Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 15 July 2021 [1]

Case C-948/19

UAB "Manpower Lit"
v
E.S.,
M.L.,
M.P.,
V.V.,
R.V.,
Joined party:
European Institute for Gender Equality (EIGE)

(Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania))

(Reference for a preliminary ruling – Social policy – Temporary work – Scope of Directive 2008/104/EC – Agencies of the European Union – User undertakings pursuant to Articles 1(1) and Article 3(1)(d) of Directive 2008/104 – Regulation (EC) No 1922/2006 – The European Institute for Gender Equality as a user undertaking)

1. This reference for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania, 'the referring court'), is the fifth occasion on which the Court has been asked to interpret Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work. [2] Its novelty lies in the fact that the user undertaking to which the applicant temporary employees E.S., M.L., M.P., V.V. and R.V. ('the

1 Original language: English.

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); and of 3 June 2021, *TEAM POWER* (C-784/19, EU:C:2021:427). See also judgment of the General Court of 13 December 2016, *IPSO* v *ECB* (T-713/14, EU:T:2016:727).

applicants')[3] were assigned by their employer, UAB "Manpower" Lit ('the defendant employer'),[4] was an agency of the European Union, namely the European Institute for Gender Equality[5] ('EIGE').

2. The applicants contend that, in breach of both national law and Directive 2008/104, they have been discriminated against by the defendant employer on the ground that, in the factual circumstances of the main proceedings, they were paid wages by the EIGE lower than those that they would have received had they been recruited directly by the EIGE under EEC/EAEC Council: Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community.[6]

3. The six questions referred therefore seek to ascertain whether, and to what extent, the fact that the user undertaking to which the defendant employer assigned the applicants was an agency of the European Union affects the outcome of the main proceedings.

4. I have reached the conclusion that the status of the EIGE as an agency of the European Union has no bearing on the outcome of the main proceedings, given that the case file demonstrates no clear impact on the administrative autonomy of the EIGE[7] if an order is made by the Lithuanian courts for the defendant employer to pay remuneration in arrears to the applicants, and nor would such an order be prejudicial to the Staff Regulations.[8] This is so essentially because the main proceedings concern a dispute between two private parties entailing assessment of compliance with the principle of equal treatment, of which Article 5(1) of Directive 2008/104 is a specific manifestation,[9] and with respect to which the EIGE has the status, only, of third-party intervener.

5. Further, the EIGE falls within the scope, *ratione personae*, of Directive 2008/104 with respect to the term 'user undertakings engaged in economic activities whether or not they are operating for gain' under Article 1(2) thereof, given that the directive cannot be read as excluding EU institutions, bodies, offices and agencies from its scope.

3 E.S., M.L., M.P., V.V. and R.V. are termed 'the defendants on appeal' in the case file. Since they were the applicants in the proceedings at first instance before the Lithuanian courts, they will be referred to as such in this Opinion.

4 UAB Manpower Lit is referred to in the case file as 'the appellant'. Since UAB Manpower Lit was the defendant in the proceedings at first instance before the Lithuanian courts, it will be referred to as 'the defendant employer' in this Opinion.

5 See Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality (OJ 2006 L 403, p. 9). See in particular Article 1 thereof. Note that the EIGE is not an institution of the European Union in the sense of Article 13 TEU. The expression 'institutions, bodies, offices, and agencies' is commonly used in the Treaties to refer to all authorities established by the Treaties or by secondary legislation. See explanations to the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 17) concerning Article 51(1) of the Charter. See also Article 1(2)(a) of the Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012 (OJ 2012 L 265, p. 1), as amended on 18 June 2013 (OJ 2013 L 173, p. 65), on 19 July 2016 (OJ 2016 L 217, p. 69), on 9 April 2019 (OJ 2019 L 111, p. 73) and on 26 November 2019 (OJ 2019 L 316, p. 103) On agencies see generally, for example, Kohtamäki, N., *Theorising the legitimacy of EU regulatory agencies* (Lang, 2019); Busuioc, M., *European Agencies: Law and Practices of Accountability* (OUP, 2013).

6 (OJ, English Special Edition, Series I Volume 1959-1962, p. 135), as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 (OJ 2004 L 124, p. 1). ('the Staff Regulations'). The part of Regulation No 31 dealing with conditions of employment of other servants of the communities will hereafter be referred to as 'the CEOS'.

7 See notably Article 335 TFEU.

8 See notably Article 6 of Regulation No 1922/2006 and Articles 335 and 336 TFEU.

9 See, by analogy, judgment of 5 June 2018, *Grupo Norte Facility* (C-574/16, EU:C:2018:390, paragraph 46) which concerned clause 4(1) of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43). Recital 5 of Directive 2008/104 explains the link between the two directives.

I. Legal framework

A. EU law

6. Article 1 of Directive 2008/104, headed 'Scope' is worded as follows:

'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.

2. This Directive applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain.

3. Member States may, after consulting the social partners, provide that this Directive does not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining programme.'

7. Article 2 of that directive, headed 'Aim', provides:

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

8. Article 3 of Directive 2008/104, headed 'Definitions', provides as follows in paragraphs 1, points (d) and (f) and 2:

'For the purposes of this Directive:

…

(d) "user undertaking" means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily;

…

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

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

(ii) pay.

2. This Directive shall be without prejudice to national law as regards the definition of pay, contract of employment, employment relationship or worker.

…'.

9. Article 5 of Directive 2008/104, headed 'The principle of equal treatment', is contained in Chapter II dealing with working conditions. Article 5(1) is worded as follows:

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

…'

10. Article 2 of Regulation No 1922/2006 is entitled 'Objectives' and is worded as follows:

'The overall objectives of the Institute shall be to contribute to and strengthen the promotion of gender equality, including gender mainstreaming in all Community policies and the resulting national policies, and the fight against discrimination based on sex, and to raise EU citizens' awareness of gender equality by providing technical assistance to the Community institutions, in particular the Commission, and the authorities of the Member States, as set out in Article 3.'

11. Article 3 of Regulation No 1922/2006 is entitled 'Tasks'; it is worded as follows:

'1. To meet the objectives set in Article 2, the Institute shall:

(a) collect, analyse and disseminate relevant objective, comparable and reliable information as regards gender equality, including results from research and best practice communicated to it by Member States, Community institutions, research centres, national equality bodies, non-governmental organisations, social partners, relevant third countries and international organisations, and suggest areas for further research;

(b) develop methods to improve the objectivity, comparability and reliability of data at European level by establishing criteria that will improve the consistency of information and take into account gender issues when collecting data;

(c) develop, analyse, evaluate and disseminate methodological tools in order to support the integration of gender equality into all Community policies and the resulting national policies and to support gender mainstreaming in all Community institutions and bodies;

(d) carry out surveys on the situation in Europe as regards gender equality;

(e) set up and coordinate a European Network on Gender Equality, involving the centres, bodies, organisations and experts dealing with gender equality and gender mainstreaming in order to support and encourage research, optimise the use of available resources and foster the exchange and dissemination of information;

(f) organise ad hoc meetings of experts to support the institute's research work, encourage the exchange of information among researchers and promote the inclusion of a gender perspective in their research;

(g) in order to raise EU citizens' awareness of gender equality, organise, with relevant stakeholders, conferences, campaigns and meetings at European level, and present the findings and conclusions to the Commission;

(h) disseminate information regarding positive examples of non-stereotypical roles for women and men in every walk of life, present its findings and initiatives designed to publicise and build on such success stories;

(i) develop dialogue and cooperation with non-governmental and equal opportunities organisations, universities and experts, research centres, social partners and related bodies actively seeking to achieve equality at national and European level;

(j) set up documentation resources accessible to the public;

(k) make information on gender mainstreaming available to public and private organisations; and

(l) provide information to the Community Institutions on gender equality and gender mainstreaming in the accession and candidate countries.

2. The Institute shall publish an annual report on its activities.'

II. Lithuanian law

12. The Lietuvos Respublikos įdarbinimo per laikinojo įdarbinimo įmones įstatymas ('Law on Employment by Temporary Work- Agencies') in the version in force from 1 May 2013 to 1 July 2017, the date of entry into force of the new Lietuvos Respublikos Darbo kodeksas (Labour Code of the Republic of Lithuania, 'the Labour Code'), featured the following provision:

'Article 2. Principle definitions used in the present law.

