



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

28 February 2019*

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Regulation (EU) No 1215/2012 — Article 1(1) — Scope — Civil and commercial matters — Article 1(2) — Matters excluded — Social security — Article 53 — Application for the issue of the certificate certifying that the judgment delivered by the court of origin is enforceable — Judgment relating to a claim for wage supplements regarding annual leave pay that a social security body has against an employer with respect to the posting of workers — Exercise of a judicial function by the court ruling in the case)

In Case C-579/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Arbeits- und Sozialgericht Wien (Labour and Social Security Court, Vienna, Austria), made by decision of 28 September 2017, received at the Court on 3 October 2017, in the proceedings

BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse

v

Gradbeništvo Korana d.o.o.,

THE COURT (Second Chamber),

composed of K. Lenaerts, President of the Court, acting as President of the Second Chamber, A. Prechal, C. Toader (Rapporteur), A. Rosas and M. Ilešič, Judges,

Advocate General: Y. Bot,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 12 July 2018,

after considering the observations submitted on behalf of:

- BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse, by V. Noss, Rechtsanwältin,
- the Austrian Government, by A. Ritzberger-Moser, C. Pesendorfer and J. Schmoll, acting as Agents,
- the Czech Government, by M. Smolek and J. Vláčil and by A. Kasalická, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,

* Language of the case: German.

– the European Commission, by M. Wilderspin and M. Heller, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 25 October 2018,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).
- 2 The request has been made in proceedings brought by BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse (Construction Workers' Leave and Severance Pay Fund, Austria) ('BUAK') for the issue of the certificate referred to in Article 53 of Regulation No 1215/2012, for the purposes of enforcing a final judgment, delivered in default against the company Gradbeništvo Korana d.o.o. ('Korana'), established in Slovenia.

Legal context

European Union law

- 3 Recitals 6, 10 and 26 of Regulation No 1215/2012 read:

'(6) In order to attain the objective of free circulation of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a legal instrument of the Union which is binding and directly applicable.

...

(10) The scope of this Regulation should cover all the main civil and commercial matters apart from certain well-defined matters, ...

...

(26) Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.'
- 4 Article 1 of that regulation is included in Chapter I thereof, entitled 'Scope and definitions'. That article provides:

'1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

2. This Regulation shall not apply to:

...

(c) social security;

...'

- 5 According to Article 37(1) of that regulation, which is included in Section 1, entitled 'Recognition', of Chapter II of that regulation, itself entitled 'Recognition and enforcement':

'A party who wishes to invoke in a Member State a judgment given in another Member State shall produce:

- (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
- (b) the certificate issued pursuant to Article 53.

- 6 Article 39 of Regulation No 1215/2012, which is included in Section 2 of Chapter III, entitled 'Enforcement', provides:

'A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.'

- 7 Article 42(1) of that regulation, which is also included in Section 2, provides:

'For the purposes of enforcement in a Member State of a judgment given in another Member State, the applicant shall provide the competent enforcement authority with:

- (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
- (b) the certificate issued pursuant to Article 53, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest.'

- 8 Article 43(1) of that regulation provides:

'Where enforcement is sought of a judgment given in another Member State, the certificate issued pursuant to Article 53 shall be served on the person against whom the enforcement is sought prior to the first enforcement measure. The certificate shall be accompanied by the judgment, if not already served on that person.'

- 9 According to Article 53 of that regulation, which is included in Section 4, entitled 'Common provisions', of Chapter III thereof:

'The court of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex I.'

Austrian law

10 The Bauarbeiter-Urlaubs- und Abfertigungsgesetz 1972 (Law of 1972 regulating paid leave and severance pay of workers in the construction sector) (BGBl. 414/1972), in its version in force at the time of the facts in the main proceedings ('the BUAG'), contains a Section IV entitled 'Organisation of the Fund for paid leave and severance pay of workers in the construction sector', which contains Paragraphs 14 to 21b of the BUAG. Article 14 of the BUAG states:

1. [BUAK] shall be responsible for the collection of the resources necessary for the payment of claims under the present law and for the performance of associated tasks. ...

2. [BUAK] is a collective body governed by public law ...'

11 According to Paragraph 21(1) of the BUAG:

'The cost of claims for annual leave pay paid by [BUAK] and management costs shall be financed by wage supplements. The amount of those wage supplements shall be fixed, following a joint request from the employers' and trade union bodies which are empowered to sign the relevant collective agreements, by decree of the Federal Minister for Labour and Social Affairs.'

