Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

3 June 2021 *

(Reference for a preliminary ruling – Migrant workers – Social security – Legislation applicable – Regulation (EC) No 883/2004 – Article 12(1) – Posting of workers – Temporary agency workers – Regulation (EC) No 987/2009 – Article 14(2) – A1 certificate – Determination of the Member State in which the employer normally carries out its activities – Concept of 'substantial activities, other than purely internal management activities' – No assignment of temporary agency workers in the territory of the Member State in which the employer is established)

In Case C-784/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad – Varna (Administrative Court, Varna, Bulgaria), made by decision of 4 October 2019, received at the Court on 22 October 2019, in the proceedings

'TEAM POWER EUROPE' EOOD

v

Direktor na Teritorialna direktsia na Natsionalna agentsia za prihodite – Varna,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, M. Vilaras, E. Regan (Rapporteur), M. Ilešič, L. Bay Larsen, N. Piçarra and A. Kumin, Presidents of Chambers, T. von Danwitz, C. Toader, M. Safjan, L.S. Rossi, I. Jarukaitis and N. Jääskinen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 13 October 2020,

after considering the observations submitted on behalf of:

– 'TEAM POWER EUROPE' EOOD, by K. Todorova, advokat, and by T. Höhn, Rechtsanwalt,

– the Bulgarian Government, by E. Petranova, T. Tsingileva and T. Mitova, acting as Agents,

* Language of the case: Bulgarian.

– the Belgian Government, by L. Van den Broeck, S. Baeyens and B. De Pauw, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the French Government, by C. Mosser, A. Desjonquères and E. de Moustier, acting as Agents,

– the Polish Government, by A. Siwek-Ślusarek, D. Lutostańska and B. Majczyna, acting as Agents,

– the Finnish Government, by M. Pere, acting as Agent,

– the European Commission, by D. Martin and Y.G. Marinova, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 December 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 14(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1).

2 The request has been made in proceedings between 'TEAM POWER EUROPE' EOOD ('Team Power Europe'), a company incorporated under Bulgarian law established in Varna (Bulgaria), and the Direktor na Teritorialna direktsia na Natsionalna agentsia za prihodite – Varna (Director of the Territorial Directorate of the National Public Revenue Agency for the City of Varna, Bulgaria) ('the Director') concerning the latter's refusal to issue a certificate attesting that Bulgarian social security legislation is applicable to a temporary agency worker employed by that agency for the period during which that worker is assigned to a user undertaking established in Germany.

Legal context

European Union law

Regulation (EC) No 883/2004

3 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4) ('Regulation No 883/2004'), repealed, with effect from 1 May 2010, Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, in the version as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) ('Regulation No 1408/71').

4 Recitals 1 and 45 of Regulation No 883/2004 read as follows:

‘(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.

…

(45) Since the objective of the proposed action, namely the coordination measures to guarantee that the right to free movement of persons can be exercised effectively, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of that action, be better achieved at [Union] level, the [Union] may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. …’

5 Article 2 of that regulation, entitled ‘Persons covered’, which appears in Title I thereof, itself entitled ‘General provisions’, provides in paragraph 1:

‘This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.’

6 Title II of that regulation, entitled ‘Determination of the legislation applicable’, comprises Articles 11 to 16 of that regulation.

7 Under the heading ‘General rules’, Article 11 of that regulation provides:

‘1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

…

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

…’

8 Article 12 of Regulation No 883/2004, entitled ‘Special rules’, provides in paragraph 1:

‘A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer’s behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person.’

9 That provision replaced Article 14(1)(a) of Regulation No 1408/71, according to which ‘a person employed in the territory of a Member State by [an] undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform

work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting'.

Regulation No 987/2009

10 Title II of Regulation No 987/2009, entitled 'Determination of the legislation applicable', comprises Articles 14 to 21 thereof.

11 Article 14 of that regulation, entitled 'Details relating to Articles 12 and 13 of [Regulation No 883/2004]', provides in paragraph 2:

'For the purposes of the application of Article 12(1) of Regulation [No 883/2004], the words "which normally carries out its activities there" shall refer to an employer that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, taking account of all criteria characterising the activities carried out by the undertaking in question. The relevant criteria must be suited to the specific characteristics of each employer and the real nature of the activities carried out.'

