Provisional text

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 10 December 2020(1)

Case C-784/19

‘TEAM POWER EUROPE’ EOOD
v
Direktor na Teritorialna direktsia na Natsionalna agentsia za prihodite – Varna

(Request for a preliminary ruling from the Administrativen sad – Varna (Administrative Court, Varna, Bulgaria))

(Reference for a preliminary ruling – Posting of workers – Social security – Applicable law – Regulation (EC) No 883/2004 – Article 12(1) – Regulation (EC) No 987/2009 – Article 14(2) – Undertaking supplying temporary workers – Activities usually carried out – Determination of the Member State in which the employer normally carries out its activities – Requirement that a significant proportion of the activity of placing temporary workers must be carried out for the benefit of undertakings established in the same Member State)

1. A temporary employment agency (‘TEA’) engages workers in order to make those workers available to other undertakings (‘users’ or ‘hirers’). Pursuant to supply contracts concluded between a TEA and user undertakings, the TEA’s staff, who retain their employment relationship with the TEA, come under the user’s supervision and authority.

2. In the proceedings which have given rise to this reference for a preliminary ruling, the national court must rule on which social security legislation is applicable to a Bulgarian worker who has been placed temporarily with a German employer by a TEA established in Bulgaria.

3. In order to clarify that issue, the referring court has asked the Court of Justice to interpret Article 14(2) of Regulation (EC) No 987/2009, (2) in conjunction with Article 12(1) of Regulation (EC) No 883/2004. (3)

4. The response to the national court’s uncertainties requires a determination of the exact nature of a TEA’s *significant activities*. More specifically, it will be necessary to trace the dividing line between the ‘substantial activities’ and the ‘purely internal management activities’ of such undertakings.

5. The EU legislature used those two expressions to enshrine in Article 14(2) of Regulation No 987/2009 the case-law laid down by the Court of Justice on Article 12(1) of Regulation No 883/2004. It now falls to the Court to refine that case-law in relation to TEAs.

I. Legislative framework

A. EU law

1. Regulation No 883/2004

6. Article 2(1) ('Persons covered') reads:

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

7. Article 11 ('General rules') provides:

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

…

3. Subject to Articles 12 to 16:

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

…'

8. In accordance with Article 12(1) ('Special rules'):

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

2. Regulation No 987/2009

9. Article 14(2) ('Details relating to Articles 12 and 13 of [Regulation No 883/2004]') provides:

'For the purposes of the application of Article 12(1) of [Regulation No 883/2004], the words "which normally carries out its activities there" shall refer to an employer that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established …'.

10. In accordance with Article 19 ('Provision of information to persons concerned and employers'):

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

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

3. Directive 96/71/EC (4)

11. Article 1 reads:

'1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

…

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

…

c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided that there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

Where a worker who has been hired out by a temporary employment undertaking or placement agency to a user undertaking as referred to in point (c) is to carry out work in the framework of the transnational provision of services within the meaning of point (a), (b) or (c) by the user undertaking in the territory of a Member State other than where the worker normally works for the temporary employment undertaking or placement agency, or for the user undertaking, the worker shall be considered to be posted to the territory of that Member State by the temporary employment undertaking or placement agency with which the worker is in an employment relationship. The temporary employment undertaking or placement agency shall be considered to be an undertaking as referred to in paragraph 1 and shall fully comply with the relevant provisions of this Directive and Directive 2014/67/EU of the European Parliament and of the Council.

…'

4. Directive 2008/104/EC (5)

12. In accordance with Article 1 ('Scope'):

'1. This Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction.

…'

13. Article 2 ('Aim') provides:

'The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.'

5. Directive 2014/67/EU (6)

14. Pursuant to Article 4 (‘Identification of a genuine posting and prevention of abuse and circumvention’):

‘1. For the purpose of implementing, applying and enforcing Directive 96/71/EC, the competent authorities shall make an overall assessment of all factual elements that are deemed to be necessary, including, in particular, those set out in paragraphs 2 and 3 of this Article. Those elements are intended to assist competent authorities when carrying out checks and controls and where they have reason to believe that a worker may not qualify as a posted worker under Directive 96/71/EC. Those elements are indicative factors in the overall assessment to be made and therefore shall not be considered in isolation.