12 Paragraph 21a of the BUAG, entitled 'Payment of wage supplements', states, in subparagraph 1 thereof:

'The employer must, with respect to each worker, pay ... the wage supplements fixed in accordance with Paragraph 21 ...'

13 Section V of the BUAG, entitled 'Rules of procedure', includes Paragraphs 22 to 29a thereof. Paragraph 22 of the BUAG, entitled 'Disclosure obligation; calculation of the amount of wage supplements', provides:

1. An employer, who employs workers within the meaning of Paragraph 1(1), must, where he begins an activity referred to in Paragraphs 1 to 3, register those workers with [BUAK] within two weeks, by submitting all the information relating to salary which is relevant for the purposes of calculating wage supplements ...

...

5. [BUAK] must calculate the amount of the wage supplement due during the wage supplement period by relying on the employer's declarations or, if a [BUAK] investigation produces another result, by relying on its own findings. In the event of a breach of the obligation to provide information, [BUAK] may calculate the wage supplement owed by the employer on the basis of the last declaration made or its own findings.

...'

14 Paragraphs 23, 23a and 23b of the BUAG deal with the powers of investigation enjoyed by BUAK in order to gather the necessary information for the calculation of wage supplements and the employer's obligation to provide to the latter all the information necessary for it to fulfil its task.

15 Under Paragraph 25 of the BUAG, entitled 'Payment of the wage supplement':

1. [BUAK] shall inform the employer of the amount to pay, on the basis of its declaration or the calculation made in accordance with Paragraph 22(5), consisting of the aggregate of the wage supplements due in respect of workers employed during a wage supplement period. ...

...

2. If the employer fails to fulfil its obligation to pay the amount due ... within the time limits or up to the full amount stated in the notice, [BUAK] shall put the employer on notice to settle the outstanding amount owed within a time limit of two weeks. ...

3. If the employer fails to comply or only partially complies with that notice, [BUAK] shall issue a statement of arrears for the purposes of recovering the amounts not paid within the time limits. ... The statement of arrears is an enforceable measure for the purposes of Paragraph 1 of the Exekutionsordnung [(Code on enforcement procedures)].

...

5. The employer may contest the payment notice issued in accordance with subparagraph 3 by bringing a claim before the district administrative authority. The latter shall issue a ruling by way of administrative decision with regard to the merits and accuracy of the amount claimed.

...'

- 16 Section VIb of the BUAG, entitled 'Special provisions governing leave in case of posting', includes Paragraphs 33d to 33i of the BUAG. Paragraph 33d of the BUAG, itself entitled 'Scope of application', provides, in subparagraph 1 thereof:

'The provisions of the present section govern the employment of workers for the purposes of Section I who do not have their habitual place of employment in Austria, and who are posted by an employer to Austria

1. in order to perform their work there or
2. in the context of the provision of workers.

A third-party employer which is established outside the territory of Austria shall be considered for the purposes of Paragraphs 23, 23a and 33g to be the employer of the workers working for it and who are posted to Austria to perform their work.

...'

- 17 According to Paragraph 33e of the BUAG, entitled 'Right to leave':

'Without prejudice to the law on employment relations, a worker for the purposes of Paragraph 33d has an absolute right to paid leave during the period of his posting to Austria in accordance with Section II.'

- 18 Under Paragraph 33f of the BUAG, entitled 'Remuneration for annual leave':

'1. During the leave, the worker has the right to claim leave pay ... Unless otherwise provided for below, the provisions of Section II are applicable.

2. The claim for leave pay arises at the level of rights to remuneration in accordance with which the employer pays the wage supplements fixed under Paragraph 21. [BUAK] is liable for that claim. ...

3. If he takes leave during the posting, the worker must make his claim under subparagraph 2 with [BUAK] by providing evidence of the agreement concerning the dates of leave. ... The claim for leave pay shall be paid directly to the worker. ...'

19 Paragraph 33g of the BUAG, entitled ‘Obligation to provide information’, provides, in subparagraph 1 thereof:

‘An employer who employs workers for the purposes of Paragraph 33d is obliged to provide the information set out in Paragraph 22 to [BUAK]. ...’

