Provisional text

JUDGMENT OF THE COURT (First Chamber)

6 September 2018 (*)

(Reference for a preliminary ruling — Social security — Regulation (EC) No 987/2009 — Articles 5 and 19(2) — Workers posted in a Member State other than that in which the employer usually carries out its activities — Issue of the A1 attestations by the Member State of origin after recognition by the host Member State that the workers are subject to its social security scheme — Opinion of the Administrative Board — Incorrect issue of A1 certificates — Finding — Binding nature and retroactive effect of those certificates — Regulation (EC) No 883/2004 — Legislation applicable — Article 12(1) — Concept of a person 'sent to replace another person')

In Case C?527/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Upper Administrative Court, Austria), made by decision of 14 September 2016, received at the Court on 14 October 2016, in the proceedings

Salzburger Gebietskrankenkasse,

Bundesminister für Arbeit, Soziales und Konsumentenschutz,

Interested parties:

Alpenrind GmbH,

Martin-Meat Szolgáltató és Kereskedelmi Kft,

Martimpex-Meat Kft,

Pensionsversicherungsanstalt,

Allgemeine Unfallversicherungsanstalt,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund, J.-C. Bonichot, S. Rodin and E. Regan (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 September 2014,

after considering the observations submitted on behalf of:

– the Salzburger Gebietskrankenkasse, by P. Reichel, Rechtsanwalt,

–	Alpenrind GmbH, by R. Haumer and W. Berger, Rechtsanwälte,

–	Martimpex-Meat Kft and Martin-Meat Szolgáltató és Kereskedelmi Kft, by U. Salburg and G. Simonfay, Rechtsanwälte,

–	the Austrian Government, by G. Hesse, acting as Agent,

–	the Belgian Government, by L. Van den Broeck and M. Jacobs, acting as Agents,

–	the Czech Government, by M. Smolek, J. Vlá?il, J. Pavliš and O. Šváb, acting as Agents,

–	the German Government, by T. Henze and D. Klebs, acting as Agents,

–	Ireland, by L. Williams, G. Hodge, J. Murray and E. Creedon and by A. Joyce and N. Donnelly, acting as Agents,

–	the French Government, by C. David, acting as Agent,

–	the Hungarian Government, by M. Fehér, acting as Agent,

–	the Polish Government, by B. Majczyna, acting as Agent, and by M. Malczewska, adwokat,

–	the European Commission, by B.-R. Killmann and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2018,

gives the following

Judgment

1	This request for a preliminary ruling concerns the interpretation, first, 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 (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35) (‘Regulation No 883/2004’) and, second, Article 5 and Article 19(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 No 883/2004 (OJ 2009 L 284, p. 1), as amended by Regulation No 1244/2010 (OJ 2010 L 338, p. 35) (‘Regulation No 987/2009’).

2	The request has been made in proceedings between Salzburger Gebietskrankenkasse (Salzburg Regional Health Insurance Fund) (‘the Health Insurance Fund’) and the Bundesminister für Arbeit, Soziales und Konsumentenschutz (Federal Minister of Labour, Social Affairs and Consumer Protection) (‘the Minister’) and Alpenrind GmbH, Martin-Meat Szolgáltató es Kereskedelmi Kft (‘Martin-Meat’), Martimpex-Meat Kft (‘Martimpex’), the Pensionsversicherungsanstalt (Pension Insurance Authority) and the Allgemeine Unfallversicherungsanstalt (General Accident Insurance Authority) concerning the social security legislation applicable to persons posted to work in Austria under an agreement between Alpenrind, established in Austria, and Martimpex, established in Hungary.

Legal framework

Regulation No 883/2004

3 Recitals 1, 3, 5, 8, 15, 17 to 18a and 45 of Regulation No 883/2004 are worded 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.

…

(3) Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the [Union] has been amended and updated on numerous occasions in order to take into account not only developments at [Union] level, including judgments of the Court of Justice, but also changes in legislation at national level. Such factors have played their part in making the [Union] coordination rules complex and lengthy. Replacing, while modernising and simplifying, these rules is therefore essential to achieve the aim of the free movement of persons.

…

(5) It is necessary, within the framework of such coordination, to guarantee within the [Union] equality of treatment under the different national legislation for the persons concerned.

…

(8) The general principle of equal treatment is of particular importance for workers who do not reside in the Member State of their employment, including frontier workers.

…

(15) It is necessary to subject persons moving within the [Union] to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom.

…

(17) With a view to guaranteeing the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues his/her activity as an employed or self-employed person.

…

(18) In specific situations which justify other criteria of applicability, it is necessary to derogate from that general rule.

(18a) The principle of single applicable legislation is of great importance and should be enhanced. …

…

(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. …'

4 In Title II of that regulation entitled, 'Determination of the legislation applicable', Article 11, headed 'General rules', 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.

…'

5 Also in Title II, Article 12 of that regulation, entitled 'Special rules', provided in paragraph 1, in the version applicable at the beginning of the period from 1 February 2012 to 13 December 2013 ('the period at issue'):

'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 carry out 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 person.'

6 During the period at issue, Article 12(1) of Regulation No 883/2004 was amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012, amending Regulation No 883/2004 and Regulation No 987/2009 (OJ 2012 L 149, p. 4) adding the word 'posted' to the end of that paragraph.

7 Under Title IV of that regulation, entitled 'Composition and working methods of the Administrative Commission', Article 71(1) provides:

'The Administrative Commission for the Coordination of Social Security Systems (hereinafter called the the Administrative Commission) attached to the [European Commission] shall be made up of a government representative from each of the Member States, assisted, where necessary, by expert advisers. A representative of the [European Commission] shall attend the meetings of the Administrative Commission in an advisory capacity.'

