Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 31 January 2018 [1]

Case C-527/16

Salzburger Gebietskrankenkasse,
Bundesminister für Arbeit, Soziales und Konsumentenschutz
Third parties:
Alpenrind GmbH,
Martin-Meat Szolgáltató és Kereskedelmi Kft,
Martimpex-Meat Kft,
Pensionsversicherungsanstalt,
Allgemeine Unfallversicherungsanstalt

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria))

(Reference for a preliminary ruling — Migrant workers — Social security — Workers posted to a Member State other than that of the establishment of their employer — Regulation (EC) No 987/2009 — Article 5(1) and Article 19(2) — Portable document A1 — Binding effect — Decision of the Administrative Commission for the Coordination of Social Security Systems that the portable document A1 should be withdrawn — Retroactive effect of the portable document A1 — Portable document A1 issued after the worker became subject to the social security system of the host Member State — Regulation (EC) No 883/2004 — Article 12(1) — 'Non-replacement condition' applicable to the posted persons)

I. Introduction

1. This request for a preliminary ruling submitted by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) concerns the interpretation of Article 12(1) of Regulation (EC) No 883/2004 [2] and of Article 5(1) and Article 19(2) of Regulation (EC) No 987/2009. [3]

2. The request has been submitted in the context of proceedings between the Salzburger Gebietskrankenkasse (Regional Health Insurance Fund of the Land of Salzburg, Austria, 'the Salzburg Regional Health Insurance Fund') and the Bundesminister für Arbeit, Soziales und Konsumentenschutz (Federal Minister for Employment, Social Matters and Consumer Protection, Austria) and (i) an Austrian undertaking and (ii) two Hungarian undertakings, concerning the determination of the social security legislation applicable to workers posted to Austria.

1 Original language: French.

2 Regulation 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), as corrected (OJ 2004 L 200, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulations No 883/2004 and No 987/2009 (OJ 2012 L 149, p. 4) ('Regulation No 883/2004'). As regards the version of Regulation No 883/2004 applicable to the facts of the main proceedings, see points 6 and 7 of this Opinion.

3 Regulation of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2009 L 284, p. 1), as amended by Regulation (EU) No 465/2012 ('Regulation No 987/2009').

3. The first and second questions submitted by the referring court invite the Court to define the effects associated with a portable document A1,[4] issued in accordance with Article 19(2) of Regulation No 987/2009, in order to attest the legislation applicable to a person by virtue of a provision of Title II of Regulation No 883/2004. In that regard, the referring court asks, by its first question, whether portable document A1 is binding on a court or tribunal, within the meaning of Article 267 TFEU, of the host Member State. If it is, the referring court asks, by its second question, in essence, whether portable document A1 is also binding where the Administrative Commission for the Coordination of Social Security Systems ('the Administrative Commission)[5] has delivered a decision that that document should be withdrawn, but the issuing institution has not withdrawn it. The referring court wonders, moreover, about the binding effect of portable document A1 where that document was issued after the worker concerned had been made subject to the social security system of the host Member State and, where appropriate, about the retroactive effects of the document.

4. By its third question, the referring court wonders about the interpretation of Article 12(1) of Regulation No 883/2004, pursuant to which the person posted by his employer to work in another Member States remains subject, on certain conditions, to the social security legislation of the Member State of origin. In that regard, the referring court asks, in essence, whether there is a breach of the condition set out in that provision and requiring that the posted person 'is not sent to replace another posted person' ('the non-replacement condition') where the replacement is made in the form of a posting not by the same employer but by another employer and whether it matters, in that context, whether both employers have their registered offices in the same Member State or whether there are staffing and/or organisational links between them.

II. EU law

A. Regulation No 883/2004

5. Article 11 of Regulation No 883/2004, entitled 'Determination of the legislation applicable', which appears in Title II of that regulation, entitled 'General rules', provides in paragraph 1 and paragraph 3(a):

'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.'

4 The portable document A1 is the successor to the E 101 certificate, which was the model form for the attestation of the legislation applicable in social security matters under the former Council Regulations (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ English Special Edition 1971(II), p. 416) and (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ English Special Edition 1972(II), p. 149).

5 As regards the Administrative Commission, see, in particular, Articles 71 and 72 of Regulation No 883/2004.

6. Article 12, which appears in the same title of Regulation No 883/2004, and is entitled 'Special rules', provided, in its initial version, in paragraph 1:

'A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to 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 is not sent to replace another person.'

7. During the period at issue in the main proceedings, namely the period between 1 February 2012 and 13 December 2013, Article 12(1) of Regulation No 883/2004 was amended by Regulation No 465/2012, with effect from 28 June 2012.[6] In particular, the words 'that he is not sent to replace another person' in the last part of the provision were replaced by the words 'that *he/she* is not sent to replace another *posted* person'.[7]

8. Article 76 of Regulation No 883/2004, entitled 'Cooperation', which appears in Title V, entitled 'Miscellaneous provisions', provides in paragraph 6:

'In the event of difficulties in the interpretation or application of this Regulation which could jeopardise the rights of a person covered by it, the institution of the competent Member State or of the Member State of residence of the person concerned shall contact the institution(s) of the Member State(s) concerned. If a solution cannot be found within a reasonable period, the authorities concerned may call on the Administrative Commission to intervene.'

B. Regulation No 987/2009

9. Article 5 of Regulation No 987/2009, entitled 'Legal value of documents and supporting evidence issued in another Member State', which appears in Title I of that regulation, entitled 'General provisions', provides:

'1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, 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 to be 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

6 See Article 3 of Regulation No 465/2012. As regards the period at issue in the main proceedings, see point 15 of this Opinion.

7 Emphasis added. As regards the purpose of that amendment of Article 12(1), see footnote 69 of this Opinion.

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 endeavour to reconcile the points of view within six months of the date on which the matter was brought before it.'

10. Article 19 of Regulation No 987/2009, entitled 'Provision of information to persons concerned and employers', which appears in Title II of that regulation, entitled 'Determination of the legislation applicable', provides in paragraph 2:

'At the request of the person concerned or of the employer, the competent institution of the Member State whose legislation is applicable pursuant to Title II of the basic Regulation shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions.'

III. The dispute in the main proceedings, the questions for a preliminary ruling and the procedure before the Court

11. Alpenrind GmbH, established in Austria, is a company active in the livestock and meat sector. Since 1997 it has operated an abattoir in Salzburg, which it leases.

12. In 2007, Alpenrind (or S GmbH, to which it succeeded) entered into a contract with Martin-Meat Szolgáltató és Kereskedelmi Kft ('Martin-Meat'), established in Hungary, under which Martin-Meat undertook to carry out meat cutting and packaging work. That work was carried out in Alpenrind's premises by workers posted to Austria.[8] Martin-Meat carried out that work until 31 January 2012.

13. On 24 January 2012, Alpenrind entered into a contract with Martimpex-Meat Kft, established in Hungary, under which Martimpex-Meat contracted to carry out meat cutting and packaging work between 1 February 2012 and 31 January 2014. That work was carried out in Alpenrind's premises by workers posted to Austria.

14. From 1 February 2014, Alpenrind again contracted with Martin-Meat to carry out the meat cutting work at the abovementioned premises referred using its staff.

15. For the more than 250 workers used by Martimpex-Meat during the period at issue, namely from 1 February 2012 until 13 December 2013, the competent Hungarian institution issued portable documents A1 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. The referring court states that those documents were issued 'sometimes retroactively and sometimes in cases where the Austrian social insurance institution had already determined by (non-final) decision that insurance for the worker concerned was compulsory under Austrian legislation'.[9] Each of those documents stated that Alpenrind was the employer at the place where the work was carried out.

16. By decision of 13 December 2013, the Salzburg Regional Health Insurance Fund determined that the abovementioned workers were subject to obligatory insurance in Austria during the period at issue, in accordance with the Austrian social security legislation.

8 As regards the classification of the contractual relationship between Martin-Meat and Alpenrind from the aspect of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), see judgment of 18 June 2015, *Martin Meat* (C-586/13, EU:C:2015:405).

9 The Hungarian Government takes issue with the referring court's statement that the portable documents A1 concerned were issued after the workers concerned were subjected to the Austrian social security scheme. See, in that regard, points 55 and 56 of this Opinion.

17. By judgment of 7 March 2016, the Bundesverwaltungsgericht (Federal Administrative Court, Austria) annulled the Salzburg Regional Health Insurance Fund's decision, on the ground that the latter was not competent. The referring court states that that judgment was based on the fact that 'each of the persons subject to compulsory insurance in Austria had been issued [a portable] document A1 by the competent Hungarian social security institution that indicated that, after a certain point, the person concerned was a paid and compulsorily insured worker of [Martimpex-Meat] in Hungary and was probably posted to [Alpenrind] in Austria for the period specified in the relevant forms, which includes the period at issue in the present case'.