…

3. "User" means all physical or legal persons and all other organisational structures for which and under the control and direction of which temporary workers work in a temporary manner.'

13. Article 75(2) of the Labour Code, which entered into force on 1 July 2017 provides as follows:

'A temporary-work agency must ensure that a temporary worker's remuneration for work carried out for a user undertaking is at least as much as the remuneration that would be paid if the user undertaking had hired the temporary worker under an employment contract for the same job, except in cases where temporary workers employed under open-ended temporary agency employment contracts receive remuneration from the temporary-work agency between assignments to work and the level of this remuneration between assignments to work is the same as that received during assignments to work. The user undertaking shall bear subsidiary responsibility for fulfilling the duty to pay the temporary worker for work carried out for the user undertaking at least as much as the remuneration that would be paid if the user undertaking had hired the temporary worker under an employment contract for the same job.' [10]

[10] Article 3(3) of the Law on Employment by Temporary-Work Agencies provided similarly.

14. On 6 June 2017, in the light of certain changes to the Labour Code put in place by the legislature of the Republic of Lithuania, the following was added to Article 75(2).

'2. … In the context of this obligation, the user must, at the request of the temporary-work agency, supply the latter with information concerning the remuneration provided to the user's own employees in the category concerned'.

III. Facts, procedure and the questions referred

15. The defendant employer was, in 2012, a successful tenderer for the provision of temporary personnel services to the EIGE, [11] a third party in the main proceedings. The defendant employer concluded a contract with the EIGE, which specified the circumstances in which the EIGE required temporary personnel, including the types and categories of the profiles of the personnel required and working conditions. The contract aimed at: supporting the statutory personnel of the EIGE; fulfilling, on a temporary basis, tasks complementary to those arising ordinarily and resulting from specific projects; dealing with peak periods for a determinate period of time; remedying staff shortages within the EIGE in the case of absences caused by certain specified reasons. The temporary personnel were to be non-statutory personnel of the EIGE, that is to say, as not falling within or recruited under the Staff Regulations. [12]

16. The defendant employer announced competitions for jobs corresponding to the staffing requirements of the EIGE and published a notice of recruitment on its website and employment announcements. The nature of the work and the qualifications required to fill available posts were set out succinctly in those notices. [13]

17. The applicants concluded temporary work contracts with the defendant employer, who agreed to pay them an hourly wage, which fluctuated during the employment relationship. Hourly salaries to be provided were as follows; EUR 5.20 for an assistant in the documentation service; EUR 5.20 for an assistant in the communication service; EUR 4.34 for an administrative assistant; EUR 5.20 for IT support; EUR 4.34 for an assistant in the personnel service. [14]

18. Annexes stating that the EIGE was the user undertaking were attached to the temporary work contracts. Also indicated in the annexes were the members of EIGE personnel responsible for giving instructions to accomplish the work agreed. [15]

19. The contracts were to remain in force until termination at the order of the user undertaking, the EIGE. By 1 January 2019, the contracts of all the applicants had been terminated. In consequence, before the Darbo ginčų komisija (Labour Disputes Commission, Lithuania) the applicants sought recovery of arrears of unpaid wages.

20. By decision of 20 June 2018, the Labour Disputes Commission, itself relying on Directive 2008/104 and on Article 75(2) of the Labour Code, found that the defendant had discriminated against the applicants on the ground that they had been paid wages lower than those that they

[11] This was stated by the EIGE in its reply to written questions from the Court to be in conformity with Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (*OJ 2012 L 298, p. 1). This regulation is no longer in force.*

[12] According to the written observations of the Commission.

[13] According to the written observations of the Commission.

[14] According to the written observations of the Commission.

[15] According to the written observations of the Commission.

would have received if they had been recruited directly by the EIGE. The Labour Disputes Commission found that the workers who had been recruited under the temporary work contracts performed the functions of permanent members of staff of the EIGE. The Labour Disputes Commission decided that the applicants should have been paid remuneration corresponding to those applicable to EIGE contract agents under CEOS in function group II, grade 4 (clerical and secretarial tasks, office management and other equivalent tasks, performed under the supervision of officials or temporary staff).[16] It ordered recovery from the defendant employer of payment in arrears of remuneration for a period of six months during 2018.[17]

21. The defendant employer appealed, unsuccessfully, against the decision of the Labour Disputes Commission to the Vilniaus miesto apylinkės teismas (District Court of the City of Vilnius, Lithuania), which court dismissed the appeal on 20 February 2019. The defendant employer then appealed to the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania). By order of 20 June 2019, that appeal was dismissed.

22. The defendant employer brought an appeal on a point of law before the referring court. It decided on 30 December 2019 that the main proceedings raised questions of interpretation and application of EU law. It referred the following questions by way of a reference for a preliminary ruling:

'(1) What content should be the given to the term "public undertaking" in Article 1(2) of Directive 2008/104? Are European Union agencies such as [the European Institute for Gender Equality (EIGE)] to be regarded as "public undertakings" within the meaning of Directive 2008/104?

(2) Which entities (temporary-work agency, user undertaking, at least one of them, or possibly both) are subject, according to Article 1(2) of Directive 2008/104, to the criterion of being engaged in economic activities? Are the areas of activity and functions of [the] EIGE, as defined in Articles 3 and 4 of [Regulation No 1922/2006], to be regarded as economic activities as that term is defined (understood) within the meaning of Article 1(2) of Directive 2008/104?

(3) Can Article 1(2) and (3) of Directive 2008/104 be interpreted as being capable of excluding from the application of the Directive those public and private temporary-work agencies or user undertakings which are not involved in the relations referred to in Article 1(3) of the Directive and are not engaged in the economic activities mentioned in Article 1(2) of the Directive?

(4) Should the provisions of Article 5(1) of Directive 2008/104 concerning the rights of temporary agency workers to basic working and employment conditions, in particular as regards pay, apply in full to European Union agencies, which are subject to special EU labour-law rules and to Articles 335 and 336 TFEU?

(5) Does the law of a Member State (Article 75 of the Lithuanian Labour Code) transposing the provisions of Article 5(1) of Directive 2008/104 for all undertakings using temporary workers (including EU institutions) infringe the principle of administrative autonomy of an EU institution established in Articles 335 and 336 TFEU, and the rules governing the calculation and payment of wages laid down in the [Staff Regulations]?

16 Article 80, CEOS.

17 According to the written observations of the Commission.

(6) In view of the fact that all posts (job functions) to which workers are directly recruited by [the] EIGE include tasks which can be performed exclusively by those workers who work under the [Staff Regulations], can the respective posts (job functions) of temporary agency workers be regarded as being "the same job[s]" within the meaning of Article 5(1) of Directive 2008/104?'

23. Written observations were filed at the Court by the applicants, the Republic of Lithuania, and the Commission. There was no hearing, but questions for written response were posed by the Court. The EIGE and the Commission responded.

IV. Summary of written observations

24. The applicants emphasise that the EIGE is neither a party nor a defendant in the main proceedings, and as such, the EIGE is not responsible under Article 75(2) of the Labour Code for paying the applicants' salaries. Both parties are Lithuanian entities, and the protection provided by Directive 2008/104 cannot be diluted by the international status of the EIGE. To do so would create social tensions.

25. Under the established case-law, and the wording of Article 1(2) of Directive 2008/104, non-profit making entities are not automatically excluded from pursuing 'economic activities'. [18] Rather, 'economic activity' means all activities linked to economic operations, independently of the interests for which they are pursued. The various activities of the EIGE (for example, education, information, collection of statistics) have an economic character because their exercise requires economic operations, such as the making of payments. Only voluntary activities are not 'economic activities'.

26. Interpretation of Directive 2008/104 permitting agencies of the European Union, like the EIGE, to discriminate against temporary agency workers because staff of the EIGE recruited under the Staff Regulations enjoy a special status which is not comparable to that of temporary agency workers would be contrary to the objectives pursued by Directive 2008/104.