2. In order to determine whether an undertaking genuinely performs substantial activities, other than purely internal management and/or administrative activities, the competent authorities shall make an overall assessment of all factual elements characterising those activities, taking account of a wider timeframe, carried out by an undertaking in the Member State of establishment, and where necessary, in the host Member State. Such elements may include in particular:

a) the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions and, where applicable, in accordance with national law has a professional licence or is registered with the chambers of commerce or professional bodies;

b) the place where posted workers are recruited and from which they are posted;

c) the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other;

d) the place where the undertaking performs its substantial business activity and where it employs administrative staff;

e) the number of contracts performed and/or the size of the turnover realised in the Member State of establishment, taking into account the specific situation of, inter alia, newly established undertakings and SMEs.’

B. Bulgarian law

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

‘(1) An employment contract concluded with a [TEA] must stipulate that the worker will be sent to a hirer undertaking to work there temporarily under the hirer undertaking’s supervision and direction.

…

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

16. Article 4 of the Kodeks za sotsialnoto osiguryavane (Social Security Code) provides:

‘Workers and employees must be compulsorily insured under this Code for sickness, maternity, disability due to illness, old age or death, industrial accident, occupational disease and unemployment, irrespective of the nature of the work, method of remuneration and source of income …’

17. Article 2(1) of the Naredba za sluzhebnite komandirovki i spetsializatsii v chuzhbina (Decree on the posting of workers and specialisation placements abroad) states:

‘Posting abroad means sending a person to a foreign country in order to perform specific work on the instructions of the body posting him.’

II. Facts, dispute and question referred for a preliminary ruling

18. ‘Team Power Europe’ EOOD (‘Team Power’) is an undertaking established under Bulgarian law which provides temporary employment and work placement services.

19. Team Power is registered as a TEA with the Agentsia po zaetostta (Employment Agency, Bulgaria) and has an official permit for the placement of staff in Germany. (7)

20. On 8 October 2018, Team Power concluded a contract of employment with a Bulgarian citizen (‘the employee’), pursuant to which the employee would be posted to Germany to be placed with the company ‘CLW Clausthaler Laser- und Werkstofftechnik’ GmbH, under the latter’s direction and supervision.

21. It was agreed in that contract that the employee’s duties (as a ‘machine operator – metalworking’) were to be specified by the hirer and that Team Power would cover his salary.

22. On 9 May 2019, Team Power requested the Teritorialna direktsia na Natsionalna agentsia po prihodite (Territorial Directorate of the National Revenue Agency, Bulgaria) to issue certificate A1, confirming that the employee was subject to Bulgarian legislation during the period of assignment.

23. That request stated that the employment relationship between the employee and Team Power continued to exist throughout the placement and that the latter was required to pay the employee’s salary and maintain his social security and medical insurance cover.

24. By decision of 30 May 2019, the competent administrative authority refused to issue the requested certificate on the grounds that the two cumulative conditions under which the employee could still be subject to Bulgarian social security law had not been met, as the direct relationship between the employee and the employer had not been maintained and the latter did not pursue a significant proportion of its activity in the territory of Bulgaria.

25. The refusal was confirmed in administrative proceedings by decision of 11 June 2019 of the Direktor na Teritorialna direktsia na Natsionalna agentsia za prihodite – Varna (Director of the Territorial Directorate of the National Revenue Agency, Varna).

26. Proceedings were lodged with the Administrativen sad – Varna (Administrative Court, Varna, Bulgaria), which has referred the following question for a preliminary ruling:

‘Is Article 14(2) of Regulation (EC) No 987/2009 … to be interpreted as meaning that, in order for it to be possible to assume that [a TEA] normally carries out its activities in the Member State in which it is established, it has to perform a substantial part of the employee assignment activity for hirers established in the same Member State?’

27. According to the referring court:

– Its case-law in relation to compliance with the second condition laid down in Article 12(1) of Regulation No 883/2004 is not uniform. The divergence results from the different interpretations of Article 14(2) of Regulation No 987/2009 for the purpose of determining whether the employer performs ‘substantial activities’ in the Member State in which it is established.

– When assessing whether that second condition is satisfied, account must be taken of all the criteria characterising the activities carried out by the employer, including those referred to in paragraphs 42 and 43 of the judgment of the Court of Justice of 10 February 2000, *FTS*. (8)

– The fact that the posted worker performs, for the hirer, duties which differ from the main activity of the employer which recruited and posted him is irrelevant. Consequently, a TEA normally carries out its activities in the Member State in which it is established if it habitually carries out significant activities in the territory of that State.

28. However, the referring court takes the view that it is not possible to infer from the case-law of the Court of Justice whether, in order to satisfy the abovementioned condition: a) it is sufficient if the employer concludes in the sending State (9) (in this case, Bulgaria) contracts of employment with the workers it posts to another Member State (the State of employment; in this case, Germany); or b) whether it is also necessary for the employer to carry out employee placement activities to be performed for clients operating in the territory of the first State (Bulgaria).