18. The Salzburg Regional Health Insurance Fund and the Federal Minister for Labour, Social Matters and Consumer Protection lodged an appeal on a point of law against that judgment before the Verwaltungsgerichtshof (Supreme Administrative Court), contesting the finding that the portable documents A1 have absolute binding effect. In their submission, that binding effect is based on compliance with the principle of sincere cooperation between the Member States enshrined in Article 4(3) TEU; however, the competent Hungarian institution breached that principle in the present case. In that regard, the Federal Minister for Labour, Social Matters and Consumer Protection produced, in the proceedings on appeal, documents showing that the Administrative Commission concluded, on 20 and 21 June 2016, that Hungary had improperly declared that it had competence over the workers concerned and that, accordingly, the portable documents A1 must be withdrawn.

19. By its conclusions of 20 and 21 June 2016, the Administrative Commission approved, by unanimous decision of all delegations not involved in the dispute, the opinion of the Conciliation Board of the Administrative Commission ('the Conciliation Board') of 9 May 2016 in relation to a dispute between the Republic of Austria and Hungary.[10] It is apparent from that opinion that the procedure before the Administrative Committee originated in a dispute dating from several years between the Republic of Austria and Hungary concerning the determination of the legislation applicable to workers who had been posted to Austria by Martin-Meat and by Martimpex-Meat under agreements which those undertakings had entered into with Alpenrind. That dispute forms part of a more general debate within the Administrative Commission relating to the non-replacement condition set out in Article 12(1) of Regulation No 883/2004.[11]

20. By its opinion of 9 May 2016, the Conciliation Board found in favour of the stance taken by the Republic of Austria, considering, in essence, that the fact that the person is posted by a *different* employer from that of the worker who was previously posted does not prevent that situation from being a 'replacement' within the meaning of Article 12(1) of Regulation No 883/2004.[12] On that basis, the Conciliation Board considered that, in the case before it, the portable documents A1 issued in respect of the replacement workers had been incorrectly issued and should be withdrawn, in principle, from the date on which the competent Hungarian institution had been informed and had received the evidence relating to the situation in the host Member State. Recognising, however, that the retroactive withdrawal of the portable documents A1 would cause substantial administrative difficulties and have an adverse effect on the workers concerned, the Conciliation Board expressed the view that the Republic of Austria and Hungary might negotiate an agreement on the matter.[13]

10 See point IV of the Main conclusions of the 347th meeting of the Administrative Commission, held in Amsterdam on 20 and 21 June 2016 (C.A. 827/16), and opinion of the Conciliation Board of 9 May 2016, *Opinion of the Conciliation Board in case CB-4/15 concerning Austria and Hungary, Subject: Replacement of posted workers* (AC 336/16). As regards the procedural history of the dispute, see paragraph 1 of that opinion.

11 This discussion was reflected in the Administrative Commission's Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland. See footnote 71 of this Opinion. Article 12(1) of Regulation No 883/2004 is cited in points 6 and 7 of this Opinion.

12 See point 4 of the opinion of the Conciliation Board of 9 May 2016, referred to above.

13 See point 5 of the opinion of the Conciliation Board, referred to above. In that regard, the Conciliation Board states that the repayment of the contributions already paid and the recovery of any benefits already paid to the workers concerned could lead to an 'administrative nightmare'.

21. It is common ground that portable documents A1 issued in respect of the workers concerned were not withdrawn or cancelled by the competent Hungarian institution following the proceedings before the Administrative Committee. In that regard, it is apparent from the observations submitted by the Hungarian and Austrian Governments that the authorities of the two Member States discussed the procedure for withdrawing those documents, but that that discussion has now been suspended pending the Court's decision on the present request for a preliminary ruling.

22. By decision of 14 September 2016, received at the Court on 14 October 2016, the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay proceedings and to refer the following questions to the Court 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 for the Coordination of Social Security Systems 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 [a portable document A1] is not issued until after the receiving 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 … in the form of a posting not by the same employer but 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?'

23. Written observations have been lodged by the Salzburg Regional Health Insurance Fund, Alpenrind, Martin Meat and Martimpex-Meat,[14] by the Austrian, Belgian, Czech and German Governments, Ireland and the Hungarian and Polish Governments and by the European Commission. At the hearing, which took place on 28 September 2017, the Salzburg Regional Health Insurance Fund, Alpenrind, Martin Meat and Martimpex-Meat, the Austrian and Czech Governments, Ireland and the French, Hungarian and Polish Governments and the Commission submitted oral observations.

14 Martin Meat and Martimpex-Meat were represented jointly before the Court.

IV. Analysis

A. First question

24. By its first question, the referring court asks, in essence, whether Article 5(1) of Regulation No 987/2009 must be interpreted as meaning that a portable document A1 issued by the competent institution of a Member State, in accordance with Article 19(2) of that regulation and attesting that the worker is affiliated to the social security regime of that Member State, pursuant to a provision in Title II of Regulation No 883/2004, is binding on a court or tribunal, within the meaning of Article 267 TFEU, of another Member State. [15]

25. Like all the parties concerned that submitted observations to the Court on this matter, with the exception of the Salzburg Regional Health Insurance Fund, [16] I consider, for the following reasons, that this question should be answered in the affirmative. [17]

26. It should be noted, first of all, that, according to the Court's consistent case-law, as long as it has not been withdrawn or declared invalid, the E 101 certificate (the predecessor of the portable document A1 [18]) takes effect in the internal legal order of the Member State to which the employee goes in order to work and therefore binds the institutions of that Member State. It follows that a court of the host Member State is not entitled to scrutinise the validity of an E 101 certificate in the light of the background against which it was issued. [19]

27. As the Court has found, Regulation No 987/2009, currently in force, codified the Court's case-law, affirming, in particular, the binding nature of the E 101 certificate and the exclusive competence of the issuing institution to assess the validity of that certificate. [20] 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 No 883/2004 and No 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. [21]

15 It is appropriate to mention the ongoing legislative work intended to amend Regulations No 883/2004 and No 987/2009, which concerns, in particular, Articles 5 and 19 of Regulation No 987/2009. See the Commission Proposal of 13 December 2016 for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (COM(2016) 815 final) (Article 2(7) and (11) of that proposal and the explanations provided in the Explanatory Memorandum).

16 The French Government did not answer that question.

17 It should be pointed out that, in the decision for reference, the referring court did not give any indication that the facts of the dispute in the main proceedings reveal any fraud or abuse of right. I therefore proceed from the premiss that the first question does not refer to specific cases of fraud or abuse, but that it relates to the more general question whether the portable document A1 is binding on the courts of the Member States. See also point 77 of this Opinion. As regards the situation in which it is found by a court of the receiving Member State that the E 101 certificate was obtained or invoked fraudulently, see my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850).

18 See footnote 4 of this Opinion.

19 See, recently, judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraphs 48 and 49 and the case-law cited). On the Court's case-law relating to the binding nature of the E 101 certificate, see my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850, paragraphs 32 to 34). Owing to the limitation of judicial review of its validity, the E 101 certificate is distinguished from other types of attestations. See, in that regard, judgment of 12 February 2015, *Bouman* (C-114/13, EU:C:2015:81, paragraphs 26 and 27). See also footnote 60 of this Opinion.

20 Judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraph 59). See also my Opinions in *A-Rosa Flussschiff* (C-620/15, EU:C:2017:12, point 56) and in *Altun and Others* (C-359/16, EU:C:2017:850, point 20).

21 Article 5 is cited in point 9 of this Opinion. As regards the definition of the term 'institution', see Article 1(p) of Regulation 883/2004.

28. In my view there is nothing to support the assumption that, in undertaking that codification, the EU legislature intended to limit the binding effect of the documents referred to in Article 5 of Regulation No 987/2009 solely to the social security institutions of the Member States and, accordingly, to depart from the Court's settled case-law that the E 101 certificate is also binding on the national courts of the other Member States. [22]

29. Admittedly, Article 5(1) of Regulation No 987/2009 does not mention the courts of the other Member States. It should be pointed out, however, that that provision is drafted in terms that to a large extent correspond to those used by the Court in its case-law relating to the E 101 certificate. The Court has thus found that the E 101 certificate *is binding on the competent institution* of the Member State in which the worker concerned actually works and that, *as long as that certificate has not been withdrawn or declared invalid*, that institution must take account of the fact that that person is already subject to the social security legislation of the Member State in which the undertaking employing him is established, and that institution cannot therefore subject the worker in question to its own social security system. [23] In addition, Article 5(1) of Regulation No 987/2009 expressly provides that the documents referred to in that provision 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 supports the conclusion that that provision does not allow *another* Member State, through its courts, to question the validity of those documents.

