Charter. (65) The requirement of the provision of effective, proportionate and dissuasive remedies, as guaranteed by the second paragraph of Article 10, requires Member States to introduce measures which are sufficiently effective to achieve the aim of Directive 2008/104, (66) and which provide a genuinely dissuasive effect. (67) EU law does not require Member State courts to create remedies to ensure the protection of rights that parties derive from EU law other than those established by national law, (68) unless 'the structure of the domestic legal system concerned were such that there were no remedy'. (69) This is to the exclusion, however, of a remedy entailing the declaration of a contract of permanent employment between a temporary agency worker and a user undertaking (for the reasons referred to in points 69 to 70 above) (70) or a *contra legem* interpretation of Member State law (points 63 to 64 above).

### *D. The answer to the fourth question*

73. Question 4 is to be answered to the effect that the extension of the individual maximum assignment period can be left to the discretion of the parties to a collective agreement, including parties to a collective agreement who exercise competence over only the sector in which the user undertaking is active. However, the answer to Question 2 applies equally to such agreements.

74. As pointed out in the written observations of Germany, Member States are free to leave the implementation of social policy objectives to the social partners, (71) and recourse to collective agreements is expressly provided for in Directive 2008/104, (72) it being immaterial whether parties to a collective agreement exercise competence not over the employment relationship of the temporary agency worker concerned, but over the sector in which the user undertaking is active. (73) However, the supplementary company-level central works council agreement (concluded between the defendant and the central works council) of 20 September 2017 provides, inter alia, that in manufacturing, the assignment of temporary workers is not to exceed 36 months. For temporary workers who were already employed on 1 April 2017, only periods postdating 1 April 2017 are to count towards calculating the maximum assignment period of 36 months. As explained in points 56 to 67, this preclusion is inconsistent with Article 5(5) of Directive 2008/104, so that the law elaborated in those points applies equally to such collective agreements.

## V. Conclusion

75. I therefore propose that the response to the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin-Brandenburg, Germany) should be as follows:

(1) In determining whether the first sentence of Article 5(5) of Directive 2008/104 of the European Parliament and of the Council of 19 November 2008 on temporary agency work, read in conjunction with the word ‘temporarily’ in Article 1 of Directive 2008/104, precludes the assignment of a temporary agency worker to the same user undertaking, over a period in excess of 55 months, to a job which is permanent and not performed for cover, a Member State court is required, as a matter of EU law, to undertake the following analysis:

(i) Has the successive assignment of a temporary agency worker to the same user undertaking resulted in a period of service that is no longer what can reasonably be regarded as assignment to a user undertaking ‘to work temporarily’ under Article 1(1) of Directive 2008/104?

(ii) Has any objective explanation been given for the decision of the user undertaking to have recourse to a series of successive temporary agency contracts?

(iii) Have any of the provisions of Directive 2008/104 been circumvented?

(iv) Weighing all these factors, and taking all the circumstances of into account, was a permanent employment relationship concealed behind successive temporary agency contracts, in a manner inconsistent with Article 5(5) of Directive 2008/104?

(2) A Member State law which expressly excludes the taking into account of periods of assignment prior to a specific date, but which take place after the date for implementation of Directive 2008/104, such exclusion being relevant to the determination of whether misuse of temporary agency work has occurred, is inconsistent with Article 5(5) of Directive 2008/104, when it contracts the length of an assignment period on which a temporary agency worker would otherwise be a able to rely. However, in a horizontal action between two private parties, inconsistent Member State laws providing for such exclusion are to be disapplied only if this does not compel *contra legem* interpretation of Member State law, which is for the referring court to decide.

(3) A temporary agency worker has no entitlement under Directive 2008/104 to the establishment of a permanent employment relationship with a user undertaking in the event of a finding of misuse of temporary agency work under Article 5(5) of Directive 2008/104. However, should the referring court rule, after taking the whole body of the law of the Member State concerned into account, that interpreting that law in conformity with Article 5(5) of Directive 2008/104 does not compel *contra legem* interpretation of Member State law, it is to determine whether adequate administrative or judicial procedures are available to ensure the fulfilment of the obligations derived from Directive 2008/104, and guarantee that the law of the Member State concerned provides effective, proportionate, and dissuasive penalties, as required by Article 10 of that directive, subject to the limitations of the established case-law.