8 Article 72 in Title IV, headed 'Tasks of the Administrative Commission', is worded as follows:

'The Administrative Commission shall:

(a) deal with all administrative questions and questions of interpretation arising from the provisions of this Regulation or those of [Regulation No 987/2009], or from any agreement concluded or arrangement made thereunder, without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislation of the Member States, by this Regulation or by the Treaty;

…

(c) foster and develop cooperation between Member States and their institutions in social security matters in order, inter alia, to take into account particular questions regarding certain categories of persons; facilitate realisation of actions of cross border cooperation activities in the area of the coordination of social security systems;

…'

9 Under Article 76, entitled 'Cooperation', in Title V of Regulation No 883/2004, itself headed 'Miscellaneous Provisions':

'1. The competent authorities of the Member States shall communicate to each other all information regarding:

(a) measures taken to implement this Regulation;

(b) changes in their legislation which may affect the implementation of this Regulation.

2. For the purposes of this Regulation, the authorities and institutions of the Member States shall lend one another their good offices and act as though implementing their own legislation. …'

Regulation No 987/2009

10 Recitals 2, 6 and 12 of Regulation No 987/2009 state:

'(2) Closer and more effective cooperation between social security institutions is a key factor in allowing the persons covered by [Regulation No 883/2004] to access their rights as quickly as possible and under optimum conditions.

…

(6) Strengthening certain procedures should ensure greater legal certainty and transparency for the users of [Regulation No 883/2004]. For example, setting common deadlines for fulfilling certain obligations or completing certain administrative tasks should assist in clarifying and structuring relations between insured persons and institutions.

…

(12) Many measures and procedures provided for in this Regulation are intended to ensure greater transparency concerning the criteria which the institutions of the Member States must apply under [Regulation No 883/2004]. Such measures and procedures are the result of the case-law of the [Court], the decisions of the Administrative Commission and the experience of more than 30 years of application of the coordination of social security systems in the context of the fundamental freedoms enshrined in the Treaty.'

11 Under Title I of Regulation No 987/2009, entitled 'General Provisions', Chapter I dealing with definitions provides, in Article 1(2)(c) thereof, that '"document" means a set of data, irrespective of the medium used, structured in such a way that it can be exchanged electronically and which must be communicated in order to enable the operation of [Regulation No 883/2004] and [Regulation No 987/2009]'.

12 Title I, Chapter II, entitled 'Provisions concerning cooperation and exchanges of data',

provides in Article 5, entitled ‘Legal value of documents and supporting evidence issued in another Member State’:

‘1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of [Regulation No 883/2004] and of [Regulation No 987/2009], and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared invalid by the Member State in which they were issued.

2. Where there is doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. The issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it.

3. Pursuant to paragraph 2, where there is doubt about the information provided by the persons concerned, the validity of a document or supporting evidence or the accuracy of the facts on which the particulars contained therein are based, the institution of the place of stay or residence shall, insofar as this is possible, at the request of the competent institution, proceed to the necessary verification of this information or document.

4. Where no agreement is reached between the institutions concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month following the date on which the institution that received the document submitted its request. The Administrative Commission shall seek to reconcile the points of view within six months of the date on which the matter was brought before it.’

13 Under Article 6 of Chapter II, entitled ‘Provisional application of legislation and provisional granting of benefits’:

‘1. Unless otherwise provided for in [Regulation No 987/2009], where there is a difference of views between the institutions or authorities of two or more Member States concerning the determination of the applicable legislation, the person concerned shall be made provisionally subject to the legislation of one of those Member States, the order of priority being determined as follows:

(a) the legislation of the Member State where the person actually pursues his employment or self-employment, if the employment or self-employment is pursued in only one Member State;

…

3. Where no agreement is reached between the institutions or authorities concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month after the date on which the difference of views, as referred to in paragraph 1 or 2 arose. The Administrative Commission shall seek to reconcile the points of view within six months of the date on which the matter was brought before it.

…’

14 Under Title II of Regulation No 987/2009, entitled ‘Determination of the applicable legislation’, Article 15, headed ‘Procedures for the application of Article 11(3)(b) and (d), Article 11(4) and Article 12 of [Regulation No 883/2004] (on the provision of information to the institutions concerned)’, provided in paragraph 1, in the version in force at the beginning of the period

concerned:

‘Unless otherwise provided for by Article 16 of [Regulation No 987/2009], where a person pursues his activity in a Member State other than the Member State competent under Title II of [Regulation No 883/2004], the employer or, in the case of a person who does not pursue an activity as an employed person, the person concerned shall inform the competent institution of the Member State whose legislation is applicable thereof, whenever possible in advance. That institution shall without delay make information concerning the legislation applicable to the person concerned, pursuant to Article 11(3)(b) or Article 12 of the [Regulation No 883/2004], available to the person concerned and to the institution designated by the competent authority of the Member State in which the activity is pursued.’

15 During the period concerned, the second sentence of Article 15(1) of Regulation No 987/2009 was amended by Regulation No 465/2012. That amended version of that provision is worded as follows:

‘… That institution shall issue the attestation referred to in Article 19(2) of the [Regulation No 987/2009] to the person concerned and shall without delay make information concerning the legislation applicable to that person, pursuant to Article 11(3)(b) or Article 12 of the [Regulation No 883/2004], available to the institution designated by the competent authority of the Member State in which the activity is pursued.’