30. Nor is there anything in the drafting history of Regulation No 987/2009 to indicate that the EU legislature intended to depart from the Court's case-law on the binding effect of the E 101 certificate vis-à-vis the national courts. On the contrary, it is apparent from the proposal that led to the adoption of that regulation that the proposal sought only to *simplify* and *modernise* the provisions of Regulation No 574/72. [24]

31. In addition, it should be noted that it follows from recital 12 of Regulation No 987/2009 that the measures and procedures provided for in 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'. [25] That suggests that if the EU legislature had intended to depart from the Court's case-law on the binding effect of the E 101 certificate it would have expressly so stated.

32. Last, as regards Article 6 of Regulation No 987/2009, to which the referring court makes reference, it should be pointed out that that provision provides for the provisional application of legislation in social security matters 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. [26] There is in my view no reason to consider that the EU legislature had intended, by that provision, to limit the binding effect of the documents referred to in Article 5 of that regulation. In that regard, it should be pointed out that, pursuant to paragraph 1 thereof, Article 6 is to apply 'unless otherwise provided for in … Regulation [No 987/2009]'. [27]

22 See point 26 and footnote 19 of this Opinion.

23 See, recently, judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraphs 41 and 43 and the case-law cited).

24 See, in particular, points 1 and 3 of the Explanatory Memorandum of the Proposal for a Regulation of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004, submitted by the Commission on 31 January 2006 (COM(2006) 16 final).

25 Emphasis added.

26 In that regard, Article 6(1) establishes an order of priority referring, in the first place, to 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.

27 As regards Article 6 of Regulation No 987/2009, see also point 66 of this Opinion.

33. On the basis of the foregoing, it is appropriate in my view to consider that in adopting Regulation No 987/2009 and, in particular, Article 5(1) thereof, the EU legislature merely wished to codify the Court's case-law on the binding effect of the E 101 certificate. For that reason, I consider that that case-law is applicable, *mutatis mutandis*, to portable documents A1.

34. I would further add that an interpretation of Article 5(1) of Regulation No 987/2009 that limited the binding effect of the portable document A1 solely to the social security institutions of the Member States would be liable to deprive that provision of its effectiveness. As the Court has held with regard to the E 101 certificate, if it were accepted that a 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 E 101 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. [28]

35. In that regard, it should be pointed out that, while the former regulatory framework governed by Regulations No 1408/71 and No 574/72 did not contain a provision corresponding to Article 5(1) of Regulation No 987/2009, the Court nonetheless based its case-law concerning the binding effect of the E 101 certificate, in particular, on respect for the principle of single applicable legislation in social security matters, set out in Article 13(1) of Regulation No 1408/71 (which corresponds to the current Article 11(1) of Regulation No 883/2004 [29]) and for the principle of the legal certainty of persons moving within the European Union, and also on the obligations arising from the principle of sincere cooperation between Member States set out in Article 4(3) TEU. [30] To my mind those considerations remain wholly valid in the framework of Regulations No 883/2004 and No 987/2009.

36. Having regard to the foregoing, I propose that the Court's answer to the first question should be that Article 5(1) of Regulation No 987/2009 must be interpreted as meaning that, for as long as it has not been withdrawn or declared invalid, the portable document A1 issued by the competent institution of a Member State, pursuant to Article 19(2) of that regulation, and attesting that the worker is affiliated to the social security system of that Member State, pursuant to a provision of Title II of Regulation No 883/2004, is binding on a court or tribunal, within the meaning of Article 267 TFEU, of another Member State. [31]

B. Second question

37. The second question, which the Court is requested to answer only in the event that the first question must be answered in the affirmative, consists of two parts, relating to two very specific situations. By the first part, the referring court wonders whether the portable document A1 has binding effect where proceedings have taken place before the Administrative Commission (part (a) of the second question). By the second part, the referring court asks whether the portable document A1 has binding effect where it has been issued after the worker concerned was made subject to the social security system of the host Member State and, if so, whether in that case the document has retroactive effect (part (b) of the second question). I shall address those two situations in turn.

28 See judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraph 47 and the case-law cited).

29 Article 11(1) of Regulation No 883/2004 is cited in point 5 of this Opinion.

30 See my Opinions in *A-Rosa Flussschiff* (C-620/15, EU:C:2017:12, points 45 to 57) and in *Altun and Others* (C-359/16, EU:C:2017:850, points 35 to 37).

31 As regards the reference which the referring court makes to Article 267 TFEU, I have already set out, in my Opinion in *Altun and Others* (C-359/16, EU:C:2017:850, points 22 to 26), the reasons why in my view the preliminary ruling procedure is not an appropriate means of determining whether the E 101 certificate (now portable document A1) was correctly issued in a specific case.

1. First situation: the procedure before the Administrative Commission (part (a) of the second question)

38. By part (a) of its second question, the referring court wonders about the binding effect of the portable document A1 where an earlier procedure before the Administrative Commission has not resulted in an agreement or the withdrawal of the documents at issue.

39. In the grounds of its request for a preliminary ruling, the referring court states that that question seeks to determine whether, '— at least after conclusion of a procedure before the Administrative Commission that neither resulted in agreement (in the sense that the institutions of both Members States now accept the validity and accuracy of the certificate) nor caused the contested document to be withdrawn (either because the Administrative Commission did not make a corresponding recommendation or because the issuing institution does not comply with the recommendation) — the document is no longer binding, making it possible to institute proceedings to determine whether insurance is compulsory'.

40. It is apparent from the order for reference and from the observations submitted to the Court that, in the present case, the Member States concerned brought the matter before the Administrative Commission, which reached a decision that the portable documents A1 in question should be withdrawn. It is also apparent from the decision for referral and from the observations in question that those documents were not withdrawn by the Hungarian competent institution following the procedure before the Administrative Commission. [32]

41. In those circumstances, I consider that part (a) of the second question must be understood as seeking to ascertain, in essence, whether the portable document A1 is also binding in a situation such as that at issue in the main proceedings, where the Administrative Commission has issued a decision that the document should be withdrawn, but the issuing institution has not withdrawn it. [33]

42. The Salzburg Regional Health Insurance Fund and the Austrian, Belgian, Czech [34] and French Governments propose, in essence, that the answer to this question should be in the negative. In that regard, those parties and interested persons claim, in particular, that there is a breach of the principle of sincere cooperation between Member States, enshrined in Article 4(3) TEU, where the issuing institution does not cancel or withdraw the portable document A1 in accordance with a decision of the Administrative Commission. The other parties and interested persons that have submitted observations to the Court contend, on the other hand, that the procedure before the Administrative Commission can have no impact on the binding effect of the portable document A1. That is also my belief, for the following reasons.

32 See points 18 to 21 of this Opinion.

33 It should be observed that, contrary to the suggestions put forward by the Hungarian Government and Ireland, part 1 of the second question is not hypothetical. Although in the present case the Hungarian Government in all likelihood accepted the Administrative Commission's decision that the portable documents A1 in question should be withdrawn, the Hungarian authorities have not thus far withdrawn them. Furthermore, while it is true, as Ireland emphasises, that the Conciliation Board referred, in its opinion of 9 May 2016, to the possibility that the Republic of Austria and Hungary will negotiate an agreement on the specific procedures for implementing the withdrawal of the portable documents A1 in question and on the corrections to be made with regard to the workers concerned, it must be pointed out that such an agreement has not thus far been concluded between those Member States. See points 18 to 21 of this Opinion.

34 The Czech Government claims, more particularly, that in the situation referred to in part (a) of the second question, the portable document A1 would provisionally lose its binding effect and that, in such a situation, it would be appropriate to have recourse to Article 6 of Regulation No 987/2009 on the provisional application of legislation in social security matters. As regards that article, see point 32 of this Opinion.

43. It should be noted, first of all, that the present case is distinguished from that case that gave rise to the judgment in *A-Rosa Flussschiff*,[35] in that, in the present case, the Member States concerned initiated the procedure before the Administrative Commission, which delivered a decision that the portable documents A1 in question should be withdrawn.[36] To my mind, however, that difference cannot affect the conclusion that emerges from that judgment, on the basis of the consistent case-law of the Court,[37] that the E 101 certificate (now the portable document A1) is binding on both the social security institutions of the Member State in which the work is carried out and the courts of that Member State.

44. I consider, in fact, that if Article 5(1) of Regulation No 987/2009 were to be interpreted as meaning that the portable document A1 loses its binding effect in a situation such as that at issue in the main proceedings, that would amount in reality to conferring a binding nature on the decisions issued by the Administrative Commission. In my view, such a result is incompatible with the present regulatory framework.

