Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

11 July 2018 (*)

(Failure of a Member State to fulfil obligations — Social security — Regulation (EC) No 883/2004 — Articles 11 and 12 and Article 76(6) — Regulation (EC) No 987/2009 — Article 5 — Posting of workers — Affiliation to a social security scheme — Combating fraud — A1 Certificate — Refusal of recognition by the Member State where the professional activity is carried out in the event of fraud or abuse)

In Case C?356/15,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 13 July 2015,

European Commission, represented by D. Martin, acting as Agent, with an address for service in Luxembourg,

applicant,

supported by:

Ireland, represented by E. Creedon, M. Browne, G. Hodge and A. Joyce, acting as Agents, and by C. Toland, Barrister-at-Law,

intervener,

v

Kingdom of Belgium, represented by L. Van den Broeck and M. Jacobs, acting as Agents, and by P. Paepe, avocat,

defendant,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits, A. Borg Barthet, M. Berger (Rapporteur) and F. Biltgen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its action, the European Commission asks the Court to declare that by adopting Articles 23 and 24 of the loi-programme (Programme Law) of 27 December 2012 (*Moniteur belge* of 31 December 2012, p. 88860; 'the Programme Law'), the Kingdom of Belgium has failed to fulfil its obligations under Articles 11 and 12 and Article 76(6) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4) ('Regulation No 883/2004'), under Article 5 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 (OJ 2009 L 284, p. 1), and under Decision No A1 of the Administrative Commission for the Coordination of social security systems 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 No 883/2004 (OJ 2010 C 106, p. 1) ('Decision No A1').

Legal context

EU law

Regulation No 883/2004

2 Recitals 5, 8, 15 and 17 of Regulation No 883/2004 state:

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

...

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

...

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

...

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

3 Article 11(1) and (3) of Regulation No 883/2004, that article being headed 'General rules', provides as follows:

'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 Article 12(1) of Regulation No 883/2004, that article being headed 'Special rules', states:

'A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person.'

5 Article 76(6) of Regulation No 883/2004, that article being headed 'Cooperation', provides as follows:

'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.'

Regulation No 987/2009

6 Recital 2 of Regulation No 987/2009 states:

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

7 Article 5 of Regulation No 987/2009, that article being headed 'Legal value of documents and supporting evidence issued in another Member State', 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, in so far as this is possible, at the request of the competent institution, proceed to the necessary verification of this information or document.

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

8 Article 6(1) of Regulation No 987/2009, that article being headed 'Provisional application of legislation and provisional granting of benefits', states:

'Unless otherwise provided for in the implementing Regulation, where there is a difference of views between the institutions or authorities of two or more Member States concerning the determination of the applicable legislation, the person concerned shall be made provisionally subject to the legislation of one of those Member States, the order of priority being determined as follows:

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

...'

9 Decision No A1 lays down a dialogue and conciliation procedure where there is doubt concerning the validity of a document or the accuracy of supporting evidence or where there is a difference of views between Member States concerning the determination of the applicable legislation or the institution that should provide the benefit.

Belgian law

10 Chapter 1 of Title 3 of the Programme Law, that title being headed 'Social fraud and the correct application of the law', contains provisions concerning the fight against fraudulent postings. Section 2 of that chapter, that section being headed 'Abuse of rights', comprises Articles 22 to 25 of the Programme Law.

11 Article 22 of the Programme Law provides:

'For the purposes of this Chapter:

1. "European regulations on coordination" means:

(a) Title II of 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, English Special Edition, 1971 (II), p. 416)];

(b) Title III of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing [Regulation No 1408/71 (OJ English Special Edition, 1972 (I), p. 160)];

(c) Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality [(OJ 2003 L 124, p. 1)];

(d) Title II of [Regulation No 883/2004];

(e) Title II of [Regulation No 987/2009];

(f) Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24

November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality [(OJ 2010 L 344, p. 1)];

2. “Practical Guide” means: the practical guide for determining the legislation applicable to workers in the European Union, the European Economic Area and in Switzerland, drawn up by the Administrative Commission;

3. “Administrative Commission” means: the Administrative Commission on the Coordination of social security systems;

...’

12 Article 23 of the Programme Law states:

‘There shall be an abuse of the rules for determining the applicable legislation in the European regulations on coordination where the provisions of the regulations on coordination are applied to an employed or self-employed person in a situation with respect to which the conditions laid down in the regulations and specified in the Practical Guide or in the Administrative Commission’s decisions are not complied with in order to circumvent the Belgian social security legislation which should have applied in that situation if the aforementioned regulatory and administrative provisions had been complied with properly.’

13 Under Article 24 of the Programme Law:

‘1. Where the national court, a public social security institution or a social security inspector finds that there is an abuse under this Chapter, the employed or self-employed person concerned shall be subject to Belgian social security legislation if such legislation would have applied under the regulatory and administrative provisions referred to in Article 22.

2. Belgian social security legislation shall apply from the first day on which the conditions for its application are met, bearing in mind the limitation periods laid down in the second sentence of paragraph 1 of Article 42 of the Law of 27 June 1969 amending the Decree-Law of 28 December 1944 on social security for workers, and in Article 16 of Royal Decree No 38 of 27 July 1967 establishing the social security scheme for self-employed persons.’

14 Article 25 of the Programme Law provides:

‘The institution or the inspector invoking the abuse referred to in Article 23 shall provide evidence of such abuse.’

The pre-litigation procedure

15 On 21 November 2013, the Commission sent the Kingdom of Belgium a letter of formal notice relating to the incompatibility of Articles 23 and 24 of the Programme Law with Articles 11 and 12 and Article 76(6) of Regulation No 883/2004, Article 5 of Regulation No 987/2009 and Decision No A1.