20 According to Paragraph 33h of the BUAG, entitled ‘Payment of wage supplements’:

‘...’

2. If the employer fails to fulfil its obligation to pay the wage supplements, [BUAK] must bring a judicial action for payment of the unpaid wage supplements. [BUAK] is authorised to take all necessary and useful measures for the purposes of recovering the wage supplements due.

...’

2b. If, as a result of the failure to comply with the obligation to provide information, [BUAK] calculated the amount of the wage supplement due by relying on its own investigations, in accordance with the second sentence of Paragraph 22(5), the employer shall be liable for the wage supplements thus calculated.

...’

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

21 BUAK, which is established in Vienna (Austria), is a body governed by public law that is responsible for collecting the funds required to satisfy claims under the BUAG. It is more particularly responsible for the management and payment of claims to paid annual leave of workers in the construction sector.

22 Korana, an undertaking established in Slovenia, posted workers to Austria in respect of construction works.

23 On 18 October 2016, BUAK brought an action before the Arbeits- und Sozialgericht Wien (Labour and Social Security Court, Vienna, Austria) seeking the payment, by Korana, of EUR 38 447.50 plus interest and costs, in respect of wage supplements owed by that company, under Section VIb of the BUAG, for the working days completed by workers posted by that company to Austria during the period between February and June 2016.

24 In support of its application, BUAK claimed that, as a leave pay fund, it was entitled, on the basis of the BUAG, to obtain a wage supplement from the employer, consisting inter alia of payments in respect of annual leave and management costs, calculated for each working day completed by a worker in the construction sector in Austria, according to a method of calculation fixed by law.

25 By a judgment of 28 April 2017, delivered in the absence of Korana, that court upheld BUAK’s claim in full. That judgment, which was notified to Korana on 21 June 2017, acquired force of *res judicata* in the absence of any opposition on the part of the latter. During the procedure which led to the delivery of that judgment, that court appears not to have examined whether it had jurisdiction in accordance with Regulation No 1215/2012.

26 On 31 July 2017, for the purposes of the execution of that judgment, BUAK brought before that court an application for the issue of the certificate referred to in Article 53 of that judgment.

- 27 The referring court notes that the issue of such a certificate, under Article 53 of Regulation No 1215/2012, is subject to the condition that the procedure which led to the judgment of 28 April 2017 relates to civil and commercial matters, for the purposes of Article 1(1) of that regulation, which is not clearly apparent from the circumstances of the case in the main proceedings.
- 28 In that regard, that court states that, unlike purely internal situations, in the context of which BUAK is empowered by Article 25(3) of the BUAG to itself issue a statement of arrears relating to the supplements being claimed, which constitutes an execution title and is capable of being a basis for enforcement proceedings, it does not have that power regarding arrears relating to posted workers who do not have their habitual place of work in Austria, since it would be required to bring the matter before the Arbeits- und Sozialgericht Wien (Labour and Social Security Court, Vienna) in order to obtain payment of those supplements.
- 29 The referring court also maintains that certain circumstances characterising the procedure which led to the judgment of 28 April 2017 could give it a public law nature.
- 30 Therefore, that court states that, in the context of an action for payment of wage supplements in respect of annual leave pay, it is not the worker who directly asserts his rights, since the action is brought against the employer for payment of wage supplements the amount of which, fixed by an order of the competent federal minister, also covers BUAK's management costs. Moreover, in addition to the powers of investigation enjoyed by BUAK in the event that the employer breaches its obligation to provide information, it could also conclude agreements with other social security bodies.
- 31 That court points out that, in the event that the employer fails to comply with its obligation to provide information, BUAK is entitled to calculate the wage supplements owed by that employer on the basis of its own investigations, in accordance with Article 33h(2b) of the BUAG. In such a situation, the powers of the court ruling on an action for payment of wage supplements in respect of annual leave pay are limited to a simple examination of the conditions of application of that provision, without there being any examination of the merits of that claim.
- 32 In those circumstances, the Arbeits- und Sozialgericht Wien (Labour and Social Security Court, Vienna) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 1 of Regulation ... No 1215/2012 ... to be interpreted as meaning that proceedings involving the assertion of claims by [BUAK] for wage supplements against employers as a result of the posting to Austria of workers without a habitual place of work in Austria for the purposes of performing work or in connection with the hiring-out of workers, or against employers established outside Austria as a result of the employment of workers with a habitual place of work in Austria, constitute "civil and commercial matters" to which the aforementioned regulation applies, even where such claims by BUAK for wage supplements concern employment relationships governed by private law and serve to cover workers' claims to annual leave and payment in respect of annual leave, governed by private law and arising from employment relationships with employers, but nevertheless