III. Procedure before the Court of Justice and the parties' positions

29. The request for a preliminary ruling was received at the Registry of the Court on 22 October 2019.

30. Written observations were lodged by Team Power, the Belgian, Bulgarian, Estonian, Finnish and French governments, and the Commission. With the exception of the Estonian Government, all those parties attended the hearing held on 13 October 2020, in which the Polish Government also participated.

IV. Summary of the parties' arguments

31. Team Power and the Commission both submit that a TEA that does not perform a significant proportion of its worker placement activity for user undertakings which operate in the sending State, where the TEA is also established, can rely on the exception at issue.

32. Team Power argues that the number of contracts performed in the sending State is not one of the criteria set out in the judgment in *FTS*. The reference to that factor in Decision A2 of the Administrative Commission of 12 June 2009 (10) is not binding.

33. Team Power further argues that the turnover criterion should not be assessed either, since it does not reflect the specific characteristics of TEAs. As a result of those characteristics, quantitative criteria should not be taken into consideration.

34. The Commission submits that, in view of its essential characteristics, it will suffice if a TEA has employees who work in the sending State and it recruits in that State workers who are temporarily made available to hirers. If that condition is met, there is nothing to preclude a TEA from engaging workers in order to send them only to hirers established in other Member States.

35. However, the Commission points out that the referring court must examine other factors in order to exclude an abuse of rights or fraudulent reliance on EU provisions. (11)

36. The Belgian, Bulgarian, Estonian, Finnish, French and Polish governments submit that TEAs must carry on a significant proportion of their activity placing workers with undertakings established in the sending State. That follows from the criteria laid down in the judgment in *FTS*, which were subsequently codified by the EU legislature and supplemented by decisions of the Administrative Commission and the Practical guide on the applicable legislation, (12) duly adapted to the specific characteristics of TEAs.

37. The position of the governments which have participated in the proceedings is based on a number of arguments:

– It follows from Decision No 162 of the Administrative Commission of 31 May 1996 (13) that a TEA normally pursues its activity in the territory of a Member State when it usually makes workers

available to hirer undertakings in the territory of that State so that they can be employed there. The Practical guide takes the same line.

– The judgment in *FTS*, Decision A2 of 2009 and the Practical guide mention turnover during a typical period in each Member State as a criterion for assessment. Since turnover is not realised in the State of the hirer undertaking, it is necessary to determine whether the TEA supplies staff to undertakings in the sending State or only to undertakings in other Member States.

– In accordance with Decision A2 of 2009 and the Practical guide, another relevant criterion is the number of contracts performed in the sending Member State, compared with those performed in other Member States.

– The rules on this subject must be interpreted strictly because they are an exception to the general rule that workers are subject to the law of the Member State in which they work.

– The aim of that exception is to ensure that an employer who sends staff to carry out work in another Member State for a limited period of time does not have to pay social security contributions in that Member State. In the case of a TEA, given that the employees work for a different undertaking, they cannot be regarded as 'posted workers' within the meaning of the exception at issue.

– Although the judgment in *FTS* did not specify the nature of the usual activities characterising a TEA, it follows from the Opinion delivered by the Advocate General in that case (14) that a TEA must carry on genuine business activity in the sending State. That was confirmed by the Court in the judgment of 9 November 2000, *Plum*. (15)

V. Analysis

A. Preliminary considerations

38. The referring court's question is very precise: in order to determine whether a worker who has been employed by a Bulgarian TEA so that he can be placed with a German undertaking is subject to Bulgarian social security legislation, must that TEA carry on a significant proportion of its worker placement business for hirer undertakings established in Bulgaria?

39. Regulation No 883/2004 contains 'a complete and uniform system of conflict of laws rules, the aim of which is to ensure that workers moving within the European Union are subject to the social security scheme of only one Member State, in order to prevent the national legislation of more than one Member State from being applicable and to avoid the attendant complications of such a situation'. (16)

40. In that connection, Article 11(1) of Regulation No 883/2004 provides that persons falling within the scope of the regulation are to be subject to the legislation of a single Member State. In accordance with Article 11(3)(a), that State will be the State where a person pursues an activity as an employed or self-employed person. The principle of *lex loci laboris* is thus enshrined.

