JUDGMENT OF THE COURT (second chamber)

March 17, 2022 (*1)

"Reference for a preliminary ruling – Social policy – Directive 2008/104/ EC – Temporary work – Article 1 , paragraph 1 – Making available "temporarily" – Concept – Occupation of an existing position on a long-term basis – Article 5, paragraph 5 – Missions successive – Article 10 – Sanctions – Article 11 – Exception by the social partners to the maximum duration set by the national legislator"

In case C-232/20 ,

REFERENCE for a preliminary ruling under Article 267 TFEU, lodged by the Landesarbeitsgericht Berlin-Brandenburg (Higher Labor Court, Berlin-Brandenburg, Germany), by decision of 13 May 2020, received at the Court on 3 June 2020, in the procedure

NP

against

Daimler AG, Mercedes-Benz Werk Berlin,

THE COURT (second chamber),

composed of Mr A. Arabadjiev, President of the First Chamber, acting as President of the Second Chamber, Ms I. Ziemele (rapporteur), MM. T. von Danwitz, P. G. Xuereb and A. Kumin, judges,

general advocate: Mr. E. Tanchev,

clerk: Mr. A. Calot Escobar,

having regard to the written procedure,

considering the observations presented:

– for NP, by MM. R. Buschmann and K. Jessolat, counsel,

– for Daimler AG, Mercedes-Benz Werk Berlin, by M es U. Baeck and M. Launer, Rechtsanwälte,

– for the German government, by MM. J. Möller and R. Kanitz, as agents,

– for the French Government, by Ms E. de Moustier and Ms N. Vincent, as Agents,

– for the European Commission, by Mr. B.-R. Killmann and Ms. C. Valero, as agents,

having heard the Advocate General in his conclusions at the hearing of September 9, 2021,

returns the present

Stop

[1]The request for a preliminary ruling concerns the interpretation of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008, L 327, p. 9), in particular its Article 1 , paragraph 1.

[2]This request was made in the context of a dispute between NP and Daimler AG, Mercedes-Benz Werk Berlin (hereinafter "Daimler"), concerning its request for a declaration of the existence of a relationship of work with Daimler on the grounds that, due to its duration, his provision to this company as a temporary worker cannot be described as "temporary".

The legal framework

Union law

[3]Recitals 12, 16, 17, 19 and 21 of Directive 2008/104 state:

"(12)This Directive establishes a protective framework for temporary workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labor markets and relations between social partners.

[...]

(16)In order to be able to deal flexibly with the diversity of labor markets and relations between the social partners, Member States may authorize the social partners to define working and employment conditions, provided that they respect the overall level of protection for temporary workers.

(17)Furthermore, in certain well-defined cases, Member States should, on the basis of an agreement concluded by the social partners at national level, have the possibility of derogating, in a limited manner, from the principle of equal treatment, for provided that a sufficient level of protection is ensured.

[...]

(19)This Directive does not affect the autonomy of the social partners or the relations between the social partners, including the right to negotiate and conclude collective agreements in accordance with Union law and national laws and practices, while respecting current Community legislation.

[...]

(21) Member States should provide for administrative or judicial procedures to safeguard the rights of temporary agency workers and should provide for effective, proportionate and dissuasive sanctions in the event of violation of the obligations arising from this Directive. »

4 Article 1 of this directive, entitled “Scope”, provides:

"1. This Directive applies to workers who have an employment contract or an employment relationship with a temporary employment agency and who are made available to user companies in order to work temporarily under their control and direction. .

2. This Directive is applicable to public and private undertakings which are temporary work undertakings or user undertakings carrying out an economic activity, whether or not they pursue a profit-making aim.

3. Member States, after consulting the social partners, may provide that this Directive does not apply to contracts or employment relationships concluded within the framework of a specific public training, vocational integration and retraining program or supported by the public authorities. »

5 Article 2 of that directive, entitled “Purpose”, reads as follows:

"The purpose of this Directive is to ensure the protection of temporary workers and to improve the quality of temporary work by ensuring compliance with the principle of equal treatment, as set out in Article 5, towards temporary workers and recognizing temporary work companies as employers, while taking into account the need to establish an appropriate framework for the use of temporary work with a view to contributing effectively to job creation and development of flexible forms of work. »

6 Article 3 of the same directive, entitled 'Definitions', provides, in paragraph 1(b) to (e):

“For the purposes of this Directive, we mean:

[...]

b) “temporary employment company”: any natural or legal person who, in accordance with national law, concludes employment contracts or establishes working relationships with temporary workers with a view to making them available to user companies to work there on a temporary basis. temporarily under the control and direction of the said companies;

vs) “temporary worker”: a worker having an employment contract or an employment relationship with a temporary employment company with the aim of being made available to a user company with a view to working there temporarily under the supervision and the management of the said company;

d) “user company”: any natural or legal person for whom and under whose control and direction a temporary worker works on a temporary basis;

e) “mission”: the period during which the temporary worker is made available to a user company with a view to working there temporarily under the control and direction of said company.

7Article 5 of Directive 2008/104, entitled “Principle of equal treatment”, provides, in paragraphs 1, 3 and 5:

"1. During the duration of their mission with a user company, the essential working and employment conditions of temporary workers are at least those which would apply to them if they were recruited directly by the said company to occupy the same position. job.

For the purposes of the application of the first paragraph, the rules in force in the user company concerning:

has)the protection of pregnant women and breastfeeding mothers and the protection of children and young people; as well as

b)equal treatment between men and women and any action aimed at combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;

must be respected, as established by legislation, regulations, administrative provisions, collective agreements or any other provision of general application.

[...]

3. Member States may, after consulting the social partners, offer them the possibility of maintaining or concluding, at the appropriate level and subject to the conditions laid down by the Member States, collective agreements which, while guaranteeing the overall protection of temporary workers, may put in place, for the working and employment conditions of temporary workers, provisions which may differ from those referred to in paragraph 1.

[...]