16 In that letter, the Commission objected to the adoption by the Kingdom of Belgium of Articles 23 and 24 of the Programme Law, which entitle the competent national authorities to require, unilaterally and without following the dialogue and conciliation procedure set out in the regulations in question, that the national legislation on social security matters is to apply to posted workers who are already subject to a social security scheme in the Member State in which their employer normally carries out its activities, on the ground that the issuing by the social security body of that

Member State of a document showing that such workers are subject to the social security scheme of that Member State (‘A1 certificate’) is an abuse of rights pursuant to Regulations No 883/2004 and No 987/2009.

17 By letter of 20 January 2014, the Kingdom of Belgium replied to the letter of formal notice dated 21 November 2013, invoking, inter alia, the maxim *fraus omnia corrumpit* and the prohibition of abuse of rights as general principles of law that allow Member States to adopt national provisions that derogate from secondary EU legislation.

18 In addition, the Belgian Government claimed that Regulations No 883/2004 and No 987/2009 allowed Member States to adopt unilateral measures such as those provided for in Articles 23 and 24 of the Programme Law when they consider that fraud or an abuse of rights will occur as a result of applying those regulations.

19 On 25 September 2014, the Commission sent a reasoned opinion to the Kingdom of Belgium, which replied by letter dated 24 November 2014, informing the Commission, inter alia, of the temporary suspension of the measures laid down in Articles 23 and 24 of the Programme Law on account of the pending infringement procedure.

20 As it was not satisfied with that reply, the Commission brought the present action.

21 By decision of the President of the Court of 10 November 2015, Ireland was given leave to intervene in support of the form of order sought by the Commission.

The action

Admissibility of the action

Admissibility of the action as a whole

– *Arguments of the parties*

22 The Kingdom of Belgium claims, primarily, that the action is inadmissible as a whole, on the ground that the Commission has failed to establish the existence of the alleged infringement and, in particular, has failed to prove that it was impossible to interpret and apply the provisions of the Programme Law at issue in accordance with the provisions of EU law, when the Kingdom of Belgium mentioned that possibility in its reply to the reasoned opinion.

23 Furthermore, according to the Kingdom of Belgium, the Commission’s assertion that Article 24 of the Programme Law expressly contradicts Articles 11 and 12 and Article 76(6) of Regulation No 883/2004 and Article 5 of Regulation No 987/2009 is not substantiated.

24 The Commission contends that the plea of inadmissibility should be dismissed.

– *Findings of the Court*

25 It is true that the Court has consistently held that it is for the Commission to prove the existence of the alleged infringement. Indeed, the Commission has to provide the Court with all the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (judgment of 4 September 2014, *Commission* v *France*, C?237/12, EU:C:2014:2152, paragraph 32).

26 However, the question whether the Commission has demonstrated the existence of the alleged infringement is to be considered in relation to the substance of the action, not its

admissibility (judgment of 4 June 2015, *Commission* v *Poland*, C?678/13, not published, EU:C:2015:358, paragraph 18 and the case-law cited).

27 The Kingdom of Belgium's plea alleging that the action is inadmissible as a whole is therefore unfounded and must be dismissed.

Admissibility of the complaints alleging breach of Article 11 of Regulation No 883/2004, Article 5 of Regulation No 987/2009 and Decision No A1

– *Arguments of the parties*

28 In the alternative, the Kingdom of Belgium submits, in the first place, that the complaint alleging breach of Article 11 of Regulation No 883/2004 is not sufficiently precise as it is not clear from the application whether the complaint relates to Article 11 as a whole or solely to paragraph 1 thereof. In any event, according to the Kingdom of Belgium, the Commission has failed to put forward specific, precise and coherent arguments relating to Article 11(1).

29 In the second place, the Kingdom of Belgium claims that the arguments set out in the application in support of the complaint alleging breach of Article 5 of Regulation No 987/2009 concern only paragraph 1 of that article. The Kingdom of Belgium contends that the Commission belatedly inferred, in its reply, a breach of Article 5(2) to (4) of Regulation No 987/2009 from the breach of Article 76(6) of Regulation No 883/2004.

30 In the third place, with regard to the complaint alleging breach of Decision No A1, the Kingdom of Belgium submits that the Commission, in its application, merely mentioned that decision without stating the grounds for an alleged breach thereof.

31 The Commission contends that the plea of inadmissibility should be dismissed.

– *Findings of the Court*

32 It must be recalled that in accordance with Article 120(c) of the Rules of Procedure of the Court and the settled case-law relating to that provision, an application initiating proceedings must state clearly and precisely the subject matter of the proceedings and set out a summary of the pleas in law relied on, so as to enable the defendant to prepare a defence and the Court to rule on the application. It follows that the essential points of law and of fact on which such an action is based must be indicated coherently and intelligibly in the application itself and that the forms of order must be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on one of the heads of claim (see, to that effect, judgment of 2 June 2016, *Commission* v *Netherlands*, C?233/14, EU:C:2016:396, paragraphs 32 and 34 and the case-law cited).

33 The Court has also held that, where an action is brought under Article 258 TFEU, the application must set out the complaints coherently and precisely, so that the Member State and the Court can know exactly the scope of the alleged infringement of EU law, a condition that must be satisfied if the Member State is to be able to present an effective defence and the Court to determine whether there has been a breach of obligations, as alleged (judgment of 2 June 2016, *Commission* v *Netherlands*, C?233/14, EU:C:2016:396, paragraph 33 and the case-law cited).