12 Article 19 of Regulation No 987/2009, entitled 'Provision of information to persons concerned and employers', provides in paragraph 2:

'At the request of the person concerned or of the employer, the competent institution of the Member State whose legislation is applicable pursuant to Title II of [Regulation No 883/2004] shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions.'

13 That attestation is given by means of a certificate known as an 'A1 certificate'.

Directive 2008/104/EC

14 Article 3(1) 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) provides:

'For the purposes of this Directive:

…

(b) "temporary-work agency" means: means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction;

(c) "temporary agency worker" means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;

…'

Bulgarian law

15 Under Article 107p of the Kodeks na truda (Employment Code):

‘(1) An employment contract concluded with a temporary-work agency must stipulate that the worker will be sent to a user undertaking to work there temporarily under the user undertaking’s supervision and direction.

…

(7) Temporary-work agencies shall carry on their activity after they have registered with the Employment Agency (Agentsia po zaetostta), in accordance with the conditions and detailed rules laid down by the Law on the promotion of employment (zakon za nasarchvane na zaetostta).’

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

16 Team Power Europe has been registered in the company register of the Republic of Bulgaria since 22 May 2017. Its commercial purpose is the provision of temporary work and work placement services in that Member State and in other countries.

17 That undertaking is registered with the Bulgarian Employment Agency as a temporary-work agency, in accordance with the certificate issued by the Ministry of Labour and Social Policy, and holds official authorisation to place staff in Germany under a permit issued by the Agentur für Arbeit Düsseldorf (Employment Agency, Düsseldorf, Germany), which is part of the Bundesagentur für Arbeit (Federal Employment Agency, Germany).

18 On 8 October 2018, Team Power Europe concluded a contract of employment with a Bulgarian national pursuant to which the latter was assigned to a user undertaking established in Germany. The letter of assignment, dated the same day, stated that the worker would carry out his work under the direction and supervision of the user undertaking during the period from 15 October to 21 December 2018.

19 On 9 May 2019, Team Power Europe applied to the revenue service of the Teritorialna direktsiya Varna na Natsionalna agentsia za prihodite (Territorial Directorate for the City of Varna of the National Revenue Agency, Bulgaria) for the issue of an A1 certificate, certifying that the Bulgarian legislation was applicable to the worker in question during the period of assignment.

20 By its decision of 30 May 2019, that service rejected the application on the ground that the situation at issue in the main proceedings did not fall within the scope of Article 12(1) of Regulation No 883/2004. It took the view, first, that the direct relationship between Team Power Europe and the worker in question had not been maintained and, second, that that undertaking did not carry on any substantial activity in Bulgaria.

21 In order to reach that conclusion on the latter point, that service relied on various factors. First, the contract between Team Power Europe and the user undertaking in question had been concluded in accordance with the conditions and terms of German law. Secondly, Team Power Europe refers in that contract to authorisation not pursuant to its registration with the Bulgarian Employment Agency, but to the permit for the placement of staff issued by the competent German authorities. Thirdly, it does not employ, with the exception of administrative and

managerial staff, workers in Bulgaria. Fourthly, Team Power Europe's entire turnover is derived from the activities undertaken by temporary agency workers assigned to Germany. Fifthly, Team Power Europe makes declarations for the purposes of value added tax (VAT) only in respect of supplies of services performed within the territory of a Member State other than that in which it is established. Finally, sixthly, no contract concluded with operators carrying on an activity in Bulgaria had been produced and no temporary work services had been provided in that territory.

22 By decision of 11 June 2019, the Director rejected the administrative complaint lodged by Team Power Europe against the revenue service's decision of 30 May 2019.

23 Team Power Europe then brought a court action before the Administrativen sad – Varna (Administrative Court, Varna, Bulgaria), seeking annulment of the Director's decision.