5. Member States shall take the necessary measures, in accordance with national law or the practices in force in the country, with a view to avoiding abusive recourse to the application of this Article and, in particular, the allocation of missions successively with the aim of circumventing the provisions of this Directive. They inform the Commission of the measures taken. »

8Article 9 of this directive, entitled “Minimum requirements”, provides:

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

2. The implementation of this Directive in no way constitutes a sufficient reason to justify a reduction in the general level of protection of workers in the areas covered by this Directive. The measures taken to implement this Directive are without prejudice to the rights of Member States and/or social partners to adopt, having regard to developments in the situation, legislative, regulatory or contractual provisions different

from those which exist at the time of adoption of this Directive, provided that the minimum requirements provided for in this Directive are respected. »

9 Article 10 of that directive, entitled “Sanctions”, reads as follows:

"1. Member States shall provide for appropriate measures in the event of non-compliance with this Directive by temporary employment agencies or user companies. In particular, they shall ensure that there are appropriate administrative or judicial procedures to enforce the obligations arising from this Directive.

2. Member States shall determine the system of sanctions applicable to breaches of national provisions adopted pursuant to this Directive and take all necessary measures to ensure their implementation. The sanctions thus provided for must be effective, proportionate and dissuasive. [...] »

10 Article 11 of the same directive, entitled “Implementation”, states, in paragraph 1:

“Member States shall adopt and publish the legislative, regulatory and administrative provisions necessary to comply with this Directive by 5 December 2011 at the latest, or ensure that the social partners put in place the necessary provisions by agreement, Member States must take all necessary measures enabling them to be able at all times to achieve the objectives set by this Directive. [...] »

German law

11 Article 1 of the Gesetz zur Regelung der Arbeitnehmerüberlassung (law regulating the provision of temporary workers), of February 3, 1995 (BGBl. 1995 I, p. 158), in the version in force from December 1 , 2011 to March 31, 2017 (hereinafter the “AÜG”), entitled “Obligation to have an authorization”, provided, in paragraph 1:

“Employers who, as temporary work companies, wish, as part of their economic activity, to make workers (temporary workers) available to third party companies (user companies) must have authorization. The provision of the worker to the user company is of a temporary nature.”

12 Article 3 of the AÜG provided, in this regard, that the authorization or its extension must be refused when factual elements allow it to be considered that the applicant does not present the reliability required by Article 1 for the exercise of the activity, in particular because he did not comply with the provisions relating to social security, relating to the withholding and repayment of income tax, relating to placement services, recruitment services in other States or the employment of workers from other States, the provisions relating to the protection of workers or the obligations provided for by labor law.

13 According to Article 5 of the AÜG, the authorization could be withdrawn for the future if the authority which issued the authorization would have been entitled, on the

basis of facts occurring subsequently, to refuse this issue. The authorization lost its validity when the withdrawal took effect.

[14]Pursuant to Section 9 of the AÜG, contracts between the temporary work company and the user company, as well as those between the temporary work company and the temporary worker, if the temporary work company does not did not have the authorization required by law, were ineffective. In this case, Article 10 of the AÜG provided that an employment relationship was considered to have arisen between the user company and the temporary worker.

[15]The AÜG was amended by the Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze (Act amending the Act on the provision of temporary labor and other laws), of 21 February 2017 (BGBl 2017 I, p . 258, hereinafter the "AÜG, as amended"), which entered into force on April 1, 2017 .

[16]Article 1 of the AÜG, as amended, entitled "Provision of workers, authorization requirement", reads as follows:

"(1) [...] The provision of workers is authorized on a temporary basis up to a maximum duration set in paragraph 1b.

[...]

(1b) The temporary employment company cannot make the same temporary worker available to the same user company for more than 18 consecutive months; the temporary employment company cannot have the same temporary worker work for more than 18 consecutive months. The duration of previous assignments made available to the same user company, by the same temporary work company or another, must be taken into account in full when the interval between two consecutive missions does not exceed three months. The social partners in the user sector may set, by collective agreement, a maximum duration of provision different from that provided for in the first sentence. [...] A maximum duration of availability different from that provided for in the first sentence may be set by means of a company or service agreement concluded on the basis of a collective agreement concluded by the social partners of the user sector. [...] »

[17]Section 9(1)(1b) of the AÜG, as amended, provides:

"Are without effect:

[1b)]employment contracts between the temporary employment company and the temporary worker as soon as the maximum period of authorized provision provided for in Article 1 , paragraph 1b, is exceeded, unless, within a period of one months from exceeding the maximum authorized duration of provision, the temporary worker notifies the temporary work company or the user company in writing that he wishes to maintain the employment contract with the temporary work company. temporary work,

[...] »

18 Section 10(1), first sentence, of the AÜG, as amended, states:

"When the contract between a temporary work company and a temporary worker is ineffective pursuant to Article 9, an employment relationship is considered to have arisen between the user company and the temporary worker on the start date of the mission agreed between the user company and the temporary work company; when said contract is deprived of effect only after the temporary worker has started working within the user company, the employment relationship between the user company and the temporary worker is considered to have arisen on the date of deprivation of effect. [...] »

19 Section 19(2) of the AÜG, as amended, contains a transitional provision, which reads as follows:

"Periods of availability prior to April 1 , 2017 are not taken into account when calculating the maximum duration of availability provided for in Article 1 , paragraph 1b [...]"

20 The collective agreement of May 23, 2012 governing agency/temporary work in the metal and electronics industry in Berlin and in the Land of Brandenburg and that of June 1, 2017 which succeeded it provide in particular that it is possible to appeal temporary to temporary workers. The collective agreement of June 1 , 2017 also expressly refers to the legal possibility of exemption provided for in article 1, paragraph 1b, of the AÜG, as amended. The social partners also agree on the point that, in application of this collective agreement, the maximum duration of a mission cannot exceed 48 months. Point 8 of the said collective agreement contains a transitional provision. Under this provision, the social partners agree at company level on the maximum duration of provision. In the absence of agreement, the maximum duration of provision is 36 months from June 1, 2017 .

The main dispute and the questions referred for a preliminary ruling

21 NP was employed from September 1, 2014 by a temporary employment company. Since this date and until May 31, 2019, with the exception of a period of parental leave lasting two months, the latter has been made available exclusively to Daimler as a user company, where it has always worked in the engine assembly shop. According to the referring court, the job in question was not intended to replace a worker.

