

Case C-784/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

22 October 2019

Referring court:

Administrativen sad Varna (Bulgaria)

Date of the decision to refer:

4 October 2019

Applicant in the main proceedings:

‘TEAM POWER EUROPE’ EOOD

Defendant in the main proceedings:

Direktor na Teritorialna direksia na Natsionalna agentsia za prihodite — Varna

Subject matter of the main proceedings

Action against the administrative authority’s refusal to issue certification regarding the legislation applicable to a person who pursues an activity as an employed person in a Member State on behalf of an employer established there and who has been posted thereby to another Member State to pursue an activity as an employed person on behalf of the same employer.

Subject matter and legal basis of the request for a preliminary ruling

The request for a preliminary ruling is based on Article 267(1)(b) of the Treaty on the Functioning of the European Union (‘the TFEU’) and concerns the interpretation of Article 14(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (‘the Implementing Regulation’) in conjunction with 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 (‘the Basic Regulation’).

Question referred

Is Article 14(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems to be interpreted as meaning that, in order for it to be possible to assume that an undertaking engaged in providing temporary personnel normally carries out its activities in the Member State in which it is established, it has to perform a substantial part of the employee assignment activity for hirers established in the same Member State?

Legislation and case-law of the European Union

Article 2(1), Article 11(1) and Article 12(1) of Regulation No 883/2004; Article 14 of Regulation No 987/2009; judgments of the Court of Justice of 17 December 1970, *Manpower* (C-35/70, EU:C:1970:120) and of 10 February 2000, *FTS* (C-202/97, EU:C:2000:75).

National legislation

Article 51(1) and Article 52(1) of the Konstitutsia na Republika Bulgaria (Constitution of the Republic of Bulgaria); Article 107r(1) and Article 107s(2) of the Kodeks na truda (Labour Code); Article 4(1) No 1 and Article 9(1) No 1 of the Kodeks za sotsialnoto osiguryavane (Social Security Law); Article 2(1) of the Naredba za sluzhebните komandirovki i spetsializatsii v chuzhbina (Regulation on posting workers and specialisation placements abroad); Article 88, Article 90(2), Article 91(1), Article 92(1), Article 95(1) and Article 97 of the Danachno-osiguritelnii protsesualen kodeks (Tax and Social Security Code).

Brief summary of the facts and procedure

- 1 The company ‘TEAM POWER EUROPE’ EOOD (‘the applicant’) was founded under Bulgarian law with the object of arranging temporary employment and work placements in Bulgaria and other States. The applicant is registered with the Bulgarian Agentsia po zаетostta (Agency for Employment) for pursuing the activity of arranging temporary employment and also has a worker assignment permit issued by the Düsseldorf Agentur für Arbeit (Agency for Employment) of the German Bundesagentur für Arbeit (Federal Agency for Employment).
- 2 On 8 October 2018, the applicant concluded a contract of employment with a Bulgarian citizen (‘the employee’). According to the contract, the applicant is obliged to post the employee to Germany, where he will work for the company

‘CLW Clausthaler Laser- und Werkstofftechnik’ GmbH (‘the hirer’) under the direction and supervision thereof. The contract also provides that the duties of the employee in the position of ‘machine operator — metalworking’ are specified by the hirer in the description of his field of activity. The applicant is obliged to pay the wages to the employee.

- 3 On 9 May 2019, the applicant asked the Teritorialna direksia na Natsionalna agentsia po prihodite (Territorial Directorate of the National Revenue Agency) in Varna to issue certification that the employee is subject to Bulgarian legislation during the period of assignment. In the request, the applicant indicated that the employment relationship between the employee and the applicant had continued to exist throughout the period of assignment and that the employee had received wages and social security and health protection from the applicant.
- 4 By decision of 30 May 2019, the competent administrative authority refused to issue the requested certification on the grounds that the two cumulative conditions under which the employee could still be subject to Bulgarian social security law had not been met, as the direct relationship between the employee and the employer had not been maintained and the latter did not pursue its substantial activity in the territory of Bulgaria.
- 5 In relation to the first condition, the administrative authority assumes that, despite the payment of the wages by the applicant as employer, the direct relationship between the applicant and the employee has not been maintained as, according to the contract of employment, the work is performed for the hirer under the supervision and direction thereof and the hirer determines the duties of the employee. With regard to the second condition, the administrative authority is of the opinion that the applicant does not pursue a substantial activity in the territory of Bulgaria since, as a company registered under the Zakon za danaka varhu dobavenata stoinost (Value Added Tax Law; ‘the ZDDS’), it exclusively declares the provision of services with place of performance in Germany and there are no indications of contracts with contracting partners carrying out their activities in Bulgaria.
- 6 In the administrative proceedings, the applicant filed an opposition against the decision refusing to issue the requested certification. By decision of 11 June 2019, the Direktor na Teritorialna direksia na Natsionalna agentsia za prihodite — Varna (Director of the Territorial Directorate of the National Revenue Agency — Varna; ‘the defendant’) rejected the opposition and confirmed the refusal decision.