27. The absence in Lithuanian law of the notion of 'economic activities' in its implementation of Directive 2008/104 through Article 75 of the Labour Code is consistent with EU law. [19] Nineteen Member States implement Directive 2008/104 in the same way as Lithuania.

28. The applicants submit that it was manifest that the EIGE could have recruited personnel directly, under the Staff Regulations, to perform the same administrative tasks as those for which they were recruited. [20] The authority for direct recruitment extends from manual tasks such as those performed by porters and cleaning staff to high-level management tasks. Functions performed by temporary agency workers should be compared with those of permanent EIGE personnel.

18 The applicants refer to the judgment of 17 November 2016, *Betreibsrat der Ruhrlandklinik* (C-216/15, EU:C:2016:883).

19 Here the applicants refers to the objectives of Directive 2008/104 as described in Article 2 thereof, and Commission Recommendation of 12 July 2004 on the transposition into national law of Directives affecting the internal market (OJ 2005 L 98, p. 47).

20 Here the applicants refer to Article 80 of the CEOS and the four function groups mentioned therein concerning tasks.

29. Before the Member State courts, the applicants presented ample evidence (emails, statements, etc.) that they in fact engaged not only in support functions, but also in tasks that were to be performed only by staff recruited directly by the EIGE (for example, planning and budget management). This is a question of fact to be respected, even if, from a legal perspective, the functions of EIGE permanent staff and the applicants are not comparable.

30. Finally, the applicants point out that they were employed as temporary workers for periods of between 22 months and 36 months. The contracts were terminated by the EIGE after the applicants sought payment in arrears of wages. Remuneration received by the applicants fluctuated between EUR 700 and EUR 800, more or less a third of the remuneration of EIGE staff recruited directly and performing similar functions.

31. The Republic of Lithuania notes, in the context of the first question referred, that the principle of non-discrimination of temporary workers is a principle of EU social law which cannot be interpreted restrictively. [21] The broad scope of Directive 2008/104 is reflected in the broad interpretation that has been given to the term 'worker' under Article 1(1) of this directive. [22] Under the jurisprudence of the Court on the interpretation of provisions of EU law protecting workers, derogations must be interpreted in a way that is limited to what is strictly necessary to safeguard the interests the derogation protects. [23]

32. In the light of all this, any exclusion *ratione personae* from the scope of Directive 2008/104 must be clear and precise. [24] So restricting the use of temporary agency workers with respect to entities of public law like the EIGE would not respond to any of the reasons envisaged by Article 4(1) of Directive 2008/104 concerning permissible prohibitions or restrictions on the use of temporary agency work. [25] Lowering the protection of temporary agency workers solely on the basis that the user undertaking is founded on a legal basis different from that provided by Member State public law would amount to another basis of unjustified discrimination. It is already established, in practical terms, that when the institutions and the agencies recruit temporary agency workers, they are to comply with the law of the Member State in which they are situated. [26]

33. The Republic of Lithuania contends that Directive 2008/104 implements fundamental rights as protected by Article 31 of the Charter. Thus, both apply to the EIGE as a 'user undertaking' due to Article 51(1) of the Charter. The institutions must, under their obligation of loyalty, take account, in their capacity as employer, of legal measures adopted at EU level. [27]

34. With regard to the second and third questions, the Republic of Lithuania agrees with the position of the Commission. [28] Member States such as Lithuania are permitted to opt for a broader scope of application of Directive 2008/104, a minimum harmonisation directive, and

21 The Republic of Lithuania refers to the judgment of 5 June 2018, *Grupo Norte Facility* (C-574/16, EU:C:2018:390, paragraphs 36 to 38 and the case-law cited). Reference is also made, with respect to the objectives of Directive 2008/104, to recitals 10 and 12 and Articles 2 and 5.

22 Referring to the judgment of 17 November 2016, *Betriebsrat der Ruhrlandklinik* (C-216/15, EU:C:2016:883, paragraph 36).

23 Referring to the judgment of 14 October 2010, *Union syndicale Solidaires Isère* (C-428/09, EU:C:2010:612, paragraph 40).

24 In this context the Republic of Lithuania refers to the exclusions provided for in Article 1(3) and Article 4(1) of Directive 2008/104.

25 See generally judgment of 17 March 2015, *AKT* (C-533/13, EU:C:2015:173). See also the judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraph 43).

26 Referring to judgment of 13 December 2016, *IPSO* v *ECB* (T-713/14, EU:T:2016:727, paragraphs 28 and 95).

27 Referring to judgments of 13 December 2016, *IPSO* v *ECB* (T-713/14, EU:T:2016:727, paragraphs 96, 105 and 106), and of 19 September 2013, *Review Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 39).

28 Referring to COM(2014) 176 final.

extend it to user undertakings which do not engage in economic activities,[29] so that it is not necessary to decide whether the EIGE engages in economic activities in the sense of Article 1(2) of Directive 2008/104.

35. With regard to the fourth and fifth questions, the Republic of Lithuania states that, in the absence of a specific rule in the Staff Regulations, a temporary agency worker's assignment to an EU agency as a 'user undertaking' is governed by Article 5 of Directive 2008/104 and the Member State law transposing it (due to, inter alia, Article 335 TFEU). This is the position of the Court of Auditors, which has questioned the legality of the activities of seven EU agencies with respect to compliance with Directive 2008/104, including the EIGE.[30]

36. There is no infringement of either the principle of autonomy of the institutions of the European Union or the rules on the calculation of remuneration contained in the Staff Regulations in Lithuania's implementation of Directive 2008/104. Any difference in treatment of EU institutions, organs and agencies has to be provided for in directly applicable rules of EU law.

37. With regard to the sixth question, the Republic of Lithuania points out that Article 5(1) of Directive 2008/104 is a concrete expression of the general principle of equal treatment.[31] The words, in Article 5(1), 'to occupy the same job' allows a hypothetical comparison of workers. It cannot be interpreted narrowly to mean, for example, that the jobs in question must be identical, otherwise it would be too easy to circumvent the obligation laid down thereby. The order for reference states that the EIGE sought recruitment of temporary workers to support the statutory personnel of the EIGE, to assume, inter alia, complementary tasks, and to remedy staff shortages. The first instance court found that, account being taken of the applicants' employment contracts, and the tasks that were in fact undertaken, all the temporary workers performed, partly or wholly, the functions of permanent personnel of the EIGE. The fact that temporary workers can fill the posts of civil servants or agents on sick leave or parental leave refutes the argument that it is forbidden to entrust statutory functions to those outside the Staff Regulations.

38. The Commission argues, with respect to the first and second questions, that both the temporary-work agency and user undertakings must exercise economic activities under Article 1(2) of Directive 2008/104. This interpretation is also supported by its origins.[32]

39. However, the Commission acknowledges that, on the basis of the wording of Article 1(2) of Directive 2008/104, the EIGE cannot be excluded from its scope on the ground that it is a public undertaking. The Commission contends that, under case-law of the Court, the EIGE is not exercising an economic activity,[33] principally because the EIGE does not offer goods or services on a given market and is not in competition with those offered by another undertaking.

29 Referring to Article 9 of Directive 2008/104 and judgment of 17 November 2016, *Betreibsrat der Ruhrlandklinik* (C-216/15, EU:C:2016:883, paragraphs 44 to 47).

30 OJ 2019, C 417, p. 1 (https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=uriserv:OJ.C_.2019.417.01.0001.01.FRA&toc=OJ:C:2019:417:TOC), points 1.33 and 2.30.

31 Reference is made here to the judgment of 5 June 2018, *Grupo Norte Facility* (C-574/16, EU:C:2018:390, paragraph 46).

32 The Commission refers, in this regard, to Article 1(2) of the Commission's initial proposal with respect to the directive (COM/2002/0149 final); a legislative resolution of the European Parliament of 20 March 2002; the modified proposal of the Commission of 28 November 2002.

33 The Commission relies on the judgments of 24 May 2011, *Commission* v *Belgium* (C-47/08, EU:C:2011:334, paragraph 96); of 6 September 2011, *Scattolon* (C-108/10, EU:C:2011:542, paragraph 44); and of 17 November 2016, *Betriebsrat der Ruhrlandklinik* (C-216/15, EU:C:2016:883, paragraphs 44 and 47). It also relies on recital 10 and Articles 2 and 3 and Article 4(1) of Regulation No 1922/2006.