22 On June 27, 2019, NP filed an appeal with the Arbeitsgericht Berlin (Labour Court of Berlin, Germany) seeking to establish that an employment relationship existed between Daimler and itself since September 1, 2015 , at on a subsidiary basis since

March 1 , 2016, on a more subsidiary basis since November 1 , 2016, on an even more subsidiary basis since October 1 , 2018 and on an infinitely subsidiary basis since October 1 May 2019. For these purposes, the latter argued in particular that, due to its duration exceeding one year, its provision to Daimler cannot be described as "temporary" and that the transitional provision provided for in the Article 19(2) of the AÜG, as amended, was contrary to Union law. By judgment of October 8, 2019, this court rejected this appeal.

23 On November 22, 2019, NP appealed this judgment to the Landesarbeitsgericht Berlin-Brandenburg (Higher Labor Court of Berlin-Brandenburg, Germany).

24 This court explains that, if the national law which implements Directive 2008/104 provided, from the outset, that the provision of workers could only be of a "temporary" nature, a maximum duration of provision was only introduced into national law from 1 April 2017, this duration having been set at 18 months, subject to possible exemptions within the framework of collective agreements concluded by the social partners of the sector concerned or within the framework of a company or service agreement concluded on the basis such collective agreements. Also since this date, the applicable regulations provide, as a sanction in the event of exceeding said duration, that an employment relationship is considered to have arisen between the user company and the temporary worker on the start date of the assignment. agreed.

25 The said court adds that the legislative modification referred to in the preceding point includes a transitional provision, under which only periods of work carried out after April 1, 2017 are taken into account in the calculation of the maximum duration of availability. , the collective agreement of June 1 , 2017 referred to in paragraph 20 of this judgment as well as a general company agreement of September 20, 2017 which applies to Daimler provide for a maximum duration of provision of 36 months, calculated respectively at from June 1 , 2017 and from June 1, 2017 April 2017. It would follow that, for a worker such as NP, the duration of his provision to Daimler would not, under the applicable regulations, be considered to have exceeded the maximum duration provided for by that regulation, when even this provision extended over a period of almost five years.

26 In this context, the referring court observes that, to the extent that NP requests that the existence of an employment relationship with Daimler be established before 1 October 2018 , its action can only be fully successful if the right to the Union imposes it.

27 It is in these conditions that the Landesarbeitsgericht Berlin-Brandenburg (Higher Labor Court of Berlin-Brandenburg) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

"1) For the provision of a temporary worker to a user company to be no longer considered "temporary" within the meaning of Article 1 of Directive 2008/104, is it sufficient

that the position occupied by this worker exists permanently and is not employed as a replacement?

2) Should it be considered that the provision of a temporary worker for a period of less than 55 months is no longer "temporary" within the meaning of Article 1 of Directive 2008/104?

[...] In the event of an affirmative answer to the first or second question [...]:

[3)] Can the temporary worker claim that an employment relationship has arisen with the user company, even though national law does not provide for this sanction before April 1, 2017 ?

[4)] Does a national rule such as that provided for in Article 19(2) of the [AÜG, as amended,] infringe Article 1 of Directive 2008/104 in that it provides, for the first time, a maximum individual duration of provision of 18 months, but expressly excludes the taking into account of past periods, if taking into account past periods would have the consequence that the provision could no longer be qualified as " temporary" ?

[5)] Can the power to extend the maximum individual duration of provision be entrusted to the social partners? If the answer is yes: does this include social partners who have jurisdiction not over the employment relationship of the temporary worker concerned, but over the sector of the user company? »

On the preliminary questions

On the first question

28 By its first question, the referring court asks, in essence, whether Article 1(1) of Directive 2008/104 must be interpreted as meaning that the terms "temporarily", referred to in that provision, oppose the provision of a worker having an employment contract or an employment relationship with a temporary work company to a user company for the purpose of filling a position which exists permanently and which is not occupied as a replacement.

29 It should be recalled that, according to established case law, for the interpretation of the provisions of Union law, it is important to take into account not only the terms thereof in accordance with their usual meaning in everyday language, but also their context and the objectives pursued by the regulations of which they form part (see, to this effect, judgments of 24 June 2010, Pontini and Others, C-375/08 , EU:C:2010:365 , paragraph 58 , and of 29 July 2019, Pelham and others, C-476/17 , EU:C:2019:624 , paragraph 28 as well as the case law cited).

30 Firstly, it is apparent from the wording of Article 1 of Directive 2008/104, which defines its scope, that this directive applies, by virtue of paragraph 1 of that article, to workers who have an employment contract or an employment relationship with a temporary employment company and who are made available to user companies in order to work temporarily under their control and direction.

[31]It thus follows from the very wording of this provision that the terms "temporarily" are not intended to limit the application of temporary work to positions which do not exist permanently or which should be occupied as a replacement, these terms characterizing not the job position to be occupied within the user company, but the terms and conditions for making a worker available to this company.

[32]Secondly, this literal interpretation of Article 1 (1) of Directive 2008/104 is corroborated by the context in which that provision takes place, and in particular by the scheme of that directive.

[33]It should be noted, firstly, that no provision of Directive 2008/104 concerns the nature of the work or the type of position to be filled within the user company. Likewise, this directive does not list the cases likely to justify the use of this form of work, the Member States having retained, as noted by the Advocate General in point 37 of his conclusions, a margin of important assessment to determine the situations justifying the use of it. In this regard, Directive 2008/104 only provides for the introduction of minimum requirements, as is apparent from Article 9(2) of that directive [see, to this effect, judgment of 14 October 2020, KG (Successive missions in the context of temporary work), C-681/18 ,EU:C:2020:823 , paragraph 41].

[34]Secondly, it should be emphasized that the terms "temporarily" are also used in Article 3(1)(b) to (e) of Directive 2008/104, which defines the notions of "undertaking temporary work", "temporary worker", "user company" and "mission". However, the Court has already ruled that it follows from these definitions that it is the employment relationship with a user company which is, by nature, of a temporary nature [see, to this effect, judgment of October 14, 2020, KG (Successive missions in the context of temporary work), C-681/18 , EU:C:2020:823 , paragraph 61].