- both the amount of the workers' claims against BUAK for annual leave pay and that of BUAK's claims against employers for wage supplements are determined not by contract or collective bargaining agreement but, instead, by decree of a Federal Minister,
- the wage supplements owed by employers to BUAK serve to cover not only the expenses for the payment in respect of annual leave payable to workers but also BUAK's expenses for administrative costs, and
- in connection with the pursuit and enforcement of its claims for such wage supplements, BUAK has more extensive powers by law than a private person, in that

- employers are required to submit reports to BUAK on specific occasions as well as at monthly intervals, using communication channels set up by BUAK, to take part in and allow BUAK's inspection measures, grant BUAK access to wage and business records and other documents, and provide information to BUAK, failing which a fine may be imposed, and
- in the event that an employer breaches its obligations to provide information, BUAK is entitled to calculate the wage supplements owed by the employer on the basis of BUAK's own investigations, whereby, in that case, BUAK has a claim for wage supplements in the amount calculated by BUAK, irrespective of the actual circumstances of the posting or employment?

Consideration of the question referred

Admissibility of the request for a preliminary ruling

- 33 By its written submissions, the European Commission requests the Court to rule on the question whether, in the context of a procedure for the issue of a certificate under Article 53 of Regulation No 1215/2012, a court is acting in the exercise of a judicial function for the purposes of Article 267 TFEU.
- 34 In that regard, it is apparent from the Court's settled case-law that, although Article 267 TFEU does not make the reference to the Court subject to there having been an *inter partes* hearing in the proceedings in the course of which the national court refers the questions for a preliminary ruling, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (judgment of 16 June 2016, *Pebros Servizi*, C-511/14, EU:C:2016:448, paragraph 24 and the case-law cited).
- 35 The Court has also held that the terms 'give judgment', within the meaning of the second paragraph of Article 267 TFEU, encompass the whole procedure leading to the referring court's judgment and must, therefore, be interpreted broadly in order to prevent many procedural questions from being regarded as inadmissible and from being unable to be the subject of interpretation by the Court and the latter from being unable to interpret all procedural provisions of EU law that the referring court is required to apply (see, to that effect, judgment of 16 June 2016, *Pebros Servizi*, C-511/14, EU:C:2016:448, paragraph 28 and the case-law cited).
- 36 The system established by Regulation No 1215/2012 is based on the abolition of exequatur, which implies that no control is exercised by the competent court of the requested Member State, since only the person against whom enforcement is brought can oppose the recognition or enforcement of the judgment affecting him. It is apparent from the combined provisions of Articles 37 and 42 of that regulation that, for the purposes of the recognition and enforcement in a Member State of a judgment delivered in another Member State, the applicant must produce solely a copy of the judgment concerned accompanied by the certificate issued, in accordance with Article 53 of that regulation, by the court of origin. That certificate is to be served on the person against whom enforcement is sought prior to any enforcement measure, in accordance with Article 43(1) of that regulation.
- 37 As was stated by the Advocate General in point 44 of his Opinion, the certificate forms the basis for implementation of the principle of direct enforcement of judgments delivered in the Member States.

- 38 The functions thus performed by that certificate in the system of Regulation No 1215/2012 justify, in particular in a situation such as that at issue in the main proceedings, where the court which delivered the judgment to be enforced did not rule, at the time of the judgment, on the applicability of Regulation No 1215/2012, that court being obliged, at the time of the issue of that certificate, to determine whether the dispute comes within the scope of application of that regulation.
- 39 In such a case, as the Advocate General noted in essence in point 52 of his Opinion, by determining whether it is competent to issue the certificate under Article 53 of Regulation No 1215/2012, that court is continuing the previous judicial proceedings by guaranteeing the full effectiveness thereof, to the extent that, in the absence of certification, a judgment is not capable of circulating freely within the European judicial area. Such a conclusion responds to the need to guarantee rapid enforcement of court judgments while ensuring the legal certainty which is the basis of mutual trust in the administration of justice in the Union.
- 40 Moreover, in the scheme of Regulation No 1215/2012, the issue of the certificate is entrusted to the court which is most familiar with the dispute and which, as regards the substance, is most able to confirm that the judgment is enforceable. Therefore, by issuing such a certificate provided for in Article 53 of that regulation, the court of origin implicitly confirms that the judgment given in default which must be recognised and enforced in another Member State falls within the scope of application of that regulation, in view of the fact that the issue of the certificate under Article 53 of that regulation is possible only on that condition.
- 41 Consequently, the procedure for the issue of a certificate under Article 53 of Regulation No 1215/2012, in circumstances such as those at issue in the main proceedings, is judicial in character, with the result that a national court ruling in the context of such a procedure is entitled to refer questions to the Court for a preliminary ruling.
- 42 It follows that the present reference for a preliminary ruling is admissible.