(4) The extension of the individual maximum assignment period can be left to the discretion of the parties to a collective agreement, including parties to a collective agreement who exercise competence over only the sector in which the user undertaking is active. However, the answer to Question 2 applies equally to such agreements.

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1 Original language: English.

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2 OJ 2008 L 327, p. 9. See previously, judgments of 11 April 2013, *Della Rocca* (C-290/12, EU:C:2013:235); of 17 March 2015, *AKT* (C-533/13, EU:C:2015:173); of 17 November 2016, *Betriebsrat der Ruhrlandklinik* (C-216/15, EU:C:2016:883); of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823); of 3 June 2021, *TEAM POWER EUROPE* (C-784/19, EU:C:2021:427); and my Opinion in *Manpower Lit* (C-948/19, EU:C:2021:624) (judgment pending). See also judgment of the General Court of 13 December 2016, *IPSO* v *ECB* (T-713/14, EU:T:2016:727).

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3 As concluded in point 51 of the Opinion of Advocate General Sharpston in *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:300).

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4 *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraph 71).

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5 See points 36 to 55 below.

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6 See points 56 to 67 below.

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7 See points 68 to 72 below.

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8 For example, the Opinion of Advocate General Szpunar in *AKT* (C-533/13, EU:C:2014:2392, point 72).

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9 This is contested, however, in the written observations of Germany.

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10 According to the written observations of the applicant. The same written observations state that the relevant collective agreement applicable to the metallurgy sector in Berlin provide for a salary of EUR 15.50 per hour.

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11 Since 1 September 2015, in the alternative, since 1 March 2016, in the further alternative, since 1 November 2016, in the further alternative, since 1 October 2018 or since 1 May 2019.

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12 See survey of language versions at footnote 21 below.

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13 C-681/18, EU:C:2020:823.

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14 Judgment of 28 February 2013, *Petersen* (C-544/11, EU:C:2013:124, paragraph 24 and the case-law cited). See also, for example, order of 4 February 2016, *Baudinet and Others* (C-194/15, not published, EU:C:2016:81, paragraph 22 and the case-law cited). As mentioned in point 45 of my Opinion in *Manpower*

*Lit* (C-948/19, EU:C:2021:624), concerning Directive 2008/104, in the procedure laid down by Article 267 TFEU, it is for the Court to provide the national court with an answer which will be of use to it and enable it to determine the case before it.

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15 Ibid., point 45 and the case-law cited. See similarly, *KG*, paragraph 49 and the case-law cited).

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16 The question referred uses the term 'abuse'. It has been here replaced with 'misuse' of temporary agency work in conformity with the wording of Article 5(5) of Directive 2008/104.

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17 C-533/13, EU:C:2014:2392, point 113.

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18 See ibid., point 114.

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19 *KG*, paragraph 41.

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20 The Court has reached this conclusion with respect to the meaning of 'worker' under Directive 2008/104. See judgment of 17 November 2016, *Betriebsrat der Ruhrlandklinik* (C-216/15, EU:C:2016:883, paragraph 36). In my Opinion in *Manpower Lit* (C-948/19, EU:C:2021:624, point 71) I advocate broad interpretation of Article 1(2) of Directive 2008/104 on engagement in 'economic activities' for the same reason.

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21 The phrase 'to work temporarily' is reflected in other language versions of Article 1(1) of Directive 2008/104. See, for example, the French version, 'afin de travailler de manière temporaire'; the Bulgarian version, 'на временна работа'; the German version 'um vorübergehend … zu arbeiten'; the Spanish version 'a fin de trabajar de manera temporal'; the Italian version 'per lavorare temporaneamente'; the Portugese version, 'temporariamente … a fim de trabalharem'; the Slovak version, 'na dočasný výkon práce'; the Czech version, 'po přechodnou dobu pracovali'; the Polish verison 'w celu wykonywania tymczasowo pracy'; the Dutch version, 'tijdelijk te werken', the Swedish version, 'för att temporärt arbeta'. See also the analysis of Advocate General Sharpston in *KG* (C-681/18, EU:C:2020:300, point 51). Contrary to arguments made in the written observations of the applicants, any nuances in the language versions are insufficient to generate doubt with respect to difference in meaning.