[35]Thirdly, the Court also considered that the first sentence of Article 5(5) of that directive, which provides that Member States are to take the necessary measures, in accordance with national law or the practices in force in the Member State concerned, with a view to avoiding abusive recourse to the application of this article and, in particular, the attribution of successive missions with the aim of circumventing the provisions of that directive, does not require Member States to make recourse to temporary work with the indication of reasons of a technical nature or relating to production, organizational or replacement requirements [see, in this sense, judgment of October 14, 2020, KG (Successive missions in the context of temporary work) , C-681/18 , EU:C:2020:823, paragraph 42].

[36]It follows, as the Commission notes, in essence, that the Union legislature did not intend to limit the use of temporary work by only authorizing the temporary worker to occupy a position of a temporary nature.

[37]the pursuit of these objectives does not require that temporary workers cannot be hired for the purpose of filling positions that exist for the long term and are not occupied as

replacements. On the contrary, the fact that Directive 2008/104 also aims, as the Court has recalled, to encourage access of temporary workers to permanent employment in the user company [judgment of October 14, 2020, KG (Missions successive in the context of temporary work),C-681/18 , EU:C:2020:823 , paragraph 51] supports the interpretation according to which a temporary worker can be made available to a user company for the purpose of filling, on a temporary basis, a permanently existing position , which it would be likely to occupy subsequently on a long-term basis.

[38]Having regard to the foregoing considerations, the answer to the first question must be that Article 1(1) of Directive 2008/104 must be interpreted as meaning that the terms "temporarily", referred to in this provision, do not oppose the provision of a worker having an employment contract or an employment relationship with a temporary work company to a user company for the purpose of filling a position which exists permanently and which is not occupied as a replacement.

On the second question

On the jurisdiction of the Court

[39]Daimler contests the Court's jurisdiction to answer the second question, on the grounds that this question aims to obtain from it that it carries out a factual assessment of the provision of the worker who is the subject of the dispute to main.

[40]In this regard, it is sufficient to note that the second question relates not to the finding or assessment of the facts of the dispute in the main proceedings, but to the legal characterization of the duration of provision of the temporary worker at issue in the main proceedings with regard to of the requirement, referred to in particular in Article 1 of Directive 2008/104, according to which such provision must remain “temporary”. However, the classification under Union law of facts established by the referring court presupposes an interpretation of that law for which, in the context of the procedure provided for in Article 267 TFEU, the Court has jurisdiction (see, to this effect, judgment of 20 December 2017, Asociación Profesional Elite Taxi, C-434/15 , EU:C:2017:981 , point 20 and cited case law).

[41]Therefore, it must be considered that the Court has jurisdiction to answer the second question.

On admissibility

[42]Daimler considers that the second question is, in any event, inadmissible, on the grounds that it is irrelevant to the resolution of the main dispute.

[43]In this regard, it should be recalled that, according to consistent case law of the Court, in the context of cooperation between the latter and the national courts, established in Article 267 TFEU, it is up to the national judge alone who is seized of the dispute and

who must assume responsibility for the judicial decision to be taken to assess, in view of the particularities of the case, both the necessity of a preliminary ruling to be able to render its judgment and the relevance of the questions which he poses at Court. Consequently, since the questions asked relate to the interpretation of Union law, the Court is, in principle, required to rule (judgment of 25 November 2021, job-medium, C-233/20 , EU : C:2021:960 , point 17and case law cited).

44It follows that questions relating to Union law benefit from a presumption of relevance. The Court's refusal to rule on a preliminary question posed by a national court is only possible if it clearly appears that the requested interpretation of Union law has no relationship with reality or the subject of the dispute in the main proceedings, when the problem is of a hypothetical nature or when the Court does not have the factual and legal elements necessary to respond usefully to the questions put to it (judgment of November 25, 2021, job-medium , C-233/20 , EU:C:2021:960 , point 18 and case law cited).

45In this case, as noted in paragraph 40 of this judgment, by its second question, the referring court questions the legal characterization of the duration of provision of the temporary worker at issue in the main proceedings in with regard to the requirement, referred to in particular in Article 1 of Directive 2008/104, according to which such provision must remain “temporary”. This court adds, as noted in paragraph 26 of this judgment, that, since NP seeks to establish that an employment relationship with Daimler existed before October 1, 2018, its action cannot be fully successful. only if Union law so requires.

46It must therefore be noted that the second question concerns the interpretation of Union law and that the answer to that question is relevant for the resolution of the dispute before the referring court.

47 It follows that this question is admissible.

On the background

48As a preliminary point, it should be recalled that, within the framework of the cooperation procedure between the national courts and the Court established by Article 267 TFEU, it is up to the latter to give the national judge a useful response which allows it to resolve the dispute before it. With this in mind, it is up to the Court, where appropriate, to reformulate the questions submitted to it. Indeed, the Court's mission is to interpret all the provisions of Union law which the national courts need in order to rule on the disputes submitted to them, even if these provisions are not expressly indicated in the questions which addressed to him by these courts (judgment of 21 June 2016, New Valmar, C-15/15 , EU:C:2016:464 , point 28 and cited case law).

[49]Consequently, even if, on a formal level, the referring court limited its second question to the interpretation of Article 1 of Directive 2008/104 alone , such a circumstance does not prevent the Court from providing it with all the elements of interpretation of Union law which may be useful in the assessment of the case before it, whether or not that court has referred to them in the statement of its question. It is for the Court, in this regard, to extract from all the elements provided by the national court, and in particular from the reasoning of the order for reference, the elements of that law which call for an interpretation taking into account the object of the main dispute (see, in this sense and by analogy, judgment of June 21, 2016, New Valmar, C-15/15, EU:C:2016:464 , paragraph 29 and case law cited).

[50]In this case, although, by its second question, the referring court asks the Court to interpret Article 1 of Directive 2008/104 and, in particular, the terms “temporarily” referred to in paragraph 1 of that article, it appears from the grounds of the order for reference that, by this question, this court seeks to know, not whether the provision of the temporary worker in question falls within the scope of this directive, but rather whether this provision is still likely to have a "temporary" character within the meaning of that directive, or, on the contrary, has a abusive nature due to the successive renewals of this worker's mission, which resulted in a period of provision of 55 months, the said court emphasizing that, before it, NP asserted such abusive nature.

[51]Thus, that question aims, in essence, to determine whether, in circumstances such as those at issue in the main proceedings, such renewals are likely to constitute an abusive recourse to the allocation of successive missions to a temporary worker, within the meaning of the Article 5(5) of Directive 2008/104.