16 Under the same title, Article 19, entitled ‘Provision of information to persons concerned and employers’, is worded as follows:

‘1. The competent institution of the Member State whose legislation becomes applicable pursuant to Title II of [Regulation No 883/2004] shall inform the person concerned and, where appropriate, his employer(s) of the obligations laid down in that legislation. It shall provide them with the necessary assistance to complete the formalities required by that legislation.

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.’

17 Under Article 20 in Title II, headed ‘Cooperation between institutions’:

‘1. The relevant institutions shall communicate to the competent institution of the Member State whose legislation is applicable to a person pursuant to Title II of [Regulation No 883/2004] the necessary information required to establish the date on which that legislation becomes applicable and the contributions which that person and his employer(s) are liable to pay under that legislation.

2. The competent institution of the Member State whose legislation becomes applicable to a person pursuant to Title II of [Regulation No 883/2004] shall make the information indicating the date on which the application of that legislation takes effect available to the institution designated by the competent authority of the Member State to whose legislation that person was last subject.’

18 Under Title V, entitled ‘Miscellaneous transitional and final provisions’, Article 89, entitled ‘Information’, provides in paragraph 3:

‘The competent authorities shall ensure that their institutions are aware of and apply all the [Union] provisions, legislative or otherwise, including the decisions of the Administrative Commission, in the areas covered by and within the terms of [Regulation No 883/2004] and [Regulation No

987/2009].’

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

19 Alpenrind is active in the livestock and meat sector. Since 1997 it has operated an abattoir in Salzburg, which it leases.

20 In 2007, Alpenrind, formerly S GmbH, entered into a contract with Martin-Meat, established in Hungary, under which Martin-Meat undertook to cut and pack 25 sides of beef per week. The work was performed at the premises of Alpenrind by workers posted to Austria. On 31 January 2012, Martin-Meat discontinued its meat-cutting operations and thereafter performed slaughterings for Alpenrind.

21 On 24 January 2012, Alpenrind concluded a contract with Martimpex, also established in Hungary, under which Martimpex undertook to cut 55 000 tonnes of beef for Alpenrind in the period from 1 February 2012 to 31 January 2014. The work was performed at the premises of Alpenrind (which it had leased, including all factory equipment) by workers posted to Austria. Martimpex took charge of the sides of beef and were then cut and packed by its workers.

22 From 1 February 2014, Alpenrind again concluded an agreement with Martin-Meat for the latter to carry out the meat cutting work at the abovementioned premises.

23 For the more than 250 workers used by Martimpex during the period at issue, the competent Hungarian social security institution issued, sometimes retroactively and sometimes in cases where the Austrian social insurance institution had already determined that the worker concerned was subject to compulsory under Austrian legislation, A1 certificates attesting that the Hungarian social security regime was applicable to those workers, in accordance with Articles 11 to 16 of Regulation No 883/2004 and Article 19 of Regulation No 987/2009. Each of those certificates stated that Alpenrind was the employer at the place where the work was carried out.

24 The Salzburg Regional Health Insurance Fund determined that the abovementioned workers were subject to compulsory insurance in Austria during the period at issue, in accordance with Paragraph 4(1) and (2) of the Allgemeine Soialversicherungsgesetz (Social Security Code) and Paragraph 1(1)(a) of the Arbeitslosenversicherungsgesetz (Law on Unemployment Insurance), based on the work carried out for the joint undertaking of Alpenrind, Martin-Meat and Martimpex.

25 By the contested judgment before the referring court, the Verwaltungsgericht (Upper Administrative Court, Austria) annulled the decision of the Salzburg Regional Health Insurance Fund on the ground that the Austrian social security institution was not competent. The Verwaltungsgericht (Upper Administrative Court) based its decision, inter alia, on the fact that the competent Hungarian social security institution issued to each of the persons subject to compulsory insurance in Austria an A1 certificate establishing that that person was, from a specific date, employed in Hungary by Martimpex as a worker subject to compulsory insurance and was probably posted to Austria to work for Alpenrind for the period indicated in each certificate, including the period at issue.

26 In the appeal brought against that judgment before the referring court, the Salzburg Regional Health Insurance Fund and the Minister reject the idea that the A1 certificates have absolute binding effect. That binding effect is based, in their view, on observance of the principle of sincere cooperation between Member States, enshrined in Article 4(3) TEU. They consider that the Hungarian social security institution has breached that principle.

27 According to the referring court, Hungary observed that only a judicial decision could resolve the stalemate, which also affects Hungary and that national Hungarian law prevents a withdrawal of the A1 certificates. The Salzburg Regional Health Insurance Fund takes the view that it does not have standing to bring proceedings in Hungary. In its view, the only way to bring about a decision in the matter is a ruling that insurance is compulsory in Austria, notwithstanding the A1 certificates issued by the competent Hungarian institution.

28 The referring court observes that the Minister has produced documents establishing that, on 20 and 21 June 2016, the Administrative Commission concluded that Hungary had wrongly declared itself competent with regard to the workers concerned and, therefore, that the A1 certificates should be withdrawn.

29 The referring court considers that the dispute before it raises certain questions concerning the interpretation of EU law.

30 In particular, that court observes, first, that according to the wording of Article 5 of Regulation No 987/2009, documents showing the position of a person for the purposes of the application of Regulations Nos 883/2004 and 987/2009 and supporting evidence on the basis of which the documents have been issued are only binding on the social security institutions of the Member States. Therefore, that court has doubts as to whether the binding effect also applies to the national courts.