40. That said, with regard to the third question, the Commission proposes reformulating it as follows: 'Must Article 1(2) of Directive 2008/104 be interpreted in the sense that it precludes provisions of Member State law pursuant to which Directive 2008/104 is applicable to temporary-work agencies or user undertakings which do not exercise economic activities?' The Commission proposes a negative answer to this question. [34]

41. With regard to the fourth and fifth questions, the Commission takes the position that the principle of equal treatment under Article 5(1) of Directive 2008/104 requires that the applicants are treated in the same way as employees recruited directly by the EIGE under Lithuanian law, as opposed to recruitment via temporary-work agencies, but not those employed on the basis of the Staff Regulations. [35] The EIGE decided to employ temporary workers under Member State law, and this choice is legitimate under EU law, pursuant to Articles 272 and 335 TFEU. The capacity there recognised to enter into contractual relations extends to contracts of employment and provision of services. [36] Such recruitment is only illegitimate if it is done to avoid the application of the Staff Regulations, [37] but the institutions have a wide margin of discretion in choosing the means best adapted for recruitment. It allows more flexibility than the conditions applicable to workers in the category of contract agents. [38]

42. The Commission further states that directives are addressed to Member States and cannot in and of themselves impose obligations on EU institutions in their relations with personnel. [39] Under Article 336 TFEU it is for the EU institutions to determine the rules applicable to such relationships, so it is only exceptionally that the directives are indirectly applicable, [40] although directives can be a source of inspiration for determining the obligations of the EU institutions with respect to the public functions of the European Union, [41] and the institutions, in their behaviour as an employer must take account of EU legislative rules. [42] This applies only to civil servants and other agents falling within the scope of the Staff Regulations and thus not to the applicants.

43. This is why the applicants' situation is thus to be compared, under Article 5(1) of Directive 2008/104, with that of staff recruited directly by the EIGE under Lithuanian law without the intermediary of a temporary-work agency, and not that of EU statutory personnel. This approach is in line with the principle of autonomy of EU institutions. A person who is not recruited by an EU institution but by a legal person under the law of a Member State, such as a temporary-work

34 In this context the Commission refers to recital 23 and Article 9(1) and Article 11 of Directive 2008/104, the directive's legal basis, namely Article 153(2) TFEU (ex 137(2) EC), Article 153(4) TFEU, and the judgments of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360, paragraphs 39 to 42); of 17 July 1997, *Leur-Bloem* (C-28/95, EU:C:1997:369, paragraph 33); and of 19 November 2019, *TSN and AKT* (C-609/17 and C-610/17, EU:C:2019:981, paragraph 48). The Commission adds in its reply to written questions from the Court that such national laws cannot contravene Article 336 TFEU which confers autonomy on the European Union with respect to the Staff Regulations.

35 The Commission notes that the Staff Regulations governs the legal relationship between the institutions and their staff and creates reciprocal rights and obligations. The Commission refers to the judgments of 22 February 2006, *Adam* v *Commission* (T-342/04, EU:T:2006:61, paragraph 34), and of 12 July 2011, *Commission* v *Q* (T-80/09 P, EU:T:2011:347, paragraph 41).

36 The Commission refers to the judgment of 19 July 1999, *Mammarella* v *Commission* (T-74/98, EU:T:1999:159, paragraphs 39 and 40). Judgment of 6 December 1989, *Mulfinger and Others* v *Commission* (C-249/87, EU:C:1989:614, paragraph 10).

37 Judgment of 6 December 1989, *Mulfinger and Others* v *Commission* (C-249/87, EU:C:1989:614, paragraphs 11 and 14).

38 The Commission refers, inter alia, to the judgment of 24 November 2015, *Commission* v *D'Agostino* (T-670/13, EU:C:2015:877, paragraph 32).

39 Here the Commission refers to the judgment of 4 December 2018, *Carreras Sequeros and Others* v *Commission* (T-518/16, EU:T:2018:873, paragraph 60) (on appeal C-119/19 P).

40 Here the Commission refers to the example of the judgment of 19 September 2013, *Review Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 46).

41 The Commission refers to the judgment of 7 February 2019, *RK* v *Council* (T-11/17, EU:T:2019:65, paragraphs 68 and 70).

42 Judgment of 4 December 2018, *Carreras Sequeros and Others* v *Commission*, T-518/16, EU:T:2018:873, paragraph 61).

agency, cannot be considered to have been recruited by an equivalent of an administrative authority and cannot obtain the status of civil servant of the European Union.[43] An interpretation of Directive 2008/104 according to which temporary agents were effectively considered equivalent to contract agents would risk infringing the autonomy of the European Union,[44] and create insurmountable practical difficulties.[45] The Commission queries whether Protocol (No 7) on the privileges and immunities of the European Union should apply.[46]

44. With regard to the sixth question, the Commission submits the Member State court must verify if the applicants have performed administrative tasks, or rather tasks linked to the 'principle activities' and tasks of the EIGE under its founding regulation, in order to check whether the goal was to avoid the application of the Staff Regulations. However, it considers that the EIGE has not exceeded the limits of its discretion in recruiting temporary agency workers under Lithuanian law. Administrative assistance is not to be considered a task that must be undertaken by the EIGE itself as a 'principle activity'.[47] The referring court is not competent to requalify the contracts in issue to contracts governed by the CEOS because the applicants did not conclude their contracts with the EIGE, but with the defendant employer (a temporary-work agency), and because in the main proceedings the EIGE is a third party.

V. Analysis

A. Reformulation of the questions referred.

45. According to settled case-law, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it.[48]

46. In the present case, it is clear from the request for a preliminary ruling that the Court is called upon to rule on whether an EU agency such as the EIGE falls within the concept of 'user undertaking' pursuant to Directive 2008/104; if so, whether the Republic of Lithuania's implementation of the term 'user undertaking' so as to encapsulate undertakings which do not engage in economic activities means that the assignment of temporary agency workers to such undertakings is governed by Directive 2008/104; if not, whether the EIGE is 'engaged in economic activities whether or not they are operating for gain' pursuant to Article 1(2) of Directive 2008/104; and if so, whether application of Article 5(1) of Directive 2008/104 on equal treatment to the EIGE in its capacity as a 'user undertaking', and in the context of a dispute between two private parties in which the EIGE is a third party intervener, would be prejudicial to the administrative autonomy of the EIGE[49] and the Staff Regulations?

47. I therefore suggest reformulating the six questions referred into the following four questions.

43 The Commission refers to the order of 6 July 2001, *Dubigh and Zaur-Gora* v *Commission* (T-375/00, EU:T:2001:181, paragraph 21).

44 The Commission refers to the judgment of 3 October 1985, *Tordeur* (232/84, EU:C:1985:392, paragraph 27).

45 Namely, which elements of contract agent's pay should be taken into account; which fiscal regime should be taken into account, given that the conditions applicable under the national regime and EU regime are completely different.

46 OJ 2016 C 202, p. 266.

47 The Commission refers to the judgment of 6 December 1989, *Mulfinger and Others* v *Commission* (C-249/87, EU:C:1989:614).

48 For example, judgment of 17 December 2020, *Generalstaatsanwaltschaft Hamburg* (C-416/20 PPU, EU:C:2020:1042, paragraph 27 and the case-law cited).

49 See Article 6 of Regulation No 1922/2006 and Articles 335 and 336 TFEU.

(1) Are agencies of the European Union such as the EIGE 'user undertakings' pursuant to Article 1(2) of Directive 2008/104, as defined in Article 3(1)(d) thereof?

(2) Is Directive 2008/104 to be interpreted as precluding the application of Directive 2008/104 to assignment of temporary agency workers to user undertakings not engaged in economic activities?

(3) Are the areas of activity and functions of the EIGE, as defined in Articles 3 and 4 of Regulation No 1922/2006, to be regarded as economic activities pursuant to Article 1(2) of Directive 2008/104?