24 In support of that action, Team Power Europe submitted that the worker in question in the main proceedings fell within the scope of application of Article 12(1) of Regulation No 883/2004 and fulfilled the conditions to which the issue of an A1 certificate is subject under that provision. As regards, more specifically, the question whether it normally carries out its activities on the Bulgarian territory, Team Power Europe submits that it carries out the substantial activities of selection, recruitment and maintenance of social security cover of temporary agency workers on that territory. That activity is not equivalent to the performance of purely internal management activities. Moreover, the fact that its turnover is generated through the performance of transactions made with user undertakings established in a Member State other than that in which it is established does not mean that it carries on its activities outside that Member State.

25 For his part, the Director submits that the situation at issue in the main proceedings does not fall within the scope of Article 12(1) of that regulation. In that regard, he points out, inter alia, that Team Power Europe employs exclusively administrative and managerial staff in Bulgaria, that all the income received by that undertaking comes from salaried activities carried out in Germany and that for VAT purposes that undertaking has made declarations only in respect of services supplied in the territory of the latter Member State.

26 The Administrativen sad – Varna (Administrative Court, Varna), which adjudicates at last instance in matters of social security, observes that the parties to the main proceedings disagree, in particular, as to whether Team Power Europe carries out a substantial activity in Bulgaria, and that the applicability of Article 12(1) of Regulation No 883/2004 to the case depends on whether that requirement is met. In its own case-law, decisions diverge, depending on the formation of the court, as to the interpretation of that requirement, as set out in Article 14(2) of Regulation No 987/2009. That divergence concerns, in particular, the relevant criteria to be taken into account in order to assess whether a temporary-work agency ordinarily performs 'substantial activities' in the territory of the Member State in which it is established, within the meaning of the latter provision.

27 According to a first line of case-law, an undertaking in Team Power Europe's position should be regarded as carrying out such activities in Bulgaria. The selection, recruitment and supply of temporary agency workers, which are the main activities of a temporary-work agency, are carried out in that Member State. In addition, the employment contracts between that undertaking and those employees are concluded there, in accordance with Bulgarian law. The contracts between the temporary-work agency and the user undertakings to which those workers are assigned are also concluded in Bulgaria. In addition, that temporary-work agency receives all its income in that

territory, even though the turnover is derived from transactions with user undertakings established in other Member States. It is, moreover, registered as a commercial company and registered for VAT in accordance with Bulgarian law.

28 According to a second line of case-law, an undertaking in Team Power Europe's position cannot be regarded as ordinarily performing a substantial activity in Bulgaria. Such an undertaking, even if it has its registered office and central administration in Bulgaria, employs only administrative and managerial staff in Bulgaria, which is sufficient in itself to exclude the application of the rules of EU law on the posting of workers. Moreover, all the temporary agency workers concerned were hired with a view to assigning them to user undertakings established in Germany, since Team Power Europe had not provided any temporary work services in Bulgaria during the period from 22 May 2017 to 29 May 2019. It follows that the entirety of the income and turnover achieved by that undertaking during that period is exclusively derived from activities performed in Germany. Furthermore, the contracts concluded with user undertakings are governed by German law and performed in Germany.

29 In the view of the referring court, the case-law of the Court resulting from the judgments of 17 December 1970, *Manpower* (35/70, EU:C:1970:120), and of 10 February 2000, *FTS* (C-202/97, EU:C:2000:75), does not make it possible to decide between one or other of those sets of case-law, and, in particular, to answer the question whether, in the light of the criteria laid down by the Court in paragraphs 42 to 45 of the latter judgment, compliance with the rule laid down in Article 12(1) of Regulation No 883/2004, to which further detail is given in Article 14(2) of Regulation No 987/2009, according to which an employer must ordinarily perform substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, presupposes that the temporary-work agency carries out a substantial part of its activities of assigning temporary agency workers for the benefit of user undertakings established and operating in the same Member State as that in which it is itself established, or whether it suffices for that undertaking merely to be registered in that Member State and to conclude employment contracts there with a view to assigning those workers to user undertakings established in other Member States.

30 In those circumstances, the Administrativen sad – Varna (Administrative Court, Varna) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 14(2) of Regulation No 987/2009 … to be interpreted as meaning that, in order for it to be possible to find that an undertaking engaged in providing temporary staff ordinarily performs its activities in the Member State in which it is established, a substantial part of its activity placing workers must be carried out for the benefit of user undertakings established in the same Member State?'