41. However, that conflict rule allows for an exception which is laid down in 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 perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State …' (17)

42. In accordance with the Court's case-law, the application of that exception is subject to two conditions: a) the maintenance of a direct link (18) between the employer and the worker during the period of posting; and b) the employer 'habitually carries out significant activities in the territory' of the sending State. (19)

43. The referring court is in no doubt that the first condition has been met (the continued existence of a direct link between the TEA and the worker) (20) and it focuses on the interpretative difficulties relating to the second condition.

44. In particular, those interpretative difficulties concern the concept of 'the normal carrying out of activities' in relation to employers with a profile as specific as that of a TEA, to which the rules laid down in Directive 96/71 apply in so far as they act as 'undertakings established in a Member State which, in the framework of the transnational provision of services, post workers' (Article 1(1) and (3) of Directive 96/71).

B. Concept of 'the normal carrying out of activities'

1. Substantial activities and purely internal management activities

45. The Court has been defining the concept of 'the normal carrying out of activities' for a number of decades in a line of case-law which started with the judgment of 17 December 1970, *Manpower*, (21) and which was incorporated into a series of provisions of EU law up to and including Directive 2014/67.

46. Regulation No 987/2009, the interpretation of which the referring court has requested, qualifies in Article 14(2) that 'the words "which normally carries out its activities there" shall refer to an employer that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established'.

47. By including that qualification in a legislative text, the EU legislature has adopted two clarifications made by the Court: the activities concerned must be 'significant activities' (22) and not 'purely internal management activities'. (23)

48. In referring in Article 14(2) of Regulation No 987/2009 to the habitual performance of '*substantial* activities, other than purely internal management activities', (24) the legislature intended, therefore, to emphasise the *qualitative* slant of the term '*significant* activities', used in the judgment in *FTS* and the judgment in *Plum*.

49. Accordingly, the decisive point is not the number of activities carried out but their significance for the purposes of defining those which constitute the inherent and characteristic object of the employer undertaking. Where that undertaking is a TEA, account must be taken of its specific features, as the Court did in the judgment in *FTS*.

50. In accordance with that judgment, 'all the criteria characterising the activities carried on by [a TEA]' must be examined. (25) Those criteria include, inter alia and not exhaustively, (26) the criteria which were largely set out later in Article (4)(2) of Directive 2014/67. (27)

51. Those criteria do not include a requirement that the majority of a TEA's activity must involve the provision of staff to hirers established in the Member State where it has its registered office. That requirement does, however, feature in decisions of the Administrative Commission, such as Decision No 128 of 17 October 1985, (28) concerning the application of Articles 14(1)(a) and 14b(1) of Council Regulation (EEC) No 1408/71.

52. The Court has declared that it is not bound by those decisions, although they may be of assistance to institutions responsible for applying EU social security law. (29) Moreover, the judgment in *FTS* did not echo that requirement in particular, even though it was already referred to in Decision No 128 of 1985 and in Decision No 162/1996. (30)

53. The Court has to clarify now whether that specific condition is a mandatory requirement for the purpose of applying the exception laid down in Article 12(1) of Regulation No 883/2004 in circumstances such as those of this dispute.

54. It should be recalled that, as the French Government has argued, the Court has not defined what the *substantial activities* of a TEA comprise. The judgment in *FTS* did not address the question of what activities of that kind involve and therefore it does not enable the boundary between substantial activities and purely internal management activities to be defined.

55. The criteria listed in the judgment in *FTS* presuppose, in fact, that there is a substantial content but they do not state that explicitly. Their usefulness is, therefore, relative, unless the nature of the activities *characterised* by those criteria are specified. (31)

56. Thus, for example, the relevance of the place of work of the administrative staff of a TEA will depend on how important the management of human resources is in the operation of that type of undertaking, which engages workers in order to make them available to other undertakings. The importance of that factor will not be the same in the case of a construction company or a cleaning undertaking as it is in the case of a TEA.

57. Therefore, it is necessary to determine what the typical (substantial) activity or, to use the French Government's expression, 'cœur de métier' of a TEA is.

2. Substantial activity and purely management activity of a TEA

58. All the parties agree that the typical activity of a TEA is to supply staff to a user or hirer undertaking.

59. Logically, that task requires a number of *preparatory activities* involving the selection and recruitment of staff, which the governments which have entered an appearance categorise as purely internal management activities. On the other hand, Team Power and the Commission contend that those preparatory activities form part of the substantial activities of a TEA and that, therefore, they define the typical activity of such undertakings.

60. In line with their respective propositions:

– The governments which have entered an appearance (32) argue that Team Power will usually carry on its activity in Bulgaria (the Member State where it is established) only if it places staff with undertakings established in that country;

– The Commission and Team Power submit that the pursuit on Bulgarian territory of the preparatory activities referred to above is sufficient to regard the TEA as usually carrying out its activity in that Member State.