31 Second, the referring court asks about the possible impact of the conduct of the proceedings before the Administrative Commission on the binding nature of the A1 certificates. In particular, that court wishes to know whether, after proceedings before the Administrative Commission which failed to reach an agreement or to a decision to withdraw the A1 certificates, those certificates are still binding and whether proceedings to determine whether insurance is compulsory should be instituted.

32 The referring court also observes that, in the present case, some A1 certificates were issued retroactively, and some only after the Austrian institution had already determined that insurance was compulsory. That court asks whether the issue of such documents also has a binding effect retroactively where compulsory insurance in the host Member State has already been formally established. According to that court, it is conceivable that the documents issued by the Austrian institutions establishing compulsory insurance are also ‘documents’ within the meaning of Article 5(1) of Regulation No 987/2009, so that they produce a binding effect under that provision.

33 Third, if, in certain circumstances, A1 certificates have only a limited binding effect, the referring court asks whether the condition, laid down in Article 12(1) of Regulation No 883/2004, that the person posted continues to be subject to the legislation of the Member State in which his employer is established, provided that he is not sent to replace another person, must be interpreted as meaning that a worker cannot be replaced immediately by another newly posted worker, regardless of which undertaking or Member State from which the newly posted worker originates. Although that strict interpretation may help to avoid abuse, it does not necessarily follow from the wording of Article 12(1) of Regulation No 883/2004.

34 In those circumstances the Verwaltungsgerichtshof (Upper Administrative Court, Austria) decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

‘(1) Does Article 5 of Regulation No 987/2009, which establishes the procedure for implementing Article 19(2) of [that regulation], also apply in proceedings before a court or tribunal within the meaning of Article 267 TFEU?

(2) If the first question is answered in the affirmative:

(a) does the aforementioned binding effect also apply where proceedings had previously taken place before the [Administrative Commission] and such proceedings did not result either in agreement or in a withdrawal of the contested documents?

(b) does the aforementioned binding effect also apply where an A1 certificate is not issued until after the host Member State has formally determined that insurance is compulsory under its legislation? Does the binding effect also apply retroactively in such cases?

(3) In the event that, under certain conditions, the binding effect of documents within the meaning of Article 19(2) of Regulation No 987/2009 is limited:

Does it contravene the prohibition on replacement set forth in Article 12(1) of Regulation No 883/2004 if the replacement occurs not in the form of a posting by the same employer but instead by another employer? Does it matter whether

(a) the second employer has its registered office in the same Member State as the first employer, and

(b) the first and the second posting employers share staffing and/or organisational resources?'

Consideration of the questions referred

The first question

35 By its first question, the referring court asks essentially whether Article 5(1) of Regulation No 987/2009, read together with Article 19(2) thereof, must be interpreted as meaning that an A1 certificate issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004 is binding not only on the institutions of the Member State in which that activity is carried out, but also on the courts of that Member State.

36 It should be stated from the outset that, according to Article 19(2) of Regulation No 987/2009, the competent institution of the Member State whose legislation is applicable pursuant to Title II of Regulation No 883/2004 is to provide an attestation that such legislation is applicable and indicate, where appropriate, until what date and under what conditions.

37 Article 5(1) of that regulation provides that documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of Regulations Nos 883/2004 and 987/2009, and supporting evidence on the basis of which the documents have been issued, are to be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued.

38 It is true, as the referring court observes, that that provision states that the documents referred to therein are binding on the 'institutions' of Member States other than the Member State in which they were issued, without expressly mentioning the courts of those other Member States.

39 However, that provision also states that such documents are to be accepted 'for as long as they have not been withdrawn or declared invalid by the Member State in which they were issued', which suggests that, in principle, only the authorities and courts of the issuing Member State may, where appropriate, withdraw or declare the A1 certificates invalid.

40 That interpretation is supported by the legislative history of Article 5(1) of Regulation No 987/2009 and the context in which it is situated.

41 In particular, as regards the E 101 certificate, which preceded the A1 certificate, the Court has already held that the binding nature of the first certificate issued by the competent institution of a Member State, in accordance with Article 12a(1a) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972(I), p. 160), binds both the institutions and the courts of the Member State in which the activity is carried out (see, to that effect, judgments of 26 January 2006, *Herbosch Kiere*, C?2/05, EU:C:2006:69, paragraphs 30 to 32, and of 27 April 2017, *A-Rosa Flussschiff*, C?620/15, EU:C:2017:309, paragraph 51).

42 Recital 12 of Regulation No 987/2009 provides, in particular, that the measures and procedures laid down by that regulation 'are the result of the case-law of the [Court], the decisions of the Administrative Commission and the experience of more than 30 years of application of the coordination of social security systems in the context of the fundamental freedoms enshrined in the Treaty'.

43 Similarly, the Court has already held that Regulation No 987/2009 codified the Court's case-law, affirming the binding nature of the E 101 certificate and the exclusive competence of the issuing institution to assess the validity of that certificate, and expressly reproducing the procedure as a means of resolving disputes concerning both the accuracy of documents drawn up by the competent institution of a Member State and the determination of the legislation applicable to the worker concerned (judgment of 27 April 2017, *A-Rosa Flusschiff*, C?620/15, EU:C:2017:309, paragraph 59, and order of 24 October 2017, *BeluBienstleistung and Nikless*, C?474/16, not published, EU:C:2017:812, paragraph 19).

44 It follows that, if, when Regulation No 987/2009 was adopted, the EU legislature wished to depart from the earlier case-law in that regard so that the courts of the Member State in which the activity is carried out are not bound by the A1 certificates issued in another Member State, it could have expressly provided for that.