Consideration of the question referred

31 By its question, the referring court asks, in essence, whether Article 14(2) of Regulation No 987/2009 must be interpreted as meaning that a temporary-work agency established in a Member State must, in order for it to be considered that it 'normally carries out its activities', within the meaning of Article 12(1) of Regulation No 883/2004, in that Member State, carry out a significant part of its activities of assigning temporary agency workers for the benefit of user undertakings established and carrying out their activities in the territory of that Member State.

32 In that regard, it should be recalled that the provisions of Title II of Regulation No 883/2004, one of which is Article 12(1), constitute, according to the settled case-law of the Court, a complete and uniform system of conflict of laws rules. Those provisions are intended not only to prevent the simultaneous application of a number of national legislative systems and the complications which that might entail, but also to ensure that persons falling within the scope of that regulation are not left without social security protection because there is no legislation which is applicable to them. (see, to that effect, judgment of 16 July 2020, *AFMB and Other*s, C-610/18, EU:C:2020:565, paragraph 40 and the case-law cited).

33 Accordingly, provided that a person falls within the scope *ratione personae* of Regulation No 883/2004, as that scope is defined in Article 2 thereof, the single legislation rule, laid down in Article 11(1) of that regulation is, in principle, applicable, and the national legislation applicable is to be determined in accordance with the provisions of Title II of that regulation (judgment of 16 July 2020, *AFMB and Other*s, C-610/18, EU:C:2020:565, paragraph 41 and the case-law cited).

34 To that end, Article 11(3)(a) of Regulation No 883/2004 lays down the general rule that a person who pursues an activity as an employed person in the territory of a Member State is subject to the legislation of that State (judgment of 16 July 2020, *AFMB and Others*, C-610/18, EU:C:2020:565, paragraph 42).

35 The general rule is, however, stated to be 'subject to Articles 12 to 16' of Regulation No 883/2004. In certain specific situations, the unrestricted application of the general rule laid down in Article 11(3)(a) of that regulation might in fact create, rather than prevent, administrative complications for workers as well as for employers and social security authorities, which could impede the freedom of movement of the persons covered by that regulation (judgment of 16 July 2020, *AFMB and Others*, C-610/18, EU:C:2020:565, paragraph 43 and the case-law cited).

36 One of those specific situations is that which is the subject of Article 12 of Regulation No 883/2004. According to paragraph 1 of that article, a person who pursues an activity as an employed person in a Member State on behalf of an employer 'which normally carries out its activities there' and who is posted by that employer to perform work on that employer's behalf in another Member State remains subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he or she is not sent to replace another posted person.

37 Therefore, a posted worker whose employer has a particular connection with the Member State in which it is established, in that it 'normally carries out its activities' in that Member State, may be covered by that provision.

38 Article 14(2) of Regulation No 987/2009 states that the latter terms are to be understood as referring to an employer 'that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established' and as 'taking account of all criteria characterising the activities carried out by the undertaking in question', criteria which 'must be suited to the specific characteristics of each employer and the real nature of the activities carried out'.

39 In paragraphs 42 and 43 of the judgment of 10 February 2000, *FTS* (C-202/97, EU:C:2000:75), the Court, interpreting Article 14(1)(a) of Regulation No 1408/71, which was replaced by Article 12(1) of Regulation No 883/2004, held that only an undertaking engaged in providing temporary personnel which habitually carries out significant activities in the Member State in which it is

established can benefit from the special rule laid down in Article 14(1)(a) and that, in order to determine whether that is the case, the competent institution of that Member State must examine all the criteria characterising the activities carried on by that undertaking. The Court stated that those criteria include, inter alia, the place where the undertaking has its seat and administration, the number of administrative staff working in the Member State in which it is established and in the other Member State, the place where posted workers are recruited and the place where the majority of contracts with clients are concluded, the law applicable to the employment contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand, and the turnover during an appropriately typical period in each Member State concerned, it being understood that that list cannot be exhaustive and that the choice of criteria must be tailored to each specific case.