45. In that regard, it should be borne in mind that, in *Romano*,[38] the Court observed that it followed both from primary law in relation to the powers conferred by the Council on the Commission to implement rules which the Council adopts and from the judicial system created by the [EEC] Treaty that a body such as the Administrative Commission may not be empowered by the Council to adopt 'acts having the force of law'. According to the Court, while a decision of such a body may provide an aid to social security institutions responsible for applying EU law, it is not of such a nature as to require those institutions to use certain methods or adopt certain interpretations when they come to apply the EU rules. The Court concluded that the decision at issue adopted by the Administrative Commission '[did] not bind' the referring court.[39]

46. While it is indeed permissible to ask, following the changes made to primary law, notably by the Treaty of Lisbon, whether that case-law continues to apply, in particular as regards the possibility of conferring on a body such as the Administrative Commission the power to adopt acts intended to produce legal effects,[40] there is nothing to suggest that the EU legislature actually intended to confer such power on the Administrative Commission.

47. In fact, Article 72 of Regulation No 883/2004, which sets out the tasks of the Administrative Commission, provides, in paragraph a, that that Commission is to 'deal with all administrative questions and questions of interpretation arising from the provisions [of that 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 [Regulation*

35 Judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309).

36 In paragraph 56 of the judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309), the Court held that 'the French authorities neither exhausted the channel of dialogue with the Swiss Social Insurance Office nor even attempted to refer the matter to the Administrative Commission, so that the events which gave rise to that dispute cannot be said to disclose supposed deficiencies in the procedure determined by the Court's case-law or show that it is impossible to resolve any instances of unfair competition or social dumping'.

37 On the Court's case-law relating to the binding nature of the E 101 certificate, see point 26 and footnote 19 of this Opinion.

38 Judgment of 14 May 1981, *Romano* (98/80, EU:C:1981:104, paragraph 20).

39 See judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18, paragraph 63 and the case-law cited). See also, to that effect, judgments of 5 December 1967, *van der Vecht* (19/67, EU:C:1967:49, pp. 355 and 356); of 5 July 1988, *Borowitz* (21/87, EU:C:1988:362, paragraph 19); of 1 October 1992, *Grisvard and Kreitz* (C-201/91, EU:C:1992:368, paragraph 25); and of 10 February 2000, *FTS* (C-202/97, EU:C:2000:75, paragraph 32 and the case-law cited).

40 See, in particular, Opinion of Advocate General Jääskinen in *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2013:562, paragraphs 60 to 88) and judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18, paragraphs 63 to 65). See, in that regard, the first paragraph of Article 263 TFEU, pursuant to which the Court is to review, in particular, 'the legality of acts of *bodies, offices or agencies of the Union* intended to produce *legal effects* vis-à-vis third parties' (emphasis added). Furthermore, pursuant to subparagraph b of the first paragraph of Article 267 TFEU, the Court is to have jurisdiction to give preliminary rulings on 'the validity and interpretation of acts of the institutions, *bodies, offices or agencies* of the Union' (emphasis added).

No 883/2004] or by the Treaty.[41] The Court has held, in relation to the virtually identical provision in Article 43 of the former Regulation No 3,[42] that 'the authority of the decision of [the Administrative Commission] is defined in Article 43 itself' and that 'this provision does not affect the powers of the competent courts or tribunals to assess the validity and content of the provisions of [that regulation], *in respect of which the decisions of [the Administrative Commission] have only the status of an opinion*'.[43]

48. Furthermore, as regards the initiation of the procedure before the Administrative Commission, Article 76(6) of Regulation No 883/2004 provides that, if a solution cannot be found within a reasonable period, the authorities concerned may call on the Administrative Commission to intervene. Article 5(4) of Regulation No 987/2009 further provides that the Administrative Commission is to endeavour to reconcile the points of view within six months of the date on which the matter was brought before it.[44] The words 'endeavour to reconcile', which are also used in Article 6(3) of Regulation No 987/2009 and in the Decision A1 of the Administrative Commission,[45] clearly indicate, in my view, the non-binding nature of the proceedings before that commission.[46]

49. The Court's case-law on the E 101 certificate also seems to me to be based on the premiss that the decisions of the Administrative Commission do not have binding effect. By that case-law, the Court identified the options available to a Member State in the event of disagreement with one or more Member States as to the legislation applicable in social security matters in a given case.[47] According to the Court, it is necessary, in the initial stage, to pursue the channel of dialogue with the institution that issued the document concerned. Where the institutions concerned do not reach an agreement, it is open to them, in the second stage, to bring the matter before the Administrative Commission. Last, if the Administrative Commission does not succeed in reconciling the points of view of the competing institutions, the host Member State may, without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs, bring infringement proceedings before the Court, under Article 259 TFEU.[48] Conversely, the Court does not refer, in that context, to the possibility of bringing an action under Article 263 TFEU for *annulment* of the decision of the Administrative Commission, which in my view would nonetheless have been logical if the Court had considered that the decisions of that Commission had binding effect.[49]

41 Emphasis added. See also point 3 of Decision A1 of the Administrative Commission of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004 (OJ 2010 C 106, p. 1).

42 Regulation No 3 on social security for migrant workers (*Journal officiel* 1958, p. 561).

43 See judgment of 5 December 1967, *van der Vecht* (19/67, EU:C:1967:49, p. 355), emphasis added. In the words of Article 43(a), an Administrative Commission is to be created whose task will be 'to settle all administrative questions and questions of interpretation arising under this Regulation and subsequent regulations or of any agreement or arrangement that may arise in the context of those [subsequent] regulations, without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and legal remedies prescribed under the legislation of the Member States, in this Regulation or in the Treaty'.

44 Article 76(6) of Regulation No 883/2004 and Article 5(4) of Regulation No 987/2009 are cited in points 8 and 9, respectively, of this Opinion.

45 See point 18 of Decision A1 of the Administrative Commission, referred to above.

46 This analysis cannot be called into question by the fact that Article 89(3) of Regulation No 987/2009 requires the competent authorities generally to 'ensure that their institutions are aware of and apply all the Community provisions, legislative or otherwise, including the decisions of the Administrative Commission'. To my mind, this provision cannot be interpreted as being intended to confer on the Administrative Commission the power to adopt acts intended to produce legal effects.

47 This case-law has been codified, in part, in Article 5(2) to (4) of Regulation No 987/2009, which are cited in point 9 of this Opinion.

48 See recently, to that effect, judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraphs 44 to 46 and the case-law cited).

49 It will be recalled that, pursuant to the first paragraph of Article 263 TFEU, the Court is to review, in particular, the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

50. On the basis of the foregoing, I conclude that, as the system put in place by Regulations No 883/2004 and No 987/2009 now stands, the decisions issued by the Administrative Commission in relation to a dispute between two or more Member States as regards the legislation applicable in a specific case do not have binding effect. It follows, to my mind, that the procedure before the Administrative Commission cannot have an impact on the binding effect of the portable document A1.

51. I consider, in other words, that even in a situation such as that at issue in the main proceedings, where the Member States concerned have called on the Administrative Commission to intervene, in accordance with Article 76(6) of Regulation No 883/2004 and Article 5(4) of Regulation No 987/2009,[50] and where the Administrative Commission has issued a decision that the portable document A1 should be withdrawn, that document is binding as long as it has not been withdrawn or declared invalid by the issuing institution.

52. In my view, that applies irrespective of whether there has been a breach of the obligations arising from the principle of sincere cooperation enshrined in Article 4(3) TEU by the Member State to which the issuing institution belongs in the context of the procedure before the Administrative Commission. If the host Member State considers that the former Member State has failed to fulfil its obligations under EU law it may bring infringement proceedings under Article 259 TFEU or request the Commission itself to take action against that Member State.[51]

53. Having regard to the foregoing, I propose that the Court's answer to part (a) of the second question should be that the portable document A1 is also binding in a situation such as that at issue in the main proceedings, where the Administrative Commission has issued a decision that that document should be withdrawn but where the issuing institution has not withdrawn it.

2. Second situation: the retroactive effect of the portable document A1 (part (b) of the second question)

54. By part (b) of its second question, the referring court asks, in essence, whether the portable document A1 is also binding where it was issued after the worker concerned had been made subject to the social security system of the host Member State and, if so, whether it has retroactive effect.

55. I note, first of all, that this question is not hypothetical, as the Hungarian Government suggests. The Hungarian Government claims, in particular, that it has not been shown in the present case that the Hungarian competent institution issued portable documents A1 retroactively, after the Austrian authorities had established that the workers concerned were subject to the Austrian social security system.