45 Furthermore, as the Advocate General observed in point 35 of his Opinion, the considerations underlying the case-law of the Court relating to the binding effect of the E 101 certificates are as valid in the context of Regulations Nos 883/2004 and 987/2009. In particular, although the principle of legal certainty is mentioned, in recital 6 of Regulation No 987/2009, the principle of the affiliation of employees to a single social security scheme is set out in recital 15 and Article 11(1) of Regulation No 883/2004, while the importance of the principle of sincere cooperation derives from Article 76 of Regulation No 883/2004 and recital 2 and Article 20 of Regulation No 987/2009.

46 If it were to be accepted that, apart from cases of fraud or abuse of rights, the competent national institution could, by bringing proceedings before a court of the host Member State of the worker concerned to which that institution belongs, have an A1 certificate declared invalid, there would be a risk that the system based on sincere cooperation between the competent institutions of the Member States would be undermined (see, to that effect, as regards E 101 certificates, judgments of 26 January 2006, *Herbosch Kiere*, C?2/05, EU:C:2006:69, paragraph 30; of 27 April 2017, *A-Rosa Flusschiff*, C?620/15, EU:C:2017:309, paragraph 47; and of 6 February 2018, *Altun and Others*, C?359/16, EU:C:2018:63, paragraphs 54, 55, 60 and 61).

47 Having regard to the foregoing, the answer to the first question is that Article 5(1) of Regulation No 987/2009, read together with Article 19(2) thereof, must be interpreted as meaning

that an A1 certificate, issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004, binds not only the institutions of the Member State in which the activity is carried out, but also the courts of that Member State.

The second question

The first part of the second question

48 By the first part of the second question, the referring court asks essentially whether Article 5(1) of Regulation No 987/2009, read together with Article 19(2) thereof, must be interpreted as meaning that an A1 certificate, issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004, binds both the social security institutions of the Member State in which the activity is carried out and the courts of that Member State so long as that certificate has not been withdrawn or declared invalid by the Member State in which it was issued, even if the competent authorities of the latter Member State and the Member State in which the activity is carried out have brought the matter before the Administrative Commission which held that that certificate has been incorrectly issued and must be withdrawn.

– *Admissibility*

49 The Hungarian Government submits, primarily, that the first part of the second question is hypothetical since, in the present case, the Administrative Commission found a solution which was accepted by both the Republic of Austria and Hungary and that the Hungarian authorities indicated that, as a consequence, they were prepared to withdraw the A1 certificates at issue.

50 In that regard it must be recalled, as the Court has consistently held, that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it refers to the Court. Consequently, where the questions submitted concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling (judgment of 7 February 2018, *American Express*, C?304/16, EU:C:2018:66, paragraph 31 and the case-law cited).

51 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 7 February 2018, *American Express*, C?304/16, EU:C:2018:66, paragraph 32 and the case-law cited).

52 In the present case, it is apparent from the file before the Court that the Administrative Commission issued an opinion on 9 May 2016, according to which Article 12(1) of Regulation No 883/2004 must be interpreted as meaning that the A1 certificates at issue in the main proceedings should never have been issued and that they should be withdrawn, that opinion being subsequently approved by that commission during its 347th meeting on 20 and 21 June 2016.

53 However, it is common ground that those certificates have not been withdrawn by the competent institution in Hungary or declared invalid by the Hungarian courts.

54 It is also clear from the file submitted to the Court that the Republic of Austria and Hungary have not reached an agreement concerning the conditions for a possible withdrawal of those

certificates or, at least, with regard to some of them. Furthermore, it appears from the file that the application of that opinion has been suspended in light of the present reference for a preliminary ruling in the context of which the Hungarian Government submits, inter alia, that the competent Hungarian institution rightly issued the A1 certificates at issue in the main proceedings under Article 12(1) of Regulation No 883/2004.

55 It follows that the factual circumstances characterising the dispute in the main proceedings, as they appear from the evidence submitted to the Court, correspond to the facts in the first part of the second question referred. In those circumstances, the fact that the Hungarian Government has, at least in principle, indicated its agreement with the findings made by the Administrative Commission adds nothing to the relevance of that question for the resolution of the dispute in the main proceedings.

56 Furthermore, the fact that the Administrative Commission found that the A1 certificates at issue in the main proceedings should be withdrawn cannot, in itself, justify the inadmissibility of the present reference for a preliminary ruling, the latter concerning precisely whether that finding is liable to have consequences concerning the binding nature of those certificates with regard to the authorities and the courts of the Member State in which the activity is carried on.

57 In those circumstances, it cannot be held that the first part of the second question is hypothetical so that the presumption of relevance referred to in paragraph 51 of that judgment is reversed.

– *Substance*

58 It must be recalled that, according to Article 72 of Regulation No 883/2004, which sets out the duties of the Administrative Commission, the latter is responsible, inter alia, for dealing with any administrative questions or questions of interpretation deriving from the provisions of that regulation or those of Regulation No 987/2009 or any agreement or arrangement concluded within the framework of those regulations, without prejudice to the right of the authorities, institutions or interested parties to have recourse to the procedures and to the courts laid down in the legislation of the Member States, by Regulation No 883/2004 and by the Treaty.

59 According to Article 72, the Administrative Commission is also responsible, first, for fostering and developing cooperation between Member States and their institutions in social security matters in order, inter alia, to take into account particular questions regarding certain categories of persons and, second, to facilitate realisation of actions of cross border cooperation activities in the area of the coordination of social security systems.