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22 It is significant that term 'assignment' as set out in Article 3(1)(e) of Directive 2008/104 'means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction'.

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23 *KG*, paragraph 61.

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24 See in particular in this regard the Opinion of Advocate General Szpunar in *AKT* (C-533/13, EU:C:2014:2392, points 113 to 115).

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25 *KG*, paragraph 62.

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26 See also recital 18 on improvement of minimum protection of temporary workers.

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27 *KG*, paragraph 60.

28 Germany and the Commission refer to the original Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers (COM(2002) 149 final); the Position of the European Parliament adopted at first reading on 21 November 2002 with a view to the adoption of European Parliament and Council Directive 2002/…/EC on temporary agency work (OJ 2004 C 25 E, p. 368); the amended proposal for the directive (COM(2002) 0701); and Common Position (EC) No 24/2008 of 15 September 2008 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to the adoption of a Directive of the European Parliament and of the Council on temporary agency work (OJ 2008 C 254 E, p. 36).

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29 The sources selected by the applicant are not indicative of a legislative intent toward *wholesale* exclusion of permanent posts from the scope of Directive 2008/104. See Position of the European Parliament adopted at first reading on 21 November 2002 with a view to the adoption of European Parliament and Council Directive 2002/…/EC on temporary agency work (OJ 2004 C 25 E, p. 368, at p. 373); Common Position (EC) No 24/2008 of 15 September 2008 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to the adoption of a Directive of the European Parliament and of the Council on temporary agency work (OJ 2008 C 254 E, p. 36, at p. 41); Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the Common Position of the Council on the adoption of a European Parliament and Council Directive on temporary agency work – Political agreement on a common position (QMV) (COM(2008) 0569 final), p. 6.

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30 As concluded in point 51 of the Opinion of Advocate General Sharpston in *KG* (C-681/18, EU:C:2020:300).

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31 *KG*, paragraph 42. Emphasis added.

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32 Ibid., paragraph 55.

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33 Ibid., paragraph 57.

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34 Ibid., paragraph 67.

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35 Ibid., paragraphs 68 to 71.

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36 Ibid., paragraph 42.

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37 See in particular paragraph 71 of *KG*. The applicant has made arguments, in any event, in his written observations to the effect that he has been subjected to unequal treatment, in a manner inconsistent with Article 4 of Directive 2008/104, with respect to both pay and risk of unemployment.

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38 *KG*, paragraph 70.

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39 *KG*, paragraph 55. See also paragraph 57.

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40 *KG*, paragraph 60.

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41 As already noted, breach of equal pay is at least intimated by the applicant in his written observations.

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42 *KG*, paragraph 54. It is to be added that this interpretative obligation subsists with respect to Article 5(1) and Article 3(1)(f) of Directive 2008/104, notwithstanding the fact that, when Member States exceed the minimum requirements set by Directive 2008/104, they are not 'implementing' EU law for the purposes of Article 51(1) of the Charter. See my Opinion in *Manpower Lit* (C-948/19, EU:C:2021:624, point 61).

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43 In the version in force from 1 December 2011 to 31 March 2017. Point 11 above.

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44 *KG*, paragraph 63.

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45 *KG*, paragraphs 64 and 65. The principle that national law must be interpreted in conformity with EU law, under which the national court is bound to interpret national law, so far as possible, in conformity with the requirements of EU law, is inherent in the system of the Treaties, in that it enables that court to ensure, within the limits of its jurisdiction, the full effectiveness of EU law when it determines the dispute before it. See judgment of 17 March 2021, *Academia de Studii Economice din Bucureşti* (C-585/19, EU:C:2021:210, paragraph 69 and the case-law cited).