(4) When the courts of the Member State concerned have found that all posts and job functions performed by temporary agency workers include tasks performed exclusively by workers employed under the Staff Regulations, can the respective posts and job functions of the temporary agency workers be regarded as being 'the same job[s]' within the meaning of Article 5(1) of Directive 2008/104, or is such an interpretation of Article 5(1) of Directive 2008/104 inconsistent with the administrative autonomy of the EIGE and/or the Staff Regulations? [50]

VI. Answers to the questions as reformulated

A. Answer to Question 1

48. The answer to Question one is in the affirmative. Agencies of the European Union, such as the EIGE, are 'user undertakings' pursuant to Article 1(2) of Directive 2008/104, as defined in Article 3(1)(d) thereof.

49. The General Court has already held that an EU institution, namely the European Central Bank, is a 'user undertaking' for the purposes of Article 1(2) of Directive 2008/104, albeit without providing details as to its reasoning. [51] This was perhaps a logical consequence of the fact that, long before the promulgation of Directive 2008/104, EU institutions had made recourse to temporary-work agencies to fulfil temporary staffing needs by means of employment contracts governed by the national law of the location of the EU institution in question. [52]

50. Further, the Civil Service Tribunal held in 2006 that the fact that a fixed-term employment contract was concluded with a body governed by public international law was not, as such, sufficient to preclude the relevance to the dispute of the Court's case-law interpreting Directive 1999/70 and its accompanying Framework Agreement. [53] In the light of this, I agree with arguments made by the Republic of Lithuania (see point 32 above) to the effect that clear words are required to remove either EU institutions as defined in Article 13 TEU, or EU agencies [54] from the scope of Directive 2008/104.

50 See Article 6 of Regulation No 1922/2006 and Articles 335 and 336 TFEU.

51 Judgment of 13 December 2016, *IPSO* v *ECB* (T-713/14, EU:T:2016:727, paragraph 102).

52 See, for example, judgment of 3 October 1985, *Tordeur* (232/84, EU:C:1985:392), and order of 6 July 2001, *Dubigh and Zaur-Gora* v *Commission* (T-375/00, EU:T:2001:181). The latter case concerned an assignment to the Commission of a temporary agency worker from a temporary-work agency called Manpower. See later, for example, the Order of 15 September 2010, *Briot* (C-386/09, EU:C:2010:526).

53 Judgment of 26 October 2006, *Landgren* v *ETF* (F-1/05, EU:F:2006:112). On the link between Directive 2008/104 and Directive 1999/70 see footnote 9 above.

54 Footnote 5 above.

51. Such clear wording does not appear in Directive 2008/104. On the contrary, Article 3(1)(d) of Directive 2008/104 defines 'user undertaking' broadly as meaning '*any* natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily' (my emphasis), while Article 5 of Regulation No 1922/2006, states that the 'Institute shall have legal personality. It shall enjoy, in each of the Member States, the most extensive legal capacity accorded to legal persons under their laws. In particular, it may acquire or dispose of movable or immovable property and may be a party to legal proceedings'. Thus a contextual analysis, which interprets Article 3(1)(d) and Article 1(2) of Directive 2008/104 in the light of Regulation No 1922/2006, equally points towards inclusion of an agency like the EIGE within the parameters of 'user undertaking' for the purposes of Directive 2008/104. [55]

52. Indeed, the only textual limitations on the term 'user undertaking' appears in Article 1(2), which adds the words 'engaged in economic activities whether or not they are operating for gain' (see further points 64 to 71 below). None of the derogations to Directive 2008/104 relate in any special or specific way to agencies of the European Union; those derogations being Article 1(3) concerning 'employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining programme', and Article 4(1) with respect to 'grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented'. No reference is made to EU agencies in Article 5(2) to (4) of Directive 2008/104 which concern limitations on the principle of equal treatment.

53. Nor do the aims and objectives of Directive 2008/104 support exclusion of EU agencies from the concept of 'user undertakings'. The dual objectives of the directive are to develop flexible forms of work, while seeking a greater degree of harmonisation of the social law behind it. That social law is designed to achieve a balance between flexibility and security in the job market, and has been referred to as 'flexicurity'. [56] The text of Article 2 of Directive 2008/104 essentially addresses four goals: protection of temporary agency workers, guarantee of the principle of equal treatment, creation of jobs, and the development of flexible forms of working. Thus, the directive aims to stimulate temporary agency workers' access to permanent employment at the user undertaking. [57] Job creation and participation and integration in the labour market are core objectives. [58] No inconsistency between these objectives and the jobs offered by EU agencies is evident from the case file. The EIGE is an active player on the Lithuanian job market, and nor do the origins of Article 1(2) suggest the exclusion of agencies such as the EIGE from its ambit. [59]

54. The term 'user undertakings' is to be interpreted broadly, [60] in order not to jeopardise the attainment of the objectives of the Directive 2008/104, and thereby undermine its effectiveness, by inordinately and unjustifiably restricting its scope. This is so because the Court has reached

55 On the various ways in which 'context' impacts on the interpretation of EU measures, see my Opinion in *Pinckernelle* (C-535/15, EU:C:2016:996, point 40).

56 See the analysis of Advocate General Sharpston in *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:300, especially in point 36 and the sources referred to therein).

57 Judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraph 51). The Court refers to recital 15 and Article 6(1) and (2) of Directive 2008/104.

58 Ibid., paragraph 50. The Court refers to recital 11.

59 On the preparatory work to Article 1(2) of Directive 2008/104, see the Report of the Expert Group 'Transposition of Directive 2008/104/EC on Temporary agency work', European Commission, August 2011, pp. 6 to 9 ('the 2011 Report of the Expert Group').

60 It is to be noted that the judgment of 17 November 2016, *Betriebsrat der Ruhrlandklinik* (C-216/15, EU:C:2016:883) concerned whether a temporary-work agency was engaged in 'economic activities'. It did not consider this issue in the context of a user undertaking.

the same conclusion with respect to the meaning of 'temporary agency worker' under Article 3(1)(c) and Article 1(2) of Directive 2008/104.[61] The same imperative must necessarily apply to the provisions of Directive 2008/104 requiring interpretation in the main proceedings.

B. Answer to Question 2

55. The answer to Question 2 is in the affirmative. Directive 2008/104 is to be interpreted as precluding the application of Directive 2008/104 to the assignment of temporary agency workers to user undertakings not engaged in economic activities.

56. It is to be acknowledged that the Court has recognised as admissible requests for a preliminary ruling concerning provisions of EU law where the facts of the case fell outside the scope of EU law but where those provisions of EU law had been rendered applicable by national law due to a reference made by that law to the content of those EU provisions.[62] This has included situations in which a domestic situation follows the same approach, due to Member State legislation, as that provided by EU law, and includes purely internal situations.[63] As Advocate General Bobek has recently observed, the Court has held that where, in regulating situations outside the scope of the EU measure concerned, national legislation adopts the same solutions as those adopted in that measure, it is clearly in the interest of the European Union that, in order to prevent future differences of interpretation, provisions taken from that measure should be interpreted uniformly.[64]

57. However, contrary to the position taken by the Republic of Lithuania and the Commission (see points 34 and 40 above, respectively) there are at least four impediments to the application to the main proceedings of what is known as the *Dzodzi* line of case-law, in which this principle was established.[65]

58. First, a dominant theme in the case-law is the identification of a provision of Member State law which 'directly and unconditionally' applies the EU measure to a context not envisaged by that measure.[66] No such clearly worded provision appears in the case file, and the simple omission of the words 'engaged in economic activities' in Article 75(2) of the Labour Code falls short of this requirement.[67]

59. Second, the Court has held that the *Dzodzi* rule cannot apply to situations with respect to which the directive concerned provides for an exclusion from its scope.[68] The specification 'user undertakings engaged in economic activities whether or not they are operating for gain' in Article 1(2) of Directive 2008/104 would be rendered meaningless if the laws established by Directive 2008/104 were extended to the assignment of temporary agency workers to user undertakings not engaging in economic activities.

61 Ibid., paragraph 36.

62 Judgment of 24 October 2019, *Belgische Staat* (C-469/18 and C-470/18, EU:C:2019:895, paragraph 21 and the case-law cited).