60 More specifically, as regards a situation such as that at issue in the main proceedings, in which a difference has arisen between the competent institution of one Member State and that of another Member State concerning the documents or evidence referred to in Article 5(1) of Regulation No 987/2009, paragraphs 2 to 4 thereof lay down a procedure for the purpose of resolving that difference of opinion. In particular, paragraphs 2 and 3 of that article lay down the steps that the institutions concerned are required to follow in the case of doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based. Paragraph 4 of that article provides that where no agreement is reached between the institutions concerned, the matter may be brought before the Administrative Commission by the competent authorities which must ‘endeavour to reconcile the points of view’ within six months of the date on which the matter was brought before it.

61 As the Court has already held with regard to Regulation No 1408/71, if the Administrative Commission does not succeed in reconciling the points of view of the competent institutions on the

question of the legislation applicable, the Member State in which the employee concerned actually works may, without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs, at least bring infringement proceedings under Article 259 TFEU in order to enable the Court to examine in those proceedings the question of the legislation applicable to such an employee and, consequently, whether the information contained in the E 101 certificate is correct (judgment of 27 April 2017, *A-Rosa Flusschiff*, C?620/15, EU:C:2017:309, paragraph 46).

62 Therefore, it must be held that the Administrative Commission's role in the procedure laid down in Article 5(2) to (4) of Regulation No 987/2009 is merely to reconcile the points of view of the competent authorities of the Member State which brought the matter before it.

63 That finding is not called into question by Article 89(3) of Regulation No 987/2009, which provides that the competent authorities must ensure that their institutions are aware of and apply all the EU provisions, legislative or otherwise, including the decisions of the Administrative Commission, in the areas covered by Regulations Nos 883/2004 and 987/2009 and under the conditions for which they provide, since that provision does not intend in any way to change the role of the Administrative Commission within the framework of the procedure to which it refers in the preceding paragraph and thus the status of an opinion on the conclusions reached by that commission in that procedure.

64 Accordingly, the answer to the first part of the second question is that Article 5(1) of Regulation No 987/2009, read together with Article 19(2) thereof, must be interpreted as meaning that an A1 certificate issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004 is binding both the social security institutions of the Member State in which the activity is carried out and the courts of that Member State, so long as the certificate has not been withdrawn or declared invalid by the Member State in which was issued, even though the competent authorities of the latter Member State and the Member State in which the activity is carried out have brought the matter before the Administrative Commission which held that that certificate was incorrectly issued and should be withdrawn.

The second part of the second question

65 By the second part of the second question, the referring court asks essentially whether Article 5(1) of Regulation No 987/2009, read together with Article 19(2) thereof, must be interpreted as meaning that an A1 certificate issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004, binds both the social security institutions of the Member State in which the activity was carried out and the courts of that Member State, if necessary, with retroactive effect, even though that certificate was issued only after that Member State determined that the worker was subject to compulsory insurance under its legislation.

– *Admissibility*

66 The Hungarian Government submits that the present question is hypothetical, since no A1 certificate was issued retroactively, after the Austrian authorities determined that the workers concerned were subject to compulsory insurance under Austrian law.

67 According to the information provided in the order for reference, some of the A1 certificates at issue in the main proceedings were issued retroactively. It is also clear from that decision that the Austrian institution had already determined that some of the workers concerned were subject to compulsory insurance under Austrian law before the competent Hungarian authority issued A1 certificates for those workers.

68 According to settled case-law, it is for the national court to find the facts and determine the

relevance of the questions it wishes to ask (see, to that effect, judgments of 26 October 2016, *Hoogstad*, C?269/15, EU;C:2016:802, paragraph 19, and of 27 April 2017, *A-Rosa Flussschiff*, C?620/15, EU:C:2017:309, paragraph 35).

69 It follows that the second part of the second question must be regarded as admissible since, according to the information provided by the referring court, the answer given by the Court of Justice may be useful to that court in order to determine whether at least some of the A1 certificates at issue are binding.

– *Substance*

70 First of all, it must be recalled that an E 101 certificate, issued in accordance with Article 11a of Regulation No 574/72, may have a retroactive effect. In particular, while it is preferable that such a certificate is issued before the beginning of the period concerned, it may also be issued during that period or indeed after its expiry (see, to that effect, judgment of 30 March 2000, *Banks and Others*, C?178/97, EU:C:2000:169, paragraphs 52 to 57).

71 As is clear from Regulations Nos 883/2004 and 987/2009, there is no provision of EU law which prevents the application of that finding to A1 certificates.

72 In particular, it is true that Article 15(1) of Regulation No 987/2009 provided, in the version applicable at the beginning of the period concerned, that 'where a person pursues his activity in a Member State other than the Member State competent under Title II of [Regulation No 883/2004], the employer or, in the case of a person who does not pursue an activity as an employed person, the person concerned shall inform the competent institution of the Member State whose legislation is applicable thereof, whenever possible in advance' and that 'that institution shall without delay make information concerning the legislation applicable to the person concerned … available to the person concerned and to the institution designated by the competent authority of the Member State in which the activity is pursued'. However, the issue of an A1 certificate during or even after the end of the period of employment concerned is still possible.

73 Therefore, it must then be determined whether an A1 certificate may apply with retroactive effect, even though, at the date on which that certificate was issued, there was already a decision of the competent institution of the Member State in which the activity is carried out according to which the worker concerned is subject to the legislation of that Member State.

74 In that connection, it must be recalled, as is clear from the answer to the first question set out in paragraphs 36 to 47 of the present judgment, that so long as it has not been withdrawn or declared invalid, an A1 certificate issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004, like its predecessor the E 101 certificate, binds both the social security institutions of the Member State in which the activity is carried out and the courts of that Member State.