56. It should be borne in mind that, in the context of a procedure under Article 267 TFEU, the Court is empowered to rule on the interpretation of an EU provision only on the basis of the facts which the national court or tribunal puts before it. The Court therefore has no jurisdiction to give a ruling on the facts in the main proceedings, which is a matter for the exclusive jurisdiction of the national court or tribunal.[52] In its decision for reference, the referring court states that the portable documents A1 in question were issued *sometimes retroactively and sometimes after the workers concerned had been made subject to the Austrian social security system.*[53] It follows that it is appropriate to answer part (b) of the second question.

50 Article 76(6) of Regulation No 883/2004 and Article 5(4) of Regulation No 987/2009 are cited in points 8 and 9, respectively, of this Opinion.

51 See, to that effect, judgment of 29 May 1997, *Denuit* (C-14/96, EU:C:1997:260, paragraph 34 and the case-law cited). I consider that there is no need for the Court to rule, in the present case, on whether a Member State's failure to comply with a decision of the Administrative Commission gives rise to a breach of the principle of sincere cooperation set out in Article 4(3) TEU.

52 See, to that effect, judgment of 11 September 2008, *CEPSA* (C-279/06, EU:C:2008:485, paragraph 28 and the case-law cited).

53 See point 15 of this Opinion. At the hearing, the Salzburg Regional Health Insurance Fund also stated that the portable documents A1 in question were issued both before and after the Austrian authorities made the workers concerned subject to the Austrian social security regime.

57. Like Alpenrind, Martin Meat and Martimpex-Meat, the Czech Government, Ireland, the Hungarian and Polish Governments and the Commission, and unlike the Salzburg Regional Health Insurance Fund and the Austrian, Belgian, German [54] and French Governments, I consider that this question must be answered in the affirmative. In my view, for the reasons set out below, the portable document A1 is also binding where it was issued after the worker concerned had been made subject to the social security system of the host Member State and that in such a case the document may have retroactive effect.

58. As the referring court points out, it follows from the Court's case-law that the E 101 certificate may have retroactive effects. The Court has thus found that, when issuing such a certificate, the competent institution does no more than state that the worker concerned remains subject to the legislation of the Member State to which that institution belongs throughout a given period in the course of which he carries out a work assignment in the territory of another Member State. Also according to the Court, although it should preferably be made before the beginning of the period concerned, such a statement may also be made during that period or indeed after its expiry. In those circumstances, there is nothing to prevent the E 101 certificate, where appropriate, from having retroactive effects. [55]

59. To my mind, that case-law is applicable, *mutatis mutandis*, to the new regulatory framework. [56] It is appropriate, in that context, to point out that Article 15 of Regulation No 987/2009, which sets out the procedure for the application of, inter alia, Article 12 of Regulation No 883/2004, expressly provides in paragraph 1 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*. That institution shall issue the attestation referred to in Article 19(2) of [Regulation No 987/2009] to the person concerned and shall without delay make information concerning the legislation applicable to that person, pursuant to … Article 12 of [Regulation No 883/2004] available to that person.' [57]

60. The referring court, however, raises the question whether the portable document A1 also has binding effect where it is issued only after it has been established that the worker concerned is subject to the social security system of the host Member State. According to the referring court, it might be considered that the acts which establish that the worker is subject to the social security system in question are also 'documents' as referred to in Article 5(1) of Regulation No 987/2009, which would mean that those acts also produce binding effects vis-à-vis the authorities of the other Member States.

61. I do not find that reasoning convincing.

62. First, I consider that such an interpretation is not consistent with the wording of Regulation No 987/2009. It will be recalled that Article 5(1) of that regulation relates to documents issued by the institution of a Member State and *showing* the position of a person for the purposes of the application of Regulations No 883/2004 and No 987/2009, and supporting evidence. [58] However, a decision that a person is subject to the social security system of a Member State does not 'show' the position of that

54 The German Government submits, more particularly, that the binding effect of the portable document A1 does not apply where that document was established only after the host Member State officially accepted that the workers concerned were subject to compulsory insurance under its legislation and where the Member State of origin *is so informed*.

55 See judgment of 30 March 2000, *Banks and Others* (C-178/97, EU:C:2000:169, paragraphs 53 and 54). See also judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe* (C-115/11, EU:C:2012:606, paragraph 43), from which it is apparent that E 101 certificate tends to be issued, *as a general rule*, before or at the start of the period which it covers. See also point 6 Decision No 181 of the Administrative Commission of 13 December 2000 concerning the interpretation of Articles 14(1), 14a(1) and 14b(1) and (2) of Regulation No 1408/71 (OJ 2001 L 329, p. 73).

56 See point 33 of this Opinion.

57 Emphasis added.

58 Article 5(1) is cited in point 9 of this Opinion.

person for the purposes of Article 5(1) of Regulation No 987/2009, but in my view seeks rather to *establish* that person's legal position. In addition, 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, *at the request* of the person concerned or the employer.[59] However, a decision establishing that a person is subject to the social security of a Member State is not issued 'at the request of the person concerned or the employer', within the meaning of that provision, but rather at the initiative of the authorities concerned.

63. Second, as I have already explained above, it must be considered that, when adopting Article 5(1) of Regulation No 987/2009, the EU legislature intended to codify the Court's case-law on the binding effect of the E 101 certificate;[60] and that case-law relates only to the E 101 certificates (now the portable document A1), and not to other types of documents.[61] In addition, it seems to me, in that context, that the judgment in *Banks and Others* concerned a situation corresponding to the situation at issue in the main proceedings, where the E 101 certificates had been issued, at least in part, *after* the workers concerned had been made subject to the social security system of the host Member State.[62] That, however, did not affect the Court's finding that the certificates had binding effect.

64. Third, I consider that an interpretation to the effect that a decision establishing that a person is subject to the social security system of a Member State may be classified as a 'document' referred to in Article 5(1) of Regulation No 987/2009 would be liable to produce inappropriate, or indeed arbitrary, results. As the Polish Government asserts, such an approach might give rise to a race against the clock between the authorities of the Member States, with each seeking to be first to issue a decision making the persons concerned subject to its own social security system, which might well undermine the legal certainty of the person concerned.[63] In such a situation, the Member States would have a financial interest in being first.

65. Having regard to the foregoing, I propose that the Court's answer to part (b) of the second question should be that the portable document A1 is also binding where that document was issued after the worker concerned was made subject to the social security system of the host Member State and that, in such a case, that document may have retroactive effect.

66. I would add, in that respect, that the question whether, by issuing the portable document A1 after the worker concerned has been made subject to the social security system of the host Member State, the issuing institution may have failed to fulfil its duty of sincere cooperation, under Article 4(3) TEU, or whether the authorities concerned ought, in such a situation, to have had recourse to Article 6 of Regulation No 987/2009, has no impact on the binding effect of that document.[64] It will be recalled that if a Member State considers that another Member State has failed to fulfil its obligations under EU law, it is at liberty to bring infringement proceedings under Article 259 TFEU.[65]

59 Article 19(2) is cited in point 10 of this Opinion. See also Article 15(1) of Regulation No 987/2009, which provides that the competent institution of the Member State whose legislation is applicable is to provide the person concerned with the *attestation* referred to in Article 19(2) of that regulation.

60 See points 27 to 33 of this Opinion.

61 As regards the distinction between the effects produced by the E 101 certificate and those produced by other types of documents, see judgments of 12 February 2015, *Bouman* (C-114/13, EU:C:2015:81, paragraphs 26 and 27), and of 9 September 2015, *X and van Dijk* (C-72/14 and C-197/14, EU:C:2015:564, paragraphs 47 to 50).

62 Judgment of 30 March 2000, *Banks and Others* (C-178/97, EU:C:2000:169). See, in particular, paragraphs 5 to 7 of that judgment.

63 It will be recalled that the Court's case-law relating to the binding effect of the E 101 certificate is based, in particular, on considerations relating to the legal certainty of persons who move within the Union. See point 35 of this Opinion. I would mention, in that context, that it is apparent from the decision for reference that, in the proceedings before the referring court, the Salzburg Regional Health Insurance Fund observed that 'the only way to bring about a decision in the matter [was] a ruling that insurance is compulsory, notwithstanding the [portable] documents A1 issued by the Hungarian institution'.

64 As regards the relationship between Articles 5 and 6 of Regulation No 987/2009, see point 32 of this Opinion.

65 See also point 52 of this Opinion.

C. Third question

1. The subject matter of the question and the proposed interpretations

67. The third question concerns the interpretation of the non-replacement condition set out in Article 12(1) of Regulation No 883/2004.[66] The referring court states that this question will arise only if, in certain circumstances, the portable document A1 would have only limited binding effect. Having regard to the answer which I propose should be given to the first and second questions, there is therefore no need, in principle, to provide an answer to the third question.