34 In particular, the Commission's action must contain a coherent and detailed statement of the reasons which have led it to conclude that the Member State in question has failed to fulfil one of its obligations under the Treaties (judgment of 2 June 2016, *Commission* v *Netherlands*, C?233/14, EU:C:2016:396, paragraph 35 and the case-law cited).

35 In the present case, the Commission's application meets the requirements of the case-law

referred to in the preceding paragraphs.

36 With regard, in the first place, to the admissibility of the complaint alleging breach of Article 11 of Regulation No 883/2004, it is unequivocally clear from the form of order sought by the applicant and the complaints set out in the application that the subject matter of the Commission's action is the incompatibility of Articles 23 and 24 of the Programme Law with various provisions of EU law on the posting of workers. The position of posted employees is covered by Article 12(1) of Regulation No 883/2004, which applies, for that category of employees, the underlying principle of the regulation, namely that persons who fall within the scope of that regulation are to be subject to the legislation of a single Member State only. That principle is enshrined in Article 11(1) of Regulation No 883/2004. The position of posted workers is not affected by Article 11(2) to (5) of that regulation.

37 While it is true that, in the context of its action, the Commission referred in general terms to Article 11 of Regulation No 883/2004, the Court finds that the action contains a clear summary of the points of law and of fact on which it is based. It is apparent from the pre-litigation procedure, in particular the reasoned opinion sent by the Commission to the Kingdom of Belgium, the description of the legal framework and the statement of reasons for the application that the infringement alleged by the Commission, in so far as it refers to that article, relates only to paragraph 1 thereof.

38 Furthermore, it can be seen from the pleadings lodged by the Kingdom of Belgium that the latter replied to the complaint alleging breach of Article 11(1) of Regulation No 883/2004. Therefore, it is clear that the Kingdom of Belgium could not reasonably have been misled about the fact that the Commission's complaints concerned Article 11(1), and it was able to reply to those complaints effectively.

39 With regard, in the second place, to the admissibility of the complaint alleging breach of Article 5 of Regulation No 987/2009, it should be borne in mind that Article 76(6) of Regulation No 883/2004 imposes a general duty on Member States to cooperate in the event of difficulties in the interpretation or application of the latter, including by calling on the Administrative Commission to intervene.

40 Article 5(1) of Regulation No 987/2009 provides that documents issued by the institution of a Member State 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 those documents have been issued, are to be accepted by the institutions of the other Member States. Paragraphs 2 to 4 of Article 5 of Regulation No 987/2009 describe the dialogue and conciliation procedure between the institutions concerned that is to be followed by the Member State with doubts about the validity of those documents or the accuracy of the facts on which the particulars contained therein are based. Those provisions thus define the content of the general duty of cooperation between the competent institutions of the Member States laid down in Article 76(6) of Regulation No 883/2004.

41 The Court notes in that regard that the Commission, in paragraph 10 of its application, recalled the substance of Article 5(1) of Regulation No 987/2009 and of Article 76(6) of Regulation No 883/2004. In addition, it is unequivocally clear from the description of the legal framework and the statement of reasons for the application that the Kingdom of Belgium is alleged to have failed to fulfil its obligation to observe the principles laid down in Article 76(6) of Regulation No 883/2004, as further defined in Article 5 of Regulation No 987/2009. Lastly, it is apparent both from the documents exchanged during the pre-litigation procedure, in particular the reasoned opinion sent by the Commission to the Kingdom of Belgium, and from the Commission's application, that the Commission claims that that Member State has failed to fulfil its obligation under Article 5 of

Regulation No 987/2009 as a whole.

42 Therefore, it is clear that (a) the Kingdom of Belgium, which could not reasonably have been misled about the subject matter of the Commission's complaints in so far as they related to Article 5 of Regulation No 987/2009 as a whole, was able to reply to those complaints effectively and (b) the argument concerning the connection between that provision and Article 76(6) of Regulation No 883/2004 was not raised belatedly.

43 With regard, in the third place, to the admissibility of the complaint alleging breach of Decision No A1, the Court notes that, in paragraph 11 of its application, the Commission, quoting the Court's case-law on A1 certificates, describes the subject matter and scope of that complaint. Moreover, it is apparent from the examination of all the arguments put forward in that application, in particular paragraphs 10 to 12 thereof, that the Commission has stated the reasons on which it based its allegation that the Kingdom of Belgium has infringed the procedures laid down in Decision No A1.

44 It follows from the foregoing that the argument raised by the Kingdom of Belgium that the complaints alleging breach of Article 11 of Regulation No 883/2004, Article 5 of Regulation No 987/2009 and Decision No A1 are inadmissible is not founded and must be dismissed.

45 The action is therefore admissible.

Substance

Arguments of the parties

46 In its application the Commission notes, as a preliminary point, that Article 11 of Regulation No 883/2004 establishes the basic principle that the persons to whom that regulation applies are subject, as a rule, to the legislation of a single Member State. With regard to posted workers, the Commission points out that, under the rule set out in Article 12 of Regulation No 883/2004, they continue to be subject to the legislation of the Member State in which they normally carry out their activity and that that Member State is to provide those workers with an A1 certificate designed to show that they are insured in that Member State.

47 In that respect, the Commission observes that Article 5(1) of Regulation No 987/2009 provides that documents issued by the competent authority of a Member State must 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.

48 The Commission adds that, in the event of difficulties in the interpretation or application of Regulation No 883/2004 which could jeopardise the rights of the persons covered by it, Article 76 of the regulation provides that the competent institution of the Member State where the persons concerned are posted is to contact the competent institution of the Member State from which they came and, if a solution cannot be found within a reasonable period, it may call on the Administrative Commission to intervene.