[52]In these circumstances, it is appropriate to reformulate the second question and consider that, by it, the referring court is asking, in essence, whether Article 1(1) and Article 5(5) of Directive 2008/104 must be interpreted in the sense that the renewal of such missions in the same position with a user company for a period of 55 months constitutes an abusive recourse to the allocation of successive missions to a temporary worker.

[53]From the outset, it should be noted, on the one hand, that Directive 2008/104 is not intended to specifically define the duration of the provision of a temporary worker to a user company. beyond which this provision can no longer be described as “temporary”. Indeed, it is clear that neither Article 1, paragraph 1, of Directive 2008/104, which, as recalled in paragraph 30 of this judgment, refers to the provision of workers to user companies in order to work “temporarily”, nor any other provision of this directive sets a duration beyond which a provision can no longer be described as “temporary”. Likewise, no provision of that directive imposes an obligation on Member States to provide, in national law, for such a duration.

54On the other hand, the first sentence of Article 5(5) of Directive 2008/104, which requires Member States in particular to take the necessary measures to avoid the allocation of successive tasks with the aim of circumventing the provisions of this directive, does not require these States to limit the number of successive missions of the same worker with the same user company, nor does it provide for any specific measure that the Member States should adopt in this regard. effect, including with a view to preventing abuse [see, to this effect, judgment of 14 October 2020, KG (Successive missions in the context of temporary work), C-681/18, EU:C: 2020 : 823 , points 42 and 44].

55It follows that the provisions of Directive 2008/104 do not require Member States to adopt specific regulations in this area (see, by analogy, judgment of 17 March 2015, AKT, C-533/ 13 , EU:C:2015:173 , paragraph 31).

56The fact remains that, as the Court has already pointed out, the first sentence of Article 5(5) of Directive 2008/104 requires Member States to take the necessary measures to avoid the allocation of successive missions to a temporary worker with the aim of circumventing the provisions of this directive as a whole. In particular, Member States must ensure that temporary work with the same user company does not become a permanent situation for a temporary worker [judgment of 14 October 2020, KG (Successive missions in the context of temporary work), C- 681/18 , EU:C:2020:823 , points 55 and 60].

57It is, in this regard, open to Member States to set, in national law, a precise duration beyond which a secondment can no longer be made available, in particular when successive renewals of the secondment of the same temporary worker with the same user company extend over time, be considered temporary. That being said, such a duration must necessarily, in accordance with Article 1 (1) of Directive 2008/104, be of a temporary nature, namely, according to the meaning of this term in common parlance, be limited in the time.

58In the event that the applicable regulations of a Member State do not provide for such a duration, it is up to the national courts to determine it on a case-by-case basis, taking into account all the relevant circumstances, which include in particular the specificities of the sector (see, to this effect, judgment of 18 December 2008, Andersen, C-306/07 , EU:C:2008:743 , paragraph 52) and to ensure, as does the Advocate General, noted, in essence, in point 46 of its conclusions, that the attribution of successive missions to a temporary worker is not intended to circumvent the objectives of Directive 2008/104, in particular, the temporary nature of temporary work .

59For the purposes of such a determination, the referring court may, according to the Court's case-law, take into account the following considerations.

60 Assuming that the successive missions of the same temporary worker with the same user company result in a duration of activity with this company which is longer than what can reasonably be described as "temporary", with regard to all of the relevant circumstances, which include in particular the specificities of the sector, this could constitute an indication of abusive recourse to successive missions, within the meaning of the first sentence of Article 5(5) of Directive 2008/104 [see, in this meaning, judgment of 14 October 2020, KG (Successive missions in the context of temporary work), C-681/18 , EU:C:2020:823 , paragraph 69].

61 Likewise, successive missions assigned to the same temporary worker with the same user company circumvent the very heart of the provisions of Directive 2008/104 and constitute an abuse of this form of employment relationship, insofar as they undermine the the balance achieved by this directive between flexibility for employers and security for workers by undermining the latter [judgment of 14 October 2020, KG (Successive missions in the context of temporary agency work), C-681/18, EU : C :2020:823 , point 70].

62 Finally, when, in a concrete case, no objective explanation is given for the fact that the user company concerned uses a succession of successive temporary employment contracts, it is up to the national court to examine, in the context of the framework national regulations and taking into account the circumstances of each case, if one of the provisions of Directive 2008/104 is circumvented, and all the more so when it is the same temporary worker who is assigned to the user company by the series of contracts in question [judgment of 14 October 2020, KG (Successive missions in the context of temporary work), C-681/18 , EU:C:2020:823 , paragraph 71].

63 Having regard to all the foregoing considerations, the answer to the second question must be that Article 1, paragraph 1, and Article 5(5) of Directive 2008/104 must be interpreted as meaning that the renewal of such missions in the same position constitutes an abusive use of the attribution of successive missions to a temporary worker with a user company for a period of 55 months, in the hypothesis where the successive missions of the same temporary worker with the same user company result in a duration of activity with this company which is longer than what can be be reasonably qualified as “temporary”, taking into account all the relevant circumstances, which include in particular the specificities of the sector, and in the context of the national regulatory framework,without any objective explanation being given to the fact that the user company concerned uses a succession of successive temporary employment contracts, which it is for the referring court to determine.

On the fourth question

64 As a preliminary point, it should be noted that the fourth question, which must be examined in the third place, is posed by the referring court in the light of the

circumstance, set out by the latter, that, while the regulations national law provided, from December 1 , 2011, that the provision of the worker to the user company must be of a temporary nature, it is only by a modification of this regulation which came into force on December 1 April 2017, i.e. more than six years after the date on which Directive 2008/104 was to be implemented, which the German legislator provided for, subject to exemptions which may occur in collective agreements between the social partners of the user sector and in company or service agreements concluded on the basis of such collective agreements, that the maximum duration of provision of a temporary worker should be set at 18 months, while providing, under a transitional provision, that only periods of availability after April 1, 2017 must be taken into account for the purposes of calculating this maximum duration.

65 However, apart from the fact that this court wonders whether Directive 2008/104 precludes such regulation, to the extent that it would exclude the taking into account of periods prior to its entry into force, whereas such taking into account account could lead to a provision no longer having a "temporary" character, the said court seeks to know whether it is required to leave the transitional provision in question unapplied, in whole or in part.