68. Nonetheless, for practical purposes, and having regard to the fact that the third question is central to the dispute between the Republic of Austria and Hungary that constitutes the backdrop to the dispute in the main proceedings,[67] I shall set out below a number of observations on this question.

69. Under Article 12(1) of Regulation No 883/2004, '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 is not sent to replace another person*'.[68] During the period at issue in the case in question, the words 'that he is not sent to replace another person' were replaced by the words 'that *he/she* is not sent to replace another *posted* person'.[69]

70. The referring court is uncertain as to the scope of that non-replacement condition and, in particular, as to whether there is a breach of that condition in a situation, such as that at issue in the main proceedings, where the replacement is in the form of a posting not by the same employer but by another employer. In that regard, the referring court states that, whereas the persons posted by Martimpex-Meat during the period at issue did not actually replace any worker from that company, they probably replaced workers from Martin-Meat.[70] The referring court asks, moreover, whether it matters whether both employers have their registered offices in the same Member State (part (a) of the third question) or whether there are staffing and/or organisational links between the employers (part (b) of the third question).

71. Two approaches are defended before the Court as regards the non-replacement condition set out in Article 12(1) of Regulation No 883/2004.

72. According to the first approach, which corresponds to the position defended by the Salzburg Regional Health Insurance Fund, the Austrian, Belgian, Czech, German and French Governments, and by the Commission, the non-replacement condition precludes any replacement of the posted workers, it being immaterial whether the postings are made by the same employer or by different employers. In their view, it follows that that condition is not met where employer B posts a worker to a Member State in order to carry out work that was previously carried out by a worker posted by employer A,

66 I must point out that the Commission's proposal of 13 December 2016, referred to above, is intended to amend Article 12 of Regulation No 883/2004. See Article 1(13) of that proposal and the relevant explanations in the Explanatory Memorandum.

67 See points 18 to 21 of this Opinion.

68 Emphasis added. It is apparent from the decision for reference that in the present case it is undisputed that the anticipated duration of the work did not exceed 24 months, as required by Article 12(1) of Regulation No 883/2004.

69 Emphasis added. It is apparent from the drafting history of Regulation No 465/2012 that that amendment was intended to clarify that a *posted* person cannot be replaced by another posted person after the posting period of the first person expires, as the word 'posted' had been accidentally omitted from the initial version of Regulation No 883/2004. See point 5 of the Explanatory Memorandum of the Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 (COM(2010) 794 final). See also points 6 and 7 of this Opinion.

70 See points 12 and 13 of this Opinion.

irrespective of whether both employers have their registered offices in the same Member State or whether there are staffing and/or organisational links between them. That broad interpretation of the non-replacement condition correspond, *mutatis mutandis*, to the interpretation set out in the Administrative Commission's Practical Guide.[71]

73. According to the second approach, which corresponds to the position defended by Alpenrind and by the Hungarian and Polish Governments, the non-replacement condition should be given a narrower interpretation: in their submission, that condition is not fulfilled where postings are made by different employers, it being immaterial in that regard whether the employers concerned have their registered offices in the same Member State.[72]

74. The two approaches are based on very different *perspectives*. According to the first approach, the non-replacement condition must be considered not only from the viewpoint of the Member State of origin but also from that of the host Member State. That condition therefore precludes certain tasks or duties in the host Member State being carried out continuously by posted workers who are not subject to the social security system of that Member State.

75. That approach means in practice, first, that employer B is prevented from relying on the regime provided for in Article 12(1) of Regulation No 883/2004, by posting workers to another Member State in order to provide a service, if employer A previously made use of that regime in order to provide the same service in that Member State. Second, the recipient of the service in the host Member State (namely, in this instance, Alpenrind) is prevented — according to that approach — from entering into successive and distinct contracts with different undertakings relating to the performance of the same work by posted workers who are not subject to the social security system of the host Member State.

76. The second approach is based, on the other hand, on the perspective of the Member State of origin and the employer posting the workers. According to that approach, all that matters is whether, from that employer's viewpoint, there is or is not a replacement of the posted workers.

77. It should be noted, first of all, that the referring court has given no indication that the facts before it in the main proceedings might constitute fraud or an abuse of right.[73] I shall therefore proceed from the premiss that the third question does not relate to individual cases of fraud or abuse.

71 See Part 1, point 7 of the Administrative Commission's Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland, of December 2013, where it is stated that 'the posted worker cannot be immediately replaced in receiving Member State A by a posted worker from the same undertaking of posting Member State B, nor by a posted worker from a different undertaking based in Member State B or a posted worker from an undertaking based in Member State C. … However, if an activity in the receiving undertaking of Member State A was previously pursued by a posted worker from posting Member State B, this worker cannot be replaced immediately by a newly posted worker from any Member State. It does not matter from which posting undertaking or Member State the newly posted worker comes from — one posted worker cannot be immediately replaced by another posted worker'. I must point out that this version of the Practical guide was not published until after the period at issue in the main proceedings. The previous version of the Administrative Commission's Practical Guide, of January 2011, did not include this explanation.

72 Neither Martin Meat and Martimpex-Meat nor Ireland provided an answer to the third question.

73 See also footnote 17 of this Opinion.

78. Next, it should be noted that the decision for reference contains no indication that there are, in the present case, any staffing and/or organisational links between the employers concerned, namely Martin-Meat and Martimpex-Meat, or, where relevant, as to the nature of such links.[74] By part (b) of the third question, the referring court nonetheless wonders about the significance of the existence of such links between the employers concerned for the interpretation of Article 12(1) of Regulation No 883/2004.[75]

79. In the analysis which follows, I shall examine, in the first place, the question whether, where there are no staffing and/or organisational links between the employers concerned, the non-replacement condition set out in Article 12(1) of Regulation No 883/2004 precludes an employer from posting a worker to another Member State in order to carry out work that was previously carried out by a worker posted by another employer (section 2).

80. I shall say right now that in my view that question must be answered in the negative. I consider, for the reasons set out below, that the broad interpretation of the non-replacement condition is unfounded and that there is nothing to prevent employer B from posting a worker or workers, in accordance with Article 12(1) of Regulation No 883/2004, where employer A had previously made such a posting.

81. In the second place, I shall examine sub-questions (a) and (b) of the third question, whereby the referring court asks, in essence, whether the circumstances that the employers have their registered offices in the same Member State and that there are staffing and/or organisational links between them are capable of altering the answer to be given to the third question. In that regard, I shall explain, first, the reasons why in my view the registered office of each of the employers concerned has no relevance for the purposes of the non-replacement condition (section 3). Second, I shall deal briefly with the case in which there are staffing and/or organisational links between the employers concerned (section 4).

2. The interpretation of Article 12(1) of Regulation No 883/2004

(a) The system provided for in Article 12(1) of Regulation No 883/2004

82. The provisions of Title II of Regulation No 883/2004, of which Article 12(1) forms part, constitute a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Union will be subject to the social security scheme of a single Member State, in order to prevent the system of legislation of more than one Member State from being applicable and to avoid the complications that might result from that situation.[76]

83. Article 11(3)(A) of Regulation No 883/2004 states the general rule on posting that a person pursuing an activity as an employed or self-employed person in a Member State is to be subject to the legislation of that Member State (*lex loci laboris*).[77] Under Article 12(1) of that regulation, a person who is posted by his employer to another Member State is to continue to be subject to the

74 Martin-Meat and Martimpex-Meat maintain that there is no link of ownership, organisation or management between the two companies. The Hungarian Government asserts, likewise, that the present case involves legal persons different from each other. On the other hand, the Austrian Government claims that there is a strong identity as regards the names and organisational structure of the two employers and, in part, also the posted workers.

75 I should make clear that in my view part (b) of the third question is not hypothetical in such a way as to render it inadmissible, in accordance with the Court's case-law. It seems to me, on the basis of the order for reference, that the referring court has not at this stage resolved the question whether in the present case there are or are not staffing and/or organisational links between the employers concerned, in so far as that question would arise only if the Court were to reject the broad interpretation of the non-replacement condition.

76 See, by analogy concerning Article 14(1)(a) of Regulation No 1408/71 (the predecessor of Article 12(1) of Regulation No 883/2004), judgment of 9 November 2000, *Plum* (C-404/98, EU:C:2000:607, paragraph 18 and the case-law cited). As regards the principle that a single legislation is to apply, see Article 11(1) of Regulation No 883/2004, which is cited in point 5 of this Opinion.

77 See point 5 of this Opinion. See also recital 17 of Regulation No 883/2004.

legislation of the Member State of origin. In other words, Article 12(1) of Regulation No 883/2004 provides for the *possibility* for the employer, in certain circumstances, to post its workers to another Member State without the need for those workers to be subject to the social security system of that Member State.