49 In addition, the Commission claims that the Court has confirmed, in its judgment of 26 January 2006, *Herbosch Kiere* (C?2/05, EU:C:2006:69, paragraphs 24 and 25), that in so far as an A1 certificate establishes a presumption that posted workers are properly affiliated to the social security scheme of the Member State in which the undertaking that posted those workers is established, that certificate is binding on the competent institution of the Member State to which those workers are posted and necessarily implies that the social security scheme of the latter Member State cannot apply.

50 According to the Commission, the effect of this case-law is that the adoption of Articles 23 and 24 of the Programme Law is contrary to Articles 11, 12 and 76 of Regulation No 883/2004 and Article 5(1) of Regulation No 987/2009, as interpreted by the Court.

51 With regard to the Kingdom of Belgium's argument put forward in the pre-litigation procedure that, on account of the requirements stemming from the maxim *fraus omnia corrumpit* and the general principle of prohibition of abuse of rights, that Member State is obliged to adopt those national provisions, the Commission submits that, under the Court's case-law, Member States are subject to significant constraints when abuse or fraudulent conduct is suspected. Thus, the Commission argues that, in order to deny citizens of the Union the benefit of EU law provisions, the courts of a Member State must not only take account of any abuse or fraudulent conduct on a case-by-case basis, but also rely on objective evidence and assess such abuse or fraudulent conduct in the light of the objectives pursued by the relevant provisions of EU law.

52 As it is, the Commission takes the view that the provisions mentioned in paragraph 50 of this judgment give precise and detailed rules for the cooperation procedure where abuse or fraudulent conduct is suspected, with the result that there is no basis under the maxim *fraus omnia corrumpit* for a derogation from rules of EU law.

53 Furthermore, according to the Commission, the general principle of legal certainty requires that, for as long as it has not been withdrawn or declared to be invalid by the authorities of the Member State in which it was issued, an A1 certificate binds the social security institutions and the courts of the Member State to which the workers concerned are posted, in so far as it shows that those workers are covered by the social security scheme of the Member State in which their undertaking is established. The Commission takes the view that the unilateral adoption of Articles 23 and 24 of the Programme Law is in breach of that principle and of the principle of sincere cooperation between the Member States enshrined in Article 4(3) TEU.

54 The Commission rejects, on the same grounds, the Kingdom of Belgium's argument that the mere fact that Regulations No 883/2004 and No 987/2009 establish specific dialogue and conciliation procedures where fraud or abuse is suspected cannot preclude Member States from using other means to combat such fraud or abuse.

55 Ireland, which intervened in support of the Commission, states, inter alia, that those regulations establish a system for the determination of the applicable legislation that observes the principle of legal certainty and is based on the rule that the legislation of a single Member State only is to apply and on the recognition of A1 certificates. Ireland also points out that a dispute resolution system is provided for.

56 With regard to the principle *fraus omniacorrumpit*, Ireland submits that, unless the principle of legal certainty is to be infringed, that general principle of EU law cannot be allowed to override express and unambiguous provisions in the absence of a claim that those provisions are invalid.

57 In its reply, the Kingdom of Belgium states, as a preliminary point, that the notion of 'abuse

of the rules for determining the applicable legislation in the European regulations on coordination', set out in Article 23 of the Programme Law, includes a factual element and one of intent.

58 By way of example, the following, inter alia, can be characterised as 'fraud' according to the Kingdom of Belgium: forged A1 certificates, the posting of Belgian residents at the end of the period during which they are subject to Belgian social security, continuous postings extending beyond the maximum duration of 24 months as well as the complete absence of any direct link between the posted worker and his or her employer and the situations described in the Practical Guide referred to in Article 22 of the Programme Law.

59 The Kingdom of Belgium submits that in such cases, it is necessary under Article 23 of the Programme Law to prove intent 'to circumvent the Belgian social security legislation which should have applied in that situation if the ... regulatory and administrative provisions had been complied with properly'. By contrast, cases of social optimisation as well as cases in which the A1 certificate contains no more than mere clerical errors fall outside the scope of that article.

60 The Kingdom of Belgium notes, moreover, that proof of abuse within the meaning of Article 24(1) of the Programme Law can be adduced only after objective factors have been examined on a case-by-case basis.

61 The Kingdom of Belgium thus submits that Articles 23 and 24 of the Programme Law only apply in the rare situations where the competent Belgian authorities or courts are able to establish a case of fraud that has resulted in the issuing of an A1 certificate that fails to comply with the provisions of Regulations No 883/2004 and No 987/2009, the intention being to avoid the application of the relevant national legislation under those provisions, namely Belgian legislation. Therefore, according to the Kingdom of Belgium, the Commission's assertion that the provisions in question are intended to set aside A1 certificates is incorrect.

62 The Kingdom of Belgium also maintains that effective means are needed to combat fraud given the unsatisfactory way in which dialogue operates between Member States with regard to the withdrawal of A1 certificates owing, in its view, to the fact that the existing framework is very basic and incomplete.

63 The Kingdom of Belgium goes on to recall the importance of the principle laid down in Article 11(3)(a) of Regulation No 883/2004 that the applicable legislation is that of the Member State of employment, and the exception to that principle for posted workers, and submits that any worker who fraudulently benefits from that exception is treated more favourably than other persons working on the territory of the Member State of employment.

64 The Kingdom of Belgium further claims that the application of the system of conflict of laws established by Regulation No 1408/71 and taken up again in Regulation No 883/2004 does not depend on the objective position of the worker in question. If applied fraudulently, Article 12 of Regulation No 883/2004 would have the effect of conferring on persons who are covered for social security purposes a right of option that infringes the mandatory nature of those conflict rules.