75 Consequently, in those specific circumstances, it cannot be held that a decision such as that at issue in the main proceedings, by which the competent institution of the Member State in which the activity is carried out decides to make the workers concerned subject to compulsory insurance under its legislation, constitutes a document 'showing' the position of the person concerned, within the meaning of Article 5(1) of Regulation No 987/2009.

76 Finally, it must be added, as the Advocate General observed in point 66 of his Opinion, that the question whether the authorities concerned in the case in the main proceedings ought to have had recourse to the provisional application of one legislation under Article 6 of Regulation No 987/2009 according to the order of priority of the applicable legislation provided for therein, is

without prejudice to the binding effect of the A1 certificates at issue. In particular, under Article 6(1) the rules governing a difference of views relating to the provisional application of legislation apply ‘unless otherwise provided for in [that regulation]’.

77 Having regard to the foregoing considerations, the answer to the second part of the second question is that Article 5(1) of Regulation No 987/2009, read together with Article 19(2) thereof, must be interpreted as meaning that an A1 certificate issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004, is binding on both the social security institutions of the Member State in which the activity is carried out and the courts of that Member State, if appropriate with retroactive effect, even though that certificate was issued only after that Member State determined that the worker concerned was subject to compulsory insurance under its legislation.

The third question

78 By its third question, the referring court asks essentially whether Article 12(1) of Regulation No 883/2004 must be interpreted as meaning that, in the case of a worker who is posted by his employer to work in another Member State, is replaced by another worker posted by another employer, the latter worker must be regarded as being ‘sent to replace another person’ within the meaning of that provision so that he cannot benefit from the specific rule laid down in that provision in order to remain subject to the legislation of the Member State in which his employer normally carries on its activities. That court also asks whether the fact that the employers of the two workers concerned have their registered office in the same Member State or the fact that they may have personal or organisational ties is relevant in that regard.

Admissibility

79 The Belgian Government submits that the third question is hypothetical in that it asks whether the fact that the second employer has its registered office in a Member State other than that in which the first employer has its registered office is relevant to the answer to the question referred, even though the two employers concerned in the case in the main proceedings are established in the same Member State.

80 In that connection, it must be stated that the third question is not hypothetical, for the reason set out in the preceding paragraph, since part of that question refers, by its very wording, to the fact that the registered offices of the employers in question are in the same Member State, a fact which corresponds to those in the main proceedings in that according to the information set out in the order for reference, both Martin-Meat and Martimpex are established in Hungary.

Substance

81 From the outset, it must be observed that the third question was referred only in the event the Court interpreted the second question as meaning that the binding nature of an A1 certificate, which follows from the answer to the first question, may be limited in one of the situations mentioned in the second question.

82 That being the case, according to settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see, to that effect, order of 7 September 2017, *Alandžak and Others*, C?187/17, not published, EU:C:2017:662, paragraphs 9 and 10).

83 As the Austrian and German Governments and the Commission submit in substance, since the third question concerns the reach of the conditions, laid down in Article 12(1) of Regulation No 883/2004, according to which, in order to remain subject to the legislation of the Member State in which the employer normally carries out its activities, the person posted must not have been ‘sent to replace another person’ (‘the non-replacement condition’), that question relates to the subject matter of the dispute in the main proceedings. By that question, the referring court asks which of the interpretations put forward by the two Member States which have submitted their difference of opinion to the Administrative Commission is to be preferred, since their contradictory interpretations with regard to the scope of the non-replacement condition are, as is clear from the file submitted to the Court, at the origin of the disagreement between the parties in the main proceedings regarding the legislation applicable to the workers concerned.

84 Furthermore, the Austrian Government argues that it is conceivable that no E 101 or A1 form was issued by the competent Hungarian institution to some of the many workers concerned and that, consequently, the interpretation of the non-replacement condition is directly relevant to the resolution of the dispute in the main proceedings with regard to those workers.

85 In those circumstances, and although, as is clear from the answers to the first and second questions, the referring court is bound by the A1 certificates at issue in the main proceedings so long as they have not been withdrawn by the competent Hungarian institution or declared invalid by the Hungarian courts, it is appropriate to answer the third question.

86 In the case in the main proceedings, it is apparent that Martin-Meat’s workers were posted to Austria between 2007 and 2012 to carry out meat cutting in the premises of Alpenrind. From 1 February 2012 until 31 January 2014, thus including the period concerned, Martimpex’s workers were posted to Austria to perform the same work. From 1 February 2014, Martin-Meat’s workers again carried out that work on the same premises.

87 Therefore, it must be determined whether the non-replacement condition is satisfied in a case such as that at issue in the main proceedings during the period concerned, and whether and to what extent the location of the registered offices of the employers concerned or the existence of possible personal and organisational connections between them are relevant in such a context.

88 According to the Court’s settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 21 September 2017, *Commission* v *Germany*, C?616/15, EU:C:2017:721, paragraph 43 and the case-law cited).

89 As regards, first of all, the wording of Article 12(1) of Regulation No 883/2004, in the version in force at the beginning of the period concerned, it provided that ‘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 person’.

90 Therefore, it follows from the wording of Article 12(1) of Regulation No 883/2004 and, in particular, the expression ‘provided that’ that the fact that a posted worker replaces another person prevents that replacement worker from remaining subject to the legislation of the Member State in which his employer usually carries out its activities and that the non-replacement condition applies to it in a cumulative manner, also laid down in that provision, relating to the maximum period of the employment concerned.