66 Thus, by its fourth question, the referring court asks, in essence, whether Directive 2008/104 must be interpreted as meaning that it precludes national legislation which sets a maximum duration for the same worker to be made available. temporary worker with the same user company, while excluding, by a transitional provision, for the purposes of calculating this duration, the taking into account of periods preceding the entry into force of such regulations. If so, this court seeks to know whether, faced with a dispute exclusively between individuals, it is required to leave such a transitional provision inapplicable.

67 As the Court has already held, the first sentence of Article 5(5) of Directive 2008/104 requires Member States, in clear, precise and unconditional terms, to take the necessary measures for the purposes of prevent abuse consisting of successive temporary work assignments with the aim of circumventing the provisions of this directive. It follows that this provision must be interpreted as meaning that it precludes a Member State from taking any measures to preserve the temporary nature of temporary work [judgment of October 14, 2020, KG (Successive Missions in the context of temporary work), C-681/18 , EU:C:2020:823 , paragraph 63].

68 That being clarified, it was recalled, in paragraph 53 of this judgment, that no provision of Directive 2008/104 imposes on Member States an obligation to provide, in national law, for a period beyond which a release available can no longer be described as "temporary".

69 However, it is open to Member States, on the one hand, to introduce, in national law, a maximum duration of provision beyond which the provision of a temporary worker

to a user company is deemed to no longer be of a temporary nature and, on the other hand, to provide transitional provisions to this effect.

70It follows from Article 9(1) of Directive 2008/104 that that directive is without prejudice to the right of Member States to apply or introduce legislative provisions more favorable to workers, including a national regulation, such as that at issue in the main proceedings, setting a maximum duration beyond which the provision of a temporary worker to a user company is deemed to no longer be of a temporary nature.

71However, in doing so, Member States cannot disregard the provisions of Directive 2008/104. Thus, on the one hand, when setting a maximum duration for the provision of a temporary worker to a user company, a Member State cannot set such a duration in such a way that it exceeds the nature temporary of such provision or allows the allocation of successive missions to a temporary worker in a manner which circumvents the provisions of this directive, in accordance with Article 1, paragraph 1, and the first sentence of Article 5(5) thereof. On the other hand, as follows from Article 9(2) of Directive 2008/104, the implementation of that directive does not in any case constitute a sufficient reason to justify a reduction in the general level of protection workers in the areas covered by this directive.

72Since, in accordance with Article 11(1) of Directive 2008/104, Member States were required to comply with those provisions by 5 December 2011 at the latest, it must be considered that, from From this date, they had the obligation to ensure that the provision of temporary workers would not exceed a duration which could be described as “temporary”.

73However, in this case, as the Advocate General noted, in substance, in point 62 of his conclusions, a transitional provision, such as that referred to in point 19 of this judgment, cannot have the consequence to deprive of useful effect the protection offered by Directive 2008/104 to a temporary worker who, due to the duration of his provision to a user company, taken in its entirety, would have been subject to such provision which can no longer be considered “temporary”, within the meaning of this directive.

74It follows that Directive 2008/104 must be interpreted as meaning that it precludes national legislation which sets a maximum duration for the provision of the same temporary worker to the same user company, in the event where this regulation would deprive of useful effect the protection offered by Directive 2008/104 to a temporary worker who, due to the duration of his provision to a user company, taken in its entirety, would have been subject to of such provision which can no longer be considered “temporary”, within the meaning of this directive. It is for the national court to determine whether this is in fact the case.

75 If so, the referring court asks whether, when faced with a dispute between individuals exclusively, it is required to leave a transitional provision such as that referred to in paragraph 19 of this judgment inapplicable.

76 In this regard, the Court has repeatedly ruled that a national court, seized of a dispute between individuals exclusively, is required, when it applies the provisions of domestic law adopted for the purposes of transposing the obligations provided for by a directive, to take into consideration all the rules of national law and interpret them, as far as possible, in the light of the text as well as the purpose of this directive in order to arrive at a solution consistent with the objective pursued by it herein (judgments of 15 January 2014, Social Mediation Association, C-176/12 , EU:C:2014:2 , paragraph 38 and case law cited, as well as of 4 June 2015, Faber, C-497/13 , EU: C:2015:357, paragraph 33).

77 However, the principle of consistent interpretation of national law has certain limits. Thus, the obligation for the national judge to refer to the content of a directive when interpreting and applying the relevant rules of national law is limited by the general principles of law and it cannot serve as a basis for a contrarian interpretation. legem of national law [see, to this effect, judgments of 15 January 2014, Association de mediation sociale, C-176/12 , EU:C:2014:2 , paragraph 39 ; of 13 December 2018, Hein, C-385/17 , EU:C:2018:1018 , point 51 , and of 14 October 2020, KG (Successive missions in the context of temporary work), C-681/18 ,EU:C:2020:823 , paragraph 66 as well as the case law cited].

78 In this case, as the Advocate General noted in points 63 and 64 of his Opinion, it is for the referring court to determine whether the transitional provision referred to in point 19 of this judgment is, by taking into consideration all the rules of national law, capable of being the subject of an interpretation consistent with the requirements of Directive 2008/104 and, therefore, of being interpreted otherwise than by depriving the applicant in the main proceedings of the right to take advantage of the total duration of its provision to the user company, in order to note, where applicable, that the temporary nature of this provision has been exceeded.

79 Failing to be able to interpret national regulations in accordance with the requirements of Union law, the principle of primacy of Union law requires that the national judge responsible for applying, within the framework of his jurisdiction, the provisions of said law ensures the full effect of these by leaving, if necessary, unapplied, by its own authority, any contrary provision of national legislation, even later, without it having to request or wait for the prior elimination of it. either by legislative means or by any other constitutional process (judgment of January 18, 2022, Thelen Technopark Berlin, C-261/20 , EU:C:2022:33 , paragraph 30 and case law cited).

80 That being said, it is still necessary to take into account the other essential characteristics of Union law, and, in particular, the nature and legal effects of the

directives (judgment of 18 January 2022, Thelen Technopark Berlin, C-261/ 20 , EU:C:2022:33 , paragraph 31 and case law cited).