65 With regard to the principle *fraus omnia corrumpit*, the Kingdom of Belgium, relying on the Court's case-law and academic legal writing, submits that a Member State cannot take implementing measures for Regulations No 883/2004 and No 987/2009 that are in breach of that general principle of EU law. When faced with fraud, national authorities and courts should thus be authorised to take immediate corrective measures.

66 With regard, more specifically, to the complaint alleging breach of Decision No A1, the Kingdom of Belgium, referring to the judgment of 8 July 1992, *Knoch* (C?102/91, EU:C:1992:303),

contends that that decision is not a legislative act and that, consequently, non-compliance with that decision cannot be challenged in the context of infringement proceedings.

67 As to the complaint alleging breach of Articles 11 and 12 of Regulation No 883/2004, the Kingdom of Belgium claims that the Belgian authorities and courts are entitled, in the context of the proper application of Regulations No 883/2004 and No 987/2009, to refuse to grant 'the benefit of the advantage conferred' by Article 12 of Regulation No 883/2004 when the benefit is being relied on for fraudulent ends. In that respect, the Kingdom of Belgium rejects the Commission's argument that the existing dialogue and conciliation procedures and the binding force of A1 certificates preclude the principle *fraus omnia corrumpit* from applying.

68 With regard to a potential breach of the principle that the persons to whom Regulation No 883/2004 applies are subject to the legislation of a single Member State only, the Kingdom of Belgium maintains that it may be the case, in the event of fraud, that the institution that is allegedly competent never issued the A1 certificate, that the worker is not subject to the legislation of that Member State and that he or she, in fact, receives no protection in terms of social security. In such a scenario, there is no serious breach of the principle in question. In addition, according to the Kingdom of Belgium, fraudulent arrangements lead to unlawful competition and social dumping. The application of Articles 23 and 24 of the Programme Law thus guarantees '[the entitlement] to social security benefits and social advantages' within the meaning of Article 34(2) of the Charter of Fundamental Rights of the European Union.

69 The Kingdom of Belgium submits that even when the person concerned is already subject to the social security scheme of the Member State of the issuing institution, being made subject to Belgian social security does not result in the overlapping application of two such schemes since Article 6(1)(a) of Regulation No 987/2009 explicitly provides that, where two Member States disagree about the determination of the applicable legislation, the person concerned is to be made provisionally subject to the legislation of one of those Member States. In such a case, the application of the legislation of the Member State in which the person actually pursues an economic activity takes priority, provided that that activity is pursued in only one Member State.

70 With regard to the complaint alleging breach of Article 5(1) of Regulation No 987/2009, the Kingdom of Belgium considers that, since the application of the system of conflict of laws established by Regulation No 883/2004 depends on the objective position of the worker concerned, where the competent Belgian authorities and courts find that an A1 certificate has been forged or that fraudulent conduct has resulted in the issuing of such a document, the presumption that posted workers are properly affiliated must be reversed.

71 In addition, according to the Kingdom of Belgium, the Court has yet to take a position on the question whether such documents are absolutely binding on the social security institutions and the courts of the Member State to which the workers are posted, even if those documents were forged or obtained fraudulently. In its view, therefore, where it has been demonstrated that the A1 certificates were obtained fraudulently or that they were forged, such documents cannot benefit from the presumption that posted workers are properly affiliated and, consequently, they cannot bind the social security institutions and the courts of the Member State to which the persons concerned are posted.

72 Lastly, with regard to the complaint alleging breach of the dialogue and conciliation procedures laid down in Article 76(6) of Regulation No 883/2004 and Article 5 of Regulation No 987/2009, the Kingdom of Belgium disagrees with the Commission's assertion that the use of those procedures is the only instrument, and that there are no others, to deal with fraud, since the dialogue and conciliation procedures are not precluded from applying at the same time.

73 The Commission, in its reply, reiterates the complaints put forward in its application and maintains its claim that Articles 23 and 24 of the Programme Law are intended to set aside A1 certificates in the event of fraud since the application of those articles has the effect of changing the applicable legislation.

74 With regard to the general principle *fraus omnia corrumpit*, the Commission asserts that the Court has expressly held, in its judgment of 10 February 2000, *FTS* (C?202/97, EU:C:2000:75, paragraph 53), that Member States do not have the power unilaterally to decide that a document issued by the Member State from which the posted worker came is vitiated by fraud.

75 With regard to the complaint alleging breach of Article 11(1) and Article 12 of Regulation No 883/2004, the Commission submits that, contrary to the Kingdom of Belgium's assertions, Article 6(1)(a) of Regulation No 987/2009 applies where the applicable legislation has yet to be determined. The objective of that provision is to ensure transitional insurance for the persons concerned, not to impose a second compulsory insurance in breach of Article 11(1) and Article 12 of Regulation No 883/2004.

76 With regard to the complaint alleging breach of Article 76(6) of Regulation No 883/2004 and Article 5 of Regulation No 987/2009, the Commission explains that its action does not seek to preclude the Kingdom of Belgium from combating abuses or fraudulent conduct; rather, it seeks to ensure compliance with the procedures put in place by Regulations No 883/2004 and No 987/2009. In the Commission's opinion, by claiming, through the adoption of Articles 23 and 24 of the Programme Law, the right unilaterally to decide to make posted workers subject to Belgian legislation on the ground that its own social security inspectors and institutions have 'shown' or 'demonstrated' that there is a case of fraud, the Kingdom of Belgium has infringed those regulations, including the principle of sincere cooperation, which, as a general principle, continues to apply even when fraud or abuse is suspected.