61. The Court's case-law on this subject was broadly outlined in the context of disputes in which workers had been placed by a TEA (33) or posted by a construction undertaking. (34) To my mind, the contrast between the *typical activities* of both types of employer may be instructive for the purpose of defining the *substantial activities* of each one.

62. The typical activity of construction undertakings is the performance of physical building work. In order to perform that work, a number of preliminary tasks must be carried out (for example, the purchase of materials and the selection and hiring of workers) which, in themselves, require an organisational and administrative structure.

63. In particular, the selection and hiring of workers is, for construction undertakings, an *instrumental* purely internal management activity vis-à-vis its essential object. It is instrumental in the sense that construction undertakings need workers in order to carry out construction work but it is not the activity which defines them as construction undertakings.

64. The place where a construction undertaking carries out its substantial activity is, logically, the place where it constructs buildings. That is why the Court has held that such an undertaking cannot rely on the exception laid down in Article 12(1) of Regulation No 883/2004 when it sends workers to the territory of a different Member State (other than their Member State of establishment) 'in which it performs all its activities, with the exception of purely internal management activities'. (35)

65. The selection, recruitment and hiring of labour – which, I repeat, are instrumental as regards the defining activity of a construction undertaking – are the typical, inherent tasks of TEAs. (36) Whereas a construction undertaking carries out construction work, a TEA provides other undertakings with staff which it has previously selected and hired.

66. The selection and recruitment of workers are, therefore, part and parcel of the activity of placing (making available) workers. It is a continuum in which the time of placement, in the strict sense, and the procedure which enables the selection of the person whose work is made available are equally important. In the case of a TEA, the selection and recruitment of workers is as important as the activity of finding hirers to which to supply those workers.

67. Therefore, I agree with the Commission that, as far as TEAs are concerned, the condition laid down by Article 12(1) of Regulation No 883/2004 is satisfied where a TEA has a certain number of employees whose role is to select workers who will be supplied temporarily to hirers established in any Member State and not only, or not primarily, the State in which the TEA concerned is established.

68. Accordingly, it is necessary to differentiate between: (a) employees of a TEA who deal with the selection, recruitment and supply of staff to hirer undertakings; and (b) workers who are selected and recruited and who, while retaining a direct link with the TEA, are placed with hirer undertakings. The former carry out the typical activity of the TEA, while the latter are the object of the service supplied by the TEA.

69. Having accepted the existence of TEAs as legitimate providers of a service (the supply of workers on a short-term basis to other economic operators), (37) that service can display a transnational dimension and be covered by the freedom guaranteed by Article 56 TFEU. To that extent, unjustified restrictions should not be placed on it.

70. Without prejudice to the considerations I shall set out below regarding the fight against abuse and fraud in this sector, it must be recalled that 'the purpose of [Article 12(1) of Regulation No 883/2004] is, in particular, to promote freedom to provide services for the benefit of 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 for workers and also at encouraging economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings'. The activity of a TEA also fits into that context. (38)

71. In order to verify whether the activities of employees of a TEA who select, recruit and provide workers are carried out in the sending State, the national authorities can rely on some of the criteria laid down in the judgment in *FTS*, namely: (a) the registered office of the TEA; (b) the location of its administration; (c) the number of staff working in the TEA's Member State of establishment and in other Member States; and (d) the place where the TEA recruits the workers whose labour it offers.

72. Those are not all the criteria referred to in the judgment in *FTS*: the criteria relating to the place where contracts between a TEA and hirers are concluded, the law applicable to those contracts, and the turnover realised in the sending State and other Member States are not included.

73. I believe that those three criteria do not confirm that there is a genuine link between a TEA and the sending State: that link depends, rather, on whether the employees who carry out the typical activity of the TEA select, recruit and provide workers in that Member State.

74. In particular, the turnover criterion could be used to confirm the place where workers are made available but not to identify the place where the selection and recruitment of posted workers is carried out, which, I stress, is the *hard core* of the typical activity of a TEA.

75. In order to determine whether there is a genuine link between the TEA and the sending State in which it is established, the really important criteria are those laid down in the judgment in *FTS*, to which I referred in point 71. The rest are not unimportant: they may be important but not for the purpose of establishing that link but rather for the purpose of preventing abuse or circumvention of the law.