91 Furthermore, the absence of any express reference in the wording of that provision to the registered offices of the respective employers or to any personal or organisational connections between them tends to suggest that such facts are not relevant for the purposes of interpreting that provision.

92 Next, as regards the context of which Article 12(1) of Regulation No 883/2004 forms part, it must be observed that, according to the heading of that article, the rules which are laid down therein, including those in paragraph 1 thereof, are ‘special rules’ relating to the determination of the social security legislation applicable to persons covered by the scope of that regulation.

93 As is clear from Article 11(3)(a) of that regulation, that article being concerned with ‘General rules’, persons, such as the workers at issue in the main proceedings, pursuing an activity as an employed or self-employed persons in a Member State are subject to the legislation of the State in which they pursue that activity.

94 Likewise, it follows from recitals 17 and 18 of Regulation No 883/2004 that, ‘as a general rule’, the legislation applicable to persons pursuing an activity as an employed or self-employed person on the territory of a Member State is that of the latter and that it is necessary to ‘derogate from the general rule’ in specific situations which justify other criteria of applicability.

95 It follows that, in so far as Article 12(1) of Regulation No 883/2004 constitutes derogation from the general rule which applies in order to determine the legislation applicable to persons pursuing an activity as an employed or self-employed person in a Member State, it must be strictly interpreted.

96 Finally, with regard to the objectives of Article 12(1) of Regulation No 883/2004 and, more generally, the legal framework of which that provision is part, it must be held that, while Article 12(1) of Regulation No 883/2004 establishes a specific rule for the determination of the legislation applicable in the case of posted workers, that special situation which, in principle, justifies another criterion of applicability, the fact remains that the EU also intended to prevent that special rule from benefiting workers posted successively who carry out the same work.

97 Furthermore, to interpret Article 12(1) of Regulation No 883/2004 differently according to the location of the registered office of the employers concerned or the existence of personal or organisational links between them could undermine the objective pursued by the EU legislature, in principle, to subject workers to the legislation of the Member State in which the person concerned pursues his activity.

98 In particular, as is clear from recital 17 of Regulation No 883/2004, it is with a view to guaranteeing the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible that it is considered appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues his activity as an employed or self-employed person. Furthermore, it follows from recitals 5 and 8 of that regulation that it is necessary, within the framework of the coordination of national social security systems, to guarantee as effectively as possible equality of treatment for persons occupied in the

territory of a Member State.

99 It follows from the findings set out in paragraphs 89 to 98 of the present judgment that the recurrent use of posted workers to fill the same post, even though the employers responsible for posting workers are different, does not comply with the wording or the objectives of Article 12(1) of Regulation No 883/2004 and is not consistent with the context of which that provision is part, so that a person posted cannot benefit from the special rule laid down in that provision if he replaces another worker.

100 Having regard to all of the foregoing considerations, the answer to the third question is that Article 12(1) of Regulation No 883/2004 must be interpreted as meaning that, if a worker who is posted by his employer to carry out work in another Member State is replaced by another worker posted by another employer, the latter employee must be regarded as being ‘sent to replace another person’, within the meaning of that provision, so that he cannot benefit from the special rules laid down in that provision in order to remain subject to the legislation of the Member State in which his employer normally carries out its activities. The fact that the employers of the two workers concerned have their registered offices in the same Member State or that they may have personal or organisational links is irrelevant in that respect.

Costs

101 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 (First Chamber) hereby rules:

1. **Article 5(1) 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, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010, read together with Article 19(2) of Regulation No 987/2009, as amended by Regulation No 1244/2010, must be interpreted as meaning that an A1 certificate, issued by the competent institution of a Member State under 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, as amended by Regulation No 1244/2010, binds not only the institutions of the Member State in which the activity is carried out, but also the courts of that Member State.**

2. **Article 5(1) of Regulation No 987/2009, as amended by Regulation No 1244/2010, read together with Article 19(2) of Regulation No 987/2009, as amended by Regulation No 1244/2010, must be interpreted as meaning that an A1 certificate issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004, as amended by Regulation No 1244/2010, is binding on both the social security institutions of the Member State in which the activity is carried out and the courts of that Member State so long as the certificate has not been withdrawn or declared invalid by the Member State in which was issued, even though the competent authorities of the latter Member State and the Member State in which the activity is carried out have brought the matter before the Administrative Commission for the Coordination of Social Security Systems which held that that certificate was incorrectly issued and should be withdrawn.**

Article 5(1) of Regulation No 987/2009, as amended by Regulation No 1244/2010, read together with Article 19(2) thereof, as amended by Regulation No 1244/2010, must be interpreted as meaning that an A1 certificate issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004, as amended by Regulation No 1244/2010, binds both social security institutions of the Member State in which the activity

is carried out and the courts of that Member State, if appropriate with retroactive effect, even though that certificate was issued only after that Member State determined that the worker concerned was subject to compulsory insurance under its legislation.

3. **Article 12(1) of Regulation No 883/2004, as amended by Regulation No 1244/2010, must be interpreted as meaning that, if a worker who is posted by his employer to carry out work in another Member State is replaced by another worker posted by another employer, the latter employee must be regarded as being 'sent to replace another person', within the meaning of that provision, so that he cannot benefit from the special rules laid down in that provision in order to remain subject to the legislation of the Member State in which his employer normally carries out its activities.**

The fact that the employers of the two workers concerned have their registered offices in the same Member State or that they may have personal or organisational links is irrelevant in that respect.

[Signatures]

*	Language of the case: German.