40 However, as the Advocate General observed, in essence, in points 54 and 55 of his Opinion, those criteria do not make it possible to give a precise answer the question raised by the referring court in the present case.

41 Those criteria were provided by the Court, as is apparent in particular from paragraphs 11 and 15 of the judgment of 10 February 2000, *FTS* (C-202/97, EU:C:2000:75), in a different context from that of the main proceedings, since the case which gave rise to that judgment concerned a temporary-work agency which, it was common ground, was engaged in the placement of temporary staff both in the Member State in which it was established and in another Member State. From that perspective, the criteria recalled in paragraph 39 above sought to identify, for the purposes of determining the social security legislation applicable, the Member State with which that undertaking had the closest links.

42 By contrast, it is apparent from the documents before the Court in the present case that Team Power Europe assigns temporary workers only to user undertakings established in a Member State other than that in which it is established. It is in that context that the present question referred for a preliminary ruling arises, which seeks to determine which types of activities a temporary-work agency must perform to a significant extent in the Member State in which it is established in order to be regarded as ordinarily performing, in that Member State, 'substantial activities, other than purely internal management activities', within the meaning of Article 14(2) of Regulation No 987/2009, and therefore as falling within the scope of Article 12(1) of Regulation No 883/2004.

43 In accordance with the Court's settled case-law, when interpreting a provision of EU law it is necessary to consider not only its wording, but also its context and the objectives pursued by the rules of which it is part (see, inter alia, judgment of 6 October 2020, *Jobcenter Krefeld*, C-181/19, EU:C:2020:794, paragraph 61 and the case-law cited).

44 As regards, in the first place, the wording of Article 14(2) of Regulation No 987/2009, it is apparent from that provision that, in order to determine whether an undertaking ordinarily performs 'substantial activities, other than purely internal management activities', in the Member State in which it is established, account must be taken, as has been stated in paragraph 38 of this judgment, of all criteria characterising the activities performed by the undertaking in question, which must be suited to the specific characteristics of each employer and the real nature of the activities carried out.

45 In that regard, as regards a temporary-work agency, such as that at issue in the main proceedings, it is common ground between all the interested parties which participated in the procedure before the Court that such an undertaking is characterised by the fact that it performs a set of activities consisting in the selection, recruitment and assignment of temporary agency workers to user undertakings.

46 It must be noted that those activities, in particular those relating to the selection and recruitment of temporary agency workers, cannot be regarded as 'purely internal management activities' within the meaning of Article 14(2) of Regulation No 987/2009. That concept covers only activities of an exclusively managerial nature which are intended to ensure the effective internal functioning of the undertaking.

47 That said, it must be determined whether, in order for a temporary-work agency to fall within the scope of that provision, it is sufficient that that undertaking perform to a significant extent, in the Member State in which it is established, activities of selecting and recruiting temporary agency workers or whether it must also perform to a significant extent activities of assigning such workers within that Member State.

48 In that regard, it should be noted that, although the activities of selecting and recruiting temporary agency workers are of particular importance for temporary-work agencies, the sole purpose of those activities is the subsequent assignment by the agencies of such workers to user undertakings.

49 In particular, it should be noted, in that regard, that, although the selection and recruitment of temporary agency workers contribute to generating the turnover achieved by a temporary-work agency, since those activities constitute an essential prerequisite for the subsequent assignment of such workers, it is only the assignment of those workers to user undertakings, in performance of the contracts concluded with those undertakings for that purpose, that actually generates that turnover. Indeed, as Team Power Europe stated in its written observations and at the hearing, the income of such an undertaking depends on the amount of remuneration paid to temporary workers who have been made available to user undertakings.

50 It follows that a temporary-work agency which, like Team Power Europe, performs its activities of selecting and recruiting temporary agency workers in the Member State in which it is established can be regarded as performing 'substantial activities' in that Member State, within the meaning of Article 14(2) of Regulation No 987/2009, read in conjunction with Article 12(1) of Regulation No 883/2004, only if it also carries out there, to a significant extent, the activities of assigning those workers for the benefit of user undertakings established and performing their activities in the same Member State.