76. In summary, if the *substantial* activity of the TEA (that is to say, the selection of workers for placement with hirer undertakings) is carried out in the sending State, where the TEA has staff and an organisational structure which satisfy the criteria laid down in the judgment in *FTS*, the greater or lesser proportion of workers which the TEA posts to another Member State in relation to those which, as the case may be, it assigns to undertakings established in Bulgaria will be irrelevant.

C. Abuse and fraud

77. In the words of the Court, 'the principle of prohibition of fraud and abuse of rights … is a general principle of EU law which individuals must comply with', since 'the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law'. (39)

78. The provision of a service the object of which is to supply workers to other undertakings is 'a particularly sensitive matter from the occupational and social point of view', since, 'owing to the special nature of the employment relationships inherent in that kind of activity, pursuit of such a business directly affects both relations on the labour market and the lawful interests of the workforce concerned.' (40)

79. Therefore, it is necessary to prevent TEAs from fraudulently exercising the option made available to them in Article 12(1) of Regulation No 883/2004. That option must not undermine the right of posted workers to benefit under the social security scheme in force in the Member State of employment, which is the general rule. (41)

80. That would occur where the creation of a TEA '[made] it easier for employers to be able to resort to purely artificial arrangements in order to exploit the EU legislation with the sole aim of obtaining an advantage from the differences that exist between the national rules [on social security]'. (42) In those circumstances, a TEA could be described as a mere 'letter box' or 'brass plate' company, (43) created to conceal a transfer of workers within the same economic operator which uses the TEA and, in so doing, avoids the payment of wages and more onerous social security costs in the State of employment.

81. The aim of preventing abuses in the conclusion of temporary employment contracts 'cannot justify an almost general exclusion of that form of work, such as a prohibition on temporary work across an entire economic sector … in the absence of any other objective justification. … a measure that is intended to prevent abuses in the exercise of a right cannot be regarded as the equivalent of a renegotiation of the right in question.' (44)

82. It is necessary, therefore, to strike a balance between the legitimate use by a TEA of its freedom to provide services to user undertakings established in other Member States (by temporarily providing them with workers) and the fight against fraud and abuse of rights. (45)

83. It should also be recalled that, according to the Court, 'the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse'. (46)

84. As a general rule, therefore, a TEA may be established in another Member State which has legislation that is considered more favourable so that the TEA can post its workers temporarily from there

to undertakings established in other States in the context of a supply of services.

85. For those purposes, the competent authorities have to establish, first, that the administrative structure of the TEA is sufficient and that it selects and recruits workers using its own staff in the territory of the Member State where it carries on its business. The competent authorities must also confirm that the TEA satisfies all the conditions laid down by the legislation of that State.

86. Second, the competent authorities must satisfy themselves that there is a genuine and existing direct link between the TEA and the worker it provides to the hirer. (47) That worker must, 'just before being posted, … have been already subject to the [social security] legislation of the Member State in which his employer is established.' (48)

87. Third, the competent authorities can take as an indication of possible fraudulent intent the fact that a TEA supplies workers only to one or a few undertakings in particular, which are situated in a single State of employment, other than the TEA's State of establishment, and with which the TEA has significant links (in terms of shareholders or similar).

88. Admittedly, the demand for temporary agency workers is not uniform throughout the EU. (49) Accordingly, not all TEAs can be expected to offer their services in all the Member States. Geographical proximity can therefore be a significant factor for defining the limits of the market in which a TEA decides to pursue its business.

89. In this case, Team Power submits that the workforce it makes available to potential hirers consists of Bulgarian workers who are resident in Bulgaria and who are, 'above all', posted to undertakings established in Germany. (50) Team Power argues, however, that the reason it does not post workers to other Member States is, essentially, due to the practices of the Bulgarian authorities which gave rise to the main proceedings. (51)

90. It will be for the referring court, should it consider it necessary, to examine this point, in addition to all the factual circumstances which will enable the elimination of any suspicion that fraud or abuse are behind the intention to rely on the exception laid down in Article 12(1) of Regulation No 883/2004. (52)

91. Having ruled out abuse and fraudulent intent, there is nothing to preclude a TEA established in Bulgaria from benefitting from the exception at issue in order to provide its services to hirers in other Member States, even if it does not provide a significant proportion of those services to undertakings established in Bulgaria.

VI. Conclusion

92. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the Administrativen sad – Varna (Administrative Court, Varna, Bulgaria):

'Article 14(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1) is to be interpreted as meaning that, unless the existence of fraud or abuse is established, in order to consider that an undertaking engaged in providing temporary staff normally carries out its activities in the Member State in which it is established, it is not necessary that a substantial part of its employee placement activity is performed for hirer undertakings established in the same Member State.'

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1 Original language: Spanish.