Principal arguments of the parties in the main proceedings

- 7 The applicant is of the opinion that the two cumulative conditions for issuing the requested certification are met in the present case.
- 8 In relation to the first condition, it claims that there is a ‘direct relationship’ between itself and the employee since, as employer, it pays wages to that

employee and is entitled to end the employment relationship where there are grounds for termination. Furthermore, according to the employee assignment contract concluded between the hirer and the applicant, the former is prohibited from offering the employee the opportunity to pursue an activity other than that contractually agreed, which means that only the applicant is allowed to determine the nature of the work to be performed by the employee mentioned. In relation to the second condition, the applicant argues that it pursues its substantial activity of recruiting, selecting and providing temporary personnel in the territory of Bulgaria and that the generation of revenue from transactions with customers established outside of Bulgaria does not mean that the company pursues its activity abroad.

- 9 The defendant considers neither of the two conditions mentioned to have been met in relation to the applicant. With regard to the direct relationship between the applicant and the employee, it states that this is impaired as, according to the contract of employment concluded between the applicant and the employee, the latter does not have to perform any work for his employer in Bulgaria. Furthermore, the contract was concluded under German law on the basis of the authorisation granted by the competent authority in Germany and not on the basis of the applicant's registration with the Agency for Employment in Bulgaria. In relation to the substantial activity of the applicant in Bulgaria, the defendant is of the opinion that, with the exception of administrative and management staff, the applicant does not have any employees in the territory of Bulgaria and its revenue was generated entirely from employment relationships in Germany.

Brief summary of the basis for the reference

- 10 The referring court considers the interpretation of Article 14(2) of the Implementing Regulation in conjunction with Article 12(1) of the Basic Regulation to be necessary for resolving the dispute between the parties.
- 11 Within the meaning of Article 12(1) of the Basic Regulation, a person who pursues an activity as an employed person in a Member State on behalf of an employer which is established 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 if two cumulative conditions are met, namely, firstly, there is a direct relationship between that person and the employer and, secondly, the latter normally carries out its activities in the territory of that Member State.
- 12 In relation to the second condition, it is necessary that the employer, in accordance with the first sentence of Article 14(2) of the Implementing Regulation, 'performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, taking account of all criteria characterising the activities carried out by the undertaking in question' in order for it to be possible to assume that it normally carries out its activities in that Member State. Pursuant to the second sentence of Article 14(2) of that regulation,

‘the relevant criteria must be suited to the specific characteristics of each employer and the real nature of the activities carried out’.

- 13 The case-law of the Administrativen sad (Administrative Court) of Varna in relation to when the second condition of Article 12(1) of the Basic Regulation is met is inconsistent. This inconsistency results from the different interpretation of Article 14(2) of the Implementing Regulation, in particular with regard to the question as to which criteria are to be taken as a basis for determining whether the employer performs ‘substantial activities’ in the Member State in which it is established.
- 14 In order to assess whether the second condition of Article 12(1) of the Basic Regulation has been met, account must be taken of all the criteria characterising the activities carried on by the employer. Those criteria include the place where the employer is established; the number of administrative staff working in the Member State in which it is established and in the other Member State to which it has posted workers; the place where posted workers are recruited; the place where contracts with hirers are concluded; the law applicable to the employment contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand, and the turnover during an appropriately typical period in each Member State concerned (judgment [of the Court of Justice] of 10 February 2000, *FTS*, C-202/97, EU:C:2000:75, paragraphs 42 and 43).
- 15 The fact that the posted workers performed, for hirers, work other than the main activity of the undertaking which recruited and posted them is of little consequence. Consequently, an undertaking engaged in providing temporary personnel normally carries on its activities in the Member State in which it is established if it habitually carries on significant activities in that State (judgment of 10 February 2000, *FTS*, C-202/97, EU:C:2000:75, paragraphs 44 and 45).
- 16 However, it cannot be gathered from the aforementioned judgments of the Court of Justice whether it is sufficient for the satisfaction of the second condition of Article 12(1) of the Basic Regulation if the employer concludes contracts of employment with the workers posted to another Member State in the Member State in which it is established or whether it is necessary for substantial employee assignment activities to be performed for hirers carrying out their activities in the territory of the Member State in which the employer is established.
- 17 As the applicant’s main activity comprises arranging temporary employment and work placements in Bulgaria and other States, one possible interpretation appears, for the reasons given, to be that it is necessary for a substantial proportion of its contracts to be concluded and performed with hirers who carry out their activities in the territory of Bulgaria in order for it to be possible to assume that the applicant normally carries out its activities in Bulgaria.
- 18 The other possible interpretation is that, regardless of the fact that all the hirers are established and carry out their activities in Germany and all the workers are

posted to perform work for German undertakings, it is sufficient that the applicant is registered in the territory of Bulgaria and concludes the contracts of employment with the posted workers in that Member State in order for it to be assumed that it normally carries out its activities in the territory of Bulgaria.

WORKING DOCUMENT