Substance

- 43 By its question, the referring court asks, in essence, whether Article 1 of Regulation No 1215/2012 must be interpreted as meaning that an action for payment of wage supplements in respect of annual leave pay brought by a body governed by public law against an employer, in connection with the posting of workers to a Member State where they do not have their habitual place of work, or in the context of the provision of labour in that Member State, or against an employer established outside of the territory of that Member State in connection with the employment of workers who have their habitual place of work in that Member State, falls within the scope of application of that regulation.
- 44 First of all and in view of the fact that the question referred relates to Article 1 of Regulation No 1215/2012 in its entirety, it is necessary, as a first step, to examine whether a judgment such as that delivered on 28 April 2017 by the referring court at the request of BUAK and for the enforcement thereof the latter applies for the issue of the certificate referred to in Article 53 of that regulation relates to civil and commercial matters for the purposes of Article 1(1) of that regulation, and, if so, to investigate, as a second step, whether such a judgment falls within the scope of application of the exception relating to social security, provided for in Article 1(2)(c) of that regulation.
- 45 It should be noted that it is settled case-law that, in so far as Regulation No 1215/2012 repeals and replaces Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), it should be observed that the Court's interpretation of the provisions of the latter regulation also

applies to Regulation No 1215/2012, whenever the provisions of the two instruments of EU law may be regarded as equivalent (judgment of 15 November 2018, *Hellenische Republik*, C-308/17, EU:C:2018:911, paragraph 31 and the case-law cited).

The concept of ‘civil and commercial matters’, for the purposes of Article 1(1) of Regulation No 1215/2012

- 46 According to the Court’s settled case-law, in order to ensure, as far as possible, that the rights and obligations which derive from Regulation No 1215/2012 for the Member States and the persons to whom it applies are equal and uniform, the concept of ‘civil and commercial matters’ included in Article 1(1) of that regulation should not be interpreted as a mere reference to the internal law of a Member State. That concept must be regarded as an autonomous concept to be interpreted by reference, first, to the objectives and scheme of that regulation and, second, to the general principles which stem from the corpus of the national legal systems (judgment of 9 March 2017, *Pula Parking*, C-551/15, EU:C:2017:193, paragraph 33 and the case-law cited).
- 47 Moreover, the need to ensure the good functioning of the internal market and to ensure, in the interests of the harmonious administration of justice, that irreconcilable judgments will not be given in two Member States require a broad interpretation of that concept of ‘civil and commercial matters’ (see, to that effect, judgment of 10 September 2009, *German Graphics Graphische Maschinen*, C-292/08, EU:C:2009:544, paragraphs 22 and 23).
- 48 In order to determine whether a matter falls within the scope of Regulation No 1215/2012, it is necessary to identify the legal relationship between the parties to the dispute and to examine the basis and the detailed rules governing the bringing of the action (see, to that effect, judgments of 11 April 2013, *Sapir and Others*, C-645/11, EU:C:2013:228, paragraphs 32 and 34, and of 12 September 2013, *Sunico and Others*, C-49/12, EU:C:2013:545, paragraph 35).
- 49 As the Court has repeatedly held, although certain actions between a public authority and a person governed by private law may come within the scope of Regulation No 1215/2012, it is otherwise where the public authority is acting in the exercise of its public powers (see, to that effect, judgment of 12 September 2013, *Sunico and Others*, C-49/12, EU:C:2013:545, paragraph 34 and the case-law cited). The exercise of public powers by one of the parties to the case, because it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals, excludes such a case from civil and commercial matters within the meaning of Article 1(1) of Regulation No 1215/2012 (see, by analogy, judgment of 23 October 2014, *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319, paragraph 31).
- 50 In this case, it should be noted, first of all, that, in view of the case-law referred to in the paragraph above, BUAK’s status as a body governed by public law is, in itself, irrelevant to the nature of the legal relationships between itself and Korana.
- 51 As regards, in the first place, the legal basis for the action which gave rise to the enforcement judgment by which BUAK requested the issue of the certificate referred to in Article 53 of Regulation No 1215/2012, it is apparent from the order for reference that, according to Paragraph 21 of the BUAG, the cost in respect of annual leave paid by BUAK is financed by wage supplements which the employer is required to pay. Although the amount of those wage supplements is fixed by decree of the Federal Minister for Labour and Social Affairs, it is apparent from BUAK’s observations and from those of the Austrian Government that that decree defines solely the detailed rules for the calculation of those wage supplements, by taking as the basis the wage fixed by the relevant collective agreement.