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2 Regulation of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4).

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3 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; corrigendum in OJ 2004 L 200, p. 1), also amended by Regulation No 465/2012. Regulation No 883/2004 repealed, with effect from 1 May 2010, Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ 1971 L 149, p. 2), last amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council (OJ 2004 L 100, p. 1).

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4 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). The version of Article 1 transcribed includes the amendments inserted by Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ 2018 L 173, p. 16).

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5 Directive of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

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6 Directive of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) (OJ 2014 L 159, p. 11).

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7 The permit was issued by the Agentur für Arbeit Düsseldorf (Employment Office, Düsseldorf) of the Bundesagentur für Arbeit (Federal Employment Agency, Germany).

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8 Case C-202/97, EU:C:2000:75; ‘judgment in *FTS*’.

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9 Where appropriate, I shall use the terms ‘sending State’ and ‘State of employment’ to denote, respectively, the State in which the TEA is established and the State in which the user undertaking employs the worker posted there. That terminology is commonplace in decisions of the Administrative Commission for the Coordination of Social Security Systems, created under Article 71 of Regulation No 883/2004 (‘the Administrative Commission’).

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10 Decision No A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State (OJ 2010 C 106, p. 5; ‘Decision A2 of 2009’).

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11 It must check, for example, whether Team Power only posts workers to one or two German undertakings; who founded it and what links it has with those German undertakings; and how many persons it has at its disposal to carry on its activity in Bulgaria.

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12 Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland: (https://ec.europa.eu/social/main.jsp?catId= 471&langId=fr&) ('Practical guide').

13 Decision concerning the interpretation of Articles 14(1) and 14b(1) of Council Regulation (EEC) No 1408/71 on the legislation applicable to posted workers (OJ 1996 L 241, p. 28; 'Decision No 162 of 1996').

14 Opinion of Advocate General Jacobs (C-202/97, EU:C:1999:33).

15 Case C-404/98, EU:C:2000:607; 'judgment in *Plum*'.

16 Judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63 ('judgment in *Altun*'), paragraph 29 and the case-law cited.

17 Provided that the anticipated duration of such work does not exceed 24 months and that the posted person is not sent to replace another worker.

18 A *direct link* does not necessarily mean a contract of employment, according to the judgment of 17 November 2016, *Betriebsrat der Ruhrlandklinik*, C-216/15, EU:C:2016:883, paragraph 36: 'To restrict the concept of "worker" as referred to in Directive 2008/104 to persons falling within the scope of that concept under national law, in particular, to those who have a contract of employment with the temporary-work agency, is liable to jeopardise the attainment of those objectives and, therefore, to undermine the effectiveness of that directive by inordinately and unjustifiably restricting the scope of that directive.'

19 For example, judgment in *Altun*, paragraph 34, and the case-law cited.

20 However, the matter is not undisputed in the main proceedings, in which the administrative authority has questioned whether there is a direct link between Team Power and the worker.

21 Case 35/70, EU:C:1970:120; 'judgment in *Manpower*'. When interpreting a distant predecessor of Article 12(1) of Regulation No 883/2004 (specifically, Article 13(1)(a) of Regulation No 3 of the Council of the EEC of 25 September 1958 as amended by Regulation No 24/64 of the Council of the EEC of 10 March 1964 (OJ 1964 47, p. 746)), the judgment in *Manpower* found that the reference in that provision 'to the establishment situated in the State where the undertaking is established and to which the worker is attached is meant essentially to limit the applicability of that provision to those workers engaged by *undertakings normally pursuing their activity* in the territory of the State in which they are established' (judgment in *Manpower*, paragraph 16; italics added).

22 Judgment in *FTS*, paragraphs 40, 42 and 45 and the Judgment in *Plum*, paragraph 21.

23 Judgment in *Plum*, paragraph 22.

24 Italics added.

25 Judgment in *FTS*, paragraph 42.

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26 Judgment in *FTS*, paragraph 43.

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27 See point 11 of this Opinion above. Paragraph 43 of the judgment in *FTS* refers to ‘the place where the undertaking has its seat and administration, the number of administrative staff working in the Member State in which it is established and in the other Member State, the place where posted workers are recruited and the place where the majority of contracts with clients are concluded, the law applicable to the employment contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand, and the turnover during an appropriately typical period in each Member State concerned.’

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28 OJ 1986 C 141, p. 6; ‘Decision No 128 of 1985’. The same course is followed by point 2(b)(ii), first indent, of Decision No 162 of 1996.

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29 For example, judgment of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 110 and the case-law cited. The same applies to the Practical guide: judgment of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381, paragraph 41.