77 Lastly, the Commission points out that Decision No A1 sets out detailed rules in respect of the dialogue and conciliation procedure introduced by Article 76 of Regulation No 883/2004 and Article 5 of Regulation No 987/2009. Also, Article 23 of the Programme Law states that that procedure is to be complied with. Nevertheless, according to the Commission, the unilateral right conferred on the Belgian institutions by that provision, in conjunction with Article 24 of the Programme Law, specifically entitles the Kingdom of Belgium to avoid complying with the detailed rules for that procedure, as set out in Decision No A1.

78 In its rejoinder, the Kingdom of Belgium disputes, inter alia, the Commission's understanding of Article 6(1) of Regulation No 987/2009. According to the Kingdom of Belgium, there is nothing in the wording of that provision to suggest that it is to apply only where the applicable legislation has yet to be determined. In its view, the provision is to apply where the institutions or authorities of two or more Member States disagree about the determination of the applicable legislation. As it is, if the competent authorities or courts wish to apply Articles 23 and 24 of the Programme Law, that is to say, in the rare cases where fraud has been demonstrated, there is, by definition, a disagreement about the applicable legislation.

Findings of the Court

79 With regard to the complaints alleging breach of Articles 11 and 12 and Article 76(6) of Regulation No 883/2004 and Article 5 of Regulation No 987/2009, the Court notes, as a preliminary point, that the provisions of Regulation No 883/2004 which determine the applicable legislation are intended to ensure, in particular, that the persons concerned are subject to the social security scheme of only one Member State in order to prevent more than one system of

national legislation from applying and to avoid the complications which may result from that situation. That principle is expressed, inter alia, in Article 11(1) of Regulation No 883/2004 (see, by analogy, judgments of 12 June 2012, *Hudzinski and Wawrzyniak*, C?611/10 and C?612/10, EU:C:2012:339, paragraph 41, and of 12 February 2015, *Bouman*, C?114/13, EU:C:2015:81, paragraph 33).

80 Article 12(1) of Regulation No 883/2004 provides that, under the conditions listed therein, the legislation applicable to a posted worker is that of the Member State in which the employer of that worker normally carries out its activity, not that of the Member State to which that person is posted.

81 The competent authorities of the Member State in which the employer normally carries out its activities provide the posted worker with an A1 certificate designed to show that the worker qualifies as an insured person in that Member State.

82 Article 5(1) of Regulation No 987/2009 states, with regard to the legal value of documents issued by the institution of a Member State showing the position of a person for the purposes of the application of Regulations No 883/2004 and No 987/2009, and of the supporting evidence on the basis of which those documents have been issued, that such documents 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.

83 Under Article 76(6) of Regulation No 883/2004, in the event of difficulties in the interpretation or application of the regulation which could jeopardise the rights of the persons covered by it, the institution of the competent Member State or of the Member State of residence of the person concerned is to contact the institution of the Member State concerned. If a solution cannot be found within a reasonable period, the authorities concerned may call on the Administrative Commission to intervene.

84 The Court notes that Article 12(1) of Regulation No 883/2004 reproduces, in essence, the content of Article 14(1)(a) of Regulation No 1408/71. However, since Regulation No 883/2004 maintains the rule that a posted worker is to be subject to the legislation of the State in which his or her employer normally carries out its activity and since the objective pursued by those regulations are identical, reference should be made, by analogy, to the Court’s case-law relating to Regulation No 1408/71.

85 In that case-law, the Court held that the competent institution of the Member State in which the employer normally carries out its activity declares in the A1 certificate that its own social security scheme will remain applicable to the posted workers for the duration of their posting. Thus, by virtue of the principle that workers are to be covered by only one social security system, the A1 certificate necessarily implies that the social security scheme of the Member State to which the worker is posted cannot apply (see, to that effect, judgments of 10 February 2000, *FTS*, C?202/97, EU:C:2000:75, paragraph 49, and of 26 January 2006, *Herbosch Kiere*, C?2/05, EU:C:2006:69, paragraph 21).

86 The principle of sincere cooperation laid down in Article 4(3) TEU and the objectives pursued by Article 12(1) of Regulation No 883/2004 and Article 5(1) of Regulation No 987/2009 would be thwarted if the Member State to which workers are posted could adopt legislation that allowed its own institutions to consider unilaterally that they are not bound by the particulars contained in the certificate and to make those workers subject to its own social security scheme (see, to that effect, judgments of 10 February 2000, *FTS*, C?202/97, EU:C:2000:75, paragraph 52; of 26 January 2006, *Herbosch Kiere*, C?2/05, EU:C:2006:69, paragraph 23; and of 6 February 2018, *Altun and Others*, C?359/16, EU:C:2018:63, paragraph 38).

87 Consequently, inasmuch as an A1 certificate establishes a presumption that posted workers are properly affiliated to the social security scheme of the Member State in which the undertaking which posted those workers is established, such a certificate is binding, as a rule, on the competent institution of the Member State to which those workers are posted (see, to that effect, judgments of 10 February 2000, *FTS*, C?202/97, EU:C:2000:75, paragraph 53; of 26 January 2006, *Herbosch Kiere*, C?2/05, EU:C:2006:69, paragraph 24; and of 27 April 2017, *A?Rosa Flussschiff*, C?620/15, EU:C:2017:309, paragraph 41).

88 The opposite result would undermine the principle that employees are to be covered by only one social security system, would make it difficult to know which scheme is applicable and would consequently impair legal certainty. In cases in which it was difficult to determine the scheme applicable, each of the competent institutions of the two Member States concerned would be inclined to take the view, to the detriment of the employees concerned, that their own social security scheme is applicable to them (judgments of 26 January 2006, *Herbosch Kiere*, C?2/05, EU:C:2006:69, paragraph 25, and of 27 April 2017, *A–Rosa Flussschiff*, C?620/15, EU:C:2017:309, paragraph 42).