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46 *KG*, paragraph 42. Opinion of Advocate General Sharpston in *KG* (C-681/18, EU:C:2020:300, point 66).

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47 Article 11(1) of Directive 2008/104.

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48 *KG*, point 66 and the case-law cited. See more recently, for example, the Opinion of Advocate General Szpunar in *Thelen Technopark Berlin* (C-261/20, EU:C:2021:620, points 30 and 31 and the case-law cited).

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49 A point underscored recently in the Opinion of Advocate General Szpunar in *Thelen Technopark Berlin*, ibid., point 32.

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50 *KG*, paragraph 65 and the case-law cited. See also notably the judgment of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraphs 107 to 119). See also, for example, judgment of the Court of 17 April 2018 *Egenberger* (C-414/16, EU:C:2018:257, paragraph 71).

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51 Judgment 9 November 1995, *Francovich* (C-479/93, EU:C:1995:372).

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52 See judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 50 and the case-law cited). See more recently the judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 56).

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53 Judgment of the Court of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraphs 76 and 78).

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54 Ibid., point 78.

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55 See judgment of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871).

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56 Judgment of 24 June 2019, *Poplawski* (C-573/17, EU:C:2019:530, paragraph 63, and the case-law cited).

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57 See also the Explanations to Article 31(1) of the Charter. It states that the provision is in fact based on a directive, namely Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1) (c.f. *Egenberger* and the pre-condition of no requirement for further legislation). The reference in the explanations to Article 156 TFEU with regard to 'working conditions' provides no further precision. As pointed out in by Advocate Sharpston in her Opinion in *KG* (C-681/18, EU:C:2020:300, point 44), Article 156 TFEU does not define 'working conditions'. On the pre-conditions of direct effect, see recently, for example, judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631).

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58 Judgment of the Court of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 79).

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59 Council Directive of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

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60 *KG*, paragraph 45. Judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859).

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61 *Sciotto*, ibid., paragraphs 61 and 62. It is to be noted that the contours, in any event, of any obligation on Member States, under Directive 1999/70, to provide a facility for the transformation of fixed-term contracts to contracts of indefinite duration in the event of abuse, is currently, in any event, subject to development in the case-law. See notably my Opinion in *GILDA-UNAMS and Others* (C-282/19, EU:C:2021:217) (judgment pending).

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62 *KG*, paragraph 45.

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63 Ibid.

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64 Opinion of Advocate General Sharpston in *KG*, (C-681/18, EU:C:2020:300, point 66).

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65 See by analogy the judgment of 15 April 2021, *Braathens Regional Aviation* (C-30/19, EU:C:2021:269, paragraph 33).

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66 Ibid., paragraph 37.

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67 Ibid., paragraph 38.

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68 Ibid., paragraph 55 and the case-law cited.

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69 Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 104). See similarly judgment of 21 November 2019, *Deutsche Lufthansa* (C-379/18, EU:C:2019:1000, paragraph 61).

70 It is to be noted that, even if the principle of equivalence were relevant to the interpretation of Article 10 of Directive 2008/104, the declaration of an employment relationship introduced under German law (see point 15 above) does not attach to an analogous claim of a purely domestic nature but an EU claim. See my Opinion in *GILDA-UNAMS and Others* (C-282/19, EU:C:2021:217, footnote 72) (judgment pending).

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71 Judgment of 18 December 2008, *Ruben Andersen* (C-306/07, EU:C:2008:743, paragraphs 25 and 26). See also, for example, judgment of 11 February 2010, *Ingeniørforeningen i Danmark* (C-405/08, EU:C:2010:69, paragraph 39).

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72 See Article 5(1) and Article 11(1), and recitals 16, 17 and 19. The applicant's assertion that either Article 9(1) or Article 5(3) of Directive 2008/104 can be read as reducing this established discretion is to be rejected, as such a diminution of Member State discretion would require clear and unambiguous wording to that effect.

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73 See Question 3.3 referred, and reproduced in point 26 above.