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30 It may be significant that, following the judgment in *FTS*, the requirement was not then included in Decision No 181 of 13 December 2000 concerning the interpretation of Articles 14(1), 14a(1) and 14b(1) and (2) of Council Regulation (EEC) No 1408/71 on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State (OJ 2001 L 329, p. 73).

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31 The judgment in *FTS* stresses that ‘the choice of criteria must be adapted to each specific case’ (paragraph 43).

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32 For example, the Finnish Government, which contends that the supply of staff and the maintenance of human resources management in the sending State are not sufficient to demonstrate significant activity in that State. When examining whether a TEA carries on significant activities in the sending State, there must be a requirement that it supplies staff to hirer undertakings established in that State.

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33 Inter alia, judgment in *FTS*; see also judgment of 10 February 2011, *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64.

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34 Judgments in *Manpower*, *Plum* and *Altun*.

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35 Judgment in *Plum*, paragraph 22. No italics in the original.

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36 The Finnish Government maintains that, even if it is accepted that the provision of staff is an inherent activity of TEAs, that is an essential task of any undertaking, from which it follows that the only important criterion can be the place where the undertakings to which a TEA provides its services operate. That approach does not take into consideration the fact that, although all undertakings recruit staff in order to carry on their business, what characterises a TEA is, specifically, the fact that it does so for the purpose of placing such staff with other undertakings. What is, for the latter undertakings, ancillary to their typical activity is, for a TEA, its

main activity. That is why it is important as a criterion for determining the place where a TEA pursues that main activity.

37 There has been resistance to the acceptance of TEAs in EU law by Member States whose legislation previously prohibited or even criminalised the activity of worker placement as the unlawful provision of workers.

38 Judgment of 25 October 2018, *Walltopia*, C-451/17, EU:C:2018:861, paragraph 38. To the same effect, see the judgment in *FTS*, paragraph 28 and the case-law cited.

39 Judgment in *Altun*, paragraph 49 and the case-law cited.

40 Judgment of 17 December 1981, *Webb*, 279/80, EU:C:1981:314, paragraph 18. That explains the intention of Directive 2008/104, referred to in recital 12 thereof, to establish ‘a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.’

41 In order to benefit under that social security scheme, workers who are going to be posted must, logically, first have a contract of employment in their State of residence. TEAs can widen the opportunities for new workers or those seeking better conditions to access the labour market (albeit in another Member State and on a temporary basis), provided that TEAs comply with the rules governing their business. That is the purport of Article 2 of Directive 2008/104, pursuant to which TEAs must ‘[contribute] effectively to the creation of jobs and to the development of flexible forms of working.’

42 Judgment of 16 July 2020, *AFMB*, C-610/18, EU:C:2020:565, paragraph 69.

43 The Court used those words in the judgment of 28 June 2007, *Planzer Luxembourg*, C-73/06, EU:C:2007:397, paragraph 62, to refer to undertakings with a merely fictitious presence.

44 Opinion of Advocate General Szpunar in *AKT*, C-533/13, EU:C:2014:2392, point 122.

45 Contrary to the Estonian Government’s claim, the view I am putting forward does not amount to a ‘broad interpretation’ of the exception at issue, which creates a greater risk of fraud and abuse. There is no need to *broaden* for TEAs an interpretation of Article 14(2) of Regulation No 987/2009 which, in itself, does not encompass them, but rather to apply to TEAs a provision whose interpretation includes them naturally.

46 Judgments of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 27; of 30 September 2003, *Inspire Art*, C-167/01, EU:C:2003:512, paragraph 96; and of 25 October 2017, *Polbud – Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 40.

47 See points 42 and 43 of this Opinion, and footnotes 18, 19 and 20.

48 Judgment of 25 October 2018, *Walltopia*, C-451/17, EU:C:2018:861, paragraph 35.

49 According to data supplied by Team Power, the difference ranges from 5.9% of workers being temporary agency workers in Slovenia to 0.2% in Greece (paragraph 11.2 of its written observations).

50 Paragraphs 2.6 and 2.7 of Team Power's written observations.

51 Loc. ult. cit. The Bulgarian Government maintains that the supply of workers to undertakings established in Germany represents 'Team Power's usual mode of working'.

52 At the hearing, the Bulgarian Government ruled out the existence of fraud or abuse in Team Power's conduct. It pointed out that, in its view, the dispute does not concern a suspicion of that kind but rather solely the interpretation, in objective terms, of the conditions for application of Article 12(1) of Regulation No 883/2004.