- 52 Furthermore, according to Paragraph 33f(2) of the BUAG, the claim for annual leave pay owed by BUAK to posted workers arises at the level of rights to remuneration in accordance with which the employer pays the wage supplements calculated.
- 53 Moreover, the referring court states itself that that remuneration, which is financed by the payment of the wage supplements claimed in this case, is part of the remuneration due, under the employment contract, by the employer for the work performed by the worker.
- 54 Consequently, in so far as the employer's obligation to pay the wage supplements is intrinsically linked with the rights, which are of a civil nature, of workers to annual leave pay, an examination of the basis for the action which gave rise to the judgment of 28 April 2017, in accordance with the case-law cited in paragraph 48 of the present judgment, does not contradict the conclusion that BUAK's claim and, therefore, an action for payment of that claim, is also of a civil nature.
- 55 As regards, in the second place, the detailed rules governing the bringing of the action which gave rise to that judgment, it follows from the provisions of the BUAG that, unlike purely internal situations, in which BUAK may itself issue an execution title in the form of a statement of arrears, the latter must, with respect to arrears relating to posted workers who do not have their habitual place of work in Austria, initiate legal proceedings for the payment of unpaid wage supplements.
- 56 Moreover, where, as a result of the failure to comply with the obligation to provide information, BUAK, in accordance with Paragraph 22(5) of the BUAG, calculated the amount of the wage supplements by relying on its own investigations, 'the employer owes the wage supplements thus calculated', as is stated in Paragraph 33h(2b) of the BUAG.
- 57 As regards the scope of the review carried out by the court in the event of an action for payment of a claim for wage supplements in respect of annual leave pay the amount of which was calculated by BUAK itself, on the basis of its own investigations, the referring court maintains that such a calculation has a constitutive effect, since the powers enjoyed by that body distinguish it from a private individual. That court concludes therefrom that, in view of its wording, Paragraph 33h(2b) of the BUAG could be interpreted as meaning that, with respect to arrears relating to posted workers, who do not have their habitual place of work in Austria, the court's powers are limited to a simple examination of the conditions for the application of that provision, with the result that, if those conditions are satisfied, the court cannot carry out a detailed examination of the accuracy of the claim relied on by BUAK.
- 58 That interpretation of the national legislation is contested both by BUAK and by the Austrian Government, which maintain that, in the context of proceedings for payment of wage supplements in respect of annual leave pay for posted workers, the Austrian court is to carry out a full review of all of the elements of the application.
- 59 In that regard, it should be noted that, in the context of proceedings brought under Article 267 TFEU, it is not for the Court to rule on the interpretation of national provisions, as such an interpretation falls within the exclusive jurisdiction of the national courts (judgment of 27 October 2009, *ČEZ*, C-115/08, EU:C:2009:660, paragraph 57 and the case-law cited).
- 60 Consequently, in so far as Paragraph 33h(2b) of the BUAG places BUAK in a legal position which derogates from the rules of general law regulating the exercise of an action for payment, by attributing a constitutive effect to the determination by it of the claim and by excluding, according to the referring court, the possibility for the court hearing such an action to control the validity of the information on which that determination is based, it must be concluded that that body acted, in that case, under a public law prerogative of its own conferred by law.