81 Thus, a directive cannot, by itself, create obligations with regard to an individual, and cannot therefore be invoked as such against him before a national court. Indeed, under the third paragraph of Article 288 TFEU, the binding nature of a directive, on which the possibility of invoking it is based, exists only with regard to "any State recipient member", the Union only having the power to enact, in a general and abstract manner, with immediate effect obligations for individuals where it is given the power to adopt regulations. Therefore, even if it is clear, precise and unconditional, a provision of a directive does not allow the national judge to set aside a provision of its domestic law which is contrary to it, if, in doing so,C-261/20 , EU:C:2022:33 , paragraph 32 and case law cited).

82 It follows that a national court, seized of a dispute between individuals exclusively, is not required, on the sole basis of Union law, to leave unapplied a transitional provision contrary to Union law which excludes, for the purposes of the application of a regulation which sets a maximum duration of provision of a temporary worker, the taking into account of periods of provision preceding the entry into force of such regulation.

83 Having regard to the foregoing considerations, the answer to the fourth question must be that Directive 2008/104 must be interpreted as meaning that it precludes national legislation which sets a maximum duration for making the same product available. temporary worker with the same user company, in the event that this regulation excludes, by a transitional provision, for the purposes of calculating this duration, the taking into account of periods preceding the entry into force of such regulation, depriving the national court of the possibility of taking into account the actual duration of provision of a temporary worker for the purposes of determining whether this provision was of a "temporary" nature, within the meaning of this directive, which is up to for this court to determine.A national court, seized of a dispute between individuals exclusively, is not required, on the sole basis of Union law, to leave such a transitional provision contrary to Union law unapplied.

On the third question

On admissibility

84 Daimler argues that the third question is inadmissible, on the grounds that the link with Union law is not established.

85 In this regard, it is sufficient to note that this question relates specifically to whether a temporary agency worker can derive directly from Union law a right to an employment relationship with a user undertaking in the event that national law would

not have provided for sanctions in the event of non-compliance with the provisions of Directive 2008/104. The link with Union law is therefore sufficiently established.

86 It follows that the third question is admissible.

On the background

87By its third question, the referring court asks, in essence, whether Article 10(1) of Directive 2008/104 must be interpreted as meaning that, in the absence of a provision of national law aimed at penalizing the non-compliance with this directive by temporary work companies or by user companies, the temporary worker may derive from Union law a subjective right to the creation of an employment relationship with the user company.

88This question is asked by the referring court due to the fact that the German legislator did not, until March 31, 2017, provide for any sanction when the provision of a temporary worker can no longer be considered temporary.

89However, this court, which notes that the applicable national law provides that an employment relationship with the user company arises when the temporary work company does not have the authorization required to make workers available, wonders whether it would not be appropriate to deduce from the effective effect of Article 10(1) of Directive 2008/104 that the same sanction should apply to provision which is no longer of a temporary nature.

90As a preliminary point, it should be noted that the premise on which the referring court is based, according to which no sanction would have been provided for in Germany in the event that the provision of a temporary worker can no longer be considered temporary, is contested by the German government, which emphasizes that the provision of a temporary worker not of a temporary nature was already sanctioned before April 1, 2017 by a withdrawal of the authorization required for the deployment. provision of workers by temporary employment companies.

91In this regard, it should be recalled that, according to settled case-law of the Court, in the context of the procedure provided for in Article 267 TFEU, the functions of the Court and those of the referring court are clearly distinct and It is exclusively up to the latter to interpret national legislation (judgment of 14 November 2019, Spedidam, C-484/18 , EU:C:2019:970 , paragraph 28 and case law cited).

92Thus, it is not for the Court to rule, in the context of a preliminary ruling, on the interpretation of national provisions. Indeed, it is incumbent on the Court to take into account, in the context of the distribution of powers between the Union and national courts, the factual and regulatory context in which the questions referred for a preliminary ruling fit, as defined by the referral decision (judgment of 14 November 2019, Spedidam, C-484/18 , EU:C:2019:970 , paragraph 29 and case law cited).

93 Under the terms of the third paragraph of Article 288 TFEU, the directive binds any recipient Member State as to the result to be achieved, while leaving to national authorities jurisdiction as to the form and means.

94 If this provision reserves for the Member States the freedom to choose the ways and means intended to ensure the implementation of the directive, this freedom however leaves intact the obligation, for each of the recipient States, to take, within the framework of its national legal order, all necessary measures to ensure the full effect of the directive, in accordance with the objective which it pursues (judgment of 10 April 1984, von Colson and Kamann, 14/83, EU: C : 1984 :153 , point 15).

95 In this case, Article 10(1) of Directive 2008/104 requires Member States to provide appropriate measures in the event of non-compliance with that directive by temporary employment agencies or user companies. In particular, those States must ensure that there are appropriate administrative or judicial procedures to enforce the obligations arising from that Directive. Paragraph 2 of this article adds that Member States shall determine the system of sanctions applicable to violations of national provisions adopted pursuant to Directive 2008/104 and take all necessary measures to ensure their implementation, and specifies that these sanctions must be effective, proportionate and dissuasive, which is also recalled in recital 21 of this directive.

96 As is clear from the wording of Article 10 of Directive 2008/104, this provision does not contain precise rules regarding the establishment of the sanctions referred to therein, but leaves Member States free to choose among those which will be suitable for achieving its objective.

97 It follows that a temporary worker, whose provision to a user company would no longer be of a temporary nature, in breach of Article 1(1) and Article 5(5), first sentence of Directive 2008/104 cannot, having regard to the case law recalled in paragraph 79 of this judgment, derive from Union law a subjective right to the creation of an employment relationship with that company.

98 A contrary interpretation would lead, in practice, to an elimination of the discretion conferred solely on national legislators, who are responsible for designing an appropriate sanctions regime, within the framework defined in Article 10 of Directive 2008/104 (see , by analogy, judgment of 4 October 2018, Link Logistik N&N, C-384/17 , EU:C:2018:810 , paragraph 54).

99 That being noted, it should be remembered that the party injured by the non-compliance of national law with Union law could rely on the case law resulting from the judgment of 19 November 1991, Francovich and others (C-6/ 90 and C-9/90 , EU:C:1991:428), to obtain, where applicable, compensation for the damage suffered (see, to this effect, judgment of 15 January 2014, Association de mediation sociale, C-176/12 , EU:C:2014:2 , paragraph 50 and case law cited).