63 See for example judgment of 30 January 2020, *I.G.I.* (C-394/18, EU:C:2020:56, paragraph 45 and the case-law cited).

64 Opinion of Advocate General Bobek in *J & S Service* (C-620/19, EU:C:2020:649, point 2). See also, for example, judgment of 7 November 2018, *K and B* (C-380/17, EU:C:2018:877, point 35).

65 Judgment of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360).

66 Judgment of 7 November 2018, *K and B* (C-380/17, EU:C:2018:877, paragraph 36 and the case-law cited). See further, for example, judgments of 28 March 1995, *Kleinwort Benson* (C-346/93, EU:C:1995:85, paragraph 20);of 4 June 2020, *C.F. (Tax audit)* (C-430/19, EU:C:2020:429, paragraph 26); and of 10 September 2020, *Tax-Fin-Lex* (C-367/19, EU:C:2020:685, paragraph 21).

67 See notably in this regard the judgment of 10 December 2020, *J & S Service* (C-620/19, EU:C:2020:1011).

68 Judgment of 18 October 2012, *Nolan* (C-583/10, EU:C:2012:638, paragraphs 33, 34, 43 and 54).

60. Third, looking at the case-law more broadly, and to again adopt the approach of Advocate General Bobek, what is crucial is whether the provision of EU law whose interpretation had been sought had been used by the legislature in a context that was too far removed from the original one.[69] The original context is confined to user undertakings engaged in economic activities, albeit one that is narrowed by the specification, in Article 1(2) of Directive 2008/104, 'whether or not they are operating for gain'.[70] Applying Directive 2008/104 beyond these parameters extends it to a remote and open-ended context, in direct contradiction of the wording of Article 1(2) of that directive.

61. Fourth, it is to be noted that Directive 2008/104 establishes a protective framework[71] to improve the minimum protection of temporary agency workers[72] with respect to their basic working and employment conditions.[73] The Grand Chamber of the Court has held that, with respect to minimum harmonisation directives, to the extent that a Member State chooses to exercise its discretion to go beyond their minimum requirements,[74] it is not implementing EU law for the purposes of Article 51(1) of the Charter.[75] Equally, therefore, Directive 2008/104 cannot be relevant to the interpretation of Lithuanian law with respect to undertakings which do not engage in economic activities within the meaning of Article 1(2) of that directive, and to which temporary agency workers have been assigned.[76] This applies to all 19 Member States who have implemented Directive 2008/104 in the same way as Lithuania (see point 27 above).

C. Answer to Question 3

62. The answer to this question is in the affirmative. The areas of activity and functions of the EIGE, as defined in Articles 3 and 4 of Regulation No 1922/2006, are to be regarded as economic activities under Article 1(2) of Directive 2008/104.

63. This is so for the following reasons.

64. First, in the context of another measure of EU social policy, namely Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts

69 Opinion of Advocate General Bobek in *J & S Service* (C-620/19, EU:C:2020:649, point 50).

70 See, similarly, the judgment of 10 December 2020, *J & S Service* (C-620/19, EU:C:2020:1011, paragraphs 46 and 47).

71 Recital 12 of Directive 2008/104.

72 Recital 18 of Directive 2008/104. See also judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823).

73 Recital 14 of Directive 2008/104.

74 Article 9(1) of Directive 2008/104.

75 Judgment of 19 November 2019, *TSN and AKT* C-609/17 and C-610/17, EU:C:2019:981, paragraph 52). In paragraph 50, the Court held that 'the situations at issue in the main proceedings are different from the situation in which an act of the Union gives the Member States the freedom to choose between various methods of implementation or grants them a margin of discretion which is an integral part of the regime established by that act, and from the situation in which such an act authorises the adoption, by the Member States, of specific measures intended to contribute to the achievement of the objective of that act'. See, further, Opinions of Advocate General Hogan in *KV (Housing assistance)* (C-94/20, EU:C:2021:155, point 64), and of Advocate General Bobek in *Asociația "Forumul Judecătorilor din România" and Others* (C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19, EU:C:2020:746, points 190 to 194). I acknowledge that Directive 2008/104, unlike the directive at issue in *TSN and AKT*, contains no specific provision permitting the Member States to introduce measures more favourable to the protection of temporary agency workers. Directive 2008/104 is, however, a minimum harmonisation directive, the requirements of which have been exceeded in Lithuania's implementation of it.

76 It is to be noted, however, that even though assignment to such undertakings is not subject to the obligation inherent in Article 31 of the Charter on the right to fair and just working conditions, they remain governed by both fundamental rights as guaranteed by Lithuanian law and the European Convention on Human Rights. See, notably, the Opinion of Advocate General Saugmandsgaard Øe in *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2018:971).This applies to all 19 Member States who have implemented Directive 2008/104 in the same way as Lithuania.

of undertakings or businesses,[77] the Court has interpreted narrowly the circumstances in which public undertakings are precluded from the scope of that directive for non-engagement in 'economic activities', and held that such circumstances are confined to 'reorganisation of structures of the public administration or the transfer of administrative functions between public administrative authorities'.[78] The fact that the EIGE is a public authority does not in itself prevent the EIGE from falling within the parameters of Article 1(2) of Directive 2008/104 as a 'user undertaking'.[79] As can be seen from the discussion below in points 67 and 68, on the EIGE's tasks and areas of activity (see, respectively, Articles 3 and 4 of Regulation No 1922/2006), along with its objectives (Article 2), the EIGE cannot be considered to be engaging in activities which fall within the exercise of public powers.[80]

65. Second, the origins of Article 1(2) of Directive 2008/104 support a broad interpretation of that directive in order to avoid unfair competition,[81] as does the established case-law of the Court; the concept of 'economic activities' tends to be interpreted broadly,[82] irrespective of the sector of EU competence in which the question arises.[83] This is to be borne in mind when applying to the main proceedings the meaning afforded by the Court to the words 'economic activities' under Article 1(2) of Directive 2008/104, in its judgment of 17 November 2016, *Betriebsraat der Ruhrlandklinik*.[84] In consequence, the question to be answered is whether the EIGE is engaged in any activity consisting in offering goods or services on a given market.[85]

66. In this context, it is to be noted that pursuant to Article 14(3)(b) of Regulation No 1922/2006, the revenue of the institute shall include 'payments received for services rendered', so that the EU legislature envisaged that the EIGE would act as a market player, even if to date, and as stated by the EIGE in its reply to the Court's written questions, it has been financed exclusively by the Commission.

67. Further, the objectives of Regulation No 1922/2006 set out in Article 2 thereof allow for the identification of a range of markets open to the provision of goods or services; influencing national and EU policies is a classic field of activity of commercial lobbyists; the provision of technical assistance to the EU institutions and the authorities of the Member States in order to raise citizen's awareness of gender equality is not a European-wide monopoly of the EIGE; assistance in mainstreaming of gender equality into EU policies and the resulting national policies is equally left unstated in Regulation No 1922/2006 as being the exclusive province of the EIGE, and is undertaken by a wide range of actors.

77 OJ 2001 L 82, p. 16.

78 Opinion of Advocate General Szpunar in *ISS Facility Services* (C-344/18, EU:C:2019:1009, point 41), referring to the judgments of 15 October 1996, *Henke* (C-298/94, EU:C:1996:382, paragraph 14); of 26 September 2000, *Mayeur* (C-175/99, EU:C:2000:505, paragraph 33); and of 11 November 2004, *Delahaye* (C-425/02, EU:C:2004:706, paragraph 30).

79 Ibid.

80 For example, judgment of 20 July 2017, *Piscarreta Ricardo* (C-416/16, EU:C:2017:574, paragraphs 34 and 35).

81 See the position taken by the social partners in the 2011 Report of the Expert Group, footnote 59 above, p. 8.

82 For example, as I observed in my Opinion in *Topfit and Biffi* (C-22/18, EU:C:2019:181, point 53) the Court held in its judgment of 11 April 2000, *Deliège* (C-51/96 and C-191/97, EU:C:2000:199, paragraph 51), a case concerning restriction on free movement, that grants of (financial) awards on the basis of sporting results, and from government, along with private sponsorship, were all relevant in determining whether an amateur athlete was engaged in economic activities. The Court, in its judgment of 13 June 2019, *TopFit and Biffi* (C-22/18, EU:C:2019:497) upheld Mr Biffi's rights to free movement as a Union citizen under Article 21 TFEU, although the case concerned amateur athletics; on 'economic activites' in the field of competition law, see, for example, the judgment of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376).