89 However, the principle of sincere cooperation laid down in Article 4(3) TEU requires the competent institution of the Member State which issued the A1 certificate to carry out a proper assessment of the facts relevant for the application of the rules relating to the determination of the applicable legislation on social security matters and, consequently, to guarantee the accuracy of the particulars contained in that certificate (judgments of 27 April 2017, *A–Rosa Flussschiff*, C?620/15, EU:C:2017:309, paragraph 39, and of 6 February 2018, *Altun and Others*, C?359/16, EU:C:2018:63, paragraph 37).

90 In addition, it is incumbent on that institution to reconsider the grounds for issuing the certificate and, if appropriate, to withdraw the certificate if the competent institution of the Member State in which the workers are posted expresses doubts as to the accuracy of the facts on which the document is based and, consequently, of the particulars contained therein, in particular because the latter do not meet the requirements of Article 12(1) of Regulation No 883/2004 (see, to that effect, judgment of 6 February 2018, *Altun and Others*, C?359/16, EU:C:2018:63, paragraph 43 and the case-law cited).

91 Should the institutions concerned not reach an agreement, in particular, on how the particular facts of a specific case are to be assessed, it is open to them to refer the matter to the Administrative Commission (see, to that effect, judgment of 6 February 2018, *Altun and Others*, C?359/16, EU:C:2018:63, paragraph 44 and the case-law cited).

92 If the Administrative Commission does not succeed in reconciling the points of view of the competent institutions on the question of the legislation applicable in the case at issue, it is at the least open to the Member State in which the workers concerned are posted, without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs, to bring infringement proceedings under Article 259 TFEU in order to enable the Court to examine in those

proceedings the question of which legislation applies to those workers and, consequently, whether the particulars contained in the A1 certificate are accurate (see, to that effect, judgment of 6 February 2018, *Altun and Others*, C?359/16, EU:C:2018:63, paragraph 45).

93 Thus, even in the case of a manifest error of assessment of the conditions governing the application of Regulation No 883/2004, and even if it were established that the conditions under which the workers concerned carry out their activities clearly do not fall within the material scope of the provision on the basis of which the A1 certificate was issued, the procedure to be followed in order to resolve any dispute between the institutions of the Member States concerned as regards the validity or the accuracy of an A1 certificate must be complied with (judgment of 6 February 2018, *Altun and Others*, C?359/16, EU:C:2018:63, paragraph 46 and the case-law cited).

94 If it were accepted that the Member State in which a worker is posted could adopt legislation that allowed its own institutions to have an A1 certificate declared invalid unilaterally by bringing proceedings before a court of that Member State, there would be a risk that the system based on the duty of sincere cooperation between the competent institutions of the Member States would be undermined. Therefore, as long as it has not been withdrawn or declared invalid, an A1 certificate is to be accepted, as a rule, in the internal legal order of the Member State to which the workers concerned are posted and, therefore, it is binding on its institutions (see, to that effect, judgment of 26 January 2006, *Herbosch Kiere*, C?2/05, EU:C:2006:69, paragraphs 30 and 31).

95 Accordingly, legislation such as Articles 23 and 24 of the Programme Law, which entitles the competent authorities of the Kingdom of Belgium unilaterally to make a worker subject to Belgian legislation on social security matters, is contrary to the principle laid down in Article 11(1) of Regulation No 883/2004 that workers are to be covered by only one social security scheme and to the principle of legal certainty which requires, inter alia, that rules of law must be clear, precise and predictable as regards their effects, in particular if they may have negative consequences for individuals and undertakings (see, to that effect, inter alia, judgment of 12 December 2013, *Test Claimants in the Franked Investment Income Group Litigation*, C?362/12, EU:C:2013:834, paragraph 44 and the case-law cited).

96 In addition, legislation such as that at issue is incompatible also with the provisions of Regulations No 883/2004 and No 987/2009 governing the procedure to be followed in the event of difficulties in the interpretation or application of those regulations, in particular when the Member State to which a worker is posted considers that the conditions for the application of Article 12(1) of Regulation No 883/2004 are not met.

97 That finding cannot be called into question by the Kingdom of Belgium’s argument that, where fraud has been established, the national authorities of that Member State are entitled to refuse to apply Article 12(1) of Regulation No 883/2004.

98 In the first place, the Court finds that Regulations No 883/2004 and No 987/2009 do not contain any provision allowing Member States unilaterally to require through legislation that Article 12(1) of Regulation No 883/2004 does not apply in the event of fraud or abuse; the principle of sincere cooperation embodied in Article 76(6) of Regulation No 883/2004 and Article 5 of Regulation No 987/2009 can therefore be applied even in such instances.

99 It is true that the Court has consistently held that individuals may not rely on EU rules for abusive or fraudulent ends, as the principle of prohibition of fraud and abuse of rights is a general principle of EU law which individuals must comply with. 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 (judgment of 6 February 2018, *Altun and Others*, C?359/16, EU:C:2018:63, paragraphs 48 and 49 and the case-law cited).

100 In that context, the Court has held that when, in the dialogue provided for in Article 76(6) of Regulation No 883/2004, the institution of the Member State to which the workers have been posted puts before the institution that issued the A1 certificates concrete evidence that suggests that those certificates were obtained fraudulently, it is the duty of the latter institution, by virtue of the principle of sincere cooperation, to review, in the light of that evidence, the grounds for the issue of those certificates and, where appropriate, to withdraw them (judgment of 6 February 2018, *Altun and Others*, C?359/16, EU:C:2018:63, paragraph 54).