51 That interpretation is corroborated, in the second place, by the context of Article 14(2) of Regulation No 987/2009.

52 It must be borne in mind that that provision, in so far as it seeks to define the scope of Article 12(1) of Regulation No 883/2004, which constitutes a derogation from the general rule laid down in Article 11(3)(a) of Regulation No 883/2004, must be interpreted strictly (see, to that effect, judgment of 6 September 2018, *Alpenrind and Others*, C-527/16, EU:C:2018:669, paragraph 95).

53 In those circumstances, that rule of derogation cannot apply to a temporary-work agency which, although it carries out, in the Member State in which it is established, the selection and recruitment of temporary agency workers, it either does not – or, at most, does so to a negligible

extent – assign such workers to user undertakings which are also established there. The application of that rule of derogation to a temporary-work agency would have the consequence of placing within its scope of application workers selected and recruited by that undertaking who perform their activities mainly, if not exclusively, in a Member State other than that in which that undertaking is established, which would be the case even though that rule is intended to apply only to situations in which an employee performs, for a limited period, his or her activities in a Member State other than that in which his or her employer normally carries out its activities.

54 Furthermore, it should be noted that Directive 2008/104, which specifically covers temporary agency work, defines, in Article 3(1)(b), 'temporary-work agency' as meaning any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers 'in order to' assign them to user undertakings to work there temporarily under the supervision and direction of those undertakings.

55 Article 3(1)(c) of that directive defines a 'temporary agency worker' as a worker with a contract of employment or an employment relationship with a temporary-work agency 'with a view' to being assigned to a user undertaking to work temporarily under its supervision and direction.

56 Those definitions, by making apparent the purpose of the activity of a temporary-work agency undertaking, which consists of assigning temporary agency workers to user undertakings, also support the interpretation that such an undertaking cannot be regarded as carrying out, in the Member State in which it is established, 'substantial activities' within the meaning of Article 14(2) of Regulation No 987/2009, unless it performs there, to a significant extent, the activities of assigning workers for the benefit of user undertakings established and performing their activities in the same Member State.

57 The foregoing interpretation is supported, in the third place, by the objective pursued by both Article 14(2) of Regulation No 987/2009 and the EU legislation of which that provision forms part.

58 In that regard, it should be recalled that Regulation No 883/2004, the detailed rules for the application of which are laid down in Regulation No 987/2009, seeks, as is apparent from recitals 1 and 45 thereof and from Article 42 EC, now Article 48 TFEU, on the basis inter alia of which it was adopted, to ensure the free movement of workers within the European Union, while respecting the special characteristics of national social security legislation, and to coordinate Member States' social security systems in order to guarantee that the right to free movement of persons can be exercised effectively and, thereby, to contribute towards improving the standard of living and conditions of employment of persons who move within the European Union (see, to that effect, judgment of 16 July 2020, *AFMB and Other*s, C-610/18, EU:C:2020:565, paragraph 63 and the case-law cited).

59 While one of the aims of Article 12(1) of Regulation No 883/2004, the scope of which is defined in Article 14(2) of Regulation No 987/2009, is to promote freedom to provide services guaranteed by Articles 56 to 62 TFEU for the benefit of undertakings which avail themselves of it by sending workers to Member States other than that in which they are established, that provision also pursues the aim referred to in the preceding paragraph, as is apparent from paragraphs 34 to 36 of this judgment, by laying down a rule derogating from the rule of the Member State of employment, laid down in Article 11(3)(a) of Regulation No 883/2004, in order to avoid the complications which might result from the application of that latter rule and thus to overcome

obstacles likely to impede freedom of movement for workers (see, to that effect, judgment of 25 October 2018, *Walltopia*, C-451/17, EU:C:2018:861, paragraphs 37 and 38 and the case-law cited).

60 In particular, in order to prevent an undertaking established in a Member State from being obliged to register its workers, normally subject to the social security legislation of that State, with the social security system of another Member State where they are sent to perform work of short duration, Article 12(1) of Regulation No 883/2004 allows the undertaking to keep its workers registered under the social security system of the first Member State (see judgment of 25 October 2018, *Walltopia*, C-451/17, EU:C:2018:861, paragraph 39 and the case-law cited).