- 61 To the extent that that is the case in the dispute in the main proceedings, which it is for the referring court to determine, the role played by BUAK cannot be characterised, in that particular context, as that of a simple collective body governed by public law tasked with collecting the resources for the payment of claims covered by the BUAG. In such a case, BUAK should be considered to be acting in the exercise of State authority in the context of a dispute such as that which led to the judgment delivered on 28 April 2017, which would have a major influence over the modalities for the exercise of that procedure, and therefore over its very nature, such that that dispute does not come within the concept of ‘civil and commercial matters’ or, therefore, within the scope of application of Regulation No 1215/2012.
- 62 As regards the other prerogatives enjoyed specifically by BUAK, pointed out by the referring court, such as the receipt by BUAK of management fees the amount of which is 1% to 2% of the wage supplements, or the possibility for BUAK to conclude agreements with other social security bodies, in so far as the first seems insignificant and the second, according to the explanations provided in that regard by the Austrian Government during the hearing, seems to be based on the conclusion of contracts under private law, they cannot result in the procedure which led to a judgment such as that at issue in the main proceedings being excluded from civil and commercial matters, for the purposes of Article 1(1) of Regulation No 1215/2012.
- 63 As regards BUAK’s powers of investigation in the event that the employer breaches its obligation to provide information, it should be noted that those powers are also not, in themselves, such as to confer a public law character on a procedure such as that which led to the judgment of 28 April 2017.
- 64 The prerogatives referred to in the two previous paragraphs have no influence over the capacity in which BUAK acts in the context of a procedure such as that in the main proceedings and do not modify the nature or determine the evolution thereof.

The concept of ‘social security’ for the purposes of Article 1(2)(c) of Regulation No 1215/2012

- 65 According to Article 1(2)(c) of Regulation No 1215/2012, social security is excluded from the scope of application of that regulation.
- 66 Exclusions from the scope of that regulation, provided for in Article 1(2) thereof, are exceptions which must be strictly interpreted.
- 67 The concept of ‘social security’ is defined autonomously in relation to the substance of that concept in EU law. Therefore, as is apparent from the Court’s case-law, that concept encompasses the matters covered by 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) (see, by analogy, as regards Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), judgment of 14 November 2002, *Baten*, C-271/00, EU:C:2002:656, paragraph 45).
- 68 Moreover, a benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 3(1) of Regulation No 883/2004 (see, by analogy, judgment of 19 September 2013, *Hliddal and Bornand*, C-216/12 and C-217/12, EU:C:2013:568 paragraph 48 and the case-law cited).

- 69 In this case, as is apparent from the reference for a preliminary ruling, the claim for payment of wage supplements in respect of annual leave pay arises at the level of rights to remuneration in accordance with which the employer pays wage supplements. According to the information provided by the referring court, it is therefore for the employer to pay that claim to annual leave pay, as a result of work performed by the posted worker, even if the payment is made through BUAK.
- 70 Such payment does not, therefore, come within the concept of ‘social security’ for the purposes of Article 1(2)(c) of Regulation No 1215/2012.
- 71 In the light of the foregoing considerations, the answer to the question referred is that Article 1 of Regulation No 1215/2012 must be interpreted as meaning that an action for payment of wage supplements in respect of annual leave pay brought by a body governed by public law against an employer, in connection with the posting of workers to a Member State where they do not have their habitual place of work, or in the context of the provision of labour in that Member State, or against an employer established outside of the territory of that Member State in connection with the employment of workers who have their habitual place of work in that Member State, falls within the scope of application of that regulation, in so far as the modalities for bringing such an action do not infringe the rules of general law and, in particular, do not exclude the possibility for the court ruling on the case to verify the merits of the information on which the establishment of that claim is based, which is a matter to be determined by the referring court.

Costs

- 72 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 (Second Chamber) hereby rules:

Article 1 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an action for payment of wage supplements in respect of annual leave pay brought by a body governed by public law against an employer, in connection with the posting of workers to a Member State where they do not have their habitual place of work, or in the context of the provision of labour in that Member State, or against an employer established outside of the territory of that Member State in connection with the employment of workers who have their habitual place of work in that Member State, falls within the scope of application of that regulation, in so far as the modalities for bringing such an action do not infringe the rules of general law and, in particular, do not exclude the possibility for the court ruling on the case to verify the merits of the information on which the establishment of that claim is based, which is a matter to be determined by the referring court.

[Signatures]