[100]Having regard to the foregoing considerations, the answer to the third question must be that Article 10(1) of Directive 2008/104 must be interpreted as meaning that, in the absence of a provision of national law aimed at to sanction non-compliance with this directive by temporary work companies or by user companies, the temporary worker cannot derive from Union law a subjective right to the birth of an employment relationship with the company user.

On the fifth question

[101]By its fifth question, the referring court asks, in essence, whether Directive 2008/104 must be interpreted as meaning that it precludes national legislation which empowers the social partners to derogate, at the level of the sector of user companies, to the maximum duration of provision of a temporary worker fixed by such regulations.

[102]According to that court, this question is raised in the light of the fact that Article 5(3) of Directive 2008/104, which provides that the social partners may put in place provisions which derogate from the principle set out in paragraph 1 of this article only concerns derogations from the principle of equal treatment, as concretized in said article. Thus, it would not appear that powers have been granted to the social partners with regard to the adjustment of the duration of the provision of workers.

[103]Admittedly, as is apparent from Article 5(3) of Directive 2008/104, Member States may, under certain conditions only, grant social partners the possibility of deviating from the conditions referred to in paragraph 1 of This item. Furthermore, recital 17 of that directive states in this regard that, in certain well-defined cases, Member States should, on the basis of an agreement concluded by the social partners at national level, have the possibility of derogating, in a manner limited to the principle of equal treatment, provided that a sufficient level of protection is ensured.

[104]However, it must be noted that the role of the social partners in the implementation of Directive 2008/104 is not limited to the mission assigned to them in Article 5 of this directive.

[105]In particular, firstly, recital 16 of that directive envisages a broad scope for intervention by the social partners by specifying that Member States may authorize the social partners to define working and employment conditions, provided that they respect the overall level protection of temporary workers. Furthermore, it appears from recital 19 of the same directive that it does not affect the autonomy of the social partners or the relations between the social partners, including the right to negotiate and conclude collective agreements in accordance not only with the Union law, but also national practices, while respecting the Union legislation in force. It follows that Member States have a wide margin of appreciation in this regard,

[106]Secondly, it should be noted that Article 9 of Directive 2008/104 provides, in essence, that Member States have the possibility of allowing collective agreements or agreements concluded between the social partners, provided that the minimum requirements provided for by this directive are respected.

[107]Thirdly, as is clear from Article 11(1) of Directive 2008/104, Member States have the possibility, in order to comply with the result of this directive, either to adopt legislative, regulatory and administrative measures necessary in this regard, i.e. to ensure that the social partners put in place the necessary provisions by agreement, the Member States having to take all necessary measures enabling them to be at any time able to achieve the objectives set by it.

[108]The option thus granted to Member States by Directive 2008/104 is consistent with the case law of the Court according to which it is open to the latter to leave in the first place to the social partners the task of achieving the social policy objectives targeted by a directive intervened in this area (see, to this effect, judgment of 11 February 2010, Ingeniørforeningen i Danmark, C-405/08 , EU:C:2010:69 , paragraph 39 and the case-law cited).

[109]This option does not, however, exempt Member States from the obligation to ensure, by appropriate legislative, regulatory or administrative measures, that temporary workers can benefit, to its full extent, from the protection conferred on them by the directive. 2008/104 (see, to this effect, judgment of 11 February 2010, Ingeniørforeningen i Danmark, C-405/08 , EU:C:2010:69 , paragraph 40 and the case-law cited).

[110]As for the circumstance that the social partners at the level of the branch of user companies would be competent, in this case, it should be noted that Directive 2008/104 does not provide for any limitation or obligation in this regard, so that Such a decision falls within the margin of appreciation of the Member States.

[111]Having regard to the foregoing considerations, the answer to the fifth question must be that Directive 2008/104 must be interpreted as meaning that it does not preclude national regulations which empower the social partners to derogate, from level of the branch of user companies, to the maximum duration of provision of a temporary worker fixed by such regulations.

On the costs

[112]As the procedure takes, with regard to the parties to the main proceedings, the character of an incident raised before the referring court, it is for the latter to rule on costs. Costs incurred for submitting observations to the Court, other than those of the said parties, cannot be reimbursed.

For these reasons, the Court (Second Chamber) rules:

1) **Article 1 (1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work must be interpreted as meaning that the terms "temporarily", referred to in this provision, do not oppose the provision of a worker having an employment contract or an employment relationship with a temporary work company to a user company for the purpose of filling a position which exists permanently and who is not occupied as a replacement.**

2) **Article 1, paragraph 1, and Article 5(5) of Directive 2008/104 must be interpreted as meaning that the renewal of such missions in the same position constitutes an abusive use of the attribution of successive missions to a temporary worker with a user company for a period of 55 months, in the hypothesis where the successive missions of the same temporary worker with the same user company result in a duration of activity with this company which is longer than what can be be reasonably qualified as "temporary", taking into account all the relevant circumstances, which include in particular the specificities of the sector, and in the context of the national regulatory framework,without any objective explanation being given to the fact that the user company concerned uses a succession of successive temporary employment contracts, which it is for the referring court to determine.**

3) **Directive 2008/104 must be interpreted as meaning that it precludes national regulations which set a maximum duration for the provision of the same temporary worker to the same user company, in the event that this regulation excludes, by a transitional provision, for the purposes of calculating this duration, the taking into account of the periods preceding the entry into force of such regulation, depriving the national court of the possibility of taking into account the actual duration of provision of a temporary worker for the purposes of determining whether this provision was of a "temporary" nature within the meaning of this directive, which it is for this court to determine. A national court, seized of a dispute between individuals exclusively, is not required,**

4) **Article 10(1) of Directive 2008/104 must be interpreted as meaning that, in the absence of any provision of national law aimed at penalizing non-compliance with that directive by temporary employment agencies or by user companies, the temporary worker cannot derive from Union law a subjective right to the creation of an employment relationship with the user company.**

5) **Directive 2008/104 must be interpreted as meaning that it does not preclude national regulations which authorize social partners to derogate, at the level of the branch of user companies, from the maximum duration of provision of a temporary worker established by such regulations.**

Signatures