84. The purpose of Article 12(1) is, in particular, to promote freedom to provide services for the benefit of the undertakings which avail themselves of it by sending workers to Member States other than that in which they are established. It is aimed at overcoming obstacles likely to impede freedom of movement of workers and also at encouraging economic interpenetration while avoiding administrative complications, in particular for workers and undertakings.[78]

85. It should be pointed out that, contrary to the suggestion put forward by the Salzburg Regional Health Insurance Fund, the Austrian, Belgian, Czech, German and French Governments and the Commission, Article 12(1) of Regulation No 883/2004 cannot be classified as an 'exception'. As its title expressly states, it is a *special rule* intended for a specific situation that justifies another posting criterion.[79] In that context, the Court has held, with respect to Article 14(1)(a) of Regulation No 1408/71 (the predecessor of Article 12(1) of Regulation No 883/2004), that 'in certain *specific situations* the unrestricted application of the rule set out in Article 13(2)(a) (now Article 11(3)(a) of Regulation No 883/2004) [of Regulation No 1408/71] might in fact create, instead of prevent, administrative complications for workers as well as for employers and social security authorities, which would place obstacles in the way of the freedom of movement of the persons covered by that regulation … Special rules governing such situations are set out, in particular, in Article 14 of Regulation No 1408/71 (now Article 12 of Regulation No 883/2004)'.[80]

86. In those circumstances, I consider that there is no reason to give Article 12(1) of Regulation No 883/2004 a particularly restrictive interpretation.

(b) The non-replacement condition set out in Article 12(1) of Regulation No 883/2004

87. Under Article 12(1) of Regulation No 883/2004, a posted person is to continue to be subject to the social security system of the Member State of origin, provided, inter alia, that he/she is 'not sent to replace another posted person'.

88. That non-replacement condition was not found in the initial version of Article 13(a) of Regulation No 3 (the predecessor of Article 12(1) of Regulation No 883/2004), but was inserted in that provision by Regulation No 24/64/EEC.[81] It is apparent from the first recital of the latter regulation that 'the application of Article 13(a) of Regulation No 3, relating to the legislation applicable to posted workers, gave rise to certain abuse and that it is therefore necessary to revise that provision in order to eradicate such abuse while retaining the possibility for posted workers to continue to be subject to the legislation of the country in which they are normally employed'.

78 See, by analogy concerning Article 14(1)(a) of Regulation No 1408/71 (the predecessor of Article 12(1) of Regulation No 883/2004), judgment of 9 November 2000, *Plum* (C-404/98, EU:C:2000:607, paragraph 19 and the case-law cited). See also recitals 1 and 2 of Decision A2 of the Administrative Commission of 12 June 2009 concerning the interpretation of Article 12 of Regulation No 883/2004 (OJ 2010 C 106, p. 5).

79 Article 12(1) of Regulation No 883/2004 is cited in points 6 and 7 of this Opinion. See also recital 18 of Regulation No 883/2004, which states that 'in specific situations which justify other criteria of applicability, it is necessary to derogate from that general rule'.

80 Emphasis added. See judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe* (C-115/11, EU:C:2012:606, paragraph 31).

81 Council Regulation No 24/64/CEE of 10 March 1964 amending Article 13 of Regulation No 3 and Article 11 of Regulation No 4 (legislation applicable to posted workers and to workers normally pursuing their activity in several countries) (*Journal officiel* 1964, p. 746).

89. According to my reading of the genesis of the non-replacement condition, the EU legislature aimed, by that condition, to remedy a manifest lacuna identified in Regulation No 3, which consisted in the fact that some employers were circumventing the condition relating to the duration of the posting,[82] by making the necessary rotations of their posted staff for the latter to be able to continue to be subject to the legislation of the Member State of origin, where the social security contributions were lower than in the host Member State.[83] The non-replacement condition was subsequently retained, without significant amendment, in Article 14(1)(a) of Regulation No 1408/71 and then in Article 12(1) of Regulation No 883/2004.[84]

90. The question that arises in the present case is whether, by introducing the non-replacement condition, the EU legislature also sought to prevent situations *other* than that in which the same employer rotates its posted staff in order to circumvent the condition relating to the duration of the posting and, in particular, whether it wished to prohibit successive postings by different employers.

91. To my mind that is not the position.

92. First, I see no evidence in either the wording of Regulations No 3, No 1408/71 and No 883/2004 or the drafting history of those regulations of such an intention on the part of the legislature.

93. Although the wording of Article 12(1) of Regulation No 883/2004, under which the posted person cannot be 'sent to replace another posted person', is not conclusive, I nonetheless consider that it argues in favour of the interpretation to the effect that the non-replacement condition is not intended to avoid successive postings by different employers. Taken literally, the words 'sent to replace', which appears in all the language versions of Article 12(1) of Regulation No 883/2004, apart from the German version, means in my view that the worker is sent by the employer *in order to* replace another posted worker.[85]

94. Save in a case of abuse, the posting by employer B is not intended to replace a worker posted by employer A. The purpose of such a posting is rather to provide a service in the host Member State. I would add, in that regard, that it is not even certain that employer B is aware of the earlier posting by employer A.[86]

82 The former Article 13(a) of Regulation No 3 provided for a 'likely duration' not exceeding 12 months, that might be extended to 24 months. It will be recalled that Article 12(1) of Regulation No 883/2004 provides for an 'anticipated duration' not exceeding 24 months. See point 6 of this Opinion.

83 See, to that effect, Opinion of Advocate General Dutheillet de Lamothe in *Manpower* (35/70, not published, EU:C:1970:104, p. 1265), where he points out that '[Article 13(a) of Regulation No 3] gave rise to abuse. Certain undertakings opened sites outside their country of origin and made such rotations of the personnel posted as were necessary so that this personnel might remain subject to the legislation of the country of origin where the social charges were less than in the country where they were employed. These practices were found in particular in France in the building and timber industry. Further it had been found, in particular in relations between the Netherlands and Germany, that "recruiting agencies" or "subcontractors", who were not themselves employers in the first country, were putting at the disposal of contractors of the second country workers who remained subject to the social security legislation of the first country.' The Advocate General's observations relate, in particular, to the introduction, in parallel, of the concept of 'posting' in Article 13(a) of Regulation No 3. See also Fifth Annual Report of the Administrative Commission on the implementation of the regulations on social security for migrant workers, January-December 1963, p. 12 and p. 56. See also Opinion of Advocate General Jacobs in *FTS* (C-202/97, EU:C:1999:33, paragraph 26), which also refers to the introduction of the non-replacement condition.

84 Article 13(a) of Regulation No 3, as amended by Regulation No 24/64, provided that the posted worker must 'not [be] sent to replace another worker who has reached the end of his term of posting'. Article 14(1)(a) of Regulation No 1408/71 provided that a posted worker '[was] not [to be] sent to replace another worker who [had] completed his term of posting'. Article 12(1) of Regulation No 883/2004 is cited in points 6 and 7 of this Opinion.

85 Some language versions even provide that the person cannot be sent '*in order to*' replace another posted person. See, for example, the Danish version ('ikke udsendes for at afløse en anden person'), the English version ('not sent to replace another person'), and the Swedish version ('inte sänds ut för att ersätta någon annan person'). The German version provides, on the other hand, that the person is not to *replace* another person ('nicht eine andere [entsandte] Person ablöst'). The amendments of Article 12(1) of Regulation No 883/2004 made by Regulation No 465/2012 do not in any way affect that analysis of the different language versions. See points 6 and 7 of this Opinion.

86 I would point out that the analysis set out in this section relates to the situation in which there are no personal and/or organisational links between the employers concerned. See points 78 and 79 of this Opinion.

95. In addition, to my mind the words 'sent to replace' support the argument that the non-replacement condition must be considered solely from the viewpoint of the employer that posts the worker. It will be recalled that Article 12(1) of Regulation No 883/2004 sets out the conditions in which that employer may post its workers without having to make them subject to the social security system of that Member State.[87] In that regard, that provision sets out the condition that the posted person cannot be sent (by that employer) to replace another posted person. From a drafting viewpoint, the non-replacement condition thus proceeds from the perspective of the employer posting the worker.

96. I therefore consider that there is no 'replacement' within the meaning of Article 12(1) of Regulation No 883/2004 where employer B posts a worker in order to carry out work that was previously carried out by a worker posted by employer A. In other words, I consider that there is nothing to prevent employer B from making such a posting. It also follows that the recipient of the service in the host Member State is not prevented from making use of successive and separate contracts with different undertakings relating to the performance of the same work by posted workers who are not subject to the social security system of the host Member State.