61 In providing for such a derogation, the EU legislature offers undertakings which exercise the freedom to provide services guaranteed by the Treaty on the Functioning of the European Union an advantage as regards social security which does not follow from the mere exercise of that freedom.

62 However, to allow temporary-work agencies exercising the freedom to provide services to benefit from that advantage when they orientate their activities of supplying temporary agency workers exclusively or mainly to one or more Member States other than that in which they are established would be likely to encourage those undertakings to choose the Member State in which they wish establish themselves on the basis of the latter's social security legislation with the sole aim of benefiting from the legislation which is most favourable to them in that field, and thus to allow 'forum shopping'.

63 It is true that Regulation No 883/2004 merely establishes a system for the coordination of the social security legislation of the Member States without harmonising that legislation and that it is inherent in such a system that differences may remain between their social security rules, not least with regard to the level of social contributions to be paid in respect of a given activity (judgment of 16 July 2020, *AFMB and Other*s, C-610/18, EU:C:2020:565, paragraph 68 and the case-law cited).

64 However, the objective of those regulations – which is to promote the freedom of movement for workers, and, in the case of the posting of workers, the freedom to provide services, by offering an advantage in the matter of social security to undertakings exercising those freedoms – might be undermined if the interpretation of Article 14(2) of Regulation No 987/2009 were to make it easier for those undertakings to use EU legislation on that subject with the sole aim of exploiting the differences between the national social security systems. In particular, such exploitation of that legislation would be likely to have a 'race to the bottom' effect on the social security systems of the Member States or might even lead to a reduction in the level of protection that they offer.

65 Furthermore, by allowing temporary-work agencies to take advantage of the differences between the social security systems of the Member States, an interpretation of Article 12(1) of Regulation No 883/2004 and Article 14(2) of Regulation No 987/2009 according to which temporary agency workers recruited by those undertakings remain affiliated to the social security system of the Member State in which those undertakings are established, even though they do not carry out any significant activity assigning those workers to user undertakings that are also established there, would have the effect of creating a distortion of competition between the various possible modes of employment in favour of recourse to temporary agency work as opposed to undertakings directly recruiting their workers, who would be affiliated to the social security system of the Member State in which they work.

66 It follows that, although a temporary-work agency which carries out its activities of assigning temporary agency workers exclusively or mainly to user undertakings established in a Member State other than that in which it is established is entitled to rely on the freedom to provide services guaranteed by the Treaty on the Functioning of the European Union, such an undertaking cannot, by contrast, benefit from the advantage offered, in the matter of social security, by Article 12(1) of Regulation No 883/2004, which consists in keeping those workers affiliated to the legislation of the Member State in which it is established, since that advantage is subject to the exercise by that undertaking of a significant part of its activities of assigning workers for the benefit of user undertakings established and carrying out its activities in the territory of the Member State in which it is itself established.

67 Consequently, the fact that a temporary-work agency carries out activities of selecting and recruiting temporary agency workers in the Member State in which it is established, even if those activities are significant, is insufficient in itself for it to be considered that such an undertaking 'normally carries out its activities' in that Member State, within the meaning of Article 12(1) of Regulation No 883/2004, as defined in Article 14(2) of Regulation No 987/2009, and for it therefore to rely on the derogation provided for in the first of those provisions.

68 In the light of all the foregoing considerations, the answer to the question referred is that Article 14(2) of Regulation No 987/2009 must be interpreted as meaning that a temporary-work agency established in a Member State must, in order for it to be considered that it 'normally carries out its activities', within the meaning of Article 12(1) of Regulation No 883/2004, in that Member State, carry out a significant part of its activities of assigning temporary agency workers for the benefit of user undertakings established and carrying out their activities in the territory of that Member State.

Costs

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

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

Article 14(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems must be interpreted as meaning that a temporary-work agency established in a Member State must, in order for it to be considered that it 'normally carries out its activities', within the meaning of Article 12(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, in that Member State, carry out a significant part of its activities of assigning temporary agency workers for the benefit of user undertakings established and carrying out their activities in the territory of that Member State.

[Signatures]