101 If the latter institution fails to carry out such a review within a reasonable period of time, it must be possible for that evidence to be relied on in judicial proceedings, in order to satisfy the court of the Member State to which the workers have been posted that the certificates should be disregarded (judgment of 6 February 2018, *Altun and Others*, C?359/16, EU:C:2018:63, paragraph 55).

102 In such a case, a national court may disregard the A1 certificates concerned and must determine whether the persons suspected of having used posted workers ostensibly covered by certificates obtained fraudulently may be held liable under the applicable national law (judgment of 6 February 2018, *Altun and Others*, C?359/16, EU:C:2018:63, paragraph 60).

103 However, the persons who are alleged, in such proceedings, to have used posted workers ostensibly covered by fraudulently obtained certificates must be given the opportunity to rebut the evidence on which those proceedings are based, with due regard to the safeguards associated with the right to a fair trial, before the national court decides, if appropriate, that the certificates should be disregarded and gives a ruling on the liability of those persons under the applicable national law (judgment of 6 February 2018, *Altun and Others*, C?359/16, EU:C:2018:63, paragraph 56).

104 The Court finds that, in the present case, the national legislation at issue does not satisfy the conditions set out in paragraphs 100 and 101 of this judgment.

105 First, that legislation does not lay down an obligation to initiate the dialogue and conciliation procedure provided for by Regulations No 883/2004 and No 987/2009. Secondly, the legislation is not limited to conferring on the national court alone the power to make a finding of fraud and to disregard, on that ground, an A1 certificate, but provides that, outside any court proceedings, Belgian social security institutions and Belgian social security inspectors may decide that posted workers are to be subject to Belgian social security legislation.

106 In the second place, it is clear from settled case-law that a Member State may not rely on the fact that other Member States have also failed to perform their obligations in order to justify its own failure to fulfil its obligations under the FEU Treaty. In fact, in the EU legal order established by the Treaty, the implementation of EU law by the Member States cannot be made subject to a condition of reciprocity. Articles 258 and 259 TFEU provide the appropriate remedies in cases where Member States fail to fulfil their obligations under the FEU Treaty (judgment of 19 November 2009, *Commission* v *Finland*, C?118/07, EU:C:2009:715, paragraph 48 and the case-law cited).

107 In the third place, with regard to the argument that the legal framework for the withdrawal of A1 certificates is very basic and incomplete, and that Member States therefore are faced with difficulties when they have to take immediate action to punish fraudulent conduct, the Court finds that, while it is possible that the way in which the cooperation and conciliation procedure operates is not always efficient and satisfactory in practice, Member States should not be able to rely on possible difficulties in obtaining the information required or on possible shortcomings of cooperation between their competent authorities to justify the fact that they have not complied with their obligations under EU law (see, to that effect, judgment of 6 June 2013, *Commission* v *Belgium* , C?383/10, EU:C:2013:364, paragraph 53 and the case-law cited).

108 In the fourth place, with regard to the Kingdom of Belgium’s argument that, even when the person concerned is already subject to the social security scheme of the Member State of the issuing institution, being made subject to Belgian social security does not result in the overlapping application of two such schemes since, pursuant to Article 6(1)(a) of Regulation No 987/2009, the person concerned is to be made provisionally subject to the legislation of the Member State in which the person actually pursues his or her employment or self-employment, the Court finds that such an interpretation would make Article 5(2) to (4) of the regulation redundant. In fact, where a document is issued in accordance with Article 5(1) of Regulation No 987/2009, the procedure laid down in Article 5(2) to (4) thereof must be followed where the competent authorities of different Member States disagree about that document, Article 6 of Regulation No 987/2009 being precluded from applying in that situation.

109 In those circumstances, the Commission’s complaints that the Kingdom of Belgium has failed to fulfil its obligations under Article 11(1), Article 12(1) and Article 76(6) of Regulation No 883/2004 and Article 5 of Regulation No 987/2009 must be upheld.

110 With regard to the complaint alleging breach of Decision No A1, it is clear from settled case-law that such a decision, although capable of providing assistance to social security institutions responsible for applying EU law in that sphere, cannot require those institutions to follow certain methods or to adopt certain interpretations when they come to apply EU law (judgments of 8 July 1992, *Knoch*, C?102/91, EU:C:1992:303, paragraph 52, and of 1 October 1992, *Grisvard and Kreitz*, C?201/91, EU:C:1992:368, paragraph 25).

111 Accordingly, since Decision No A1 is not a legislative act, there is no ground for claiming that the Kingdom of Belgium, by adopting Articles 23 and 24 of the Programme Law, infringed that decision.

112 In those circumstances, the argument alleging infringement of Decision No A1 must be rejected as unfounded.

113 In the light of the foregoing considerations, the Court finds that, by adopting Articles 23 and

24 of the Programme Law, the Kingdom of Belgium has failed to fulfil its obligations under Article 11(1), Article 12(1) and Article 76(6) of Regulation No 883/2004 and under Article 5 of Regulation No 987/2009.

Costs

114 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium's failure to fulfil its obligations has been established in all essential respects, the latter must be ordered to pay the costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. **Declares that, by adopting Articles 23 and 24 of the Programme Law of 27 December 2012, the Kingdom of Belgium has failed to fulfil its obligations under Article 11(1), Article 12(1) and Article 76(6) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012, and under Article 5 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Kingdom of Belgium to pay the costs.**

[Signatures]

* Language of the case: French.