97. I would add, in that regard, that an interpretation to the contrary would have the consequence that employer B would be placed in a less favourable position than that of employer A solely because employer A was the first to take advantage of the possibility provided for in Article 12(1) of Regulation No 883/2004 (the 'first come, first served' principle). In my view there is no suggestion that the EU legislature intended such a result. To my mind, such an interpretation would therefore introduce a new condition into that provision which is not apparent from its wording, which in my view would be contrary to the principle of the legal certainty of those concerned.[88]

98. In that context, it must be considered that, when adopting Regulation No 883/2004, the EU legislature was perfectly aware of the problem relating to the replacement of the posted workers and that it was also aware of the potential economic advantages contained in Article 12(1) of that regulation for the employer and, by extension, for its contracting party in the host Member State. If the legislature had wished to prevent successive postings by different employers it would no doubt have done so in much clearer terms.

99. Second, as regards the objective of avoiding abuse, I consider that there is nothing to suggest, generally, that there is abuse where employer B posts its workers, in accordance with Article 12(1) of Regulation No 883/2004, in order to carry out work that was previously carried out by workers posted by employer A. I recall, moreover, that in such a case employer B is not necessarily aware of the previous posting by employer A.[89]

100. Third, and last, I consider that the broad interpretation of the non-replacement condition, according to which it would also cover successive postings by different employers, is liable to undermine the objectives pursued by Article 12(1) of Regulation No 883/2004. It will be recalled that that provision is aimed, in particular, at promoting freedom of movement of workers and also at encouraging economic interpenetration while avoiding administrative complications, in particular for workers and undertakings.[90]

87 See also point 83 of this Opinion.

88 According to the Court's case-law, the principle of legal certainty requires, particularly, that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences on individuals. See, inter alia, judgment of 18 December 2008, *Altun* (C-337/07, EU:C:2008:744, paragraph 60).

89 It will be recalled that the referring court has given no indication that the facts of the main proceedings constitute fraud or abuse of right. See point 77 of this Opinion.

90 See point 84 of this Opinion.

101. The broad interpretation of the non-replacement condition would mean, in practice, that the employer would be potentially uncertain, at the time of making the posting, whether or not the posted worker's situation would come within the scope of Article 12(1) of Regulation No 883/2004 and, accordingly, whether the worker, when he is posted, is subject to the social security system of the Member State of origin or to that of the host Member State. Indeed, employer B may lawfully consider that the conditions set out in Article 12(1) of Regulation No 883/2004 are fulfilled. If it subsequently transpires that a worker posted by employer A previously carried out the work concerned in the host Member State, employer B must, according to that interpretation, accept the fact that the worker which it has posted will be subject to the system of the host Member State. That would be so notwithstanding that a portable document A1 had been issued by the competent institution of the Member State of origin showing that that worker belongs to the social security system of that Member State. [91]

102. Such a development would be likely to alter considerably the economic conditions in which employer B provides its services in the host Member State [92] and would also give rise to administrative complications for employer B and the worker concerned relating, in particular, to that fact that that worker would be subject to the system of the host Member State, to the reclaiming of the contributions already paid in the Member State of origin and to the withdrawal of the portable document A1 by the issuing institution. I consider that the existence of such uncertainty for employer B is not consistent with the principle of legal certainty and that it is liable to impede freedom to provide services and the free movement of workers within the European Union, contrary to the objective pursued by Article 12(1) of Regulation No 883/2004.

103. Having regard to all of the foregoing considerations, I propose that the Court's answer to the third question should be that the non-replacement condition laid down in Article 12(1) of Regulation No 883/2004 does not preclude an employer from posting a worker to carry out work that was previously carried out by a worker posted by another employer.

104. In the interest of completeness, I would emphasise that the interpretation of Article 12(1) of Regulation No 883/2004 which I recommend is different from that reached by the Administrative Commission. [93] In that regard, it is sufficient to state that the EU legislature is at liberty to amend that regulation if it wishes to extend the non-replacement condition, laid down in that provision, to successive postings by different employers. Under the existing legal framework, however, I see no basis for opting for such a result.

3. The situation in which the employers have their registered offices in the same Member State (part (a) of the third question)

105. By part (a) of the third question, the referring court asks, in essence, whether the fact that the employers concerned have their registered offices in the same Member State can alter the answer to be given to the third question.

106. To my mind there is no doubt that this question must be answered in the negative.

91 See, in that regard, point 7 of Part 1 of the Administrative Commission's Practical guide of December 2013, referred to above, where it is stated that 'from the point of view of the competent institution of posting Member State, the posting conditions may appear to be fulfilled when assessing the posting conditions'.

92 In the present case, Martin-Meat and Martimpex-Meat observe that the Austrian social security authorities sent to Martimpex-Meat, on 21 March 2016, a notice to pay the contributions for those workers, in the amount of more than EUR 4 million, plus default interest, or around EUR 5 million in all.

93 See point 72 and footnote 70 of this Opinion.

107. The foregoing analysis has revealed nothing to justify a distinction being drawn according to the place of the registered office of each of the employers concerned. I therefore consider that the non-replacement condition laid down in Article 12(1) of Regulation No 883/2004 does not preclude the employer from posting a worker who was previously posted by another employer, whether or not those employers have their registered offices in the same Member State.

108. I therefore propose that the Court's answer to part (a) of the third question should be that, for the purposes of the third question, it does not matter whether the employers concerned have their registered offices in the same Member State.

4. The situation in which there are staffing and/or organisational links between the employers (part (b) of the third question)

109. By part (b) of its third question, the referring court asks, in essence, whether the fact that there are staffing and/or organisational links between the employers concerned is capable of altering the answer to be given to the third question.

110. It should be borne in mind that the analysis which I have just set out as regards the interpretation of the non-replacement condition laid down in Article 12(1) of Regulation No 883/2004 concerns the situation in which there are no staffing and/or organisation links between the employers concerned. [94] I recall, moreover, that the referring court has given no indication that there are, in the present case, any staffing and/or organisational between the employers concerned or, where appropriate, of the nature of such links. [95]

111. In those circumstances, I shall merely state that, where there *are* staffing and/or organisational links between the employers concerned, it is appropriate in my view to examine whether the postings by those employers are aimed at circumventing the non-replacement condition laid down in Article 12(1) of Regulation No 883/2004. It will be recalled that, according to the Court's consistent case-law, EU law cannot be relied on for abusive or fraudulent ends and the application of EU legislation cannot be extended to cover abusive practices by economic operators. [96]

112. However, the referring court has given no indication that the facts of the dispute in the main proceedings constitute fraud or abuse of right. [97] In those circumstances, I consider that there is no need for the Court to rule further on this matter.

113. On the basis of the foregoing, I propose that the Court's answer to part (b) of the third question should be that where there are staffing and/or organisational links between the employers concerned, it is appropriate to examine whether the postings by those employers are aimed at circumventing the non-replacement condition laid down in Article 12(1) of Regulation No 883/2004.

94 See point 79 of this Opinion.

95 See point 78 of this Opinion.

96 See judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 27 and the case-law cited).

97 See point 77 of this Opinion.

V. Conclusion

114. In the light of the foregoing considerations, I propose that the Court should answer the questions for a preliminary ruling referred by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), as follows:

(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 on the coordination of social security systems, as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012, must be interpreted as meaning that, for as long as it has not been withdrawn or declared invalid, the portable document A1 issued by the competent institution of a Member State, pursuant to Article 19(2) of Regulation No 987/2009, as amended by Regulation No 465/2012, and attesting that the worker is affiliated to the social security system of that Member State, pursuant to a provision of Title II of Regulation No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as corrected, as amended by Regulation (EU) No 465/2012, is binding on a court or tribunal, within the meaning of Article 267 TFEU, of another Member State.

(2) The portable document A1 is also binding in a situation such as that at issue in the main proceedings, where the Administrative Commission for the Coordination of Social Security Systems has issued a decision that that document should be withdrawn but the issuing institution has not withdrawn it.

The same applies where that document was issued after the worker concerned was made subject to the social security system of the host Member State. In such a case, that document may have retroactive effect.

(3) Article 12(1) of Regulation No 883/2004, as amended by Regulation No 465/2012, must be interpreted as meaning that the non-replacement condition laid down in Article 12(1) of Regulation No 883/2004 does not preclude an employer from posting a worker to carry out work that was previously carried out by a worker posted by another employer, irrespective of whether the employers concerned have their registered offices in the same Member State.

However, where there are staffing and/or organisational links between the employers concerned, it is appropriate to examine whether the postings by those employers are aimed at circumventing the non-replacement condition laid down in Article 12(1) of Regulation No 883/2004.