83 I agree with the approach adopted by Advocate General Saugmandsgaard Øe in *Betriebsrat der Ruhrlandklinik* (C-216/15, EU:C:2016:518, point 47) that, given that definition of engagement in 'economic activity' is not clear from the content of Directive 2008/104, or the preparatory work, the Court was able to draw on the meaning of 'economic activity' in other areas of EU law.

84 C-216/15, EU:C:2016:883.

85 Ibid., paragraph 44 and the case-law cited.

68. Examples of activities consisting in offering goods or services and in which commercial undertakings are involved are included among the tasks of the EIGE as listed in Article 3. Prominent examples are: the dissemination of data and information on gender equality to, inter alia, research centres and national equality bodies, non-governmental organisations and social partners (Article 3(1)(a)); the dissemination of methodological tools to EU institutions and governmental authorities of the Member State (Article 3(1)(c)); the carrying out of surveys on the situation in Europe as regards gender equality (Article 3(1)(d)); the organisation of conferences (Article 3(1)(g)); and the development of dialogue across a range of bodies (Article 3(1)(i)). Activities of other entities, namely, 'other institutions, bodies and competent national and international organisations', are recognised in Article 4(3).

69. I acknowledge that the EIGE states in its reply to the questions posed by the Court that its principle task is the collection of data and the analysis and diffusion of data, and that it is the sole source of comparable data on equality between men and women at both EU and national level. However, the legislation summarised above shows that this is not its only activity.

70. Finally, even though the case file indicates that all of the EIGE's activities are currently funded from EU resources, rather than from receipts for services rendered under Article 14(3)(b) of Regulation No 1922/2006, this does not preclude a finding that it is engaged in 'economic activities'. This is so because Article 1(2) of Directive 2008/104 renders it immaterial whether the user undertaking operates for gain. [86] Under case-law developed pursuant to Directive 2001/23, the Court has held that services which, without falling within the exercise of public powers, are carried out in the public interest and without a profit motive and are in competition with those offered by operators pursuing a profit motive have been classified as economic activities. [87] Thus, contrary to arguments made by the EIGE and the Commission in their reply to the written questions, it is immaterial whether or not the EIGE pursues competitive goals in undertaking its activities; what matters is the existence of services in competition with *other undertakings* on the relevant markets who do. Nor does prescribing the EIGE's tasks within EU competence (Article 4(1) of Regulation No 1922/2006) diminish the EIGE's engagement in 'economic activities' given the breadth of EU competence over gender equality, the promotion of which is in the public interest.

71. Finally, it is to be recalled that broad interpretation of the scope of Directive 2008/104 is warranted so as not to jeopardise the attainment of the objectives of the directive and undermine its effectiveness (see point 54 above).

D. The answer to Question 4

72. The answer to the fourth question is in the affirmative. When the courts of the Member State concerned have found that all posts and job functions performed by temporary agency workers include tasks performed exclusively by workers employed under the Staff Regulations, the

[86] Contrary arguments made by the EIGE, it is therefore immaterial that the EIGE is not a 'taxable person' for the purposes of Article 9 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ 2006 L 347, p. 1. See Commission Document ARES (2018) 4985586-28/09/2018.

[87] Judgment of 20 July 2017, *Piscarreta Ricardo* (C-416/16, EU:C:2017:574, paragraph 34 and the case-law cited). It is noteworthy that Directive 1999/70 concerning the framework agreement on fixed-term work, and to which Directive 2008/104 is linked (see footnote 9 above) applies to fixed-term employment contracts concluded with public authorities and other public-sector bodies. See judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859, paragraph 43). This context suggests that only public bodies exercising core public functions should be precluded from the concept of engagement in 'economic activities' under Directive 2008/104.

respective posts and job functions of the temporary agency workers are to be regarded as being 'the same job[s]' within the meaning of Article 5(1) of Directive 2008/104. This is consistent with the administrative autonomy of the EIGE [88] and the Staff Regulations.

73. This is so for the following reasons.

74. First, the party responsible for breach of the obligation of equal treatment provided for in Article 5(1) of Directive 2008/104 is the defendant employer. As pointed out by the applicants (point 24 above), interpretation of Article 5(1) is sought by the referring court to determine the responsibilities under Lithuanian law of the defendant employer vis-à-vis the applicants, and not the EIGE. Thus, to some degree the discussion in the written observations on the extent to which obligations contained in EU directives are applicable to EU institutions when acting in a capacity as an employer is superfluous, [89] since those rulings concern actions initiated before the General Court in which the institution was the defendant in complaints brought by its servants. [90] Those rulings concern the impact of directives on the EU institutions with respect to 'their staff'. [91]

75. Second, no question arises in terms of prejudice to either the autonomy of the EIGE, or the Staff Regulations because the applicants seek only, and from the defendant rather than the EIGE, payment in arrears of remuneration they allege is owed to them, rather than conversion of their temporary work contracts into permanent contracts. No question arises, therefore, of the courts of Lithuania having conferred on the applicants the status of official or other agent of the European Union in breach of the Staff Regulations and the autonomy of the EU institutions. [92] Contrary to arguments made by the Commission, the main proceedings are therefore distinguishable from the judgment in *Tordeur*, [93] relied on by the Commission in its reply to written questions from the Court, because the temporary agency worker in that case sought to rely, in a reference for a preliminary ruling, on a provision of Belgian law that would have required the Commission to convert a contract of determinate duration to a contract of indeterminate duration. The Court held as follows:

'It is true that a temporary worker cannot be denied social protection solely on the ground that he has been placed at the disposal of a Community institution. However, such protection cannot be provided by means which encroach upon the autonomy of the Community institutions in this area … it is not possible for a contract of employment … of indeterminate duration to come into being as a result not of a decision of the designated competent authority but of the fact, even

88 See Article 6 of Regulation No 1922/2006 and Articles 335 and 336 TFEU.

89 Republic of Lithuania, point 33 above, the Commission, point 42 above.

90 See, for example, judgments of 19 September 2013, *Review Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570); of 13 December 2016, *IPSO* v *ECB* (T-713/14, EU:T:2016:727, paragraphs 105 and 106); and of 7 February 2019, *RK* v *Council* (T-11/17, EU:T:2019:65). For a discussion of the bases on which directives can bind EU institutions see Cortese, B., 'Reasonableness of legislative choices and protection against (discriminatory) dismissal of temporary staff: does the approach of the Court of Justice of the European Union to judicial review and judicial control meet high rule of law standards?' (2012) 12 *Era Forum* 641, 650 to 651.

91 Judgment of 4 December 2018, *Carreras Sequeros and Others* v *Commission* (T-518/16, EU:T:2018:873, paragraph 60 and the case-law cited). See also judgment of 24 September 2019, *VF* v *ECB* (T-39/18, not published, EU:T:2019:683).

92 Judgment of 11 March 1975, *Porrini and Others* (65/74, EU:C:1975:38, paragraphs 14 and 15). See also judgments of 9 November 2000, *Vitari* (C-126/99, EU:C:2000:609, paragraph 31), and of 8 September 2005, *AB* (C-288/04, EU:C:2005:526, paragraph 31). It is contended in the order for reference that, Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation No 966/2012 (OJ 2018 L 193, p. 1) prohibits the transfer of the performance of functions to persons who do not work under the Staff Regulations. However, this issue does not arise in the main proceedings, which concern only pay.

93 Judgment of 3 October 1985, 232/84, EU:C:1985:392.

where it is supported by a decision of a national court, that certain statutory provisions of the Member State in which the institution is situated which relate to temporary work have not been complied with.'[94]

76. There is no suggestion in the case file of anyone other than the defendant employer being responsible either for the payment sought by the applicants, or the obligation, under Article 5(1) of Directive 2008/104, for the 'basic working and employment conditions of temporary agency workers' to be 'for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job'.[95]

77. It is to be acknowledged that 'pay' under Directive 2008/104 is not defined in that provision,[96] and that there are other provisions of that directive that may arguably infringe the EIGE's autonomy, such as Article 10 which allows for Member States to impose penalties on user undertakings. However, this would depend on the nature of the penalty and the circumstances of the particular case. The main proceedings, by contrast, are confined to working and employment conditions relating to 'pay' under Article 3(f)(ii) and how to calculate 'at least those [pay conditions] that would apply' if the applicants has been recruited directly as provided by Article 5(1). Recourse by the Lithuanian courts to Article 80 of the CEOS is logical, in the light of the factual findings made, and I do not agree with arguments of the Commission to the effect that this creates insurmountable difficulties (see footnote 45 above).

78. The EIGE and the Commission argue that 'recruited directly by that undertaking to occupy the same job' under Article 5(1) of Directive 2008/104 merits comparison between temporary workers recruited *directly* by the EIGE for temporary work under Lithuanian law, rather than through a temporary-work agency, while both the applicants and the Republic of Lithuania argue that the comparative exercise should instead entail consideration of recruitment under the Staff Regulations.

79. Neither reflects a full picture of the exercise required. It is to be recalled that the 'principle of equal treatment, as laid down in Article 5(1) of Directive 2008/104 … requires the basic working and employment conditions of temporary agency workers to be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.'[97]

80. As explained in the written observations of the applicants (see point 29 above) and those of the Republic of Lithuania (point 37 above), Article 5(1) requires an investigation of forensic facts.[98] Have the applicants in fact, performed functions, in the jobs which they have occupied,

[94] Ibid., paragraphs 27 and 28. In paragraph 26, the Court noted that 'Article 6 of the Conditions of Employment of Other Servants of the European Communities provides that each institution is to determine who is authorised to engage servants under contract, whether they be temporary staff, auxiliary staff, local staff or even special advisers'. See also, for example, judgment of 8 September 2005, *AB* (C-288/04, EU:C:2005:526). It is to be noted that the main proceedings are not comparable to the situation considered by Advocate General Geelhoed in *Betriebsrat der Vertretung der Europäischen Kommission in Österreich* (C-165/01, EU:C:2003:224, point 100). For an example of a ruling of the Court in which an order of a Member State court concerning local staff employed by an EU agency under CEOS did not encroach on the sphere of autonomy of the community institutions see the judgment of 9 November 2000, *Vitari* (C-126/99, EU:C:2000:609).

[95] See also recital 14 of Directive 2008/104.

[96] For suggestions on how elements of EU law can aid this exercise see the 2011 Report of the Expert Group, footnote 59 above, pp. 16 to 18.

[97] Judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraph 52).

[98] Indeed, in considering whether the principle of equal treatment has been breached, it is for the court of the Member State to assess all the relevant facts, including whether the relevant groups are comparable, whether or not difference in treatment has occurred, and whether it is objectively justified. See, for example, my Opinion in *GILDA-UNAMS and Others* (C-282/19, EU:C:2021:217).

which are those of an employee who, under the Staff Regulations, receives a higher remuneration than that received under the temporary work contract? The contracts of employment and the Staff Regulations are of assistance more as evidence than as legal norms for undertaking this exercise. It appears from the order for reference that this forensic exercise was in fact undertaken by the Labour Disputes Commission (see point 20 above). Once it had been ascertained, on the basis of evidence, precisely what functions and activities had been performed by the temporary agency workers, and then an analysis of what was agreed, the Labour Disputes Commission awarded the remuneration provided for underfunction group II, grade 4 under Article 80 of the CEOS, and to be paid by the defendant employer.

81. Third, as already noted, restriction of the principle of equal treatment, one of the cornerstones of Directive 2008/104 is permitted only under 'certain limited circumstances'.[99] These are set out in Article 5(2) to (4) of Directive 2008/104. They do not arise in the main proceedings.

82. Finally, the question might be posed as to what is to be done if the EIGE has exceeded its discretion, under Article 4(5) of Regulation No 1922/2006 to 'enter into contractual relations, in particular sub-contracting arrangements, with other organisations, in order to accomplish any tasks which it may entrust to them'[100] or has acted in a manner inconsistent with the Staff Regulations which are binding on the EIGE by virtue of Article 13(1) of Regulation No 1922/2006?[101]

83. It is established case-law that 'temporary work is characterised by a triangular relationship between the worker, an external agency and the EU institution or body which involves two contracts being signed: one between the temporary employment agency and the EU institution or body and a second between the temporary worker and the temporary employment agency. … That relationship is therefore characterised by the presence of a private intermediary business which makes a profit by making a worker available to the EU institution or by assigning the worker to perform specific tasks in or on behalf of that institution. The intervention of those external businesses as intermediaries prevents a finding of a direct legal relationship between the individual concerned and the EU institution or body'.[102]

84. A triangular relationship therefore warrants a triangular solution. It is for the defendant employer to bring proceedings before the General Court of the European Union, rather than the applicants, to seek recovery from the EIGE of the arrears ordered by a Lithuanian court if, as a matter of EU law, they wish to contend that the EIGE exceeded its powers with respect to the nature of the work it in fact assigned the applicants to do. As argued by the Republic of Lithuania (point 35 above), this solution is consistent with the absence of provisions in the Staff Regulations concerning temporary agency workers.

99 Recital 17 of Directive 2008/104.

100 On the right of the Commission to enter into contractual relations, generally, see judgment of 6 December 1989, *Mulfinger and Others* v *Commission* (C-249/87, EU:C:1989:614, paragraph 10). See also Articles 272 and 335 TFEU.

101 Under the established case-law, this may occur, for example, in relation to one of the functions which are assigned to the institutions by the Treaties, and which therefore call for employment under the Staff Regulations rather than contracts governed by the laws of the Member States. See judgment of 6 December 1989, *Mulfinger and Others* v *Commission* (C-249/87, EU:C:1989:614).

102 Judgment of 13 July 2018, *Quadri du Cardano* v *Commission* (T-273/17, EU:T:2018:480, paragraph 68 and the case-law cited). See also judgment of 11 April 2013, *Della Rocca* (C-290/12, EU:C:2013:235, paragraph 40).

85. I come to this conclusion in the light of the applicants' right of access to a court and an effective remedy under the first paragraph of Article 47 of the Charter,[103] given the difficulties they would encounter in terms of securing *locus standi* before the General Court, due to the absence of a contract with the EIGE.[104]

VII. Conclusion

86. I therefore propose the following response to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania):

(1) Agencies of the European Union, such as the European Institute for Gender Equality (EIGE), are 'user undertakings' pursuant to Article 1(2) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, as defined in Article 3(1)(d) of Directive 2008/104.

(2) Directive 2008/104 is to be interpreted as precluding the application of Directive 2008/104 to the assignment of temporary agency workers to user undertakings not engaged in economic activities.

(3) The areas of activity and functions of the EIGE, as defined in Articles 3 and 4 of Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 establishing a European Institute for Gender Equality, are to be regarded as economic activities pursuant to Article 1(2) of Directive 2008/104.

(4) When the courts of the Member State concerned have found that all posts and job functions performed by temporary agency workers include tasks performed exclusively by workers employed under the Staff Regulations of Officials of the European Union, the respective posts and job functions of temporary agency workers are to be regarded as being 'the same job[s]' within the meaning of Article 5(1) of Directive 2008/104. This is consistent with the administrative autonomy of the EIGE and the Staff Regulations.

[103] See notably, in the context of the issues arising in this case, the judgment of 25 June 2020, *SatCen* v *KF* (C-14/19 P, EU:C:2020:492).

[104] See, for example, order of 6 July 2001, *Dubigh and Zaur-Gora* v *Commission* (T-375/00, EU:T:2001:181), and judgment of 13 December 2016, *IPSO* v *ECB* (T-713/14, EU:T:2016:727). Recital 21 of Directive 2008/104 is also pertinent here, providing as it does an obligation on Member States to furnish 'effective, dissuasive and proportionate penalties for breaches of the obligations' laid down in Directive 2008/104, as does Article 10. Further, non-contractual liability would seem to be precluded under the case-law. See, for example, judgment of 3 October 1985, *Tordeur* (232/84, EU:C:1985:392, paragraphs 15 to 21).